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## Making States Comply

### The European Commission, the European Court of Justice, and the Enforcement of the Internal Market

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# **MAKING STATES COMPLY**





# **MAKING STATES COMPLY**

**THE EUROPEAN COMMISSION,  
THE EUROPEAN COURT OF JUSTICE &  
THE ENFORCEMENT OF THE INTERNAL MARKET**

**Jonas Tallberg**

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*To My Parents*



# CONTENTS

<b>List of Figures and Tables</b>	x
<b>List of Treaty Articles</b>	xi
<b>Acknowledgments</b>	xiii
<b>Abbreviations</b>	xvi

## PART I: INTRODUCTION

<b>1 A Study of Supranational Influence in EU Enforcement</b>	<b>3</b>
The Debate	4
The Orientation of the Study	6
The Argument in Brief	12
Method and Material	15
The Plan of the Study	23

## PART II: SUPRANATIONAL INFLUENCE IN THEORY

<b>2 The Role of the Supranational Institutions in European Integration</b>	<b>27</b>
The Supranational Institutions in Integration Theory	28
Legal and Political Analysis of EU Enforcement	38
Summary	47
<b>3 Principal-Agent Analysis</b>	<b>49</b>
Rational Choice Institutionalism and P-A Analysis	49
The Principal-Agent Model	56
Principal-Agent Analysis and European Integration	66
Summary	74
<b>4 A Principal-Supervisor-Agent Model of EU Enforcement</b>	<b>75</b>
Principals, Supervisors, and Agents in EU Enforcement	76
Interests, Information, and Shirking in EU Enforcement	80
Monitoring and Sanctions in EU Enforcement	88
Hypotheses Generated by the P-S-A Model	96
Summary	103

### **PART III: SUPRANATIONAL INFLUENCE IN PRACTICE**

<b>5 The European Internal Market and Member State Non-Compliance</b>	107
The Internal Market: A Short History	108
Deep Integration and the Pressure of Adjustment	117
Softening the Pressure of Adjustment: Non-Compliance	124
Summary	134
<b>6 Making Effective Use of Existing Powers: Centralized Enforcement through Article 169</b>	135
Enhancing the Capacity of the Article 169 Procedure	137
Putting the Formal Procedure to Informal Use	146
Autonomous Enforcement and Independent Influence	153
Summary	161
<b>7 Inducing the Delegation of New Enforcement Powers: The 1991 and 1996-97 IGCs</b>	163
Wanted: Sanctions against Non-Complying States	164
The 1991 IGC and the Introduction of Sanctions	169
The 1996-97 IGC and the Failure to Boost Sanctions	178
Summary	191
<b>8 Independently Creating New Powers: Decentralized Enforcement through National Courts</b>	193
Toward Effective Decentralized Enforcement	194
The ECJ and the Principle of State Liability	206
The Commission and Decentralized Enforcement	219
State Principals Sanction Supranational Shirking	232
Summary	249

### **PART IV: CONCLUSION**

<b>9 Toward a More Advanced Understanding of European Integration and International Cooperation</b>	253
Supranational Influence in EU Enforcement	254
Implications for the Study of European Integration	263
Implications for the Study of International Cooperation	269

<b>Appendix 1: Selected Treaty Articles</b>	275
<b>Appendix 2: Declaration on the Implementation of Community Law (Attached to the TEU)</b>	278
<b>Bibliography</b>	279

## LIST OF FIGURES AND TABLES

Figure 5.1	Infringement proceedings initiated for late or incorrect transposition, 1978-1997	126
Figure 5.2	Infringement proceedings initiated for faulty application of EC rules, 1978-1997	128
Figure 5.3	Infringement proceedings initiated for non-compliance with EC rules, 1978-1997	130
Figure 5.4	Infringement proceedings initiated per member state, yearly average 1978-1997	130
Figure 5.5	Infringement judgments not complied with, 1983-1997	131
Figure 5.6	Infringement judgments not complied with per member state, yearly average 1983-1997	133
Figure 6.1	Origin of cases of suspected infringements, 1980-1997	144
Table 5.1	Rate of transposition, White Paper directives and all directives	125
Table 7.1	Commission requests for penalty payments to be imposed under Article 171, 1997-1998	180

## LIST OF TREATY ARTICLES

With the entry into force of the Amsterdam Treaty on May 1 1999, the Treaty establishing the European Community (EC Treaty) and the Treaty on European Union (TEU) appeared in new, consolidated versions. In this study, I use the traditional numbering of treaty articles rather than the new numbering of the consolidated treaties. To facilitate conversion, however, I list below the corresponding article references in the consolidated versions of the treaties.

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<b>EC Treaty</b>	<b>Consolidated Treaty</b>
Article 5	Article 10
Article 85	Article 81
Article 86	Article 82
Article 100	Article 94
Article 100a	Article 95
Article 126	Article 149
Article 127	Article 150
Article 155	Article 211
Article 164	Article 220
Article 169	Article 226
Article 170	Article 227
Article 171	Article 228
Article 173	Article 230
Article 174	Article 231
Article 175	Article 232
Article 177	Article 234
Article 189	Article 249
Article 215	Article 288

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*Lund*  
*September 1999*

## **ABBREVIATIONS**

Coreper	Committee of Permanent Representatives
DG	Directorate-General
EC	European Community
ECB	European Central Bank
ECJ	European Court of Justice
ECSC	European Coal and Steel Community
ECU	European Currency Unit
EEC	European Economic Community
EFTA	European Free Trade Association
EMS	European Monetary System
EMU	Economic and Monetary Union
EP	European Parliament
EPC	European Political Cooperation
ERDF	European Regional Development Fund
EU	European Union
Euratom	European Atomic Energy Community
FIDE	International Federation for European Law
GATT	General Agreement on Tariffs and Trade
IAEA	International Atomic Energy Agency
IGC	Intergovernmental Conference
IMF	International Monetary Fund
IR	International Relations
JHA	Justice and Home Affairs
MEP	Member of the European Parliament
NTB	Non-Tariff Barrier
P-A	Principal-Agent
P-S-A	Principal-Supervisor-Agent
QMV	Qualified Majority Voting
SEA	Single European Act
TEU	Treaty on European Union
UN	United Nations
VAT	Value Added Tax
WTO	World Trade Organization

**PART I**  
**INTRODUCTION**

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CHAPTER  
ONE

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## A STUDY OF SUPRANATIONAL INFLUENCE IN EU ENFORCEMENT

Do the supranational institutions of the European Union (EU)<sup>1</sup> constitute “engines of integration” capable of independently pushing European integration further and in other directions than desired by the member states, or are they simply “obedient servants” passively fulfilling the technical functions delegated to them by EU governments? This question of whether or not the European Commission, the European Court of Justice (ECJ), and the European Parliament (EP) actually exert independent causal influence on the course of European integration is one of the central bones of contention in the scholarly literature on the EU.

Whereas existing research predominantly addresses the capacity of the institutions to accelerate the process of integration by acting as agenda-setters and policy entrepreneurs in the pre-decisional phase of EU policy-making, this study examines supranational influence in the post-decisional phase of EU enforcement. Do the Commission and the Court have the capacity to enforce member state compliance with EC rules more strenuously and by other means than EU governments ever intended when delegating supervisory powers to these institutions?<sup>2</sup> If so, what are the determinants of such supranational influence in EU enforcement?

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<sup>1</sup> On November 1 1993, the European Community (EC) became one of three pillars of the EU. In this study, I refer to the EU by its current name, except (*a*) where I speak of it in a particular historical context, when I use the historically correct term, or (*b*) where I refer explicitly to its law, when I use the terms EC law, legislation, and rules, as the law-making powers of the EU are restricted to the EC pillar.

<sup>2</sup> Whereas the powers of the EP have grown significantly over the last two decades, it has not been delegated any significant enforcement competences, and is therefore not included in this study of supranational influence in EU enforcement.

The study explores these questions by tracing the supranational institutions' efforts to secure compliance with the European Internal Market, as originally envisaged in 1957, as relaunched in 1985, as officially completed in 1992, but as yet unfinished in practical terms.

### **The Debate**

One of the distinguishing features of the EU as opposed to other international organizations is the degree to which the member governments have delegated powers and functions to the central institutions of the EU. In simplified terms, the Commission has been delegated the essential tasks of initiating and developing proposals for new EU policy, executing EU policy within some clearly specified domains, and ensuring member state compliance with EC rules as the “guardian of the treaties.”<sup>3</sup> The ECJ has been delegated the functions to interpret the treaties and to ensure that EC law is correctly applied in the member states. And the EP enjoys delegated powers in the legislative process through which EU policy is created, in the budgetary process through which the EU budget is shaped and adopted, and in the control and supervision of the Commission.

These powers and functions delegated to the Commission, the Court, and the Parliament—commonly referred to as the supranational institutions of the EU<sup>4</sup>—have been the object of a fierce academic debate since the inception of European integration.<sup>5</sup> The two dominating theories of regional integration—neofunctionalism and intergovernmentalism—have traditionally offered the most

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<sup>3</sup> The treaties are: the European Coal and Steel Community Treaty (the ECSC Treaty, the Treaty of Paris), concluded 1951 and entered into force 1952; the European Economic Community Treaty and the European Atomic Energy Community Treaty (the EEC Treaty and the Euratom Treaty; the Treaties of Rome), concluded 1957 and entered into force 1958; the Single European Act (SEA), concluded 1986 and entered into force 1987; the Treaty on European Union (TEU, Maastricht Treaty), concluded 1991 and entered into force 1993; the Amsterdam Treaty, concluded 1997 and entered into force 1999.

<sup>4</sup> The term supranational is generally employed to signal the institutional independence and mode of decision-making of the Commission, the ECJ, and the EP, and to distinguish these institutions from the intergovernmental bodies of the Council of Ministers and the European Council.

<sup>5</sup> For a richer account of this debate and full references, see chapter two.

distinct and influential conceptions of the institutions' role in the integration process.

In the 1950s, 1960s, and early 1970s, the first wave of neofunctionalists and intergovernmentalists debated whether the delegated powers actually conferred a role on the supranational institutions in European integration. Neofunctionalist scholars, such as Ernst Haas, Leon Lindberg, Stuart Scheingold, Donald Puchala, Philippe Schmitter, and Joseph Nye, maintained that the supranational institutions—primarily the Commission—were highly instrumental to the progression of European integration. By contrast, intergovernmentalist scholars, such as Stanley Hoffmann, inspired by traditional conceptions of power politics in International Relations (IR) theory, submitted that the authority of the supranational institutions was limited in scope, conditional on member state approval, reversible if proven unacceptable in its results, and unlikely to be extended to domains of key importance to national interests.

This study is primarily concerned with the contemporary version of this debate on the supranational institutions' relative importance. In the debate, as it has unfolded since the end of the 1980s, the principal point of contention is not whether the institutions fulfill essential functions in European integration—all now agree they do—but whether they only fulfill the functions delegated to them, and only do so as national governments desire. In positivistic jargon, the central question is whether the supranational institutions exert *independent causal influence* on the course of European integration. This comprises all influence that cannot be reduced to the effects of performing delegated functions exactly as member governments have stipulated.

Modern-day neofunctionalists generally contend that the supranational institutions enjoy substantial autonomy from national governments in the exercise of their powers. As a consequence, the institutions are capable of independently driving European integration further and in other directions than member states wish. In this vein, Wayne Sandholtz, John Zysman, George Ross, Laura Cram, and others argue that the Commission is causally important as an agenda-setter and policy entrepreneur, which identifies policy problems, mobilizes support from transnational interests, exploits openings in the political opportunity structure,

and calculates strategically how to achieve “more Europe.” Others, such as Anne-Marie Slaughter, Walter Mattli, Karen Alter, and Alec Stone Sweet, contend that the ECJ has successfully engineered a process of legal integration, which goes far beyond member governments’ original intentions when designing the European legal system.

Countering the neofunctionalist claims, intergovernmentalist scholars assert that member governments remain firmly in control of the process of integration. The supranational institutions do not enjoy autonomy in any real sense of the term, and are not capable of exerting independent causal influence. On the contrary, they function as passive devices facilitating intergovernmental bargaining. Embracing this perspective, Andrew Moravcsik, Geoffrey Garrett, Robert Keohane, and Stanley Hoffmann claim that the Commission’s supposed influence as agenda-setter and policy entrepreneur in fact is illusory. The Commission simply fulfills functions entrusted to it by, and in the interest of, member governments, as well as drafts its proposals with a view to what would be acceptable in the capitals of the major European states. In a similar way, Geoffrey Garrett, Barry Weingast, and others contend that the ECJ has only acted autonomously with the consent of member governments, that the legal system it has created is consistent with the interests of national governments, and that the Court tends to tailor its rulings to the preferences of the major member states.

## **The Orientation of the Study**

### *Moving beyond existing research*

In its orientation, this study differs in two essential ways from the neofunctionalist-intergovernmentalist debate on supranational influence in European integration. First, it starts with the premise that empirical research can move this debate beyond conflicting, and sometimes unqualified, theoretical assumptions and assertions, and toward an understanding of supranational influence that is open to the possibility of variation in member governments’ control. Modern neofunctionalism and intergovernmentalism espouse two absolute and competing theoretical conceptions of su-

pranational influence, which rest on *a priori* assumptions about the role of the Commission, the Court, and the Parliament in European integration. But, as James Caporaso points out in a recent review article on the field of European integration studies, the influence of the EU's supranational institutions "is an empirical question to be resolved through research."<sup>6</sup>

Most importantly, such an open-ended empirical approach to supranational influence would recognize that this phenomenon probably does not differ from other social science phenomena, insofar as it is likely to vary depending on the values of a certain set of factors. If we truly want to understand the scope for supranational influence, we must determine what these factors are. In this study, I join a growing number of scholars who for this purpose turn to principal-agent (P-A) theory, as developed within the new institutionalism in rational choice theory. P-A theory is specifically designed to explain variations in control and autonomy, and offers a set of hypotheses about what the explanatory factors might be.

Second, this study addresses the Commission's and the Court's capacity to exert independent causal influence through their post-decisional enforcement functions, rather than through pre-decisional agenda-setting and policy entrepreneurship. Existing research on supranational influence is almost exclusively concerned with the institutions' capacity to drive European integration forward by engaging in political or judicial policy-making, thus biasing EC rules away from member state interests. By contrast, the supranational institutions' post-decisional enforcement functions have been almost entirely overlooked, although policy-making in the EU would be of little value if compliance with EC rules could not be secured. Of the Commission's three traditional functions—to initiate, execute, and enforce policy—only the first two have been examined in the perspective of supranational influence. Correspondingly, existing research on the Court's autonomy and influence has been preoccupied with the first duty of the ECJ—to interpret the treaties—but has largely neglected its second task of ensuring that EC rules are correctly applied and complied with.

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<sup>6</sup> Caporaso, 1998, p. 11

### *Aims and questions*

In view of this general orientation of the study, one overarching theoretical aim can be distinguished. The purpose of this study is to improve our understanding of supranational influence in European integration, by exploring the Commission's and the Court's capacity to exert independent causal influence in the enforcement of member state compliance. The central theoretical questions in the study are thus: Do the Commission and the ECJ have the capacity to enforce member state compliance in other ways than EU governments desire and originally intended? If so, what are the determinants of this supranational influence in EU enforcement?

Beyond this principal and overarching purpose, the study has two additional, subordinate aims. The first of these is to make a strictly empirical contribution to the literature on EU enforcement. As it stands, the predominantly legal literature on the enforcement of compliance in the EU is wanting in a number of areas. The theoretically-driven empirical analysis conducted here provides an opportunity to close gaps in the knowledge on EU enforcement. The second subordinate aim is to draw out the implications of this examination of EU enforcement for the study of international institutions and cooperation in IR theory. In the conclusion, I will relate the findings here to (a) the prevailing conception of the autonomy and influence of international institutions, and (b) the debate between the so-called enforcement and management schools on compliance with international agreements.

Two important limitations in the scope of the study should be stated explicitly so as to avoid misunderstanding. First, this study is exclusively concerned with the supranational institutions' enforcement of member state obligations under EC law, as opposed to state enforcement of EC rules binding on individuals and companies. In substantive terms, this qualification is not particularly restrictive, however, as most EC rules impose some form of obligation on the member states. Second, this is a study of EU enforcement rather than compliance and implementation in the EU. Whereas developments in member state compliance form a natural part of the examination as inducements of supranational action, the study is not aimed at explaining these patterns or at assessing the effectiveness of enforcement as a route to proper compliance and implementation.

*The model and the case*

The pursuit of this study's aims rests on two primary pillars. First, drawing on the analytical tools and insights of P-A theory, I construct a principal-supervisor-agent (P-S-A) model specifically designed to explain supranational influence in EU enforcement. The analytical core of P-A theory is the principal-agent relation, which in its simplest version arises whenever one party (principal) delegates certain functions to another party (agent). P-A theory posits that this relationship is inherently problematic, as conflicting preferences and information asymmetry induce the agent to pursue its own interests rather than those of the principal—to “shirk” in the P-A vocabulary. The principal's prospects of preventing or reducing such shirking is to engage in monitoring of the agent's actions and to threaten the imposition of sanctions if undesired behavior is detected.

Whereas existing P-A analysis in EU studies, owing to the concern with pre-decisional agenda-setting, conceives of member governments as principals who have delegated certain functions to the supranational institutions as agents, my focus on post-decisional enforcement requires an extension of the original two-actor model into a triangular principal-supervisor-agent model. The addition of a supervisor to the cast of actors is familiar from economic P-A theory, where it is recognized that the principal, for the purpose of enhancing control over the agent's actions, may engage a supervisor whose role it is to gather information about the agent's activity.

In the simple P-S-A model presented here, national governments (principals), for the sake of self-commitment, assign to the Commission and the Court (supervisors) the task of enforcing compliance with EC law, as delegated to the individual member states (agents). Member states are thus conceived of as both principals and agents, who at  $t_0$  collectively reach decisions in inter-governmental bodies, and at  $t_1$  are expected to individually carry out the adjustments necessary to realize these decisions. The supranational institutions function as supervisors engaged by national governments for the purpose of monitoring actual member state behavior and enforcing compliance with Community rules. This configuration reflects the roles of member states and institutions as laid down in the treaties and as exercised in practice.

Engaging the Commission and the Court as supervisors does not solve the problem of shirking *per se*, however. Rather, it replaces governments' concern with one form of shirking—member state non-compliance—with another—supranational influence. The P-S-A model generates three sets of hypotheses about such supranational influence in EU enforcement. The first pertains to the conditions which induce the Commission and the Court to exert independent influence, the second to the scope for such supranational influence, and the third to the forms of supervision that the institutions are likely to promote in the process of strengthening EU enforcement. Most importantly, conceptualizing the supranational institutions as supervisors suggests that their capacity to move EU enforcement beyond member states' wishes is constrained by the latter's ability to control the institutions through monitoring and sanctions.

In general terms, P-A analysis offers a number of advantages to scholars who are willing to subject the question of supranational influence to careful empirical examination: (1) By acknowledging the initial primacy of the member states and then investigating their degree of control over the supranational institutions, P-A analysis offers a neutral theoretical language which does not *a priori* discriminate against the claims of either neofunctionalism or intergovernmentalism; (2) P-A analysis permits open-ended empirical analysis of the degree of autonomy in the relationship between member states and supranational institutions; and (3) P-A analysis encourages us to formulate conditional generalizations about supranational influence, as it recognizes the likelihood of variation across time, issue-areas, and institutions.

The second pillar of this study is the case. I assess the explanatory power of the P-S-A model in light of the Commission's and the Court's efforts in the period 1985-1998 to secure member state compliance with the rules of the EU's Internal Market. The aim to complete the Internal Market between 1985 and 1992 through the elimination of all barriers to the free movement of goods, people, services, and capital in Europe was the most ambitious target the EC had ever set itself. The Internal Market program—as agreed upon by the heads of government and state in June 1985 and later formalized in the 1986 Single European Act

(SEA)—called for extensive legislative efforts on the European level and required far-reaching changes in national regulatory practices.

Recognizing that the Internal Market and its rules would amount to little if member states did not correctly implement and apply the measures set out in the program, the Commission and the ECJ embarked on a crusade in the early 1990s to strengthen EU enforcement. The enforcement-enhancing actions followed three parallel tracks: (1) efforts to enhance the enforcement potential of existing, delegated means at the centralized EU level; (2) concerted action to independently boost the supervisory potential of decentralized enforcement through national courts; and (3) attempts to induce the delegation of new and more far-reaching enforcement powers at the 1991 and 1996-97 intergovernmental conferences (IGCs). In the empirical examination, I assess the degree of supranational influence in this three-way process, and analyze the factors facilitating and impeding member state control, thus evaluating the hypotheses generated by the P-S-A model.

The decision to select this episode of potential supranational influence in EU enforcement as a case for examination is based on three principal considerations. First, it satisfies the necessary condition that the supranational institutions indeed wished to strengthen EU enforcement by moving beyond the prevailing usage of existing means. Whereas the research design would have been subject to the problem of selection bias had a case been selected on the basis of confirmed supranational influence, it would have been equally problematic to select a case covering just any period in EU enforcement.<sup>7</sup> As opposed to pre-decisional agenda-setting, where the supranational institutions can always press for “more Europe,” a particularity of post-decisional enforcement is that compliance—the equivalent of “more Europe”—has a finite value since it cannot be more than “good.” This effectively limits the instances when the institutions are induced to act to those where the existing means clearly are insufficient to guarantee adequate

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<sup>7</sup> Moravcsik argues that the study of supranational influence is contaminated by selection bias, as (neofunctionalist) scholars have predominantly selected cases known to confirm their argument: “Previous studies tend disproportionately to investigate those cases in which supranational entrepreneurs were active and the outcomes were positive....There are few cases of overt failure.” Moravcsik, 1998, p. 484fn. The case selection here does not suffer from this bias, as the case is selected in its capacity as *potential* rather than confirmed supranational influence.

compliance. The completion of the Internal Market is in fact one of very few times in the history of European integration when the institutions have found it necessary to try to expand enforcement, and thus one of very few possible cases for a study like this.

Second, the supranational institutions' efforts to reinforce EU supervision in association with the Internal Market is a particularly rich case, as each of the three parallel tracks pursued by the institutions is a candidate for one of three conceivable ways in which independent influence can be exerted: (1) exercising delegated powers contrary to the preferences of member governments, (2) single-handedly creating new means beyond the confines of the treaties, and (3) inducing the delegation of powers that member governments would not have conferred in the absence of supranational maneuvering. Selecting this case for analysis therefore permits a comprehensive picture of the Commission's and the Court's capacity to move EU enforcement beyond governments' wishes.

The third and final reason for selecting this case is the real-world significance of the changes in EU enforcement which were set off by the supranational institutions' desire to ensure adequate enforcement of the Internal Market. To name but two examples, this is the process through which the EU gained its power—unique by international comparison—to impose financial sanctions on non-complying member states, and this is the process within which EU governments for the first time ever formally attacked and attempted to reduce the powers of the ECJ. This motive for selecting the Internal Market case is admittedly less scientific. Most readers would probably agree, however, that the unveiling of revolutionary and partly undocumented developments in EU enforcement during the last decade is of greater heuristic value than, for instance, a coverage of the already well-documented process by which national courts were once granted a role in the enforcement of EC law.

### **The Argument in Brief**

This study suggests that the Commission and the Court may exert supranational influence not only through agenda-setting and policy execution, but also by moving the enforcement of state compliance

beyond governments' wishes and intentions. The findings of the empirical chapters lend extensive support to the conceptualization of member states and supranational institutions as principals, supervisors, and agents in EU enforcement, where states' control mechanisms define the scope for independent supranational action. Where member governments could readily observe, interpret, and intervene, and where shirking which nevertheless occurred could be countered with sanctions, the Commission's and the Court's scope for supranational influence was highly limited, or even non-existing. By contrast, the supranational institutions enjoyed some capacity to introduce enforcement measures countering government preferences where few means existed to actively monitor their actions, and where sanctions were either lacking or difficult to apply effectively.

When the supranational institutions embarked on the crusade to boost EU enforcement in the early 1990s, they did so against the backdrop of growing non-compliance. Three forms of compliance problems were particularly prominent and worrying: non-compliance in the legal implementation of directives, in the actual application of EC rules, and with ECJ judgments. If the Internal Market were to be realized, non-compliance would have to be contained. Recognizing the limits of existing enforcement means, the Commission and the Court pursued three parallel avenues aimed at reinforcing Community supervision, where all potentially could have resulted in supranational influence.

First, the Commission attempted to improve the effectiveness of existing powers through a fivefold set of measures enhancing the enforcement capacity of the infringement procedure under Article 169: internal reforms streamlining the handling of cases, a shift to a firmer enforcement policy, encouragement of complaints to the Commission, the development of a shaming strategy, and the intensification of compliance bargaining. While strengthening EU enforcement, these efforts did not qualify as shirking. The most credible explanation is that the infringement procedure offered ample room for improvements without a transgression of delegated competences and the associated risk of being sanctioned.

Second, the Commission sought to induce the delegation of new means of enforcement at the 1991 and 1996-97 IGCs; first the

introduction of sanctions against non-complying states, and then more time and resource efficient procedures for the imposition of these sanctions. On both occasions, the Commission's attempts to maneuver EU governments into accepting its preferred proposals failed. The IGC format granted governments an extreme form of monitoring, which in turn generated a more even distribution of information about the consequences of alternative proposals. Fearing the detrimental implications for national sovereignty of the supranational proposals, member governments either settled for less consequential alternatives or forced the Commission to dilute its suggestions.

Third, the Commission and the Court collectively sought to shift the gravity in EU enforcement toward greater reliance on decentralized supervision through national courts. Exploiting its judicial independence and the absence of intrusive monitoring means, the ECJ strengthened the remedies available to individuals, creating, most notably, a new form of decentralized sanctions through the principle of state liability. Member state attempts to sanction this judicial shirking through treaty revision and inaction at the national level were of varied, but altogether limited, effectiveness. In parallel, the Commission launched policy programs which supplemented the ECJ's efforts, e.g., by raising the awareness of EC rights and law among citizens and in the legal professions. The Commission, however, was subject to active and intrusive monitoring, and where it did not adapt its proposals to government preferences *ex ante*, member states sanctioned the programs *ex post*. Notwithstanding these adjustments, the Commission exercised limited supranational influence when shielding these programs from wholesale rejection. This joint reinforcement of decentralized supervision passes the counterfactual test that intergovernmentalist scholars recommend whenever an independent supranational effect on European integration is claimed. It is highly unlikely that EU governments, in the absence of supranational action, would have stepped in to strengthen decentralized enforcement to a corresponding extent.

These results challenge and confirm established positions on supranational influence in European integration. The identification of independent influence shows that the supranational institutions may affect the course of European integration not only by

introducing new issues on the policy agenda, as is often argued, but also by securing a higher degree of implementation of the policy decisions that indeed are taken. The picture of supranational influence in EU enforcement is, however, more complex than either intergovernmentalism or neofunctionalism would predict. Control was neither complete, as the supranational institutions did manage to introduce measures many or most governments did not appreciate, nor lost, since member states succeeded in blocking or limiting the effects of other attempts at supranational influence. Instead, as predicted by P-A theory, the scope for supranational influence varied with member states' control mechanisms. One of the most striking findings, which confirms the untested presumptions of other P-A theorists, is the greater ease with which the Court, as compared to the Commission, can introduce measures which go beyond governments' preferences.

## **Method and Material**

### *Avoiding the perils of empirical principal-agent analysis*

Empirical P-A analysis is associated with analytical pitfalls that only can be safeguarded against through a careful selection of research strategies. The problem that warrants attention is the notion of "anticipated reactions," which can make it exceedingly difficult to determine whether agents (or supervisors) act completely autonomously or are effectively controlled by principals.<sup>8</sup> The essence of this problem is the possibility that agents may rationally anticipate the reactions of their principals, such as the imposition of sanctions, and therefore choose to adjust their behavior in line with the principals' interests *ex ante* so as to avoid these punishments. The implication of such anticipatory adjustments is that agents may seem to act autonomously, as principals do not exercise any overt control, while they in fact are perfectly controlled through the threat of sanctions. Indeed, the more effec-

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<sup>8</sup> E.g., Weingast and Moran, 1983; McCubbins, Noll, and Weingast, 1987, p. 274; Moe, 1987; Martin, 1994, p. 97; Pierson, 1996, pp. 134-135; Pollack, 1997a, p. 100; 1998, pp. 222-224; Stone Sweet and Caporaso, 1998, pp. 97-98. In the EU context, the most pertinent example of the analytical difficulties posed by this problem is the debate on the autonomy of the Court. See, in particular, Garrett, 1992, 1995; Burley and Mattli, 1993; Mattli and Slaughter, 1995.

tive the principals' control mechanisms, the less overt sanctioning there should be.

This poses a serious problem to empirical P-A analysis. How do we tell when supposedly autonomous agent actions are truly autonomous and when they only reflect an internalization of the principal's interests? While pointing to the analytical problems posed by rational anticipation, the P-A literature also suggests ways to overcome this potential pitfall. Three methodological choices are stressed as particularly conducive: to conduct case studies, to engage in the technique of process-tracing, and to perform counterfactual analysis.<sup>9</sup> In this study, I employ all three strategies.

First, rather than work with aggregated data and quantitative measures of various kinds of sanctions, researchers are recommended to engage in systematic and detailed case studies. Where aggregate data cannot capture nuances in agent autonomy and do not provide a basis for distinguishing between false and real autonomy, case studies allow for an in-depth treatment, which minimizes the risk of premature conclusions about principals' degree of control. Moreover, to the extent the cases selected also reveal instances of open conflict, this has the attendant advantages of ruling out the phenomenon of rational anticipation, unveiling the actors' conflicting preferences, and illuminating principals' true capacity to rein in their agents.<sup>10</sup>

This study employs the case study method and examines a case where essential developments are characterized by open conflict between powerful governments and the supranational institutions. It may be disputed whether the Commission's and the Court's attempt to boost the enforcement of the Internal Market actually constitutes one case, or in fact is a process that consists of a large number of cases. I have chosen to regard their efforts as one case, since all measures constituted responses to compliance problems perceived as threatening the Internal Market. As I explain below, however, it is mainly of semantic importance whether

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<sup>9</sup> Pollack, 1998, p. 223.

<sup>10</sup> Pollack even argues that such incidents of open conflict constitute hard or crucial cases, since if we find that supranational agents/supervisors enjoy autonomy even in cases of open conflict, then they are likely to enjoy as much or even more autonomy in less high-profile cases where member states have less information or only have weak preferences. Pollack, 1998, p. 223.

to consider these efforts one or many cases, as the scientifically relevant category is “observation” and the empirical development examined here contains a large number of observations.

This study combines what Harry Eckstein in a seminal article calls the “disciplined-configurative” and “heuristic” case study techniques.<sup>11</sup> Disciplined-configurative case studies attempt to explain particular phenomena by making explicit use of established theoretical propositions and frameworks. This mode of inquiry assumes that theories with sufficient explanatory power are readily available and can provide satisfactory explanations. Often, however, arriving at reasonable explanations requires that existing theories are improved upon and new hypotheses are formulated. This is the essence of heuristic case studies, which attempt to isolate preliminary theoretical propositions in an area where no or little theory yet exists.

In its efforts to apply the general insights of P-A theory to the question of supranational influence in EU enforcement, this study conforms to the disciplined-configurative type of inquiry. It explores a case of potential supranational influence and it makes explicit use of a theoretical approach that is particularly apt at explaining control and autonomy in strategic relations. However, recognizing that the conventional two-actor model cannot fully capture the dynamics of post-decisional enforcement relations, the study also presents a refined and reconfigured P-S-A model. This model bestows a heuristic quality to the study by generating a set of novel theoretical hypotheses that subsequently guide the analysis of the case and thus become subject to preliminary evaluation.

The second and related strategy suggested for empirical P-A analysis is to conduct case studies through the technique which Alexander George and Timothy McKeown call “process-tracing.”<sup>12</sup> By investigating and explaining the process by which initial conditions are transformed into outcomes, process-tracing isolates the mechanisms which link causes to effects. Process-tracing consequently “involves both an attempt to reconstruct actors’ definitions

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<sup>11</sup> Eckstein, 1975. For the first discussion of disciplined-configurative case studies and their value, see Verba, 1967. Lijphart uses other terms for the same forms of case studies, calling disciplined-configurative studies “interpretative” and heuristic studies “hypothesis-generating.” Lijphart, 1971.

<sup>12</sup> George and McKeown, 1985.

of the situation and an attempt to develop a theory of action.”<sup>13</sup> In the context of P-A analysis, careful process-tracing makes it possible first to determine the actors’ true interests and then to trace the subtle influences principals, supervisors, and agents may exert upon each other. The degree of supranational influence and the development of EU enforcement in association with the Internal Market can only be explained if we identify the actors’ preferences, the opportunities they have for furthering their course, and the constraints they face in doing so.

Third, counterfactual analysis is recommended in cases where it is argued that agents indeed have managed to successfully escape the control of principals.<sup>14</sup> Counterfactual thought experiments typically try to picture what the outcome would be in an imaginative case, in which everything is identical to the actual case, but the presumed causal factor is absent. This approach has been advocated by intergovernmentalist scholars in EU studies, who contend that we cannot claim the existence of supranational influence unless the presumed example also passes the counterfactual test: Could the same outcome now credited to the supranational institutions also have resulted from member state actions in the absence of these institutions?<sup>15</sup> Only if it is unlikely that member states would have stepped in to fulfill the same function and produce the same outcome, can it be established that the supranational institutions exert independent causal influence. In this study, I subject all potential instances of supranational influence to this counterfactual test.

#### *Taking seriously the criticism of single-case studies*

By presenting the supranational institutions’ attempt to boost the enforcement of the Internal Market as a case of potential supranational influence, I expose this study to the criticism of case studies in general and single-case designs in particular. To be able to claim with some credibility that this study can contribute to theory development and generalizations, these objections must be taken seriously. The thrust of this criticism is that: (1) the research de-

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<sup>13</sup> George and McKeown, 1985, p. 35.

<sup>14</sup> On counterfactual analysis, see Fearon, 1991; Tetlock and Belkin, 1996.

<sup>15</sup> See, in particular, Moravcsik, 1995, p. 616.

sign will be indeterminate, since few explanations depend on only one causal variable; (2) the risk that measurement error will result in the rejection of a true hypothesis or the confirmation of a false is greater than if we had more cases; (3) even if measurement were perfect, there would always be a possibility that an unknown chance factor, an omitted variable, had influenced the result; (4) all social science should involve comparison, whether in quantitative or qualitative terms; and (5) single cases in themselves do not provide a sufficient basis for making or disproving generalizations.<sup>16</sup> Taking these concerns at face value, I submit that there are four ways in which we can constructively respond to these charges.

The first is to be explicit about the ways in which we claim that a case study can yield contributions to the existing body of theory. In our particular case, this is intimately bound up with the disciplined-configurative and heuristic properties of the study. Disciplined-configurative case studies can contribute to theory development, given that they are conducted and present the results in a way that permits comparison and cumulation of findings.<sup>17</sup> This requires that the researcher employs general theoretical variables for purposes of description and explanation, clearly identifies the class of events of which the selected case is a particular instance, and is focused in the analysis of the case, only singling out those aspects which are relevant from a theoretical perspective. This study embraces these principles. The analysis explicitly employs the general terminology of P-A theory when exploring this case of potential supranational influence, and the theoretical perspective disciplines the study by selecting for analysis the actors' interests, information, and means of monitoring, sanctioning, and shirking.

This study also contributes to theory development through its heuristic element. As Eckstein notes, heuristic case studies "tie directly into theory building" in a way "less passively and fortuitously than does disciplined-configurative study, because the potentially generalizable relations do not just turn up but are delib-

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<sup>16</sup> E.g., Lijphart, 1971, p. 691; King, Keohane, and Verba, 1994, pp. 208-211. For discussions of common critique, see Eckstein, 1975, pp. 123-131; Yin, 1984, pp. 21-22.

<sup>17</sup> George, 1979, p. 50.

erately sought out.”<sup>18</sup> Arend Lijphart shares this positive assessment of the potential contribution of heuristic case studies, claiming they are one of two types of case studies that have “the greatest value in terms of their contribution to theory.”<sup>19</sup> Employing a deductive logic, the P-S-A model presented here generates a set of novel and theoretically coherent hypotheses about supranational influence in EU enforcement. The theoretical value of the model and its hypotheses depends on the extent to which the model abstracts the right features of the reality it represents, and its subsequent ability to accurately predict unobserved empirical developments within the specified realm of explanation.<sup>20</sup>

A second and equally constructive response is to explain that what is often presented as *one case* in fact contains *many observations*. In an attempt to reduce the confusion surrounding the question of what actually constitutes a case, Gary King, Robert Keohane, and Sidney Verba draw a distinction between cases as we most often talk about them—full case studies of entire phenomena—and the more methodologically relevant category of observations—the measure of a dependent variable on exactly one unit.<sup>21</sup> It is these observations, they argue, which are the fundamental components of social science research and which are aggregated to provide the evidence against which to evaluate models and theories.

If studies indeed consist of only one observation, then it is impossible to escape the problems noted by critics of the single-case study design. But, as King, Keohane, and Verba point out, “what may appear to be a single-case study, or a study of only a few cases, may indeed contain many potential observations, at different levels of analysis, that are relevant to the theory being evaluated.”<sup>22</sup> Moreover, by employing certain techniques, the researcher can increase the number of theoretically relevant observations without necessarily adding more cases to a study. Prominent among these is the process-tracing procedure employed here. By

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<sup>18</sup> Eckstein, 1975, p. 104.

<sup>19</sup> Lijphart, 1971, p. 692.

<sup>20</sup> See chapter four for an in-depth discussion of the theoretical status of the hypotheses generated by the model.

<sup>21</sup> King, Keohane, and Verba, 1994, pp. 51-53.

<sup>22</sup> King, Keohane, and Verba, 1994, p. 208.

tracing a process and searching for evidence in the sequence of events and decisions of how the final outcome was produced, process-tracing yields more observations than would a focus limited to the ultimate outcome.<sup>23</sup> Conclude King, Keohane, and Verba: “By providing more observations relevant to the implications of a theory, such a method can help overcome the dilemmas of small-*n* research and enable investigators and their readers to increase their confidence in the findings of social science.”<sup>24</sup>

While presented as only one case, the process through which the Commission and the Court sought to boost the enforcement of the Internal Market in fact contains many observations relevant to the hypotheses of the P-S-A model. These observations are drawn from different stages of the process, from different levels of analysis, and from different sets of actors. For instance, the hypothesis that member states’ control mechanisms determine the scope for supranational influence is assessed not only once in the study. Rather, it is evaluated in relation to each of the institutions’ three parallel ways of boosting EU enforcement, where each also covers more than one enforcement-enhancing Commission measure, Court judgment, and supranational IGC initiative.

A third constructive response is to make explicit the comparative elements which often exist, but which tend to remain implicit in the analysis. These comparative elements may either be contained within the same case—as suggested by the notion of observations—or consist of an effort to relate the analysis of the specific case to another, already known, instance of the same phenomenon. This study contains three forms of comparison which all contribute to a more refined analysis of supranational influence in EU enforcement. First, comparisons within the case, such as the relative capacity of the Commission and the Court to exert supranational influence and the relative effectiveness of member states’ means of monitoring and sanctioning. Second, a comparison between this study’s observations on supranational influence in the post-decisional phase and the results of studies focusing on the pre-decisional phase. And third, as already indicated, counterfactual analysis exploring whether outcomes of alleged supranational

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<sup>23</sup> George and McKeown, 1985, p. 36; King, Keohane, and Verba, 1994, pp. 226-228.

<sup>24</sup> King, Keohane, and Verba, 1994, p. 227.

influence also could have resulted from the actions of EU governments had these stepped in to fill the breach.

A fourth and final response to the criticism against single-case designs is to underline that one of the strengths of the case study method is indeed the amount of information which can be brought to bear on one particular case. Whereas the case study method through its low  $n$  may be more susceptible to the problems of measurement error and omitted variables, the risk that these methodological plagues are at play is correspondingly offset by the greater amount of evidence permitted by this design. To go more deeply into a single case allows the analyst to commit greater resources to the specific case, to engage in intensive analysis, and to avoid superficiality in research.<sup>25</sup> On this note, we turn to the nature of the data used in this study.

#### *Material and sources*

This study makes use of three forms of material. The first and absolutely most important category in both quantitative and qualitative terms is primary material in the form of official documentation. This includes publications and documents of the Commission, the ECJ, the EP, member states, and IGCs.

The second category also consists of primary material in the form of documents, but in this case unofficial ones. While spending five months with the Commission, I was given access to internal records on the condition that I would neither quote nor refer to specific, identifiable documents. This posed a dilemma: Whether to follow the rule that all sources of data should be identifiable and lose important material, or make an exception to this rule and include the information, but without referring to the documents in other ways than as “internal Commission memo.” I chose the latter, as these documents contributed essential information, for instance, on how the Commission experienced the opportunities and constraints in the strengthening of EU enforcement.

The third kind of data is primary material in the form of interviews.<sup>26</sup> The 27 interviews conducted between March 1996 and

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<sup>25</sup> Lijphart, 1971, p. 691; Eckstein, 1975, pp. 106, 121-122; Stenelo, 1984, pp. 21-26.

<sup>26</sup> On the use of interviews as a means of collecting information, see Patton, 1980, ch. 7; Stenelo, 1984, pp. 29-31; Yin, 1984, pp. 82-85.

March 1999 served two purposes, and in both cases they came to involve chiefly junior and senior Commission officials. At the early stages of the research process, Commission officials offered a short cut to an introductory overview of compliance and enforcement in the EU, and the interviews were thus mainly explorative.<sup>27</sup> As research progressed and I selected what aspects of EU enforcement to analyze in detail, the interviews were increasingly conducted with Commission officials as political actors. These interviews served an explicit data-collection function and supplemented other forms of material. As in the case of the unofficial documents, several interviews would never have been granted, and many things would never have been said, had I not shown a willingness to keep my sources unidentified in the text. For each interview, I therefore indicate the institutional affiliation of the interviewee, as well as the date of the interview, but refrain from exposing his or her name and rank.

### **The Plan of the Study**

This study is composed of four parts. Part one consists of this first chapter, where I have explained the rationale of the study, outlined the methodological approach, and briefly introduced the argument.

Part two focuses on supranational influence in theory and encompasses three chapters. Chapter two reviews the literature on the role of the supranational institutions in European integration, and demonstrates that neither the theoretical literature on supranational influence nor the empirical literature on EU enforcement systematically addresses the question of supranational influence in EU enforcement. Chapter three lays the theoretical foundation of the study: principal-agent analysis as developed within the new institutionalism in rational choice theory. Chapter

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<sup>27</sup> As anyone familiar with fieldwork on the EU knows, the Commission's role as an actor in the political process is not the only reason why it tends to figure prominently among the sources, whether documents or interviews. The other, and sometimes more important reason, is that the Commission, more than any other official instance, systematically collects information on member state actions, monitors the positions of national governments, and carefully follows the development in areas both within and beyond the competences of the EU.

four presents the principal-supervisor-agent model and the hypotheses it generates regarding supranational influence in EU enforcement.

Part three evaluates supranational influence in practice by examining the Commission's and the Court's efforts to boost EU enforcement in association with the Internal Market. In chapter five, I provide the necessary background for comprehending these supranational efforts by showing how member state non-compliance threatened the realization of the Internal Market. Chapters six, seven, and eight each account for one of the three ways in which the institutions attempted to boost EU enforcement, each a candidate for supranational influence: efforts to enhance the enforcement potential of existing means at the centralized EU level (chapter six); attempts to induce the delegation of new and more far-reaching enforcement powers at the 1991 and 1996-97 IGCs (chapter seven); and concerted action to independently boost the supervisory potential of decentralized enforcement (chapter eight).

Part four, finally, consists of the concluding chapter, where I sum up the findings and draw out the implications of the study for research on European integration and international cooperation generally.

**PART II**  
**SUPRANATIONAL INFLUENCE IN THEORY**

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CHAPTER  
TWO

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## **THE ROLE OF THE SUPRANATIONAL INSTITUTIONS IN EUROPEAN INTEGRATION**

In its focus on the Commission's and the Court's capacity to enforce EU compliance in other ways and by other means than desired by member states, this study seeks to explore supranational influence in an empirical domain hardly subjected to this form of analysis. Inquiries into the supranational institutions' capacity to exercise independent influence in EU enforcement could potentially have been conducted either in the theoretical literature on their role in European integration, or in the empirical literature on their enforcement functions. In this chapter, I introduce and review these two bodies of literature, thus indirectly positioning the study in relation to the most relevant theoretical and empirical literature.<sup>28</sup>

The theoretical literature is thoroughly dominated by the debate between neofunctionalist and intergovernmentalist perspectives on the roles, functions, and influence of the Commission and the Court in European integration, whereas the empirical field of EU enforcement has almost exclusively been the domain of legal scholars. In the review of neofunctionalism and intergovernmentalism, I show how neither has dealt in depth with the Commission's and the Court's influence in EU enforcement, and how both offer interpretations which do not allow for the possibility of variation in supranational influence. In the examination of the empirical literature on EU enforcement, I submit that this body of research covers essential elements of the factual development, but that its mainly legal orientation, combined with certain palpable gaps in

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<sup>28</sup> Note, however, that existing principal-agent applications in the study of European integration are examined only in chapter three.

the empirical coverage, renders it incapable of providing a comprehensive account of supranational enforcement influence.

### **The Supranational Institutions in Integration Theory**

The supranational institutions' capacity to be a driving force in the process toward deeper and deeper integration is one of the classic questions debated by students of European integration. The two primary theories of integration—neofunctionalism and intergovernmentalism—have traditionally offered the most distinct and influential conceptions of the institutions' relative importance.<sup>29</sup> As the general features of neofunctionalism and intergovernmentalism are already well known and have been treated at great length elsewhere, I deal exclusively with their propositions pertaining to the role of the Commission and the Court.<sup>30</sup>

*The early debate: Do the supranational institutions play a role?*

*Neofunctionalism.* The early neofunctionalist literature of the 1950s and 1960s mainly addressed the role of the supranational institutions indirectly in the attempts to advance a theory of regional integration. The central claim of this literature was that regional integration would proceed through a process of spill-over from one sectoral domain to another, as societal demands for European policies were encouraged and translated into concrete proposals by the supranational institutions, the Commission in particular.

In his 1958 classic *The Uniting of Europe*, Ernst Haas pictured political integration as a two-way process involving national socie-

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<sup>29</sup> In this study, the focus is supranational influence in European integration, not European integration *per se*. In this review, I have therefore chosen to exclude important perspectives on European integration—most notably, the multi-level governance approach and reflectivist approaches—which do not coherently and systematically address the question of supranational influence. For works which depict the EU as a system of multi-level governance, see Marks, 1993; Scharpf, 1994; Peterson, 1995; Hooghe, 1996; Jachtenfuchs and Kohler-Koch, 1996; Marks, Hooghe, and Blank, 1996; Risse-Kappen, 1996. For good collections of reflectivist contributions, see Jørgensen, 1997; *Journal of European Public Policy*, 1999.

<sup>30</sup> For overviews of integration theory in general, and neofunctionalism and intergovernmentalism in particular, see Hansen, 1969; Puchala, 1972; Haaland Matlary, 1993; Hix, 1994, 1998; Anderson, 1995; Caporaso and Keeler, 1995; Mörth, 1996, ch. 2; Caporaso, 1998.

tal actors and the new supranational institutions on the European level.<sup>31</sup> Social and economic actors, motivated by the advantages of collective action beyond their former national confines, created expectations and demands for common policies, which the empowered institutions could transform into a permanent integrative impulse by meeting these expectations and further encouraging the shift of activities and loyalties to the European level. As coordinated policies in one area demonstrated the inadequacy of uncoordinated policies in another, common action would spread to new functional domains through a process of spill-over.

The power of the supranational institutions to accelerate this integration process consequently rested with their willingness and ability to respond in action to the expectations of societal actors. Recognizing that the High Authority (the Commission's predecessor in the European Coal and Steel Community, ECSC) had chosen an unnecessarily passive approach, Haas nevertheless asserted that the institution possessed the capacity to actively hasten integration:

The spill-over *can* be accelerated in the face of divisions of opinion among the governments and in the absence of an articulate consensus toward unity as an end in itself. All that is needed is the effective demonstration by a resourceful supranational executive that the ends already agreed upon cannot be attained without further unified steps.<sup>32</sup>

Haas's conception of the supranational institutions' role in the integration process proved highly influential in early neofunctionalist research.<sup>33</sup> In a 1963 study of the first years of the European Economic Community (EEC), Leon Lindberg repeated Haas's assertion that the Commission was able to play a significant integrative role by virtue of its roles as policy-initiator and mediator, not least when combined:

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<sup>31</sup> Haas, 1958. Emphasis in original. For other important contributions by Haas to neofunctionalist integration theory, as well as self-criticism, see Haas, 1964, 1967, 1975, 1976; Haas and Schmitter, 1964.

<sup>32</sup> Haas, 1958, pp. 483-484.

<sup>33</sup> In addition to the works discussed here, see Nye, 1971; Lindberg and Scheingold, 1971.

The Commission bases its proposals on a judgment of what the governments are likely to accept. This has not meant in practice that the Commission has proposed the minimum which was acceptable, but that its proposals were designed to accommodate enough from each national position to win support or acquiescence, albeit grudging.<sup>34</sup>

Focusing instead on the ECJ, Stuart Scheingold similarly concluded that “[t]he Court is in a strong position to play a creative role when it is dealing with an unforeseen ambiguity in the detailed provisions which make up the body of the treaty,” as such ambiguity allows the Court to engage in a form of judicial activism when deciding cases “by reference to broad treaty goals in the light of the treaty’s fundamental principles.”<sup>35</sup>

The most explicit treatment of the supranational institutions’ importance in early neofunctionalist scholarship is found in a 1970 study by Lindberg and Scheingold, where the Commission’s roles and capabilities are discussed in some detail.<sup>36</sup> Maintaining that the Commission indeed had succeeded in wielding considerable decision-making power in the Community process, Lindberg and Scheingold summarized what they considered the Commission’s political skills *par excellence*: (1) *goal articulation*, i.e., the capacity to formulate long-term goals for the Community, legitimated by reference to a common European interest, which can mobilize supporters and neutralize opposition; (2) *coalition-building*, i.e., the capacity to identify problems to be solved through coordinated action and to build coalitions with client groups and national bureaucracies; (3) *political experience and technical expertise*, i.e., the capacity to maximize national contacts, technical expertise, and political experience in the organization; (4) *task expansion*, i.e., the capacity to convince client groups and governments of the need for new policies, new tasks, and new powers for the Community institutions; and (5) *brokerage and package deals*, i.e., the capacity to play an active role in intergovernmental bargaining,

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<sup>34</sup> Lindberg, 1963, p. 71.

<sup>35</sup> Scheingold, 1965, p. 21.

<sup>36</sup> Lindberg and Scheingold, 1970, pp. 92-95.

building support for its own proposals and constructing deals which satisfy interests of all national governments.

*Intergovernmentalism.* Early intergovernmentalist scholarship turned sharply against this picture of the supranational institutions as engines and facilitators of European integration, encouraging societal demands, structuring the agenda, and brokering deals. Grounded in classical realist conceptions of anarchy, conflict, and power politics, early intergovernmentalism posited that governments had not and were unlikely to endow the EEC's supranational institutions with powers that would grant them a true role in European politics.

In a classic 1966 article, Stanley Hoffmann formulated what is generally regarded as the most influential critique of early neofunctionalist scholarship.<sup>37</sup> Writing at the height of French president Charles de Gaulle's "empty-chair" policy, which blocked progress on European integration in the mid-1960s, Hoffmann proclaimed that the belief in a self-propelling integration process engineered by the supranational institutions was highly unrealistic. Most fundamentally, in view of our focus here, national governments were unlikely to confer powers to the European institutions in areas of key importance to the national interest, and effectively remained in control in the less vital areas where the institutions indeed were equipped with decision-making authority. According to Hoffmann, the authority of the supranational institutions remained "limited, conditional, dependent, and reversible,"<sup>38</sup> with little hope of change. Facing powerful national governments, "the supranational civil servants, for all their skill and legal powers, are a bit like Jonases trying to turn whales into jellyfish."<sup>39</sup>

Reflecting anew on the same theme in the early 1980s, after more than a decade of seemingly limited advances in European integration, Hoffmann maintained that the Community had helped preserve the nation-state rather than force it to wither

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<sup>37</sup> Hoffmann, 1966.

<sup>38</sup> Hoffmann, 1966, p. 909.

<sup>39</sup> Hoffmann, 1966, p. 884.

away.<sup>40</sup> The powerful integrative process predicted by neofunctionalists had not been realized. Hoffmann pointed to the weakness of the supranational institutions as one of the prime reasons: “The EEC’s institutions are weak, because they lack autonomy (from the member states) and because their capacity to act is small.”<sup>41</sup> Drawing the implications of his reasoning, Hoffmann suggested that the best way to analyze the Community was not as a new, supranational political entity in the traditional terms of integration theory, but rather as an international regime, as conceived of in the then emerging work of Robert Keohane, Joseph Nye, Stephen Krasner, and others.<sup>42</sup> Inherent in this understanding of the Community was the notion that the supranational institutions were but instruments serving a functional purpose for governments, and which lacked independent power and influence.

*The modern debate: Do they only play the roles delegated?*

Hoffmann’s reference to the EEC as an international regime was the first sign of a shift in the focus of the debate on the role of the supranational institutions. To suggest that the EEC constituted a functional regime, was to indirectly acknowledge that the institutions actually fulfilled certain important roles and functions (though this was because governments saw that to be in their interest). With this general recognition, the bone of contention in the debate shifted to whether the Commission and the Court only perform the functions delegated to them by member governments, or have developed roles for themselves that go beyond those which governments intended. In causal terms, do the institutions solely produce effects on European integration as desired by EU governments, through the competences they have been delegated, or do they also exercise an *independent* causal influence that goes beyond?

*Neofunctionalism.* When neofunctionalist analysis reemerged in the late 1980s and 1990s, after a decline in scholarly interest (es-

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<sup>40</sup> Hoffmann, 1982. The notion that European integration strengthens rather than weakens the state is a recurring theme in intergovernmentalist scholarship. For other formulations, see Milward, 1992; Moravcsik, 1994.

<sup>41</sup> Hoffmann, 1982, p. 32.

<sup>42</sup> E.g., Keohane and Nye, 1977; Krasner, 1982.

pecially among neofunctionalists) during the 1970s and early 1980s, many of the same ideas resurfaced. Again, the supranational institutions were viewed as playing an important role in the deepening of integration, by way of encouraging, responding to, and capitalizing on transnational societal pressures for European-level rules. What sets apart recent from earlier neofunctionalist scholarship, however, is a clearer emphasis on the supranational institutions as autonomous and causally important actors, and the greater attention paid to the integrative role of the Court.

The essential role of the Commission is one of the central aspects of the 1989 article, by which Wayne Sandholtz and John Zysman opened the modern version of the neofunctionalist-intergovernmentalist debate.<sup>43</sup> Attempting to explain the relaunching of European integration in the mid-1980s and the “1992” project of completing the Internal Market, Sandholtz and Zysman argue that the Commission’s function as policy entrepreneur was of fundamental importance. Perceiving structural changes in the world economy and recognizing the inadequacy of national responses, the Commission successfully exercised political leadership when proposing the completion of the Internal Market and mobilizing support from transnational industrial interests.

In an article that quickly reached seminal status, Anne-Marie Burley and Walter Mattli present a neofunctionalist interpretation of legal integration in the EU, where the Court is credited with having transformed the European legal order.<sup>44</sup> Transferring Haas’s original neofunctionalist argument to the legal domain, Burley and Mattli argue that the ECJ succeeded in constructing a Community legal system, with powerful political implications, by giving pro-Community constituencies of litigants, lawyers, and national courts a stake in the promulgation and implementation of EC law. In its pursuit, the Court exploited the capacity of law to function as a mask for politics and a shield from member state opposition—exactly the role that early neofunctionalism predicted

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<sup>43</sup> Sandholtz and Zysman, 1989. For other recent contributions inspired by the neofunctionalist conception of supranational autonomy and which stress the Commission’s leadership and influence, see, e.g., Ludlow, 1991; Sandholtz, 1992, 1993; Ross, 1995; Cram, 1997; Schmidt, 1998a.

<sup>44</sup> Burley and Mattli, 1993. For other recent interpretations of the Court’s role that draw on neofunctionalism, see Alter and Meunier-Aitsahalia, 1994; Alter, 1996, 1998a; Stone Sweet and Brunell, 1998a; Stone Sweet and Caporaso, 1998.

for economics. Burley and Mattli conclude: “[T]he principle of law as a medium that both masks and to a certain extent alters political conflicts portends a role for the Court in the wider processes of economic and even political integration.”<sup>45</sup>

The autonomy and influence of both the Commission and the Court are central concerns in what must be considered the most ambitious attempt to breathe fresh life into neofunctionalism. Reporting on a collaborative research project, Alec Stone Sweet and Wayne Sandholtz present a theory of “supranational governance” with three constituent elements: the development of transnational society with an associated push for European-level rules, responsive and autonomous supranational institutions with capacity to pursue an integrative agenda, and EC rule-making to achieve collective (transnational) gains.<sup>46</sup> Contrasting their conception of the influence of the Commission and the Court with that of intergovernmentalism, Stone Sweet and Sandholtz emphasize that they view the supranational institutions as working “to enhance their own autonomy and influence within the European polity, so as to promote the interests of transnational society and the construction of supranational governance.”<sup>47</sup>

*Intergovernmentalism.* By contrast, the notion of the EU as an international regime, designed to fulfill the functional needs of national governments, and whose supranational institutions enjoy little or no autonomy, has become a defining feature of the intergovernmentalist contributions to the modern debate.<sup>48</sup>

In a direct reply to Sandholtz and Zysman, Andrew Moravcsik presents an intergovernmentalist account of why European integration gained renewed force in the second half of the 1980s.<sup>49</sup> Challenging the view that the Single European Act and the “1992” project resulted from the concurring influence of EC institutions and transnational business interests, Moravcsik instead stresses

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<sup>45</sup> Burley and Mattli, 1993, p. 44.

<sup>46</sup> Stone Sweet and Sandholtz, 1997. The results of the collaborative research project are published in Stone Sweet and Sandholtz, 1998.

<sup>47</sup> Stone Sweet and Sandholtz, 1997, p. 314.

<sup>48</sup> In addition to the intergovernmentalist contributions discussed here, see also Keohane and Hoffmann, 1991.

<sup>49</sup> Moravcsik, 1991.

the importance of interstate bargains between heads of government. The causal influence of the supranational institutions has been exaggerated and cannot be confirmed by the historical record, argues Moravcsik. Neither did the Commission and the Parliament in any way affect the outcomes of the negotiations, nor are the SEA negotiations an isolated example, as the same conclusions essentially hold for both earlier intergovernmental bargains and everyday decision-making in the EU.

Moravcsik's theory of European integration and perception of the supranational institutions was later refined in a set of articles and the 1998 book *The Choice for Europe*.<sup>50</sup> The core of liberal intergovernmentalism is a three-stage theory where (1) domestic preferences are aggregated by governments at the national level, (2) national interests are articulated in interstate negotiations where outcomes are the result of bargaining power and preference intensity, and (3) governments pool or delegate sovereignty to the EU institutions if needed to secure joint gains against defection. The refinement of the theory also brought with it a more elaborate conception of the (limited) autonomy of the supranational institutions. Defending the notion of the EU as a functional regime, Moravcsik takes issue with the neofunctionalist claim that the supranational institutions enjoy substantial autonomy within their delegated powers. Examining the most important functions delegated to the institutions, Moravcsik does not find any scope for independent initiative, with the exception of the "anomaly" posed by the Court's transformation of the European legal order:

Only where the actions of supranational leaders *systematically* bias outcomes away from the long-term self-interest of Member States can we speak of serious challenge to an intergovernmentalist view. While some cases of supranational autonomy, such as certain actions of the European Court of Justice, may pose such a challenge, most fit comfortably within it.<sup>51</sup>

Moravcsik's intergovernmentalist perspective is shared by Geoffrey Garrett, who in a series of articles has addressed the lim-

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<sup>50</sup> Moravcsik, 1993, 1995, 1998, 1999; Moravcsik and Nicolaïdis, 1999. See also the section in chapter three on principal-agent applications in EU studies.

<sup>51</sup> Moravcsik, 1993, p. 514. Emphasis in original.

ited capacity of the supranational institutions to stray from member state interests.<sup>52</sup> The Commission's ability to effectively use the substantial agenda-setting powers it enjoys to introduce proposals, which correspond closely to its own preferences, is severely circumscribed, argues Garrett. Not only does the Commission restrain its actions for fear of government reprisal in case it were to act too radically, but it also adapts its proposals to the preferences of the most powerful governments in anticipation of strategic voting in the Council. The most important contribution of Garrett's work is, however, the attempt to tackle the anomaly of the Court to intergovernmentalist theory. Pointing to how the ECJ and the national courts it empowered solve monitoring and incomplete contracting problems, which otherwise would have hampered the realization of intergovernmental agreements, Garrett claims that "where the ECJ has been activist, the member governments have supported this."<sup>53</sup> Moreover, fearing political reactions, the Court has as a rule been reluctant to make decisions that governments, especially the German and the French, would disapprove of.

*The limits of the neofunctionalist-intergovernmentalist debate*

Overzealous bashing of neofunctionalism and intergovernmentalism is an all too common endeavor in the field of EU studies. However, for the purpose of clarifying the rationale and orientation of this study, it suffices to point to two general weaknesses in the way these traditional approaches address the question of the supranational institutions' role in European integration.

First, modern neofunctionalism and intergovernmentalism are absolute in their conceptions of supranational autonomy and influence, and are neither sensitive nor open to the possibility of *variation*. These two strands of scholarship represent two fixed and competing positions on the supranational institutions' capacity to push integration further than member governments desire.<sup>54</sup>

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<sup>52</sup> Garrett, 1992; 1995; Garrett and Weingast, 1993; Garrett, Kelemen, and Schulz, 1998.

<sup>53</sup> Garrett, Kelemen, and Schulz, 1998, p. 150.

<sup>54</sup> It may be argued that neofunctionalism and intergovernmentalism are complementary rather than competing theories of European integration, where, highly simplified, neofunctionalism captures the integrative impulse of everyday, trans-

Whereas neofunctionalists view the institutions as endowed with substantial autonomy and as possessing an independent capacity to accelerate and deepen European integration, intergovernmentalists regard them as obedient servants only fulfilling functions delegated to them by national governments, with little or no capacity to move the integration process beyond what governments wish.

These two conceptions appear to be mutually exclusive in their theoretical formulations, as both claim to have general applicability. Yet they may not be mutually exclusive in practice, if we recognize that the degree of supranational influence in fact may vary from one case to another. To my mind, supranational influence is not a constant which takes on either high values (“engines of integration”) or low values (“obedient servants”), but a variable that is likely to vary across issue-areas, time, and institutions. In this perspective, one of the prime merits of P-A theory is the possibility of moving beyond the theoretical deadlock of these competing conceptions and toward a neutral theoretical language that is capable of accounting for variation in supranational influence.

The second weakness of the neofunctionalist-intergovernmentalist debate is the near exclusive focus on the Commission’s and the Court’s powers in the pre-decisional phase of European policy-making. As Mark Pollack concedes: “Much of the literature on the EC’s supranational organizations focuses on the purported ‘agenda setting’ functions of these organizations.”<sup>55</sup> With few exceptions, the institutions’ post-decisional enforcement functions have been overlooked in the debate on supranational influence. Recalling the works reviewed above, these examine the Commission’s functions as encourager of societal demands for European policies, as policy-initiator, as broker in intergovernmental bargaining, and as technical expert. In sum, they address the Commission’s capacity to influence the course of European integration as policy entrepreneur or agenda-setter. Similarly, existing works on the influence of the ECJ tend to discuss the Court in its capacity as

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national exchange and the associated push for European-level rules, while intergovernmentalism accounts for the effect of history-making decisions in intergovernmental bargains. Whatever the merits of this argument, it must be recognized that it does not extend to the conception of the supranational institutions, where these two theories offer competing interpretations, as illustrated by the review.

<sup>55</sup> Pollack, 1996, p. 10.

judicial policy-maker, exploiting its power of interpretation and the ambiguity of the treaties for the purpose of advancing an integrationist policy agenda.

Exceptions to this neglect are the neofunctionalist and intergovernmentalist interpretations of the Court's early transformation of the European legal system.<sup>56</sup> Whereas neofunctionalists argue that the process of legal integration took off with the transformation of the preliminary ruling procedure into an additional enforcement instrument, intergovernmentalists maintain that EU governments perceived this strengthening of enforcement to be in their interest. Rather than enforcement *per se*, however, the key issues in this debate are legal integration, the role of the Court in European integration, and the ECJ's sensitivity to member state preferences. Enforcement is merely the domain affected by the ECJ decisions, which first and most forcefully illustrated how its power of interpretation could be used to establish principles not previously acknowledged in the treaty or its case law. Moreover, as I will show in chapters six to eight, supranational attempts to reinforce EU supervision did not end with the creation of this important avenue of enforcement.

### **Legal and Political Analysis of EU Enforcement**

If the Commission's and the Court's functions in EU enforcement have hardly been examined in integration theory, where then have they been analyzed? With the exception of a set of rare studies conducted by political scientists, the empirical area of EU enforcement has so far been the domain of legal scholars. In this section, I briefly introduce existing political analyses of EU enforcement, and then review the more voluminous legal literature on the Commission's and the Court's means for, and attempts at, enforcing member state compliance.

#### *Political analysis of the supranational institutions' enforcement roles*

Political scientists studying European integration have been largely oblivious of the enforcement functions of the supranational insti-

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<sup>56</sup> Garrett, 1992; Garrett and Weingast, 1993; Burley and Mattli, 1993; Alter, 1998a.

tutions. Compared to the extensive literature on the Commission's policy-initiation and policy-execution functions, and on the Court's exploitation of its power of interpretation for the purpose of encouraging legal integration, the catch is meager when we search for works explicitly devoted to the institutions' role in EU enforcement.

Two lines of political research relate in one way or the other to the enforcement functions of the Commission and the Court. First, there is a very small number of works that directly address the Commission's enforcement of member state compliance within the framework of the Article 169 infringement procedure. This procedure is the supranational institutions' treaty-based enforcement instrument *par excellence*, and gives the Commission the power to bring member states before the Court if they have failed to fulfill their obligations. Second, there is a limited public policy literature, which occasionally refers to EU enforcement in the examination of national-level implementation of EC rules.<sup>57</sup> Below, I restrict the review to the two existing articles which analyze the Commission's use of the Article 169 procedure, as the sporadic references to EU enforcement in the public policy literature do not motivate a separate coverage.

In a 1996 article, Maria Mendrinou covers developments in the Commission's use of the Article 169 procedure, and advances a model for analyzing the Commission's enforcement approach.<sup>58</sup> Having established that non-compliance is a systemic phenomenon in the EU, Mendrinou asserts that the Commission's enforcement policy shifted in the late 1970s from more lax to more rigorous initiation of proceedings against non-complying states. This shift can be explained by growing Commission awareness of how a strict enforcement approach would be beneficial both to its own position in EU politics and to the Community system of rules. A firm approach to infringement proceedings altered the nature of the strategic interaction between the Commission and EU governments—the “enforcement policy game”—and made compliance a more attractive option for the member states.

In the second article, Christer Jönsson and myself use the Commission's enforcement under Article 169 as an illustration of

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<sup>57</sup> Puchala, 1975; Siedentopf and Ziller, 1988; From and Stava, 1993; Jordan, 1997; Peters, 1997.

<sup>58</sup> Mendrinou, 1996.

the general phenomenon of “compliance bargaining” in international relations.<sup>59</sup> Expanding on the notion of strategic interaction in EU enforcement, we conceive of the Article 169 procedure as an arena for bargaining, specify the respective interests and bargaining power of the Commission and the member states, and explain patterns in EU compliance bargaining. More specifically, we submit that the Commission’s preference for bargaining as a means of enforcement stems from its limited resources and the need to ensure the continued cooperation of member governments, while its bargaining power primarily is derived from its unilateral authority to bring infringement cases to the next step in the procedure.

*Legal analysis of the institutions’ treaty-based enforcement powers*

The first of two strands of legal research, which directly address the Commission’s and the Court’s enforcement powers, is the less voluminous literature on provisions in the treaty granting the institutions the right to initiate and decide infringement proceedings. The principal focus of this literature is the infringement procedure under Article 169. The research is primarily descriptive in nature and typical questions explored through a legal perspective include the exact powers of the institutions under the treaties, the stages of the Article 169 procedure, the degree of discretion enjoyed by the Commission, and empirical patterns in infringement proceedings. To convey an impression of the main orientation of this literature, I briefly introduce two of the most influential articles, as well as the only book-length study on the subject.<sup>60</sup>

In an early article, A. C. Evans examines the degree of formal and actual discretion enjoyed by the Commission in the initiation and completion of infringement cases.<sup>61</sup> Evans advances three primary arguments. First, from a legal perspective, the text of Article 169 obliges the Commission to initiate proceedings if it detects cases of suspected non-compliance, whereas it enjoys a subjective power of appreciation in terms of when and whether it should close proceedings. Second, the ECJ’s case law on the subject grants more but not full discretion to the Commission in terms

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<sup>59</sup> Jönsson and Tallberg, 1998.

<sup>60</sup> Other important contributions to this literature include Cahier, 1967, 1974; Ehlermann, 1981; Everling, 1984; Snyder, 1993.

<sup>61</sup> Evans, 1979.

of the duty to open infringement proceedings. Third, in its practice, the Commission has indeed made full use of this discretion, most importantly, by seeking informal solutions with member states rather than beginning proceedings in all cases or letting all initiated cases run their full course.

In an oft-cited article, Alan Dashwood and Robin White provide an in-depth treatment of the Article 169 enforcement procedure in legal and empirical terms.<sup>62</sup> Disaggregating the procedure, Dashwood and White examine the sources and modes of member state infringements, the administrative phase of Commission action, the judicial phase before the Court, and the final effectiveness of infringement proceedings in terms of inducing compliance. Rather than advancing a single argument, Dashwood and White provide a highly detailed treatment of each step of the procedure, deriving the legal setting and actual practices through a close review of existing case law.

The most comprehensive and influential work on the enforcement means of the Commission and the Court under the treaties is certainly H. A. H. Audretsch's *Supervision in European Community Law*.<sup>63</sup> Audretsch's study covers both legal and policy aspects of enforcement through the Article 169 procedure. The legal and procedural assessment is focused on the two phases of the procedure, and addresses questions such as the legal character of the Commission's actions, defenses used by member states, and compliance with ECJ judgments. The more practically oriented part of the study examines the Commission's actual supervision policy, e.g., the philosophy guiding the Commission's enforcement actions and the organization of in-house investigations. To the extent that one overarching conclusion can be derived from this extensive coverage, it would be that the Commission's enforcement policy underwent a significant reorientation in 1978, from a more careful to a more vigorous use of Article 169 as an enforcement weapon.

*Legal analysis of the ECJ's development of decentralized enforcement*

The second line of legal research that directly addresses EU enforcement is the considerably more voluminous body of literature

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<sup>62</sup> Dashwood and White, 1989.

<sup>63</sup> Audretsch, 1986.

on the ECJ's efforts to ensure the effectiveness of Community law through enforcement in national courts. To simplify slightly, this literature covers two central developments: first, how the ECJ in the early 1960s turned national courts into enforcers of EC law by establishing the principles of direct effect and EC law supremacy; and second, how the ECJ during the last decade has developed this decentralized route of enforcement by laying down principles and requirements, whose purpose it is to achieve effective remedies against non-complying states. The bulk of this literature consists of legal analysis of the Court's reasoning when deriving these essential principles from the treaties and existing case law. Other frequent themes in this research include the reception of the principles in national courts, and the impact of these developments on domestic law and national legal systems. For the purpose of conveying an impression of the principal orientation of this literature, I briefly introduce two of the most influential articles on each of the two main developments in the Court's construction of decentralized enforcement.<sup>64</sup>

In a 1981 article, Eric Stein provides a seminal account of how the Court established and expanded the principles of direct effect and EC law supremacy.<sup>65</sup> Stein's emphasis is on the "constitutional" status of these decisions, which, he asserts, form cornerstones in "a constitutional framework for a federal-type structure in Europe."<sup>66</sup> In enforcement terms, the combined effect of the two decisions was to transform the preliminary ruling procedure under Article 177 into a means for challenging national legislation, and to grant national courts a role in the enforcement of EC law. In the article, Stein traces the positions of the Commission, the member governments, the advocates-general, and finally the Court itself, on the most important legal questions of the cases. The most prominent conclusion of Stein's analysis is the Court's close alliance with the Commission, whose positions the Court largely followed in these pro-integration judgments.

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<sup>64</sup> On the creation of decentralized enforcement through the principles of direct effect and EC law supremacy, see also Pescatore, 1974, ch. 4; Rasmussen, 1986, ch. 8; Weiler, 1991, 1994. On the Court's attempts to ensure adequate and effective remedies, see also Craig, 1993; Emiliou, 1996; Lewis and Moore, 1993; Ross, 1993; Snyder, 1993; Steiner, 1995; Van Gerven, 1995, 1996; Lonbay and Biondi, 1997.

<sup>65</sup> Stein, 1981.

<sup>66</sup> Stein, 1981, p. 1.

In an oft-cited article on the principle of direct effect, Pierre Pescatore—at the time judge at the ECJ—performs an in-depth analysis of the legal scope of the principle, and thus of the extent to which individuals can secure their EC rights in national courts.<sup>67</sup> Pescatore examines the ECJ’s case law and traces the development in the Court’s position as to whether not only treaty articles but also regulations, directives, and international agreements can have direct effect. Pescatore concludes that the Court’s jurisprudence at the time of writing had evolved to the point where all forms of EC law could be considered capable of having direct effect.

Turning to the legal literature, which has emerged in connection with the Court’s attempts in recent years to strengthen decentralized enforcement in national courts, Josephine Steiner was one of the first to recognize this development.<sup>68</sup> The spark igniting the huge volume of legal scholarship, of which Steiner’s article is a prominent contribution, was the *Francovich* decision handed down by the ECJ in 1991.<sup>69</sup> In this judgment, the Court introduced the previously non-existing principle of state liability, the essence being that individuals can claim financial compensation from non-complying member states violating their rights under EC law. In the article, Steiner explores the ECJ’s reasons for establishing this principle, assesses the case and the Court’s judgment, and analyzes legal questions raised by the decision. Steiner finds that the likely rationale of the introduction of state liability was the insufficiency of existing remedies to secure individuals’ EC rights and the effective implementation of Community law.

Taking stock of the legal evolution of the principle of state liability after *Francovich*, P. P. Craig examines the string of cases in 1996 through which the Court specified the reach of the principle, most notably, by laying down certain criteria which have to be fulfilled for state liability to arise. In the article, Craig analyzes the reasoning of the Court, defends the criteria established, and counters the criticism that the Court engaged in judicial activism when developing this principle. Stepping beyond the Court’s rea-

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<sup>67</sup> Pescatore, 1983.

<sup>68</sup> Steiner, 1993.

<sup>69</sup> *Francovich*, Cases C-6 and 9/90 (1991).

soning, Craig ends by considering the implications of this principle for national law and legal procedures.

*The limits of existing scholarship on EU enforcement*

While a few selected works can never be fully representative of whole strands of research, these prominent contributions do illustrate the general orientation of the political and legal literature on EU enforcement. Through its focus on enforcement, this literature fills an important gap in the understanding of European integration. In the empirical section of this study, I therefore draw on specific parts of this research when analyzing the scope for supranational influence in EU enforcement. The merits of this literature notwithstanding, I submit that it is subject to three limitations, which render it incapable of providing an account of supranational enforcement influence and its determinants.

First, and most fundamentally, existing literature on enforcement in the EU does not address the question of supranational influence. In the limited political literature on EU enforcement, the issue of whether the Commission and the Court may exert independent influence is not at the forefront. Where EU enforcement is explicitly analyzed, in the few works on the Article 169 procedure, the primary focus is the Commission's choice of enforcement policy and the dynamics of compliance bargaining. Where EU enforcement plays a minor role, in the research on national implementation of EC rules, the prioritized question is the extent to which proper implementation is dependent on enforcement.

The analysis conducted in the judicial literature is for obvious reasons legally oriented, and therefore neither aims nor attempts to explain the Commission's and the Court's scope for independent influence. The questions lawyers and political scientists ask, when they approach an empirical phenomenon in which they have a shared interest, often differ in orientation. EU enforcement does not constitute an exception in this respect. The literature on the Article 169 procedure outlines the legal scope of this power, identifies legal differences between the steps of the procedure, and presents statistics on infringement cases. Similarly, the primary focus of the literature on the Court's enforcement-enhancing case law is the legal reasoning in these judgments and possible implications for national law and legal procedures. The political motives be-

hind, results of, and constraints on the Commission's and the Court's actions are simply not the prime preoccupation of this legal research.

This being said, it must be recognized that the legal literature on EU enforcement gives evidence of the tension between the so-called legalist and contextualist approaches to EC law. As Burley and Mattli point out: "Most of the European legal literature begins and ends with law, describing a legalist world that is hermetically closed to considerations of power and self-interest. A handful of 'contextualists' do go further in an effort to place law in a broader political context."<sup>70</sup> Also the legal literature on EU enforcement hosts cases of contextual rather than legalist analysis.<sup>71</sup> In view of this study's concern with supranational influence, the main merit of contextualism, as opposed to legalism, is the willingness to recognize the Court's occasional venturing into judicial activism or policy-making.<sup>72</sup>

Second, the existing political and legal literature signifies a compartmentalized rather than integrated understanding of EU enforcement. Each strand of research focuses on one essential component of EU enforcement—centralized through Article 169 proceedings, or decentralized through national courts—but does so in relative isolation, and without being sufficiently concerned with developments in the other component. The Commission's and the Court's enforcement through Article 169 is viewed as distinct from the Court's creation and reinforcement of the decentralized route of enforcement. A notable exception in this regard is a 1993 article by Francis Snyder, which successfully integrates the supranational institutions' means for ensuring compliance.<sup>73</sup>

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<sup>70</sup> Burley and Mattli, 1993, p. 45.

<sup>71</sup> See, especially, Rasmussen, 1986; Weiler, 1991, 1994.

<sup>72</sup> Whether or not the Court occasionally engages in judicial activism or judicial policy-making, and whether this is something it should do, is an intra-legal debate that has taken on highly ideological overtones. Whereas the position of legalist scholars in this debate is alien to most political analysts, the contextualist notion of a reciprocal relationship between law and politics generally comes across as a natural assumption. While the contextualist literature effectively provides indications of where the Court may have exploited its position to pursue supranational interests, it is not aimed at evaluating supranational influence *per se*. Rather, the focus tends to be normative: whether or not the Court is right in engaging in judicial activism. For contributions to this debate, see Rasmussen, 1986, 1988; Cappelletti, 1987; Volcansek, 1992; Neill, 1995; Tridimas, 1996.

<sup>73</sup> Snyder, 1993.

The orientation of this study reflects another perspective—one where EU enforcement is viewed as one strategic setting, and where these two levels of enforcement are understood in relation to each other. Not forestalling the analysis of the empirical chapters, I submit that the development of EU enforcement since 1985 cannot be explained, unless it is recognized that the Commission's and the Court's actions on both levels are driven by the same logic. The choices they make reflect their understanding of the effectiveness of EU supervision as a whole, not just either centralized or decentralized enforcement.

The third limit of existing literature on EU enforcement is the coverage of empirical developments, which is wanting in a number of areas. Blank spots of considerable importance can be found in the coverage of each of the three ways by which the supranational institutions may exert independent influence in EU enforcement.

First, existing literature is not up-to-date with developments in the ways the Commission exercises the enforcement power granted under Article 169. Whereas legal textbooks commonly take stock of the number of yearly infringement proceedings, no comprehensive analysis exists as to how the Commission's use of this instrument has evolved since the mid-1980s. Neither do the political analyses of the Article 169 infringement procedure venture much beyond the Commission's general approach to enforcement. As I show in chapters five and six, however, the Commission has made increasing recourse to this procedure, and has taken five distinct steps to improve the capacity of the procedure to function as an effective means of enforcement.

Second, existing literature has not yet recognized the crucial role played by the Commission in the supranational institutions' attempts to reinforce decentralized enforcement in national courts. Not only the Court but also the Commission has worked actively to enhance the capacity of national courts to solve compliance problems. In chapter eight, I show how the Commission, for instance, has launched initiatives to encourage citizens to turn to national courts when they see their rights infringed upon by member states, and to improve the knowledge of EC law among national lawyers and judges.

Third, existing literature does not account for the supranational institutions' efforts to induce member governments to delegate

more far-reaching enforcement competences. Developments in EU enforcement may result not only from the institutions' exercise of existing means, or independent creation of new ones, but also from the delegation of additional enforcement powers at intergovernmental conferences. In chapter seven, I trace the Commission's and the Court's attempts to induce the delegation of new enforcement powers at the 1991 and 1996-97 IGCs.

### **Summary**

This chapter has provided an overview of the bodies of research that are of the most immediate relevance to the theoretical and empirical focus of this study. This review demonstrates that integration theory by and large has refrained from theorizing the scope for independent influence in the post-decisional phase of EU enforcement. At the same time, the literature that indeed examines enforcement as an empirical domain does not systematically address the question of supranational influence. Beyond clarifying the fundamental rationale of a study of supranational enforcement influence, the review also brings out a number of additional limits, which are essential to the study's orientation. Neofunctionalism and intergovernmentalism espouse theoretical conceptions of supranational influence, which do not allow for the possibility of variation in EU governments' capacity to control the Commission and the Court. Moreover, the empirical coverage of the literature on EU enforcement is lacking in a number of respects and must be supplemented to provide a comprehensive picture of recent developments. In the chapters to come, this study makes an attempt to address these theoretical and empirical weaknesses. Most immediately, this is done by turning to a theoretical literature which suggests that control and autonomy in relationships of delegation are likely to vary with the means for monitoring and sanctioning unwanted actions.



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CHAPTER  
**THREE**

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## **PRINCIPAL-AGENT ANALYSIS**

The theoretical foundation of this study is principal-agent analysis, as developed within the new institutionalism in rational choice theory. In this chapter, I account for the origin and main tenets of P-A analysis, as well as actual applications to politics and European integration. In next chapter, I employ these theoretical tools in the construction of a principal-supervisor-agent model of EU enforcement.

The chapter consists of three parts. In the first section, I introduce the new institutionalism in rational choice theory, and I delineate the historical use of P-A analysis, from its origin within the study of the firm in economics, to the political study of domestic and international institutions. In the second section, I present the generic P-A model, explain its logic, and elaborate on its main components and implications. And in the third section, I contend that P-A analysis offers a set of advantages, making it a particularly powerful theoretical instrument for addressing questions of delegation and autonomy in the EU; and I introduce the most important applications in EU studies to date.

### **Rational Choice Institutionalism and P-A Analysis**

Principal-agent analysis forms part of what in Political Science often is referred to as the new institutionalism in rational choice theory. Below, I outline the central features of rational choice institutionalism, describe how P-A analysis once originated in the new institutional economics, and trace the import of this analytical construct into the study of politics.

*The new institutionalism in rational choice theory*

The Political Science literature of today is replete with references to the “new institutionalism,” which has become one of the most prominent academic catchwords in the 1980s and 1990s. While the frequent use of this term indeed reflects a renewed interest in institutions, which again have risen to the top of the research agenda, it does not refer to a unified body of thought. Rather, at least three different analytical approaches can be distinguished, which all call themselves the new institutionalism: historical institutionalism, sociological institutionalism, and rational choice institutionalism.<sup>74</sup> The focus here is strictly on the new institutionalism in rational choice theory.

Rational choice institutionalism encompasses a quite diverse body of literature, which addresses a multitude of empirical phenomena employing a highly varied theoretical tool box, but which has a common ground in the assumptions of rational choice theory and the importance attached to institutions.<sup>75</sup> Like all forms of institutional analysis, rational choice institutionalism seeks to provide answers to two primary questions, namely, how institutions shape political, economic, and social behavior, and how institutions originate, persist, and change.<sup>76</sup>

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<sup>74</sup> For overviews and comparisons, see Hall and Taylor, 1996; Immergut, 1998; Peters, 1998. Prominent contributions to historical institutionalism include Evans, Rueschemeyer, and Skocpol, 1985; Hall, 1986; Steinmo, Thelen, and Longstreth, 1992; Weaver and Rockman, 1993. Important works in sociological institutionalism include Meyer and Scott, 1983; March and Olsen, 1989; Powell and DiMaggio, 1991; Scott, Meyer, and Associates, 1994.

<sup>75</sup> The origin of rational choice institutionalism can be traced to the pioneering work of Shepsle on the role of institutions in the US Congress. Puzzled by the stability of majorities for legislation in Congress, Shepsle argued that this could be explained by the way in which congressional institutions, such as the committees, structured the choices and information available to members of Congress. Shepsle, 1979, 1986, 1989.

<sup>76</sup> While the precise conception of what an institution actually is tends to shift within and between the three new institutionalisms, it should be noted that the term “institution” within all approaches generally is employed to denote something broader than formal institutions such as the Commission and the Court. Often, institutions are widely conceived of as formal or informal procedures, routines, norms, and conventions, or as North puts it, “any form of constraint that human beings devise to shape human interactions.” North, 1990, p. 4. By consequence, the concept is taken to mean two things in this study depending on the context: formal organizations in the context of the supranational institutions of the EU, and the broader conception referred to above in the context of the new institutionalist approaches discussed here.

The new institutionalism in rational choice theory distinguishes itself from other institutional approaches through four notable features.<sup>77</sup> First, this brand of institutionalism relies on the behavioral assumptions of rational choice theory. In simple terms, actors are assumed to have a fixed set of preferences and to behave instrumentally so as to maximize the attainment of these preferences. Second, rational choice institutionalists tend to see politics as a series of collective action or contracting dilemmas. In the absence of facilitating institutional arrangements, individuals acting to maximize the attainment of their preferences may produce collectively sub-optimal outcomes, and contractual problems may prevent mutually advantageous exchange from taking place. Third, rational choice institutionalism emphasizes the role of strategic interaction in the determination of political outcomes. An actor's behavior is deeply affected by strategic calculations about how other actors are likely to behave. In this context, institutions structure and shape these interactions and their outcomes, for example, by providing information about other actors' behavior. Fourth, rational choice institutionalists present a distinctive, functional response to the question of how institutions originate and persist. In simple terms, institutions emerge and survive because they fulfill important functions for the actors affected by these institutions.<sup>78</sup>

*The new institutional economics and principal-agent analysis*

This study draws on a strand of rational choice institutionalism which emerged in the mid-1980s, when political scientists recognized the wider applicability of, and decided to import, the analytical tools of what is generally referred to as the "new institutional economics" or the "new economics of organization."<sup>79</sup> The new institutional economics arose in the 1970s in response to the

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<sup>77</sup> The identification of these features draws on Hall and Taylor, 1996, pp. 944-946.

<sup>78</sup> For a good discussion of the functionalist fallacy, or the *post hoc ergo propter hoc* fallacy, which functionalist explanations run the risk of being subject to, see Keohane, 1984, pp. 80-82.

<sup>79</sup> The new institutional economics could potentially be identified as a fourth branch of new institutionalism. However, as this approach overlaps heavily with the new institutionalism in rational choice theory, which in part has become the political science reflection of this originally economic body of theory, I have chosen to treat them together in this brief review.

failure of traditional neoclassical economics to recognize the importance of institutions for economic activity and exchange. Blowing new life into Ronald Coase's argument that a proper understanding of economic exchange requires a systematic inquiry into the institutional context in which such activity takes place, new institutional economists set out to conceptualize firms, markets, and economic relations in institutional terms.<sup>80</sup>

In simplified terms, the new institutional economics, which by the mid-1980s had become "one of the liveliest areas in [the] discipline,"<sup>81</sup> developed into three main branches: transaction cost theory, agency theory, and property rights theory.<sup>82</sup> Agency theory, our main preoccupation here, centered around the so-called principal-agent relationship and the problem of "shirking." The P-A relationship was posited to arise whenever one actor (principal) engages another actor (agent) to perform a task on its behalf. The economic agency literature typically considered the relations between shareholders and corporate executives, between managers and employees, and between retailers and suppliers to be examples of the principal-agent relationship.

In an early, seminal article, Armen Alchian and Harold Demsetz explained why the problem of shirking was central to this relationship and to explaining the existence of the firm and its internal organization.<sup>83</sup> On the market and in a firm, economic agents are rewarded based on their productivity. To take the example of the firm, it must be possible for the owners to obtain information on the actions of the employees for each employee to be rewarded according to its contribution to the production. In the absence of monitoring mechanisms, however, no such information is available, and economic agents thus have an incentive to shirk, to free-ride, as it is impossible to determine the relative effort of each employee. The solution to the problem of shirking is for the employer to set up mechanisms for monitoring the agents' actions

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<sup>80</sup> Coase, 1937, 1960.

<sup>81</sup> Mathews, 1986, p. 903.

<sup>82</sup> Williamson, 1985, pp. 26-29; 1990; Eggertsson, 1990. Seminal works on transaction costs are Coase, 1937, 1960; Williamson, 1975, 1985; North, 1990. Major works in agency theory include Ross, 1973; Jensen and Meckling, 1976; Jensen, 1983; Pratt and Zeckhauser, 1985b. Important contributions in property rights theory are Demsetz, 1964; Alchian, 1965; Furubotn and Pejovich, 1972; De Alessi, 1980.

<sup>83</sup> Alchian and Demsetz, 1972.

and apportioning the appropriate compensation, thus aligning productivity with reward. Alchian and Demsetz concluded that the firm exists because it provides a more efficient solution to the problem of shirking than the market does, and, likewise, that some forms of corporate organization are better adapted to deal with this problem than others.

Expressed in more general terms, new institutional economists suggested that shirking would be an integral problem to contractual relationships, as agents often have private interests, which diverge from those of their principals, and know more about their true performance than the principals do. As P-A analysis has developed within the new institutional economics, the primary analytical focus has been the result of shirking, so-called agency costs, which include the costs of monitoring the behavior of the agent and the loss resulting from undetected shirking. Embracing a comparative perspective to institutional design, this largely mathematical and non-empirical literature has been preoccupied with the question of how such agency costs can be minimized through alternative contractual arrangements.

*Principal-agent analysis and the study of politics*

While developed in relation to economic phenomena, the analytical tools of the new institutional economics were neither by nature nor by definition restricted to the economic domain. On the contrary, they were highly generalizable. Politics is replete with hierarchical, contractual relationships, as Terry Moe noted in an article written for the purpose of introducing political scientists to the new institutional economics:

Democratic politics is easily viewed in principal-agent terms. Citizens are principals, politicians are their agents. Politicians are principals, bureaucrats are their agents. Bureaucratic superiors are principals, bureaucratic subordinates are their agents. The whole of politics is therefore structured by a chain of principal-agent relationships, from citizen to politician to bureaucratic superior to bureaucratic subordinate and on down the hierarchy of government to the

lowest-level bureaucrats who actually deliver services directly to citizens.<sup>84</sup>

Though the ideas initially traveled slowly, the potential of theoretical tools drawn from the new institutional economics gradually became more evident to rational choice institutionalists in Political Science. Predicted Moe: “Conditions are ripe...and it is only a matter of time before politics becomes the contractual paradigm’s new frontier.”<sup>85</sup>

The prophecy came true, in large parts, and the 1980s witnessed the incorporation of analytical tools from the new institutional economics into rational choice institutionalism in Political Science. For little less than two decades now, transaction cost and principal-agent analyses have contributed substantially to the development of powerful and influential theories on legislative institutions, regulatory bureaucracy, and international regimes.<sup>86</sup> An amalgam of all three, the European Union is increasingly being analyzed by means of these new institutional instruments—a development to which I return in the last section of this chapter.

The empirical, political domain, where rational choice institutionalists most forcefully have applied the P-A model and where the scientific debate has come to be framed in terms of principal control or agent autonomy, is legislative-bureaucratic relations in the US. The central question in this debate has been the extent to which the US Congress is effectively in control of the regulatory agencies to which it has delegated extensive administrative authority.

Advocates of the “runaway-bureaucracy thesis” have maintained that Congress (principal) has largely lost control of the regulatory agencies of the executive branch (agents).<sup>87</sup> The US Congress has had few or no mechanisms for overseeing the agencies’

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<sup>84</sup> Moe, 1984, pp. 765-766.

<sup>85</sup> Moe, 1984, p. 758.

<sup>86</sup> In addition to the bodies of literature reviewed below and in the final section of this chapter, see the following works for examples of applications of the contractual perspective in Political Science: Shepsle, 1979; Keohane, 1984; Yarbrough and Yarbrough, 1987, 1990, 1992; Weingast and Marshall, 1988; Martin, 1993; Simmons, 1993.

<sup>87</sup> For a bibliographical review of this literature, see McCubbins and Schwartz, 1984, p. 165. For one of the earliest analyses struck in principal-agent terms, see Mitnick, 1980

administrative compliance with legislative goals, permitting the executive branch to violate these goals and to develop actual policy in directions that deviate from legislative intentions. Expressed in the terms of the P-A literature, bureaucratic shirking has prevailed in the absence of monitoring mechanisms sufficient to alleviate the asymmetric distribution of information about the agencies' actions.

Emerging largely as a response to the runaway-bureaucracy thesis, the "congressional-dominance school" challenged the proposition that Congress has abdicated control to bureaucracies, which essentially form their own policy and shape their own organization.<sup>88</sup> Just because there are few direct means of oversight, this does not mean that control is not exercised. Congress's supervision of the regulatory agents is instead more indirect: "The mechanisms evolved by Congress over the past one hundred years comprise an ingenious system for control of agencies that involves little direct congressional monitoring of decisions but which nonetheless results in policies desired by Congress."<sup>89</sup> For instance, Congress has established an indirect and decentralized system of monitoring, where it is provided with information on bureaucratic compliance through citizens and organized interests reporting and challenging violations with legislative goals.

The literature emerging in connection with the debate between the runaway-bureaucracy and congressional-dominance schools constitutes the singularly most important application of P-A theory in the study of politics. The debate and the less extreme and more nuanced P-A analysis, which was produced in its aftermath, recognized the problems inherent in political delegation, identified means of political control, and helped specify the conditions under which political agents can escape the supervision of political principals.<sup>90</sup> In sum, this literature illustrates the usefulness of attacking questions of political delegation and control with the theoretical tools of P-A analysis.

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<sup>88</sup> E.g., Weingast and Moran, 1982, 1983; McCubbins and Schwartz, 1984; Weingast, 1984; McCubbins, Noll, and Weingast, 1987.

<sup>89</sup> Weingast, 1984, p. 148.

<sup>90</sup> Important works in the second wave of P-A analysis of legislative control and public bureaucracy include McCubbins and Sullivan, 1987; Moe, 1987, 1990; Kiewiet and McCubbins, 1991.

## The Principal-Agent Model

In this section, I provide a comprehensive introduction to the generic principal-agent model—the theoretical basis for the principal-supervisor-agent model of EU enforcement presented and employed in this study. I begin by presenting the model in its simplest version, after which I focus in detail on each of the model’s main components and on the ways it may be extended and elaborated. Throughout the overview, I draw on the P-A literature in both Economics and Political Science. As the purpose is to present the P-A model in its generic version, however, I attempt, as far as possible, to reframe the context-specific aspects of this literature into general, analytical features.

### *The principal-agent model in short*

In the seminal article, where the principal-agent imagery was first introduced, Stephen Ross describes how this relationship arises “between two (or more) parties when one, designated as the agent, acts for, on behalf of, or as representative for the other, designated the principal, in a particular domain of decision problems.”<sup>91</sup> The principal and the agent thus enter into a contractual arrangement, in which the principal chooses to delegate certain functions or decision-making authority to the agent, in the expectation that the agent will act in ways which produce outcomes desired by the principal.

The so-called principal-agent problem is the result of a simultaneous presence of information asymmetry and conflicting interests. First, information asymmetry prevails, because agents generally know more about their interests and actions than their principals do. Second, what is optimal for the principal is not necessarily optimal for the agent. While the principal would prefer the agent to perform the functions it has been delegated in accordance with the principal’s preferences, the agent may have private interests at heart.

When information asymmetry and conflicting interests coincide, the agent will shirk—that is, pursue its own interests rather than the principal’s—to the extent that such behavior is not rendered

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<sup>91</sup> Ross, 1973, p. 134.

disadvantageous by the principal. The essence of the principal's problem is therefore the construction of an incentive structure that will induce the agent to act as the principal would prefer. The literature on agency and delegation points to two means that the principal may employ: monitoring and rewards/sanctions. Monitoring is required to overcome the information asymmetry and to detect shirking on the part of the agent. Rewards or sanctions, in turn, induce the agent to faithfully fulfill its functions, by raising the gains from compliance and the costs of shirking. Together, monitoring and rewards/sanctions determine the agent's incentive structure: The more extensive the monitoring mechanism and the greater the reward or the fiercer the sanctions, the less likely it is that the agent will try to shirk. As both monitoring and rewards/sanctions are costly and consume considerable resources, however, it is unlikely that the principal will invest in such measures to the degree that shirking and non-compliance can be fully eliminated.

*Information, interests, and shirking*

Information and interests are the two fundamental building blocks of the P-A relationship. In simple terms, the degree to which the principal and the agent share the same information and the same interests determines the extent to which shirking becomes a problem. If the principal possessed the same information as the agent and their interests were identical, there would be neither room nor reason for the agent to shirk. Conversely, if the principal could not access any of the information held by the agent and their interests were highly contradictory, agency shirking would certainly be ubiquitous. In the P-A model, it is assumed that the relationship, at a first analytical stage, is subject to some degree of both information asymmetry and conflicting interests, which the principal at a later analytical stage may attempt to compensate for and align through monitoring and rewards/sanctions.

While the degree of asymmetry may vary, any act of delegation is likely to establish a relationship where information is unevenly distributed. As John Pratt and Richard Zeckhauser put it: "In most social and business relationships, the parties have different

information available to them.”<sup>92</sup> Consider a few examples from the economic and political world. Stockholders generally know less than management about the appropriateness of corporate decisions. Employers rarely have the information to determine whether employees have performed at the top of their capacity. Politicians tend not to know as well as responsible bureaucrats whether government agencies really meet the goals set by legislators. Voters generally do not know as well as politicians whether elected representatives in fact have done their utmost to realize the program they campaigned on.

Information asymmetry may be of two different kinds. On the one hand, we may choose to delegate tasks to another actor since we do not ourselves possess the skills and knowledge necessary to perform these functions. Joseph Stiglitz explains:

[I]n many circumstances, the principal wishes the agent to take actions based on the information which is available to the agent, not the principal. Indeed, this is the very reason that individuals delegate responsibility. Because of the asymmetry of information, the principal does not know whether the agent undertook the action the principal would himself have undertaken, in the given circumstances. Hence, even if the principal can observe the action, he may not know whether that action was appropriate.<sup>93</sup>

A classic example of this form of information asymmetry is the doctor-patient relation, where the patient (principal) engages the doctor (agent) exactly because of the doctor’s superior medical knowledge, and consequently is unable to determine whether the doctor’s actions and orders are correct.

Alternatively, we may choose to delegate functions and authority to an actor because we, for instance, do not have the time or opportunity to undertake the actions ourselves. In this case, there is no knowledge barrier, but it may nevertheless be impossible to ascertain whether the agent does its best to serve the principal’s interests. Generally, the actions of the agent cannot be readily observed by the principal. Rather, as Gary Miller points out, “what

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<sup>92</sup> Pratt and Zeckhauser, 1985a, p. 4.

<sup>93</sup> Stiglitz, 1987, p. 967.

[the principal] observes is some output that is determined by factors that include the [agent's] effort, but also a variety of uncertain other events."<sup>94</sup> While the agent knows what role its own efforts play in the outcomes produced, the principal does not hold the information necessary to separate the effects of the agent's actions from the effects of exogenous factors.

Turning to interests, a principal who enters into a contractual arrangement with an agent expects the agent to behave in ways that produce outcomes desired by the principal. But the agent has interests, too, which it acts to attain; and once engaged, the agent's actions may be driven by other logics than those dictated by the principal. While the shareholders of a firm want to maximize the profit, the manager may want to collect a high wage; while the employer wants the employees to work as hard as possible, the employees may prefer leisure; while the politicians want to see certain policies implemented, bureaucrats may be more concerned with expanding their organization; while the voters want their elected politicians to pursue the policies they have campaigned on, the politicians may also have private and party interests at heart.

Conflicting interests are a defining feature, not only when delegation entails transferring decision-making authority to an already existing agent, e.g., an employee or a politician, but also when it involves the setting up of an entirely new organization. Moe provides an excellent account of why the creation of a new organization, an administrative agency in this case, does not prevent conflicting interests from arising:

Once an agency is created, the political world becomes a different place. Agency bureaucrats are now political actors in their own right: they have career and institutional interests that may not be entirely congruent with their formal missions, and they have powerful resources—expertise and delegated authority—that might be employed toward these 'selfish' ends. They are new players whose interests and resources alter the political game.<sup>95</sup>

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<sup>94</sup> Miller, 1992, p. 121.

<sup>95</sup> Moe, 1990, p. 143.

When information asymmetry and conflicting interests coincide, the agent both has the motive and the opportunity to shirk. Agent shirking or non-compliance can take a variety of forms, for example, not pursuing a matter hard enough, pursuing it overzealously, or pursuing other issues than those delegated. The sole defining characteristic is that the agent acts in a way that conflicts with the attainment of the principal's interests.

The P-A literature distinguishes between two analytically distinct forms of shirking: hidden action and hidden information.<sup>96</sup> Shirking in the form of hidden action arises from the unobservability of the agent's actual behavior. In simple terms, the agent has an incentive to shirk, as its true actions cannot be ascertained by the principal. This is how shirking is predominantly conceptualized in the P-A literature. Shirking of the hidden information type, on the other hand, results from the unobservability of the information possessed by the agent. The agent may know, for example, that much more of a good could be produced under the prevailing circumstances, but chooses not to reveal this information to the principal, as it grants the agent certain slack.

*The contractual framework: Monitoring and rewards/sanctions*

Principals are not helpless in the face of agent shirking. Quite to the contrary, the principal can mitigate this problem and induce the agent to better fulfill its delegated functions by designing a contractual framework consisting of monitoring and incentive mechanisms. By attacking the problem of shirking at its root—information and interests—the principal can alter the incentives the agent faces, make compliance a more attractive option, and deter the agent from shirking.

Monitoring affects agent behavior by making it less likely that shirking will go unnoticed. The elimination of both hidden action and hidden information types of shirking requires, however, that both the agent's actions and information are monitored. To reduce shirking in the form of hidden action, the monitoring mechanisms must uncover the agent's actual behavior. Similarly, to ameliorate the problem of hidden information, the principal must find means of tapping the agent's information about its true capacity.

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<sup>96</sup> E.g., Holmström, 1979; Moe, 1984, pp. 755-756; Arrow, 1985.

What form monitoring takes naturally depends on the context of the particular P-A relationship. The economic literature stresses, for example, economic auditing and means for measuring employees' productivity, while the political literature may point to hearings, judicial review, and budget review. Nevertheless, certain general analytical distinctions can be made as to the various means of monitoring. Drawing on an influential article by Mathew McCubbins and Thomas Schwartz, we may distinguish between "police-patrol" oversight, which is centralized, active, and direct, and "fire-alarm" oversight, which is decentralized, reactive, and indirect, allowing the principal to intervene only in those instances when the system signals the occurrence of shirking.<sup>97</sup> McCubbins and Schwartz's argument pertains to legislative-bureaucratic relations in the US, where "fire-alarm" oversight refers to the feed-back Congress receives from constituency groups affected by bureaucratic performance, but the distinction is equally applicable in other empirical domains.<sup>98</sup> Yet another typology of monitoring can be established by distinguishing between monitoring performed by the principal, and the means of monitoring that are conceivable when the relationship is extended to involve more than two actors, for example, supervisor monitoring agent or agent monitoring another agent.

Monitoring does not come for free. To set up and operate the kind of monitoring mechanism required to fully eliminate agent shirking would be "either impossible or prohibitively costly."<sup>99</sup> In economic terms, it is only rational for the principal to invest in monitoring to the point where the marginal benefits of better compliance equal the marginal costs of running the mechanism. In other words, the level of monitoring that is optimal in terms of reducing shirking is seldom optimal in an economic perspective. In general, therefore, "principal-agent problems do not have first-best

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<sup>97</sup> McCubbins and Schwartz, 1984.

<sup>98</sup> In the economic P-A literature, the market is often stressed as an indirect, "fire-alarm" source of information on agent performance. E.g., Pratt and Zeckhauser, 1985a, p. 5. The "decibel meter" is another term that is frequently used to denote the "fire-alarm" monitoring performed by constituency groups. E.g., Weingast, 1984. On how administrative procedures create a "fire-alarm" system, see McCubbins, Noll, and Weingast, 1987; McCubbins and Page, 1987. On how asymmetric "fire-alarm" signals can introduce a bias in regulative outcomes, see Hopenhayn and Lohmann, 1996.

<sup>99</sup> Holmström, 1979, p. 74.

solutions that guarantee perfect compliance.”<sup>100</sup> Evidently, certain forms of monitoring are more or less costly than others. McCubbins, Schwartz, and others, emphasize as one of the main advantages of “fire-alarm” oversight that it provides principals with more monitoring for the same price, as the costs are predominantly borne by “fire-alarms,” such as constituents.<sup>101</sup>

Rewards—or their negative equivalent, sanctions—affect agent behavior by making compliance more profitable and shirking more costly if detected. By structuring incentives through rewards and sanctions, the principal aligns the agent’s interests with its own and induces behavior that better corresponds to the aims of delegation. Rather than positing, as neoclassical economics does, that the productivity determines the reward, the P-A model conjectures that the causality is the reverse: “[T]he specific system of rewarding which is relied upon stimulates a particular productivity response.”<sup>102</sup>

Whereas incentive mechanisms are central in all work on the principal-agent relation, the economic literature tends to stress rewards, while the political one emphasizes sanctions.<sup>103</sup> For economists one of the main theoretical advantages of the P-A model is the possibility to study how reward systems, such as pay schedules, should be structured in order to yield the greatest possible effort from the agent.<sup>104</sup> Typical considerations are whether payment schemes should be founded on fixed or piece-rate compensation, and whether they should compensate the agent based on its input or output. These kinds of rewards and fee schedules are less common in the political world, where the threat of sanctions constitutes the primary incentive mechanism. Political sanctions, which typically are *ex post* means of correcting the effects of shirking and preventing it from happening again, include reorganizing agencies, cutting an organization’s budget, refusing re-

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<sup>100</sup> McCubbins, Noll, and Weingast, 1987, pp. 243-244.

<sup>101</sup> McCubbins and Schwartz, 1984, p. 168; McCubbins, Noll, and Weingast, 1987, pp. 250-251.

<sup>102</sup> Alchian and Demsetz, 1972, pp. 778-779.

<sup>103</sup> Note that there is nothing in the P-A model that reduces incentive mechanisms to strictly monetary forms. Rewards and sanctions can be social in nature and may, for example, consist of effects on an agent’s reputation. E.g., Jensen and Meckling, 1976, p. 351; Arrow, 1985, p. 50; Pratt and Zeckhauser, 1985a, pp. 16-17.

<sup>104</sup> For an overview, see Lazear, 1987.

appointment of personnel and reelection of politicians, overriding administrative shirking with new legislation, and challenging agents in court.<sup>105</sup>

Just like monitoring, incentives in the form of rewards and sanctions have their price, also in the political domain. “[M]ost of the methods for imposing meaningful sanctions also create costs for political principals.”<sup>106</sup> The costs of sanctions not only limit the extent to which principals can have recourse to these instruments, but also reduce the credibility of the threat that these in fact would be used against the agent. This, obviously, gives the agent additional reason to believe that shirking may be a profitable enterprise after all.

In reality, the P-A relationship is seldom a one-shot operation, where all relevant contracting action is concentrated to an *ex ante* stage, and where the agent’s *ex post* behavior is a direct consequence of how successful the principal was in providing sufficient monitoring and incentive mechanisms. Rather, principal-agent relationships tend to be dynamic and interactive, subject to bargaining and revision by the parties.<sup>107</sup> The delegated functions and decision-making authority may be up for renegotiation, and perhaps more importantly, the principal may choose to revise existing means of monitoring and sanctioning/rewarding in light of unsatisfying agent behavior. In that sense, the more general new institutionalist argument that unintended and sub-optimal consequences of institutional design can be corrected at later stages applies also to dynamic P-A relationships: “Once the unanticipated consequences are understood, those effects will thereafter be anticipated and the ramifications can be folded back into the organizational design. Unwanted costs will then be mitigated and unanticipated benefits will be enhanced. Better...performance will ordinarily result.”<sup>108</sup>

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<sup>105</sup> E.g., McCubbins and Schwartz, 1984, p. 166; Weingast, 1984, pp. 155-156; McCubbins, Noll, and Weingast, 1987, pp. 248-249.

<sup>106</sup> McCubbins, Noll, and Weingast, 1987, p. 252.

<sup>107</sup> E.g., Pratt and Zeckhauser, 1985a, p. 21; Holmström and Tirole, 1989, p. 123; Sappington, 1991, pp. 59-61; Solnick, 1992, p. 8.

<sup>108</sup> Williamson, 1995, p. 216.

*Extending the principal-agent model vertically and horizontally*

So far, the account has been exclusively concerned with the basic, two-actor P-A model of delegation. Rare, however, are those actual empirical relationships of delegation, which in fact only involve one principal and one agent. While introducing more actors entails compromising with the parsimony that serves the original two-actor model so well, not acknowledging the existence of other actors often results in an even greater loss in explanatory power. New actors—whether a supervisor, another agent, or another principal—can fundamentally change the nature of the game, for example, by making monitoring easier and sanctioning more difficult. Often, therefore, the original model is extended either horizontally, introducing multiple principals or multiple agents, or vertically, adding supervisors or depicting principals and agents as linked in a chain where they constitute both principals and agents simultaneously.

When a principal delegates functions to more than one agent, this has implications for each agent's incentive to shirk, as well as for the principal's means of monitoring. As Alchian and Demsetz concluded already in their 1972 article, an agent has even greater incentives to shirk when it works as part of a team of agents, given that the principal only can observe the output of the group as a whole.<sup>109</sup> The agent not only faces the "ordinary" incentive to shirk, but also a free-riding incentive to let the other agents produce the collective good. Multiple agents also have certain monitoring advantages, however, from the perspective of the principal.<sup>110</sup> First, the principal may encourage one or many of the agents to monitor and provide valuable information about the others. "[S]imply because information is costly to the principal doesn't mean that it is costly to everyone. It may happen that the agents themselves are in good positions to monitor or advise each other. In reality it is common to find incentive mechanisms that involve

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<sup>109</sup> Alchian and Demsetz, 1972, pp. 779-781. See also Arrow, 1985, pp. 46-47.

<sup>110</sup> Note, however, that the need to monitor multiple agents also tends to have the negative effect of raising the total costs of monitoring, thus forcing the principal to invest less monitoring in each agent than had there been only one.

agents monitoring each other.”<sup>111</sup> Besides encouraging this form of “squealing,”<sup>112</sup> where one agent informs on another, the principal can also, to the extent that the agents fulfill similar functions, gain additional information about their efforts by comparing their performances.<sup>113</sup>

The primary theoretical consequence of multiple principals is the likelihood of competing demands on an agent and the subsequent increase in the agent’s discretion. Not seldom, multiple principals mean multiple wills. In some systems, e.g., those resting on a separation of powers, competitive multiple-principal arrangements are even built into the design.<sup>114</sup> The implication of competing preferences among the principals is potentially greater autonomy for the agent, as principals might disagree about the inappropriateness of the agent’s actions and about the need to impose sanctions. In more formal terms, the factors influencing the agent’s capacity to shirk and escape sanctioning in a setting of multiple principals may be summarized as (a) the principals’ preferences, and (b) the decision-rules governing the application of sanctions.<sup>115</sup>

Turning to how the original P-A model can be extended vertically, the most common addition is to acknowledge the frequent use of a supervisor in real-world delegation.<sup>116</sup> To enhance the control over and information about the agent’s actions, and thereby reduce shirking, the principal may engage a supervisor, whose role it is to gather more information about the agent’s activity than what would otherwise be available to the principal. While mitigating the original problem of shirking, the engagement of a supervisor also, however, creates a new one. As Douglass North points out, a third-party enforcer or supervisor constitutes a

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<sup>111</sup> Varian, 1990, p. 85. On how political principals can encourage agents to monitor other agents through a system of institutional checks and balances, see Kiewiet and McCubbins, 1991, pp. 31-32.

<sup>112</sup> I borrow the term from Sappington, 1991, p. 54.

<sup>113</sup> E.g., Sappington, 1991, p. 54.

<sup>114</sup> On the separation of powers in the US political system as an example of multiple-principal competition, see Moe, 1984, p. 768; McCubbins, Noll, and Weingast, 1989, p. 439.

<sup>115</sup> Pollack, 1997a, p. 112.

<sup>116</sup> On supervisors and the problem of who should monitor the supervisor, see, e.g., Alchian and Demsetz, 1972, pp. 781-782; Tirole, 1986; Holmström and Tirole, 1989, pp. 112-113.

kind of agent as well: "The enforcer is an agent and has his or her own utility function, which will dictate his or her perception about the issues and therefore will be affected by his or her own interests."<sup>117</sup> Since the supervisor, too, has been delegated authority by the principal, it is subject to agent-like problems as well. Just like the agent, the supervisor knows more about its own actions than the principal does; and just like the agent's interests, those of the supervisor are likely to diverge from the preferences of the principal. Consequently, the supervisor will have to be monitored as well and, if shirking is detected, sanctioned by the principal.

Finally, one single actor can at the same time be both a principal and an agent. In a vertical extension of the original principal-agent model, we may thus conceive of both business and politics as a chain of P-A relationships, where all but the ultimate principal and agent occupy dual roles: shareholders - executive managers, executive managers - middle managers, middle managers - employees; or, voters - politicians, politicians - senior bureaucrats, senior bureaucrats - junior bureaucrats. Few would dispute that such chains of principal-agent relationships are the best conceptualization of what delegation looks like in reality. Because of the difficulty involved in performing multiple-level P-A analysis in a systematic manner, however, it is still quite rare that studies engage in this form of analysis.

### **Principal-Agent Analysis and European Integration**

The study of European integration is the contractual paradigm's most recent frontier in Political Science. Building on the work of rational choice institutionalists on the US Congress and regulatory agencies, and on international institutions and regimes, students of European integration are increasingly turning to transaction-cost and principal-agent analysis in order to explain the form and importance of the EU's institutional features.

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<sup>117</sup> North, 1990, p. 58.

*The merits of principal-agent analysis for the study of the EU*

The growing interest in the theoretical tools of the contractual perspective in general, and P-A analysis in particular, can be explained by three factors. Firstly, institutions, whether broadly or narrowly defined, have gained a more prominent position on the research agenda of European studies.<sup>118</sup> To a greater extent than before, researchers study the individual institutions of the EU and the institutionalization of politics and policies in Europe. Somewhat paradoxically, institutions have not always been a subject of great interests to students of European integration. As James Caporaso and John Keeler point out: “Despite the seeming importance of the EC’s institutional components, with few exceptions institutions have played a scant role theoretically in accounts of European integration.”<sup>119</sup> The growing importance accorded to institutions does not simply reflect an academic fad, but is the product of a deep change in the structure of the EU and its mode of governance. As they have gained new competences in an increasing number of policy domains, the institutions of the EU have manifested their positions as important political actors and arenas. Concurrently, and as a consequence, European economic and political life has been subject to a deep and broad institutionalization, as EC rules replace national and the locus of interest mediation is shifted to the European level.

Secondly, rational choice theory has emerged as one of two main meta-theoretical directions in the study of the EU, the other being reflectivist.<sup>120</sup> Ranging from actor-centered theories, to theories of strategic interaction, game theory, and formal modeling, applications based on rational choice have become everyday commodities in EU studies. On the one hand, the growing use of rational choice methods reflects a demand for theories with firm microfoundations—one of the undeniable advantages of rational choice.<sup>121</sup> As opposed to the macrostructural basis of old-style in-

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<sup>118</sup> Caporaso and Keeler, 1995, pp. 48-51; Caporaso, 1998. Note that this is not only reflected in the growing use of rational choice institutionalism, but also historical institutionalism and sociological institutionalism. For interesting reflections on institutionalist approaches in EU studies, see *ECSA Review*, 1999.

<sup>119</sup> Caporaso and Keeler, 1995, p. 49.

<sup>120</sup> Hix, 1998, pp. 46-50.

<sup>121</sup> Caporaso and Keeler, 1995, p. 47.

tergovernmentalism and neofunctionalism, the methodological individualism of rational choice theory readily supplies microfoundations linking individual action with collective outcomes. On the other hand, rational choice applications in EU studies are a product of the conviction among many scholars that European integration, too, can be understood and explained using general Political Science tools of analysis.<sup>122</sup> The EU might be a *sui generis* phenomenon, but aspects of it are sufficiently general and comparable not to require *sui generis* theories and methods.

Thirdly, P-A analysis in itself, as one form of new institutional rational choice analysis, offers a number of advantages, making it a particularly powerful theoretical instrument for addressing questions of delegation and autonomy in the EU. To my mind, these strengths—which also are instrumental to my choice of P-A analysis in this study—are threefold.

First, P-A analysis provides a neutral theoretical language that does not *a priori* discriminate against the claims of either neofunctionalism or intergovernmentalism. Acknowledging the initial primacy of member states and investigating their degree of control over the supranational institutions they have created, this approach does not in theoretical terms preclude certain outcomes. This is confirmed by the fact that both intergovernmentalists and neofunctionalists have employed the principal-agent imagery to advance their claims.

Second, P-A theory permits open-ended empirical analysis, which might confirm the propositions of neofunctionalism or intergovernmentalism, but which also might result in conclusions about supranational influence that are less one-sided and more complex. The supranational institutions' degree of autonomy and influence is not necessarily either very limited or very extensive, but might in fact, in any given empirical case, be anywhere on the spectrum. Neofunctionalism and intergovernmentalism merely set the outer parameters.

Third, P-A analysis invites us to formulate conditional generalizations about supranational influence, as it allows for specification of the conditions under which the EU institutions do or do not enjoy autonomy from member state governments. Member states'

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<sup>122</sup> For forceful articulations of this position, see Moravcsik, 1993; Hix, 1998.

control and the supranational institutions' influence are not unconditional. Rather, the ability of national governments to keep their supranational agents in check is at any given moment dependent on a number of factors, for instance, means of monitoring and sanctions. The scope for independent action may consequently vary across the supranational institutions, across time, across issue-areas, and across the phases of the policy-making cycle.

*Principal-agent analysis of European integration*

Below, I introduce what I consider the most significant, published works on European integration employing P-A analysis.<sup>123</sup> Slightly simplified, these contributions can be grouped in three main camps: works using P-A analysis to forward intergovernmentalist claims, to boost the neofunctionalist image of the supranational institutions, and to perform open-ended analysis of variations in supranational autonomy and influence.

*Intergovernmentalist P-A analysis.* The tools of P-A analysis were first introduced by intergovernmentalists who employed the image of principals delegating certain limited functions to agents for the purpose of explaining why member governments have come to allow the supranational institutions some room for independent action in certain strictly defined areas. Somewhat ironically—given the centrality of the problem of shirking in the generic P-A model—intergovernmentalists took the agency relationship to mean that the institutions only performed functions desired by national governments.

Geoffrey Garrett and Barry Weingast use P-A theory and new institutional contractual theory more broadly in an account of the EC legal system.<sup>124</sup> In comparison with international law generally, the Community legal system is far more constraining on member governments and domestic actors, which raises the question of why member states have allowed this system to develop and persist. Addressing this puzzle, Garrett and Weingast con-

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<sup>123</sup> Note that this survey is restricted to the works that use P-A theory to conceptualize the relationship between the member states and the supranational institutions. For an article which employs P-A theory to examine the relationship between the EU and standardization bodies, see Egan, 1998.

<sup>124</sup> Garrett, 1992; Garrett and Weingast, 1993.

tend that the EC legal system in fact is consistent with the interests of the member states, as the ECJ actually helps solving monitoring and incomplete contracting problems. By fulfilling the enforcement functions it has been delegated and painting scarlet letters on transgressors of EC rules, the ECJ (and the national courts and individuals it has empowered) deters non-compliance among EU members. Similarly, the EC legal system helps mitigating incomplete contracting problems by allowing member governments to conclude broad and non-exhaustive agreements, which later are “filled out” and adapted to specific cases by the ECJ and national courts.

Andrew Moravcsik extends this functional and contractual logic to encompass all instances where national governments delegate sovereign powers to the supranational institutions.<sup>125</sup> Strong supranational institutions are not the antithesis of intergovernmentalism. On the contrary, “the unique institutional structure of the EC is acceptable to national governments only insofar as it strengthens, rather than weakens, their control over domestic affairs, permitting them to attain goals otherwise unachievable.”<sup>126</sup> Member states, Moravcsik argues, delegate functions to the supranational institutions based on a cost-benefit calculation, which takes into account the potential benefits of delegation (i.e., facilitates cooperation), the level of uncertainty (i.e., degree of incomplete contracting problems), and the political risk (i.e., risk of supranational shirking).

In a later article, Moravcsik develops his intergovernmentalist theory of supranational autonomy, this time grounding the argument more explicitly in the P-A vocabulary: “Delegating sovereignty establishes a principal-agent relationship between member governments (multiple principals) and supranational officials, judges, and representatives (multiple agents).”<sup>127</sup> Drawing on the central propositions of P-A theory, Moravcsik suggests that member states’ control over the supranational agents depends on the incentives of governments to limit supranational autonomy and on the ability of governments to monitor and sanction the institutions. From these general determinants, Moravcsik distills six fac-

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<sup>125</sup> Moravcsik, 1993.

<sup>126</sup> Moravcsik, 1993, p. 507. See also Moravcsik, 1994.

<sup>127</sup> Moravcsik, 1995, p. 622.

tors which he argues explain the level of discretion enjoyed by the institutions: substantive benefits of delegation, asymmetrical time horizons, stability of preferences, asymmetrical information and expertise, domestic informational manipulation, and institutional control. In Moravcsik's analysis, however, the notion of member states delegating functions to the supranational institutions remains, in itself, evidence of the power of intergovernmentalism.

*Neofunctionalist P-A analysis.* Theorists inspired by the neofunctionalist image of the supranational institutions, who contest intergovernmentalism's state-centric conception of what drives European integration, soon recognized that P-A theory in fact could be used to show why member states could *not* control the Commission and the Court. In view of information asymmetry and other barriers to proper control, it was quite understandable that the supranational institutions had succeeded in pushing European integration in other directions than desired by national governments.

In two articles directly challenging intergovernmentalism, first Paul Pierson and then Gary Marks, Liesbet Hooghe, and Kermit Blank, present historical accounts of European integration partly based on principal-agent theory.<sup>128</sup> While historical institutionalist in orientation, Pierson draws on P-A theory when explaining why the supranational institutions have created gaps in member states' control over the European integration process. Exploiting the short time horizons of member-state decision-makers, the prevalence of unintended consequences, and the shifting of member-state policy preferences, the supranational institutions have succeeded in pursuing autonomous actions, whose effects government principals have been unable to undo at later stages of the process. In a similar way, Marks, Hooghe, and Blank advance, as one of the components in their multi-level governance approach, the incapacity of state principals to effectively control their supranational agents: "In the EU, the ability of principals, i.e. member state executives, to control supranational agents is constrained by the multiplicity of principals, the mistrust that exists among them, impediments to coherent principal action, informational

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<sup>128</sup> Pierson, 1996; Marks, Hooghe, and Blank, 1996.

asymmetries between principals and agents and by the unintended consequences of institutional change.”<sup>129</sup>

In the only monograph that so far has relied on the principal-agent imagery, Laura Cram provides a detailed examination of how the Commission’s actions have shaped social policy and information and communication technology policy in the EU.<sup>130</sup> While framing her analysis in P-A terms, Cram is more eclectic in her explanation of why the Commission “consistently enjoyed some limited autonomy”<sup>131</sup> from member state governments. Acting as a purposeful opportunist, the Commission has learned to maximize its room for maneuver in the policy process, while avoiding direct conflict with member states. Focusing on the Commission’s means of influence, Cram suggests that these include a capacity to catalyze collective action on the EU level, package issue in the form likely to engender least opposition, prepare the ground for the Commission’s preferred course of action, and facilitate the emergence of policy windows.

In two recent articles, first Karen Alter and then Alec Stone Sweet and James Caporaso present neofunctionalist interpretations framed in principal-agent terms of the integrative role played by the ECJ.<sup>132</sup> Alter addresses the classic political question in relation to the EC legal system, namely, how the ECJ managed to transform it into something far more powerful and constraining than originally intended by the member states. Alter’s argument, vaguely based on the central premises of P-A theory, consists of two components. In a first step, the ECJ managed to escape member state control and be doctrinally activist owing to the different time horizons of judges and politicians, which led national politicians to be more concerned with the short-term material impact of ECJ decisions than their long-term doctrinal effect. And in a second step, member states were incapable of regaining control because of institutional impediments, preventing the reversal of decisions and the sanctioning of the Court.

Stone Sweet and Caporaso are more firmly grounded in P-A theory in their attempt to present a theory of legal integration and

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<sup>129</sup> Marks, Hooghe, and Blank, 1996, p. 19.

<sup>130</sup> Cram, 1997.

<sup>131</sup> Cram, 1997, pp. 173-174.

<sup>132</sup> Alter, 1998a; Stone Sweet and Caporaso, 1998.

to challenge intergovernmentalist conceptions of the ECJ. While employing the P-A model more as an effective instrument for proving the limits of intergovernmentalism than as a means of furthering their own theory, Stone Sweet and Caporaso also discuss in detail the mechanisms available to member states for controlling the Court and shaping its decisions. Stone Sweet and Caporaso come to the conclusion, however, that these mechanisms are largely ineffective and that the Court enjoys far more autonomy than assumed by intergovernmentalists.

*Open-ended P-A analysis.* Moving beyond the competing interpretations of intergovernmentalism and neofunctionalism, which in large part conform to the positions of the congressional-dominance school and the runaway-bureaucracy school in the study of US legislative relations, a third strand of theorists have employed P-A theory to explain variation in the scope for supranational influence. Appreciating the open-ended nature of the model, these works have attempted to isolate the factors determining variation in member state control and supranational autonomy across issue-areas and over time. The work of Mark Pollack stands out as truly pioneering.<sup>133</sup>

In what has already become a highly influential article, Pollack presents a unified rational-institutionalist P-A argument about supranational autonomy and influence in the EU.<sup>134</sup> In a first step, Pollack demonstrates that the functionalist theory of delegation does an excellent job at predicting the functions that member state principals have delegated to their supranational agents: monitoring state compliance, solving incomplete contracting problems, executing complex tasks based on expert skills, and initiating policy proposals. Then, in a second step, Pollack shows how the central propositions of P-A theory can be applied to the EU, and surveys the variety of monitoring and sanctioning mechanisms that governments may use to control the supranational institutions.

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<sup>133</sup> In addition to the articles mentioned below, see also Pollack, 1997b, 1999. For other examples of such open-ended theoretical and empirical analysis, see Schmidt, 1998a; Tallberg, forthcoming.

<sup>134</sup> Pollack, 1997a.

Pollack concludes that four factors emerge as the most important determinants of supranational influence, of which we recognize the first three from the P-A literature: the distribution of preferences among member state principals, the institutional rules governing the sanctioning of supranational agents, the distribution of information among institutions and member states, and the existence of transnational constituencies supporting the institutions' efforts to exert influence. In a follow-up article, Pollack tests these four hypotheses on the Commission's role in EU structural policy, competition policy, and external trade policy.<sup>135</sup> The empirical evidence from these sectors lends preliminary support to the notion that the Commission can serve, and has served, as an engine of integration within the limits set by these factors.

### **Summary**

Principal-agent analysis forms the theoretical foundation of this study, and in this chapter I have introduced this approach in three steps, thus preparing the ground for the principal-supervisor-agent model to which we now turn. First, I showed how P-A analysis first originated within the study of the firm in the new institutional economics, and how it was later used in the political study of legislative-bureaucratic relations in the US. Second, I gave an in-depth introduction to the logic and essential components of the principal-agent model. Finally, I argued that P-A analysis constitutes a particularly powerful tool for analyzing questions of control and autonomy in the EU, and I introduced the most significant works on European integration employing this approach.

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<sup>135</sup> Pollack, 1998.

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CHAPTER  
FOUR

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## **A PRINCIPAL-SUPERVISOR-AGENT MODEL OF EU ENFORCEMENT**

In this chapter, I present a principal-supervisor-agent model of EU enforcement. The model and the hypotheses it generates form the basis for the remainder of the study, where they are subjected to an empirical evaluation through the case of the supranational institutions' efforts to strengthen Internal Market enforcement. The model differs from existing research on supranational influence in its focus on the post-decisional phase of enforcement, and in its extension of the standard two-actor P-A model into a triangular P-S-A model.

The overarching argument of the chapter is that the strategic relationship in EU enforcement is best understood as one where the member governments of the EU (multiple principals) have assigned to the Commission and the Court (supervisors) the task of enforcing compliance with EC rules, as delegated to the individual member states (multiple agents). On the basis of this role configuration, the model generates three basic sets of hypotheses about the conditions inducing, the scope for, and the result of supranational influence in EU enforcement.

The chapter is divided into four sections. In the first section, I explain why the study of supranational influence in EU enforcement requires an extended and reconfigured P-S-A model, and I introduce the model in a stylized version. In the second and third sections, I elaborate on the form and nature of the central building blocks of the model in the EU context: interests, information, shirking, monitoring, and sanctions. In the final section, I distill general and specified hypotheses about EU enforcement generated

by the model, and I clarify the power of empirical evidence to confirm or disprove the model and its hypotheses.

### **Principals, Supervisors, and Agents in EU Enforcement**

In the study of the supranational institutions' role in European integration, the standard P-A model has been employed to account for the institutions' capacity to act autonomously and move European integration beyond member states' explicit desires. Below, I explain how the triangular P-S-A model I present differs from existing use of P-A analysis in the study of European integration, and I introduce the model in a stylized version.<sup>136</sup>

#### *Essential differences compared to existing P-A applications*

The P-S-A model presented here differs in two significant ways from existing research on supranational influence cast in principal-agent terms. First, this model theorizes supranational influence in the post-decisional phase of European integration. Like the general literature on supranational influence, existing works cast in P-A terms have been heavily focused on the pre-decisional agenda-setting functions of the Commission and the Court, and have largely neglected their enforcement functions.<sup>137</sup> The P-S-A model introduced here and the subsequent empirical analysis represent an attempt to remedy this weakness in the understanding of supranational influence. The model is explicitly designed to capture strategic interaction between the Commission, the Court, and member states in the post-decisional phase of rule enforcement, and to generate hypotheses about supranational enforcement influence.

The second way in which this model differs from existing P-A applications is the extended triangular configuration employed here. Rather than relying on the standard two-actor model, I expand the cast of actors to include also the category of supervisors. This is a direct theoretical consequence of the shift in empirical

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<sup>136</sup> For a more condensed formulation of the P-S-A model, see Tallberg, forthcoming.

<sup>137</sup> For a similar assessment of the existing literature, see Schmidt, 1998b.

focus. When turning from agenda-setting to the post-decisional phase and the enforcement of compliance, member states are best characterized as both principals and agents, while the Commission and the ECJ function as supervisors.<sup>138</sup> The roles that member states and supranational institutions play thus depend on what aspect of the EU policy process is under scrutiny.

The triangular P-S-A model is not merely of analytical value in that it better captures the roles that member states and supranational institutions play in EU enforcement, but also has clear substantive implications in terms of explanatory power. Where the two-actor P-A model would be incapable of explaining certain instances of actor behavior in the enforcement phase, the P-S-A model can provide an account of the same phenomenon.

*The principal-supervisor-agent model: Stylized version*

In the simple P-S-A model presented here, the member governments of the EU (multiple principals) assign to the Commission and the Court (supervisors) the task of enforcing the implementation of and compliance with EC law, as delegated to the individual member states (multiple agents). Member states are thus conceived of as both principals and agents, who at  $t_0$  collectively reach decisions in intergovernmental bodies, and at  $t_1$  are expected to individually carry out the adjustments necessary to realize these decisions.<sup>139</sup> The supranational institutions, for their part, function as supervisors engaged by national governments for the pur-

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<sup>138</sup> Also Peters recognizes that the role configuration in the P-A relation shifts when we move to the post-decisional phase of enforcement, but chooses to regard the Commission as principal and the member states as agents—a configuration that neither accords with the treaty nor actual practice. Peters, 1997.

<sup>139</sup> The P-S-A model, in line with P-A theory in general, employs a conception of the actors as unified entities with a given set of preferences. Obviously, this is a simplification, which does not recognize the degree of division inside the supranational institutions and the member states. However, as the purpose here is to model strategic interaction between these actors, rather than internal relations within, this assumption is quite helpful. Moreover, it should be noted that this conception accords with the legal status of these actors in the EU policy process; the *member states* agree to decisions in intergovernmental bodies, the *Commission* and the *Court* are delegated enforcement competences, and the *member states* are responsible for adequate implementation and compliance. For the sake of linguistic variation, however, I often use the terms “national governments,” “member governments,” and “EU governments” when I refer to member states as principals.

pose of monitoring actual member state behavior and enforcing compliance with Community rules.

The delegation of supervisory powers to the Commission and the Court constitutes an act of collective self-commitment. In rational choice terms, compliance with Community rules is a collective action dilemma, where each state at  $t_1$  has an incentive to free-ride what was agreed upon at  $t_0$ , but where such widespread non-compliance would undermine the purpose of cooperation.<sup>140</sup> Much like Ulysses tying himself to the mast for the purpose of resisting the Sirens' calls, EU governments attempt to escape this dilemma by setting up an institutional structure which renders non-compliance less attractive and which ameliorates the problem of free-riding. The anchor in this strategy are the supervisory powers delegated to the Commission and the Court.

The member states' act of collective self-commitment transforms the original principal-agent relation into a principal-supervisor-agent relationship. But, whereas the delegation of supervisory powers to the supranational institutions ameliorates the problem of member state non-compliance, it also creates a new dilemma. National governments engage the Commission and the Court to perform certain well-defined enforcement functions—no more, no less. The supranational institutions have interests as well, however, which may differ from those of national governments, and which consequently may lead the institutions to conduct their enforcement operations in other ways than member states desire.

Engaging the Commission and the Court as supervisors therefore does not solve the problem of shirking *per se*. Rather, it replaces governments' concern with one form of shirking—member state non-compliance—with another—supranational influence. Instead of one, we now have two principal-agent-like relationships subject to the problem of shirking, namely, that between supervisor and agent and that between principal and supervisor. On the one hand, the Commission and the Court have taken over the burden of enforcing compliance. And on the other, member states are anxious to ensure that the Commission's and the Court's actions do not deviate from the mandate given.

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<sup>140</sup> On collective action, the prisoners' dilemma, and the problem of free-riding, see Olson, 1965; Axelrod, 1984; Oye, 1986.

Whereas conflicting interests provide agents and supervisors with the motive to shirk, information asymmetry furnishes the opportunity. Member state principals do not know as much about the supranational supervisors' enforcement efforts as the Commission and the Court do. Likewise, the supranational supervisors do not know as well as the member state agents what measures have been taken to comply with EC rules.

Given conflicting interests and an asymmetric distribution of information, the scope for shirking in these two principal-agent-like relationships is determined by existing means of monitoring and sanctioning. The more extensive and credible member states' control mechanisms are, the less likely it is that the supranational institutions will attempt and manage to conduct enforcement in other ways than EU governments desire. Similarly, the more powerful the Commission's and the Court's means of monitoring state behavior and sanctioning non-compliance, the more limited is the scope for inadequate implementation and unsatisfactory compliance.

As these actors are involved in a dynamic and ongoing relationship, the member states and the supranational institutions may revise their means of supervision, and national governments renegotiate the delegation of powers to the supervisors, in light of past experience. Since monitoring and sanctions do not come for free, however, it is unlikely that state principals will invest in, and the supranational supervisors be delegated, enforcement powers sufficient to fully eliminate non-compliance. Both principals and supervisors will therefore search for the methods of supervision that enable the most extensive enforcement for a given set of resources.

This is the P-S-A model in its stylized form. The model is *stylized* because it expresses in a pure form what standard P-A theory would consider as the typical problems, key factors, and logical consequences of conceptualizing EU governments as principals, entrusting supranational supervisors with the task of enforcing member state agents' compliance with EC rules. The stylized character of the model is important for two reasons.

First, it means that the model in this version is not specific to EU enforcement *per se*, but would isolate the same problems, factors, and hypotheses in all instances where states, in an act of self-commitment, delegate enforcement functions to international

institutions. What makes the EU context unique in a comparative perspective is the range and nature of these powers, not the delegation in itself. We will return to the question of generalizability in the concluding chapter of this study.

Second, the stylized character means that the model must be specified further, if it is to generate meaningful and context-specific hypotheses about supranational influence in EU enforcement. In the remaining sections of this chapter, I take the model beyond its stylized version. In the next two sections, I elaborate on the nature of each of the fundamental building blocks in the EU context. First I identify interests, information asymmetries, and modes of shirking, and then I conduct an inventory of monitoring and sanctioning means at the disposal of member states and supranational institutions.

### **Interests, Information, and Shirking in EU Enforcement**

According to P-A theory, interests and information determine the extent to which shirking becomes a problem in relationships of delegation. If interests were identical in EU enforcement, and member states and supranational institutions had access to the same information, there would be no basis for shirking. Delegation in the post-decisional phase of EU enforcement does not differ from other instances of delegation, however, and conflicting interests and information asymmetry are defining features of the relationships between government principals and supranational supervisors, as well as between supranational supervisors and member state agents.

#### *Interests in EU enforcement*

The member states and the supranational institutions hold two distinct and partly conflicting sets of preferences with respect to compliance and enforcement.

*The preferences of the supranational institutions.* There is near consensus in the literature on European integration that the preferences of the Commission and the Court are best described as

highly pro-integrationist.<sup>141</sup> In a broad sense, the supranational institutions seek “more Europe.” In the policy-making field, more Europe is generally synonymous with broader and deeper decision-making competence for the supranational institutions themselves, and for the EU as a whole.

The Commission’s pro-integrationist preferences are intimately bound up with its role as prime mover of European integration. As “[i]ts destiny and prestige are connected to the promotion of advances in European integration,” the political agenda of the Commission “has been, and probably always will be, broadly federalist.”<sup>142</sup> In simple terms, when the Commission fulfills its three functions as policy initiator, policy executor, and policy enforcer, it does so with the furthering of European integration as its overriding objective. Like most organizations, the Commission considers a strengthening of its own position to be the best way of furthering its stated goals. But, as Giandomenico Majone notes, rather than attempting to maximize its budget, “what the European Commission attempts to maximize is its influence, as measured by the scope of its competences.”<sup>143</sup> The more extensive the scope of the Commission’s competences, the greater its influence in EU policy-making, and the better its chances of moving European integration forward.

As opposed to the Commission, the Court was not created as a political institution whose purpose it was to push European integration ahead. Nevertheless, few would disagree with the assertion that the Court has been of utmost importance in driving the integration process forward, and most would agree with Judge Pierre Pescatore’s famous statement that the Court has acted on

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<sup>141</sup> See, e.g., Pescatore, 1983; Peters, 1992; Grant, 1994; Hartley, 1994; Ross, 1995; Garrett and Tsebelis, 1996; Majone, 1996; Cram, 1997; Pollack, 1998. For a challenge to this position, see Hooghe, 1999. Note, however, that it is often acknowledged that the preferences of the supranational institutions, the Commission in particular, are less consistent and predictable on substantive issues, where internal political strife between the Commission’s directorates-general (DGs) can cause the external position to shift from issue to issue.

<sup>142</sup> First quote from Ross, 1995, p. 14; second quote from Grant, 1994, p. 65.

<sup>143</sup> Majone, 1996, p. 65. According to Majone, the reason is that still developing bureaucratic organizations, like the Commission, are more concerned with defining and expanding competences, than organizations for which administrative and regulatory tasks already have been assigned once and for all, in which case budget-maximization tends to be the dominating goal.

the basis of “une certaine idée de l’Europe.”<sup>144</sup> In an attempt to summarize the main elements of these pro-integrationist preferences, Trevor Hartley identifies as distinctive goals the strengthening of the Union and especially its federal elements, the increase in the scope and effectiveness of Community law, and the enlargement of the power of the supranational institutions.<sup>145</sup>

These pro-integrationist preferences of the Commission and the Court hold true also in the post-decisional phase of European policy-making, where they take the shape of adequate compliance. “More Europe” can only be achieved through a high level of member state compliance and through proper implementation of policy programs. As the Commission and the Court emphasize in basically all reports and judgments pertaining to the question of compliance, policy-making initiatives on the European level are of little value and the concept of a “Community based on the rule of law” amounts to little, if member states routinely flout legislation and fail to comply with Court judgments. Moreover, and in line with the competence-maximizing objectives of the supranational institutions, the Commission and the Court consider enhanced enforcement means to be a potent solution to compliance problems plaguing member states’ application of EC rules.

*The preferences of EU member states.* Member states’ preferences with respect to compliance and enforcement are more complex and cannot as easily be reduced to a single overarching objective such as “more Europe” through better compliance. Drawing on general theories in Political Science and confirmed empirical patterns, it must instead be acknowledged that member states hold three parallel and partly competing preferences.<sup>146</sup> These preferences reflect member states’ various roles in EU enforcement, as expressed in the principal-supervisor-agent role configuration.

First, as principals, governments want to see the policy proposals agreed on properly implemented and complied with. When

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<sup>144</sup> Pescatore, 1983, p. 157.

<sup>145</sup> Hartley, 1994, p. 86.

<sup>146</sup> The first and third preferences are firmly rooted in the literature on cooperation, e.g., collective action theory and game theory, and the third preference is also widely recognized in the public policy and implementation literature. The second preference is a cornerstone in all realist and statist theory.

EU governments agree on new rules in intergovernmental decision-making bodies, they do so with a purpose. Regardless of what policy domain the specific rules pertain to, they signify a desire among member governments to see the Union's undertakings develop in some specific way. And even if not all decisions have the support of all governments, intergovernmental decision-making rests on the expectation of member states' subsequent implementation and compliance. It is this preference for compliance over non-compliance that has led member governments to equip the Commission and the Court with enforcement powers.

Second, as principals, member governments are also anxious to protect state sovereignty. Like all governments, the European ones—despite far-reaching integration—see national sovereignty as a positive value which is intimately bound up with the unity, identity, and *raison d'être* of the state. In the tug-of-war over decision-making competence in the European Union, member governments carefully protect national prerogatives, and to the extent that governments pool or delegate decision-making authority, this is done reluctantly in the expectation of greater problem-solving efficiency. Recognizes Majone: “[M]ember states strive to preserve the greatest possible degree of sovereignty and policy-making autonomy.”<sup>147</sup> In the area of EU enforcement, this concern with state sovereignty is expressed in the desire to restrict the supranational institutions' enforcement weapons to the minimum necessary, and to ensure that the institutions do not exceed their competences.

Third, as agents, member states prefer to soften the adjustment demands of Community rules on national political, economic, and administrative structures. Adjusting national practices to Community rules is often anything but smooth, automatic, and costless; passing new legislation within the time limits set in the Council frequently puts strains on the legislative machinery, bureaucratic structures are often rigid and hard to change, and introducing new rules generally challenges those with vested interests in existing procedures. Proper implementation and subsequent compliance therefore tend to involve substantial economic,

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<sup>147</sup> Majone, 1996, p. 61.

political, and administrative costs and strains, making the leeway non-compliance has to offer a very attractive option.

All EU member states hold all three kinds of preferences, and in this sense, their preferences are fixed and stable. It is essential to note, however, that the relative intensity of the different preferences may vary across the member states and across time. While one member government, for example, may attach great value to national sovereignty and is reluctant to strengthen supranational enforcement means for the sake of reducing non-compliance, another government may consider improved implementation and compliance to be worth the loss in national sovereignty. The relative weight attached by a member state, or the collective of member states, to each preference at a given point in time remains an empirical question, which can only be determined through close observation. This variation in the intensity of preferences has important implications for the likelihood of further delegation of enforcement means to the Commission and the Court, as well as for government principals' ability to sanction the supranational supervisors.

#### *The distribution of information in EU enforcement*

In the absence of monitoring mechanisms, information asymmetry prevails on both the principal-supervisor and supervisor-agent sides of the equation. That information asymmetry is a real problem for both government principals and supranational supervisors, and not just a theoretical assumption, is evidenced not least by the setting up of various control mechanisms. Differently put, why would member governments establish forms for monitoring the Commission and the Court, and why would the supranational institutions set up mechanisms for overseeing implementation and compliance, if these relationships were not initially characterized by information asymmetry?

Both relationships are subject to both forms of information asymmetry, since the actions of the supranational supervisors and the member state agents are neither perfectly observable nor perfectly understandable. In the absence of control mechanisms, the full range of the Commission's enforcement actions is not readily observable to member states. Whereas its initiation of infringement proceedings against non-complying states is both highly

visible and comprehensible, informal enforcement means or enforcement actions dressed up as policy initiatives cannot as readily be observed and comprehended in terms of intentions and effects. In the case of the ECJ, the enforcement actions are highly transparent in the form of court judgments. The history of European legal integration shows, however, that member states have had certain difficulties decoding the Court's apolitical legalese and identifying the long-term implications for EU enforcement of the Court's judgments.

That the supranational institutions, without recourse to very extensive and intrusive monitoring means, cannot fully observe how member states apply Community rules on the ground is beyond question. Whether those state administrators, who are in direct contact with individuals and companies, correctly apply EC law is, for instance, far from immediately observable to the supranational supervisors and can at best be determined based on an extensive array of monitoring instruments. In addition, the supranational institutions do not always possess the information and knowledge to determine whether observed and supposedly compliant behavior indeed has the desired effects. For instance, the incorporation of EC legislation into national law may be fully observable, but the Commission may nevertheless be unable to determine whether it constitutes compliance or not, for lack of knowledge of the national legal context.

#### *Shirking in EU enforcement*

Diverging preferences give supranational supervisors and member state agents the motive to shirk, and information asymmetry provides the opportunity. In the standard P-A model of delegation, shirking takes place whenever an agent pursues its own interests at the expense of the principal's, and thus acts in ways that conflict with the attainment of the principal's preferences.

For the Commission and the Court, this is synonymous with enforcing member state compliance in other ways and by other means than those favored and originally intended by governments when delegating enforcement powers to the institutions.<sup>148</sup> Given

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<sup>148</sup> Note that shirking only can be confirmed if the behavior diverges both from the intentions of governments when delegating powers to the institutions and from governments' preferences at the time of the supranational action. An assessment

the preferences of the Commission and the Court, what member state principals worry about is for enforcement to be over-provided rather than under-provided, overzealous rather than sluggish.

Analytically, we can distinguish between three different forms of supranational shirking in EU enforcement. First, and most straightforward, the Commission and the Court may shirk by *exercising their delegated enforcement powers* in ways that neither conform to member governments' original intentions nor their current preferences. Second, the Commission and the Court may shirk by independently *creating new means of enforcement* in the process of exercising their non-enforcement powers. Third, at moments when the delegation of supervisory powers may be up for renegotiation among EU governments, i.e. IGCs, the Commission and the Court may shirk by *planting and engineering consensus around enforcement-enhancing proposals* that member governments would not have devised in the absence of supranational maneuvering.

The identification of different forms of supranational shirking in EU enforcement highlights the need to distinguish between supranational shirking, autonomy, and influence. Whereas these concepts, somewhat carelessly, often are taken to mean the same thing, a proper understanding of the scope for supranational influence in EU enforcement and European integration generally, requires an acknowledgement of their separate properties. Supranational shirking and autonomy are necessary but not sufficient conditions for supranational influence. Shirking, as noted above, refers to supranational actions signifying pursuit of the institutions' own interests rather than those of government principals. But only to the extent that the results of these actions survive member state sanctions, does this shirking actually translate into independent causal influence. Autonomy refers to the supranational institutions' capacity to act independently, without absolute government control. Such autonomy, however, forms an inherent part of Court's position of judicial independence, as well as some of the Commission's functions, not least its role as guardian of the trea-

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based only on the original delegated mandate would fail to recognize that governments might support the creative evolution of supranational practices within or beyond the treaty. Likewise, an evaluation based only on governments' reactions to the particular supranational action, would fail to recognize that the institutions have been delegated certain powers on the basis of self-commitment and the expectation of myopic member state behavior.

ties. Autonomy, therefore, does not correspond to supranational influence, but may result in influence if the institutions successfully use this autonomy to further their own rather than governments' interests.

To facilitate the identification of supranational shirking, I have devised a three-stage "test of supranational shirking," which will be applied in the empirical chapters to determine whether the Commission's and the Court's enforcement-enhancing efforts qualify. If they do, then we must explore the impact of possible government sanctions, and on that basis determine the degree of supranational influence. At each stage of the test, one simple question is asked. The first stage consists of an inquiry into member governments' perception of, and reactions to, the supranational actions. Did the supranational behavior provoke an open conflict with national governments, involving allegations of competence transgression that cannot be reduced to myopic protests against powers they themselves have delegated in the name of self-commitment? If yes, we can conclude that the institutions have not been sensitive to governments' interests and intentions, and that supranational shirking indeed took place. If not, this is insufficient to conclude that the Commission and the Court did not shirk, since information asymmetry may have prevented member states from reacting. To control for this possibility, the test must be taken two steps further. First, it must be determined whether the supranational measure could possibly qualify as shirking. Does it depart from the powers laid down in the treaty and from known positions of national governments, and is it unlikely that the member states would have taken actions to the same effect in the absence of the supranational initiative? Second, it must be ascertained whether information asymmetry actually prevailed, and what it would have consisted of. Does the empirical material provide any indications of governments failing to recognize or grasp the consequences of the supranational institutions' actions? Only if the answer to both questions is yes, can we conclude that the supranational institutions have shirked, and that the absence of open conflict can be explained by an asymmetric distribution of information.

For member state agents, shirking means non-compliance with Community rules. In general terms, a state fails to comply when-

ever its behavior diverges from what is explicitly specified in EC law. Slightly simplified, member state shirking can also be of three different kinds. First, states shirk their obligations to the extent that they do not correctly transpose EC legislation into national law—that is, legally implement EC rules—in a timely manner. Non-compliance can in that case consist of faulty, partial, late, or no transposition of EU directives. Second, member states fail to comply when they do not properly apply the existing body of Community rules. In this case, non-compliance may involve violations of Community directives, regulations, treaty articles, and decisions, as well as principles derived from the Court’s case law. Third, states shirk their obligations as members of the Union when they choose to disregard Court judgments proving their actions to be in violation of Community rules.

In conceptual terms, supranational and member state shirking may be of both the hidden action and the hidden information kind. Recall that shirking in the form of hidden action is made possible by the unobservability of the agent’s actions, whereas shirking of the hidden-information kind is a product of the unobservability of the agent’s information. Supranational influence may thus result, either because government principals cannot observe the Commission’s and the Court’s enforcement-enhancing actions, or because they do not possess the information and knowledge to determine whether the supranational behavior they indeed witness constitutes shirking or not. Similarly, member state non-compliance may be possible, either because the supranational supervisors do not have the full capacity to oversee how EC rules are implemented and applied nationally, or because they do not have the knowledge and information to tell whether, for instance, the notified transposition of EC legislation into national law is the most optimal and has the intended effects.

### **Monitoring and Sanctions in EU Enforcement**

What conflicting interests and information asymmetry make possible, monitoring and sanctions can prevent. The general conclusion derived from the generic P-A model is that the agent will shirk to the extent that monitoring and sanctions do not render such

behavior disadvantageous. This applies to both sides of the principal-supervisor-agent relationship in EU enforcement. If we want to understand the possibility for member state agents to cut loose from the supranational supervisors, and for the institutions to escape the control of government principals, we must isolate the instruments of control. This section constitutes an inventory of these instruments, and I begin by identifying the primary means at the disposal of the Commission and the Court for making states comply, before I turn to member states' instruments for controlling the supranational institutions.

*The supranational supervisors' control of member state agents*

In the EC Treaty, the High Contracting Parties delegate to the Commission, as one of its roles, to “[e]nsure that the provisions of this Treaty and the measures taken by the institutions pursuant thereto are applied” (Article 155), and to the Court of Justice to “ensure that in the interpretation and application of this Treaty the law is observed” (Article 164).<sup>149</sup>

To provide the Commission and the Court with the means to fulfill these supervisory responsibilities, government principals have also equipped the institutions with certain concrete enforcement powers. Primary among these powers is the Commission's right to initiate infringement proceedings against non-complying states under Article 169, and the Court's right in such cases to determine whether member states are in compliance or not.<sup>150</sup> Besides this delegated enforcement power at the centralized EU level, an additional instrument has been created at the national level through the ECJ's transformation of the preliminary ruling procedure under Article 177 into a means of enforcement.<sup>151</sup>

These two forms of supranational enforcement constitute the Commission's and the Court's primary tools for making states comply, and in the empirical analysis of supranational enforcement influence in chapters six to eight, I examine in depth how they have been used and developed since 1985. Here, I confine myself to a brief introduction of the main features of these two en-

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<sup>149</sup> For the full text of Articles 155 and 164 EC, see appendix 1.

<sup>150</sup> For the full text of Article 169, see appendix 1.

<sup>151</sup> For the full text of Article 177, see appendix 1.

forcement structures. Both contain elements of monitoring as well as sanctions, but differ as to the particular means employed. In their respective profiles, these forms of centralized and decentralized enforcement conform to what Mathew McCubbins and Thomas Schwartz denote “police-patrol” and “fire-alarm” oversight.<sup>152</sup>

*Centralized enforcement through Article 169 proceedings.* When the Commission and the Court enforce member state compliance through the infringement procedure under Article 169, they exercise what McCubbins and Schwartz would call “police-patrol” oversight: “Analogous to the use of real police patrols, police-patrol oversight is comparatively centralized, active, and direct: at its own initiative, Congress examines a sample of executive-agency activities, with the aim of detecting and remedying any violations of legislative goals and, by its surveillance, discourage such violations.”<sup>153</sup> In the EU, the Article 169 infringement procedure constitutes the means for such centralized, active, direct, and comparatively resource demanding monitoring and sanctioning.

In terms of monitoring, the Commission actively and systematically collects and assesses information on member states’ compliance with Community rules. On the one hand, this involves controlling that EC legislation has in fact been incorporated into national law, and that these national legal measures reflect the intentions of the original directives. On the other hand, in-house monitoring performed by the Commission entails collecting information on possible infringements from sources, such as member states’ official journals, national or specialized press, and contacts with national experts. In addition to cases detected by the Commission itself, many infringement proceedings are initiated by the Commission on the basis of complaints lodged by private individuals and companies, either directly with the Commission or with a member of the European Parliament (MEP).

If the Commission detects a suspected infringement, it may initiate an infringement proceeding against the member state in question under Article 169. As a rule, the formal opening of an

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<sup>152</sup> McCubbins and Schwartz, 1984.

<sup>153</sup> McCubbins and Schwartz, 1984, p. 166.

infringement proceeding is preceded as well as followed by informal consultation and bargaining between the Commission and the member state for the purpose of finding mutually acceptable solutions in line with Community law. If member states do not adjust their non-compliant behavior during the course of the proceedings, the cases are finally referred to the ECJ for a decision. To the extent that the ECJ rules against member states, and these choose not to adjust in accordance with the judgment, a renewed Article 169 proceeding can be initiated under Article 171. As I will describe in chapter seven, Article 171 was equipped with the threat of financial sanctions, when the Treaty on European Union (TEU) entered into force in November 1993.<sup>154</sup>

*Decentralized enforcement through national courts.* Besides this strategy of active “police-patrol” enforcement, the supranational institutions have created and manage a decentralized enforcement structure with clear parallels to the kind of “fire-alarm” oversight performed by the US Congress:

Congress establishes a system of rules, procedures, and informal practices that enable individual citizens and organized interest groups to examine administrative decisions..., to charge executive agencies with violating congressional goals, and to seek remedies from agencies, courts, and Congress itself...Congress's role consists in creating and perfecting this decentralized system and, occasionally, intervening in response to complaints.<sup>155</sup>

In the EU, the Commission and the Court conduct “fire-alarm” oversight through the decentralized enforcement structure initially established in the 1960s, when the Court, through the principles of direct effect and EC law supremacy, transformed the preliminary ruling procedure, and thereby individuals and national courts, into instruments of enforcement. Whereas this transformation in itself generally is considered an instance of ECJ activism and supranational influence, that is history today, and for the last

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<sup>154</sup> For the full text of Article 171 as revised by through the TEU, see appendix 1.

<sup>155</sup> McCubbins and Schwartz, 1984, p. 166.

three decades decentralized action in national courts has been an established part of EU enforcement.

The basis of decentralized enforcement is the possibility for private individuals, companies, and organizations to sue national governments in national courts for failure to comply with Community rules. If a national judge finds that the legal situation of the matter is sufficiently clear, he or she decides the question of compliance on the basis of EC law. To the extent that a national judge finds it difficult to determine whether a member state is in compliance or not, he or she can refer the matter to the ECJ for a preliminary ruling.<sup>156</sup> Whereas the ECJ's ruling does not formally decide the issue before the national court, its interpretation is generally sufficient to establish whether or not an infringement of Community rules has occurred. As I will show in chapter eight, individuals may not only defend their EC rights in national courts, but as of 1991 can also more readily obtain financial compensation, if it is found that these rights are violated through member state non-compliance.

Through this decentralized enforcement structure, the supranational institutions engage individuals and companies as enforcement tools, which monitor member state behavior and sanction non-compliance. The role of the Court and the Commission in this form of "fire-alarm" oversight consists in providing the framework conditions necessary for this decentralized structure to function properly. This is done, among other things, by delivering preliminary rulings on potential cases of infringement, laying down principles and conditions for actions in national courts, and informing citizens of the possibility to turn to national courts when they see their rights infringed upon.

#### *Member state principals' control of the supranational supervisors*

Like any principal, national governments are not inclined to let the supervisors freely exploit the room for shirking, created by the simultaneous presence of conflicting interests and information asymmetry. Quite to the contrary, member states possess a range of mechanisms for controlling the supranational institutions and

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<sup>156</sup> Note, however, that the highest courts of the national legal systems are obligated to refer all cases pertaining to EC law.

their enforcement actions. For obvious reasons, the particular instruments of control differ substantially between the Commission and the Court, as an independent court cannot be monitored and sanctioned in the same way as a political bureaucracy. Grouping existing control mechanisms in a number of general categories of means allows us to distill what these differences consist of.

*Participation- and observation-based monitoring.* To actively monitor the Commission and the Court is one of two primary ways in which member governments oversee the supranational institutions. The terms *participation-* and *observation-*based monitoring are used here to differentiate between two distinct forms of monitoring with differing conceptual and empirical properties. While participation-based monitoring refers to the ability to observe and actively intervene in the making of a decision or the execution of an action, observation-based monitoring refers to the ability to observe a decision or an action without the possibility to intervene in, and force a change of outcomes in, this process.

The distinction captures one of the main differences in the means available to member governments for monitoring the Commission and the Court, respectively. Active interference in the Court's work would conflict with its purpose as an independent arbiter; consequently, no means exist for participation-based involvement in the Court's decision-making process. Even if member governments may submit observations and argue their cases before the Court, they are not involved in the actual decision-making of the Court and cannot prevent it from handing down a particular judgment.

Also the Commission's initiation of infringement proceedings against non-complying states is relieved of participation-based monitoring, since this power would be of little value if those supervised controlled the supervisor. To the extent that the Commission attempts to enhance enforcement by other means than the specific enforcement powers delegated by EU governments, this occurs within the ambit of the Commission's functions as policy initiator and policy executor. The Commission's actions in both these functions are, however, generally subject to participation-based monitoring. Policy proposals require the consent of national governments in the Council, and the Commission cannot perform

its executive tasks, unless governments grant their approval in the advisory, management, and regulatory committees of the comitology system.<sup>157</sup>

The monitoring of supranational actions at IGCs is a special case, as both the Commission and the Court are subject to an extreme form of participation-based oversight. Member states hold the exclusive control of the agenda at these conferences, and each state enjoys the capacity to prevent supranational shirking by exercising its veto.

*Monitoring through institutional checks and judicial review.* The second way in which national governments can monitor the supranational institutions is through *ex post* institutional checks and judicial review. In the terminology of P-A theory, monitoring through institutional checks is an example of the strategy to let agents (or in this case supervisors) monitor each other, whereas judicial review constitutes a form of “fire-alarm” oversight.

Also in the case of institutional checks and judicial review the Commission is more intensely monitored, since no means whatsoever exist for reviewing the Court’s actions. As Mark Pollack puts it: “[A]lmost every EC institution besides the Commission plays a role in monitoring and checking the Commission’s behavior.”<sup>158</sup> Institutions which provide checks on the Commission’s actions include the EP, the ECJ, the Court of First Instance, the Court of Auditors, and the European Ombudsman. A special form of institutional check is the ECJ’s power to review the legality of the Commission’s actions under Articles 173-175 EC, which allow member governments, the Council, and citizens and companies to bring actions against the Commission “on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers” (Article 173). The Court, on the other hand, is relieved from institutional checks, and conducts, rather than being the object of, judicial review.

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<sup>157</sup> For a good discussion on comitology as a means of member state control, see Pollack, 1997a, pp. 114-116. On comitology, see also Wessels, 1998.

<sup>158</sup> Pollack, 1997a, p. 116.

*Cutting the budget and refusing to appoint personnel.* The first of four possible ways of sanctioning the supranational institutions is the rather blunt instruments of cutting their budget and dismissing or refusing to appoint their personnel. In the P-A literature, these two means are often pointed to as a possible way of forcefully sanctioning shirking agents.<sup>159</sup> Member governments can exercise this form of resource control, for example, by cutting the budget of enforcement-enhancing programs, which under the Commission's guidance have developed in ways not originally intended, or by refusing to provide the financial, manpower, and organizational resources necessary for the institutions to adequately perform their enforcement functions.

*Overruling a supranational decision with new legislation.* A second form of sanction is the possibility to overrule a Commission or Court decision through new legislation.<sup>160</sup> If member states find that executive decisions taken by the Commission and judgments handed down by the Court have adverse consequences from their point of view, they can in a limited set of cases restore the situation through new legislation. In theoretical terms, the Commission's actions are most susceptible to this form of *ex post* correction, as member governments can always relegislate. In practical terms, this is made more difficult, however, by the Commission's exclusive right of initiative, and the requirement that governments must reach a sufficient level of agreement, be it qualified majority or unanimity. In the case of the Court, only decisions based on secondary legislation, such as a directive or a regulation, can be reversed by enacting new legislation. But even when rewriting Court decisions based on secondary legislation, the normal legislative procedures and decision-making principles apply. To the extent that member states want to reverse an ECJ ruling based on primary law in the form of treaty articles, the only option open is a revision of the treaties.

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<sup>159</sup> See, e.g., Weingast, 1984, pp. 155-156; McCubbins, Noll, and Weingast, 1987, pp. 248-249.

<sup>160</sup> For good discussions of this form of sanction, see Alter, 1998a, pp. 136-139; Stone Sweet and Caporaso, 1998, pp. 96-97.

*Revising the treaties.* The third and most drastic form of sanction against the supranational institutions is to revise their mandates through treaty revision.<sup>161</sup> As principals, which have delegated certain limited decision-making powers to the supranational supervisors, member governments obviously always have the option of altering the scope and conditions of these powers. By renegotiating the treaties, member states can reduce the competences of an institution, whose actions stray too far from government preferences, or counteract unwanted legal development. Revising the treaties requires, however, that national governments first agree unanimously at an IGC, and that this revision is later ratified in all member states.

*Unilateral non-compliance.* A fourth and final form of sanction against the supranational institutions is to unilaterally decide not to comply with Commission decisions or Court judgments. National governments and courts may, for example, refuse to acknowledge the implications of judgments introducing enforcement-enhancing principles, or refrain from cooperating with the Commission in the execution of its enforcement functions. Unilateral non-compliance allows member states to avoid adjustments stipulated by unwanted Court or Commission decisions. But, as opposed to other forms of sanctions, non-compliance does not remove the source of discontent and may become the object of infringement proceedings and court action at both national and EU levels.

### **Hypotheses Generated by the P-S-A Model**

Drawing on previous sections, I close the chapter by specifying the hypotheses generated by the principal-supervisor-agent model. General hypotheses about supranational influence in EU enforcement are derived from the stylized P-S-A model, and specified hypotheses are deduced from the confrontation of the stylized model with the inventory of interests, information, shirking, monitoring, and sanctions, conducted in the preceding sections. For the purpose of clarifying the theoretical status of these hypotheses and

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<sup>161</sup> For insightful discussions of treaty revision as a sanction, see Pollack, 1997a, pp. 118-119; Alter, 1998a, pp. 136-140.

the power of empirical evidence to confirm or disprove them and the model, I begin with a brief discussion of models, hypotheses, and empirical evidence.

*Models, hypotheses, and empirical evidence*

The analytical purpose of the P-S-A model is to generate hypotheses, which can explain and predict supranational influence in EU enforcement better than alternative theoretical formulations. In a deductive model, such as this one, abstraction and simplification are the primary means for reaching this objective. As Gary King, Robert Keohane, and Sidney Verba put it: “A *model* is a simplification of, and approximation to, some aspect of the world.”<sup>162</sup> When constructing the model, the theorist attempts to reduce the massive complexity of “the world out there” by only abstracting those features with most bearing on the problem at hand. In the case of principal-agent applications, such features include the basic role configuration of the actors, their interests, the distribution of information, as well as means of monitoring and sanctioning.

What a model does is to specify how these distinguishing features relate to each other analytically, that is, how a given set of values on these variables by necessity, and through a logic that is both internal and deductive, translates into a specific outcome.<sup>163</sup> Standard P-A models posit, for example, that diverging preferences and information asymmetry are positively related to shirking, whereas monitoring and sanctions are negatively related. Therefore, to follow the logic, given conflicting interests and information asymmetry, the less extensive the monitoring and sanctioning mechanisms, the greater the problem of shirking. The correspondences specified by the model thus permit the theorist to derive certain hypotheses about the problem under investigation.

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<sup>162</sup> King, Keohane, and Verba, 1994, p. 49. Emphasis in original. For a classic discussion of models as ideal types not intended to be descriptive but designed to isolate the features that are crucial for a particular problem, see Friedman, 1953.

<sup>163</sup> For a good discussion of the distinguishing characteristics of a model as opposed to other theoretical and analytical constructs, see Snidal, 1986. Note, in particular, that a model such as the P-S-A model differs from the analytical construct of a framework by containing specified causal hypotheses, whereas a framework generally is taken to be more or less causally empty, though it often identifies a number of potentially important explanatory factors.

Two forms of hypotheses can be derived from a deductive model. First, in its stylized version, the deductive model produces a set of “general” hypotheses, such as the one above that limited means of monitoring and sanctioning enlarge the scope for shirking. General hypotheses are always “true” in a theoretical sense, that is, they follow logically, given the assumptions and the specified relationships of the model. Whether these hypotheses also hold true empirically depends on whether the model isolates the right features and interrelationships of the particular problem. Consequently, as Elinor Ostrom puts it: “When conditions in the world approximate the conditions assumed in the models, observed behaviors and outcomes can be expected to approximate predicted behaviors and outcomes.”<sup>164</sup> Another way of saying this is to state that “[m]odels are never literally ‘true’ or ‘false,’ although good models abstract only the ‘right’ features of the reality they represent.”<sup>165</sup> To the extent that empirical evaluation does not confirm the general hypotheses, the model has not succeeded in correctly isolating the most essential features of a problem. While “true” in a conceptual sense, the model is flawed as an approximation of reality and must be revised, if it is to have any explanatory value.

Besides general hypotheses, a deductive model can also generate “specified” hypotheses. Specified hypotheses build on the general ones, but result from an assessment of the values on the key variables in a particular empirical context. As opposed to the general hypotheses, the specified ones are thus context-dependent, expressing what the deductive model would predict, given a particular configuration of known values. For instance, an application of the generic P-A model to legislative-bureaucratic relations could generate the specified hypothesis that a particular agency is likely to enjoy extensive slack, as the control mechanisms of the legislature scored low on both monitoring and sanctions. Unlike general ones, specified hypotheses can be literally false if the assessment failed to identify the correct empirical value on a key factor in the model. If it is found that outcomes do not conform to what a specified hypothesis would predict, it is essential to establish whether

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<sup>164</sup> Ostrom, 1990, p. 183.

<sup>165</sup> King, Keohane, and Verba, 1994, p. 49.

the misfit resulted from flaws in the general logic of the model or from an inadequate identification of existing means of monitoring and sanctioning, for instance. In the first case, the model would have to be revised or surrendered, while in the second, it would have to be assessed whether the model can account for the outcome, once the new information has been integrated.

The standard way of evaluating a deductive model, such as the P-S-A model, is to examine whether real-world outcomes conform to those predicted by the model. To provide a more complete assessment of the P-S-A model, I examine not only the final outcome, but also the process through which this outcome is generated. As advocates of process-tracing often note, a hypothesis explaining a particular outcome should also be capable of accounting for the process through which the outcome occurs.<sup>166</sup>

*Three sets of hypotheses on supranational influence in enforcement*

The P-S-A model generates three primary sets of hypotheses about supranational influence in EU enforcement. The first set pertains to the conditions that induce the Commission and the Court to exert independent supranational influence in EU enforcement, the second to the scope for supranational influence, and the third to the forms of supervision that the Commission and the Court are likely to promote in the process of strengthening EU enforcement. Each set contains general as well as specified hypotheses.

*The conditions inducing supranational influence.* In keeping with P-A theory generally, the P-S-A model stipulates that the supervisors' original incentive to shirk is the product of the simultaneous presence of interests which conflict with those of the principals, and a privileged distribution of information offering an opportunity to act on these interests. The general hypothesis thus reads:

GH 1 When conflicting interests and information asymmetry in their favor coincide, the supranational supervisors are induced to shirk by enforcing compliance in other ways or by other means than government principals desire.

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<sup>166</sup> George and McKeown, 1985; King, Keohane, and Verba, 1994, p. 228.

Whereas the context of EU enforcement offers both competing preferences and a skewed distribution of information, the specific contents of these preferences have implications for the relationship expressed in this hypothesis. The supranational institutions' overarching interest in the post-decisional phase is to ensure adequate compliance with EC rules. However, as opposed to other forms of actor incentives, such as private gain and political influence, which can be maximized indefinitely, compliance is a goal with a finite value. If existing enforcement means are sufficient to secure good compliance, the Commission and the Court have little reason to shirk for the purpose of strengthening enforcement. If, on the other hand, existing means prove wanting and compliance problems are pervasive, the supranational institutions face strong incentives to independently strengthen enforcement. The specified hypothesis incorporates this qualification:

SH 1 Given conflicting interests and information asymmetry in their favor, the supranational supervisors are induced to independently strengthen EU enforcement when, and only when, delegated supervisory powers prove insufficient to ensure compliance in a satisfactory fashion.

*The scope for supranational influence.* The core question addressed by the P-S-A model and P-A analysis in general, is the scope for shirking and supranational influence, once the institutions have been induced to move enforcement beyond government preferences. Whether the Commission and the Court actually attempt to shirk, and whether they succeed in exerting independent influence, are posited to be dependent on the availability and credibility of member states' control mechanisms:

GH 2 The Commission's and the Court's capacity to exert independent causal influence in EU enforcement is determined by member states' means for monitoring and sanctioning the actions of the supranational institutions. The more extensive these control mechanisms are, the more reduced the scope for supranational influence.

The inventory of member states' means of monitoring and sanctioning provides certain indications as to where the control

apparatus may be particularly weak, and thus where the scope for supranational influence is likely to be the greatest. Control mechanisms vary across the three different forms of possible supranational influence, as well as between the two supervisors. First, in the exercise of delegated enforcement means, the Commission is comparatively relieved from direct monitoring, owing to the autonomy inherent in the supervisory role, but could, of course, be subject to both *ex post* review and sanctions. The ECJ is free from all forms of control short of sanctions against itself and its enforcement decisions. Second, if attempting to boost enforcement through existing non-enforcement competences, the Commission would most likely find itself subject to participation-based monitoring, while the Court would enjoy greater scope for autonomous action, as its judicial independence only permits observation-based monitoring. Both institutions could be subject to sanctions. Third, at IGCs, EU governments' control over the agenda makes them particularly well placed to observe the input of the supranational institutions and to prevent supranational maneuvering from resulting in unwelcome surprises. Sanctions are difficult to imagine. This slightly simplified overview, isolating key patterns in member states' control mechanisms, motivates two specified hypotheses:

SH 2.1 The Court is comparatively more free from member state control, and is therefore more likely than the Commission to succeed in exercising supranational influence in EU enforcement.

SH 2.2 The Commission and the Court are comparatively less controlled in the exercise of existing competences, than at moments of treaty revision, and are therefore more likely to exert supranational influence either by employing delegated enforcement means in ways not intended, or by boosting enforcement through their non-enforcement competences.

The general hypothesis that monitoring and sanctions determine the scope for supranational influence rests on an understanding that principals, if they so desire, have the capacity to impose available sanctions. This assumption must be qualified, however, when we take into account the existence of multiple prin-

cipals in the EU context. In a political setting of multiple principals, the distribution of preferences and the institutional decision-rules become central to the imposition of sanctions. The decision-rules governing the use of sanctions determine the necessary degree of accord among principals, and the particular distribution of preferences among the principals may or may not reach this level, thus blocking or paving the way for sanctions to be applied. In the EU, the collective sanctions available to national governments generally require the consent of either all or a qualified majority. This renders collective sanctions a fairly difficult instrument to use, given variations between governments in the relative importance attached to national sovereignty and proper compliance. By contrast, sanctions that can be executed unilaterally, such as non-compliance with supranational decisions, are not conditioned by institutional decision-rules and the distribution of preferences. These implications of the existence of multiple principals suggest a specified hypothesis:

SH 2.3 The requirement of (qualified or unanimous) consent among multiple government principals renders collective sanctions comparatively more difficult to impose than unilateral ones, and restricts the capacity of sanctions generally to function as effective control mechanisms.

*The results of supranational influence.* Just like member state principals can limit the scope for supranational influence in EU enforcement by operating control mechanisms, the supranational supervisors can reduce the scope for non-compliance with EC rules by monitoring and possibly sanctioning state behavior. Whereas the costs of supervision are likely to prohibit the complete eradication of state non-compliance, the supranational institutions may gain more enforcement for the same cost by shifting from more to less resource intensive means of enforcement. The general hypothesis reads:

GH 3 The supranational supervisors are sensitive to the relative resource efficiency of alternative forms of supervision, and are likely to favor less over more resource demanding forms of enforcement.

In the EU, resource intensive “police-patrol” enforcement coexists with forms of “fire-alarm” supervision, where the costs are borne primarily by individuals and national courts. The preference for relatively more resource efficient forms of supervision is likely to be disclosed when the institutions, from any given point in time, seek to strengthen EU enforcement. Expressed in economic terms, each new unit of enforcement is likely to contain more of the resource efficient form of supervision. Finally, it should be noted that the level of the supranational institutions’ enforcement efforts is limited not only by the economic irrationality of investing in enforcement until all non-compliance has been eliminated, but also by the economic reality of budgetary resource constraints. These qualifications translate into a specified hypothesis:

SH 3 The supranational supervisors are sensitive to the relative resource efficiency of alternative forms of supervision, and are likely to favor decentralized “fire-alarm” enforcement through national courts, over centralized “police-patrol” enforcement through Commission oversight, when moving to reinforce supervision in the EU.

## **Summary**

In this chapter, I have suggested that the strategic relationship between the member states and the supranational institutions in the phase of EU enforcement is best understood as one between principals, supervisors, and agents. To picture the Commission and the Court as supervisors in a P-S-A relationship yields a number of important implications. It suggests that the Commission and the ECJ will perform their enforcement functions with an eye to their own interests, that is, promoting “more Europe.” To the extent that existing enforcement means are insufficient to secure satisfactory compliance with EC rules, the supranational institutions will work to reinforce these instruments, if necessary by independent action in conflict with government preferences. The mechanisms, by which the institutions can induce higher compliance, and the means they must enhance, if they are to exert independent causal influence in EU enforcement, are monitoring and sanctions. Most importantly, however, conceptualizing the Com-

mission and the Court as supervisors suggests that their capacity to move EU enforcement beyond governments' explicit wishes is constrained by member states' ability to control the institutions through monitoring and sanctions.

**PART III**  
**SUPRANATIONAL INFLUENCE IN PRACTICE**

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CHAPTER  
**FIVE**

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**THE EUROPEAN INTERNAL MARKET AND  
MEMBER STATE NON-COMPLIANCE**

When the Commission and the ECJ embarked on a crusade to strengthen EU enforcement in the early 1990s, they did so for a clear and identifiable reason. This reason was the European Internal Market and the rampant compliance problems threatening the realization of this project. In this chapter, I provide the necessary framing for comprehending the supranational institutions' intensified efforts to reinforce EU enforcement, to be analyzed in chapters six to eight. Whereas the hypotheses of the P-S-A model therefore only are subjected to testing as of next chapter, the process delineated here may be described as that of member state agents increasingly attempting to cut loose, as the Internal Market program raised the costs of compliance and the gains of non-compliance.

The chapter is structured in three sections, each making a distinct contribution to the understanding of why it was the Internal Market program that propelled the institutions into action. In the first section, I introduce the Internal Market initiative as such and describe the essence of the program's three phases: decision-making, legal implementation, and application. The second section spells out in concrete terms the forms of barriers that the Internal Market program sought to remove, and demonstrates how the process of eliminating these imposed palpable adjustment strains on the political, economic, and administrative structures of the member states. In the third and final section, I trace the effects of these strains on member states' capacity and willingness to comply with EC rules in general, and the Internal Market provisions in particular.

## **The Internal Market: A Short History**

The Internal Market program, as a political vision, had firm roots in the Community's history, but the completion of the project required something else than a continuation of past efforts and practices. In this section, I first describe the route from Common to Internal Market, before I outline the three concrete phases of the Internal Market program itself.

### *From Common Market to Internal Market*

The 1985 launch of the Internal Market program was not the first attempt by the EC to establish a unified market in Europe, and can only be understood in its historical context. The aim to create a single market was first expressed in the EEC Treaty of 1957, which laid down a clear path how the member states should establish a customs union and provided for the creation of the Common Market.

A conceptual tool that is often employed for the purpose of distinguishing between a customs union, a common market, and other forms of economic integration is Bela Balassa's ladder of economic integration.<sup>167</sup> The ladder is composed of five stages: free trade area, customs union, common market, monetary union, and economic union. The free trade area consists of an arrangement in which the participating states remove all tariffs and quotas on goods exchanged within the area, but are free to unilaterally set the level of tariffs on imports coming from outside the area. In a customs union, the states go one step further and decide on a common external trade regime versus third countries. The third step is the common market, which entails that the free movement of goods within the customs union is supplemented by the free movement of the factors of production, especially capital and labor. The monetary union consists of a common market with a common currency, while the economic union entails that all economic policy—also fiscal—is conducted by a central authority.

The ambition of the EEC Treaty was clearly to establish a common market in the terminology of Balassa, and the "Common Market" was also the term generally used when referring to this

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<sup>167</sup> Balassa, 1961.

project. Article 3a of the treaty provided for free movement of goods and called for “the elimination, as between Member States, of customs duties and of quantitative restrictions on the import and export of goods, and of all other measures having equivalent effect.” Article 3b laid down the provisions creating a common external tariff and a common commercial policy. Article 3c, finally, required member states to abolish obstacles to the free movement of capital, persons, and services. In a comparative perspective, the arrangement envisaged was extremely far-reaching in terms of economic integration. In view of the economic adjustment pressure expected from the internal abolition of tariffs and quotas, the member states decided to introduce a transition period of twelve years for the establishment of the customs union, rather than let the provisions gain full effect at the entry into force of the treaty on January 1 1958.

By 1968, all internal duties and quantitative restrictions had been eliminated, and the external tariffs of the participating states had been aligned so as to form a common external tariff. The customs union was thus completed. The intentions of the Common Market had, however, not been realized:

Although the EC was able to complete its internal tariff disarmament by the middle of 1968, the task of creating a truly unified market in which goods could move freely was not thereby achieved. There still remained other significant non-tariff barriers (NTBs) which could continue to prevent totally, or in some degree to restrict, or in some way to distort, the flow of intra-Community trade.<sup>168</sup>

To this should be added that, while certain initiatives had been taken to facilitate the free movement of capital, persons, and services, very substantial restrictions remained, and the ambition of free movement of the factors of production was far from realized.

Rather than press ahead for the purpose of completing the Common Market in the full sense of the term, the Community now entered a period which, if anything, made a truly unified market seem increasingly remote. Politically, the member states were occupied by a new set of projects. The late 1960s and the 1970s

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<sup>168</sup> Swann, 1995, p. 133.

witnessed the enlargement of the Community to the UK, Ireland and Denmark in 1973, plans or attempts to establish an Economic and Monetary Union (EMU), a European Regional Development Fund (ERDF), a structured relationship with the ex-colonies (Lomé Convention), European Political Cooperation (EPC) in matters of foreign policy, and a European Monetary System (EMS), as well as developments in the fields of fisheries policy, industrial policy, and science and research policy. Economically, the Community and the rest of the industrialized world were in the 1970s and early 1980s plagued by the most severe recession since the 1930s. While the causes may be disputed, the breakdown of the Bretton Woods monetary system and the two consecutive oil shocks certainly contributed to the deep economic crisis. Compared to North America and Japan, Europe was worst hit by the recession, and the EEC's share of world trade in manufactured goods fell from 45 to 36 percent between 1973 and 1985.<sup>169</sup> Rather than a continued liberalization of European trade, governments' use of various protectionist instruments proliferated in the face of declining exports, stagnating output, and rising unemployment. Taken together, the political and economic developments in Europe did not call for optimism, and instead terms such as "Euro-pessimism" and "Euro-sclerosis" became fashionable ways of referring to the gloom of the European economies and the lack of faith in the institutions of the EEC.

In view of the economic nature of Europe's problems, it is not coincidental that the notion of removing existing internal barriers to trade reemerged in the early 1980s. The emergence can be traced to the European Council summit in Luxembourg in June 1981, where alarm was expressed about what was now referred to as the "Internal Market." At a number of consecutive summits, the idea of strengthening and developing the Internal Market was further elaborated, most concretely by creating a special Internal Market Council within the framework of the Council of Ministers. Whereas the Internal Market thus was very much on the agenda before Jacques Delors became president of the European Commission and Lord Cockfield took over as Internal Market commissioner in January 1985, it was not until the new Commission took

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<sup>169</sup> Price, 1988.

office that words were transformed into action. Drawing on the work of the previous Commission and the encouragement of the European Council, the Delors Commission, and Lord Cockfield in particular, prepared a detailed program of 300 measures to be taken for the purpose of achieving a truly unified European Internal Market, and a time table for arriving at this goal by December 31 1992. This program—the famous White Paper on completing the Internal Market<sup>170</sup>—was presented to the European Council at the summit in Milan at the end of June 1985, where it was endorsed by the heads of government and state. The Internal Market program—or the “1992” initiative as it would often be referred to—was subsequently provided with a legal basis in the 1986 Single European Act.<sup>171</sup>

The Internal Market program sought a *de facto* completion of the Common Market as once envisaged in the original EEC Treaty. As expressed in the SEA, the aim was to create “an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured.” In formal terms, this was nothing new. In concrete terms, however, it constituted “a disjunction, a dramatic new start,”<sup>172</sup> perhaps “the most ambitious instance of multilateral cooperation since the construction of the post-World War II international order.”<sup>173</sup> With the benefit of hindsight, we know today that the launch of the Internal Market program in 1985 marked the end of the period of Euro-pessimism and the beginning of a new period of intensified integration, culminating in the 1992 Maastricht Treaty. As “the centerpiece of European integration in the last decade,”<sup>174</sup> the Internal Market has not only brought economic integration between sovereign states to a new dimension, but has also stimulated the development and strengthening of “flanking policies” in areas, such as regional policy, social policy, competition policy, environmental policy, and science and technology policy. In addition, the Internal Market has

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<sup>170</sup> European Commission, 1985b.

<sup>171</sup> The sources of the Internal Market initiative and the SEA have been the object of an intense scientific exchange. See, in particular, Sandholtz and Zysman, 1989; Moravcsik, 1991; Cameron, 1992; Garrett, 1992; Garrett and Weingast, 1993.

<sup>172</sup> Sandholtz and Zysman, 1989, p. 95.

<sup>173</sup> Garrett, 1992, p. 533.

<sup>174</sup> Begg, 1996, p. 525.

functioned as a magnet for countries outside the EU, most notably the members of the European Free Trade Association (EFTA) and countries in Central and Eastern Europe, as well as formed the basis on which the EMU is founded.

*Three phases in the Internal Market program*

The endorsement of the Commission's White Paper and the subsequent legal basing in the SEA formed the starting point for a still ongoing process of making the Internal Market work.<sup>175</sup> Slightly simplified, this process can be divided into three partly overlapping stages: decision-making, legal implementation, and actual application.

*Decision-making.* The first stage of adopting the Internal Market measures commenced upon the closing of the Milan summit and was in large parts completed as planned by the end of 1992.<sup>176</sup> In legal terms, the 300 measures suggested in the White Paper consisted of approximately 220 proposals for directives and 80 proposals for regulations, decisions, and recommendations.<sup>177</sup> Article 189 of the EC Treaty specifies that directives are binding as to the result to be achieved, but that it is up to each member state to choose the form and the method.<sup>178</sup> In practice, this entails that directives constitute a form of two-step legislation; first they must be adopted in the Council, and then each member state must undertake national implementing measures to give effect to the directive. As opposed to directives, the other legislative instruments employed in connection with the Internal Market program—regulations, decisions, and recommendations—do not require national implementing measures.

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<sup>175</sup> For a comprehensive analysis of the governance of the Internal Market, couched in institutionalist terms, see Armstrong and Bulmer, 1998.

<sup>176</sup> The deadline of December 31 1992 should be interpreted as an expression of political will, and was not legally binding in the sense that it had certain legal consequences or created an automatic legal effect.

<sup>177</sup> Note that this number of 300 measures has not remained constant over time, as some measures have been abandoned, become obsolete, or been merged, while others have been added. At an early stage in the process, the number dropped to about 280 measures, and since then it has hovered between 270 and 280. E.g., European Commission, 1988c, p. 4; 1995c, p. 9fn.

<sup>178</sup> On directives, regulations, decisions, and recommendations, see the full text of Article 189 EC in appendix 1.

Whereas the original intention behind directives as a legislative instrument had been to grant the member states certain freedom in the attainment of the desired harmonization, the decades preceding the Internal Market program had shown that directives instead tended to be formulated in a very detailed and precise way, often laying down comprehensive uniform standards. Experience had also shown that this approach of total harmonization was extremely cumbersome and time-consuming. With the White Paper and the Internal Market initiative, the Commission broke with the past and launched the “New Approach” to harmonization.<sup>179</sup> The essence of the New Approach was (1) to introduce a new form of directive that only laid down the essential safety requirements to which products must conform, and (2) to delegate the task of drawing up harmonized standards defining technical specifications to a set of standardization bodies. Moreover, harmonization would only be undertaken when necessary, and the ambition of the Community should be to rely on mutual recognition of goods to the greatest extent possible. The principle of mutual recognition, laid down in the ECJ’s 1979 judgment *Cassis de Dijon*,<sup>180</sup> stipulated that a product lawfully manufactured and marketed in one state, could be sold freely throughout the Community.

The first step of the decision-making stage was for the Commission to draw up and table proposals on the specific measures outlined in the White Paper.<sup>181</sup> After a slow start, the Commission’s drafting of proposals picked up speed, and though the aim of having tabled all proposals by the end of 1988 was not reached, this was achieved in the spring of 1990.<sup>182</sup>

In light of the objective to have the Internal Market in place by the end of 1992, the work of the Parliament, and in particular the

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<sup>179</sup> On the New Approach, see, e.g., European Commission, 1985b; CEN, 1994.

<sup>180</sup> *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)*, Case 120/78 (1979).

<sup>181</sup> Often forgotten, however, is the fact that about 100 of the measures were already before the Parliament and the Council, when the Internal Market program was presented in June 1985. These were proposals, which had been bogged down in the Council for years, but which also would have to be adopted if a truly unified Internal Market were to be created. Cockfield, 1994, p. 82.

<sup>182</sup> European Commission, 1986b, p. 4; 1987a, p. 6; 1991b, p. 4; Cockfield, 1994, pp. 81-83.

decision-making of the Council, lagged behind for a number of years.<sup>183</sup> A prominent reason for the sluggish passing of proposals in the Council during these first years was the requirement of unanimity. Following the so-called Luxembourg Compromise of 1966, unanimity had been the dominating principle in the Council, and each state had been able to exercise a veto when it deemed that very important interests were at stake.<sup>184</sup> But as the then Internal Market commissioner Lord Cockfield emphasized: “If the Internal Market Programme was to succeed it would be essential to move away from unanimity, the source of much of the paralysis in the Community, to majority voting.”<sup>185</sup> Indeed, this was “an absolute necessity if the programme was to be completed and completed on time.”<sup>186</sup>

Through the SEA, the Community did exactly that. In force as of July 1 1987, the SEA introduced qualified majority voting (QMV) in the Council for matters pertaining to the establishment and functioning of the Internal Market. With few exceptions, the proposals submitted by the Commission now only required the support of a qualified majority to pass, and no state was capable of unilaterally blocking a proposal.<sup>187</sup> The introduction of QMV speeded up the passing of legislation in the Council, and as a consequence, the bulk of the Commission’s proposals had been adopted in the Council by 1991. As 1992 came to a close, about 90 percent of the White Paper had passed through the Community’s legislative machinery.<sup>188</sup>

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<sup>183</sup> See, e.g., European Commission, 1986b, 1987a, 1988a.

<sup>184</sup> The Luxembourg Compromise was the result of a prolonged crisis in 1965-1966, when France refused to accept the introduction of majority voting in the Council as specified in the EEC Treaty. The compromise, which granted a member state the right to veto proposals when “very important interests” were at stake, enabled France to resume normal business in the Council after a six-month long “empty chair” policy. The Luxembourg Compromise greatly handicapped the work in the Council in areas where some form of majority voting should have been the case according to the treaty. Note, however, that proposals for directives aimed at harmonizing national policies for the purpose of establishing the Common Market in any case were subject to the requirement of unanimity (Article 100 EEC).

<sup>185</sup> Cockfield, 1994, p. 62.

<sup>186</sup> Cockfield, 1994, p. 63.

<sup>187</sup> Some proposals, such as those pertaining to certain forms of fiscal barriers, still required unanimity however.

<sup>188</sup> European Commission, 1992b, p. 2. The measures which had not been adopted were primarily found in the areas of intellectual property, company law, VAT, and

*Legal implementation.* As directives were adopted in the Council, the Internal Market process shifted to the stage of legal implementation. Now the member states were obliged to incorporate the Internal Market directives into national law—to “transpose” them, in EU parlance—for these to gain effect. The legal means for transposing directives into national law differ between the member states depending on the respective constitutions and legislative procedures. In general, however, the incorporation of EU directives is “by no means a simple and straightforward task.”<sup>189</sup> Not only does the nature of the directive as a legislative instrument grant some discretion as to how the measure can be transposed, which entails that the incorporation in effect involves a choice between competing alternatives, but this process must also be concluded before the deadline set by the Council (generally two years).

The legal transposition of directives into national law is an absolute prerequisite for the practical implementation and application of EC rules that should follow. It is therefore not surprising that the Commission, when referring to the incorporation of the Internal Market directives, repeatedly stressed that this was not simply a legal exercise of minor significance: “If the single market is to work properly in practice, that legislation has to be integrated into the national legal systems.”<sup>190</sup> While a large number of directives were transposed before that date, 1990 marks the point when the European Council emphasized transposition as the new stage in the process of establishing a single European market.<sup>191</sup> By November 1990, member states were supposed to have transposed 107 measures, by August 1992 this had climbed to 174, and in late 1993 the deadline had passed for transposing all 220 directives within the Internal Market program.<sup>192</sup>

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company taxation. European Commission, 1994c, p. xi. Paradoxically, a very large portion of the measures that could have been adopted through QMV were in fact adopted by unanimity, as the identification of a sufficient majority made formal voting superfluous. Wallace and Young, 1996, pp. 137, 140; De Schoutheete, 1997, p. 21.

<sup>189</sup> From and Stava, 1993, p. 60.

<sup>190</sup> European Commission, 1994c, p. 15.

<sup>191</sup> European Commission, 1990c, p. 17.

<sup>192</sup> European Commission, 1990c, p. 17; 1992b, app. 7; 1994c, p. xii. Note that while the total number of Internal Market directives in force has remained at the level of about 220 since late 1993, new directives have entered into force and others have correspondingly been merged or consolidated after that date.

As I will show in the last section of this chapter, however, the overall rate of transposition was far below the requisite 100 percent, and member states displayed substantial variations in the capacity to incorporate the Internal Market directives correctly and timely. For the Commission, the stage of transposition therefore essentially consisted of pressuring member states to better fulfill their obligations—informally if possible, but by way of infringement proceedings if necessary.

*Application.* The final phase in the process of creating the Internal Market was embarked upon in 1993. As of that year, most of the Internal Market directives were in force and individuals and companies could take advantage of the single market to the extent that member states correctly applied the rules. Though the Internal Market disappeared from the center of public attention with the passing of the 1992 deadline, this by no means meant that a fully unified and smoothly working European market was in place. As the Commission noted in its first report on the operation of the Internal Market:

[T]he establishment of a single market is not simply a question of adopting Community-level legislation. It is a more complex, long-term process of gradually changing legal structures and administrative practice at the national level and of encouraging new attitudes and behaviour from economic operators in the market. The date of 1 January 1993 represents the beginning, rather than the end, of this process.<sup>193</sup>

Focusing more directly on the Internal Market rules, the post-1992 period has involved, on the one hand, the application of these rules in the member states and the supranational institutions' enforcement of state compliance, and on the other, collective efforts to improve the structures which cause problems in the application of these rules. For member states, the entry into force of the Internal Market measures has not only imposed an obligation to correctly apply those rules which regulate state behavior, but has also entailed a responsibility to enforce the rules that pertain to the actions of private individuals and companies on their terri-

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<sup>193</sup> European Commission, 1994c, p. ix.

tory. For the Commission and the Court, the Internal Market legislation has within a very short period of time added a considerable chunk to the body of EC rules that these institutions must make sure are correctly applied in the member states. Finally, the collective efforts to improve the functioning of the Internal Market have centered on the establishment of a common structure for problem-solving, on a simplification and improvement of the Internal Market legislation, and on attempts to tackle weaknesses and gaps in the existing legal framework.

### **Deep Integration and the Pressure of Adjustment**

In its ambition to remove all barriers to a single European market, the Internal Market program went beyond previous endeavors of EC cooperation, in addition to being unprecedented among multilateral trade agreements. As Internal Market commissioner Monti concluded in 1996, the Internal Market program was “the most ambitious target that the European Community ever set itself.”<sup>194</sup> In this section, I explain in concrete terms what forms of barriers the program sought to remove, and I show how the process of eliminating these barriers imposed palpable adjustment costs and strains on the member states.

#### *The Internal Market program as deep integration*

While more far-reaching than other multilateral trade initiatives, the Internal Market program testified to a general trend in international economic relations. “As economic integration progresses, issues of ‘deeper’ integration emerge on the international agenda. These issues concern ‘behind-the-border’ policies that had previously not been subjected to international scrutiny or negotiation.”<sup>195</sup>

With a collective name, these barriers are generally referred to as non-tariff barriers to trade (NTBs). As barriers to trade, NTBs are defined by their non-tariff nature and thus include all restrictions to trade, which provide for a differential treatment of im-

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<sup>194</sup> European Commission, 1996h, p. ix.

<sup>195</sup> Kahler, 1995, p. 2.

ported and domestically produced goods, but which are not tariffs. In concrete terms, NTBs consist of a range of measures which may or may not be designed for the purpose of impeding or distorting trade, but which have that effect. Examples of NTBs, which are explicitly employed in order to restrict trade, are quotas, export subsidies, and government procurement. Examples of NTBs, which are employed to meet some other policy target but which affect trade flows in the process, include subsidization of state-owned companies, health and safety regulations, and customs valuation procedures. As opposed to tariffs, a defining characteristic of NTBs is the opaque and non-transparent nature, making them particularly difficult to identify, categorize, and ultimately eliminate.

Internationally, policy-makers became increasingly aware of the existence of NTBs, as tariffs were gradually reduced within the framework of the GATT. Not only did NTBs stand out better, as tariffs were dismantled and trade nevertheless remained restricted, but governments in the industrialized countries also had increasing recourse to these instruments as a way of compensating for the reduction in protection. In the 1970s, when the use of NTBs mounted in connection with the economic crisis, the “New Protectionism” became the term used when referring to this form of trade barriers.<sup>196</sup> The EEC constituted no exception—quite to the contrary. Beate Kohler-Koch summarizes European protectionism 1970’s style:

Following the completion of the customs union at the end of the 60’s, the history of the Common Market is a fascinating story of how ingeniously governments have invented new instruments to protect markets and keep off unwanted competition....State interference did not vanish away. It changed its outer appearance, different instruments were applied, and other actors at different levels became responsible.<sup>197</sup>

At the international level, the Tokyo Round of the GATT (1974-1979) was the first serious attempt to deal with NTBs—an at-

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<sup>196</sup> On the New Protectionism, see, e.g., Krauss, 1979; Greenaway, 1983, ch. 7-9; Bhagwati, 1988; Baldwin, 1993.

<sup>197</sup> Kohler-Koch, 1996, pp. 177-178.

tempt which at best was of mixed success.<sup>198</sup> In Europe, the Internal Market program attacked the prevalence of NTBs with more determination and at greater length than any previous free trade initiative.<sup>199</sup> In concrete terms, the 300 measures suggested in the White Paper were aimed at eliminating three forms of main obstacles to the achievement of a single market: physical barriers, technical barriers, and fiscal barriers.<sup>200</sup> Whereas all three contained non-tariff impediments to trade in goods, they also consisted of barriers to the free movement of capital, persons, and services.

Physical barriers covered such practices as intra-EC border stoppages, customs controls, and associated paperwork. These were viewed as imposing unnecessary costs on industry, flowing from delays, administration, and transport and handling charges. Technical barriers became a label used for a wide range of measures, which were not necessarily just technical in nature. Prominent among these were barriers created by variations in national product regulations and standards, and protectionist public procurement practices. Fiscal barriers referred primarily to variations in the national systems of indirect taxation, including both general VAT rates and excise duties on, for instance, alcohol, tobacco, and petrol. Differences in these systems were regarded as creating distortions in intra-EC trade, as the variations in tax level translated into substantial price differentials.

#### *The Internal Market program and strains of adjustment*

All these barriers to a truly unified European market had in common that they had previously been, and elsewhere often still are, perceived of as purely domestic concerns, not usually subject to international (de-)regulation. As a consequence, the Internal Market program struck at the nerve of the state's involvement in the economy. To implement the measures suggested, states had to refashion domestic regulatory regimes, overturn existing practices,

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<sup>198</sup> E.g., Gilpin, 1987, pp. 195-199; Grieco, 1990.

<sup>199</sup> Note, however, that certain forms of NTBs, e.g., quantitative restrictions, already had been abolished in the EEC through the completion of the customs union.

<sup>200</sup> European Commission, 1985b. The economic benefits which could result from a unified European market were assessed by the Commission in the famous "Costs of Non-Europe" project. For summaries, see Ceccini, 1988; Emerson et al., 1988.

and frame new relationships with the economic operators of the market. This was understood by the Commission when launching the program: "We recognise that many of the changes we propose will present considerable difficulties for Member States."<sup>201</sup> Slightly simplified, the Internal Market program resulted in three forms of strains on the economic, political, and administrative structures of the member states.

First, the implementation act itself put strains on the legislative and bureaucratic branches of government. This is a strain that is familiar from the general literature on the compliance and implementation of international agreements. "[S]tates must possess the political and administrative capacity to make the domestic adjustments necessary for the implementation of international norms, principles, and rules."<sup>202</sup>

To implement the Internal Market program, member states were asked to transpose a very large body of EC legislation into national law within a quite limited time period. The pressure of this process on the legislative machinery of the member states was in many cases formidable. Not only did the 220 Internal Market directives have to be implemented in accordance with their stated intentions and EC law, but also before the deadlines set by the Council, which for most member states proved a challenging task.<sup>203</sup> As Heinrich Siedentopf and Christoph Hauschild point out: "[T]he normal legislative procedure often takes much more time than provided by a directive's deadline."<sup>204</sup> The degree of strain varied with the legislative capacity of each state, that is, the extent to which the legislative procedure and the political situation permitted and facilitated a rapid and correct incorporation of the directives into national law.<sup>205</sup>

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<sup>201</sup> European Commission, 1985b, p. 7.

<sup>202</sup> Keohane, Haas, and Levy, 1993, p. 20. See also Young, 1992, pp. 183-185; Mitchell, 1994, pp. 44-45; Chayes and Chayes, 1995, pp. 13-15; Jacobson and Brown Weiss, 1995, p. 141.

<sup>203</sup> See next section of this chapter. As the Commission noted in 1989: "[T]he mechanisms within Member States have not yet adjusted to the new pace of decision-making." European Commission, 1989c, p. 8.

<sup>204</sup> Siedentopf and Hauschild, 1988, p. 56.

<sup>205</sup> E.g., European Commission, 1989c, p. 8. For a cross-national comparison of legislative capacity and incorporation procedures, see Siedentopf and Ziller, 1988.

Implementing the Internal Market program also required substantial changes in bureaucratic practices, not the least of which was at the level of daily contact with individuals and companies. This raised two immediate problems to national governments and their bureaucratic branches. The government, responsible for the correct application of EC law, was faced with the task of altering entrenched administrative behavior and practices. To the extent that the bureaucracy was not positively disposed toward these reforms, administrative implementation posed a control problem for the national government.<sup>206</sup> Secondly, even if the bureaucracy was willing to adjust to the new rules, such changes also required that it possessed sufficient administrative capacity. According to a cross-national study of implementation in the EC in the mid-1980s, however, administrative capacity varied considerably within the Community, with Belgium, Greece, Ireland, Italy, and the UK confronting “serious deficiencies in their administrative capacities.”<sup>207</sup>

The second strain imposed by the Internal Market program was more general in nature and concerned governments’ role in the economy, ability to intervene in the market, and capacity to structure barriers to their own advantage. “The 1992 programme represented a challenge to the *economic sovereignty of the state* as well as to its political power.”<sup>208</sup> The post-World War era had witnessed the development in Europe of models of capitalism, which to varying degrees combined free enterprise and competition with state regulation and welfare ambitions. This mixed economy had not only been the distinguishing mark of European states as compared to the US, but also the defining characteristic of the “European model of society” actively promoted by the Community. With the Internal Market program, this traditional role of the state in the economy was up for reevaluation and redefinition. Loukas Tsoukalis succinctly summarizes the challenge:

Domestic government intervention is part and parcel of the established political and economic order in each country. The White Paper was presented as a set of

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<sup>206</sup> E.g., European Commission, 1989c, pp. 8-9.

<sup>207</sup> Siedentopf and Hauschild, 1988, p. 62.

<sup>208</sup> Williams, 1991, p. 98. Emphasis in original.

technical measures, presumably intended to assuage nationalist fears. However, a more careful reading of the text...would lead to a different conclusion. Many of those measures touched at the very heart of national economic sovereignty; and modern politics is very much about welfare issues. Fiscal harmonization, monetary policy and capital movements, state subsidies, and even industrial standards are the basic material of which the economic role of the state consists; and also the instruments through which governments can influence the direction of votes.<sup>209</sup>

The elimination of physical, technical, and fiscal barriers entailed that governments would lose many of the traditional tools for influencing the allocation of resources within and between countries. Slightly simplified, deregulation and liberalization meant that the power of the state to intervene in the market was rolled back, whereas regulation and harmonization on the European level meant that EC governments agreed to collective standards beyond their unilateral control. It is therefore hardly an exaggeration to say that the measures included in the Internal Market program threatened to lead to "serious depletions in the stock of traditional instruments used to steer the mixed economy at national level."<sup>210</sup>

The third strain imposed by the Internal Market program and the dismantling of internal barriers was experienced by the economic operators in the increasingly unified European market. Companies and enterprises, which previously had profited from state protectionism and a segmented European market, were now put under growing economic pressure. For companies in a favorable competitive position, trade liberalization is often a promise of better times; for less efficient producers, it may very well be the end.

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<sup>209</sup> Tsoukalis, 1997, p. 67.

<sup>210</sup> Hancher, 1996, p. 55. Note that students of European regulation, most forcefully Majone, have testified to the emergence of a particular European model of regulation as the Internal Market has been progressively completed. This model brings together different regulatory traditions, with the philosophy being guided by the Anglo-Saxon emphasis on free markets, while the instruments owe more to French and German regulatory styles. Through this model, the regulatory powers of the states are partly reinvented at the European level. See, e.g., Majone, 1994, 1996; Begg, 1996; McGowan and Wallace, 1996.

Economic studies and business surveys conducted by the Commission confirm that the market integration resulting from the completion of the Internal Market unleashed substantial competitive pressure, to the advantage of some firms and the dismay of others. The Internal Market has promoted a broad restructuring of the European economy, and the primary means through which firms have handled the enhanced competition have been mergers and acquisitions.<sup>211</sup> Comparing the situation in 1997 with that in 1993, business found competition to be greater in both national and European markets. But, whereas some 45 percent of companies reckoned that competition had been positive or very positive for their business, up to 25 percent of all firms perceived the unleashed competition as negative.<sup>212</sup>

These competitive strains (deliberately) caused by the Internal Market program did not only have economic effects for economic actors, however. To the extent that the “disadvantaged” companies turned to national authorities for help and continued protection, the economic strains quickly became political. As Stephen Weatherill points out: “[P]arties with interests affected by measures agreed at Community level can be expected to develop strategies for persuading ‘their’ governments to dilute the practical impact of agreed norms. The temptation of governments to yield to such blandishments will be especially strong where the interests likely to be prejudiced by underimplementation lie out-of-State (consumers, environment).”<sup>213</sup> Not surprisingly, evidence suggests that national governments and regional authorities, concerned with employment and regional development, have been sensitive to the calls from firms in dire straits. Identifying reasons for late transposition of Internal Market directives in the member states, the Commission stresses, for example, that it is not unusual for governments to succumb to “pressures from domestic industries who urge it to delay the transposition of EU legislation in order to keep their sectors protected for just a little bit longer.”<sup>214</sup>

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<sup>211</sup> European Commission, 1996i.

<sup>212</sup> European Commission, 1997q, p. iii.

<sup>213</sup> Weatherill, 1997, pp. 14-15.

<sup>214</sup> European Commission, 1996h, p. 8.

## Softening the Pressure of Adjustment: Non-Compliance

In the face of the strains and costs imposed on member states by the Internal Market program, non-compliance—whether it resulted from default or calculation—offered an attractive way to cushion the adjustment and to soften the blow. The compliance problems emerging in connection with the Internal Market program were mainly of three different kinds: (1) non-compliance in the transposition of directives, (2) non-compliance in the application of EC rules, and (3) non-compliance with judgments of the ECJ. All three problems had existed prior to the Internal Market program. Indeed, wide-ranging non-compliance with EC rules had prompted observers to speak of a “paradox of non-compliance,”<sup>215</sup> to refer to non-compliance as a “systemic phenomenon,”<sup>216</sup> and to declare that the Community suffered from an “implementation deficit.”<sup>217</sup> As the Internal Market program shifted to the stages of implementation and actual application of the rules, these three forms of non-compliance were significantly amplified.

### *Non-compliance in the transposition of directives*

For directives to serve their purpose as means of harmonizing European policies, they have to be legally implemented in the member states, and implemented correctly. In both respects, member states’ transposition of the Internal Market directives was wanting.

First, member states failed to transpose the directives into national law within the time limits set by the Council. In a 1989 report on the completion of the Internal Market, the Commission was forced to emphasize that “a change of attitude on the part of the Member States is needed to incorporate the decisions taken into their national law and to do away with the delays which are currently evident in the implementation of Community legislation.”<sup>218</sup> At the time this report was published, for example, only 2

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<sup>215</sup> Krislov, Ehlermann, and Weiler, 1986, p. 61.

<sup>216</sup> Mendrinou, 1996, p. 11.

<sup>217</sup> From and Stava, 1993, p. 55.

<sup>218</sup> European Commission, 1989b, p. 3.

out of 68 measures in force had been implemented in every member state.<sup>219</sup>

Table 5.1 Rate of transposition, White Paper directives and all directives, 1990-1997

<i>Year</i>	<i>WP Directives (%)</i>	<i>All Directives (%)</i>
1990	69.0	n.a.
1991	73.0	89.7
1992	75.0	91.0
1993	87.0	90.4
1994	89.9	91.9
1995	93.4	90.7
1996	92.5	92.8
1997	94.3	94.5

Source: European Commission, 1991b, p. 5, app. 6; 1992a, p. iii; 1992b, app. 7; 1993b, p. 7; 1994b, p. 7; 1994c, p. xii; 1995b, p. 1f, g; 1995c, p. 11; 1996b, p. 10; 1996d, p. 12; 1996l, p. 7; 1997d, p. 17; 1997n, p. 2.

Table 5.1 testifies to this problem of late or non-existing transposition. At the end of 1990, member states had on average transposed less than 70 percent of the White Paper directives for which the implementation deadline had passed. At the end of 1993, when the Internal Market had been officially completed for a full year, the rate of legal implementation spoke a different language (87 percent). As member states in the mid-1990s have increasingly caught up with the backlog and fewer directives have been up for transposition, the rate has improved to around 93-95 percent. Throughout this period, delays have been particularly common in the areas of public procurement, company law, intellectual and industrial property, and the insurance sector.<sup>220</sup> The second column in table 5.1 shows the rate of transposition for all directives, new and old Internal Market directives included. This data points to the general character of the problem of late or no transposition. In the 1990s, member states have consistently failed to comply even on paper with about 10 percent of all Com-

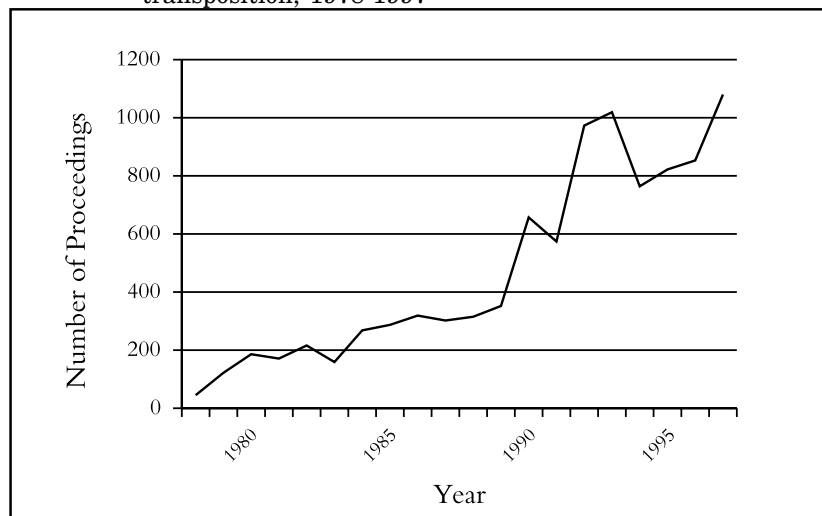
<sup>219</sup> European Commission, 1989b, p. 4.

<sup>220</sup> E.g., European Commission, 1994c, p. xiii; 1995c, p. 9; 1996b, p. 11.

munity directives—a situation the Commission repeatedly has expressed its concern about.<sup>221</sup> This means that each member state on average had failed to legally implement a total of 110 directives in 1992 and 120 directives in 1995.

A second problem was the quality of the transposition. When directives indeed were implemented, transposition was sometimes faulty or partial. Not seldom, the discretion granted to national authorities by directives as legislative instruments resulted in national implementing measures, which did not reflect the spirit of the directives and did not have the requisite binding force.<sup>222</sup> The legal uncertainty resulting from such incorrect transposition could even have effects highly contrary to the objective: “In some cases, over-bureaucratic implementation of Community rules at national level can appear to maintain the barriers that Community legislation was intended to remove.”<sup>223</sup>

Figure 5.1 Infringement proceedings initiated for late or incorrect transposition, 1978-1997



Source: European Commission, 1984, p. 26; 1989d, p. 74; 1994b, p. 105; 1998c, p. 121.

<sup>221</sup> E.g., European Commission, 1991c, p. 1; 1994c, p. xii.

<sup>222</sup> E.g., European Commission, 1994c, p. 120.

<sup>223</sup> European Commission, 1995c, p. 4.

An indirect way of assessing compliance problems in the EU is to take stock of the Commission's initiation of infringement proceedings against member states under Article 169. Whereas it is clear that the number of opened proceedings also is influenced by the Commission's policy priorities and internal procedures for handling infringement cases, as well as by the number of states to monitor, this measure nevertheless provides an indication of the gravity of compliance problems, as experienced by the Commission. Drawing on this source of data, figure 5.1 depicts the number of infringement proceedings initiated each year for late or incorrect transposition of directives. The curve indicates a virtual explosion in the number of proceedings at the time when the Internal Market program shifted to the stage of legal implementation. Whereas the number of proceedings had been fairly stable at a level of about 200-300 a year during the 1980s, the early 1990s witnessed a doubling of that figure. As opposed to this first jump in the figures, which partly could have resulted from delayed effects of the enlargement to Portugal and Spain in 1986, the further increase in the number of proceedings to a level of around 1,000 in 1992 and 1993 is more purely an effect of the bulk of the Internal Market directives entering into force.

*Non-compliance in the application of EC rules*

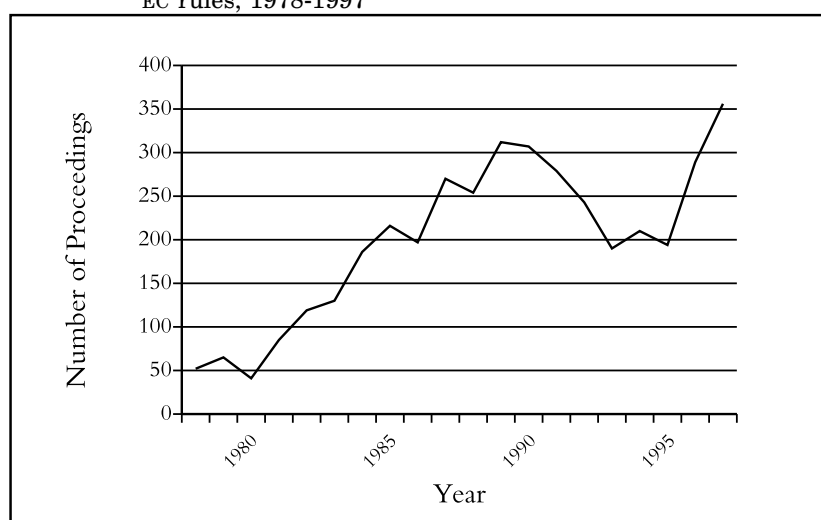
The essence of European policies is the application of these common rules and principles in the member states. Directives that have been transposed must be correctly applied, and member state behavior must conform to the rules laid down by treaty articles, regulations, and decisions (which do not require national implementing measures). As the Internal Market program shifted to the stage of actual application, it became clear that the compliance problems extended to member states' application of the rules.<sup>224</sup> On the one hand, there were shortfalls in member states' exercise of rules that regulated their own behavior. But equally problematic was the uneven application or enforcement of rules regulating the actions of private parties such as companies. Responding to this picture, John Mogg, director-general at DG XV of the Commission, the Internal Market directorate, delivered this

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<sup>224</sup> See, e.g., European Commission, 1996f, p. 17; 1996i, p. 20; 1997c .

poignant critique: “There is no point in having agreed all these rules on the Single Market if they are not respected on the ground....If the Single Market is to work in practice, Member States must apply the rules in practice even if they come under protectionist pressure from narrow interest groups.”<sup>225</sup>

Figure 5.2 Infringement proceedings initiated for faulty application of EC rules, 1978-1997



Source: European Commission, 1984, p. 26; 1989d, p. 74; 1994b, p. 105; 1998c, p. 121.

Figure 5.2 displays the number of Article 169 proceedings initiated yearly by the Commission for faulty application of EC rules. Though portraying a gradual increase in the number of infringement proceedings, the curve does not fully confirm the assertion of intensified compliance problems when the Internal Market program entered into force. Whereas the sharp increase from 1995 onwards corresponds to the overall picture of non-compliance, the low numbers for the first years of the “completed” Internal Market come across as puzzling. There are two primary factors that help explain why these figures do not fully reflect actual non-compliance problems. First, at the time of the entry into force of the Internal

<sup>225</sup> Mogg, 1996, p. 1.

Market measures, the Commission's priority was to make sure that these were legally implemented in the member states. This was the logical first step, and with a given set of resources, the boost in proceedings against non-transposition precluded the devotion of a similar degree of attention to the actual application. Second, though the Commission may receive information about, and be able to form a picture of, the state of compliance, it is extremely hard to monitor member states' application on the ground from Brussels.<sup>226</sup> As Weatherill notes: "Underimplementation is hard to track, for it is a continuing process, embedded within, and subject to the adaptive capacity of, administrative structures."<sup>227</sup>

Figures 5.3 and 5.4 summarize the two forms of compliance problems covered so far, measured by infringement proceedings under Article 169. Figure 5.3 shows the total number of proceedings initiated each year during the period 1978-1997 (transposition and application problems), while figure 5.4 ranks the member states according to the average number of proceedings initiated against them on a yearly basis during the same period.<sup>228</sup> The two figures largely speak for themselves. The number of proceedings opened as a result of member state non-compliance has gradually climbed over time, with a sharp jump as the Internal Market program shifted to the stages of first transposition and then application. Over this 20-year period, member states display clear and manifest patterns in non-compliance.<sup>229</sup> The most compliant state is Denmark, followed by the Netherlands, Luxembourg, Ireland, the UK, and Germany. Above the EU average, we find the states, which proportionally have contributed most to compliance problems in the Union: Belgium, France, Spain, Greece, Portugal, and Italy.<sup>230</sup>

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<sup>226</sup> Interviews, Commission officials, September 24 1996.

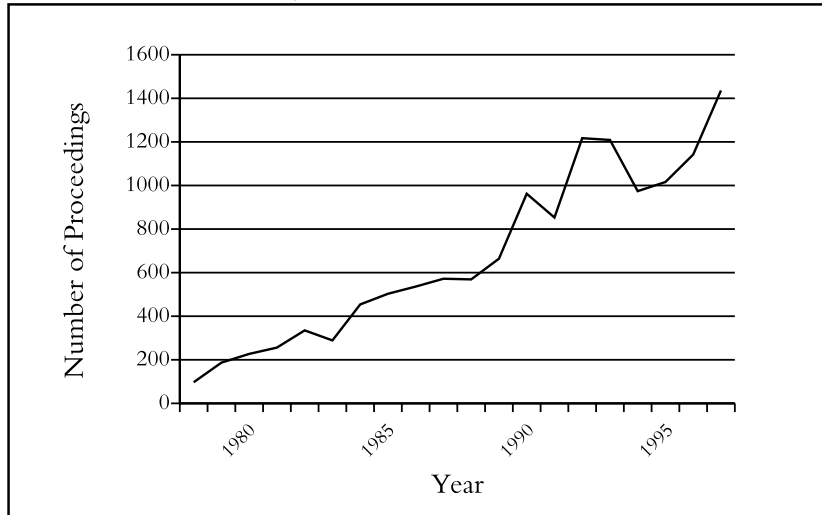
<sup>227</sup> Weatherill, 1997, p. 14.

<sup>228</sup> Austria, Finland, and Sweden are excluded from this comparison, as the few years as members cannot be compared to the substantially longer time-series of all other states.

<sup>229</sup> Measured over time, the only significant shift in the internal positions is that of Germany, whose compliance relative to the others has deteriorated for each five-year period. Tallberg, 1997, p. 15.

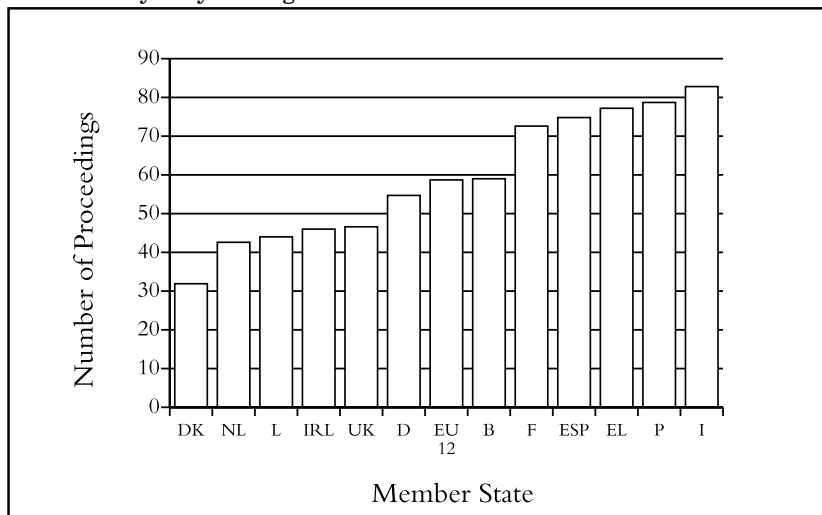
<sup>230</sup> For discussions of cross-national differences in compliance in the EU, see Mendrinou, 1996; Tallberg, 1999.

Figure 5.3 Infringement proceedings initiated for non-compliance with EC rules, 1978-1997



Source: European Commission, 1984, p. 26; 1989d, p. 74; 1994b, p. 105; 1998c, p. 121.

Figure 5.4 Infringement proceedings initiated per member state, yearly average 1978-1997

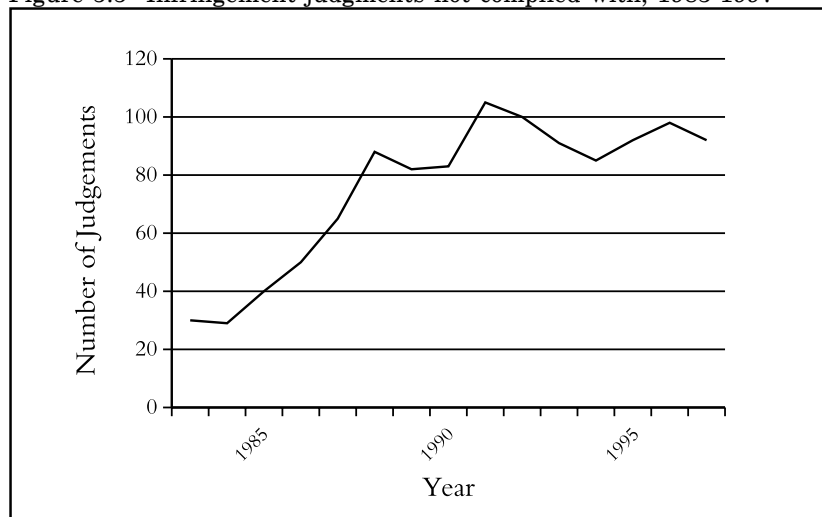


Source: European Commission, 1984, p. 26; 1989d, p. 74; 1994b, p. 105; 1998c, p. 121.

*Non-compliance with ECJ judgments*

More than any other form of compliance, member state respect for judgments of the ECJ epitomizes the “Community based on the rule of law.” To the extent that the Commission and the member states cannot reach an amicable solution in keeping with EC law during the course of Article 169 infringement proceedings, the case is finally referred to the ECJ for a decision. If the Court confirms the Commission’s suspicion of non-compliance, the state is thereby required to undertake the necessary measures to comply with the judgment. Swift and diligent compliance has been anything but the rule, however, and late compliance or complete disregard of Court judgments constituted a third form of compliance problem.

Figure 5.5 Infringement judgments not complied with, 1983-1997



Source: European Commission, 1984, pp. 27-30; 1985a, pp. 28-31; 1986a, pp. 41-47; 1987b, pp. 26-32; 1988b, pp. 4, 41-47; 1989d, pp. 81-102; 1990a, pp. 57-71; 1991c, pp. 102-119; 1992a, pp. 89-108; 1993b, pp. 405-418; 1994b, pp. 394-415; 1995b, pp. 358-374; 1996d, pp. 405-420; 1997d, pp. 438-459; 1998c, pp. 286-302.

Figure 5.5 compiles all ECJ judgments not complied with at the end of each year during the 15-year period 1983-1997. Whereas some of the disregarded decisions were handed down during the year under review, many were several years old, thus showing up

in the statistics more than one year. The plotted curve demonstrates how the total number of cases underwent a steady increase in the second half of the 1980s, and then stabilized at a level of around 80-100 annually. These figures should be compared to the annual number of decisions handed down by the Court in Article 169 cases, where the average was 39 judgments per year during the period 1988-1994.<sup>231</sup> At the end of each year, then, the judgments not yet complied with were twice as many as the decisions handed down by the Court in infringement proceedings during that year. For obvious reasons, both the steady rise in the late 1980s and the subsequent stabilization at a very high level were perceived as extremely worrying by the EC enforcement institutions.<sup>232</sup> As the Commission concluded in 1990: "This situation gives cause for concern as it undermines the fundamental principles of a Community based on law."<sup>233</sup> Not seldom, non-compliance with Court judgments forced the Commission to initiate new infringement proceedings against member states under Article 171.<sup>234</sup>

The rise in the late 1980s and early 1990s to a new and unprecedented level of non-compliance with ECJ judgments did not result from the Internal Market program *per se*, as these measures could not have become the object of Court decisions until the mid-1990s. The Internal Market was nevertheless a prominent concern in view of this increase in non-compliance. Given that the program was the Community's most extensive legislative exercise ever, widespread non-compliance with Court decisions was anything but encouraging. Neither were these worries soothed by the fact that the Internal Market was the policy area most afflicted by member states' disregard of ECJ decisions. The Commission took particular note of this in a 1989 communication:

A fundamental problem is compliance with Court judgments; that the increase in infringement proceed-

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<sup>231</sup> European Court of Justice, 1990, pp. 20, 32; 1991, p. 104; 1993, p. 126; 1995a, pp. 244, 247, 250.

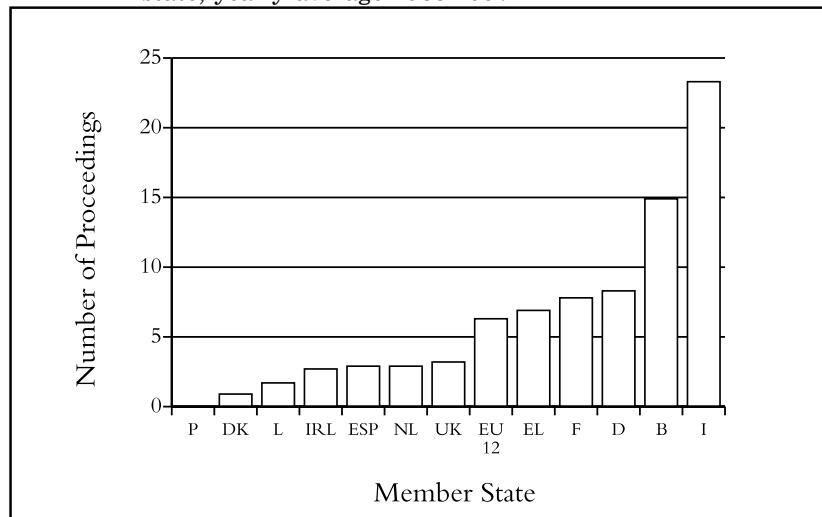
<sup>232</sup> See, e.g., European Commission, 1988c, p. 12; 1989c, p. 14; 1989d, p. vi; 1990a, p. iii; 1995b, p. 1e.

<sup>233</sup> European Commission, 1990a, p. iii.

<sup>234</sup> In 1989, for instance, the Commission initiated a total of 26 new proceedings under Article 171. European Commission, 1990a, p. iii.

ings is reflected not only in a less satisfactory implementation of Community law, but also and more particularly in a growing number of non-enforced judgments, gives real cause for concern....The burden of non-implementation of the Court of Justice decisions is particularly felt in the internal market domain. Out of 58 infringement procedures opened by the Commission for non-respect of a judgement of the Court (Art. 171 of the Treaty), 45 directly concern either the application of Treaty provisions ensuring the functioning of the internal market (15), or the application of directives or regulations (30).<sup>235</sup>

Figure 5.6 Infringement judgments not complied with per member state, yearly average 1983-1997



Source: European Commission, 1984, pp. 27-30; 1985a, pp. 28-31; 1986a, pp. 41-47; 1987b, pp. 26-32; 1988b, pp. 4, 41-47; 1989d, pp. 81-102; 1990a, pp. 57-71; 1991c, pp. 102-119; 1992a, pp. 89-108; 1993b, pp. 405-418; 1994b, pp. 394-415; 1995b, pp. 358-374; 1996d, pp. 405-420; 1997d, pp. 438-459; 1998c, pp. 286-302.

<sup>235</sup> European Commission, 1989c, p. 14.

Figure 5.6 breaks down the instances of non-compliance with Court judgments by member state.<sup>236</sup> The variation is striking. Substantially below the EU average of 6.3 cases a year, we find Portugal, Denmark, Luxembourg, Ireland, Spain, the Netherlands, and the UK. Greece, France, and Germany form a group slightly above the EU average, while Belgium on average has had an annual stock of 15 disregarded Court decisions. Italy, again, is the least compliant state, alone accounting for almost one third of all cases of non-compliance with ECJ judgments.

### Summary

In its focus on the Internal Market program and member state non-compliance, this chapter has provided the framing necessary to understand why the Commission and the ECJ in the early 1990s embarked on a mission to reinforce the means of EU enforcement. The launch in 1985 of the initiative to complete the European Internal Market marked the beginning of a process which would come to entail considerable adjustment pressure on the political, economic, and administrative structures of member states. Non-compliance became a refuge from the most immediate adjustment pressure and a way of softening the blow on domestic structures. In the terminology of P-A theory, the process accounted for in this chapter may be described as that of member state agents increasingly attempting to cut loose, as the Internal Market program raised the costs of compliance and the gains of non-compliance. Moving to the empirical heartland of the study, the next three chapters explicitly test the hypotheses of the P-S-A model as they trace the Commission's and the ECJ's response to these growing problems of non-compliance.

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<sup>236</sup> Austria, Finland, and Sweden are excluded from this comparison, as the few years as members do not constitute a time sufficient for infringement cases to reach the stage of Court judgment. Nor would such statistics be comparable to the long time series of the other member states.

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CHAPTER  
**S I X**

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**MAKING EFFECTIVE USE OF EXISTING  
POWERS: CENTRALIZED ENFORCEMENT  
THROUGH ARTICLE 169**

The Commission and ECJ could not sit idly watching the aggravation in member state non-compliance with EC rules. Quite to the contrary, the anticipation of growing compliance problems and the actual experience of a deterioration in the late 1980s and early 1990s sparked the supranational supervisors into action. Explained the then director-general of the Commission's Legal Service, Claus-Dieter Ehlermann, in 1986: "Actually, there will be no such area without internal frontiers if Community rules are not applied effectively in all the 12 Member States. Inevitably, therefore, the establishment of the internal market involves...the setting up of systems of control to ensure the full compliance of all Member States with Community legislation governing the internal market."<sup>237</sup>

The supranational institutions' efforts to strengthen EU enforcement followed three parallel approaches. First, they took steps to enhance the enforcement potential of existing means at the centralized EU level. Second, they attempted to induce the delegation of further and more far-reaching enforcement powers at the 1991 and 1996-97 IGCs. Third, they took concerted action to boost the supervisory potential of decentralized enforcement in national courts, thus shifting the center of gravity in EU enforcement. These efforts raise the question of supranational influence, as each is a potential candidate for one of the three ways in which the institutions can exert independent causal influence in EU en-

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<sup>237</sup> Ehlermann, 1988, pp. 144-145.

forcement: exercising existing powers in other ways than governments desire, maneuver governments into delegating powers they would not otherwise have conferred on the institutions, and independently creating new means of enforcement against governments' wishes. The following three chapters analyze these developments in EU enforcement, thereby subjecting the hypotheses of the principal-supervisor-agent model to testing.

In this chapter, which covers empirical developments not previously accounted for in a coherent fashion, the focus is on the Commission's attempts to boost the effectiveness of delegated powers at the centralized Community level. These efforts centered around the infringement procedure under Article 169, which was elevated from the backstage status of a seldom used last resort into a central means for realizing the Internal Market. Declared the Commission in 1988:

Article 169 of the EEC Treaty is now an instrument for the achievement of a policy, and not solely an essential legal instrument. The objective...to achieve by 1992 an area without internal frontiers, is now the Commission's priority objective and requires a strict application of existing Community law. It is Article 169 which makes it possible to monitor this application and ensures its observance by the Member States.<sup>238</sup>

I isolate five measures taken by the Commission for the purpose of enhancing the enforcement potential of the Article 169 procedure: internal reforms streamlining the handling of infringement cases, a shift to a firmer enforcement policy, the encouragement of complaints to the Commission, the development of a shaming strategy, and the intensification and institutionalization of compliance bargaining. Together, these developments speak of a widening of the Commission's enforcement repertoire, as well as of a shift toward practices that are relatively more resource efficient.

Though signifying autonomy, neither of these measures qualifies as supranational shirking, since governments endorsed rather than sanctioned the Commission's actions. The Commission's reasons for refraining from pushing centralized enforcement beyond

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<sup>238</sup> European Commission, 1988b, p. 5.

governments' wishes are not found in intrusive control as much as in the lack of a clear motive, since the infringement procedure offered ample room for improvements not necessitating a transgression of delegated competences.

The chapter is divided into three substantive sections. In the first, I account for Commission measures which were direct attempts to enhance the potential of the Article 169 procedure, while in the second, I describe attempts to put the formal procedure to informal use. Shifting to a theoretical discussion of these five measures, the third section analyzes the Commission's autonomy and the question of supranational influence.

### **Enhancing the Capacity of the Article 169 Procedure**

Three of the five measures undertaken by the Commission were direct attempts to enhance the capacity of the infringement procedure to function as a primary means of enforcement. Streamlining the handling of infringement cases improved the processing capacity, shifting from a careful to a firm enforcement policy reduced the vulnerability to political pressure, and encouraging complaints to the Commission boosted the input into the procedure. Each also entailed a shift to more resource efficient ways of exercising the enforcement power under Article 169.

#### *Internal reforms to improve the functioning of the procedure*

The first measure consisted of attempts to streamline the Article 169 procedure, the rationale being the need to ensure a more time and resource efficient processing of infringement cases.

Disaggregating the Article 169 infringement procedure, we find that it is composed of four distinct phases. The first, informal, phase consists of the Commission detecting a case of potential non-compliance through its own inquiries or through complaints, and the subsequent move to *informal contacts* with the member state in question for the purpose of finding an early solution. If the case is not settled in this first phase, the infringement procedure continues by way of formal means. In the second phase, the Commission sends a *letter of formal notice* to the member state, whereby the Commission informs the state of its grounds for com-

plaint and invites it to submit its views. The third phase consists of the Commission giving a *reasoned opinion*, which elaborates on the legal arguments of the case. If the member state does not comply with the Commission's guidelines and fails to adjust its behavior, the infringement proceeding enters into the fourth and final stage of *referral to the ECJ*.

In its construction, the infringement procedure is thus anything but swift and expeditious. At each of the four stages, the Commission must have sufficient time to scrutinize member state actions and arguments, form a position internally, and express this position to the member state with all the attendant evidence and legal backing. Similarly, the procedure must at all stages permit the member state to react to the Commission's allegations, to conduct its own investigations into the case, and to undertake the administrative and/or legislative changes necessary to correct the situation.

Already in 1975, Donald Puchala noted: "Article 169 favors national governments because it forces the Commission into procedures which involve almost interminable delays."<sup>239</sup> The Commission's ambition has been not to let more than 12 months pass between the actual detection of a case of potential non-compliance and the decision on whether or not to initiate a formal infringement proceeding.<sup>240</sup> In practice, however, "this has proved impossible in many cases because of the complexity of the dossier."<sup>241</sup> The stages of formal notice and reasoned opinion have been quite protracted as well.<sup>242</sup> In the early 1980s, the average time elapsing from the formal letter to the reasoned opinion was 12-16 months, though certain cases could be pending for years. Similarly, the average time between the reasoned opinion and a final reference to the Court was 8-11 months. Adding an average of 12-14 months from referral to judgment, we can conclude that it often took four to five years for a normal case to move from detection to final judgment.<sup>243</sup>

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<sup>239</sup> Puchala, 1975, p. 513.

<sup>240</sup> European Commission, 1984, p. 3; 1993b, p. 10; 1997d, p. 9; Dashwood and White, 1989, p. 396.

<sup>241</sup> European Commission, 1993b, p. 9.

<sup>242</sup> Audretsch, 1986, pp. 32, 377

<sup>243</sup> Audretsch, 1986, p. 377.

In view of this picture, it is understandable that the Commission met the Internal Market initiative with attempts to streamline the handling of Article 169 cases. If the infringement procedure were to function as a tool for the attainment of policy, nudging member states toward the full implementation of Internal Market rules, then it would have to be more time and resource efficient. Since little could be done unilaterally to compress the structure of the procedure, as the three formal steps were specified in the treaty, the Commission's efforts were aimed at the delaying factor it could most easily affect: its own working methods.

From the mid-1980s and well into the early 1990s, the Commission undertook consecutive sets of changes in the internal handling of Article 169 cases. In addition to the ever-present declaration that the Commission intended to better respect its internal deadlines, reports indicate that concrete modifications were conducted in the mid-1980s, in 1990, and in 1993.<sup>244</sup> These reforms, which were expressly carried out with the management of the Internal Market in mind, sought to tighten internal rules for the handling of complaints, focus resources on prioritized policy areas, promote the use of an expedited procedure for closing cases, and reduce the interval between Commission meetings at which infringement decisions were taken.

Though these modifications helped moderate the pressure on the Article 169 procedure from the enormous amount of infringement cases in the first half of the 1990s, they proved insufficient. In 1996, therefore, the Commission initiated the most far-reaching reforms thus far of its internal handling of infringement cases. In the Commission's own terms, the 1996 reforms were motivated by "[l]engthening timespans, cumbersome and sometimes inappropriate internal procedures, a degree of confidentiality that is perceived as excessive and repeated requests from Parliament for greater speed and transparency."<sup>245</sup> The changes carried one overarching theme: greater efficiency, and thus effectiveness, through quicker processing of cases.

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<sup>244</sup> European Commission, 1984, p. 3; 1987b, p. 4; 1991b, p. 5; 1997d, p. 8.

<sup>245</sup> European Commission, 1997d, p. 8.

Simplifying slightly, the measures can be grouped in three categories.<sup>246</sup> First, the Commission confirmed its priorities in the processing of complaints, stressing the need to proceed quickly with those infringements causing the greatest harm to the Community legal order, i.e., non-transposition of directives. Second, the Commission reformed internal procedural deadlines. Most notably, it sought to (a) compress the structure of the infringement procedure by taking decisions on the formal initiation of proceedings at what had previously been the informal stage, (b) facilitate quick decisions on the sending of formal notices and reasoned opinions by increasing the number of Commission meetings, and (c) reduce the time between the decision to issue a reasoned opinion and its actual issuance. Third and finally, the Commission declared its intention to make greater use of a simplified procedure for the closing of cases, where complaints were found to be clearly unfounded or the requisite evidence was lacking. In sum, the 1996 reforms were the most ambitious attempt thus far to improve the time and resource efficiency of a procedure, which by nature is slow and cumbersome.<sup>247</sup>

*Completing the turn to a firm enforcement policy*

The second measure undertaken by the Commission for the purpose of exploiting the full potential of the Article 169 procedure, was to continue the shift toward a “firm” enforcement policy. The Commission thereby confirmed the establishment of an enforcement approach it had first embarked upon in the late 1970s.

The Commission’s enforcement policy prior to 1977 was best characterized as extremely cautious and sensitive to the potential political repercussions that could result from challenging member states with non-compliance. Rather than making full use of the Article 169 procedure, the Commission trod lightly and followed the path of least political resistance. H. A. H. Audretsch summarizes the core features of this pre-1977 enforcement policy:

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<sup>246</sup> European Commission, 1997d, pp. 8-10; Mogg, 1998, p. 1; interviews, Commission officials, December 15 1997 and February 3 1998.

<sup>247</sup> While of little analytical leverage here, it may be interesting to note that these reforms undertaken in 1996 also have resulted in clear and identifiable effects on the time-spans of the procedure. European Commission, 1998c, p. ii; 1998g, p. 7.

Recourse to the formal infringement procedure and initiating proceedings before the Court against a Member State was to be avoided as much as possible. Indeed, already the act of sending a warning letter was considered an (unfriendly) political act, and even more so was the issue of a reasoned opinion or decision, and, ultimately, recourse to the Court. Only after it had been proved that all informal efforts remained without effect was a formal step to be taken. That step, as such, was considered an *ultima ratio*. For that reason, every formal step was decided upon separately, since it was considered as a political act, having political consequences....As the general political atmosphere deteriorated (owing to internal and external crises) the Commission thought it advisable to follow a safe and selective policy, reducing the risks of a confrontation to a minimum.<sup>248</sup>

When the new Commission under the presidency of Roy Jenkins came to power in 1977, both the philosophy and practice of the Commission's enforcement policy underwent a radical reorientation. Recourse to formal means was to be considered a natural step, whenever there was reason to believe that infringements had occurred. To the extent that this first step was not effective in bringing about compliance, there should be no hesitation to proceed to the subsequent stages in the procedure, even if this might prove unpopular with the member state in question.

Dissecting this new enforcement approach, launched under Jenkins (1977-1980), continued under Gaston Thorne (1981-1984), and reinforced under Jacques Delors (1985-1994), we find five distinct elements.<sup>249</sup> First, the Commission attempted to strip the infringement procedure of its highly political stigma, and to weaken the taboo of bringing member states before the Court. Second, and in challenge of the notion that each case carried individual political weight, the Commission introduced a comprehensive approach, according to which decisions were taken on all cases of a similar nature at the same time. Third, the new enforcement approach entailed more systematic monitoring of

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<sup>248</sup> Audretsch, 1986, p. 279.

<sup>249</sup> Here, I draw on Audretsch, 1986, pp. 283-289. On the turn to this new approach and its main elements, see also European Commission, 1984; Dashwood and White, 1989, pp. 399-400; Ludlow, 1991, pp. 104-105.

member state incorporation and application of Community law. Fourth, the Commission introduced a higher degree of strictness into the procedure and the initiation of proceedings, close to what could be described as “quasi-automatism.” Fifth and finally, the Commission embarked on a policy of improving the information to citizens and political actors about member state infringements and its own enforcement actions.

With the launch of the Internal Market project and the associated pressure on the Commission to contain non-compliance, this shift to a firm enforcement policy was further buttressed.<sup>250</sup> The primary target of these efforts was member states’ transposition of Community directives into national law. On the one hand, the Commission developed its practices for monitoring member state compliance, for instance, by instituting means for systematic vetting of national implementation acts and a close follow-up on transposition deadlines.<sup>251</sup> On the other hand, the Commission strengthened the mechanical element of its enforcement approach, automatically initiating infringement proceedings whenever member states had failed to notify implementation measures in time.<sup>252</sup>

#### *Encouraging complaints to the Commission*

The third way in which the Commission worked to enhance the potential of the infringement procedure in the late 1980s and 1990s was to further encourage citizens and companies to complain to the Commission in the event of member state infringements. Private complaints to the Commission had always been its primary source of information on member states’ application of Community law, and have thus been the origin of most of the Commission’s infringement proceedings under Article 169. As one Commission official expressed it: “The best ally of the Commission is the economic operator.”<sup>253</sup> By actively facilitating complaints, the Commission attempted to improve the enforcement capacity of

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<sup>250</sup> E.g., Ludlow, 1991, p. 105; Mendrinou, 1996, p. 16.

<sup>251</sup> E.g., European Commission, 1995c, p. 9; 1996b, p. 9.

<sup>252</sup> E.g., European Commission, 1994c, p. xiii.

<sup>253</sup> Interview, Commission official, September 27 1996.

the procedure by way of boosting “input” rather than adjusting the machinery itself.

Since the early 1960s, the Commission had operated an informal procedure through which it recorded and examined complaints from citizens, companies, associations, and national administrations about member state infringements of Community rules.<sup>254</sup> Consisting of nothing more than a written or oral complaint to the Commission in Brussels or to any of its offices in the member states, the complaint procedure was simple and straight-forward, making it “the most direct and effective instrument available to the citizen to ensure the application of Community law, leaving aside of course proceedings before a national court.”<sup>255</sup> For the Commission, the complaint procedure offered a form of monitoring which was far more resource efficient than systematic in-house inquiries.<sup>256</sup> In addition, given the Commission’s lack of powers and resources to investigate state compliance on the ground, the procedure provided access to information otherwise unobtainable.<sup>257</sup>

Figure 6.1 depicts the development of complaints and the Commission’s own inquiries as sources of cases identified as suspected infringements of EC rules.<sup>258</sup> The figure testifies to a *de facto* management of centralized monitoring through a system which is largely “complaint-based.”<sup>259</sup> The factors behind the growing gap between cases detected through complaints and those discovered by the Commission are likely to have been twofold: on the one hand, the aggravation of compliance problems from the mid-1980s; and on the other, steps taken by the Commission to boost complaints as a means of monitoring the implementation and application of Internal Market rules.

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<sup>254</sup> Audretsch, 1986, p. 330.

<sup>255</sup> European Commission, 1988b, p. 5.

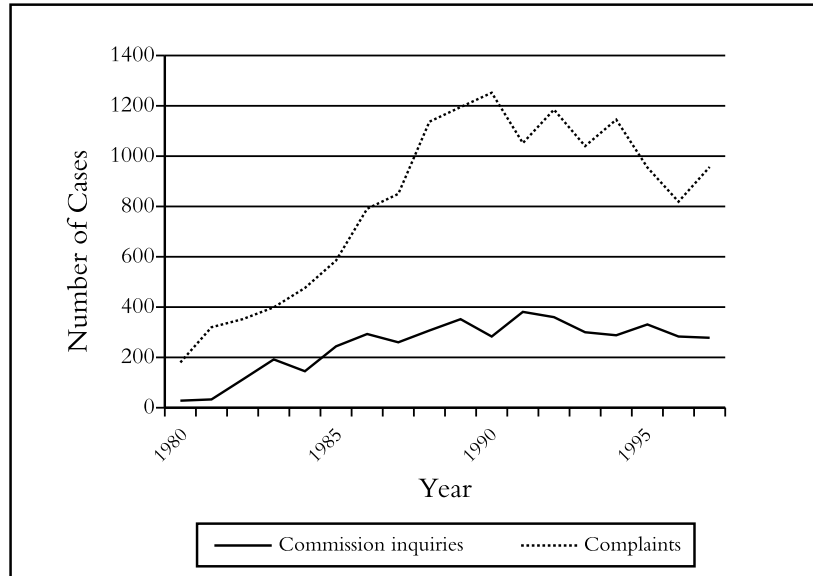
<sup>256</sup> E.g., interview, Commission official, September 24 1996.

<sup>257</sup> European Commission, 1996d, p. 6.

<sup>258</sup> In the category “Commission inquiries” are also included cases which have reached the Commission through petitions to the EP or questions asked by members of the EP, since these have been combined in many of the reports from which the data have been compiled.

<sup>259</sup> Interview, Commission official, September 24 1996.

Figure 6.1 Origin of cases of suspected infringements, 1980-1997



Source: European Commission, 1984, p. 7; 1985a, p. 23; 1986a, p. 54; 1987b, p. 36; 1988b, p. 77; 1989d, p. 113; 1990a, p. 84; 1992a, p. 121; 1993b, p. 147.

These efforts were aimed at making the infringement procedure more known and accessible to potential complainants. Reporting on its activities in 1992, the Commission communicated the core of this strategy: “The Commission has tried to make people in the Member States more aware of the procedure and to encourage its use with the aim of improving the application of Community law.”<sup>260</sup>

Whereas the earliest declarations stem from the mid-1980s, the most concrete steps to encourage and facilitate this complaint-based form of monitoring are more recent in origin.<sup>261</sup> In 1989, the Commission rendered the lodging of complaints simpler and more effective by preparing a one-page standard complaint form to be used by citizens and companies.<sup>262</sup> As the Internal Market program shifted to the stage of enforcement, these efforts were rein-

<sup>260</sup> European Commission, 1993b, p. 8.

<sup>261</sup> For an early statement of intention, see European Commission, 1984, p. 4.

<sup>262</sup> European Commission, 1989a.

forced. In the so-called Strategic Programme on how to make the most of the Internal Market, the Commission stressed the importance of complaints and expressed its intention to further promote this means of monitoring: "In those areas of the Internal Market legislation in which the Commission relies heavily on *complaints* as a means of detecting problems, steps will be taken to make economic operators and the relevant networks more aware of the methods for drawing attention to difficulties they may encounter, if necessary by means of formal complaints."<sup>263</sup>

Following the declaration in the Strategic Programme, the period 1994-1998 witnessed a large number of concrete measures. In 1994, the Commission enhanced its information-gathering activities, for instance, by arranging "Internal Market weeks" in the member states, involving conferences, public hearings, telephone hot-lines, radio phone-ins, etc., chaired by Commission officials.<sup>264</sup> The strategy to inform citizens of their rights under EC law, and thereby indirectly improve their capacity to function as active complainants, was further developed in association with the information campaign "Citizens First," which encouraged citizens to lodge complaints with the Commission.<sup>265</sup> As yet another concrete way of enhancing this channel of information, DG XV established a help desk for complaints in 1997. Announcing the new help desk in its newsletter to interested citizens and companies, the Commission was clear on the purpose: "The objective of the Help Desk is to inform people about the role that DG XV can play if they would like the support of the Commission to safeguard their rights in the Single Market. Information is available on complaints procedures, the information needed to support such a procedure and the prospects and time frame of such procedures."<sup>266</sup>

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<sup>263</sup> European Commission, 1993c, p. 12. Emphasis in original.

<sup>264</sup> European Commission, 1995c, p. 3.

<sup>265</sup> E.g., European Commission, 1996j, p. 14. The Citizens First initiative is given an in-depth treatment in chapter eight, where I argue that it formed an essential component in the Commission's strategy to alleviate weaknesses in the structure of decentralized enforcement.

<sup>266</sup> European Commission, 1997m, p. 25.

## Putting the Formal Procedure to Informal Use

Beyond the direct attempts to enhance the capacity of the infringement procedure, the Commission also took steps to exploit the potential this power offered for informal pressure and solutions. This took two forms: the development of a shaming strategy, and the intensification and institutionalization of compliance bargaining. Both encouraged a more efficient use of the Commission's enforcement resources, as shaming generated a self-propelling social and political pressure to comply, and compliance bargaining permitted proceedings to be closed through informal, amicable solutions.

### *Toward a strategy of shaming states into compliance*

To politicize non-compliance and thereby attempt to shame offending member states into compliance constituted a first informal measure employed by the Commission. Rather than avoiding steps which could throw negative light on member states, the Commission made it its strategy from the late 1980s onwards to embarrass laggards into action by publishing regular reports on compliance, issue press releases on infringement decisions, and review compliance records at Council meetings.

This shaming strategy differed substantially from previous Commission practices. Prior to the 1977 reorientation of its enforcement policy, the Commission had been extremely sensitive to political concerns in the execution of its enforcement functions, and had resolutely refrained from exploiting the political potential inherent in these powers.<sup>267</sup> As the Commission's more resolute enforcement policy was gradually implemented in the late 1970s and early 1980s, the merits of political pressure and transparency were increasingly recognized. With the more systematic and less cautious approach to enforcement came a number of concrete changes, which all involved an element of politicization.

In 1984, the Commission began to publish a yearly report on member states' application of Community law, the purpose being "to bring about greater transparency."<sup>268</sup> A second step was to

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<sup>267</sup> E.g., Audretsch, 1986, p. 277.

<sup>268</sup> European Commission, 1984, p. 4.

increasingly attempt to exert direct political pressure on the higher political levels in the member states, not least in cases of non-compliance with ECJ judgments.<sup>269</sup> Thirdly, the Commission put its trust in the persuasive power of public opinion in the member states; if only the public and national parliamentarians were informed of state non-compliance, then government bureaucrats would find this a less attractive option.<sup>270</sup>

When the Internal Market program entered the stages of implementation and application in the beginning of the 1990s, these rather disparate steps were transformed into a more coherent strategy. The comprehensiveness of the White Paper and the growing problems of non-compliance motivated the shaping of a “political” approach next to the “judicial” activity: “[T]he challenge of 1992, the comprehensiveness and balance of the White Paper programme and the speeding up of decision making all justify the steps taken to politicize monitoring of the transposition process based on complete transparency of the situation in each Member State.”<sup>271</sup> During the 1990s, this strategy of shaming took on a more concrete form, and with the appointment of the Italian Mario Monti as Internal Market commissioner in 1995, it gained a firm supporter willing to enter the role as supreme whip.<sup>272</sup> The measures taken to politicize compliance may be summarized under three headings.

First, the Commission took steps to further enhance the transparency of member states’ implementation of the Internal Market provisions. Transparency was presented as a key area where renewed efforts would have to be made, and the Commission emphasized that it was of manifest importance “in order to put pressure on the laggard Member States..., that national incorporation measures should be entirely transparent.”<sup>273</sup> In actual terms, this took two forms: regular reports and databases.<sup>274</sup> The general report on member states’ application of Community law was ex-

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<sup>269</sup> E.g., European Commission, 1985a, p. 3; 1986a, p. 5.

<sup>270</sup> E.g., European Commission, 1986a, p. 7.

<sup>271</sup> European Commission, 1991b, p. 5.

<sup>272</sup> Interview, Commission official, March 22 1996.

<sup>273</sup> European Commission, 1990a, p. 1. See also European Commission, 1989c, pp. 10-11.

<sup>274</sup> European Commission, 1991c, p. 1; 1994b, p. 10.

tended on consecutive occasions to provide a more encompassing picture of state compliance. In addition, special Internal Market reports were issued, which analyzed in detail the progress (or lack thereof) in all Internal Market sectors.<sup>275</sup> Besides these reports, the Commission set up and operated databases covering Internal Market legislation and member states' measures for putting these acts into effect—Celex and Info 92—“whose users can keep a running check on the progress of single market legislation and the transposing of Community law.”<sup>276</sup>

Second, the Commission put in place and gradually extended a practice to issue press releases, when it took decisions on infringement cases. The expressed purpose was to name and shame non-complying member states, not only in Commission reports, but also in the national press. In the late 1980s, the Commission began issuing press releases in the two prioritized areas in terms of compliance, the Internal Market and environment.<sup>277</sup> In the early 1990s, this practice was extended to infringement decisions in all policy areas, though the Internal Market and environment remained dominant.<sup>278</sup> In 1995 and 1996, the practice of issuing press releases was further intensified and extended, motivated not least by the desire to fully complete the Internal Market.<sup>279</sup> Declared the Commission in 1996: “Publicity is now the general rule for decisions to issue reasoned opinions and referrals to the Court of Justice.”<sup>280</sup>

Third, the Commission encouraged peer pressure at Council meetings by presenting increasingly detailed reports on member states' implementation and application of Internal Market legislation. For each meeting of the Internal Market Council, the Commission prepared reports where it indicated the state of play, es-

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<sup>275</sup> E.g., European Commission, 1992b; 1994c; 1995c; 1996b.

<sup>276</sup> European Commission, 1991c, p. 1.

<sup>277</sup> European Commission, 1988b, p. 6.

<sup>278</sup> European Commission, 1993b, p. 10. In view of the “preliminary” character of the first formal stage in the infringement procedure, press releases were restricted to the sending of reasoned opinions and the referral of cases to the ECJ, unless the letters of formal notice pertained to failures to comply with ECJ rulings or failures to notify national implementing measures.

<sup>279</sup> European Commission, 1996d, p. 10; 1997d, p. 10.

<sup>280</sup> European Commission, 1997d, p. 10.

pecially as regards the transposition of directives.<sup>281</sup> In 1996, this practice was stepped up, when the Commission moved toward a more comprehensive report.<sup>282</sup> The rationale was clear: “The purpose is to put greater pressure on states by way of transparency, which is one of the keys to getting member states to implement directives. It means that a member state not only sees its own position, but also that of other member states, and obviously member states do not like to see themselves at the bottom of the list.”<sup>283</sup>

In 1997, this strategy of peer pressure and shaming was further reinforced when the Commission introduced the biannual Internal Market Scoreboard, which in great detail compared the member states in terms of implementation, compliance, and infringement proceedings.<sup>284</sup> Emphasized Commissioner Monti: “I... intend to publicise any discrepancies between the Member States’ political statements of support for the Single Market and their actual record on respecting the rules in reality.”<sup>285</sup> More than any other Commission measure, the scoreboard—or “scareboard,” as it has also been called<sup>286</sup>—epitomized the new shaming strategy of the Commission.

#### *Extending the use of compliance bargaining*

The other way, in which the Commission put its formal enforcement powers to informal use, was by way of “compliance bargaining.”<sup>287</sup> Whereas the infringement procedure, with its consecutive steps where conflicts may be resolved, had always formed an invitation to bargaining, it was not until the Internal Market program and the late 1980s that these practices became partly institutionalized. This more extensive use of bargaining was closely related to aspects of the Commission’s enforcement approach that I

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<sup>281</sup> European Commission, 1994c, p. xiii; 1995c, p. 9.

<sup>282</sup> Interview, Commission official, September 25 1996.

<sup>283</sup> Interview, Commission official, September 25 1996.

<sup>284</sup> For the first three scoreboards, see European Commission 1997j; 1998d; 1998g.

<sup>285</sup> Monti, 1997.

<sup>286</sup> Monti, 1998.

<sup>287</sup> This section draws on the notion of compliance bargaining as elaborated in Jönsson and Tallberg, 1998.

have already accounted for, in particular, the shift to a firm enforcement policy and the strategy of shaming.

What had made bargaining solutions to compliance problems possible, despite the seemingly formal and inflexible framework of the infringement procedure and the Commission's lack of authority to compromise with EC law, was the coexistence of three elements: discretion for the Commission, mutual and conflicting interests, and a multiple-step sanctioning ladder.

First, when deciding about infringement proceedings, the Commission enjoyed a degree of discretion, which granted it room for maneuver and bargaining within the framework of the Article 169 infringement procedure.<sup>288</sup> At a most basic level, the Commission's infringement decisions were the consequence of its own view of the situation at hand.<sup>289</sup> In addition, the confidentiality of its handling of infringement cases made it difficult for other parties to judge the validity of these decisions. This discretion provided a setting in which the Commission could arrive at "compromise solutions in a flexible way through negotiations, conciliatory measures, and mutual concessions."<sup>290</sup>

Second, the infringement procedure offered both cooperative and conflictual elements—a prerequisite for bargaining. On the one hand, the parties disagreed as to what actions were in breach of Community law. Simultaneously, however, both parties shared a common interest by preferring amicable solutions over continued proceedings. As one Commission official put it: "Legal proceedings are not good for anyone."<sup>291</sup> For the Commission, with its limited workforce and heavy workload, the option of informal solutions was very attractive in comparison to the highly resource intensive alternative of full, formal proceedings. For the member states, infringement proceedings in general, and ECJ judgments against

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<sup>288</sup> E.g., Audretsch, 1986, p. 36; Dashwood and White, 1989, p. 399.

<sup>289</sup> This discretion is most notable with regard to three essential aspects of the Article 169 procedure: the decision of whether to initiate infringement proceedings, the decision of what the time limits should be within which member states will have to comply in order for the Commission not to bring the case yet one step further in the procedure, and the decision of when and how to close formal infringement proceedings.

<sup>290</sup> Audretsch, 1986, p. 440.

<sup>291</sup> Interview, September 24 1996.

them in particular, were highly uncomfortable and tarnished their reputation as cooperative partners.

Thirdly, the four stages of the infringement procedure functioned as a sanctioning ladder, which progressively raised the pressure and the costs of non-compliance, thereby inviting bargaining between the parties. Exploiting its unilateral power to decide on infringement cases, the Commission attempted to persuade member states to comply by communicating the threat that the case may be brought to the next step in the procedure.<sup>292</sup> “When the State appears to persist in the violation, an attempt will be made to raise the cost of violation or to lower its profit.”<sup>293</sup> The shaming strategy was an integral part of this sanctioning ladder. By exposing member states’ wrongdoings, the Commission exploited their concern with reputation and the fact that “no member state wants to have infringement proceedings in front of the Court of Justice against it.”<sup>294</sup>

In the late 1980s, important changes occurred in the nature of this compliance bargaining between the Commission and the member states. Whereas previous interaction predominantly had consisted of bargaining in the broad sense, what now emerged was pure negotiation in the narrow sense. Instead of expressing threats, promises, and compromise alternatives in the formal exchange of views inherent in the procedure, the Commission introduced a practice of actually meeting in person with responsible government officials. The introduction of such meetings, so-called package meetings, led one observer to conclude that what we had witnessed was “a significant change since the mid-1980s in the dominant mode of settling infringement disputes.”<sup>295</sup>

The term package meeting stems from the nature of these encounters, as each meeting deals with a badge or package of cases

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<sup>292</sup> Since 1995, the communication of these threats or warnings has included the reminder that economic sanctions may be imposed on the state in question if it fails to comply with Court judgments. European Commission, 1995b, p. 1e; interview, Swedish government official, December 6 1996.

<sup>293</sup> Audretsch, 1986, p. 410.

<sup>294</sup> Interview, Commission official, September 24 1996. Note, however, that reliance on fierce shaming also may counteract the strategy of compliance bargaining, to the extent that it upsets member states and renders them less willing to cede to Commission demands.

<sup>295</sup> Snyder, 1993, p. 30.

rather than singular files. Package meetings are held with one member state at a time and cover all cases currently under review by the Commission in a particular area. “These meetings ensure that the situation is kept constantly under joint review and allow the Commission to bring extra pressure to bear on the competent national departments.”<sup>296</sup>

The practice of holding package meetings was first introduced in the Internal Market domain in the late 1980s, but later spread to other areas of EU regulation, most notably environment.<sup>297</sup> Encouraged by the perceived success of this practice, which led to the closing of a large number of infringement cases, package meetings became an explicit component in the Commission’s strategy to deal with compliance problems, as the 1992 deadline passed.<sup>298</sup> Declared the Commission in the Strategic Programme: “In view of the considerable success of *package meetings*, an instrument of partnership between the Commission and the Member States which is designed to arrive at non-contentious solutions to existing litigation concerning national compliance with Community law, the Commission will, as appropriate, extend them to all Member States and increase their frequency.”<sup>299</sup>

Today, package meetings are a prominent aspect of the Commission’s handling of Article 169 cases. These compliance negotiations, considered both resource efficient and effective, are increasingly being seen as a cooperative approach on top of the otherwise conflictual approach of the infringement procedure.<sup>300</sup> Francis Snyder eloquently captures this complementarity:

We usually think of negotiation and adjudication as alternative forms of dispute settlement. It may be suggested, however, that in the daily practice and working ideology of the Commission, the two are not alternatives but instead are complementary. The main form of dispute settlement used by the Commis-

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<sup>296</sup> European Commission, 1992a, p. 2.

<sup>297</sup> European Commission, 1989c, p. 5; 1990a, p. v; 1994b, p.6; 1995b, p. 1e; 1997d, p. 16.

<sup>298</sup> European Commission, 1992a, p. 11; 1993b, p. 17.

<sup>299</sup> European Commission, 1993c, p. 13. Emphasis in original. On the intention to extend the practice of package meetings, see also European Commission, 1994b, p. 8.

<sup>300</sup> Interview, Commission official, September 25 1996.

sion is negotiation, and litigation is simply a part, sometimes inevitable but nevertheless generally a minor part, of this process.<sup>301</sup>

### **Autonomous Enforcement and Independent Influence**

The two preceding sections on the Commission's exercise of its centralized enforcement powers have brought home two essential points. First, that the anticipation and actualization of compliance problems related to the Internal Market program induced the Commission to strengthen its enforcement operations and widen its enforcement repertoire. Second, that the Commission consistently introduced or reinforced practices which were relatively more resource efficient and thus yielded more enforcement for a given amount of resources. Taken together, these conclusions also encourage an additional observation: that the Commission, in the exercise of its supervisory role, evidently enjoyed sufficient autonomy to shape and transform enforcement at the centralized Community level. This observation raises the fundamental question of whether or not the Commission can be said to have exerted independent supranational influence in the exercise of its powers under Article 169. I have chosen to address this question in an integrated analysis rather than in association with each of the five individual developments, as all suggest the same conclusion: The autonomy enjoyed by the Commission was real, but its actions do not qualify as shirking and independent supranational influence.

#### *The absence of overt conflict*

Only to the extent that the Commission pursues its own rather than member states' interests does it shirk, and could it possibly exercise independent influence in EU enforcement. The essential question is therefore whether the Commission employed its delegated enforcement means in ways that conflicted with the intentions of member governments. To adjudicate this question, three consecutive inquiries must be undertaken, as prescribed in the test of supranational shirking. The first pertains to member states' response to the Commission's actions, the second is an as-

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<sup>301</sup> Snyder, 1993, p. 30.

assessment of whether these actions violated formal powers, and the third explores the degree of information asymmetry.

The reactions of member state principals to the Commission's enforcement-enhancing actions are essential to the question of supranational shirking. If member governments countered these reforms with allegations of competence transgression and threatened or even imposed sanctions, then we can conclude that the Commission was not sensitive to governments' interests and intentions, and that supranational shirking must have taken place. If, on the contrary, the Commission's upgrading of its enforcement practices met with explicit or implicit approval, it is less likely that these actions were in conflict with the interests of EU governments.

The empirical record sends a clear message. In no instance did the Commission's actions result in open conflicts with member states. Neither the internal reforms, the shift to a firm enforcement policy, and the promotion of complaints, nor the strategy of shaming, and the stepping-up of compliance bargaining drove member governments to challenge the Commission's execution of its enforcement function. Most importantly, national governments had three opportunities during this period of time to effectively demonstrate that they did not support the way the Commission exercised its enforcement powers: the 1986, 1991, and 1996-97 IGCs. On neither occasion, however, was the question of a *reduction* in the powers of Article 169 on the agenda.

Quite to the contrary, all three IGCs witnessed proposals for *extensions* of the Commission's direct enforcement powers, and in two of the three cases these suggestions even resulted in treaty revisions reinforcing the Commission's arsenal.<sup>302</sup> First, at the 1986 IGC, member states decided to introduce, by derogation from Article 169, an accelerated procedure for bringing a state directly before the Court in certain Internal Market matters.<sup>303</sup> Second, at the 1991 IGC, national governments supplemented Article 169 with a new Article 171, in which they conferred on the Commission and the Court the power to financially sanction member states refusing to comply with Court judgments. And third, at the 1996-

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<sup>302</sup> See chapter seven for a detailed analysis of the proposals tabled at the 1991 and 1996-97 IGCs.

<sup>303</sup> For the full text of Article 100a as revised by the SEA, see appendix 1.

97 IGC, when indeed all five elements sketched above had been fully developed, certain governments, inspired by a Commission proposal, suggested that Articles 100a, 169, and 171 be revised, so as to confer special enforcement powers on the Commission in the Internal Market domain. These proposals for extensions of the Commission's competences in centralized EU enforcement motivate an obvious counterfactual and rhetorical question: Is it likely that member governments would have proposed and united to delegate more far-reaching enforcement instruments to the Commission, had they considered the Commission's exercise of its existing powers unacceptable and in conflict with their interests? The answer, of course, is no.

*A case of shirking veiled by information asymmetry?*

We cannot conclude from the absence of overt conflict alone, however, that the Commission's actions did not constitute an exercise in shirking and supranational influence. As suggested by the notion of information asymmetry, government principals may not always register and fully understand the implications of supranational behavior, thereby permitting shirking to go unpunished. To control for this possibility, we must assess whether these enforcement-enhancing actions actually could qualify as shirking, and whether member states were disprivileged by an asymmetric distribution of information.

To judge whether any or all of the Commission's moves can qualify as shirking requires a conception of what exercising enforcement powers "in other ways than member states desire and originally intended" would consist of. The most clear-cut case would obviously be the violation of the legal competence itself, as laid down in the relevant article. Did the Commission's measures in any way conflict with the legal power defined in Article 169?<sup>304</sup> Legal observers have suggested that the Commission, in cases of particular political sensitivity, has not always followed the instruction that it *shall* rather than *may* deliver a reasoned opinion, if it suspects infringements.<sup>305</sup> With the exception of this potential violation, which weakens rather than strengthens the Commis-

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<sup>304</sup> For the full text of Article 169, see appendix 1.

<sup>305</sup> E.g., Evans, 1979; Audretsch, 1986, pp. 35-39, 276-277.

sion's enforcement position, none of the five measures can be said to transgress the basic legal structure of the procedure. The reforms to streamline the internal handling of infringement cases, the shift to a firmer enforcement policy, the encouragement of complaints, the politicization of infringements, and the introduction of package meetings, all conform to the enforcement powers laid down in the treaty—the ultimate expression of member states' collective interests.

It is impossible to neglect, however, that Article 169 is extremely open in its legal formulation, thus leaving scope for Commission actions, which might conform to the legal competence, but which nevertheless diverge from member governments' original intention when establishing the infringement procedure. Could it be that the Commission, over time, has independently transformed the procedure into a creature never intended, which governments would not recognize as their own? Certainly, the Commission's exercise of its enforcement powers has been transformed since the procedure was set up in the late 1950s, as indicated not least by the developments covered in this chapter. Whereas the Spaak report, which served as the basis for the Treaties of Rome, testifies that national governments knew very well that they were granting the Commission exceptional enforcement competences compared to other "international secretariats," there is reason to believe that they did not anticipate the use to which the procedure is put today.<sup>306</sup> Partly because it was such a rare feature in the world of international organization at the time, we may expect that member states did not envisage that up to 1,200 new proceedings would come to be initiated each year, and that the procedure would function as "an instrument for the achievement of... policy"<sup>307</sup> rather than as an extraordinary means for settling the occasional case of treaty violation.

There is little to suggest, however, that governments were unaware of the Commission's efforts to boost the enforcement potential of the Article 169 procedure. Quite to the contrary, the five measures ranged from rather to very transparent. While least open to state observation, as they consisted strictly of *cuisine in-*

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<sup>306</sup> On the Spaak report, see Audretsch, 1986, pp. 18-19.

<sup>307</sup> Refers back to quote in the first paragraph of this chapter.

*terne*, the Commission's internal reforms, like all the other four moves, were accounted for in official Commission reports presented to EU governments. The gradual turn from a careful to a firm enforcement policy was concretely felt by member states, as the Commission became far less hesitant about initiating infringement proceedings and the numbers rose sharply. The encouragement of complaints to the Commission is the best candidate for a measure, where information asymmetry partly might have prevented government reactions, though, of course, it was no secret that complaints had been an important source of suspected infringements ever since the early 1960s. The informal use of the formal infringement procedure was exceedingly transparent in nature. The very point of the Commission's shaming and peer-pressure strategy was for governments to take notice as performance rates were officially compared, and the stepping up of compliance bargaining even involved member governments' active cooperation as one party to the package meetings.

Summing up, little evidence supports the notion that the Commission's five measures constituted supranational shirking and that the absence of open conflict can be explained by an asymmetric distribution of information. The five steps neither violated the Commission's formal competence, nor were they particularly sheltered from government observation. What remains to be explained, then, is why EU governments did not voice any form of opposition to the gradual transformation of the infringement procedure into something, which we can assume was not envisaged originally.

#### *Article 169 as collective self-commitment*

The explanation suggested by existing evidence is that member governments in fact welcomed, or in any case did not oppose, the Commission's attempts to improve the capacity of the infringement procedure. In the terms of the P-S-A model, government principals appreciated the need for exploiting the full potential of the Article 169 procedure, if it were to effectively function as a means

for collective self-commitment, capable of ensuring the realization of the Internal Market.<sup>308</sup>

Again, it is important to consider member governments' suggestions for extensions of the Commission's enforcement mandate at the three IGCs in the 1980s and 1990s. Besides indicating, by their very existence, that national governments were not opposed to the idea of strengthening EU enforcement, these suggestions also illustrate, by way of what they targeted, that governments were aware of the problems the Commission sought to combat through its measures. First, the fact that member governments at the 1986 IGC unanimously decided to introduce an accelerated infringement procedure shows that they shared the Commission's concern that the normal Article 169 procedure was slow and cumbersome. Second, the fact that EU governments agreed at the 1991 IGC to supplement Article 169 with a provision for financial sanctions in a revised Article 171 proves that they recognized the limits of Article 169 as a means of deterrence. And third, the fact that these revisions as well as the proposition at the 1996-97 IGC were specifically focused on the Internal Market domain suggests that member states appreciated the problem of non-compliance with Internal Market rules.

Besides what we can derive about governments' preferences from how their behavior at IGCs, existing documentation and testimony on the Commission's five measures lend direct support to the notion of implicit or explicit member state approval. Save the obvious case of compliance bargaining, which would not survive unless member states found it to be in their interest as well, the best example is provided by the strategy of shaming. From the perspective of member states, few things are as embarrassing and uncomfortable as the public announcement of their failures to meet well-known obligations. Nevertheless, national governments endorsed the introduction of the measure that more than anything epitomized the strategy of shaming—the Internal Market

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<sup>308</sup> In theoretical terms, this explanation has close affinities with Garrett and Weingast's account for the transformation of the EC judicial system, with the essential differences that here it (a) rests on empirical observation rather than assumption, (b) in no way corresponds to assuming that the Commission's enforcement-enhancing actions would *always* enjoy governments' support, and (c) pertains to the Commission's rather than the Court's enforcement actions. Garrett, 1992; Garrett and Weingast, 1993.

Scoreboard. At the informal meeting of Internal Market ministers at Echternach, Luxembourg, in October 1997, where Commissioner Monti first presented what would be the contents of the scoreboard, there was wide support for the aim of the exercise and the part on compliance, but certain hesitation about a business survey planned to be included.<sup>309</sup> As the practice continued and the second and third scoreboards were presented during 1998, governments grew increasingly enthusiastic. Reported *European Voice* the week before the presentation of the third scoreboard in September 1998: "Some ministers are also expected to push for the scoreboard to be published four times a year rather than twice to 'name and shame' countries who fail to stick to timetables."<sup>310</sup> Rather than expressing strong dislike for the new measure or sanctioning the Commission for "creative" use of its supervisory means, member governments thus welcomed this instrument for keeping check on each other and embarrassing laggards into action.

*Why did not the Commission attempt to shirk?*

Having reached the conclusion that the Commission's enforcement-enhancing measures did not constitute acts of shirking and independent supranational influence, we must address the slightly speculative question of why no such attempts were made. Two alternative explanations stand out. Both would be entirely plausible in view of the P-S-A model.

First, it could indeed be the case that the Commission avoided shirking, because government principals possessed elaborate control mechanisms, which reduced the scope for independent supranational action. This is the essence of the notion of anticipated reactions. Surveying member governments' potential mechanisms for monitoring and sanctioning the Commission's enforcement actions, we find these to be more restricted than those pertaining to its other competences. Monitoring of Commission enforcement is by necessity observation-based, as the delegation of supervisory functions would be of little use, if those supervised could interfere in the supervisor's infringement decisions. However, governments

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<sup>309</sup> Internal Commission memo, October 10 1997.

<sup>310</sup> *European Voice*, 1998e, p. 2.

do possess means for sanctioning the Commission *ex post*. In general terms, member states are highly watchful of the Commission's extraordinary enforcement power, and there is little reason to believe that actual violations of this legal competence would escape attention and judicial review. Among governments' means for sanctioning Commission shirking in EU enforcement, we find those generally applicable to all domains of Commission activity, e.g., cutting the budget and refusing to appoint personnel, treaty revision, and unilateral non-compliance.

As suggested by the notion of anticipated reactions, we would not see any trace of these control mechanisms, were they perfectly credible deterrents against Commission shirking. As I explained in the introduction, however, close empirical analysis through process-tracing is a methodological strategy, which is capable of identifying also such "invisible" control. In view of the close process-tracing conducted here, I submit that the empirical material, but for one notable exception, does not provide any evidence that observation-based monitoring and the threat of sanctions restrained the Commission in its use of the Article 169 procedure. The exception is the fear of policy-phase retaliation—a form of unilateral non-compliance—which may prevent the Commission from pushing ahead with highly politicized infringement cases. The essence of this "linkage sanction" is the possibility that governments will obstruct Commission initiatives in the decisional phase of EU policy-making in retaliation for infringement proceedings in the post-decisional phase. The restraining effect of this potential sanction on the Commission's exercise of its supervisory role has been limited to highly exceptional cases, however.<sup>311</sup> Separation between creative and repressive functions has remained the norm acknowledged by both member states and Community institutions, not least because the opposite would put the entire judicial system in peril. Moreover, rather than taking increasing notice of the possibility of policy-phase sanctions, the Commission instead took a step away from letting political concerns influence infringe-

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<sup>311</sup> See, for instance, the highly politicized *Loi Evin* case, where the Commission was extremely hesitant about, and finally refrained from, taking the final step of referral to the ECJ for fear of upsetting the French government. E.g., *European Voice*, 1997b, p. 4; 1998c, p. 2; 1998f, p. 16.

ment decisions, when shifting to a firmer and quasi-automatic enforcement policy.

The second explanation, for which there is more concrete empirical support, suggests that the Commission in fact found little reason to shirk its delegated competence under Article 169. As noted in chapter four, one condition separating the post-decisional from the pre-decisional phase is the fact that supranational shirking has no intrinsic value in the first. Why shirk if compliance is good? Or alternatively, as in this case, why shirk if there is a yet unexploited potential in existing means which could be utilized without risking the imposition of sanctions? As the five measures described here illustrate, the Article 169 procedure offered such an unexploited potential. These five measures, however, must also be viewed in relation to parallel supranational actions covered in the next two chapters: attempts to induce the delegation of more far-reaching enforcement means, and a strategic move to reinforce decentralized enforcement. In view of the inherent weaknesses of the Article 169 procedure, primarily its slowness and resource intensity, there were other ways of strengthening EU enforcement with greater promise of delivering significant improvements in member state compliance. The five measures taken to improve the enforcement power of the Article 169 procedure were thus but one of several routes taken by the supranational institutions for the purpose of strengthening EU enforcement.

### **Summary**

In this chapter, I have accounted for the Commission's efforts to enhance the enforcement potential of the Article 169 infringement procedure. These measures were fivefold: internal reforms rendering the handling of Article 169 cases more effective, the shift to a firm enforcement policy, the encouragement of complaints to the Commission, the development of a shaming strategy, and the intensification of compliance bargaining. Together, these developments testify to a strengthening of the Commission's enforcement operations, a widening of its enforcement repertoire, and a sensitivity to the resource intensity of alternative means of enforcement. However, as much as these five measures reinforced the en-

forcement potential of the Article 169 procedure, neither qualifies as supranational shirking, since member states endorsed rather than sanctioned the Commission's actions. The room for maneuver enjoyed by the Commission in this process instead underscores that supranational autonomy is a necessary but not sufficient condition for independent supranational influence.

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CHAPTER  
SEVEN

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**INDUCING THE DELEGATION OF NEW  
ENFORCEMENT POWERS: THE 1991 AND  
1996-97 IGCs**

Whereas the Commission's measures to enhance the enforcement potential of the Article 169 procedure boosted the effectiveness of delegated means, they could not compensate for what the institutions experienced as a serious omission in their supervisory competences—the absence of sanctions against non-complying states. In this second chapter on the supranational supervisors' efforts to strengthen EU enforcement, I trace their moves to induce the delegation of sanctioning powers. The focus of the chapter, which largely covers empirical developments not previously accounted for, are the negotiations on sanctions at the 1991 and 1996-97 IGCs.

As moments, when the basic "contract" between the multiple principals, and between them and the two supervisors, is renegotiated, IGCs provide an opportunity for the supranational institutions to exert independent influence in EU enforcement. Through the planting of proposals on the IGC agenda, the Commission and the Court may succeed in inducing member state principals to delegate new enforcement powers these would never have considered or consented to in the absence of supranational maneuvering. Though, by definition, IGCs are intergovernmental affairs between national delegates, the supranational institutions—the Commission in particular—are involved in the IGC process. All the supranational institutions contribute to IGC agenda-setting by presenting reports on the functioning of the treaties prior to a conference. Only the Commission, however, is part of the entire process, including the key negotiating stage. "[P]resent but not quite a full

participant,”<sup>312</sup> the Commission monitors the negotiations, advances proposals, builds coalitions, and brokers agreements for the furthering of its own and the EU’s interests.

In this chapter, I make one primary argument about each of the three sets of hypotheses generated by the P-S-A model. First, at both IGCs, the conditions typically inducing independent supranational action were present and acted upon, as the insufficiency of existing enforcement powers spurred the Commission to push for new. Second, on both occasions, the Commission failed in engineering sufficient support for the suggestions it advanced, key reasons being the proposals’ implications for national sovereignty and the ease with which governments could identify these consequences as a result of the IGC format. Third, the proposals presented or planted by the Commission confirm the notion that the supranational institutions are sensitive to the resource efficiency of various means of enforcement.

The chapter is divided into three substantive sections. The first accounts for the omission of sanctions in the treaty and early supranational calls for sanctions to be added to their enforcement arsenal. The second section covers the 1991 IGC and the introduction of sanctions under a revised Article 171 championed by the UK, while the third deals with the 1996-97 IGC and the forced adaptation to government preferences of the Commission’s proposal to upgrade Articles 169 and 171.

### **Wanted: Sanctions against Non-Complying States**

In P-A theory as well as IR literature, enforcement is generally taken to mean the existence of both monitoring and sanctions. Prior to 1991, however, neither centralized “police-patrol” enforcement through Article 169 proceedings nor decentralized “fire-alarm” enforcement through national courts could be backed up with a general threat of financial sanctions, if member states refused to comply. This absence of sanctions seriously handicapped EU enforcement and challenged the supranational institutions’ ability to effectively fulfill the role as supervisors securing member

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<sup>312</sup> Dinan, 1997, p. 250.

state compliance. Not surprisingly, therefore, the institutions, on repeated occasions, called on government principals to delegate also the power to impose sanctions of some form on member states in breach of Community law.

*The absence of sanctions in the EEC Treaty*

The 1957 EEC Treaty did not provide for any form of sanction against member states in breach of their obligations. Article 169, which “was not designed as a punitive measure,”<sup>313</sup> only laid down the steps to a Court judgment, and Article 171, which obliged member states to comply with these judgments, amounted to little more than a proclamation: “If the Court of Justice finds that a Member State has failed to fulfil an obligation under this Treaty, the State shall be required to take the necessary measures to comply with the judgment of the Court of Justice.”<sup>314</sup> In effect, the Court’s judgment in infringement proceedings under Article 169 was nothing but declaratory. To the extent that member states refused to comply with compliance decisions handed down by the ECJ, the only measure available was renewed Article 169 proceedings under Article 171.

The absence of sanctions in the EEC Treaty was no coincidence; it was the result of an active choice to safeguard national sovereignty.<sup>315</sup> While in line with common practices in international relations at the time, the lack of sanctions in the treaty broke with the rules governing existing European cooperation in the ECSC. As Karen Alter notes: “Negotiators of the Treaty of Rome...actually weakened its enforcement mechanisms compared to what they were in the European Coal and Steel Community (ECSC) Treaty in order to protect national sovereignty, stripping the sanctioning power from European institutions.”<sup>316</sup> The enforcement provisions in the ECSC Treaty differed in two essential ways from the weaker counterparts in the later EEC Treaty.<sup>317</sup>

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<sup>313</sup> Steiner and Woods, 1996, p. 410.

<sup>314</sup> Article 171 EEC prior to the amendments of the TEU.

<sup>315</sup> In addition to Alter below, see also Cahier, 1967, p. 159; Everling, 1984, p. 228; Steiner, 1993, p. 3.

<sup>316</sup> Alter, 1998a, p. 127.

<sup>317</sup> For comparisons, see Audretsch, 1986, pp. 137-141; Dashwood and White, 1989, p. 410. For the full text of Article 88 ECSC, see appendix 1.

First, under the ECSC Treaty, the Commission itself could find a member state in breach, subject to review by the Court, whereas, under the EEC Treaty, it was the Court that determined whether a violation had occurred.<sup>318</sup> Second, and more importantly, the ECSC Treaty provided for sanctions against the non-complying state, if it chose to ignore the Commission's decision or the Court's judgment. Subject to the assent of a two-thirds majority in the Council, the Commission could suspend payments eligible to the state, and authorize countermeasures to correct the effects of the infringement.

For the supranational institutions, the absence of sanctions in the EEC Treaty constituted an omission with potentially severe consequences for compliance. This was a view shared by certain legal observers: "This omission posed a real threat to the uniform application of Community law, indeed to the Community's very existence. Without solidarity, the full compliance with Community law by all Member States, the Community would be unlikely to survive."<sup>319</sup>

#### *Early supranational calls for sanctions*

The fact that sanctioning ability had been excluded from the powers delegated to the supranational supervisors was not interpreted by the institutions as the final word in this matter. On a number of occasions during the 1970s and 1980s, the institutions called on government principals to delegate the authority to impose sanctions of some form on member states in breach of Community law. In none of the cases did national governments respond by conferring sanctioning powers through treaty revision. The proposals put forward both included suggestions to give the Court and the Commission the right to inflict financial penalties on member states, and suggestions that some kind of state liability principle should be developed to the effect that individuals could claim compensation from non-complying states.

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<sup>318</sup> Note that Articles 169 and 171 EEC in this respect did not only differ from the ECSC Treaty, but also from Articles 85 and 86 EEC, which conferred on the Commission the power to take authoritative decisions on compliance with the treaty's rules on competition. For a discussion, see Shaw, 1993, p. 121.

<sup>319</sup> Steiner, 1993, p. 3.

Already in 1975 the ECJ publicly developed its position on the question of sanctions in a report motivated by the vision to construct a European Union.<sup>320</sup> Addressing the Community's legal structure, the Court stressed that a genuine rule of law in a future Union would be impossible, if legal certainty could not be guaranteed, and true legal certainty required the capacity to sanction non-compliance:

[L]egal certainty entails the filling of a legal gap in the Treaty of Rome in that it does not in terms provide for any effective sanction against a state which fails to temper its obligations, to the detriment of states which do. It is therefore desirable firstly that, in its judgment against a defaulting state, the Court should be able to specify those steps which that state is invited to take, secondly that the execution of the judgment should be subject to an appropriate systematic control and finally that any advantages sought by the state concerned would be conditional upon its rectification of the failure.<sup>321</sup>

In the mind of the Court, the lack of sanctions in the treaty constituted an omission, which ought to be corrected through amendment, and the suggestions it presented bore apparent similarity to the sanctioning powers under the ECSC Treaty.<sup>322</sup>

In the same document, the Court also signaled that it was not alien to the notion of some form of damages against non-complying member states. Addressing the question of how individuals' rights under EC law could be better protected, the ECJ suggested that one improvement would be to create a remedy, through which citizens could claim damages from states violating the preliminary ruling procedure under Article 177.<sup>323</sup>

In 1983, the European Parliament publicly sided with the Court in the so-called Sieglerschmidt report, which made explicit reference to the 1975 suggestions of the Court.<sup>324</sup> Drawn up in

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<sup>320</sup> European Court of Justice, 1975.

<sup>321</sup> European Court of Justice, 1975, p. 17.

<sup>322</sup> European Parliament, 1983a, p. 24; Audretsch, 1986, p. 141.

<sup>323</sup> European Court of Justice, 1975, p. 18.

<sup>324</sup> European Parliament, 1983a. For an in-depth analysis of the Sieglerschmidt report, see Audretsch, 1986, pp. 251-263.

response to signs of an increase in infringements, the report presented suggestions on how to remedy this situation.<sup>325</sup> Most far-reaching was the proposal to introduce sanctions against member states:

[The EP:] Is aware of the problem that the existing Treaties do not permit any enforcement action against the Member States and regrets, with the Court of Justice, that only the ECSC Treaty permits flanking measures in favour of Member States which have complied with the Treaty or against Member States which have acted in breach thereof; Calls upon the Member States to adopt an amendment to the EEC Treaty, as suggested by the European Court of Justice, to provide effective sanctions against a Member State in default of a judgment.<sup>326</sup>

Also the EP recognized that an alternative way of introducing sanctions would be to improve the possibility for individuals to claim compensation from member states in breach: "Although under the Treaties presently in force no penalties may be imposed on the Member States, Member States which have infringed the Treaty should at least be obliged to compensate for all losses of property which have occurred as a result of the infringement."<sup>327</sup>

Though the Commission had not formally presented any concrete proposals, such as those of the Court and the Parliament, it had informally advocated the introduction of some system of sanctions. In a 1986 speech, for example, Claus-Dieter Ehlermann, then director-general of the Commission's Legal Service, suggested that one of the ways, in which the Community could come to terms with the disrespect for Court judgments, would be the creation of "a penalty system on the lines of the one provided for in Article 88 ECSC."<sup>328</sup> As the IGC scheduled to begin in December 1990 approached, the Commission confirmed, in an opinion targeting the IGC, its interest in the establishment of a sanctioning mechanism. Again, the rationale was the effectiveness of the institutions and

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<sup>325</sup> The resolution was later adopted by the EP. See European Parliament, 1983b.

<sup>326</sup> European Parliament, 1983b, p. 33.

<sup>327</sup> European Parliament, 1983a, p. 24.

<sup>328</sup> Ehlermann, 1988, p. 147.

non-compliance with Court judgments: “One disturbing fact remains: in the absence of sanctions, the Court of Justice rulings are not always implemented. The Commission may consider proposing a system of sanctions to deal with this type of situation.”<sup>329</sup>

In view of member governments’ disregard of these supranational propositions, H. A. H. Audretsch was in 1986 highly pessimistic about the chances of ever seeing sanctions incorporated into the treaty: “[I]t may be questioned whether proposals for sanctions will not remain purely academic, at any rate for many years to come.”<sup>330</sup> Audretsch’s prophecy could not have been more off-target.

### **The 1991 IGC and the Introduction of Sanctions**

With mounting compliance problems in the second half of the 1980s and the imminent arrival of the 1992 deadline for the completion of the Internal Market, the question of sanctions was put in a different light. The supranational supervisors renewed their calls for sanctioning provisions, and for the first time ever member state principals perceived the plague of non-compliance as sufficiently serious to motivate compromises with national sovereignty. At the 1991 IGC, resulting in the TEU, member governments agreed to introduce financial penalties against states refusing to comply with Court judgments. The sanctioning arrangements advocated by the Commission were consistently discarded because of their far-reaching consequences for national sovereignty, as EU governments settled for a less consequential alternative proposed by the UK.

#### *Non-compliance incites British sanction proposal*

The shift in the governments’ position on sanctions can only be understood against the backdrop of two interrelated developments in the late 1980s and early 1990s: the perceived deterioration in compliance and the putting in place of the Internal Market provisions. For a number of years, there had been a steady rise in in-

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<sup>329</sup> European Commission, 1990b, p. 14.

<sup>330</sup> Audretsch, 1986, p. 141.

fringement proceedings, conveying the impression that EC rules were increasingly disrespected. Whereas the Internal Market programme in itself was one source behind this development, it was also painfully clear that continued violations of this magnitude would seriously challenge the vision of a unified European market.

While the Commission had begun taking measures to improve the effectiveness of the Article 169 procedure, it had become increasingly evident to both the supranational institutions and member governments that such proceedings alone could not contain the spread in non-compliance. This was particularly the case concerning disrespect for ECJ judgments. Given the absence of sanctions in the treaty, non-compliance with ECJ judgments could only be met with renewed Article 169 proceedings under Article 171—a weapon that already had proven its limited effectiveness once. “This being so, the idea of applying sanctions to make the procedure more effective was bound to arise,”<sup>331</sup> the Commission later observed.

For member governments, sanctions was a question which, despite its challenge to state sovereignty, had to be considered if non-compliance were not to erode previous and future achievements, the Internal Market in particular. For the supranational institutions, the emergence of sanctions on the agenda of the 1991 IGC was a moment long waited for and an opportunity to maneuver governments into reinforcing the supervisory arsenal.

Perhaps somewhat surprisingly given the UK’s traditional preference for solutions safeguarding national sovereignty over those leading the way toward a federal Europe, it was London that put the item of sanctions on the agenda of the IGC.<sup>332</sup> As the *Financial Times* pointed out at the time: “[It is somewhat ironic that] a sovereignty-conscious UK should come up with one of the most supranational proposals since the 1952 European Coal and Steel Treaty provided for the unused power to suspend budget payments to a recalcitrant government.”<sup>333</sup>

To the UK government, it made perfect sense, however. A continuation or worsening of existing compliance problems would have

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<sup>331</sup> European Commission, 1991a, p. 128.

<sup>332</sup> On the UK’s position as an “awkward partner” in European integration, see, e.g., George, 1998.

<sup>333</sup> *Financial Times*, 1991, p. 20.

risked undermining the Internal Market, embraced by the UK as the most important deregulatory exercise ever.<sup>334</sup> Britain relished the idea of a frontier-free Europe and was “an enthusiastic supporter of liberalization, which accorded with long-standing demands of British industry, the competitiveness of British service providers, and Thatcherite ideology.”<sup>335</sup> National barriers sustained through non-compliance would have left the UK with the worst possible outcome: restricted access to the European market combined with the “federalist” political reforms already agreed in the SEA, most notably the introduction of qualified majority voting. Moreover, the UK had traditionally been one of the most compliant member states in the Community. Sanctions would thus not be a measure that primarily threatened to afflict them. Rather, financial penalties would be a way of correcting existing asymmetries in member states’ compliance records.<sup>336</sup> By the same token, it was thought that “[s]anctions could have the effect of constraining the approach to the development of various other policies of states that, viewed from the British perspective, appeared to be over-enthusiastic in agreeing ways forward but less impressive in implementing them.”<sup>337</sup>

Prepared to compromise with national sovereignty, given the promise of a level and open playing field in Europe, the British government answered to the supranational institutions’ calls for sanctions. The UK proposal targeted disrespect for Court judgments, though it was thought that this *ultima ratio* option also would have a deterrent effect on non-compliance in general. The essence of the proposal was a revision of the existing Article 171. Whereas previously, this article only had been declaratory, the amendment suggested by the UK would add teeth. Under this proposal, the Commission and the Court would have the option of imposing financial penalties on a member state once non-compliance with a first judgment had been established in a second decision, following a repeated Article 169 proceeding.

The UK proposal was favorably received by the other member governments. In view of previous intransigence as regards sanc-

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<sup>334</sup> E.g., Shackleton, 1991, p. 596; Mendrinou, 1996, p. 14.

<sup>335</sup> Moravcsik, 1998, p. 319.

<sup>336</sup> E.g., Shackleton, 1991, p. 596; Mendrinou, 1996, p. 14.

<sup>337</sup> Mendrinou, 1996, p. 14.

tions, this degree of support may seem puzzling. Three factors explain the endorsement. To start with, the other governments, too, found the deepening of compliance problems worrying. Whereas not every government fully shared the UK's enthusiasm for the deregulatory aspects of the Internal Market exercise, and some had supported it for its reregulatory and integration-driving elements, all found widespread non-compliance threatening to the realization of the project. This was evidenced not least by a declaration on the implementation of Community law, which was attached by the member governments to the TEU at Maastricht.<sup>338</sup>

Second, it bears repeating that the UK constituted the most sovereignty-conscious member state of all. If the British government supported this reinforcement of the supranational institutions' powers—yes, even championed the amendment—then it would have been surprising indeed, if the others had found the consequences for national sovereignty prohibitive. The member states that, according to this reasoning, should have found the trade-off between compliance and sovereignty least attractive were those with the most to lose from the introduction of sanctions. However, the states with the worst compliance records concerning ECJ judgments were Italy and Belgium—two staunchly federalist countries and ardent supporters of the supranational institutions.<sup>339</sup>

The third and final factor explaining the widespread approval of the UK proposal was the proposal itself. For a treaty revision introducing sanctions, the amendment of Article 171 could hardly have been less consequential in terms of national sovereignty and practical usage. The design of the sanctioning mechanism, with the requirement of two judgments and two full rounds of the infringement procedure, guaranteed that only very few cases could become subject to the imposition of sanctions, and that this would not be a means for everyday enforcement of EC rules.

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<sup>338</sup> This declaration has been described as the culmination of governments' concern with non-compliance. Snyder, 1993, p. 21. For the full text of declaration 19 attached to the TEU, see appendix 2.

<sup>339</sup> See figure 5.6 in chapter five.

*The Commission widens the range of possible sanctions*

Notwithstanding the supranational institutions' campaign for sanctions to be included in the treaty, the Commission's immediate reception of the British proposal was not one of overwhelming enthusiasm. Stephen Weatherill and Paul Beaumont refer to the Commission's response as "lukewarm."<sup>340</sup> While capturing the careful and slightly critical air of the Commission's replication, this description is not sufficiently sensitive to the tactical context of the IGC. When the UK put the question of sanctions on the IGC agenda, this provided a window of opportunity for the Commission. Not since the founding fathers had decided against the inclusion of sanctioning provisions in the EEC Treaty, had sanctions been on the table of intergovernmental negotiations in the Community. In addition, the reaction of other member governments was one of support for the UK's initiative. In this context, it would have been unwise of the Commission to enthusiastically endorse an option regarded as secondary to other alternative sanctioning mechanisms. Instead, the Commission chose to distribute a paper at the IGC, which evaluated a wide set of possible arrangements, the UK proposal and its own prioritized options included.<sup>341</sup> This contribution is given an in-depth treatment here, as it unveiled the Commission's thinking on sanctions, constituted an attempt to induce governments into endorsing the sanctioning arrangements most favored by the Commission, and set forth proposals, which the supranational institutions would later act on independently in spite of member governments' dismissal at the IGC.

The document sketched four alternative ways of introducing penalties for failure to comply with EC rules. The first possibility, immediately dismissed by the Commission, was a sanctioning provision such as the one in the ECSC Treaty. Given earlier Commission statements in favor of this form of sanctioning arrangement, the dismissal was perhaps somewhat surprising. Two explanations were forwarded. First, the provisions in the ECSC Treaty had actually never been used, and there was a suspicion that the same misfortune would afflict corresponding means in the

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<sup>340</sup> Weatherill and Beaumont, 1995, p. 210.

<sup>341</sup> European Commission, 1991a.

EEC Treaty.<sup>342</sup> Second, and more importantly, the sanction of countermeasures, though conceivable in a limited policy domain such as coal and steel, ran the risk of actually dismantling the Internal Market by introducing new barriers as member states retaliated against non-compliance.

The second possible arrangement was the British proposal. The approach was, as noted above, one of careful and constructive criticism. This form of mechanism was doable, indicated the Commission, and suggested that one route would be to give the Court the power to decide, or to authorize the Commission to decide, to suspend payments owing to the offending state or to impose a financial penalty. As for the downside of the proposal, the Commission stressed practical as well as political difficulties. Practically, it would be difficult to set the penalty at such a level that it would be both effective and balanced, given the divergences in member states' financial situation. Politically, it was essential that an independent institution—either the Court alone or the Commission acting with the Court's authorization—set the amount and imposed the sanction, and that the Council was left out of the matter: "If the Council were to be involved, the spirit of mutual understanding between the Member States, or indeed their complicity (if several of them were guilty of an infringement), could make the sanction ineffectual in practice."<sup>343</sup>

Having dismissed ECSC sanctions and presented its reservations against the UK proposal, the Commission turned to the two options it preferred. Both pertained to decentralized enforcement through national courts, both involved the sanction of state liability, and both were relatively less resource demanding for the supranational institutions. The third alternative sanctioning mechanism was an amplification of Article 5 of the EEC Treaty. In its existing version, Article 5 conferred a general duty on the member states to take all appropriate measures to ensure the fulfillment of their obligations under EC law.<sup>344</sup> One of the re-

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<sup>342</sup> For discussions of why, see Audretsch, 1986, p. 140; Dashwood and White, 1989, p. 140.

<sup>343</sup> European Commission, 1991a, p. 130. The Court's preference was for the Commission to set the amount of the penalty, while the Court took the decision to impose it. European Commission, 1991, p. 130a; Shaw, 1993, p. 127.

<sup>344</sup> For the full text of Article 5, see appendix 1.

quirements, imposed by this article and the Court's jurisprudence in the matter, was the adequate provision in national legal systems of remedies for individuals suffering from state non-compliance with EC rules. Uneven and sometimes inadequate provision of such remedies rendered the situation far from satisfactory, however, spurring the Commission to suggest that these requirements be explicitly spelled out in the treaty. Among the requirements the Commission wished to see specified were judicial remedies for citizens, financial liability of public authorities toward the victims, and the possibility of interim measures. The Commission concluded by stating that, if necessary, the EU institutions could be endowed with the power to harmonize or coordinate the rules in national legal systems on this point.

The fourth sanctioning arrangement considered by the Commission was a suggestion to extend the jurisdiction of the Court in cases concerning state non-compliance with treaty obligations. Here, the Commission canvassed a number of possible extensions, among them, the power to annul or declare national law incompatible with Community law, and the power to specify what measures a member state had to take to end an infringement. Clearly most favored was the proposal of granting the Court the power to explicitly declare in judgments that the effect of an infringement was to render the offending member state financially liable toward individuals, whose EC rights had been violated. Comparing state liability to the British proposal for a sanctioning mechanism, the Commission found the first to be highly superior: "A real possibility of having this liability duly established would have a much greater deterrent effect on Member States than the possibility of being ordered to make fixed or periodic penalty payments."<sup>345</sup>

*The outcome: A revised Article 171*

The Commission did not succeed in garnering government support for its preferred solutions. Article 5 had already been criticized by member governments as being a tool too frequently used by the Court to expand the European judicial order.<sup>346</sup> Furthermore, the

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<sup>345</sup> European Commission, 1991a, p. 133.

<sup>346</sup> E.g., Caranta, 1995, p. 704.

specification by an intergovernmental treaty of the procedural rules of internal legal systems would have infringed on the institutional autonomy of national courts, as would also, of course, the realization of the Commission's audacious bid for powers to harmonize remedy provisions in national legal orders. The proposals to endow the Court with the power to specify the consequences of its compliance judgments—measures to be taken and financial compensation to victims—challenged entrenched government positions on the Court's competence. In the case of financial liability for public authorities, the realization of the proposal would have entailed the introduction of a principle, which did not even exist in all national legal systems for violations of national law. While, indeed, the dismissal of these suggestions spoke for itself, EU governments also took the opportunity to respond in point, in the declaration on the implementation on Community law attached to the TEU: "[I]t must be for each Member State to determine how the provisions of Community law can best be enforced in light of its own particular institutions, legal system and other circumstances."<sup>347</sup>

Member governments instead settled for a less consequential and more sovereignty-friendly alternative. The UK proposal had been presented in the early stages of the IGC and the Commission's paper was distributed later in the spring of 1991. When the Luxembourg Presidency summed up the negotiations thus far in its draft treaty in June 1991, the British suggestion for amendment of Article 171 was included.<sup>348</sup> Little suggests that the question was up for reevaluation, as the Luxembourg draft proposals remained in place in the final version of Article 171, agreed at Maastricht in December 1991.

In their revision of Article 171, member governments followed the recommendations of the supranational institutions that the Commission should propose the amount of the penalty, while the Court should take the final decision to impose it on the faulting member state. At the same time, however, governments opted for a more restricted choice of financial penalties, when excluding the possibility to suspend payment of sums owing to offending mem-

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<sup>347</sup> For the full text of this declaration, see appendix 2.

<sup>348</sup> Weatherill and Beaumont, 1995, p. 210.

ber states. In its adopted version, the revised Article 171 specified that the Commission, at the end of a second infringement proceeding, could propose a lump sum or penalty payment to be approved by the Court, if it found that the member state had failed to comply with its earlier judgment.<sup>349</sup>

*The 1991 IGC and supranational influence: The implications*

The process, through which Article 171 was equipped with sanctions, bears on the hypotheses generated by the P-S-A model in clear and identifiable ways.

First, both supranational supervisors and government principals were spurred into action by the growing awareness that existing enforcement means were insufficient to prevent non-compliance from undermining the Internal Market. Only by amending the treaty and adding sanctions to the enforcement arsenal, could disrespect for EC rules be contained, argued the supranational institutions. That also governments came to support a move in this direction can only be understood in view of the threat posed by spiraling non-compliance to the completion of the Community's most ambitious project so far.

Second, the Commission sought to affect governments' choice of sanctioning mechanism by introducing alternative proposals, preferred from a supranational perspective. These proposals were consistently more resource efficient from the point of view of the supranational institutions, being aimed at decentralized rather than centralized enforcement. The Commission's suggestions were also, however, more threatening to national sovereignty.

Third, enjoying a privileged position of agenda control, national governments had little difficulty unveiling the consequences of the supranational proposals and blocking unwanted initiatives. By balancing the distribution of information and offering governments an extreme form of participation-based monitoring, the format of the IGC made supranational maneuvering exceedingly difficult. On the one hand, the IGC format, as opposed to everyday policymaking in the EU, entailed that governments were free to present their own proposals for sanctioning mechanisms without involving the Commission. Stripped of its monopoly on initiative, the Com-

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<sup>349</sup> For the full text of Article 171 as revised through the TEU, see appendix 1.

mission could not ensure that all possible agreements would have to be built around its own, carefully thought-out proposal. On the other hand, the IGC format permitted governments to fully peruse the Commission's suggestions for alternative sanctioning arrangements and identify their implications. Well aware of the competing proposals' consequences for national sovereignty, EU governments chose a restrictive reinforcement of centralized enforcement over the more far-reaching alternative of formally recognizing and extending the decentralized enforcement system.

### **The 1996-97 IGC and the Failure to Boost Sanctions**

While highly effective when used, the construction of the new sanctioning mechanism clearly prevented it from functioning as the ultimate enforcement weapon. In view of this limit, the Commission proposed at the 1996-97 IGC that Articles 169 and 171 be upgraded, so as to further boost the supranational supervisors' enforcement means. This time, member state principals were more reluctant to confer new powers. Despite clever maneuvering on the part of the Commission, member governments had few difficulties identifying the implications of its proposals. The Commission was forced to dilute its suggestions, until it could finally gain unanimous support for an extremely weakened intervention mechanism in the post-IGC period.

#### *The new Article 171: Effective when used, but seldom employed*

As part of the TEU, the revised Article 171 entered into force on November 1 1993, and in June 1994 the Commission informed member states that it was planning to make full use of the new enforcement instrument.<sup>350</sup> While in formal terms, the new Article 171 primarily granted additional competence to the Court, it was the Commission that would be the real manager of this sanctioning power. It was up to the Commission to set sufficiently deterrent penalty levels and to decide when such cases should be referred to the Court for a decision. In mid-1996, the Commission implemented the new sanctioning provisions by laying down crite-

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<sup>350</sup> European Commission, 1995b, p. 1e.

ria for the setting of penalty levels. “[I]n the spirit of openness,”<sup>351</sup> the criteria were communicated to member states in the form of two memoranda, which clearly fulfilled functions of deterrence as well as information.<sup>352</sup>

Confronting the choice offered by the new provisions as to the nature of the sanction, the Commission stated that it would employ penalty payments rather than lump sums, in view of the former’s superior deterrence capacity. The level of the penalty payments would be based on the seriousness of the infringement, its duration, and the need to ensure that the penalty was sufficient to deter future infringements. To secure a sufficiently deterrent effect, the Commission would take into consideration the member states’ ability to pay, as well as their weight in the Council. No member state—whether rich or poor, powerful or powerless—should have the capacity to lightly ignore the Court’s judgments.

Having prepared the ground, the Commission made use of the new sanctioning power for the first time in January 1997, when it proposed penalties on Germany and Italy in five cases.<sup>353</sup> Reflecting the criteria laid down by the Commission, the amounts suggested were highly deterrent, ranging from 26,400 to 264,000 ECU/day. Commenting on the decision, Commissioner Ritt Bjerregaard stated: “It is the first time that the Commission makes use of its powers according to article 171 in the Treaty. It is also high time. The public and the European Parliament are waiting impatiently as they rightly see article 171 as a needed means to improve implementation in general and in the environment and internal market in particular.”<sup>354</sup>

Table 7.1 summarizes all the cases where the Commission requested penalties during 1997 and 1998. The table illustrates that member states have been quick to back down, when penalties have been proposed. In no single case has the Commission and the Court been forced to actually carry out the threat of applying sanctions. In almost half of the cases, member states complied

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<sup>351</sup> European Commission, 1996e, p. 6.

<sup>352</sup> European Commission, 1996e; 1997b.

<sup>353</sup> It took long before the provisions were used for the first time, because no cases initiated under the new regime reached the stage of a second referral to the ECJ until late 1996.

<sup>354</sup> European Commission, 1997a.

within days of the Commission decision, and before their cases were referred to the Court for the second time. In another two instances, member states retreated once the cases had been referred to the ECJ, but before the Court had approved the imposition of penalty payments. A number of cases were at the end of March 1999 pending decision either at the Commission (referral not yet executed by the Legal Service) or at the Court (in process, but no judgment yet). Evaluating the sanctioning mechanism's capacity to enforce compliance in the first cases where it was used, the Commission rightly concluded: "The threat of the penalty proved extremely effective."<sup>355</sup>

Table 7.1 Commission requests for penalty payments to be imposed under Article 171, 1997-1998

<i>Member State</i>	<i>Policy Area</i>	<i>Penalty ECU/day</i>	<i>Commission Decision</i>	<i>Stage Settled</i>
Italy	Environment	159,300	29.1.1997	Before referral
Italy	Environment	123,900	29.1.1997	Before referral
Germany	Environment	158,400	29.1.1997	After referral
Germany	Environment	26,400	29.1.1997	After referral
Germany	Environment	264,000	29.1.1997	Before referral
Greece	Environment	24,600	26.6.1997	Pending at ECJ
Belgium	Environment	7,750	10.12.1997	Before referral
Greece	Internal Market	61,500	10.12.1997	Before referral
Greece	Internal Market	41,000	10.12.1997	Pending at ECJ
France	Internal Market	158,250	31.3.1998	Before referral
France	Environment	105,500	24.6.1998	Pending at ECJ
Greece	Internal Market	39,975	24.6.1998	Pending at COM
Italy	Environment	185,850	2.12.1998	Pending at COM
Luxembourg	Social Policy	14,000	2.12.1998	Pending at COM

Source: European Commission, 1998e, 1998f, 1998h; interviews, Commission official, February 2 1998, and March 23 1999.

Notwithstanding this effectiveness in bringing about compliance, the revised Article 171 has been a mixed success. The provisions have only been employed in a very limited number of cases,

<sup>355</sup> European Commission, 1998e. Also, interviews, Commission official, February 24 1998 and March 23 1999.

and the mechanism certainly has not demonstrated any capacity to function as a general means of enforcement. The sanctioning procedure under Article 171 suffers from weaknesses similar to those of the Article 169 procedure, which is not surprising given that it consists *de facto* of two such proceedings with the threat of sanctions tagged on at the end.

First, the Commission considers the Article 171 procedure too slow and cumbersome to make it the enforcement weapon that could finally do away with member state non-compliance. The two rounds of informal consultations, letters of formal notice, reasoned opinions, referrals to the ECJ, and Court judgments make the procedure extremely heavy.<sup>356</sup> In addition, by choosing such a construction, governments effectively circumscribed the domain of state non-compliance where sanctions could be used as a means of enforcement.

The second weakness is the influence of political consideration on the decision on whether to request sanctions against a state. While Article 169 proceedings seldom stir political commotion, as they have become too commonplace, it is inevitable that the imposition of actual financial sanctions by supranational institutions on sovereign member states is a highly sensitive matter. Consequently, Commission officials testify to certain hesitancy within the organization, as regards requests for penalties against non-complying states.<sup>357</sup> To collect penalty payments of, say, 150,000 ECU/day from a member state, and at the same time attempt to gain its support for new legislative proposals, the future budget, or the distribution of regional aid, is a task not easily performed.

Reflecting on the Commission's enforcement instruments as upgraded by the revised Article 171, a centrally placed Commission official concluded: "It could be argued that the Commission's enforcement powers against member states ultimately are not all that strong, and it may be something that ought to be looked at in the context of the IGC."<sup>358</sup> The Commission would later come to work actively and intensely for placing this issue on the agenda of the 1996-97 IGC, and for engineering government support for revisions of Articles 169 and 171.

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<sup>356</sup> Interview, Commission official, December 15 1997.

<sup>357</sup> Interview, Commission official, December 15 1997.

<sup>358</sup> Interview, March 22 1996.

*Calls for further sanctioning powers meet with state opposition*

The decision to convene a new IGC in 1996 had been taken by EU governments already at the preceding IGC and subsequently been inscribed in the TEU.<sup>359</sup> Following a decision by the European Council at its Corfu summit in June 1994, a “Reflection Group” was set up and charged with the task of preparing the work of the IGC. The Reflection Group—composed of representatives of the member states, the Commission, and the Parliament—began its work in early June 1995 and presented its final report at the European Council summit in Madrid in December 1995. The IGC was opened in Turin on March 29 1996.

Neither of the supranational institutions included evaluations of the new sanctioning provisions under Article 171 in their 1995 reports to the Reflection Group on the operation of the TEU. The Commission’s Legal Service held the position that no assessment could be conducted, as no case commenced under the new regime had yet reached the sanctioning stage.<sup>360</sup> On this note, the Commission shied away from suggesting further revisions, and instead repeated its intention to make use of this new power when given reason and opportunity.<sup>361</sup> Echoing the Commission, the Court declined to comment on the amended Article 171, as it had not yet been asked to apply these new provisions.<sup>362</sup>

The question of sanctions was nevertheless raised in the work of the Reflection Group. In an oral presentation to the Group, the Belgian member, Law Professor Franklin Dehousse, proposed that Article 171 be removed and its sanctioning provisions inserted into Article 169.<sup>363</sup> The rationale of this proposition was to simplify and shorten the sanctioning procedure, permitting financial penalties to be imposed on member states already after the first Court judgment and the subsequent establishment that the necessary measures to comply had not been taken. The suggestion received meager support among the other member state represen-

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<sup>359</sup> Article N, para. 2, TEU.

<sup>360</sup> Internal Commission memo, February 22 1995.

<sup>361</sup> European Commission, 1995e, p. 33.

<sup>362</sup> European Court of Justice, 1995b, pp. 3, 5.

<sup>363</sup> Internal Commission memo, November 15 1995. Interview, Commission official, January 7 1998.

tatives, who generally considered it politically unacceptable.<sup>364</sup> In its final report, the Reflection Group confined itself to noting that “[a] few have suggested the possibility of enabling the Court to enforce more swiftly the penalties it may impose.”<sup>365</sup>

Despite the negative reception of the Belgian proposal, this was the spark that set the Commission in motion and made the upgrading of supranational enforcement powers a question also for the 1996-97 IGC. No longer was the absence of actual proceedings under the new Article 171 a sufficient reason to refrain from criticizing the weaknesses of this sanctioning arrangement. In truth, it did not take actual experience of the new provisions to understand that the sanctioning procedure would be excessively, perhaps even prohibitively, slow and cumbersome.

In an internal analysis, the Commission’s Legal Service found the Belgian proposal an attractive solution to the problem of protracted infringement and sanctioning proceedings.<sup>366</sup> The proposed solution suffered from a number of deficiencies, however, motivating the Legal Service to suggest that a preferable option would be to maintain Article 171 but to remove its administrative phase, so that the Court could be seized immediately.<sup>367</sup>

In late 1995 and early 1996, the Commission services continued discussing ways of shortening the sanctioning procedure.<sup>368</sup> The suggestion to eliminate the administrative phase of the Article 171 sanctioning procedure received growing support. In addition, DG XV campaigned for greater enforcement powers as regards the Internal Market. When the Commission presented its opinion on the themes of the IGC in late February 1996, the inclusion of both these elements marked an essential difference compared to the Commission’s report to the Reflection Group one year earlier:

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<sup>364</sup> Interview, Commission official, January 7 1998.

<sup>365</sup> Reflection Group, 1995, p. 33.

<sup>366</sup> Internal Commission memo, November 15 1995.

<sup>367</sup> Most notably, under the Belgian proposal (*a*) a second Court decision would still be required in cases where a member state and the Commission disputed whether or not the necessary measures to comply with the first judgment had been taken, and (*b*) the Commission would have to go through the time-consuming job of calculating penalties in each Article 169 case referred to the ECJ, including those where the member state then decided to comply with the Court’s judgment.

<sup>368</sup> Internal Commission memos, December 8 1995, January 15 1996, and January 22 1996.

To consolidate the rule of law as the basis of the Union, the proper implementation and enforcement of Community law has to be assured....The Commission therefore believes that: (a) the means available to it to enforce Community law should be made more effective, notably as regards the internal market; (b) there should be a stronger role for the Court of Justice, particularly as regards compliance with its judgments.<sup>369</sup>

While the Commission, since the Belgian proposal in the Reflection Group in October 1995, had mobilized for a campaign on the issue of supranational enforcement powers, member governments had not found any reason to reevaluate the question. The Commission's calls fell on deaf ears. Summarizing the negotiations two months into the IGC, the Italian Presidency flatly concluded that a strengthening of existing enforcement powers was a non-issue: "[I]t is not thought necessary to amend Article 171 of the TEU."<sup>370</sup>

*Commission maneuvering reinstates enforcement on the agenda*

Government intransigence did not deter the Commission, however. The supranational supervisor was intent on providing member state principals with additional opportunities and reasons to delegate the enforcement means necessary to effectively combat non-compliance. Rather than taking no for an answer, the Commission reformulated its original proposals and sought intergovernmental channels for reinstating them on the IGC agenda.

In the spring of 1997, with only a few months left to the closing of the IGC, DG XV prepared a proposal with concrete suggestions on how to improve the speed and efficiency of the infringement and sanctioning procedures.<sup>371</sup> Two propositions were presented, which combined in a solution not previously considered. First, it was suggested that the reasoned opinion, sent by the Commission to member states in Article 169 proceedings, should be replaced by a reasoned decision, thus in effect granting the Commission the competence to adjudicate compliance cases. Second, it was sug-

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<sup>369</sup> European Commission, 1996c, p. 4. Enumeration added. See also European Commission, 1996d, 1996f.

<sup>370</sup> IGC, 1996b, p. 8.

<sup>371</sup> Internal Commission memo, April 3 1997.

gested that the sanctioning provisions of Article 171 be attached to Article 169 instead, thereby reducing the time it takes to get to the stage of sanctions. If a member state decided not to comply with the Commission's reasoned decision, then the case together with a penalty request could be referred to the ECJ for approval.

One way for the Commission to plant issues on the agenda of an ongoing IGC is to convince receptive governments to present its proposals as their own. As a Commission official in the Task Force monitoring the IGC put it: "You can always lobby a member state or the Presidency to present a Commission proposal under their own name, which happens now and then."<sup>372</sup> This was the strategy chosen in order to put the DG XV proposal on the agenda. In early May 1997, the Italian government submitted a proposal to the IGC that was, as one Commission official modestly expressed it, "Commission inspired."<sup>373</sup> Save for two, admittedly important, modifications, it was exactly the same document. Both alterations weakened the Commission's original proposal. First, the Italian government suggested limiting the upgrading of Article 169 to the field of the Internal Market by instead inserting a new paragraph in Article 100a.<sup>374</sup> Second, rather than removing Article 171 and attaching the sanctioning provisions to Article 169, it was proposed that the administrative stage of the sanctioning procedure be eliminated.

This proposal, which had not been part of Italy's original positions on the themes of the IGC,<sup>375</sup> did not fly with the majority of the other member governments. Following domestic turbulence in Spain, which suggested the need for some form of rapid means to safeguard the Internal Market, it did, however, inspire the Spanish government to present a slightly revised version in early June. The Spanish proposal did not differ in any major way from the Italian—either in terms of concrete propositions or in the other governments' reception.<sup>376</sup> When the IGC came to a close with the European Council summit in Amsterdam, June 16-17 1997, the

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<sup>372</sup> Interview, January 26 1998.

<sup>373</sup> IGC, 1997b. Interview, February 3 1998.

<sup>374</sup> For the full text of Article 100a, see appendix 1.

<sup>375</sup> IGC, 1996a.

<sup>376</sup> Internal Commission memo, June 9 1997.

treaty agreed upon did not contain any new provisions strengthening the enforcement weapons of the supranational institutions.

Analyzing the failure, the Commission suggests two primary reasons why the “Commission-inspired” Italian and Spanish proposals did not gain the support of the other member governments. The first explanation points to the late arrival of the issue on the agenda.<sup>377</sup> With only a few weeks to go and an immensely crowded agenda—most of the important decisions had been put off till the end—new, controversial issues were less than welcome, and stood a very limited chance of being worked out in time to be included in the new treaty. The second explanation stresses the consequences for national sovereignty of the proposed measures. These proposals included variants of suggestions that governments had discarded at the 1991 IGC and at earlier stages of the 1996-97 IGC. On all occasions, a corresponding strengthening of the supranational institutions’ enforcement powers had been perceived as highly threatening to national sovereignty. Submitted a DG XV official involved in the drafting of the original Commission proposal: “No matter when introduced [during the IGC], the proposal would have been too contentious.”<sup>378</sup>

The assertion that sensitivity to national sovereignty was prohibitive must be viewed in relation to developments in governments’ concern with compliance. A brief comparison between 1991 and 1996-97 suggests that governments’ compliance concerns had evolved in a direction that made them less willing to pay the price in national sovereignty for the gain in improved compliance. Whereas member state principals in 1991 had been receptive to the idea of boosted enforcement powers because of mounting compliance problems and the approaching 1992 deadline for the Internal Market, the situation in 1996-97 did not motivate similar concerns. The Internal Market was up and running (albeit with certain child diseases), the primary focus had shifted to the process of enlarging the EU to Central and Eastern Europe, and non-compliance with Court judgments had actually declined since the early 1990s.<sup>379</sup>

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<sup>377</sup> Interview, Commission official, December 15 1997.

<sup>378</sup> Interview, February 3 1998.

<sup>379</sup> See figure 5.5 in chapter five.

*The post-IGC game: Stripping the proposal of contentious elements*

While a failure in the sense that government principals did not agree to delegate more far-reaching enforcement powers, the conclusion of the IGC still left hope for the future. At Amsterdam, the Commission had managed to get a “hook” into the Council conclusions—as Commission officials expressed it<sup>380</sup>—which opened the door to future supranational proposals in this area:

The European Council underlines the crucial importance of timely and correct transposition of all agreed legislation into national law, the need fully to inform citizens and business about the Single Market, and the necessity of active enforcement of Community law in the Member States and the introduction of more rapid and effective procedures for problem-solving including deliberations at Council level in cases of recurring problems. The European Council requests the Commission to examine ways and means of guaranteeing in an effective manner the free movement of goods. It requests the Commission to submit relevant proposals before its next meeting in December 1997.<sup>381</sup>

This hook provided the Commission with an opportunity to revise its proposal and present it anew to member governments in a format more likely to be accepted. To use summit conclusions as a launching pad for Commission proposals was nothing original, but a rather common Commission tactic. As one senior Commission official, cited by John Peterson, has asserted: “[Summit declarations] give you a knock out blow in negotiations. If you can cite a European Council conclusion in a debate you’re away.”<sup>382</sup> In this case, it permitted the Commission to develop a proposal for a regulation during the fall of 1997.

When the Internal Market Council met for an informal meeting in Echternach, Luxembourg, at the beginning of October 1997, Commissioner Mario Monti recalled the Amsterdam mandate, and declared his intention to present a legislative proposal for a means

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<sup>380</sup> Interviews, December 15 1997 and February 3 1998.

<sup>381</sup> European Council, 1997, pp. 11-12.

<sup>382</sup> Cited in Peterson, 1995, p. 72.

to rapidly correct Internal Market violations.<sup>383</sup> At the meeting, the governments of Italy, Spain, and Portugal were, not surprisingly, quick to support this initiative.<sup>384</sup> On November 18, the full Commission adopted the proposal for a Council regulation.<sup>385</sup> The regulation would endow the Commission with special powers in cases involving serious obstacles to the free movement of goods. The Commission would be permitted to request, through a binding decision, member states to remove such obstacles within a particular time period, after which it could rapidly seize the Court through an accelerated Article 169 procedure. While still an appeal for new substantive enforcement powers, the proposal was nevertheless a shadow of its former self. Drafted on the philosophy that “a limited proposal is more likely to be accepted by the member states,”<sup>386</sup> this version excluded the most contentious elements of the “Commission-inspired” Italian and Spanish proposals presented at the IGC.

The reception of the proposal was mixed. When member governments were given the opportunity to react at the Internal Market Council in late November, their general response was positive, though also involving certain legal and institutional objections.<sup>387</sup> When, again, the issue was considered at the informal meeting of the Internal Market Council in Cambridge in mid-February 1998, governments repeated their support for the idea in principle, but also “expressed doubts about the proposal, questioning the legal basis for Internal Market Commissioner Mario Monti’s attempts to speed up procedures to punish governments which fail to dismantle serious obstacles.”<sup>388</sup> The positive element should be understood against the backdrop of the Commission’s now more sovereignty-friendly proposal, as well as the French lorry drivers’ strike in late 1997, which effectively illustrated that the Commission lacked the powers necessary to secure the free movement of

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<sup>383</sup> Internal Commission memo, October 10 1997.

<sup>384</sup> Internal Commission memo, October 10 1997.

<sup>385</sup> European Commission, 1997f. On this proposal, see also European Commission, 1997g; 1998c, p. iv; *European Voice*, 1997a, p. 1.

<sup>386</sup> Interview, Commission official, February 3 1998.

<sup>387</sup> Internal Commission memo, December 1 1997.

<sup>388</sup> *European Voice*, 1998b, p. 31. See also European Commission, 1998i.

goods in Europe.<sup>389</sup> The negative element should be understood in view of the still far-reaching strengthening of the Commission's powers that such a regulation would entail, and the fear that it would have implications for the democratic right to strike, laid down in the national law of the member states.<sup>390</sup>

While weaker than previous proposals, the draft regulation was thus still not uncontroversial and certainly did not enjoy the support of all governments, which was necessary given the requirement of unanimity in the Council. On the contrary, the Commission testifies that, at the time, almost all governments opposed the proposal as it stood: "[L]a quasi-unanimité des Etats membres s'est opposée au mécanisme d'intervention tel que proposé par la Commission car, selon eux, il conférait un pouvoir de décision à la Commission qui allait rompre l'équilibre institutionnel voulu par le Traité."<sup>391</sup> It was clear that, if the Commission wanted anything to come out of its efforts, it would have to agree to a further dilution of the proposal.

Following the failure of Commissioner Monti to secure support for the proposal at the Internal Market Council in late March 1998, the British Presidency engaged the other governments in attempts to find a solution which would be acceptable to all parties. The late spring of 1998 witnessed the welding of such a compromise, and at the Internal Market Council on May 18, member governments reached a unanimous political agreement on the establishment of a rapid intervention mechanism.<sup>392</sup> In substance, the agreement entailed a significant weakening of the Commission's proposal. Rather than the delegation of new and substantive centralized enforcement powers, it specified two parallel and quite lame legislative instruments. First, as a diluted version of the Commission's November proposal, a regulation establishing a rapid intervention mechanism on Community level was to be adopted. The role of the Commission had been scaled down, however, in order to meet governments' worries. Instead of the power to order member states to remove obstacles to the free movement of goods, the Commission would now only be granted the right to

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<sup>389</sup> *European Voice*, 1998a, p. 5; 1998b, p. 31.

<sup>390</sup> European Commission, 1998i; *European Voice*, 1998a, p. 5; 1998b, p. 31.

<sup>391</sup> European Commission, 1998l, p. 11.

<sup>392</sup> *European Voice*, 1998d, p. 31.

notify states of the existence of such barriers. Second, the agreement specified a (non-legally binding) resolution confirming member states' commitment to take the necessary measures to remove obstacles to the free movement of goods. Through consecutive steps of adaptation to the preferences of EU governments, the Commission proposal, envisaging a significant up-grading of Articles 169 and 171, had been watered down to an unrecognizable regulation, laying down an impotent intervention mechanism.

*The 1996-97 IGC and supranational influence: The implications*

The negotiations at and after the 1996-97 IGC, on a possible strengthening of the supranational institutions' enforcement powers, bring home three points of particular relevance to the hypotheses of the P-S-A model.

First, again, the Commission responded to the incapacity of existing means to secure compliance with requests that member state principals delegate more far-reaching powers, and with attempts to maneuver governments into accepting supranational proposals. The impetus behind this activity was not actual experience of the new Article 171, as much as the realization that the construction of the sanctioning mechanism limited its capacity to effectively contain non-compliance. All the Commission's suggestions were targeted at ways, in which the infringement and sanctioning procedures could be made more efficient, and thereby more effective and deterrent.

Second, from beginning to end, this process illustrates the Commission's limited capacity to engineer agreement for proposals that would have brought an evident increase in the supranational institutions' enforcement powers. Because of government principals' control over the agenda at the IGC, and the relative symmetry of information on the consequences of treaty article revisions, it was exceedingly difficult for the Commission to gain approval for planted proposals, even when these were dressed up as government initiatives. At no stage did the consequences of the Commission's enforcement-enhancing suggestions escape member governments. These results accord with general assessments of the IGC. Mark Pollack notes that the 1996-97 IGC constituted an "an information-rich context relatively uncondusive to entrepreneurial

agenda-setting,”<sup>393</sup> and Andrew Moravcsik and Kalypso Nicolaïdis attribute the general lack of supranational influence to clear and stable member state preferences and a balanced distribution of information.<sup>394</sup>

Third, member states’ greater reluctance to strengthen EU enforcement in 1996-97 as compared to 1991, is best explained by shifts in the trade-off between national sovereignty and compliance. The proposals presented at the 1996-97 IGC *de facto* would have entailed a more extensive reinforcement of supranational enforcement powers. But, in addition, compliance concerns figured less prominently, with the Internal Market in place and the compliance with Court judgments improving.

### Summary

IGCs offer an opportunity for the supranational institutions to exert independent influence in EU enforcement by planting and engineering accord for proposals that governments otherwise would not have agreed to. This chapter has shown, however, that the format of the IGC facilitates member state control and effectively reduces the capacity of the institutions to push enforcement beyond governments’ wishes. The inadequacy of existing enforcement means moved the supranational supervisors to request more far-reaching powers at both the 1991 and 1996-97 IGCs. Balancing the distribution of information, governments’ agenda control and the transparency of the supranational proposals enabled state principals to easily identify the implications for national sovereignty. Member governments’ decision at the 1991 IGC to introduce sanctions into the treaty, while refraining from further boosting this power in 1996-97, is best explained by their unprecedented concern with non-compliance in the early 1990s. With a view to next chapter, it is of particular importance that one of the proposals forcefully and repeatedly dismissed by EU governments was the introduction of some form of state liability system.

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<sup>393</sup> Pollack, 1999, p. 13.

<sup>394</sup> Moravcsik and Nicolaïdis, 1999. For a diverging opinion, see Christiansen and Jørgensen, 1998.



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CHAPTER  
**EIGHT**

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**INDEPENDENTLY CREATING NEW POWERS:  
DECENTRALIZED ENFORCEMENT THROUGH  
NATIONAL COURTS**

This chapter is the third and final of three on the supranational institutions' efforts to boost EU enforcement in response to compliance problems threatening the completion of the Internal Market. Here the focus shifts to the third possible way the Commission and the Court may exercise independent causal influence in EU enforcement: single-handedly creating new means of supervision.

In this chapter, I advance three primary arguments. First, perceiving centralized "police-patrol" enforcement as limited in its capacity to secure adequate compliance, and decentralized "fire-alarm" enforcement as holding the promise of more efficient and effective supervision, the supranational supervisors independently initiated a gradual shift toward the latter in the late 1980s. Through a string of important decisions, the ECJ laid down principles and requirements, strengthening the hand of individuals wishing to enforce their EC rights in national courts. In parallel, the Commission launched policy initiatives aimed at ameliorating weaknesses in the existing structure of decentralized enforcement. I provide a detailed analysis of the Court's establishment of the principle of state liability, and of the Commission's Citizens First and Robert Schuman programs.

Second, with their aim of reinforcing a system of enforcement that national governments had explicitly decided not to strengthen at the 1991 IGC, these efforts qualify as attempts at supranational shirking. But, reflecting the variance in the monitoring mechanisms of member state principals, the Commission was

markedly more constrained in its actions than the ECJ, whose judicial independence greatly facilitated the introduction of measures unwelcome in the capitals of Europe.

Third, two parallel attempts at sanctioning the Court can be distinguished: the campaign by some member governments to clip the wings of the ECJ at the 1996-97 IGC, and the recalcitrant reception of the new jurisprudence by some national governments and courts. While the sanction of treaty revision failed as a result of the high institutional barriers involved, the sanction of inaction was more successful in limiting, at least partially and temporarily, the effects of the Court's activism in the area of enforcement. Assessing the net result of this process, I conclude that the Commission and, in particular, the Court nevertheless succeeded in exerting supranational influence in their promotion of decentralized enforcement.<sup>395</sup>

The chapter is divided into four sections. In the first, I account for the motives behind the shift toward greater reliance on decentralized enforcement, as well as introduce the gist of the Commission's and the Court's steps. The second section analyzes the ECJ's establishment of the principle of state liability, while the third section deals with the Commission's Citizens First and Robert Schuman programs. The fourth and final section examines the two forms of sanctions launched against the ECJ.

### **Toward Effective Decentralized Enforcement**

The supranational supervisors' motives for attempting to shift the center of gravity in EU enforcement rested both with the limits of centralized "police-patrol" supervision and the merits of decentralized "fire-alarm" supervision. Despite its promise of more efficient and effective enforcement, decentralized supervision, too, suffered from certain deficiencies. As the supranational institutions moved to further supplement centralized with decentralized enforcement in the late 1980s and early 1990s, their efforts were directed at these identified weaknesses. Working in tandem, the ECJ laid

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<sup>395</sup> For a more condensed analysis of how the ECJ exerted supranational influence in EU enforcement when introducing the principle of state liability, see Tallberg, forthcoming.

down enforcement-enhancing principles and requirements through its case law, while the Commission launched policy programs aimed at strengthening the structure of decentralized enforcement.

*The promise of effective decentralized enforcement*

In the late 1980s, as non-compliance was on the rise and the Article 169 procedure was put under growing strain, it became increasingly clear that centralized enforcement alone would not be sufficient to secure compliance with Internal Market rules.<sup>396</sup> Stated Claus-Dieter Ehlermann, the influential director-general of the Commission's Legal Service at the time: "After almost ten years of energetic policy regarding infringements, practical and legal limits of this centralized control mechanism have now become clearly apparent."<sup>397</sup> As shown in chapters six and seven, the next decade would bring a set of efficiency-enhancing reforms as well as the delegation of certain sanctioning powers. These improvements notwithstanding, centralized enforcement suffered from inherent and permanent weaknesses, strongly limiting its ability to secure adequate compliance.

The infringement and sanctioning procedures were by design exceedingly slow and sluggish, or as the Commission itself put it, "by definition time-consuming."<sup>398</sup> While the Commission's internal reforms succeeded in reducing the time required for handling cases within the institution, they were not capable of changing the nature of these procedures. Lamented one Commission official: "No matter how much we speed it up, it is always going to be a slow procedure."<sup>399</sup> In addition, the management of centralized enforcement was extremely resource demanding. Given the Commission's limited resources, further reliance solely on this form of supervision would most probably have resulted in a declining quality of enforcement.<sup>400</sup> With the shift from implementation to

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<sup>396</sup> E.g., Ehlermann, 1992, p. 225; Steiner, 1993, pp. 6-7.

<sup>397</sup> Ehlermann, 1988, p. 146.

<sup>398</sup> European Commission, 1997d, p. 8. Also, interviews, Commission officials, March 22 1996, December 15 1997, February 3 1998.

<sup>399</sup> Interview, February 2 1998. Also, interview, Commission official, December 15 1998.

<sup>400</sup> On the Commission's limited resources, see Ehlermann, 1988, p. 146; Ludlow, 1991, p. 94; European Commission, 1993c, p. 18; From and Stava, 1993, p. 64. Also, interviews, Commission officials, September 25 1996 and February 13 1998.

application of the Internal Market rules, the need for effective monitoring would reach an “unprecedented”<sup>401</sup> scale, in view of which the Commission perceived its existing resources as “clearly insufficient.”<sup>402</sup> The limits of centralized enforcement means forced the supranational institutions to consider and search for alternative forms of supervision. Concluded Ehlermann: “[C]entralized control alone will never ensure that Community law is observed in all Member States, whatever effort is made to strengthen this control.”<sup>403</sup>

A boosting of decentralized enforcement became the supranational supervisors’ solution to the problem of inadequate enforcement means at the centralized level. This idea had already been brewing in Brussels and Luxembourg for quite a few years. As shown in the previous chapter, early supranational calls for the delegation of sanctioning powers had, as a rule, included the option of some form of state liability principle, permitting individuals to sue and obtain compensation from non-compliant states in national courts. In the mid- to late 1980s, the early thinking crystallized into a concrete alternative for the enforcement of EC rules in the future Community. Again, Ehlermann expressed most clearly the Commission’s reasoning on the subject at the time:

I would like to present you with the following principle: instead of concentrating only on the functioning of centralized control, the Commission, the European Parliament and the Council should focus as much, if not more, attention on strengthening decentralized control of the implementation of Community law...In a Community of 12 Member States, with some 320 million inhabitants, we think it more important also to be able to count on the decentralized control mechanisms, triggered by private individuals and enterprises obtaining redress before national courts.<sup>404</sup>

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<sup>401</sup> European Commission, 1989c, p. 4. Also European Commission, 1993c, p. 11; interview, Commission official, February 13 1998.

<sup>402</sup> European Commission, 1993c, p. 11. As the Commission acknowledged in its 1993 Strategic Programme: “The scale of the problem is such that it merits a more detailed examination in order to identify the most efficient approaches to the task [of monitoring].” European Commission, 1993c, p. 11.

<sup>403</sup> Ehlermann, 1988, p. 147.

<sup>404</sup> Ehlermann, 1988, pp. 147-148.

Sharing this vision of how EC supervision should develop, Guisepppe Ciavarini Azzi, director in charge of enforcement coordination at the Commission's Secretariat General, asserted at the same colloquium that "the future lies with the 'decentralized control' of the application of Community law."<sup>405</sup> The Court's consent with this assertion is most evident in the particular string of judgments that it began to hand down in the mid- to late 1980s, and the Parliament, too, encouraged a development in this direction.<sup>406</sup> These public announcements indicating a new line of thinking on enforcement prompted a legal observer to conclude in 1989: "The advantages of decentralized supervision on the enforcement of Community law, through national courts and other bodies, are beginning to find wider recognition."<sup>407</sup>

What, then, were the merits and strengths of decentralized enforcement that motivated the supranational institutions to embrace this alternative form of supervision? First, decentralized enforcement would not be limited by the Commission's resource limitations. Instead, it would shift the costs of supervision to individuals, enterprises, and national courts, and thereby alleviate some of the enforcement burden placed on the Commission and the Court. This was particularly important in view of the Internal Market program: "National courts must be in a position to resolve a larger proportion of cases concerning the conformity of rules or behaviour with Community law—the number of which can be expected to increase substantially in the context of the Single Market—if the Commission and the Court of Justice are not to be inundated."<sup>408</sup> A move to decentralized enforcement would also permit monitoring of state compliance on the ground, which centralized supervision as a rule was unable to perform. These advantages would in no way be unique to decentralized supervision

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<sup>405</sup> Azzi, 1988, p. 200.

<sup>406</sup> E.g., European Parliament, 1988, p. 10.

<sup>407</sup> Bronckers, 1989, p. 529. In a 1991 talk, Ehlermann confirms the solid anchoring of these thoughts within the Commission: "Whatever views may have been held in the Commission regarding its own supervisory powers, for a number of years we in Brussels have been convinced that centralized supervision must increasingly be supplemented by decentralized enforcement." Ehlermann, 1992, p. 225.

<sup>408</sup> European Commission, 1993c, p. 17. See also European Commission, 1996f, p. 23.

in the EU context, but are in fact the classic merits of “fire-alarm” as opposed to “police-patrol” oversight.<sup>409</sup>

Second, decentralized enforcement would allow individuals to secure their rights under EC law more directly and more quickly.<sup>410</sup> Whereas the centralized enforcement procedures did not allow any direct access for citizens and companies, national procedures would grant individuals judicial standing and permit them to directly pursue cases against non-complying member states. Enforcement through national courts also held the promise of a quicker processing of cases, and thus of a more rapid correction of member state infringements. In a wider perspective, this advantage of decentralized enforcement tied into the more general wish to involve citizens more closely in Community affairs.<sup>411</sup> “Whatever the reaction of any government, a ‘grass roots’ construction certainly responds better to the aspirations of the 320 million Europeans living in the Community than the prospect of an insatiable superstructure which in the last resort is unable to ensure compliance by national administrations with the Community legal system.”<sup>412</sup>

The third advantage was the greater ease with which the supranational institutions could shape this form of supervision. As I will show in this chapter, the boosting of decentralized enforcement could be engineered by the supranational supervisors with a certain degree of autonomy, not least because government principals lacked means for blocking advances in ECJ jurisprudence.

#### *The weaknesses of existing decentralized enforcement*

The basic building blocks of the decentralized enforcement structure had been laid down already in the 1960s with the Court’s establishment of the principles of direct effect and EC law supremacy. Through these doctrines, the ECJ turned the preliminary ruling system under Article 177 from a mechanism that allowed individuals to challenge EC law in national courts, into a means for challenging national law and enforcing EC law in national

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<sup>409</sup> McCubbins and Schwartz, 1984.

<sup>410</sup> European Commission, 1993b, p. 11.

<sup>411</sup> E.g., Shaw, 1993, p. 139.

<sup>412</sup> Ehlermann, 1988, p. 150.

courts.<sup>413</sup> The principle of direct effect, laid down in the 1963 judgment *Van Gend & Loos*,<sup>414</sup> posited that EC law created legally enforceable rights for individuals, allowing them to invoke Community provisions directly before national courts. The principle of EC law supremacy, first established in the 1964 decision *Costa v. ENEL*,<sup>415</sup> stipulated that EC law “trumps” national law when in conflict. Together, these doctrines turned the preliminary ruling procedure on its head, as the combined effect was to make national courts legally compelled to ignore conflicting national law and to enforce individuals’ rights under EC law.

When the supranational institutions took steps to boost decentralized enforcement in the late 1980s and early 1990s, this form of “fire-alarm” supervision had already been in operation for more than two decades. After some initial opposition among many national courts, these had accepted to enforce the EC rights of citizens and companies, and to refer cases to the ECJ when interpretative uncertainty so demanded.<sup>416</sup> National courts had become the linchpins of the European legal system and had entered into a symbiotic relationship with the ECJ. A functional division was established, where the European Court interpreted Community law, while national courts referred cases to the ECJ and later applied its interpretation to the facts of these cases. From a very limited number of Article 177 references yearly in the 1960s, these increased to around 50 in the mid-1970s, slightly over 100 in the early 1980s, and close to 200 around 1990.<sup>417</sup>

While revolutionary in its creation of a new tier of enforcement, this transformation of the preliminary ruling system was not sufficient to turn national courts, individuals, and enterprises into effective enforcers of Community law. As Josephine Steiner notes: “Although the fundamental principles of direct effect and suprema-

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<sup>413</sup> See, especially, Stein, 1981; Rasmussen, 1986; Weiler, 1991.

<sup>414</sup> *Van Gend & Loos*, Case 26/62 (1963).

<sup>415</sup> *Costa v. ENEL*, Case 6/64 (1964).

<sup>416</sup> The relationship between the ECJ and national courts is the subject of a substantial literature in Political Science and Law. On the acceptance among national courts of the doctrines and principles handed down by the ECJ, see Weiler, 1991, 1993; Burley and Mattli, 1993; Alter, 1996; Golub, 1996; Slaughter, Stone Sweet, and Weiler, 1998; Stone Sweet and Brunell, 1998b. On the duties of national courts as EC courts, see Maher, 1994; Temple Lang, 1997. For critical evaluations of this literature, see Alter, 1998b; Kilpatrick, 1998.

<sup>417</sup> Stone Sweet and Brunell, 1998b, p. 74.

cy of Community law were laid down in the 1960s and developed in the 1970s they did not prove adequate in themselves to protect individuals' Community rights or to deter member states from breaching Community law.<sup>418</sup> A number of problems plagued this decentralized enforcement structure, as it stood in the mid-1980s, rendering it insufficient both in terms of protecting Community rights and as a complement to centralized enforcement.

The first and primary weakness was the substantial differences between national legal systems as to the procedural and substantive rules governing access to courts, legal remedies, penalties, etc., making it exceedingly difficult to achieve an even and effective level of enforcement of Community law across all member states. Whereas all were obliged to enforce EC law, national courts were part of national legal systems, formed by different legal traditions and cultures. While stating in its early case law that it was not for the ECJ to harmonize or create new procedures and remedies, the Court nevertheless tried to achieve some degree of uniformity by laying down three basic principles to be followed by national courts: national treatment, non-discrimination, and effectiveness.<sup>419</sup> The classic formula, containing all principles, was first introduced in the 1976 judgment *Rewe-Zentralfinanz*.<sup>420</sup> There it was explained that it was for the domestic system of each member state to designate the courts having jurisdiction and the procedural rules governing the protection of EC rights, as long as these conditions were not less favorable than those relating to similar domestic actions and did not make it impossible in practice to secure Community rights.

Notwithstanding these attempts by the Court to lay down principles ensuring an even and uniform enforcement of EC rules, experience confirmed substantial divergences in actual practices. As Francis Jacobs, advocate-general at the Court, expresses the accepted truth among legal observers: "The inevitable consequence of relying on national remedies and procedures for the enforcement of Community law is that the latter is not applied with complete uniformity throughout the Community."<sup>421</sup> This was widely inter-

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<sup>418</sup> Steiner, 1995, p. 171.

<sup>419</sup> For a good discussion, see Steiner, 1995, ch. 5.

<sup>420</sup> *Rewe-Zentralfinanz*, Case 33/76 (1976), para. 5.

<sup>421</sup> Jacobs, 1997, p. 26.

preted as a major weakness in the system of decentralized enforcement, not least in view of the entry into force of the Internal Market provisions in the early 1990s.<sup>422</sup> Noted the Commission with concern: "If businesses and individuals are to operate confidently in the single market, they need to know that there are adequate means of redress available to them should they run into problems. In a single Community market covering different national jurisdictions, this cannot be taken for granted."<sup>423</sup> Jacobs went as far as to state: "The need for uniformity has often been stressed but the explanation is quite simply that, in the absence of uniformity, there would be no Community law."<sup>424</sup>

A second and related weakness emerged from the Court's attempts through the years to lay down conditions, criteria, and principles ensuring an effective and deterrent judicial protection of EC rights in national courts. Established one by one in a patchwork fashion, these rules and requirements brought near harmonization to certain aspects of national legal procedures and to the protection of certain EC rights, while others fell through the cracks. One of the areas, where few steps had been taken by the Court prior to the mid-1980s, were remedies in national courts. Remedies are, slightly simplified, legal means or procedures, which aggrieved parties may seek, and include, for example, the right to restitution of money paid contrary to applicable rules, the right to interim relief pending judgment, the right to damages for losses suffered as a result of infringements, and the right to judicial review. In the mid-1980s, it was highly unclear what forms of remedies were available for breaches of EC law; and where existing case law provided clues, the conclusion was not necessarily to the advantage of the effective protection of EC rights.<sup>425</sup> Most important for the remainder of this chapter, it was recognized that no such thing as a general principle of state liability existed.

The third weakness of the decentralized enforcement structure was of a cognitive nature. Enforcement through citizens and enterprises, safeguarding their Community rights in national courts,

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<sup>422</sup> E.g., European Commission, 1992c, pp. 38-51; 1993c, p. 16; 1996f, p. 18; Van Gerven, 1995, 1996.

<sup>423</sup> European Commission, 1995c, p. 15.

<sup>424</sup> Cited in Van Gerven, 1996, p. 514fn.

<sup>425</sup> E.g., Steiner, 1987; Szyszczak, 1992, p. 691; Prechal, 1997, p. 4.

can only be effective if individuals are aware of these rights, and lawyers and judges are capable of identifying the Community dimension of the cases before them. In the late 1980s and early 1990s, however, the Commission found the awareness of EC rights and law wanting in both these key groups, which clearly impeded the effectiveness of decentralized enforcement.<sup>426</sup> Not only did this lack of awareness entail a lower than optimal level of enforcement generally, but it also contributed to unfortunate variations in the application of EC law throughout the Community.

*Boosting decentralized enforcement*

As the Court and the Commission moved to boost decentralized enforcement, their efforts were directed at these identified weaknesses.<sup>427</sup> Like many times before, the supranational institutions worked in tandem for the attainment of a common goal: effective decentralized enforcement.<sup>428</sup> In this process, the Court laid down legal principles and requirements that the institutions had advocated for quite some time. These would ensure both a more uniform protection of EC rights and a more deterrent weapon against state non-compliance. The Commission, for its part, launched policy programs aimed at strengthening decentralized enforcement, which drew support and power from the principles and requirements laid down by the Court.

The ECJ's campaign to boost national courts as enforcers of EC rules began in the mid-1980s and stretched over more than a decade. Noted Steiner in 1995: "[T]he last decade has seen a determined effort on the part of the Court of Justice to increase the effective enforcement of Community law by extending the scope for its enforcement by individuals before their national courts."<sup>429</sup> The heart of this campaign coincided with, and was an expression of,

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<sup>426</sup> E.g., European Commission, 1989c, p. 14; 1992c, pp. 27-28, 38, 45; 1993c, p. 16.

<sup>427</sup> These measures to induce state compliance by boosting decentralized enforcement paralleled simultaneous processes of decentralization in the enforcement of competition rules, in the establishment of regulatory standards, and in the administration and application of EC rules. On competition, see European Commission, 1993a, 1995d. On regulation, see Majone, 1996, ch. 3. On administrative cooperation, see European Commission, 1994a, 1996a.

<sup>428</sup> On "cooperation" between the Commission and the Court, see Stein, 1981; Mancini, 1991, p. 179; Burley and Mattli, 1993, p. 71; Pollack, 1998, p. 249.

<sup>429</sup> Steiner, 1995, p. 171.

what is widely acknowledged as a period of activism in the Court's jurisprudence, before a period of consolidation began in the early 1990s.<sup>430</sup> The focus of these efforts were the remedies available in national courts. As Gerhard Bebr concluded in 1992: "The recent case law of the Court reveals an intention to develop a coherent system of legal remedies."<sup>431</sup>

In a string of ground-breaking decisions, the Court laid down principles and requirements for the remedies and procedures that citizens and companies should have access to in national courts, when wishing to safeguard rights granted by EC rules. Marking the initiation of the Court's crusade, the judgment in *Von Colson*<sup>432</sup> expanded the principle of effectiveness and required that national legal remedies be both sufficiently effective to protect individuals' EC rights and to function as a deterrent against future non-compliance. In *Factortame I*<sup>433</sup> and *Zuckerfabrik*,<sup>434</sup> the Court substantially enhanced individuals' right to interim relief and established that this form of remedy would have to be provided, even where no such provisions existed in national law. In *Emmott*,<sup>435</sup> the Court limited member states' ability to apply national limitation periods to cases brought against them and thereby to bar individuals from securing their rights in national courts. In *Marshall II*,<sup>436</sup> the ECJ expanded individuals' rights to obtain damages from member states violating directly effective directives, stating that compensation must be adequate in relation to the damage. The culmination of the Court's attempts to ensure effective remedies in national courts was, however, its judgment in *Francovich*,<sup>437</sup> where a completely new damages remedy was created—state liability—granting individuals and companies the right to financial compensation from non-complying member states.

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<sup>430</sup> E.g., Tridimas, 1996, p. 200; Dehousse, 1998, ch. 6.

<sup>431</sup> Bebr, 1992, p. 564.

<sup>432</sup> *Von Colson*, Case 14/83 (1984).

<sup>433</sup> *Factortame I*, Case C-213/89 (1990).

<sup>434</sup> *Zuckerfabrik*, Joined Cases C-143/88 and C-92/89 (1991).

<sup>435</sup> *Emmott*, Case C-208/90 (1991).

<sup>436</sup> *Marshall II*, Case C-271/91 (1993).

<sup>437</sup> *Francovich*, Joined Cases C-6 and 9/90 (1991).

Taken by themselves, these steps might seem disparate. But, as Francis Snyder emphasizes in an influential article, when considered together with existing enforcement means in national courts and at the centralized Community level, “these elements can be seen to be interconnected, interdependent, forming a coherent whole and, in this sense, systematic.”<sup>438</sup> In a wider perspective, the boosting of legal remedies in general, and the establishment of the principle of state liability in particular, stand out as a second or third stage or pillar in the development of a fully effective structure of decentralized enforcement. Some legal observers describe this judicial campaign as the third stage in achieving a decentralized enforcement system, after the initial development of the doctrines of direct and indirect effect and EC law supremacy,<sup>439</sup> while others compare it to the third pillar in an enforcement edifice:

[T]he ECJ has been able to construct a remarkable enforcement system, which is without precedent on the international plane. The whole edifice rests on three main pillars: (a) an interpretation of the EC Treaty as a source of rights which may be invoked by private parties before courts, (b) a procedural avenue for the dialogue between national courts and the ECJ (Article 177 preliminary rulings) and, more recently, (c) a system of state liability for violations of Community law.<sup>440</sup>

Parallel to the Court’s case law development, the Commission has since the early 1990s attempted to perfect, and fill gaps in, the functioning of decentralized enforcement, by launching a number of policy initiatives within the general framework of managing the Internal Market. The origin of these initiatives was a report presented in 1992 by the so-called High Level Group on the Operation of the Internal Market, chaired by former commissioner Peter Sutherland. The High Level Group had been requested by the Commission to identify potential problems and suggest a strategy as to how the full benefits of the Internal Market could be

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<sup>438</sup> Snyder, 1993, p. 40. See also Prechal, 1997.

<sup>439</sup> Steiner, 1995, ch. 2; Goebel, 1997.

<sup>440</sup> Dehousse, 1998, p. 46. Enumeration added.

secured post-1992.<sup>441</sup> On enforcement, the message was clear and unequivocal: Centralized supervision must be increasingly supplemented by decentralized enforcement through national courts. Concrete recommendations stressed the need to raise the awareness of Internal Market rules among citizens and business, to improve the knowledge of EC law in the legal professions, to promote an approximation of sanctions against non-complying private parties, to inform individuals about the possibilities offered by the principle of state liability, and to generally work toward a uniform and effective enforcement of EC rules in national courts.

Most of the suggestions on enforcement outlined in the Sutherland report were subsequently included in the Commission's 1993 Strategic Programme on how to make the most of the Internal Market.<sup>442</sup> The Strategic Programme firmly endorsed the measures proposed and stressed the need to ensure that "the capacity of national courts to apply Community law is optimised."<sup>443</sup> Drawing on this general philosophy and the more specific proposals, the Commission developed, from about 1993 onwards, a set of concrete policy initiatives aimed at boosting decentralized enforcement. The Citizens First initiative answered to the calls for an information policy, making individuals aware of their rights in the Internal Market and of how they should go about securing these. The Robert Schuman project sought to improve the knowledge of EC law in the legal professions. A Commission communication was issued, stressing member states' obligation to ensure that penalties in national courts against private parties infringing Internal Market rules were effective, proportionate, and dissuasive.<sup>444</sup> In another communication, the Commission proposed a Council act on improved judicial cooperation between the member states, in particular, a reinforcement of the mutual recognition of judgments.<sup>445</sup>

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<sup>441</sup> European Commission, 1992c.

<sup>442</sup> European Commission, 1993c. Interview, Commission official, September 25 1996.

<sup>443</sup> European Commission, 1993c, p. 16.

<sup>444</sup> European Commission, 1995a. This communication later resulted in a Council resolution. Council of Ministers, 1995.

<sup>445</sup> European Commission, 1997i.

In the next two sections of this chapter, I provide a detailed analysis of, first, the Court's development of the principle of state liability, and second, the Commission's launching of the Citizens First and Robert Schuman programs. The selection of these supranational initiatives is motivated by three principal factors. First, all three are concrete and significant attempts to ameliorate weaknesses in decentralized supervision, which impede the potential of citizens, companies, and national courts to function as effective enforcers of EC rules. Second, all three initiatives thereby boosted a system of enforcement potentially more threatening to national sovereignty, which member governments had explicitly decided not to reinforce at the 1991 IGC. And third, to varying degrees, all three constitute cases of open conflict between the supranational institutions and member states, thus unveiling the actors' preferences, excluding the possibility of complete supranational adaptation to government interests, and illuminating member states' true capacity to control the Commission and the Court.

### **The ECJ and the Principle of State Liability**

With the establishment of the principle of state liability, the ECJ *de facto* created new, decentralized sanctions against member states that fail to implement Community provisions and to comply with EC law. The fact that government principals had explicitly decided against fiercer sanctions than Article 171, as well as discarded the alternative of introducing a principle of state liability, did not discourage the supranational supervisor. The ease, with which the ECJ could shirk and introduce measures colliding head on with the positions of EU governments, is best attributed to member states' lack of capacity to intervene through participation-based monitoring.

#### *The ECJ establishes and expands the principle of state liability*

The establishment of the principle of state liability is a cornerstone in the reinforcement of decentralized enforcement and one of the most significant developments in Community law in the

1990s.<sup>446</sup> Before this principle was introduced, national courts could only under very limited circumstances award damages to individuals who had suffered from member state non-compliance. The principle of direct effect only provided a remedy in the individual case, where Community acts clearly conferred directly enforceable rights. Many EU directives did not fulfill the requirements of direct effect, however (e.g., many directives pertaining to employee and consumer protection). To the extent that member states failed to implement such directives correctly or in time, individuals were deprived of the rights granted by these rules as well as incapable of claiming compensation in national courts. Neither did the principle of indirect effect offer a solution in this very common situation. As it stood in 1990, the decentralized enforcement system therefore provided neither adequate protection of individuals' EC rights, nor effective sanctions to deter member states from non-compliance.

The case of *Francovich* provided the perfect opportunity for the Court to close these dual gaps. The case arose as a result of the Italian government's failure to implement a directive regulating protection of employees in the event of an employer's insolvency. The directive required member states to operate guarantee institutions, which would ensure payment of outstanding salaries in cases of bankruptcy. The directive was supposed to have been implemented already in 1983, but despite this lengthy time period and an Article 169 judgment against the Italian state in 1989, no implementing measures had been taken when the *Francovich* case came before the Court in 1990 and was decided in 1991. The direct reason for the referral of the case to the ECJ was a suit in an Italian court against the Italian state by an employee, Mr. Francovich, who had suffered from the non-implementation of this directive.

Recognizing that existing legal remedies did not offer any right to financial compensation in cases like this, the ECJ introduced a completely new remedy—state liability—that previously had not

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<sup>446</sup> The principle of state liability has been the object of an enormous amount of legal attention and research. See, e.g., Bebr, 1992; Duffy, 1992; Szyszczak, 1992; Tesauero, 1992; Caranta, 1993, 1995; Craig, 1993, 1997; Ross, 1993; Steiner, 1993; Uecker, 1994; Tagaras, 1995; Emiliou, 1996; Gardner, 1996; Jarvis, 1996; Simon, 1996; Wooldridge and D'Sa, 1996; Irmer and Wooldridge, 1997; King, 1997; Quitzow, 1997; Wathelet and Van Raepenbusch, 1997.

been acknowledged by the Court or recognized by legal observers as inherent in Community law.<sup>447</sup> The Court established that the new principle was general in nature, and thus not dependent on direct effect. Relying on purposive and teleological reasoning, the Court argued that the full effectiveness of Community law would be called into question and that the protection of individuals' rights under it would be weakened, if compensation could not be obtained in cases where member states had violated Community law. The Court concluded by stating that this principle, given previous case law and the aims of the treaty, in fact was inherent in this judicial order: "It follows that the principle whereby a State must be liable for loss and damage caused to individuals as a result of breaches of Community law for which the State can be held responsible is inherent in the system of the Treaty."<sup>448</sup> In more specific terms, the Court determined that an individual can claim compensation, given that three conditions are satisfied: (1) that the directive confers rights on individuals, (2) that the contents of those rights are apparent from the directive, and (3) that there is a causal link between the state's failure to implement the directive and the loss suffered by the persons affected.

By introducing a new, general principle of state liability, the Court thus circumvented the weaknesses of existing remedies, improved individuals' possibilities to obtain compensation when their rights have been infringed upon, and provided a powerful incentive for member states to comply with EC rules. As Paul Craig concluded: "[I]t is clear that the rationale for the existence of state damages liability for breach of EC law is in part deterrence, in the sense of providing an incentive for Member States to comply with Community law; and in part the desire to ensure the effective protection of Community rights through the provision of compensation when those rights have been infringed."<sup>449</sup>

The price for this new principle was the challenge against the institutional and procedural autonomy of national courts. While the Court had previously asserted that the treaty "was not intended to create new remedies in the national courts to ensure the

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<sup>447</sup> For pre-1991 discussions on the topic of state liability, see Simon and Barav, 1987; Barav, 1988.

<sup>448</sup> *Francovich*, Joined Cases C-6 and 9/90 (1991), para. 35.

<sup>449</sup> Craig, 1997, p. 85. Also, e.g., Steiner, 1993, p. 11; Jarvis, 1996, p. 235.

observance of Community law,<sup>450</sup> this was exactly what it did with the principle of state liability. “[T]he time has come to accept that the ECJ has created a new, *sui generis*, tort.”<sup>451</sup> *Francovich* thereby marked the definitive departure from the traditional approach, where the Court’s part had been confined to the definition of rights and duties, while the procedures and remedies of decentralized enforcement depended entirely on the legal systems of the member states.<sup>452</sup>

Most national legal systems did not provide a liability remedy against the state in matters of *national* law, making it all the more difficult to offer one for actions brought under *Community* law. National governments and courts would therefore have to create or designate new legal procedures to allow for claims brought on the basis of the principle of state liability. Concludes Snyder: “While thus recognising that Community rights are to be enforced primarily in national courts, the Court’s jurisprudence has none the less impinged increasingly on national legal remedies...[T]he Court of Justice is beginning to contribute to the restructuring of national procedural systems.”<sup>453</sup>

But, *Francovich* raised as many questions as it closed. For example, did the principle of state liability apply to all kinds of Community acts, treaty articles as well as other kinds of provisions; to all kinds of breaches, lacking as well as late and incorrect implementation; to breaches by all branches of government, administrative as well as legislative and judicial? Familiar with the ECJ’s custom of gradually expanding established principles, legal observers expected a progressive continuation. Malcolm Ross noted that “[t]he elasticity of the key passages in the Court’s judgment in *Francovich* provides ample ammunition for an expansive approach to the future development of individual protection,”<sup>454</sup> while Steiner concluded that “[a] principle of State liability is a

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<sup>450</sup> *Rewe-Zentralfinanz*, Case 33/76 (1976), para. 5.

<sup>451</sup> Steiner and Woods, 1996, p. 380.

<sup>452</sup> E.g., Caranta, 1993, p. 282; Ross, 1993; Gardner, 1996, pp. 280-282.

<sup>453</sup> Snyder, 1993, pp. 45-46. Gardner advances a similar conclusion: “Although the Court has traditionally held that only national courts are free to determine what form of remedies to award for the infringement of EU law, it has eviscerated that principle in practice.” Gardner, 1996, p. 280.

<sup>454</sup> Ross, 1993, p. 57.

powerful instrument in the enforcement of Community law; it is likely that the Court of Justice will seek to maximise its use.”<sup>455</sup>

In 1996, these expectations were fulfilled, as the Court answered the outstanding questions in a long line of cases, which elucidated and specified the principle. In the linked cases *Brasserie du Pêcheur* and *Factortame III*,<sup>456</sup> the Court expanded the principle, when establishing that it applies to *all* breaches of *all* Community law, that is, regardless of whether the EC rule infringed is a treaty article, directive, or regulation, and regardless of whether the infringement results from actions of the legislative, executive, or judicial branches of government. The ECJ had thereby confirmed the general applicability of the principle of state liability. Aligning the principle with the conditions governing liability of the EU institutions under Article 215, the Court differentiated, however, between situations where the member state in its actions enjoyed little discretion (e.g., implementation of directive) and wide discretion (e.g., legislation involving choice between alternative arrangements). In the latter situation, state liability would only arise if the infringement fulfilled the additional condition of having been “sufficiently serious.”

In the remaining three formative cases that followed during 1996, *British Telecommunications*,<sup>457</sup> *Hedley Lomas*,<sup>458</sup> and *Dillenkofer*,<sup>459</sup> the Court addressed what had become the key remaining question: the definition of a sufficiently serious breach of Community law. In *Brasserie du Pêcheur* and *Factortame III*, the Court had already specified that a breach was sufficiently serious when a member state had manifestly and gravely disregarded the limits of its discretion, which it clearly had if the breach continued despite a relevant ruling from the ECJ or settled case law. In addition, the Court had suggested a number of other factors that might have to be considered. Elaborating on these conditions, the ECJ held in *British Telecommunications* that a breach was not sufficiently serious, if the directive was imprecisely worded and capable of bearing the meaning given to it by a government acting in

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<sup>455</sup> Steiner, 1993, p. 11.

<sup>456</sup> *Brasserie du Pêcheur* and *Factortame III*, Joined Cases C-46 and 48/93 (1996).

<sup>457</sup> *British Telecommunications*, Case C-392/93 (1996).

<sup>458</sup> *Hedley Lomas*, Case C-5/94 (1996).

<sup>459</sup> *Dillenkofer*, Joined Cases C-178, 179, 188, 189, and 190/94 (1996).

good faith. In *Hedley Lomas*, the Court strengthened the principle of state liability by stating that the mere infringement of Community law could be enough to establish the existence of a sufficiently serious breach, given that the member state at the time had little or no discretion. Finally, in *Dillenkofer*, the Court clearly stated that all instances, where member states have not implemented a directive in time, constitute *per se* serious breaches of Community law, thus giving individuals the right to financial compensation. As 1996 came to a close, the Court had achieved what it, and for that matter the Commission, desired. Concluded a councilor with the Commission's Legal Service: "Everything is now set. Today we cannot think of any action of a member state that could not give rise to state liability."<sup>460</sup>

The cases handed down in 1996 reinforced the impression that the price for this potent enforcement weapon was a challenge of the functional division between the ECJ and national courts. Whereas the establishment of state liability in 1991 impinged on the institutional and procedural autonomy of national legal systems, the subsequent elaboration in 1996 challenged the notion that the ECJ interprets and national courts apply EC law. The highly detailed conditions and specifications laid down by the Court left little to be settled at the national level, as Craig observes with respect to *Brasserie du Pêcheur* and *Factortame III*: "This 'guidance' from the ECJ effectively resolved the crucial factual issues in the two cases."<sup>461</sup> This dual challenge led one legal scholar to conclude that the principle of state liability had brought a clear shift in the relationship between the ECJ and national courts: "The logic is not consociational, but one of control. It entails the construction by the Court of Justice of positive legal institutions in a more detailed and extensive manner than previously,

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<sup>460</sup> Interview, February 18 1998.

<sup>461</sup> Craig, 1997, p. 86. See also Emiliou, 1996, pp. 410-411. Note, however, that this distinction between interpretation and application never has been fully respected by the ECJ. Particularly revealing is a description by ECJ judge Mancini of how the Court's respect for the division in principle was coupled with transgressions in practice: "But having paid this lip service to the language of the Treaty and having clarified the meaning of the relevant Community measure, the Court usually went on to indicate to what extent a *certain type* of national legislation can be regarded as compatible with that measure. The national judge is thus led by the hand as far as the door; crossing the threshold is the judge's job, but now a job no harder than child's play." Mancini, 1991, p. 185. Emphasis in original.

with a corresponding loss of autonomy for national courts whose role would be reduced to that of fact-finding agencies and administrators of the Court's judgments."<sup>462</sup>

*A case of Court shirking*

The establishment of the principle of state liability constituted an essential step in the Court's efforts to reinforce decentralized, "fire-alarm" enforcement. By conferring on individuals the right to obtain compensation from non-complying member states, the Court greatly expanded the role of citizens and companies in the enforcement of Community law, and equipped decentralized supervision with a highly deterrent sanction. The fundamental question from the perspective of supranational influence is, however, whether this move also constituted a case of Court shirking. The test of supranational shirking prescribes that we first trace governments' positions and reactions, since these may be sufficient to establish shirking, if we find that the Court moved beyond the preferences of member state principals.

All existing evidence firmly indicates that the Court exploited its privileged position of interpretation to introduce a means of enforcement that collided head on with government preferences at the time, and with their original intention when delegating supervisory powers to the ECJ. The Court's judgment in *Francovich* was delivered on November 19 1991, just a few weeks before the closing of the IGC, at a time when it was clear that member governments at that very conference had discarded the alternative of introducing state liability sanctions, and instead had chosen to revise Article 171. Not surprisingly, therefore, "[t]he decision sent shock waves through European capitals,"<sup>463</sup> and provoked loud cries about judge-made law and judicial activism.

EU governments had expressed their positions on state liability directly to the Court before the passing of the judgment. Member states' preferences with respect to a particular case or principle are best revealed through the legal briefs, "observations," they

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<sup>462</sup> Chalmers, 1997, p. 191. For an article where a judge of the ECJ defends the Court's actions by claiming that there really is no such thing as national procedural autonomy, thereby inadvertently explaining the Court's behavior in this area and confirming the fears of many legal observers, see Kakouris, 1997.

<sup>463</sup> Garrett, Kelemen, and Schulz, 1998, p. 170.

may submit to the ECJ on all actions before it. These observations are also the primary instrument, through which they can actively signal their positions to the ECJ and attempt to influence jurisprudence.<sup>464</sup> As a consequence, the Court is always well informed of governments' preferences regarding a particular case.

Besides the Italian government, the defendant, three other governments submitted written or oral observations in the *Francovich* case. All rejected the argument that anything like a principle of state liability was inherent in the treaty, and all emphasized the need to preserve the institutional and procedural autonomy of national legal systems.<sup>465</sup> The UK stated that there was no basis in Community law for the proposition that an individual has the right to obtain compensation from a member state that has failed to fulfill its obligations. On the contrary, the Court's case law showed that the treaty was not intended to create new remedies in national courts. The Dutch government submitted that there was no Community law on the question of state liability, and that, consequently, possible liability could only be determined on the basis of national liability rules. In addition, the Dutch government stressed the institutional autonomy of national courts, stating that it was for national legal systems to lay down the applicable substantive and procedural rules. The German government, finally, contended that the liability of member states did not fall within the competence of the Community.

When the question of state liability returned in 1996 with *Brasserie du Pêcheur* and *Factortame III*, there were still governments that insisted that state liability was a question of national law and that no basis for such a principle could be found in the treaty.<sup>466</sup> This time, governments opposed to the principle— the German, the Irish, and the Dutch—also made a point of firmly emphasizing that the 1991 IGC had decided not to lay down any general rules governing state liability and instead had chosen to revise Article 171. In its extremely forceful observation, the German government even went as far as to openly accuse the ECJ of

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<sup>464</sup> Everling, 1984, p. 228; Stone Sweet and Caporaso, 1998, p. 115.

<sup>465</sup> *Francovich*, Joined Cases C-6 and 9/90 (1991), paras. 15-17.

<sup>466</sup> *Brasserie du Pêcheur* and *Factortame III*, Joined Cases C-46 and 48/93 (1996), paras. 30-46. It should be noted, however, that this time governments were divided, as some had come to accept the introduction of state liability.

judicial activism and of violating the institutional balance in the EU:

The *German Government* considers that it was not the intention of the Community legislature to establish any general liability on the part of Member States for infringements of Community law. It points out that during the negotiations concerning the Maastricht Treaty the Member States did not adopt any rules in that regard. The new version of Article 171 of the EC Treaty merely provides for the imposition of penalties on Member States which do not comply with the Court's judgments. The German Government further states that an extension of Community law by judge-made law going beyond the bounds of the legitimate closure of lacunae would be incompatible with the division of competence between the Community institutions and the Member States laid down by the Treaty, and with the principle of the maintenance of institutional balance. The institutions having legislative competence, in particular the Council and the Parliament, cannot be excluded from the establishment of a general right to compensation, which requires democratic legitimation. Furthermore, such a principle requires an alteration of the Treaty entailing financial implications which also necessitate the consent of national parliaments.<sup>467</sup>

The legal observations submitted by EU governments justify the conclusion that the Court, when introducing and expanding the principle of state liability, went beyond the preferences and intentions of government principals as regards the structure of EU enforcement. To answer the counterfactual question Andrew Moravcsik urges us to confront when we identify incidents of probable supranational influence, it is extremely unlikely that EU governments would have stepped in to introduce this decentralized sanction had not the Court. The form of open conflict exposed in this case precludes the inference that what appears as a supranational institution acting with substantial autonomy in fact is a perfectly controlled supervisor. Rather than preempt negative re-

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<sup>467</sup> *Brasserie du Pêcheur* and *Factortame III*, Joined Cases C-46 and 48/93 (1996), para. 32. Emphasis in original. Note that the quote is from the summary of the German observation in the report on the hearing, not the original brief.

actions by avoiding undesired actions, the Court charged ahead with a principle that challenged explicit government preferences and later would induce some governments to launch the first formal attack ever on the ECJ.

In this perspective, it is interesting that Geoffrey Garrett, Daniel Kelemen, and Heiner Schulz use the principle of state liability as a case confirming the explanatory power of their intergovernmental theory of legal politics in the EU. The core of Garrett, Kelemen, and Schulz's legal politics argument is the assertion that the Court is sensitive to, and acts on, government preferences. Applying this proposition to the development of state liability, they argue that the string of judgments delivered in 1996 illustrate how the ECJ limited the principle in ways desired by powerful national governments. "These cases suggest that the ECJ is willing to tailor its state liability rulings in ways that the core member governments, especially France and Germany, wish."<sup>468</sup>

This conclusion does not hold when confronted with the empirical evidence presented here, and indeed seems to have been based more on theoretical assumption than on a detailed examination of this doctrinal development. The argument is subject to both empirical and logical limits, of which four are particularly notable. First, and most importantly, the 1996 judgments cannot be interpreted a retreat in the face of member state opposition. Whereas, correctly, the sufficiently serious condition added in *Brasserie du Pêcheur* and *Factortame III* constituted a clarification of the criteria which must be fulfilled for states to be liable, this was, however, combined with the *extension* of state liability to *all* breaches of *all* Community law. Rather than a limitation of the principle, these two judgments are therefore generally interpreted in the legal community as a broadening of the state liability doctrine.<sup>469</sup> Moreover, in both *Hedley Lomas* and *Dillenkofer*, the Court further strengthened the principle by chipping away at the sufficiently serious condition. Second, even a cursory reading of the German observation submitted on *Brasserie du Pêcheur* and *Factortame III* suffices to preclude the conclusion that the Court should have tailored its ruling to the preferences of the German government.

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<sup>468</sup> Garrett, Kelemen, and Schulz, 1998, p. 173.

<sup>469</sup> E.g., Wooldridge and D'Sa, 1996, p. 167; Craig, 1997, p. 77; Quitzow, 1997, p. 693; Dehousse, 1998, p. 55; interview, Commission official, February 19 1998.

Third, if indeed we were to accept their argument, then we would expect the Court to accommodate governments in some other way than by introducing a condition (sufficiently serious breach) that required such detailed instructions to national courts as to seriously challenge their autonomy in applying EC law. Finally, it is logically flawed to assume that the Court suddenly became sensitive to government preferences *after* the principle had been established in *Francovich*. The observations submitted by EU governments, as well as the positions taken at the 1991 IGC, had fully revealed member states' sharp opposition to a principle of state liability, and the strong reaction therefore came as no surprise. An ECJ rationally adapting its judgments to government preferences would never have proceeded with the introduction of state liability in the first place.

*Judicial independence and the absence of intrusive monitoring*

If the establishment of the principle of state liability constitutes an instance of supranational shirking, then how can we explain this degree of autonomy? The P-S-A model posits that the capacity of member state principals to prevent supranational shirking rests with the monitoring mechanisms they can furnish, while shirking that has already occurred may be undone only at a second stage through sanctioning. Whereas member states' attempts to sanction the Court and undo the effects of its legal advances will be treated at length in a later section of this chapter, I explain here why they lacked the monitoring means to forestall Court shirking.

The case of state liability well illustrates the analytical and explanatory value of the distinction between participation- and observation-based monitoring. To refresh the reader's memory, participation-based monitoring refers to the ability of the principal to observe and intervene in the making of a decision or the execution of an action, while observation-based monitoring refers to the ability to observe an action or decision without the possibility to intervene in, and force a change of outcomes in, this process. The notable ease, with which the Court could shirk and introduce the principle of state liability, is best explained by member states' absence of means for interfering through participation-based monitoring. As reflected in the observations submitted in *Francovich*, governments were fully aware of the potential implications of a

general state liability principle. Still, they were unable to prevent the Court from proceeding with the establishment of the principle.

Needless to say, this autonomy from intrusive monitoring is an expression of the Court's judicial independence, which indeed constitutes a prerequisite for the ECJ to function as a court in the first place. It might seem like a truism to explain Court shirking by referring to the absence of interference through participation-based monitoring. Nevertheless, it is exactly this independence and member states' forced recourse to observation-based monitoring that make it uniquely easy for the Court to introduce measures, such as state liability, that go beyond many governments' interests. Whereas member states often can limit, stop, or even correct shirking by the Commission through monitoring, the only means they have at their disposal with respect to the Court are sanctions. Inability to prevent Court shirking is, with a different expression, the price that national governments must pay for the existence of a neutral and hierarchical judicial system within the Union, safeguarding the rule of law rather than the rule of power.

Member governments' lack of means to intervene in the ECJ's decision-making process should not, however, be taken as evidence that the ECJ is free to lay down whatever doctrine it wishes. Emphasizes one legal scholar: "The absence of formal external constraints implied by judicial independence does not...entail that judicial power is exercised free from political or social constraints."<sup>470</sup> If judicial independence is a prerequisite for a court to function as a court, so is judicial legitimacy. Without legal legitimacy and authority, courts are unable to command compliance with the judgments they deliver, and ensure respect for the interpretations they present. Slightly simplified, the legitimacy of a court is dependent on its legal reasoning, which must be consistent with existing doctrine and with the methodological requirements of legal deduction. Given that legal reasoning is perceived as consistent with these conditions, and only to the extent that it is, legal legitimacy may even be exploited to advance political goals. As Anne-Marie Burley and Walter Mattli explain in a by now famous passage:

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<sup>470</sup> Chalmers, 1997, p. 171.

[L]aw functions both as mask and shield. It hides and protects the promotion of one particular set of political objectives against contending objectives in the purely political sphere. In specifying this dual relationship between law and politics, we uncover a striking paradox. Law can only perform this dual political function to the extent that it is accepted as law. A 'legal' decision that is transparently 'political,' in the sense that it departs too far from the principles and methods of the law, will invite direct political attack. It will thus fail both as mask and shield....In short, a court's political legitimacy, and hence its ability to advance its own political agenda, rests on its legal legitimacy.<sup>471</sup>

Jurisprudence, which clearly challenges or violates the requirements of sound legal reasoning, risks ruining the judicial legitimacy and authority of a court. This, rather than the political implications of the ECJ's pro-Community campaign, has been the main reason why certain legal scholars have criticized the activism of the Court. Notes Hjalte Rasmussen, a chief proponent of this view: "If Court-curbing or Court-destroying initiatives were to be launched by some countervailing power(s), an irreparable harm would be inflicted on the Court's authority and legitimacy. Although slower, a day-to-day erosion may cause equally detrimental effects."<sup>472</sup>

In the case of state liability, it is clear that law failed miserably both as mask and shield; the apolitical language of the Court neither masked the political content of its decisions nor shielded judges from political criticism. The extent to which this activism also caused permanent damage to the legitimacy of the Court will be illuminated, when I later account for sanctions against the Court.

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<sup>471</sup> Burley and Mattli, 1993, pp. 72-73. Given that law often is the language of politics in the EU, and especially before the ECJ, even political attacks are and must be framed in legal terms. E.g., Bengtsson and Tallberg, 1998.

<sup>472</sup> Rasmussen, 1986, p. 9.

## The Commission and Decentralized Enforcement

Parallel to the Court's enforcement-enhancing judgments, the Commission launched initiatives, which supplemented the actions of the ECJ. Here, I will provide an in-depth analysis of the two perhaps most important programs: the Citizens First initiative and the Robert Schuman project. In their aim to enhance the awareness of Community law and legislation, these programs served to reduce cognitive weaknesses in decentralized enforcement. The formulation and launching of both programs testify to the more extensive control mechanisms member states possess as regards the Commission, which undertook adjustments both in anticipation of governments' reactions and in response to actual criticism. Counterfactual reasoning suggests, however, that the Commission nevertheless succeeded in exerting limited independent influence by employing drafting techniques that shielded these programs from government rejection.

### *The Citizens First initiative*

In the overall scheme of decentralized enforcement, the Citizens First initiative served to encourage citizens and companies to turn to national courts, when their EC rights are infringed upon. Recognized the Commission in 1994: "The adoption and implementation of legislation must be accompanied by an active information policy in order that citizens and companies are aware of their rights and obligations and can act quickly whenever they are infringed."<sup>473</sup> With Citizens First, launched in 1996 as "the most ambitious information initiative ever undertaken by the Commission,"<sup>474</sup> such an active policy was put in practice.

In the actual formulation of the Citizens First initiative, the objective to encourage individuals to secure their rights in national courts was fitted into the broader objective of raising people's awareness of their rights in the EU. Ever since the backlash in public opinion in connection with the TEU, the Commission had been concerned about Euro-skepticism. One of the reasons for this skepticism, it reasoned, was the fact that European citizens knew

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<sup>473</sup> European Commission, 1994c, p. xvi.

<sup>474</sup> European Commission, 1997l, p. 3.

very little about the rights and opportunities they enjoyed under Community law, especially with respect to the Internal Market.<sup>475</sup> With an information campaign like Citizens First, the Commission would consequently meet two objectives: (1) increase citizens' awareness of their rights and opportunities in the EU, and (2) improve the necessary conditions for decentralized enforcement, as "enforcement through citizens is a non-starter if citizens are not aware of their rights."<sup>476</sup>

The first phase of the initiative, covering the rights of EU citizens to live, work and study in another EU country, started in November 1996, and the second, focusing on travelling, equal opportunities, and buying goods and services, in November 1997.<sup>477</sup> The campaign used a formula of layered information: general information through free phone-numbers, an Internet site, and brochures on the various themes; detailed information through specialized fact sheets; and expert advice through a signpost service. To advertise the launch of the initiative, a media campaign was conducted in all the member states but the UK.

The reach of the campaign was considerable. In the first year, 75 million people became aware of the initiative and over one million contacted Citizens First to obtain brochures and fact sheets.<sup>478</sup> In the second year, the responsiveness to the campaign remained high, and a tremendous increase was identified in Internet-based requests for information.<sup>479</sup> Within the Commission, Citizens First was perceived as a clear success, which raised the question of whether this initiative should not be placed on a permanent footing.<sup>480</sup> Commission analyses of citizens' inquiries showed that most problems encountered resulted from lack of information, suggesting the need for a continuous program rather than a finite initiative.<sup>481</sup> At the Amsterdam summit in June 1997, a proposal for such a permanent program—"Dialogue with

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<sup>475</sup> Interview, Commission official, February 16 1998.

<sup>476</sup> Interview, Commission official, February 16 1998.

<sup>477</sup> On the Citizens First initiative, see European Commission 1995f, p. 2; 1997l, pp. 2-3; 1997o, p. 4; 1997p, p. 4; 1997r, pp. 2-3; 1998j, pp. 4-5; 1998k, pp. 4-5.

<sup>478</sup> European Commission, 1997h, p. 1.

<sup>479</sup> European Commission, 1998k, pp. 4-5.

<sup>480</sup> European Commission, 1998j, p. 4.

<sup>481</sup> European Commission, 1997k, 1998a, 1998b.

Citizens and Business”—was adopted as part of the Commission’s Action Plan on the Internal Market. The new program was launched in June 1998, primarily oriented toward citizens, with an extension to business planned for January 1999.<sup>482</sup>

While primarily aimed at improving individuals’ knowledge of their Internal Market rights, all aspects of Citizens First also contained an enforcement dimension. Most concretely, all information brochures contained a page on “How to get your rights recognized and enforced,” which informed citizens of the legal routes they could follow, if they encountered problems in exercising their rights. The Commission’s explicit recommendation was to turn to national courts, and it tempted victims of state infringement with the prospect of financial compensation under the newly established principle of state liability: “You should start by following national procedures, because you have a variety of possibilities open to you and you may be awarded compensation. National courts must ensure that rights based on Community law are respected and, where necessary, set aside any measure which infringes it.”<sup>483</sup> Should national procedures prove inadequate or inconvenient, the brochures also informed citizens of alternative enforcement routes, such as a complaint to the Commission, which might open infringement proceedings, or a complaint to a MEP, who in turn could put questions to the Commission and the Council. Also fact sheets and the signpost service served enforcement purposes. The fact sheets clearly laid out relevant Community law in the area and indicated how citizens could go about enforcing these rights, while the signpost service provided important feedback to the Commission on problematic areas—information that could be used both to improve Internal Market rules and to launch infringement proceedings.<sup>484</sup>

Formally, member states’ consent was not required for the launching of Citizens First, which was strictly a Commission program only subject to the budgetary limits set by the EP. In prac-

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<sup>482</sup> On Dialogue with Citizens and Business, see European Commission, 1998j, pp. 4-5; 1998m, pp. 2-3.

<sup>483</sup> European Commission, 1996j, p. 14. For other statements where the Commission explicitly advised individuals to turn to national courts as these, as opposed to a proceeding under the Article 169 procedure, could issue injunctions and grant damages, see European Commission, 1996h, pp. 9-10; 1996k, p. 1.

<sup>484</sup> Interview, Commission official, February 16 1998.

tice, however, “the campaign could not be undertaken without their networks and their cooperation.”<sup>485</sup> The active participation of national governments was required not least for the distribution of brochures and fact sheets, and for the drafting of detailed instructions on how EC rights were best asserted in that particular country. Consequently, national governments became involved already at the formulation stage of the program. The initiative was discussed in the Internal Market Council, in an advisory group, and in bilateral visits the Commission made to all the member states.<sup>486</sup>

The formulation and implementation of Citizens First caused three primary points of contention between the Commission and member governments.<sup>487</sup> First, “member states did not trust the Commission one inch”<sup>488</sup> in terms of being capable of providing straightforward, factual information. To meet this concern, the Commission agreed to show all drafts of the information material to member governments, but kept the editorial control. Second, “member states were afraid that the Commission would use the information to encourage citizens to complain about the national administration, which would make them look bad.”<sup>489</sup> To get past this suspicion, the Commission introduced the concept of a signpost service, which would not only be a complaint service but also a constructive way of solving problems. Still, there were many difficult discussions with national governments, of which the most skeptical were the UK, Germany, France, the Netherlands, and Denmark. The third area of contention was the actual implementation of the campaign, where certain national governments had very strong ideas. The UK under the Major administration was “totally uninterested”<sup>490</sup> in publicizing the initiative, and caused major problems in 1996 by effectively not participating in the first phase of Citizens First.<sup>491</sup> Likewise, the Danish government was

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<sup>485</sup> Interview, Commission official, February 16 1998.

<sup>486</sup> Interviews, Commission officials, February 16 1998.

<sup>487</sup> Interviews, Commission officials, February 16 1998.

<sup>488</sup> Interview, Commission official, February 16 1998.

<sup>489</sup> Interview, Commission official, February 16 1998.

<sup>490</sup> Interview, Commission official, February 16 1998.

<sup>491</sup> The effects of the UK's resistance are clearly traceable in the statistics on Citizens First inquiries. The UK was the country where the lowest share of people

very skeptical and only agreed to a low-profile campaign initially. In a second group, the Netherlands and Portugal thought it politically unacceptable to have a European phone line, and in both countries the campaign ended up using national information services.

The fact that member states to such a degree still accepted the initiative, despite the attendant risk of being exposed for non-compliance and being taken to court, is best attributed to the realization among national governments that *their* citizens, safeguarding their rights in the Internal Market, would primarily put pressure on *other* governments. “That was the trick,”<sup>492</sup> asserts a senior Commission *fonctionnaire*—an impression that is confirmed by other officials with insight into the process.<sup>493</sup> Other important factors were the Commission’s adjustments of the campaign in response to government reactions, and the obvious problem for national governments to find legitimate arguments against informing citizens about their rights and opportunities.

#### *The Robert Schuman project*

In the general structure of decentralized supervision, the Robert Schuman project served to reduce the second important cognitive weakness: insufficient knowledge of Community law in the legal professions. The idea behind the program can be traced back to 1992-1993, when the pivotal role of national judges, prosecutors, and lawyers in making the Internal Market work was first emphasized by the Commission.<sup>494</sup> Unless national judges and lawyers could be assumed to have a sufficiently developed “Community reflex,” causing them automatically and systematically to check whether Community solutions apply to the cases they handle, they would be unable to secure individuals’ Internal Market rights and to facilitate decentralized enforcement. Surveys indicated, however, that severe gaps existed in the awareness of Community law among legal practitioners. In 1995, two out of three lawyers

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had seen, heard, or read about the first phase of the initiative, which directly contributed to making the UK the state with the lowest number of inquiries per 100,000 households. European Commission, 1997k, pp. 2-3.

<sup>492</sup> Interview, February 16 1998.

<sup>493</sup> Interviews, February 3 and 16 1998.

<sup>494</sup> European Commission, 1992c, p. 45; 1993c, p. 16.

considered their knowledge of Community law inadequate or very inadequate, and only 25 percent of those who practiced Community law were satisfied with their knowledge.<sup>495</sup>

In view of this situation, the objective of the Robert Schuman project was to raise the awareness of Community law among judges, prosecutors, and lawyers. Explained Commissioner Monti: “The effective and uniform application of common rules throughout the internal market now constitutes the main political priority for the Commission. The Robert Schuman Project would enable us to target direct judges and lawyers, the key players in the correct application of internal market rules.”<sup>496</sup> It was explicitly recognized that the Robert Schuman project constituted a necessary supplement to the Citizens First initiative.<sup>497</sup>

To this end, the Robert Schuman project was designed to financially encourage and support national initiatives that sought to improve the knowledge of Community law in the legal professions. The program would rest on a partnership between national professional associations and the Commission, and would not require member governments’ active cooperation to be implemented. The proposal for a program was first submitted to the Council in late 1996, after lengthy internal preparations.<sup>498</sup> Two pilot phases of the project were launched in 1997 and 1998 respectively, involving support to a limited number of pilot initiatives.<sup>499</sup> An amended proposal was submitted by the Commission in late 1997, and at the Council meeting of November 27 1997, a deal was finally reached on the action program, which officially entered into force in July 1998 for a period of three years.<sup>500</sup>

As opposed to the Citizens First initiative, the Robert Schuman project required the formal consent of member states. Given the legal basis of the program, the co-decision procedure applied, which meant that the project required the backing of a qualified majority in the Council. The Commission was aware that the program would be a sensitive issue and therefore took great care

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<sup>495</sup> EOS Gallup Europe, 1995, p. 12.

<sup>496</sup> European Commission, 1996k, p. 1.

<sup>497</sup> European Commission, 1996g, p. 2.

<sup>498</sup> European Commission, 1996g.

<sup>499</sup> European Commission, 1998n.

<sup>500</sup> For the amended proposal, see European Commission, 1997e.

drafting the proposal for a decision.<sup>501</sup> This partly explains the considerable time that passed from the first formulation of the ideas in 1992-1993 to the presentation of the proposal in late 1996. During this time, the Commission also distributed a working document among governments to elicit a first reaction. Despite these careful preparations, the proposal encountered tough negotiations in the Council.<sup>502</sup>

The UK under the Tories was very much against the entire project, and even if the British became more positive after the change in government in May 1997, they remained adamant on key points of contention. Also the Netherlands, Sweden, and Germany were less enthusiastic. France and Luxembourg were supportive of the proposal, while small states like Portugal, Greece, Finland, Ireland, and Austria were positive in general, but not active. The points of dissatisfaction were varied in nature. Apart from a number of objections concerning minor substantive issues—many of which were solved in the Council negotiations—some member governments questioned the entire legitimacy of the project on the basis of the principle of subsidiarity. Was it really the Commission's and the Union's task to sponsor the training of national lawyers and judges? From the perspective of the Commission, the project was fully in line with the principle of subsidiarity: "The Robert Schuman Project shall support and complement training and information work on Community law undertaken by the Member States while not encroaching on their responsibility for defining course content and organising vocational training."<sup>503</sup>

The most contentious area was, however, the legal basis of the proposal.<sup>504</sup> The Commission argued that the proposal should be based on Article 100a of the treaty, since it served the purpose of securing the establishment and functioning of the Internal Market.<sup>505</sup> Stated the Commission:

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<sup>501</sup> Interview, Commission official, February 3 1998.

<sup>502</sup> The paragraphs on the Council negotiations are based on interviews with two Commission officials involved in the Robert Schuman project, February 3 and 26 1998.

<sup>503</sup> European Commission, 1997e, p. 8.

<sup>504</sup> On the legal base as a common source of conflict between member governments and the Commission, illustrating the continued dispute between intergovernmentalism and supranationalism, see Emiliou, 1994; Usher, 1994.

<sup>505</sup> For the full text of Article 100a, see appendix 1.

The effective and uniform application of Community law with a view to approximating national legislation is a condition for the smooth functioning of the Internal Market. The Robert Schuman Project has intentionally been integrated into overall arrangements which...are designed to ensure the optional functioning of the Internal Market. It complements these arrangements by conveying the idea that, in addition to infringement proceedings instituted by the Commission...or the imposition of penalties, the effective and homogenous application of Community law depends on raising the awareness of national legal professionals whose task it is to apply that law on a decentralized basis.<sup>506</sup>

Certain member states, on the contrary, advocated Articles 126 and 127—cooperation in education and vocational training—as the legal basis for the proposal. The voting rule was not the reason for the controversy, since both alternatives prescribed QMV. Rather, the actual importance rested in the direction of the program and in how it could be continued after the first three years. If the Council took the decision based on Articles 126 and 127, then there was no reason why the project, at a second stage, could not be extended or redirected to professions completely unrelated to the original purpose of the initiative. The Commission obviously wanted to secure the program against any such dilution. Member governments, for their part, are likely to have feared that a decision based on the general Article 100a would set a precedent leading to an increase in the Commission's powers, while Articles 126 and 127 as a treaty base would close the door on such future claims.

In the intergovernmental discussions in Coreper and the Council, a coalition sufficient to block the proposal—the UK, the Netherlands, Sweden, and Germany—had taken a tough stance against Article 100a and advocated Articles 126 and 127 as the legal basis. As the negotiations moved to a vote in the Council after “a

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<sup>506</sup> European Commission, 1996g, p. 5.

very passionate discussion,”<sup>507</sup> the UK decided to support the Commission’s proposal, which consequently passed.<sup>508</sup>

The Commission, in its analysis of the negotiations, points to three reasons why member governments actually accepted the proposal, even if this meant facilitating decentralized enforcement through individuals suing non-compliant states in national courts.<sup>509</sup> First, compared to Citizens First, this program was much more indirect in its influence. Improving the knowledge of the legal professions is not the same thing as advising people to take member states to court. Second, just as in the case of Citizens First, national governments were concerned with the possibilities for their citizens to enforce their rights in other member states’ courts. Third, it may be less embarrassing for a government to have a national court declare that it has not fully implemented a directive, than to be exposed in Article 169 proceedings where “member states are more in the flashlight.”<sup>510</sup>

*Member state control limits the scope for Commission shirking*

The Citizens First initiative and the Robert Schuman project illustrate how the Commission has worked in tandem with the Court in the reinforcement of decentralized, “fire-alarm” enforcement. Both programs sought to mend holes that previously had weakened, and could continue to restrict, the power and effectiveness of enforcement through national courts. Notwithstanding the differences between these two programs, they paint a similar picture of the Commission’s capacity to boost decentralized supervision beyond governments’ preferences. Confronting the formulation, enactment, and reception of Citizens First and Robert Schuman with the test of supranational shirking, we find that member state control restricted the Commission’s enforcement-enhancing projects, but did not fully eliminate the independent effect on EU supervision.

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<sup>507</sup> Interview, Commission official, February 26 1998.

<sup>508</sup> This vote was unique in the sense that it was the Commission that called for a vote on its own proposal. This was, according to Commission officials, the second time ever that such a thing had happened. Internal Commission memo, December 1 1997; Interview, Commission official, February 26 1998.

<sup>509</sup> Interview, Commission official, February 26 1998.

<sup>510</sup> Interview, Commission official, February 26 1998.

Again, the first step in assessing the question of supranational shirking is to trace EU governments' perception of, and reaction to, the Commission's actions. With respect to the Citizens First and Robert Schuman programs, the positions of government principals are easily identified, as these were revealed in the discussions and negotiations on the two initiatives. In both cases, member governments largely endorsed the programs.

An important reason behind this high degree of consent was the *de facto* control, which the prerequisite of member state approval constituted. Citizens First and Robert Schuman illustrate how member states' control mechanisms are far more intrusive with respect to the Commission than in the case of the Court. National governments carefully followed the Commission's moves, intervened in the policy formulation, and forced it to adapt its proposals. Sanctions were an integral part of this process, as illustrated, for instance, by the UK's opting out of Citizens First. It is particularly interesting to note that the Commission in both cases consulted governments and took their reactions into consideration, given that only the Robert Schuman project required the formal consent of member states. To the extent that Commission initiatives require member states' active cooperation at the implementation stage, it is of less importance whether their consent is formally required or not, as the Commission nonetheless has to seek approval and thus is forced to facilitate participation-based monitoring.

Besides *ex post* adjustments following government reactions, both projects also give evidence of how the Commission attempted to anticipate contentious issues already at the drafting stage. Conforming to the picture of a perfectly controlled agent (supervisor), the Commission sought to improve the chances of approval by avoiding or eliminating features thought challenging to government preferences. In conclusion, participation-based monitoring and the risk of sanctions forced the Commission to adjust its proposals and thereby restricted its capacity to introduce measures that went beyond what some or all member states would wish to see.

Should we conclude from the fairly high degree of support for the two programs that these did not diverge from government preferences, and that the Commission thus did not shirk and exert independent influence? Not necessarily. We must be careful not to

equate member state approval with lack of supranational influence, since this would preclude both formal agenda-setting through the Commission's monopoly on legislative initiative and informal agenda-setting through policy entrepreneurship. As suggested by the notion of information asymmetry, for instance, member states may consent to supranational initiatives challenging their interests, if they do not possess the information necessary to comprehend the consequences of these moves. The consideration of this alternative explanation requires, first, an analysis of whether these initiatives at all could qualify as shirking, and second, an assessment of indications that governments failed to identify the consequences of these programs.

The null hypothesis posits that member states had successfully gotten rid of unpopular elements of the programs and supported the remaining features. Any indications to the contrary would support the notion of supranational shirking and influence. Empirical evidence and counterfactual reasoning combined provide us with two such indications. First, the two programs remained surprisingly intact, given the objective of strengthening decentralized enforcement and governments' intrusive monitoring. In the case of Citizens First, government interference slightly affected the means employed and reduced the participation of the UK and Denmark during the first year, but in no way threatened the overall objective and implementation of the campaign. With respect to Robert Schuman, both the Commission's authority to launch this measure and the legal basis on which this was done were questioned, but the project escaped this battle unharmed.

Second, counterfactual reasoning suggests that these programs introduced measures member states preferably would have avoided. The likelihood that EU governments, in the absence of the Commission's initiatives, would have stepped in and undertaken efforts, which in a similar way would have strengthened decentralized enforcement, must, by all accounts, be regarded as quite limited. The Citizens First initiative and the Robert Schuman project made it more likely that citizens and companies would sue member states in court, possibly for damages, and would do so with competent legal help trained to detect and prosecute infringements. Both programs thereby reinforced a structure of enforcement that governments had actively refrained

from strengthening at the 1991 IGC, and actually would challenge at the 1996-97 IGC.

The enforcement objectives and effects of the Citizens First and Robert Schuman programs indicate that government consent may not necessarily reflect a lack of supranational shirking and influence. The source of this limited degree of independent influence, I submit, is found in the strategic shaping of the two programs and the techniques the Commission employed in shielding the initiatives from government rejection. In the formulation and presentation of the Citizens First initiative and the Robert Schuman project, the Commission made use of what I will refer to as the techniques of “packaging,” “framing,” and “co-optive justification.”<sup>511</sup> Two of these methods go beyond exploitations of information asymmetry, indicating a need to broaden the conception of the means used by the Commission to smooth the path for controversial proposals.

Packaging entails that the supranational institutions manipulate the cost/benefit calculations of national governments by linking unpopular measures to popular ones, or by presenting a number of proposals that appeal to different member states. In the Citizens First initiative, the Commission linked the unpopular measure of encouraging individuals to sue governments in national courts to the broader and less contentious aim of informing citizens about their rights and opportunities in the EU. Similarly, in the Robert Schuman project, the Commission linked the objective of promoting even and effective enforcement in national courts to means that contributed to the funding of education and training in the member states. In addition, both programs exploited what could be considered a collective action problem, as national governments were led to endorse them because this would make it easier for *their* citizens to enforce their rights in *other* member states’ courts, when collectively, this meant turning the gun on themselves.

Framing refers to the notion that the supranational institutions may succeed in getting approval for a controversial proposal by presenting it in a way that appeals to governments, withholding consequences that are likely to be interpreted as negative. In

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<sup>511</sup> For related conceptions, see Cram, 1997, p. 162; Ross, 1995, p. 39.

contrast to the Robert Schuman project, where the potentially threatening objective of reinforcing decentralized enforcement was openly stated, the Commission in the formulation of the Citizens First initiative actively played down the knock-on effect of encouraging individuals to turn to national courts. Typically, the enforcement objective of Citizens First is absent from all publications presenting the program and its purpose.

Co-optive justification, finally, implies that the supranational institutions, by appealing to principles and beliefs heralded by member states, justify a decision or policy proposal in a way that renders it more difficult for governments to reject it. A variant of this technique is the “hook” or “spring board” that the reference to a European Council conclusion or other collective statements by EU governments may constitute. In Citizens First, the Commission publicly justified the information campaign by referring to the need to “bring citizens closer to Europe and Europe closer to the citizens,”<sup>512</sup> which was welcomed rather than feared by member states in the wake of growing Euro-skepticism. The overall aim of the initiative was presented as being “to improve the understanding which people have of their rights and opportunities in the European Union and its Single Market”<sup>513</sup>—an objective national governments obviously had problems challenging with legitimate arguments. In the proposal for the Robert Schuman project, the Commission appealed to the generally embraced principle of “the rule of law,” the concept of “a Community of law,” and the smooth functioning of the Internal Market, “the apex of Community construction.”<sup>514</sup> The ensuing difficulty of rejecting the project—an act that could be interpreted as questioning these principles and achievements—may partially explain why critical member governments instead chose to challenge the legal basis of the proposal. In search of additional spring-boards, the program proposal also made explicit reference to, and derived legitimacy from, member states’ declaration on the implementation of Community law, attached to the TEU.<sup>515</sup>

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<sup>512</sup> Interview, Commission official, February 16 1998.

<sup>513</sup> European Commission, 1997k, p. 1.

<sup>514</sup> European Commission, 1996g, p. 1.

<sup>515</sup> European Commission, 1996g, p. 9.

Whereas, admittedly, it is exceedingly difficult to assess the relative influence and explanatory power of these Commission techniques, the practices of packaging, framing, and co-optive justification likely facilitated government approval of the Citizens First initiative and the Robert Schuman project. In sum, the primary conclusion derived from the two Commission programs is the extent to which the Commission, as opposed to the Court, was restricted in its enforcement-enhancing efforts by member state control. The consent of member states does not, however, reflect a clear-cut lack of supranational influence, as the acceptance of these programs partly may have resulted from the Commission's techniques for shielding them from rejection.

### **State Principals Sanction Supranational Shirking**

In the preceding sections, I have shown how the ECJ and the Commission since the late 1980s have taken decisive steps to reinforce the structure of decentralized, "fire-alarm" enforcement. Individually, these measures varied in the degree to which they embodied supranational shirking: The introduction of decentralized sanctions through the principle of state liability was as good an example of supranational shirking as there will ever be, while the Commission's enforcement-enhancing programs were more limited in the extent to which they diverged from government preferences. Taken together, these supranational initiatives have shifted the balance in EU supervision toward a form of enforcement that member states perceive as more threatening to national sovereignty, and therefore have chosen not to reinforce through intergovernmental decisions.

But this is not the end of the story. The P-S-A model and the P-A literature at large suggest that principals will respond to shirking by sanctioning the agent/supervisor, improving control mechanisms, or attempting to undo the effects of the agent's/supervisor's actions. Supranational shirking and autonomy therefore do not translate into supranational influence, unless the Commission, the Court, and the measures they have introduced, survive possible *ex post* sanctions by member states.

Two alternatives remained open to member state principals for regaining control and reversing the reinforcement of decentralized enforcement, and they have pursued both, albeit with mixed success. First, at the 1996-97 IGC, a group of governments led by the UK openly proposed a revision of the Court's competences, including measures that were directed at limiting the effects of the *Francovich* decision on state liability. Second, some national governments and courts have been hesitant, not to say recalcitrant, in their reception of the state liability principle, thereby limiting, at least temporarily, some of the impact of this enforcement-enhancing jurisprudence.

*The sanction of treaty revision*

Just because the Court's competences were enshrined in the treaty and had not previously been formally challenged, this did not mean that member governments would forever refrain from attempting to clip its wings. The early 1990s witnessed growing signs that national governments had become increasingly uncomfortable with the way the Court expanded Community law into domains previously thought off limits. The two most vocal critics were the German government under Chancellor Helmut Kohl and the British Tory government headed by Prime Minister John Major.

In October 1992, Kohl went as far as to openly accuse the ECJ of judicial activism: "If one takes the Court of Justice...it does not only exert its competencies in legal matters, but goes far further. We have an example of something that was not wanted in the beginning. This should be discussed so that the necessary measures may be taken later."<sup>516</sup> That same year in December, at the Edinburgh summit, Germany attempted to table a proposal that suggested curtailing the power of national courts to refer cases to the Court under the preliminary ruling procedure, limiting this right to the highest courts.<sup>517</sup> While, allegedly, the reason was the need to reduce the work load of the highly strained ECJ, all observers agree that the German government's true intention was to

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<sup>516</sup> *Agence Europe*, 1992. One source of German discontent at this time was clearly the *Francovich* judgment, which had caused an outburst of criticism in Germany among scholars, politicians, and judges. Uecker, 1994.

<sup>517</sup> Weiler, 1993, p. 444. Interview, Commission official, February 18 1998.

eliminate the source of most of the ECJ's doctrinal developments: referrals from lower national courts.<sup>518</sup>

The other member state that showed signs of desiring a reevaluation of the supranational institutions' competences, and the Court's in particular, was the UK. British Euro-skeptics had reacted strongly against ECJ judgments delivered in the late 1980s and early 1990s.<sup>519</sup> Most notably, *Factortame I* had been viewed as challenging the closely heralded British doctrine of parliamentary sovereignty, and *Francovich* as introducing a completely new principle, not previously recognized and with far-reaching consequences for national judicial orders. British discontent with the Court made its mark outside legal circles. Surveying the trend of growing criticism against the ECJ, the *Economist* recognized that "by far the most vociferous recent critics have been the British, who think of the court as an unguarded back door through which national sovereignty is being carted away."<sup>520</sup>

The IGC scheduled for 1996 provided the perfect opportunity to voice this discontent and turn these threats into action. The Court knew what was coming. In its contribution to the upcoming IGC, the ECJ took an explicitly defensive position and responded to the threat of treaty revision: "The Court considers it indispensable, if the essential features of the Community legal order are to be maintained, that the functions and prerogatives of its judicial organs be safeguarded in the forthcoming process of revision."<sup>521</sup> In particular, the Court defended the preliminary ruling procedure under Article 177. Targeting directly the informal German suggestion that references be limited to the highest courts, the Court strongly advised against any such revision: "To limit access to the Court would have the effect of jeopardizing the uniform application and interpretation of Community law throughout the Union, and could deprive individuals of effective judicial protection and undermine the unity of the case-law."<sup>522</sup> Also the notion that the ECJ's competence to give preliminary rulings be split, so as to let

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<sup>518</sup> E.g., Weiler, 1993, p. 444; Alter, 1998a, p. 140; Dehousse, 1998, p. 167.

<sup>519</sup> For an often cited expression of these Euro-skeptic voices, see Neill, 1995.

<sup>520</sup> *Economist*, 1997, p. 35.

<sup>521</sup> European Court of Justice, 1995, p. 2. On the Court's position, also internal Commission memo, September 13 1996.

<sup>522</sup> European Court of Justice, 1995, p. 6.

the Court of First Instance take on certain categories of cases, was firmly rejected.

Member states bent on challenging the Court were undeterred by the Court's defense. In September 1995, David Davis, the UK representative to the Reflection Group, circulated a paper, which contended that certain ECJ judgments, *Francovich* and *Emmott* in particular, "have led to significant unforeseen consequences for member states, have been disproportionate in their effect and have created severe practical problems."<sup>523</sup> To correct this situation, the UK proposed that the IGC should decide on three measures. First, to limit member state liability for breaches of EC law to cases of grave and manifest disregard of a Community obligation. Second, to explicitly state the Court's power to limit the retrospective effect of judgments, as the ECJ only had used this option in exceptional cases. And third, to extend governments' capacity to apply national time limits to cases based on EC law, and restrict exceptions to cases of grave and manifest disregard.<sup>524</sup> In addition, the British government also offered a number of suggestions for improvements of a more "practical" and "procedural" nature: to create an ECJ appeals procedure, to facilitate the rapid amendment of Community legislation in cases where the Council believes that the Court has interpreted a provision in a way not originally intended, and to introduce an accelerated procedure for time-sensitive cases.

The first three proposals were an explicit attempt to meddle in the Court's domain *par excellence*—its case law. Rather than recognizing the Court's discretion to lay down, define, and develop principles and conditions governing state liability, retrospective effect, and national time limits, the British sought to bring these under government control by fixing them in the treaty. It should, however, be noted that there was nothing in the existing order that denied the Court the authority to limit state liability and retrospective effect of judgments, or to allow national time limits to be applied. The British hoped, however, that having them enshrined in the treaty would encourage the ECJ to use them and

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<sup>523</sup> Davis, 1995, p. 1.

<sup>524</sup> Davis, 1995, p. 1.

provide a basis for challenging judgments in the appeals procedure also proposed.<sup>525</sup>

Nor were the “practical” and “procedural” suggestions as innocent as they were portrayed. Most notably, the suggestion of an appeals procedure sought to give the Court a second chance to reflect on its judgments in light of political reactions, while the proposal for a rapid amendment procedure manifestly challenged the division between the legislature and the judiciary in the EU, and questioned the Commission’s monopoly on initiation. As the Commission’s Legal Service remarked, the Court’s power to interpret EC law and impose its interpretations on governments, citizens, and economic operators alike, is the foundation of the rule of law.<sup>526</sup> While some of these suggestions thus sought to limit the effects of particular judgments, and others constituted direct sanctions against the Court itself, all challenged the existing judicial system of the Community. Concluded a legal observer at the time: “The implementation of many of these proposals might grossly impede the work of the ECJ.”<sup>527</sup>

A majority of the members in the Reflection Group were not prepared to back the UK proposals, though the French and German representatives indicated a certain level of approval.<sup>528</sup> Other members of the group sympathized with the one or the other of the suggestions, but no single proposal ever gathered the support of a majority, never mind the unanimity required for treaty revision. The small states, Belgium in particular, remained faithful to the Court.<sup>529</sup> In its concluding report of December 1995, the Reflection Group took notice of the UK proposals, while also indicating that no other member government had formally joined the British in their quest.<sup>530</sup>

Notwithstanding this setback in the Reflection Group, the UK persisted in its campaign against the Court. The IGC opened in March 1996, and in July the UK delegation distributed a refined

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<sup>525</sup> Alter, 1998a, p. 141.

<sup>526</sup> Internal Commission memo, October 19 1995.

<sup>527</sup> Wooldridge, 1996, p. 284.

<sup>528</sup> Internal Commission memo, October 27 1995.

<sup>529</sup> Internal Commission memo, October 27 1995; interview, Commission official, January 7 1998.

<sup>530</sup> Reflection Group, 1995, p. 33.

and elaborated version of the proposals previously presented in the Reflection Group.<sup>531</sup> While dressed up in a more legal garb, the suggestions were essentially the same. Again, the main emphasis was on the perceived need to limit the effects of the judgments strengthening decentralized enforcement:

The risk of excessively large and unpredictable financial liabilities, particularly for national exchequers, has been substantially increased by: (a) the Court's recognition in *Francovich* that there is a Community law principle in accordance with which a Member State is liable to pay damages to persons whose rights have been adversely affected by its breach of Community law; and (b) the inability of a Member State, following the judgment in *Emmott*, to rely on its national time limits for actions brought in cases in which it has in any way failed to implement a directive correctly.<sup>532</sup>

This time as well, the UK proposals—“infused with distrust of the creative role of the ECJ”<sup>533</sup>—failed to gather sufficient support. While most member governments rejected the British suggestions outright, some were sympathetic to the idea that the ECJ should be sent a warning.<sup>534</sup> As a Commission official monitoring the negotiations on the Court put it: “The UK was marginalized, but not alone.”<sup>535</sup> In particular, the British enjoyed the moderate support of the German and French governments.<sup>536</sup> While most of the time hiding behind the more extreme British position, these governments came out in the open, as it became increasingly clear that the UK proposals would be dismissed by the IGC.

In October 1996, Germany presented a suggestion that collided head on with the declared position of the ECJ, when arguing for

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<sup>531</sup> IGC, 1996c. For an analysis of the British memo, see Wooldridge, 1996.

<sup>532</sup> IGC, 1996c, p. 4.

<sup>533</sup> Wooldridge, 1996, p. 284.

<sup>534</sup> Internal Commission memo, March 19 1997. Also the Commission, of course, was negative as regards the British proposals. E.g., internal Commission memo, October 31 1996.

<sup>535</sup> Interview, Commission official, January 7 1998.

<sup>536</sup> Also the Spanish government was likely to have given its tacit approval, as the Spanish general policy statement on the IGC proposed reducing the “law-creating” powers of the Court. Internal Commission memo, no date.

the splitting of the Court's competence with respect to preliminary references from national courts, and the transfer of certain domains to the Court of First Instance.<sup>537</sup> In March 1997, the French government tabled a proposal with modified versions of the British suggestions concerning the limitation of the retrospective effect of judgments, the power of the Council to amend Community law when the Court has interpreted a provision "incorrectly," and the possibility to rely on national time limits.<sup>538</sup> While milder, the French suggestions nevertheless retained the essence of the British proposals. One Commission official monitoring the negotiations goes as far as to denote all these proposals "blatant attempts by certain member states to weaken the Court."<sup>539</sup>

In the end, none of the proposals suggesting revisions of the Court's existing competences gathered anything close to the support of all member governments, and none found its way into the Amsterdam Treaty.<sup>540</sup> The Court had escaped the first formal and most serious attempt ever at clipping its wings. But, as Dehousse puts it: "The message to the Court was...very clear: stick to your role of ensuring the uniform application of Community law, and do not interfere in policy choices, lest the risk of political overruling."<sup>541</sup>

#### *The sanction of inaction*

Besides the attempts to sanction the Court and limit the effects of its shirking through treaty revision, inaction at the national level has functioned as a second form of sanction. In general terms, inaction or non-compliance functions as a sanction, whenever official

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<sup>537</sup> IGC, 1996d.

<sup>538</sup> IGC, 1997a.

<sup>539</sup> Interview, Commission official, January 7 1998.

<sup>540</sup> It should be noted, however, that toward the end of the IGC, when these proposals were laid to rest in the face of insufficient backing, the skeptic sentiments of certain member states were instead channeled into the negotiations on the Court's future role in the area of Justice and Home Affairs (JHA). In particular, the UK, Germany, France, and Spain criticized the Court and questioned whether it should really be given the same powers in JHA as it already held in the Community pillar. This time it was the skeptical governments that enjoyed the power to block any treaty revision, and these states subsequently succeeded in limiting the involvement of the Court in JHA. Interview, Commission official, January 7 1998; Alter, 1998a, p. 141.

<sup>541</sup> Dehousse, 1998, p. 168.

member state actors refrain from accepting or adjusting to the results of supranational shirking, e.g., Commission decisions and ECJ case-law advances, thereby reducing their impact on the national level.

In the case of decentralized enforcement, existing evidence, albeit limited in some respects, suggests that recalcitrant reception and implementation of the principle of state liability by some national courts and governments have reduced, at least temporarily, the impact of this supranational shirking. Resistance to case-law advances is by no means unique to enforcement-related cases. Rather, the question of when, where, and how ECJ jurisprudence translates into policy effects, through acceptance and proper application in national courts, is the subject of a growing literature.<sup>542</sup> As Karen Alter, one of the contributors to this literature, notes: “Legal integration is not simply the issuing of legal decisions which create new doctrine, but more importantly the acceptance of this jurisprudence within national legal systems and by national politicians.”<sup>543</sup>

In general terms, member states are obliged under Article 5 to facilitate the achievement of the Community’s tasks and to refrain from measures, which could jeopardize the attainment of its objectives.<sup>544</sup> As part of this, national courts are in their function as Community courts charged with the duty to apply EC law, and national governments must enable and allow domestic courts to fulfill this function. Translating this obligation to the case of state liability, national governments and courts were required to ensure that citizens and companies actually could claim damages on the basis of this principle.<sup>545</sup> If the substantive and procedural conditions laid down in national law were sufficient to satisfy the standard of protection set by the Court, these were to be relied on. If not, then national legal systems would have to be adjusted; either

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<sup>542</sup> See, especially, Conant, 1998; Slaughter, Stone Sweet, and Weiler, 1998; Alter, 1999.

<sup>543</sup> Alter, 1998b, p. 227.

<sup>544</sup> For the full text of Article 5, see appendix 1.

<sup>545</sup> As the Court put it: “[T]he substantive and procedural conditions for reparation of loss and damage laid down by the national law of the Member States must not be less favourable than those relating to similar domestic claims and must not be so framed as to make it virtually impossible or excessively difficult to obtain reparation.” *Francovich*, Joined Cases C-6 and 9/90 (1991), para. 43.

through governments legislating to the effect that appropriate remedies were created, or through courts recognizing a new cause of action or adjusting existing remedies.

Many national legal systems did not provide a corresponding damages remedy against the state in matters of national law, and where they did, this seldom permitted actions against the legislative and judicial branches of government. “[I]t is clear that in most, if not all, member states, national law will not be effective (in any sense of the word) to protect individuals’ rights under *Francovich*.”<sup>546</sup> In the UK, existing procedures did not fully satisfy the necessary conditions, therefore requiring that a new cause of action either be recognized, or existing torts be adapted to fulfill the requirements of Community law.<sup>547</sup> The German legal system did not recognize that the legislature could be held liable, nor did the law of Belgium and Luxembourg.<sup>548</sup> In Sweden, Finland, and Austria, neither the legislature nor the highest courts could be found liable under national law.<sup>549</sup> In Irish law, much stricter conditions had to be satisfied for state liability to arise than those specified by the ECJ, while Italy more or less lacked functioning rules on state liability.<sup>550</sup> By contrast, the French and the Dutch legal systems had few difficulties receiving and accommodating the new European rules on state liability, nor did Danish law raise any obstacles to the application of this principle in national courts.<sup>551</sup> Summarized one legal observer in 1996: “The ECJ has indeed entered deep constitutional waters.”<sup>552</sup>

*Francovich* and the ensuing string of cases therefore introduced something, which was partially or completely new, and which required that new remedies be created through judicial or legislative action. Yet, by 1997, no member state had taken legislative action to accommodate the development in Community law.<sup>553</sup> According

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<sup>546</sup> Steiner, 1995, p. 52.

<sup>547</sup> Jarvis, 1996, p. 233; Van Gerven, 1996, pp. 532-535; Convery, 1997; Craig, 1997, pp. 87-89.

<sup>548</sup> Jarvis, 1996, p. 534; Van Gerven, 1996, pp. 535-536; SOU, 1997, p. 102.

<sup>549</sup> Andersson, 1997; SOU, 1997, pp. 100-101, ch. 9.

<sup>550</sup> Caranta, 1993, pp. 286-291; SOU, 1997, p. 102.

<sup>551</sup> Caranta, 1993, pp. 291-292; Jarvis, 1996, p. 233; Van Gerven, 1996, pp. 536-537; SOU, 1997, pp. 100, 102; Claes and De Witte, 1998, p. 182.

<sup>552</sup> Jarvis, 1996, p. 235.

<sup>553</sup> SOU, 1997, p. 104.

to a Swedish official report investigating the need to adjust Swedish law in response to the state liability principle, only two member governments—the UK and Sweden—were even in the process of considering legislative modifications.<sup>554</sup> Based on the information collected for that report in cooperation with the Ministries of Justice in the other member states, the Swedish investigator describes the prevailing approach in most governments as being the ostrich strategy of burying the head in the sand.<sup>555</sup> Rather than duly initiating the legislative measures required for national law to fully accommodate the EC rules on state liability, national governments have confidently refrained from any action and accepted the less-than-optimal fit resulting from the existing order or the modifications national courts may undertake.

The other way, in which national legal systems could have been adjusted to allow for claims brought on the principle of state liability, would have been for national courts to modify existing procedures to meet the specified needs and requirements. These adjustments may result either from the recognition in national case law of how individuals can make use of the state liability remedy, or from a *de facto* practice of accepting such claims, even though national law does not explicitly designate an appropriate procedure. It is considerably more difficult to assess the extent to which national procedures actually have been adjusted, *de jure* or *de facto*. However, the fact that this is a question of court discretion—or “flexibility and ingenuity”<sup>556</sup>—does raise the problem of procedural and legal incertitude. Italy provides several examples of how individuals have been unable to rely on the principle of state liability because of inadequately modified and designated national procedures.<sup>557</sup>

Patterns in the cases handled by national courts are an indirect indication of the extent to which citizens and companies have been able to rely on the principle of state liability. While, for obvious reasons, no complete systematic register exists of all cases where the principle has been invoked, the International Federation for European Law (FIDE) and the Commission have both at-

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<sup>554</sup> SOU, 1997, p. 104.

<sup>555</sup> Interview, SOU investigator, February 18 1999.

<sup>556</sup> Jarvis, 1996, p. 234.

<sup>557</sup> Caranta, 1993, pp. 290-291.

tempted to assemble information on state liability cases.<sup>558</sup> The most immediate observation is the remarkably limited number of cases in all member states. As regards cases brought before courts based on incorrect or no transposition of directives, many member states—Belgium, Germany, the UK, Sweden, France, Ireland, Italy, and the Netherlands—had only seen a few cases, generally less than five, by early 1998.<sup>559</sup> Even more strikingly, an entire group of states—Austria, Denmark, Finland, Greece, Portugal, and Spain—had not witnessed a single state liability case raised on these grounds.<sup>560</sup> While these figures must be interpreted with great care, they do suggest that the practical implications of state liability have been less far-reaching than often predicted.<sup>561</sup>

Of the state liability cases that indeed have been decided by national courts, the dominant, but by no means exclusive, picture is one of hesitancy or reluctance. This is also the impression of the Commission's Legal Service.<sup>562</sup> In relatively few cases have the claimants actually been awarded compensation. More often, their claims have been dismissed on procedural or substantive grounds. It is slightly ironic, if not typical, that among the examples we find the cases that established and expanded the principle of state liability: *Francovich* and *Brasserie du Pêcheur*.

Mr. Francovich's first action failed, because he had not employed the proper procedure for pursuing a state liability claim,

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<sup>558</sup> European Commission, 1997d, pp. 475-477; 1998c, pp. 313-315; FIDE, 1998. In the case of the Commission, the data reported emanates from the Research and Documentation Department at the European Court of Justice, while for FIDE, the data comes from a questionnaire responded to by legal scholars in most of the member states.

<sup>559</sup> FIDE, 1998. Incorrect or no transposition of directives covers a large part, but not all, of the member states' violations of Community law. In other words, additional liability cases may exist in the member states outside this area covered in the FIDE report.

<sup>560</sup> FIDE, 1998.

<sup>561</sup> Carefulness is warranted, since it cannot be automatically inferred from a low number of cases that individuals have not been able to rely on the principle of state liability. A low number can also be interpreted as an indication that the legal situation has been clear, and that the government has chosen conciliation rather than a court decision. Moreover, one case may function as a precedent allowing later claimants compensation without having their cases determined in court. In at least one of the cases noted above—Sweden's incorrect implementation of the wage guarantee directive—the decision has led to hundreds of people claiming and receiving compensation from the state on the basis of one decision. FIDE, 1998, p. 398; interview, Swedish government official, April 16 1998.

<sup>562</sup> Interview, Commission official, February 18 1998.

though the Italian legal system had not clearly designated what procedure to use.<sup>563</sup> Similar dismissals of liability claims on procedural grounds have occurred, for instance, in the UK.<sup>564</sup> Claimants may also be denied compensation on substantive, legal grounds. While it is exceedingly difficult for a layman, and tricky even for a lawyer, to determine whether the decisions of national courts have been warranted given the facts of the cases, the number and character of such rejections suggest a certain level of hesitation about awarding compensation on the grounds of state liability. More often than not, claims have been dismissed, based on the arguments that the causal link between state violation and individual damage suffered was insufficient, that the EC rule breached did not confer rights on individuals, or that the infringement could not be considered sufficiently serious.<sup>565</sup> *Brasserie du Pêcheur* is a case in point. Whereas most legal observers regarded liability as effectively established in *Brasserie du Pêcheur* and *Factortame III* after the ECJ's judgment, and criticized the ECJ for meddling in the business of national courts on this basis, the German Federal High Court very surprisingly ruled against the claimant when the case returned from the ECJ. On the basis of how some national courts in this and other decisions skillfully have exploited legal loop-holes to avoid finding member governments liable, Elspeth Deards concludes: "Despite the dire warnings as to the consequences of the judgment in *Brasserie du Pêcheur/Factortame III*, it is evident that the judgment in fact allows national courts quite easily to avoid awarding damages against a Member State."<sup>566</sup>

Special and more obvious cases of national court recalcitrance are the instances where higher courts have dismissed liability claims by refuting the supremacy of EC law over national law. The Commission, for example, recounts an Italian case, where two lower courts had taken the view that the Italian state was obliged to pay compensation because of legislative breach, but where the

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<sup>563</sup> Caranta, 1993, pp. 290-291.

<sup>564</sup> FIDE, 1998, p. 148.

<sup>565</sup> E.g., European Commission, 1997d, pp. 475, 477; FIDE, 1998, pp. 149, 150, 346.

<sup>566</sup> Deards, 1997, p. 624. Note also that in *Factortame III*, where the UK Divisional Court found the state liable, the national court exploited its discretion to heavily restrict the damages awarded, denying the claimants exemplary damages. Deards, 1997, p. 625; European Commission, 1998c, p. 314.

Supreme Court of Appeal—disregarding the legal duty under Community law to create an effective remedy if one does not exist—took the view that the Italian state could not be held liable, since there were no such provisions in Italian law.<sup>567</sup>

In sum, existing data, though less than systematic in some respects, suggest that many national courts and governments have been hesitant in their reception of the ECJ's state liability case law. Through various forms of inaction—not adjusting national legal systems to the requirements of EC law, not designating appropriate procedures and courts, and not applying the rules to the advantage of claimants—national courts and governments have emasculated the principle and, at least temporarily, limited its enforcement-enhancing effect. Concludes a councilor with the Commission's Legal Service: "When it comes to the real possibilities, it remains very difficult to sue a member state in its own courts."<sup>568</sup>

*When inaction is more effective than action*

Existing literature applying P-A analysis to European integration isolates four kinds of possible sanctions against supranational shirking: cutting the budget and refusing to appoint personnel, overruling a supranational decision with new legislation, revising the treaties, and unilateral non-compliance.<sup>569</sup> The first rather blunt sanction of cutting the budget of the institutions or refusing to appoint their personnel is seldom effective in the EU context, and probably would not have been so in this case either. On the one hand, the bluntness of this sanction would have handicapped the ECJ's capacity to perform functions actually endorsed by member governments, and on the other, it would not have corrected the effects of the supranational shirking. The second sanction of rewriting the Court's judgments through new legislation was not available, as only decisions based on secondary legisla-

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<sup>567</sup> European Commission, 1997d, p. 476. It is no coincidence that this occurred in Italy, where mistrust toward the supremacy of Community law has been the leitmotif of the constitutional court during the last three decades. Laderchi, 1998, p. 147.

<sup>568</sup> Interview, February 18 1998.

<sup>569</sup> See chapter four and Pollack, 1997a; Alter, 1998a; Stone Sweet and Caporaso, 1998.

tion can be rewritten by statute, and not judgments based on the treaty, such as *Francovich*. The two sanctions that remained open to member states, wishing to sanction the Court and undo the effects of its shirking, were treaty revision and non-compliance, and they pursued varieties of both.

The attempt by some member governments to sanction the Court at the 1996-97 IGC suggests that there are considerable difficulties involved in revising the supranational agent's/supervisor's mandate in the context of the EU. Reforming the core institutional set-up, altering the mandates of the supranational institutions, and reversing ECJ decisions based on the treaty necessitate treaty amendments agreed upon at an IGC. Given the requirement of unanimity for treaty revisions, however, the Court and the Commission will remain unsanctioned, and the result of their shirking will survive unscathed, as long as this is preferred by just a single government. In view of, for instance, Belgium's staunch backing of the ECJ, it is therefore unlikely that the Court will see its wings clipped as long as unanimous agreement is required for treaty amendments.

With the concept of the "joint-decision trap," Fritz Scharpf has captured the essential features and likely consequences of the institutional conditions present at an IGC in more formal terms.<sup>570</sup> According to Scharpf, the joint-decision trap emerges in the EU, whenever the institutional conditions are such that: (a) decisions at the central EU level are directly dependent on the agreement of the constituent governments, and (b) the agreement of the constituent governments must be unanimous or nearly unanimous. In situations characterized by these institutional arrangements, Scharpf posits, the central EU level, in the form of the Council, will be unable to respond to internal and external demands, which in turn will lead to sub-optimal decisional outcomes.

Mark Pollack and Karen Alter have translated the logic of Scharpf's joint-decision trap to the sanctioning of supranational agents in the EU.<sup>571</sup> Not surprisingly, both are pessimistic about governments' capacity to rely on treaty revision as a means for reining in shirking agents. As Pollack puts it: "[T]he threat of

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<sup>570</sup> Scharpf, 1988.

<sup>571</sup> Pollack, 1997a; Alter, 1998a.

treaty revision is essentially the ‘nuclear option’—exceedingly effective, but difficult to use—and is therefore a relatively ineffective and noncredible means of member state control.”<sup>572</sup> The ineffectiveness of treaty revision as a sanction is by no means predestined, however, but dependent on the distribution of government preferences and the decision rules governing the sanctioning of agents. As decisions on the institutions’ competences require unanimity, and it is rare that all states prefer modifications to the existing order, the prospects for sanctioning through treaty revision look bleak, however.

In the negotiations on the ECJ at the 1996-97 IGC, both these variables pointed in favor of the Court.<sup>573</sup> While it is difficult to determine exactly how many governments tacitly supported the UK, it is clear that the additional ECJ skepticism of Germany, France, and Spain was not sufficient to turn around the remaining governments. Since the Court’s jurisprudence on state liability was based on treaty articles rather than secondary legislation, the judgments could not be reversed with less than the full accord of EU governments. Likewise, unanimity was required for revisions of the Court’s competences, as always. In one deal, member state principals could have revised the delegated powers of the Court, improved control mechanisms, and reduced the effects of supranational shirking. Now, a stern warning was instead the end result of the attack on the ECJ at the 1996-97 IGC.

While not as coherent and easily observable as the sanction of treaty revision, inaction also constitutes a sanction. Depending on the degree to which it challenges actual legal obligations, inaction can varyingly be conceived of as non-compliance, obstruction, and circumvention. In comparison with the act of revising the treaty, this alternative has greater chances of succeeding. The sanction of inaction is not subject to barriers at the supranational level, such as decision-making rules and the distribution of preferences among national governments. Moreover, as the sanction consists of

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<sup>572</sup> Pollack, 1997a, pp. 118-119.

<sup>573</sup> Note, however, that the joint-decision trap and these key variables worked in the opposite direction as regards the extension of competence to the ECJ in the third pillar of JHA at the IGC. As unanimity was required for the transfer of new policy areas into the domain of the Court, governments skeptical of the ECJ enjoyed the power to block the extension of the Court’s involvement. Alter, 1998a, pp. 141-142.

political and judicial inaction rather than action, it does not have to pass the hurdles of the domestic decision-making process to be effected. Rather, this option is automatically executed, whenever an official member state actor, whose active cooperation is required for supranational decisions to gain practical importance, instead prefers to maintain the status quo.

Looking more specifically at the judicial component of inaction in a case such as state liability, it is evident that the attitude of national courts is of seminal importance. In the EU, national courts are the carriers of dual identities, loyalties, and purposes. Rather than being only courts of a member state, or only European courts, national courts are both. Neither the ECJ nor member governments can therefore entirely control national courts or expect their full allegiance.

In the case of state liability, discontented governments were privileged enough to enjoy the assistance of certain national courts in the attempts to emasculate the principle. A probable explanation for the reluctance of some national courts to embrace and fully exploit the enforcement potential of the new principle is its interference in national constitutional orders and the challenge against their institutional and procedural autonomy. Commenting on the jurisprudence reinforcing decentralized enforcement, Joseph Weiler observed already in 1993 that *Francovich*, *Emmott*, and *Factortame I* risked jeopardizing the integration-driving alliance between the ECJ and national courts:

[T]he recent line of cases represents a potential encroachment of Community law and the authority of the European Court into procedural matters which hitherto were within the almost exclusive province of national courts. In the past the European Court was always careful to present itself as *primus inter pares* and to maintain a zone of autonomy of national jurisdiction even at the price of non-uniformity of application of Community law. If the new line of cases represents a nuanced departure from that earlier ethos, the prize may be increased effectiveness, but the cost may be a potential tension in the critical relationship between European and national courts.<sup>574</sup>

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<sup>574</sup>Weiler, 1993, pp. 442-443.

In this perspective, it is no coincidence that the most telling examples of reticent national courts, such as the German judgment in *Brasserie du Pêcheur* and the Italian case of disrespect for EC law supremacy, involved the highest courts rather than lower courts. The highest courts in the national legal systems have traditionally been the most reluctant to accept principles introduced by the ECJ, not least the path-breaking introduction of EC law supremacy. “While EC law supremacy posed a threat to the influence and authority of high courts and implied a significant compromise of national sovereignty, lower courts found few costs and numerous benefits in making their own referrals to the ECJ and in applying EC law.”<sup>575</sup> This logic seems to have been at work in the case of state liability as well, where some high courts, intent on policing and preserving national legal systems, found the new principle too offensive to apply in full.

The sanction of inaction forces us to question what actually constitutes successful supranational influence. A focus on legal output and formal sanctions alone would have called for the conclusion that the reinforcement of decentralized enforcement was home free, once established by the Court and saved from countermeasures at the IGC. As member states’ recourse to evasion and inaction has shown, however, such a conclusion would have overestimated the immediate influence of these supranational actions on European governance. The supranational institutions cannot be said to have pushed European integration further than desired by member governments, unless their shirking results not only in legislative output but also in practical outcomes. This qualified understanding of supranational influence is at the heart of the emerging literature on the conditions determining when ECJ jurisprudence translates into concrete policy effects.

The effectiveness and success of inaction as a method for limiting the impact of the state liability principle should not, however, be overstated. While existing evidence indicates that certain national courts and governments have been quite hesitant in their reception of the principle, it also shows that this recalcitrance by no means constitutes the general and exclusive rule. In more principal terms, the major weakness of the sanction of inaction, com-

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<sup>575</sup> Alter, 1996, p. 466.

pared to a revision of the treaty, is that it cannot remove the basic cause of concern, but instead merely limits its effects, and perhaps only temporarily. The mere fact that some national governments and courts have emasculated the principle and its implications does not mean it is not there and will not come back to haunt them from time to time. Moreover, if the approach to state liability will follow the same pattern of development as the attitude toward direct effect and EC law supremacy, then we are likely to see subsiding resistance and growing acceptance over time. Finally, in the perspective of doctrinal development, the state liability principle might provide a future stepping-stone for the Court in the continued construction of a European judicial order.

### **Summary**

Independent creation of new means of supervision is a third possible form of supranational influence in EU enforcement. In this chapter, I have accounted for the Commission's and the Court's joint efforts to single-handedly shift the gravity in EU enforcement toward a greater reliance on decentralized, "fire-alarm" supervision rather than centralized, "police-patrol" enforcement. The chapter testifies to greater latitude for the supranational institutions in affecting decentralized as compared to centralized enforcement, though the degree of autonomy varied considerably between the two supervisors. Whereas the Court enjoyed the capacity to lay down enforcement-enhancing principles and requirements, owing to the absence of intrusive, participation-based control, the Commission's actions were to a greater extent subject to such monitoring. Member states' ability to limit the effects of this supranational shirking, the Court's case-law advances in particular, was therefore dependent on the sanctions they could muster. While the attempt to sanction the ECJ at the 1996-97 IGC failed, due to the high institutional barriers involved in treaty revision, the recalcitrant reception of the Court's jurisprudence by some national governments and courts limited the effects of this supranational shirking at least partially and temporarily.



**PART IV**  
**CONCLUSION**

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CHAPTER  
NINE

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**TOWARD A MORE ADVANCED UNDER-  
STANDING OF EUROPEAN INTEGRATION  
AND INTERNATIONAL COOPERATION**

This study departed from one of the most central points of contention in the study of European integration—whether the EU’s supranational institutions constitute engines of integration, actively driving and directing the process of integration, or simply are obedient servants passively fulfilling the technical functions they have been delegated by member governments. In social scientific jargon, at the heart of this debate are competing claims about the degree of independent causal influence exerted by the Commission, the Court, and the Parliament on the course of European integration. Whereas the predominant focus of existing research is the capacity of the institutions to exercise such independent influence in the pre-decisional phase of EU policy-making, this study has attempted to fill a gap by examining the scope for supranational influence in the post-decisional phase of enforcement. EU decision-making is of little value *per se*, and does not result in actual integration and cooperation, unless member state compliance with EC rules can be secured as well. The extent to which the Commission and the Court can enforce compliance more strenuously than member governments desire and originally intended is therefore pivotal to the general question of supranational influence in European integration.

The aims of the study have been threefold. The principal purpose has been to improve our understanding of supranational influence by exploring the Commission’s and the Court’s capacity to exert independent causal influence in the enforcement of member state compliance. Beyond this overarching theoretical aim, I also

formulated two additional, subordinate goals. First, to make an empirical contribution to the literature on EU enforcement by closing gaps in the documentation of its evolution since the mid-1980s. Second, to isolate the implications of this examination of EU enforcement for the study of international institutions and cooperation in IR theory. The pursuit of these aims rested on two pillars. Drawing on P-A theory, I constructed a principal-supervisor-agent model specifically designed to explain supranational influence in enforcement. The explanatory power of the model and its hypotheses were then assessed in light of the supranational institutions' efforts to secure compliance with the EU's Internal Market in the period 1985-1998, which qualifies as a case of potential supranational influence in EU enforcement.

Formulating the principal conclusion in one sentence, the study suggests that the Commission and the Court indeed may succeed in exerting independent influence in EU enforcement, but that this capacity is conditioned by member states' means of monitoring and sanctioning, which, in the process examined here, effectively forestalled certain forms of supranational influence, while proving insufficient to prevent the institutions from reinforcing decentralized supervision. In view of this conclusion, three tasks remain in this final chapter. In the first section, I will elaborate on this conclusion, synthesizing the findings of the empirical examination and assessing the evidence bearing on the hypotheses of the P-S-A model. The second section isolates the implications of the study for research on European integration and the debate on supranational influence, before I conclude by identifying the implications for general theories of international cooperation.

### **Supranational Influence in EU Enforcement**

The empirical examination of supranational attempts to strengthen supervision in association with the Internal Market effectively entailed mapping key developments in EU enforcement since the mid-1980s. Essential parts of this evolution were previously partially or completely undocumented in the literature on EU enforcement. The theoretical purpose of assessing supranational influence thereby contributed to the empirical aim of closing lacunae in

the historical record. Below, I have structured the findings of the empirical examination across the three sets of hypotheses about supranational influence generated by the P-S-A model.

Confidence in these findings is secured by the methodological strategy of the study. The case-study format, combined with process-tracing and counterfactual analysis, allowed for close analysis of actor interests and behavior, thus safeguarding the inferences against the problem of anticipated reactions. The reliability of the findings is further strengthened by the high dependency on primary rather than secondary sources, as the latter always involve an element of interpretation by other scholars, who may not have been oriented toward the same problem in their selection of facts. To the extent that the empirical evidence has been open to more than one interpretation, or if alternative interpretations have been advanced in the literature, I have reported this uncertainty and attempted to assess the relative value of the interpretations. While presented as one case, this empirical process recounted here has contained a large number of observations on the critical variables, boosting reliability and facilitating generalizations. To the extent that these multiple observations form stable patterns, they suggest that we might find the same relationships in other comparable cases of potential supranational influence in EU enforcement.

#### *The conditions inducing supranational influence*

The first set of hypotheses generated by the P-S-A model pertained to the conditions that induce the supranational institutions to shirk and attempt to move EU enforcement beyond governments' wishes. It was posited that the Commission and the Court, given conflicting interests and information asymmetry, would engage in efforts to independently strengthen EU enforcement when, and only when, delegated supervisory powers proved insufficient to ensure compliance in a satisfactory fashion. Essentially, this hypothesis contained two parts: the notion that the supranational institutions are motivated by the need to secure adequate compliance, which is the equivalent of "more Europe" in the post-decisional phase; and the recognition that enforcement differs from other phases of the policy cycle in that the preference held has a

finite value, restricting the urge to shirk to those instances when compliance is less than adequate.

The findings grant support to both these aspects of the conditions inducing supranational influence in EU enforcement. The anticipation of growing compliance problems and the experience of a deterioration in member state compliance in the late 1980s and early 1990s were the basic cause inducing the supranational institutions to launch a campaign to strengthen enforcement. Three forms of compliance problems were especially prominent and worrying: non-compliance in the legal transposition of directives, in the actual application of EC rules, and with ECJ judgments.

This situation was considered particularly alarming in view of the Internal Market program—the most ambitious legislative project of the Community so far. If the Internal Market were to be realized, non-compliance would have to be attacked with all enforcement weapons available. The instruments existing in the late 1980s were, however, perceived by the supranational institutions as limited in their capacity to ameliorate these compliance problems, not least because of the extremely time- and resource-consuming nature of the Article 169 infringement procedure. It was painfully clear that the limits of this procedure would be even more exposed when the body of Internal Market rules came up for implementation and application in the early 1990s.

The concrete steps taken by the supranational institutions in this situation confirm their sensitivity to the capacity of existing means to effectively contain non-compliance. First, the Commission attempted to improve the effectiveness of existing powers through a fivefold set of measures enhancing the Article 169 procedure as an enforcement instrument. Second, the Commission sought to induce the delegation of new means of enforcement at the 1991 and 1996-97 IGCs; first the introduction of sanctions against non-complying states, and then more time and resource efficient procedures for the imposition of these sanctions. Third, the Commission and the Court took joint action to shift the gravity in EU enforcement toward greater reliance on decentralized supervision through national courts—a process that involved the creation of entirely new enforcement means.

*The scope for supranational influence*

The second set of hypotheses generated by the P-S-A model addressed the scope for supranational influence in EU enforcement—the core question of the study. Drawing on the most central elements of P-A theory, the general hypothesis predicted that the Commission's and the Court's capacity to exert independent causal influence in EU enforcement would be determined by member states' means for monitoring and sanctioning the actions of the institutions. This hypothesis, in turn, generated three specified hypotheses pertaining to the relative capacity of the two institutions to exert supranational influence, the relative difficulty of successfully exercising different forms of supranational influence, and the relative effectiveness of government sanctions in terms of preventing supranational influence.

The empirical record strongly supports the notion that member states' control mechanisms condition the ability of the supranational institutions to enforce compliance by other means and in other ways than EU governments desire. Where member states could readily observe, interpret, and intervene in supranational actions, and where shirking which nevertheless occurred could be countered with sanctions, the Commission's and the Court's scope for supranational influence was highly limited, or even non-existing. By contrast, the supranational institutions enjoyed some capacity to introduce enforcement measures countering government preferences, where few means existed to actively monitor their actions, and where sanctions were either lacking or difficult to apply effectively. The assertion that member states' means of monitoring and sanctioning conditioned the scope for supranational influence is bolstered, when we consider the evidence bearing on the three specified hypotheses.

*Comparing forms of supranational influence.* The first of these posited that the Commission and the Court would be comparatively less controlled in the exercise of existing competences, than at moments of treaty revision, and therefore would be more likely to exert supranational influence either by employing delegated enforcement means in ways not intended or by boosting the means of supervision through delegated non-enforcement competences. To the extent that the evolution of events allows an assessment of

this hypothesis, it endorses this conception of the relative ease of exercising alternative forms of supranational influence in EU enforcement. Each of the three approaches followed by the Commission and the Court in their quest to boost enforcement resulted in a different outcome.

While all five measures taken by the Commission to enhance the enforcement potential of the Article 169 procedure—the internal reforms streamlining the handling of cases, the shift to a firmer enforcement policy, the encouragement of complaints to the Commission, the development of a shaming strategy, and the intensification of compliance bargaining—in some way strengthened EU supervision, none of them qualified as shirking, rendering an evaluation of the scope for supranational influence impossible. One potential explanation for the absence of shirking could have been the phenomenon of anticipated reactions, i.e., the notion that member states' control mechanisms were sufficiently effective and credible to discourage the Commission from venturing beyond government preferences. Existing empirical evidence lends little support to this interpretation, but rather suggests that the Commission lacked a clear motive to shirk, as the infringement procedure offered ample room for self-engineered improvements not necessitating a transgression of delegated competences.

The Commission's attempts to induce the delegation of more far-reaching enforcement means at the 1991 and 1996-97 IGCs illustrated the limited capacity of the supranational institutions to exert independent influence at such moments of treaty revision. Compared to everyday decision-making and enforcement in the EU, IGCs entail a high degree of agenda control for member governments. This agenda control generates a more even distribution of information about the consequences of supranational proposals and allows member states to present alternative solutions without involving the Commission, thus reducing the institutions' capacity to maneuver governments into accepting supranational proposals. At the 1991 IGC, the Commission sought to induce governments into accepting its preferred sanctioning mechanisms rather than the revision of Article 171 promoted by the UK, but failed, as the negative consequences for national sovereignty were fully observable to the member states. Similarly, the 1996-97 IGC was a rearguard battle for the Commission, which was forced to

adapt its proposal for a more efficient sanctioning procedure to governments' preferences in a number of consecutive steps. EU governments never showed any sign of failing to understand the consequences of the Commission's suggestion. Expressed in terms of alternative forms of monitoring, the IGC format on these occasions granted member states effective control through an extreme form of participation-based monitoring.

The Commission's and the Court's collective efforts to strengthen decentralized enforcement was, by contrast, a process which member states had great difficulties controlling, not least because of the pivotal role of the Court. Exploiting the discretion inherent in its competence to interpret Community law, the ECJ strengthened the remedies available to aggrieved parties in national courts—a process, whose completion member states could do little but observe, save the option of sanctioning the Court and its actions. Two forms of sanctions were attempted, and whereas the sanction of treaty revision failed, the sanction of inaction at the national level partially limited the consequences of the ECJ's actions. The Commission, for its part, succeeded in exerting limited supranational influence by launching policy programs supplementing the Court's case law advances. This joint reinforcement of decentralized supervision passes the counterfactual test that intergovernmentalist scholars recommend, whenever an independent supranational effect on European integration is claimed. By any measure, it is highly unlikely that member states, in the absence of supranational action, would have stepped in to strengthen decentralized enforcement to a corresponding extent. That national governments, somewhere between their 1991 rejection of state liability as a system of sanctions and their attempts in 1996-97 to punish the ECJ for introducing this very sanction, would have decided to institutionalize this system themselves is simply unimaginable.

*Comparing the supranational institutions.* The second specified hypothesis concerned the relative capacity of the two enforcement institutions to exercise supranational influence, and predicted that the Commission would be more constrained than the ECJ. This hypothesis is confirmed by clear and unequivocal empirical evidence. In general terms, attempts at supranational shirking

only succeeded where the Court was involved, that is, in the strengthening of decentralized enforcement. Examinations of centralized enforcement, centered mainly on the Commission and political processes, called for pessimistic conclusions as to the supranational institutions' ability to move EU enforcement beyond governments' preferences. By contrast, the tracing of developments in decentralized enforcement, with the correspondingly larger emphasis on the Court and judicial processes, gave reason to question this verdict.

The central position of member state control mechanisms in explaining the divergent records of the Commission and the Court stands out, if we contrast the institutions' parallel attempts to enhance decentralized enforcement. Through a string of important decisions in the late 1980s and early 1990s, the ECJ laid down principles and requirements, among them state liability, which strengthened the hand of individuals wishing to enforce their EC rights in national courts. The Court's capacity to shirk and introduce measures unwanted by member governments is best attributed to the latter's absence of means for intrusive, participation-based monitoring. The judicial independence inherent in the Court's position as legal supreme grants the institution an autonomy that makes it uniquely easy to introduce measures perceived to be in the interest of the EU and its judicial system. National governments may argue their cases before the Court, but cannot prevent the Court from handing down unwanted judgments. In effect, therefore, member states' only weapon against the Court are *ex post* sanctions, once judicial shirking has already taken place. In the case of decentralized enforcement, the sanctions applied did not succeed in fully eliminating the effects of the Court's shirking.

In parallel, the Commission launched policy initiatives aimed at ameliorating weaknesses in the existing structure of decentralized enforcement, thus reinforcing the measures introduced by the ECJ. As opposed to the Court, however, the Commission was far from relieved of oversight, and the formulation of the Citizens First and Robert Schuman programs was monitored actively and intrusively by member governments. Independent of whether or not it was formally required, government consent was *de facto* necessary for the launching of both these programs, effectively facilitating control of the Commission's actions. Where the Commis-

sion did not adapt its proposals to government preferences *ex ante*, member states sanctioned the projects *ex post*, for instance, by opting out like the UK in the case of Citizens First. Arguably, the Commission nevertheless exercised limited supranational influence, when shielding these programs from wholesale rejection through the techniques of packaging, framing, and co-optive justification.

*Comparing member state sanctions.* The third specified hypothesis pertained to the relative effectiveness of member state sanctions in preventing supranational influence. It was posited that the requirement of qualified or unanimous consent among member governments would render collective sanctions comparatively more difficult to impose than unilateral, as well as restrict the capacity of sanctions generally to function as effective control mechanisms. Member states' attempts to sanction the ECJ's introduction of state liability confirm this hypothesized relationship.

Symptomatically, the UK-led attempt at the 1996-97 IGC to revise the ECJ's mandate and rewrite its enforcement-enhancing decisions was thwarted by the requirement of unanimous agreement, which could not be secured despite the support of powerful governments. The joint-decision trap indeed proved impossible to overcome in the face of divergent government preferences and the most demanding decision rule. By contrast, existing data suggest that inaction at the national level limited, at least partially and temporarily, the effects of the state liability principle. Rather than enthusiastically embracing the enforcement-enhancing principles and conditions handed down by the ECJ, some national governments and courts were reluctant to take the full implications of the new case law.

Whereas the multilateral sanction of treaty revision could be applied only if all governments agreed, the unilateral sanction of inaction was merely contingent on the actions of a single government, or even a single official member state actor. Nor did it have to pass the hurdles of the domestic decision-making process to be effected, as it consisted of political and judicial inaction rather than action. The sanction was automatically executed whenever a national actor, whose active cooperation was required, instead preferred to maintain the status quo. In the particular case of

state liability, it was clear that national courts held such a key position, and that some governments were fortunate enough to enjoy the support of especially higher courts in the ambition to restrict the consequences of the principle. The major weakness of inaction as a sanction, compared to treaty revision, is that it cannot remove the basic cause of concern, but instead merely limits its effects, and perhaps only temporarily. Despite the recalcitrant reception at the national level, the principle of state liability remains a part of Community law, which every now and then will remind governments of the hollowness of national sovereignty and make non-compliance a costly business.

Taken together, the empirical findings suggest that the scope for supranational influence in EU enforcement is indeed a phenomenon which, like most other social science phenomena, varies depending on the configuration of a set of crucial explanatory factors. The analysis in this study suggests that the monitoring and sanctioning mechanisms available to member states for controlling supranational behavior are strong candidates for the position as such key factors in explaining supranational enforcement influence.

#### *The result of supranational influence*

The third set of hypotheses generated by the P-S-A model concerned the forms of supervision that the supranational institutions are likely to promote in the process of exercising independent influence. The hypothesis posited that the Commission and the Court would be sensitive to the relative resource efficiency of alternative forms of supervision, and therefore likely to favor the less resource demanding mode of decentralized enforcement over the highly resource intensive strategy of centralized enforcement. This reasoning rested on the assumption that the costs of completely eradicating member state non-compliance are prohibitively high, inducing the supranational institutions to shift from more to less resource intensive means in order to obtain as much enforcement as possible, given existing resources.

If anything, this hypothesis was defined too restrictively. The striving for more resource efficient forms of supervision was a defining feature of all supranational action in EU enforcement during the period examined—not only when the institutions indeed at-

tempted to shirk, and not only in terms of a preference for decentralized enforcement over centralized. All three aspects of the campaign to reinforce EU supervision testify to a well-developed resource-sensitivity among the supranational institutions, the Commission in particular. In the exercise of its delegated enforcement powers, the Commission consistently took steps or intensified practices, which would make centralized enforcement more resource efficient, such as internal reforms and the extension of compliance bargaining. At the two IGCs, the Commission sought first to obtain sanctions that were relatively less resource demanding for the supranational institutions, and then to abolish steps of the new procedure that rendered it particularly time and resource consuming. Finally, in the quest to boost decentralized supervision, the Commission and the Court shifted the gravity in EU enforcement toward a form of supervision that was less resource intensive for the institutions.

The supranational institutions clearly appreciated the problem of resources in enforcement. The preference for less resource demanding forms of enforcement should not, however, be taken to mean that the institutions were sensitive to the total resource requirements of various modes of supervision. For instance, the shift toward greater reliance on decentralized enforcement did not necessarily reduce the resources required, as such; rather, it entailed that the costs of enforcement would increasingly have to be borne by individuals and national courts instead. Maximizing compliance and enforcement rather than competences, the Commission and the Court found it an attractive option to spread the costs and responsibility of supervision, as long as more enforcement and better compliance were likely to be the result.

### **Implications for the Study of European Integration**

What do these results imply for the study of European integration? Do they carry importance outside this individual study? Beyond the assertion that there is a high probability of the patterns identified here to reemerge in comparable cases of potential enforcement influence, the findings carry two additional forms of implications; for the theoretical value of P-A analysis and the P-S-A

model beyond this particular case, as well as for the prevailing understanding of supranational influence and European integration in general.

*The merits and demerits of P-A analysis and the P-S-A model*

Derived from general P-A theory, the principal-supervisor-agent model was construed to capture the control problems inherent in the delegation of supervisory competences to the supranational institutions of the EU. The empirical process examined here constitutes the first test of this model's value as a tool for explaining and analyzing the scope for supranational enforcement influence, and thus grants the first opportunity to confront the question of whether the model ought best be revised, recommended, or regretted. In short, would this be a valuable instrument for the future analysis of supranational influence in EU enforcement?

While the empirical analysis highlights merits as well as demerits, the dominating impression is one of firm endorsement of the model as theoretical construct. Most fundamentally, the hypotheses generated by the model receive widespread support in the empirical findings. This, I submit, is because the P-S-A model effectively captures the *strategic context* of EU enforcement: the configuration of actors, their preferences, their constraints, and their opportunities.

The extension of the generic P-A model into the triangular P-S-A model permitted a configuration of the key actors, which accords better with legal and political practice in EU enforcement. Higher explanatory and predictive capacity has been the substantive consequence of this reconfiguration and the dual role it confers on member states.

The empirical examination offers extensive support for the actor preferences stipulated in the model. Member states are essentially torn between the threefold interests of securing compliance, safeguarding sovereignty, and retaining room for maneuver in the implementation of Community provisions—each state conceiving the relative importance of these objectives slightly differently than the others. The supranational institutions, for their part, are steadfastly pursuing the objective of better compliance through more effective enforcement, which need not involve a maximization of their own competences.

The empirical process covered in the study also persistently testifies that monitoring and sanctions enable governments to better control that the supranational institutions work toward the objectives of the member states rather than pursue their own. I cannot claim to have tested properly the constraining effect of monitoring and sanctions in the second part of the principal-supervisor-agent equation. Unstructured indications suggest, however, that supranational enforcement worked to reduce the scope for state non-compliance, thereby facilitating the realization of EU policy.

In broader terms, the study validates the advantages of P-A analysis in general as a tool for addressing delegation and autonomy in European integration. The neutral theoretical language of P-A analysis has indeed permitted an open-ended assessment of the degree of independent influence exercised by the supranational institutions, not discriminating against the claims of either neo-functionalism or intergovernmentalism. Supranational influence has been treated as a question of empirical analysis rather than assumption, and hardly surprisingly, the findings also indicate a more complex picture of variation between, for instance, the Commission and the Court.

From a meta-theoretical perspective, these confirmed advantages of P-A analysis support the notion that the EU, while unique as political phenomenon, in fact can be adequately explained using general theories of political behavior. While this study and the debate it has addressed pertain to the independent influence of the EU's traditional supranational institutions, the growing tendency to delegate extensive powers to independent institutions, whether regulatory agencies or economic bodies such as the European Central Bank (ECB), suggests that P-A theory may be of broad applicability in the study of European governance.

No theoretical construct or perspective is likely to capture all facets of a political phenomenon. P-A theory and the P-S-A model do not constitute an exception in this respect, and the empirical examination gives us reason to note at least two limits of this approach. First, strictly applied P-A theory accords to information asymmetry the exclusive explanatory power as regards shirking. Only if the principal cannot fully monitor and correctly interpret the agent's/supervisor's actions, may shirking take place. However,

as illustrated by the Commission's techniques for shielding supranational proposals from government rejection, this conception of the sources of shirking is too restrictive. Shirking may in fact result even when EU governments are fully aware what the Commission and the Court are doing, if the supranational institutions, for instance, skillfully package issues so that each government is given sufficient reason to approve rather than reject a proposal. Second, the dual position of national courts as integral parts of both the European and the national legal structures poses a difficulty to a model such as this one, where the actors are assumed to be clearly delimited and mutually exclusive. This is, however, a weakness that the P-S-A model shares with many other theoretical conceptualizations of national, European, and international politics. As one legal scholar notes, existing political accounts of European legal integration simply do not "provide theoretical space for the fact that national courts are simultaneously both 'of' and 'not of' the national and European systems of governance."<sup>576</sup>

These weaknesses of the P-S-A model reflect the downside of deductive models resting on abstraction and simplification. What is gained in parsimony and logical inference may be partially lost in empirical comprehensiveness and explanatory breadth. The choice confronting scholars wishing to employ P-A theory, is therefore one of either: (a) relying entirely on the generic and theoretically coherent logic of the P-A model, while being aware that certain explanatory power may have to be sacrificed; or (b) applying the generic logic, but recognizing its limits and broadening the analysis if, for instance, information asymmetry cannot by itself account for shirking; or (c) acknowledging *a priori* that the principal-agent relationship may be most useful as an imagery or general framework, in which all forms of constraints and opportunities can be integrated.

#### *Challenging existing conceptions of supranational influence*

What are the implications of the study for existing conceptions of supranational influence in European integration, and how far can we generalize the findings obtained here? Structuring the main

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<sup>576</sup> Kilpatrick, 1998, p. 145.

contribution of the study under four headings, we find that its results both challenge and confirm established positions.

First, and most importantly, the analysis indicates that the supranational institutions may exert independent influence in EU policy-making, not only through agenda-setting and policy-execution, as is often argued, but also by moving the enforcement of state compliance beyond governments' original intentions when delegating supervisory competences. The supranational institutions may thus influence the course of European integration, not only by introducing new issues on the policy agenda, but also by securing a higher degree of realization of the decisions that indeed are taken.

The picture of supranational influence in EU enforcement is, however, more complex than what either intergovernmentalism or neofunctionalism would predict. In the process studied here, control was neither complete, as the supranational institutions did manage to introduce measures many or most governments did not appreciate, nor lost, since member states succeeded in blocking or limiting the effects of other attempts at supranational influence. Intergovernmentalism and neofunctionalism prove too blunt to capture supranational influence in a real-world process such as the strengthening of EU enforcement. Rather than supporting either of these competing theoretical positions, the findings endorse the need to search for conditional generalizations, as allowed for in P-A analysis.

Second, the empirical analysis provides firm support for the notion in existing research that it is comparatively easier for the Court than the Commission to exert supranational influence.<sup>577</sup> Having equipped the Commission with the political mandate to act as the spearhead of European integration, member governments have also been careful to set up control mechanisms that are far more elaborate than those which can exist in relation to an independent court. This difference extends to the supervisory function of the two institutions as well. Though the Commission enjoys an unusual degree of autonomy in the enforcement of state compliance, governments are still highly watchful of how it makes use of this competence. We are therefore more likely to find in-

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<sup>577</sup> E.g., Pollack, 1997a.

stances of supranational enforcement influence in the tracks of the equally pro-integrationist, but less restrained Court. To quote Martin Shapiro: “To understand policymaking, one must hunt where the ducks are—even if they are in the deep thickets of the law.”<sup>578</sup>

Third, beyond confirming the claim of other P-A theorists that member states’ means of monitoring and sanctioning are decisive of the scope of supranational influence, the study contributes to the growing body of knowledge on the specific means of control employed. As regards monitoring, the distinction between participation- and observation-based forms captures essential differences between the means available for preventing the Commission and the Court from venturing into shirking. It is the absence of participation-based monitoring and the forced recourse to observation-based monitoring and sanctions that make it uniquely easy for the Court to introduce measures, which go against established government positions. With respect to sanctions, the study confirms the conclusions of existing research that institutional hurdles render the sanction of treaty revision exceedingly difficult to use. It suggests, however, that unilateral sanctions, such as inaction, can more readily be used to undo the consequences of supranational influence. Indeed, inaction is an oft-neglected sanction and line of member state defense, indicating that we should not restrict our conception of sanctions to formal means, but be open to other forms of *de facto* sanctions.

Fourth, the study indicates the need for a more nuanced conception of the goals pursued by the supranational institutions when seeking to exert independent influence. While greater competences for the institutions and the EU in general may be the primary objective of supranational actions at the agenda-setting stage, the pro-integration preference takes the shape of better compliance at the enforcement stage—an aim whose fulfillment need not involve new competences. “More Europe” simply stands for different things, depending on the phase of the policy cycle.

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<sup>578</sup> Shapiro, 1992, p. 124.

## Implications for the Study of International Cooperation

The EU is often described by students of European integration as unique or *sui generis*, rendering comparisons with other forms of governance, national as well as international, difficult. Finding this pessimism partly unjustified, and the task of isolating the implications of the EU for IR theory imperative, I submit that this study (a) has contributed to a theoretical approach—P-A theory—which could be highly useful in understanding the autonomy of international institutions generally, and (b) has generated results with bearing on the on-going debate on the sources of compliance with international agreements.<sup>579</sup>

### *P-A analysis and the autonomy of international institutions*

This study started out from the assumption that P-A theory, as developed in new institutional rational choice theory, could be helpful in assessing and explaining the scope for supranational influence in EU enforcement. With this study, I joined a group of scholars, willing to apply P-A theory to an empirical domain not previously examined using these theoretical tools: member states' control over the EU's supranational institutions. While the focus in this new wave of research has remained restricted to the EU, it is time to recognize that the theoretical contribution of these works may reach beyond this particular empirical context.

The EU is not the only case, where governments have set up and delegated functions to international institutions, simultaneously creating a potential control problem. Secretariats and dispute-settlement bodies of international organizations, such as the WTO, the IMF, the UN, and the IAEA, generally enjoy certain duties of representation, initiation, execution, and supervision. What makes the supranational institutions of the EU unique in this comparative perspective is the range of the powers delegated, not the act of delegation itself. The Commission and the Court perform functions, which they have in common with other secretariats and dispute-settlement bodies, but enjoy competences

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<sup>579</sup> For an excellent discussion of the scope for generalizations and comparisons on the basis of the EU, see *ECSC Review*, 1997.

within these functions, which widely exceed those of the other institutions.

In view of the unique level of delegation in the EU and frequent indications of control problems, it is hardly surprising that P-A theory was first applied seriously to state-institutional relations in this context. Though serious gaps in control are less likely to be found elsewhere, there is nothing inherent in P-A theory that limits the use of this instrument to the study of the EU. Rather, it may be effectively employed to assess the degree of autonomy and control, whenever governments have delegated functions of some sort to international institutions. To mention but an easily recognizable example of how the P-A perspective may shed light on the autonomy of international institutions, member governments of the UN have historically used both the threat of not renewing the mandate of the secretary-general, and the threat of not paying outstanding dues to the organization, as means to control the orientation of policy.

Turning specifically to rule supervision, one of the classic functions of international organizations, the P-S-A model developed and applied in this study is capable of capturing the relationship between member states and an international institution, whenever monitoring and/or dispute-settlement competences have been delegated to the latter. In the stylized version presented in the first section of chapter four, the P-S-A model expresses in a pure form what standard P-A theory would consider as the typical problems, key factors, and logical consequences of conceptualizing member states and institutions as principals, supervisors, and agents. Before it was further specified in later sections, the model was thus not particular to EU enforcement as such, but would have isolated the same hypotheses in all instances, where states in an act of self-commitment delegate supervisory functions to international institutions.

Again, what sets the EU apart from other international organizations is the range of the enforcement powers conferred on its institutions, not the delegation itself. Few other international secretariats share the Commission's position as third-party prosecutor, and no other dispute-settlement bodies enjoy the same judicial authority as the ECJ. Rather, "[t]he common understanding of the role of international institutions is that they monitor the behavior

of participants in cooperative agreements and paint 'scarlet letters' on transgressors. The states themselves punish violations; all that the international institutions do is provide information that allows the states to further their own interests."<sup>580</sup>

Once we recognize that an essential trend in international relations today is the growing willingness to equip international institutions with more far-reaching dispute-settlement powers, it becomes clear, however, that we had better conceive of international supervisory competences as a continuum, with a number of coexisting models involving varying degrees of delegation.<sup>581</sup> The P-S-A model can prove a useful tool in assessing the degree and determinants of control and autonomy in these instances of enforcement delegation. In addition, such an international, comparative approach would address two gaps in existing research on international cooperation: the highly limited attention paid to the autonomy of international institutions, and the scarce attention that processes of implementation and supervision so far have received by political scientists.<sup>582</sup>

#### *Enforcement as a source of compliance with international rules*

The second area, where this study has implications for existing research on international cooperation, is the debate over the sources of compliance with international agreements. In the last decade, the study of compliance in IR theory has primarily been concerned with the question of what specific treaty and regime characteristics are most conducive to a high degree of compliance. Two loosely configured positions have emerged in this debate, often referred to as the management school and the enforcement school.

According to the enforcement school, non-compliance with international regulatory agreements will ensue, unless effective enforcement is provided.<sup>583</sup> States are viewed as having an incentive

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<sup>580</sup> Garrett, 1992, p. 535.

<sup>581</sup> For an elaboration on this continuum as regards international trade institutions, see Yarbrough and Yarbrough, 1997.

<sup>582</sup> For a recent identification of this dual weakness, see Reinalda and Verbeek, 1998.

<sup>583</sup> Works which can be referred to the enforcement school include Olson, 1965; Oye, 1986; Yarbrough and Yarbrough, 1992; Bayard and Elliot, 1994; Downs, Rocke, and Barsoon, 1996; Dorn and Fulton, 1997.

to defect in international cooperation, since they gain more from an agreement if they reap all the benefits of cooperation without putting in their own fair share. As a consequence, if states are to comply and international cooperation is to survive, enforcement and punishment are required to deter states from shirking. Moreover, the enforcement school hypothesizes that the deeper and more far-reaching the cooperation, the greater the punishment required to deter states from violating the agreement. This general logic of the enforcement school rests on the analytical foundations of game theory and collective action theory, which both emphasize the crucial role of enforcement.

The management school presents a picture at odds with the general conclusions of the enforcement school.<sup>584</sup> Compliance with international agreements is generally quite good, they argue. In real-life international relations, states meet their commitments almost all the time, and this high level of compliance has been achieved in the absence of enforcement. Most importantly, when proper compliance actually is difficult to achieve, it is better addressed as a management rather than an enforcement problem. Non-compliance often does not reflect a deliberate decision to violate an agreement, the management school submits. Instead, it may be the product of treaty ambiguity, limitations on capacity, or unexpected social and economic problems. As a consequence, managerial solutions, such as mutual consultation and analysis, technical and financial assistance, enhanced transparency, and improved dispute resolution procedures, hold the key to higher levels of compliance.

Whereas the focus of this study has been EU governments' control over the Commission and the Court, rather than the effectiveness of the supranational institutions' means in securing member state compliance, the process depicted here still contains unstructured indications bearing on the compliance debate. While conceptual overlap between the enforcement and management schools renders authoritative adjudication to the advantage of the one or the other approach difficult, these indications lend relatively more support to the assertions of the enforcement school. In general

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<sup>584</sup> Works which can be referred to the management school include Young, 1989; Chayes and Chayes, 1991, 1993, 1995; Haas, Keohane, and Levy, 1993; Keohane and Levy, 1996.

terms, it should be recognized that the EU's primary approach to compliance certainly is enforcement, that the institutions enjoy extensive enforcement powers, and that these powers—centralized as well as decentralized—are quite effective in inducing governments to correct their actions.

More particularly, the process of putting the Internal Market in place provides extensive support for the notion that the importance of enforcement grows, as cooperation deepens and states experience greater incentives to defect. As shown in chapter five, the process of realizing the Internal Market program imposed palpable adjustment costs on the member states, which increasingly found non-compliance an attractive way of softening the pressure. In view of the deterioration in compliance, fiercer enforcement means were perceived as the most promising solution by both the member states and the supranational institutions. While the effectiveness of the strengthening of decentralized enforcement is difficult to assess, complete data show that the new enforcement weapon formally conferred on the institutions—the sanctioning mechanism under Article 171—has been exceedingly effective in forcing member states to comply, whenever it has been used. “[S]anctioning authority is rarely granted by treaty, rarely used when granted, and likely to be ineffective when used,”<sup>585</sup> contend two of the foremost proponents of the management school. The EU of today is proof of the opposite: sanctioning authority is granted by treaty, used in all applicable cases, and highly effective when used.

Do these indications of support of the enforcement school matter for the debate on compliance, given the particularity of the EU as an international organization? The neglect of the EU in IR theory on international cooperation stems partly from the assertion of many EU scholars that European integration is an historical singularity precluding all comparison. As Gary Marks points out, however: “Comparison is entirely feasible even assuming that the EU is unique. What matters is *second order similarity*, that is, the existence of underlying dimensions on which one may place the EU alongside other cases.”<sup>586</sup> The relative capacity of enforcement and

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<sup>585</sup> Chayes and Chayes, 1995, pp. 32-33.

<sup>586</sup> Marks, 1997, p. 3. Emphasis in original.

management to bring about compliance is one such dimension, and there is reason to believe that the support for the enforcement school in this case may be of particular relevance.

With its highly institutionalized forms of cooperation, high reliance on diffuse reciprocity, unusual degree of value community, and extensive armory of managerial mechanisms, the EU constitutes a most likely case for the management school. If compliance problems require enforcement solutions here, then it is unlikely that managerial means are the best and only answer to faulty implementation and poor compliance. But, in addition, the EU constitutes a prototypical case in the sense that it lies at one end of a distribution of cases—an end perhaps indicative of the kind of regulatory agreements that are likely to be concluded in international relations in years to come. The growing institutionalization of world politics and the deepening of cooperation are not isolated to the EU, but extend to other areas of international relations as well, most notably the regulatory frameworks governing international trade at both regional and international levels. To determine the effectiveness of alternative avenues to compliance in the EU may therefore be to engage in preliminary forecasting of the potency of various solutions to non-compliance with future international agreements. As one student of both international and European politics notes: “Today the EU provides the best laboratory for studying theoretical issues only just emerging elsewhere.”<sup>587</sup>

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<sup>587</sup> Moravcsik, 1997, p. 4.

## **APPENDIX 1: SELECTED TREATY ARTICLES**

### *Article 5 EC*

Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks. They shall abstain from any measure which could jeopardize the attainment of the objectives of this Treaty.

### *Article 100a EC*

1. By way of derogation from Article 100 and save where otherwise provided in this Treaty, the following provisions shall apply for the achievement of the objectives set out in Article 7a. The Council shall, acting in accordance with the procedure referred to in Article 189b and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market....

4. If, after the adoption of a harmonization measure by the Council acting by a qualified majority, a Member State deems it necessary to apply national provisions on grounds of major needs referred to in Article 36, or relating to protection of the environment or the working environment, it shall notify the Commission of these provisions. The Commission shall confirm the provisions involved after having verified that they are not a means of arbitrary discrimination or a disguised restriction on trade between Member States. By way of derogation from the procedure laid down in Articles 169 and 170, the Commission or any Member State may bring the matter directly before the Court of Justice if it considers that another Member State is making improper use of the powers provided for in this Article.

### *Article 155 EC*

In order to ensure the proper functioning and development of the common market, the Commission shall:

- Ensure that the provisions of this Treaty and the measures taken by the institutions pursuant thereto are applied;
- formulate recommendations or deliver opinions on matters dealt with in this Treaty, if it expressly so provides or if the Commission considers it necessary;

- have its own power of decision and participate in the shaping of measures taken by the Council and by the European Parliament in the manner provided for in this Treaty;
- exercise the powers conferred on it by the Council for the implementation of the rules laid down by the latter.

*Article 164 EC*

The Court of Justice shall ensure that in the interpretation and application of this Treaty the law is observed.

*Article 169 EC*

If the Commission considers that a Member State has failed to fulfil an obligation under this Treaty, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations. If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice.

*Article 171 EC (as revised by the TEU)*

1. If the Court of Justice finds that a Member State has failed to fulfil an obligation under this Treaty, the State shall be required to take the necessary measures to comply with the judgment of the Court of Justice.
2. If the Commission considers that the Member State concerned has not taken such measures it shall, after giving that State the opportunity to submit its observations, issue a reasoned opinion specifying the points on which the Member State concerned has not complied with the judgment of the Court of Justice. If the Member State concerned fails to take the necessary measures to comply with the Court's judgment within the time-limit laid down by the Commission, the latter may bring the case before the Court of Justice. In so doing it shall specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances. If the Court finds that the Member State concerned has not complied with its judgment it may impose a lump sum or penalty payment on it. This procedure shall be without prejudice to Article 170.

*Article 177 EC*

The Court of Justice shall have jurisdiction to give preliminary rulings concerning: (a) the interpretation of this Treaty; (b) the validity and interpretation of acts of the institutions of the Community and of the ECB; (c) the interpretation of the

statutes of bodies established by an act of the Council, where those statutes so provide. Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon. Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice.

*Article 189 EC*

In order to carry out their task and in accordance with the provisions of this Treaty, the European Parliament acting jointly with the Council, the Council and the Commission shall make regulations and issue directives, take decisions, make recommendations or deliver opinions. A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States. A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods. A decision shall be binding in its entirety upon those to whom it is addressed. Recommendations and opinions shall have no binding force.

*Article 88 ECSC*

If the High Authority considers that a State has failed to fulfil an obligation under this Treaty, it shall record this failure in a reasoned opinion after giving the State concerned the opportunity to submit its comments. It shall set the State a time-limit for the fulfilment of its obligation. The State may institute proceedings before the Court within two months of notification of the decision; the Court shall have unlimited jurisdiction in such cases. If the State has not fulfilled its obligation by the time-limit set by the High Authority, or if it brings an action which is dismissed, the High Authority may, with the assent of the Council acting by a two-thirds majority: (a) suspend the payment of any sums which it may be liable to pay to the State in question under this Treaty; (b) take measures or authorize the other Member States to take measures by way of derogation from the provisions of Article 4, in order to correct the effects of the infringement of the obligation. Proceedings may be instituted before the Court against decisions taken under subparagraphs (a) and (b) within two months of their notification; the Court shall have unlimited jurisdiction in such cases. If these measures prove ineffective, the High Authority shall bring the matter before the Council.

## **APPENDIX 2: DECLARATION ON THE IMPLEMENTATION OF COMMUNITY LAW (ATTACHED TO THE TEU)**

1. The Conference stresses that it is central to the coherence and unity of the process of European construction that each Member state should fully and accurately transpose into national law the Community Directives addressed to it within the deadlines laid down therein. Moreover, the Conference, while recognizing that it must be for each Member State to determine how the provisions of Community law can best be enforced in the light of its own particular institutions, legal system and other circumstances, but in any event in compliance with Article 189 of the Treaty establishing the European Community, considers it essential for the proper functioning of the Community that the measures taken by the different Member States should result in Community law being applied with the same effectiveness and rigour as in the application of their national law.
2. The Conference calls on the Commission to ensure, in exercising its powers under Article 155 of this Treaty, that Member States fulfil their obligations. It asks the Commission to publish periodically a full report for the Member States and the European Parliament.

## BIBLIOGRAPHY

### Books and Articles

- Alchian, Armen A. 1965. Some Economics of Property Rights. *Il Politico* 30 (4): 816-829.
- Alchian, Armen A. and Harold Demsetz. 1972. Production, Information Costs, and Economic Organization. *American Economic Review* 62: 777-795.
- Alter, Karen J. 1996. The European Court's Political Power. *West European Politics* 19 (3): 458-487.
- Alter, Karen J. 1998a. Who are the "Masters of the Treaty"? European Governments and the European Court of Justice. *International Organization* 52 (1): 121-147.
- Alter, Karen J. 1998b. Explaining National Court Acceptance of European Court Jurisprudence: A Critical Evaluation of Theories of Legal Integration. In *The European Courts and National Courts: Doctrine and Jurisprudence*, edited by Anne-Marie Slaughter, Alec Stone Sweet, and Joseph H. H. Weiler, 227-252. Oxford: Hart Publishing.
- Alter, Karen J. 1999. Where, When and How Does the European Legal System Influence Domestic Policy? Paper presented at the Sixth Biennial International Conference of the European Community Studies Association, June 2-5 1999, Pittsburgh, Penn.
- Alter, Karen J. and Sophie Meunier-Aitsahalia. 1994. Judicial Politics in the European Community: European Integration and the Pathbreaking Cassis de Dijon Decision. *Comparative Political Studies* 26 (4): 535-561.
- Anderson, Jeffrey J. 1995. The State of the (European) Union: From the Single Market to Maastricht, from Singular Events to General Theories. *World Politics* 47: 441-65.
- Andersson, Torbjörn. 1997. Remedies for Breach of EC Law before Swedish Courts. In *Remedies for Breach of EC Law*, edited by Julian Lonbay and Andrea Biondi, 203-222. Chichester: John Wiley & Sons.
- Armstrong, Kenneth and Simon Bulmer. 1998. *The Governance of the Single European Market*. Manchester: Manchester University Press.
- Arrow, Kenneth J. 1985. The Economics of Agency. In *Principals and Agents: The Structure of Business*, edited by John W. Pratt and Richard J. Zeckhauser, 37-51. Boston, Mass.: Harvard Business School Press.
- Audretsch, H. A. H. 1986. *Supervision in European Community Law*. 2<sup>nd</sup> ed. Amsterdam: North-Holland.

- Axelrod, Robert. 1984. *The Evolution of Co-operation*. London: Penguin.
- Azzi, Guisepppe Ciavarini. 1988. What Is This New Research into the Implementation of Community Legislation Bringing Us? In *Making European Policies Work: The Implementation of Community Legislation in the Member States. Volume 1. Comparative Syntheses*, edited by Heinrich Siedentopf and Jacques Ziller, 190-201. London: SAGE.
- Baldwin, Robert. 1993. The New Protectionism: A Response to Shifts in National Economic Power. In *Protectionism and World Welfare*, edited by Dominick Salvatore. Cambridge: Cambridge University Press.
- Barav, Ami. 1988. Damages in the Domestic Courts for Breach of Community Law by National Public Authorities. In *Non-Contractual Liability of the European Communities*, edited by Schermers, H. G., T. Heukels, and P. Mead, 149-168. Dordrecht: Martinus Nijhoff Publishers.
- Bayard, Thomas O. and Kimberley Elliott. 1994. *Reciprocity and Retaliation in U.S. Trade Policy*. Washington D.C.: Institute of International Economics.
- Bebr, Gerhard. 1992. Joined Cases C-6/90 and C-9/90, *Francovich v. Italy, Bonifaci v. Italy*. *Common Market Law Review* 29: 557-584.
- Begg, Iain. 1996. Introduction: Regulation in the European Union. *Journal of European Public Policy* 3 (4): 525-535.
- Belassa, Bela. 1961. *The Theory of Economic Integration*. Homewood, Ill.: Richard D. Irwin.
- Bengtsson, Rikard and Jonas Tallberg. 1998. EG-domstolens politiska roll. *Internationella Studier* 1998 (1): 6-14.
- Bhagwati, Jagdish. 1988. *Protectionism*. Cambridge, Mass.: The MIT Press.
- Bronckers, Marco C. E. J. 1989. Private Enforcement of 1992: Do Trade and Industry Stand a Chance against the Member States? *Common Market Law Review* 26: 513-533.
- Burley, Anne-Marie and Walter Mattli. 1993. Europe before the Court: A Political Theory of Legal Integration. *International Organization* 47 (1): 41-76.
- Cahier, P. 1967. Le Recours en constatation de manquements des États membres devant la Cour des Communautés européennes. *Cahiers de Droit Européen* 1967 (2): 123-159.
- Cahier, P. 1974. Les Articles 169 et 171 du traité instituant la CEE à travers la pratique de la Commission et la jurisprudence de la Cour. *Cahiers de Droit Européen* 1974 (1): 3-38.
- Cameron, David R. 1992. The 1992 Initiative: Causes and Consequences. In *Euro-Politics: Institutions and Policymaking in the "New" European Community*, edited by Alberta M. Sbragia, 23-74. Washington D.C.: The Brookings Institution.

- Caporaso, James. 1998. Regional Integration Theory: Understanding Our Past and Anticipating Our Future. *Journal of European Public Policy* 5 (1): 1-16.
- Caporaso, James A. and John T. S. Keeler. 1995. The European Union and Regional Integration Theory. In *The State of the European Union. Vol. 3. Building a European Polity?*, edited by Carolyn Rhodes and Sonia Mazey, 29-62. Boulder, Colo.: Lynne Rienner.
- Cappelletti, Mauro. 1987. Is the European Court of Justice "Running Wild"? *European Law Review* 12: 3-17.
- Caranta, Roberto. 1993. Governmental Liability after Francovich. *Cambridge Law Journal* 52 (2): 272-297.
- Caranta, Roberto. 1995. Judicial Protection against Member States: A New *Jus Commune* Takes Shape. *Common Market Law Review* 32: 703-726.
- Ceccini, Paolo. 1988. *The European Challenge 1992: The Benefits of a Single Market*. Aldershot: Gower.
- Chalmers, Damian. 1997. Judicial Preferences and the Community Legal Order. *Modern Law Review* 60 (2): 164-199.
- Chayes, Abram and Antonia Handler Chayes. 1991. Compliance without Enforcement: State Behavior and Regulatory Treaties. *Negotiation Journal* 7: 311-330.
- Chayes, Abram and Antonia Handler Chayes. 1993. On Compliance. *International Organization* 47 (2): 175-205.
- Chayes, Abram and Antonia Handler Chayes. 1995. *The New Sovereignty: Compliance with International Regulatory Agreements*. Cambridge, Mass.: Harvard University Press.
- Christiansen, Thomas and Knud Erik Jørgensen. 1998. Negotiating Treaty Reform in the European Union: The Role of the European Commission. *International Negotiation* 3: 435-452.
- Claes, Monica and Bruno de Witte. 1998. Report on the Netherlands. In *The European Courts and National Courts: Doctrine and Jurisprudence*, edited by Anne-Marie Slaughter, Alec Stone Sweet, and Joseph H. H. Weiler, 171-194. Oxford: Hart Publishing.
- Coase, Ronald H. 1937. The Nature of the Firm. *Economica* 4: 386-405.
- Coase, Ronald H. 1960. The Problem of Social Cost. *Journal of Law and Economics* 3: 1-44.
- Cockfield, Lord. 1994. *The European Union: Creating the Single Market*. Chichester: John Wiley & Sons.
- Conant, Lisa. 1998. *Contained Justice: The Politics behind Europe's Rule of Law*. Ph.D. dissertation, University of Washington.
- Convery, Jane. 1997. State Liability in the United Kingdom after *Brasserie du Pêcheur*. *Common Market Law Review* 34: 603-634.

- Craig, P. P. 1993. *Francovich*, Remedies and the Scope for Damages Liability. *Law Quarterly Review* 109: 595-621.
- Craig, P. P. 1997. Once More unto the Breach: The Community, the State and Damages Liability. *Law Quarterly Review* 113: 67-94.
- Cram, Laura. 1997. *Policy-Making in the EU: Conceptual Lenses and the Integration Process*. London: Routledge.
- De Alessi, Louis. 1980. The Economics of Property Rights: A Review of the Evidence. *Research in Law and Economics*: 1-47.
- Dashwood, Alan and Robin White. 1989. Enforcement Actions under Articles 169 and 170 EEC. *European Law Review* 14: 388-413.
- Deards, Elspeth. 1997. *Brasserie du Pêcheur*: Snatching Defeat from the Jaws of Victory? *European Law Review* 22: 620-625.
- Dehousse, Renaud. 1998. *The European Court of Justice: The Politics of Judicial Integration*. London: Macmillan.
- Demsetz, Harold. 1964. The Exchange and Enforcement of Property Rights. *Journal of Law and Economics* 3: 1-44.
- De Schoutheete, Philippe. 1997. *Une Europe pour tous*. Paris: Editions Odile Jacob.
- Dinan, Desmond. 1997. The Commission and the Intergovernmental Conferences. In *At the Heart of the Union: Studies of the European Commission*, edited by Neill Nugent, 245-264. Houndmills: Macmillan.
- Dorn, A. Walter and Andrew Fulton. 1997. Securing Compliance with Disarmament Treaties: Carrots, Sticks, and the Case of North Korea. *Global Governance* 3: 17-40.
- Downs, George W., David M. Rocke and Peter N. Barsoon. 1996. Is the Good News about Compliance Also Good News about Cooperation? *International Organization* 50 (3): 379-406.
- Duffy, Peter. 1992. Damages against the State: A New Remedy for Failure to Implement Community Obligations. *European Law Review* 17 (2): 133-138.
- Eckstein, Harry. 1975. Case Study and Theory in Political Science. In *Handbook in Political Science. Vol. 7. Strategies of Inquiry*, edited by Fred I. Greenstein and Nelson W. Polsby, 79-137. Reading, Mass.: Addison-Wesley.
- ECSA Review*. 1997. Does the European Union Represent an *n* of 1? *ECSA Review* 10 (3):1-5.
- ECSA Review*. 1999. Approaches to the Study of European Politics. *ECSA Review* 12 (2): 2-9.
- Egan, Michelle. 1998. Regulatory Strategies, Delegation and European Market Integration. *Journal of European Public Policy* 5 (3): 485-506.
- Eggertsson, Thraínn. 1990. *Economic Behavior and Institutions*. Cambridge: Cambridge University Press.

- Ehlermann, Claus-Dieter. 1981. Die Verfolgung von Vertragsverletzungen durch die Kommission. *Festschrift zum 70. Geburtstag von Hans Kutscher*. Baden-Baden.
- Ehlermann, Claus-Dieter. 1988. Opening Speech at the IVth Erenstein Colloquium. In *Making European Policies Work: The Implementation of Community Legislation in the Member States. Volume 1. Comparative Syntheses*, edited by Heinrich Siedentopf and Jacques Ziller, 143-150. London: SAGE.
- Ehlermann, Claus-Dieter. 1992. The Second Wilberforce Lecture. *Common Market Law Review* 29: 213-227.
- Emerson, Michael, Michel Aujean, Michel Catinat, Philippe Goybet, and Alexis Jacquemin. 1988. *The Economics of 1992: The EC Commission's Assessment of the Economic Effects of Completing the Internal Market*. Oxford: Oxford University Press.
- Emiliou, Nicholas. 1994. Opening Pandora's Box: The Legal Basis of Community Measures before the Court of Justice. *European Law Review* 19 (5): 488-507.
- Emiliou, Nicholas. 1996. State Liability under Community Law: Shedding More Light on the *Francovich* Principle? *European Law Review* 21 (5): 399-411.
- EOS Gallup Europe. 1995. *Lawyers and the Community Law*. February 1995.
- Evans, A. C. 1979. The Enforcement Procedure of Article 169 EEC: Commission Discretion. *European Law Review* 4 (6): 442-456.
- Evans, Peter B., Dietrich Rueschemeyer, and Theda Skocpol, eds. 1985. *Bringing the State Back In*. Cambridge: Cambridge University Press.
- Everling, Ulrich. 1984. The Member States of the European Community before Their Court of Justice. *European Law Review* 9 (4): 215-241.
- Fearon, James D. 1991. Counterfactuals and Hypothesis Testing in Political Science. *World Politics* 43: 169-195.
- FIDE. 1998. *Les Directives communautaires: Effets, efficacité, justiciabilité*. XVIII FIDE Congress, June 3-6 1998, Stockholm.
- Friedman, Milton. 1953. The Methodology of Positive Economics. In *Essays in Positive Economics*, by Milton Friedman, 3-43. Chicago, Ill.: University of Chicago Press.
- From, Johan and Per Stava. 1993. Implementation of Community Law: The Last Stronghold of National Control? In *Making Policy in Europe. The Europeanification of National Policy-Making*, edited by Svein S. Andersen and Kjell A. Eliassen, 55-67. London: SAGE.
- Furubotn, Eirik G. and Svetozar Pejovich. 1972. Property Rights and Economic Theory: A Survey of Recent Literature. *Journal of Economic Literature* 10: 1137-1162.

- Gardner, Anthony. 1996. EU Member State Liability: A Cure for Euro-Sclerosis? *European Competition Law Review* 17 (5): 275-282.
- Garrett, Geoffrey. 1992. International Cooperation and Institutional Choice: The European Community's Internal Market. *International Organization* 46 (2): 533-560.
- Garrett, Geoffrey. 1995. The Politics of Legal Integration in the European Union. *International Organization* 49 (1): 171-181.
- Garrett, Geoffrey and Barry R. Weingast. 1993. Ideas, Interests, and Institutions: Constructing the European Community's Internal Market. In *Ideas and Foreign Policy: Beliefs, Institutions, and Political Change*, edited by Judith Goldstein and Robert O. Keohane, 173-206. Ithaca, N.Y.: Cornell University Press.
- Garrett, Geoffrey and George Tsebelis. 1996. An Institutional Critique of Intergovernmentalism. *International Organization* 50 (2): 269-299.
- Garrett, Geoffrey, R. Daniel Kelemen, and Heiner Schulz. 1998. The European Court of Justice, National Governments, and Legal Integration in the European Union. *International Organization* 52 (1): 149-176.
- George, Alexander L. 1979. Case Studies and Theory Development: The Method of Structured, Focused Comparison. In *Diplomatic History: New Approaches*, edited by P. G. Lauren, 43-67. New York, N.Y.: The Free Press.
- George, Alexander L. and Timothy J. McKeown. 1985. Case Studies and Theories of Organizational Decision Making. *Advances in Information Processing in Organizations* 2: 21-58.
- George, Stephen. 1998. *An Awkward Partner: Britain in the European Community*. Oxford: Oxford University Press.
- Gilpin, Robert, 1987. *The Political Economy of International Relations*. Princeton, N.J.: Princeton University Press.
- Goebel, Roger J. 1997. Achieving Full Effectiveness of Community Law: The Court of Justice's Third Stage of Enforcement Rules. Paper presented at the 91<sup>st</sup> Annual Meeting of the American Society of International Law, April 9-12 1997, Washington D.C.
- Golub, Jonathan. 1996. The Politics of Judicial Discretion: Rethinking the Interaction between National Courts and the European Court of Justice. *West European Politics* 19 (2): 360-385.
- Grant, Charles. 1994. *Delors: Inside the House That Jacques Built*. London: Nicholas Brealey Publishing.
- Greenaway, David. 1983. *International Trade Policy: From Tariffs to the New Protectionism*. Houndmills: Macmillan.

- Grieco, Joseph M. 1990. *Cooperation among Nations. Europe, America, and Non-Tariff Barriers to Trade*. Ithaca, N.Y.: Cornell University Press.
- Haaland Matlary, Janne. 1993. Now You See It; Now You Don't: Exposé and Critique of Approaches to the Study of European Integration. In *The Nordic Countries and the EC*, edited by Teija Tiilikainen and Ib Damgaard Petersen, 107-135. Copenhagen: Copenhagen University Press.
- Haas, Ernst B. 1958. *The Uniting of Europe: Political, Social and Economical Forces 1950-1957*. London: Stevens & Sons Limited.
- Haas, Ernst B. 1964. *Beyond the Nation State: Functionalism and International Organization*. Stanford, Calif.: Stanford University Press.
- Haas, Ernst B. 1967. *The Uniting of Europe and the Uniting of Latin America*. *Journal of Common Market Studies* 5: 315-344.
- Haas, Ernst B. 1975. *The Obsolescence of Regional Integration Theory*. Berkeley, Calif.: Center for International Studies.
- Haas, Ernst B. 1976. Turbulent Fields and the Theory of Regional Integration. *International Organization* 30 (2): 173-212.
- Haas, Ernst B. and Philippe C. Schmitter. 1964. Economic and Differential Patterns of Political Integration: Projections about Unity in Latin America. *International Organization* 18: 705-737.
- Haas, Peter M., Robert O. Keohane, and Marc A. Levy, eds. 1993. *Institutions for the Earth: Sources of Effective International Environmental Protection*. Cambridge, Mass.: MIT Press.
- Hall, Peter A. 1986. *Governing the Economy: The Politics of State Intervention in Britain and France*. New York, N.Y.: Oxford University Press.
- Hall, Peter A. and Rosemary C. R. Taylor. 1996. Political Science and the Three New Institutionalisms. *Political Studies* 44: 936-957.
- Hancher, Leigh. 1996. The Regulatory Role of the European Union. In *The European Union and National Industrial Policy*, edited by Hussein Kassim and Anand Menon, 52-69. London: Routledge.
- Hansen, Roger D. 1969. Regional Integration: Reflections on a Decade of Theoretical Efforts. *World Politics* 21: 242-271.
- Hartley, T. C. 1994. *The Foundations of European Community Law. An Introduction to the Constitutional and Administrative Law of the European Community*. 3<sup>rd</sup> ed. Oxford: Clarendon Press.
- Hix, Simon. 1994. The Study of the European Community: The Challenge to Comparative Politics. *West European Politics* 17 (1): 1-30.
- Hix, Simon. 1998. The Study of the European Union II: The "New Governance" Agenda and its Rival. *Journal of European Public Policy* 5 (1): 38-65.

- Hoffmann, Stanley. 1966. Obstinate or Obsolete? The Fate of the Nation-State and the Case of Western Europe. *Dædalus* 95 (3): 862-915.
- Hoffmann, Stanley. 1982. Reflections on the Nation-State in Western Europe Today. *Journal of Common Market Studies* 21: 21-37.
- Holmström, Bengt. 1979. Moral Hazard and Observability. *The Bell Journal of Economics* 10 (1): 74-91.
- Holmström, Bengt and Jean Tirole. 1989. The Theory of the Firm. In *Handbook of Industrial Organization, Vol. 1*, edited by Richard Schmalensee and Robert D. Willig, 63-133. Amsterdam: North Holland.
- Hooghe, Liesbet. 1999. Images of Europe: Orientations to European Integration among Senior Officials of the Commission. *British Journal of Political Science* 29: 345-367.
- Hooghe, Liesbet, ed. 1996. *Cohesion Policy and European Integration: Building Multi-Level Governance*. Oxford: Oxford University Press.
- Hopenhayn, Hugo and Susanne Lohmann. 1996. Fire-Alarm Signals and the Political Oversight of Regulatory Agencies. *Journal of Law, Economics, and Organization* 12 (1): 196-213.
- Immergut, Ellen M. 1998. The Theoretical Core of the New Institutionalism. *Politics & Society* 26 (1): 5-34.
- Irmer, Wolfram and Frank Wooldridge. 1997. 1996: The Return of Francovich. *European Business Law Review* 8 (3): 67-74.
- Jachtenfuchs, Markus and Beate Kohler-Koch. 1996. Einleitung: Regieren im dynamischen Mehrebenensystem. In *Europäische Integration*, edited by Markus Jachtenfuchs and Beate Kohler-Koch, 15-44. Opladen: Leske + Budrich.
- Jacobs, Francis G. 1997. Enforcing Community Rights and Obligations in National Courts: Striking the Balance. In *Remedies for Breach of EC Law*, edited by Julian Lonbay and Andrea Biondi, 25-36. Chichester: John Wiley & Sons.
- Jacobson, Harold K. and Edith Brown Weiss. 1995. Strengthening Compliance with International Environmental Accords: Preliminary Observations from a Collaborative Project. *Global Governance* 1: 119-148.
- Jarvis, Malcolm. 1996. The Liability of Member States for Legislative Omissions: A Summary of Conference Proceedings. *European Business Law Review* 7 (10): 230-235.
- Jensen, Michael C. 1983. Organization Theory and Methodology. *Accounting Review* 58: 319-339.
- Jensen, Michael C. and William H. Meckling. 1976. Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure. *Journal of Financial Economics* 3: 305-359.

- Jordan, Andrew. 1997. "Overcoming the Divide" between Comparative Politics and International Relations Approaches to the EC: What Role for "Post-Decisional Politics"? *West European Politics* 20 (4): 43-70.
- Journal of European Public Policy*, 1999. Special Issue: The Social Construction of Europe. *Journal of European Public Policy* 6(4).
- Jönsson, Christer and Jonas Tallberg. 1998. Compliance and Post-Agreement Bargaining. *European Journal of International Relations* 4 (4): 371-408.
- Jørgensen, Knud Erik, ed. 1997. *Reflective Approaches to European Governance*. London: Macmillan.
- Kahler, Miles. 1995. *International Institutions and the Political Economy of Integration*. Washington D.C.: The Brookings Institution.
- Kakouris, C. N. 1997. Do the Member States Possess Judicial Procedural "Autonomy"? *Common Market Law Review* 34: 1389-1412.
- Keohane, Robert O. 1984. *After Hegemony*. Princeton, N.J.: Princeton University Press.
- Keohane, Robert O. and Joseph S. Nye. 1977. *Power and Interdependence*. Boston, Mass.: Little, Brown.
- Keohane, Robert O. and Stanley Hoffmann. 1991. Institutional Change in Europe in the 1980s. In *The New European Community: Decisionmaking and Institutional Change*, edited by Robert O. Keohane and Stanley Hoffmann, 1-39. Boulder, Colo.: Westview Press.
- Keohane, Robert O., Peter M. Haas, and Marc A. Levy. 1993. The Effectiveness of International Environmental Institutions. In *Institutions for the Earth: Sources of Effective International Environmental Protection*, edited by Peter M. Haas, Robert O. Keohane, and Marc A. Levy, 3-24. Cambridge, Mass.: The MIT Press.
- Keohane, Robert O. and Marc A. Levy, eds. 1996. *Institutions for Environmental Aid*. Cambridge, Mass.: MIT Press.
- Kiewiet, D. Roderick and Mathew D. McCubbins. 1991. *The Logic of Delegation: Congressional Parties and the Appropriation Process*. Chicago, Ill.: University of Chicago Press.
- Kilpatrick, Claire. 1998. Community or Communities of Courts in European Integration? Sex Equality Dialogues between UK Courts and the ECJ. *European Law Journal* 4 (2): 121-147.
- King, Gary, Robert O. Keohane, and Sidney Verba. 1994. *Designing Social Inquiry: Scientific Inference in Qualitative Research*. Princeton, N.J.: Princeton University Press.
- King, Victoria. 1997. The Fault Issue in State Liability: From Francovich to Dillenkofer. *European Competition Law Review* 18 (2): 110-113.

- Kohler-Koch, Beate. 1996. The Strengths of Weakness: The Transformation of Governance in the EU. In *The Future of the Nation State*, edited by Sverker Gustavsson and Leif Lewin, 169-210. Stockholm: Nerenius & Santérus.
- Krasner, Stephen D., ed. 1983. *International Regimes*. Ithaca, N.Y.: Cornell University Press.
- Krauss, Melvyn B. 1979. *The New Protectionism, the Welfare State, and International Trade*. Oxford: Blackwell.
- Krislov, Samuel, Claus-Dieter Ehlermann, and Joseph Weiler. 1986. The Political Organs and the Decision-Making Process in the United States and the European Community. In *Integration through Law. Volume 1. Book 2*, edited by Mauro Cappelletti, Monica Seccombe, and Joseph Weiler, 3-110. Berlin: De Gruyter.
- Laderchi, P. Ruggeri. 1998. Report on Italy. In *The European Courts and National Courts: Doctrine and Jurisprudence*, edited by Anne-Marie Slaughter, Alec Stone Sweet, and Joseph H. H. Weiler, 147-170. Oxford: Hart Publishing.
- Lazear, Edward P. 1987. Incentive Contracts. In *The New Palgrave: A Dictionary of Economics*, edited by J. Eatwell, M. Milgate, and P. Newman, 744-748. London: Macmillan.
- Lewis, Clive and Sarah Moore. 1993. Duties, Directives and Damages in European Community Law. *Public Law* 1993: 151-170.
- Lijphart, Arend. 1971. Comparative Politics and the Comparative Method. *American Political Science Review* 65: 682-693.
- Lindberg, Leon N. 1963. *The Political Dynamics of European Economic Integration*. Stanford, Calif.: Stanford University Press.
- Lindberg, Leon N. and Stuart A. Scheingold. 1970. *Europe's Would-Be Polity. Patterns of Change in the European Community*. Englewood Cliffs, N.J.: Prentice-Hall.
- Lindberg, Leon N. and Stuart A. Scheingold, eds. 1971. *Regional Integration: Theory and Research*. Cambridge, Mass.: Harvard University Press.
- Lonbay, Julian and Andrea Biondi, eds. 1997. *Remedies for Breach of EC Law*. Chichester: John Wiley & Sons.
- Ludlow, Peter. 1991. The European Commission. In *The New European Community: Decisionmaking and Institutional Change*, edited by Robert O. Keohane and Stanley Hoffmann, 85-132. Boulder, Colo.: Westview Press.
- Maher, Imelda. 1994. National Courts as European Community Courts. *Legal Studies* 14 (2): 226-243.
- Majone, Giandomenico. 1994. The Rise of the Regulatory State in Europe. *West European Politics* 17: 77-101.
- Majone, Giandomenico. 1996. *Regulating Europe*. London: Routledge.

- Mancini, G. Federico. 1991. The Making of a Constitution for Europe. In *The New European Community: Decisionmaking and Institutional Change*, edited by Robert O. Keohane and Stanley Hoffmann, 177-194. Boulder, Colo.: Westview Press.
- March, James G. and Johan P. Olsen. 1989. *Rediscovering Institutions: The Organizational Basis of Society*. New York, N.Y.: The Free Press.
- Marks, Gary. 1993. Structural Policy and Multilevel Governance in the EC. In *The State of the European Community. Vol. 2*, edited by Alan W. Cafruny and Glenda G. Rosenthal, 391-410. Boulder, Colo.: Lynne Rienner.
- Marks, Gary. 1997. Does the European Union Represent an  $n$  of 1? *ECSC Review* 10 (3): 2-3.
- Marks, Gary, Liesbet Hooghe, and Kermit Blank. 1996. European Integration from the 1980s. *Journal of Common Market Studies* 34 (3): 341-378.
- Martin, Lisa L. 1993. Credibility, Costs, and Institutions: Cooperation on Economic Sanctions. *World Politics* 45 (3): 903-918.
- Martin, Lisa L. 1994. International and Domestic Institutions in the EMU Process. In *The Political Economy of European Monetary Unification*, edited by Barry Eichengreen and Jeffrey Frieden, 87-106. Boulder, Colo.: Westview Press.
- Mathews, R. C. O. 1986. The Economics of Institutions and the Source of Economic Growth. *Economic Journal* 96: 903-918.
- Mattli, Walter and Anne-Marie Slaughter. 1995. Law and Politics in the European Union: A Reply to Garrett. *International Organization* 49 (1): 183-190.
- McCubbins, Mathew D. and Talbot Page. 1987. A Theory of Congressional Delegation. In *Congress: Structure and Policy*, edited by Mathew D. McCubbins and Terry Sullivan, 409-425. New York, N.Y.: Cambridge University Press.
- McCubbins, Mathew D. and Thomas Schwartz. 1984. Congressional Oversight Overlooked: Police Patrols versus Fire Alarms. *American Journal of Political Science* 28 (1): 165-179.
- McCubbins, Mathew D. and Terry Sullivan, eds. 1987. *Congress: Structure and Policy*. New York, N.Y.: Cambridge University Press.
- McCubbins, Mathew D., Roger G. Noll, and Barry R. Weingast. 1987. Administrative Procedures as Instruments of Political Control. *Journal of Law, Economics, and Organization* 3 (2): 243-277.
- McGowan, Francis and Helen Wallace. 1996. Towards a European Regulatory State. *Journal of European Public Policy* 3 (4): 560-576.
- Mendrinou, Maria. 1996. Non-compliance and the European Commission's Role in Integration. *Journal of European Public Policy* 3 (1): 1-22.
- Meyer, John W. and W. Richard Scott. 1983. *Organizational Environments: Ritual and Rationality*. Beverly Hills, Calif.: SAGE.

- Miller, Gary J. 1992. *Managerial Dilemmas: The Political Economy of Hierarchy*. Cambridge: Cambridge University Press.
- Milward, Alan S. 1992. *The European Rescue of the Nation-State*. London: Routledge.
- Mitchell, Ronald B. 1994. *Intentional Oil Pollution at Sea: Environmental Policy and Treaty Compliance*. Cambridge, Mass.: The MIT Press.
- Mitnick, Barry. 1980. *The Political Economy of Regulation*. New York, N.Y.: Columbia University Press.
- Moe, Terry M. 1984. The New Economics of Organization. *American Journal of Political Science* 28: 739-777.
- Moe, Terry M. 1987. An Assessment of the Positive Theory of "Congressional Dominance." *Legislative Studies Quarterly* 12 (4): 475-520.
- Moe, Terry M. 1990. The Politics of Structural Choice: Toward a Theory of Public Bureaucracy. In *Organization Theory: From Chester Barnard to the Present and Beyond*, edited by Oliver Williamson, 116-153. New York, N.Y.: Oxford University Press.
- Moravcsik, Andrew. 1991. Negotiating the Single European Act. *International Organization* 45 (1): 651-688.
- Moravcsik, Andrew. 1993. Preferences and Power in the European Community: A Liberal Intergovernmentalist Approach. *Journal of Common Market Studies* 31 (4): 473-524.
- Moravcsik, Andrew. 1994. Why the European Community Strengthens the State: Domestic Politics and International Cooperation. Working Paper No. 52. Cambridge, Mass.: Center for European Studies, Harvard University.
- Moravcsik, Andrew. 1995. Liberal Intergovernmentalism and Integration: A Rejoinder. *Journal of Common Market Studies* 33 (4): 611-628.
- Moravcsik, Andrew. 1997. Does the European Union Represent an *n* of 1? *ECSCA Review* 10 (3): 3-4.
- Moravcsik, Andrew. 1998. *The Choice for Europe: Social Purpose and State Power from Messina to Maastricht*. London: UCL Press.
- Moravcsik, Andrew. 1999. A New Statecraft? Supranational Entrepreneurs and International Cooperation. *International Organization* 53(2): 267-306.
- Moravcsik, Andrew and Kalypsa Nicolaïdis. 1999. Explaining the Amsterdam Treaty: Interests, Influence, Institutions. *Journal of Common Market Studies* 37 (1): 59-85.
- Mörth, Ulrika. 1996. *Vardagsintegration – la vie quotidienne – i Europa: Sverige i EUREKA och EUREKA i Sverige*. Ph.D. dissertation, Stockholm University.
- Neill, Patrick. 1995. The European Court of Justice: A Case Study in Judicial Activism. Working Paper. London: European Policy Forum.

- North, Douglass C. 1990. *Institutions, Institutional Change and Economic Performance*. Cambridge: Cambridge University Press.
- Nye, Joseph. 1971. *Peace in Parts: Integration and Conflict in Regional Organization*. Boston, Mass.: Little, Brown.
- Olson, Mancur. 1965. *The Logic of Collective Action: Public Goods and the Theory of Groups*. Cambridge, Mass.: Harvard University Press.
- Ostrom, Elinor. 1990. *Governing the Commons: The Evolution of Institutions for Collective Action*. Cambridge: Cambridge University Press.
- Oye, Kenneth A., ed. 1986. *Cooperation under Anarchy*. Princeton, N.J.: Princeton University Press.
- Patton, Michael Quinn. 1980. *Qualitative Evaluation Methods*. Beverly Hills, Calif.: SAGE.
- Pescatore, Pierre. 1974. *The Law of Integration: Emergence of a New Phenomenon in International Relations, Based on the Experience of the European Communities*. Leiden: A. W. Sijthoff.
- Pescatore, Pierre. 1983. The Doctrine of "Direct Effect": An Infant Disease of Community Law. *European Law Review* 8 (3): 155-177.
- Peters, B. Guy. 1992. Bureaucratic Politics and the Institutions of the European Community. In *Euro-Politics: Institutions and Policymaking in the "New" European Community*, edited by Alberta M. Sbragia, 75-122. Washington D.C.: The Brookings Institution.
- Peters, B. Guy. 1997. The Commission and Implementation in the European Union: Is There an Implementation Deficit and Why? In *At the Heart of the Union: Studies of the European Commission*, edited by Neill Nugent, 187-202. Houndmills: Macmillan.
- Peters, B. Guy. 1998. *Institutional Theory in Political Science*. London: Pinter.
- Peterson, John. 1995. Decision-Making in the European Union: Towards a Framework for Analysis. *Journal of European Public Policy* 2 (1): 69-93.
- Pierson, Paul. 1996. The Path to European Integration: A Historical Institutional Analysis. *Comparative Political Studies* 29 (2): 123-163.
- Pollack, Mark A. 1996. The Engines of Integration? Supranational Autonomy and Influence in the European Community. Working Paper No. 2.41. Berkeley, Calif.: Center for German and European Studies, University of California at Berkeley.
- Pollack, Mark A. 1997a. Delegation, Agency, and Agenda-Setting in the European Community. *International Organization* 51 (1): 99-134.
- Pollack, Mark A. 1997b. The Commission as an Agent. In *At the Heart of the Union: Studies of the European Commission*, edited by Neill Nugent, 109-128. Houndmills: Macmillan.

- Pollack, Mark A. 1998. The Engines of Integration? Supranational Autonomy and Influence in the European Union. In *European Integration and Supranational Governance*, edited by Alec Stone Sweet and Wayne Sandholtz, 217-249. Oxford: Oxford University Press.
- Pollack, Mark A. 1999. Delegation, Agency and Agenda Setting in the Treaty of Amsterdam. *European Integration online Papers* 3 (6). Internet: <http://eiop.or.at/eiop/texte/1999-006a.htm>.
- Powell, Walter W. and Paul J. DiMaggio, eds. 1991. *The New Institutionalism in Organizational Analysis*. Chicago, Ill.: University of Chicago Press.
- Pratt, John W. and Richard J. Zeckhauser. 1985a. Principals and Agents: An Overview. In *Principals and Agents: The Structure of Business*, 1-35. Boston, Mass.: Harvard Business School Press.
- Pratt, John W. and Richard J. Zeckhauser, eds. 1985b. *Principals and Agents: The Structure of Business*. Boston, Mass.: Harvard Business School Press.
- Prechal, Sacha. 1997. EC Requirements for an Effective Remedy. In *Remedies for Breach of EC Law*, edited by Julian Lonbay and Andrea Biondi, 3-13. Chichester: John Wiley & Sons.
- Price, Victoria C. 1988. *1992: Europe's Last Chance?* London: Institute of Economic Affairs.
- Puchala, Donald J. 1972. Of Blind Men, Elephants and International Integration. *Journal of Common Market Studies* 10: 267-285.
- Puchala, Donald J. 1975. Domestic Politics and Regional Harmonization in the European Communities. *World Politics* 27 (4): 496-520.
- Quitow, Carl Michael. 1997. "Private enforcement" i EG-rätten: En studie av medlemsstaternas skadeståndsansvar i samband med överträdelse av gemenskapsregler. *Juridisk Tidskrift* 1997 (3): 682-700.
- Rasmussen, Hjalte. 1986. *On Law and Policy in the European Court of Justice: A Comparative Study in Judicial Policymaking*. Dordrecht: Martinus Nijhoff Publishers.
- Rasmussen, Hjalte. 1988. Between Self-Restraint and Activism: A Judicial Policy for the European Court. *European Law Review* 13 (1): 28-38.
- Reinalda, Bob and Bertjan Verbeek. 1998. Autonomous Policy Making by International Organizations: Purpose, Outline and Results. In *Autonomous Policy Making by International Organizations*, edited by Bob Reinalda and Bertjan Verbeek, 1-8. London: Routledge.
- Risse-Kappen, Thomas. 1996. Exploring the Nature of the Beast: International Relations Theory and Comparative Policy Analysis Meet the European Union. *Journal of Common Market Studies* 34 (1): 53-80.

- Ross, George. 1995. *Jacques Delors and European Integration*. Cambridge: Polity Press.
- Ross, Malcolm. 1993. Beyond *Francovich*. *Modern Law Review* 56 (1): 55-73.
- Ross, Stephen A. 1973. The Economic Theory of Agency: The Principal's Problem. *The American Economic Review* 63 (2): 134-139.
- Sandholtz, Wayne. 1992. ESPRIT and the Politics of International Collective Action. *Journal of Common Market Studies* 30 (1): 1-21.
- Sandholtz, Wayne. 1993. Institutions and Collective Action: The New Telecommunications in Western Europe. *World Politics* 45 (2): 242-270.
- Sandholtz, Wayne and John Zysman. 1989. 1992: Recasting the European Bargain. *World Politics* 42 (1): 95-128.
- Sappington, David E. M. 1991. Incentives in Principal-Agent Relationships. *Journal of Economic Perspectives* 5 (2): 45-66.
- Scharpf, Fritz W. 1988. The Joint-Decision Trap: Lessons from German Federalism and European Integration. *Public Administration* 66: 239-278.
- Scharpf, Fritz W. 1994. Community and Autonomy: Multi-Level Policy-Making in the European Union. *Journal of European Public Policy* 1 (2): 219-242.
- Scheingold, Stuart A. 1965. *The Rule of Law in European Integration: The Path of the Schuman Plan*. New Haven, Conn.: Yale University Press.
- Schmidt, Susanne K. 1998a. Commission Activism: Subsuming Telecommunications and Electricity under European Competition Law. *Journal of European Public Policy* 5 (1): 169-184.
- Schmidt, Susanne K. 1998b. Following up on Judicial Politics: How the European Commission Uses the Court of Justice to Pressure the Member States. Paper prepared for the Annual Meeting of the American Political Science Association, September 3-6, Boston, Mass.
- Scott, W. Richard, John W. Meyer, and Associates. 1994. *Institutional Environments and Organizations*. Thousand Oaks, Calif.: SAGE.
- Shackleton, Michael. 1991. The European Community between Three Ways of Life. A Cultural Analysis. *Journal of Common Market Studies* 29 (6): 575-601.
- Shapiro, Martin. 1992. The European Court of Justice. In *Euro-Politics: Institutions and Policymaking in the "New" European Community*, edited by Alberta M. Sbragia, 123-156. Washington D.C.: The Brookings Institution.
- Shaw, Josephine. 1993. *European Community Law*. London: Macmillan.
- Shepsle, Kenneth A. 1979. Institutional Arrangements and Equilibrium in Multi-dimensional Voting Models. *American Journal of Political Science* 23: 27-60.
- Shepsle, Kenneth A. 1986. Institutional Equilibrium and Equilibrium Institutions. In *Political Science: The Science of Politics*, edited by Herbert Weisberg, 51-81. New York, N.Y.: Agathon.

- Shepsle, Kenneth A. 1989. Studying Institutions: Some Lessons from the Rational Choice Approach. *Journal of Theoretical Politics* 1: 131-147.
- Siedentopf, Heinrich and Christoph Hauschild. 1988. The Implementation of Community Legislation by the Member States: A Comparative Analysis. In *Making European Policies Work: The Implementation of Community Legislation in the Member States. Volume 1. Comparative Syntheses*, edited by Heinrich Siedentopf and Jacques Ziller, 1-87. London: SAGE.
- Siedentopf, Heinrich and Jacques Ziller, eds. 1988. *Making European Policies Work. The Implementation of Community Legislation in the Member States. Vol. 1. Comparative Syntheses*. London: SAGE.
- Simmons, Beth A. 1993. Why Innovate? Founding the Bank for International Settlements. *World Politics* 45: 361-405.
- Simon, Denys. 1996. La Responsabilité de l'État saisie par le droit communautaire. *L'Actualité Juridique – Droit Administratif* 7-8: 489-499.
- Simon, Denys and Ami Barav. 1987. La Responsabilité de l'administration nationale en cas de violation du droit communautaire. *Revue du Marché Commun* No. 305: 165-174.
- Slaughter, Anne-Marie, Alec Stone Sweet, and Joseph H. H. Weiler. 1998. *The European Courts and National Courts: Doctrine and Jurisprudence*. Oxford: Hart Publishing.
- Snidal, Duncan. 1986. The Game Theory of International Politics. In *Cooperation under Anarchy*, edited by Kenneth A. Oye, 25-57. Princeton, N.J.: Princeton University Press.
- Snyder, Francis. 1993. The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques. *Modern Law Review* 56 (1): 19-54.
- Solnick, Steven L. 1992. Understanding the Soviet Collapse: Institutional Transformation in Periods of Political Chaos. Paper prepared for the Annual meeting of the American Political Science Association, September 3-6 1992, Chicago Ill.
- Stein, Eric. 1981. Lawyers, Judges, and the Making of a Transnational Constitution. *American Journal of International Law* 75: 1-27.
- Steiner, Josephine. 1987. How to Make the Action Suit the Case. Domestic Remedies for Breach of EEC Law. *European Law Review* 12: 102-122.
- Steiner, Josephine. 1993. From Direct Effects to *Franovich*: Shifting Means of Enforcement of Community Law. *European Law Review* 18 (1): 3-22.
- Steiner, Josephine. 1995. *Enforcing EC Law*. London: Blackstone Press Limited.
- Steiner, Josephine and Lorna Woods. 1996. *Textbook on EC Law*. London: Blackstone Press Limited.

- Steinmo, Sven, Kathleen Thelen, and Frank Longstreth, eds. 1992. *Structuring Politics: Historical Institutionalism in Comparative Perspective*. Cambridge: Cambridge University Press.
- Stenelo, Lars-Göran. 1984. *The International Critic: The Impact of Swedish Criticism of the U.S. Involvement in Vietnam*. Lund: Studentlitteratur.
- Stiglitz, Joseph E. 1987. Principal and Agent. In *The New Palgrave: A Dictionary of Economics*, edited by J. Eatwell, M. Milgate, and P. Newman, 966-972. London: Macmillan.
- Stone Sweet, Alec and Wayne Sandholtz. 1997. European Integration and Supranational Governance. *Journal of European Public Policy* 4 (3): 297-317.
- Stone Sweet, Alec and Thomas L. Brunell. 1998a. Constructing a Supranational Constitution: Dispute Resolution and Governance in the European Community. *American Political Science Association* 92 (1): 63-81.
- Stone Sweet, Alec and Thomas L. Brunell. 1998b. The European Court and the National Courts: A Statistical Analysis of Preliminary References, 1961-95. *Journal of European Public Policy* 5 (1): 66-97.
- Stone Sweet, Alec and James A. Caporaso. 1998. From Free Trade to Supranational Polity: The European Court and Integration. In *European Integration and Supranational Governance*, edited by Alec Stone Sweet and Wayne Sandholtz, 92-130. Oxford: Oxford University Press.
- Stone Sweet, Alec and Wayne Sandholtz, eds. 1998. *European Integration and Supranational Governance*. Oxford: Oxford University Press.
- Swann, Dennis. 1995. *The Economics of the Common Market: Integration in the European Union*. 8<sup>th</sup> ed. London: Penguin Books.
- Szyszczyk, Erika. 1992. European Community Law: New Remedies, New Directions? Joined Cases C-6/90 and C-9/90, *Francovich and Bonifaci v Italy*. *Modern Law Review* 55 (5): 690-697.
- Tagaras, Haris. 1995. La Responsabilité étatique pour les dommages causés aux particuliers du fait de violations du droit communautaire. *Revue Hellenique de Droit International* 48: 147-163.
- Tallberg, Jonas. 1997. Non-Compliance in the EC: Evidence and Explanations. Paper prepared for the Workshop on Quantitative Methods, June 11-13 1997, Umeå.
- Tallberg, Jonas. 1999. Sverige och efterlevnaden av EU:s regelverk: Ett samarbetsdilemma. In *Sverige i EU*, edited by Karl Magnus Johansson, 55-76. Stockholm: SNS Förlag.
- Tallberg, Jonas. Forthcoming. Supranational Influence in EU Enforcement: The ECJ and the Principle of State Liability. Accepted for publication in *Journal of European Public Policy* 7(1).

- Temple Lang, John. 1997. The Duties of National Courts under Community Constitutional Law. *European Law Review* 22 (1): 3-18.
- Tesauro, Giuseppe. 1992. La Sanction des infractions au droit communautaire. *Rivista di Diritto Europeo* 32 (3): 477-509.
- Tetlock, Philip E. and Aaron Belkin, eds. 1996. *Counterfactual Thought Experiments in World Politics: Logical, Methodological, and Psychological Perspectives*. Princeton, N.J.: Princeton University Press.
- Tirole, Jean. 1986. Hierarchies and Bureaucracies: On the Role of Collusion in Organizations. *Journal of Law, Economics, and Organization* 2 (2): 181-214.
- Tridimas, Takis. 1996. The Court of Justice and Judicial Activism. *European Law Review* 21 (3): 199-210.
- Tsoukalis, Loukas. 1997. *The New European Economy Revisited*. Oxford: Oxford University Press.
- Uecker, Rolf. 1994. *Francovich* and Beyond: A German Perspective. *European Business Law Review* 5 (12): 286-291.
- Usher, John A. 1994. The Commission and the Law. In *The European Commission*, edited by Geoffrey Edwards and David Spence, 146-168. London: Cartermill Publishing.
- Van Gerven, Walter. 1995. Bridging the Gap between Community and National Laws: Towards a Principle of Homogeneity in the Field of Legal Remedies. *Common Market Law Review* 32: 679-702.
- Van Gerven, Walter. 1996. Bridging the Unbridgeable: Community and National Tort Laws after *Francovich* and *Brasserie*. *International and Comparative Law Quarterly* 45 (3): 507-544.
- Varian, Hal R. 1990. Monitoring Agents with Other Agents. *Journal of Institutional and Theoretical Economics* 146 (1): 85-105.
- Verba, Sidney. 1967. Some Dilemmas in Comparative Research. *World Politics* 20 (1): 111-127.
- Volcansek, Mary L. 1992. The European Court of Justice: Supranational Policy-Making. *West European Politics* 15 (3): 109-121.
- Wallace, Helen and Alasdair R. Young. 1996. The Single Market. In *Policy-Making in the European Union*, edited by Helen Wallace and William Wallace, 125-155. 3<sup>rd</sup> ed. Oxford: Oxford University Press.
- Wathelet, Melchior and Sean Van Raepenbusch. 1997. La Responsabilité des États membres en cas de violation du droit communautaire: Vers un alignement de la responsabilité de l'État sur celle de la Communauté ou l'inverse? *Cahiers de Droit Européen* 1-2: 13-65.
- Weatherill, Stephen. 1997. Constitutional Issues in the Implementation of EC Law: Addressing the Imbalance in Favour of Market Deregulation. Paper prepared

- for the Biannual Meeting of the European Community Studies Association, May 29 - June 1 1997, Seattle, Wash.
- Weatherill, Stephen and Paul Beaumont. 1995. *EC Law: The Essential Guide to the Legal Workings of the European Community*. 2<sup>nd</sup> ed. London: Penguin.
- Weaver, R. Kent and Bert A. Rockman, eds. 1993. *Do Institutions Matter? Government Capabilities in the United States and Abroad*. Washington D.C.: The Brookings Institution.
- Weiler, J. H. H. 1991. The Transformation of Europe. *Yale Law Journal* 100: 2403-2483.
- Weiler, J. H. H. 1993. Journey to an Unknown Destination: A Retrospective and Prospective of the European Court of Justice in the Arena of Political Integration. *Journal of Common Market Studies* 31 (4): 417-446.
- Weiler, J. H. H. 1994. A Quiet Revolution: The European Court of Justice and Its Interlocutors. *Comparative Political Studies* 26 (4): 510-534.
- Weingast, Barry R. 1984. The Congressional-Bureaucratic System: A Principal-Agent Perspective (with Applications to the SEC). *Public Choice* 44: 147-191.
- Weingast, Barry R. and Mark J. Moran. 1982. The Myth of Runaway Bureaucracy. *Regulation* 6: 33-38.
- Weingast, Barry R. and Mark J. Moran. 1983. Bureaucratic Discretion or Congressional Control: Regulatory Policymaking by the Federal Trade Commission. *Journal of Political Economy* 91: 765-800.
- Weingast, Barry R. and William J. Marshall. 1988. The Industrial Organization of Congress: Or Why Legislatures, like Firms, Are Not Organized as Markets. *Journal of Political Economy* 96: 132-163.
- Wessels, Wolfgang. 1998. Comitology: Fusion in Action. Politico-Administrative Trends in the EU System. *European Journal of Public Policy* 5 (2): 209-234.
- Williams, Allan M. 1991. *The European Community*. Oxford: Blackwell.
- Williamson, Oliver E. 1975. *Markets and Hierarchies: Analysis and Antitrust Implications*. New York, N.Y.: The Free Press.
- Williamson, Oliver E. 1985. *The Economic Institutions of Capitalism*. New York, N.Y.: The Free Press.
- Williamson, Oliver E. 1995. Transaction Cost Economics and Organization Theory. In *Organization Theory: From Chester Barnard to the Present and Beyond*, edited by Oliver E. Williamson, 207-256. New York, N.Y.: Oxford University Press.
- Wooldridge, Frank. 1996. The United Kingdom Memorandum on the European Court of Justice. *European Business Law Review* 7 (12): 279-284.
- Wooldridge, Frank and Rose M. D'Sa. 1996. ECJ Decides Factortame (No 3) and Brasserie du Pêcheur. *European Business Law Review* 7 (7): 161-167.

- Yarbrough, Beth V. and Robert M. Yarbrough. 1987. Cooperation in the Liberalization of International Trade: After Hegemony, What? *International Organization* 41 (1): 1-26.
- Yarbrough, Beth V. and Robert M. Yarbrough. 1990. International Institutions and the New Economics of Organization. *International Organization* 44 (2): 235-260.
- Yarbrough, Beth V. and Robert M. Yarbrough. 1992. *Cooperation and Governance in International Trade: The Strategic Organizational Approach*. Princeton, N.J.: Princeton University Press.
- Yarbrough, Beth V. and Robert M. Yarbrough. 1997. Dispute Settlement in International Trade: Regionalism and Procedural Coordination. In *The Political Economy of Regionalism*, edited by Edward D. Mansfield and Helen V. Milner, 134-163. New York, N.Y.: Columbia University Press.
- Yin, Robert K. 1984. *Case Study Research: Design and Methods*. Beverly Hills, Calif.: SAGE.
- Young, Oran R. 1989. *International Cooperation: Building Regimes for Natural Resources and the Environment*. Ithaca, N.Y.: Cornell University Press.
- Young, Oran R. 1992. The Effectiveness of International Institutions: Hard Cases and Critical Variables. In *Governance without Government: Order and Change in World Politics*, edited by James N. Rosenau and Ernst-Otto Czempiel, 160-194. Cambridge: Cambridge University Press.

### **Official Documents**

- CEN. 1994. *The New Approach: Legislation and Standards on the Free Movement of Goods in Europe*. Brussels: CEN.
- Council of Ministers. 1995. Council Resolution of 29 June 1995 on the Effective Uniform Application of Community Law and on the Penalties Applicable for Breaches of Community Law in the Internal Market. *Official Journal*, No. C 188/1-3. 22.7.1995.
- European Commission. 1984. *First Annual Report to the European Parliament on Commission Monitoring of the Application of Community Law (1983)*. COM (84) 181 Final. 11.4.1984.
- European Commission. 1985a. *Second Annual Report to the European Parliament on Commission Monitoring of the Application of Community Law (1984)*. COM (85) 149 Final. 6.5.1985.

- European Commission. 1985b. *Completing the Internal Market: White Paper from the Commission to the European Council (Milan, 28 and 29 June 1985)*. COM (85) 310 Final. 14.6.1985.
- European Commission. 1986a. *Third Annual Report to the European Parliament on Commission Monitoring of the Application of Community Law (1986)*. COM (86) 204 Final. 3.6.1986.
- European Commission. 1986b. *First Report from the Commission to the Council and the European Parliament on the Implementation of the Commission's White Paper on Completing the Internal Market*. COM (86) 300 Final. 26.5.1986.
- European Commission. 1987a. *Second Report from the Commission to the Council and the European Parliament on the Implementation of the Commission's White Paper on Completing the Internal Market*. COM (87) 203 Final. 11.5.1987.
- European Commission. 1987b. *Fourth Annual Report to the European Parliament on Commission Monitoring of the Application of Community Law (1987)*. COM (87) 250 Final. 16.12.1987.
- European Commission. 1988a. *Third Report from the Commission to the Council and the European Parliament on the Implementation of the Commission's White Paper on Completing the Internal Market*. COM (88) 134 Final. 21.3.1988.
- European Commission. 1988b. *Fifth Annual Report to the European Parliament on Commission Monitoring of the Application of Community Law (1987)*. COM (88) 425 Final. 3.10.1988.
- European Commission. 1988c. *Completing the Internal Market: An Area without Internal Frontiers. The Progress Report Required by Article 8b of the Treaty*. COM (88) 650 Final. 17.11.1988.
- European Commission. 1989a. *Complaint to the Commission of the European Communities for Failure to Comply with Community Law. Official Journal, No. C/26/6-7*. 1.2.1989.
- European Commission. 1989b. *Fourth Progress Report of the Commission to the Council and the European Parliament Concerning the Implementation of the Commission's White Paper on the Completion of the Internal Market*. COM (89) 311 Final. 20.6.1989.
- European Commission. 1989c. *Communication from the Commission on Implementation of the Legal Acts Required to Build the Single Market*. COM (89) 422 Final. 7.9.1989.
- European Commission. 1989d. *Sixth Annual Report to the European Parliament on Commission Monitoring of the Application of Community Law (1988)*. COM (89) 411 Final. 21.12.1989.

- European Commission. 1990a. *Seventh Annual Report to the European Parliament on Commission Monitoring of the Application of Community Law (1989)*. COM (90) 288 Final. 22.5.1990.
- European Commission. 1990b. *Commission Opinion of 21 October 1990 on the Proposal for Amendment of the Treaty Establishing the European Economic Community with a View to Political Union*. COM (90) 600 Final. 23.10.1990.
- European Commission. 1990c. *Completing the Internal Market: An Area without Internal Frontiers. Progress Report Required by Article 8b of the Treaty*. COM (90) 552 Final. 23.11.1990.
- European Commission. 1991a. *Initial Contributions by the Commission to the Intergovernmental Conference on Political Union: Composite Working Paper*. SEC (91) 500. 15.5.1991.
- European Commission. 1991b. *Sixth Report of the Commission to the Council and the European Parliament Concerning the Implementation of the White Paper on the Completion of the Internal Market*. COM (91) 237 Final. 19.5.1991.
- European Commission. 1991c. *Eighth Annual Report to the European Parliament on Commission Monitoring of the Application of Community Law (1990)*. COM (91) 321 Final. 16.10.1991.
- European Commission. 1992a. *Ninth Annual Report on Commission Monitoring of the Application of Community Law (1991)*. COM (92) 136 Final. 12.5.1992.
- European Commission. 1992b. *Seventh Report of the Commission to the Council and the European Parliament Concerning the Implementation of the White Paper on the Completion of the Internal Market*. COM (92) 383 Final. 2.9.1992.
- European Commission. 1992c. *The Internal Market After 1992: Meeting the Challenge. Report to the EEC Commission by the High Level Group on the Operation of the Internal Market*. Brussels, October 1992.
- European Commission. 1993a. Notice on Cooperation between National Courts and the Commission in Applying Article 85 and 86 of the EEC Treaty. *Official Journal*, No. C 39/6-12. 13.2.1993.
- European Commission. 1993b. *Tenth Annual Report on the Monitoring of the Application of Community Law (1992)*. COM (93) 320 Final. 28.4.1993.
- European Commission. 1993c. *Making the Most of the Internal Market: Strategic Programme. Communication from the Commission to the Council*. COM (93) 632 Final. 22.12.1993.
- European Commission. 1994a. *Communication from the Commission to the Council and the European Parliament on the Development of Administrative Cooperation in the Implementation and Enforcement of Community Legislation in the Internal Market*. COM (94) 29 Final. 16.2.1994.

- European Commission. 1994b. *Eleventh Annual Report on Monitoring the Application of Community Law (1993)*. COM (94) 500 Final. 29.3.1994.
- European Commission. 1994c. *The Community Internal Market: 1993 Report*. Luxembourg: Office for Official Publications of the European Communities.
- European Commission. 1995a. *Communication from the Commission to the Council and the European Parliament on the Role of Penalties in Implementing Community Internal Market Legislation*. COM (95) 162 Final. 3.5.1995.
- European Commission. 1995b. *Twelfth Annual Report on Monitoring the Application of Community Law (1994)*. COM (95) 500 Final. 7.6.1995.
- European Commission. 1995c. *The Single Market in 1994: Report from the Commission to the Council and the European Parliament*. COM (95) 238 Final. 15.6.1995.
- European Commission. 1995d. Notice on Cooperation between National Courts and the Commission in the State Aid Field. *Official Journal*, No. C 312/8-13. 23.11.1995.
- European Commission. 1995e. *Commission Report for the Reflection Group*. Luxembourg: Office for Official Publications of the European Communities.
- European Commission. 1995f. Initiative: "Les Citoyens d'abord". Informer les citoyens de leurs droits. *Single Market News* 1: 2.
- European Commission. 1996a. *Cooperation between Administrations for Enforcement of Internal Market Law: A Progress Report. Report from the Commission to the Council and the European Parliament*. COM (96) 20 Final. 29.1.1996.
- European Commission. 1996b. *The Single Market in 1995: Report from the Commission to the Council and the European Parliament*. COM (96) 51 Final. 20.2.1996.
- European Commission. 1996c. *Reinforcing Political Union and Preparing for Enlargement: Commission Opinion*. COM (96) 90 Final. 28.2.1996.
- European Commission. 1996d. *Thirteenth Annual Report on Monitoring the Application of Community Law (1995)*. COM (96) 600 Final. 29.5.1996.
- European Commission. 1996e. Memorandum on Applying Article 171 of the EC Treaty. *Official Journal*, No. C 242/6-8. 21.8.1996.
- European Commission. 1996f. *The Impact and Effectiveness of the Single Market: Communication from the Commission to the European Parliament and the Council*. COM (96) 520 Final. 30.10.1996.
- European Commission. 1996g. *Proposal for a European Parliament and Council Decision Establishing an Action Programme to Improve Awareness of Community Law for the Legal Professions (Robert Schuman Project)*. COM (96) 580 Final. 15.11.1996.

- European Commission. 1996h. *The Single Market and Tomorrow's Europe: A Progress Report from the European Commission*. Luxembourg: Office for Official Publications of the European Communities.
- European Commission. 1996i. Economic Evaluation of the Internal Market. *European Economy* 4. Luxembourg: Office for Official Publications of the European Communities.
- European Commission. 1996j. *Living in Another Country of the European Union*. Information brochure, Citizens First.
- European Commission. 1996k. *Internal Market: Action Programme to Improve the Application of Community Law*. Press Release IP/96/1069.
- European Commission. 1996l. Fonctionnement du marché unique: M. Monti demande aux États membres de mettre les bouchées doubles. *Single Market News* 4: 6-7.
- European Commission. 1997a. *The Commission for the First Time Seeks Financial Penalties against Non-Compliance with European Court Judgments*. Press Release IP/97/63. 29.1.1997.
- European Commission. 1997b. Method of Calculating the Penalty Payments Provided for Pursuant to Article 171 of the EC Treaty. *Official Journal*, No. C 63/2-4. 28.2.1997.
- European Commission. 1997c. *Single Market: Overview of Compliance Problems in 1996*. Press Release IP/97/362. 29.4.1997.
- European Commission. 1997d. *Fourteenth Annual Report on Monitoring the Application of Community Law (1996)*. COM (97) 299 Final. 29.5.1997.
- European Commission. 1997e. *Amended Proposal for a European Parliament and Council Decision Establishing an Action Programme to Improve Awareness of Community Law for the Legal Professions (Robert Schuman Project)*. COM (97) 596 Final. 7.11.1997.
- European Commission. 1997f. *Proposal for a Council Regulation (EC) Creating a Mechanism whereby the Commission Can Intervene in Order to Remove Certain Obstacles to Trade*. COM (97) 619 Final. 18.11.1997.
- European Commission. 1997g. *The Commission Proposes an Intervention Mechanism to Safeguard Free Trade in the Single Market*. Press Release IP/97/1016. 19.11.1997.
- European Commission. 1997h. *Citizens First: EU Rights on Equal Opportunities, Buying Goods and Services and Travelling*. Press Release IP/97/1035. 25.11.1997.
- European Commission. 1997i. *Towards Greater Efficiency in Obtaining and Enforcing Judgments in the European Union: Proposal for a Council Act Establishing the Convention on Jurisdiction and the Recognition of Judgments in*

- Civil and Commercial Matters in the Member States of the European Union. Commission Communication to the Council and the European Parliament. COM (97) 609 Final. 26.11.1997.*
- European Commission. 1997j. *Single Market Scoreboard*. No. 1. November 1997.
- European Commission. 1997k. *Evaluation of Phase 1 of Citizens First*.
- European Commission. 1997l. Citoyens d'Europe: Mieux faire connaître leurs droits aux habitants de l'Union. *Single Market News* 6: 2-3.
- European Commission. 1997m. Help Desk on Complaints Procedure. *Single Market News* 6: 25.
- European Commission. 1997n. Transposition: State of Implementation of the White Paper Measures. *Single Market News* 7: 2.
- European Commission. 1997o. Citizens First: 450 000 People Have Now Contacted Citizens First. *Single Market News* 7: 4.
- European Commission. 1997p. Citizens First: The Next Phase Will Be Launched in November. *Single Market News* 9: 4.
- European Commission. 1997q. Strengths and Weaknesses of the Single Market. Special Dossier in *Single Market News* 10.
- European Commission. 1997r. Initiative "Citoyens d'Europe": Une deuxième phase aussi ambitieuse que la première. *Single Market News* 10: 2-3.
- European Commission. 1998a. *Citizens First Signpost Service: Analysis of Enquiries, November 1996 – July 1997*. 18.5.1998.
- European Commission. 1998b. *Listening to Citizens: The Difficulties That People Face in Exercising Their Rights within the Single European Market. A Report Drafted by the Signpost Service as Part of the "Citizens First" Initiative*. 18.5.1998.
- European Commission. 1998c. *Fifteenth Annual Report on Monitoring the Application of Community Law (1997)*. COM (98) 317 Final. 19.5.1998.
- European Commission. 1998d. *Single Market Scoreboard*. No. 2. May 1998.
- European Commission. 1998e. *Monitoring the Application of Community Law: 1997 Report*. Press Release IP/98/519. 11.6.1998.
- European Commission. 1998f. *Public Procurement: Commission Proposes Financial Penalties against Greece and Opens New Proceedings against Italy*. Press Release IP/98/559. 24.6.1998.
- European Commission. 1998g. *Single Market Scoreboard*. No. 3. October 1998.
- European Commission. 1998h. *Commission Decides to Seek Financial Penalties against Italy for Not Meeting ECJ Ruling on Urban Waste Water Treatment Directive*. Press Release IP/98/1103. 11.12.1998.

- European Commission. 1998i. *Informal Meeting of Internal Market Ministers, Cambridge, 13-14 February*. Internet: <http://europa.eu.int/comm/dg15/en/index.htm>.
- European Commission. 1998j. Citizens First – Phase 2: New Dialogues with Citizens and Business. *Single Market News* 11: 4-5.
- European Commission. 1998k. Citizens First Update: Results of Phase II for All Member States. *Single Market News* 12: 4-5.
- European Commission. 1998l. Pour éliminer certains obstacles aux échanges: Instauration d'un double mécanisme d'intervention rapide. *Single Market News* 13: 11.
- European Commission. 1998m. Dialogue with Citizens and Business: Encouraging Awareness of Opportunities in the Single Market. *Single Market News* 13: 2-3.
- European Commission. 1998n. Action Robert Schuman: Sensibiliser les juristes au droit communautaire. *Single Market News* 15: 5.
- European Council. 1997. Amsterdam European Council: Conclusions of the Presidency. *Bulletin of the European Union* 1997 (6): 8-22.
- European Court of Justice. 1975. Suggestions of the Court of Justice on European Union. *Bulletin of the EC*, Supplement 9/75: 17-21.
- European Court of Justice. 1990. *Synopsis of the Work of the Court of Justice and the Court of First Instance of the European Communities in 1988 and 1989*. Luxembourg: European Court of Justice.
- European Court of Justice. 1991. *Synopsis of the Work of the Court of Justice and the Court of First Instance of the European Communities in 1990*. Luxembourg: European Court of Justice.
- European Court of Justice. 1993. *Rapport annuel 1991*. Luxembourg: European Court of Justice.
- European Court of Justice. 1995a. *Report of the Proceedings 1992-1994*. Luxembourg: European Court of Justice.
- European Court of Justice. 1995b. *Report of the Court of Justice on Certain Aspects of the Application of the Treaty on European Union*. Luxembourg: European Court of Justice.
- European Parliament. 1983a. *Report Drawn up on Behalf of the Legal Affairs Committee on the Responsibility of Member States for the Application of Community Law*. PE 77.275/fin. 10.1.1983.
- European Parliament. 1983b. Resolution on the Responsibility of the Member States for the Application of and Compliance with Community Law. *Official Journal*, No. C 68/32-34. 14.3.1983.
- European Parliament. 1988. *Report Drawn up on Behalf of the Committee on Legal Affairs and Citizens' Rights on the Fourth Annual Report to the European*

*Parliament on Commission Monitoring of the Application of Community Law – 1986.* PE 119.095/fin. 22.2.1988.

IGC. 1996a. *Position du gouvernement italien sur la conférence intergouvernementale pour la révision des traités.* CONF/3839/96.

IGC. 1996b. *Note from the Presidency: The Institutions of a More Democratic and More Effective Union.* CONF 3849/96.

IGC. 1996c. *Memorandum by the United Kingdom on the European Court of Justice.* CONF/3883/96.

IGC. 1996d. *Création de la possibilité de transférer au Tribunal de Première Instance les procédures relatives aux questions préjudicielles: Note de transmission, délégation allemande.* CONF/3962/96.

IGC. 1997a. *Proposition d'amendement de la délégation française sur la Cour de Justice.* CONF/3853/97.

IGC. 1997b. *Pour une application uniforme et efficace des dispositions relatives au marché intérieur: Note de transmission de la délégation italienne, transmise par M. Silvio Fagiolo, représentant à la conférence intergouvernementale, à M. Jürgen Trumpf, secrétaire général du Conseil de l'Union européenne.* CONF/3913/97.

Reflection Group. 1995. *Reflection Group's Report.* Brussels, 5.12.1995.

SOU. 1997. *Det allmännas skadeståndsansvar vid överträdelse av EG-regler: Betänkande av utredningen om det allmännas skadeståndsansvar vid överträdelse av EG-rätten.* Statens offentliga utredningar, SOU 1997: 194.

#### **Official Speeches, Letters, and Articles**

Davis, David. 1995. *1996 Inter-Governmental Conference: European Court of Justice.* Letter to Carlos Westendorp, chairman of the Reflection Group, September 25 1995.

Mogg, John. 1996. Editorial. *Single Market News* 5: 1.

Mogg, John. 1998. Editorial. *Single Market News* 13: 1.

Monti, Mario. 1997. *Making the Single Market Work: The Next Steps.* Speech, March 7 1997, Brussels.

Monti, Mario. 1998. *EMU, Taxation and Competitiveness.* Speech, November 27 1998, London.

### **Newspapers, Magazines, and News Agencies**

- Agence Europe*. 1992. No. 5835, October 14 1992.
- Economist*. 1997. Biased Referee? May 17 1997: 35-36.
- European Voice*. 1997a. Plan to Boost Legal Powers to Police the Single Market. *European Voice* 3 (40): 1. November 6-12 1997.
- European Voice*. 1997b. Industry to Lobby against French Advertising Law. *European Voice* 3 (41): 4. November 13-19 1997.
- European Voice*. 1998a. Rough Ride for Proposal to End EU Blockades. *European Voice* 4 (5): 5. February 5-11 1998.
- European Voice*. 1998b. Informal Internal Market Council. *European Voice* 4 (7): 31. February 19-25 1998.
- European Voice*. 1998c. Drinks Industry Calls for End to Stalling over “Loi Evin.” *European Voice* 4 (15): 2. April 16-22 1998.
- European Voice*. 1998d. Internal Market Council. *European Voice* 4 (20): 31. May 20-27 1998.
- European Voice*. 1998e. EU Governments Face Pressure to Meet Single Market Deadlines. *European Voice* 4 (33): 2. September 17-13 1998.
- European Voice*. 1998f. Governments Make Progress on Single Market but Significant Gaps Remain. *European Voice* 4 (46): 16-17. December 17 1998 – January 6 1999.
- Financial Times*. 1991. February 6 1991, p. 20.

### **Judgments by the European Court of Justice**

- Brasserie du Pêcheur SA v. Germany, and Factortame and Others v. the UK*, Joined Cases C-46 and 48/93 (Factortame III), ECR 1996 (I): 1029ff.
- British Telecommunications v. the UK*, Case C-392/93, ECR 1996 (I): 1631ff.
- Costa v. ENEL*, Case 6/64, ECR 1964: 585ff.
- Dillenkofer and Others v. Germany*, Joined Cases C-178, 179, 188, 189, and 190/94, ECR 1996 (I): 4845ff.
- Emmott v. Minister for Social Welfare*, Case C-208/90, ECR 1991 (I): 4269ff.
- Factortame v. Secretary of State for Transport*, Case C-213/89 (Factortame I), ECR 1990: 2433ff.
- Francovich and Others v. Italy*, Joined Cases C-6 and 9/90, ECR 1991 (I): 5357ff.
- Hedley Lomas v. the UK*, Case C-5/94, ECR 1996 (I): 2553ff.
- Marshall v. Southampton and South West Hampshire Health Authority*, Case C-271/91 (Marshall II), ECR 1993 (I): 4367ff.

Rewe-Zentralfinanz *v.* Landwirtschaftskammer, Case 33/76, ECR 1976: 1989ff.  
Rewe-Zentral AG *v.* Bundesmonopolverwaltung für Branntwein, Case 120/78  
(Cassis de Dijon), ECR 1979: 649ff.  
Van Gend & Loos *v.* Nederlandse Administratie der Belastingen, Case 26/62,  
European Court Reports (ECR) 1963: 1ff.  
Von Colson and Kamann *v.* Land Nordrhein-Westfalen, Case 14/83, ECR 1984:  
1891ff.  
Zuckerfabrik Süderdithmarschen AG *v.* Hauptzollamt Itzehoe, Joined Cases C-  
143/88 and C-92/89, ECR 1991 (I): 415ff.



## LUND POLITICAL STUDIES

1. Ruin, Olof: *Kooperativa förbundet 1899-1929. En organisationsstudie*, Stockholm: Rabén & Sjögren 1960
2. Vallinder, Torbjörn: *I kamp för demokratin. Rösträttsrörelsen i Sverige 1886-1900*, Stockholm: Natur & Kultur 1962
3. Petersson, Hans F: *Power and International Order. An Analytic Study of Four Schools of Thought and Their Approaches to the War, the Peace and the Postwar System 1914-1919*, Lund: Gleerups 1964
4. Westerhult, Bo: *Kronofogde, häradsskrivare, länsman. Den svenska fögderiförvaltningen 1810-1917*, Lund: Gleerups 1966
5. Wieslander, Hans: *I nedrustningens tecken. Intressen och aktiviteter kring försvarsfrågan 1918-1925*, Lund: Gleerup 1966
6. Söderberg, Olof: *Motororganisationerna i Sverige. Bakgrund, grupperingar, aktiviteter*, Stockholm: Rabén & Sjögren 1966
7. Sjöblom, Gunnar: *Party Strategies in a Multiparty System*, Lund: Studentlitteratur 1968
8. Hydén, Göran: *TANU Yajenga Nchi. Political Development in Rural Tanzania*, Lund: Uniskol 1968
9. Lindeberg, Sven-Ola: *Nödhjälp och samhällsneutralitet. Svensk arbetslöshetspolitik 1920-1923*, Lund: Uniskol 1968
10. Westerhult, Bo: *Underdåniga påtryckningar. Fögderitjänstemännens intressebevakning från 1800-talets början till år 1918*, Lund: Gleerups 1969
11. Bergquist, Mats: *Sverige och EEC. En statsvetenskaplig studie av fyra åsiktsriktningars syn på svensk marknadspolitik 1961-62*, Stockholm: Norstedts 1970
12. Lundquist, Lennart: *Means and Goals of Political Decentralization*, Lund: Studentlitteratur 1972
13. Bjurulf, Bo: *An Analysis of Some Aspects of the Voting Process*, Lund: Studentlitteratur 1972
14. Stenelo, Lars-Göran: *Mediation in International Negotiations*, Lund: Studentlitteratur 1972
15. Lindquist, Stellan: *Linkages between Domestic and Foreign Policy. The Record of Ghana*, Lund 1974
16. Bjurulf, Bo: *A Dynamic Analysis of Scandinavian Roll-Call Behavior. A Test of a Prediction Model of Ten Minority Situations in Three Countries*, Lund: Studentlitteratur 1974

17. Hermerén, Henrik: *Regeringsbildningen i flerpartisystem*, Lund: Studentlitteratur 1975
18. Johannesson, Conny: *Studier över Svenska metallindustriarbetarförbundets förhandlingsorganisation vid förbundsförhandlingar – med samordning*, Lund: Studentlitteratur 1975
19. Peterson, Carl-Gunnar: *Ungdom och politik. En studie av Sveriges Socialdemokratiska Ungdomsförbund*, Stockholm: Frihets förlag 1975
20. Bryder, Tom: *Power and Responsibility. Contending Approaches to Industrial Relations and Decision Making in Britain 1963-1971*, Lund: Gleerups 1975
21. Jönsson, Christer: *The Soviet Union and the Test Ban: A Study in Soviet Negotiation Behavior*, Lund: Studentlitteratur 1975
22. Kronvall, Kai: *Politisk masskommunikation i ett flerpartisystem. Sverige – en fallstudie*, Lund: Studentlitteratur 1975
23. Liljequist, Gunnar: *Distribution av kommunal service*, Lund: Liber 1977
24. Lartey, George W.: *The Fourth Dimension*, Lund 1977
25. Weston, David: *Realism, Language and Social Theories. Studies in the Relation of the Epistemology of Science and Politics*, Lund 1978
26. Hagström, Bo: *1971 års länsförvaltningsreform. En utvärdering*, Lund: Studentlitteratur 1978
27. Skogmar, Gunnar: *Atompolitik. Sambandet mellan militärt och civilt utnyttjande av atomenergi i amerikansk utrikespolitik 1945-1973*, Malmö: Stenvalls Förlag 1979
28. Sannerstedt, Anders: *Fri konkurrens eller politisk styrning? 1963 års trafikpolitiska beslut – debatten om innehåll, tillämpning och effekter*, Lund: Studentlitteratur 1979
29. Lidén, Anders: *Security and Recognition. A Study of Change in Israel's Official Doctrine 1967-1974*, Lund: Studentlitteratur 1979
30. Magnusson, Håkan: *Kommunerna och den regionala planeringen. En analys av länsplaneringen och den fysiska riksplaneringen*, Lund: Studentlitteratur 1980
31. Stenelo, Lars-Göran: *Foreign Policy Predictions*, Lund: Studentlitteratur 1980
32. Lundell, Bengt: *MBL utan avtal. Kommunerna och MBL*, Helsingborg 1981
33. Norrving, Bengt: *Kommunerna och bostadsförsörjningen. En analys av bostadsplaneringen*, Lund: Liber 1981
34. Linderoth, Sven: *Från konkurrens till monopol. En studie av lokal politisk och ekonomisk journalistik*, Malmö: Dialog 1981

35. Forje, John: *The One and Indivisible Cameroon: Political Integration and Socio-Economic Development in a Fragmented Society*, Lund 1981
36. Adebo, Tarekegn: *Ideological Trends in the Political Thinking of the Developing Regions: The Case of Sub Saharan Africa*, Lund: Studentlitteratur 1982
37. Elgström, Ole: *Aktiv utrikespolitik. En jämförelse mellan svensk och dansk parlamentarisk utrikesdebatt 1962-1978*, Lund: Studentlitteratur 1982
38. Lindkvist, Kent: *Program och parti: principprogram och partiideologi inom den kommunistiska rörelsen i Sverige 1917-1972*, Lund: Arkiv för studier i arbetarrörelsens historia 1982
39. Bergström, Tomas och Lundell, Bengt: *Från MBL till MBA. Kommunerna och MBL*, Lund: Statsvetenskapliga institutionen 1982
40. Hörberg, Thomas: *Prediktion, osäkerhet och risk i internationella förhandlingar. En studie av svenskt förhandlingsbeteende vid förhandlingarna med Sovjetunionen 1940-41 om ett handelsavtal*, Lund: Studentlitteratur 1983
41. Geraedts, Henry: *The People's Republic of China: Foreign Economic Relations and Technology Acquisition 1972-1981*, Lund: Forskningspolitiska institutet 1983
42. Jerneck, Magnus: *Kritik som utrikespolitiskt medel. En studie av de amerikanska reaktionerna på den svenska Vietnamkritiken*, Lund: Dialogos 1983
43. Stenelo, Lars-Göran: *The International Critic*, Lund: Studentlitteratur 1984
44. Bergström, Tomas och Lundell, Bengt: *Lokalt medbestämmande. Kommunerna och MBL*, Lund: Statsvetenskapliga institutionen 1984
45. Sjölin, Mats: *Kommunalpolitiken i massmediernas spegel. En studie av dagspressen och lokalradions bevakning av fem kommuner*, Lund: Dialogos 1985
46. Albinsson, Per: *Skiftningar i blått. Förändringar inom Moderata Samlingspartiets riksorganisation 1960-1985*, Lund: Kommunfakta Förlag 1986
47. Jonsson, Rolf: *De okända förhandlingarna. Statens förhandlingsråd och regeringens MBL-förhandlingar*, Lund: Dialogos 1986
48. Polak, Jiri: *Dependence Patterns in the Soviet Bloc: The Case of Romania and East Germany*, Lund: Studentlitteratur 1986
49. Lundell, Bengt: *Kommunerna och MBL*, Lund: Statsvetenskapliga institutionen 1986

50. Rothstein, Bo: *Den socialdemokratiska staten. Reformen och förvaltning inom svensk arbetsmarknads- och skolpolitik*, Lund: Arkiv 1986
51. Pierre, Jon: *Partikongresser och regeringspolitik. En studie av den socialdemokratiska partikongressens beslutsfattande och inflytande 1948-1978*, Lund: Kommunfakta Förlag 1986
52. Schmidt, Stephan: *Pionjärer, efterföljare och avvaktare. Innovationer och deras spridning bland svenska primärkommuner*, Lund: Kommunfakta Förlag 1986
53. Westerlund, Ulf: *Superpower Roles. A Comparative Analysis of United States and Soviet Foreign Policy*, Lund: Department of Political Science 1987
54. Lundquist, Lennart: *Implementation Steering. An Actor-Structure Approach*, Lund: Studentlitteratur 1987
55. Stenelo, Lars-Göran, red: *Statsvetenskapens mångfald. Festskrift till Nils Stjernquist*. Lund: Lund University Press 1987
56. Nilsson, Ann-Sofie: *Political Uses of International Law*, Lund: Dialogos 1987
57. Bergström, Tomas: *Konkurrerande eller kompletterande demokrati? Om företagsdemokrati i de svenska kommunerna*, Lund: Statsvetenskapliga institutionen 1988
58. Lindell, Ulf: *Modern Multinational Negotiation: The Consensus Rule and Its Implications in International Conferences*, Lund: Statsvetenskapliga institutionen 1988
59. Stenelo, Lars-Göran, red: *Makten över den decentraliserade skolan*, Lund: Studentlitteratur 1988
60. Lundquist, Lennart: *Byråkratisk etik*, Lund: Studentlitteratur 1988
61. Petersson, Harry, red: *Vem styr förändringarna inom sjukvården – politikerna eller de medicinska professionerna? En studie av subspecialiseringen inom ortopedin*, Lund: Kommunfakta Förlag 1989
62. Jonsson, Rolf: *Fackligt inflytande och politisk demokrati. En analys av regeringens MBL-förhandlingar*, Lund: Kommunfakta Förlag 1989
63. Johannesson, Bengt: *Kommunal bostadspolitik*, Lund: Kommunfakta Förlag 1989
64. Aronson, Torbjörn: *Konservatism och demokrati. En rekonstruktion av fem svenska högerledares styrelsedoktriner*, Stockholm: Norstedts 1990
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67. Højelid, Stefan: *Sovjetbilden i nordisk press. Svenska, norska och finländska reaktioner på sovjetiskt agerande*, Lund: Statsvetenskapliga institutionen 1991
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