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Making States Comply: EC Enforcement and the Internal Market Program

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1. INTRODUCTION

International relations theory generally assumes that the problem of member state non-compliance with treaties and agreements cannot be remedied through enforcement by international institutions. Either it is argued that there are better ways than enforcement to make states comply¹, or that enforcement—if indeed provided for—must rely on the principle of self-help and sanctions imposed by fellow member states.²

These common assertions in contemporary theories on international cooperation, are belied by the European experience. For decades, the Commission and the European Court of Justice have played a key role in inducing member states to comply with Community law. As Audretsch puts it in a seminal work on EC enforcement, “Community supervision is an exceptional matter. It is a *species* of the *genus* of international supervision.”³

This paper offers a theoretical framework for analyzing third-party enforcement in general, and the development of Community enforcement in particular. The analytical framework is based on the tools and logic of the principal-agent literature within the New Institutional Economics, and contributes to an understanding of EC enforcement in primarily three ways. First, by framing the relation between member states and Community institutions in the post-agreement phase as a principal-supervisor-agent relationship, where states (principals), for the sake of self-commitment, assign the Commission and the Court (supervisors) the task of enforcing the implementation of EC law, as delegated to the individual member states (agents). Second, by highlighting two dilemmas or key areas of tension in this relationship—the delegation dilemma facing member states and the enforcement dilemma facing the Commission and the Court. Third, by identifying and disentangling strategies and means of enforcement, such as centralized

¹ See, in particular, the so-called management school in the study of compliance, e.g.: Chayes and Chayes, 1991; Chayes and Chayes, 1993; Chayes and Chayes, 1995; Haas, et al., 1993; Keohane and Levy, 1996; Mitchell, 1994a; Mitchell, 1994b.

² See, in particular, many of the contributions to the so-called enforcement school in the study of compliance, e.g.: Downs, et al., 1996; Young, 1979; Oye, 1986; Martin, 1992; Yarbrough and Yarbrough, 1987; Yarbrough and Yarbrough, 1992; Bayard and Elliott, 1994; Hungerford, 1991.

³ Audretsch, 1986, p. 2.

supervision through the Commission and the ECJ, and decentralized enforcement through individuals safe-guarding their right under EC law.

The paper applies this analytical framework to the development of EC enforcement in the late 1980s and the 1990s in conjunction with the implementation of the internal market program. The internal market program entailed considerable strains on the economic, political, and administrative structures of member states, in light of which non-compliance offered an attractive way to cushion the adjustment. In response to such compliance problems, Community institutions and member states called for and undertook significant revisions of the EC enforcement structure. The tightening of Community enforcement covered all fronts, both centralized and decentralized supervision, both monitoring and sanctions. But, while member states' protection of sovereignty put a limit on the extent to which centralized enforcement could be strengthened, crucial steps were taken by the Commission and the Court towards constructing a full-fledged decentralized enforcement structure.

The plan of the paper is as follows. After a brief introduction to the New Institutional Economics, the next section presents the principal-supervisor-agent framework for analyzing third-party enforcement. Section three focuses on the internal market program, the adjustments it required in member state behavior, and the three kinds of non-compliance which followed. Section four examines how Community enforcement developed in response to these compliance problems. The paper is closed with a brief conclusion.

2. A PRINCIPAL-SUPERVISOR-AGENT FRAMEWORK FOR ANALYZING EC ENFORCEMENT

The New Institutional Economics and the Principal-Agent Problem

In the last two decades we have witnessed the rise of a new and widely influential approach within economics, the New Institutional Economics (NIE).⁴ This approach originated within the study of the firm, but has made substantial inroads into other areas of economics and the social sciences in general. Indeed, its emphasis on how institutional structures affect performance and why different institutional structures arise, carries immediate intuitive appeal to scholars outside economics. Williamson, one of the foremost contributors to this approach, divides the NIE into four different parts: transaction cost theory, property rights theory, public choice theory, and agency theory.⁵ While certainly of great relevance to many aspects of politics, the first three parts of the NIE will not be dealt with further here.

Agency theory focuses on the problems involved in designing an efficient contract in situations of information asymmetry and conflicting interests. Agency theory is most often expressed in the setting of the principal-agent model.⁶ In a seminal article on the principal-agent problem, 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.”⁷ In other words, the principal and the agent enter into a contractual arrangement in which the agent is hired and expected to perform a function which is desired by the principal. The principal-agent relationship is indeed a very common mode of social interaction and a wide set of actor relations can be expressed in these terms, e.g.

⁴ Numerous rubrics have been employed to denote this approach, e.g. the New Institutional Economics, the New Economics of Organization, and the New Economic History. I use the term New Institutional Economics, since it is the most frequently used rubric.

⁵ Williamson, 1990.

⁶ On agency and the principal-agent problem, see, e.g., Alchian and Demsetz, 1972; Arrow, 1985; Jensen and Meckling, 1976; Lazear, 1987; Pratt and Zeckhauser, 1985; Ross, 1973; Sappington, 1991; Shavell, 1979; Smith, 1987; Stiglitz, 1987.

⁷ Ross, 1973, p. 134.

shareholders-corporate manager, employer-employee, voters-politicians, politicians-bureaucrats, superior-subordinate, client-lawyer, investor-broker, etc.

The problem in this relationship emanates from the simultaneous presence of information asymmetry and conflicting interests. Information asymmetry prevails because agents know more about their interests and actions than their principals do. But, the asymmetric distribution of information would not cause friction in the relationship between the principal and the agent, had they not had conflicting interests as well. What is optimal for the principal is not necessarily optimal for the agent. While the shareholders of a firm want to maximize the profit, the manager wants to collect a high wage; while the voters want their elected politicians to pursue the policies they campaigned on, the politicians also have private and party interests at heart.

When information asymmetry and conflicting interests coincide, the agent will shirk to the extent that such behavior is not rendered disadvantageous. Hence, the essence of the principal's problem is the construction of an incentive structure that will induce the agent to act as the principal would prefer. Basically, the agent considers three factors when deciding whether to shirk or not. First, what are the gains from successful shirking? Second, what are the losses from detection? Third, what is the probability of getting caught? The first two factors—rewards and sanctions—are specified in the contract, which stipulates the conditions of the principal's compensation to the agent for performing a task desired by the principal. The third factor—the risk of getting caught—depends on the monitoring mechanism set up by the principal, where the principal may either decide to monitor the agent's actions itself or delegate this task to a supervisor.⁸ Together, the contract and the monitoring mechanism determine the agent's incentive structure: Given a certain reward for performing as the principal wishes, the fiercer the sanctions, and the more extensive the monitoring mechanism, the less likely it is that the agent will try to shirk.

The merits of the principal-agent model are numerous and obvious. Many, if not most, contractual relations are *de facto* characterized by conflicting interests and

⁸ For examples and a discussion of how the principal-agent model can be extended to include supervisors, see, e.g., Alchian and Demsetz, 1972; Holmström and Tirole, 1989; Tirole, 1986.

information asymmetry, and can thus be framed in terms of the principal-agent relation. Hence, the model is of a highly generalizable character. Furthermore and most important, “[i]t cuts through the inherent complexity of organizational relationships by identifying distinct aspects of individuals and their environments that are most worthy of investigation, and it integrates these elements into a logically coherent whole.”⁹

Principals, supervisors, and agents in EC enforcement

To argue that the study of politics may benefit from importing the conceptual tools of the NIE is hardly original.¹⁰ For little more than a decade now, the NIE has contributed substantially to the development of powerful theories within political science. Two topics in particular have been furthered by the incorporation of these tools: international cooperation and legislative-regulatory relations.¹¹ Departing from the conviction that such integration across disciplinary boundaries is essential to generating innovative research, I present in this section a principal-supervisor-agent framework for analyzing EC enforcement. In particular, I argue that the NIE and the principal-agent problem may contribute in three significant ways to the understanding of enforcement in the EC and in international cooperation in general. First, by providing a conceptualization of the general relationship between actors in the post-agreement phase. Second, by highlighting dilemmas or key areas of tension in this relationship. Third, by identifying and distinguishing between the various strategies and means of the enforcement (incentive) structure.

Supervision and self-commitment: A principal-supervisor-agent model of EC enforcement

In recent years, a growing number of scholars have attempted to interpret the general relationship between member states and EC institutions in terms of principals and

⁹ Moe, 1984, p. 757.

¹⁰ In addition to the works mentioned below, Moe, 1984, and Yarbrough and Yarbrough, 1990, particularly push this point.

¹¹ Hall and Taylor, 1994, p. 9. For applications to international cooperation, see, e.g., Keohane, 1984, ch. 6; Martin, 1993; Sevilla, 1995; Simmons, 1993; Yarbrough and Yarbrough, 1990; as well as the references below to principal-agent analyses of the EC. For applications to legislative-regulatory relations, see, e.g., McCubbins and Schwartz, 1984; McCubbins, et al., 1987; McCubbins and Sullivan, 1987; Moe, 1984; Weingast, 1984.

agents.¹² All these works share the common feature that they depict member states as principals which delegate authority and functions to EC institutions as agents. In their focus on delegation and member state control over EC institutions, these works undoubtedly capture a fundamental aspect of the EC's institutional set-up. When turning to the issue of supervision and enforcement in the EC, however, this application of principal-agent theory only tells us part of the truth. The roles that states and institutions play depend on what aspect of the EC policy process that is under scrutiny. When analyzing the enforcement of compliance with Community law, member states are best characterized as both principals and agents, while the Commission and the Court function as supervisors. Essentially, EC enforcement can be framed as a principal-supervisor-agent relationship resting on the logic of member state self-commitment. Like Ulysses, states are weak and aware of it, and like Ulysses, states take measures to overcome this weakness.¹³

Given the often substantial political, economic, and administrative costs involved in the implementation of Community law, compliance does not come for free. It is safe to assume, and practice provides us with plenty of evidence thereof, that states would prefer if all other member states complied fully, while certain leeway was granted in terms of one's own performance. In more rigorous terms, full compliance is the second best alternative of every state and will be chosen only if the option of free-riding is blocked. Consequently, states will shirk, i.e. fail to fully implement and comply with EC legal provisions, if this can be done without incurring intolerable costs.¹⁴

¹² Moravcsik seeks to explain the extraordinary role of the European Court of Justice by developing an intergovernmental theory of supranational autonomy, in which “[d]elegating sovereignty establishes a principal-agent relationship between member state governments (multiple principals) and supranational officials, judges and representatives (multiple agents).” (Moravcsik, 1995, p. 622) Confounded by the same puzzle—why member states maintain an EC legal system that is seemingly contradictory to state sovereignty and interests—Garrett ends up with an explanation similar to Moravcsik's, and in which “the delegation of authority to the European court [is viewed] in terms of monitoring and incomplete contracting problems confronting EC members.” (Garrett, 1992, p. 557) Taking a wider perspective, Pierson presents an historical institutionalist critique of intergovernmentalist accounts of EC integration, where the argument is cast in principal-agent terms and focuses on gaps in member state control. (Pierson, 1996) The most elaborate attempt so far at framing EC relations as a principal-agent problem, however, is Pollack's recent approach to the question of supranational autonomy, where he examines the mechanisms of member state control over the supranational institutions of the EC. (Pollack, 1997)

¹³ Elster, 1979.

¹⁴ This preference structure is often referred to as collaboration. On the distinction between collaboration and coordination, see Stein, 1983; Stein, 1990. Collaboration refers to a game structure in which the first best alternative of every actor is to defect while the adversary cooperates. But, if all actors pursue the same

In the face of this weakness, the member states of the EC have set 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 formal delegation of authority to the Commission and the Court is regulated in the EEC Treaty of 1957. The Commission's role as guardian of the treaties, Community watch-dog, and "the one body able to take a bird's-eye view of the states' warring interests"¹⁵, is manifested in Article 155, which states that the first duty of the Commission is to "ensure that the provisions of this Treaty and the measures taken by the institutions pursuant thereto are applied." The function of the European Court of Justice is expressed in Article 164 of the Treaty, according to which the ECJ "shall ensure that in the interpretation and application of this Treaty the law is observed." To this end, the ECJ provides direct or indirect dispute-settlement in conflicts between the Commission, member states, firms, and individuals.

In the concepts of the NIE, this act of self-commitment can be framed as a principal-supervisor-agent relationship. When reaching decisions in the Council, member states as a collective of principals, delegate to each and every member state as agent, to individually implement and comply with what has been agreed upon. Like any principal, member states would thus prefer the agents to act as stipulated in the "contract". Similarly, like any agent, the member states would thus prefer to cut slack and shirk from their obligations. As in the original version of the principal-agent problem, the key to avoiding shirking rests with the construction of an enforcement (incentive) structure which induces the agent to act as the principal prefers. In the case of the EC, the member states have for this purpose endowed the Commission and the Court with supervisory powers in order to prevent non-compliance in the implementation and application of Community law.

strategy, they will end up in the third best alternative, mutual defection. International regimes may facilitate a more advantageous outcome by improving the preconditions for collaboration, i.e. mutual cooperation. Coordination, on the other hand, refers to a situation where there is no conflict of interest between the actors and the problem consists of agreeing on a common "standard". It is generally argued that most issues in international relations, e.g. trade, arms reduction etc., are characterized by collaboration rather than coordination.

¹⁵ Colchester, 1992, ch. 4, p. 1.

Two dilemmas in EC enforcement

Two dilemmas or areas of tension can be derived from the principal-supervisor-agent framework outlined above: a delegation dilemma and an enforcement dilemma. First, member states face a dilemma in the delegation of supervisory powers to the Community institutions, owing to member states' dual role as both principals and agents. Second, the Community institutions experience a dilemma as regards their enforcement approach, which is also an effect of the twofold position of member states.

In the first case, the dilemma is the result of member states' dual role in the principal-supervisor-agent relationship, and the conflicting desires to ensure full compliance while at the same time maintaining state sovereignty. On the one hand, member states collectively want to guarantee a high level of compliance, to which end they need to equip the Commission and the Court with the necessary enforcement powers. On the other hand, member states want to safeguard sovereignty and to retain certain leeway in the implementation and application of Community acts.¹⁶ Everling captures the essence of the delegation dilemma when discussing the member states' position towards the ECJ: "The relationship of the Member States to the European Court is therefore ambivalent. On the one hand they need the Court when they wish what they consider to be legitimate interests to prevail in the face of Community institutions or other Member States. On the other hand, however, the Court's judgments interfere with their freedom of actions."¹⁷

In the second case, the dilemma results from the precarious role of the Community institutions in enforcing state compliance with EC law. Given the twofold position of the member states, the Commission and the Court are caught in an enforcement dilemma, much like "damned if you do, damned if you don't." If they do not fulfil their task of effectively supervising and enforcing Community law, they fail in their role as supervisors and fall in disgrace. If, however, they make full use of all the instruments

¹⁶ See Alter, 1996, p. 472, for the argument that protection of state sovereignty was the main reason behind the member states' weakening of the enforcement mechanism for the Treaty of Rome compared to what it had been in the ECSC.

¹⁷ Everling, 1984, p. 216.

and resources within their control for the purpose of inducing compliance, they face the risk that member states will feel threatened, will circumscribe the powers of the institutions, or will refuse to cooperate. Again, Everling provides an excellent illustration in his work on the ECJ: “The lesson that the Court must draw...is that it must keep its Judgments within the general limits of the development of the Community so as not to destroy [the consensus that the Court's Judgments are to be respected and complied with. (---) [T]he Court must interpret and apply furthermore Community law and above all the rules of the common market without any reservation and in a coherent manner; but it must at the same time be aware of the Member States' central role in the Community.”¹⁸

The design of an effective enforcement structure: means and strategies

The third way in which principal-agent theory can contribute to an understanding of EC supervision, is by identifying and untangling the strategies and means through which enforcement can be conducted. In general terms, the power of member states to affect the overall level of compliance rests with the construction of an effective enforcement structure—that is, an incentive structure which will induce member states as agents to behave as preferred by member states as principals. As described above, the anchor in this enforcement structure is the supervisory role of the Commission and the Court. Drawing on McCubbins and Schwartz's classic application of principal-agent theory to congressional oversight, the enforcement structure can be said to rest on one of two strategies, or a combination of both: police-patrol oversight and fire-alarm oversight.¹⁹ Both contain monitoring as well as sanctions, but they differ as to the means employed.

Police-patrol oversight refers to enforcement as it is most commonly conceived. As McCubbins and Schwartz describe police-patrol oversight in the context of the U.S. Congress (principal) and its executive agencies (agents): “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 such violations of legislative goals and, by its

¹⁸ Everling, 1984, p. 232-233.

¹⁹ McCubbins and Schwartz, 1984.

surveillance, discourage such violations.”²⁰ In the context of the EC, police-patrol oversight is practised when the Commission and the Court enforce compliance through the infringement procedure under Article 169. The Commission actively and systematically collects information on member state compliance and, when infringements are confirmed, initiates proceedings against member states for faulty transposition or outright non-compliance in the application of Community law. To the extent that member states do not back down during the course of the proceedings, which they most often do, the cases are finally brought before the ECJ.²¹

But enforcement does not necessarily have to be centralized, active, and direct. As opposed to the interventionist strategy of police-patrol monitoring, fire-alarm monitoring is decentralized, reactive, and indirect: “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 centralized system and, occasionally, intervening in response to complaints.”²² The parallel within the EC is the Commission's and the Court's promotion of decentralized, private enforcement of EC law, by way of providing means for and encouraging individuals to complain to the Commission or to seek remedies in national courts when they see their rights infringed upon by member states.

Summing up, I argue that principal-agent theory can contribute to an understanding of enforcement in the EC in primarily three ways: (1) By conceptualizing the relationship between member states and Community institutions in the post-agreement phase as a

²⁰ McCubbins and Schwartz, 1984, p. 166.

²¹ For evidence that nearly all cases are solved before they reach a full court, see the Commission's monitoring reports, e.g. European Commission, 1996e, p. 113-117.

²² McCubbins and Schwartz, 1984, p. 166. The term ‘decibel meter’ is often used for this source of information in the principal-agent context of politicians and bureaucrats; when bureaucrats do not provide the services which they have been assigned to perform, the citizens will bring this to the attention of politicians by way of loud complaints. See, e.g., Moe, 1984; Weingast, 1984. Those complaining may also be other agents, a condition which has been denoted as ‘squealing’ in the principal-agent literature on multiple, competing agents. See, e.g., Sappington, 1991; Varian, 1990.

principal-supervisor-agent relationship, where states (principals), for the sake of self-commitment, assign the Commission and the Court (supervisors) the task of supervising the implementation of EC law, as delegated to the individual member states (agents); (2) by highlighting two dilemmas or key areas of tension in this relationship—the delegation dilemma facing member states and the enforcement dilemma facing the Commission and the Court; and (3) by identifying and disentangling strategies and means of enforcement, such as centralized police-patrol oversight through the Commission and the ECJ, and decentralized fire-alarm oversight through individuals safe-guarding their right under EC law in national courts and by way of complaints lodged with the Commission.

In the following sections, I draw on this principal-supervisor-agent framework when analyzing the development of the EC's enforcement structure in conjunction with the implementation of the internal market program. Next section discusses the internal market program and non-compliance on the part of member states, while the last section deals with the subsequent attempts at strengthening centralized police-patrol enforcement and decentralized fire-alarm enforcement.

3. THE STRAINS OF DEEP COOPERATION: THE INTERNAL MARKET PROGRAM AND MEMBER STATE NON-COMPLIANCE

With the launching and implementation of the internal market program, the European Community progressively deepened the cooperation between its members to a level unique by international comparison. Indeed, the internal market program is the best example of the unambiguous development in recent years for international agreements to stretch into areas of state activity previously considered off-limits. As Kahler puts it: “[When] 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.”²³

²³ Kahler, 1995, p. 2.

According to Downs *et al*, the kind of deepening of regulatory cooperation which the internal market is a prime example of, is likely to enhance the importance of enforcement in securing member state compliance with the rules agreed upon. As cooperation is deepened and regulation is tightened within an issue area, compliance on the part of member states requires changes in behavior at a level previously not experienced. The costs associated with these changes yield greater incentives for member states to shirk rather than to honor their commitments, and consequently there is greater need for enforcement instruments which are sufficiently effective and deterrent, argue Downs *et al*.²⁴

After a brief introduction to the internal market initiative, I show in this section in two steps, (1) how the internal market program constituted an extreme example of deepened cooperation, and (2) how the high costs of complying with the internal market rules resulted in significant compliance problems. Then, in the next section, I bring the argument yet one step further and show how these compliance problems induced the Commission and the Court, in their role as supervisors, to promote a strengthening of centralized as well as decentralized Community enforcement.

The internal market program: three stages

The Commission presented its White Paper on completing the internal market to the European Council in Milan at the end of June 1985.²⁵ The Single European Act agreed upon by the member states in 1986 and in force as of July 1, 1987, provided the legal basis for the internal market program, which according to the SEA was to be completed by December 31, 1992. The endorsement by the heads of state of the Commission's White Paper on completing the internal market and the subsequent legal basing in the Single European Act, formed the starting point for a still ongoing process for making the internal market work. In general terms, this process can be divided into three partly overlapping stages: decision-making, implementation, and operation.

²⁴ Downs, et al., 1996.

²⁵ European Commission, 1985.

The first stage, decision-making, commenced upon the closing of the Milan summit and has in fact not yet come to an end, since a very limited number of the original 300 proposals have still not been agreed upon in the Council of Ministers.²⁶ All proposals had been tabled by the Commission by April 1990, however, and the bulk of them had also passed the Council by 1991. In light of the objective to have the internal market in place by the end of 1992, the decision-making of the Council lagged behind for a number of years.²⁷ With the entry into force of the Single European Act on July 1, 1987, the adoption of proposals hastened, as two-thirds of the internal market measures then only required qualified-majority voting rather than unanimity.

As directives were adopted in the Council, the internal market process shifted to the stage of implementation, or formal transposition of directives into national law. While many directives were transposed earlier and some still remain to be, 1990 marks the point when the European Council emphasized transposition as the new stage in the process of establishing a single European market.²⁸ As stressed by the Commission, transposition is not simply a legal exercise of minor significance, but of crucial importance to the internal market project: "The achievement of...an area without frontiers in which free movement is ensured, depends mainly on the way in which the single market rules are applied. If the single market is to work properly in practice, that legislation has to be integrated into the national legal systems."²⁹

The final phase in the process of making the internal market work, actual operation and performance, was embarked upon in 1993. As of that year, most of the internal market directives were in force and economic actors could take advantage of the open market to the extent that member states fulfilled their obligations.

The internal market as deep cooperation

In its ambition to completely liberalize the European market, the internal market program went beyond previous endeavours of EC cooperation, in addition to being unprecedented

²⁶ European Commission, 1996c, p. 3-4.

²⁷ European Commission, 1986; European Commission, 1987; European Commission, 1988.

²⁸ European Commission, 1990a, p. 17.

²⁹ European Commission, 1994b, p. 15.

among multilateral trade agreements. As Commissioner Monti concluded in 1996, “[t]he eight-year programme to complete [the internal market] between 1985 and 1992 was the most ambitious target that the European Community ever set itself.”³⁰

At the international level, the Tokyo Round of the GATT (1974-1979) was the first serious attempt to deal with non-tariff barriers to trade—an attempt which at best was of mixed success.³¹ At the European level, the internal market program attacked the prevalence of NTBs with more determination and at greater length than any previous free trade initiative. The internal market program sought a *de facto* completion of the common market agreed upon in the EEC Treaty of 1957. Article 3a of the Treaty 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.” By 1968, such measures had been eliminated, and in combination with the common external tariff, the customs union was thus completed. The intentions of the common market had, however, not been realized. As Swann puts it, “[a]lthough 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 some way distort, the flow of intra-Community trade.”³²

The aim of the internal market initiative was to, once and for all, complete the unified European market as once envisaged, and to create “an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured.”³³ The bed-rock of the program was the elimination of non-tariff barriers, i.e. barriers and restrictions to trade which provide for a differential treatment of imported and domestically produced goods, but that are not tariffs. In the White Paper, the Commission classified the measures needed to be removed under three headings: physical

³⁰ European Commission, 1996d, p. ix.

³¹ See, e.g., Gilpin, 1987, p. 195-199; Grieco, 1990.

³² Swann, 1995, p. 133.

³³ Article 13 of Single European Act, Article 8a when supplemented to the EEC Treaty.

barriers, technical barriers, and fiscal barriers.³⁴ Physical barriers cover such practices as intra-EC border stoppages and customs controls; technical barriers include for example product standards, technical regulations, and protectionist public procurement practices; while fiscal barriers comprise differing rates of indirect (VAT and excise duties) as well as direct taxation.

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.³⁵ As a consequence, the internal market program's attempt to eliminate these barriers struck at the nerve of the state's involvement in the economy. To implement the measures suggested in the White Paper, states had to refashion domestic regulatory regimes, overturn existing practices, and frame new relationships with the economic operators of the market. As Begg puts it in a recent introduction article to a special volume on European regulation, "the establishment of the single market—the centerpiece of European integration in the last decade—has not been purely about liberalization. It has had a profound effect not only on product and factor markets, a recasting rather than a simplification of rules, but also on the nature of governance itself."³⁶ Given the magnitude of these changes required in member state behavior, the internal market program constituted a deepening of cooperation by any standard. Indeed, this was understood by the Commission already when launching the program: "We recognize that many of the changes we propose will present considerable difficulties for Member States." (White Paper, p. 7)

The changes in state behavior which were necessary in order to make the internal market come true entailed considerable strains on the economic, political, and administrative structures of member states. In particular, three kinds of costs can be singled out. First, the implementation act itself put strains on the legislative and bureaucratic branches of government. Member states were asked to transpose a large body

³⁴ European Commission, 1985.

³⁵ See, e.g., Kahler, 1995, p. 2, 31-33, who discusses these kinds of barriers in terms of "issues of deep integration" and "behind-the-border issues."

³⁶ Begg, 1996, p. 525. On the nature of European regulation as developed in connection with the internal market, see, e.g., Majone, 1990; Majone, 1996; and *Journal of European Public Policy*, 1996:4, a special issue devoted to regulation in the EC.

of EC legislation into national law within a very limited time period. Moreover, correct application of these measures required substantial changes in bureaucratic practices, not the least of which was at the level in daily contact with individuals and companies. Secondly, and at a more general level, governments' ability to intervene in the market and to structure barriers to the advantage of the particular member state, was severely circumscribed. Thirdly, companies and enterprises which previously had profited from state protectionism and a segmented European market, were put under increasing economic pressure.³⁷ In sum, the deepening of cooperation implied by the internal market program called for extensive changes in member state behavior, and resulted in substantial strains on governments and sizeable costs for certain groups of economic actors.

Softening the blow: Three kinds of 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 of mainly three different kinds: non-compliance in the transposition of directives, in the operation of directives, and with judgments of the European Court of Justice.³⁸

Non-compliance in the transposition of directives was of two kinds. First, member states failed to transpose the directives into national law within the time limits agreed upon. As emphasized by the Commission in its fourth annual report on the completion of the internal market: “[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.”³⁹

³⁷ See, e.g., the reports presented by the Commission in late 1996, based on a study of the impact and effectiveness of the single market: European Commission, 1996b; European Commission, 1996d. For a summary of the results of the business survey which was part of study, see European Commission, 1996a.

³⁸ These three kinds of problems had existed within the EC prior to the internal market. They were, however, amplified in the context of the internal market to an extent that they were regarded as major concerns and called for reforms of the enforcement structure (see next section).

³⁹ European Commission, 1989b, p. 3.

At the time this report was published, for example, only 2 out of the 68 measures had been implemented in every member state.⁴⁰

Secondly, when directives indeed were implemented, transposition was often faulty, partial, or simply inadequate. It is in the nature of directives that they require national legislation before they are effective, and that the member states are allowed certain discretion as to how they are implemented.⁴¹ All too often, however, this discretion resulted in national implementing measures which did not reflect the spirit of the directives and did not have the requisite binding force.⁴² As late as in the spring of 1996, the Commission was forced to acknowledge that, “[r]egrettably, implementation of agreed Community law remains seriously flawed in some key sectors as it was last year... Failure by Member States to honour their commitments is all the greater cause for concern the longer they persist.”⁴³

Non-compliance in the operation of the directives once in place was a second source of great concern. The extent of the problem varied from one issue area to another and across member states, but was pervasive enough to trigger counter measures from the Commission and the Court. As John Mogg, director-general at DG XV of the Commission, the internal market directorate, put it: “The primary responsibility for applying these rules rests clearly with the Member States themselves, but the Commission as the guardian of the Treaty must make sure that the Member States live up to their responsibility. 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.”⁴⁴

Non-compliance with judgments of the Court was the third main concern. In cases where the Court rules in favor of the Commission in proceedings under Article 169, non-

⁴⁰ European Commission, 1989b, p. 4.

⁴¹ Article 189 of the EEC Treaty defines directives as “binding any member state to which they are addressed, as to the result to be achieved, while leaving to domestic agencies a competence as to form and means.”

⁴² European Commission, 1994b, p. 120.

⁴³ European Commission, 1996c, p. 5.

⁴⁴ Mogg, 1996, p. 1.

compliance on the part of the member state is thereby firmly established and the state is required to undertake the necessary measures to comply with the judgment. Member states were, however, generally slow to comply. Through the late 1980s and the early 1990s, the total number of cases in which states failed to correct their actions in line with Court judgments, numbered around 50-80 annually, of which a majority could be directly tied to the internal market.⁴⁵ In some cases, the Commission even had to initiate new infringement proceedings under Article 171 for non-compliance with the Court's judgments. In 1989, for example, a total of 26 such proceedings were commenced.⁴⁶ Naturally, these patterns were unacceptable in the eyes of the EC enforcement institutions. As the Commission concluded in 1990, "[t]his situation gives cause for concern as it undermines the fundamental principles of a Community based on law."⁴⁷

4. REVISING AND STRENGTHENING THE COMMUNITY ENFORCEMENT STRUCTURE

The concerns regarding non-compliance in the implementation and operation of the internal market and with judgments of the Court, persuaded member states as well as Community institutions to call for and undertake revisions of the EC enforcement structure. These revisions covered all fronts, both centralized and decentralized supervision, both monitoring and sanctions. But, while member states' protection of sovereignty put a limit on the extent to which centralized enforcement could be strengthened, crucial steps were taken by the Commission and the Court towards constructing a full-fledged decentralized enforcement structure.

⁴⁵ European Commission, 1989a, p. 14. See also European Commission, 1990b, p. iii; European Commission, 1994a, p. 169-173.

⁴⁶ European Commission, 1990b, p. V.

⁴⁷ European Commission, 1990b, p. iii.

The limits of self-commitment: State sovereignty and centralized Community enforcement

Dissatisfied with member states' failure to live up to their commitments, the Commission and the Court, in their role as supervisors, undertook measures with the aim of strengthening centralized police-patrol enforcement. These efforts to boost the enforcement structure at central Community level comprised two steps: (1) Within the limits of the supervisory authority delegated to it, the Commission strengthened its internal procedures for monitoring member state actions and for initiation of infringement proceedings in cases on non-compliance; (2) The Commission and the Court called for member states to delegate to them more substantive enforcement powers, primarily the right to sanction member states in breach of Community law.

The Commission's revision of its internal operation was focused on the infringement procedure under Article 169, whose importance "cannot be adequately stressed" and whose purpose the Commission described as: "to induce a Member State to come into line with Community law."⁴⁸ Centralized infringement proceedings under Article 169 were reinforced in two ways, primarily in response to late or faulty transposition on the part of member states. First, the great number of instances where states failed to transpose directives in time caused the Commission to introduce two new categories of infringement proceedings: actions for failure to transpose directives and actions in respect of other violations of the EEC Treaty.⁴⁹ While infringement proceedings were previously opened in response to violations of already transposed directives, the new procedure entailed that proceedings were also initiated for failure to implement a directive in time or correctly.

Secondly, the Commission made great use of this possibility and added a distinct element of resolution and unwillingness to compromise. The Commission *systematically* examined member states' transposition of each directive, and whenever member states failed to meet the transposition deadline or transposed incorrectly, infringement

⁴⁸ European Commission, 1996c, p. 5. On Article 169, see, e.g., Evans, 1979; Audretsch, 1986; Dashwood and White, 1989.

⁴⁹ Shaw, 1993, p. 128.

proceedings under Article 169 were *rapidly* and *automatically* opened, irrespective of whatever reasons the states presented to their defence.⁵⁰ The aim of these proceedings was not necessarily to take the case as far as the Court, but “to put and end to infringements - in particular to secure proper implementation of directives.”⁵¹

Besides making its own internal procedures for enforcing compliance more effective, the Commission in tandem with the ECJ, appealed to member states for a delegation of more extensive enforcement powers through Treaty revisions. In particular, potent sanctions were high on this list of wishes. Previously, non-compliance with the Court's judgments could only be met with renewed Article 169 proceedings under Article 171. But, when the number of such cases increased alarmingly during the late 1980s, the Commission joined the ECJ and the European Parliament in the quest for equipping the Court with tougher legal means.⁵²

A number of proposals were discussed at the Maastricht IGC in 1991. Although the Court was at the center of attention in these discussions, it “adopted a remarkably low profile,” observe Ludlow and Ersbøll.⁵³ The low profile of the Court is best understood and explained by the enforcement dilemma facing the Court, and its precarious position in light of member states' concern with the judicial activism of the Court in the 1970s and 1980s.⁵⁴ In the absence of action on the part of the ECJ, the Commission took a vocal position and presented the IGC with concrete proposals.⁵⁵ The more radical propositions discussed included suggestions that the Court should be given the right to strike down ‘unconstitutional’ national legislation, and that the Court should have the power to award compensation to victims of member state infringement.⁵⁶ In light of the threat to national sovereignty posed by these suggestions, it is hardly surprising that the IGC settled for a less consequential alternative. Answering to the calls of the Community institutions, the

⁵⁰ European Commission, 1989b, p. 7; European Commission, 1994b, p. xiii, 17-18; European Commission, 1995c, p. 10.

⁵¹ European Commission, 1992, p. ii.

⁵² See, e.g., European Commission, 1990b, p. iii. On the Court's and the Parliament's proposals, see Audretsch, 1986, p. 137-141.

⁵³ Ludlow and Ersbøll, 1994, p. 51.

⁵⁴ Ludlow and Ersbøll, 1994, p. 51.

⁵⁵ Indeed, the Court is known to use the Commission as a political bellwether, see Burley and Mattli, 1993, p. 71.

⁵⁶ Shaw, 1993, p. 127.

UK took on the role of promoting a strengthening of the Court's authority, albeit with the more sovereignty-friendly suggestion of revising Article 171.⁵⁷

In the end, the Intergovernmental Conference agreed on strengthening the existing Article 171, by adding the possibility to impose penalty payments on member states which fail to comply with Court judgments.⁵⁸ In cases where member states have not taken the measures to comply with the Court's judgment within the assigned time period, the Commission may now propose a penalty to be approved or dismissed by the Court. In July 1994, the Commission informed the member states that it planned on making full use of the new powers of Article 171 as amended by the Treaty on the European Union. Since then, all communication with non-complying member states has stated that penalties could be placed upon them if they do not correct their behavior in line with the Court's judgments.⁵⁹ To date, however, the procedure to impose sanctions on member states under the revised Article 171 has never been used, despite a continuation in non-compliance with ECJ judgments.

Towards a decentralized enforcement structure

While a step in the right direction, the amended Article 171 hardly provided the fiercer enforcement weapons called for by the Commission and which were considered necessary to do away with member states' wide-spread non-compliance with internal market legislation.⁶⁰ However, in their quest to strengthen EC enforcement, the Community institutions followed a two-track strategy. In tandem with the efforts at the centralized Community level, the Commission and the Court took crucial steps in the early/mid 1990s towards constructing a full-fledged decentralized fire-alarm enforcement structure. Just like essential aspects of Congress' control of executive agencies were

⁵⁷ Ehlermann, 1992, p. 216; Shaw, 1993, p. 127.

⁵⁸ Article 171 EC, as revised by the TEU, reads: "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 of Justice finds that the Member State concerned has not complied with its judgment it may impose a lump sum or penalty payment on it."

⁵⁹ European Commission, 1995d, p. 1e.

⁶⁰ See, e.g., Bebr, 1992, p. 582.

overlooked when staring blindly at direct and centralized oversight, as argued by McCubbins and Schwartz in the classic article on police-patrols and fire-alarms, to solely focus on centralized Community supervision is to neglect the most fundamental development in EC enforcement in the last decade.

The Commission and the Court have built a decentralized, reactive, and indirect enforcement structure, which rests on the principles of fire-alarms oversight and where the supervisory role of the Community institutions consists of creating, managing, and perfecting this system. The essence of the strategy has been to promote a “grass roots approach” by enhancing the role of companies and individuals in the enforcement of Community law.⁶¹ The steps taken by the Commission and the Court towards a decentralized enforcement structure can be summarized as being twofold: (1) The improvement of the Commission's procedures for handling complaints from private sources, and the further encouragement of economic operators to complain with the Commission when they see their rights infringed upon; (2) The strengthening of the role of national courts in the enforcement of Community law, through ECJ case law development which grants national courts the authority to award financial compensation to individuals whose rights have been infringed by a member state, and by way of Commission efforts to homogenize national application of EC law, to encourage companies and individuals to seek redress in national courts, and to homogenize the penalties available in national courts.

Private complaints with the Commission have always been the Commission's primary source of information on member states' application of Community law, and have thus been the origin behind most of the Commission's infringement proceedings under Article 169.⁶² In connection with its struggle to make the internal market work, however, the Commission took new steps to enhance the function of private complaints in enforcing EC law, since, as one Commission official puts it, “the best ally of the Commission is the economic operator.”⁶³ These efforts focused on making this avenue of

⁶¹ See, e.g., director-general Ehlermann of DG IV of the Commission in Ehlermann, 1992, p. 225.

⁶² See, e.g., Audretsch, 1986, p. 240-247; European Commission, 1984, p. 7; European Commission, 1996e, p. 103.

⁶³ Interview with Commission official, DG XV, 27.09.1996.

influence more known and accessible to economic operators. To this end, the Commission launched the information campaign 'Citizens first!': "[I]n a market of 370m people, the Commission has to rely on its elected representatives in the European Parliament and on consumer and industry organisations to be its eyes and ears in the member states and to alert it to infringements of single market law. Naturally, this presupposes that companies, consumers and citizens know what their rights are. To improve such knowledge and to encourage 'grass root' enforcement of single market law, the Commission is planning a major information campaign, 'Citizens first!'.⁶⁴ Moreover, as from January 1, 1997, the Commission operates a Help Desk, the objective of which it 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."⁶⁵ Together, these measures are likely to further enhance the importance of private complaints in the Commission's efforts to make states live up to their commitments.

The most fundamental component, however, in the Community institutions' grass-root strategy, has been the strengthening of the role of national courts. Through the preliminary reference procedure under Article 177 of the Treaty, national courts have always been granted a role in the enforcement of EC law. As Maher puts it, Article 177 "creates a two-tier system in the Community judicial framework where the European Court acts as interpreter and national courts implement Community law as interpreted. This framework, backed by the doctrines of direct effect and supremacy, is meant to guarantee a uniform system of law throughout the Community ensuring its effectiveness and credibility."⁶⁶ In effect, this procedure provides a framework for organic links between the ECJ and national courts.⁶⁷ Building on this framework, a number of

⁶⁴ European Commission, 1996d, p. 10. See also European Commission, 1995b, p. 2; European Commission, 1997a, p. 2-3. For earlier statements on this strategy, see, e.g., European Commission, 1993c, p. 8; European Commission, 1995c, p. 21.

⁶⁵ European Commission, 1997b, p. 25.

⁶⁶ Maher, 1994, p. 226.

⁶⁷ On this link, see, e.g., Stein, 1981; Burley and Mattli, 1993; Shaw, 1993, ch. 7; Maher, 1994; Alter, 1996.

measures were taken by the Commission and the Court for the purpose of turning national courts into effective enforcers of Community law.

First, through its case law, the Court extended the powers of national courts by conferring on them the right to award damages to individuals whose rights have been infringed upon by member states.⁶⁸ By developing the principle of state liability, the Court continued what Steiner describes as “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.”⁶⁹ Previously, penalties in national courts could only be imposed on member states in case of non-compliance with a directive. However, through the cases of *Francovich*⁷⁰ in 1991, and *Brasserie du Pêcheur*⁷¹, *Factortame III*⁷², *British Telecommunications*⁷³, *Hedley Lomas*⁷⁴, and *Dillenkofer*⁷⁵ in 1996, the Court greatly extended the possibility of granting nationally based compensation. In effect, it created new, decentralized sanctions against member states which fail to comply with Community law.

Francovich established the principle of state liability, that is, that an individual can claim damage compensation from a state which has failed to transpose a directive in time. The linked cases *Brasserie du Pêcheur* and *Factortame III* clarified uncertainties in *Francovich* and established that the principle of state liability applies to all breaches of Community law, whether they result from the legislative, executive, or judicial branches of government in member states. In *British Telecommunications*, *Hedley Lomas*, and *Dillenkofer*, the principle of state liability was further clarified by the Court's elucidation of what constitutes a “sufficiently serious breach” of Community law, a prerequisite in order for the principle of state liability to apply. The implications of these decisions are far-reaching: “The judgments thus imply that member states may be liable to compensate

⁶⁸ As Bebr put it in a case note on the *Francovich* ruling: “The recent case law of the Court reveals an intention to develop a coherent system of legal remedies.” (Bebr, 1992, p. 564.)

⁶⁹ Steiner, 1995, p. 171.

⁷⁰ Case C-6/90.

⁷¹ Case C-46/93.

⁷² Case C-48/93.

⁷³ Case C-392/93.

⁷⁴ Case C-5/94.

⁷⁵ Case C-190/94.

individuals for damages suffered as a result of various infringements of Community law. Hereby, individuals are granted a decisive function in the work of supervising how member states comply with EC law. This leads to the conclusion that the supervision of member states' compliance with EC law, can be said to rest on 'private enforcement.'"⁷⁶ In short, these landmark decisions carved out a role for national courts and individuals in the sanctioning of state non-compliance, and thereby fundamentally transformed the essence and power of Community enforcement.

The second measure undertaken by the Community institutions for the purpose of turning national courts into more effective enforcers, was an attempt to remedy a significant weakness in this decentralized structure—that the rigour with which Community law was applied differed between member states. In particular, there was a lack of consistency between member states as regards the availability of means of redress and effective remedies.⁷⁷ Moreover, while all member states referred cases annually to the Court for consultation in accordance with Article 177, the number of such referrals differed considerably from one member state to the next.⁷⁸ Such differences in the application of EC law were seen as detrimental to compliance, since they gave rise to doubts as to the general application of Community law.⁷⁹

Accordingly, the Commission launched an initiative for improving judicial cooperation and homogenizing the application of EC law, as part of the 1993 Strategic Programme on making the most of the internal market.⁸⁰ As stressed by the Commission: "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. Hence the importance given in the strategic programme for improving access to justice and judicial cooperation within the single market."⁸¹

⁷⁶ Quitzow, 1997, p. 9. Translation from Swedish by J.T.

⁷⁷ European Commission, 1996b, p. 17.

⁷⁸ See, e.g., European Commission, 1991, p. 121; European Commission, 1992, p. 110.

⁷⁹ European Commission, 1995c, p. 10.

⁸⁰ On the Strategic Programme, see European Commission, 1993a.

⁸¹ European Commission, 1995c, p. 15.

Measures falling under the rubric of judicial cooperation included attempts to improve the knowledge of Community law in the legal professions, to homogenize the infringement procedures available to consumers, and to reinforce the mutual recognition of judgments.⁸²

The third building bloc in the Commission's and the Court's strategy to enhance the role of national courts in the enforcement of Community law, was to further encourage individuals and companies to turn to national courts when their rights are infringed upon. In the absence of private litigants who actually challenge member states in their own courts, the structure of private or decentralized enforcement established by the previous two building blocs would be of little use. The information measures paralleled those of encouraging individuals and companies to complain to the Commission, since the basis of both is that citizens and enterprises are aware of their rights under Community law: "The adoption and implementation of legislation must be accompanied by active information policy in order that citizens and companies are aware of their rights and obligations and can act quickly whenever they are infringed."⁸³ Efforts thus centered mainly on making national courts as an avenue of redress more generally known and on making EC law more easily understood.⁸⁴ Moreover, in their contacts with economic operators, the Commission encouraged these "to take action in national courts if they feel that they have suffered as result of single market rules not being applied."⁸⁵

The fourth and last part of the Court's and the Commission's strategy as regards the role of national courts, was to promote an homogenization of and transparency in the national penalty systems which apply to individuals and companies. Homogenization focused on the problem that penalties differed from one member state to another. Just like access to justice should be equal in all member states, so must national penalties, reasoned the Commission: "Penalties are an integral part of a system of enforcement. There would be no point in bringing the enforcement mechanisms more closely in line if

⁸² European Commission, 1993a, p. 16-18; European Commission, 1995c, p. 15-17.

⁸³ European Commission, 1994b, p. xvi.

⁸⁴ See, e.g., European Commission, 1989c, p. 10; European Commission, 1993c, p. 12; European Commission, 1994b, p. xvi.

⁸⁵ European Commission, 1996d, p. 9-10. This is confirmed by the business sector, for example by the Swedish multinational Ericsson in Ericsson, 1996.

the penalties imposed were inconsistent.”⁸⁶ In essence, equal national penalties had to be provided for so that non-compliance on the part of economic operators would not be less costly in one member state than in another.⁸⁷

Furthermore, the Commission stressed the importance of penalty systems to be transparent, so that economic operators and member states would know in advance what penalties would be applied in the event of breach of internal market rules.⁸⁸ To that end, the Commission presented a communication in 1995, which set out its intention to include in future regulations and directives a clause requiring member states to notify the penalties to be applied in case of violation.⁸⁹ Only when transparent, the Commission stressed, could national penalty systems be “effective, proportionate and a sufficient deterrent.”⁹⁰

Summing up, in conjunction with the internal market program, the Commission and the Court established a decentralized, reactive, and indirect enforcement structure, based on individuals and companies safeguarding their rights under Community law through complaints with the Commission or redress in national courts. But, if this was such a significant step towards a system of enforcement which is effective in forcing member states to fully honor their commitments, why, then, did member states permit this to happen? Unlike the promotion of potent weapons at the centralized level, the construction of this far more powerful enforcement structure was not met with knee-jerk reactions in protection of sovereignty on the part of member states.

Two factors stand out. First, the building of this decentralized enforcement structure occurred within the supervisory powers formally delegated to the Community institutions. The ECJ's case law is very much its own backyard and off-limits to member states, and the Commission is free to launch whatever information or coordination campaign it so desires within the boundaries of its supervisory role. Secondly, these reforms were clothed in the language of law and were undertaken in the name of law.

⁸⁶ European Commission, 1993b, p. 19.

⁸⁷ European Commission, 1995a, p. 2.

⁸⁸ European Commission, 1996c, p. 14-15.

⁸⁹ European Commission, 1995a.

⁹⁰ European Commission, 1996c, p. 15.

Much like during the “activist era” of the Court⁹¹, member states seem to have been unaware of what was happening—an interpretation which is supported by the striking divergence in attitude between member state and Community officials when confronted on this issue.⁹² Accordingly, it appears likely that this highly potent and hardly sovereignty-friendly decentralized enforcement structure was allowed to evolve since it did not, on the surface, seem to threaten state sovereignty.

6. CONCLUSION

In this paper I have advanced two main propositions, one theoretical and one empirical. The core of the theoretical argument is that the relation between member states and the EC's supervisory institutions in the implementation phase may be framed as a principal-supervisor-agent relationship: States (principals), for the sake of self-commitment, assign the Commission and the Court (supervisors) the task of enforcing the implementation of EC law, as delegated to the individual member states (agents). Based on this conceptualization, I have drawn on the principal-agent literature of the New Institutional Economics in (1) identifying two key areas of tension in this relationship—the delegation dilemma facing member states and the enforcement dilemma facing the Commission and the Court, and (2) disentangling strategies and means of enforcement, such as centralized police-patrol supervision through the Commission and the ECJ, and decentralized fire-alarm oversight through individuals safe-guarding their right under EC law.

The empirical argument departs from the analytical framework above and pertains to the development of EC enforcement in conjunction with the implementation of the internal market program. In response to significant compliance problems, Community institutions and member states called for and undertook significant revisions of the EC enforcement structure. But, while member states' protection of sovereignty put a limit on

⁹¹ On the political role and judicial activism of the ECJ, see, e.g., Burley and Mattli, 1993; Rasmussen, 1993; Alter, 1996.

⁹² Interviews with Commission officials, DG XV, 24.09.1996 and 27.09.1996, and interviews with Swedish government officials, Ministry of Foreign Affairs and Ministry of Trade, 06.12.1996.

the extent to which centralized enforcement could be strengthened, crucial steps were taken by the Commission and the Court towards constructing a full-fledged decentralized enforcement structure. Most important, the role of individuals and national courts in the enforcement of Community law was strengthened through strategic measures by the Commission and the ECJ.

In terms of generalizability, the principal-supervisor-agent framework presented in this paper may be successfully applied to other periods in EC enforcement as well as to other instances of international cooperation. The delegation and enforcement dilemmas are relevant in all cases of cooperation between states where supervisory powers—whether minimal or extensive—are delegated to international institutions. In the same way, the unveiling power of concepts such as police-patrol and fire-alarm oversight is not limited to the EC context. Though *sui generis*, Community enforcement can be successfully analyzed by applying general social science approaches, as well as generate theories with explanatory power beyond the context of the EC.

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