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Implementation Problems in the EU

Analyzed with Principal-Agent Analysis

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Abstract

This study analyzes the problems of implementation in the EU with the help of Principal-Agent Analysis. The focus of the study is the Principal-Agent relationship between the member states and the Commission, where the member states have delegated the task of enforcing EU law to the Commission. Four main problems are discussed and analyzed, and it is argued that these are the reasons for the problematic situation of lack of implementation of EU law. The four problems are the conflict of interest between the Commission and the member states, the lack of resources suffered by the Commission, the lack of deterrence in the sanctions offered by the Commission and the inability witnessed in the authorities of the member states. Evidence is given, in the form of implementation statistics and official opinions, to prove the reality of this problematic situation. The problematic situation is considered important by the author because it shortchanges actors in the EU of their rights under the law.

Keywords: Principal-Agent Analysis, implementation, Commission, compliance, legislation

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1 Introduction

1.1 Research purpose and Question

Uneven application and failure to implement the law deprives citizens, businesses, states and organizations of their rights under the law. Such deprivation causes lack of trust and predictability in the legal system of the political territory in question. I believe that the EU suffers from this problem and I want to know why. I will attempt to answer why the EU faces problems with the implementation of its legislation. In other words, the purpose of this study is to reveal and understand the reasons that lead to the detrimental situation of uneven application and failure to implement EU law. To my help in responding to the inquiry I will use the Principal-Agent Analysis. In other words, the efficiency of the P-A Analysis will be tested. The P-A Analysis will help me understand if the problems that I brought up are problems that are normally seen in a Principal-Agent relationship. The purpose of doing that is to add value to the study by being able to draw conclusions of P-A relationships applicable, but not limited to, regional cooperation. Since the EU is somewhat of a pioneer in such tight regional cooperation, it will in fact serve to evaluate the efficiency of P-A Analysis in cases like this one.

I will identify and describe four problems which cause the situation of non-uniform application and uneven implementation of EU law across the Union. In this study "implementation" refers to the complex process of putting a policy into practice by a variety of mechanisms and procedures that can involve a wide and diverse range of actors (Dimitrakopoulus, Richardson 2004:337). My first problem is the problem of conflict of interest in the P-A relationship between the Commission and the member states. The second problem is the lack of resources faced by the Commission, which makes fulfillment of its task problematic. The third problem is the lack of deterrence found in the threat of sanctions from the Commission. The fourth and final problem, which causes the problematic situation, is the inability of the authorities of the member states to implement EU law. Throughout the discussion of the problems it will be shown that they are intertwined and related to each other. By identifying and discussing the problems I will reveal the reasons to the problematic situation that arise. Thus, my main hypothesis is that P-A Analysis can explain the four problems of the Principal-Agent relationship between the member states and the Commission, which cause the situation of non-uniform application and failure to implement EU law.

1.2 Methodology and plan

I attempt to prove my hypothesis according to the following plan. First of all, I want to give the reader a proper base for evaluating my argument by showing that the problems actually exist. I feel obliged to include this section to make the reader aware that my question is properly anchored in reality. The case of the Stability and Growth Pact is included to really underline the point that there are problems. It is a high profile case with a lot of interests and importance, and it may, for that very reason, not be perfectly representative. However, I did not bring this case up to be perfectly representative of the problems, but rather to show the readiness to ignore the agreements by the member states. This readiness is primarily caused by the member states prioritizing their own problems.

My second section will describe the P-A Analysis and explain what it expects from a P-A relationship in terms of structure and problems that may surface. It will provide the reader with knowledge about the situation where a Principal delegates tasks to an Agent and why that might occur. I cover the main aspects of P-A Analysis to give an overall view and a solid understanding of what it represents. A selective overview would give the reader a false picture of the overall quality of P-A Analysis, which is why I chose to do it in that way. I will give illustrating examples of P-A Analysis that relates to the problems of the particular P-A relationship between the Commission and the member states.

As the reader is now well equipped with an awareness of the problem and the P-A Analysis, he or she will be able to understand how they lead to the problematic situation of non-uniform application and failures to implement EU law in the Union. All four problems (1. Problem of Conflict of Interest 2. Lack of resources for the Commission 3. Lack of deterrence in the Commission's threat of sanctions 4. Inability of the authorities of the member states) will be discussed and followed by a section on how well the problems are analyzed by P-A Analysis. The problems will be related to each other and concluded. The problems that I bring up as reasons for the troubled situation with implementation are chosen because they frequently return in the literature. Some authors (Dimitrakopoulos, Richardson 2004:345) divide the problems differently or do not include all of them, but none of the four problems that I bring up, is based on one single source. They are all based on the writings or official statements from numerous sources in order to reduce the risk of fault. They are also chosen because they make sense to me. As in any other study it is nearly impossible to get away from personal bias. I have always been positive towards the EU and deeper integration, which may lead to selective attention on my part. If such selective attention has influenced me it has done so without my knowledge or intent.

1.3 Sources

As I researched this study I made sure to have sources that represented both the official view of the Commission and the opinions and points of numerous authors. I made an attempt to not make up any cornerstone of this study based on the opinions or points of one single source. This was problematic when it came to the actual statistics of implementation. I considered the statistics of the Commission to be reliable and without bias for any member state. The risk that the Commission is falsely inflating these numbers is not very big. The member states are probably attentive to the fact that they are not shamed without reason. Inflating the numbers and thereby giving a greater estimate of the problems could be a call for more resources from the Commission, but it would also give a picture of the Commission of being worse at fulfilling its task than they really are. I seriously doubt that the Commission wants to give that impression. In addition to the statistics it was argued, in official communications from the EU institutions and by the authors (Nugent, Tallberg, Thatcher, Pollack, Barnard, Majone), that problems do exist. One disagreeing author was found, who claimed that the numbers are not convincing enough to claim that there is a problem (Börzel 2001). I obviously think the evidence speaks against her.

As briefly mentioned above, the four problems that lead to the overall problematic situation of poor implementation frequently return in the writings of numerous authors. This is why I put sufficient trust in the reality of these problems. I am not arguing that simply because one can find the same argument or point made in numerous sources that it holds true. However, it is impossible in a study like this to not put some trust into recommended authors. It is possible that five different recommended authors, who claim the same thing, are all wrong. Still, it is a risk that is hard to elude in a study like this one.

1.4 Why Care about the problems? - Relevance of the study

The EU aspires to be a Union under the rule of law. To be able to reach this goal the citizens, the companies and every other actor in the Union need to know that the judicial system functions to protect their given right and punish the party who breaches them. There is no point to agree on a lot of rules and laws if the Union is not going to enforce them. A poor functioning enforcement system will deprive citizens and businesses of their benefits under the law, and this will inevitably lead to a loss of trust, predictability and credibility of the Union. Citizens will not feel protected by the law and professionals will hesitate to invest or carry out clean business in the Union since they are unsure whether the system will protect them. Furthermore, elements who are tempted to breach the law can

do so without fear of receiving punishment. The poor functioning system will lead to frustration which probably will lead to a rightful skepticism of the EU project. Clean business will move from the EU and seek environments where their rights are guarded, the laws enforced and where the predictability of the system can safeguard their investments. The consequences of implementation problems in the EU are huge and they will only get bigger when the Union takes on more tasks and the integration speeds up.

1.5 Choice of Theory

The main reason for my choice of P-A Analysis was the fact that it offers good explanations and predictions of the problems. I will later reveal how P-A Analysis explains the problems, but a fair question to ask now would be why I did not pick other theories. The option of picking Neofunctionalism did not look attractive since it generally argues that supranational institutions enjoy substantial independence from national governments in the exercise of their powers. I think the problems I look at and the degree to which member states can put a stop to the Commission proves that this is not the case. On the other side, the Intergovernmentalists argue that member states have a firm control of the process of integration. My perceived truth falls somewhere in between. The P-A Analysis shows that the relationship between the Commission and the member states is a relationship of give and take. The ability to choose what infringements to follow and how to follow them is clearly an example of Commission influence. Since the Commission is given the power of initiating policy in the treaty I think it is tough to argue that the Commission lacks influence. My study will show that the Commission is able to push integration on their own. It will also show that the member states are able to put a stop to non-desired effect in many cases.

Another option was to bring in two-level game as a theory to be applied to the problems. I thought two-level game had good points that applied to my problem. The theoretical arguments that domestic positions influence international bargaining, and that international positions influence domestic bargaining, made good sense to me. I still chose not to use two-level game for three reasons. First, the difficulties of studying bargaining where there is very little material regarding pre-negotiating positions, the actual negotiating process nor the actual or unofficial opinions of the result of the bargaining, discouraged me. Secondly, I found two-level game to be focused on classical international bargaining where politicians are accountable to their domestic constituents. The Commissioners in my study do not have this accountability to worry about, because they work in the interest of the Union. These two were also the reasons for me not choosing Compliance Bargaining Theory. Lastly, two-level game emphasized the ratification procedure and this study is more concerned with the implementation stage. The bottom line is that P-A Analysis offers the best choice of theory.

1.6 Delimitations

Considerations of time and space set certain limits for this study. To make an extensive analysis of the implementation of EU legislation I think one have to at least a mention the role of the ECJ. This study is intended to focus on the problems faced by the Commission and not by the ECJ. Still, the ECJ does have a role in implementation which I do not ignore, but due to the limits of this study the analysis of this role is impossible to make here. The ECJ is mentioned where it is inevitable to do so for the greater understanding of the argument.

A more extensive study could also include material from numerous interviews made with officials at different stages of the enforcement and implementation process. In order to make this material valuable I think one would have to carry out numerous interviews in each of the studied member states. Since a lot of the authors based their research on interviews, I found it to be a poor utilization of time and resources to try and improve on this material. In case of more time and space it would have been possible to make a thorough comparison of all the theories of European integration and evaluate where they are efficient and where they go wrong in this problem. This study allowed only for a brief mentioning of the choice of theory and it also disallowed a scrutiny of the negotiations between the Commission and the member states (or companies) regarding infringements. It would be interesting to know how the Commission makes its decisions regarding infringements and what options, if any, the member states or companies face.

2 Do problems with implementation really exist?

In order to determine if problems with implementation really exist I would first like to define what I mean by problems. In this study I refer to the problems with implementation as the failure to comply with Community law, which consists of violating the Treaty, regulations or decisions or of incorrectly applying directives. In addition to this I will also include the failure to notify, measures and of measures incorrectly transposing directives (EC 2002:11). As for the failure to respect ECJ judgments, this is included in the statistics even if it makes up a very small part of the numbers.

2.1 Implementation Numbers

During the 1990s the EU experienced implementation deficits of between five and ten percent, which meant that each member state had, on average, between 75 and 100 directives left to implement at the end of each year. Golub contended that this was a non-negligible number since only 30-70 directives were adopted each year in the EU (Golub 1999:741). Considering a backlog like that it would be impossible for the EU citizens or its member states to put trust in the newly passed legislation. Throughout the 90s the implementation deficit decreased as both member states and the Commission got more efficient at the implementation procedure. Nevertheless, press releases and official communication from the Commission still makes clear that substantial progress still needs to be made (EC 2003:7) to improve the current implementation deficit of 2,2% to the goal of 1,5% (EC 1997:1), set by the Stockholm European Council (EC 2002:6). Still, substantial improvements during the 1990s have been witnessed.

The improvement of implementation has been paralleled by an increase of complaints of infringements to the Commission. The average number of complaints during1990-98 was 1047 and it rose to 1346 during 1999-2002. According to the Commission this was the result of the public interest in the sound operation of this Community mechanism (EC 2003:6). Almost half (47,6%) of detection of infringements happened from complaints by individuals or companies (EC 2004a). The individuals and companies thus have a very important role to play in the safeguarding of correct application of EU law. The Commission has recognized that complaints are vital means of detecting infringements and have therefore made efforts to streamline and make the procedure as easy as

possible for the EU citizens (EC 2002:10). The infringement procedure which may follow a complaint consists of four different stages. When the Commission has detected an infringement it initiates *informal communication* with the concerned member state. Assuming that the case is not settled in the first phase, the Commission continues with formal means by sending a *letter of formal notice*, where it informs the state of the grounds for the complaint and invites it to submit its views. In the third phase the Commission gives the member state a *reasoned opinion* which expands on the legal arguments of the case. The final phase of the procedure is to refer the case to the ECJ (Tallberg 2003:55). The Commission notes that out of the cases of infringements detected by complaints, a low percentage leads to letters of formal notice compared to the cases of infringements detected by Commission investigations (EC 2002:10). The Commission only mentions this very briefly, which surprises me. I think this is something to be content with for the Commission. The Commission has been successful in streamlining the complaint procedure and citizens are benefiting. In a large number of the cases of infringements detected by complaints, the problem is quickly repaired and the citizens enjoy the benefits of living under the rule of law.

In 2003, 2147 cases were opened to infringement proceedings by the Commission. 36% of these cases (783 out of 2147) were terminated before a formal notice was sent by the Commission (EC 2004a). This number is pretty low when one considers how much efforts the Commission puts into terminating a case through negotiations before the formal notice. Since the Commission has very limited resources they do not have the benefit of being able to investigate all suspected cases. When the Commission does open infringement proceedings it wants to be sure of its ground, which is why they make great efforts in investigating the case thoroughly and encourages the breacher to fall in line in the informal proceedings (Nugent 2001:282). The Commission wants to be seen as a fair and impartial guardian of EU law and do not want to aggravate the member states, on whom they are highly dependent, unnecessarily. This is why they proceed cautiously and make great efforts to avoid going to formal procedures. Despite all those efforts, 64% of all opened cases go to formal procedures and 14% are referred to the ECJ. I think that this is a clear indicator of problems with implementation.

2.2 Official Opinions regarding the problem

In a Motion for an EP Resolution the official view on the problems of implementation was clearly revealed. It was uttered that member states "regularly" fail to fulfill the obligations that their governments have legally agreed to, and that they sometimes show a cynical disregard for their obligations by deferring compliance to the last possible stage in the enforcement process. It was also stated that member states undermine the ideal of the Union as a Community-under-law through its glaring examples of drawn out failure to

comply with declared obligations. The Commission also received its fair share of criticism through expressed regrets that the Commission falls short of keeping complainants timely and fully informed throughout the process. In addition, the possible expansion of problems from the enlargement of the Union was uttered as a clear worry (EP Motion 2003:5-9). The report also gave some painting examples of the "disturbing readiness to abuse the rule of law" (EP Motion 2003:9), such as the British beef case (Commission versus France- see discussion in this study 4.3.3). Tallberg adds weight to the case by saying that non-compliance is often an attractive way for member states to cushion the adjustment required by the massive legislative program. He also brings in authors like Stava who declared that the EU is currently suffering from an implementation deficit (Tallberg 2003:48). The bottom line is, in my view, that it is abundantly clear that the problems with implementation exist and hinders the EU from being a Union completely under the rule of law.

2.3 High Profile Example: The Stability and Growth Pact

The case of the Stability and Growth pact is, in my view, the darkest chapter of implementation problems of the EU. It is probably the case of infringement proceedings that received the most attention in the history of the EU. It is also, unfortunately, the worst case of open, head-on negligence of EU law by the member states.

In 2004, Germany and France breached the allowed budget deficit limit of 3% of the GDP (Gross Domestic Product) for the third consecutive year. The Commission pushed for punishment, but the finance ministers rejected the prescriptions of the Commission and passed new softer recommendations on their own and decided to hold punishment proceedings of the stability pact in "abeyance for the time being"(The Economist.com:2004). The outrage was widespread in the EU and the Commissioner for economic affairs, Pedro Solbes, took the lead and said that the Council with the Finance ministers had acted illegally and noted that there is nothing in the treaty that allows finance ministers to suspend the pact's punishment proceeding as and when they see fit (The Economist.com:2004). Officials in smaller states complained that they would have to pick up the bill for the lack of discipline showed by France and Germany. The former German minister of Finance and one of the architects of the EMU (European Monetary Union), Theo Wiagel, said that the compromise was a catastrophe for Europe (Landler, Meller 2003:1). Even the ECJ joined the angered critics and said that France and Germany should not have been allowed to flout the fiscal rules that underpin the shared Euro currency (Landler:2004). The ECB concluded that the deal carried serious dangers and risked undermining the

credibility of the institutional framework and the confidence in sound public finances (Landler, Meller 2003).

France and Germany responded that they simply could not cut their state budgets further without risking their economic recovery (Landler, Meller:2003). The French President commented, after the leaders had agreed to relax the pact, that "A more intelligent pact is a pact that will be better accepted and better respected" (Landler, Meller:2005). It seems peculiar to me that he did not comment on the intelligence of the pact at the time of its creation. A lot of frustration was vented due to the change in the Pact and the case turned out to be an ugly showing of the fact that France and Germany has a lot of leverage in the EU. Many contend that the Stability and Growth Pact has now lost all its teeth and should be considered dead. After fighting long and hard for the Pact the Commission helplessly tried to claim that the new pact still had the essential features (The Economist 2005:55).The future will tell what consequences this case will have for the future of legal discipline in the EU. The disregard for the Commission and EU law in this case is in my view extremely dangerous for the discipline of the future.

3 THEORY

3.1 Principal Agent Analysis

The imagery of Principal and Agent was introduced by Stephen Ross in 1973, when he described the relationship between two or more parties, where one acts as the "Agent" or representative of the other party entitled the "Principal" (Ross 1973:134). The Principal delegates certain functions or decision-making authorities to the agent, through a contractual agreement, with the hope or expectation that the Agent will act in ways to produce desired outcomes for the Principal. Tallberg claims that the Principal-Agent relationship experience problems due to simultaneous presence of information asymmetry and conflicting interests (Tallberg 2003: 19). Information asymmetry occurs because the Agent generally knows more about its interests and actions than the Principals does. When it comes to conflicting interests the optimal behavior for the Principal may not necessarily be the optimal for the Agent (Tallberg 2003:19). One of the main challenges of the principal is to structure the relationship in a way that makes the agent likely to act in the desired way.

A big problem the Principal faces is that of Agent shirking. Shirking refers to the situation when the Agent pursues its own interests at the expense of the Principal's interest. The shirking situation is most likely to occur when information asymmetry and conflicting interests coincide. In other words, the extent to which the Principal and the Agent share the same information and the same interest determines the extent to which shirking becomes a problem. When the Agent has the same information as the Principal and their interests are identical, there is not really any room or reason for shirking behavior by the Agent. On the contrary, if the Principal can not access any of the information held by the Agent and their interests are highly contradicting, agency shirking will probably be widespread (Tallberg 2003:20).

The Principal-Agent Analysis makes a difference between two forms of information asymmetry. First, the problem of *hidden action* occurs when the behavior of the Agent cannot be clearly observed by the Principal. The Principal may only see the result of a process where the Agent has had a role, but the Principal may be unable, perhaps due to a lack of resources, to determine what role the Agent's efforts have played. The Agent on the other hand is probably very aware of its efforts but has no incentive to reveal this in any way which is short of flattering for itself. This situation can lead to false estimations of the

capabilities of the Agent which can have negative consequences further down in the Principal-Agent relationship.

Second, the problem of *hidden information* is somewhat similar and occurs when the Agent receives its task due to its expert knowledge or information on the subject (Tallberg 2003:20). A typical example would be a situation where the Commission assigns the writing of secondary legislation, regarding levels of dangerous chemicals in toys, to a small group of chemists. The Commission (Principal) engages the chemists (Agents) precisely because of the chemists' superior knowledge and is consequently unable to determine whether the chemists' conclusions and writings are correct. The Agent may have a bias to write the legislation in a way that benefits its unrevealed personal agenda, or the Agent may simply have a damaging bias of which it is unaware. This leads us to the problem of conflict of interests between the Principal and the Agent.

When a Principal delegates tasks or authorities to the Agent, it expects the Agent to behave in ways that will produce the outcomes desired by the Principal. However, it is almost inevitable for the Agent to develop its own interest, and these interests may not necessarily be a perfect match with the interests of the Principal. Tallberg provides the reader with a very illustrative and fitting example of this problematic situation. The Commission and the member states are involved in Principal-Agent relationships with each other, and they often have conflicting interests. The member states (Principal), assign the Commission (Agents), with the tasks like taking care of the workings of the common market. As Tallberg points out, the Commission and the member states have different interests and goals. In the literature of European Governance one can fairly claim that a consensus exist on the opinion that a supranational institution like the Commission has a pro-integration preference (Tallberg 2003:28). The Commission is considered a pusher of integration with its destiny and prestige related to the progress of European Integration. With the goal of furthering European integration the Commission fulfills its functions of policy initiator, policy executor and policy enforcer. The best way of achieving its goals is often considered to be the strengthening of its own position, and as Majone notes, rather than attempting to maximize its budget, the Commission often attempts to maximize its influence by increasing its competencies (Majone 1994:65). The pro-integration preference of the Commission also carries over to the emphasizing of the importance of adequate compliance. The ECJ and the Commission points out in nearly all reports on compliance that the concept of a "Community based on the rule of law" is of little value if member states frequently ignore legislation or fail to comply with ECJ judgments (Tallberg 2003:28).

In contrast to the Commission the member states have somewhat different interests. It is hard to summarize the interests of the member states in one sentence but Tallberg gives the reader three preferences which reflect the member states' various roles in EU enforcement. Acting as Principals the governments of the member states want to see the proposals that the Council agreed on implemented efficiently and complied with by all member states. This preference is the very reason for their decision to delegate the Commission and the ECJ (European Court of Justice) with powers to take care of enforcement. Still acting

as Principals, the member states eagerly protect state sovereignty and national prerogatives. According to Moravcsik the member states reluctantly delegate decision-making authority, and it is only done with the expectation of reaching greater problem-solving efficiency (Moravcsik 1998). The third and final preference brought up by Tallberg is a preference kept by member states acting as Agents under the Commission as Principal. Member states prefer to attempt to soften the adjustment demands of newly introduced EU policies on national political, economic, and administrative structures. The member states often know well that changing administrative ways of doing things and their structures is a painful, time consuming, and often costly endeavor (Tallberg 2003:29)

4 Reasons for Problems

In this section I will discuss the four main reasons to problems with implementation, as I see them. The four problems are conflict of interest, lack of resources, threatening sanctions without the backing of deterrence and weakness of the national authorities in the member states. Each problem will be discussed and followed by a section where the problem is analyzed by the P-A Analysis.

4.1 Reasons for Problems- Problem #1 Conflict of Interest

4.1.1 Conflict of Interest at the Individual level

The conflict of interest on the individual level is a challenge that goes with the job for any individual whether they work for a comitology committee where they serve as an independent expert, or if they work as a Commissioner appointed by one of the member states. As I mentioned above, the Commissioners are supposed to work in the interest of the Commission and the European Union, and not favor the interest of their member state. In the best of Unions this would work without any problems, but as Nugent points out, the Commissioners are not chosen first and foremost on the basis of what would be best for the Commission. When the national governments nominate their Commissioners they pay attention to the possible willingness and capability of the nominee to keep an eye on the interest of the member state, as that interest is defined by the ruling party of the government (Nugent 2001:205). These desires of the member states are probably not spelled out in official documents. Still, one can be sure that the appointed Commissioner is very aware of these desires and keeps them in mind in situation relating to the interest of the member state. Majone supports this by pointing out that European Commissioners have never been completely immune from political influence from the member states, even if they are not supposed to pursue national interests. The fact that many of the Commissioners are politicians who will return to their member states further underlines this fact (Majone 2000:285).

Individual conflict of interest can also occur in individuals serving as independent experts in Comitology committees where they are appointed to provide expertise absent of member state considerations. The BSE crisis raised concerns that member states may have exploited their position in the comitology

system rather than working for the health and safety of the Community (Majone 2000: 282). An even clearer instance of conflict of interest is present for former monopolists whom continue to enjoy political and economic advantages vis-à-vis their competitors. The economic and political advantages occurred when they became managers of newly privatized utility companies. They were given an important role in the definition of the regulatory system created to control their companies (Veljanovski 1991). This conflict of interest faced by individuals can obviously have dire consequences for the implementation process. When the Commissioners or comitology committee members give special treatment or favor their member states, it can lead to unfair infringement procedures or undeserved economic benefits to name some of the milder consequences. Harsher consequences could be a loss of confidence in the system or the jeopardizing of the health and safety of the Community as seen in the BSE crisis.

4.1.2 Conflict of Interest within the Commission

The second part of the problem of conflict of interest is found in the Commission. Coherence is difficult to achieve with a high diversity of preferences, styles and culture. In addition to the diversity, many Commissioners and Directorate Generals (DGs) have a considerable degree of independence in the exercise of their duties which further problematize political unity (Nugent 2001:206). An example of such problematic division was witnessed at the end of the Delors' presidency when open conflicts within the Commission were seen as very damaging to the Commission (Nugent 2001:213). In my view it would be very disrupting for the Commission's overall efficiency if the different DGs and the Commissioners pulled in different directions toward their preferred objectives. One can imagine how hard it would be to work with a case of non-compliance involving both environmental and competition aspects, if DG Competition and DG Environment pushed two different agendas. Such division would lead to confusion and could potentially be exploited by non-complying member states or companies. In other words, it is important that the Commission is united in its work to enable efficiency in the enforcement of EU law.

4.1.3 Conflict of Interest between the Commission and the Member States

The third and perhaps the most self evident section of the problem of conflict of interest, is the conflict of interest between the Commission and the member states. I think it is understandable that there occur conflicts here even if the Commission and the member states should work towards the same goal. The member states signed the treaty and the Commission can find its guidelines in the treaties. Even

so, the Commissioners want to look good by achieving a lot of integration and the representatives of the member states want to look good by safeguarding the interest of their state. Let us first look at what the Commission does to push for their interest.

The institutional evolution of expanding the areas where QMV applies worked to tip some influence onto the scale of the Commission. When the Commission is aware that QMV will be applied to its proposal (instead of unanimity) it allows them to be bolder with its policy ideas and proposals (Nugent 2001:214). The Commission need not be inhibited about bringing forward a proposal even if it suspects that one or two member states strongly oppose the proposal. The Commission does not even need to soften up or water down the proposal to meet opinions of resisting member states (Nugent 2001:214). Initially this may sound like a good power-expanding-deal for the Commission, but I suspect that a bold tactic where the opinions of a few resisting states are neglected, may have negative consequences down the road. A frustrated and neglected member state is not a good cooperation partner in the implementation process for the Commission. I think that such a state will do everything it can to hinder a smooth and efficient implementation process of the legislation, which it opposed. It seems to come down to a balance act of looking good by getting proposals through, or safeguarding the consensus of the member states and thereby having a greater chance of an efficient implementation of the proposal. In other words, what may look like an efficient Commission who gets a lot done, can actually result in delayed negative consequences seen in poor implementation. An example of this was seen in the case of legal protection for bio-technical innovations. Sweden was opposed to the legislation from the start and refused to implement it over a period exceeding three years (Bolkestein letter: 2003).

Politicians in the member states are very willing to use the Commission's competition powers as a cover for decisions they wish to take, but which they know are unpopular for their constituents (Nugent 2001:272). Only highlighting the cons of the internal market and putting the "blame" for certain policies on the Commission is a tactic that could create further conflict of interest. Negativity towards the Commission is sometimes accepted in the member states and administrators may not be discouraged to drag their feet and make implementation of Commission legislation more difficult than it needs to be. (Dimitrakapoulos et al 2004:347)

As the member states witnessed their influence over their economies slowly wither away, they became innovative to find other paths to safeguard some of this influence. Non-tariff-barriers (NTBs) to trade became a frequently used tool to hinder the goals of the internal market and keep some of the influence and perhaps even revenues from trade in the member state (Tallberg 2003:45). NTBs called "technical barriers" became a label used for a wide range of measure even if they were not necessarily technical in nature. Especially popular were barriers created by variations in national product regulations and standards (Tallberg 2003:45). Such NTBs have been efficiently attacked by the Commission with the help of favorable rulings of the ECJ. All kinds of NTBs have not been destroyed though and some of them are still distorting EC trade. Distortions of EC trade

destroys the level playing field of the Union and shortchanges actors of the benefits under the law.

4.1.4 Conflict of Interest According to P-A Analysis

After this discussion of conflict of interest I like to discuss what P-A Analysis say about this. Since conflicting interest is one of the problems of the P-A relationship it is perhaps not very surprising that P-A Analysis does a good job with explaining this first problem. I began by describing conflicting interest at the individual level, with the problem of Commissioners and "independent experts" who favor the interest of their member states. The Commissioners and experts, who serve the role of an Agent to the united interest of all the EU member states, secretly help their member states. This is an example of the P-A problem of hidden action where the EU member states (Principal) are unable to detect the biased actions of the Commissioners and experts. Hidden action falls into the P-A problem of information asymmetry.

My second section of conflicting interests concerned such conflicts found within the Commission. As mentioned above, one of the main challenges of the Principal is to structure the relationship between the Agent and the Principal in a way that makes the Agent likely to act in desired ways. The independence of the many DGs within the Commission and diversity of interests between the Commissioners are examples of a structure that did not make the Agent act in a desired way. Regardless, the conflict of interests witnessed in this P-A relationship is efficiently explained and predicted by the P-A analysis. The considerable degree of independence of the DGs leads to information asymmetry between the Principal and the Agent in the form of hidden information. The DGs, acting as Agents, further develops their own interest which they pursue. Many different interest pulls in their preferred direction and the result is that implementation of EU law suffers.

My final section of conflict of interest treated the conflict of interest between the member states and the Commission. I discussed the problem where the Commission and the member states are in rough terms pursuing two different goals. The Commission is always pushing towards deeper integration through the powers assigned to them in the treaties. The member states on the other hand want to be pictured as a guardian of the interest of the constituents in their member states, which may not match up with deeper integration. The Principal (the member states) and the Agent (the Commission) work towards somewhat different goals, which are detrimental to an efficient P-A relationship. This was expanded on in the following paragraph concerning the evolution and expansion of the areas where QMV could be applied to the proposals from the Commission. The Commission became bolder and managed to get more things done by getting proposals through. The ignored opinions of some member states later create obstacles to uniform and efficient implementation. As an additional note it is meaningful to point out the problem of distinguishing well meant implementation efforts that fails by the Agent, from deliberate efforts of sabotaging the

implementation, because of distaste for the proposal (see Dimitrakopoulus et al 2004:347).

The conflict of interest between the member states and the Commission could also be seen in the decreasing power of the member state to intervene in the market. I think this is a good example of a Principal (the member states) delegating the task of the internal market to the Agent (the Commission) with the hopes that the Agent will produce the desired outcome. In the case of the internal market expanding into new areas I believe the Commission (the Agent) is doing what it is set out to do. The Principal uses the Agent as a shield for unpopular decisions which they wish to see materialized. The Principal (the member states) is sometimes unwilling to admit to such behavior due to the risk of loss of political points from their constituents.

By distancing itself from unpopular decisions and blaming the Commission and the EU for unwanted consequences, the member states are playing a game that may backfire. The member states could try to elude the implementing of certain legislation (see discussion Dimitrakopoulos et al 2004:347) by not discouraging administrators to drag their feet or by spreading anti-EU sentiment which problematizes implementation. By using such a tactic the member states are acting in a way that undermines the EU project and encourages others to do so. Further down the road this behavior will shortchange them for the benefits of uniform compliance to Commission legislation throughout the EU. The bottom line is that P-A Analysis does a good job explaining and foreseeing the conflicts of interests brought up in this case.

4.2 Reasons for problems- Problem # 2- Lack of Resources

The second reason for problems with the implementation of Commission legislation is the lack of resources the Commission suffers from. I will be looking at the size of the resources compared to the tasks of the Commission and the willingness, or unwillingness, of the member states to provide resources to the Commission. Finally, I will bring up what the Commission has done to deal with this situation.

4.2.1 Tasks versus Resources

The problem of lack of resources is frequently mentioned in the literature regarding the work of the Commission (Thatcher 2004:313). What is not very

surprising is the uttered opinion of the Commission that their resources are "clearly insufficient" (Tallberg 2003:93). Any institution or organization that is dependent on somebody else for their budgetary means is probably likely to make such statements in an effort to gain bigger budgets in the future. Still, if one should give any trust to the authors who are writing about the Commission, one would conclude that there really is a budgetary problem. In Majone's article about the credibility crisis of Community regulation, he brings up two specific threats to credibility. One of them is the mismatch between the Community's highly complex and differentiated regulatory tasks and the available administrative resources. The tasks of the Commission have experienced three decades of expansion. The list of the main administrative structures necessary for the implementation of the acquis communitaire is extremely long and demanding, and while the tasks covered by the Commission have grown along with the acquis, the resources have not grown with the same pace (Majone 2000:274). Christiansen argues that the "pressure to meet an expanding range of tasks with often limited resources can create problems with administrative overload, which in turn may damage the efficiency and legitimacy of Commission actions" (Christiansen 2004:96). Thatcher gives further weight to this argument when he says that the Commission has a tiny staff relative to the breadth and importance of its tasks. The regulation produced by the Commission is frequently difficult, highly technical, and staffing is constantly a problem where many officials are in fact seconding national officials and experts (Thatcher 2004:313). It seems clear that there is a widespread consensus on the fact that the resources available for the Commission are not sufficient to carry out the tasks for which the Commission is responsible. This lack of resources will have a negative impact of the problematic situation of implementation.

The lack of staff is another problem that makes the Commission unable to watch over the activities of national administrative agencies as closely as they would like. The Commission is therefore heavily dependent on the good faith and willingness of national agencies. Still, even when the Commission has constant communication with national officials they are unable to know everything that is going on. As for the areas where contacts and flow of communication between Brussels and national agencies is irregular and poor, it is close to impossible for Commission officials to have a very accurate idea of what is happening at the front (Nugent 2001:275).

4.2.2 Willingness to provide Resources

The budget of the Commission is provided by the member states. They agree to provide the Commission with a level of resources that they find economically and politically feasible. The member state has to handle both the pressures from their home constituents and the pressures from the Commission when they decide on the size of the budget for the Commission. Whatever size they decide on they are likely to hear complaints from one side or the other. Still, if the member states do not want to loose their credibility, or the belief in their willingness to make the

Commission more efficient, they may want to consider putting more resources behind the Commission. Some may counter argue that the Commission is in more need of streamlining than in need of more money. It is my opinion that the Commission is in dire need of more resources. Member states need to be more willing to provide resources to enable the Commission to be efficient. When the Commission can only partially fulfil its tasks it leads to frustration for everyone involved. As the Union is getting ever tighter and bigger the Commission's work becomes more and more important. The effects of its work will be felt throughout the societies of the Union. If this is sloppy work it will shortchange the citizens of the Union of its benefits afforded under EU law. This will lead to a negative perception of the EU which may prove hard to alter. By giving the Commission more resources from the get-go I think the member states save the big costs of repairing the damages at a later stage.

4.2.3 The Commission's Response

In respect of the situation, where resources are scarce, the Commission has sought to shift a lot of EU enforcement toward greater reliance on decentralized supervision through national courts. The courts have been able to use their judicial independence and the absence of intrusive government control to strengthen the remedies available to individuals. As most notable, Tallberg mentions the creation of new decentralized sanctions through the introduction and expansion of state liability, which is a form of sanction that the member states had rejected at the 1991 IGC (Tallberg 2003:11). The member states were not very content with this development and tried to punish the ECJ by revising its powers and refusing to apply the principal in their home states. This tactic was limited in its efficiency (Tallberg 2003:11).

The Commission has been forced to be innovative with the resources it has, in order to get what it wants and fulfill the tasks given to them. When faced with limited success of making the member state follow a particular path of action, the Commission has tried to persuade other key actors to its way of thinking, and through them persuade national governments (Nugent 2001:216). Peterson takes the example of when the Commission wanted the member states to implement mutual Community technology policy on their national level. The Commission aided in the creation of an industrial consensus for new collaborative schemes, urging the transfer of authority to the Community level. They were finally able to convince the member states to start a special program dealing with this very task (Peterson 1991:276).

Another approach of the Commission has been to pursue a strategy of "divide and conquer" where it has taken, or threatening to take actions, that may soften some national positions. Threatening actions include examinations of national practices and initiation of infringement proceedings in the court (Nugent 2001:216). There are mixed views regarding the success of these tactics by the

Commission. The Commission's attempts since the mid-1980s to make member states more accommodating to the view that the SEM initiative must be ever wider in scope are an example of successful Commission work. On the other hand, the Commission's efforts to push for faster integration in 1991-92, which resulted in the governments to conclude that the Commission was over-reaching itself, is an example of a failure in the Commission's tactic.

Due to its lack of resources the Commission has been an enthusiastic supporter of decentralized enforcement in the shape of citizens taking responsibility for the enforcement. By working for increased responsibility of the citizens, the financial weight for the need of oversight would be shifted from the Commission to the citizens. The strategy of improving awareness of citizens rights under EU law, and thereby improving their capacity to function as active complainants, was clearly seen in the launching of the Citizens First Initiative (Tallberg 2003:61). The initiative served to encourage citizens and companies to turn to national courts when their EU rights were infringed upon. The Commission commented on the program by saying that "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" (Commission 1994:16). The information campaign would meet the objective of increasing citizens' awareness of their rights, and improve the conditions for decentralized enforcement, since enforcement with the help of citizens is useless if they do not know their rights (Tallberg 2003:110). The Commission considered the program a success. During the first year 75 million people became aware of their rights and one million people contacted to obtain information (Commission 1997:1). The hopes of the Commission are that increased awareness and responsibility of the citizens in their member states will ease the task of enforcement for the Commission.

4.2.4 Lack of Resources according to P-A Analysis

The problem of resources for the Commission is a perfect example of problems between the Principal and its Agent. The member states (Principal) have assigned the Commission with the task of implementation of legislation. They have done so with the desire that the Commission will fulfil this task and make all the actors, whether it is individuals, companies or member states, accountable for their actions. However, to enable the Commission to fulfil its task they are in need of greater resources. This increase in the level of resources has not been granted by the Principal to its Agent. As the tasks of the Commission have expanded along with the internal market, the cost of running an efficient Commission has obviously increased. The fact that the Agent (The Commission) has assumed new tasks and thereby increased its need for resources has not been totally lined up

with the will of the Principal (member states). It then becomes clear that the problem of lack of resources is actually very closely related to the problem of conflict of interest. If the Principal does supply the Agent with more resources it will be able to carry out its task more efficiently. The Principal fears that increased resources will be used in ways to increase its power vis-à-vis the Principal. The P-A Analysis reveals that the member states, acting as Principal, is eager to protect state sovereignty and national prerogatives and they do not want the Commission (the Agent) to overreach into this territory. In the best of Unions there should not occur a conflict of interest between the Commission and the member state since they, according to the treaty, want the same thing. But, P-A Analysis it is mentioned that it is almost inevitable for the Agent to develop its own interest which may be in contrast to the interest of the Principal. This is exactly what we see in the Commission and member state P-A relation. The perceived conflict of interest leads to a lack of resources for the Commission because the member states fear that the resources will be used in undesirable ways.

As I discussed above there has been a tendency for the Commission to move towards the thriftier alternative of decentralized enforcement where more responsibility is in the hands of the citizens. When I look at the Commission-member state P-A relation at this oversight stage, it is actually the Commission that has the role of the Principal as it oversees the implementation by the Agents, which are the citizens of the member states.

The bottom line is that P-A Analysis is efficient in analyzing and predicting the problem of lack of resources faced by the Commission. Let us now move on to the third reason for problems with implementation.

4.3 Reasons for Problems- Problem #3, Empty threat of sanctions

An efficient implementation of legislation needs to have a mechanism of punishment if an actor fails to behave according to the agreed rules and standards. In the absence of a punishment I do not think that there is sufficient motivation for making a member state behave correctly. One of the reasons for the problems of the implementation of Commission legislation is that the threat of sanctions provided by the Commission lacks sufficient deterrence. According to the Commission there is no such thing as a general penalty for violating Community law, nor is it possible to impose a penalty likely to prevent repetition of an infringement under the EC Treaty (EC 2002:15). Since the Commission has very limited resources and puts plenty of emphasis on cooperation before referring a case to the court, a breacher of EU Law can continue to violate the law up until the very last warning and then walk away without a fine. I agree with Tallberg when he says that the absence of sanctions seriously handicaps EU

enforcement and challenges supranational institutions to effectively fulfil their role as supervisors securing member state compliance (Tallberg 2003:73).

There are of course instances of imposition of financial penalties, but they are often more symbolic than punitive in character. For example, repayments of state aid often constitute a very small portion of the aid actually received and the way the Commission reaches the decision on the penalties is more like a negotiation with the breacher than anything else (Nugent 2001:287). So, why is the Commission so soft on the breachers? According to Nugent it has to do with political considerations. The Commission supposedly has no wish to upset or embarrass national governments or to cause economic damage for that matter. Taking actions at the wrong time may cause companies to move their business outside the EU which the Commission fears. They want to keep business in the EU, which is one of the reasons why they are careful not to aggravate companies or member states (Nugent 2001.286). Although it is good to keep business in the EU, I think the Commission needs to be tougher in their relation with breaching parties.

4.3.1 Strategy of Shaming

When I talk about the lack of deterrence that the threat of sanctions, it is fair to bring up a related means of pressure used by the Commission to make member states comply. This other type of pressure is peer pressure created by the strategy of shaming. According to Tallberg there are few things as embarrassing and uncomfortable as the public announcement of the failures to meet well known obligations from the perspective of the member states (Tallberg 2003:70). The member states still embraced the introduction of the internal market scoreboard by the Commission, which was created to produce such embarrassment and discomfort. The scoreboard or "scareboard" as it sometimes referred to, is an important instrument in the strategy of shaming and peer pressure by the Commission. It is a biannual report where the member states are compared, in great detail, in terms of implementation, compliance and infringement proceedings. Many member states embraced this instrument because it was an efficient way to keep checks on the other member states and their progress with implementation (Tallberg 2003:70). It was hoped that this strategy would produce better compliance and implementation by the member states. It is tough to make a causal relation between the introduction of the scoreboard and the slight improvement in implementation statistics. Nevertheless, the Commission's shaming strategy that produced peer pressure through the scoreboard was a welcomed move to the member states.

4.3.2 Revealing Priorities

A move that I would consider to be negative was the publication of priorities of infringements by the Commission. The Commission announced that it would bring proceedings against infringements effectively and fairly by applying priority criteria reflecting the seriousness of the failure to comply with legislation (EC 2002:8). I can see that these priorities could provide the member states with some kind of idea of what to try and implement first versus later. Furthermore, I can see that this is a call for more resources from the Commission. After all, if the Commission felt that they had adequate resources they would not have had to prioritize at all. They would simply go after every infringement with full force. The Commission has now, by giving the member states these priorities, practically told everyone what infringements they will be ignoring. The member states know that the Commission are low on resources, so the chances that the Commission will hunt down infringements consisting in the failure to transpose or transpose incorrectly (lowest priority) are rather slim. The deterrence in the threat of sanctions pretty much disappeared with that revelation. The Commission even mentions that the type of infringements with the lowest priority are a common source of infringement which in reality deprives large segments of the public of access to Community law (EC 2002:9). If this list of priorities is not a cry for more resources I think it is a mistake to publish it.

4.3.3 Slow Litigation

Another obstacle to deterrence is the fact that litigation under article 226 is by its nature, uncoordinated and sometimes very slow. The Commission can, under article 226, bring proceedings against a defaulting state. The lack of speed in the process can extend the damage suffered in the case. The case where France refused British beef imports is an elucidating example of that. The Commission had banned the UK from exporting its beef to member states or third countries because of a found link between Creutzfeldt-Jakob disease (affecting humans) and BSE (Bovine Spongiform Encephalopathy), which was widespread among cattle in the UK. The ban was lifted in 1999, after the UK had fulfilled the Commission's criteria's for getting rid of BSE, but France continued to refuse imports of British beef. The Commission brought article 226 proceedings against France who continued to refuse. The case was referred to the Court and three years after the initial ban was lifted, France finally agreed to allow British imports. The Commission withdrew its second round of proceedings and France walked away without fines. British beef exporters had lost at least three years of beef exports to the French market and France did not have to pay a dime. According to the President of the National Farmers Union, Ben Gill, France had protected their beef producers by exploiting false consumer protection. The case severely undermined confidence in the effectiveness of the whole infringement procedure, especially in the UK (Barnard 2004:531). I think this is a clear example of a too soft approach by the Commission. By not forcing the French to

pay a fine the Commission undermined the trust and confidence in the infringement procedure. A lack of trust and confidence will make the proper implementation hard to reach.

The last obstacle to increased deterrence of the procedure is the format of the IGC (Inter-Governmental Conferences). The IGCs facilitates member state control and effectively reduces the capacity of the supranational institutions to push enforcement beyond the desires of the governments. The Commission has pushed for greater enforcement powers both in 1991 and at the 1996-97 IGCs. According to Tallberg, the member states (acting as Principals) had an easy time identifying the implications of the proposals and they were in full control of the development. The member states were concerned with non-compliance in the early 1990s which led to the agreement of strengthening the enforcement power by introducing sanctions into the treaty. This concern was not present in 1997 which was the reason for the lack of further reinforcement of the enforcement powers at the 1997 IGC.

4.3.4 Empty Threats According to P-A Analysis

The problem of the absence of deterrence in the Commission's threat of sanctions is well connected to P-A Analysis. P-A Analysis holds that the primary incentive mechanism for the Agent to act in the assigned manner is the threat of sanctions. Since I concluded that the Commission's threats of sanctions are not sufficient to make the member states abide, one could argue that P-A Analysis foresees problem in this relationship. It is important to point out that the P-A relationship in this case is not an ideal one. The member states actually have the role of both a Principal and an Agent. They delegate the task of implementation to the Commission where they clearly play the role of a Principal. The Commission assumes the task as an Agent but will later on in the process delegate some of the responsibility of implementation back to the member states. So, the Commission changes its role from Agent to Principal and makes an Agent out of the member states. This duality in the role of the member states makes it hard for them to be an efficient Principal because the effect of their behavior will come right back to them.

The problem of lack of deterrence is clearly linked with the problem of resources. The member states are unwilling to provide the Commission with enough resource, and without these resources the Commission will not be able to go after a sufficient amount of infringements. The member states knows that the Commission is not likely to open up infringement proceedings if the case is not severe, which clearly undermines the deterrence in the threat of sanctions. Both the problem of lack of resources and deterrence is efficiently analyzed by P-A Analysis.

The P-A relationship seems to be pretty well structured with the member states (as a Principal) sometimes loosening the leach to let the Commission go into new areas. Whenever the member states feel that the Commission

overreaches, it tightens the leach. This well structured and controlled P-A relationship may seem like a good thing, but it is inevitable to point out that it is not perfectly efficient in reaching the goal of implementation. I believe that it would be more efficient if the Principal (member states) gave the Agent (The Commission) the resources to actually put some weight behind their threats, which would produce deterrence to keep the member states in line. It would produce better implementation, all the member states would enjoy the same benefits under the law, and if the Commission went too far, the member states could deal with this in the IGCs. The P-A relationship would be more efficient with deterrence behind the threats of sanctions. The P-A Analysis does a good job in the prediction and the analysis of the problem. The duality of the P-A roles adds another dimension, but P-A Analysis still does a good job when one looks at the problems of the relationships.

4.4 Reasons for Problems- Problem #4- Inability in the Member States

The fourth reason for problems with implementation of Commission legislation is the inability or lack of capacity seen in the authorities of the member states. Implementing agencies face a challenging task, and the differences in ability or capacity between the agencies of the different member states is rather large. The differences in the capacities of the member states increase the lack of predictability in the system. Majone takes the example of the area of public utility where many countries still lack regulatory authorities with sufficient capacity in terms of expertise and independence. A switch from state monopolies to privatization has taken place in many member states and it has been more problematic in some states than others (Majone 2000:277). Each member state has a different tradition (or lack thereof) of the rule of law and faces the challenge of the complexity of EU legislation.

4.4.1 Size and Complexity of Legislation

The sheer volume of the acquis communitaire of around 90,000 pages is pretty intimidating for the member states. The Commission realized this and set a goal of reducing it to between 30,000 and 35,000 pages by the end of 2005 with the help of codification of the legislation (EC 2002:4). In the codification of the legislation the Commission has been severely slowed down by the unforeseen problems of translation of the acquis into the new languages. This translation takes place in the member states and was scheduled to be finished by May 2004. At the beginning

of 2005 this still was not done (EC 2004b:4). It is interesting to note that a lot of the new member states entered without having the acquis translated into their own languages.

There are few doubts about the fact that legislation coming out of the Commission has been complex. The Commission has promised to work on the simplification of legislation and they have done so with a process of screening of policy sectors to find simplification potential. These are good steps in the right direction, but as the Commission points out, the benefits of simplification materialize only after adoption by the legislator and the entry into force of simplified legislation (EC 2004c:4). This means that the benefits from the easier legislation will be even further down the road.

Evidence of the complexity of Commission law surfaced in a motion for an EP Resolution, where it was noted that the failure on part of the Community legislator to achieve good quality law-making could be detrimental to the correct application and understanding of Community law (EP Motion 2002:6). In a Commission Communication on better monitoring, the Commission pointed out that the quality of legislation drafting is of vital importance and that difficulty with application and implementation should be taken into account no later than at the drafting stage. The legislators could do this by giving thought to the choice of legislative instrument such as directive or regulation. They could also assess in advance the foreseeable difficulties with incorporation into national law and potential litigation (EC 2002:4). Nugent provides us with an example of an EU legislation which, by its very nature, is difficult to administer. The Common Fisheries Policy (CFP) of the EU is a policy area where the rules are complicated and the activity is difficult to track. The CFP requires thorough knowledge of the rules of the fishing zones, total allowable catches and conservation measures. Its implementing mechanism also requires obligatory and properly kept logbooks, port inspections and aerial surveillance (Nugent 2001:277). Fishery is obviously an area where plenty of resources and advanced know-how is required by the member states. There is clearly need and room to make Commission legislation less complex and more understandable for the sometimes weak authorities at the member state level. Investment in better lawmaking today may save resources further along in the process.

4.4.2 Efforts of Improvement by the Commission

For the national authorities to be efficient in its work there are some areas that require improvements. One of those areas or issues is the provision of information to the citizens about their rights and benefits under EU law. As I mentioned above, the Commission has taken useful steps to improve the level of awareness of citizens regarding their rights under EU law. The Citizens First Initiative was one example of that. Another example is the Commission's plan of a law portal that will offer information on the application of the law and access to it in a layman friendly form. This law portal will be linked to the existing EUR-LEX

database (EC 2002:8). The Commission has obviously realized the need for improved understanding at the member state level and they are taking steps to improve it.

Tallberg identifies another possible area of improvement in the lack of knowledge of EU law among legal practitioners. The Robert Schuman project was launched to reduce the detrimental informational barrier of insufficient knowledge of EU law in the legal professions (Tallberg 2003:97). The Commission sought to develop what was called the "EU reflex" among judges and lawyers in the member states. If they had a developed EU reflex they would automatically and systematically check whether EU solutions applied to the cases they handled. Unfortunately, they found that this reflex was not very well developed, which was one of the reasons for initiating the program. The national practitioners did not only lack the EU reflex, two thirds of them considered their knowledge of EU law to be inadequate or very inadequate (Tallberg 2003:113).

The situation was considered to be serious, because without the proper knowledge of EU law, the national practitioners were unable to secure individuals internal market rights and facilitate decentralized enforcement. The Schuman project consisted of financial encouragement and support of national initiatives to improve the knowledge of EU law in the legal professions. The program would not require the cooperation of the national governments since it rested on a partnership between the Commission and professional associations in the member states. However, unlike the Citizens First Initiative the Schuman project did need support of a qualified majority in the Council to be accepted. Following tough negotiations it passed (Tallberg 2003:115). The Commission saw the need for improvement in the authorities of the member states so they initiated action to deal with the problem, and the member states accepted. Let us now move to difficulties and challenges that still remain to be dealt with for the implementing authorities in the member states.

4.4.3 Remaining Challenges

It is pretty clear that there are still substantial differences between the practices of EU law between the member states. The natural, or inevitable consequence for the Community is that it is hard to rely on national remedies and procedures for the enforcement of Community law, since it is not applied with complete uniformity throughout the EU (Tallberg 2003:96). The internal market program demanded the member states to transpose a big amount of European legislation into national law within a quite limited time period (Tallberg 2003:46). It would be unreasonable to expect this to take place without numerous obstacles and problems. The transposal of EU law in the late 80s, and the implementation of all the EU legislation for the new member states required big changes in administrative behavior and practices. Such behavior may be difficult to alter if it has been in place for a long time and if it has offered the member states a sense of

security. To make it even harder it is very possible that the personnel are unwilling to cooperate with the new developments, which they may see as a threatening change. If EU skepticism is present in the member states, the administrators may willingly drag their feet and not make all out efforts to make the required changes in the administrative structures. Still, the Commission points out, in one of its communications, that problem with delays in transposing EU legislation are often not the result of deliberate dragging of feet or refusal to act in the authorities of the member states. Rather, it is more often about the problems of understanding complex Community legislative texts (COM(2002)725:6).

The Commission has taken some measures to deal with this problem of understanding. They have developed what they call the practice of "package meetings". These meetings take place after an infringement procedure has been initiated against a member states, and it provides an opportunity for discussion between the Commission and the national authorities, regarding any problem with transposals for a given sector (COM(2002)725:6). Another measure from the Commission to deal with the problems is the offering of technical assistance to the member states. This assistance helps the member states understand highly complex texts that demands special knowledge in the specific area (COM(2002)725:6).

In their official communication, the Commission also identifies problems in the structure of contact or communication with the member state. It is not always clear who the proper contact is in the member state. Different member states have different structures with different institutions or bodies covering different sectors. In some cases the transposal requires the actions of more than one institution or body, and this complicates the contact with the Commission, especially if the communication between the institutions in the member state is poor. The Commission is obviously encouraging such restructuring, but to restructure the whole national administrative structure for this purpose may be too much to ask for the Commission.

So, there are obviously weaknesses in the national authorities of the member states and these weaknesses lead to problems with implementation. In addition to the weaknesses seen in the member states one should point out that legislation produced by the Commission is complex and would pose a challenge for any implementing authorities. In other words, the problem is partly caused by complex legislation produced by the Commission and partly caused by inability in the member states. The Commission has realized this and is making efforts to deal with this problem. Let us now look at what P-A Analysis say about this.

4.4.4 Inability in the member states according to P-A Analysis

Out of the four problems I have brought up, this is the one where P-A Analysis does not do a perfect job of analyzing. One could probably say that it does a decent job of predicting and explaining, but it is not as clear cut and efficient as it is with the other problems. I like to argue that this problem is partly rooted in a conflict of interest between the member states and the Commission. The

Commission classifies the implementation of its laws as a top priority since it is defined as one of its main task to carry out. They work hard to raise the implementation percentages and have made efforts, as mentioned above, to rid the process of obstacles. Still, no matter how much the Commission wants to improve implementation it is inevitable to note that they are helplessly dependent on the member states for their budgetary means. The efficiency of the Commission is restricted by its limited means, and they will remain less than perfect in the fulfillment of its implementation task until they are able to land more resources from the member states.

The member states are ready to drag their feet or disobey if they have to do this to soften the hardships from EU legislation. It is difficult to distinguish this behavior from actual inability of the national authorities. The real inability of the national authorities can be the result of different priorities between the member states. Some member states have long traditions of assigning a lot of resources and a lot of importance to their national administrations. Other member states have no traditions of this kind of administrative work and they have never put a lot of weight or importance to it. P-A Analysis does not give any importance to the long term traditions of institutions that now have to respond to the demands of the modern Union. The member states that have high competence and organized structures in their national authorities have a much better chance to succeed with implementation, compared to new member states that may lack a history of organized institution functioning under the rule of law. I think the traditions and the competence of the national authorities' matters to the problems we see with implementation. Since P-A Analysis does not account for this aspect; I believe it to be a weakness of the theory.

The inability or weakness of the national authorities is a problem that needs time to decrease. Since the 1990s we have seen a steady improvement in implementation across the EU. It is unreasonable to think that problems with implementation of legislation as immense as EU legislation will go away fast and without bumps in the road. I see the whole things as part of a process. The Commission will learn how to make better laws and communicate better with the member states, and the member states will steadily build more efficient structures and experience of dealing with EU legislation. P-A Analysis does not make a note of a learning phase, transition phase or anything of that nature between the Principal and the Agent. P-A Analysis can trace the problem of inability in the authorities of the member states, to a conflict of interest between the Commission and the member states, which is connected to the problem of lack of resources. However, it does not account for a learning phase of the P-A relationship or the traditions that lay behind the relative strength or weakness of national authorities.

4.4.5 Relation between the Problems

One final note should be made on the relationship between the four problems. The problems are related to each other. The lack of resources suffered by the Commission can be traced to a conflict of interest between the member states and

the Commission where the member states only want to give the Commission a given amount of resources. The lack of deterrence of the sanctions can be traced back to a lack of resources, in the sense that the Commission could be able to go after all infringements and thereby creating deterrence, which would improve implementation. Inability of the member states can be partially traced to a lack of resources. It could be argued that if the Commission had enough resources it would make the laws easily understandable and educate the member states on all aspects of Community law with the special relation to the specific member state in mind. An improvement in one problem could potentially improve the other problems. For example, if the consequences of poor implementation are made clearer to the member states they may realize that they need to do more to safeguard proper implementation. This could lead to an increase in means awarded to the Commission. In other words, a change in the conflict of interest to a situation where the interests of the member states and the Commission are more in line with each other, would lead to a smaller problem of lack of resources. On the other hand, when some member states see that the Commission is too benign towards certain member states (see Stability and Growth Pact case), the conflict of interest may increase, which in turn could lead to a decrease in the willingness to provide the Commission with sufficient resources. The result would be a deterioration of the implementation situation. Thus, a change towards the better or worse could have a rippling effect.

5 Conclusion

I began this study with brief discussions of the relevance of the study and a justification of my choice of P-A Analysis as my theory. In the section that followed I provided the reader with evidence of the problematic situation of uneven application and failure to implement EU law. The evidence was made up of official implementation numbers, official opinions on the issue and of the high profile example of the Stability and Growth Pact. My third section was a description of the P-A Analysis and a brief explanation of its predictions of a typical P-A relationship. The fourth section was the biggest and most important one. In the fourth section I discussed and explained the four problems that lead to the problems we see with implementation. The problem of conflict of interest was the first problem, and it was revealed at the individual level among the Commissioners; within the Commission itself; and between the member states and the Commission. The problem of lack of resources for the Commission followed. For this problem the tasks of the Commission were compared to its resources, and the willingness, or lack of willingness, of the member states to provide resources was discussed. It was made clear that the Commission had realized this problem and its response were mentioned. The third problem was the lack of deterrence seen in the threats of sanctions made by the Commission. The Commission's strategy of shaming, the fact that litigation is slow and the Commission's decision to reveal its enforcement priorities were discussed within this problem of lack of deterrence. The fourth and final problem was the inability found in the authorities of the member states. Possible explanations of this problem were discussed and, like all the other problems, it was followed by an Analysis of the problem according to P-A Analysis. The relationship between the problems was briefly discussed to conclude the discussion of the problems.

This study was an attempt to reveal and understand the problems in the Principal-Agent relationship between the member states and the Commission, which leads to the problematic situation of uneven application or failure to implement EU law. Throughout the discussion of the problems it was revealed that the four problems are efficiently explained and predicted by the Principal-Agent Analysis. So, one can say that it was successfully shown that P-A Analysis predicts and explains the problems that lead to a poor implementation situation. Furthermore, it was revealed that the problems were related to each other.

I decided to carry out this study because the problems of implementation interest me. They interest me because I believe that they are important and that they will continue to grow in importance as the EU continues to integrate. In my opinion it would be detrimental to ignore the problems. In other words, how many more Stability and Growth pact cases can the EU withstand before the trust comes crashing down?

6.References

1 Barnard, Catherine (2004). *The Substantive Law of the EU: The Four Freedoms*. Oxford, Oxford University Press.

2. Bolkestein, Fritz (2003). Letter to Mr. Thomas Bodström, Minister of Justice, 25/06/2003.
3. Bomberg, Elizabeth and Stubb, Alexander (2003). *The European Union- How Does it Work?* Oxford University Press.
4. Bomberg, Elizabeth, Cram, Laura and Martin, David (2003). `The EU's Institutions` chapter 3 in Bomberg, Elizabeth and Stubb, Alexander (2003). *The European Union- How Does it Work?* Oxford University Press.
5. Börzel, Tanja A (2001). "Non-Compliance in the European Union. Pathology or Statistical Artifact?" RSC No.2001/28. Robert Schuman Centre for Advanced Studies.
6. Christiansen, Thomas (2004). `The European Commission- Administration in turbulent times`, chapter 5 in Richardson, Jeremy (2004) *European Union- Power and Policy-making, 2nd Edition*. Routledge 2004.
7. European Commission Press Release (2004). 'Internal Market: Commission acts to ensure eight member states implement EU laws', Reference:IP/04/1533, Brussels 22/12/2004.
8. Cram, Laura (1994). `The European Commission as a Multi-Organization: Social Policy and IT Policy in the EU`, *Journal of European Public Policy*, vol 1, no.2, pp. 195-217.
9. Dimitrakopoulos, Dionyssis and Richardson, Jeremy (2004). 'Implementing EU Public Policy' chapter 16 in Richardson, Jeremy (2004) *European Union- Power and Policy-making, 2nd Edition*. Routledge 2004.
10. European Commission (1994). 'The Community Internal Market:1993 Report, Luxembourg: Office for Official Publications of the European Communities.
11. European Commission (1997). 'Citizens First: EU Rights on Equal Opportunities, Buying Goods and Services and Travelling. Press Release IP/97/1035.25.11.1997.
12. European Commission (2002). Better Monitoring of the Application of Community Law, Commission Communication, COM(2002)725 final/4. Brussels, May 15, 2003.
13. European Commission (2003). '20th Annual Report on Monitoring the Application of Community Law', COM(2003)669 final. Brussels, 21 November, 2003.
14. European Commission (2004a) 'Annexe I- La detection des infractions- Tableau 1.1', XXIst Report on monitoring the application of Community law. COM(2004)839.

15. European Commission (2004b). The Implementation of the framework action-updating and simplifying the Community acquis. COM(2004)432 final. Brussels, 16 June, 2004.
16. European Commission Press Release (2004c). 'Internal Market: Commission acts to ensure eight member states implement EU laws', Reference:IP/04/1533, Brussels 22/12/2004.
17. 'France and Germany Given More Time to Curb deficits', *The New York Times*, 26/11/2003. P.1.
18. Garrett, Geoffrey-Keleman, Daniel and Schulz, Heiner (1998). 'The European Court of Justice, national governments, and legal integration in the European Union', International Organization 52(1):149-76.
19. 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):360-85.
20. Landler, Mark (2004). The New York Times, 14/07/2004. P.1.
21. Majone, Giandomenico (1994), `The Rise of the regulatory state in Europe`, *West European Politics* 17:77-101.
22. Moravcsik, Andrew (1998). *The Choice for Europe: Social Purpose and State Power from Messina to Maastricht*, Ithaca, NY: Cornell University Press.
23. Motion for a European Parliament Resolution on the Commission communication on better monitoring of the application of Community law COM(2002)725-C5-0008/2003.
24. Nelsen, Brent and Stubb, Alexander (2003) *The European Union- Readings on the Theory and Practice of European Integration 3rd Edition*, The European Union Series. Palgrave.
25. Nugent, Neill (2001). *The European Commission*. The European Union Series. Palgrave.
26. 'On the Record' (2005) *International Herald Tribune*, 27/03/2005.
27. Pollack, Mark (1997) `Delegation, agency and agenda-setting in the European Community`, International Organization 51(1):99-134.
28. Peterson, J. (1991) 'Technology Policy in Europe: Explaining the Framework Programme and Eureka in Theory and Practice', *Journal of Common Market Studies*, vol.29, no.3, pp.269-90.
29. Ross, Stephen (1973). `The Economic Theory of agency: the prinicipal's problem`, *The American Economic Review.* 63(2):134-9.
30. Tallberg, Jonas (2003). *European Governance and Supranational Institutions-Making States Comply*, Routledge.
31. Thatcher, Mark (2001). 'European Regulation', chapter 15 in Richardson, Jeremy (2004) *European Union- Power and Policy-making, 2nd Edition*. Routledge 2004.
32. The Economist.com/Global Agenda (2004) 'Busted budgets, vented spleens' 15/01/2004, London.
33. The Economist (2005). "Debasing the currency", The Economist 26/3/2005 vol. 374. P.55.