1

Introduction

Harmonizing Europe with Directives

Most of the world is currently witnessing the spread of capitalist markets. In some areas, like Southeast Asia and Russia, this is primarily a phenomenon at the level of nation-states, as nations struggle to build the necessary institutions. In other areas, like North America and Europe, it is an effort at the transnational level, as politicians and policy-makers gather to agree on rules and regulations, such as the North American Free Trade Agreement, that can foster international trade among participating states.

My objective in this book is to demonstrate, through the example of the European Union (EU), that the rules and regulations used to build transnational markets consistently demand dramatic *institutional*, and hence *cultural*, transformations in member states, and to argue that those demands explain why transnational markets stall when they do. Capitalism, as Max Weber once wrote, requires "the absence of irrational limitations on trading in the market" (Weber 1992, 276). No one doubts that transnational markets must be free of irrational limitations, such as national differences in environmental constraints on industry; few, however, truly understand what the removal of those limitations entails.

Transnational markets challenge the institutions of member states in very specific and tangible ways. By introducing rules and regulations that member states are expected to ratify or adopt, they pose a direct challenge to existing *national legal systems*. National legal systems are, however, much more than a set of abstract rules: they are the answers that members of society have surmised, at times of specific political and economic conditions, to deal with the difficulties of social life. They hence reflect deeply rooted, collective values and beliefs, interpretations of problems, issues, and life. Great Britain's understanding of "air pollution" and how to control it legally in the 1980s, for instance, was the product of the timing of the industrial revolution, the

perceived sacredness of domestic fires, the available technology, and the political compromises of the 1800s between industrialists and the state. An European Community (EC) directive with unprecedented, apparently merely technical rules meant for Great Britain a profound transformation of long-standing and widely accepted principles and ideas.

Legal systems regulate societies through administrative structures that apply their principles. Accordingly, when transnational markets demand changes in laws, they also demand changes in *administrative structures*. These structures, however, are as rooted in history as the laws they are designed to apply. In the 1980s, the decentralized, informal administrative apparatus for controlling air pollution in Great Britain descended from the historical legacies of the nineteenth and eighteenth centuries. An EC directive demanding the centralized, uniform application of new principles of air pollution control asked in effect for an administrative revolution.

The challenges of transnational markets reach beyond the legal and administrative legacies of nations. They also threaten the *distribution of resources and goods among groups* in society. Within the boundaries of nation-states and their legal systems, interest groups have learned to adapt, accepting existing limitations while investing heavily in safe practices. Industrialists in Great Britain, for instance, learned through time that paying women far less than men for different jobs, even when these could be deemed of equal value, was a perfectly acceptable way of keeping labor costs down and boosting their competitiveness within their country and abroad. The British state, after all, had resisted drafting equal pay legislations since the 1800s. The arrival of an EC directive on equal pay for men and women in 1975 threatened to weaken dramatically two interest groups—British capital and working men—while enriching a third, working women, that for very long had been terribly weak.

Nation-states have answered the challenges of transnational markets with concrete measures. While their representatives have committed themselves to the principles of the new agreements, domestic legislators and policy-makers have found it difficult to impose on society the spirit and application of principles that overrun long-standing norms and traditionally powerful groups that have grown out of particular legal environments. Systematically and consciously, they have failed to ratify or properly import basic legal concepts, belatedly miscommunicating goals and objectives or outright ignoring the new rules. They have operated with the perceived well-being of the nation in mind, and inevitably under pressure from strong interest groups alarmed at the possibility of losing power.

It is impossible for transnational markets to avoid challenging the legal foundations and the powerful interest groups of member states. They require, in order to function, national legal systems and interest groups subject to

identical constraints. Yet, as this book demonstrates with the European Union, it would be wrong to claim that these challenges concern every member state at any given time. In some instances, the demands of markets match the legal and administrative contexts of certain nation-states, or they reinforce the current distribution of resources among groups in society. In such nations, the new principles are respected and upheld.

Similarly, it would be wrong to claim that the demands of transnational markets are doomed to encounter complete rejection anywhere they demand deep transformations. More commonly, controversial principles find their way even in the more recalcitrant of the member states but only partially and belatedly. National idiosyncrasies and international mandates then coexist in contradiction with each other, both under pressure to change. It follows that I do not intend to argue for the ubiquitous rejection of the transformative demands of transnational markets, but rather for an appreciation of the fact that transnational markets do demand transformation and that, as a result, they are bound to encounter resistance and therefore experience differences in implementation across member states.

I will prove my argument by turning to the European Union,[1] a fifty-year-old struggling but major experiment to merge the economies of several powerful capitalist nations (full compliance with EU law is set to around 50%), and I will concentrate on the demands and fate of directives, the primary tool for creating a single market, in member states. I will show how directives, despite their apparent technical content, have challenged national institutions and hence the fundamental values of some member states, and thus why their implementation has varied across the Union.

My hope is that, by reaching deep into the demands and fate of directives, I offer an unprecedented, full picture of what transnational capitalism really asks, albeit only for the European Union. There exists a growing literature on transnational markets, their demands, and the resistance of entrenched national institutions and interest groups to changes in laws and resources. Vogel (1995), for instance, discusses in detail the environmental demands that the EU, GATT, and NAFTA have posed on member states and the resulting reaction from domestic interest groups and legislators. Keohane and Milner (1996), Katzenstein (1985), and Golden (1986) have, in a similar spirit, analyzed the resistance of and the relationships between domestic institutions and transnational, as well as international, markets. None of these works, in my view, offers a *systematic* theory of what, exactly, transnational markets ask of member states, and *illustrates* and tests its assertions with a systematic, in-depth examination of the fate of those demands in domestic settings. My hope is thus to complement the existing literature by offering a clear analytical theory of the demands of transnational markets accompanied by an exhaustive empirical illustration of that theory.

By applying my theory to the EU, I also outline what I think is one of the first theories of implementation in the EU to date, despite the poor implementation record of member states and the significant number of scholars working on the EU.[2] Indeed, most literature on the EC has covered various aspects of policy-*making*, rather than implementation.[3] When focused on implementation, past works have documented implementation patterns, rather than offer an explanation for them. Thus, Siedentopf and Ziller (1988) openly state that "the objective of [their] comparative review is an overview presenting facts and examples given by national reports" on implementation and not an explanation of the facts themselves. Their work is otherwise very comprehensive: it covers seventeen directives from different policy areas in ten nations. Bennett (1991) reports on the implementation of air pollution control directives in the twelve member states as of 1991. A number of facts are used to describe the transposition, application, and impact of directives, but no theory is offered to explain outcomes. Landau (1985) and Warner (1984) provide a detailed account of the impact of Article 119 of the Treaty of Rome on equality of pay, social security, and equal treatment, but no explanation of what limited or drove that impact. Vogel-Polsky (1985) studies the types of institutional and noninstitutional structures that have grown in member states to implement gender legislations. This work is echoed by those of Brewster and Teague (1989) and Mény et al. (1996), when they consider the impact of the EU policy on national institutions and policies. None of these works, however, outlines a theory of implementation.

The Case of the European Union

The European Union dates back to the years following World War II and unites, through several treaties and agreements, fifteen economies, including three of the five most powerful in the world (Germany, France, and Italy). It began in 1951 in Paris with the creation of the European Coal and Steel Community (ECSC) among France, Germany, Belgium, Italy, the Netherlands, and Luxembourg. In 1957, the same six signed the two Treaties of Rome: the European Economic Community (EEC) and the European Atomic Energy Community (Euratom), formally giving birth to what was known, until 1993, as the European Community (now European Union) (Nugent 1991, 42).[4] At different stages, nine more members joined, as additional treaties, acts, and charters, including the Single European Act of 1986 and the Maastricht Treaty of 1992, sought to add or specify in greater detail the common objectives of European member states and to accelerate the elimination of those 'irrational' barriers, to use Weber's terminology, that precluded the existence of an efficient single market.

Powerful laws, known as directives, have articulated the principles of each major treaty into binding words.[5] To comply with directives, the parliaments of member states have had to draft laws whose principles superceded those of any existing legislation (a process I refer to as the *transposition* of directives),[6] while national administrations have had to mobilize to ensure the application of the new principles, regardless of whether the appropriate infrastructure existed or whether existing policies or structures conflicted with the new mandates (a process I call the administrative *application* of directives).[7] Theoretically, the exact wording of the new domestic laws and the administrative means for application were left to the discretion of members states, as Article 189 (3) of the EEC Treaty specified:[8]

> A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and method.

Practically, nothing less than a faithful, almost word by word, transposition of the directive into national laws and the choice of the "most appropriate forms and methods" of administrative application were expected (Capotorti 1988, 159), with the European Commission and the European Court of Justice empowered with the right to judge and punish transgressors.[9]

Directives have dealt mostly with the economic sphere, such as the free movement of persons, capital, and services, the erection of common external tariffs, and the introduction of commercial rules, but the transnational market has required that other policy areas find a place on the Community's agenda. The early EEC Treaty provided the basis for a Community Social Policy in Articles 117–22, and a Social Fund in Articles 123–28. Later, more elaborate directives over gender equality, immigration, education, workers' rights, and labor markets were produced, culminating with declarations such as *The Community Charter of Fundamental Social Rights for Workers* written by the Commission in 1989.[10] Most recently, energy, research and technological development, environmental, sectoral (e.g., fishing, steel), and foreign relations have all been regulated, leaving "few policy areas with which the [Union] does not have at least some sort of involvement" (Nugent 1991, 272).

Not all directives have targeted major sectors of the economy, society, or the polity. Some have merely set rules in areas of little relevance or have affected a handful of persons or groups. Others were formulated so loosely that their transposition into national law challenged little.[11] By and large, however, directives have been the major tool used to build the European transnational market. Hence, we must turn to them when wondering what transformations, really, the European transnational market has asked of member states.

In the chapters that follow, I intend to demonstrate that directives have challenged the legal-administrative legacies of member states and the interest groups that grew in those legal-administrative contexts. Normally, any one directive has corresponded to the legal-administrative landscape of some member states, and, accordingly, has left interest groups on safe grounds. Yet, inevitably, the same directive has demanded deep transformations in some other member states. It was its nature to do so, for the creation of the single market entailed precisely the harmonization of differences *among* the participants. I intend to show that legacies and groups have emerged from decades or centuries of social, political, and economic struggles, embodying collective consciousnesses and interests. Directives, that is, have challenged deeply rooted social entities. This, I will argue, explains why any one member state has only selectively implemented EC and EU directives: only those directives that have affirmed existing ideas and interests, or that left them alone, have found their way in the legal systems of a member state.

When the challenges were great, I will show, parliaments stepped up as the guardians of the status quo, as the shield protecting their countries against radical demands descending from the EC and the EU. Legislators proved unwilling to build the consensus necessary for drafting transformative laws. Similarly, they barred the creation of new administrative structures, changes in the informal and formal operating procedures within and outside of the administration, and the allocation of resources to new, unprecedented tasks. Parliaments accepted only those directives that were in consonance with past policies.[12]

At the same time, legislators, unable to upset existing economic and social systems, opposed laws that they knew would undermine the current organization of interest groups. Interest groups, in turn, merely reinforced the decisions of legislators: strong groups supported the state's protection of the status quo, while weak groups mobilized, generally unsuccessfully, to pressure the state to adopt a radical directive or to oppose the implementation of a directive that merely reaffirmed the status quo.

The outcome of this protectionism has been the *variation* in implementation of any given directive that one can easily observe across the European Union. In most cases, either the *timing* of transposition or application, or the *extent* of transposition or application of a directive has been faulty in one or more member states. Member states have been *late* in transposing or applying the directive's principles,[13] or have *failed* to transpose all of the principles found in the directive (with modifications in numbers, deadlines, concepts, affected parties, regions, and sectors of industries) or to apply those principles (through the imposition of weak penalties, sanctions, etc.).[14]

Table 1.1 summarizes this theoretical viewpoint, without addressing explicitly the historical origins of interest group strength and policy legacies

Table 1.1. The Institutional Explanation

Demand on Domestic Institutions	*Mechanisms*	*Impact*
• Major shift in policy legacy	• **State opposes directive**	• National version reflects existing laws and administrative traditions; elimination of principles that depart from status quo
• Major reorganization of interest groups	• **State opposes directive** • Strong interest groups oppose directive • Weak interest groups cannot ensure implementation of directive	• National version void of any principle that undermines strong interest groups; santions weak from the start
• Consistent with policy legacy	• **State supports directive**	• National version fully embodies the principles of the directive; drafting is punctual and administrative measures are serious
• Consistent with organization of interest groups	• **State supports directive** • Strong interest groups support the directive • Weak interest groups cannot block implementation of directive	• National version fully embodies the principles of the directive; drafting is punctual and administrative measures are serious

that explain why domestic institutions endure in spite of transnational pressures. Naturally, not all directives have challenged both the state policy and interest groups of any one member state. Some directives have been in consonance with parts (typically the legal tradition) of existing policy legacies and, at the same time, have imposed major changes on interest groups. Textual transposition of such directives into national law, without the actual application, has then been typical. Other directives have challenged parts of existing policy legacies but have been perfectly in line with existing interest group conditions. Those directives have then been transposed without application or simply applied without being transposed.

My argument may seem to leave little hope for the completion of a single European market. If I am correct, the European transnational market will not take place, since directives cannot eliminate institutional differences between countries. But putting the problem in such strong terms is by no means intended to dismiss the European effort as futile. The European Union has not completely failed to transform member states' legal-administrative systems. Even in the case of the worst offenders, such as Italy and Belgium, convergence toward the single market is an accepted, obvious fact of life. A fair percentage of the most challenging directives is implemented in all member states, however belatedly and partially.

It is, then, rather a question of *degrees* of convergence, of resistance, of the co-existence of enduring national idiosyncrasies and transnational elements; it is a question of appreciating and understanding that national institutions and cultures are being eradicated and replaced with *standardized answers* to the problems of social life; and, finally, it is a question of comprehending the reasons for countries' failures to implement fully and on time.

Moreover, by painting a clear and realistic picture of the functional state of the Union, I intend to direct policy-makers toward more constructive strategies for unification. By identifying dynamics hitherto unknown concerning the implementation of directives, the book offers initial guidance on how to improve implementation in the future. The conclusion suggests constructive ideas for future planning, such as assigning a stronger role to the European Court of Justice, improving the design of directives, and carrying out consultations with national interest groups and legislators.

I chose to illustrate my thesis by way of in-depth examination of the fate of two directives in selected member states. Numerous directives could be used for this purpose, but I have selected directive 75/117EEC on Equal Pay and directive 80/779EEC on Sulphur Dioxide and Suspended Particulates (Smoke) in the Air. I selected these directives for the following reasons: their period for implementation has fully elapsed and some years have passed since the deadlines expired, allowing for the possibility of observing not only member states' activities during the allowed time, but also their reactions when the European Commission pressured unobserving members to adopt those laws; the directives, secondly, showed great degrees of variation in implementation across member states, making it imperative that any explanation I offer be able to account for the failures but also successes of the EU; and they involved, by virtue of being controversial, burdensome, and potentially far-reaching, a number of actors and structures, making it less likely that any single explanation can truly make sense of the turn of events. The two directives, moreover, regulated what I felt were fascinating areas of social life, ones that touched in one way or another the lives of most citizens of the then Community.

The Equal Pay Directive (EPD) introduced the principle of equal pay for work of equal value and abolished discriminatory clauses in collective agreements. Its aim was to maximize the use of human capital and to promote gender equality in the labor market. It mobilized and affected trade unions, women's groups, governmental departments and ministries, and employers' organizations. Wherever implemented, it matched women's skills and capacities to commensurate rewards, thus promoting the ideal use of female labor and bringing women one step closer to real equality at the workplace and in society.

The Sulphur Dioxide and Suspended Particulates Directive (SSD) introduced standards for air quality in order to hold all industrial producers to identical standards and as a major attempt to fight air pollution throughout the member states. Introduced in 1980, it affected industries, power plants, and all producers of exhaust. When implemented, it cleaned the air from one of its worst polluters in history.

The implementation of the EPD is considered for France, Italy, and Great Britain; that of the SSD for Italy, Great Britain, and Spain. There, where a host of differences beyond institutional arrangements separate these countries, the directives experienced the most variation, making it less likely, again, that a single explanation can account successfully for the outcome of events.

With the theoretical underpinnings of my arguments thus elucidated, let me describe the content of the following chapters. Chapters 2, 3, and 4 analyze and account for the implementation of the EPD in England, Italy, and France respectively. Chapter 5, 6, and 7 analyze and account for the SSD in Italy, Great Britain, and Spain respectively. Chapter 8 compares the main findings for the different case studies, considers possible alternative explanations for the outcome of events, discusses the implications of the findings for the future of the European Union and transnational markets, and suggests venues for future research.