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The Enforcement of EU Law The Role of the European Commission

Stine Andersen

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General Editors: Paul Craig and Gráinne de Búrca

THE ENFORCEMENT OF EU LAW

This book is dedicated to my parents, Ellen and Peter.

It could not have been written without the support and supervision of Gráinne de Búrca and Christian Joerges, whom I greatly admire.

Many other friends and colleagues helped me, including Tommi Ralli, Cormac Mac Amhlaigh, Andrew Glencross, Robert Schütze, Paul Nemitz, Flemming Reislev, Kenn Skau Fischer, Niels Fenger, Bruno de Witte, Jacques Ziller, Joanne Scott, Deirdre Curtin, Aitor Erce, Tom Daly, Pontus Rendahl, Ben Johnston, Ann-Marie Enggard, Elisabeth Day, and Marsha Green.

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The Enforcement of EU Law

The Role of the European Commission

STINE ANDERSEN

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GENERAL EDITORS' PREFACE

This book tackles the familiar subject of the European Commission's role in enforcing compliance with EU law.

Although it begins with a thorough and up-to-date treatment of the public enforcement procedure under Articles 258–260 TFEU, including the operation of the pecuniary penalty payment, the book then moves beyond conventional dimensions of the subject. Exploring a little-known aspect of the Commission's attempts to expand its power in this respect, the author examines how the Commission tried unsuccessfully to strengthen its powers of enforcement by means of secondary legislation in fields such as fisheries and internal market policy.

Having concluded for reasons of institutional balance and constitutional principle that the Commission's direct enforcement powers can only be expanded through treaty amendment, the author moves on to consider the relationship between the Commission's role in enforcing compliance with EU law and its role in executing, implementing, and guiding the interpretation of EU norms. In a series of interesting chapters, Andersen probes the notions of 'implementation' through the exercise of executive power, and the 'management of compliance' through what she describes as 'auxiliary enforcement procedures' devised and used by the Commission. These include the establishment of expert groups on the implementation of particular EU laws and directives, and the use of peer review to monitor implementation.

This is an original work which functions both as a study of the Commission's use and adaptation of its powers as an institutional actor within the EU framework, and as an exploration of the nuances of the meaning of compliance and enforcement in the context of EU law. The book usefully combines careful legal analysis and interesting case studies with insights and questions drawn from political and regulatory theory.

It should be of considerable interest to students and scholars of EU law, as well as to political scientist students and scholars interested in questions of compliance and enforcement.

Paul Craig
Gráinne de Búrca

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Introduction

1. Introduction to the Book and its Central Themes

This book undertakes a comprehensive analysis of the Commission's general role in supervising member state compliance with EU law.¹ The Commission works within the legal framework set under the general EU infringement procedure stipulated in Articles 258 and 260 of the Treaty on the Functioning of the European Union (TFEU). On several occasions the Commission has proposed that its enforcement powers against the EU member states should be amended either through a comprehensive treaty amendment or on an ad hoc basis.² Against this background, this book describes the Commission's general powers of enforcement and investigates how the Commission manages its role in promoting compliance with EU law. The enquiries driving this book are of pressing importance given that the Commission has voiced criticism of the general infringement procedure's viability in a European Union of 27 member states covering numerous and substantially different policy areas.

This introductory chapter outlines the arguments made throughout the book and fleshes out their major implications for the understanding of the Commission's role in ensuring member state compliance with EU law. In addition, it explains in more detail the research methodologies applied in the book and how the work is situated within literature on international law and international relations, governance, and constitutional law.

Chapter one provides a general introduction to EU enforcement. It discusses the political dimension of EU enforcement and the member states' call for flexibility, which is reflected in the design of the general infringement procedure. The chapter proceeds to set out some of the particular challenges

¹ Article 17(1) TEU.

² See chapter four.

EU legal tools such as directives and regulations pose from an enforcement point of view. Albeit to various degrees, most types of binding regulatory instruments leave margins of discretion to the member states. This leeway reflects basic political choices made at treaty level. The degree of regulatory detail and, in turn, member state discretion is a result of concrete political compromise between the Commission and the ‘EU legislators’, ie, the Council and the European Parliament.³ At the same time, differences in the member states’ legal and administrative systems may also necessitate procedural and/or substantive leeway in the transposition phase. As a consequence, compliance can often materialize in different ways. These aspects are important in order to fully appreciate the specific enforcement powers granted to the Commission. These are examined in chapters two and three. Likewise, they are central to the analysis of this book’s other central themes. Chapter four: the Commission’s proposals that it should be empowered with supplementary enforcement powers on an ad hoc basis. Chapter five: the functional overlap between implementation tools and enforcement tools, and, finally, chapter six on the piecemeal emergence of non-binding, auxiliary enforcement powers. Even though they are non-binding they have significant policy implications.

The arguments made throughout this book have five major implications for the understanding of the Commission’s role in ensuring member state compliance with EU law.

First, whereas the Commission pleads that its enforcement powers should be invigorated using arguments of effectiveness, chapter one maintains that the EU as well as the general infringement procedure is shaped by political conditions underpinning the EU polity more broadly. In this regard, effectiveness is a deceptive notion. Specifically, it tends to obscure the very central point that EU enforcement is a dialectical exercise in which the Commission and the Court of Justice help refine and flesh out EU law. The notion of responsive enforcement allows for further discussion of whether it is viable to establish stronger Commission powers of enforcement at this point in time. Moreover, it helps explaining how such powers would change the dynamics in the relationship between the member states and the Commission and ultimately between the member states and the EU. Finally, the

³ With the ratification of the Lisbon Treaty the Council and the European Parliament became co-legislators in most policy areas. The Commission also plays a central role given its legislative monopoly according to the ordinary legislative procedure (Art 294 TFEU) and given that where the Council acts on a proposal from the Commission, it may with certain exceptions only amend the proposal by acting unanimously (Art 293 TFEU).

notion of responsive enforcement helps unpack the policy implications of the burgeoning non-binding enforcement measures in the EU.

Second, with the ratification of the Lisbon Treaty the Commission obtained general powers to supervise compliance with EU law and not merely EC law. Moreover, the Lisbon Treaty invigorates the Commission's tools against repetitive infringements and provides the Commission more easily employable tools against failure to transpose directives. Chapters two and three take stock of the general EU infringement procedure established under Articles 258 and 260 TFEU. Chapter three provides an analysis of the sanctioning mechanism established by the Maastricht Treaty in view of pertinent case law. Moreover, it analyses the amendments of the general EU infringement procedure made in the Lisbon Treaty, including their practical implications and extra-legal significance. The aims of the chapters are two-fold. They account for the procedural steps involved and appraise the procedures against contemporary international law and international relations enforcement theory. It is demonstrated that the general EU infringement procedure is primarily based on non-coercive problem-solving. Nonetheless, it proposes a durable procedural framework for awarding pecuniary sanctions. Specifically, it is argued, Article 260 TFEU remedies some of the drawbacks that characterize sanctions against states according to international lawyers. Thus, the Commission has been granted a tool to put sustained pressure on defaulting member states while maintaining them in a process towards compliance and this in a manner which does not undermine the treaty regime's legitimacy.

Third, this book examines the Commission's quest for ad hoc enforcement powers in secondary legislation. Neither lawyers nor political scientists have addressed this issue in a comprehensive manner. The case studies undertaken in chapter four demonstrate how the principle of attributed powers has indeed served as a constitutional safeguard barring the Commission from obtaining direct enforcement powers. More generally, the case studies illustrate that although the fundamental distribution of powers and competences is established in the Treaty on European Union (TEU) and the TFEU, significant struggles for influence between the national level and the EU level are negotiated between the Council and the Commission. The analysis in chapter four frames the legal question of ad hoc infringement procedures as a matter of institutional balance. It argues that the Commission's proposals examined in the chapter have broader implications not only for the horizontal, but also for the vertical division of EU powers. Moreover, it is maintained, because the Commission's current tools of enforcement mirror basic constitutional choices any question pertaining

to the Commission's enforcement powers against member states should be decided upon in primary legislation, ie, in the EU Treaties. The analysis and the arguments made in chapter four, as well as the appraisal of the general EU infringement procedure in chapters two and three, add to an understanding as to why the Commission retreats to other instruments available to it, such as non-binding, auxiliary enforcement mechanisms and implementation measures. The difficulties in amending the treaty basis have been discussed thoroughly by political scientists. This book provides concrete examples of the strategies the Commission can employ in order to make up for the unsuccessful attempts to gain stronger enforcement powers in secondary legislation.

Fourth, this book addresses the functional overlap of enforcement tools and implementation tools and the broad range of instruments available to the Commission in ensuring member state compliance despite not being part of its enforcement powers *sensu stricto*. It argues that notwithstanding the doctrinal distinction between enforcement and implementing measures, there are effective points of functional overlap between enforcement powers and certain types of implementing tools, which are lawful in that they serve other aims and purposes than enforcement. Since the Commission employs these measures in conjunction with the general infringement procedure or as an alternative with the less discernible aim of ensuring compliance, a comprehensive EU enforcement analysis must take note of them. Potential legal constraints on the Commission in employing these instruments, such as the proportionality principle, are among the questions raised in chapter five. In addition, the chapter explores how any perceived misuse may have ramifications for the Commission's ability to have certain implementation powers established in secondary law.

Against this backdrop, chapter six proceeds to describe and analyse a range of tools available to the Commission other than the general infringement procedure. Article 70 TFEU establishes a mechanism whereby the Council may, on a proposal from the Commission, adopt peer-review arrangements. Thus, the member states can conduct 'objective and impartial evaluation of member state implementation' in collaboration with the Commission. The legal basis to establish ad hoc procedures is aimed at policies concerning an area of freedom, security, and justice, in particular in order to facilitate the full application of the principle of mutual recognition. The mechanism displays potential to install and strengthen mutual confidence in the respective member state systems. This trust may indeed be a prerequisite for effective implementation and enforcement of the very sensitive obligations established

within an area of freedom, security, and justice. However, non-binding peer-review also creates a potential slippage of competences and accidental institutional empowerment. Particularly, the procedure may bring about a degree of *de facto* interpretation of EU law as well as normative adaptation. Article 70 TFEU mirrors a more general turn to less formalized means of enforcement in the EU. They supplement the Commission's general and binding enforcement powers. Significantly, they provide more easily employable ways of ensuring compliance and of gathering information on whether and how EU law is being applied. The described turn is illustrated by the themes described and analysed in chapter six on: 'The Emergence of Non-Binding, Auxiliary Enforcement Procedures: Expert Management of Compliance with Directives'. In addition, the Commission has established a comprehensive system of cooperation between the Commission and national authorities with a view to facilitating practical solutions to compliance problems. The fifth contribution this book makes to existing literature on centralized enforcement is to account for these turns and to assess the implications they have for the overall understanding of the Commission's role in ensuring compliance with EU law and how it executes its task as guardian.

Chapter seven ties together the themes of the various chapters. It argues that the enforcement stage shares many features with earlier steps in the legislative process. These include flexibility and deliberation. Finally, it places the Commission's enforcement function in the broader context of the EU policy process.

2. Research Methodologies

Enforcement of EU law has received considerable academic attention in recent years by lawyers and political scientists alike. Early legal literature includes Audretsch's monograph *Supervision in European Community Law* first published in 1978.⁴ Since then, a number of journal articles and monographs have examined the general EU infringement procedure or specific procedural aspects thereof.⁵ Recent publications by Borzsák,

⁴ HAH Audretsch, *Supervision in European Community Law* (Elsevier Science Publishers BV, 1986).

⁵ A Barav, 'Failure of Member States to Fulfil their Obligations under Community Law' (1975) *Common Market Law Review* 12, 369–83; A Evans, 'The Enforcement Procedure of Article 169 EC: Commission Discretion' (1979) *European Law Review* 4:6, 442–56; A Dashwood and

Hedemann-Robinson, and Wennerås look closer at enforcement of EU environmental law.⁶ Rawlings, Harlow, and Smith have raised pertinent questions pertaining to good governance, transparency, and legitimacy in relation to the general infringement procedure and the Commission's exercise of powers.⁷ More recently, lawyers and political scientists alike interested in enforcement of EU law have also drawn on the work of international law scholars Chayes and Chayes.⁸

R White, 'Enforcement Actions under Articles 169 and 170 EEC' (1989) *European Law Review* 14, 388–412; G Tesaro, 'Remedies for Infringement of Community Law by Member States' in W van Gerwen and M Zuleeg (eds.), *Sanktionen als Mittel zur Durchsetzung des Gemeinschaftsrechts* (Bundesanzeiger, 1996); M Mendrinou, 'Non-Compliance and the European Commission's Role in Integration' (1996) *Journal of European Public Policy* 3:1, 1–22; AJG Ibáñez, 'A Deeper Insight into Article 169' *Harvard Jean Monnet Working Paper* 11/98; AJG Ibáñez, *The Administrative Supervision and Enforcement of EC Law* (Hart, 1999); M Zürn and C Joerges (eds.), *Law and Governance in Postnational Europe, Compliance Beyond the Nation-State* (Cambridge University Press, 2004); R Rawlings, 'Engaged Elites: Citizen Action and Institutional Attitudes in Commission Enforcement' in C Kilpatrick, T Novitz, and P Skidmore (eds.), *The Future of Remedies in Europe* (Hart Publishing, 2000); MA Theodossiou, 'An Analysis of the recent response of the Community to non-compliance with Court of Justice judgments: Article 228(2) E.C.' (2002) *European Law Review* 27, 25–46; P Wennerås, 'A New Dawn for Commission Enforcement under Articles 226 and 228 EC: General and Persistent (GAP) Infringements, Lump Sums and Penalty Payments' (2006) *Common Market Law Review* 43, 31–62; I Kilbey, 'Financial Penalties under Article 228(2) EC: Excessive Complexity?' (2007) *Common Market Law Review* 44, 743–59; Stine Andersen, 'Procedural Overview and Substantive Comments on Articles 226 and 228 EC' (2008) *Yearbook of European Law* 27, 121–66; L Prete and B Smuders, 'The Coming of Age of Infringement Proceedings' (2010) *Common Market Law Review* 47, 9–61; M Smith, 'Inter-institutional Dialogue and the Establishment of Enforcement Norms: A Decade of Financial Penalties under Article 228 EC (now Article 260 TFEU)' (2010) *European Public Law* 16, 547–70; and I Kilbey, 'The interpretation of Article 260 TFEU (ex 228 EC)' (2010) *European Law Review* 35, 370–86.

⁶ L Borzsák, *The Impact of Environmental Concerns on the Public Enforcement Mechanism under EU* (Wolters Kluwer, 2011); P Wennerås, *The Enforcement of EC Environmental Law* (Oxford University Press, 2007); M Hedemann-Robinson, *Enforcement of European Union Environmental Law: Legal Issues and Challenges* (Routledge-Cavendish, 2006); and M Hedemann-Robinson, 'Article 228(2) EC and the Enforcement of EC Environmental Law: A Case of Environmental Justice Delayed and Denied? An Analysis of Recent Legal Developments' (2006) *European Environmental Law Review* 15:11, 312–42.

⁷ R Rawlings and C Harlow, 'Accountability and Law Enforcement: the Centralised EU Infringement Procedure' (2006) *European Law Review* 31, 447–75; M Smith, *Centralised Enforcement, Legitimacy and Good Governance in the EU* (Routledge Cavendish, 2009); and M Smith, 'Enforcement, Monitoring, Verification, Outsourcing: the Decline and Decline of the Infringement Process' (2008) *European Law Review* 33, 777–802.

⁸ A Chayes and AH Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Harvard University Press, 1995). See not least L Borzsák, *The Impact of Environmental Concerns on the Public Enforcement Mechanism under EU* (Wolters Kluwer, 2011). For a literature survey see, eg, WC Bradford, 'International Legal Compliance: Surveying the Discipline'

2.1 *Procedural law, governance, and constitutional theory*

Chapters two and three provide descriptive procedural accounts of Articles 258 and 260 TFEU. The analyses will inevitably touch upon some of the same elements that the general literature on the infringement procedure addresses. However, chapters two and three also contain comments on legitimacy and efficiency. The main theoretical emphases in those chapters are on EU constitutional law and governance theory. In chapter five it is argued, among other things, that there are points of functional overlap between enforcement and certain EU implementing measures. This type of argument, as well as the arguments made in the chapter on the legality of establishing infringement procedures in secondary law, touch upon the distribution of powers to (and between) the EU institutions as well as the legality of delegation of power, ie, two central issues in EU constitutional law. These questions have not hitherto been addressed comprehensively in EU enforcement literature. The legal questions ultimately concern the institutional structure of the EU polity. Because the analyses touch upon the distribution of powers, the case studies in turn become illustrative of the interplay between law and politics in practice. Another theme of this book is that of non-binding multilateral enforcement mechanisms established on an ad hoc basis. This type of enforcement method raises some of the same questions often addressed in new governance literature. For instance, who sets the agenda, which actors shape the policy outcomes, and are the policy outcomes *de facto* binding or norm-setting?

2.2 *Political science, international relations, and international law theory*

The legal foundations of the EU are ‘instruments of international law’.⁹ Moreover, the EU has been conceptualized within the terms of various frameworks including that of public international law. Still, significant differences persist in terms of organization and authority and the EU is most often referred to as a third and *sui generis* entity. It is the special features of supranationalism such as the institutionalization of autonomous legislative, judicial, and executive powers which set apart the EU from

ExpressO Preprint Series Working Paper 2004/331. For a survey and analysis see H Koh, ‘Why Do Nations Obey International Law?’ (1997) *Yale Law Journal* 106, 2599–659.

⁹ AA Levasseur and RE Scott, *The Law of the European Union—A New Constitutional Order* (Carolina Academic Press, 2001), 341.