



**The Impact of Environmental Concerns
on the Public Enforcement
Mechanism under EU Law**
Environmental Protection in the 25th Hour

By Levente Borzsák



Wolters Kluwer

Law & Business

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- to increase the access to environmental and energy information for students, academics, non-governmental organisations, government institutions, and business;
- to facilitate cooperation between academic and non-academic communities in the field of energy and environmental law and policy throughout the world.

Áginak

ABOUT THE AUTHOR

Dr Levente Borzsák obtained a university degree in Law (JD) from the University of Eötvös Loránd in Budapest (Hungary) in 1998, and a Ph.D. in European Law from the European University Institute in Florence (Italy) in 2008.

He has worked both in the private sector in various law firms, as well as in the public sector. He has completed a traineeship at the legal implementation and enforcement unit of DG Environment within the European Commission and gained professional experience in the Hungarian Parliamentary Committee for Integration, in the European Commission as a desk officer for criminal justice, and in the European Parliament as a lawyer-linguist for several years. He speaks six European languages.

He is a member of the Society of Scientists and Scholars of the Hungarian Academy of Sciences and founding member of the International Social Sciences Network and of the Brussels Chapter of the EUI Alumni Association.

He currently works in the European Parliament in Brussels as Head of Service in the Directorate General for Personnel. He has given several presentations at conferences and in universities (Graz, Florence, Salzburg, Rome, Budapest, Aarhus). He is the author of several articles on the topics of national parliaments and the EU, European environmental policy and public enforcement.

LIST OF ABBREVIATIONS

Amsterdam Treaty	Treaty of Amsterdam amending the Treaty of the European Union, the Treaties establishing the European Communities and certain related acts, entered into force on 1 May 1999
AG	Advocate General
CAP	Common Agricultural Policy
CFI	Court of First Instance
COMM	Commission
COREPER	Committee of Permanent Representatives of the Member States
DG	Directorate General
EAP	Environmental Action Programme
EAW	European Arrest Warrant
EC	European Community, or (after a Treaty article) the EC Treaty after the Amsterdam Treaty
ECJ	European Court of Justice
ECSC	European Coal and Steel Community
ECSC Treaty	Treaty establishing the European Coal and Steel Community, entered into force on 23 July 1952, expired on 23 July 2002
EC Treaty	Treaty establishing the European Community: the new name of the EEC Treaty after the Maastricht Treaty
ECU	European Currency Unit
EEA	European Environment Agency
EEC	European Economic Community
EEC Treaty	Treaty establishing the European Economic Community, entered into force 1 January 1958. The Maastricht Treaty renamed it to Treaty establishing the European Community
EFTA	European Free Trade Area
EIA	environmental impact assessment
EIB	European Investment Bank
EMAS	Eco-Management and Audit Scheme

List of Abbreviations

EU	European Union, or (after a Treaty article) the Treaty on European Union after the Amsterdam Treaty
EUI	European University Institute
EUR	euro
Euratom Treaty	Treaty establishing the European Atomic Energy Community, entered into force on 1 January 1958
GAP	general and persistent infringement
GATT	General Agreement on Trade and Tariffs
GMO	genetically modified organism
IGC	Intergovernmental Conference
IMPEL	EU Network for the Implementation and Enforcement of Environmental Law
INECE	International Network on Environmental Compliance and Enforcement
JHA	Justice and Home Affairs
Lisbon Treaty	Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, entered into force on 1 December 2009
Maastricht Treaty	Treaty on European Union, entered into force on 1 November 1993
MEP	Member of Parliament
NEPI	new environmental policy instrument
NGO	non-governmental organisation
Reform Treaty	see Lisbon Treaty
SEA	Single European Act, entered into force on 1 July 1987
TEU	Treaty on European Union, entered into force on 1 December 2009
TFEU	Treaty on the Functioning of the European Union, entered into force on 1 December 2009
the Treaty	see TFEU
Treaty of Rome	see EEC Treaty
UK	United Kingdom
UNCED	United Nations Conference on Environment and Development
UNEP	United Nations Environment Programme
v.	versus
WTO	World Trade Organization

FOREWORD

Levente Borzsák's book brings together two topical themes in contemporary European Union law. The first is the EU's unique public enforcement procedure, and the second is the problem of environmental protection, and more specifically the difficulties of enforcing environmental laws and regulations.

Despite its distinctive role within the EU legal system, relatively little was written about the public enforcement procedure for many years. As Joseph Weiler noted many years ago, one of the distinctive features of the European Union is the closure of the kind of 'selective exit' which is possible within other international systems, where states may choose not to comply with some of the laws of a particular regime. Within the EU, the powerful role of the Commission, with its extensive discretion to pursue states for non-compliance with any area of EU law, plays an important part in the closure of selective exit, and is fundamental to the EU's unique set of enforcement mechanisms.

Despite the importance and distinctiveness of the EU's centralised enforcement procedure, however, few major scholarly works on the EU's infringement procedure have appeared until relatively recently. With the introduction of the penalty payment procedure in the *Maastricht Treaty*, however, interest in the infringement procedure has revived, and a number of interesting books and articles have appeared over the past decade by Carol Harlow, Richard Rawlings, Jonas Tallberg, Alberto Gil Ibáñez, Stine Andersen and Melanie Smith, amongst others. One of the themes of this literature is that the infringement procedure needs to be understood in a broader and less legalistic way, to take account of the multiple-functions of the Article 226–228 procedure. It is not only a legal enforcement procedure but part of a multifaceted strategy for managing compliance; it fulfils many roles other than simply taking Member States to task for violating EU laws and obligations.

Against the backdrop of this call in the literature for what might be called a more holistic understanding of the centralised EU enforcement procedure, Levente Borzsák's book strikes a different and original note. While his analysis does not overlook the many other strategies and tools the EU and the Commission possess for managing and encouraging compliance, he argues that we should value precisely the sharp, legal tools which are available within the centralised infringement procedure. These, in his view, are an essential component of any truly effective enforcement procedure, and many of the recommendations which he makes in the final chapter of the book are dedicated precisely to strengthening and sharpening

Foreword

further these legal tools. He pays close attention to the use and operation of the pecuniary penalty procedure, and makes various proposals for enhancing its scope and functioning.

The second topical theme of the book is that of environmental protection. Indeed, it seems that the author's normative commitments, and the source of the energy animating his legal analysis, stem from a deep concern about environmental degradation and the potential role of the EU in countering it. The statistics seem to speak for themselves, given that environmental cases comprise between one-fifth and one quarter of the infringement proceedings commenced or pending before the European Court of Justice. More generally, EU environmental law and policy have comprised a significant dimension of the EU's activities both internally and externally, over the past twenty-five years. While the book is concerned with reform of the EU's public enforcement procedure more generally, it uses the domain of environmental law enforcement in order to illustrate the seriousness of the problems of non-compliance, as well as the problems and weaknesses of the current infringement procedure.

The book draws these two themes together in a lively analysis of the dilemmas of environmental non-compliance, and the shortcomings of the EU's public enforcement procedure. It is a spirited, informative and practically minded account of an important area of contemporary EU law, and will be of interest to all of those concerned with EU environmental law and policy, as well as those who are interested in the public enforcement of EU law.

Gráinne de Búrca
Harvard Law School

PREFACE

Writing a book is an adventure. To begin with, it is a toy and an amusement; then it becomes a mistress, and then it becomes a master, and then a tyrant. The last phase is that just as you are about to be reconciled to your servitude, you kill the monster, and fling him out to the public.

Winston Churchill

This ‘monster’ is based on my doctoral thesis defended at the European University Institute in July 2008. The thesis grew out of an ambitious idea of exploring the ways in which Member States both find and exploit loopholes in the legal system of the European Union. At the beginning of the research, I was wondering how the EU could function without a strong enforcement body.

After reading an article by Doreen McBarnett and Christopher Whelan, I wanted to know more about creative compliance and how such legal ‘law avoidance’ could be prevented in the Union. Exploring the enforcement powers in the EU directed me to the role of the Commission and the infringement procedures. The public enforcement procedures, which are enshrined – among others – in the current Articles 258 and 260 of the *Treaty on the functioning of the European Union* (TFEU), offered an interesting opportunity to explore them in greater detail. Although there was already extensive legal literature on Article 258, the final solution, Article 260, seemed a relatively white area, where new exploration awaited the eager researcher of EU law.

During the writing of my doctoral thesis, I spent several years as a researcher at the European University Institute and the knowledge that I mastered there, together with the international research environment, proved to be invaluable for the theoretical part of such a dissertation. A case study which I wrote during the years at the European University Institute (EUI) was published in the *Journal of Environmental Law*. Although some parts of Chapter 3 and Chapter 6 of this book are taken from this earlier publication (*Punishing Member States or Influencing their Behaviour or Iudex (non) calculat?*), the more than nine years which have elapsed have enabled me to revise and fine-tune the views expressed therein.

I have also been working in the European Commission in DG Environment and DG Justice and Home Affairs and finally in the European Parliament. Whereas some of the comments in this book could not have been made without the experience

Preface

that I gained there, it has to be noted that all the views and ideas expressed in the following chapters are that of the author and not of the institutions.

Before turning to the introduction, let me clarify some issues that were of importance to the research.

STATISTICS

The statistical data concerning infringements used in the book are mainly taken from the annual reports of the Commission on monitoring the application of Community law. The Commission devised procedures in 1977 that have been improved on several occasions up to the point when, in 1984, the Commission published its *First Annual report on the application of Community law* in general. From that time on, it became an annual practice to publish data on the implementation of directives, detected infringements, improvements of the Commission's working methods, etc. These data include impressive tables in which the figures of infringements can be found broken down into Member States, sectors of EU law, stages reached and many more aspects. The problem which I have faced so many times is that these data are not always coherent or comparable with the figures for other years, or, alternatively, what one finds in the text is not exactly mirrored later on in the tables. Thus, working with these statistics and establishing trends based upon them cannot be complete in every instance. I have attempted to fill in the gaps in these statistics to the best of my knowledge; however, sometimes one has to face the fact that the statistical data are not up-to-date.

Developments, documents, decisions, communications, etc. in the research area were taken into account until June 2010.

MODIFICATION OF THE TREATIES

'Law must be stable and yet it cannot stand still' – argued Pound,¹ and in fifty years, the Founding Treaties went through several changes. Indeed, one of the most problematic issues I was faced with when I updated my earlier thesis was the great amount of modifications introduced by the *Treaty of Lisbon*. It not only changed the numbering of the articles, modified, repealed or replaced some of them, but in some cases even their content was 'distributed' between the two old-new Treaties. In addition to this amendment, during the period covered in this book, several earlier modifications to the Founding Treaties have been carried out, that have changed the numbering and sometimes also the content of their articles. In order that it is clear which form of an article is referred to, this book follows the system elaborated upon and used by the Court of Justice.

¹Pound (1923), 1.

According to this practice, articles before the entry into force of the *Amsterdam Treaty* (1 May 1999) are indicated as ‘Article 171 of the EC Treaty’, whereas articles after the amendment are named after the pattern ‘Article 228 EC’. The *Treaty of Lisbon*, mentioned above, came into force on 1 December 2009, and amended the Founding Treaties substantially. The new name of the *Treaty establishing the European Community* became the *Treaty on the Functioning of the European Union* (TFEU), while the name of the Treaty on European Union (TEU) remained the same. The numbering of the articles, however, of both treaties changed. If reference is made to the older form of the articles, then they are named as ‘Article 228 EC (now Article 260 TFEU)’ or ‘Article 3 EU (now Article 5 TEU)’.

This book focuses on two Treaty articles in particular: Articles 258 and 260 of the TFEU. Before the *Amsterdam Treaty* they were named as Articles 169 and 171 of the EC Treaty, and after it their numbering changed to Articles 226 and 228 EC. In quotations, sometimes a formula of ‘Article [258 TFEU]’ is used to mark that the citation originally had the old numbering, but it is Article 258 TFEU that we are talking about. Finally, if nothing else is indicated, articles are that of the TFEU in force on 1 September 2010.

Similarly, the name ‘European Community’ was replaced by a new legal entity, the European Union, whereas before the *Treaty of Lisbon*, both concepts existed in parallel and they had different competences. Throughout the book, therefore, I kept the names ‘Community’ and ‘Community law’ where they referred to an earlier stage of the European integration.

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I am particularly indebted to my thesis supervisor, Professor Gráinne de Búrca, who has always guided me towards the right path to writing a doctoral thesis, and has helped me with many useful comments when I felt blocked as to how to continue the writing, and thus helped it to arrive in its final shape. In addition, I wish to thank her for the honour of accepting to write the foreword. I am grateful to my professors of European law, who taught me in Budapest, Linz and Florence, and especially to my late friend, Professor Paul Mullen, who made invaluable comments on an earlier version of some parts of the thesis. I would like to express my thanks to numerous students at the EUJ, with whom I had enlightening conversations on issues which are touched upon in this book. The research was also made possible by the financial support of the Italian Ministry of Foreign Affairs.

I am happy to have worked with helpful librarians, especially Emir Lawless at the EUJ, Géza Hámori at the Court of Justice and Gergely Czuppon at the European Parliament without whose assistance the research would have been much more difficult. I would also like to thank Javier Ruiz-Tomas, who was my supervisor during the stage at DG Environment of the Commission and to all the colleagues I had the privilege to work with during my traineeship. I am grateful to Zsuzsanna Jámber for the clarifications concerning procedural law, to Márton Szűcs as regards the procedures at the European Court of Justice, as well as to the unit of the lawyer-linguists in the European Parliament for the fact that I have mastered an approach towards treaty amendments which helped me in finalising the last chapter. I am especially grateful to Chris Engert, for the devotion and the time he spent on bringing the doctoral thesis into a shape that can even please native English readers. This book would never have been written, had the jury at the European University Institute not found that it merited the award of a Ph.D. I am particularly grateful to Professors Gráinne de Búrca, Jane Holder, Bruno de Witte and Sibylle Grohs for their useful input and comments. I tried to include as many of their remarks in this book as possible. Thanks are also due to Karel van der Linde, Hanneke Verbeek and all the editing staff at Kluwer Law International for their flexibility, kindness and patience during the publishing process. Needless to say, that all remaining errors are mine.

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Levente Borzsák,
Brussels, 8 October 2010.

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