

Centralised Enforcement, Legitimacy and Good Governance in the EU

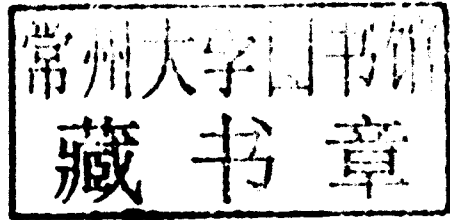
Melanie Smith



Routledge Research in EU Law

Centralised Enforcement, Legitimacy and Good Governance in the EU

Melanie Smith



First published 2010
by Routledge
2 Park Square, Milton Park, Abingdon, Oxon, OX14 4RN

Simultaneously published in the USA and Canada
by Routledge
270 Madison Avenue, New York, NY 10016

Routledge is an imprint of the Taylor & Francis Group, an informa business

© 2010 Melanie Smith

Typeset in Garamond by RefineCatch Limited, Bungay, Suffolk
Printed and bound in Great Britain by
CPI Antony Rowe, Chippenham, Wiltshire

All rights reserved. No part of this book may be reprinted,
or reproduced or utilised in any form or by any electronic,
mechanical or other means, now known or hereafter
invented, including photocopying and recording, or in any
information storage or retrieval system, without permission
in writing from the publishers.

British Library Cataloguing in Publication Data

A catalogue record for this book is available from the British Library

Library of Congress Cataloging in Publication Data

Smith, Melanie K.

Centralised enforcement, legitimacy, and good governance in the EU /
Melanie Smith.

p. cm.

Includes bibliographical references.

1. Police power—European Union countries. 2. European
Commission. 3. Law enforcement—European Union countries.
4. Legitimacy of government—European Union countries.
5. European Union countries—Politics and government. I. Title.

KJE971.5.S65 2009

342.24'0418—dc22

2009008442

ISBN 10: 0-415-46784-5 (hbk)

ISBN 10: 0-203-87239-8 (ebk)

ISBN 13: 978-0-415-46784-1 (hbk)

ISBN 13: 978-0-203-87239-0 (ebk)

Centralised Enforcement, Legitimacy and Good Governance in the EU

Article 226 EC is the central mechanism of enforcement in the EC Treaty, and has remained unchanged since the original Treaty of Rome. It provides the European Commission, as guardian of the Treaty, with a broad power of policing Member States' conduct. Article 226 has been traditionally characterised as an arena of secretive negotiation focused on the sole function of effective enforcement. This study seeks to move beyond this approach by characterising Article 226 as a multi-functional mechanism within the Treaty. It does this by examining the central mechanism of enforcement through the normative lenses of legitimacy, good administration and good governance.

Centralised Enforcement, Legitimacy and Good Governance in the EU is interdisciplinary in nature, examining law in its political context. It focuses on how the institutions interact and react to competing policy pressures, and explores the tensions that lie at the heart of legitimacy in the actions of public actors by engaging with concepts such as democracy, legitimacy and good administration.

Scholars and policy-makers whose work explores Article 226 will find this work especially relevant. It will also appeal to those who are interested in enforcement and regulation in the international/EU arena, as well as those whose work considers concepts such as good governance, legitimacy and accountability in the EU. It is also relevant to scholars engaged in the study of institutions and processes of interaction and change.

Dr Melanie Smith is a Lecturer at the Law School, Cardiff University, UK.

Routledge Research in EU Law

Forthcoming titles in this series include:

EU External Relations and Systems of Governance (2009)

The CFSP, Euro-Mediterranean Partnership and migration

Paul James Cardwell

Criminal Law and Policy in the European Union (2010)

Samuli Miittinen

Human Rights and Minority Rights in the European Union (2010)

Kirsten Sboraka

New Governance and the European Strategy for Employment (2010)

Samantha Velluti

For my Mother and Father

Preface and acknowledgements

This book is based upon a PhD thesis entitled 'Good Governance and Legitimacy in the EU: The Role of Article 226 EC', which was awarded a doctorate in June 2007. As such, it is important that I acknowledge and give thanks to numerous people who have helped me throughout the period of my doctoral studies. I am most grateful to my supervisor, Professor Jo Shaw, for all of her constructive feedback and advice throughout my doctoral studies in relation to the subject matter of my PhD, and for supporting my academic development more generally. I am always inspired by her never-ending energy, application and dedication to her work. I would also like to acknowledge the important contribution made by the University of Manchester and the University of Edinburgh to my PhD studies. Without the financial support of both of these institutions, completion of the PhD and thus the eventual production of this monograph would not have been possible.

I am particularly grateful to Professor Richard Rawlings. First, through his teaching at the London School of Economics, and later through numerous discussions, he inspired my interest in this topic and encouraged me to pursue a doctorate. I would like to thank him for all of his support, guidance and his insightful comments and criticism of my ideas, and for continuing to give me his time whenever I needed it. I would also like to thank Professor Conor Gearty for his support throughout all of my academic studies and for always being available to give the necessary word of encouragement when required.

This book was written at a time of constitutional and legal uncertainty. The period of active research (2004 to 2009) witnessed a number of attempts at Treaty reform, only for them to fail in referenda in various Member States. At the time of finalising the book, the Lisbon Treaty had been rejected by Ireland, but after further negotiations there appeared to be a prospect of yet another referendum. In order to try to cope with this legal uncertainty, this monograph includes Lisbon Treaty amendments where relevant to the substance of the discussion of Article 226. A table of equivalences has also been provided in order to assist the reader with the renumbering of the Treaties should Lisbon be ratified.

Some material contained in Chapter 5 and Chapter 7 of this book first appeared in M Smith, 'Enforcement, monitoring, verification, outsourcing: the decline and decline of the infringement process' (2008) 33 *European Law Review* 777 and has been reproduced with the permission of Sweet & Maxwell.

Figures

1.1	Method of detection of all suspected infringements (1998–2007)	8
3.1	Framework of analysis	78
5.1	Article 226 cases under examination by ECJ, by sector (2007)	125
5.2	Article 228 cases referred to ECJ – top two sectors (1998–2007)	125
5.3	Total number of cases detected by sector (Commission detection) (2007)	126
5.4	Referrals to the ECJ under Article 228 (1998–2007)	128
5.5	Directives as the main source of infringements (1998–2007)	129
5.6	Types of infringements of directives (1998–2007)	129
5.7	Method of detection of all suspected infringements (1998–2007)	134
5.8	Number of cases by stage of infringement process (1998–2007)	139
6.1	Percentage of complaints for non-fulfilment of Article 226 obligations (1995–2007)	166
A1.1	Article 226 cases by sector (2004)	229

Tables

1.1	The different functions of Article 226	15
3.1	Interlocking concepts of good administration, good governance and legitimacy	79
5.1	Priority criteria	123
5.2	Impact of enlargement	155
6.1	Summary of relevant facts as they appear after the Ombudsman's investigation	178
6.2	Interlocking concepts of good administration, good governance and legitimacy	189
A1.1	Table of Commission interviews	230
A1.2	A sample of questions asked of all of the Commission interviewees	230
A1.3	Other elite interviews	232
A1.4	Interview, Mr Olivier Verhecke	232

Table of equivalences

<i>Current numbering</i>	<i>Post Lisbon numbering</i>	
<i>TEC</i>	<i>TFEU</i>	<i>TEU</i>
Article 10		Article 4 (3)
Article 22	Article 24	
Article 82	Article 102	
Article 83	Article 103	
Article 84	Article 104	
Article 85	Article 105	
Article 88	Article 108	
Article 195	Article 228	
Article 211 (repealed)		Article 17
Article 220 (repealed)	Article 263	
Article 226	Article 258	
Article 227	Article 259	
Article 228	Article 260	
Article 230	Article 263	
Article 232	Article 265	
Article 253	Article 296	
Article 255	Article 15	

TEC – Treaty on European Community
TFEU – Treaty on the Functioning of the European Union
TEU – Treaty on European Union

Table of cases

European Court of Justice cases (numerical order)

Case 7/61 <i>Commission v Italy</i> [1961] ECR 317	45
Case 25/62 <i>Plaumann & Co v Commission</i> [1963] ECR 95	26
Case 48/65 <i>Lütticke v Commission</i> [1966] ECR 19	46, 169
Case 7/68 <i>Commission v Italy</i> [1968] ECR 428	45
Case 7/69 <i>Commission v Italy</i> [1970] ECR 111	44
Case 29/69 <i>Stauder v City of Ulm</i> [1969] ECR 419	28
Case 11/70 <i>Internationale Handelsgesellschaft v Einfuhr- und Vorratstelle für Getreide und Futtermittel</i> [1970] ECR 1125	27
Case 141/78 <i>France v UK</i> [1979] ECR 2923	7
Case 232/78 <i>Commission v France</i> [1979] ECR 2729	44
Case 44/79 <i>Hauer v Land Rheinland-Pfalz</i> [1979] ECR 3727	27
Case 102/79 <i>Commission v Belgium</i> [1980] ECR 1473	133
Case 96/81 <i>Commission v Netherlands</i> [1982] ECR 1791	131
Case 29/84 <i>Commission v Germany</i> [1985] ECR 1661	133
Case 293/85 <i>Commission v Belgium</i> [1988] ECR 305	45
Case 240/86 <i>Commission v Greece</i> [1988] ECR 1835	45
Case 226/87 <i>Commission v Greece</i> [1988] ECR 3611	46
Case 247/87 <i>Star Fruit v Commission</i> [1989] ECR 291	46, 169
Case C-35/88 <i>Commission v Greece</i> [1990] ECR I-3125	132
Case C-64/88 <i>Commission v France</i> [1991] ECR I-272	107
Case C-48/89 <i>Commission v Italy</i> [1990] ECR I-2425	132
Case C-87/89 <i>Sonito v Commission</i> [1990] ECR I-1981	146, 169
Case C-96/89 <i>Commission v Netherlands</i> [1991] ECR I-2461	45
Case C-146/89 <i>Commission v UK</i> [1991] ECR 3533	46
Case C-374/89 <i>Commission v Belgium</i> [1991] ECR I-367	132
Case C-56/90 <i>Commission v UK</i> [1993] ECR I-4109	45
Case C-255/90 P <i>Louis Barbán v European Parliament</i> [1992] ECR II-2253	37
Case C-431/92 <i>Commission v Germany</i> [1995] ECR I-2189	169
Case C-191/95 <i>Commission v Germany</i> [1998] ECR I-5449	45
Case C-265/95 <i>Commission v France</i> [1997] ECR I-6959	43
Case C-388/95 <i>Belgium v Spain</i> [2000] ECR I-3123	7
Case C-3/96 <i>Commission v Netherlands</i> [1998] ECR I-3931	45
Case C-328/96 <i>Commission v Austria</i> [1999] ECR I-7479	45
Case C-387/97 <i>Commission v Greece</i> [2000] ECR I-5047	6, 91, 92, 128
Case C-376/98 <i>Germany v European Parliament and Council</i> [2000] ECR I-8419	27
Case C-50/00 P <i>Unión de Pequeños Agricultores v Council</i> [2002] ECR I-6677	48, 124
Case C-338/00 P <i>Volksvagen AG v Commission</i> [2003] ECR I-9189	37
Case C-224/01 <i>Köbler v Austria</i> [2003] ECR I-10239	124

Case C-278/01 <i>Commission v Spain</i> [2003] ECR I-14141	92, 128, 216
Case C-494/01 <i>Commission v Ireland</i> [2005] ECR I-3331	45
Case C-141/02 P <i>Commission v T-Mobile Austria GmbH, formerly max.mobil Telekommunikation Service GmbH</i> [2005] ECR I-1283	42, 204
Case C-304/02 <i>Commission v France</i> [2005] ECR I-06263	92, 107, 128, 130
Case C-320/03 R <i>Commission v Austria</i> [2005] ECR I-9871	106
Case C-344/03 <i>Commission v Finland</i> [2005] ECR I-11033	106
Case C-145/04 <i>Spain v UK</i> [2006] ECR I-7917	7
Case C-177/04 <i>Commission v France</i> [2006] ECR I-02461	92, 128
Case C-70/06 <i>Commission v Portugal</i> [2008] ECR I-1	92, 128
Case C-121/07 <i>Commission v France</i> [2008] 9 December 2008 nyr	92, 128

Court of First Instance cases (in numerical order)

Case T-167/94 <i>Detlef Nölle v Council</i> [1995] ECR II-2589	37
Case T-105/95 <i>WWF UK v Commission</i> [1997] ECR II-313	31, 35
Case T-174/95 <i>Svenska Journalistförbundet v Council</i> [1998] ECR II-2289	33
Case T-194/95 <i>Carvel and Guardian v Council</i> [1995] ECR II-2765	31
Case T-124/96 <i>Interpore Im-und Export GmbH v Commission</i> [1998] ECR II-231	33
Case T-182/97 <i>Smanor SA v Commission</i> [1998] ECR II-271	42, 46
Case T-188/97 <i>Rothmans International v Commission</i> [1999] ECR II-2463	31
Case T-309/97 <i>Bavarian Lager Co v Commission</i> [1999] ECR II-3217	35
Case T-14/98 <i>Hantala v Council</i> [1999] ECR II-2489	31
Case T-54/99 <i>max.mobil Telekommunikation Service GmbH v Commission</i> [2002] ECR II-313	39, 40
Case T-191/99 <i>Petrie and Others v Commission</i> [2001] ECR II-3677	35, 194
Case T-211/00 <i>Kuijjer v Council</i> [2002] ECR II-1729	31
Joined Cases T-392/02 and T-392/02 R <i>Solvay Pharmaceuticals BV v Council</i> [2003] ECR II-1825	37
Case T-139/06 <i>France v Commission</i> (action brought on 12 May 2006)	92
Case T-412/05 'M' v <i>Ombudsman</i> [2008] 24 September 2008 nyr	182

European Court of Human Rights

Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v Ireland Application

No 45036/98 [2006] 42 EHRR 1	26
------------------------------	----

Abbreviations

CFI	Court of First Instance
CGAB	Code of Good Administrative Behaviour
DG	Directorate General
EC	European Community
ECJ	European Court of Justice
ECSC	European Coal and Steel Community
EIA	Environmental Impact Assessment
EU	European Union
IGC	Intergovernmental Conference
MEP	Member of the European Parliament
NGO	non-governmental organisation
SG	Secretariat General
US	United States
WPG	White Paper on Governance

Contents

<i>Preface and Acknowledgements</i>	vii
<i>Figures</i>	xiii
<i>Tables</i>	xiv
<i>Table of equivalences</i>	xv
<i>Table of cases</i>	xvi
<i>Abbreviations</i>	xviii
1 Introduction	1
<i>The centralised enforcement provisions</i>	3
<i>Previous research on the enforcement mechanism</i>	10
<i>The focus of the book</i>	15
<i>Research approach</i>	18
2 Mind the accountability gap – administrative law and legitimate governance	21
<i>An introduction to administrative law in the EU</i>	23
Judicial review of EU institutional decision-making	25
Grounds of review	27
<i>Two key principles of administrative law: transparency and the obligation to give reasons</i>	29
Transparency in the EU	30
The obligation to give reasons for decisions	32
Transparency and giving reasons in infringement investigations	34
<i>The attempt to develop new administrative rights</i>	36
The principle of sound administration	37
The principle of diligent complaint handling	38
Administrative law principles and Article 226	43
<i>Concluding remarks</i>	47

x	<i>Centralised Enforcement, Legitimacy and Good Governance in the EU</i>	
3	Conceptualising democracy, legitimacy and the development of good governance in the EU	50
	<i>The challenge of terminology</i>	51
	The 'state model' of democracy	52
	<i>Conceptual tools to aid the discussion of democracy and legitimacy</i>	54
	Focusing on the 'key pillars' of democracy	55
	A liberal democratic emphasis	57
	Democracy and citizen control	58
	Categorisation of approaches: reconciling differences	60
	Technocratic governance: the non-majoritarian approach	62
	<i>The introduction of 'good governance' as a tool to redress the legitimacy deficit</i>	64
	A changing political vision of Europe	65
	The background to the White Paper on Governance	66
	The underlying normative vision and the five principles of good governance	67
	The principle of openness	68
	The principle of participation	69
	The principle of accountability	70
	The principles of effectiveness and coherence	72
	The WPG and its five principles: is this 'good governance'?	73
	The WPG and the enforcement action	75
	<i>A framework for evaluating policy and practice in Article 226</i>	77
	<i>Concluding remarks</i>	81
4	Political enforcement, neutral guardianship and legal uniformity	83
	<i>The European Commission: an introduction</i>	84
	The formal Treaty process and Commission discretion	86
	Buttressing the enforcement mechanism – financial penalties under Article 228 EC	89
	Attempts to reform the Treaty language	93
	<i>Operational problems with the infringement mechanism</i>	97
	Scale	97
	Reform of administrative procedures	98
	One size fits all: a horizontal approach with vertical challenges	105
	<i>Conflicting roles of the Commission within Article 226</i>	110
	The guardian of the Treaties – enforcement and compliance	111
	An efficient administration – complaint handling and case investigation	112
	An executive power – policy development and control	114
	<i>Concluding remarks</i>	117

5	The policy on centralised enforcement: technocratic legitimacy, special relationships and the turn from good governance	119
	<i>The two-tier approach to enforcement: prevention and correction</i>	120
	Prevention of infringements	121
	Correction of infringements – developing a strategy of prioritisation	123
	The Commission and Member State ‘special relationship’	131
	The citizen as enforcer	132
	<i>Enforcement policy and good governance principles: increasing legitimacy and good governance in the management of Article 226?</i>	134
	Coherence, identifiable (policy) rules and effectiveness	135
	Openness, accountability and justifications for decisions	141
	Participation, consent and recognition	148
	<i>After good governance: the Commission’s response to enlargement</i>	149
	Prioritisation and acceleration	151
	The pilot scheme	152
	Continuing the good governance agenda?	154
	Implications of the new process	156
	<i>Concluding remarks</i>	158
6	The impact of the European Ombudsman: breaking down barriers to procedural legitimacy	161
	<i>An introduction to the Office of the European Ombudsman</i>	162
	Powers and process	163
	Overview of numbers of complaints for non-fulfilment of Article 226 obligations	165
	<i>Re-moulding the process through inquiries and complaint handling</i>	168
	The quest for full and frank reasoning	168
	The own initiative inquiry: concentration on basic procedural guarantees	171
	A genuine opportunity to respond	172
	Proper consideration of all of the relevant factors	174
	<i>A detailed case study: the Parga complaint</i>	175
	The facts according to the complainant	176
	The complaint to the Ombudsman	178
	The inquiry	179
	The final decision	181