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ENFORCEMENT  
OF EUROPEAN UNION  
ENVIRONMENTAL LAW

LEGAL ISSUES AND CHALLENGES

# ENFORCEMENT OF EUROPEAN UNION ENVIRONMENTAL LAW: LEGAL ISSUES AND CHALLENGES

Without their proper enforcement, governmental commitments to improving the state of the environment are prone to remain but ‘greenspeak’. The European Union has adopted a raft of legislative instruments intended to enhance standards to protect the environment, but to what extent has it developed suitable mechanisms to ensure that the EU Member States adhere to its environmental protection legislation? This book examines the subject of EU environmental law enforcement by providing a detailed account of the various legal and administrative arrangements at EU level that may be used for the purpose of upholding EU environmental norms, and assesses the practical impact of those arrangements.

Spanning three parts, the book focuses on the principal sources of EU environmental law enforcement: namely, the role of the European Commission, the possibilities for private law enforcement and the responsibilities of Member State national authorities. In seeking to provide a comprehensive account of the current state of and developments affecting EU environmental law enforcement, it aims to provide environmental legal scholars and practitioners with a useful reference tool as well as a contribution to legal and political debates on the subject.

**Martin Hedemann-Robinson** has been a Lecturer in Law at Brunel University in London since 1993. During his tenure at Brunel, he has also worked as an administrator in the Environment Directorate-General of the European Commission between 2001–2003 dealing with legal issues concerning waste management.



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*Martin Hedemann-Robinson*



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For Sam, Freya and Jocelyn,  
and in memory of my late grandfather,  
Walter Hedemann.



# PREFACE

Without their proper enforcement, governmental commitments to improving the state of the environment are prone to remain but ‘greenspeak’. Over the last 30 years and more, the European Union has developed a raft of legislation intended to enhance standards to protect the environment. The main purpose of this book is to provide an overview of the current legal principles of the European Union on how EU environmental law may be enforced. It aims to examine the subject of EU environmental law enforcement by providing a detailed account of the various legal arrangements that may be used for the purpose of upholding EU environmental norms as well as by providing a critical appraisal of the practical impact of those arrangements, considering, in particular, issues of efficacy and accountability. Spanning three parts, the book focuses on the principal modes of EU environmental law enforcement: namely, the role of the European Commission, possibilities for private law enforcement and the role of national authorities.

In Part One, in addition to detailing the key legal considerations that affect the European Commission’s prosecution of infringement proceedings against Member States acting in violation of EU environmental law, the author draws from his own professional experience within the Commission’s Environment Directorate General of the practical and systemic limitations faced by this EU institution with regard to law enforcement. In Part Two, the author seeks to appraise the possibilities available under EU law for private individuals to enforce EU environmental law, taking account of recent legal developments emanating from the European Court of Justice, recent European Community directives such as those on environmental damage and access to environmental information as well as new initiatives on human rights protection. In Part Three, the book examines the requirements and structures in place at EU level which may serve to assist national authorities involved in environmental protection to make use of EU environmental law.

This is the first time to my knowledge that a publication of this sort has examined EU environmental law enforcement in such a broad manner. It is hoped that it will provide a useful reference point of key information as well as a trigger for legal and political debate at academic and legal professional



## PREFACE

levels. Too little light is being shone into the nooks and crevices of this important evolving legal area. There are many heartening as well as disturbing aspects concerning the legal arrangements relating to EU environmental law enforcement. The heartening aspects relate mostly to the recent opening up of possibilities for civil society to play a more active and serious legal role in supervision of EU environmental law, in large part due to the Union's commitment to implementing the UNECE 1998 Århus Convention. In addition, recent EC legislative initiatives have sought to crystallize EU Member State authorities' enforcement role and responsibilities more effectively. The disturbing aspects concern the continued undue reliance of the EU on the European Commission to act as its environmental watchdog, an expectation that has always been over-ambitious and has brought with it special problems of its own. Whether the recent legislative changes introduced and being introduced at EC level to the area of environmental law enforcement are adequate to meet the challenges of substantial enlargement of the Union's membership is an open question. I have intended the book to be up to date as at the end of 2005.

Martin Hedemann-Robinson  
London, January 2006

# CONTENTS

<i>Preface</i>	vii
<i>Table of cases</i>	xix
<i>Table of statutes</i>	xxv
<i>Abbreviations and acronyms</i>	xxxiii

<b>1</b>	<b>Introduction</b>	<b>1</b>
----------	---------------------	----------

- 1.1 Aims and objectives 1
- 1.2 Legal architecture and terminology of the EU: a brief overview 9
  - 1.2.1 EU environmental law: some definitions and clarifications 10
    - 1.2.1.1 Historical developments: from EEC to EU 11
    - 1.2.1.2 The EU's institutions 12
    - 1.2.1.3 The three pillar framework of the EU 13
    - 1.2.1.4 EU environmental policy and law 15
    - 1.2.1.5 Legal bases for EU environmental measures 16
    - 1.2.1.6 Types of EC environmental measures 19
  - 1.2.2 The 2004 European Union Constitution 21

## PART 1

<b>The role of the European Commission in enforcing EU Environmental Law</b>	<b>25</b>
--	-----------

<b>2</b>	<b>EU institutional enforcement of EU environmental law: the general legal framework</b>	<b>27</b>
----------	--	-----------

- 2.1 The role of the European Commission as primary law enforcer 29
- 2.2 Enforcement proceedings brought by the European Commission: Arts 226 and 228(2) EC 31

## CONTENTS

2.2.1	Structure and format of Art 226 EC proceedings	32
2.2.2	Structure and format of Art 228(2) EC ‘second round’ proceedings	35
2.3	Enforcement proceedings brought by a Member State: Art 227 EC	37
2.4	Types of breaches of EU environmental law	40
<b>3</b>	<b>Enforcement proceedings brought by the European Commission (1): Art 226 EC and ‘first round’ proceedings</b>	<b>45</b>
3.1	Detection of breaches of law	46
3.2	Overview of core elements of Commission enforcement actions	47
3.3	The pre-litigation phase	51
3.3.1	Evidence and onus of proof	52
3.3.2	Investigations and the role of Art 10 EC: duty of co-operation	57
3.3.3	Commission discretion in deciding to take legal action	59
3.3.3.1	Legal justification needed for bringing an action before the ECJ	60
3.3.3.2	Temporal aspects: delays in taking legal action and historical breaches	61
3.3.3.3	Collegiality and Commission decision making	65
3.3.3.4	Commission immunity from judicial review proceedings	68
3.3.4	Letter of formal notice (LFN): the first written warning	69
3.3.4.1	Purpose and degree of precision of LFN	70
3.3.4.2	Defendant’s observations regarding the LFN	74
3.3.5	Reasoned opinion (RO): the second written warning	75
3.3.5.1	General requirements and effects of the RO	76
3.3.5.2	Defendant’s observations regarding the RO	80
3.4	The litigation phase: application to the Court of Justice	85
3.4.1	Contents of the Court application	85
3.4.2	Temporal aspects of the litigation phase	88
3.5	Common defence submissions in environmental proceedings against Member States	89
3.5.1	Internal problems facing a Member State	92
3.5.2	The element of fault on the part of the defendant Member State	93
3.5.3	Breach by another Member State	93
3.5.4	<i>De minimis</i> -type arguments	94
3.5.5	Adequacy of implementation of EU environmental law	96
3.5.6	Temporal arguments	103
3.6	Interim relief and Art 226 proceedings	104

<b>4</b>	<b>Enforcement proceedings brought by the European Commission (2): Art 228 and ‘second round’ proceedings</b>	<b>112</b>
4.1	General legal framework of Art 228 EC	113
4.1.1	Art 228(1) EC	115
4.1.2	Art 228(2) EC	117
4.2	Commission guidance on financial penalties under Art 228(2) EC	117
4.3	Case law of the ECJ on Art 228(2) EC	124
4.3.1	<i>Kouroupitos (2)</i> (Case C–387/97)	125
4.3.1.1	Procedural and substantive issues	127
4.3.1.2	Determination of the penalty payment	132
4.3.2	<i>Spanish Bathing Waters (2)</i> (Case C–278/01)	137
4.3.2.1	Procedural and substantive issues	139
4.3.2.2	Determination of the penalty payment	144
4.3.3	<i>French Fishing Controls (2)</i> (Case C–304/02)	151
4.3.3.1	Procedural and substantive issues	151
4.3.3.2	Determination of the penalty payment and lump sum	152
4.4	Summary of established legal principles in respect of Art 228(2) EC proceedings	155
<b>5</b>	<b>Enforcement proceedings brought by the European Commission against Member States (3): Some critical reflections</b>	<b>159</b>
5.1	Investigation and detection of infringements	161
5.1.1	Investigatory and inspection tools	161
5.1.2	Resources issues	164
5.1.3	Complainants as sources of information on environmental law enforcement	165
5.2	Limitations of legal structures underpinning Arts 226/228 EC	167
5.2.1	Temporal aspects	167
5.2.1.1	Length of infringement proceedings	168
5.2.1.2	Interim measures	172
5.2.2	Legal sanctions	173
5.2.2.1	Sanctions and Art 226 EC	174
5.2.2.2	Sanctions and Art 228(2) EC	175
5.3	The European Commission and conflicts of interest	178
5.3.1	College of Commissioners	179
5.3.2	The level of Directorate-General	181
5.4	Prioritisation of cases and reform of the monitoring process	185
5.4.1	Commission responses to the issue of prioritisation	189
5.4.1.1	Recognition of the limits to Arts 226/228 EC and decentralisation of enforcement	189

## CONTENTS

5.4.1.2	Prioritising and improving handling of infringement casework	192
5.5	Transparency and accountability	196
5.5.1	Transparency of decision making	196
5.5.2	Accountability to complainants	199
5.6	Statistical information on EU environmental infringement cases	202
5.6.1	Statistical tables	203
5.6.2	Complaints	205
 <b>PART 2</b>		
<b>The role of private persons in enforcing EU environmental law</b>		<b>207</b>
<i>Section 1: Taking action at national level</i>		207
<b>6</b>	<b>Enforcement of EU environmental law at national level by private persons: general legal principles</b>	<b>209</b>
6.1	Direct effect and EU environmental law	213
6.1.1	General introduction	213
6.1.2	Criteria for direct effect and EU environmental directives	218
6.1.2.1	Sufficient precision	221
6.1.2.2	Unconditionality	223
6.1.2.3	Sufficient precision and unconditionality applied to environmental cases	225
6.1.2.4	Transposition deadline and direct effect	229
6.1.2.5	Subjective individual rights and direct effect	230
6.1.3	Applying direct effect of directives against public authorities	234
6.1.3.1	General points	234
6.1.3.2	Vertical effects	235
6.1.3.3	Limited Member State discretion and ‘vertical’ effects of directives	238
6.1.4	Reliance on directives against private persons	247
6.1.4.1	Inverse vertical effects of directives	248
6.1.4.2	Horizontal direct effect and directives	250
6.1.4.3	‘Triangular’ situations: indirect inverse effects	252
6.1.4.4	Incidental horizontal effects	255
6.2	Indirect effect and EU environmental law	261
6.2.1	General points	262
6.2.2	Indirect effect and criminal liability	264
6.3	Concluding remarks	266

<b>7</b>	<b>Access to justice at national level for breaches of EU environmental law (1): the role of the European Court of Justice</b>	<b>268</b>
7.1	General principles of procedural autonomy under EC law	269
7.2	Remedies at national level: general principles developed by the ECJ	271
7.2.1	Duties on national courts to provide remedies	271
7.2.2	Duties of non-judicial Member State authorities to provide adequate remedies	275
7.3	State liability for breaches of EC environmental law	278
7.3.1	General legal criteria for proving state liability	279
7.3.1.1	Rule of EC law must be intended to confer rights on individuals	282
7.3.1.2	Sufficiently serious breach of EC law	282
7.3.1.3	Attribution of liability	285
7.3.1.4	Loss and damage	285
7.3.1.5	Causation	286
7.3.2	State liability and EC environmental law	288
7.3.2.1	Rights intended to be created for individuals	288
7.3.2.2	Criterion of a 'sufficiently serious' breach	293
7.3.2.3	Direct causal link	295
7.3.2.4	Loss, damage and reparation	297
7.4	Concluding remarks	301
<b>8</b>	<b>Access to justice at national level for breaches of EU environmental law (2): EC legislation on access to national courts and environmental information</b>	<b>304</b>
8.1	Access to Justice in environmental matters and the EU	307
8.2	Proposed EC directive on access to justice in environmental matters	310
8.2.1	'Qualified entities'	311
8.2.2	The right to take environmental proceedings	313
8.2.3	Right to request an internal review	317
8.2.4	The role of direct effect and the Draft AJEM Directive	319
8.3	Other access to justice instruments in environmental matters at EU level	321
8.3.1	Access to justice in relation to environmental information and environmental decision making	322
8.3.2	Access to justice under Directive 2004/35 on environmental liability (EL Directive)	323
8.3.2.1	Rights of private entities to request action under the EL Directive	324

## CONTENTS

- 8.3.2.2 Right to subject competent authority's conduct to legal review under the EL Directive 327
- 8.3.2.3 Impact of EL Directive on access to environmental justice 328
- 8.4 Access to environmental information held by Member State authorities 330
  - 8.4.1 Directive 2003/4 on public access to environmental information (AEI Directive) 330
    - 8.4.1.1 Right of access to environmental information under the AEI Directive 331
    - 8.4.1.2 Public dissemination of environmental information under the AEI Directive 336
    - 8.4.1.3 Impact of AEI Directive on EU environmental law enforcement 341
- 8.5 Concluding remarks 344

### *Section 2: Taking action at EU level* 347

## **9 Private enforcement of EU environmental law at EU institutional level (1): access to justice and information** 349

- 9.1 Access to environmental justice at EU level 350
  - 9.1.1 Access to justice under the current EC Treaty system (pre-Århus Convention) 351
    - 9.1.1.1 Art 232 EC—legal proceedings in respect of a failure to act 353
    - 9.1.1.2 Art 230 EC—annulment proceedings 356
    - 9.1.1.3 Arts 235 and 288(2)—non-contractual liability of the Community institutions 365
    - 9.1.1.4 Art 234 EC—the preliminary ruling procedure 368
  - 9.1.2 The Draft Århus Regulation and access to environmental justice at EU level 370
    - 9.1.2.1 Material and personal scope of the Draft Århus Regulation's access to justice provisions 371
    - 9.1.2.2 Review procedures under the Draft Århus Regulation's access to justice provisions 375
- 9.2 Access to environmental information held by EU institutions 377
  - 9.2.1 Regulation 1049 on public access to information 379
    - 9.2.1.1 Scope and definitions 380
    - 9.2.1.2 Key procedural aspects 382
    - 9.2.1.3 Exceptions 385

9.2.2	Court of First Instance (CFI) rulings on access to information	388
9.2.3	The European Ombudsman (EO) and access to information	395
9.2.4	Access to information relating to infringement proceedings: practice of the Commission	399
9.2.5	The Draft Århus Regulation and access to environmental information	401
9.3	Impact of the EU's access to environmental justice and information framework in relation to EU Institutions: some reflections	403
9.3.1	Access to environmental justice at EU level: prospects	404
9.3.2	Access to environmental information at EU level: prospects	405
<b>10</b>	<b>Private enforcement of EU environmental law at EU institutional level (2): administrative complaints procedures and other possibilities</b>	<b>407</b>
10.1	The European Ombudsman (EO)	408
10.1.1	General remit and powers of the EO	411
10.1.1.1	The concept of maladministration	412
10.1.1.2	Legal powers of the EO	416
10.1.1.3	Exclusion of EO from legal proceedings	419
10.1.2	The EO's complaints procedure: key aspects	420
10.1.3	Complaints to the EO against the Commission in environmental cases	423
10.1.3.1	The EO's substantive analysis of EC environmental law	425
10.1.3.2	The EO's scrutiny of the European Commission's procedures in handling complaints about non-compliance with EC environmental law	426
10.2	The European Parliament (EP)	430
10.2.1	Right of petition	431
10.2.2	Parliamentary questions	434
10.2.3	EP temporary Committees of Inquiry	435
10.2.4	The EP and Art 226/228 EC infringement proceedings	436
10.3	The European Environment Agency (EEA)	436
10.4	The Council of the EU and individual Member States	438
10.5	Concluding remarks	439



**PART 3**

**The role of Member States in enforcing EU environmental law 443**

**11 Enforcement of EU environmental law by national authorities (1): general principles and environmental inspection responsibilities 445**

- 11.1 General implementation duties of national authorities under EC law 447
  - 11.1.1 Positive legal responsibilities of national authorities under Art 10 EC 447
  - 11.1.2 Passive legal responsibilities of national authorities under EC law 450
  - 11.1.3 The principle of subsidiarity 453
- 11.2 The IMPEL Network 454
  - 11.2.1 Overview of IMPEL's organisation and activities 455
  - 11.2.2 Origins and development of IMPEL 459
  - 11.2.3 Brief appraisal of IMPEL's impact 462
- 11.3 Recommendation 2001/331 on environmental inspections (EI Recommendation) 465
  - 11.3.1 General aspects: implementation and scope of the EI Recommendation 466
  - 11.3.2 The EI Recommendation's minimum criteria for inspections 469
    - 11.3.2.1 Planning 469
    - 11.3.2.2 Site visits 470
    - 11.3.2.3 Reporting 472
    - 11.3.2.4 Investigations of serious cases of non-compliance 473
- 11.4 Environmental inspections and EC environmental legislation: concluding remarks 474

**12 Enforcement of EU environmental law by national authorities (2): environmental civil liability 479**

- 12.1 The Council of Europe's 1993 Lugano Convention 481
- 12.2 Developments of EC environmental policy on environmental civil liability 485
- 12.3 Directive 2004/35 on environmental liability (EL Directive) 489
  - 12.3.1 Scope of liability under the EL Directive 492
    - 12.3.1.1 Operators of occupational activities 493
    - 12.3.1.2 Environmental damage 496
    - 12.3.1.3 Causation issues 497
    - 12.3.1.4 Fault and negligence 499
    - 12.3.1.5 Temporal scope of liability 501

## CONTENTS

12.3.2	Exceptions to liability	501
12.3.3	Extent of liability: an operator's specific obligations	502
12.3.3.1	Preventive action	503
12.3.3.2	Remedial action	504
12.3.3.3	Operator's financial liability for preventive and remedial action	507
12.3.4	Competent authorities: principal enforcers	508
12.3.5	Cross-border liability scenarios	511
12.3.6	Legal effects of the EL Directive	512
12.4	Environmental civil liability and the EU: concluding remarks	513
<b>13</b>	<b>Enforcement of EU environmental law by national authorities (3): environmental criminal liability</b>	<b>516</b>
13.1	1998 Council of Europe Convention on the Protection of the Environment through Criminal Law (PECL Convention) 1998	516
13.2	EU policy developments on environmental crime: the political and constitutional backdrop	520
13.3	The EU's third pillar legislative: the 2003 Framework Decision	525
13.4	Draft EC Directive on the Protection of the Environment through Criminal Law (Draft PECL Directive)	527
13.4.1	Environmental offences under the Draft PECL Directive	529
13.4.2	Sanctions under the Draft PECL Directive	532
13.4.3	Degree of proposed harmonisation under the Draft PECL Directive	532
13.5	The ECJ's ruling in Case C-176/03 <i>Commission v Council</i>	534
13.5.1	Appraisal of the ECJ's ruling in Case C-176/03 <i>Commission v Council</i>	000
13.6	Prospects for EU environmental criminal law?	546
<b>14</b>	<b>EU environmental law enforcement: reflections</b>	<b>549</b>
	<i>Bibliography</i>	559
	<i>Index</i>	565



# TABLE OF CASES

ACAV (Case T-138/98) .....	360
AF Con Management (Case T-160/03) .....	365
Allue (Case C-332/91) .....	392
Amsterdam Bulb BV (Case 50/76) .....	20, 218
An Taisce (Case T-461/93) .....	358–9, 389
Antillean Rice Mills (Cases T-480 & 483/93) .....	376
Arcaro (Case C-168/95) .....	100, 249, 264, 265, 449, 513, 531
Arnaud (Case C-131/92) .....	360
Asia Motor France (Case T-387/94) .....	376
Associazione Agricoltori della Provincia di Rovigo (Case T-117/94) .....	360
Atlanta (Case C-465/93) .....	369
Aubertin (Case C-29/94) .....	101
 Bavarian Lager Company (Case T-309/97) .....	 389, 391
Becker (Case 8/81) .....	220, 223–4, 226, 235
Bergaderm (Case C-352/98P) .....	365
Bernaldez (Case C-129/94) .....	258–9, 261
Bernardi (Cases T-479 & T-559/93) .....	353, 358, 367
Bettati (Case C-341/95) .....	369
Brasserie du Pecheur (Case C-46/93) .....	280, 281, 282–3, 283, 286, 365
Brinkmann (Case C-319/96) .....	279, 282, 284, 285, 286–7, 295
Brunner v European Union Treaty [1994] I CMLR 57 .....	536–7
BT (Case C-392/93) .....	284
Buralux SA (Cases T-475/93 and C-209/94P) .....	360
 Casati (Case 203/80) .....	 523
Centrosteeel (Case C-456/98) .....	266
CIA Security (Case C-194/94) .....	220, 228, 256–7, 258, 259
COFAZ (Case 169/84) .....	358
Commission v Austria (Case C-328/96) .....	77, 82
Commission v Belgium (Case 77/69) .....	92
Commission v Belgium (Case 293/85) .....	74, 81, 84
Commission v Belgium (Case 301/81) .....	76
Commission v Belgium (Case 342/82) .....	62
Commission v Belgium (Case C-42/89) .....	71, 111
Commission v Belgium (Case C-301/81) .....	98
Commission v Belgium (Case C-347/97) .....	93
Commission v Belgium (Cases 227–230/85) .....	117

# TABLE OF CASES

Commission v CEVA (Case C-198/03P) .....	365
Commission v Council (Case 22/70) .....	20
Commission v Council (Case C-155/91) .....	16
Commission v Council (Case C-176/03) .....	17, 28, 520, 523, 534–45, 547
Commission v Denmark (Case 211/81) .....	70, 71, 79, 86, 90
Commission v France (Case 7/71) .....	104
Commission v France (Case 232/78) .....	91, 92, 94
Commission v France (Case C-1/00) .....	39
Commission v France (Case C-333/99) .....	61–2
Commission v Germany (Case C-43/90) .....	86
Commission v Germany (Case C-57/89 and C-57/89R) (Leybucht litigation) .....	109–11, 172
Commission v Germany (Case C-59/89) .....	222
Commission v Germany (Case C-131/88) .....	221, 366
Commission v Germany (Case C-191/95) .....	67, 73, 391
Commission v Germany (Case C-198/97) .....	65, 67, 95, 181
Commission v Germany (Case C-217/97) .....	52–3, 101
Commission v Germany (Case C-262/95) .....	97
Commission v Germany (Case C-272/97) .....	67
Commission v Germany (Case C-361/88) .....	221–2
Commission v Germany (Case C-431/92) .....	98
Commission v Greece (Case 66/88) .....	58–9, 99, 297, 448, 523
Commission v Greece (Case 123/99) .....	92
Commission v Greece (Case 200/88) .....	77, 92
Commission v Greece (Case 240/86) .....	77
Commission v Greece (Case 272/86) .....	54
Commission v Greece (Case C-200/88) .....	63
Commission v Ireland (Case 74/82) .....	52, 77, 82–3
Commission v Ireland (Case C-13/00) .....	88, 92
Commission v Ireland (Case C-145/01) .....	70
Commission v Ireland (Case C-354/99) .....	59, 92, 99, 448, 523
Commission v Ireland (Case C-362/01) .....	75
Commission v Ireland (Case C-392/96) .....	53, 63, 72, 88, 91
Commission v Italy (Case 7/61) .....	77, 92
Commission v Italy (Case 7/68) .....	92
Commission v Italy (Case 39/72) .....	217–18
Commission v Italy (Case 193/80) .....	71
Commission v Italy (Case C-145/01) .....	73
Commission v Italy (Case C-279/94) .....	91
Commission v Luxembourg (Case C-473/93) .....	81–2, 116
Commission v Netherlands (Case 96/81) .....	52, 57–8, 97
Commission v Netherlands (Case 96/89) .....	63, 104
Commission v Netherlands (Case 160/82) .....	92
Commission v Netherlands (Case C-3/96) .....	52, 84–5, 86, 87, 90–1
Commission v Netherlands (Case C-75/91) .....	117
Commission v Portugal (Case C-247/89) .....	77, 81, 91
Commission v Portugal (Case C-392/99) .....	63–4, 101
Commission v Spain (Case C-71/97) .....	93
Commission v Spain (Case C-266/94) .....	78–9, 85
Commission v Spain (Case C-278/01) .....	36
Commission v Spain (Case C-414/97) .....	90
Commission v UK (Case 124/81) .....	79

## TABLE OF CASES

Commission v UK (Case 146/89) .....	61
Commission v UK (Case 416/85) .....	60
Commission v UK (Case C-56/90) .....	93, 103–4
Commission v UK (Case C-85/01) .....	140
Commission v UK (Case C-146/89) .....	94
Commission v UK (Case C-300/95) .....	52
Commission v UK (Case C-337/89) .....	71, 92, 102
Consten and Grundig (Cases 56 & 56/64) .....	134
Costa v ENEL (Case 6/64) .....	14, 215, 216
Costanzo (Case 103/88) .....	236, 451
Daihatsu (Case C-97/96) .....	250, 253
Danielsson (Case T-219/95R) .....	360, 361
Difesa della Cava (Case C-236/92) .....	220, 221, 223, 225–7, 244
Dillenkofer (Case C-178/94) .....	280, 281, 282, 283
Dori (Case C-91/92) .....	235, 250, 251, 263, 273
Dorsch Consult (C-54/96) .....	263
Draehmpahl (Case C-180/95) .....	272
Duke v GCE Reliance [1987] .....	263
El Corte Ingles (Case C-192/94) .....	250, 260
Emrich (Case C-371/89) .....	353
Enichem Base (Case 380/87) .....	225, 227–8, 233–4, 257, 258, 260
European Environmental Bureau (EEB) (Case T-94/04) .....	358, 360–1, 370, 404
European Parliament v Council (Case C-70/88) .....	17, 158, 545
European Parliament v Council (Case C-217/94) .....	17
European Parliament v Council (Joined Cases C-164 and 195/97) .....	16
Factortame (1) (Case C-213/89) .....	272
Factortame (3) (Case C-48/93) .....	282
Fornasar (Case C-318/98) .....	247, 275
Foster (Case C-188/89) .....	236, 512
Foto Frost (Case 314/85) .....	369
Francovich (Cases C-6 & 9/90) .....	224, 279–81, 282, 283, 285, 288, 298, 301, 329, 452, 512
French Fishing Controls (2) (Case C-304/02) .....	36, 113, 119, 120, 121, 122, 124, 151–5, 156, 157, 176, 551
French Product Liability (2) .....	122
Grad (Case 9/70) .....	217
Gravier (Case 293/83) .....	84
Grosskrotzenberg (Case C-431/92) .....	86, 232–3, 234, 237, 555
Haim (2) (Case C-424/97) .....	284, 285, 452
Hauer (Case 44/79) .....	312
Hedley Lomas (Case C-5/94) .....	283–4
Humblet (Case 6/60) .....	270
IFAW Internationaler Tierschutz-Fonds GmbH (Case T-168/02) .....	386
InterEnvironment Wallonie (Case C-129/96) .....	229–30
International Chemical Corporation (Case 66/80) .....	369
International Tierschutzfonds (Case T-168/02) .....	394

# TABLE OF CASES

Interporc II (Case T-92/98) .....	389, 393
Jégo-Quéré (Case C-263/02P) .....	360, 361, 363, 364
Johnston (Case 222/84) .....	236, 361
Köbler (Case C-224/01) .....	285
Kolpinghuis (Case 80/86) .....	100, 234, 264, 448
Kouroupitos (1) (Case C-365/97) .....	102, 140
Kouroupitos (2) (Case C-387/97) .....	36, 102, 113, 117, 118, 119, 122, 124, 125–37, 139, 145, 147, 150, 152, 154, 155, 156, 157, 158, 162, 163, 176, 226, 244, 295
Kraaijeveld (Case C-72/95) .....	234, 237, 238–42, 243, 244, 245, 246, 247, 268, 273, 274, 275, 277, 290, 312, 341, 451, 553
Kruger (Case C-334/95) .....	369
Landelijke Vereniging (Case C-127/02) .....	244–5, 253, 273, 296–7
Lappel Bank (Case C-44/95) .....	274–5, 302, 313
Larsy (Case C-118/00) .....	285
Lemmens (Case C-226/97) .....	258, 523
Les Verts (Case 294/83) .....	361, 545
Liberal Democrats v Parliament (Case C-41/92) .....	92–3
Linster (Case C-287/98) .....	260, 273
Litster [1990] .....	263
Lütticke (Case 4/69) .....	353, 367
Marleasing (Case C-106/89) .....	263, 265, 273
Marshall (1) (Case 152/84) .....	234, 236, 248, 249, 250–1, 253, 255, 448, 512
Marshall (2) (Case C-271/91) .....	251, 271–2
Matra (Case C-225/91) .....	134
Mecklenburg (Case C-321/96) .....	336
Metro (1) (Case 27/76) .....	358
Mondiet (Case C-405/92) .....	369
Muñoz (Case C-253/00) .....	217
Niselli (Case C-457/02) .....	249
Nold (Case 4/73) .....	292
Norbrook (Case C-127/95) .....	285
Norup Carlsen (Case T-610/97) .....	398
Nunes (Case C-186/98) .....	523, 528
Océano (Cases C-240–244/98) .....	266
Pafitis (Case C-441/93) .....	259, 261
Palin Granit Oy (Case C-9/00) .....	40
Petrie (Case T-191/99) .....	378, 392
Plaumann (Case 25/62) .....	357
Politi (Case 43/71) .....	217
Pretore di Salò (Case 14/86) .....	248, 264, 448, 512
Procura della Repubblica v X (Cases C-74 & 129/95) .....	266
Ramel (Cases 80–81/77) .....	368
Ratti (Case 148/78) .....	220, 229, 235
Rechberger (Case C-140/97) .....	282, 286, 295

# TABLE OF CASES

Regione Veneto (Case C-118/94) .....	230, 233
Rewe (Case 33/76) .....	270
Rewe (Case 158/80) .....	278
Rutili (Case 36/75) .....	292
Saetti (Case C-235/02) .....	249
Salgoil (Case 13/68) .....	270
San Rocco (Case C-365/97) .....	52, 54–7, 58, 63, 72–3, 79–80, 85, 87, 95, 102, 226, 244, 295, 448, 508
Santona Marshes (Case C-355/90) .....	174
Scholz (Case C-419/92) .....	236
Simmenthal (Case 106/77) .....	216
Sison (Case T-110/03) .....	385, 389, 393
Smanor (Cases T-201/96 & C-317/97P) .....	353, 358, 367
Smithkline Beecham (Case C-77/97) .....	259, 261, 523, 528
Sonito (Case C-87/89) .....	358
Spanish Bathing Waters (2) (Case C-278/01) .....	113, 116–17, 118, 123, 124, 137–51, 154, 155, 156, 157, 158, 176
Standley (Case C-293/97) .....	217
Star Fruit Co (Case 247/87) .....	68, 178, 353, 354, 358, 367
Stichting Greenpeace (Case T-583/93) .....	359, 361, 362, 364, 370, 404
Sweden v Commission (Case C-64/05P) .....	386
Tate (Case T-460/92) .....	360
Titanium Dioxide (Case C-300/89) .....	17, 545
Tombesi (Case C-304/94) .....	249
Traen (Cases 372–374/85) .....	249
Transocéan (Case 17/74) .....	506
Twyford Parish Council v Secretary of State for the Environment and another (1992) 1 CMLR 286 .....	231, 293
Unilever Italia (Case C-443/98) .....	257–8, 259
Union des Minotiers (Case 11/74) .....	312
Van Duyn (Case 41/74) .....	219, 235
Van Gend en Loos (Case 26/62) .....	14, 213–14, 215, 289, 300
Van Schijndel (Case C-430/93) .....	270, 273
Variola (Case 34/73) .....	20, 217
Veneetveld (Case C-316/93) .....	251
Verbond (Case C-51/76) .....	230
Verein für Konsumenteninformation (Case T-2/03) .....	383, 393
Von Colson (Case C-14/83) .....	262–3, 272
Wagner Miret (Case C-334/92) .....	263
Wallonian Waste (Case C-2/90) .....	217
Watson (Case 118/75) .....	292
Webb v EMO Cargo [1995] .....	263
Wells (Delena) (Case C-201/02) .....	252–3, 254, 275–6, 277, 451, 553
WWF UK (Case T-105/95) .....	388–91, 392, 393, 399, 406
WWF v Bozen (Case C-437/97) .....	242, 243–4, 244, 253, 273, 451
Zuckerfabrik Süderdithmarschen (Cases C-143/88 & 92/89) .....	369





# TABLE OF STATUTES

Act of Accession of Spain and Portugal 1985	Art 5(10) .....	337
Art 395 .....	Art 9 .....	308
Act of Accession (Second)	Art 9(1)–(2) .....	308
Art 145 .....	Art 9(3) .....	308, 370, 371, 374, 375, 405, 554
Århus Convention 1998 .....	Art 9(4) .....	309, 313
4, 195, 213, 306, 308, 310, 320, 322, 330, 331, 332, 333, 335, 344, 345, 350, 351, 370, 379, 403, 464, 478, 484, 519, 553, 554	Art 9(5) .....	309
Art 1(3) .....	Art 14–Art 15 .....	342
Art 1(4) .....	Protocol on Pollution Release and Transfer Registers .....	339
Art 2(2) .....		
Art 3 .....	Charter of Fundamental Rights of the EU .....	89–90, 128, 291, 366, 409, 420
Art 3(2) .....	Art 7–Art 8 .....	335
Art 3(3) .....	Art 37 .....	291–2, 366, 513
Art 3(5) .....	Art 41 .....	137, 409, 420
Art 3(8)–(9) .....	Art 41(1)–(2) .....	137
Art 4 .....	Art 47 .....	361, 418, 420
Art 4(1)–(2) .....	Art 48 .....	90
Art 4(3) .....	Art 49 .....	90, 100, 266
Art 4(3)(d) .....	Art 50–Art 51 .....	90
Art 4(4) .....	Art 52 .....	335
Art 4(5) .....	Competition Act 1998 (UK) .....	472
Art 4(7)–(8) .....	Comprehensive Environmental Response, Compensation and Liability Act (USA) .....	501
Art 5 .....	Convention on an International Fund for Oil Pollution Compensation 1992 .....	483
Art 5(1)(a) .....	Convention on Bunker Oil Damage 2001 .....	483
Art 5(1)(c) .....	Convention on Limitation of Liability for Maritime Claims 1976 .....	502
Art 5(2) .....	Convention on Limitation of Liability in Inland Navigation 1988 .....	502
Art 5(2)(c) .....	Convention on the Law of the Sea 1982	
Art 5(3) .....	Art 218 .....	516
Art 5(3)(a) .....		
Art 5(4) .....		
Art 5(5)(a)–(c) .....		
Art 5(6) .....		
Art 5(7)(a)–(b) .....		
Art 5(8) .....		
Art 5(9) .....		

# TABLE OF STATUTES

Convention on the Protection of the Environment through Criminal Law (PECL Convention) 1998 .....	516–20, 526, 530, 532, 546–7	Art 12 .....	57, 97
Art 2 .....	517	Art 13 .....	138
Art 2(2) .....	517	Directive 1976/207 (Equal Treatment Directive) .....	236, 250, 262
Art 3–Art 4 .....	517	Art 2 .....	250
Art 5–Art 8 .....	518	Art 6 .....	262, 272
Art 9 .....	518	Directive 1976/464 .....	100, 264, 530
Art 9(2) .....	532	Art 3 .....	100, 264
Art 11 .....	518	Directive 1977/62 .....	81
Art 13 .....	518	Directive 1977/91 .....	259
Directive 1967/548 .....	344	Directive 1977/388 (Sixth VAT Directive) .....	60, 62, 223
Directive 1968/151 (First Companies Directive) .....	253	Directive 1977/728 (Varnish Labelling) .....	229
Directive 1972/166 (Motor Vehicle Insurance) ....	258, 259	Directive 1978/319 (Toxic and Dangerous Waste) .....	56, 126, 127
Art 3(1) .....	258, 259	Art 5 .....	127, 130, 133, 137
Directive 1973/173 (Solvent Labelling) .....	229	Art 12 .....	127, 129, 132
Directive 1973/239 .....	396	Art 12(1) .....	126
Directive 1975/439 (Waste Oils Directive) .....	101, 530	Directive 1978/659 (Fresh Water Quality) .....	248–9
Directive 1975/442 (Waste Framework Directive) .....	33, 54, 63, 79, 95, 113, 126, 127, 129, 184, 185, 225, 229, 249, 254, 257, 288, 343	Directive 1979/32 .....	282, 287
Art 1 .....	40	Directive 1979/409 (Wild Birds Directive) .....	52, 85, 86, 91, 109, 231, 233, 245, 274, 288, 424, 468
Art 2(1)(iv) .....	55	Annex I .....	496
Art 3 .....	226, 288	Art 4 .....	86, 90, 109, 174
Art 4 .....	54, 55, 56, 64, 79, 126, 127, 129, 133, 184, 225, 226, 247	Art 4(2) .....	496
Art 4(2) .....	295	Art 5 .....	233
Art 5 .....	126	Art 7 .....	233
Art 6 .....	127, 129	Art 7(1) .....	233
Art 7 .....	73, 126, 132	Art 9 .....	233
Art 8–Art 10 .....	249	Directive 1980/777 (Insolvency Protection Directive) .....	289
Art 11 .....	229, 249	Directive 1980/778 (Drinking Water Directive) .....	71
Art 12 .....	249	Directive 1980/987 .....	279
Art 13 .....	56	Directive 1983/189 (Technical Standards Directive) ...	228, 256, 257, 258, 260
Directive 1976/160 (Bathing Water Directive) .....	57, 65, 93, 95, 97, 104, 113, 116, 123, 137–8, 142, 143, 148, 149, 288, 423	Art 8–Art 9 .....	256
Art 1(2)(a) .....	143, 144	Directive 1983/513 .....	264
Art 3 .....	138, 141, 143	Directive 1985/337 (Environmental Impact Assessment Directive) .....	33, 53, 77, 83, 87, 91, 98, 231, 232–3, 238, 243, 252, 254, 276, 289, 290, 305, 322, 359, 362, 388, 423, 425, 429, 434, 464, 554
Art 4 .....	141, 149		
Art 4(3) .....	143		
Art 7–Art 8 .....	143		

# TABLE OF STATUTES

Annex I .....	238, 242	Art 7 .....	78
Annex II .....	238, 239, 240, 241, 242, 267	Directive 1992/75 .....	344
Art 1(2) .....	323	Directive 1995/46 .....	335
Art 1(5) .....	243	Directive 1996/61 (IPPC Directive) .....	305, 322, 339, 456, 464, 494
Art 2 .....	232, 243	Art 2(11) .....	222
Art 2(1) .....	238–9, 240, 241, 243, 253	Art 2(14) .....	323
Art 3 .....	232, 243	Art 15a .....	323
Art 4 .....	239	Directive 1996/62 (Air Quality Assessment) .....	123
Art 4(2) ....	87, 238, 239, 240, 241, 242, 243, 253	Directive 1996/82 .....	473
Art 5 .....	243	Directive 1998/34 .....	256
Art 5(1) .....	254	Directive 1999/31 (Landfill) ....	126, 149
Art 6–Art 7 .....	243	Directive 1999/94 .....	344
Art 8 .....	232, 243	Directive 2000/60 (Water Framework Directive) .....	149, 175
Art 9–Art 10 .....	243	Directive 2003/4 (Access to Environmental Information) .....	52, 101, 107, 305, 306, 307, 322, 330–1, 341, 342, 343, 344, 402, 452, 464, 473, 554
Art 10a .....	323	Annex .....	331
Directive 1986/609 (Animal Experimentation) .....	59	Art 1(1)–(b) .....	331
Directive 1990/313 (Access to Environmental Information) ...	52, 101, 107, 305, 330, 331, 333, 336, 402, 453, 464, 473, 554	Art 2(1) .....	332
Art 2(b) .....	53	Art 2(1)(b) .....	341
Art 3(2) .....	53	Art 2(2) .....	332
Art 3(4) .....	333	Art 2(5) .....	332
Art 5 .....	322, 333	Art 3 .....	331, 333, 340, 342
Art 7 .....	331, 336	Art 3(1) .....	331
Art 8 .....	326, 336	Art 3(2) .....	332
Directive 1990/314 .....	286	Art 3(2)(a) .....	332
Directive 1991/156 .....	127, 229, 249	Art 3(2)(b) .....	333
Directive 1991/157 .....	344	Art 3(3) .....	332, 333, 334
Directive 1991/271 (Urban Waste Water Directive) ....	55, 149	Art 3(4) .....	332, 333
Directive 1991/414 .....	360	Art 3(5) .....	333
Directive 1991/689 (Hazardous Waste Directive) .....	56, 126, 127	Art 3(5)(a)–(c) .....	333
Art 3 .....	229	Art 4 .....	332, 335, 336
Art 3(2) .....	373	Art 4(1) .....	334
Directive 1991/692 .....	164	Art 4(1)(a)–(e) .....	334
Directive 1992/43 (Habitats Directive) .....	83, 231, 245, 288, 424, 468	Art 4(2) .....	334, 335, 336
Annex II .....	496	Art 4(2)(a) .....	335
Annex IV .....	496	Art 4(2)(d)–(h) .....	335
Art 2(1) .....	296	Art 4(4) .....	334
Art 6(3) .....	245, 246, 247, 296	Art 4(5) .....	333
Art 6(4) .....	373	Art 5(1)–(3) .....	333
Directive 1992/44 .....	78	Art 6(1)–(2) .....	322
Art 3–Art 4 .....	78	Art 7 .....	337, 338, 340
		Art 7(1) .....	338
		Art 7(2) .....	337, 342
		Art 7(2)(a)–(g) .....	337
		Art 7(3)–(5) .....	337

# TABLE OF STATUTES

Directive 2003/4 (Access to Environmental Information) ( <i>Cont.</i> )	Art 6 .....495, 499, 503, 504, 510
Art 7(6) .....338	Art 6(1) .....504, 509, 510
Art 8 .....340	Art 6(1)(a) .....504
Art 8(1) .....340, 341, 343	Art 6(2) .....504, 510
Art 8(2) .....341	Art 6(2)(a) .....509
Art 9 .....342	Art 6(3) .....500, 504, 510
Art 10–Art 12 .....331	Art 7 .....495, 499, 503, 504
Directive 2003/35 .....305, 306, 322	Art 7(1) .....505
Art 3(7) .....322	Art 7(2)–(4) .....504, 506
Art 4(4) .....322	Art 8 .....495, 499, 503
Directive 2003/112 .....360	Art 8(1) .....507
Directive 2004/35 (Environmental Liability Directive) .....8, 213, 269, 305, 306, 323, 324, 344, 345, 368, 450, 454, 464, 473, 479, 482, 485, 489, 490, 491, 498, 502, 504, 507, 508, 509, 511, 512, 513, 514, 515, 554	Art 8(2) .....500, 507
Annex I .....497	Art 8(3) .....507
Annex II .....504, 505, 506, 509	Art 8(3)(a)–(b) .....499
Annex III .....494, 495, 497, 499, 500, 507	Art 8(4) .....507
Annex IV .....502	Art 8(4)(a)–(b) .....500
Annex V .....502	Art 9 .....508
Art 1 .....492	Art 10 .....501
Art 2(1) .....451	Art 11 .....324, 491, 508
Art 2(1)(a)–(c) .....497	Art 11(1) .....508
Art 2(2) .....496	Art 11(2) .....497, 508, 509
Art 2(3)(a)–(c) .....496	Art 11(3) .....508, 510
Art 2(4)(a) .....496	Art 11(4) .....503
Art 2(6) .....495	Art 12 .....324, 328, 329
Art 2(7) .....494	Art 12(1) .....325, 326, 328
Art 2(10) .....503	Art 12(2)–(3) .....326, 327
Art 2(14) .....497, 505	Art 12(4) .....327
Art 3 .....493, 495	Art 12(5) .....325, 327
Art 3(1) .....494	Art 13 .....324, 328, 329
Art 3(1)(b) .....494, 496, 500	Art 13(1) .....327, 328, 329
Art 3(2) .....494, 512	Art 13(2) .....328
Art 3(3) .....323, 490	Art 14(1) .....507
Art 4 .....497, 501	Art 15 .....511
Art 4(1)(a) .....501	Art 15(1)–(2) .....511
Art 4(1)(b) .....502	Art 15(3) .....512
Art 4(2) .....451, 502	Art 16(1) .....492
Art 4(3)–(4) .....502	Art 16(3) .....490
Art 4(5) .....497	Art 17 .....328, 501
Art 4(6) .....501, 502	Art 18 .....329
Art 5 .....495, 499, 503, 509	Art 18(3) .....502
Art 5(1)–(2) .....503, 509	Art 19 .....324, 489
Art 5(3) .....504, 510	Art 19(1) .....328
Art 5(3)(a) .....509	Art 20 .....489
Art 5(4) .....500, 504, 510	EC Treaty (Treaty of Rome) 1957 ....1, 9, 10, 11, 12, 13, 17, 18, 19, 21, 28, 30, 42, 59, 66, 213, 268, 269, 270, 280, 289, 301, 351, 360, 404, 407, 447
	Art 2 .....16, 23, 187, 216, 290, 294, 477, 500, 520, 524, 528
	Art 3 .....187, 520
	Art 3(1) .....16

# TABLE OF STATUTES

Art 3(2) .....	227, 228	Art 173 .....	362
Art 3(c) .....	524	Art 174 .....	18, 245, 374, 525
Art 3(g) .....	524	Art 174(2) .....	216, 245, 247, 294, 295, 296, 297, 300, 327, 477, 486, 493, 498, 500, 528
Art 4 .....	12, 227	Art 174(4) .....	2
Art 4(5) .....	493	Art 175 .....	12, 16, 17, 18, 19, 21, 28, 129, 135, 187, 210, 217, 297, 310, 331, 374, 440, 523, 525, 527, 531, 533, 534, 537, 541, 542, 544, 545, 546, 547
Art 5 .....	18, 21, 29, 95, 222, 313, 465, 523	Art 175(1) .....	17, 96, 134, 350
Art 5(1) .....	523	Art 175(2) .....	216
Art 5(2) .....	453, 477, 486, 487, 523	Art 176 .....	2, 18, 310, 331
Art 5(3) .....	523	Art 192 .....	179
Art 6 .....	2, 16, 216, 290, 332, 367, 477, 493	Art 193 .....	431, 435, 440
Art 10 .....	5, 29, 30, 42, 57, 58, 59, 72, 78, 99, 108, 161, 186, 229, 230, 237, 261, 271, 273, 275, 276, 277, 278, 301, 447–8, 449, 450, 452, 468, 474, 475, 504, 508, 528, 555	Art 194 .....	411, 430, 431
Art 10(1) .....	29	Art 195 .....	395, 408, 411, 419, 430
Art 14 .....	524	Art 195(1) .....	396, 410, 411, 417, 422, 432
Art 17–Art 19 .....	410	Art 195(2) .....	408, 410, 419
Art 20 .....	411	Art 195(3) .....	416
Art 21 .....	408, 411, 431	Art 197 .....	66, 430, 434
Art 22 .....	413	Art 200 .....	430
Art 25 .....	214, 215	Art 201 .....	66, 430
Art 28 .....	94, 228, 391	Art 205(4) .....	544
Art 29 .....	94, 228, 283	Art 211 .....	4, 5, 10, 12, 15, 30, 57, 69, 114, 134, 159, 178, 196, 354, 374, 375, 409, 414, 433, 440, 441, 467, 478, 552
Art 30 .....	89, 228	Art 213(1) .....	65
Art 37 .....	374	Art 214 .....	66
Art 39 .....	81, 94	Art 216 .....	66
Art 39(2) .....	392	Art 219 .....	65, 180
Art 43 .....	272	Art 220 .....	34, 69, 106, 280, 296
Art 46 .....	89	Art 223 .....	106
Art 49 .....	94	Art 225 .....	352
Art 55 .....	89	Art 226 .....	4, 6, 18, 27, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 43, 45, 47, 48, 49, 51, 52, 53, 54, 58, 60, 61, 62, 63, 65, 66, 67, 68, 69, 70, 74, 75, 76, 77, 78, 79, 80, 83, 85, 88, 89, 90, 91, 93, 94, 96, 98, 102, 103, 104, 105, 106, 107, 108, 109, 110, 112, 114, 116, 117, 119, 125, 128, 131, 136, 137, 138, 139, 144, 145, 150, 151, 152, 155, 158, 159, 160, 161, 164, 165, 166, 167, 168, 169, 170, 172, 173, 174, 175, 176, 178, 179, 184, 185, 186, 187, 189, 190, 191, 193, 194, 196, 198, 199, 202, 203, 204, 210, 212, 213, 221, 278, 294, 295,
Art 56 .....	94		
Art 64 .....	89		
Art 71 .....	374		
Art 81–Art 82 .....	44, 94, 106, 107, 109, 114, 134, 174, 176, 218, 358, 409, 460, 471, 472		
Art 86 .....	89		
Art 86(3) .....	218		
Art 87 .....	89, 358, 397		
Art 88 .....	397		
Art 88(2) .....	62, 218		
Art 89 .....	397		
Art 95 .....	374, 545		
Art 95(6) .....	62		
Art 95(9) .....	399		
Art 134 .....	89		
Art 135 .....	521, 535, 540, 541, 542		
Art 141 .....	251		

# TABLE OF STATUTES

## EC Treaty (Treaty of Rome) 1957

(*Cont.*)

314, 326, 342, 352, 353, 354, 355,	
358, 359, 366, 368, 374, 375, 377,	
381, 387, 389, 391, 392, 396, 397,	
399, 400, 405, 408, 409, 414, 418,	
419, 420, 425, 428, 431, 433, 434,	
435, 436, 438, 441, 445, 448, 450,	
466, 467, 513, 527, 550, 551, 554,	
557	
Art 227 .... 27, 31, 37, 38, 39, 112, 114,	
116, 139, 150, 151, 155	
Art 227(1) ..... 38	
Art 227(2) ..... 37	
Art 227(3)–(4) ..... 38	
Art 228 .... 6, 18, 27, 36, 40, 43, 83, 90,	
93, 94, 105, 113, 117, 154, 159,	
160, 164, 166, 167, 169, 170, 173,	
176, 177, 179, 187, 189, 190, 191,	
196, 197, 198, 199, 201, 202, 205,	
210, 213, 278, 294, 295, 314, 326,	
352, 354, 355, 358, 359, 366, 368,	
374, 375, 377, 381, 387, 399, 400,	
405, 408, 414, 418, 419, 420, 425,	
428, 431, 433, 434, 435, 436, 438,	
441, 445, 450, 466, 467, 513, 527,	
550	
Art 228(1) .... 34, 35, 113, 115–17, 126,	
130, 136, 139	
Art 228(2) .... 18, 27, 30, 31, 32, 34, 35,	
36, 37, 39, 45, 46, 47, 49, 54, 66, 67,	
68, 69, 70, 74, 76, 89, 104, 105, 106,	
109, 112, 113, 117, 120, 121, 122,	
124, 125, 126, 127, 128, 130, 131,	
132, 133, 134, 135, 136, 137, 140,	
141, 144, 145, 150, 151, 152, 153,	
154, 155, 157, 158, 159, 167, 175,	
176, 177, 178, 210, 212, 354, 551,	
552, 557	
Art 229 ..... 114	
Art 230 ..... 68, 158, 169, 178, 278,	
301, 352, 356, 357, 358, 359, 360,	
362, 363, 364, 367, 370, 371, 376,	
387, 404, 417, 418, 436, 438	
Art 230(4) ..... 356, 357, 358, 361, 363,	
364, 376	
Art 231 ..... 356, 376	
Art 232 ..... 68, 145, 278, 301, 352,	
353, 354, 355, 356, 357, 371, 376,	
404, 417, 436, 438	
Art 232(3) ..... 353, 376	
Art 233 ..... 376	

Art 234 .... 10, 214, 223, 225, 239, 249,	
302, 352, 362, 368, 369, 370, 415	
Art 234(1) ..... 368	
Art 234(1)(a)–(b) ..... 368	
Art 235 ..... 278, 301, 352, 365, 367,	
404	
Art 239(4) ..... 359	
Art 242 ..... 105	
Art 243 ..... 106, 172	
Art 244 ..... 10, 114	
Art 249 .... 5, 19, 23, 72, 217, 239, 245,	
555	
Art 249(2) ..... 20, 22, 102, 235, 379,	
449, 476	
Art 249(3) ..... 20, 23, 59, 96, 98, 99,	
218, 219, 220, 234, 235, 239, 240,	
248, 251, 261, 262, 447, 474, 512,	
522, 533	
Art 249(5) ..... 466	
Art 250(2) ..... 527	
Art 251 ..... 96, 179, 310, 350, 398,	
440, 489, 537, 552	
Art 253 ..... 390	
Art 255 ..... 201, 378, 380	
Art 255(1) .... 12, 201–2, 378, 380, 394	
Art 255(2) ..... 202, 380	
Art 255(3) ..... 202, 379	
Art 256 ..... 10, 114	
Art 262 ..... 534	
Art 280 ..... 535, 540, 541, 542	
Art 280(4) ..... 521	
Art 287 ..... 417	
Art 288 ..... 301	
Art 288(2) ..... 352, 365, 367	
Art 308 ..... 114, 537, 545	
Art 314 ..... 383	
Protocol 9 on the role of National	
Parliaments ..... 544	
Protocol 30 on Subsidiarity and	
Proportionality ..... 18, 21, 222, 486,	
523	
Protocol on the Enlargement of	
the EU	
Art 4 ..... 65	
Protocol on the Statute of the	
Court of Justice ..... 39	
Title I ..... 16	
Title II ..... 521	
Title IV ..... 374	
Title X ..... 521	
Title XIX ..... 16, 19, 30, 210, 525	
Enterprise Act 2002 (UK) ..... 472	

# TABLE OF STATUTES

European Atomic Energy Community	International Covenant on Civil and
Treaty 1957 ..... 11, 13, 28	Political Rights 1966 ..... 291
Art 146 ..... 360	International Covenant on Economic,
European Coal and Steel Community	Social and Cultural Rights 1966 ... 291
Treaty 1951 ..... 11, 13, 169,	
174	Lugano Convention 1993 ..... 481–5, 486,
Art 88 ..... 169, 174	487, 488, 489, 501
Art 97 ..... 13	Annex I ..... 482
European Convention on Human	Annex II ..... 482
Rights 1950 ..... 89, 291, 335	Art 1 ..... 482
Art 7 ..... 100, 128, 266	Art 2 ..... 482
Art 7(1) ..... 266	Art 2(7)–(10) ..... 482
Art 8(2) ..... 335	Art 4 ..... 482
European Ombudsman Statute ..... 420	Art 5 ..... 483
Art 1(3) ..... 415, 419, 420	Art 6(1) ..... 482
Art 2(1) ..... 415	Art 6(2)–(4) ..... 483
Art 2(2) ..... 411, 422	Art 7(1) ..... 482
Art 2(3) ..... 422	Art 7(3) ..... 483
Art 2(4) ..... 421	Art 8–Art 10 ..... 482
Art 2(7) ..... 419	Art 11–Art 15 ..... 483
Art 2(9) ..... 422	Art 16 ..... 484
Art 3(1) ..... 432	Art 17 ..... 483
Art 3(2) ..... 416	Art 18 ..... 484
Art 3(3)–(4) ..... 417	Art 18(1)–(4) ..... 484
Art 3(5) ..... 418	Art 19–Art 24 ..... 484
Art 3(6)–(7) ..... 417, 422	Art 25(2) ..... 481
Art 4(1) ..... 417	Art 32(3) ..... 481
Art 4(2) ..... 417, 430	
Art 6(2) ..... 416	Oporto Agreement 1992 ..... 455
Art 9 ..... 416	
Art 10(2) ..... 416	Recommendation 2001/331
Art 13 ..... 410	(Environmental Inspection) ... 465–74,
European Union Constitution	476–7
2004 ..... 10–11, 21–4, 28–9, 112,	Regulation 17/1962 ..... 114, 134, 460
171, 292, 351, 355, 364, 367,	Regulation 3626/82 ..... 20
441, 548	Regulation 2052/88
Art.I–33–Art.I–39 ..... 364	Art 7 ..... 359
Art.II–37 ..... 292	Regulation 1210/90 ..... 13, 108, 163, 437
Art.II–103 ..... 409	Art 1 ..... 437
Art.III–271–Art.III–272 ..... 548	Art 2(i)–(ii) ..... 437
Art.III–362(3) ..... 45–6, 170, 171	Art 3–Art 4 ..... 437
Art.III–365 ..... 364, 365	Art 20 ..... 437, 460
Art.III–365(4) ..... 364	Regulation 2092/91 ..... 344
Art.III–367 ..... 355	Regulation 259/93 (Waste Shipment)
Art.III–367(1) ..... 355	..... 20, 218, 319, 449, 456, 468
Art.III–370 ..... 367	Regulation 1836/93 ..... 344
Art.III–398 ..... 413	Regulation 1999/93 ..... 437
Art.III–431 ..... 367	Regulation 1164/94 ..... 373, 424
Part II ..... 137, 409	Regulation 3093/94 ..... 369
German Basic Law	Regulation 338/97 (Trade in Endangered
Art 38 ..... 537	Species) ..... 218, 449, 468
	Regulation 358/97 ..... 344



# TABLE OF STATUTES

Regulation 659/99	Art 23–Art 24	134, 472
Art 20	Art 27	358, 409
Regulation 1260/99	Regulation 6/2004	6
Art 12	Regulation 139/2004	
Regulation 1655/00	(Merger Regulation)	44, 62
Regulation 1980/00	Art 1	94
Regulation 2037/2000	Art 4(5)	94
(Ozone Regulation)	Art 18	409
20, 161,	Art 22	94
218, 449	Regulation 773/2004	176
Regulation 44/01	Rio Declaration 1992	291
Regulation 76/01	Single European Act (SEA) 1986	1, 9,
Regulation 1049/2001	11, 12, 290, 300, 486	
66, 201, 202,	Statute of the International Criminal	
377, 378, 379, 380, 381, 382, 386,	Court 1998	
389, 395, 398, 399, 401, 402, 406,	Art 8	516
428, 554	Stockholm Declaration on the Human	
Art 1(a)	Environment 1972	291
Art 2(1)–(3)	Treaty of Amsterdam 1997	4, 9, 12,
Art 3(a)–(b)	14, 18, 198, 218, 222, 290, 378,	
Art 4(1)	394, 398, 523, 544	
Art 4(1)(a)–(b)	Treaty of Nice 2001	9, 12, 15, 24, 39,
Art 4(2)	65, 290, 544	
386–7, 393, 396, 397,	Treaty on European Union	
398, 400	(Maastricht Treaty) 1992	9, 10, 11,
Art 4(3)	13, 14, 18, 24, 32, 34, 36, 95, 113,	
Art 4(4)	114, 124, 136, 167, 175, 180, 251,	
Art 4(5)	290, 408, 410, 453, 486, 541	
380, 386, 393, 394, 402, 405	Art 2	23
Art 4(6)–(7)	Art 13(3)	15
Art 6(1)–(2)	Art 27	15
Art 6(4)	Art 29	17, 28, 521, 522, 525
Art 7	Art 31(e)	17, 28, 521, 525
Art 7(1)–(4)	Art 34(2)	521
Art 8(1)	Art 34(2)(b)	17, 28, 521–2, 525
Art 8(2)	Art 35	534
Art 8(3)	Art 35(6)	534
Art 9	Art 36(2)	15, 28
Art 10(1)	Art 42	534, 547
Art 10(3)	Art 46	15
Art 11	Art 47	15, 522, 534, 540
Art 12	Art 48	364
Art 12(1)	Art.L	14
Art 13	Declaration 17	202
Art 14	Title I	13
Art 17(1)–(2)	Title V	13, 28, 209, 210
Art 18(1)	Title VI	13, 15, 17, 28, 209, 210,
Art 19	521, 522, 525, 533, 534, 535, 536,	
Regulation 1496/02	538, 539, 545, 547	
Regulation 1/2003	Universal Declaration on Human	
6, 44, 60, 107, 114,	Rights 1948	291
176, 218, 460, 471, 472		
Art 5		
Art 7(2)		
Art 8		
Art 18–Art 19		
Art 20–Art 21		
Art 22(2)		

# ABBREVIATIONS AND ACRONYMS

Århus Convention	1998 UNECE Convention on access to information, public participation in decision-making and access to justice in environmental matters
AEI	Access to environmental information
AG	Advocate-General of the Court of Justice
AJEM	Access to justice in environmental matters
BATNEEC	Best available technology not entailing excessive cost
BSE	bovine spongiform encephalopathy ('mad cow' disease)
CFI	Court of First Instance
CFP	Common Fisheries Policy
CITES	Convention on International Trade in Endangered Species 1973
CML Rev	Common Market Law Review
COM	European Commission document
DG	Directorate-General
EAP	Environmental Action Programme
EC	European Community (European Community Treaty if placed immediately after a treaty article)
ECHR	European Convention on Human Rights and Fundamental Freedoms 1950, of the Council of Europe
ECJ	European Court of Justice
ECSC	European Coal and Steel Community
EEA	European Environment Agency, also European Economic Area (Agreement 1992)
EEB	European Environmental Bureau
EEC	European Economic Community
EEL Rev	European Environmental Law Review
EI	Environmental inspection
EIA	Environmental impact assessment
EIB	European Investment Bank

## ABBREVIATIONS

EIONET	European Environment Information and Observation Network
EL	Environmental liability
ELJ	European Law Journal
ELM	Environmental Law and Management Journal
EL Rev	European Law Review
ENV	Environment (European Commission DG)
EO	European Ombudsman
EP	European Parliament
EPER	European Pollutant Emission Register
EPL	European Public Law Journal
EPRTR	European Pollutant Release and Transfer Register
EU	European Union
EU15	European Union of 15 Member States (before 1.5.2004)
EU25	European Union of 25 Member States (as from 1.5.2004)
EUC	European Union Constitution (Treaty establishing a Constitution for Europe 2004)
Euratom	European Atomic Energy Community (Treaty)
Fordham Int. LJ	Fordham International Law Journal
GDP	gross domestic product
GMOs	genetically modified organisms
ICLQ	International Comparative Law Quarterly
ILM	International Legal Materials
IMPEL	EU Network for the Implementation of Environmental Law
IPPC	Integrated pollution prevention and control
JEL	Journal of Environmental Law
JHA	Justice and Home Affairs
LFN	Letter of formal notice
LIEI	Legal Issues of European Integration Journal
LIFE	EC Financial Instrument for the Environment
LQR	Law Quarterly Review
Lugano Convention	1993 Council of Europe Convention on civil liability resulting from activities dangerous to the environment
MEP	Member of the European Parliament
MJ	Maastricht Journal of European and Comparative Law
MLR	Modern Law Review
NGO	non-governmental organisation
NGEO	non-governmental environmental organisation
NIMBY	not in my back yard
OECD	Organisation for Economic Co-operation and Development

## ABBREVIATIONS

OJ	Official Journal of the European Union
OOPEC	Office for Official Publications of the EC
PECL	Protecting the environment through criminal law
RECIEL	Review of European Community and International Environmental Law
RO	Reasoned opinion
RSPB	Royal Society for the Protection of Birds
SEC	European Commission internal working paper
SPA	Special Protection Area
TEU	Treaty on European Union 1992
VAT	value added tax
UN	United Nations
UNECE	United Nations Economic Commission for Europe
UNTS	United Nations Treaty Series
WFD	WasteFrameworkCouncilDirective75/442,asamended
YEL	Yearbook of European Law
YEEL	Yearbook of European Environmental Law



# INTRODUCTION

## 1.1 Aims and objectives

Without question, environmental policy of the European Union (EU) has, over the last thirty years or so, evolved into an important integral component within the wide range of the regional international organisation's economic and political objectives. Until the mid-1980s, though, the constitutional framework of the EU did not formally provide itself with a mandate to develop a policy on the environment. Specifically, this came about by virtue of the Single European Act (SEA) 1986, a treaty agreed between the EU's Member States which served to amend the Union's original founding treaties and include protection of the environment amongst its official objectives and tasks. The entry into force of the SEA signalled an important shift in relation to the identity, purpose and direction of supranational European integration. Hitherto, the EU had predominantly, if not exclusively, been founded on the objective of establishing a common market between its constituent Member States, principally through the elimination of trading barriers between them as well as other distortions to competition. At the inception of the Union, the project of realising a common market was intended to serve as the principal mechanism of achieving the core, broader ambitions of the founding treaties, which include most notably the laying of the 'foundations of ever closer union among the peoples of Europe', 'to ensure the economic and social progress' of the Member States and 'the constant improvements of the living and working conditions' of the Member States' populations.<sup>1</sup> The specific inclusion of an environmental protection policy in the political make-up of the EU in 1986 brought with it profound changes in terms of how the Union's core aims are now interpreted and applied at a political level. Over 200 legislative measures have been passed by the EU concerning environmental protection

1 As set out in recitals 1–3 of the European Economic Treaty 1957 (Treaty of Rome), the principal founding treaty of the EU.

issues, and its constitutional commitment to environmental policy has been entrenched further and more profoundly by a later treaty amendment stipulating that environmental protection requirements must be incorporated within the definition and implementation of the entire range of its economically related policies and activities.<sup>2</sup> It is true that EU rules on environmental protection account for only part of the legal framework that constitutes environmental law from the perspective of EU Member States. For them, the subject of environmental law also comprises rules binding on them passed at national and other international levels. However, the material range and effects of EU environmental legislation are both wide and deep. Although Member States share competence with the EU in relation to the area of environmental policy,<sup>3</sup> national rules that conflict with the requirements of environmental measures adopted at Union level are required to be set aside, in order to respect the principle of the supremacy of EU law over national law.<sup>4</sup> Accordingly, EU environmental law constitutes a very significant element in the overall package of measures adopted by Member States to protect the environment.

Notwithstanding the emergence of a clear constitutional commitment on the part of the EU to develop policies to protect the environment, the implementation of that commitment into practice has faced considerable challenges at various levels, political as well as legal. First, from a purely political perspective, moves to adopt environmental protection measures have faced resistance from a number of quarters, public and private. Concerns are constantly raised about the impact of the perceived level of 'economic cost' of environmental measures intended to introduce enhanced systems for the protection of the environment, particularly from certain industrial lobby groups and Member State governments. This tension is part and parcel of the constant struggle that faces the Union, and indeed all systems of contemporary political governance, on determining the extent to which regulation is required in order to prevent and/or minimise society's adverse impacts on the state of the environment. Ultimately, it is a battle of ideas and interests over priorities for improving the welfare of the community through the allocation of governmental resources. This challenge is, essentially a political struggle, in respect of which there are no scientifically objective or otherwise clear-cut solutions. Second, the EU has faced difficulties of a legal nature in securing the proper implementation of its adopted policies relating

2 By virtue of Art 6 EC (i.e. of the EC Treaty, the current amended version of the Treaty of Rome).

3 See Arts 174(4) and 176 EC.

4 Art 176 EC stipulates, by way of exception to the supremacy principle, that Member States are entitled to maintain or introduce 'more stringent protective measures' than those adopted at EU level, so long as they comply with other EC Treaty requirements. Such measures must be notified to the Commission.

to environmental protection. Specifically, it has faced a number of problems in ensuring that its legislation on environmental protection is actually implemented within the Member States, despite the legally binding force of such measures. Implementation of agreed policy is a problem shared by several international organisations, of which the EU is one. The writ of international law does not run readily or easily within the internal legal systems of nation states. The standard principles of international law do not provide for legal mechanisms by which legally binding accords agreed between subjects of international law (nation states and international organisations) may be enforced within the subject's area of jurisdiction.

However, as will be discussed in detail, the EU has developed its own special legal order, radically different from that which normally applies between international organisations and their respective contracting parties. The EU's legal order, as developed at the hand of the Union's judicial institution (the Court of Justice), involves the existence of a special legal relationship between the EU and its Member States, whereby there are several possibilities for various actors to take steps to enforce provisions adopted at Union level intended to be binding on the EU institutions, Member States and/or private persons. Notwithstanding these legal possibilities, the EU's record on ensuring proper implementation of its legislative measures on environmental protection has been relatively poor. Notably, the responsibility of the Member States to internalise the environmental measures agreed between themselves at EU level and apply them within their respective jurisdictions has been a difficult legal and political pill to swallow.

The focus of this book is to consider the second of the major challenges identified above that confront the EU in its aims to realise its environmental protection commitments. To what extent the EU, in developing its environmental protection policy, has achieved an appropriate balance between the relevant interests involved and affected by its environmental measures is open to debate as a political question and is not the concern of this book. This book aims instead to consider the various legal means by which EU law on environmental protection may be enforced effectively at the level of the Member State as well as by EU institutions responsible for crafting and deciding on supra-national measures affecting environmental protection issues. Specifically, it will look in detail at the particular legal principles and mechanisms that exist under the auspices of EU law which are designed to assist in ensuring that the legislative and legally binding administrative decisions adopted by the Union on the environment are actually adhered to. As part of this endeavour, the book will seek to place the legal machinery into its broader political context, drawing in part from the author's recent experiences working as an administrator in environmental legal affairs within the European Commission of the EU.

It is important to note from the outset that the sphere of environmental policy and law at EU level is an area often subject to rapid change. This applies equally in the area of EU environmental law enforcement. Over the



last decade or so, the legal picture on EU environmental law enforcement has been transformed and, at the time of writing, is currently undergoing a series of significant alterations. This has been due in substantial part to the EU's decision to sign up to and implement the United Nations Economic Commission for Europe's (UNECE) Convention on access to information, public participation in decision making and access to justice in environmental matters, agreed on 25 June 1998 in Århus, Denmark (referred to as the 'Århus Convention').<sup>5</sup> The Århus Convention has important ramifications for the EU, in terms of the extent to which private persons, in particular environmental non-governmental organisations (NGEOs), may have an input and influence in supervising the implementation of EU environmental law. Given the above, it is perhaps not surprising that few books or other monographs exist which appraise in detail the most recent significant developments in this field. It is intended that this book will provide a reasonably up to date and comprehensive analysis of the current and prospective state of environmental law enforcement mechanisms provided under EU law. It aims to represent the state of the law as at the end of 2005.

This book explores the subject of EU environmental law enforcement from the perspectives of the three principal stakeholders involved in law enforcement work, namely the European Commission of the EU, Member States and civil society (primarily but not exclusively environmental NGOs). Historically, supervision of the implementation of EU environmental law has been viewed as a responsibility principally resting with the executive institution of the Union, namely the European Commission. The original founding treaties of the Union imposed a specific duty on the Commission to ensure the application of the treaty provisions and secondary measures taken at EU level (Art 211 EC (ex Art 155)).<sup>6</sup> In addition, the treaties also provided the Commission with specific powers to bring legal proceedings against Member States in the event of it detecting that the latter had breached the law of the EU (Art 226 EC (ex Art 169)). These treaty provisions have remained intact. The involvement of other actors in the area of EU law enforcement, notably in relation to the environmental sector, has materialised only relatively recently in terms of EU history.

As far as civil society is concerned, a combination of the evolving jurisprudence of the Court of Justice together with recent legislative developments have served to provide private persons with a range of rights relevant to the area of enforcement of EU environmental law. The potential for civil society to become effectively engaged in supervisory tasks has not yet been fully

5 United Nations, Treaty Series, Vol. 2161, p 447. The text of the Convention is accessible on the following UNECE website: [www.unece.org](http://www.unece.org)

6 The provision in brackets relates to the former numbering of the EC Treaty. By virtue of the Treaty of Amsterdam 1997, the nomenclature of the EC Treaty was fundamentally changed.

harnessed, in large part because a number of pieces of EU legislation intended to internalise within the EU's legal order the access to environmental justice and information provisions of the Århus Convention have yet to be either adopted and/or come into legal effect.

Member States play a seminal role in the enforcement area, bearing legal obligations under EU law to ensure that the Union's environmental protection legislation is properly implemented within their respective territories and within the deadlines foreseen (Arts 10 and 249 EC (ex Arts 5 and 189)). However, in practice, Member States have not been particularly diligent to ensure that relevant law and practice is aligned with the environmental obligations entered into by them at EU level. Until recently, it would be fair to assess the general approach of Member States towards the issue of compliance with EU environmental obligations as being low key and minimalist. To a great extent, this approach has meant that the EU has been unduly reliant on the Commission's supervisory work to detect and follow up breaches of EU environmental law by Member States, whether committed by governments, other public authorities and/or the private sector. Since 2000 though, the picture has begun to change. Notably, recent EU legislative initiatives on civil and criminal environmental liability foresee a far greater role to be played by Member State authorities to ensure that legally binding EU environmental protection standards are adhered to within their respective territories.

There are a number of reasons to account for the gradual but steady transformation of the legal picture of EU environmental law enforcement, which is moving from a situation originally dominated by one stakeholder (namely the Commission) to one that is becoming subject to the influence of three types of players (Commission, Member State competent authorities and civil society). From the perspective of resources alone, it has been evident for a considerable number of years that the Commission has faced often-overwhelming challenges to meet its supervisory duties contained in Art 211 EC. Since its inception, EU membership has expanded from six to 25 countries. The number of Member States is set to rise further in the coming years.<sup>7</sup> It is now an even less realistic proposition than it ever was to consider the Commission services, comprising essentially of a legal team of around 30 or so lawyers dealing with environmental law enforcement issues,<sup>8</sup> to be able to monitor each and every breach of EU environmental legislation. Moreover, the Commission services have never been endowed with the requisite

7 These include potentially, Bulgaria, Croatia, Romania and Turkey, which are currently engaged in negotiations over their terms of membership with the EU.

8 This is a rough estimate of the number of officials working with the Legal Unit (currently A.2) of the Directorate-General Environment of the Commission, the relevant unit dealing with environmental infringement cases against Member States.

legal or financial resources to undertake routine and non-routine inspections and investigations, with a view to checking for compliance. Accordingly, from the perspective of efficiency, it has never been a satisfactory position to consider placing primary responsibility on the shoulders of the Commission to ensure due implementation of EU environmental legislation at the national level. Recent efforts at EU level to require Member State authorities to take a more active role in enforcement of EU environmental law tie in with long-standing concerns about the limited effectiveness of relying on the Commission alone to ensure due compliance by Member States with their EU obligations. Efforts have also been made in other policy sectors to decentralise responsibility for law enforcement for similar reasons, most notably in the field of competition law<sup>9</sup> but also in the sectors of consumer protection<sup>10</sup> and the internal market.<sup>11</sup> Recent initiatives to include the participation of civil society, notably environmental NGOs, within the law enforcement agenda have followed ‘moves since the early 1990s to render the decision-making processes of the EU and its impact both more transparent and accountable to the general public. Notwithstanding the fact that changes are afoot, it is still fair to say at this stage the Commission still represents the dominant actor in questions of enforcement of EU environmental law. The changes already carried out, as well as those in the legislative pipeline, will take a considerable period of time to beddown in practice as well as be appreciated for the major cultural shift that they collectively represent in terms of legal practice.

To take account of the three-dimensional nature of the subject of EU environmental law enforcement, this book is divided into three parts. Part One (Chapters 2–5) examines the role of the European Commission in enforcing EU environmental law. It will first examine in detail the various legal provisions and principles that govern the operation of the particular legal proceedings that the Commission may institute against Member States over suspected infractions of EU environmental protection legislation. After a brief overview of the relevant treaty provisions in Chapter 2, Chapters 3 and 4 will assess the operational rules underpinning the Commission’s right to take legal action against Member States under Arts 226 and 228 of the Treaty of the European Community (EC Treaty), which may and indeed have in a few cases culminated in financial penalties being imposed on Member States by the Court of Justice in respect of failing to comply with their environmental

9 Regulation 1/2003 on the implementation of the rules of competition laid down in Arts 81–82 of the Treaty (OJ 2003 L1/1).

10 Regulation 6/2004 on co-operation between national authorities responsible for the enforcement of consumer protection laws (the Regulation on Consumer Protection co-operation) (OJ 2004 L354/1).

11 Commission Recommendation 2005/309 on the transposition into law of directives affecting the internal market (OJ 2005 L98/47).

protection obligations. Subsequent to detailed legal analysis of the law regulating the operation of these proceedings, Chapter 5 takes stock and offers some critical reflections on the supervisory role of the Commission.

Part Two of the book (Chapters 6–10) focuses on the role of and rights accorded to civil society in being able to assist in the supervision of the implementation of EU environmental law. It is divided into two sections in order to take into account of bi-dimensional nature of private sector enforcement of the EU's environmental protection legislation, namely supervision of implementation at national level as well as supervision of the decision-making processes conducted at EU level that may affect operational performance of EU environmental protection legislation. The first section of Part Two (Chapters 6–8) considers to what extent the EU has developed a body of rules to assist private persons take legal steps to ensure that the Union's environmental protection legislation is properly implemented and adhered to in practice at national level. It commences in Chapters 6 and 7 with an analysis of the important general legal principles that have emerged from the case law of the Court of Justice, which have served to establish a floor of rights for private persons to be able to enforce certain norms of EU law before national courts, including those relating to the environment. Chapter 8 examines the extent to which the Århus Convention is set to have an impact on these rights, in terms of access to justice and environmental information held by Member State authorities. Specifically, it assesses the implications of recently proposed and adopted pieces of EU legislation intended to implement the Convention within the EU. The second section of Part Two (Chapters 9–10) considers the extent to which private persons are vested with legal powers to hold EU institutions to account in respect of the decisions they make affecting the environment. Chapter 9 considers in detail the various rights that private persons have to take legal proceedings against those EU institutions they consider to have breached requirements of EU environmental law. It also assesses their rights to gain access to information on the environment held by such institutions, information that may well throw light on the dynamics involved in terms of the decision-making processes at Union level. Consequent to this examination of judicially enforceable mechanisms available to private persons, Chapter 10 provides an analysis of the various non-judicial complaints procedures open to civil society to use to seek review of controversial EU decisions on the environment, including the complaints process before the European Ombudsman.

Part Three (Chapters 11–13) considers the role and responsibilities of the Member States of the EU and their public authorities involved in overseeing implementation of EU environmental protection controls. Chapter 11, in examining this issue from a general perspective, assesses the impact of existing EU legal obligations on Member States in relation to enforcement of EU environmental legislation. In addition, it looks at the evolution of administrative steps taken at EU level since the 1990s to foster good practice

at national authority level with regard to developing systems of inspection of industrial and commercial installations having actual or potential significant adverse impacts on the quality of the environment. These administrative arrangements have culminated in the establishment of an informal forum, the EU Network for the Implementation of Environmental Law (IMPEL), comprising representatives of the EU Member States and the Commission. Chapters 12 and 13 consider the prospective impact of recent EU legislative initiatives intended to enhance the performance of Member States in fulfilling their obligations to ensure proper implementation of EU environmental protection legislation. Chapter 12 examines the legislation addressing the area of environmental civil liability at national level, specifically the provisions of the EU's Directive 2004/35 on environmental liability with regard to the prevention and remedying of environmental damage.<sup>12</sup> Chapter 13 focuses on the EU's recently proposed legislation on environmental criminal liability, namely the Commission's proposal for a directive on the protection of the environment through criminal law.<sup>13</sup> In both cases, the EU legislative instruments seek to place central responsibility with the competent Member State authorities charged with implementing environmental protection policy to apply the liability rules. Finally, with Chapter 14 the book closes offering some critical reflections on the actual and prospective state of the EU's legal and administrative machinery for enforcing its environmental protection legislation.

Before proceeding to examine the three elements of EU environmental law enforcement, it is worth making some introductory comments about the general nature and terminology of the law of the EU. This is, in part, intended to be of assistance to readers who may not be readily familiar with the ever-evolving legal and political structures of the Union. It is also intended to clarify and explain my use of terminology when referring to the institutional systems and legal principles that underpin the constitutional fabric of the EU. In particular, in order to avoid unnecessary confusion, it is important to establish clarity about the distinction between references made to the 'European Economic Community', 'European Community' and 'European Union'. This is important from a legal perspective, as there is a technical but important difference between EU and EC law. So far in this chapter, I have been referring in general and unqualified terms to 'EU' environmental law. However, whilst this may be an acceptable general term of reference, the description of the body of rules of the Union requires further clarification and refinement from a legal perspective.

<sup>12</sup> OJ 2004 L143/56.

<sup>13</sup> COM(2001)139, of 13.3.2001.

## 1.2 Legal architecture and terminology of the EU: a brief overview

Fundamental to any analysis of the enforcement of EU environmental law is a clear understanding of the core provisions of the main treaty that constitutes the core part of the Union's constitutional arrangements, namely the European Community Treaty (EC Treaty).<sup>14</sup> Since its inception in 1957, the regional project for an 'ever closer union among the peoples of Europe'<sup>15</sup> has developed substantially, both in terms of range of policies falling within its remit as well as in terms of its legal impact on the national legal systems of the Member States of the Union. The original core aim to establish a common market between the constituent Member States, as laid out in the original text of the EC Treaty (the 1957 European Economic Treaty), has been extended to include a large number of other common policy goals either directly or more indirectly related to the aspiration to attain conditions leading to a single market within the combined territories of the member countries. Since the mid-1980s this has also formally included the development of a common policy on the environment, by virtue of an amendment to the EC Treaty.<sup>16</sup> Additional environmental policy objectives were introduced by way of amendment to the Treaty of Rome through the Single European Act 1986, Treaty on European Union 1992, Treaty of Amsterdam 1997 and Treaty of Nice 2001. The incremental addition of policy objectives has led to a complex constitutional framework that serves to underpin the regional international organisation's activities, a framework that is currently divided up into three main parts or 'pillars', each reflecting the degree of intensity of European political integration with which the Member States have agreed to proceed in broadly defined policy areas. These pillars are discussed below in section 1.2.1.3. As a way of reflecting the political shift in the mid-1980s towards embracing a broader diversity of common policy objectives under the auspices of the EC Treaty, the title of the international organisation was changed to 'European Union' in 1992. It was no longer apt to refer simply to a 'European Economic Community' of member countries, or even simply a 'European Community'. For the horizons of the organisation had by then developed to embrace overtly political goals in addition to its classic goals on greater economic co-operation. Examples of such newly acquired political goals included environmental protection, as well as co-operation in the fields of foreign and defence policy and justice and home affairs.

Aside from the growth of a multiplicity of substantive tasks undertaken by the EU, it is important to note that the Union is endowed with a

14 Commonly referred to as the Treaty of Rome, denoting the place where the treaty was signed in its original form in 1957.

15 See recital 1 to the EC Treaty.

16 By virtue of the Single European Act 1986, which came into force on 1.7.1987.

supranational institutional framework designed to develop as well as enforce policies agreed at Union level. Such a decision-making framework is unique in the sphere of international relations. With respect to policy enforcement, the European Commission and Court of Justice (ECJ) are of seminal importance. In particular, the EC Treaty recognises the role of the Commission to ensure that the law underpinning the EC Treaty is upheld by the Member States<sup>17</sup> and endows the ECJ with exclusive powers to interpret the EC Treaty as well as determine the validity and interpretation of its acts.<sup>18</sup> Unlike the International Court of Justice, the triggering of jurisdiction of the ECJ is not dependent on the consent of States party to litigation and the ECJ's judgments are enforceable through national civil procedural rules within the jurisdictions of those States.<sup>19</sup> Over the last half century, development of the EU has also witnessed unprecedented legal innovations and developments, many of which have had and do have important ramifications relating to the enforcement of EU environmental law. Jurisprudence from the Court of Justice has confirmed that the law under the auspices of the EC Treaty represents a special and unique source of public international arrangement. Unlike traditional forms of treaty-based organisations, the rules and norms that go to form the European Union, depending on their particular structure and legal base, may in certain circumstances have special legal effects within the jurisdictions of the Member States without needing prior individual ratification at national level and/or the enactment of a domestic statute. This has opened up possibilities for individuals to seek to rely on and enforce those EU norms vested with those particular legal qualities. As this book will explore in some detail in Part Two, this judicial development has had some impact on how EU environmental legislation may be enforced.

### *1.2.1 EU environmental law: some definitions and clarifications*

It is first important to be clear what is meant by the term 'EU environmental law', for legal as well as constitutional reasons. Since the Treaty on European Union 1992 (TEU, Maastricht Treaty), it has become increasingly common in everyday speech to refer to the European Union as a description for the international regional organisation originally known as the European Economic Community or Common Market. The European Union Constitution (EUC),<sup>20</sup> recently signed by all Member States in 2004 and which is intended to replace and consolidate the *acquis communautaire* of existing treaties that currently constitute the regional international organisation's legal framework,

17 Art 211 EC. 18 Art 234 EC. 19 Arts 244 and 256 EC.

20 The Constitution, namely the Treaty establishing a Constitution for Europe 2004, is published in the EU's Official Journal (OJ 2004 C310, 16.12.2004) and may also be inspected on the EU's Europa website: [www.europa.eu.int/constitution](http://www.europa.eu.int/constitution)

merely entrenches the discourse of a 'Union'. At the time of writing, considerable doubt exists as to when or indeed whether the EUC will enter into force, given that two Member States (France and the Netherlands) have so far failed in their attempts to ratify it. The impact of the EUC will be briefly discussed at the end of this chapter.

The term 'European Union' may be a convenient journalistic or political label to use in general terms. However, it would be inaccurate to refer without qualification to the body of rules that make up this regional international organisation as being simply 'European Union law'. The position is more complex and requires precise legal analysis, given that EU norms possess differing legal qualities and effects depending on the particular legal basis of the measure involved as well the legal structure of the material provision concerned. An understanding of the historical developments of the Union's core legal structures and principles will serve to explain the necessity of being precise on legal terminology. Only a very brief overview need be provided here, readers are referred to more in-depth analyses on the general legal underpinnings of the EU available elsewhere.<sup>21</sup>

#### *1.2.1.1 Historical developments: from EEC to EU*

Originally, the regional international organisation that now constitutes the EU comprised of three framework treaties that established three distinct Communities, each with its own distinct sets of norms: the European Coal and Steel Community Treaty 1951 (ECSC), the European Economic Community Treaty 1957 (EEC) and the European Atomic Energy Community Treaty 1957 (Euratom). Whereas the coal, steel and atomic energy sectors of the economies of the Communities' Member States were to be addressed principally by the ECSC and Euratom Treaties, the EEC Treaty constituted the legal framework that would serve as the basis for developing greater integration of the economies of the Member States, principally by fostering completion of a common or single-market area comprising the territories of the States concerned. By the late 1960s, the Communities were being served by a common institutional framework. The body of rules contained in the EEC Treaty, provisions, together with the secondary measures adopted under their auspices and as interpreted by Court of Justice, constituted the main foundations of EEC law. As already mentioned, over time the EEC acquired a range of policy competences whose scope transcended the original core economic priorities set down in 1957, namely the establishment of a common market and a customs union. Successive international treaties agreed between the Member States such as the Single European Act (SEA) 1986, the Treaty on European

21 For an excellent overview of the analysis of the EU's legal framework, see e.g. Craig and De Búrca, 2003, Chs 1–3; Hartley, 2003, especially Ch 1.



Union (TEU) 1992, the Treaty of Amsterdam 1997 and the Treaty of Nice 2001 broadened the remit of the initial European integration project, amending the scope of the original EEC Treaty to include new common policy agendas on areas such as the environment, consumer protection, public health, education, culture, and justice and home affairs. A specific legal framework for development of a common policy on the environment was introduced into the EEC treaty framework only in 1986 by virtue of the SEA. As a symbolic recognition of this process toward a greater depth and range of Community co-operation, the TEU determined that references in the 1957 treaty to 'EEC' should be replaced by 'EC'. Accordingly, the terms 'EC Treaty' and 'EC law' would be henceforth applicable.

## *1.2.1.2 The EU's institutions*

Before proceeding to consider the pillar framework of the Union in detail, it is perhaps first apt to make a brief introductory clarification of the EU's institutional framework. Article 4 of the EC Treaty specifies that five organs of the Union have the status of institution: the European Parliament, Council of the EU, European Commission, Court of Justice and Court of Auditors. The first three institutions constitute the key decision-makers over the EU's legislative processes, in so far as policy matters falling under the auspices of the EC Treaty are concerned. Whereas as the Commission is vested essentially with a monopoly on deciding whether to propose legislation based on the EC Treaty's provisions, the Parliament and Council are the actors responsible for determining whether a specific legislative measure should be passed. In the context of EU environmental policy, the Parliament and Council have equal powers in relation to legislative decision making.<sup>22</sup> The European Commission, the chief executive institution of the Union, is vested with a plurality of tasks in relation to policy matters covered by the EC Treaty. In addition to its legislative role, the Commission has responsibility for developing policy, carrying out responsibilities delegated to it by the Council as well as ensuring that the EC Treaty's provisions and measures are applied (Art 211 EC). The Court of Justice constitutes the Union's judicial institution. The Court comprises two branches, the European Court of Justice (ECJ) and Court of First Instance (CFI). Whereas the ECJ hears disputes brought before it by the EU institutions, Member States or national courts of the Member States, the CFI adjudicates cases brought by private persons against certain EU institutions. An appeal lies to the ECJ from the CFI on points of law (Art 255(1) EC). The Court of Auditors has responsibility for assessing the financial accounting relating to the operations of the EU. Alongside the five institutions, various other supranational bodies

<sup>22</sup> See Art 175 EC.

exist under the EC Treaty framework. Of particular note from an environmental policy perspective is the European Environment Agency (EEA), an agency set up in the early 1990s in order to collate and disseminate statistical data on the state of Europe's environment.<sup>23</sup>

### *1.2.1.3 The three pillar framework of the EU*

The TEU was also responsible for reframing the legal foundations of the original three European Communities in a profound manner. The treaty introduced what has become known as the 'three pillar' framework. Collectively, the tripartite pillar structure comprises the essential constitutional underpinnings of the European Union in its current state. The first pillar comprises the Community treaties. Given that the ECSC Treaty elapsed in 2002,<sup>24</sup> this means that the first pillar comprises the body of rules and policies that are developed under the aegis of the EC and Euratom Treaties. In addition to restructuring and amending the Community treaties, the TEU introduced a set of rules on mutual co-operation in two broad areas of policy that would be governed wholly outside the legal frameworks of the Community treaties. These second and third pillars related to provisions on a common foreign and security policy and on co-operation in the field of justice and home affairs respectively.<sup>25</sup> Collectively, the three pillars were from now on to embody the 'European Union', an entity founded on the European Communities and supplemented by the policies and forms of co-operation introduced by the TEU, with a set of common overarching objectives.<sup>26</sup>

Key reasons why the second and third pillars were developed outside the auspices of the Community treaty framework was that not all the Member States were prepared to accept that co-operation measures agreed in the policy sectors covered by these pillars should be subject to the supranational decision-making type processes and legal effects characteristic of the first pillar (namely, European Community law). In particular, certain Member States were not prepared to engage in a process of majority voting on such matters at Council of Ministers level most notably, the UK and Denmark. Accordingly, rules established under the TEU preserved sovereign powers of Member States by incorporating intergovernmental decision-making processes (that is, safeguarding the principles of unanimity and national veto as well as preserving the right of initiative for Member States). In addition, Member States were not (all) willing to craft foreign and security as well as justice and home affairs measures in the legal form of specific Community measures.

23 See Regulation 1210/90, as amended. Based in Copenhagen, the EEA began operations in 1993.

24 Art 97 ECSC, specifying that the Treaty would remain in force for 50 years.

25 See Titles V and VI TEU. 26 See Title I TEU.

The ECJ, in a long line of jurisprudence tracing back to the seminal cases of *Van Gend en Loos* (Case 26/62) and *Costa v ENEL* (Case 6/64) in the early 1960s, established some fundamental principles pertaining to Community norms that had a profound bearing on the relationship between national and EC law: namely, supremacy and direct effect. In *Costa v ENEL* and in subsequent cases, the ECJ established that Community law is supreme over conflicting national laws and that national governments and authorities are obliged under the EC Treaty to ensure that domestic rules are to be amended and/or repealed in order to ensure due compliance with Community obligations. In *Van Gend*, the ECJ ruled that under certain conditions, private individuals may enforce certain Community norms directly before national courts without the need for those norms to have been first formally transposed into national law, such as by way of rules promulgated by domestic parliaments. This is known as the ‘doctrine of direct effect’, where the ECJ has established in a substantial body of case law that private individuals may be able to enforce Community treaty and legislative provisions where these are precise, clear and unconditional. This particular judicial interpretation of the potential scope of the legal effect of Community law represented a radical departure from contemporary analysis of the legal effects of the Community treaties. International agreements between states are not usually intended to automatically confer rights or obligations on private individuals; ratification and implementation measures at national level are required for this to happen. However, in a long line of cases starting with *Van Gend*, the ECJ has established that Community law constitutes a new legal order of international law, in which Member States have limited their sovereign rights within certain fields and the subjects of which comprise not only Member States, but also individuals. The second and third pillars under the TEU were established with a view to ensuring that they would not be affected by the unique supra-national legal quality accorded to Community norms outlined above; the powers of the ECJ to be able to interpret and rule on validity of measures adopted under the aegis of the second and third pillars was deliberately curtailed for this purpose.<sup>27</sup>

The tripartite pillar framework remains in place today, albeit in a modified form. The Treaty of Amsterdam 1997 amended the TEU so as to change the material scope of the second and third pillars. These now comprise provisions on a common foreign and security policy as well as on police and judicial co-operation respectively, the Member States having agreed to transfer immigration and asylum policy matters to be regulated under the first pillar in a specific format with special intergovernmental arrangements for the UK and Denmark. Measures that may be taken under the second and third pillars are qualitatively different in form and nature than those adopted under the first

27 Art L TEU.

pillar, in retaining an intergovernmental as opposed to supranational character. The fact that the EU is described as having a common set of objectives and being served by a single institutional framework should not mask the fact that the norms emanating from the Union do not (at least as yet in its constitutional history) possess a single common set of underlying legal principles. This is because the legal system of the European Union is bifurcated into two distinct legal structures, namely the first pillar framework (commonly referred to as the *acquis communautaire*) on the one hand, and the second and third pillars, on the other. The legal base on which an EU measure is passed determines the nature of its legal effects. Whereas the first pillar measures are subject to the full range of supranational legal consequences in accordance with the existing jurisprudence of the ECJ on Community law deriving from the EC and Euratom Treaties, second and third pillar measures are essentially of an intergovernmental nature with very limited jurisdiction vested in the European Commission<sup>28</sup> and ECJ<sup>29</sup> for the purposes of supervising policy implementation.

In light of the above, references to the legal system of the European Union should take into account the legal differences that clearly apply as between first, second and third pillar measures. Accordingly, European Union law refers to that body of law which comprises the totality of normals as well as jurisprudence of the ECJ that are founded on the three pillar legal framework and contained in the Community treaties and the TEU, as amended. EC or Community law refers to the body of rules and ECJ jurisprudence that serve to make up the first pillar, which is housed in the EC and Euratom Treaties, as amended. A consolidated version of the EU treaty system has been recently provided in the Official Journal of the European Union,<sup>30</sup> taking account of recent changes including those introduced by virtue of the Treaty of Nice 2001.

#### *1.2.1.4 EU environmental policy and law*

As far as environmental protection matters are concerned, it is apparent that the first pillar of the EU's constitutional framework has been the principal

28 See e.g. Art 13(3), third sentence TEU which charges the Council of the EU, as opposed to the Commission, with ensuring 'unity, consistency and effectiveness of action by the Union' in pillar two matters. Similarly, the Commission has no specific enforcement role with respect to pillar three instruments in Title VI TEU. Instead, the Commission is simply to be 'fully associated' (i.e. informed) of work under the auspices of the second and third pillars (see Arts 27 and 36(2) TEU). The Commission has a supervisory role in the negative sense, in that it has responsibility to ensure that pillar two and three work does not interfere with jurisdiction already conferred to the EU in pillar one, as required by Art 47 TEU. Art 211 EC requires the Commission to ensure that the provisions of the EC Treaty and measures taken thereunder by the EC institutions are applied.

29 Art 46 TEU. 30 OJ 2002 C325/1.

legal structure which has been used in order to develop a common European policy on the environment. Title I to the EC Treaty (Arts 1–16 EC), which contains provisions defining the fundamental principles that pertain to the EC, identifies environmental protection as a common and core political objective. Article 2 EC, which contains a list of the tasks of the European Community, confirms one of these is to promote sustainable development of economic activities as well as a high level of protection and improvement of the quality of the environment, whilst Art 3(1) EC specifies that the Community is to establish a policy in the sphere of the environment for this purpose. Article 6 EC stipulates that environmental protection requirements must be integrated into the definition and implementation of Community policies, as listed in Art 3, in particular with a view to promoting sustainable development. Title XIX to the EC Treaty (Arts 174–176 EC) contain the relevant framework provisions relating to the aims, principles and decision-making processes involved in crystallizing common political agreements forged by the EU legislative institutions intended to address environmental protection issues.

Throughout this book references are made both to ‘EU’ as well as ‘EC’ environmental law. For the purpose of this book, references to ‘EU environmental law’ relate to the entirety of the legally binding rules emanating from the EU that specifically address environmental protection issues. Accordingly, EU environmental law embraces all sources of environmental law that may be found within the three pillar constitutional framework of the Union. References to EC environmental law refer to environmental norms falling under the aegis of the first pillar, specifically the relevant environmental provisions of the EC Treaty. The vast majority of environmental measures adopted at EU level are passed under the auspices of the first pillar of Community law. Unless there is a specific reason for either reference to be used in a particular legal context, this book will refer to the terms ‘EU environmental law’ and ‘EC environmental law’ interchangeably. If the 2004 European Union Constitution is ratified by all the Member States, the three pillar framework will be dissolved, so that in future, references to law of the Union will simply be ‘EU law’.

#### *1.2.1.5 Legal bases for EU environmental measures*

The ECJ has clarified that Art 175 EC will be the appropriate legal basis if a measure relates principally to the environmental field (Cases C–155/91 *Commission v Council* and Joined Cases C–164 and 195/97 *European Parliament v Council*). Where the aim of the EC legislative measure containing environmental protection requirements is intended to fulfil equally essential environmental and non-environmental policy goals or where the environmental aspects are ancillary to the main policy objectives of the measure, the ECJ has ruled that such measures may be adopted respectively on additional

(C-300/89 *Titanium Dioxide*) or other provisions (Cases C-70/88 *European Parliament v Council* and C-217/94 *European Parliament v Council*) contained in the EC Treaty. It is no surprise to find that, given the legal framework underpinning environmental policy development of the EU, it is accurate to state that European Community law has been and remains the principal legal means with which normative environmental protection standards are developed at this level. Until very recently, no second or third pillar measures had been adopted which specifically addressed environmental protection issues. Given this, it is fair to state that discussions about EU environmental law relate essentially to the collection of rules that derive from the EC Treaty that stipulate obligations on Member States (and where relevant also individuals) relating to minimum standards of environmental protection.

However, it is clear that EU environmental measures will not necessarily always relate to first pillar measures. This is, for instance, apparent in the context of criminal law used in relation to the deterrence and punishment of environmental offences. Provisions in both the first and third pillars of the EU legal framework present themselves as potential legal bases for the promulgation of measures designed to develop environmental criminal law at national level. In a recent landmark ruling in September 2005 (Case C-176/03 *Commission v Council*), the ECJ has confirmed that the European Community has legal competence to pass measures intended to require Member States to punish breaches of EC environmental legislation under the auspices of Art 175 EC. Several Member States have been opposed to moves on the part of the European Commission, supported in particular by the European Parliament, to introduce any degree of harmonisation of national laws on environmental crime under the auspices of the first pillar. Such States have maintained a strong preference, on grounds of preserving national sovereignty, for retaining exclusive competence to enact measures in the criminal law field. Where consensus may be found between the Member States (that is, based on the principle of unanimity) on moves to consider co-operation in the field of criminal law, they have been prepared to agree to measures of an intergovernmental nature under the third pillar (Title VI of the Treaty on European Union on Police and Judicial Co-operation in Criminal Matters).

Until the recent ECJ ruling, the Commission and Council were locked in a legal battle over whether or not a proposed measure to require Member States to adopt criminal sanctions for particular major breaches of Community environmental norms should be based either on Art 175(1) EC (first pillar) as a Community directive or on counterpart provisions<sup>31</sup> under Title VI TEU (third pillar) in the form of an intergovernmental Union framework decision. The Council has asserted that Title VI is the appropriate legal framework, on the grounds essentially that according to its view Member

31 Arts 29, 31(e) and 34(2)(b) TEU.

States have clearly determined that matters concerning co-operation in the criminal policy field should be decided in the intergovernmental context of the third pillar and that historically EC law has proceeded on the basis that Member States are ultimately competent and sovereign to determine the means by which they ensure compliance with first pillar obligations. This position resonates with growing concerns of a number of Member States governments, particularly since the 1990s, to foster and entrench principles pertaining to subsidiarity within the framework of governance in the EC Treaty system.<sup>32</sup> The details of this particular legal debate are taken up in Chapter 13.

Suffice it to say at this stage that the ruling of the ECJ, in holding that the Council's Framework Decision encroached on the existing powers of the European Community under Arts 174–176 EC on the environment, has potentially profound implications. It has substantially altered orthodox legal perceptions on the extent of EC competence to engage in law enforcement strategies in relation to its environmental protection legislation. In addition, the ECJ's judgment offers the opportunity for EC legislation to require Member States to enhance the effectiveness of implementation of EC environmental legislation. As will be discussed in Part One of this book, the Commission's existing range of powers to enforce EC environmental law under the EC Treaty are, of themselves, wholly inadequate to ensure due enforcement of EC environmental law within the territories of the Member States. Implied powers for the EU legislative institutions under Art 175 EC to enact legislation so as to require Member States to enforce such law by way of criminal sanctions offers potentially a far more effective means of securing adherence to EC environmental protection rules.

However basing an agreement between Member States on environmental criminal matters under the third pillar instead of the first pillar of the EU constitutional framework has particular disadvantages. The existing range of powers vested in the Commission by virtue of the EC Treaty to ensure due enforcement of EC environmental law (namely, Arts 226 and 228(2) EC) do not extend to supervision of implementation of second or third pillar measures by Member States. The Commission has no specific enforcement role for pillars two or three. Accordingly, it has no legal means of holding Member States to account for failing to adhere to third pillar commitments on any minimum standards set in relation to the application of environmental criminal law. Moreover, it should be borne in mind that measures adopted under the auspices of the second and third pillars of the EU's constitutional framework have profoundly differing legal qualities and effects within Member State national legal systems to those adopted under the auspices of

32 See Art 5 EC (introduced by virtue of the TEU) and Protocol No. 30 annexed to the EC Treaty on Subsidiarity and Proportionality (inserted by the Treaty of Amsterdam 1997).

the first pillar. As will be considered in the next section, legislative measures adopted under the framework of the first pillar may have their own special legal effects which, in certain circumstances, may provide individuals with rights or subject them to obligations enforceable before national courts. This dimension may be of particular value in terms of enhancing the effectiveness of such legislative measures, as a wider range of stakeholders other than the European Commission may thereby be entitled to participate in securing their enforcement. Second and third pillar measures are devoid of such potential, given their intergovernmental as opposed to supranational legal qualities.

Accordingly, the distinction between European Union and European Community environmental law is an important one. In particular, the decision-making processes as well as the legal effects of EC environmental norms are radically different from those adopted under the second or third pillars of the European Union legal framework. In this book, references to EU environmental law refer to the totality of rules of the EU on environmental protection, irrespective of legal base. References to EC environmental law comprise the legal rules on environmental protection based on the EC Treaty, namely relevant EC Treaty provisions on the environment, international agreements adopted by the EC, case law of the European Court of Justice and Court of First Instance on EC norms, and EC environmental legislation.

#### *1.2.1.6 Types of EC environmental legislative measures*

The EC Treaty provides the main legal framework for the promulgation of environmental legislation agreed between Member States at EU level. Title XIX of the EC Treaty (Arts 174–176 EC) contain the principles and pertinent decision-making rules relevant for the development of EC policy on the environment. Article 175 constitutes the principal legal basis for the promulgation of environmental protection legislation to be agreed between the EU institutions that go to make up the Union legislature (namely, the Commission, European Parliament and Council of Ministers). Title XIX of the EC Treaty is not specific about which types of EC norms may be used to further European Community objectives in relation to environmental protection; an indicative list is provided in Art 249 EC. Article 249 EC refers to and defines a range of secondary measures that may be taken at EC level: regulations, directives, decisions, recommendations and opinions. Whereas recommendations and opinions are non-binding political instruments, the first three are legally binding measures. Regulations and directives are designed to serve as legislative measures, namely to implement policy through instruments affecting the public community at large. Decisions, on the other hand, are measures more suited to enforce existing EC legal obligations vis-à-vis specified entities (for example, Member States or legal/natural persons). Whilst the ECJ has clarified that the list of instruments contained in Article



249 EC is not exhaustive (for example, Case 22/70 *Commission v Council*), in practice it is evident that regulations and directives are used as the principal legal means at EC level in order to crystallize Community environmental policy into minimum binding standards across the territory of the European Union.

EC regulations are used relatively infrequently as measures to implement Community environmental policy, not least given the lack of involvement of national parliamentary bodies in relation to completion of the promulgation process. Article 249(2) EC defines regulations as having 'general application', being 'binding in its entirety and directly applicable in all Member States'. ECJ case law has established that where a regulation is used as the mechanism to enact EC legislation, then it is automatically taken to be a constituent part of the national legal order of the Member States without the need for national parliamentary bodies having to pass any local measures in order to implement its contents (Case 34/73 *Variola*). In addition, the ECJ has also confirmed that regulations may be capable of being enforced by private individuals directly before national courts (direct effect) (for example, Case 50/76 *Amsterdam Bulb BV*). Only a few EC environmental regulations have been enacted, given that Member States have been reluctant to develop a common environmental policy without local legislative involvement, a factor that directives are designed to take on board. A number of the environmental regulations passed to date relate to international trade affecting the environment, such as controls on transboundary waste shipments (Regulation (EEC) 259/93), transboundary movements in substances that deplete the ozone layer (Regulation (EC) 2037/00) and on the importation/sale of endangered species (Regulation (EEC) 3626/82). Given the often very detailed and inherently transboundary nature of these instruments, it would make little sense in foreseeing a secondary legislative process at national level. A single legislative document is of benefit to all concerned in order to facilitate certainty of normative application in each national jurisdiction, where often several national authorities and traders liaise with each other over permit requirements on a frequent basis. However, under the current EC Treaty framework there is no formal limitation or hard and fast rules on the use of the regulation as a policy implementation instrument, and it has been used on a number of occasions in the environmental protection context.

In practice, though, the vast majority of legislative instruments that are adopted at EC level in relation to environmental protection are crafted in the form of directives. Article 249(3) EC defines a directive as 'being binding, as to the result to be achieved, on each Member State to whom it is addressed, but shall leave to the national authorities the choice of form and methods'. In essence, this means that where the EC decides to use the instrument of a directive to establish environmental protection standards, the legislative process does not stop at the adoption of the directive but goes on to require a

second decision-making stage; specifically the promulgation of national rules designed to implement the directive's provisions within the national legal systems of the Member States. Member States have the choice as to how they implement obligations entered into under a directive, subject to the mode of implementation being legally binding rules (for example, civil, administrative and/or criminal measures promulgated by the appropriate relevant legislative or other decision-making bodies according to domestic constitutional law). Accordingly, EC directives, unlike regulations, are not designed to be self-executing instruments, but are intended to involve a two-stage legislative process: first, the adoption of the directive itself by the EU's legislature, and second, the adoption by Member States of binding national implementation measures. The entire legislative process envisaged under the EC Treaty where a directive is used is thus only fully completed when the addressees of the directive, namely the Member States, have enacted specific implementing measures locally according to procedures specified at domestic constitutional level.

Whilst the EC Treaty is silent on the choice of legislative instrument that should be used in any given instance by the EU's legislature, over time it has become evident that the directive has become the standard legislative instrument for enacting EC-wide agreed minimum environmental protection standards.<sup>33</sup> From the Member States' perspective, the directive offers a number of advantages. Notably, by specifically including Member State legislative participation in the process in determining the mode of implementation at local level, the directive accords with the subsidiarity principle which mandates the Union to act only if and in so far as is necessary.<sup>34</sup> Moreover, where local legislative action is foreseen, substantial periods are frequently granted to Member States under the terms of each directive for them to take steps to ensure that their respective domestic laws are in compliance with the directive's provisions by a certain deadline after the directive has entered into force (usually at least 18 months or more). In contrast, no transposition period is in principle provided where regulations are used, given that they are directly applicable in all Member States on entry into force, where local implementing measures are rarely or minimally required.

## ***1.2.2 The 2004 European Union Constitution***

With the recent signature by Member States of the Treaty establishing a Constitution for Europe in Rome, 29 October 2004, (otherwise known as the

33 See Art 175 EC which is the principal provision governing the decision-making processes in relation to environmental protection measures adopted at EU level.

34 See Art 5 EC and Protocol No. 30 to the EC Treaty on Subsidiarity and Proportionality.

European Union Constitution, EUC), it is important to take into account that the Union is currently in the process of seeking to initiate further change to its legal framework. The EUC, if and when it enters into force, is intended to replace the existing treaty documents that together comprise the current tripartite pillar system of the Union with a single unifying treaty. The Euratom Treaty is, however, to be left unaffected.

In December 2001, the European Council in its Laeken Declaration created a European Convention chaired by the former French President Valéry Giscard d'Estaing and comprising representatives of national governments and parliaments, the European Parliament and the European Commission in order to flesh out draft terms of a new consolidated legal framework for the Union. The European Council had a number of reasons for seeking to initiate change. The main ones included a perceived need to enhance and better clarify the Union's role on the international scene, to ensure a clearer division of competences between Member States and the Union, to achieve simplification of the EU's legal framework, as well as to enhance aspects of democratic accountability, transparency and efficiency pertaining to EU activities. The Convention submitted its draft treaty to the European Council in June 2003. It was not until the end of October 2004 before the European Council agreed to a final text. Particular problems concerned disputes between certain Member States over respective (legislative) voting rights in the Council of the EU and the extent to which the scope of EU powers based on qualifying majority voting should extend in the short term (including certain fiscal, immigration and foreign policy areas).

It is beyond the purpose of this book to provide but a cursory reference & the EUC. Suffice it to say that, if the EUC is ratified by all the Member States, the legal framework of the EU will undergo some important constitutional-type changes. A few may be noted here. In particular, the nomenclature and internal structuring of EU treaty law will be fundamentally altered as a result of the 'merging' of existing treaty contents. The EUC comprises four parts: Part I focuses on the overall constitutional structure, Part 2 includes the EU's Charter on Fundamental Rights, Part 3 deals with the policies and functioning of the Union, and Part 4 includes general fiscal provisions. The typology for EU legislation is completely changed, with a list of new acts which may be adopted by the Union once the EUC enters into force, as provided in Part I (Art I-32 EUC). An act which is currently referred to as a regulation in Art 249(2) of the EC Treaty will be replaced by an instrument referred to as a 'European law'. A directive is to be substituted by the instrument known as a 'European framework law'. Together, these acts are intended to constitute the source of primary EU legislation in future, namely those used in crystallizing policy commitments into binding form (see Art I-33 EUC). Article I-32 EUC also specifies two legal acts of a secondary and non-legislative nature, namely the 'European regulation' and 'European decision'. A 'European regulation' is defined as a

‘non-legislative act of general application for the implementation of legislative acts and of certain specific provisions of the Constitution’. It may either be binding in its entirety and directly applicable in all Member States or be merely binding on Member States as to the result to be achieved. Accordingly, the legal effect of a European regulation is flexible according to the will of the promulgator; it may be drafted with the legal force equivalent to that vested in an existing regulation or directive as defined in Art 249 EC. Specific provision is made for the possibility of European laws and framework laws to be drafted so as to delegate to the Commission power to enact delegated regulations to supplement or amend certain ‘non-essential elements of the law or framework law’ (Art I–35 EUC). In addition, provision is made for the possibility of the Commission to be vested with implementing powers in relation to binding Union acts, specifically the power to adopt European implementing regulations or decisions ‘where uniform conditions for implementing binding Union acts are needed’ (Art I–36 EUC).<sup>35</sup> A ‘European decision’ under the EUC is defined as a non-legislative measure binding in its entirety, unless it is directed to specific addressees, in which case it is binding only on such persons. Under the current EC Treaty, decisions are defined as being binding only on their addressees (Art 249(3) EC).

As far as environmental policy is concerned, the EUC offers little in the way of notable substantive change or innovation. The provisions on the Union’s common policy on the environment are housed in Art III–233 to 234 EUC (Part 3) and incorporate the existing provisions Arts 174–176 EC. The current provision Art 6 EC that requires all first pillar EU policies and activities should integrate environmental protection requirements is inserted in Part 3, Art III–119. In addition, the ‘integration requirement’ is elevated to the status of a fundamental right in Part 2, in the form of Art II–97. In addition, the EUC confirms that ‘sustainable development’ and ‘a high level of protection and improvement of the quality of the environment’ constitute formal Union objectives (Art I–3(3) EUC),<sup>36</sup> essentially consolidating the current position.<sup>37</sup> In terms of EU law enforcement, the current range of legal proceedings available in the EC Treaty has been subject to some limited amendments under the EUC. They are contained in Part 3 of

35 This clause has interesting potential in terms of EU environmental law enforcement, especially given that Member States’ track record on implementation of environmental legislation remains poor. However, it is envisaged by the author that several Member States would be resistant to making use of this mechanism in practice.

36 See also EUC preamble, fourth recital which refers to the Member States’ ‘awareness of their responsibilities towards future generations and the Earth’. Hitherto, none of the EU’s founding treaties made any clear reference to the need to protect the environment as an integral motivation for enhancing inter-state co-operation.

37 See Art 2 EC and Art 2, first indent TEU.

the EUC<sup>38</sup> and will be addressed in more detail in subsequent chapters of this book.

At the time of writing, it is too early to tell whether the EUC will enter into force. However, ratification of the EUC by all the EU Member States, required in order for it to enter into force,<sup>39</sup> appears now to be a relatively remote possibility, given that its adoption in France and the Netherlands was rejected in May and June 2005 respectively by the citizens of those countries voting in referenda. The United Kingdom has determined not to proceed to ratification unless and until the French and Dutch governments clarify whether they will arrange for a second referendum to take place in their respective countries. A second referendum was called by Denmark in relation to the Treaty on European Union 1992 and by Ireland in relation to the Treaty of Nice 2001. It is apparent, though, that there is considerable political and popular reluctance in a number of Member States, most notably the UK, to approve the EUC formally at national level. Bearing this factor in mind, together with the fact that the ratification process is not expected to be completed for a considerable period of time, this book has been written with a view to focusing primarily on the legal position under the existing EU constitutional framework.

38 In particular, see Art III–360 to 362 EUC (ex Arts 226–228 EC), Art III–365 EUC (ex Art 230 EC), Art III–367 EUC (ex Art 232 EC), Art III–369 EUC (ex-Art 234 EC), Art III–370 EUC (ex Art 235 EC) and Art III–379 EUC (ex Art 243 EC).

39 Signed in Rome on 29 October, 2004, the EUC is required to be ratified by all Member States before it is able to enter into force. The EUC envisages that the earliest date on which it may enter into force is 1 November 2006, assuming that all Member States have ratified by that date (Art IV–447 EUC).

## Part 1

# THE ROLE OF THE EUROPEAN COMMISSION IN ENFORCING EU ENVIRONMENTAL LAW



# EU INSTITUTIONAL ENFORCEMENT OF EU ENVIRONMENTAL LAW: THE GENERAL LEGAL FRAMEWORK

The aim of this chapter is to provide an overview of the core legal machinery set down in the EC Treaty to enforce the proper application of EU environmental law by Member States. In particular, it will consider the general framework of Arts 226–228 EC (ex Art 169–171) which provide the possibility for, *inter alia*, the European Commission to be able to take legal proceedings against Member States considered by it to have infringed EC law, including environmental protection legislation enacted under the relevant EC Treaty provisions relating to the environmental policy sector.<sup>1</sup> The chapter will also consider the type of infringements which these enforcement proceedings seek to address. Chapters 3 and 4 will then examine in more detail the legal principles applicable to these particular legal proceedings, before Chapter 5 takes a critical look at their impact and effectiveness.

Articles 226 and 228(2) proceedings have traditionally constituted very significant, indeed arguably the most significant, EU legal mechanisms for securing due enforcement by Member States of laws adopted under the aegis of the ‘first pillar’ of the EU’s constitutional framework. Vested with specific powers to take legal action against Member States since the inception of the EU, the European Commission has come to be perceived as the entity primarily responsible for enforcing the proper implementation of EC norms at national level. Whilst later chapters will seek to explore the enforcement role of other actors and question the appropriateness of this widely held perception, it is fair to state from the outset that the view is still held today in several quarters, particularly by many Member States, namely that the issue of EU environmental law enforcement is essentially as a task for the Commission. In recognition of the Commission’s central position in the area of EC law enforcement, Part One of this book focuses on the Commission’s role.

<sup>1</sup> Arts 174–176 EC.



Given that the principal legal basis for EU measures on environmental protection is contained within the EC Treaty, specifically Art 175 EC (ex Art 130s), the vast majority of measures on environmental protection adopted at EU level are passed under the auspices of the first pillar of the Union's constitutional framework (namely under the EC and Euratom Treaties). The second and third pillar frameworks of the EU are rarely used in connection with environmental protection. The second pillar concerns measures agreed between Member States in the field of common foreign and security policy, and is regulated by Title V of the Treaty of European Union (TEU).<sup>2</sup> The third pillar concerns agreements between Member States in the field of criminal affairs, and is regulated under Title VI TEU on police and judicial co-operation in criminal matters.<sup>3</sup> A recent notable dispute has arisen over the appropriate legal basis for Union measures adopted in the area of environmental crime. The Council of the EU, in disagreement with the Commission, has considered that the appropriate legal basis for Union measures is contained within the third pillar.<sup>4</sup> This inter-institutional disagreement has culminated in a legal dispute brought before the ECJ, which recently decided the issue in Case C-176/03 *Commission v Council*. The Court found in favour of the Commission, holding that, to a certain extent, the European Community is competent to enact measures on environmental crime on the basis of Art 175 EC. This judgment is discussed in detail in Chapter 13. In contrast with the situation applicable to first pillar measures, the Commission is not vested with any specific powers to take legal action to ensure the enforcement of decisions taken under the EU's second or third pillars. In recognition of the essentially intergovernmental as opposed to supranational nature of decision-making processes applicable to policy areas covered by the third pillar, Title VI TEU leaves responsibility for the implementation and enforcement of measures agreed under its provisions as matters for the individual EU Member States, in accordance with the traditional approach to enforcement of international law. Whilst the Commission is to be 'fully associated' with action taken in the areas covered by the third pillar,<sup>5</sup> it has no specific enforcement role with respect to such action.

Given the legal prominence of the first pillar in relation to the adoption of Union environmental protection legislation, the subject of this book is accordingly essentially about the enforcement of EC environmental law. Pending amendment of the EU founding treaties, this legal picture will not change. The 2004 European Union Constitution envisages dissolution of the current three pillar framework, so that references to the law of the EU are to be simply the law of the European Union. However, as already mentioned, at the time of writing ratification by all the Member States of the Constitution

2 Arts 11–28 TEU.

3 Arts 29–42 TEU.

4 Specifically, Arts 29, 31(e) and 34(2)(b) TEU.

5 Art 36(2) TEU.

appears a rather remote prospect. Accordingly, it is currently still necessary to distinguish between EU and EC environmental law, and make the consequential distinction between enforcement of EU and EC environmental law.

## **2.1 The role of the European Commission as primary law enforcer**

When addressing the subject of enforcing EC environmental law, it is important to be clear about the distinction that needs to be made between implementation and enforcement at national level. The EC Treaty provisions place legal responsibility with the Member States for ensuring that first pillar norms are correctly implemented within their respective national legal systems. This duty is laid down in general terms in Art 10 of the EC Treaty (ex Art 5), and is broad in scope. Specifically, Art 10(1) EC states that Member States are to take all appropriate measures to ensure fulfilment of EC Treaty obligations and measures derived from them. Fundamentally, the obligation embraces the requirement to ensure that national laws are wholly in alignment with EC rules. That the legal responsibility for implementation of EC law rests with Member States reflects a fundamental division of the balance of powers and jurisdiction struck between the EU and Member States in the EC Treaty system. As a matter of general principle, Member States have competence to determine the means by which EU norms are implemented at national level (for example, whether through civil or criminal procedures and/or sanctions). This retention of legislative involvement at national level in relation to EC policy development serves to meet a concern on the Member States' part to ensure that decisions are taken as locally as possible to the citizen. This concern is crystallized in the EC Treaty provisions incorporating the principle of subsidiarity (Art 5 EC (ex Art 3b)). From a practical perspective, there are sound reasons for having Member States, as opposed to the Union, shoulder the burden of implementing their EU obligations. Only Member States command the necessary financial and administrative resources necessary to ensure that the rule of EU law is adhered to on the ground in a sufficiently comprehensive manner.

The duty of implementation also embraces a requirement to ensure that the law is adhered to in practice by all persons operating within a Member State's territory. Article 10 EC reflects the general principles existing in international law that States are required to take steps to ensure that internationally binding norms are respected and adhered to. Accordingly, law enforcement of EC norms has always constituted an integral part of the Member States' responsibilities that inhere in EU membership. However, in practice, Member States have been reluctant to undertake this particular dimension of their implementation obligations seriously. In general terms, they have not readily internalised their legal responsibility to ensure that EC law is properly enforced, but have tended to focus on ensuring that the terms of their respective domestic laws accord with EC rules of law.

The EC Treaty also addresses the issue of enforcement from the perspective of its own institutions. Specifically, it provides the European Commission with powers and responsibility for overseeing the performance by Member States of their implementation obligations. Specifically, the EC Treaty has since its inception in 1957 conferred the European Commission with the task of ensuring that the treaty provisions and measures taken by the EU institutions thereunder are 'applied' (Art 211 EC). This responsibility of guardianship coexists with the Commission's other executive functions and powers set out in the EC Treaty, including principally the role of proposing EU legislative initiatives.<sup>6</sup> The task of implementation is therefore one shared between the Member States and Commission, the Commission having an ancillary part to play in overseeing that Member States fulfil their Union implementation obligations at national level, in practice as well as on paper.

The Commission's duty to oversee the correct application of EC law covers environmental protection measures promulgated under the auspices of Title XIX of the EC Treaty. The principal mechanisms with which the Commission holds Member States to account in respect of their duty to ensure timely and complete implementation of EC environmental norms are the provisions contained in Arts 226 and 228(2) EC, which provide the possibility for the Commission to bring Member States before the ECJ in the event of the latter failing to fulfil this obligation, ultimately with the possibility of financial penalties being imposed on an unsuccessful defendant. The Commission is entitled to bring proceedings against a Member State in the event of a violation of EC environmental law occurring within its territory. For the purposes of Arts 226 and 228(2), the Member State's government is legally responsible for due implementation of supranational commitments within its borders. It is irrelevant that a violation is carried out by a third party, such as a private person, and not perpetrated by a state agency. The obligations assumed by Member States under EC law, in particular by virtue of Art 10 EC, mean that they are held accountable for failures to supervise and/or take effective action against entities that breach binding EU environmental standards.

The conferral in the EC Treaty of specific law enforcement tools to the Commission under Arts 226 and 228(2) EC has provided this EU institution with a high profile role in the area of EU law enforcement. Member States' obligations to secure enforcement of EC norms within their respective territories are less obviously visible within the provisions of the treaty and are to be drawn out from the general requirements imposed on them to implement

6 The sensitive constitutional issues that arise in relation to the state of plurality of functions assumed by the Commission, with particular reference to how these affect its ability and credibility on carrying out its enforcement duties, will be considered during the course of this book.

such norms. Over time, these factors have contributed to a general occlusion of law enforcement responsibilities incumbent on Member States. The EC Treaty does, however, make specific reference to the connection between law enforcement and Member States. Specifically, Art 227 EC provides individual Member States with the power to take other Member States before the ECJ in the event of a breach of EC law. However, for various reasons considered below (see Section 2.3), this particular enforcement power is rarely used.

## 2.2 Enforcement proceedings brought by the European Commission: Arts 226 and 228(2) EC

The relevant EC Treaty provisions which provide the legal framework for the Commission's law enforcement role that cover the environmental sector are Arts 226 and 228(2) EC. The provisions divide up the system of enforcement by the Commission into two distinct types of legal proceedings, namely infraction proceedings brought under Art 226 and those brought under Art 228(2) EC. Proceedings brought by the Commission under Art 226 and 228(2) EC are commonly referred to as 'first round' and 'second round' enforcement actions respectively, given they are linked to one another in a temporal sense. Where the Commission initially detects a breach of EC law, it may decide to take enforcement proceedings under the auspices of Art 226 EC. If it transpires that the defendant Member State persists in the particular breach of EC law at hand, notwithstanding a finding of an infraction by the ECJ, then subsequent follow-up action can be taken by the Commission in the form of proceedings brought under Art 228(2) EC, with a view to obtaining from the ECJ a decision to impose financial penalties on the defendant Member State if necessary.

The 'first round' proceedings enable the Commission to bring proceedings against a Member State where it considers that particular Member State has breached a norm of EC law. Article 226 proceedings envisage the possibility of such a dispute being brought before the ECJ for the purpose of obtaining a declaratory judgment from the court on whether a breach has been committed. However, the principal aim underpinning Art 226 EC is to seek a non-judicial resolution, namely a friendly settlement on the matter between the Commission and defendant Member State. Referral to the ECJ is foreseen only as a last resort mechanism and in practice the vast majority of enforcement proceedings, including those relating to environmental protection disputes, are settled before the matter comes before the ECJ for definitive judgment.<sup>7</sup>

<sup>7</sup> See, for instance, COM(2002)725 Commission Communication on Better Monitoring of the Application of Community Law, which estimates that around 10% of infringement cases are referred to the ECJ (see p 3).

‘Second round’ enforcement proceedings under Art 228(2) EC may be brought by the Commission if a defendant Member State fails to take necessary measures to remedy a breach of EC environmental law as prescribed by a judgment of the ECJ in the context of Art 226 proceedings. As with Art 226 EC, second round proceedings are designed with a view to achieving an out of court settlement of the dispute through negotiation between the Commission and defendant Member State. However, a notable difference lies in the fact that with Art 228(2) actions the ECJ is entitled to impose a financial penalty on the Member State in the event of finding that the defendant State has failed to take the necessary remedial measures in order to comply with its initial judgment. The second round action is a relatively recent feature of the system of EC law enforcement, having been inserted into the EC Treaty by virtue of the Treaty of Maastricht 1992. The Member States agreed to introduce this supplemental enforcement mechanism into the system of EU law enforcement, having taken account of the poor record of compliance by a number of Member States with Union legislation over the years, including with respect to environmental legislation. The inclusion of a financial penalty was perceived to introduce a much-needed element of deterrence in the arrangements for implementation supervision.

### ***2.2.1 Structure and format of Art 226 EC proceedings***

Art 226 EC states:

If the Commission considers that a Member State has failed to fulfil an obligation under this Treaty, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.

If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice.

The brevity of the text belies the often complex, unpredictable and prolonged nature of Art 226 proceedings in practice. Article 226 proceedings contain two principal stages: namely, the pre-litigation and litigation phases. The pre-litigation phase, cited in the first paragraph of Art 226, is a requisite first step to be taken in the course of Art 226 legal proceedings. Also known as the ‘non-contentious’ phase of proceedings, it is designed in particular to achieve two things: to assist the Commission in seeking to verify the factual position concerning state of compliance with EU law, and to facilitate a dialogue with the defendant Member State with a view to reaching a friendly settlement if the Commission considers there to be a proven existence of a breach of law (thereby avoiding the need to litigate before the ECJ). The descriptions of ‘pre-litigation’ and ‘non-contentious’ reflect a main

underlying purpose of the first phase of the proceedings, namely to seek an out of court settlement where this is possible. The pre-litigation procedure comprises two formal stages: namely, the issuing of a letter of formal notice (LFN) and a reasoned opinion (RO) to the defendant Member State by the Commission. The LFN constitutes a first official communication from the Commission to a Member State which sets out the essential lines of argument that lead the Commission to consider that the Member State has breached EC law. In essence, the LFN constitutes a first official warning to a Member State to address the issues raised by the Commission.

In cases where the Commission has clear evidence of non-compliance with EC environmental legislation by a Member State, such as where a Member State fails to transpose a directive into national law within the deadline set by the directive, it is usually prepared to issue an LFN without the need for further preparatory work prior to commencing proceedings. However, in respect of complaints sent to it from the public about allegations of specific instances of improper application of EC environmental legislation on the ground (for example, uncontrolled deposition of waste contrary to Waste Framework Directive 75/442, as amended, or failures to hold an environmental impact assessment for a particular development project in accordance with the Environmental Impact Assessment Directive 85/337, as amended), the Commission will normally first raise the matter informally with the Member State to enable more detailed disclosure of factual evidence prior to triggering the formal commencement of Art 226 procedures. This informal correspondence may take the form of what is known as a pre-letter of formal notice (pre-LFN). Whilst no formal legal implications run from non-compliance with a pre-LFN by a Member State, in that the letter does not formally constitute the commencement of enforcement proceedings, such a letter indicates the degree of seriousness which the Commission attaches to the subject matter and conveys the message that proceedings may well be taken up in the event of a non-co-operative attitude on the part of the Member State concerned in dealing with the issues raised by the pre-LFN.

Article 226 does not stipulate a minimum or maximum period which the Commission should set Member States to send their observations on the charges set out in a formal LFN. In practice, with respect to environmental cases it is not uncommon for the Commission to afford Member States up to six months or more to issue observations. If the Commission is not satisfied that the Member State's observations disprove the allegation of non-compliance, it may then go on to issue a formal reasoned opinion (RO) which will set out in precise detail the legal grounds underpinning the Commission's view that EC law has been violated. Article 226 is silent as to how much time should be afforded to Member States to comply with the RO, which is in effect a second official warning. For environmental cases, again it has been established practice for the Commission to grant Member States a substantial period for compliance. It is not uncommon for periods of six

months or more to elapse before the next stage in proceedings is triggered by the Commission, namely the litigious phase.

The second phase, known as the 'litigious' or 'contentious phase' of Art 226 proceedings commences where the Commission decides to refer the dispute to the ECJ for judgment. Reference to the Court follows where a Member State fails to comply with the RO within a reasonable time limit set by the Commission. Once the file has been registered with the ECJ, it may take up to two years or more before the Court issues its ruling. Prior to the judgment, the Court will have had the opportunity to consider a formal detailed legal opinion on the case issued by a member of the Court, namely from one of the Advocates-General who are specific legal advisers of the ECJ, acting as *amicus curiae*. Whilst an Advocate General's opinion is not binding on the Court and is of persuasive value only, it is usually the case that the views of the Advocate General are followed by the judges. However, one should be guarded about making any generalisations here, particularly where legal interpretation of EU law may be open to a number of differing but equally valid constructions. Ultimately, the role of the Court is to provide a definitive declaratory judgment as to whether or not the defendant Member State in question has acted or failed to act in breach of EU law.

By virtue of Art 228(1) EC, Member States are explicitly obliged to take the necessary measures to comply with the ECJ's judgment if the latter finds that a Member State has failed to fulfil an obligation under the EC Treaty. The contents of Art 228(1) EC (ex Art 171), just as is the case with Art 226, have remained unaltered since the signature of the initial founding European Economic Community (EEC) Treaty in 1957. However, it is important to note that the force of a declaratory judgment by the Court does not necessarily mean in practice that Member States always take the appropriate steps to ensure that the position is changed within their respective borders. The absence of a sanction accompanying a judicial declaration of non-compliance on the part of Member States has, over time, proved to be a clear disadvantage of Art 226 proceedings and was a principal reason why the 'second round' proceedings under Art 228(2) EC were introduced into the EC Treaty framework by virtue of the Treaty on European Union 1992 (TEU). By the end of the 1980s, a number of Member States were failing to follow up and adhere to condemnatory judgments delivered under Art 226 EC. Whilst the Commission could decide to take such states to Court using Art 226 proceedings in respect of a breach of the duty to adhere to an ECJ ruling under Art 228(1), the end result would once again lead only to a declaration of illegality, without any specific sanction such as a penalty or judicial order being imposed.

This state of affairs brought into question the authority of the ECJ itself, mandated to ensure that the rule of law is observed (Art 220 EC). By virtue of the Treaty on European Union 1992, the EC Treaty was amended so as to introduce the power for the Commission to bring additional enforcement

proceedings against any Member State failing to comply with an ECJ judgment against it, ultimately with a possibility of the Court being able to impose a financial penalty on the defaulting State. These additional proceedings are set out in Art 228(2) EC (ex Art 171(2)).

### ***2.2.2 Structure and format of Art 228(2) EC ‘second round’ proceedings***

Art 228 EC states:

(1) If the Court of Justice finds that a Member State has failed to fulfil an obligation under this Treaty, the State shall be required to take the necessary measures to comply with the judgment of the Court of Justice.

(2) If the Commission considers that the Member State concerned has not taken such measures it shall, after giving that State the opportunity to submit its observations, issue a reasoned opinion specifying the points on which the Member State concerned has not complied with the judgment of the Court of Justice.

If the Member State concerned fails to take the necessary measures to comply with the Court’s judgment within the time-limit laid down by the Commission, the latter may bring the case before the Court of Justice. In so doing it shall specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances.

If the Court of Justice finds that the Member State concerned has not complied with its judgment it may impose a lump sum or penalty payment on it.

This procedure shall be without prejudice to Art 227.

The structure of Art 228(2) ‘second round’ proceedings is similar to that applicable to ‘first round’ enforcement proceedings under Art 226. A pre-litigation phase, comprising of an LFN and RO, is to be followed by a litigation phase before the ECJ. Accordingly, the emphasis is on seeking a friendly settlement with appearance before the ECJ as a last resort. The substantial difference lies in the fact that the proceedings may culminate in the imposition of a financial penalty. Art 228(2) makes it clear that, whilst the Commission’s role in bringing proceedings ultimately before the ECJ is to propose to the Court the particular nature and level of fine that might be imposed, it is for the Court to decide whether to impose any pecuniary sanction and what form this might take. The text refers to the pecuniary sanction taking the form of either a ‘lump sum’ (a single one-off payment), or a ‘penalty payment’ (a fine of a periodic nature; for instance, payable on a daily basis pending compliance).

The Commission has published guidelines on how it sets about framing



proposals for penalties under Art 228(2) in individual cases. These include a 1996 Commission Memorandum on applying Art 228 of the EC Treaty (96/C 242/07) and a 1997 Commission Communication on the method of calculating the penalty payments provided for pursuant to Art 228 of the EC Treaty (97/C 63/02). The Commission has recently introduced new guidance at the end of 2005. This guidance documentation will be examined in detail in Chapter 4, which considers the application of second round proceedings. Although there has been little case law on the application of the penalty procedure, the ECJ appears to have broadly endorsed the Commission's guidelines as being a suitable starting basis for assessment. At the time of writing, three occasions had arisen whereby the ECJ had imposed a pecuniary sanction on Member States under the auspices of Art 228(2) EC, all of which concern failures to adhere to EU measures relating to environmental protection (see Cases C-387/97 *Kouroupitos* (2), C-278/01 *Commission v Spain* and C-304/02 *French Fishing Controls* (2)).<sup>8</sup>

It should be pointed out by way of general comment that, although its existence within the EU legal framework has spanned over a decade,<sup>9</sup> the full legal implications of Art 228(2) proceedings are far from having been clarified. The absence of definitive guidance in the treaty text and the paucity of second round actions so far brought before the ECJ inevitably mean that it will take a considerable period of time for the legal parameters to Art 228(2) to be settled. As a consequence, a substantial element of uncertainty still surrounds the operation of its penalty procedures. Given the considerable length of time for a second round case to come before the Court on account of the structure and practice underpinning Art 226/228 proceedings, namely up to 10 or more years, it is no surprise that as at the end of 2005 only three ECJ judgments had been handed down. The current practice of the Commission services involved in environmental casework is to seek a faster turnaround of proceedings at second round stage, in particular with short time limits for Member State responses to pre-litigation communications being introduced. In respect of environmental cases, it is standard practice for Commission services to confine Member States to relatively short periods for issuing communications in the early part of the pre-litigation stage. Specifically, the Commission will follow up an Art 226 judgment within one month and allow Member States one month only to issue observations in response to an Art 228(2) LFN. However, it is questionable to what extent this will in practice have a significant bearing on ensuring a dramatic reduction in the overall length of time that currently transpires between initial detection of infringement and eventual penalty. Chapter 5 takes a critical look at the temporal aspects to first and second round enforcement proceedings.

<sup>8</sup> These ECJ judgments will be examined in detail in Chapter 4.

<sup>9</sup> Entry into force of the TEU was 1.11.1993.

### **2.3 Enforcement proceedings brought by a Member State: Art 227 EC**

Technically, it is possible under the EC Treaty for Member States to take legal action against other Member States in respect of breaches of European Union environmental law under the procedure set out in Art 227 EC. Such proceedings may be brought independently of any action taken under the auspices of Arts 226 and 228(2) EC by the Commission. So much is made expressly clear in the final sentence to Art 228(2). A potentially radical and far-reaching dimension in Art 227 EC in the context of international relations is that Art 227 vests Member States with the power to initiate enforcement proceedings, irrespective of whether the plaintiff Member State has suffered any loss or damage within its particular borders as a result of the infringement committed by another Member State. In practice, this dimension to Art 227 remains only a theoretical possibility, with each Member State government taking a self-oriented narrow viewpoint of the national interest; that is, concerning itself to the extent that any violation has specific effects within its immediate frontiers.

The legal framework of Art 227 EC bears some resemblance to the powers enjoyed by the Commission under Art 226 EC. The process is, however, distinct and qualitatively different in nature. Art 227 EC states:

A Member State which considers that another Member State has failed to fulfil an obligation under this Treaty may bring the matter before the Court of Justice.

Before a Member State brings an action against another Member State for an alleged infringement of an obligation under this Treaty, it shall bring the matter before the Commission.

The Commission shall deliver a reasoned opinion after each of the States concerned has been given the opportunity to submit its own case and its observations on the other party's case both orally and in writing.

If the Commission has not delivered an opinion within three months of the date on which the matter was brought before it, the absence of such an opinion shall not prevent the matter from being brought before the Court of Justice.

The proceedings involve three distinct phases. First, Art 227(2) EC stipulates that where a Member State considers that another EU country has violated an obligation under the EC Treaty it must bring the matter to the attention of the Commission before it may bring an action before the Court of Justice. The second phase then involves the Commission taking up the matter with the defendant and complainant Member States, providing them with the opportunity to submit their own case and observations

on the complainant State's case both orally and in writing. The oral phase of the process is an aspect which is not formally enshrined as an integral part of the earlier phases of Art 226 EC proceedings. In practice, though, the Legal Unit of the Commission's DG Environment, charged with administering the progress of infringement proceedings in environmental cases, engages in informal oral bilateral talks and discussions with each Member State for Art 226 cases. Usually held at least twice a year, these discussions are referred to as 'package meetings', where substantive legal issues are discussed between the Legal Unit and counterpart national officials on the current list of infringement actions against the Member State concerned. Subsequent to hearing the parties' submissions, the Commission is to draw up a reasoned opinion (Art 227(3) EC). If the Commission fails to deliver an opinion within three months of the matter having been brought to its attention, the EC Treaty provides the possibility for the complainant Member State to bring proceedings before the ECJ (Art 227(4) EC).

Whilst it has not yet been tested before the ECJ and is not specifically addressed in the text within Art 227 EC, it appears fairly evident from the provision as a whole that a complainant Member State may decide to take proceedings before the ECJ even if a Commission's reasoned opinion considers there to be no breach of EU law (Craig and De Búrca, 2003, p 402). Article 227(1) EC stipulates that a Member State 'may bring the matter before the Court of Justice' which establishes as a matter of principle that an independent right of referral to the ECJ exists, a right that may not be abrogated by a third party; for example, through Commission intervention.

In practice, Art 227 proceedings have remained a theoretical legal remedy for addressing breaches of EU environmental law. To date, no cases have been brought to the ECJ involving environmental protection issues, and hardly any cases in other policy sectors have been adjudicated on by the ECJ. The absence of litigation supports the view that Member States are careful not to arouse political and diplomatic ill-feeling or tit-for-tat counter-litigation amongst the Council of Ministers, even in situations which are perceived to damage the immediate national interest. Given that domestic electoral pressures and vested interests do not normally revolve around environmental issues, it would be an unusually grave set of circumstances for a Member State to decide to pursue Art 227 proceedings. A Member State government might decide to take such proceedings if the effects of a breach were felt within its territorial borders (for example, cross-border air/water pollution) and the effects were of a significant magnitude. The concept of extraterritorial responsibility for environmental protection does not feature on diplomatic agendas of Member States, unless there are clear potential or actual adverse effects to be felt intraterritorially within domestic borders resulting from an activity taking place extraterritorially. It is as if there is an unwritten concord between Member States that they are each exclusively responsible for the state of the environment within their particular frontiers

unless the pollutant effects of a breach of EU environmental law by a Member State spills over into the national territory of another EU country. Environmental responsibility amongst Member States appears to be firmly compartmentalised on a national basis.

It is accordingly not surprising that no Member State has yet taken legal action under Art 227 against other States in respect of pollution incidents located within the other's territory. No doubt it would be perceived to be an act of unwarranted political interference in the internal affairs of another State, notwithstanding that the concept of the European Union is defined by the EU's founding treaties as a common and shared internal space deserving of a high level of environmental protection and despite widespread awareness of the political artificiality of drawing up national borders for the purposes of environmental protection issues. Even in circumstances of cross-border pollution, it is most likely that the Commission would take up the case itself and prosecute under Art 226 EC. Member State governments are very aware of the need to avoid making adversaries within the Council of Ministers as far as possible, given the requirement to secure qualified majorities for determining policy developments as well as the need to be mindful of being outvoted (the principle of national veto no longer existing for the vast majority of 'first pillar' policy decisions; that is, decisions taken under the auspices of the EC Treaty, including those in respect of environmental protection).

Accordingly, it would be fair to suggest that to date Art 227 proceedings are viewed only as a legal mechanism of last resort by Member States. The prospect of the Commission, in its constitutional capacity as EC Treaty legal guardian, of taking up legal proceedings is much preferred, no doubt in order to defuse potential diplomatic confrontation. A well-known recent example has been the United Kingdom Government's strategy of preferring to let the Commission undertake legal proceedings against France's policy to restrict the importation of British beef products in the wake of concern over BSE (Case C-1/00 *Commission v France*). In some respects one could argue that this is a matter of perception as opposed to substance. It is not uncommon, for instance, for one or more Member States to take sides once a case has been brought by the Commission under Art 226 or 228(2) EC before the ECJ, particularly where the legal position is not clear-cut. Under the Statute of the Court of Justice,<sup>10</sup> Member States have the automatic right to make legal submissions to the ECJ as interveners. The right given to Member States to make interventions in proceedings before the ECJ may therefore serve as an informal proxy for Art 227 proceedings.

On occasion, the facility provided for Member State interventions in enforcement proceedings brought by the Commission can also expose sharp

10 See Art 40 of the Protocol on the Statute of the Court of Justice, annexed to the EC Treaty by virtue of the Treaty of Nice 2001. See also Art 93 of Rules of Procedure of the Court of Justice (OJ 1991 L176/7), as amended, issued on the basis of Art 223 EC.

divisions between the States on policy as well as on legal grounds. Member States may wish to intervene in support or against a defendant, even though the activities taking place on the defendant's territory do not directly interfere with the intervener's current legal practice. A recent example has been over the issue of waste definition under Art 1 of the Waste Framework Directive 75/442, as amended. Several Member States have clashed over their individual interpretations as to how broadly the material scope of the definition of waste should be defined (for example, Case C-9/00 *Palin Granit Oy*). In this type of context, the facility provided for Member State interventions has frequently been used to provide additional legal arguments in support of either party, with a view to defending current or potential domestic practice. Interventions before the ECJ are made, though, with the Member State's attention usually firmly focused on upholding a current domestic political agenda, as opposed to the geographical locus of the alleged breach of law.

Before proceeding to consider the case law pertaining to the application of the EC Treaty Member State infringement proceeding provisions in Chapters 3 and 4, it is useful to be clear about the types of breaches of EU environmental law with which the Commission is typically confronted. In order to do this, it is first necessary to confirm the sources of EC environmental law involved and how their implementation into the national legal order is to be secured by individual Member States. Legal proceedings taken by the European Commission against Member States' breaches of EC environmental norms are most commonly triggered as a result of Member States' failure to complete the implementation process at national level in respect of directives, as is required under EC law.

## 2.4 Types of breaches of EC environmental law

Violations of EC environmental law that may give rise to the Commission deciding to take legal proceedings against Member States under Arts 226/228 EC may be divided broadly into two distinct categories: namely 'non-transposition' and 'bad application' cases. Collectively, they cover instances of failure on the part of Member State governments and/or authorities to ensure that EC environmental legislative instruments are properly implemented within the State's territorial jurisdiction. This typology has been used by the Legal Unit for Infringements within the Commission's Environment Directorate-General (DG Environment) when drawing up implementation reports on EC environmental legislation, as well as for regularly updating and liaising with Member States on the state of infringement proceedings in the environmental sector.<sup>11</sup>

11 This is usually done by way of information briefings in so-called 'package meetings', held at least twice a year, jointly between Commission services and Member State representatives.

‘Non-transposition’ relates to instances where Member States have failed to adopt national measures to implement an EC environmental directive within the deadline set down in its provisions (transposition deadline). The most serious instance of non-transposition is where a Member State fails to communicate to the Commission its national implementing rules within the set deadline (referred to as ‘non-communication’ cases by the Commission). In this case the Member State usually has failed to take any steps to ensure that its domestic provisions are amended so as to be in alignment with a particular directive. A standard provision is included in each directive, obligating Member States to notify national implementing rules to the Commission. Occasionally, a Member State may take the view that its existing rules already satisfy the terms of a directive, so no transposition steps need to be taken, but this is rarely the case and is a risky assumption to make. In any event, the Member State is obliged as a standard requirement in environmental directives to communicate its implementing rules, whether in force before or after adoption of the particular directive concerned.

Non-transposition also includes the situation where a Member State has failed to adopt measures in order to implement part or all of a directive correctly (referred to as ‘non-conformity’ cases by the Commission). Transposition deficiencies of this kind may either be essentially substantive or geographical in nature, the former being usually more serious, given that such a deficiency would normally affect the entire country. Substantive non-conformity involves situations where the Member State concerned has failed to take any measures to implement a binding norm contained in an environmental directive, such as a minimum protection standard or a definition over material scope of application of the directive (such as a definition of an activity, area or species). Such breaches may arise for a number of reasons, ranging from a false assumption that the norm is already in force under national law, an administrative oversight, through to outright hostility to agreed EC environmental policy. Geographical non-conformity concerns instances where measures have been adopted at national level, but which implement the directive only in parts of a Member State. This particular type of transposition shortcoming is not infrequently encountered in Member States with highly decentralised constitutional settlements, which provide for regional devolution in respect of environmental policy. In such countries, the involvement of a number of local, regional and/or national legislative bodies may lead to implementation delays and/or fragmentation of policy approach. However, the federal government of the Member State concerned bears legal responsibility for nationwide implementation of EU (environmental) directives, and this is not affected if it transpires that a regional as opposed to the federal government is to blame for incomplete geographical coverage of implementation.

‘Bad application’ is the label commonly attached to the scenario where a Member State has failed to ensure that EC environmental legislation has

been respected in practice. It is important to note that under the EC Treaty it is the legal responsibility of Member States to ensure that EC environmental law is implemented within their respective territories. Article 10 EC lays down the general duty incumbent on Member States to ensure fulfilment of the obligations arising out of the EC Treaty or resulting from actions taken by the Union's institutions under the auspices of that treaty (namely legislative measures). Accordingly, mere transposition of a directive into national law is *per se* inadequate for the purposes of meeting a Member State's implementation commitments under the EC Treaty. In addition, Member States are obliged to ensure that directives are duly adhered to by the national community, by force of law. This legal responsibility to ensure practical implementation applies to all forms of legally binding environmental commitments entered into by the Member States at EC level, not just directives. Accordingly, the same considerations apply, for instance, with respect to EC decisions (for example, to accede to an international environmental convention) and EC regulations.

In its annual reports on implementation and enforcement of EU environmental law, the Commission has focused on instances of 'horizontal bad application' by Member States. These cases refer to situations where a number of Member States have failed to implement obligations contained in EU environmental directives which serve to create the necessary administrative infrastructure needed for their implementation: for example, drawing up plans, designating sites/installations, adopting programmes, filing monitoring data/reports. They are 'horizontal' in the sense that they involve the infraction of basic implementation provisions shared by all Member States. Horizontal bad application is likely to be detected by the Commission on its own initiative, mainly because the implementation of the environmental legislative provisions in question is most likely to be subject to a clear timetable under the relevant directive and effected through distinct and readily verifiable decision making and drafting procedures. In contrast, the Commission is most usually going to be heavily reliant on complaints from members of the public and non-governmental organisations (NGOs) in order to take up other instances of bad application, such as failures on the part of local environmental protection authorities to ensure territorial integrity of a legally protected habitat, to ensure delivery of an environmental impact assessment in relation to a particular development project, or to ensure that individual industrial installations comply with EC emission requirements.

A recent report carried out by the Commission on implementation and enforcement of EU environmental law<sup>12</sup> reveals widespread implementa-

12 SEC(2005)1055, Commission Staff Working Paper—Sixth Annual Survey on the implementation and enforcement of Community environmental law 2004.

tion deficiencies on the part of Member States. Specifically, 173 non-communication cases, 103 non-conformity and 294 bad application cases were reported as being the subject of Art 226/228 proceedings as at end December 2004 in respect of the 25 EU Member States. Collectively, these cases comprise approximately one-third of all infringement cases taken by the Commission against Member States over alleged breaches of EU law. The environmental sector represents the most litigious policy area as far as state implementation is concerned.

However, it is questionable whether these statistics alone are capable of providing a fully accurate picture of the actual state of conformity with EC environmental legislation at national level. The reason lies with the very limited scope of investigatory powers available to the Commission. For some cases, such powers are not necessarily vital. The Commission is able, in the main, to detect several basic and obvious implementation failings on the part of Member States to adopt measures in order to establish a framework for law enforcement at local level. These cases tend to relate to instances of failures to adopt and communicate to the Commission domestic legislation intended to implement EC environmental directives (non-communication/non-conformity). Due notification of transposition measures to the Commission is a standard requirement inserted into environmental directives. Similarly, the Commission is likely to be able to follow up cases of bad horizontal application, as it will be able to chase Member States for omissions to adopt measures that are designed to be an integral part of the framework for implementing the directive's aims and objectives, such as reports, plans and itemised lists (for example, protected habitat sites or targeted industrial installations). Notification of adoption of such measures within a certain deadline is usually stipulated to be a standard requirement in EC environmental legislative instruments. Given that assessment by the Commission as to whether there is compliance with EC environmental law in these cases is based wholly on the presence and precision of nationally adopted measures (that is, correct transposition), investigatory powers are not in principle usually required in order to garner further evidence of a breach of law.

On the other hand, detection of other types of infringements of EC environmental law often depend on the Commission (and/or national authorities) being vested with appropriate powers to investigate allegations of non-compliance. These cases typically concern complaints (for example, made by the general public or NGOs) that an activity at a specific location breaches EC environmental legislation and that no action has been taken at national level to remedy the situation. Common examples include complaints about uncontrolled fly-tipping contrary to EC waste legislation, failures to establish an environmental impact assessment in relation to project development contrary to EC legislation, and unlawful encroachment of protected habitats contrary to EC nature protection legislation. Complaints



concerning specific breaches of EC environmental legislation are frequently communicated to the Commission. Some 555 complaints (usually either from members of the public or non-governmental organisations) were lodged with DG Environment in 2002 alone. For these types of cases, the Commission is not in a strong position to be able to detect a breach unilaterally or ensure that Member State authorities apply EC environmental legislation in specific cases. The Commission has no specific powers to require Member States to provide its officials engaged in law enforcement access to sites for the purpose of obtaining information and evidence concerning compliance issues. Neither does it have powers to require Member State authorities to carry out investigations. Instead, the relationship between Commission and Member States over EC environmental law enforcement in instances of alleged bad application is currently structured on the footing that Member State authorities are deemed to be primarily responsible for day to day implementation of EC environmental legislation. The Commission has no specific legal powers to follow up these complaints with mandatory investigations of its own, such as surprise site inspections to verify whether EC environmental standards have been breached. Instead, it has to rely on the national authorities to do this and supply it with information in order to place it in a position to assess whether or not there is sufficient evidence to proceed with an infringement action.

This state of affairs contrasts sharply with the position elsewhere in EC administrative law. For instance, in the field of competition policy, where the Commission as well as Member State authorities are specifically vested with substantial powers to investigate and fine companies suspected of breaches of EC competition rules.<sup>13</sup> One of the reasons for the difference in approach to enforcement is that substantive EC competition rules, as opposed to many EC environmental standards, are directly binding on individuals as well as Member States under EC law. The direct applicability of key competition norms such as Art 81 EC (prohibition of anti-competitive agreements), Art 82 EC (prohibition of abuse of a dominant position) and the Merger Regulation 139/2004 (mandatory assessment of concentrations of a Community dimension) serve to legitimise the basis for constructing a direct and robust relationship of law enforcement between the Commission and private entities. In contrast, much of EC environmental law does not possess the same legal quality of direct obligation on the general public. The bulk of EC environmental legislation is passed in the form of a directive, an instrument which is specifically addressed only to Member States.

13 See Regulations (EC) 1/2003 on the implementation of Arts 81 and 82 EC (OJ 2003 L1/1) and 139/2004 on the control of concentrations between undertakings (OJ 2004 L24/1).

## ENFORCEMENT PROCEEDINGS BROUGHT BY THE EUROPEAN COMMISSION (1): ART 226 EC AND ‘FIRST ROUND’ PROCEEDINGS

This chapter together with Chapter 4 will focus on the legal principles underpinning the particular provisions enabling the European Commission to take legal action against those Member States failing to implement EC environmental measures correctly. Collectively, those provisions are Arts 226 and 228(2) EC. As explained in the previous chapter, Commission infringement actions concerning breaches of environmental norms based on the EC Treaty may be divided into two types: namely, first and second round actions. Article 226 EC provides the legal basis for the Commission to take action against particular violations when they first arise (first round action), ultimately bringing the defendant Member State before the European Court of Justice (ECJ) for a definitive ruling as to whether or not a breach of EC law by the defendant has transpired. Article 228(2) EC (second round action) enables the Commission to take subsequent legal action against the same Member State where the latter fails to respect a judgment against it by the ECJ, laid down in the first round of legal proceedings under Art 226 EC.

Currently, the types of rulings that may be delivered by the ECJ differ between those handed down in the context of first and second round proceedings. Specifically, in the context of Art 226 proceedings, the ECJ has the power solely to issue a judicial declaration on the question of compliance by a Member State with respect to its obligations under EC law. In relation to Art 228(2) proceedings, the ECJ has the power to levy fines against a Member State it finds guilty of having failed to comply with a judgment it has made under the auspices of Art 226 EC. The 2004 European Union Constitution (EUC) envisages adjustments being made to the judicial powers currently afforded to the ECJ under Art 226 EC. Specifically, Art III-362(3) EUC provides the opportunity for the ECJ to impose a financial penalty on Member States which have failed to notify the Commission of measures

transposing a European Framework Law, a legislative instrument provided in the EUC having a similar legal structure to EC directives.<sup>1</sup> Such an amendment would undoubtedly prove to be a significant incentive for Member States to ensure that they notify, on time, national measures intended to implement EC environmental legislation. However, as noted in the previous chapters, at the time of writing it is wholly unclear whether or not the EUC will ever come into force.

This chapter will consider the various legal steps involved in the application of first round proceedings. Chapter 4 will focus on Art 228(2) EC. Particular emphasis will be placed on the relevant jurisprudence from the ECJ which has assisted in interpreting the scope of the relevant provisions. This jurisprudence has set down important markers relating to the scope of the Commission's investigatory powers as well as assisting in identifying the parameters of the various procedural rights of defendant Member States faced with such legal action.

### **3.1 Detection of breaches of law**

Enforcement proceedings commenced by the Commission may be triggered usually in one of two ways: either by way of own-initiative or on the basis of third party information. The Commission will be able to initiate legal action on its own account in cases where national laws fail to implement EC environmental norms as required. Typically, this type of case might well involve a failure on the part of a Member State to transpose an EC environmental protection directive into national legislation within the deadline prescribed by the directive. Tracking of compliance is relatively easy for the Commission in instances where directives are drafted so as to contain a standard obligation for Member States to notify the Commission of their transposition measures. However, the Commission is far less likely, of its own initiative, to uncover instances of specific breaches of EC environmental norms on the ground. Instead, any enforcement action launched by the Commission in respect of Member States failing to ensure that EC environmental norms are respected in practice is in fact most likely to stem from information garnered from members of the general public, including NGOs. Given that no formal powers are vested in the Commission to investigate potential or alleged breaches of EC environmental law, this is not particularly surprising. The Commission has published a model complaints form for complainants to complete and send to it when filing allegations of

1 The fast-track penalty procedure in Art III-362(3) EUC would apply to European framework laws which are defined in the EUC in terms equivalent to the definition for directives under the current EC Treaty. See Art I-33(1) EUC, third sub-paragraph.

infringements.<sup>2</sup> The form is designed to assist the Commission in receiving details and evidence of the particular case at hand. It is not binding, though, and members of the public may send in complaints in any particular format they choose.

The means available to law enforcement agencies in securing detection of breaches of environmental law is a matter that is central to any assessment of the relative effectiveness of a system of environmental law enforcement. The range of tools available to the Commission for detecting actual or suspected infringements of EC environmental law is pretty limited. In practice, it is reliant on the general public for referring to it specific instances of breaches of EC environmental law. Even when the Commission has received a complaint, it has no specific powers to investigate any particular site, either by dispatching its own officers to relevant sites or instructing national environmental protection agencies to carry out an inspection on its behalf. Instead, it is wholly reliant on the defendant Member State to supply it with site-specific environmental information and evidence. The balance of power between prosecution and defence in relation to the garnering of factual evidence lies heavily in the defendant's favour. This state of affairs raises a number of questions about the efficacy and scope of Commission enforcement actions, in particular to what extent they represent a satisfactory means of holding Member States to account in meeting their obligations to ensure that EC environmental norms are adhered to within their respective territories. It is relatively straightforward to understand why the vast majority of proceedings taken by the Commission in environmental disputes relate to transposition-type issues, given that the question of il/legality in these cases may usually be resolved by way of simple examination of usually publicly accessible legal documents (namely by comparing national implementing measures with those required to be in place by EC legislation).

### **3.2 Overview of core elements of Commission enforcement actions**

Both first and second round proceedings undertaken by the Commission under Arts 226 and 228(2) EC<sup>3</sup> respectively are composed of a distinct set of steps leading from initial decision to launch of legal action through to eventual judgment by the ECJ. The steps may be described as falling into two broad stages of legal action: namely, the pre-litigation and litigation phases. Given that both proceedings are designed to encourage friendly out of court settlement of disputes between Commission and defendant Member State, in practice a significant period of time is often taken up by the respective parties in

2 OJ 1999 C119/5. The form may be accessed also from the Commission's Secretariat-General website: [www.Europa.eu.int/comm/secretariat\\_general/sgb/lexcomm/index\\_en.htm](http://www.Europa.eu.int/comm/secretariat_general/sgb/lexcomm/index_en.htm)

3 The texts of Arts 226 and 228 EC are reproduced in the Chapter 2.

the pre-litigation phase. This phase essentially involves an exchange of correspondence and views between the Commission and defendant Member State, undertaken with a view to seeking a negotiated settlement where possible.

The nature of the pre-litigation phase for Art 226 proceedings involves the Commission aiming to achieve two things in particular. First and foremost, the Commission is charged with the task of following up lines of enquiry with a defendant Member State in order to verify whether or not any allegations or concerns of a breach of law occurring within the State's territory are borne out. The second principal task comes into operation if the Commission is satisfied that a breach of law has occurred. This involves the Commission seeking ways of ensuring that the defendant state takes appropriate remedial action. If a satisfactory solution can be found, further pursuit of legal proceedings will be unnecessary. Where the breach is an ongoing violation of environmental provisions, action on the part of the defendant state to order a cessation of the breach might be sufficient remedial action in certain cases for environmental protection purposes. An example could be a Member State ordering the cessation of illegal hunting methods of protected species as required under EC nature protection legislation (directives 79/409 and 92/42). The protected site would (hopefully) then be in a position to fulfil its core purpose of conserving protected species. However, in a number of other cases, cessation of illegal activity would be an insufficient remedy, such as where a protected habitat site has been the subject of unlawful development or where uncontrolled fly-tipping has led to a situation of ongoing pollution to the environment. In these situations appropriate remedial action on the part of the defendant Member State requires additional steps to be taken in order to tackle the effects generated by illicit activities, namely restorative measures. In other instances, it may not be possible to unravel the environmental consequences of certain illegal acts. The prosecution of legal proceedings may nevertheless be necessary for other reasons, such as deterrence and/or holding a defendant Member State to account.

The pre-litigation phase envisaged in Art 226 EC involves the Commission issuing two formal written warnings to the defendant Member State to institute corrective action; namely a letter of formal notice (LFN) followed by a reasoned opinion (RO). In practice, these written warnings are issued only after the Commission is satisfied that the strength of evidence before it indicates that a breach of environmental law is likely to have occurred. This is usually unnecessary in cases where a Member State has failed to transpose EC environmental norms correctly into national law. The matter is usually clear from the state of national implementing measures available for inspection by the Commission services. However, in cases involving allegations of bad application of EC environmental law, it is common practice for the Commission initially to send to the Member State concerned informal letters of enquiry with the purpose of ascertaining a clearer account of the facts and of offering the State an opportunity to provide its own assessment of the

legal picture. This type of initial correspondence may take the form of what are known as pre-letters of formal notice (informal warnings) or simply letters of enquiry requesting Member States to provide information about a specific site area.

If the pre-litigation phase proves unsuccessful in resolving matters to the satisfaction of the Commission, then the Commission may decide to bring proceedings before the ECJ. At the point when a case is filed before the ECJ by the Commission, the litigation phase of enforcement proceedings under Art 226 commences. During this phase, handling of the case will take place under the stewardship of the ECJ in accordance with its Rules of Procedure. Filing of court papers and all correspondence from the parties is conducted through the ECJ. The litigation phase is completed once the ECJ has issued a declaratory judgment as to whether a Member State has infringed EC law as alleged by the Commission.

In many respects the legal framework of Art 228(2) proceedings is similar to that applicable to Art 226. The proceedings are composed formally of pre-litigation and litigation phases. However, the nature of the dispute in second round actions is profoundly different. The object of Art 228(2) proceedings is to hold Member States to account should they fail to take suitable steps to adhere to a 'first round' judgment made against them by the Court in Art 226 proceedings. In practice, the pre-litigation phase is not as protracted as for first round actions, given that the zone of conflict between Commission and Member State is quite clearly defined by the judgment of the ECJ in the Art 226 action. The principal task for the Commission in the pre-litigation stage of Art 228(2) proceedings is to ascertain whether, and try to ensure that, the Member State has complied with the Court's findings within a reasonable period of time. This is made more straightforward by the fact that it is for the defendant Member State to satisfy the Commission that compliance has been achieved, not the other way around. In practice, the LFN is issued automatically within one or two months of the ECJ judgment for the purpose of elucidating from the Member State its timetable for instituting remedial measures. Within a few months thereafter, a second written warning (RO) will usually be issued. Pressure is placed accordingly on the defendant to set about implementing the first round judgment as soon as practicable.

Table 3.1 indicates the various legal stages involved in the prosecution of first and second round enforcement proceedings taken by the Commission under Arts 226 and 228(2) EC. An indication of estimated an average length of each stage is provided in respect of what the author estimates to be involved generally for first and second round enforcement proceedings. These timescales may well vary in practice, depending on the degree of complexity of each particular case. The times noted in the table are intended to indicate the period of time that would usually be earmarked for management of a case bearing no undue technical or legal complexities (such as non-transposition of an EC environmental directive).

Table 3.1 Legal stages involved in Article 226 and 228(2) EC proceedings

ARTICLE 226 PROCEEDINGS: First round action

<i>A. Pre-litigation phase</i>	<i>Usual expected timescale (environmental cases)</i>
1. Pre-Letter of Formal Notice (Pre-LFN)	Approx. up to 6 months deadline for response
2. Letter of Formal Notice (LFN)	Approx. up to 6 months deadline for response
3. Reasoned Opinion (RO)	Approx. up to 6 months deadline for response
<i>B. Litigation phase</i>	
1. Case papers registered with ECJ	Approx. within 2–6 months of end of RO deadline
2. Hearing	Approx. between 6–9 months after case filed with ECJ
3. Advocate-General's (AG) Opinion	Approx. 9–12 months after case filed with ECJ
4. ECJ judgment	Approx. 9–18 months after AG Opinion

ARTICLE 228(2) PROCEEDINGS: Second round action

<i>A. Pre-litigation phase</i>	<i>Usual expected timescale (environmental cases)</i>
1. Letter of Formal Notice (LFN)	<ul style="list-style-type: none"> <li>• Sent approx. within 1–2 months after ECJ first round judgment</li> <li>• Approx. 2–6 months deadline for response</li> </ul>
2. Reasoned Opinion (RO)	Approx. up to 6 months deadline for response
<i>B. Litigation phase</i>	
1. Case papers registered with ECJ	Approx. within 2–6 months of end of RO deadline
2. Hearing	Approx. within 6–9 months of case registration
3. Advocate-General's Opinion	Approx. within 9–12 months of case registration
4. ECJ judgment (with possible penalty)	Approx. within 9–18 months after AG Opinion

From Table 3.1, it is possible to appreciate the considerable length of time that is taken up by the prosecution of enforcement proceedings before judgment is handed down by the ECJ. The minimum amount of time that could be expected for a first round action to be completed would be in the region of some 38 months (over three years), with second round actions taking some 32 months from start to finish. In theory, the earliest a Member State could expect to receive a penalty for failing to ensure implementation of an EC environmental provision would be approximately six years (70 months). In practice, the time taken is often considerably longer, with the Commission frequently providing extended deadlines for compliance during pre-litigation phases in Art 226 first round environmental actions. It has been calculated that on average the timespan between the Commission's decision to issue an LFN and application to Court in environmental cases was 35 months during 1992–94, 33 months during 1995–97, 48 months during 1998–99 and 59 months during 2000–01 (see Krämer, 2002a, p 423). In addition, the litigation phase may take considerably longer than anticipated, there being no hard or fast rules about turnaround times for judicial pronouncements on any particular case. The ECJ is in sole control of handling each case through the various stages in the litigation phase of enforcement proceedings. It has been calculated that in respect of the environmental cases decided between 1998–99, the litigation phase took on average 20 months, with the entire Art 226 action lasting 68 months, over five and a half years (Krämer, 2002a, p 424). With the recent accession of 10 new Member States to the Union on 1 May 2004, the time-scale of proceedings is not expected to shorten in the near future. Subsequent sections of this chapter will examine the provisions and jurisprudence concerning the various legal stages to Art 226 proceedings in more detail, with a view to exploring their impact on the handling of environmental cases.

### 3.3 The pre-litigation phase

As already mentioned, Art 226 enforcement proceedings are essentially divided into two distinct phases: pre-litigation and litigation. The pre-litigation phase, constituting the first part of an enforcement action, involves the Commission placing a Member State on notice that it considers a breach of EC law to have occurred within its territory, the responsibility falling on the defendant to effect a remedy within a reasonable period of time. The notification of a breach takes the form of two consecutive written warnings, each with independently set deadlines for compliance: a letter of formal notice (LFN) followed by a reasoned opinion (RO) after the Member State has had an opportunity to submit its observations. An RO is issued if the Commission considers that the Member State has failed to take steps for the purpose of remedying the alleged breach of law or has failed to prove to the Commission's satisfaction that the allegation is in fact unfounded. The purpose of



the pre-litigation phase has been summed up by the ECJ in the following terms in an action against the Netherlands over implementation failures regarding the Wild Birds Directive 79/409:

The aim of the pre-litigation procedure is [. . .] to give the Member State an opportunity to justify its position or, as the case may be, to comply of its own accord with the requirements of the [EC] Treaty. If that attempt to reach a settlement proves unsuccessful, the Member State is requested to comply with its obligations as set out in the reasoned opinion which concludes the pre-litigation procedure provided for in Article 226 within the period prescribed in that opinion. (Case C-3/96, para 16 of judgment).

Put another way, the purpose of the pre-litigation procedure is to provide the Member State concerned with a real opportunity to remedy the position before the matter is brought before the ECJ and also to put forward its defence (Case C-74/82 *Commission v Ireland*). The Court has made it clear that the Commission is obliged to ensure proper respect for the essential rights of the defendant during this phase, in particular by ensuring that the Member State is informed about the exact extent and nature of any allegation of illegal in/activity within its frontiers or other breaches of EC law. In any event, by the time the Commission comes to issuing an RO to the defendant, this will constitute the definitive subject matter of any legal action it wishes to bring before the ECJ during the subsequent phase, namely the litigation phase, of proceedings.

### **3.3.1 Evidence and onus of proof**

One of the central features of Art 226 proceedings is that the onus of proof is placed on the Commission to demonstrate that there has been an infringement of EC law in respect of which a particular Member State is responsible (for example, see Cases 96/81 *Commission v Netherlands*, C-217/97 *Commission v Germany*, C-300/95 *Commission v UK*, C-365/97 *San Rocco*). The Commission, in discharging its responsibility of supervising due application of EC law within the constituent Member States, may not enter into any presumptions of culpability on the part of national authorities, but must provide evidence of sufficient probative value in order to back up its statement(s) of claim (for example, Cases C-300/95 *Commission v UK*, C-365/97 *San Rocco*).

The ECJ has had occasion to comment on the onus of proof in a case brought against Germany over failure to correctly implement Directive 90/313 on access to environmental information (Case C-217/97). The 1990 Directive has subsequently been replaced by new legislation, namely Directive 2003/4, with effect from 14 February 2005. In this case the Commission submitted that German legislation had omitted to include national courts as well as

criminal prosecution and disciplinary authorities within the scope of the national implementing legislation, arguing that these bodies may well have environmental information not necessarily obtained in the context of their judicial activities which they would be obliged to disclose to the public on request (for example, statistical information on the environment).<sup>4</sup> Germany submitted that under the 1990 Directive such authorities did not have responsibilities relating to the environment other than in a judicial capacity. The ECJ held that the Commission had failed to discharge its onus of proof in this case, having relied on a presumption that such entities would have responsibilities derived from the Directive in addition to those applying when they acted normally in the exercise of their judicial powers. In addition, the Commission had not come forward with any evidence to show that such authorities were in possession of environmental information obtained outside their judicial capacities.

In non-transposition cases, where the Commission alleges that a Member State has failed to transpose an EC environmental protection directive correctly within the time period set by the legislative instrument, the issue of evidence does not usually arise as a problem for the Commission. The defective state of implementation will be evident from the wording of the national legislation itself. In an important recent judgment, the ECJ has confirmed that in a non-transposition case, the Commission does not have to prove that non-compliance with an EC environmental directive exists in practice in addition to having to show that national law fails to adhere to the requirements of the directive on paper. In Case C-392/96, the Court upheld the Commission's action against Ireland in respect of the latter's failure to transpose the Environmental Impact Assessment (EIA) Directive 85/337 accurately. Ireland had failed, *inter alia*, to ensure that certain development projects would be subject to an EIA in accordance with the terms of the Directive (peat extraction, afforestation, use of uncultivated land as well the cumulative impact of small projects). According to the ECJ, it was immaterial that the Commission had not presented it with any evidence to show that in practice any of these deficiencies had actually materialised. Incorrect transposition of an environmental directive into national law is accordingly sufficient on its own to constitute an infringement for the purposes of Art 226 proceedings. This is an important judgment, as it prevents Member States from being able to abuse their position by taking advantage of the lack of investigatory powers vested in the Commission. It also enables the Commission to take preventive action, in that it is not bound to wait until

4 The former Directive excluded public authorities from information disclosure obligations where acting in a judicial or legislative capacity (Art 2(b)). It also excluded from its scope information affecting matters *sub judice*, under enquiry or the subject of preliminary investigation proceedings (Art 3(2) second indent).

defective national legislation bears out in practice as the cause of harmful effects to the environment.<sup>5</sup>

It should be pointed out, however, that although as a principle the onus of proof rests with the Commission to make out its legal case, that evidentiary burden may be displaced as soon as the Commission has amassed sufficient evidence pointing towards probability of liability on the part of the defendant Member State (for example, Case 272/86 *Commission v Greece*). Once it has gleaned information and evidence of a sufficiently specific and concrete nature that indicate in all likelihood a breach of EC environmental law has occurred (for example, by virtue of photographic or documentary evidence, or samples), this should be enough for the burden of proof to transfer to the defendant Member State to account for these circumstances. Accordingly, it is not for the Commission to prove liability in an absolute sense. This relates directly to the fact that Art 226 and 228(2) proceedings are of a civil and not criminal nature, so the standard of proof required has been recognised by the ECJ to be below that of 'beyond all reasonable doubt'. The requisite legal standard referred to by the Court appears to be based on a test of the balance of probabilities, a test that one would expect to be applied to civil cases at national level of the Member States (that is, of an administrative or private law nature). The standard of proof set for Art 226 enforcement proceedings may in practice be crucial in assisting the Commission to hold Member States to account for failures to ensure due implementation of EC environmental law. This is particularly so, given the fact that the Commission's legal teams involved in environmental casework rely for the most part on local sources of information concerning bad application of EC environmental legislation, it being usually unable to set up or launch an independent investigation of its own because of lack of financial resources and legal powers.

A good example of the importance of application of the onus of proof principle may be taken from the San Rocco valley waste case (Case C-365/97). In this case, the Commission had pursued a complaint concerning illegal depositions of hazardous hospital waste into a quarry in the San Rocco valley near Naples. A LFN was sent to Italy in June 1990 by the Commission, setting out a number of heads of infringement of EC waste legislation that it had identified, in particular a number of provisions of the general Waste Framework Directive 75/442 (WFD) as amended and the former Hazardous Waste Directive 78/319. In particular, the Commission considered that Art 4 of the WFD had been breached, which stipulates that Member States are to take the necessary measures in order to ensure that waste is recovered or disposed of without endangering human health and without using processes or methods which could harm the

<sup>5</sup> See for example, paras 61–62 of judgment.

environment.<sup>6</sup> The Commission received a reply from the Italian Government in 1992, which admitted that the San Rocco valley had been used for illegal waste dumping, including biological and chemical waste from a local general hospital. It informed the Commission that a particular quarry in the local area used for dumping had been sequestered in May 1990, only to be subsequently re-used as a fly-tip again in 1991. Subsequently, the operator of the site was prosecuted under Italian law for breaching its waste management legislation. As the Commission had not received any information from the Italian authorities concerning any implementation measures intended to restore the San Rocco riverbed environment to be in conformity with EC waste law requirements, in 1996 it issued Italy with an RO. By way of reply, the Italian Government notified the Commission in 1997 of various initiatives that had been taken to restore the local environment, including sequestration of a number of sites in the valley used for fly-tipping up to 1996, re-channelling of waste waters discharged by a local general hospital to a municipal sewer, and the appointment of a special taskforce to draw up a plan for restoring the riverbed. Subsequently, the Commission undertook checks to assess whether or not these initiatives were capable of restoring the environment in conformity with Art 4 of the Waste Framework Directive. In the light of a report it received from the Naples municipality in 1997, it decided to press ahead with legal action and filed proceedings before the ECJ. The report confirmed that pollution of the riverbed had recently intensified and concluded that it was in need of immediate hydraulic improvements. As part of its defence, the Italian Government submitted that Art 4 WFD had not been breached in that, at the time of the deadline for compliance with the RO, the Commission had been unable to show that biological and chemical waste was still being discharged into the riverbed in addition to waste waters. The ECJ dismissed this argument, by effectively reversing the burden of proof in this instance. Given that the Commission had amassed sufficient evidence to prove that in the early 1990s hospital waste had been discharged into the San Rocco valley, including information to that effect gleaned from the Italian Environment Ministry's on-the-spot investigation in 1991/92, it was for the Italian Government to prove subsequently that the position had changed, namely to show that the riverbed was being fouled only by waste waters. Accordingly, the ECJ found that the Commission had established to the requisite legal standard that waste discharged into the valley did not solely comprise waste waters.

However, the ECJ has established limits to which it will be prepared to

6 Waste waters, though, are excluded from the scope of the WFD in so far as they are covered by 'other' legislation (Art 2(1)(iv) WFD). The treatment of sewer waste is subject to obligations under the Urban Waste Water Directive 91/271 which constitutes 'other' legislation for this purpose.

accept *prima facie* evidence of an infringement of EC law from the Commission. Specifically, it is not prepared to allow the Commission to base its case on what it terms a 'presumption' of fact. Each head of infringement must be based on sufficient evidence. In environmental investigations, the distinction between a presumption of fact and an inference of fact that might be made logically from available evidence may be a very fine one to draw, and even an unrealistic one given the very real practical and legal challenges facing the Commission in being able to prove its case successfully. Nevertheless, the ECJ has held that presumptions of illegality are inadmissible, even where they may appear to be quite plausible in the circumstances. A good illustration of this difficulty can be taken again from the *San Rocco* case (Case C-365/97).

In its statement of claim, the Commission had submitted that, given that the valley concerned had been subject to illicit dumping of waste in contravention of Art 4 WFD, it was reasonable to assume that the Italian authorities had also failed to organise supervision of undertakings involved either in the transport, collection, storage, tipping or treating their own waste or in the collection or transportation of waste on behalf of third parties in contravention of Art 13 WFD. However, the ECJ held that the Commission was barred from making what it termed to be such a presumption; instead, specific evidence needed to be garnered by the Commission that illicit dumping of waste in the area had been carried out by an undertaking or undertakings subject to supervision by the national authorities. It appears questionable whether the conclusions drawn by the Commission were unreasonable in the circumstances. The Commission submitted that it was not in a position to verify the identify of individuals involved in the fly-tipping, mainly because of the absence of investigatory powers and resources vested in its services for this purpose. In addition, the Court had already accepted that on the evidence, illicit dumping of hospital waste had been carried out in the valley. It was highly unlikely that unauthorised entities had been solely responsible for all the damage caused, not least given that the type of waste found in the valley was hazardous (medical) waste, the management of which has been required to be subject to close supervision by national authorities under EC waste legislation since the end of the 1970s (namely, Directive 78/319 on toxic and dangerous waste, as succeeded by the Hazardous Waste Directive 91/689). One could have expected the Court to shift the onus of proof over to the Italian authorities to show that fly-tipping had been solely carried out by unsupervised entities, bearing in mind that the Commission was successful in proving its case that illegal dumping of waste had occurred. The ECJ's decision here might be explained by an overly cautious attitude on its part towards making judicial conclusions that could serve to impute culpability indirectly to particular identifiable individual operators concerned with the management of hospital waste in the area. However, if that caution existed it was misplaced. From the available evidence, it was logical to conclude that the Italian authorities had failed to ensure adequate supervision of a

particular hazardous waste stream, which the Member States are obliged under EC law to carry out. Culpability of any individual operator involved in the collection, transportation and management of that waste would be a matter settled exclusively under national law, as directives do not have binding effects on private individuals.

### ***3.3.2 Investigations and the role of Art 10 EC: duty of co-operation***

Whilst the evidentiary burden is on the Commission to prove its case, Member States are under a general legal duty to co-operate with investigations and proceedings carried out under the auspices of Art 226. The ECJ has confirmed that this obligation derives from the general provision on co-operation contained in Art 10 EC. Article 10 EC states:

Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks.

They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty.

This wide-ranging provision contains both a positive as well as negative element: Member States are obliged not only to desist from activities that would undermine the implementation of law and objectives existing under the auspices of the EC Treaty (negative component), but also to take active steps to ensure that legal obligations arising under the treaty are duly fulfilled (positive component). This duty of co-operation has come to the aid of the Commission in the context of a number of enforcement proceedings, including environmental cases. For instance, in Case 96/81, the ECJ found that the Netherlands had been guilty of infringing Art 10 EC in failing to co-operate adequately with the Commission in the context of an investigation over implementation of the Bathing Water Directive 76/160. Specifically, the Netherlands had failed to provide the Commission with information about any steps taken to transpose the Directive. Article 12 of the Directive requires Member States to notify the Commission within two years of its entry into force of those national laws, regulations and provisions designed to transpose the Directive's norms into its national law. In its defence, the Netherlands Government submitted that implementation had been fulfilled, in that the relevant local authorities responsible for Dutch water management were directly bound by the provisions of the Directive. The ECJ dismissed this argument, underlining that Member States are under a positive duty in accordance with Art 10 EC to facilitate the achievement of the Commission's task set out in Art 211 EC to ensure that the EC Treaty's

provisions are applied. In this case, the duty of co-operation was crystallized in the form of a notification obligation contained in the Directive itself; a failure to fulfil that obligation would entitle the Commission to commence Art 226 proceedings against the Member State concerned.

The general duty of co-operation under Art 10 EC has been of assistance to the Commission in the course of investigating other instances of breaches of EC environmental law. A good example is the *San Rocco* case (Case C-365/97). The ECJ took into account Art 10 EC in its judicial findings regarding the relevant responsibilities involved at national and supranational levels during the investigation of alleged breaches of EC environmental law. Specifically, the Court commented:

[I]t is primarily for the national authorities to conduct the necessary on-the-spot investigations, in a spirit of genuine co-operation and mindful of each Member State's duty under Article 5 of the EC Treaty (now Article 10 EC), to facilitate attainment of the general task of the Commission, which is to ensure that the provisions of the Treaty, as well as provisions adopted thereunder by the institutions, are applied.<sup>7</sup>

This judgment underlines the particular importance of the provisions in Art 10 EC in securing active as well as passive assistance from Member States in connection with the Commission's task to secure due application of EC environmental law. Passive assistance involves Member States desisting from taking any steps that may obstruct Commission infringement investigations or proceedings; active assistance requires Member States to ensure that they take steps to help the Commission determine the veracity of allegations of illegal conduct/omissions. In the absence of powers of investigation specifically vested in the Commission for the purposes of uncovering and following up alleged breaches of environmental norms, the general duties incumbent on each Member State under Art 10 to take the necessary steps to ensure full implementation of EC law cannot be underestimated.

The ECJ has established that a number of duties on Member States arise in connection with the detection and prosecution of infringements of EC law in accordance with Art 10 EC. The Court has confirmed that the duty of co-operation in this context requires Member States to ensure that they proceed in dealing with EC law infringements with the same diligence as that which they bring to bear in implementing corresponding national laws (Case 66/88 *Commission v Greece*). In holding that Art 10 EC requires Member States to take all measures necessary to guarantee the application and effectiveness of EC law, the ECJ has established that this includes

7 Para 85 of judgment.

ensuring that infringements of EC law are penalised effectively. This point was illustrated in Case C-354/99, where the Commission took infringement proceedings against Ireland for failing to legislate for adequate penalties for the purpose of enforcing particular animal welfare requirements prescribed in Directive 86/609 on animal experimentation. Whilst the Directive does not include any specific provisions on penalty provisions, Ireland had introduced fines for breaches of the Directive's requirements significantly below the threshold it set for punishing offenders other animal cruelty scenarios (some 200 per cent less). Notwithstanding the omission of specific provisions on penalty clauses in the Directive, the ECJ confirmed that Member States had a legal obligation under Art 10 EC to ensure that infringements of EC law are penalised under conditions and terms analogous to the handling of infringements of national law of a similar nature and importance. The Court confirmed that, in any event, the Member States were obliged to ensure that the penalties laid down in respect of breaches of the Directive were effective, proportionate and dissuasive. Thus, whilst the ECJ recognised that Member States in principle retain choice over the particular mode of implementing an EC directive, the particular means it uses to deter, detect and sanction breaches of that legislation is subject to the residual caveat that it must be an effective enforcement mechanism. The autonomy of Member States in Art 249(3) EC is thereby made subject to notable qualifications. This jurisprudence is particularly important in the context of EC environmental law, where effective sanctions are especially needed, not least given the marked lack of private interest, resources and possibilities to tackle infringements of EC environmental provisions through private law remedies. This latter point will be explored in Part Two of the book.

### ***3.3.3 Commission discretion in deciding to take legal action***

A key feature of the various powers vested in the Commission under the EC Treaty in taking infringement proceedings against Member States for breaches of EC law is that, as interpreted by the ECJ, the Commission has complete discretion in determining whether or not to commence or continue with legal action against a Member State. Accordingly, the EC Treaty has conferred the Commission with a certain amount of political leverage it may use in deciding whether or not to, or how far to, prosecute any particular case. It also enables the Commission to have some purchase on managing its own limited resources as efficiently as possible in tackling breaches of EC law. For instance, it may decide to devote its legal resources to resolving particularly grave instances of violations of EC law, relying on national authorities to focus on casework which is principally localised in nature. This has happened, for instance, recently in the field of competition law where the Commission has been allowed to devolve greater responsibilities on national authorities, governments and individuals to enforce EC competition norms



whilst reserving itself the power to intervene in particularly serious cases, cases involving multiple jurisdictions and instances which involve novel points of law.<sup>8</sup> There have been long-standing discussions within the Commission's services on possibilities of a move towards decentralising the enforcement of EC environmental law. Most recently, two EC legislative initiatives have emerged addressing the subjects of civil and criminal liability for breaches of EC environmental law, which involve the imposition of specific responsibilities on national competent authorities to enforce EC environmental legislation. These are discussed in detail in Chapters 12 and 13. The wide degree of discretionary power afforded to the Commission over the launch of Art 226 proceedings is a double-edged sword, in the sense that it may well bring with it problems of accountability and inefficiency, not least as the Commission has a monopoly over whether or not to launch and/or continue with any proceedings.

### *3.3.3.1 Legal justification needed for bringing an action before the ECJ*

The ECJ has confirmed that success of any particular infringement action will be determined exclusively on the question as to whether, objectively, there has been a breach of EC law by the close of the deadline set to reply to the Commission's second written warning, namely the RO. All other factors are in principle irrelevant to the outcome of such litigation.

The Court has confirmed that the motives for the Commission's legal action are irrelevant in assessing its legitimacy. For instance, in Case 416/85 the Commission took legal proceedings against the United Kingdom over alleged failures to implement Directive 77/388 on Value Added Tax; the Commission considered that the UK had provided zero-rating for certain services that were not permitted under the terms of the Directive for social reasons benefiting the end consumer. The UK countered by submitting that the Commission was seeking to use Art 226 proceedings for political reasons, namely to bypass the requirement of a unanimous vote in the Council of Ministers which would be needed for an amendment to the rules on VAT exemption. The ECJ dismissed the UK's arguments, confirming that it was not for the Court to comment on the particular objectives pursued for the purposes of enforcement proceedings, only to determine whether or not the Member State had failed to comply with its EC obligations; the launch of Art 226 proceedings is at the discretion of the Commission.<sup>9</sup> This line of jurisprudence leaves the Commission effectively free to prioritise particular types of cases, for legal or policy reasons. In practice, though, to date the Commission services have sought to approach environmental litigation on

8 See Regulation 1/2003 (OJ 2003 L1/1).

9 Para 9 of judgment.

the individual legal merits of the particular case at hand. However, given the limited resources available to the Commission, in particular in terms of human resources and investigatory powers, it is not inconceivable that a rationing or prioritising of Commission enforcement casework may happen in the future, mainly because of the prospect of a substantial increase in casework for the Commission as a result of the considerable number of countries recently acceding to the EU.

The ECJ has also confirmed that it is no defence to an action to complain that not all Member States have been treated equally from an enforcement perspective. In Case 146/89, the UK argued unsuccessfully that an action against it for illicit unilateral extension of its exclusion zones for fishing purposes should be struck out on the basis that, in the past, the Commission had failed to take legal action against other infracting States. The ECJ held that it is for the Commission alone to assess whether or not it is appropriate to commence an enforcement action. In practice, though, the Commission's DG Environment has made it clear on a number of occasions that litigation against Member States will be conducted on an equal-treatment basis; in particular, every Member State's transposition record is tracked and monitored on an equal basis. League tables are regularly published by the Commission to indicate relative performance between the Member States on transposition performance.

The above case law provides the Commission with a good deal of flexibility when deciding to take enforcement proceedings against any particular Member State, allowing it to use litigation as a means of last resort if other channels of dispute resolution of a faster and more informal nature may be found.

### *3.3.3.2 Temporal aspects: delays in taking legal action and historical breaches*

Article 226 EC does not prescribe any specific deadline by which the Commission must decide whether or not to commence infringement action. The ECJ has also confirmed that there are no express or implied limitation periods which apply. Accordingly, as a matter of legal principle there are no specific deadlines by which the Commission must decide whether or not to take legal action. Even where the Commission has taken a considerable period of time (months, even years) either to decide to launch proceedings or to process the pre-litigation phase, the Court has dismissed arguments from defendant Member States that an action should be barred on the ground that such a substantial delay is tantamount to procedural impropriety on the part of the Commission. For instance, in Case C-333/99 the Commission had decided to take action against France on account of its failures to abide by fishing quota restrictions allocated to it for the years 1988 and 1990 under the auspices of the Common Fisheries Policy. Specifically, the Commission submitted that France had failed to monitor the quota level and had omitted

to take penal measures against French enterprises contravening those conservation measures. By the time the matter came to Court, some 10 years had elapsed; this was largely because the Commission had taken some seven years to complete the pre-litigation stage of proceedings. The French Government pleaded that the action should be declared inadmissible, submitting that such a delay on the Commission's part in handling the proceedings deviated from the objective of Art 226 EC to secure compliance with EC law. However, the ECJ dismissed this argument, holding that the rules pertaining to the operation of Art 226 did not oblige the Commission to act within a specified period.<sup>10</sup> In the absence of any evidence to show that the unusual length taken in processing the case during pre-litigation stage adversely affected the defendant State, the admissibility of the action would not be put into question (para 25 of judgment). In Case 342/82, the Commission decided to initiate Art 226 proceedings against Belgium in March 1981 over failures in transposing the Sixth VAT Directive 77/388.<sup>11</sup> More than three years after the Belgian Government had communicated its national rules intended to implement the EC tax legislation in December 1977, the Commission decided to take legal action. The Commission had communicated its objections by informal letter in November 1979, but had waited until the Directive entered into force for all Member States before examining compatibility issues. The Court's ruling confirms that the Commission will not be estopped from taking action, even if a significant period of time elapses between when it is informed of a breach and when it formally launches litigation.

This element of flexibility is useful in allowing the Commission a broad opportunity to negotiate with a Member State behind the scenes with a view to achieving where possible a workable friendly settlement. Not only does this have the advantage of avoiding the embarrassing publicity of legal proceedings for the State concerned, it also allows the Commission to prioritise its resources on targeting and processing proceedings on the most serious infractions. Given the large number of complaints over Member States' failure to protect the environment that are regularly sent to the Commission, it is important that the Commission is afforded the time necessary to be able to follow up these appropriately. In some instances, an immediate LFN will not be warranted, for instance because of lack of verification of the statement of complaint, the real prospect that the Member State may offer a solution without the need for recourse to litigation, or the fact that a case on a key legal point is currently pending adjudication by the ECJ (for example, Case

10 This may be contrasted with the time restrictions imposed in other types of enforcement actions set out in the EC Treaty (e.g. single market supervision under Art 95(6) EC, Council of Ministers involvement in state aid supervision under Art 88(2) EC, and supervision of mergers under Regulation 139/2004 (OJ 2004 L24/1).

11 OJ 1977 L145.

C-96/89 *Commission v Netherlands*). In these circumstances, more time may well be needed before a definitive view may be taken on whether Art 226 proceedings are required.

The ECJ case law also confirms that the Commission is not per se barred from taking action against breaches of EC law that are purely historical. The general position established by the ECJ is that a Member State will be held liable for a breach of EC law if it has not remedied the position by the time the deadline set by the Commission's RO has elapsed (Case C-392/96 *Commission v Ireland*). One might consider that this would render an action against Member States for historical breaches of EC law problematic; namely a breach of law which has occurred in the past and is not ongoing during the passage of Art 226 proceedings. However, the ECJ has confirmed that the Commission may take States to court for such breaches so long as the Court is presented with objective evidence of an infringement having taken place. In Case C-200/88, for instance, the Commission took action against Greece over failures to supply it with price information relating to the fishery sector pertinent to a particular time period. Such information was necessary for the Commission to establish an EC guide price for fish products imported into the Union for the purposes of the Common Fisheries Policy (CFP). The ECJ rejected the Greek Government's argument that the infringement was of historical interest, given that an entirely new time period was in place for managing the current CFP at the material time when legal proceedings were brought before it. The ECJ considered that it was for the Commission alone to assess whether it was wise to launch enforcement proceedings in any given case, as it enjoys discretionary power to decide whether or not to institute Art 226 proceedings.<sup>12</sup>

The Commission will not continue to pursue proceedings against a Member State where the EC legislation concerned has been repealed prior to the case coming to court so that the relevant provisions are no longer in force in some form or another. If the relevant legislative provisions have simply been included without changes into new successor legislation, then the pleadings simply have to be amended accordingly without proceedings having to be commenced afresh. These points arose in the *San Rocco* litigation (Case C-365/97), where during the course of the proceedings legislative amendments were made to the Waste Framework Directive 75/442 in 1991. The Court confirmed that the Commission would be able to continue to rely on the Directive's provisions cited at the commencement of its action so long as their scope had not been altered by the amendment made to the Directive, even if they may have been re-located in the amended legislation so as to have different Article numbers. The ECJ has confirmed, in a case against Portugal over implementation of EC waste oils legislation, that the Commission

<sup>12</sup> Para 9 of judgment.

would not be able to use interim legislative amendments to that legislation so as to extend the scope of liability (Case C-392/99 *Commission v Portugal*).

In an environmental protection context, an important factor is that the Commission retains the right to bring an action against Member States for historical breaches of EC environmental law. It may be the case, for instance, that a particular incident of illicit pollution that a Member State fails to address in accordance with its EC legislative obligations may have been cleared up or have dissipated prior to the Commission being notified of its existence (for example, dumping of waste in the marine environment, failure to properly supervise air emissions from a particular installation over a specified period). This would be no bar to the Commission being able to take legal action once appraised of the facts and provided with evidence of an infringement. If Member States were able to avail themselves of such a defence, this would undermine potentially a large number of actions that the Commission may wish to take against Member States failing to ensure respect for EC environmental norms within their respective territories. Member States would be able to excuse themselves from past breaches of environmental law, however serious, by submitting that they had taken remedial action to rectify the position. The ECJ case law would appear to confirm that the Commission may seek to bring an action in order to uphold provisions of EC law as a matter of legal principle. It may be the case that the Commission might wish to take a State to court in respect of a particularly serious breach of environmental legislation. An example would be, for instance, failures on the part of a Member State to take steps to minimise the effects of an oil or chemical spillage at sea.

A case in point would appear to be the 2002 oil spill from the *Prestige* oil tanker off the coast of Spain and Portugal. Both countries, fearing for the safety of their local fishery reserves, ordered the *Prestige* tanker out to sea away from their coastlines, notwithstanding that it had appealed for emergency assistance after reporting leakages of oil and a failed engine. In the event, the tanker sank a few days later some 200 miles away in the Atlantic, with a total loss of oil cargo. Wind and tidal forces soon forced the spill to pollute the Galician and French coastlines with severe effects on coastal marine life, particularly wild birds, as well as local fishing and tourist sectors. Within Commission's DG Environment, the question arose as to whether legal action should be initiated against those countries for failing to minimise oil pollution waste in accordance with the terms laid down in Art 4 of the Waste Framework Directive 75/442, such as taking the oil tanker into a local port as advised by the expert salvage team on location at the time. In the event, the Commission services decided not to bring legal proceedings, preferring to take action instead to subsidise those governments' coastline clean-up operations. The Commission, however, would have been perfectly entitled to take legal action even though the steps taken by the Member States were not of an ongoing nature.

On the other hand, not all historical breaches of EC environmental law may be caught. In particular, if a Member State manages to prove the absence of, or remedy to, an infringement of EC environmental law before the elapse of the deadline for compliance set by the Commission, then the action will fall. In Case C-198/97, the Commission had taken action against Germany over failures in various parts of its territory to adhere to minimum environmental protection standards prescribed by the Bathing Water Directive 76/160. The German Government sought to defend itself before the ECJ by arguing that, by the time the action had come before the Court for a hearing, the various bathing sites alleged to have infringed the Directive had either been sufficiently cleaned up in accordance with the terms of the Directive, or closed. Because these steps had not occurred within the deadline set by the RO, the Court held that they did not cure the infringement.<sup>13</sup> However, had the German Government completed these measures before that deadline, then the outcome would have been different.

### 3.3.3.3 *Collegiality and Commission decision making*

Another significant element that goes to make up the wide degree of discretion afforded to the Commission in relation to Art 226 EC enforcement proceedings is the very limited degree of scrutiny in law and practice that its internal decisions concerning case management are subjected to. At a formal level, this would not appear to be the case from inspection of the constitutional position.

Under the EC Treaty system, Commission decisions over whether or not to commence, progress or terminate legal proceedings against a Member State are formally taken at college level, namely by the Commissioners themselves acting on a collective basis. Specifically, it is foreseen in the treaty that Commission decisions are to be taken on the basis of a majority of the Commissioners (Art 219(EC)); action pursued by the Commission on any other footing would be *ultra vires*. Accordingly, each stage of the litigation process has to be ratified by the College of Commissioners.<sup>14</sup> That the College itself, as opposed to the Commission's services (namely Directorates-General), is invested with the responsibility of decision making is a particular crystallization of the principle of political accountability and balance of institutional powers crafted into the legal framework of the EC Treaty. Notably, the Commissioners are made accountable to the other key political EC institutions, namely European Parliament and Council of Ministers, in various ways under the EC Treaty framework: notably, a quinquennial appointments

<sup>13</sup> Para 33 of judgment.

<sup>14</sup> Art 213(1) EC, as amended by Art 4 of the Protocol on the Enlargement of the EU, annexed to the Treaty of Nice 2001.

process (Art 214 EC); Parliamentary powers to censure the College and subject Commissioners to questions (Arts 201 and 197 EC respectively); and compulsory retirement in the event of misconduct or incapacity to perform duties (Art 216 EC).

However, in practice, most Art 226 and 228(2) litigation management is processed, to all intents and purposes, far from the collegiate level and instead within the civil service system of the Commission itself. Environmental casework is principally handled within the Legal Unit of DG Environment, whose officers determine whether or not any next steps in terms of litigation process should be proposed at college level. Legal analysis is conducted more or less exclusively at the level of the Directorate-General. The College rarely, if ever, conducts its own legal assessment on such proposals. In practice, the proposals are usually adopted on the nod by the College without independent verification. However, occasionally the Legal Service of the Commission may be referred to for advice in the event of any internal dispute amongst or within Commission services over whether a Member State has violated EC law. The Legal Service is attached to the Secretariat-General of the Commission, a Commission service independent of any particular Directorate-General and falling under the supervision of the Commission's Presidency. However, its legal opinions are not open to review by the public and there is no formal way of knowing if its services for a second legal opinion have been requested<sup>15</sup> or knowing to what extent its opinions prevail in any particular case.

Whilst on paper the Commissioners must authorise Commission action on the basis of a majority vote, it is rarely if ever the case that this happens in practice. The vast majority of decisions over Art 226 and 228(2) litigation are made without any substantive debate or exchange of views at Commissioner level; such decisions are channelled upwards through the Commission service hierarchy ultimately to the Commission's Secretariat-General, before being classified usually as items on the agenda of a College meeting not requiring oral debate. Instead, they are normally subject to a purely 'written procedure' and are signed off on paper only by the College without substantive debate. The internal decision making practices of the College of Commissioners are not open to public scrutiny. All that appears on the public record is that a College decision has been reached. However it appears fairly clear from available (mostly anecdotal) evidence that the principle of majority voting is not applied or expected to be applied, particularly in the context of decisions over legal proceedings. Instead, a culture of consensus appears to prevail in terms of college decision making. First, there appears to be a basic working presumption that, bar special or unusual circumstances, issues concerning enforcement proceedings are anticipated to be beyond the sphere of

15 See Art 4(2) Regulation 1049/01. See also Chapter 9.

usual political negotiation and that Commissioners with portfolio for the particular policy sector concerned are to take a lead role. Hence, the practice has developed to favour a written procedure classification for litigation items. Second, if a major dispute does arise within the Commission over whether to pursue legal action against a Member State, traditionally a culture of consensus has appeared to surface at collegiate level so that blocking minorities may hold sway. However, given the secrecy that attends Commission voting procedures, it is impossible to analyse the political dynamics involved in such cases or to make any generalisations with any certainty. The comment that may be made safely is that the element of voting, coupled with the fact that the Commission is also responsible for policy development at EC level, is a combination inappropriate for the purposes of law enforcement. Some decisions over litigation may be subject to or compromised by unrelated broader political considerations (for example, trade-offs in relation to current/pending policy initiatives or instruments).

The manner in which the Commission has come to process enforcement proceedings has itself been questioned before the ECJ recently. From a formal perspective, the ECJ has confirmed that decision making on the part of the Commission in relation to law enforcement under Arts 226 and 228(2) EC necessarily implies equal participation on the part of Commissioners, collective deliberation and no possibility of decisions being delegated (for example, to individual Commissioners) (Cases C-191/95, 272/97 both *Commission v Germany*). However, the case law has also made it clear that collective decision making on the part of the Commission may also be passive in nature. For instance, in litigation over compliance with the Bathing Water Directive 76/160 (Case C-198/97), Germany submitted that the principle of collegiality at Commissioner level had been breached when the College came to issue it with an RO. Specifically, Germany considered that the RO had been issued *ultra vires*, in that the Commission was unable to demonstrate that all the Commissioners had been aware of the operative part of or the reasons underpinning the draft Commission decision to issue Germany with an RO, at the time when the College met to decide how it should proceed. Collegiality, in the German Government's view, implied active collective deliberation. In contrast, the ECJ employed a more flexible test of collegiality, holding that this principle would be observed as long as the members of the College had available to them all the information that would assist them in adopting a decision to issue an RO. Whether and to what extent individual Commissioners followed up this information at the College meeting was accordingly immaterial. This judgment effectively legitimises the practice within the Commission for the College to leave, in most instances, active responsibility for case management decisions in the hands of individual Commissioners according to political portfolio, with passive endorsement from the rest of the College. Whilst the form suggests collegiality, the substance indicates delegated responsibility.



In fact, it is not even clear that individual Commissioners necessarily have command over the processing of enforcement proceedings. As far as environmental casework is concerned, all proposals for next steps in litigation matters are made at the level of the Environment Directorate-General, specifically by the DG's Legal Unit. In practice, the Environment Commissioner is rarely in any position to query proposals for next steps made by the DG, not least given the fact that s/he does not usually have the time or resources to do this. The Commissioner's group of advisers (cabinet) is not staffed with a team dedicated to inspect litigation issues, and in any event the Commissioner's agenda is usually filled with considerations pertaining to policy development. In practice, reliance is placed on the Commission's services, in this case the Environment DG, to do the day to day job of monitoring Member State implementation of EC environmental law and following this up where necessary. The author knows of no initiative for proposing litigation against a Member State over contravention of EC environmental legislation that has originated from a Commissioner's office.

#### 3.3.3.4 *Commission immunity from judicial review proceedings*

A central feature of the discretionary nature of Art 226 enforcement proceedings is the degree of legal immunity afforded to the Commission *vis à vis* any legal challenges launched against decisions on its part either to commence or desist from taking action against a Member State. Legal challenges have been made in the past on the basis principally of two EC Treaty provisions, namely Art 230 EC (annulment proceedings) and Art 232 EC (action for a failure to act). The position of the ECJ has been robust, namely to safeguard the discretionary power of the Commission in its decisions whether or not to apply these EC treaty provisions relating to law enforcement in individual cases by minimising the rights of defendants or third parties to interfere with these decisions. Accordingly, in principle any Commission decision over the commencement of infringement proceedings will not be subject to the possibility of judicial review, either at national or supra-national levels (see for example, Case 247/87 *Star Fruit Co.*). The Commission is vested with sole control over determining whether or not to take legal action under either Arts 226 or 228(2) EC. This legal area is considered in detail in Chapter 9, which assesses the various rights available to private persons under EC law to subject Commission environmental decision making to independent scrutiny.

The jurisprudence from the ECJ which provides the Commission with judicial immunity is problematic. From a legal perspective, the narrow judicial interpretation adopted by the Court does not accord with the fact that the Commission has a definitive obligation set out in Art 211 of the EC Treaty for the Commission to ensure that its provisions and measures are duly applied. The jurisprudence effectively provides the Commission

with little or no risk of its decisions over law enforcement being held to account. It is highly questionable whether those drafting the EC Treaty intended that Art 226 EC should have this effect. It is also difficult to see how the ECJ's case law complies with the obligations set down for it under the EC Treaty to ensure that the rule of law is maintained, specifically those set out in Art 220 EC which stipulate the Court of Justice 'shall ensure' that the 'law is observed' in the application and interpretation of the EC Treaty. The legal position as it stands places a great deal of trust in the Commission to be able to follow up infringements of EC environmental law objectively, without political factors interfering with its management of Art 226/228(2) cases. Such trust may be misplaced, given that the Commission has overtly political functions to fulfil in its capacity as an EU institution. The stance taken by the ECJ over immunity is questionable when one considers that the Commission has concurrent responsibility for the development of policy as well as enforcement. According to the interpretation provided by the Court, the Commission may not be held to account for purely political decisions to desist from taking legal action against a Member State. This legal position effectively licenses the Commission to be able to use enforcement proceedings as a tool for promoting related or distinct political ends.

The jurisprudence of the ECJ, as has been outlined in this sub-section, confirms that the Commission is vested with a good deal of flexibility and power when deciding to take enforcement proceedings against any particular Member State, allowing it to use litigation as a means of last resort if other channels of dispute resolution of a faster and more informal nature may be found. However, in certain respects, the fact that the Commission retains a monopoly over triggering enforcement proceedings and discretion over determining the individual circumstances required to justify such action is problematic. These factors raise questions about whether the Commission is sufficiently accountable, both legally and politically, for its actions on the litigation front. Given that the Commission has a considerable degree of responsibility also for the development of environmental policy and legislation at Union level (having a monopoly over proposing environmental legislative initiatives under the EC Treaty framework), it is questionable from a separation of powers perspective whether the Commission should also be granted the executive responsibility of law enforcement. The legal system provides little or no safeguards for preventing the Commission taking or, more importantly, desisting from taking enforcement proceedings for purely political reasons.

### ***3.3.4 Letter of formal notice (LFN): the first written warning***

The letter of formal notice (LFN) constitutes the first formal stage in enforcement proceedings under Art 226 EC. Essentially the LFN is an initial

formal written warning from the Commission to a particular Member State, placing the latter on notice that the Commission considers, on the evidence made available to it, that there has been a violation of EC law within its territory. Whilst Art 226 does not refer specifically to the LFN as being the starting point of legal proceedings, this may be deduced logically from the wording of that provision. The text refers only to the Commission's RO. However, the RO may be issued only 'after giving the State concerned the opportunity to submit its observations'; logically, this means that the Commission has to place the Member State on formal notice of its views and provide it with a genuine opportunity to address them prior to the delivery of the RO. The LFN fulfils this function.

#### 3.3.4.1 *Purpose and degree of precision of the LFN*

The LFN constitutes the formal commencement of legal proceedings under Art 226 EC. Effectively, it is the trigger for the commencement of legal action that ultimately may result in a declaration of illegality from the ECJ under Art 226 EC and, if the defendant Member State fails to comply with the ECJ's judgment, even financial penalties for the defendant Member State concerned (by virtue of second round action taken under Art 228(2) EC). The potential consequences for the defendant are therefore serious in terms of implications for its reputation relating to upholding the rule of law and credibility in defending EC agreed policy, as well as from a financial perspective. Bearing this in mind, the ECJ has carved out a number of important legal principles that underpin the workings of Art 226 proceedings, in particular specifying particular legal consequences that flow from the issuing of an LFN.

The ECJ has established that the LFN constitutes the basic legal document that serves to frame the scope of the legal action itself. Case law confirms that the letter must delimit the subject matter of the legal dispute, convey this information to the Member State concerned and invite the latter to submit its observations. Accordingly, the LFN must be drafted with sufficient clarity and precision in order to enable the defendant State to prepare for its defence (Cases 211/81 *Commission v Denmark* and C-145/01 *Commission v Italy*). This means that the Commission not only has to be sufficiently precise about its allegations of illegality, delineating facts and relevant EC norms that it alleges have been breached, it is also barred from extending the material scope of its action at a subsequent stage in the same proceedings. This is so even if it finds new evidence of related breaches at a later stage. In that event the Commission is obliged to commence a separate legal action with respect to any new allegations of infringements. Failure to comply with these elementary requirements will inevitably result in the action being declared inadmissible by the ECJ if the matter comes to court. The chief concern of the ECJ is to ensure that the defendant has had sufficient

opportunity to address each legal challenge raised by the Commission, and not be surprised by any new heads of infringement presented at a late stage in proceedings. The Court is particularly strict on safeguarding the procedural rights of the defence.

Accordingly, the Commission has to take care when drafting the terms of the LFN to ensure that its allegations are neither too vague nor too narrow. In certain environmental cases this should not pose a problem, namely cases where a Member State fails to transpose EC environmental norms into national law where this is required (notably in the case of EC environmental protection directives). The Commission must, though, ensure that its LFN covers the particular dispute. For instance, in an action against the UK (Case C-337/89) over alleged failure to implement the Drinking Water Directive 80/778, the UK argued that the Commission had drawn up the terms of infringement in the LFN as focusing only on the standard of water quality in private water supplies. Given that the ECJ had ruled in a judgment subsequent to the LFN (Case C-42/89 *Commission v Belgium*) that private water supply was a matter excluded from the remit of the Directive, the UK submitted that the action should be ruled inadmissible. However, the ECJ agreed with the Commission's counter-submission that the LFN had in fact made a general complaint concerning non-implementation of the Directive by the UK, and had not restricted itself to addressing the subject of private water supply, which was mentioned in the letter only by way of example. Accordingly, the action was ruled admissible, although the particular heads of infringement referring to private water supply would have to be dropped. The point clarified here by the ECJ is that the Commission is not entitled to extend the scope of its legal action beyond that which it sets out in the LFN. Specifically, the RO and/or subsequent court proceedings must not include heads of infringement which have not already been referred to or otherwise are covered within the terms of the LFN (Case 193/80 *Commission v Italy*). The ECJ has also confirmed that usually the Commission is obliged to specify in its LFN the particular provisions of EC law it considers have been breached. In one case, the Commission had simply referred to a failure by Denmark to transpose a particular EC directive into national law in the LFN. Exceptionally, the action was declared admissible on account of the fact that in pre-litigation correspondence the Member State had received advice from the Commission of its particular concerns, with relevant details of the directive's provisions alleged not to have been transposed into Danish law (Case 211/81).

In certain types of environmental disputes between the Commission and a Member State, the details of the infringement will be self-evident. These are the so-called 'non-transposition' cases, where the Commission finds that a State has failed to ensure that an EC environmental protection directive has been properly transposed into national law. The defects of the national implementing measures will usually be evident from their texts (such as

ambiguous wording, wording which only partially transposes an environmental directive or wording which overtly contradicts EC legislative requirements). As already mentioned, the ECJ has confirmed that the Commission need not prove in practice as well as in form that implementation of a directive has been defective (Case C-392/96 *Commission v Ireland*). In non-transposition cases, the drafting of a sufficiently clear and detailed LFN will usually be a relatively straightforward affair. However, in cases where the Commission considers that a Member State has failed to ensure respect for EC environmental norms in practice (instances of 'bad application'), it usually is far from straightforward for the Commission to be in a position to provide precise details of breaches of EC environmental legislation by the time it wishes to issue an LFN. The Commission has no independent investigatory powers either to follow up and verify complaints of particular incidents of pollution notified to it from the general public or to launch own-initiative investigations as a result of information gleaned elsewhere (for example, scientific reports or journal articles). It may receive information from an external source that is incomplete or otherwise yet unsuited to constitute sufficient evidence to prosecute a particular Member State. Notably, the information received from the general public may be very general and raw in nature. Hard evidence may well be difficult to come by. Pollutants may be difficult to identify and source without specialist knowledge, equipment and/or powers to search sites such as industrial premises. The Commission is, accordingly, in most instances fundamentally reliant on the co-operation of national environmental authorities and ministries of the defendant Member State concerned to assist it in its investigation of allegations of factual non-compliance with EC environmental law. It may well be faced with a situation at the LFN stage where it considers that there may well have been a breach of EC environmental legislation and the information it has received, but is not in a position to completely verify, and accordingly requires further investigation and explanation at local level by the Member State authorities which are responsible for implementation of EC law at national level (see in particular Arts 10 and 249 EC).

If the LFN in a bad application case had to set out in precise terms all the specific details of alleged infringements of EC environmental law, this would effectively place the Commission in a 'Catch 22' situation. Such a precise account would in practice be feasible only with the active co-operation of national investigatory authorities. However, those authorities would be required to deliver this information only if they were faced with a specific case to answer (that is, with an LFN). This issue was addressed to some extent in the *San Rocco* case (Case C-365/97), where the Italian Government submitted that the Commission had provided an insufficiently clear description of alleged illegal waste dumping activities in its LFN, with the consequence that it was unable to prepare its defence. The Commission countered by submitting that it had issued a sufficiently precise statement of claim in

referring to the general location of pollution (the upper San Rocco valley), the manner of its generation (uncontrolled fly-tipping) and that relevant EC environmental provisions that had been breached. The ECJ agreed with the Commission, holding that the LFN in general may not be subject to equivalent strict requirements of precision as is the case with the RO, given that the initial warning cannot contain anything other than a brief summary of the complaints concerned. According to the Court, an LFN would satisfy the degree of precision required if identification of the factual circumstances of the State's non-compliance and designation as an infringement of specific EC norms were sufficient to enable it to present a defence.<sup>16</sup> This important judgment underlines the requirement of active participation that is incumbent on Member States to verify instances of alleged infringements of EC (environmental) law; they may not simply sit back and wait for the Commission to provide definitive proof. The *San Rocco* case effectively confirms that the Commission is able to trigger environmental enforcement proceedings under Art 226 on the basis of information that points towards a *prima facie* case of non-compliance, whereupon it is up to the Member States to demonstrate satisfactorily to the Commission that proceedings are unwarranted (for example, by showing that the allegations are factually inaccurate or satisfying the Commission that adequate steps have been taken to rectify the situation).

It may be the case that as proceedings develop, more information and evidence comes to light that may require a refinement of the original statement of claim filed by the Commission in its LFN. The ECJ has confirmed that the Commission is entitled to further delimit (that is, narrow down) its claims of infringement as proceedings progress, but not the other way around (for example, Case C-191/95 *Commission v Germany*). This may be warranted for a variety of reasons. For instance, the defendant Member State may alter its behaviour so as to comply with certain provisions of environmental law, which may well render redundant the need to continue to pursue a particular head or heads of infringement. In the *San Rocco* case, the Commission abandoned its claims under Art 7 of the Waste Framework Directive 75/442 after Italy had taken steps to establish a waste management plan for the region as required by that provision. Alternatively, proceedings will have to be refined if the EC legislation concerned is substantively amended or repealed during the course of pre-litigation with the effect that a specific legislative obligation no longer pertains in its current form (for example, see Cases C-365/97 *San Rocco* and C-145/01 *Commission v Italy*).

<sup>16</sup> Para 27 of judgment.

### 3.3.4.2 *Defendant's observations regarding the LFN*

It is a formal procedural requirement of Art 226 proceedings that the defendant Member State has a genuine opportunity to submit to the Commission observations on the LFN. Essentially, the observations stage provides the defendant Member State with the first real opportunity to prepare and deliver any available lines of defence in response to the charges of illegality alleged by the Commission. Whilst the treaty text does not specify a specific deadline by which defendants must reply, the ECJ has held that the Commission is implicitly obligated to allow the defendant a reasonable period to reply to the LFN, this to be determined in the light of the particular circumstances of the case (Case 293/85 *Commission v Belgium*). Accordingly, very short periods may be justified in certain circumstances, especially where there is an urgent need to remedy a breach or where the defendant State is fully aware of the Commission's views long before the pre-litigation procedure is actually commenced.<sup>17</sup> However, the Commission is not entitled to allege that there is an urgent situation when it is partially or fully responsible for failing to take action earlier.

The possibility available to the Commission of being able process legal proceedings expeditiously brings with it several potential benefits for the purposes of enhancing the effectiveness of EC environmental law enforcement. For non-transposition cases, the case law would appear to suggest that relatively short deadlines could be provided to defendants to require relevant changes to be made to national law so that the latter would come into alignment with the particular environmental directive(s) in issue. Typically, Member States are provided with a substantial period of time between formal adoption of an environmental directive and the deadline it stipulates by which transposition into national law has to have occurred. Given that such directives commonly contain clauses requiring the Member State to provide the Commission with details of implementation measures, it is quite likely that a State will know in advance of the transposition deadline the Commission's views as to whether its national implementation measures are in conformity with the particular EC environmental directive. Substantial periods of time granted for transposition of directives is a key factor that points in favour of allowing the Commission to be able to provide defendant States with relatively short deadlines to reply to an LFN and an RO in non-transposition cases. Occasionally, the Commission may be confronted with a particularly urgent situation in a bad application case that requires fast-tracking of litigation. For instance, this could involve a situation where a planned project development threatens to encroach on a protected habitat. Unless the Commission is able to turn around legal proceedings relatively

17 Para 14 of judgment in Case 293/85.

swiftly, the development may have already completed the planning process and be constructed, or in the process of being constructed, with all the irrevocable consequences that this may bring to a particular habitat of protected wild species. However, the practice of the Commission has not been to set particularly rigorous deadlines for responses to the LFN and RO during the pre-litigation stage of most environmental cases. In contrast, typically six months is usually the minimum period allowed by the Commission for a defendant to reply to an LFN for Art 226 environmental cases, and not infrequently this may be up to one year.

The ECJ has clarified that any observations sent by Member States must be taken into account by the Commission if the latter decides to progress to the next stage of pre-litigation, namely the RO stage. Accordingly, even if a State has failed to meet the deadline set for observations to an LFN and sends in belated submissions to the Commission, these will nevertheless have to be taken into account in the RO. A fresh RO will have to be issued if the existing one does not take the State's observations on board, even if the Commission considers that the submissions do not provide any convincing defence to the alleged heads of infringement (Case C-362/01 *Commission v Ireland*).

### ***3.3.5 Reasoned opinion (RO): the second written warning***

The issuing of an RO by the Commission to a defendant Member State constitutes the most significant step of the pre-litigation phase of enforcement proceedings. It is designed to be a second and final written warning to a defendant Member State to take the necessary measures to rectify a breach of EC law in the State's territory within a deadline set by the Commission. Typically, the breach may be ongoing (for example, defective implementation of a directive). Alternatively, it might be historical, in which case the Commission's interest in taking any action is in seeking to prevent a re-occurrence in the future, due to the unsatisfactory state of implementation or enforcement of EC law at national level. The issuing of an RO signals that there is a final opportunity for the defendant to take steps to avoid having to face proceedings before the ECJ, and thereby arrive at a friendly resolution of the dispute. In contrast with the LFN, the RO bears more distinct and significant legal consequences in the event of a failure by a Member State to heed its admonitions. Specifically, if the Member State fails to take remedial measures in respect of the complaints set out in the RO within the deadline set by the Commission in the opinion, then the defendant State will be liable if the facts and evidence are borne out before the ECJ at the subsequent stage in proceedings.

For both parties, the RO represents a cornerstone of proceedings. The RO stage may be divided essentially into two parts: namely, the issuing of the opinion followed by a window of opportunity for the Member State to take



action in response. If the defendant State accepts the Commission's arguments that a breach has occurred, it must seek to take measures within the deadline set by the Commission for a satisfactory response in order to ensure that the proceedings against it will be dropped. Alternatively, the defendant State may consider the Commission's case ill-founded, in which case it must submit its defence (known as 'observations') to the Commission within the set deadline. If the defendant Member State fails to provide the Commission with a satisfactory defence to the complaints within the set period, the Commission may decide to apply to the ECJ for a ruling on the matter.

### *3.3.5.1 General requirements and effects of the RO*

The RO constitutes a key legal document for the purposes of enforcement proceedings and the Commission needs to pay particular care to draft its contents with sufficient precision. Failure by the Commission to crystallize its statement of complaint in the RO in accordance with legal requirements is liable to render an application to the Court inadmissible and set back a successful prosecution of litigation a number of months, even years. In this sense the RO may be contrasted with the LFN, which need only set out the Commission's complaint of breach in basic and general terms.

## CONTENT

The ECJ has confirmed that it is the RO, and not the LFN, which constitutes the formal foundation of the legal action and is to crystallize the specific subject matter of any proceedings brought before it under Art 226 EC. Accordingly, all the various heads of infringement of EC environment law identified by the Commission in a particular case need to be set out definitively and precisely in the RO. The ECJ has confirmed that it must contain a coherent exposition of the reasons that have led the Commission to conclude that the defendant Member State has failed to fulfil an obligation under the EC Treaty. Whether or not an action is well founded will ultimately turn on an objective finding of a failure to fulfil EC legal obligations on the defendant's part. Liability is strict in the sense that the Commission need not demonstrate specific intention or negligence on the part of the State in jeopardising or omitting to effect due implementation of EC law (see for example, Case 301/81 *Commission v Belgium*). Accordingly, a Member State may not be able to shrug off blame for a breach of EC environmental law on account of internal difficulties (for example, constitutional problems associated with decentralisation of responsibility for environmental affairs at sub-national level or lack of parliamentary time to enact national transposition legislation).

The central task of the Commission is to prove ultimately to the satisfaction of the ECJ, on the balance of probabilities, that the defendant Member

State has committed a breach of EC law and has not remedied the particular legal defects concerned within the deadline set for compliance in the RO. The ECJ has confirmed that it is not incumbent on the Commission to specify to the defendant in the RO or elsewhere the necessary measures required in order to remedy the breach of law. Instead, the duty to identify and carry out remediation falls squarely on the shoulders of the defendant, who must seek to convince the Commission that further pursuit of enforcement proceedings, is no longer warranted (see for example, Cases C-247/89 *Commission v Portugal*, C-328/96 *Commission v Austria*).

#### DEADLINE FOR COMPLIANCE

Culpability will ultimately turn on whether there is a breach of law at the time when the opportunity for the defendant to deliver observations on the RO has elapsed. It is, therefore, no defence for a Member State to assert after this point in time that the breach has been remedied; the legal action will not fail on this ground. As a matter of fundamental legal principle, the Commission is entitled to bring an action to the Court under Art 226 EC to obtain a judicial declaration that a Member State has failed to adhere to EC law by the end of the deadline set for responses to an RO (for example, Cases 7/61 *Commission v Italy*, 240/86 *Commission v Greece* and 200/88 *Commission v Greece*). For instance, in a case against Germany over its failure to ensure that environmental impact assessments would be carried out in relation to extensions of thermal power stations in contravention of the Environmental Impact Assessment (EIA) Directive 85/337 (Case C-431/92), the ECJ dismissed the German Government's submission that the proceedings were devoid of purpose on the grounds that, subsequent to the RO, German legislation had been introduced to remedy the particular deficit in national implementation rules. The Court held that the Commission alone is competent to determine whether it would be appropriate to pursue court action against a Member State. It need not have to demonstrate any specific special interest in bringing proceedings before the ECJ in such circumstances. Effectively, the Court has recognised the legitimate role of the Commission in holding Member States to account for any failure to remedy a defective national implementation of EC law, after the defendant concerned has been sent two formal warnings and has not responded in sufficient time.

The LFN and RO need not necessarily be identical to one another. There is nothing to prevent the Commission from setting out in the RO in more detail the general complaints it initially registers in the LFN (for example, particular provisions of the EC legislation identified as in issue or setting out more precise legal argumentation) (Case 74/82 *Commission v Ireland*). With respect to environmental cases involving a failure to transpose legislation correctly, in practice there will not be any significant difference between the contents of an LFN and an RO, for the Commission will be seised of all the

relevant information in order to be able to set out its case at first written warning stage. However, in cases involving bad application of EC environmental legislation, it may well be the case that the Commission will need to receive and assess the information to be gleaned from the defendant's observations to the LFN and other available investigatory work before being in a suitable position to issue a definitive statement of complaint in the form of an RO. Requiring the LFN and RO to be identical would constitute an unreasonable procedural hurdle for the Commission to overcome. Given that the Commission has no powers to investigate instances of practical breaches of EC environmental legislation, it is often heavily reliant on the co-operation of the Member State and its environmental authorities to submit to it the particular details and information about the activities occurring at national level which have been placed in question. Frequently, the only realistic way of inducing Member States to assist in investigatory work on behalf of the Commission is to compel them to act by virtue of opening Art 226 proceedings. As mentioned earlier, the ECJ has recognised that Member States are under a general legal duty to co-operate with the due enforcement of EC law under Art 10 EC and this includes offering assistance to the Commission in enabling it to carry out its investigatory work in connection with Art 226 proceedings.

#### TAKING INTO ACCOUNT MEMBER STATE RESPONSES TO THE LFN

As a matter of general principle, the Commission is obliged to take into account replies filed by Member States to the LFN when drawing up the terms of the RO. Where the Commission fails to do this, it is at risk of rendering further pursuit of legal action inadmissible. This is especially the case where the Member State's response to the LFN has a clear bearing on assisting the Commission to delimit the subject matter of the case. For instance, in one case (Case C-266/94) the Commission had sent an LFN to Spain in August 1993 on account of its failure to ensure timely transposition of a particular telecommunications Directive.<sup>18</sup> The Spanish Government had subsequently sent to the Commission by registered post a reply in October 1993 notifying it of imminent fulfilment of certain provisions of the Directive (Arts 3, 4 and 7). Because of what the Commission later described as communication problems, the RO [issued in February 1994] failed to respond to the Spanish observations and stated that the Commission had received no formal reply from Spain. The Commission decided to pursue proceedings to the next stage, by applying to the ECJ for a ruling, notwithstanding another reply from Spain in March 1994. The Commission contended before the Court that no procedural irregularity on its part had been committed, given

18 Directive 92/44 on open network leased telecommunication lines (OJ 1992 L165/27).

that it took into account the Spanish replies to the RO in the course of the judicial stage of proceedings (through the reply and rejoinder). Moreover, the Commission submitted that the defendant's replies failed in any case to exculpate the Member State from the charge of failing to transpose the Directive. In its view, the replies referred only to partial transposition of the EC legislation. However, the ECJ ruled the action inadmissible, on the grounds that the definition of the subject matter of the dispute had been clarified only during the course of the judicial stage of proceedings and not in the RO. According to the Court, the Commission should have examined the Spanish responses and then delivered a second RO specifying the complaints it intended to maintain.<sup>19</sup>

#### SUBSEQUENT AMENDMENTS OF THE RO

After issuing the RO, the Commission may not amend its complaint at a later stage in pleadings before the ECJ to include additional related allegations and arguments concerning infringements, even if evidence is available to support additional claims of illegality. The subject matter of an application brought before the Court is determined by the RO and both legal documents must be founded on the same grounds and submissions (Case 211/81 *Commission v Denmark*). Any extension to the scope of legal proceedings must as a matter of principle be conducted by way of fresh litigation, namely by issuing a separate LFN. Accordingly, any discovery by the Commission of additional new heads of complaint which are related to the instant legal proceedings against a Member State after the RO has been issued may not be included in the same action at a later stage (Case 124/81 *Commission v UK*).

On the other hand, in the relatively rare event that the Commission is able to arrange for its own on-site investigation of a complaint, this step may be used to check the veracity of a Member State's defence and/or bring itself up to date on the factual state of a particular site prior to progressing further with litigation (Case C-365/97 *San Rocco*). This may be particularly useful where proceedings become protracted. An example of this was in the *San Rocco* litigation, where, in 1990, the Commission took Art 226 proceedings against Italy over failures to prevent illegal depositions of hazardous and non-hazardous waste taking place in the San Rocco valley near Naples, contaminating local riverbeds in contravention of EC waste management legislation (notably the Waste Framework Directive 75/442, as amended). In 1992 the Italian Government replied to the initial LFN by stating that the site area had been sequestered in 1990, before being re-used as a waste tip whereon the operator concerned had been prosecuted. The Commission received no communication from the Italian authorities for some four years about progress

<sup>19</sup> Paras 22–23 of judgment.

on implementation of measures to rehabilitate the site in accordance with, in particular, Art 4 of the Directive. In July 1996 the Commission issued Italy with an RO. In January 1997 Italy replied with a list of measures that it had undertaken to deal with the fly-tipping problem, including establishment of a waste management plan for the area, further sequestration of the site in September 1996 and establishment of a local taskforce. Not satisfied with this reply, the Commission decided to organise its own independent investigation in 1997 to verify the state of the site area. The investigation confirmed that Italy still had not complied with the Commission's original complaints. The ECJ held that in these circumstances, the findings of the investigation did not constitute a fresh complaint for the purposes of enforcement litigation under Art 226 EC.

### *3.3.5.2 Defendant's observations regarding the RO*

It is an integral part of the RO stage that the defendant Member State be afforded an opportunity to submit to the Commission a formal response to the complaints laid out in the opinion (known as observations). In effect, the time limit set for a response constitutes a deadline for achieving compliance on the part of the defendant Member State. The response filed by the Member State will be with a view to seeking to settle the dispute, if possible, out of court. The nature of the legal framework underpinning Art 226 enforcement proceedings provides the possibility for complainant and defendant to work towards a friendly settlement of the dispute. Accordingly, even where a Member State may be clearly in breach of a provision of EC law and not be in a position to remedy the defective state of national implementation of the EC norm, it is within the power of the Commission to decide nevertheless to desist from further legal action if it considers that the Member State will be in a position of compliance at a later date. Alternatively, it may decide to suspend proceedings until compliance actually materialises. In practice, the Commission will follow the latter option where, for instance, the Member State promises that national implementing rules are forthcoming, for example in a legislative pipeline. By suspending as opposed to closing proceedings, the Commission will seek to keep up the pressure by maintaining the 'live' status of legal action, as and until it is satisfied that compliance at national level has in actual fact occurred. This may, for instance, be by way of issuing the State with a second RO if the period for response to the first RO has elapsed.

#### PERIOD FOR OBSERVATIONS TO BE SUBMITTED

Just as in respect to the LFN, Art 226 EC does not specify a particular maximum or minimum period by which time a defendant Member State must submit observations in relation to an RO. The EC Treaty wording is

open-ended. However, case law of the ECJ has established a general principle that the time afforded for a response should be a reasonable period, this to be determined in accordance with the circumstances of the particular case at hand (for example, Cases 293/85 *Commission v Belgium*, C-473/93 *Commission v Luxembourg*).

The Commission services usually set a time limit of six months in the context of a first round environmental action, although in practice it is not uncommon for a period of a year or longer to elapse before the proceedings progress to the next stage, in the event of an unsatisfactory response to the statements of complaint set out in the RO. According to ECJ case law, there is no reason why the time limit set by the Commission for observations may not be relatively short. This may be so where the defendant Member State has already had a substantial period to ensure that national legislation is compliant with EC law. A couple of examples serve to illustrate this point. In one case (Case C-247/89), Portugal had failed to transpose an open tender procedure for a particular public sector telephone exchange contract in accordance with a 1977 Directive (Directive 77/62/EEC). On receiving an LFN in September 1987, two years after it had joined the EU, it disputed that the particular contract (supply to airport traffic control agency) fell within the scope of the relevant EC legislation. The ensuing RO, issued in November 1988, requested Portugal to bring its national implementing rules into compliance with the terms of the Directive within one month. The ECJ confirmed that in the circumstances, one month was not an unreasonable deadline, given that the Commission had already brought the matter to the defendant's attention one year previously and that Portugal had disputed liability from the outset.

In another case (Case C-473/93), Luxembourg contested the reasonableness of a four-month deadline set by the Commission in an RO. Luxembourg was in breach of Art 39 EC on the free movement of workers in reserving a number of civil servant positions exclusively for its own nationals. Aware of the problem at least since the early 1980s, by virtue of a Commission Communication on the subject<sup>20</sup> as well as a number of related rulings from the ECJ, the State nevertheless failed to take any action. An LFN was issued in March 1991, giving Luxembourg six months to reply. Luxembourg replied almost a year later, submitting that it had already applied the free movement provisions in a wide range of fields. The RO, issued in July 1992, gave the defendant State four months to comply. When the dispute came before the ECJ, the defendant State submitted that the four months' compliance period set out in the RO was unreasonably short in the circumstances, given that it would have to enact a series of legislative measures at national level in order to bring its domestic legal system into compliance with EC law and that this

20 OJ 1988 C72/2.

would take a considerable period of time. In dismissing the defendant's arguments, the Court took into account the length of time that Luxembourg had known of the Commission's position, the fact that Luxembourg had made it clear that it was not going to undertake legislative reform, and that the four-month period was double the length of the standard period for observations granted by the Commission.

This last point is particularly interesting from an environmental law enforcement perspective, given that the Commission services' practice in environmental actions appears relatively generous in normally granting six months' grace for defendant States to respond to its communications during the pre-litigation phase. There are no legal reasons why the Legal Unit in the Commission's Environment Directorate-General could not considerably shorten the time limits afforded to defendant States in non-transposition cases, especially as Member States usually have considerable periods of time built into EC environmental legislation in order to provide them with sufficient time to set up implementation rules and systems at national level. From an environmental policy perspective, such a change would be welcome as it would put greater pressure on Member States to ensure due implementation of EC environmental protection legislative commitments. Given its pyramidal structure, all formal decisions of the Commission have to be taken at College level, unless otherwise decided. The formal inclusion of the College over infringement cases has had the effect of slowing down the processing of cases, given that it takes time for the individual decisions to work their way up the administrative chain of command within the institution. It has been the long-standing practice for the College to take decisions on infringement matters twice a year, barring exceptional cases.

The case law of the ECJ has made it clear that the Commission may even impose shorter time limits than a month for compliance with an RO. The Court has established that very short time periods may be justified in particular circumstances, especially where there is an urgent need to remedy a breach or where the Member State is fully aware of the Commission's position long before the commencement of legal proceedings. In one case where Austria had failed to ensure public tendering procedures were in place as required by EC legislation, the ECJ held the periods of one week to reply to an LFN and two weeks to comply with an RO were justified given that a number of relevant public tender contracts were yet to be awarded by the Austrian authorities which fell under the auspices of the EC tendering rules (Case C-328/96). In another case (Case 74/82), Ireland was given just five days after receipt of an RO to terminate its ban on imports of poultry meat and other products from EC countries that vaccinated their livestock. Ireland had employed a non-vaccination policy on poultry meat since 1938. The RO was issued less than two months after the initial LFN. Even though the ECJ voiced disapproval of the Commission's conduct as being unreasonable in principle, the Court nevertheless held the enforcement action to be

admissible as the Commission had in fact taken into account the Irish Government's observations which were submitted some time after the five-day deadline (in fact at one and three months thereafter). Had the Commission in fact allowed only five days for compliance, the enforcement action would have been held inadmissible, as this would have meant that the Commission could have demanded immediate amendment to national legislation notwithstanding the fact that it had neither seen fit to signal its concerns regarding the legality of Irish legislation beforehand and had not shown that this was an exceptionally urgent case.

The admissibility of very short time limits may be valuable in certain types of environmental cases where urgency may be a prevalent factor. Specifically, in cases where EC environmental law has been identified by the Commission as having been incorrectly implemented in practice (that is, bad application), a very short time limit for compliance specified in the RO (and LFN) may be useful in inducing a defendant Member State to introduce measures to minimise or eradicate pollution arising from a breach or to prevent activities that may have irrevocable consequences for the environment. Examples of particular urgency in an environmental protection context could include Member State failures to carry out an environmental impact assessment prior to development on a particular site in accordance with the Environmental Impact Assessment Directive 85/337, or failures to respect habitat protection norms under the Habitats Directive 92/43. Failures to control or restrict illicit activities on protected habitat sites may have irrevocable adverse consequences for wildlife, such as the undermining or destruction of breeding areas and/or food resources. Articles 226 and 228 EC do not provide the Commission with specific powers to require the cessation of particular illicit activities. Instead, both procedures culminate with a declaration of illegality, with only the second round action under Art 228 having the possibility of imposing a fine on a defendant. Nevertheless, the delivery of a relatively swift judicial declaration of illegality under Art 226 EC might well assist, legally and from a political perspective, national enforcement agencies and other stakeholders in being able to prevent the commencement of such activities. However, in practice it is unlikely that, in its current state, enforcement proceedings under Art 226 will be able to conclude prior to the decision or even the actual launch of a planned development that contravenes EC environmental law. In particular, the lack of investigatory powers afforded to the Commission coupled with lack of direct co-ordination between enforcement agencies at national and EC levels often means that proceedings are commenced at a relatively late stage, hindering the chances of using Art 226 proceedings as an effective means of preventing the commencement or continuation of illicit activity. The subject of securing urgent preventive measures at EC level is examined further at the end of this chapter (section 3.6).

The ECJ has made it clear that the reasonableness of the time limit set for submission of observations will depend on the circumstances. In particular,



the conduct of the Commission in steering proceedings is relevant in this regard, as underlined by the Court in a case against Belgium over discriminatory university tuition fees (Case 293/85). In this case, in the wake of a preliminary ruling in February 1985 holding the Belgian rules on tuition fees to be contrary to the EC Treaty provisions prohibiting discrimination on grounds of nationality (Case 293/83 *Gravier*), the Commission sought belatedly to follow up this ruling by obtaining a declaration from the Court confirming the illegality of the Belgian fee system prior to the commencement of the academic year 1985/86. The Belgian system was slightly amended with new rules promulgated in mid-June 1985. However, these amendments merely required reimbursement of fees charged to non-Belgian students who had brought legal proceedings prior to the *Gravier* judgment. Having issued its LFN in July 1985, the Commission sought to justify very short response deadlines given to the defendant State on grounds of urgency (eight days to reply to the LFN and 15 days to submit observations in respect of the RO). However, when the matter came before the ECJ, the Court held the action to be inadmissible on the grounds that the brevity of the time limit for observations was unjustified in the circumstances; the Commission could have commenced legal proceedings immediately after the *Gravier* judgment, that is, long before July 1985. Neither had it indicated unequivocally to Belgium before July that it considered the Belgian rules as amended to be contrary to EC law, and thus the defendant could not be said to be sufficiently aware of the Commission's view in advance. In addition, the Commission had failed to respond to a request from the Belgian Government for an extension to the set time limit for responding to the LFN. The fact that the Commission considered these deadlines in practice not to be absolute and would have taken into account any replies from the defence was irrelevant for the Court.

#### TAKING INTO ACCOUNT OF THE OBSERVATIONS

Once the Commission has received a response from a defendant Member State to the complaints set out in the RO, it will seek to take them on board before deciding whether to pursue the enforcement proceedings to the next level, namely the judicial phase. The object of the pre-litigation phase is to provide an opportunity for the two parties to come to an out of court settlement, where this is possible. Not infrequently, however, Member States submit observations after the deadline stipulated in the RO. The question arises as to whether the Commission is nevertheless obliged to take such submissions into account prior to filing an application for a declaration before the ECJ. The ECJ has confirmed that the Commission is entitled to proceed to the judicial phase in these circumstances, where an opportunity is provided for the defendant's submissions to be heard.

This issue arose in an environmental enforcement action taken against the Netherlands (Case C-3/96), where the latter had failed to notify the

Commission of a sufficient number of special protection areas (SPAs) for the purposes of the Wild Birds Directive 79/409. A dispute arose between the parties as to whether the observations had been submitted by the defendant out of time, the Commission having claimed not to have received them within the two-month time limit it had specified. Nevertheless, the Commission argued that it had taken them on board when crafting its application to the ECJ, in particular recognising that three new SPAs had been included within the Dutch total. The Commission maintained, however, that the defendant's observations did not have a material bearing on the complaints set out in the RO. The ECJ rejected the Dutch claims of inadmissibility on this point, in holding that the defendant's fundamental procedural guarantees of a fair hearing had not been undermined, given that the Dutch Government had ample opportunity to raise its arguments during the litigation phase of proceedings and for them to be assessed by the Court itself. Ideally, the Commission should have issued another RO, but the fact that it did not do so did not vitiate the proceedings. One may compare this judgment with the relatively stricter approach taken by the Court in relation to belated replies to an LFN, where the Court has held that these must be taken into account by the Commission if they have a bearing on the Commission's ability to delimit the complaints of non-compliance set out in the RO (see Case C-266/94 *Commission v Spain*). On the other hand, the case law may be explained by the fact that the elapse of the deadline for responses to an RO is qualitatively different from that applicable to an LFN. The former constitutes the point in time where any future remedial action on the part of the defendant has no effect on the outcome of proceedings. If the defendant Member State is in breach of EC law by the time the period for observations to the RO has expired, then automatically the Court will make a finding of illegality when the matter comes to the contentious phase in proceedings (Case C-365/97 *San Rocco*).

### **3.4 The litigation phase: application to the Court of Justice**

The filing of an application to the ECJ by the Commission for the purposes of obtaining a judicial declaration of illegality against a defendant Member State constitutes the commencement of the second and final phase of enforcement proceedings brought under Art 226 EC. The pre-litigation phase is terminated once the period for submitting observations in respect of an RO has elapsed. The Commission must then take a decision (formally speaking it is the College of Commissioners to decide) whether or not to proceed to the next phase of proceedings.

#### **3.4.1 Contents of the Court application**

From a substantive perspective, the litigation phase of Art 226 proceedings does not really represent the most important part of proceedings. As with the

RO, the application must meet basic requirements of precision and completeness; the Rules of Procedure of the Court of Justice stipulate<sup>21</sup> that the application must contain, *inter alia*, the subject matter of the dispute, the relevant submissions and a brief statement of the grounds on which it based. Failure to meet these formal requirements will render the action inadmissible, and a cross-reference to the contents of the LFN or RO will not suffice (Case C-43/90 *Commission v Germany*). The complaints set out by the Commission in the application must be those specified together with relevant evidence as submitted at RO stage. The case law of the ECJ has confirmed that no new legal claims may be filed by the Commission before the ECJ after the termination of the pre-litigation phase. The application to the Court for a declaration of illegality must mirror the terms of the RO, or more precisely must not extend beyond the remit of the complaints set out in the RO (for example, Cases C-431/92 *Grosskrotzenburg* and 211/81 *Commission v Denmark*). The Commission is not entitled to add related complaints to the action during the litigation phase, even in situations where this may not have been possible so to do at an earlier stage. Accordingly, even if it elucidates evidence of a breach of EC environmental law distinct from other complaints it has already specified in an RO in relation to a particular site, it is barred from incorporating such evidence and new claim of a violation of EC environmental law into its application to the Court. The ECJ has applied this procedural principle with particular vigour.

This point may be illustrated in a number of environmental cases. One example involved action taken against the Netherlands (Case C-3/96) over transposition failures concerning the Wild Birds Directive 79/409. The complaint set out in the RO had focused solely on the fact that the defendant had failed to notify a sufficient number of special protection areas for wild birds to the Commission in accordance with Art 4 of the Directive. The ECJ held it to be inadmissible for the Commission to introduce fresh submissions at the application stage to the effect that the dimensions to particular SPAs notified to the Commission were inadequate from an ornithological perspective (specifically the extent of notified fresh water lakes, marshes and moorland). Such heads of complaint of a qualitative nature should have been crystallized already in the RO together with those concerning quantitative-type compliance failures, with a view to enabling the defendant to respond at the pre-litigation stage to these specific allegations. The Court was unmoved by the Commission's submission that the qualitative line of argument only served to underline its fundamental complaint that a breach of Art 4 of the Directive had been committed by the Netherlands, namely a failure to notify a sufficient number of SPAs. On the other hand, the ECJ did not question the admissibility of the Commission specifying only at application stage two

21 Art 38(1)(c) and (d) of the Rules of Procedure (OJ 1991 L176/7) as amended.

particular sites that should have been notified as SPAs. Although references to these sites did not appear in the RO, the Court considered that they were merely examples of the failure of the defendant to classify a sufficient total area of SPAs.

In another environmental protection case, the Court confirmed that any evidence that the Commission may glean from any investigations carried out on its or a third party's behalf regarding the environmental state of a site after delivery of the RO may be used only to confirm the veracity of a specific complaint set out in the RO itself (Case C-365/97 *San Rocco*). If the investigation reveals evidence of a separate head of infringement, then the Commission must commence separate enforcement proceedings.<sup>22</sup> The reasoning of the Court here is rather unconvincing and formalistic to say the least, given that it is inconceivable that most of the key measurements, if not the findings of a major study of this kind, would not in all probability have been extrapolated prior to the period running up to the delivery of the RO,<sup>23</sup> and taking into account that the defendant State would have had the opportunity to respond to the study's findings during the litigation phase. However, the ECJ has demonstrated its keenness to uphold to the letter the principle it has established that the application must not introduce distinctly new evidence or legal complaints into the proceedings.

Where the Commission has referred to a particular complaint sufficiently clearly in the pre-litigation stage, and most importantly in the RO, then it will be able to carry this through to the contentious phase. In a case against Ireland over the EIA Directive 85/337 (Case C-392/96), the Commission submitted that the defendant had transposed the Directive in a defective manner. Specifically, it asserted that by applying absolute minimum thresholds in relation to the regulation of certain types of development projects (peat extraction, afforestation and use of uncultivated land), Ireland had failed to ensure that its domestic rules respected the requirements of Art 4(2) of the Directive, which stipulates that projects having significant effects on the environment must be subject to an impact assessment. Part of the Commission's complaints concerned the fact that the Irish rules on implementing the Directive failed to address the problem of the cumulative impact of small development projects located in the same area. However, the RO did not expressly refer to the issue of cumulative impact. According to the ECJ, this particular head of complaint was nevertheless ruled admissible in the application to the Court, given that the Commission had addressed this

22 See also Case C-3/96 where the Commission was barred from using a 1994 ornithological study in support of its case (1994 edition of the Inventory of Important Bird Areas in the Community) as there was no evidence to show that its information related to a situation covering the period prior to the elapse of the period for compliance with the RO (that is, before 14 June 1993).

23 This is all the more likely given the previous edition of the study was compiled in 1989.

issue clearly in the text of the RO as part of the general problem resulting from threshold setting. The fact that it had not specifically used the words 'cumulative effects of projects' was accordingly immaterial.

### ***3.4.2 Temporal aspects of the litigation phase***

Logically, one could expect that the litigation phase should not take up any significant amount of time. Both parties have ample opportunity in the pre-litigation phase to prepare and present their legal arguments in relation to the substance of the case, and the relevant point in time in terms of liability is that at the elapse of the period for submission of observations to the RO. However, the legal framework underpinning Art 226 EC proceedings provides for a relatively elaborate litigation phase that serves to draw out the processing of the litigation considerably. Form does not follow substance in this context. From a formal perspective, it appears that the dispute commences as if for the first time in terms of legal proceedings. Not only do both parties have the opportunity to engage in a further exchange of legal argument in the litigation phase (by way of a reply and rejoinder to the court application), but they may usually expect to receive an oral hearing convened before the Court after this written correspondence. Exceptionally, the oral hearing may be waived where a ruling on similar points of law and fact has been already handed down by the ECJ. In addition, as already noted, other Member States are vested with automatic legal standing to act as interveners during this phase. Specifically, they may submit legal arguments relating to the case at hand, which may be taken up by the ECJ in its assessment of the dispute; however, they will not be entitled to raise a plea of inadmissibility which has not already been set out in the forms of order sought by the defendant (Case C-13/00 *Commission v Ireland*).

The ECJ's active contribution to the litigation phase itself is divided into two key stages that take place some months after the oral hearing. These are the delivery of the opinion of the Advocate-General assigned to the case followed by the final judgment of the Court meeting in plenary session. The function of the Advocate-General, who is a full member of the Court of Justice, is to provide advisory opinions for consideration of the ECJ judges meeting to determine the outcome of the case. Whilst the opinion is technically not binding, in practice the majority of ECJ judgments concur with the Advocate-General's submissions. All these extra procedural stages contribute to a considerable period of time being used up by the litigation phase, usually several months (often between 18 to 24 months or longer). It would be an understatement to describe the litigation phase as not being in a streamlined state. However, this is hardly surprising given that the legal framework has remained essentially the same since the inception of the European Economic Community in 1957, where

the membership of the international organisation numbered only six countries with relatively few infraction cases to be adjudicated on per year by the ECJ.

### **3.5 Common defence submissions in environmental proceedings against Member States**

The range of legal defences available to a Member State in the context of Art 226 EC constitutes a fundamental component of the legal structure underpinning enforcement proceedings at EC level. To what extent the scope of legitimate defences is defined will have an impact in terms of contributing to the degree of stringency and overall effectiveness of legal proceedings. From an environmental protection perspective, the deterrence value of law enforcement is an important factor that goes hand in glove with the aim of securing due implementation of EC environmental norms by Member States within their respective jurisdictions. The more that enforcement proceedings are conducted efficiently and swiftly with an effective result at the end of the legal process, the more likely it is that Member States will prioritise resources into implementing their environmental commitments correctly in the first place.

There is, however, a sensitive and sometimes difficult balancing of interests to be weighed in this context, namely ensuring on the one hand that enforcement action represents a real and effective response to illegitimate conduct on the part of Member States whilst on the other hand upholding the basic rights of the defendant to a fair hearing and due process. In the context of environmental protection disputes between the Commission and Member States under Art 226 EC, the body of law that has been developed on this front has been principally developed by the ECJ. The EC Treaty and EC environmental legislation are, to all intents and purposes, mostly silent on the issue of defences to complaints of breaches of EC environmental law. This situation may be contrasted with the legal framework concerning some other key policies of the EC, such as in relation to free movement of the factors of production, competition or common commercial policy where the EC Treaty expressly provides instances of possible lines of defence (see for example, Arts 30, 46, 55, 64, 86–87 and 134 EC). The ECJ has developed its body of jurisprudence on the rights of the Member State defendant in Art 226 proceedings broadly in line with the evolution of fundamental rights recognised as being an inherent necessary safeguard in the context of litigious processes. The Council of Europe's 1950 European Convention on Human Rights and Fundamental Freedoms (ECHR) has been influential in this regard. The Court has focused on the need to uphold, in particular, basic procedural rights of the defendant Member State, such as the right to a fair hearing and the right not to be subject to retrospective prosecution. Such rights have received constitutional recognition in the form of the

2000 Charter of Fundamental Rights of the European Union,<sup>24</sup> to which the EU's institutions are bound when carrying out their duties, and Member States when implementing EC law.<sup>25</sup>

In the context of Art 226 enforcement actions, the ECJ has stressed the need for the European Commission to observe high standards of procedural propriety and that there be a genuine opportunity for the Member State to be in a position to raise a defence to the statement of complaint set out by the Commission. We have already seen that the Court has taken a strict view of the need for adherence to procedure and form by the Commission during the pre-litigation stage. The Court has adopted a more lenient position in relation to defendant Member States. For instance, the ECJ has recognised that it is admissible for a Member State to raise a fresh line of argument to defend an action at a relatively late stage, namely during the litigation phase of proceedings (that is, when the case has been filed with the Court for hearing). The Court has justified the need for allowing the possibility of belated defence pleas on the basis that otherwise the general principle respecting the rights of the defence would be undermined (Case C-414/97 *Commission v Spain*).

In contrast, the Commission may not raise a new line of legal argument which has not been set out already in its RO, which the Court has stated must contain a clear, coherent and full statement of complaint founding the subject matter of the legal action. Consequently, the RO and the application to the ECJ must be identical, in that both must be founded on the same grounds and submissions (Case 211/81 *Commission v Denmark*). Notwithstanding the fact that the Member State has a number of opportunities to defend itself in relation to any refinements of Commission submissions made after the RO stage (for example, written submissions to the Court and an oral hearing), the ECJ has adhered strictly to its view that the Commission's grounds of attack must be crystallized already at pre-litigation phase in the form of the RO. One might question whether the principle that parties should bear an equality of arms in terms of fighting their case is respected here, particularly given the length that enforcement proceedings take before judicial resolution is obtained.

In some environmental cases this had led to problems for the Commission in being unable to address all dimensions to a particular case in one set of proceedings. In one case (Case C-3/96), where the Commission brought an action against the Netherlands for failing to provide a sufficiently complete list of special protection areas as required by Art 4 of the Wild Birds Directive 79/409, the defendant alleged inconsistencies had occurred between the Commission's position in the pre-litigation and litigation phases. The Dutch Government objected, *inter alia*, to the fact that the Commission had

24 OJ 2000 C364/1. See especially Arts 47–50 (Ch VI. Justice).

25 See Art 51 of the Charter.

submitted only at application stage that certain sites actually notified by the Netherlands failed to fulfil the qualitative criteria required by the Directive. The Court agreed, holding that the original complaint contained in the Commission's LFN and RO was quantitative in nature, namely focusing on the insufficient number of SPAs recognised by and notified to it from the defendant. It concluded that the quantitative nature of the Commission's complaint could not implicitly subsume or cover the complaint that certain notified Dutch SPA sites were deficient, even where the problem lay with insufficient size of particular notified sites. In addition, the Court barred the Commission from using a 1994 ornithological study as evidence in support of its complaint, given that the study could not be shown to have related to a period prior to the expiry of the RO deadline.

In another case (Case C-392/96), the Commission had taken action against Ireland for having set up certain thresholds in relation to certain development projects before environmental impact assessments would be required (peat extraction, afforestation, uncultivated land use). The Commission submitted that the thresholds contravened the EIA Directive 85/337 which requires impact assessments to be held in the event of a development project having significant effects on the environment. Ireland defended itself in part by submitting that the Commission had filed only one of its particular objections at application stage, namely that the threshold system would ignore the cumulative effect of small projects on the environment. The ECJ held that although the Commission had not specifically used the words 'cumulative effects of projects' at pre-litigation stage, it was clear nevertheless that the Commission had addressed the issue in substance in the RO by referring to the problem or danger of developers avoiding impact assessments by splitting projects into small parcels of development in order to evade EIA scrutiny. Accordingly, it appears that the substance of all material submissions made by the Commission must be made at pre-litigation stage, as the Court has emphasised that the subject matter of the action is delimited at this point in the Art 226 EC procedure.<sup>26</sup>

Over the years, the ECJ has considered and ruled on a great number of legal submissions from Member States presented in order to justify why they have been unable to implement EC legislation at national level. The case law reveals that the ECJ has taken a relatively strict viewpoint over compliance, accepting only a very narrow range of exculpatory arguments to justify implementation failures. This has been a particularly important development from the perspective of EC environmental law enforcement. The jurisprudence of the Court has confirmed that Member States are strictly bound to the task of implementing their legislative commitments undertaken at

26 See also e.g. Cases 232/78 *Commission v France*; C-279/94 *Commission v Italy*; C-247/89 *Commission v Portugal*.



Community level. It would not be inaccurate to describe Member States as being essentially strictly liable for the state of implementation of EC environmental law within their respective borders. The following examples of defence submissions raised by Member States in the context of enforcement proceedings underline the importance recognised by the Court of holding them to account for failures to fulfil their responsibilities to implement EC environmental norms.

### ***3.5.1 Internal problems facing a Member State***

The ECJ has confirmed on a number of occasions that Member States are barred from pleading domestic internal problems within their own jurisdictions as being factors that may have the effect of justifying failures on their part to secure due implementation of EC (environmental) law within their own sovereign borders. The Court has taken the view that liability is strict here for Member States. Even where it may be shown that a particular Member State's government or central administration is not to blame for a delay in correct implementation, the Member State nevertheless must shoulder full legal responsibility for any implementation failure. Accordingly, it has been held, for instance, that Member States may not be able to plead serious or emergency economic domestic circumstances (for example, Cases 7/61 *Commission v Italy*, 232/78 *Commission v France*), internal constitutional problems (Case C-337/89 *Commission v UK*), failures by domestic legislatures to adopt implementing measures (for example, Cases 7/68 *Commission v Italy*, 77/69 *Commission v Belgium*), internal technical problems (Case C-200/88 *Commission v Greece*) or overriding domestic priorities (for example, Case 160/82 *Commission v Netherlands*) as mitigating factors. Even if it may be shown that draft national implementation measures are currently being drafted or undergoing internal scrutiny through its internal legislative system, liability will be strict if those measures have not been passed as at the elapse of the deadline for compliance with the RO (for example, Cases C-123/99 *Commission v Greece*, C-354/99 *Commission v Ireland*, C-13/00 *Commission v Ireland*).

The factor of internal circumstances may be particularly evident in environmental disputes between the Commission and Member States. Specifically, the defendant Member State may wish to plead that internal local opposition to new environmental regulatory or structural changes are responsible for failures to implement EC environmental law. This may be particularly the case in waste management and water treatment cases, where local inhabitants may raise objections to planning consent for landfill sites, recycling plants or sewage treatment works sought to be introduced in order to meet improved environmental protection standards agreed at Union level. The ECJ has made it clear that defendant Member States are not entitled to rely on the factor of NIMBY-ism as a justification for delaying proper

implementation of EC obligations (for example, Case C-45/91 *Commission v Greece*). Constitutional settlements within a Member State that devolve decision-making powers on the environment at sub-national level may not be pleaded in order to abrogate the Member State from its supranational responsibilities.

### ***3.5.2 The element of fault on the part of the defendant Member State***

Crucially, the ECJ has not interpreted from Art 226 EC that the element of fault on the part of the defendant Member State is relevant for the purposes of enforcement proceedings. Thus, where it is clear that a Member State neither intended to breach EC environmental law nor was negligent in taking steps to ensure timely implementation of its EC environmental obligations, that Member State will nevertheless be held liable for any implementation failures. It is irrelevant, for instance, that under domestic constitutional law, responsibility for environmental protection matters is devolved at regional or sub-regional level; the federal government assumes full responsibility for nationwide adherence to legally binding EC environmental standards (for example, Cases C-347/97 *Commission v Belgium*, C-71/97 *Commission v Spain*). Similarly, it is no defence for a Member State to argue that it has undertaken what it considers to be all reasonable or practicable measures to implement EC environmental protection requirements, unless this defence is expressly woven into the text of the legislation. The ECJ made this clear, for instance, in the context of enforcement proceedings taken against the UK over breaches of the aquatic pollution limit values contained in the Bathing Water Directive 76/160 relating to waters around Blackpool, Formby and Southport (Case C-56/90). The Court held that the Directive's provisions required compliance with its pollution-limit values within a specified transposition deadline of 10 years; the only exceptions to these obligations were and could only be set out in any express derogations contained in the legislative instrument. Were the position taken by the ECJ otherwise, it would be relatively easy to see how the credibility of the Directive could be undermined by claims by Member States that it would be reasonable in the circumstances that they require more time than agreed in order to implement their EC environmental protection obligations contained in the Directive. It is, of course, a slippery slope to begin to accept arguments based on reasonableness or practicability in terms of implementation. The result is an erosion of legal certainty and enforceability pertaining to environmental protection obligations.

### ***3.5.3 Breach by another Member State***

The ECJ has also consistently held that one Member State's breach of EC law may not constitute justification for a breach of the same norms by another Member State. The Court has confirmed that under the EC Treaty

system, a Member State may not under any circumstances be entitled to adopt unilaterally measures designed to prevent or combat breaches by another Member State of EC law (Case 232/78 *Commission v France*). In this sense the system of EC law enforcement may be contrasted with the rules of enforcement adopted by the World Trade Organisation, which are predicated on traditional international norms of reciprocity of obligation. Under EC law, Arts 226 and 288 EC provide for a supranational forms of infringement action, with the ECJ ultimately imposing final judgment (and sanction in the case of Art 228) on any particular case. In a similar vein, the ECJ has also clarified that Member States may not be entitled to plead that the European Commission must institute enforcement action equally between Member States; what is material is whether the defendant in question has failed to adhere to its EC commitments (Case C-146/89 *Commission v UK*).

### 3.5.4 *De minimis-type arguments*

On more than one occasion, Member States have sought to overturn enforcement proceedings taken against them on the grounds that the particular subject matter disputed before the ECJ is of a minor or insignificant nature, as seen from an EC perspective. Such arguments have succeeded in other areas of EC policy, where jurisdiction of the Union to intervene over infractions of its norms has been confined to being applicable to situations where more than one Member State is involved. The traditional core areas of law underpinning the EC legal system, namely the rules pertaining to the realisation of the Single Market, have always been founded on this jurisdictional principle. For instance, the free movement provisions in the EC Treaty pertaining to goods and services are predicated on there existing an impact on interstate trade patterns.<sup>27</sup> Rules on the free movement of capital and persons are likewise triggered in situations involving cross-border scenarios or dimensions.<sup>28</sup> The ECJ has confirmed such provisions to be inapplicable where the effects are felt simply within the borders of a single State or the interstate connection is too remote. Another example is competition policy, where the jurisdiction of the EC to control anti-competitive practices has been similarly limited.<sup>29</sup> Traditionally, then, the EC has developed on the

27 See Arts 28–29 and 49 EC.

28 See Arts 56 and 39 EC.

29 Arts 81 EC on anti-competitive agreements and 82 EC on abuses of dominance apply in so far as the outlawed practices ‘may affect trade between Member States’. EC law prescribing competition controls over mergers and acquisitions is limited in principle to tackling concentrations of a ‘Community dimension’ (see Art 1 of Regulation 139/2004 (OJ 2004 L 24/1)). Exceptionally, the European Commission may also come to scrutinize concentrations that fall below this quantitative threshold that either involve at least three Member States or, whilst affecting only one Member State, nevertheless affect trade between Member States (see Arts 4(5) and 22 of the Regulation).

basis that its policies and laws should apply in the context of regulating Member States' trading relationships with one another, leaving States free to develop and enact policies autonomously that are not considered to be of a significant direct threat to the establishment of a single market area. The principle of subsidiarity, enshrined in the EC Treaty (principally in Art 5) by virtue of the Treaty of European Union 1992, was inserted into the EC legal framework as a fundamental principle to accommodate concerns perceived by certain Member States that the development of EC law and policies should not intervene in areas that could not be 'sufficiently achieved by the Member States', with reference to the scale and effects of any proposed action.

Member States have in the past sought to raise *de minimis* type arguments as a means of escaping liability for instances of bad application of EC environmental law. In particular, they have attempted to undermine the possibility of EC control where it appears that adverse impacts on the environment flowing from breaches of EC environmental law have been felt within a relatively small geographical area within their own borders. The ECJ has dismissed such arguments consistently and robustly. For instance, in the *San Rocco* litigation, where the Commission took legal action against Italy over illicit dumping of waste in the San Rocco valley near Naples, contrary to the Waste Framework Directive 75/442 (Case C-365/97), the Italian Government submitted that the limited territorial extent of the case rendered the action inadmissible. The ECJ rejected this argument, holding that the question of finding of non-compliance with the Directive is not determined on whether it takes place in a small part of the national territory (para 70 of ECJ judgment). Similarly, in a case against Germany over failures to implement the pollution limit values contained in the Bathing Water Directive 76/160, in five of its *Länder*, the German Government's argument that the infractions in question were relatively minor given that the bathing waters concerned represented less than 5 per cent of bathing waters in Germany as a whole, was held to be irrelevant by the Court as regards the question of compliance by that Member State with the Directive (Case C-198/97).

The position taken by the Court is fully justified. It would be a false and dangerous argument to suggest that a particular breach of EC environmental law could be purely a local affair on account of its 'minor' impact, and thus fall outside the scope of supranational jurisdiction. By definition, any breach of an EC norm has a supranational dimension. Whilst any particular instance of breach of EC environmental legislation might appear to be confined to a relatively small area, the discovery of such a practice might be indicative of a number of implementation failures in the particular Member State. Moreover, the instance of pollution may well have less obvious but real international dimensions: adverse impact on migrant bird populations, foreign nationals (for example, tourists residing in the immediate area), distortion of the Single Market (for example, 'environmental dumping' by a

particular Member State either by design or default) to name but a few examples. Moreover, it is impossible for any court to be clear or indeed just about what amounts to an insignificant instance of illicit pollution. The Court has rightly adhered to its position of asserting that evidence of a breach of EC environmental law is sufficient for prosecution of a case under the auspices of Art 226 EC; any other approach would undermine not only legal certainty and equity in terms of law enforcement, but also the very legal commitments stipulated by the EC legislature itself on environmental protection matters, in the form of the Council and European Parliament operating jointly under the co-decision procedure (see Arts 175(1) and 251 EC).

### ***3.5.5 Adequacy of implementation of EC environmental law***

The ECJ has confirmed on a number of occasions that it is fundamental for Member States to ensure that they implement their supranational legal obligations at national level unequivocally and comprehensively, in both substance as well as form. This approach by the Court has been important from an environmental law enforcement perspective, given that many Member States have sought to take a number of shortcuts or only soft measures in order to internalise EC environmental norms.

A number of problems have been encountered with the transposition of EC environmental directives into national law. For various reasons, Member States have frequently failed to ensure that binding national implementing legislation is in place as at the deadline stipulated in the directive, notwithstanding that often substantial periods of time are provided for transposition. According to Art 249(3) EC, which defines the legal nature of EC directives, a directive shall be binding as to the result to be achieved on each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods. The Court has construed from this EC Treaty provision that national implementing legislation alone fulfils the requirements of proper transposition prescribed by this provision, despite the fact that the provision allows a distinct element of choice and discretion for national authorities over the means to achieve the objectives set out in the EC norm. Two factors in particular would seem to have influenced the Court's approach here: the need to respect the legally binding nature of directives and the need to ensure that their transposition is carried out in a publicly transparent manner. The requirement of having to adopt national legislation as the mechanism for transposing EC environmental directives serves to sustain the legally binding nature of the provisions contained in the EC directive and more specifically ensure that the terms of the directive are enforceable publicly at national level, namely via the respective national judicial systems and throughout the entire territory of the EU. Second, the promulgation of national legislation offers a transparent means of introducing the directive's terms into the national domain, ensuring that

all stakeholders (from enforcement authorities through to members of the public) are aware of the requirements to adhere to them.

Accordingly, it is well-established by the Court that administrative measures alone will not suffice for the purposes of transposing and implementing requirements set down in an EC environmental directive. In one case (Case 96/81), the Commission had taken action against the Netherlands for having failed to implement the Bathing Water Directive 76/160 into national law within a two-year time period set by Art 12 of the Directive. The Dutch Government sought to defend itself by arguing that in practice the terms of the Directive were being observed at national level; the decentralised nature of water quality management in the Netherlands meant that the local and regional water authorities were directly bound by the EC Directive. The ECJ dismissed this argument, holding that the delegation of responsibilities by central government to domestic local or regional authorities does not release the Member State itself from the basic duty to enact national provisions of a binding nature serving to transpose the terms of the EC directive concerned. Specifically, the ECJ justified this requirement by underlining that ‘mere administrative practices which by their nature may be altered at the whim of the administration, may not be considered as constituting the proper fulfilment of the obligations deriving from that directive’ (para 12 of ECJ judgment). For similar reasons, informal measures adopted at central government level designed to instruct or guide local authorities are likewise deficient means of transposing EC directives, such as ministerial circulars (for example, Case C-262/95 *Commission v Germany*) or multi-annual programmes (Case 96/81 *Commission v Netherlands*), given their non-binding status.

The reasons for the Court’s strict approach to the need for national legislative measures as a necessary form of transposition is readily understandable from a number of perspectives. First, national legislation is beneficial in terms of assisting in securing proper enforcement by all Member States of EC-agreed specific environmental standards. In particular, where specific parameters on pollutant emissions are agreed between Member States, such as a maximum permissible amount of discharge of a particular substance into the environment, it is obviously important that these are seen to be respected and enforced on an equal footing by each Member State within their respective jurisdictions. If the enforcement of thresholds were to depend on the relative efficacy and good faith of administrative practice and discretion in each constituent country, this could easily lead to a downward spiralling of general confidence in the feasibility and credibility of effective enforcement. Member State governments would understandably be hesitant to commit resources to local implementation measures in a situation where it would be difficult to scrutinise the state of implementation in other EU countries. In particular, such an approach would effectively open up the EC legal system to practices of ‘environmental dumping’ by Member

States, namely practices which tolerated non-observance of environmental protection measures for the purpose of lowering compliance costs for local industries. The principle that Member States are to refrain from engaging in protectionist-type measures *vis à vis* one another is a pivotal foundation of a single market, which is predicated on the abolition of obstacles to free circulation of goods, services, labour and capital, plus anti-competitive constraints. Member States would be also wary of investing in environmental protection implementation measures that could be undermined on account of laxity on the part of a neighbouring Member State in implementation of EC environmental norms (cross-border pollution scenarios).

Second, where EC directives aim to establish certain substantive or procedural rights and/or obligations for individuals, these have to be similarly expressed in national law in order to ensure that they are enforceable under local law. The ECJ has confirmed that it is no defence for a Member State to argue that an EC provision is directly effective, namely one that confers rights on individuals which is directly enforceable before national courts, and therefore is not in want of transposition. Even if certain EC provisions in directives are directly effective by virtue of EC law, this fact does not exempt a Member State from its transposition obligations rooted in Art 249(3) EC; direct effect constitutes only a minimum legal guarantee arising from the binding nature of a particular type of supranational obligation (Case C-301/81 *Commission v Belgium*). It is in practice often debatable as to whether a particular EC environmental provision may have direct effects, namely be sufficiently precise, clear and unconditional so as to lend itself to entitle individuals to enforce it before national courts. This underlines the need for transposition measures to be in place, in order to obviate unnecessary legal uncertainty and litigation costs that would otherwise focus on this issue. It is also no defence for a Member State to argue that because provisions of an EC environmental directive do not have direct effect, they need not as a consequence be implemented by national authorities in practice prior to the date when the directive is actually transposed into national law. That line of argument was raised in a case taken by the Commission against Germany over partially defective implementation of the EIA Directive 85/337 (Case C-431/92). The ECJ held that the material question over compliance under Art 226 EC was whether the development project concerned (a thermal power station) should have been subject to an environmental impact assessment in accordance with the terms of the Directive, an entirely separate question from whether individuals were able to rely on its provisions directly before a national court. The impact of the direct effect doctrine in the area of EC environmental law enforcement is explored in detail in Chapter 6.

The need for ensuring comprehensive local enforcement of environmental directives that stipulate minimum protection measures has been emphasised by the ECJ's focus on developing the general principle that Member States are required to ensure that domestic transposition measures contain effective

means to attain their goals. In particular, the Court has stressed the need for Member States to ensure that national transposition measures are underpinned by genuinely effective penalties in the event of any violations. As a basic legal principle, in the absence of EC rules it is a matter for the Member States to stipulate the type and measure of penalty that should apply in the event of an infringement of an EC norm. The mode of procedure used to secure implementation of EC law is presumed to rest within the exclusive competence of the Member State in so far as the Union has not agreed to harmonise the process of implementation. This is underpinned by the fact that most EC environmental protection measures are crafted in the form of a directive, which means that it is for the individual State addressed by the directive to determine the form and methods by which it will attain compliance with the substantive requirements set out in the legislative instrument (see Art 249(3) EC). This leaves it up to Member States to decide what type of law enforcement measure is appropriate to apply in respect of infringements of environmental protection standards set at EC level (for example, administrative sanctions such as cease and desist orders, or criminal sanctions such as fines and/or custodial punishment for offenders).

Nevertheless, the ECJ has confirmed that Member States do not have complete autonomy over the means used to fulfil EC obligations. Specifically, it has construed that a general obligation flows from Art 10 EC requiring Member States to guarantee the effectiveness and application of EC law. For that purpose, they are obliged to ensure that infringements of Union law are penalised under conditions, both procedural and substantive, which are analogous to those applicable to infringements of a similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive (for example, Cases 66/88 *Commission v Greece*, C-354/99 *Commission v Ireland*). This legal requirement was illustrated in a case against Ireland over its failure to properly implement EC Directive 86/609 on animals used for experimental and other scientific protection (Case C-354/99). The Commission had taken action because Irish law had introduced a relatively modest financial penalty in the event of breaches of the Directive's terms (which was at the time 50 Irish Pounds), whereas commensurate animal cruelty offences in the Ireland at the time were backed up by much stiffer penalty provisions (at the time 1,000 Irish Pounds). The Directive itself was silent as to how its provisions should be enforced. The ECJ held that penalties established under Irish law to implement the Directive were incompatible with the minimum requirements under Art 10 EC with regard to fulfilment of Member State obligations under EC law.

That national implementing measures should be in place to provide for effective penalties of minimum standards set out in EC environmental norms is further underpinned by a human rights argument. It is a well-established basic principle recognised at national and international levels that no one shall be held guilty of an offence which has not been already prescribed by



the law (*'nullum crimen sine lege'*). Article 7 of the ECHR specifically enshrines this principle in the form of a fundamental human right. The EC legal system, principally through the case law of the ECJ, and most recently under the auspices of (Art 49 of) the Charter of Fundamental Rights of the EU,<sup>30</sup> also recognises the importance of this legal principle. Bearing it in mind, the ECJ has had occasion to prevent Member State environmental authorities from seeking to enforce obligations contained in an EC environmental directive against individuals, where no national legislation had been passed to transpose the particular directive. In the case of *Arcaro* (Case C-168/95), Italian authorities had sought to rely directly on Directive 76/464 on dangerous discharges of pollutants into the aquatic environment in order to bring a criminal prosecution against Arcaro for discharges of cadmium into a river emitted by a precious metal plant owned by him. Article 3 of the Directive contains a basic prohibition against discharges of certain pollutants, including cadmium, into aquatic environments within the EC. The Court held that, although the deadline for the Directive's transposition had elapsed, the national authorities concerned were not entitled to rely on the terms of a directive against a private individual in the context of a criminal prosecution, either directly or indirectly (for example, in order to construe existing national law so that it would include a criminal sanction that would otherwise not apply under national legislation). Instead, the Directive had to have been transposed expressly into national law in order to provide the appropriate clear basis for individual liability. This is underlined by the fact that only Member States are the addressees of EC directives, and not private persons. In other words, whilst it may undoubtedly have been the intention of the Directive that there should be a comprehensive public ban on cadmium discharges into aquatic environments, no formal legal obligation arose on the part of individuals as and until national, publicly applicable legislation crystallized this intention into obligations specifically targeted at private persons in the form of criminal law. The ECJ has underlined that it is most reluctant to see a Member State taking advantage—as it sees it—of any failure to comply with EC law in this way, namely by taking short cuts in the formal implementation process to determine or aggravate liability of individuals (see for example, Case 80/86 *Kolpinghuis*).

Third, the need for national implementing measures in the form of legislation assists greatly in ensuring that the process of transposition and implementation becomes transparent, more accountable and legally certain. It enables the Commission to monitor Member States' formal steps to implement EC environmental directives, and to intervene if basic conceptual errors are made over the interpretation of the material or personal scope of

30 OJ 2000 C364/1.

obligations underpinning the directive's provisions. Moreover, the requirement to provide for binding national implementation measures ensures that the public and national/local authorities are in a suitable position to be cognisant of the entire reach and effect of the legal obligations that run from the terms of the EC directive concerned. These factors were clearly illustrated in two environmental cases. In Case C-392/99, Portugal was held to have failed to provide interested parties with a sufficiently clear and precise legal implementation of the Waste Oils Directive 75/439, in not having made it clear that adoption of certain health protection measures was a precondition for the grant of a licence to manage waste oils. The national legislation merely enabled the authorities to establish that appropriate health measures were present. In another case (Case C-217/97) Germany failed to transpose the terms of the former Access to Environmental Information Directive 90/313<sup>31</sup> sufficiently clearly, by not making it clear whether national authorities would be obliged to communicate any information in a situation where they would be justified in refusing to communicate part of the information requested. The ECJ has elevated the principle of transparency to be a fundamental prerequisite for the state of national transposition measures. Accordingly, even if it were illegal under national law for a public authority to deviate from the terms of a nationwide administrative practice or policy document that aligns itself fully to implementing a particular EC directive, this would not suffice for the purposes of proper transposition of that directive into national law. As the Court has confirmed, that state of affairs would nevertheless leave the position insufficiently transparent for individuals to discover their rights and rely on them before national courts if required (Case C-29/94 *Aubertin*).

Adequate implementation of EC environmental law requires, of course, that at national level, systems are in place to ensure that compliance is respected in practice as well on paper. It is one thing for Member States to ensure that the letter of their domestic laws reflects the requirements of EC environmental directives within the relevant time limit prescribed by the latter. Correct transposition of directives into national law is an important integral component of the implementation process. However, national transposition does not by any means constitute the entirety of a Member State's legal obligation. On the contrary, it merely constitutes completion of the initial process of ensuring that the requisite domestic legal framework is in place, so that the relevant legal tools are in place at national level in order to assist local authorities in the fundamental task of upholding the requirements laid down in environmental directives. Crucially, Member States are also held to account under EC law if they fail to ensure that action is

31 Replaced by Directive 2003/4 on public access to environmental information and repealing Directive 90/313, as discussed in detail in Chapters 8 and 9.

taken in order to apply those legal tools. Without active and effective systems of public agency enforcement in place, any national transposition legislation is most likely to be wholly ineffective, especially if, as is the case in the vast majority of environmental protection instruments, the enforcement process is dependent on State involvement. Similar considerations apply to EC environmental regulations. In the rare event that these instruments are used in order to promulgate EC environmental legislation, it is, in practice, of relative little consequence that they are, at the time of entry into force, directly applicable and generally binding within each of the legal systems of the Member States (Art 249(2) EC). The States are required to enforce both actively and effectively the terms of each regulation in order to meet their ongoing duty of due and correct implementation of EC law.<sup>32</sup>

Accordingly, where the Commission has obtained evidence of the failure within a Member State to respect the requirements of EC environmental legislation, it has the opportunity to take legal proceedings against the Member State government under Art 226 EC. It is irrelevant in this instance whether the State has adopted legislation designed to implement EC environmental protection standards (for example, Case C-337/89 *Commission v UK*) or whether private parties have been directly responsible for the illicit pollution incident(s) and not the State itself or its agencies. The latter point is well illustrated in various actions that the Commission has brought against Member States in respect of failures to take steps to clean up incidents of fly-tipping perpetrated by unknown third parties (for example, Cases C-45/91 *Kouroupitos (1)*, C-365/97 *San Rocco*, C-387/97 *Kouroupitos (2)*). The Member State is held legally responsible for the state of implementation in practice as well as under national law. The Court has thus confirmed that enforcement proceedings under Art 226 EC may be used as a means to pierce the veil of formal compliance with EC environmental norms and enable the Commission to hold Member States accountable for substantive compliance with legislative commitments on minimum environmental standards. In this sense, Art 226 EC facilitates the EC Commission to engage a far more in-depth and comprehensive legal scrutiny of Member State compliance than would be expected under traditional rules of public international law. The classic principal role of international organisations involved in developing international environmental protection standards is to consider whether or not a member country of its organisation, that has signed up to a particular international environmental agreement, has actually adopted internal legislative measures to ratify it. Few international organisations

32 In most cases, EC regulations do not provide the detailed rules by which national authorities are to enforce its requirements. The specific national authorities responsible for enforcement, their investigative powers as well as the sanctions that they are to enforce are, in conformity with standard practice, set out under national legislation.

are vested with specific powers to scrutinise *de facto* compliance with international law and/or take legal or disciplinary action in respect of non-compliance in particular instances.

### 3.5.6 *Temporal arguments*

A not infrequent claim raised by Member States in the context of Art 226 proceedings is that they have been given insufficient time to comply with EC environmental legislation after the Commission initiated legal action. In cases where the Commission is confident of having obtained sufficiently persuasive evidence of an infringement and has decided relatively early on to move to judicial resolution of the dispute unless it is satisfied of moves on the part of the defendant to ensure compliance with the EC environmental norms in question, it may well see little reason to engage in prolonged phases of attempting to secure an out of court friendly settlement during the pre-litigation phase. In such circumstances, the Commission may wish to set relatively short time limits for the defendant Member State to respond to the LFN and RO. The Commission is aware that Art 226 proceedings take a considerable number of months to culminate in a judgment from the ECJ, even in the cases with short pre-litigation phases (see Table 3.1). This situation is far from satisfactory in many environmental implementation disputes, where illicit pollution may well be an ongoing situation as opposed to a one-off event. Defendant Member States are usually keen to play the system so as to lever for more time to comply with the environmental requirements or to negotiate an alternative workable settlement with the Commission during the pre-litigation phase. They have, on occasion, sought to resist attempts—as they see it—by the Commission to short cut the pre-litigation phase and impose unreasonably short deadlines for legislative compliance.

The ECJ has been wary of Member State attempts to abuse the pre-litigation phase of Art 226 by stringing out the length of proceedings. The terms of Art 226 do not specify the minimum length of time which the Commission should allow Member States to be able to respond to the LFN and RO. The ECJ has refused to stipulate absolute minimum periods, holding instead that the response times should be reasonable in length, account being taken of the circumstances in each case. In practice, the Commission usually allows at least two months for a response to materialise although, as discussed earlier, it has set tighter deadlines which the Court has endorsed in urgent cases. An important case dealing with this temporal element in environmental actions was the UK *Bathing Waters* case (Case C-56/90), in which the UK submitted that the two months' compliance deadline set out in the Commission's RO was unreasonable, given that it was not physically possible to ensure implementation of pollution-limit value adherence prescribed by the Directive in respect of the UK bathing waters targeted by

the litigation (namely around Blackpool and adjacent to Southport and Formby). The ECJ dismissed this argument as irrelevant in the circumstances, noting that the Commission in fact had pointed out its concern regarding those areas some two years earlier and that the UK could have prohibited bathing in the areas concerned. The Court could also have underlined the point that Member States are provided with periods for compliance with EC legislation, as negotiated by the EC legislative institutions involved in crafting its terms. EC environmental legislation is no different, with substantial periods being allowed for compliance purposes (10 years were provided for implementation of the Bathing Water Directive 76/160). The purpose of the LFN and RO is not principally to provide sufficient time for the Member State to comply, but instead to have sufficient opportunity to provide a detailed response to the statements of complaint raised in those documents. In other words, the Member States are entitled to be provided with a fair hearing at the pre-litigation as well as litigation stage. That the pre-litigation phase may be and is in many instances used by the Commission together with defendant to engineer a friendly settlement should not lead to any inference being drawn that such an outcome is a mandatory requirement of the pre-litigation phase. Article 226 proceedings are there to ensure that EC law is enforced, ultimately with a view to obtaining a judicial declaration in the event of an infringement having occurred.

Another type of temporal-based defence raised by Member States is where they allege that the Commission has delayed in bringing proceedings to the point where it would be unfair bring an action. This issue has been discussed earlier in this chapter (see 3.3.3.2 above). Suffice it to say that the Court has in general not implied any general limitation period as being applicable to Arts 226 or 228(2) EC. It has consistently held that Art 226 does not oblige the Commission to act within any given period (for example, Cases 7/71 *Commission v France*, C-96/89 *Commission v Netherlands*).

### **3.6 Interim relief and Art 226 EC proceedings**

A key factor that has to be borne in mind when considering the nature and efficacy of environmental law enforcement systems is the extent to which emergency measures may be applied or requested by an enforcement agency against a defendant in order to prevent or minimise prospective or actual environmental damage. Given the fact that it may take a considerable period of time before the substantive legal issues underpinning an environmental enforcement dispute are heard and adjudicated on by a judicial body, the responsibilities of the disputing parties pending final judicial resolution of the case are frequently an important issue from an environmental protection perspective. This may be of particular significance if the contested conduct of the defendant is active and ongoing in nature. In particular, the question then arises as to what extent is it possible to require a defendant prior to final

judgment to refrain from continuing with certain activities considered by the enforcement agency to be an illicit form of pollution? In certain situations, the availability of emergency measures for the purposes of enforcement may be even more important than the final legal outcome of the case itself. For instance, if a particular disputed building development is permitted to proceed within a particularly sensitive ecological area containing protected wildlife species and habitats judicial confirmation of a breach of law may come too late to provide effective safeguards against their deterioration or even eradication; the environmental damage may well have become irreversible by that stage. The saying 'justice delayed is justice denied' resonates particularly strongly here.

The issues at stake in respect of environmental law enforcement under the auspices of Arts 226 and 228 EC are no different. Mention has already been made earlier in this chapter concerning the considerable length of time it may take in practice from start to completion of a first round environmental enforcement action: on average over 5 years. Whilst it is conceivable that very short pre-litigation deadlines may be stipulated by the Commission in urgent cases, this alone does not solve the problem that a considerable period of time is taken up between court application and judgment (20 months or more). In any event, the Commission often takes a substantial legal risk in setting tight pre-litigation deadlines, as it is not necessarily sufficiently clear in any particular case what deadline the Court would consider reasonable. It has been rare in general for the Commission to have set very tight deadlines in the context of Art 226 proceedings, and to the author's knowledge unprecedented in environmental cases. A response deadline deemed unreasonable by the Court would, as already outlined, render the action inadmissible. If the Commission wished to continue to pursue the matter, it would have to commence first round proceedings afresh, resulting in considerable delays before a judicial declaration could be obtained. This would, of course, fatally undermine the key purpose of securing speedy resolution of the dispute and minimisation of environmental damage. Even very short deadlines do not assist to address a more fundamental problem, namely that Art 226 and 228(2) proceedings do not have a suspensory effect (see Art 242 EC, first sentence).

The question of whether the Commission may be able to take distinct emergency measures *vis à vis* a Member State may be a particularly core issue in the context of bad application cases, namely where the State has failed to ensure that EC environmental legislation is respected in practice within its borders. Article 243 EC provides, however, for the possibility of the ECJ being able to decide 'any necessary interim measures'. These powers of the Court apply in relation to the entire range of legal actions that may be brought before it, including enforcement actions under Arts. 226 and 228 EC. Accordingly, it is possible for injunctive relief to be obtained pending delivery of the Court's judgment as to whether a breach of EC environmental law

has been committed by the defendant Member State. From a legal perspective, it is the Commission that shoulders the principal responsibility of securing emergency relief measures pending the declaration by the ECJ of its judgment in an environmental case. The framework underpinning Arts 226 and 228(2) places the onus on the Commission to prove the need to use special interim measures; the fact that the EC Treaty rules out Art 226 or 228(2) proceedings having any automatic immediate suspensory effect underlines this point. There is an in-built presumption that the defendant's actions or inaction are to be considered lawful until the final decision of the Court.

Article 243 EC states that the ECJ has authority to decide on the issue of granting any interim relief; the Commission is not vested with any such powers in the context of Art 226 EC. One may contrast this with the express powers vested in the Commission to adopt interim measures in the context of other EC administrative law procedures, such as those applicable in the field of competition law.<sup>33</sup> Evidently, the current state of EC administrative law reflects a long-standing institutionalised and cultural bias that resources are prioritised to prevent or minimise monetary as opposed to environmental damage flowing from breaches of EC law. This position reflects a narrow perception about the parameters, concerns and values underpinning the Union's single market economy. Nevertheless, Art 243 EC effectively confirms that it is, in principle, open to the Commission to seek to persuade the Court of the need for injunctive relief in the context of an environmental enforcement action. It is not clear what the scope of interim relief might cover from the EC Treaty's text. However, it would appear reasonable to conclude from its deliberately generally worded terms, that Art 243 should be construed broadly so as to cover a wide range of interim remedies. This construction would be in alignment with the essential mandate of the Court itself, set out in Art 220 EC, which is to ensure that 'in the interpretation and application of this Treaty the law is observed'. An overly narrow view of interim relief could undermine that mandate, something the drafters of the EC Treaty clearly did not envisage or intend to be the case. The range of interim measures could accordingly include judicial orders directed to the defendant to desist from a particular activity as well as orders to take active remedial steps in relation to a previous activity considered illegal by the Commission.

The Rules of Procedure of the Court of Justice, established under the auspices of Art 223 EC, provide specific details concerning the relevant procedures involved for applications for interim measures.<sup>34</sup> Specifically, Art 83

33 See for example, Art 8 of Regulation 1/2003 on the implementation of the rules on competition laid down in Arts 81 and 82 of the Treaty (OJ 2003 L1/1).

34 See Ch1 (Suspension of Operation or Enforcement and Other Interim Measures) of Title III (Special Forms of Procedure) to the Rules of Procedure of the Court of Justice (OJ 1991 L176/7 and OJ 1995 L44/61, as amended).

of the Rules provides that such an application shall state the subject matter of the proceedings, the circumstances giving rise to urgency and the pleas of fact or law establishing a *prima facie* case for the interim measures applied for. Applications to the Court for interim relief may be submitted only by the parties to legal proceedings.<sup>35</sup> In the context of Art 226 actions in environmental cases, this means that it is exclusively the Commission that may file an application against a defendant Member State. Third parties who may be interested in taking or supporting enforcement action, such as complainants (for example, individuals or environmental NGOs who may have alerted the Commission to the infringement) or other entities who may be seised of the facts of the case, such as local authorities, have no opportunity to file an application in the event that the Commission decides not to do so. Accordingly, third parties interested in obtaining immediate measures are wholly dependent on any legal proceedings and remedies available to them for this purpose provided under national law.

Whilst it is the case that interim measures are available as a legal enforcement tool, in practice they have rarely been used by the Commission in the context of environmental disputes. A number of reasons explain why this is so. One of the reasons is the factor of delayed access to relevant information on the state of the environment. The Commission is often not made aware of the full facts or provided with sufficient evidence at a relatively early stage. This is not altogether surprising, as complainants themselves often have no detailed knowledge or ready access to relevant data. However, it is important to note that EC law does oblige Member States to provide public access to environmental information which is in their possession.<sup>36</sup> The pre-litigation stage, which involves in part a process which may lead to the dissemination of evidence from the defendant Member State, often takes a considerable period of time. Moreover, the Commission is not vested with any specific investigative powers in the context of environmental disputes that might enable it to garner evidence omitting. Specifically, it has no powers to investigate any particular sites without the prior consent of either Member State or landowner, to seize and or copy relevant documents, or to interview witnesses. Such powers are vital in order for the Commission to be able to secure sufficient evidence speedily in order to meet the legal requirements that attend the granting of interim measures. Elsewhere, though, the Commission has been vested with such powers, notably for the purpose of tackling anti-competitive practices contrary to Arts 81–82 EC.<sup>37</sup> One can certainly make the case that

35 Art 83(2) of the Rules of Procedure.

36 See Directive 2003/4 on public access to environmental information (OJ 2003 L41/26), which repealed Directive 90/313 on the freedom of access to information on the environment (OJ 1990 L158/56) with effect from 14 February 2005.

37 Regulation 1/2003 (OJ 2003 L1/1).



such powers are implicit from Art 10 EC, which obliges Member States to take steps to ensure fulfilment of their EC obligations and 'facilitate achievement of the Community's tasks' (Krämer, 1993, p 405). However, in practice, such an argument remains tenuous and prone to arguments of legal uncertainty without specific legislation delineating the Commissions investigatory powers. In addition, given that any on-site inspections should be allowed to cover privately as well as publicly owned property, the issues concerning rights of the defence and third parties need to be addressed carefully and in detail. The general 'good faith' obligations contained in Art 10 EC simply do not address this dimension.

An additional hurdle that the Commission faces is a relative lack of up to date information and data on the state of the environment in the EU. In recent years, this position has improved somewhat with the establishment of bodies and mechanisms designed to focus on producing better information on environmental conditions in Europe. This trend can only assist in improving the task of overseeing implementation of environmental standards. For instance, the European Environment Agency,<sup>38</sup> which came into operation in November 1993, regularly produces general and sectoral reports on the state of the Union's environment. One could also mention more recently the inauguration of EPER (the European Pollutant Emission Register) in February 2004, an online publicly accessible database which collates information on emissions of 50 industrial pollutants emanating from specific large industrial plants.<sup>39</sup> EPER is shortly to be replaced by an improved database known as EPRTR (European Pollutant Release and Transfer Register) which will cover 65 pollutants and provide information on solid waste and waste water management by large installations. The Commission has also set up an online database on bathing water quality in Europe. However, whilst these initiatives may well be helpful in providing more focused and up to date information on environmental quality, in terms of law enforcement there is often no effective substitute for site-specific investigations designed to root out evidence material to allegations or facts of illicit pollution.

The lack of human resources endowed to the Commission for the purposes of environmental law enforcement also constitutes a significant problem. On average there are no more than two legal officers in DG Environment charged with responsibility to manage environmental cases relating to an entire Member State; for some countries, it may be that fewer than two officials are involved. This has been and remains a long-standing issue in connection with the management of Art 226 environmental cases. Without more legal staff being employed, it is unrealistic to expect that the Commission could manage the workload involved for securing interim measures.

38 Set up under the auspices of Regulation 1210/1990 (OJ 1990 L120/1), as amended.

39 EPER website: [www.eper.cec.eu.int](http://www.eper.cec.eu.int)

Enlisting the assistance of national environmental protection authorities could be helpful in this regard. However, there is no legal framework in place which provides for the co-ordination of law enforcement activities between national authorities and the Commission. In particular, there is no mechanism which ensures that any relevant information and evidence gleaned by a national authority may be disseminated (quickly) to the Commission. Nor are there any specific requirements laid down at EC level that national environmental authorities are obliged to enforce EC environmental law or are to be endowed with relevant investigative (and injunctive) powers to assist them in this purpose. In the context of environmental disputes, the Commission is not empowered to address national environmental authorities directly without the Member State's prior approval. In practice, this rarely happens in the context of Art 226/228(2) proceedings, where the dialogue is usually solely between the Commission and Member State government. In comparison, the position with respect to EC competition law is radically different, where a special dedicated network of (competition) enforcement authorities has been formally established with specific responsibilities to offer mutual assistance in the context of law enforcement activities. In the field of EC competition law, casework responsibility concerning infringements of Arts 81–82 EC has been heavily decentralised and devolved to national authority level with the Commission maintaining an overall supervisory role. In large part, this step was taken in recognition of the practical difficulties experienced in seeking to maintain centralised law enforcement through the Commission.

The only instance where the Commission tried to obtain emergency interim measures in an environmental enforcement action proved to be unsuccessful before the ECJ. This was in the context of proceedings taken against Germany (Cases C–57/89 and C–57/89R) in respect of certain coastal defence works that the Commission considered to infringe the requirements of the Wild Birds Directive 79/409. The Commission considered that the works illegally encroached on a designated wild bird special protection area (SPA) in the northern German coastal bay area known as Leybucht, specifically the 'Wattenmeer' of Lower Saxony. The German authorities justified the project on the grounds of health and safety, submitting that coastal defences needed strengthening in order to protect local coastal communities against flooding from storm tides that had breached the existing dikes in the past. From the Court's file, the Commission had been informed by certain environmental NGOs in September 1984 that the project constituted a potential threat to protected bird habitats, such as that of the avocet. Works commenced on the coastal defence project in 1986, following its formal drawing up in September 1985. The Commission considered that the German authorities had breached Art 4 of the Directive (as it then stood), in failing to ensure that the SPA would be subjected only to the minimum degree of deterioration necessary for the purposes of dike strengthening. Accordingly,

it issued an LFN in August 1987, followed by an RO almost a year later in July 1988. The Art 226 action was filed with the Court in February 1989 (Case C-57/89). In July 1989, the Commission applied to the ECJ for interim measures, seeking an injunction from the Court in order to compel Germany to cease commencement of the final phase of the project, known as Stage IV (Case C-57/89R). Some two-thirds of the defence works had already been completed by this time. The Commission submitted that completion of this phase could result in the disappearance of the habitat of bird species meant to be protected, specifically disrupting some 10 per cent of breeding pairs established in Leybucht.

The President of the ECJ, responsible for hearing such applications for interim measures, dismissed the Commission's application. He identified a number of problems with the Commission's contention of the need for interim measures in the case. A major issue concerned the factor of urgency, one of the elements required to be shown in order to justify an application. The Court noted that the Commission had filed its request for interim relief only after two-thirds of the works had already been completed. In listing the chronology of events, with specific reference to the time taken for the Commission's processing of its complaints, the ECJ President clearly understood the situation as being one where the Commission could have applied for interim relief at a much earlier stage. Nevertheless, he did not formally use this point to reject the Commission's case. In fact, the ECJ President considered that an application for an injunction against commencement of Stage IV of the project could have been theoretically granted, had the Commission been able to convince the Court that there would be the prospect of serious harm to birds in the Leybucht area.<sup>40</sup> In rejecting the application for interim measures, President took into account three factors: the nature of the Stage IV works, which did not reduce the size of the bay but constituted a dike extension into the sea, the statistical evidence proffered by the regional German *Land* authorities which indicated that the coastal defence project had not affected resident avocet populations (a steady fall in avocet numbers had occurred since 1984 before the project began, stabilising somewhat in 1987); and the inability of the Commission to substantiate evidence concerning development of mass tourism in the immediate area likely to disturb wild bird populations.

Accordingly, it may be seen that interim measures constitute a potentially valuable legal tool for the Commission in environmental disputes that require immediate intervening steps. The Court has demonstrated that it is prepared to countenance injunctive relief, in the event it is shown that without such relief serious environmental harm may be caused prior to Art 226 judgment. However, in practice, the Commission is often not in a strong

40 Para 18 of the judicial Order.

position to be able to meet the relevant requirements set out in the Court's Rules of Procedure, not least when it is usually only able to be seised of the facts and supporting evidence relating to the particular matter after a considerable period of time. Having said that, the Court does appear to provide the Commission with a significant amount of legal support in the *Leybucht* judgment, in not undermining its case for urgency simply because, for whatever reason, the Commission has brought the matter to the Court's attention at a relatively late stage, namely where the disputed conduct has been taking place for a period of time. What appears material for the Court is to consider whether the Commission is able to show prospective serious harm. However, the Commission appears to have shown itself reluctant to bring further test cases to clarify the legal parameters of this important area.<sup>41</sup>

41 See Krämer, 2002, p 432, fn 95, where he provides a telling insight into Commission legal appraisal of the factor of urgency in a contaminated drinking water case: (Case C-42/89). He comments that in the case 'there was a serious contamination of drinking water with lead in the Belgian city of Verviers. This had even led to fatalities. The Commission considered asking the Court for interim measures, but refrained from that, since the fatal cases dated several years back. The legal advice was that interim measures would be possible if a new fatal accident occurred!'.

## ENFORCEMENT PROCEEDINGS BROUGHT BY THE EUROPEAN COMMISSION (2): ART 228 EC AND 'SECOND ROUND' PROCEEDINGS

This chapter focuses on the EC Treaty provisions that enable the Commission to take legal action under Art 228(2) EC against a Member State that fails to adhere to the terms of a judgment of the European Court of Justice (ECJ) made under the auspices of Art 226 or 227 EC. As noted in previous chapters, judgments made under the latter Treaty provisions are currently purely of a declaratory nature; the ECJ has no powers at the moment to apply any specific sanctions under Arts 226 or 227 in order to induce a defendant Member State to take specific action to remedy a judicial finding of defective implementation of EC environmental law. The 2004 European Union Constitution<sup>1</sup> does, however, envisage providing the ECJ with specific penalty powers in first round proceedings where Member States fail to notify transposition legislation on time.<sup>2</sup>

Article 228(2) EC provides the possibility for legal action to be taken in the event that a Member State fails to adhere to the terms of a judgment made under Art 226/227 EC (first round judgment). Second round legal action taken by the Commission under Art 228(2) EC may ultimately lead to the ECJ imposing a financial penalty on the Member State concerned if it finds that the terms of its first round judgment have been breached. The financial penalty may take the form of a periodic penalty payment and/or a one-off lump sum payment.

As at the end of 2005, three judgments had been handed down by the ECJ concerning the application of Art 228(2) EC. All three cases involved instances where Member States received substantial fines in respect of failures to adhere to Art 226 ECJ rulings which had found them to be in breach of EC law concerning environmental protection. In the first case, in 2000 the ECJ imposed a daily penalty of €20,000 on Greece in respect of the failure

1 Treaty establishing a Constitution for Europe (OJ 2004 C310, 16.12.2004)

2 See Art III-362(3) EUC.

by its authorities to ensure compliance with the terms of the Waste Framework Directive 75/442, as amended, in relation to a waste disposal site at Kouroupitos on the island of Crete (Case C-387/97, *Kouroupitos* (2)). The second ruling involved the imposition by the ECJ in 2003 of an annual penalty payment of €624,150 against Spain in respect of each 1 per cent of the latter's inshore bathing areas continuing to fail to comply with the terms of the Bathing Water Directive 76/160 (Case C-278/01, *Spanish Bathing Waters* (2)). In 2005, the ECJ imposed on France a penalty payment of €57,761,250 for each six months it continued to fail to adhere to an earlier first round judgment against it relating to implementation of EC measures requiring the imposition of conservation measures in the fishing industry. In addition, the Court also imposed a lump sum fine of €20 million in this case (Case C-304/02, *French Fishing Controls* (2)). The substantial amounts involved have, without doubt, considerably raised the profile of the second round infringement procedure amongst Member States. This is exemplified by the fact that no fewer than 16 Member States elected to make observations to the ECJ in the 2005 second round judgment. Whether or not the second round procedure proves, in the future, to act as an effective tool in relation to the enhancement of due implementation of EC environmental law on the part of Member States remains an open question, and this issue is considered further in Chapter 5. The purpose of the current chapter, though, is to consider the legal components of Art 228(2) EC in the light of the available jurisprudence of the ECJ.

#### 4.1 General legal framework of Art 228 EC

Article 228 EC, the text of which is reproduced in Chapter 2, deals with the obligations and procedures that relate to enforcement of first round judgments. Article 228 EC is split essentially into two parts. Article 228(1) EC lays down a basic legal duty on Member States to take the necessary measures to comply with a judgment of the ECJ, whereas Art 228(2) outlines the various key stages and requirements of the second round proceedings to be taken by the Commission in order to enforce a finding of the Court that a Member State has breached EC law.

Until the entry into force of the Treaty on European Union (TEU) on 1 November 1993, the EC Treaty did not provide for the possibility of the Commission being able to seek second round proceedings with a view to requesting the imposition of a financial penalty from the ECJ. The EC Treaty simply referred to the basic duty of Member States to uphold its judgments confirming breaches of EC law by them, a duty now contained in Art 228(1) EC.<sup>3</sup> Article 228(2) did not exist before this point in time. Prior to the

3 Formerly, Art 171 EC.

amendments introduced to the EC Treaty by the TEU, in the event of the Commission finding that a Member State was not adhering to the terms of a judgment made against it under Art 226 EC, the only legal action that the Commission could take was to initiate, by way of follow up, further legal proceedings again on the basis of Art 226 EC. However, the remedy that could be provided at the end of the day by the Court was simply a further judicial declaration.

Under the original EEC Treaty, financial sanctions were available only for the enforcement of specifically prioritised sectors of policy, such as EC competition rules.<sup>4</sup> Enforcement of EC environmental law fell under the auspices of the general provisions on proceedings that may be taken by the Commission or a Member State against an infracting Member State, namely Arts 226–227 EC under which no specific sanctions could be employed in order to induce defendants to comply with their obligations. Whereas from its outset the Treaty specifically determined that decisions of the Court against persons other than States are to be enforceable,<sup>5</sup> the mode of enforcement to be governed according to national civil procedural rules, it was silent on the question of enforceability against defendant Member States until the TEU amendments. The original EEC Treaty effectively trusted that the Member States would fulfil their obligations ultimately on the basis of a legal finding of the ECJ, without the threat of any penalties. Its framework did contain the facility for secondary legislation to be passed in order to introduce specific sanctions to provide some teeth to judicial findings against defendant Member States.<sup>6</sup> However, these were not followed up and it fell to a treaty amendment under the TEU to effect a step change.

By the time the TEU was being negotiated by the Member States in the early 1990s, it was clear that the credibility of the framework of EC law enforcement was coming under increasing pressure. It was evident that the

4 Since 1962, the European Commission has been vested with powers under EC legislation to impose financial penalties on undertakings which breach the prohibitions contained in Arts 81–82 EC concerning particular anti-competitive practices. See Regulation 17/1962 recently superseded by Regulation 1/2003.

5 See Arts 244 and 256 EC (ex Arts 187 and 192).

6 See Art 229 EC (ex Art 172) which provides the possibility for regulations adopted jointly by the European Parliament and the Council, and by the Council, pursuant to the Treaty to give the ECJ unlimited jurisdiction with respect to any penalties provided for in such regulations. Other provisions in the Treaty of Rome indicate that the Council has jurisdiction to vest the Commission with powers to issue sanctions in the event of breaches of EC law (notably, Arts 211 and 308 EC). Specifically, Art 211 EC (ex Art 155) fourth indent, obliges the Commission as one of its tasks to exercise the powers given to it by the Council for the purpose of implementation of rules laid down by the Council. Article 308 EC (ex Art 235) provides the possibility for the Council, on the basis of unanimity after consulting the European Parliament, to take appropriate measures if action by the Community should prove necessary to attain one of its objectives and the Treaty has not provided the necessary powers for so doing.

Commission was undertaking an increasing number of second round proceedings under Art 226 EC on account of failures by Member States to adhere to ECJ judgments. Its annual reports on the monitoring of the implementation of EEC law provided evidence of an increase in this type of case, indicating that Member States were failing in their basic duty to uphold the rule of law. The environmental sector was a good example of this unfortunate trend. Professor Krämer<sup>7</sup> has provided a useful survey of the increasing number of instances where the Commission had decided to initiate follow-up enforcement action in the 1980s and early 1990s against Member States who were failing to carry out decisions of the ECJ confirming breaches of EC legislative obligations. He notes that the Commission reported the following number of environmental cases being taken up by the Commission on the grounds that Member States were failing to adhere to the basic duty contained in Art 228(1) EC, the annual reports filed by the Commission on the monitoring of the application of Community law: 1984–1 case; 1985 to 87–2 cases; 1988–8 cases; 1989–8 cases; 1990–13 cases; 1991–21 cases.<sup>8</sup> Such a trend indicated that a number of Member States were increasingly prepared to defy the rule of law as laid down by the Court of Justice in Luxembourg. In 1993, by virtue of the TEU, the introduction of second round proceedings with the possibility of pecuniary sanctions being imposed by the ECJ was brought about specifically with a view to enhancing the performance of Member States in implementing their EU legislative obligations. The threat of a real penalty was recognised as being a necessary replacement to reliance on goodwill.

#### ***4.1.1 Art 228(1) EC***

Under the first paragraph of Art 228 EC, each Member States is obliged to take the necessary measures to comply with a judgment of the ECJ that finds it has failed to fulfil an obligation under the EC Treaty. This basic duty has been enshrined in the Treaty's text since its inception, and the Court has had a number of opportunities to clarify a number of aspects regarding the scope and application of this provision.

One aspect of notable significance concerning Art 228(1) EC that has needed to be clarified by the ECJ is the question of how long a Member State may be entitled to take in order to complete the necessary measures. The Treaty text is silent on the point. On a number of occasions in the past, including in environmental cases, Member States have sought to argue that the Commission has been unduly hasty in taking second round legal action, not allowing them sufficient time to carry out the findings of the Court made against them in a previous judgment. The thrust of their defence has been to argue that Art 228(1) implicitly provides a Member State with a reasonable

7 Krämer, 1993, pp 430–32.

8 Krämer, 1993, p 429–35.



opportunity to effect compliance with a Court ruling; consequently, the Commission is obliged to allow for a period of time appropriate to the circumstances before deciding whether or not to initiate legal action to enforce the Court's judgment.

The ECJ has set out some general principles concerning the temporal dimension to the duty set out in Art 228(1) EC. Whilst noting that the Treaty text does not stipulate specific time limits by which a Member State is to comply with a judgment made under Art 226/227 EC, the ECJ has consistently held that it is in the interest of a direct and uniform application of EC law that measures be taken immediately by the State involved and come into effect without delay (for example, Cases 131/84, 227–230/85, C–75/91, C–291/93, C–387/97 and C–278/01). The Court has emphasised the obligations of the defendant Member State to ensure swift compliance with its first round judgments, rather than lay down binding general time limits directed at the Commission. The ECJ has declared that it has no power under Art 228(1) EC to grant a Member State a specific period of grace in order to comply with its judgment (Case C–473/93 *Commission v Luxembourg*). Instead, the decision as to whether or not legal action should be taken in order to compel a Member State to comply with a previous Court ruling lies essentially with the Commission itself. The Court has given little guidance on the length of time that should be afforded as a general rule. This is understandable and welcome, given that the nature of infringements vary considerably, as does the time in respect of which compliance may be achieved. This is so also in terms of implementing EC environmental legislation, where cases will vary enormously in terms of the relative difficulty of attaining conformity with EC legislative provisions. Cases concerning transposition failures could be classed as infringements whose remediation may be effected relatively quickly and straightforwardly. Not only may the problems be readily detected by the Commission and national authorities, the changes that need to be effected are in principle of a documentary nature only. The Commission need not be expected to wait that long before appropriate changes are made in national law.

However, cases involving bad application of EC environmental law may take a considerable period of time before a state of conformity with the law is achieved. The question arises whether the Commission should take this into account when deciding the appropriate time to commence litigation. A recent case in point is the *Spanish Bathing Waters (2)* litigation, where the Commission took second round enforcement action against Spain in respect of the latter's failure to comply with the water quality limit values under the Bathing Water Directive 76/160 in respect of its inland bathing waters. The case is discussed in detail in section 4.3. One of the Spanish Government's arguments raised in defence to the legal action was that it had received insufficient time from the Commission to carry out meaningful improvements to its inland bathing waters; some 31 months elapsed between the date of the

first judgment of the Court and close of the pre-litigation phase of second round proceedings. The Court found in favour of the Commission, holding that this period was sufficient, even if compliance with its judgment called for complex and long-term operations to improve bathing water quality. The appraisal of the Court differs markedly from that of the Advocate-General, who as *amicus curiae* to the ECJ had opined that the Commission's action should be declared inadmissible on the grounds that it had failed to take into account particular technical difficulties faced by a Member State in attaining conformity with the Directive's water quality requirements within that timescale.

As in the case of first round actions under Art 226 EC, the ECJ has adopted a strict approach with respect to reasons put forward by Member States to explain delays in taking compliance measures. In particular, internal constitutional or political difficulties are in principle no defence to failing in ensuring timely adherence with a Court ruling: (see for example, Cases 227–230/85 *Commission v Belgium* and C–75/91 *Commission v Netherlands*). Partial completion and evidence of good faith on the national government's part to seek to adhere to a first round judgment will also not act as a bar to the Commission launching second round proceedings in the event of compliance not being effected as soon as possible (for example, Case C–387/97 *Kouroupitos* (2)).

#### **4.1.2 Art 228(2) EC**

Article 228(2) EC provides the Commission with the possibility of taking legal action against Member States that fail to respect the obligations set out and as interpreted by the ECJ under Art 228(1) EC. Essentially, the legal procedure spelt out in its clauses mirror that which applies under Art 226 EC, with the exception that these proceedings envisage the possibility of a pecuniary sanction being imposed on the defendant Member State by the Court in addition to a judicial declaration on the relevant legal position.

### **4.2 Commission guidance on financial penalties under Art 228(2) EC**

The Commission has published guidelines on how it is to set about framing proposals for penalties under Art 228(2) in individual cases. These include a 1996 Commission Memorandum on applying Art 228 of the EC Treaty (96/C 242/07) and a 1997 Commission Communication on the method of calculating the penalty payments provided for, pursuant to Art 228 of the EC Treaty (97/C 63/02).<sup>9</sup> As from 2006, this guidance is to be superseded by a

<sup>9</sup> Both documents refer to the relevant EC Treaty nomenclature applicable as at 1996–97; second round proceedings were then housed in ex Art 171.

new Commission Communication (SEC (2005) 1658) for new cases. Although there has been as yet little case law on the application of the penalty procedure, the ECJ appears to have broadly endorsed the guidelines as being a suitable starting point for assessment.<sup>10</sup>

The guidelines were published for a number of reasons. Their drawing up constituted part of a broader ongoing process of rendering the Commission's evaluation and decision-making processes more transparent to Member States and the general public. In addition, the Commission was keen to establish working criteria that would be appropriately sound from a legal perspective before the ECJ; namely ones that would be clear, consistent, proportionate and applicable in equal degree as between Member States. In seeking to reflect or echo general principles of EC law established by the ECJ, the Commission guidance documentation seeks to craft a framework which is capable of being endorsed by the Court and which is likely to deliver up proposals that will be confirmed by it.

In its 1996 Memorandum, the Commission identifies three fundamental criteria for calculating individual penalties: the seriousness of the infringement, its duration and the need to ensure that the penalty itself is a deterrent to further infringements. Two particular parameters are to be closely considered in relation to assessing the degree of seriousness: the importance of EC rules at stake as well the effects of the infringement on general as well as particular individual interests. The guidelines appear to indicate that the Commission will take a pragmatic and substantive approach in considering these parameters. Accordingly, as regards importance of Union provisions, the Commission is to consider their nature and scope as opposed to their standing in the hierarchy of norms under EC law. The effects of infringements are to be gauged on a case by case basis, taking into account any 'particularly damaging effects of pollution arising from an action in breach of Community law' (para 6.2).

The 1997 Communication offers a little more detail in relation to the two parameters. As regards 'importance', it indicates that the Commission will also consider whether the ECJ judgment in question forms part of well-established jurisprudence, the degree of clarity of the provision in question and whether the Member State has taken any steps to comply with the Court's ruling (para 3.1.1). It also cites a number of examples of points to be considered when the Commission evaluates the effects of the infringement (para 3.1.2). A number of examples cited are particularly relevant in environmental cases: serious or irreparable damage to human health or the environment; economic or other damage suffered by individuals or economic operators, including those of an intangible nature such as human con-

10 See Cases C-387/97 *Kouroupitos (2)* and C-278/01 *Spanish Bathing Waters (2)*, both discussed in detail in the next section.

sequences; the number of people affected by the infringement (it may be considered less serious if it does not affect the whole population of the Member State concerned); the Community's responsibility towards non-member countries; and whether the infringement is an isolated case or a repeat of an earlier infringement (for example, repeated delays in transposing directives in a particular sector).

Both the 1996 Memorandum and 1997 Communication indicate that the Commission will propose relatively stiffer penalties where Member State infringements of environmental provisions have resulted in significant levels of damage to the environment. The Commission has set out its intention in these documents to favour proposing penalty payments as opposed to a lump sum sanction. It considers the periodic penalty payment to be the most appropriate instrument for securing rapid compliance, whereas the use of the lump sum should be confined to minor infringements or to incidents whose repetition is unlikely to occur. This would appear to be an accurate appraisal of the functional difference of the two types of fine, given that a penalty payment will remain and accumulate over time until the breach is remedied. This position has also been reflected in legal practice. In the *Kouroupitos* (2) case, where the Commission took action against Greece for failing to organise the safe management of waste in the region of Chania on the Greek island of Crete, the Greek authorities were extremely keen to secure the lifting of the €20,000 daily fine imposed by the ECJ as soon as possible, having failed in the previous 10 years of Art 226 proceedings to adhere to EC waste management legislation requirements. The ECJ has most recently confirmed in *French Fishing Controls* (2) the utility of the sanction of the daily penalty payment as a means of invoking pressure on defendant Member States to comply with the terms of its judgments and, as a consequence, with the relevant sources of EC law at the root of the particular legal dispute. These recent case law developments will be considered in more detail in the next section of this chapter.

The 1997 Communication establishes the specific modalities used by the Commission for quantifying penalty payments. In focusing its attention on establishing a calculation formula specifically suited for a daily as opposed to a lump sum penalty, the Commission reinforces its strong preference for concentrating on the former sanction as a means of securing compliance. The amount of daily penalty is calculated on the basis of a uniform flat-rate amount (Fr) set at €500. This is then multiplied by two coefficients, each representing an evaluation by the Commission as to seriousness (Cs) and duration (Cd) of the infringement. Depending on the gravity of the infringement, the coefficient for seriousness can be between 1 and 20 and the one for the element of duration between 1 and 3. Subsequently, the result is multiplied by a special factor (n) which is designed to reflect the relative ability of the Member State to pay (based on its GDP) and the number of votes it has in the Council of the EU. The Communication provides a list of Member

States' ability to pay, ranging from a score of 1 to 26.4. This list is due to be updated in line with the recent and prospective accession to the EU by various central, eastern and southern European countries. The method of calculation used by the Commission may therefore be summarised as follows:

$$\text{Daily penalty} = (\text{Fr} \times \text{Cs} \times \text{Cd}) \times n$$

On 13 December 2005, the Commission adopted a Communication containing new guidelines<sup>11</sup> on the application of Art 228(2) EC (hereinafter referred to as the 2005 Guidelines). The 2005 Guidelines are to apply to infringement cases registered with the ECJ after the beginning of 2006; the Commission will continue to use the old guidelines contained in the 1996 Commission Memorandum and 1997 Commission Communication in respect of those cases already pending before the ECJ prior to that date. The 2005 Guidelines seek to take account of the emerging case law of the ECJ on various legal principles and procedural aspects underpinning second round infringement proceedings, update its penalty calculation formulae, and consolidate its existing policy and practice into a single published document. Foundational aspects of the Commission's policy on Art 228(2) EC have been preserved, reflecting the essentially favourable attitude taken by the ECJ to the overall thrust of the initial Commission guidance. Notably, the three fundamental criteria identified in the original guidance documentation on fixing of sanctions have been preserved, namely seriousness of infringement, its duration as well the need to ensure that the penalty is a deterrent to further infractions.<sup>12</sup> However, changes have been made, most significantly with respect to the Commission's approach to the lump sum sanction, application of the principle of proportionality, duration coefficient, and figures for the flat-rate amount and Member States' ability to pay. Each of these elements of Art 228(2) EC procedure will be considered in brief below.

Perhaps the most profound changes to the Commission's approach to applying the second round infringement procedure under the 2005 Guidelines concern the lump sum financial sanction. Prior to the ECJ's judgment in *French Fishing Controls (2)* issued in July 2005 and discussed in detail below, the Commission appeared to have been uncertain of the scope of application of the lump sum fine. A notable issue of controversy included whether both a lump sum and penalty payment could be imposed in an individual case. In addition, the Commission had not requested a lump sum from the ECJ where a Member State had decided to comply with its EC obligations at the eleventh hour just before an Art 228(2) ruling from the

11 SEC(2005) 1658 Commission Communication on Application of Art 228 of the EC Treaty, 13.12.2005.

12 Paras 6–8, *ibid*.

ECJ. Its approach appeared to be that such cases should be terminated without any significant sanction being imposed on the defendant. The factor of securing Member State compliance with EC obligations had appeared in practice to override a defendant's lengthy disregard of the rule of law. A radical and welcome change of approach has been triggered, however, in the wake of the ECJ decision in *French Fishing Controls (2)*, which confirmed that a lump sum and penalty payment could apply cumulatively. In the light of this ruling, the Commission has signalled its intention in the 2005 Guidelines to request, as a rule, that both types of sanction be imposed for infringements that are ongoing at the time of its registering a case with the ECJ: namely, a penalty payment for each day of delay after delivery of the second round judgment as well as a lump sum penalising continuation of the infringement of EC obligations between the first and second round judgments.<sup>13</sup> The potential imposition of two sanctions will, in general, serve to enhance the element of deterrence that is supposed to underpin the second round infringement procedure. In addition, this change of enforcement policy will also serve to ensure that, in future, Member States will not be able to evade sanction by effecting compliance with a first round ruling at the last minute, just before an Art 228(2) judgment is handed down. Quite correctly, albeit belatedly, the Commission recognises that last-minute compliance by defendants does not render a second round infringement action devoid of purpose.<sup>14</sup> This means that a Member State will in future be held to account financially for failing to adhere to a first round judgment by the end of the deadline set for compliance by the RO in the pre-litigation stage of the second round procedure. For the Commission has now confirmed that it will, in future, seek for a sanction in the form of a lump sum from the ECJ if the Member State has failed to adhere to the terms of the first round court ruling by the end of RO deadline (that is, by completion of pre-litigation stage). The 2005 Guidelines clarify that the Commission does not rule out situations where it might request only a lump sum fine from the ECJ, notably in exceptional cases of repeated confirmed infringements or when it is clear that a Member State has completed all the relevant measures required but where these still need some time to take their desired effect.<sup>15</sup> The effect of these changes will, without doubt, make a useful contribution to deterring Member States from delaying compliance with first round judgments.

The 2005 Guidelines have also fleshed out the Commission's proposed formula for calculating lump sum fines.<sup>16</sup> The Commission has adopted a calculation methodology that is designed to stress the objective of deterrence underpinning the Art 228(2) EC procedure. Specifically, the lump sum is to be based on two calculation formulae: (a) the setting of a minimum fixed

13 Section II.A of SEC(2005) 1658 para 10.3.

14 Para 11, *ibid*.

15 Para 10.5, *ibid*.

16 Section IV Paras 19–24, *ibid*.

lump sum; and (b) a method of calculation based on a daily amount multiplied by the number of days the infringement has persisted as from date of the first round judgment. Where the minimum lump sum figure applicable to the defendant Member State exceeds the second method of calculation, the former will be requested to be imposed by the ECJ. The second method of calculation is to be determined according to methodology not dissimilar to that applied in respect of penalty payments. Specifically, a basic flat rate of €200<sup>17</sup> is to be multiplied by a coefficient of seriousness (graded from 1 to 20), by the number of days of infringement of first round judgment and by a special 'n' factor designed to reflect the relative ability of the Member State to pay, based on GDP and the number of votes it has in the Council of Ministers. The Member State with the lowest minimum lump sum is Malta with €180,000 and the highest is Germany with €12,700,000.<sup>18</sup> These figures will be revised every three years to take account of inflationary developments. The Commission justifies the imposition of at least the figure represented by the minimum lump sum fine in any given case on the grounds that persistent non-compliance with a first round ruling of the ECJ represents an 'attack on the principle of legality in a Community governed by the rule of law' which warrants a 'real sanction' having a deterrent effect.<sup>19</sup> It will be interesting to see to what extent the ECJ endorses this approach to meeting the objectives underpinning Art 228(2) EC. Without doubt, Member States will seek to challenge the introduction of the minimum lump sum formula as a breach of the principle of proportionality.

The 2005 Guidelines have also sought to take on board judicial pronouncements by the ECJ on the relevance of the proportionality principle in connection with application of Art 228(2) EC proceedings. The Court has consistently affirmed in second round rulings that penalty payments levied on defendant Member States are to be appropriate to the circumstances and proportionate both to the breach of law that has been found and to the ability to pay by the Member State.<sup>20</sup> The new Commission guidance on Art 228(2) EC seeks to introduce four specific changes to the organisation of its requests for sanctions in order to ensure that these serve to satisfy the

17 This figure is one-third of the flat rate amount determined for penalty payments under the 2005 Guidelines (i.e. €600). The Commission justifies a lower rate on the basis that failure by a Member State to adhere to a first round judgment becomes 'more reprehensible' once an Art 228(2) EC ruling has been delivered against the defendant Member State.

18 Other relatively large Member States are also allocated substantial minimum lump sum figures in accordance with the Commission's calculation formula: €10,995,000 (UK), €10,915,000 (France), €9,920,000 (Italy), and €7,385,000 (Spain).

19 Para 20 of SEC(2005)1658.

20 See *Kouroupitos (2)* (para 90 of judgment) *Spanish Bathing Waters (2)* (para 41 of judgment), *French Fishing Controls (2)* (para 103 of judgment) and *French Product Liability (2)* (para 61 of judgment).

requirements of the general principle of proportionality.<sup>21</sup> First, distinct sanctions will be proposed for each head of infringement in a particular case. Second, the Commission will endeavour to frame penalty requests so as to take due account of ongoing progress made by Member States in achieving compliance with EC obligations. Both of these innovations to prosecution policy will not only render Commission calculations more transparent but also make it easier for it to be able to adjust requests for sanctions in line with measures taken by defendants that partially comply with their EC obligations, both before and after second round rulings. Third, whilst penalty payments will normally be set according to a daily basis, the Commission recognises that this may not be appropriate in all cases involving ongoing infringements after the second round judgment. In particular, where implementation of compliance with EC legislative obligations occurs only at periodic intervals, such as in the case with the Bathing Water Directive 76/160 as considered in the *Spanish Bathing Waters* (2) judgment, then penalty payments will accrue only on the date in which periodic implementation checks are assessed according to the relevant legislation and where evidence of ongoing infringement has been verified at that particular stage. The Commission is keen here to avoid setting penalties that accrue over periods that have not been ascertained as having involved an infringement. This change is relevant to certain pieces of EC environmental legislation, notably where verification of their implementation is based on assessment of periodic reports on national environmental quality standards supplied to the Commission.<sup>22</sup> Fourth, the Commission indicates that it may also be necessary to provide for the suspension of a penalty in the event that a defendant Member State claims compliance has been attained or where it has taken requisite measures but these require time to take effect. In such cases, time may be required for verification of compliance or measures taken. The Commission indicates that it may be appropriate to seek guidance from the ECJ in its second round judgment on conditions and terms for a suspension.<sup>23</sup> Given that the ECJ has exclusive competence in determining the level of financial sanctions in any given case, the Commission's role being ultimately advisory, it would seem to be an absolute requirement for the Commission to seek definitive instructions from the ECJ before suspending financial sanctions. In the past, though, the Commission has not

21 Section II.B (paras 13–13.4) of SEC(2005)1658.

22 For example, EC legislation on air pollution, notably Directive 96/62 on ambient air quality assessment and management (OJ 1996 L296/55) in conjunction with its ancillary legislative instruments relating to particular air pollutants (not cited here).

23 Para 13.4 of SEC(2005)1658.



thought it necessary to refer to the ECJ before deciding to stop collection of penalty payments.<sup>24</sup>

In addition to introducing substantive changes concerning the Commission's approach to lump sum fines and practical application of the proportionality principle in relation to sanction requests, the 2005 Guidelines also revised certain aspects of the modalities for calculating financial sanctions. Specifically, the Guidelines have increased the flat-rate amount for penalty payments from €500 to €600, in order to take account of inflationary developments since the amount was first published in 1997. In addition, the special 'n' factor, which is designed to reflect a Member State's ability to pay, has been amended to include the 10 countries that acceded to the EU in May 2004.<sup>25</sup> The 2005 Guidelines have amended Commission policy with regard to application of the coefficient for duration of infringement in line with ECJ case law applicable as at the end of 2005.<sup>26</sup> Specifically, the Commission's calculation of the duration coefficient commences from the date of the first round judgment, in accordance with ECJ rulings.<sup>27</sup> The Commission is to calculate the infringement at a rate of 0.10 per month as from the date of the first ruling.

### 4.3 Case law of the ECJ on Art 228(2) EC

It was not until mid-2000 that the first case regarding Art 228(2) EC came before the ECJ, almost seven years having elapsed since the second round procedure had been formally inserted into the EC Treaty by virtue of the TEU.<sup>28</sup> As mentioned in the introduction to this chapter, as at the end of 2005, the ECJ had ruled on only three cases concerning the application of Art 228(2) EC, all of which have concerned implementation failures relating to EC environmental law (namely, the *Kouroupitos (2)*, *Spanish Bathing Waters (2)* and *French Fishing Controls (2)* cases).<sup>29</sup> The relative lack of case law to date on the second round procedure has underlined the considerable period of time it takes for the Commission in practice to bring second round

24 In *Kouroupitos (2)*, the Commission decided to cease collection of penalty payments from Greece on the basis that it considered requisite implementation measures had been undertaken in relation to a landfill that had previously been found to be in breach of the terms of the WFD 75/442, as amended. This decision was based on a controversial interpretation of obligations of the Directive that should have been first referred to the ECJ.

25 Fresh guidance will have to be issued in the event of more countries joining the EU. A definitive decision on whether Bulgaria and Romania will accede to the Union in 2007 is anticipated sometime during the autumn of 2006.

26 Section C para 17 of SEC(2005)1658.

27 See *French Fishing Controls (2)* paras 81, 102 and 108 of the judgment.

28 The TEU entered into force on 1.11.93. The ECJ issued its judgment in Case C-387/97 on 4.7.2000.

29 Cases C-387/97, C-278/01 and C-304/02 respectively.

actions to court. The fact that the three cases have concerned environmental law is no coincidence. For a considerable period now, Commission enforcement proceedings against Member States involving non-implementation of EC environmental legislation have constituted the largest segment of infringement actions overall: namely, around one-third of all Art 226 proceedings.<sup>30</sup> The track record of Member States in securing timely and correct fulfilment of their EC environmental legislative obligations has been very poor, and the introduction of the possibility of financial penalties under Art 228(2) EC has not yet shown itself to be a sufficient motivation for change in current Member State practice. This position may begin change as more cases appear before the ECJ and awareness improves concerning the imposition and implications of financial penalties. Given the relative paucity of case law, it is perhaps premature to make hard and fast predictions.

#### **4.3.1 Kouroupitos (2) (Case C-387/97)**

The first occasion that the ECJ had to pronounce on the interpretation and application of Art 228(2) EC was in relation to a notorious landfill case in Greece, on the island of Crete. The case dates back to 1987 when the Commission issued Greece with a letter of formal notice (LFN) under Art 226 EC in relation to problems posed by the poor state of management of waste in Chania region of Crete. In particular, the Commission had received complaints from a local inhabitant about the existence of a rubbish tip on the coast at the mouth of the Kouroupitos river, on the Akrotiri peninsula. For several years, the tip had been used by the local community as a place to dump various wastes; waste streams included those from military sources,<sup>31</sup> hospitals, poultry farms, slaughterhouses, salt factories, as well as from local municipalities.<sup>32</sup> A sad irony in this squalid tale is the fact that the Akrotiri peninsula constitutes a site of outstanding natural beauty, hosting a variety of rare species of flora and fauna. Completely unmanaged, the state of the tip had deteriorated over time to the extent that it had begun to self-combust, with noxious gases and fumes affecting the local area;<sup>33</sup> one local village had

30 See e.g., COM(2004) 839 XXist Commission Report on monitoring the application of Community Law (2003).

31 A US military base is located within 2–3 km of the waste dump at Souda.

32 As confirmed by the ECJ (see para 61 of judgment in Case C-387/97).

33 A technical study carried out in 1996 by the Greek Government acknowledged the presence of high concentrations of various toxic substances in and around the Kouroupitos site, including polycyclic aromatic hydrocarbons, polychlorobiphenyls, polychlorodibenzodioxins, polychlorodibenzofurans and heavy metals (referred to in para 66 of Advocate-General Colomer's Opinion on Case C-387/97, delivered on 28.9.99). The study found that the waste dump had been uncontrollably burning for at least a decade (see extracts of study cited in ECJ's judgment, para 63, in Case C-387/97).

even to be evacuated. In addition, a considerable amount of waste had been dumped into a coastal ravine, contaminating the Kouroupitos estuary and surrounding marine environs. The Commission considered that the Greek authorities had contravened a series of provisions of EC waste management legislation in force at the time, namely Directive 75/442 on waste and Directive 78/319 on toxic and dangerous waste.<sup>34</sup> In particular, the Commission considered that the Greek authorities had breached the Directives' provisions in failing to ensure safe management of the waste<sup>35</sup> as well as to draw up waste management plans<sup>36</sup> for the area. The Greek authorities responded in 1989 and throughout the pre-litigation and litigation phases by submitting that their planned programme for organising alternative better-managed disposal sites had encountered opposition from the local population, which accounted for the need to continue using the Kouroupitos site. On 7 April 1992, the ECJ declared that Greece had breached both Directives, in failing to ensure that waste as well as toxic and dangerous waste from the Chania area was disposed of without endangerment to human health or without harm to the environment and in failing to draw up waste management plans (Case C-45/91 *Kouroupitos (I)*).

However, having received no notification of any measures to comply with the ECJ ruling in over a year, in October 1993 the Commission issued a letter to the Greek authorities reminding them of their obligations to adhere to the ECJ judgment under Art 228(1) EC. During the course of the pre-litigation phase, the TEU entered into force on 1 November 1993. The EC Treaty was accordingly vested from that date with the legal framework for second round enforcement proceedings in the form of Art 228(2) EC. In September 1995, the Commission decided to initiate second round proceedings, after promises made by the Greek authorities in 1994 of the development of two new waste-disposal sites failed to materialise. An RO was issued in August 1996, the

34 Since repealed and succeeded by Directive 91/689 on hazardous waste. In accordance with the Second Act of Accession to the European Communities (Art 145), these legislative obligations entered into force for Greece on 1.1.81. In 1999, the EU promulgated specific requirements with respect to landfill management under the Landfill Directive 99/31. The 1999 Directive does not apply to landfills already in existence at the time of its entry into force, so is not applicable in respect to waste sites such as that at the mouth of the Kouroupitos.

35 Arts 4 and 5 of Directives 75/442 and 78/319 respectively. Article 4(1) of the former stipulates that 'Member States shall take the necessary measures to ensure that waste is disposed of without endangering human health and without harming the environment, and in particular:

- without risk to water, air, soil and plants and animals;
- without causing a nuisance through noise or odours;
- without adversely affecting the countryside or places of special interest.'

36 Required by Art 6 (now 7) and 12(1) of Directives 75/442 and 78/319 respectively.

Commission noting that the waste-disposal programme planned by the local authorities remained at a preliminary stage and that waste continued to be deposited in an uncontrolled fashion at the Kouroupitos site; Greece was given two months to respond. The Commission remained dissatisfied with the state of progress made by Greece to implement measures in order to give effect to the ECJ's judgment, eventually applying to the Court in late 1997 to impose a daily penalty payment of €24,600 on Greece until compliance with the 1992 first round judgment had been achieved. By the time the case came before the ECJ a second time, changes had been effected to the relevant EC waste management directives. Directive 75/442 had been amended<sup>37</sup> and Directive 78/319 had been repealed and replaced.<sup>38</sup> Given that the legislative changes had ensured that the obligations forming the subject matter of litigation continued to apply in substance as before at EC level, albeit not necessarily in the same legislative provision or instrument, this factor proved no bar to the prosecution of second round proceedings.<sup>39</sup>

The Commission calculated its proposed fine on the basis of its published guidance on the application of Art 228(2) penalty payments (see section 4.2). The Commission arrived at its figure by multiplying the basic flat rate starting payment of €500 by the coefficients chosen by it for seriousness (factor of 6 out of a possible range of 1 to 20),<sup>40</sup> duration (factor of 2 out of a possible range from 1 to 3) and relative financial ability of Member State to pay the penalty (factor of 4.1 based on the GDP of the defendant Member State and its voting power in the Council of the EU). The calculation was made accordingly:  $500 \times 6 \times 2 \times 4.1 = 24,600$  total.

#### 4.3.1.1 *Procedural and substantive issues*

The ECJ's judgment in *Kouroupitos* (2) upheld in substance most of the Commission's complaints concerning the failure by the Greek Government to ensure that the terms of the Court's first round judgment were adhered to within a reasonable time period. The Court first rejected the defendant's

37 By Directive 91/156.

38 By Directive 91/689 on hazardous waste.

39 See paras 44–51 of ECJ judgment in Case C–387/97 and comments by Advocate-General Colomer at paras 53–54 of his Opinion to Case C–387/97.

40 The following coefficients were applied to individual infringements, the highest figure being attributed to a grave violation of the general safety requirements set out in Art 4 of Directive 75/442 with respect to waste management: coefficients 4 and 2 in respect of infringements of Art 4 (safety) and Art 6 (waste plans) of Directive 75/442 respectively; 1 in respect of infringements of Art 5 (safety) and Art 12 (waste plans) of Directive 78/319. The Commission thereby considered that in terms of seriousness of infringement, less weight should be attached to the breaches of Directive 78/319 than Directive 75/442, as a reflection of the relative importance of the legislative instruments with respect to Greece meeting the terms of the first round ECJ judgment.

assertion that the action should be held inadmissible, on the grounds that it was retroactive in nature. Specifically, Greece submitted that, given that second round proceedings were introduced into the EU legal system only after 1 November 1993, their application to events that transpired prior to this date should be barred, otherwise the defendant would effectively be facing a penalty in respect of a breach of law that did not exist at the material time of infringement.<sup>41</sup> The Court dismissed this interpretation of the nature and function of Art 228(2) EC. It noted that the pre-litigation phase of second round proceedings in this case had been commenced in 1995, namely after the TEU had entered into force (para 42 of judgment). Accordingly, the Court limited the question of retroactivity as to when second round proceedings had been started, as opposed to the dates concerning Commission enforcement under Art 226 EC. Elsewhere, the judgment makes it plain that the ECJ considered the nature of Art 228(2) to be essentially prospective and not retrospective in nature, confirming that the principal aim of penalty payments is that the defendant should remedy the breach of obligations as soon as possible (para 90 of judgment). The ECJ's approach resonates with that followed by the Advocate-General in his Opinion in the case, who rejected the Greek Government's contention that Art 228(2) EC possesses an essentially criminal (punitive) character. He underlines at some length the purpose of the penalty payment system as he sees it as being a means of coercing defendants to take necessary measures to bring current violations of law to an end as swiftly as possible,<sup>42</sup> as opposed to essentially relating to the quest of exacting punishment in respect of past conduct. On the other hand, it is also evident from the Court's ruling in *Kouroupitos (2)* that second round penalty proceedings do involve elements of a retrospective nature in terms of evaluating the extent of the penalty that should be awarded. In particular, the factors of seriousness and duration of violation form important parts of the framework for calculating payments employed by the Commission and endorsed by the Court in practice.<sup>43</sup>

The findings of the Court on the substantive legal points at issue illustrate some key difficulties that often face the Commission when pursuing enforcement actions. One factor concerned the general wording of the basic safety provisions on waste management set out under the two Directives, and whether these were of a sufficiently precise nature so as to impose specific legal obligations on Member States. It is not uncommon for ambiguities and

41 The Greek Government was in effect pleading a breach of the general principle against retroactivity (*nulla poena sine lege*), recognised as one of the general principles of EC law (e.g. Case 63/83). This is enshrined as a fundamental right in the 1950 European Convention on Human Rights and Fundamental Freedoms (Art 7), as well as in the EU Charter of Fundamental Rights.

42 See paras 28–43 of Opinion (especially para 33).

43 See paras 79–99 of ECJ judgment in Case C–387/97.

generalisations to be incorporated into EC legislative texts, especially where there are internal divisions within the EC legislative institutions and, in particular, the Council of the EU over the content of sensitive commitments. More detailed provision might not command sufficient support within the Council to approve legislation.<sup>44</sup> On the other hand, legislation may be deliberately designed by the EC legislature to embrace a large number of contexts and situations, the object of which might well be defeated if very specific parameters are affixed to obligations. Directive 75/442 is a case in point, being framework legislation intended to lay down basic and essential legal obligations and principles pertaining to the proper management of waste in general. The ECJ noted that Art 4 of Directive 75/442 does not specify the actual content of measures to be taken to ensure that waste is disposed of without harming human health and/or the environment;<sup>45</sup> the provision is framed in a negative manner offering no detailed parameters as to what might constitute 'harm'. The Commission itself maintained that it would have closed the file had the defendant drawn up and implemented waste plans prescribed by Arts 6 and 12 of Directive 75/442 and 78/319 respectively,<sup>46</sup> the safety obligations being satisfied if the plans were drawn up and implemented. Nevertheless, the ECJ held that Art 4 is nonetheless binding on the Member States as to the objective to be achieved, whilst leaving them a margin of discretion in assessing the need for such measures. Echoing an earlier ruling,<sup>47</sup> it found that in principle it will be an indication that Art 4 is breached and the State's discretion exceeded in the event of a 'significant deterioration in the environment over a protracted period when no action has been taken by the competent authorities'.<sup>48</sup> In the particular case, the ECJ agreed with the Commission that the available evidence indicated that the Greek authorities had failed to ensure proper management of waste within Chania in accordance with the requirements set out in its first round ruling, in that uncontrolled and illicit dumping of waste had been allowed to continue at the Kouroupitos site.<sup>49</sup> The various steps claimed to have been undertaken by the Greek authorities to improve waste management in the area had shown themselves to be essentially inadequate to deal with the environmental problem of uncontrolled dumping of waste. These included plans to establish a mechanical recycling and composting plant and landfill at a neighbouring location, Strongili Kefali, although this had been delayed because of local opposition. The Greek authorities also claimed that waste

44 In the case of environmental legislation, a qualified majority of the Council votes are required (see Art 175 EC).

45 See para 55 of judgment. 46 See para 52 of judgment.

47 See Case C-365/97. 48 Para 56 of judgment.

49 At para 65 of its judgment, the ECJ noted that correspondence in 1998 from the Chania Prefecture to the Greek Ministry of the Environment revealed this to be the case.

volumes at Kouroupitos had decreased, with toxic and dangerous waste streams being diverted from the site, although this was not supported by independent verification. The Court noted that these developments did not constitute a definitive solution to the core problem, identified as needing to be rectified by its first ruling.

On the other hand, the ECJ considered that Greece had not been shown to have been in breach of the terms of its first round judgment as far as the management of toxic and dangerous waste streams were concerned. It noted that the Greek Government in its defence had maintained that various measures had been taken to control the movement of such waste in the local area, and that it was not being dumped at the Kouroupitos site. Specifically, it was claimed that since 1996, military waste from the local US base had not been deposited at Kouroupitos, that hydrocarbon sediment was now placed into separate storage pending export, that waste mineral oils were being diverted to a reclamation plant and that septic tank waste was being transported to a dedicated biological sewage treatment plant. In the event the ECJ held that the Commission had failed to provide evidence that the Greek Government had breached the safety requirements contained in Art 5 of Directive 78/319 on toxic and dangerous waste, underlining that it was for the Commission to provide the Court with the information necessary to determine the extent to which a Member State has complied with one of its judgments.<sup>50</sup>

This part of the judgment has been rightly criticised for failing to take into account the real limitations placed on the Commission in terms of its law enforcement role, namely the lack of investigatory powers, human and financial resources in order to verify a defendant's claims of this kind (Krämer, 2002a, p 399). It is submitted that the Court also misinterpreted a fundamental aspect of the legal framework underpinning second round proceedings to this case, namely with respect to the issue of the burden of proof. It is a basic tenet of Art 228(2) EC that it is for the defendant Member State to satisfy the Commission and ultimately the ECJ that it has complied with the terms of a judgment found against it under the auspices of Art 226 EC. Article 228(1) underlines that it is the Member State which is obliged to take necessary measures in order to comply with the judgment. The onus is clearly on the Member State to demonstrate that a situation already found to exist contravening EC law has been subsequently transformed into a situation of compliance with such law.

Accordingly, in Art 228(2) proceedings it may be said that the evidential burden is firmly placed on the defendant State to demonstrate fulfilment of its legal obligations, and not on the Commission to prove what it has already proven, namely a state of non-compliance with EC law. If a Member State

50 Paras 73–74 of judgment.

fails to show to the Commission that it has taken any measures in response to an Art 226 Court ruling, the Commission is clearly entitled to apply to the ECJ for a penalty payment or lump sum in order to seek to induce the State to comply with its Union obligations. If that were not the case, silence and non-co-operation on the part of a Member State in response to a Commission LFN and RO would provide a simple escape route for that State from having to comply with the Art 226 judgment. In the case against Greece over Kouroupitos, the ECJ appears to have considered erroneously that the question concerning who shoulders the onus of proof is to be addressed in Art 228(2) proceedings in the same manner as it is for first round actions under Art 226 EC. It is noteworthy that the Court differs substantially in its approach from that of the Advocate-General, who had no problem in upholding the Commission's findings in relation to mismanagement of toxic and dangerous waste. In noting the Commission's pleading concerning the lack of evidence produced by the Greek Government to support its claims of improvements to treatment of such waste streams in the Chania area, on the specific question of evidentiary burden he states:

It is my view that, in proceedings under Article [228], it is for the defendant Member State to prove that it has duly complied with the judgment establishing an infringement of the Treaty. On that basis, the Commission's role can be confined to pointing out which obligations have not been fully shown to have been discharged. This is particularly true where, as here, the Community rule requires that a Member State notify the Commission of the measures that it has adopted. It is therefore appropriate to find that the Hellenic Republic has failed to fulfil its obligations.<sup>51</sup>

It would be an error to construe the above interpretation of the onus of proof under Art 228(2) as one that undermines the fundamental rights of the defendant, such as the presumption of innocence or the right not have to disprove a negative. The essential question of 'innocence' or 'guilt' over a breach of law has already been addressed in the first round action, which the Commission has to prove to the satisfaction of the Court. The function of Art 228(2) proceedings is a related but different one in seeking to ensure that that initial judicial finding of fact is enforced, namely carried out by the defendant. In having to shoulder the responsibility of demonstrating compliance with the terms of the Court's first round judgment, the Member State defendant, in the context of a second round action, is obliged to demonstrate that appropriate positive steps have been taken by it to terminate the situation of illegality as required. Such a task is neither unduly onerous nor

<sup>51</sup> Para 77 of Advocate-General Colomer's Opinion in Case C-387/97.



impossible, and is certainly not akin to having to disprove a negative. It is not a question of the defendant being obliged to prove not having committed a violation of law, but instead it is a question of the defendant being obliged to show credible evidence of active and effective measures having been taken by it in order to bring a proven state of illegality to an end.

In contrast with the evidentiary difficulties surrounding the part of the case concerning mismanagement of waste, the ECJ had relatively little difficulty in upholding the Commission's complaint that the Greek Government had failed to draw up and implement comprehensive waste plans as required by the relevant EC waste legislation.<sup>52</sup> In conformity with well-established case law, the Court underlines that incomplete practical measures or fragmentary legislation cannot discharge the obligation to draw up a comprehensive programme with a view to attaining certain objectives.<sup>53</sup> It found that the measures taken by the Greek authorities had amounted collectively to being steps of a preparatory nature, without being 'capable of constituting an organised and co-ordinated system for the management of waste'.<sup>54</sup> As the Advocate-General had pointed out, the national legislative measures taken had failed to contain sufficient detail regarding types and quantities of waste involved, general technical requirements, suitable sites for its treatment and disposal or deposit and any other special arrangements as required by the EC waste directives' provisions. The key specific decisions on how to account for the various waste arising in the Chania area had not yet materialised. This exemplifies how much easier and straightforward it is for the Commission to supervise compliance with those EC environmental norms which require Member States to produce particular documentation, whether in the form of national legislation, programmes or reports, than with those that require implementation with specific practical environmental effect. Given that it is a standard requirement incorporated into EC environmental legislation that Member States are required to notify the Commission of the content of such documentation, the Commission's task of ensuring that due implementation has been respected is crystallized into cross-checking whether the national measures comply with the relevant substantive legislative requirements. Evidentiary issues are usually irrelevant in this context.

#### 4.3.1.2 *Determination of the penalty payment*

The Court's judgment in *Kouroupitos* (2) provides only a cursory insight into its thinking on how financial penalties are to be calculated under Art 228(2) EC. The ECJ held that Greece should be fined a daily penalty payment

52 Specifically, Arts 6 (now 7) and 12 of Directives 75/442 and 78/319 respectively.

53 See e.g. Case C-298/97.

54 Para 76 of judgment.

of €20,000 from delivery of the second round judgment until the first round judgment is found to be complied with. The Court makes it clear that financial sanctions under Art 228(2) EC take on board a strong element of the state of prospective as opposed to historic track record of compliance. Specifically, a defendant Member State found guilty of infringing Art 228(2) EC is to be required to make payments according to the length of time that it fails to adhere to the terms of the first round judgment after the date of delivery of the second round judgment. No penalty payments appear to be required to be made in respect of any period of non-conformity confirmed by the Court as having occurred prior to this date,<sup>55</sup> even though such an interpretation is not expressly ruled out under Art 228(2) EC. However, the Court did not expressly address this point nor did it provide a detailed analysis as to how it arrived at this final figure, merely indicating in outline the main factors influencing its decision. In contrast, Advocate-General Colomer provided a detailed breakdown and analysis of his suggested penalty payment figure of €15,375.<sup>56</sup> The Advocate-General considered that the level of payment proposed by the Commission should be reduced, on the basis that the obligation to draw up and implement waste plans were effectively incorporated into the general requirements pertaining to safe management of waste laid down in Arts 4 and 5 of Directives 75/442 and 78/319 respectively. The Court disagreed with this approach, making it clear that the obligations should be considered distinctly from one another.<sup>57</sup>

One key aspect that had to be determined by the Court was the extent of its jurisdiction in setting financial penalties under Art 228(2) EC. For a variety of reasons, the Advocate-General opined that the wording of the provision provided the Court with only limited judicial review in relation to Commission proposals for financial penalties.<sup>58</sup> First, he submitted that were the Court to have absolute discretion in setting an amount, the Commission's role would be reduced as a consequence to one of offering legal advice to the Court, a power it already enjoys in its capacity as party to proceedings. Second, he noted that a considerable amount of political expediency entered into any assessment as to the calculation in monetary terms of the relative degree of seriousness and urgency attached to any given infringement, a function that the Commission would be better suited to tackle than the Court. Finally, he raised concerns about the rights of the defence being undermined if the Court carried out its role autonomously and without

55 Such as from close of the pre-litigation stage of second round proceedings.

56 See paras 100–120 of his Opinion.

57 See paras 95–96 of the judgment, where the ECJ holds that any reduction in the amounts of toxic and dangerous waste being dumped in an uncontrolled fashion could not have any bearing on the degree of seriousness attached to a failure to draw up and implement a plan for the management of this type of waste under Art 12 of Directive 78/319.

58 See paras 86–98 of A-G Colomer's Opinion in Case C–387/97.

regard to the Commission's proposal; in particular, how would the defendant have a sufficient opportunity to respond? For those reasons, the Advocate-General considered that the Court's function envisaged by those who drafted the text to Art 228(2) to be confined to assessing whether the Commission's proposal was manifestly inappropriate in some way:

In my view, in so far as each of the Commission's choices inevitably entails an assessment of expediency, the examination of the Court of Justice is required to carry out must be no more extensive than that which it undertakes in relation to acts adopted by a Community authority on the basis of complex evaluations.

In those circumstances, the case law of the Court of Justice recognises that the Community has a wide measure of discretion the exercise of which is subject to limited judicial review, which means that the Community judicature cannot substitute its own assessment of the facts for that carried out by that authority. The Community judicature restricts itself in such cases to examining the correctness of the facts and legal characterisations effected by the Community authority on the basis of those facts, and, in particular, whether the action of the latter is vitiated by a manifest error or a misuse of powers or whether it clearly exceeds the bounds of its discretion.<sup>59</sup>

The case law to which the Advocate-General referred relates to the jurisprudence of the ECJ concerning the administration of EC competition law.<sup>60</sup> Under EC competition rules, the Commission has specific powers<sup>61</sup> to fine companies that engage in particular anti-competitive practices prohibited under EC law, such as entering into cartel agreements and abuses of a dominant market position.<sup>62</sup> There are significant differences, though, that exist between the powers vested in the Commission in relation to the enforcement of competition and environmental protection rules. In particular, the Commission is specifically authorised under EC law to impose fines on economic entities infringing Community competition rules, whereas it does not have such power in the context of EC environmental law enforcement. The EU legislature has not so far chosen to delegate the Commission with such a power, although this would be perfectly possible under the EC Treaty framework<sup>63</sup> (Krämer, 1993, p 433). In the case of infringements of EC

59 Para 94 of Opinion.

60 Such as Cases 56,58/64 *Consten and Grundig*, C-225/91 *Matra*

61 See Arts 23–24 of Regulation 1/2003 on the implementation of the rules of competition laid down in Arts 81 and 82 of the Treaty (OJ 2003 L1/1), formerly enshrined in Regulation 17/1962 (OJ Sp Ed 1959–62/87).

62 See Arts 81–82 EC.

63 See Art 211 EC, fourth indent in conjunction with Art 175(1) EC.

environmental law, the Commission has only a power to request the ECJ to impose a lump sum or penalty payment under the auspices of Art 228(2) EC. Moreover, the guidelines published by the Commission on financial penalties do not have legally binding effects vis à vis third parties, given that they are not legislative instruments.<sup>64</sup> However, it is fair to consider that the guidelines are binding on the Commission itself, in accordance with the general legal principle of legitimate expectations.<sup>65</sup>

In *Kouroupitos* (2), the Court made it clear that the Commission guidelines and proposals for any particular penalty are not to be binding on it, being instead simply 'a useful point of reference'.<sup>66</sup> The ECJ appears therefore to make it clear that it considers itself to have discretion to choose methods of calculating a financial penalty which might differ from that proffered by the Commission. However, in the case at hand, the Court's legal reasoning revealed that it followed in substance the analytical framework used by the Commission. It remains an open question as to whether in practice the ECJ will always adopt this approach.

The ECJ identified a number of factors which assisted it in determining its penalty payment decision. As a starting point, it made it clear that the guidance documentation published by the Commission<sup>67</sup> provided a suitable basis for it to come forward to the Court with penalty proposals, which in particular would be consistent with essential basic procedural principles of transparency, foreseeability, legal certainty and proportionality.<sup>68</sup> In the event, the ECJ followed the key points of reference used by the Commission for determining a penalty payment for Greece: namely, duration of infringement, degree of seriousness and relative ability of Member State to pay. In applying those criteria, the Court confirmed regard would have to be paid to the effects of non-compliance on private and public interests and to the factor of urgency in getting the defendant to fulfil its EU obligations.<sup>69</sup> It accepted that a penalty payment was the appropriate sanction in the circumstances, as opposed to a lump sum, given the nature of the breaches of EC environmental law which it regarded as ongoing and particularly serious.<sup>70</sup>

64 The Commission guidelines are published in the 'C' section of the Official Journal of the European Union, which comprises documentation providing information. The 'L' section of the OJ comprises legally binding instruments of the EU.

65 See the comments of A-G Colomer at para 100 of his Opinion in Case C-387/97.

66 Para 89 of judgment.

67 Commission Memorandum 96/C 242/07 and Communication 97/C 63/02, discussed earlier in this chapter.

68 See paras 87–88 of judgment. 69 See para 92 of judgment.

70 See especially, paras 93–94 of judgment. The Court considered that the breach of health and environmental safety requirements contained in the EC waste legislation constituted a particularly serious infringement of a rule that forms part of the very objectives of EC environmental policy as set out in Art 175 EC.

As far as the factor of duration was concerned, the ECJ considered it sufficient to note that the length of infringement had been 'considerable'. It noted that this was the case, even if technically the starting date for the purposes of this particular litigation was when the TEU entered into force (1 November 1993) and not the date when the first round judgment was delivered (7 April 1992).<sup>71</sup> The comments of the Court reveal that its understanding on the temporal dimension to calculating a financial penalty spans from the time of the first round judgment until the date of the second round ruling. This accords with the Commission's view on the temporal limits ascribed to Art 228(2) proceedings. The text of Art 228(2), though, is not entirely clear on this point. It states that the Court may impose a fine on the defendant if the latter 'has not complied with its judgment'. The wording at first sight might appear to indicate that the Court is restricted in stipulating a penalty corresponding to the time that the State has failed to observe the terms of its judgment since the date of the judgment itself.<sup>72</sup> However, it is conceivable that a different interpretation might be gleaned from the provision's wording, namely that the ECJ is not restricted in imposing a penalty. Specifically, it could be argued that the text endows it with power to impose a financial sanction which would take into account the length of time that the State has been found by the ECJ to have failed to implement EC law correctly, namely as from the elapse of the deadline set down by the RO under Art 226 EC and not merely from the date of its initial ruling. Had the Commission and ECJ adopted this interpretation of the scope of the Court's powers, this would have provided the latter with the possibility to impose (higher) financial sanctions that would take full account of the time that EC environmental law has in fact been infringed. This interpretation would have added a greater level of incentive for Member States to avoid failing to ensure due and proper implementation of their EC obligations and being tempted to draw out disputes with the Commission. It would also have been in better alignment with the aims of the EC to ensure a high level of protection of the environment. From discussion in Chapter 3, it is evident that a considerable period of time may elapse between the end of the pre-litigation stage and first round judgment. In the first round action in relation to *Kouroupitos*, this amounted to some two years alone.<sup>73</sup>

As seen above, the ECJ's judgment in *Kouroupitos* (2) established a number

71 Para 98 of judgment.

72 Art 228(1) also lends support to such an interpretation, which refers to the defendant Member State being obliged to take necessary measures in order 'to comply with the judgment of the Court of Justice'. This obligation obviously runs only from the date of judgment.

73 It would seem that any change to the current official interpretation would require either express EC Treaty amendment or another ECJ judgment overturning its approach to the temporal dimension to Art 228(2), which is most unlikely to occur.

of important principles surrounding the operation of second round proceedings. Crucially, it endorsed the basic framework published by the Commission on calculating penalties under Art 228(2), thereby providing greater transparency, predictability and legal certainty surrounding the process for determining individual cases. In other respects, some of its reasoning is questionable, such as with regard to the issue of evidentiary burdens shouldered by the parties to litigation and temporal limitation of sanctions. The Court also failed to produce a detailed breakdown of the elements of the penalty payment it imposed. It has been mooted that the ECJ may have simply subtracted from the Commission's total of €24,600 a figure that would represent absence of a breach of Art 5 of Directive 78/319.<sup>74</sup> However, if the ECJ had followed the Commission's figures exactly, the penalty would have been €21,535 and not €20,000 as it actually determined (the Commission having attributed €3,075 weighting for the alleged breach of Art 5 of Directive 78/319). The difference is considerable, bearing in mind that a daily penalty was imposed which would be likely in the circumstances to accumulate for some considerable time.<sup>75</sup> It is submitted that the Court should have offered a fuller insight into its own calculations, for the purposes of providing greater transparency and accountability in terms of its decision making.<sup>76</sup> The Court may have simply rounded down the figures, but if so this requires an explanation as to why this should have been appropriate in the circumstances.

#### 4.3.2 Spanish Bathing Waters (2) (*Case C-278/01*)

On 25 November 2003, the ECJ delivered its second ruling on the application of Art 228(2) EC, the case also involving a failure by a Member State to implement EC environmental legislation correctly. On this occasion it involved the Commission taking enforcement proceedings under Art 226 EC against Spain, over the latter's failure to adhere to various requirements set down by the EU's first Bathing Water Directive 76/160.<sup>77</sup> Legal action had been taken against Spain on the basis of information derived from annual

<sup>74</sup> See e.g. Krämer, 2002a, p 401.

<sup>75</sup> In the event, the Commission decided that penalty payments should cease to be required to be made by Greece in less than one year of the second round judgment. A daily penalty of €21,500 would have required Greece in total to pay approximately an additional €300,000 than that required by the actual daily fine imposed by the Court of €20,000.

<sup>76</sup> See Art 41 of the EU's Charter of Fundamental Rights. Article 41(1) obliges EU institutions to handle every person's affairs impartially, fairly and within a reasonable time and Art 41(2) specifies that this right requires the 'administration' to give reasons for its decisions. The Charter, adopted in 2000, is incorporated in Part II of the 2004 Treaty on the Constitution for Europe.

<sup>77</sup> Under Art 395 of the 1985 Act of Accession of Spain and Portugal to the European Communities, the Directive came into force in Spain with effect from 1.1.86.

reports submitted by it to the Commission, concerning the state of implementation of the Directive.<sup>78</sup> This had culminated in a ruling from the ECJ (Case C-92/96), that the Spanish Government had breached the Directive by not ensuring that the limit values for water quality set down in Art 3 of the Directive were implemented with respect to its inshore bathing waters.

Annual Spanish bathing water reports subsequent to the Court's judgment under Art 226 EC revealed that the Directive's limit values on bathing quality continued to be infringed with respect to a number of inland waters.<sup>79</sup> After a reminder letter issued in March 1998, the Commission issued Spain with an LFN in January 2000, submitting that the Spanish Government had not taken the necessary measures in order to comply with the terms of the first round judgment. Annual bathing reports submitted to the Commission from Spain in respect of the years 1998–2000 revealed that over 20 per cent of inland bathing waters continued to breach of the Directive's limit values. During the course of the pre-litigation stage, it was apparent that the Spanish Government had undertaken and was in the course of introducing a number of steps to bring itself into a state of compliance with the Directive, including water purification projects, greater supervision and prosecution of illicit discharges, and prohibition on bathing in areas identified not to be in conformity with the Directive.<sup>80</sup> The Spanish Government also decided to commission a belated study into the state of its inland bathing waters in 2000 and set a timetable for action on measures to be taken, estimated to be completed by 2005. By the time the pre-litigation phase was entering its final stages in early 2001, the Spanish Government decided to accelerate completion of its timetable to 2003 and provided the Commission with an internal report drawn up by the national Ministry of the Environment on the state of progress on action taken to comply with the first round judgment, with a view to persuading the Commission not to apply for a second Court ruling.

Nevertheless, it was clear that by the time the deadline elapsed for responding to the Commission's RO, Spain had not ensured that all its inland bathing waters were in compliance with Directive 76/160 as required. Accordingly, by mid-2001 the Commission decided to apply to the ECJ for a daily penalty payment to be imposed on Spain of €45,600 pending fulfilment of its EC

78 Such reports have been required to be completed by each Member State under the terms of the Directive (Art 13) since 1993. Each annual report is to be delivered to the Commission by the end of each year in question.

79 Commission figures, not contested by Spain, revealed the following percentages of inshore bathing areas conforming with the requisite limit values from 1998 onwards: 1998 (73%), 1999 (76.5%), 2000 (79.2%), 2001 (80%) and 2002 (85.1%).

80 This particular tactic is a highly controversial move, and one not infrequently employed by other Member States. It is clearly against the spirit of the Directive, the purpose of which is to oblige Member States to enhance bathing water quality as opposed to instituting schemes designed to avoid carrying out their environmental protection commitments.

environmental obligations. The Commission considered that in the circumstances a penalty payment instead of a lump sum was an appropriate sanction. It was of the opinion that this was warranted, given the relative seriousness and duration of the infraction, as well as bearing in mind the need to ensure that an effective penalty be imposed in order to induce swift compliance. The Commission arrived at its figure by multiplying the basic flat rate starting payment of €500 by the coefficients chosen by it for seriousness (factor of 4 out of a possible range of 1 to 20), duration (factor of 2 out of a possible range from 1 to 3) and relative financial ability of Member State to pay the penalty (factor of 11.4 based on the GDP of the defendant Member State and its voting power in the Council of the EU). The calculation was made accordingly:  $500 \times 4 \times 2 \times 11.4 = 45,600$  total.

#### 4.3.2.1 *Procedural and substantive issues*

Even though the Spanish Government did not contest the statistical evidence produced by the Commission showing that Spain had consistently failed to ensure conformity with the limit values since the first round judgment, it asserted that in the circumstances the action should be dismissed on other grounds. Specifically, it submitted that the Commission had failed to ensure that sufficient time had been allowed after the first judgment for it to be able to comply with the Directive.

The time span between the first round ECJ ruling and expiry of the date by which Spain had to respond to the Commission's RO lasted 31 months (namely, from 12 February 1998 to 27 September 2000). Spain considered this to be an unreasonably short period for the purposes of Art 228(1) EC, given that the measures required to be taken were long term in nature. As already discussed, this provision requires the defendant State to take the necessary steps to comply with a judgment of the Court under Arts 226 or 227 EC. The text is silent as to period of grace allowed to Member States in order for them to ensure that they comply with its terms. However, well-established case law of the ECJ has clarified that the importance of immediate and uniform application of EC law across the respective territories of the Member States requires that the process of compliance must be initiated by the concerned Member State at once and completed as soon as possible.<sup>81</sup>

In his Opinion, Advocate-General Mischo considered that the Commission's action should be dismissed on the grounds that Spain had not been offered a reasonable period in the circumstances to comply with the Court's first round judgment in 1998, which in this instance had been effectively two years. He first rejected the Commission's submission that Spain had failed to undertake corrective action as swiftly as possible after the first round

81 See e.g. para 82 of Case C-387/97 *Kouroupitos (2)* and Case 131/84.



judgment, as required under Art 228(2) EC in accordance with well-established jurisprudence of the Court. He opined that the Commission failed to prove its argument, in referring to the fact that the Spanish Government was able to draw up a detailed programme of corrective action within the deadline stipulated by the RO but had not done so in the early months after delivery of the first round judgment in 1998.<sup>82</sup> In his view, the Spanish Government required sufficient time to co-ordinate and crystallize implementation of the first judgment for all areas involved, which included time to conduct further tests on water quality.

The Advocate-General considered that the Commission is implicitly under a general duty to allow a reasonable period for compliance to take place under the terms of Art 228(2) EC.<sup>83</sup> Although he was of the view that in principle liability will normally be proven in the event of a defendant failing to adhere to the terms of a first round judgment within the time limit set by the Commission's RO, this particular case exhibited exceptional circumstances which would require a longer time for compliance. He listed a number of factors in support of this view. In particular, he noted the very long time limit prescribed in the Directive for a Member State to implement its limit values (10 years) which constituted in his view recognition of particular difficulties for national authorities to secure conformity other than through long-term measures. He also noted the fact that the presence of mainly shallow and slow moving inland bathing waters in Spain constituted a particularly difficult technical hindrance to upgrading water quality, a feature not shared to such an extent with other Member States. In addition, he underlined the much more difficult task of implementing ecological improvements on the ground than merely transposing environmental directives into national law. He observed in this context that in some non-transposition cases, the Commission had taken several years more than in the proceedings at hand to apply to the ECJ for a second ruling.<sup>84</sup> He also noted that the Commission had taken a considerably longer time in recent environmental cases to close the pre-litigation phase. In the *Kouroupitos* litigation, some five years elapsed between the first round judgment and application to Court, and in proceedings against the United Kingdom<sup>85</sup> over six years expired between first round judgment and issuing the RO. Finally, he referred to the particularly challenging difficulties that national authorities

82 See para 36–41 of his Opinion.

83 See especially paras 32 and 63 of his Opinion in Case C–278/01.

84 See para 64 of the A-G's Opinion, where he notes that in one case it took some 20 years before the Commission applied to the ECJ for a second round judgment (Case C–334/94). But he fails to take into account that this case came to Court before the penalty payment proceedings were introduced into the EC Treaty; the ECJ could only issue a declaration of illegality.

85 Case C- 85/01.

face in tracing and eliminating sources of pollution in bathing water contexts, many of which may be diffuse (for example, agricultural sources) and may well require general long-term reform in terms of agricultural practices before improvements to aquatic environments can be detected. These factors were sufficient for the Advocate-General to consider that the action should be dismissed, notwithstanding that the defendant had in effect been granted the opportunity of 15 years (1986–2001) to comply with the Directive's limit values until the elapse of the time limit for compliance with the Commission's RO issued under Art 228(2) EC, a period of time far longer than that granted to other Member States under the terms of the Directive.<sup>86</sup>

In contrast with the Advocate-General, the ECJ concluded in *Spanish Bathing Waters (2)* that the action should not be dismissed on the grounds that the Commission had provided Spain with an unreasonably short time to comply with the first round judgment. Consistent with previous case law, the ECJ preferred to avoid setting any general standard concerning the minimum time limit that should be allowed before the Commission could apply to the Court for a financial penalty. The Court instead reiterated well-established case law that the process of compliance with a first round ruling must be initiated at once and completed as soon as possible, as a means of upholding the importance of ensuring the immediate and uniform application of EC law.<sup>87</sup> This is not only understandable but also a wise approach, given the indefinite variety of situations where implementation failures may arise, in terms of their complexity and longevity. Instead, the Court chose to consider whether the 31-month period provided between date of delivery of first round judgment and elapse of the time limit for compliance with the RO could be regarded as sufficient time, in the circumstances, for Spain to adopt the relevant measures needed to comply with the first judgment. The reasoning of the ECJ implicitly accepts the proposition that a reasonable opportunity for attainment of compliance must be granted by the Commission in Art 228(2) proceedings. It considered that the length of time given to the defendant in the instant case was sufficient in the circumstances, namely covering three bathing seasons (1998–2000), even if compliance with the first round judgment may call for complex and long-term operations.<sup>88</sup>

The Court's approach is to be welcomed in a number of respects. First, it appears to provide a workable degree of certainty to the Commission when pursuing complex and long-term environmental disputes in terms of what might be considered to be a reasonable period granted to a defendant to implement a first round Court ruling. Second, by taking into account the time taken up by the pre-litigation phase of Art 228(2) proceedings, the

86 Art 4 of the Bathing Water Directive 76/160 stipulates a period of 10 years for implementation of the Directive's limit values set out in Art 3.

87 See para 27 of judgment.

88 Para 30 of judgment.

Court also ensures that second round proceedings will not be unnecessarily postponed or lengthened. One may draw from the Court's reasoning that the Commission must in effect ensure that a reasonable period of time in the circumstances has been provided to the defendant prior to the close of the pre-litigation phase, for the purpose of enabling defendant State to take steps to implement the ECJ's first round judgment. Third, the Court's refusal to adopt a more flexible approach in deference to Member State claims of needing more time underpins the essential purpose of second round proceedings, namely to ensure that a state of conformity is to be achieved as swiftly as possible. It also implicitly takes account of the fact that each Member State has been provided with a considerable period of time to implement their EC environmental obligations before a case comes to financial penalty stage. Spain should have already complied with the Bathing Water Directive 76/160 at the beginning of 1986. It therefore had in effect been granted some 15 years more than the time foreseen for it to ensure that its bathing waters conformed with the Directive's limit values, before the Commission got to the stage of applying to the Court for the imposition of a penalty payment.

A notable factor that clearly played a significant role in terms of the prosecution of the case was the strategy employed by Spain of reducing the number of areas for inland bathing as a means of implementing the first round judgment. The Commission noted that there had been a reduction of 100 of such areas between 1996 and 2000 in Spain, and opined that the Spanish Government was seeking to comply with the judgment by artificially reducing the number of bathing areas as opposed to improving bathing water quality. This was clearly an important factor for the Commission in terms of its prosecution of the case, given that the longer proceedings were stretched out at the pre-litigation stage the greater the opportunity for the defendant to seek to comply with the terms of the first round judgment simply by closing polluted inland bathing areas without taking any steps to improve their environmental quality.

On technical grounds the ECJ elected not to comment on this point, noting that the material evidence proffered by the Commission in support of its case did not specifically include areas removed from the list of bathing areas reported to it by the Spanish Government. This is unfortunate, given that such a strategy employed by a State could, without check, readily undermine the efficacy and purpose of the Directive. Moreover, recent reports by the Commission on the state of implementation of EC environmental law note that the practice of prohibiting or otherwise declassifying bathing areas has been employed as a tactic by a number of Member States as part of a strategy for ensuring compliance with the Directive.<sup>89</sup> Under the terms of the

89 See e.g. the Commission's Bathing Water Report for the year 2002: website: [www.europa.eu.int/water/water-bathing/report.html](http://www.europa.eu.int/water/water-bathing/report.html).

Directive it is not readily clear from the wording of the relevant provision whether Member States are provided with absolute discretion to declassify bathing waters. The material provision is Art 1(2)(a) of the Directive which defines ‘bathing water’ as follows:

- (a) ‘bathing water’ means: all running or still fresh waters or parts thereof and sea water, in which:
  - bathing is explicitly authorised by the competent authorities of each Member State, or
  - bathing is not prohibited and is traditionally practised by a large number of bathers;

The wording of this provision might at first sight appear to suggest that Member States are not restricted in seeking to exclude those of its bathing areas falling short of the Directive’s limit values from the scope of the Directive by prohibiting bathing at such sites. However, one could also construe the reference to ‘prohibited’ as implicitly referring only to those bathing sites prohibited before the date by which Member States had to have implemented the Directive. This would mean that whilst a Member State might seek to prohibit a bathing area which it previously has notified to the Commission as a bathing area, the prohibition would not entitle it to refrain from ensuring adherence to the Directive’s limit values with respect to the particular area. Whilst the first interpretation might accord with a literal interpretation of the provision’s wording, it would not accord with an interpretation that would reflect a teleological or purposive understanding of the legislative provision. The ECJ has consistently stated that as a matter of general principle it favours considering the *telos* of EC law as a principal tool for interpreting individual provisions, the literal or ordinary meanings of legislative text not being presumed to be decisive.<sup>90</sup> The Court’s approach has been fortified by its preparedness to ensure that the desired aims and objectives of Union legislation are upheld so as to preserve its effectiveness (or *effet utile*).

As regards the Bathing Water Directive 76/160, it is apparent from considering the preamble that a key purpose of the Directive is to reduce the pollution of bathing water and to protect it against further deterioration.<sup>91</sup> The Directive provides for a range of narrowly and precisely defined situations in which the Member States may derogate from the environmental protection standards set out in Art 3.<sup>92</sup> Moreover, Art 7 of the Directive

<sup>90</sup> For examples of this approach to statutory interpretation being applied in the context of environmental disputes, see Case 187/87 *Saarland et al.* (para 10 of judgment) and Case C-72/95 *Kraaijeveld* (para 28 of judgment).

<sup>91</sup> As stated in recital 1 to the preamble of Directive 76/160.

<sup>92</sup> See Arts 4(3) and 8 of Directive 76/160.

underlines that implementation measures taken pursuant to the Directive may under no circumstances lead either directly or indirectly to the deterioration of bathing water quality. Collectively, these various sources in the Directive suggest that it would be contrary to the *telos* of the Directive (namely, its general purpose and overall scheme) if a Member State were able to change the list of bathing areas unilaterally subsequent to the date by which the Directive had to be implemented into national law. If they were able to retain such power, Member States would have a clear possibility of undermining the purpose of the Directive to prevent deterioration of bathing quality in the EU. Seen from a teleological perspective, it would be therefore more appropriate to construe the reference to the term 'prohibited' in the second indent of Art 1(2)(a) in a narrow sense, temporally speaking. A narrow interpretation would mean that second indent refers only to those bathing areas prohibited as at the transposition deadline applicable to each Member State. Thus, whilst a Member State might be able to prohibit bathing at a particular site after the transposition deadline in respect of the Directive, it would not be entitled to use this step as a pretext for excluding application of the Directive's limit values to the bathing area concerned.

Advocate-General Mischo did take the opportunity to comment on this particular aspect of the case. He opined that the terms of the Directive would bar a Member State from unilaterally seeking to declassify an area without applying a prohibition, but would allow a Member State to declassify an area if it actually imposed a ban on swimming in respect of the particular bathing site.<sup>93</sup> In his Opinion, the Directive's wording is expressly clear on the point, so that a contrary interpretation would be an unwarranted and unjustified extension to the scope of the legislative instrument. It is, however, questionable whether the legislation is indeed crystal clear on the point. Given that there is room for more than one meaning of the relevant text, it would be surprising and regrettable if a Member State would not be estopped from seeking to evade attainment of the clear intent behind the Union legislation. However, until the Court has another opportunity to adjudicate on this important legal issue, the position will continue to remain uncertain.

#### 4.3.2.2 *Determination of the penalty payment*

The ECJ clarified in *Spanish Bathing Waters (2)* a number of legal points concerning the imposition of financial sanctions under Art 228(2) EC in the course of its judgment. In agreeing with the Commission that Spain had failed to adhere to the terms of its judgment made under Art 226 EC, the Court then determined what particular monetary sanction should be imposed on the defendant. In so doing, the Court differed in its approach

93 See paras 112–117 of his Opinion in Case C–278/01.

from the Commission, electing to use the model of a lump sum payment instead of a daily penalty arrangement.

The Court first clarified the particular point in time as to when the Commission is entitled to specify a calculation as to the amount of penalty involved. This point had been left unaddressed by it in *Kouroupitos (2)*. In *Kouroupitos (2)*, Advocate-General Colomer had opined that this should be not before the last opportunity for the defendant to submit pleadings in the course of the litigation phase (that is, either at the closure of written submissions to or the oral hearing before the Court).<sup>94</sup> He considered that this interpretation would be in line with the purpose of second round proceedings to encourage a recalcitrant Member State to comply with a judgment establishing a breach of obligations. He rejected closure of the pre-litigation phase as being the relevant moment in time, given that the function of Art 228(2) was not to obtain a declaration of failure to fulfil EU statutory obligations, as is the case with Art 226 proceedings. His comments were not taken up by the Court in that case, though. However, the ECJ in *Spanish Bathing Waters (2)* rejected his interpretation by confirming that the elapse of the period for responding to the RO in second round proceedings constituted the appropriate moment in time when the Commission was entitled to bring the matter to the Court for the purposes of imposing a financial sanction either in the form of a daily penalty or lump sum payment.<sup>95</sup> Moreover, it was the circumstances at that particular point in time that the Commission had to assess in terms of specifying the amount it considered appropriate to be paid by the defendant.<sup>96</sup>

The Court's findings with regard to this point are convincing, as they enhance the elements of procedural efficacy as well as deterrence underpinning Art 228(2) proceedings. Advocate-General Colomer's suggested interpretation in *Kouroupitos (2)* would have allowed a defendant Member State to be able to get away with effecting compliance at the very last minute so to speak, notwithstanding that a considerable period of time may have elapsed before the defendant actually gets round to complying with the first round judgment. He doubted whether the Commission could be considered to have a legitimate interest in pursuing litigation after the point in time where a Member State complies with a first round judgment.<sup>97</sup> In effect, he implied that Art 228(2) proceedings were akin to legal action taken against EU institutions in respect of failures to act under Art 232 EC, where proceedings are deemed to be devoid of purpose once the defendant institution has defined its position (that is, actually taken action with respect to the subject matter in question).<sup>98</sup> The Court's contrary interpretation in *Spanish Bathing*

94 See paras 55–59 of his Opinion in Case C–387/97.

95 Para 28 of judgment in Case C–278/01.

96 See para 29 of judgment.

97 See para 58 of his Opinion.

98 See e.g. Case 13/83.

*Waters* (2) has the advantage of minimising the possibility of defendants abusing the second round procedure by deliberately seeking to draw out the length of litigation in order to gain extra time to comply with a first round judgment. Moreover, the ECJ's view lends an element of greater certainty and predictability to proceedings, each party now having a relatively clear framework in advance to calculate, at least in broad terms, the approximate level of a financial penalty to be affirmed by the Court.

Unlike in *Kouroupitos* (2), the ECJ in *Spanish Bathing Waters* (2) shed some light as to the nature of the financial penalty to be imposed in any given case. Article 228(2) EC refers to the possibility of the Court imposing either a lump sum or penalty payment on the defendant State, without disclosing any details as to how one should choose between these options in practice. Whereas in this case the Commission had proposed a daily penalty payment of €45,600, the Court disagreed and considered that a special annual penalty payment would be most appropriate in the circumstances. Specifically, the Court held that the Spanish Government would be obliged to pay a penalty payment of €624,150 per year and for every 1 per cent of the inland bathing areas found not to be in conformity with its first round judgment, as from the time when the quality of the bathing water achieved in the first bathing season following delivery of the second round judgment is ascertained until the year in which the first round judgment is found to be complied with.<sup>99</sup> Moreover, the Court decided that the level of fine specified by the Commission should be reduced considerably, to take account of particular circumstances pertaining to the case, notably degree of difficulty in complying with the Directive and past improvements by Spain in terms of conformity.

The ECJ justified its determination for an annual penalty payment on two main grounds. First, it noted that in practice the defendant State would be able prove that the infringement has come to an end annually only when it provides the Commission with its end of year bathing water implementation report. A situation could therefore conceivably arise where a daily penalty payment mechanism could accordingly require payments be made in respect of a period during which the Directive's requirements might have already been met by the defendant.<sup>100</sup> Second, it considered that a flat rate penalty payment here would fail to take account of progress made by Spain towards compliance with the first round judgment. The Court's points followed in substance the reasoning employed by the Advocate-General in querying the relevance of a daily penalty payment.<sup>101</sup> The Court noted the considerable difficulty in practice for Member States to achieve complete implementation of the Directive. It referred to the factors of difficulty pointed out by the

99 See para 2 of the specific terms of the ECJ's judgment in Case C-278/01.

100 See para 45 of judgment. 101 See paras 72 et seq. of A-G's Opinion.

Advocate-General in his Opinion, who had noted that the challenges faced by national authorities to detect and eliminate all sources of water pollution were substantial and often took several years to overcome, as recognised by the Commission itself. In particular, a definitive solution to a particular problem might only be successful through long-term programmes of reform of particular agricultural practices. Taking this into account the ECJ concluded:

In those circumstances, a penalty which does not take into account of the progress which a Member State may have made in complying with its obligations is neither appropriate to the circumstances nor proportionate to the breach which has been found<sup>102</sup>

The Court appears here to be laying down a general benchmark for the Commission in determining how to calculate its penalty specifications. The principle may be deduced from the Court's reasoning that the Commission needs to ensure that the fine it proposes is sufficiently sensitive to accommodate improvements made by the defendant in working towards complying with the first round judgment. In particular, the element of proportionality is not respected even if the Commission would seek to guarantee refunding the defendant in respect of any overpayments found to have been made as a result of the daily penalty payment mechanism. The Commission will be particularly mindful of the need to adjust its penalty specifications in cases where its evidence is predicated on periodic reports supplied by Member States in accordance with EC environmental legislation.

In its judgment the Court also decided, for various reasons, to reduce the level of the penalty requested by the Commission. The Court considered the factors of degree of seriousness, duration of infringement and relative ability to pay that underpin the Commission's framework for calculating a fine. As in *Kouroupitos (2)*, the Court approved the framework as one suitable for it to use,<sup>103</sup> whilst also making it clear that, as a matter of legal principle, the Commission's actual specifications would not bind it and instead be simply a useful reference point.<sup>104</sup> However, the ECJ considered that the Commission had erred in its assessment of the factor of duration of infringement. Specifically, it considered that compliance with the Directive was, in the circumstances, relatively difficult to achieve within a short timescale. In addition to referring to problems of pollution detection, the need to draw up plans of action and implementation, the Court noted that application of EC public

<sup>102</sup> Para 49 of judgment.

<sup>103</sup> See para 52 of judgment. The ECJ also specifically endorsed the amount of €500 set as a basic amount by which the three coefficients are multiplied (see para 60 of judgment).

<sup>104</sup> Para 41 of judgment.



procurement legislation would add specific minimum periods to allow for open tendering procedures.<sup>105</sup> Accordingly, the Court lowered the coefficient of factor 2 for duration, as proposed by the Commission, to 1.5.

The Court agreed, however, with the Commission's assessment with regard to the other coefficients of seriousness of breach and ability to pay. With regard to seriousness, the ECJ considered that the Commission, in applying a relatively low coefficient (namely factor 4 out of a possible range of 1 to 20), had given due account to the extent to which the Directive had been implemented over time. It noted a rate of conformity of 79.2 per cent in 2000 as compared with 54.5 per cent in 1992. It was unimpressed with the Spanish Government's submission that it was not provided with a similar length of time for implementing the Directive (that is, 10 years), commenting that an opportunity to organise an extended period for transposition applicable to Spain would have been available for negotiation at the time of Spain's commencement of membership with the EU under the relevant Act of Accession. Spain could not now be allowed to plead retroactively for extra time, given that it had not considered it necessary to do so in 1985. In sum, the Court computed the penalty payment on the following basis:

$$\begin{aligned} & \text{€}500 \text{ (basic amount)} \times 1.5 \text{ (duration coefficient)} \times 4 \text{ (seriousness} \\ & \text{coefficient)} \times 11.4 \text{ (ability of Member State to pay coefficient)} \\ & = \\ & \text{€}12,483,000 \text{ (expressed as an annual penalty)} \end{aligned}$$

The total annual penalty payment expressed the annual financial sanction that would be applied if the same proportion of Spanish inland bathing waters that was found not to be in conformity with the Court's first round judgment at the end of the pre-litigation stage (that is, 20 per cent), was reported to be still in a state of non-conformity by the time the Member State reports for the 2004 bathing season emerged. The Court refined its final figures by stipulating that for every 1 per cent of inland bathing water area shown not to conform with the terms of the first round judgment as from the first year after the date of the second round judgment, Spain would be subject to an annual penalty payment of €624,150, representing one-twentieth of the total annual payment calculated on the basis of a rate of 20 per cent non-compliance for inland bathing waters.

The Court's determination of the penalty payment in *Spanish Bathing Waters (2)* may be regarded as relatively generous to the defendant in the circumstances. In particular, the ECJ failed to address what turns out to be a fundamental issue in this case, namely what exactly constitutes 'conformity'

<sup>105</sup> See para 53 of judgment.

for the purposes of the Bathing Water Directive. As already noted, the Court fails to consider whether a strategy on the part of the defendant to prohibit or otherwise unilaterally declassify bathing areas in order to reduce the number of sites subject to the terms of the Directive is legitimate. Whilst such a strategy may render statistics that appear to point towards improvements in terms of the proportion of bathing areas in compliance with the Directive's limit values, in reality such action masks a toleration of deterioration of EU bathing water, something that the Directive is intended to combat. The judgment of the Court regrettably leaves open the question whether Spain would be entitled to adopt such an approach within the first year of its second round judgment in order to avoid paying any cent of the fine. The Court's decision is based on the percentage of inland bathing areas 'found not to conform' with the Directive's limit values. No guidance is provided as to what might not constitute conformity, notwithstanding that the Commission had proffered evidence of Spain having used in the past the tactic of applying prohibitions to various inland bathing waters falling short of the Directive's limit values. However, one might imply from the Court's references to the difficulties faced by Spain in being able to achieve short-term compliance with the Directive that the Court might well not accept a prohibition strategy as being a legitimate means to achieve conformity with its limit values.<sup>106</sup>

Moreover, the Court's assessment of the application of the factor of duration of infringement is questionable. The fact that it may, as the ECJ in this case points out, take a considerable period of time for a Member State to ensure that its bathing areas comply with certain agreed qualitative criteria is an issue that the legislation itself should and does take into account. That the Directive specifically allowed a relatively long period for compliance (10 years from the date of the Directive's notification<sup>107</sup>) is a reflection of the degree of political concern and agreement expressed by the EU's legislative institutions on this point. EC environmental legislation frequently builds in considerable periods for the process of national implementation, precisely where substantial periods of time for implementation plans and infrastructural changes are envisaged to be required. EC legislation on improvements to water quality,<sup>108</sup> waste water treatment<sup>109</sup> and solid waste management<sup>110</sup> are good examples of this. It could be argued that the ECJ, by taking the

106 See para 53 of judgment focusing on the factor of duration of infringement.

107 Art 4 of Directive 76/160.

108 See the Water Framework Directive 2000/60.

109 See Directive 91/271 on urban waste water treatment which allows Member States until end 2005 to ensure that agglomerations with a population equivalent of between 2,000–15,000 are provided with collecting systems for urban waste water. States were required to provide such systems for agglomerations in excess of 15,000 population equivalent by the end of 2000.

110 See e.g. Directive 99/31 on landfill of waste.

relative length of time it may take to fulfil a first round Court judgment into the duration coefficient, is factoring in something that the EC legislature has already taken into account from the outset. The effect of the Court's approach here is to tolerate the prospect of double accounting, whereby a Member State pleads for the factor of time taken for due implementation to be taken into account twice: first with respect to the deadline for implementation of the legislation and second in respect of implementation of a first round judgment, which itself is predicated on the presence or otherwise of faulty implementation.

As in *Kouroupitos (2)*, the ECJ in *Spanish Bathing Waters (2)* stipulates that liability to make penalty payment applies prospectively, namely in the event that the breach of the first round judgment is shown to continue from the date of delivery of the second round judgment. One could question the assumption which the Court appears to make that financial sanctions should run only from the date of delivery of the second round judgment onwards. The text of Art 228(2) EC provides simply that either a penalty payment or lump sum may be imposed by the Court in the event of it finding that a Member State has breached the terms of an earlier judgment made under either Art 226 or 227 EC. Under Art 226 EC, as discussed in Chapter 3, liability in respect of that provision is triggered by virtue of non-compliance as at the termination of the pre-litigation stage. The Court, in *Spanish Bathing Waters (2)*, also appears to be suggesting this principle should apply in the context of second round proceedings, in confirming that the Commission is entitled to specify the penalty amount as soon as deadline for response to its RO has elapsed.<sup>111</sup> However, it transpires from the Court's rulings that whilst closure of the pre-litigation stage marks the point in time that the defendant Member State may be said to have definitively infringed Art 228(2) EC, this does not mark the point in time when the defendant becomes liable to make any penalty payment. If the defendant Member State is able to demonstrate that it complies with the first round judgment as from the date of delivery of the second round judgment, then it appears that it may well not be liable to make a penalty payment.

It is evident that penalty payments, being periodic in nature, are clearly best suited to address situations where compliance has not yet been achieved and represent a form of continuous pressure or incentive for the defendant to achieve a state of legal conformity.<sup>112</sup> Lump sum fines are better suited to address situations where the defendant failed to comply with a first round judgment as at closure of the pre-litigation stage but attained compliance

111 See paras 28–29 of judgment in Case C–278/01.

112 See also A-G Mischo's Opinion in Case C–278/01 at paras 76–78.

before the delivery of the second round judgment. The latter type of fine is therefore capable of expressing the clear requirement underpinning Art 228(2) EC that Member States, found by the ECJ to have failed to adhere to the terms of one of its previous rulings under Arts 226 or 227 EC, should incur a financial penalty, either in the form of a penalty payment or a lump sum.

#### **4.3.3 French Fishing Controls (2) (*Case C-304/02*)**

The third opportunity for the ECJ to rule on the application of Art 228(2) EC arose in the *French Fishing Controls (2)* case, concerning the area of conservation of marine resources. Specifically, in that case the Commission had decided to bring second round proceedings against France in respect of its failure to adhere to an earlier judgment of the ECJ (Case C-64/88), which had held that it had breached the requirements of EC legislation on controls relating to the fishing industry. In the earlier ruling, the Court had agreed with the Commission's submissions that France had failed to adhere to EC rules on minimum mesh sizes of fishing nets, had failed to set up inadequate controls to prevent the sale of undersized fish and had failed to take steps to ensure that appropriate sanctions would be taken against persons found to infringe EC conservation requirements.

When referring its dispute with France to the ECJ under Art 228(2) EC, the Commission requested the Court to impose a daily penalty payment of €316,500 on France. The figure, based on the Commission's published guidance on calculation of penalty payments, was arrived at by multiplying the basic amount of €500 by the following three coefficients: 21.1 in accordance with ability to pay applicable to France based on relative GDP and Council voting rights, 10 for the seriousness of the infringement and 3 in respect of the duration of the infringement.

##### *4.3.3.1 Procedural and substantive issues*

In several respects, the issues surrounding compliance in this particular case were relatively straightforward. The Commission, by way of evidence obtained through a number of inspections carried out by its officials in French fishing ports as well as its assessments of the relevant conservation control mechanisms existing in law and practice at national level, was able to demonstrate that France had continued to breach the terms of the first round ruling made against it by the ECJ under Art 226 EC. As a consequence, the ECJ was not faced with difficult questions of evidence pertaining to the substance of the case.

In assessing the question of liability under the terms of Art 228(2), the ECJ confirmed that the relevant reference date for assessing an alleged breach of obligations is the deadline set for compliance with the (final) RO

by the Commission.<sup>113</sup> This mirrors the position applicable under Art 226 EC. Accordingly, the ECJ confirmed that Member States will not be able to evade liability under Art 228(2) EC by complying with the terms of the RO after that date and before the ECJ has had an opportunity to give a ruling on the case. A court action is not to be considered devoid of purpose, where a Member State is able to show that it has complied with the terms of the RO after the set deadline. This confirmation by the ECJ is to be welcomed, in that it prevents the possibility of Member States being able to delay compliance until the last possible minute. In other respects, the ECJ also reaffirmed fairly self-evident but nonetheless important procedural points. Specifically, in confirming that the Commission had the onus to prove that the Member State in question had failed to adhere to a first round ruling, the ECJ held that the onus shifts to the defendant to challenge the Commission's case, where the Commission has adduced sufficient evidence in support of its submissions of non-compliance.<sup>114</sup> As was commented in relation to the *Kouroupitos (2)* judgment, the placement of the burden of proof on the Commission in the context of Art 228(2) cases may well be problematic in the context of cases involving bad application of EC environmental law, bearing in mind, in particular, the relative lack of resources and powers vested in the Commission services to carry out investigations. The fishing sector constitutes an exception in this regard, in respect of which the Commission is vested with powers and resources to carry out inspections within Member States. In this case, the Commission services carried out a number of inspections at French fishing ports, which were seminal in being able to verify the existence of illicit practices of catching undersized fish. The Court's reaffirmation of the initial burden of proof being placed on the Commission is unjustified also on other more basic grounds. Such an interpretation of the evidential requirements underpinning Art 228(2) EC undermines the effectiveness of the legal procedure. It appears unduly lenient on the part of the ECJ, to say the least, to hold that the onus of proof does not lie with the Member State to demonstrate compliance with the terms of a court judgment, which has already confirmed that it is guilty of failing to comply with EC law.

#### 4.3.3.2 *Determination of the penalty payment and lump sum*

The particular significance of the *French Fishing Controls (2)* case lies in the fact that it is the first case in which the ECJ has imposed a lump sum fine on a Member State. In addition, the judgment also throws considerably more light on the independent powers of the Court to impose penalties and fines on defendants under Art 228(2) EC.

113 Para 30 of judgment.

114 Para 56 of judgment.

The ECJ confirmed the Commission's request for a penalty payment to be made against France. The Commission had proposed a daily penalty payment of €316,500 to be levied on France, considering this to be the best type of sanction to be used in order to ensure rapid compliance with the terms of the first round ruling. Whilst agreeing that a penalty payment is likely to have the effect of inducing compliance on the part of the defendant, the ECJ was keen to assert that the decision as to whether a fine should be imposed was ultimately a matter for it to set the penalty payment, with a view to ensuring that the fine is determined appropriately in accordance with the particular circumstances and is proportionate both to the breach of law established and ability to pay on the part of the defendant Member State.<sup>115</sup> The ECJ confirmed that the Commission's published guidelines on penalty calculations are to be considered a useful reference point, and worked on the basis that a calculation should be premised on the three factors developed by the Commission's guidelines of degree of seriousness of infringement, its duration and the Member State's ability to pay. In applying these considerations to the case at hand, the ECJ in essence agreed with the Commission's penalty payment request. However, the Court considered that the penalty payment should be paid on a half-yearly as opposed to a daily basis, to take into account measures taken by the French authorities which could potentially serve as a basis for implementing the relevant EC marine conservation obligations. Accordingly, the ECJ effectively provided the French authorities with a breathing space of six months to comply with the first round judgment.

The particular interest of this case concerns the decision of the ECJ to impose a lump sum fine on France, specifically a one-off payment of €20 million. In so doing, the ECJ clarified a number of legal issues. First, it confirmed its independence in determining whether or not to levy penalties and lump sum fines in Art 228(2) cases. Specifically, the ECJ held that the Commission's request for penalties or fines is not binding on the Court. In this particular case, the Commission had not requested the imposition of anything other than a penalty payment. Second, the ECJ held that the wording of Art 228(2) EC did not oblige the Commission or the Court to elect either a penalty payment or a lump sum fine. Article 228(2) specifies that the ECJ 'may impose a lump sum or penalty payment'. The ECJ construed the terms of that provision to mean that the ECJ could choose to levy both types of financial sanction in any given case. It was supported in its views by the Opinions of the Advocate-General in the case, the Commission and three Member States.<sup>116</sup> Thirteen Member States<sup>117</sup> submitted to it a contrary

115 Para 103 of judgment.

116 Namely, the governments of Denmark, Finland, Netherlands, and the UK.

117 Namely, the governments of Austria, Belgium, Cyprus, Czech Republic, France, Germany, Greece, Hungary, Ireland, Italy, Poland, Portugal and Spain,

Opinion, opining that the word ‘or’ in the text of Art 228(2) indicated that a choice had to be made between levying either a penalty payment or a lump sum fine. The ECJ considered that the interpretation of the word ‘or’ was that it should be read in a cumulative as opposed to a disjunctive sense, taking into account the objective of Art 228 EC, namely to induce compliance by the defendant Member State.<sup>118</sup> Third, the ECJ rejected submissions made by some Member States that the imposition of two sanctions would impose a breach the principle of *non bis in idem*, holding that the functions of the two types of sanction were different.<sup>119</sup> Specifically, the ECJ considered that the imposition of a penalty payment was prospective in nature, namely particularly focused on inducing swift compliance by the defendant. In contrast, the Court viewed the lump sum fine as a sanction more attuned to assessing the effects on public and private interests of the failure on the part of the Member State to achieve compliance with its EC obligations. The Court considered that imposition of a lump sum fine was particularly appropriate where non-compliance with a first round judgment had persisted for a considerable period of time. In this case, some 14 years separated the first and second round judgments. Fourth, the ECJ rejected the Belgian Government’s submission that principles of legal certainty and transparency required clarification by the Commission in the form of guidelines on the criteria applicable to the levying of a lump sum fine. The ECJ reiterated the point that Art 228 did not require these to be established, given that the Court is vested with independent powers of adjudicating whether or not sanctions should be imposed, and their levels in any given case.<sup>120</sup> Finally, the Court dismissed arguments made by the French Government that the imposition of a lump sum fine in this case would breach the principle of equality of treatment of Member States, notwithstanding that in the previous Art 228(2) cases neither Greece nor Spain had been subject to lump sum fines. The Court ruled that each case would be determined in accordance with its particular merits, and no precedent could be implied from the absence of lump sum fines being imposed in *Kouroupitos (2)* or *Spanish Bathing Waters (2)*. The Court findings were supported in its views by the two Opinions issued by Advocate-General Geelhoed in the proceedings,<sup>121</sup>

What is remarkable in the ECJ’s judgment is that it fails to provide any detailed analysis as to how it arrived at the figure of €20 million for the lump sum payment. Guidelines from the Court on the application of the lump sum mechanism would have been clearly welcomed by the Commission, for the purpose of handling future cases. In addition, they would have underpinned the principles of transparency, consistency and legal certainty, which the

118 See paras 80 and 83 of judgment.

119 See paras 81–84 of judgment.

120 Para 85 of judgment.

121 Opinions of 19.4.2004 and 18.11.2004.

Court itself indicated are required to be followed by the Commission in forwarding requests for sanctions. In this context the Court did concede that such guidelines would be useful in ensuring that the Commission acts in accordance with those principles. It is difficult to see why such comments should not also apply to the decisions of the ECJ in relation to Art 228(2) EC.

#### **4.4 Summary of established legal principles in respect of Art 228(2) EC proceedings**

It is perhaps useful to conclude this particular chapter by providing a summary of the various matters of general legal principle established as at the end of 2005 by the ECJ in relation to the prosecution of Art 228(2) proceedings. The three cases that the Court had an opportunity to interpret and apply the provisions applicable to second round proceedings by the end of 2005 involving imposition of penalty payments and a lump sum have clarified a number of important legal issues. These are listed below:

##### CRITERIA ESTABLISHING LIABILITY UNDER ART 228(2) EC

- The defendant Member State is under a duty to ensure that steps are taken immediately to initiate the process of complying with a first round judgment decided under Art 226/227 EC and are completed as soon as possible: *Kouroupitos (2)*(para 82 of judgment); *Spanish Bathing Waters (2)*(para 27 of judgment).
- The Commission should ensure that the defendant Member State has had a reasonable opportunity in the circumstances prior to the elapse of the time limit set out in the RO to comply with the first round judgment. The ECJ has found that even where it is clear that compliance measures may require a substantial period of time in which to be carried out, a period of 31 months between date of first judgment and close of pre-litigation phase may be deemed to be a reasonable period to comply with that judgment: *Spanish Bathing Waters (2)* (paras 29–31 of judgment).
- Whilst it is incumbent on the defendant Member State to ensure that it complies with a first round judgment, the Commission is obliged to provide the Court with sufficient evidence that the Member State has failed to fulfil its terms: *Kouroupitos (2)* (for example, para 73 of judgment); *French Fishing Controls (2)* (for example, para 56 of judgment).
- It is no defence for a Member State to plead that partial compliance has been achieved. Incomplete fulfilment of the terms of the first round judgment as at the end of the time limit of responses to the RO renders the defendant guilty of infringing Art 228(2): *Kouroupitos*



(2) (para 75 of judgment); *French Fishing Controls* (2) (para 30 of judgment).

- The question of liability is unaffected after the expiry of the deadline of the (final) RO, even if the defendant manages to effect compliance with the first round judgment prior to delivery of the second round judgment: *Spanish Bathing Waters* (2) (paras 28–29 of judgment).

#### DETERMINATION OF INDIVIDUAL FINES

- The Commission's published guidance on calculation of financial penalties under Art 228(2) has essentially been approved by the ECJ and is used as a basic framework in practice by the Court. The ECJ considers that this published framework complies with basic procedural principles of transparency, foreseeability, legal certainty and proportionality. However, Commission suggestions on fines in any given case are not binding on the Court, but instead are useful reference points: *Kouroupitos* (2) (paras 88–89 of judgment); *Spanish Bathing Waters* (2) (para 41 of judgment) and *French Fishing Controls* (2) (para 103 of judgment).
- Consequently, the basic criteria to be taken into account in determining the level of the fine are in principle the duration of the infringement, its degree of seriousness and ability of defendant to pay: *Kouroupitos* (2) (para 92 of judgment); *Spanish Bathing Waters* (2) (para 52 of judgment) and *French Fishing Controls* (2) (para 104 of judgment).
- The Commission is to assess the details of its proposed financial penalty in the light of circumstances prevailing as at the close of the pre-litigation phase (that is, by the end of the time limit provided for responses to its RO): *Spanish Bathing Waters* (2) (para 29 of judgment).
- Penalty payments are to run from the date of delivery of the second round judgment. Specifically, a Member State will be liable to pay a periodic penalty if it fails to ensure compliance with the terms of the first round judgment after the delivery of the second ECJ judgment:<sup>122</sup> *Kouroupitos* (2) (para 99 of judgment); *Spanish Bathing Waters* (2) (see para 51 of judgment) and *French Fishing Controls* (2) (para 113 of judgment).
- A penalty payment's principal aim is that the defendant should remedy the breach of obligations as soon as possible (that is, its

122 By way of distinction, the level of penalty takes into account the factor of duration of non-compliance since the delivery of the first ECJ judgment.

purpose is essentially prospective, as opposed to punishing past conduct): *Kouroupitos* (2) (para 90 of judgment).

- The ECJ has power to determine which financial sanctions are to be imposed and the levels of payments to be made, independent of the Commission which may make only non-binding suggestions in this regard: *French Fishing Controls* (2) (para 103 of judgment).
- The ECJ may impose one or both types of sanction (penalty payment and lump sum fine) in a given case. Both sanctions may be applied in particular where the breach of EC obligations is long-standing and is inclined to persist: *French Fishing Controls* (2) (para 82 of judgment).
- Penalty payments must be set so as to be appropriate to the circumstances and in proportion to the breach of obligations and ability of defendant to pay: *Kouroupitos* (2) (para 90 of judgment); *Spanish Bathing Waters* (2) (para 49 of judgment) and *French Fishing Controls* (2) (para 103 of judgment).
- Penalty payments must not be imposed in respect of matters that have been shown to have been rendered into a state of conformity with the terms of the first round judgment before the second round judgment has been delivered. The nature of a penalty payment imposed must be sensitive enough to accommodate and reflect the value of any progress made by the defendant towards conforming with the terms of the first ECJ judgment: *Spanish Bathing Waters* (2) (paras 49–50 of judgment).
- As a general principle, penalty payment calculations should endeavour take into account the relative length of time that it may be expected to take for the Member State in practice to comply with the first round judgment, bearing in mind the relative degree of technical difficulty involved in terms of implementing the relevant EC environmental legislation in question: *Spanish Bathing Waters* (2) (para 53 of judgment).

As may be seen from the above analysis, the relatively little case law that there has so far been from the ECJ on Art 228(2) EC has already managed to clarify several key legal points concerning the application of that procedure. However, as one might expect, a number of important legal issues remain as yet unanswered. One outstanding issue of particular note concerns the procedure for determining when payments should finally cease. The text in Art 228(2) is silent as to how this matter should be addressed. For instance, no specific arbitration/appeal procedure is provided in the event that the Commission and defendant clash over whether the necessary measures have been taken to comply with the first round ruling of the ECJ after a penalty has been imposed. Logically, it should be the Court to decide this, given that

it alone has formal powers to impose a fine. It might well be the case that the Court would consider that it has either implied or inherent jurisdiction to decide to hear pleadings in such an instance, as a means of upholding basic procedural rights of litigants to enjoy a fair hearing and be able to defend their legal interests.<sup>123</sup> In the wake of *Kouroupitos (2)*, in mid-2001 the Commission determined that Greece had taken sufficient measures in order to comply with the first round judgment and decided that it would no longer require payments to be made to it. Under the terms of the Court's second ruling, the penalty payments were to be paid to the Commission, into the EU's own resources budget.<sup>124</sup> One might wonder whether the Commission should not first have clarified whether it had the authority unilaterally (that is, without formal approval from the ECJ) to decide that payments into the EU's budget should cease. For the Commission was instructed to effectively act as the 'trustee' of the monies paid to it by the Greek Government, not as ultimate beneficiary. This issue was all the more important, given the fact that within the Commission itself the decision to suspend the requirement to make payments was highly controversial from a legal perspective. This aspect of the case will be discussed in greater detail in the Chapter 5, which considers the various shortcomings of the current law enforcement framework of Arts 226 and 228(2) EC.

In his Opinion in *Spanish Bathing Waters (2)*, Advocate-General Mischo made some interesting comments on this particular issue which were not taken up by the ECJ in its judgment. He opined that requiring the parties to apply to the Court for adjustments to its financial penalty decisions in a straightforward non-transposition case would be an unreasonably formalistic requirement; the Commission should be allowed to determine cessation of the need to pay in the event of appropriate transposition measures being forthcoming. However, in respect cases involving bad application of EC law, such as *Kouroupitos (2)* and *Spanish Bathing Waters (2)*, he appeared to question whether the Commission would have the legal authority without prior approval from the Court to adjust penalty payment in order to reflect steps taken to ensure compliance with a first round judgment.<sup>125</sup> Further case law from the ECJ is required to provide clarity on the proper procedures that should be taken in order to effect an amendment to a penalty payment decision of the Court.

123 Consider e.g. Case C-70/88, where the ECJ accepted that the European Parliament had an implicit right of standing to bring an action for annulment in order to be able to protect its prerogatives, despite the relevant EC Treaty provision on judicial review at the time (ex Art 173) did not accord the Parliament with such privileged access to the Court. (The Parliament has subsequently been accorded automatic legal standing to bring annulment actions under Art 230 EC by virtue of the EC Treaty being amended).

124 See Order of the Court (item 2 of its ruling in Case C-387/97).

125 See paras 82-85 of his Opinion in Case C-278/01.

## ENFORCEMENT PROCEEDINGS BROUGHT BY THE EUROPEAN COMMISSION AGAINST MEMBER STATES (3): SOME CRITICAL REFLECTIONS

Following on from the discussion in the previous two chapters of the legal framework underpinning Arts 226 and 228 EC, this chapter reflects on the broader context and effect of these particular tools of environmental law enforcement at EC level. At a basic level, their importance for EC environmental policy should not be underestimated. As has been noted with good reason elsewhere, the credibility of policy is undermined unless there is due and effective supervision and enforcement of transposition of legally binding EC commitments entered into by the constituent Member States (Demmke, 2003, p 354; Johnson and Corcelle, 1995, p 482; Krämer, 2003, p 377).

In many respects the enforcement proceedings of Arts 226 and 228 EC remain the most important legal weapons that the Commission holds in order to assist it in its role as an EU institution charged with responsibility under Art 211 EC for ensuring that EC environmental law is applied correctly by and within the Member States. That role becomes all the more important when one considers in practice how alone the Commission stands in shouldering this responsibility (Macrory, 1992, p 348).<sup>1</sup> As Krämer points out, ‘the general interest “environment” has no vested interest defender’ (Krämer 2003, p 378). Member States’ record on compliance with EC environmental law indicates that it is unsafe to rely on their promises to fulfil their environmental obligations. It is evident that the state of political and financial resources invested in EC environmental law enforcement at national level leaves a lot to be desired. Very few, if any, Member States ensure that EC environmental directives are transposed into national law on time. In addition, the second round penalty procedure under Art 228(2) EC was introduced specifically in order to improve the poor state of compliance by

1 See also more generally Rawlings, 2000, p 28.

Member States with Art 226 EC judgments. The concept of the rule of EC law has not been an easy pill for national administrations to swallow, and the environmental sector is no exception. Moreover, it is also evident that there are relatively few powerful actors, outside of government interests, in civil society which are prepared and/or able to shoulder the responsibility of EC environmental law enforcement. The mainstream within the business sector has little if any vested economic interest in ensuring that environmental norms are upheld. In contrast, large elements within this sector have been and are established crucial players in terms of assisting in the enforcement of the laws pertaining to the single market of the EU, through such methods as taking civil action before national courts as well as reporting of instances of violations of EC law to the Commission. This is not surprising when one considers that the enforcement of single market law is a means of enhancing opportunities to access the Union marketplace and therefore profit opportunity for several businesses, particularly those with an international presence. This leaves ordinary citizens and non-governmental environmental organisations (NGEOs), the latter which do constitute particularly important actors of civil society engaged in environmental law enforcement. However, there are several well-known significant legal, financial and technical challenges facing citizens and environmental NGOs interested in pursuing (EC) environmental law enforcement. These range from difficulties in being able to secure the legal right to act on behalf of the environment in order to take action against polluters in any given case (legal standing), being able or entitled to secure evidence of a principal cause of illicit pollution (causation) to having the financial resources to take legal action (legal costs burden). The ability of the private individual and associations to undertake EC environmental law enforcement work will be considered in more detail in Part Two of the book. In light of the above, there is little doubt that Arts 226 and 228 EC will continue to retain pre-eminent roles in terms of environmental law enforcement, not least taking into account the diffuse nature of relevant interests involved in upholding environmental policy and significant practical hurdles involved in mounting legal action to enforce environmental protection standards.

On the other hand, it is also widely understood and recognised from Commission and commentators alike, that Art 226/228 EC legal proceedings suffer from a number of significant problems and limitations, many of which are not easily soluble. There are several issues concerning the current structure of infringement proceedings which constitute serious checks on the capability of the Commission to carry out its task to ensure that EC environmental law is upheld within the Union. The problems range from the technical inadequacies and shortcomings of the legal machinery itself to more profound issues concerning the inherent limitations posed for a centralised model of law enforcement. This chapter seeks to identify these aspects, with a view to discussing possible ways and means of improving the current

position and, in particular, how the Commission itself has sought to address some of the problems involved.

## **5.1 Investigation and detection of infringements**

A significant area of weakness associated with infringement proceedings brought under Art 226 EC is the pre-judicial process, namely the initial period of investigation carried out by the Commission. In a number of important respects the Commission is hampered from the outset in certain types of cases in being able to ascertain whether or not a violation of law has occurred, specifically by not having suitable powers or resources to verify complaints or launch own-initiative enquiries. These are the so-called 'bad application' cases, where the Commission suspects that EC environmental law has failed to be applied properly on the ground in a particular Member State. For cases which involve assessing whether a Member State has transposed its environmental obligations into national law as required by an EC environmental legislative instruments (non-communication and non-conformity casework), this particular problem does not arise, as legal analysis of these cases is entirely based on Commission scrutiny of official documents (ie. national legislation).

### ***5.1.1 Investigatory and inspection tools***

Article 226 EC does not provide the Commission with any powers to investigate cases where a Member State is alleged to have failed to ensure that EC environmental law is applied in practice (bad application cases). The allegation could embrace a situation where a Member State authority is suspected of having infringed an environmental norm itself, or tolerated an infringement on its territory by a third party. In either case, the Commission is not vested with any legal powers under Art 226 to be able to require relevant sites to be subject to mandatory inspection by its officials or those of the relevant environmental authorities within the Member State concerned. As a result, the Commission has been virtually dependent on outsiders for the delivery of information and evidence for each bad application case, whether from the Member State authorities or from a complainant.

In the vast majority of cases, EC environmental legislation does not incorporate provisions that specifically address the subject of EC level inspection.<sup>2</sup> Article 10 EC, the treaty provision imposing a general duty of co-operation by Member States in connection with the activities of the EC, is too general in nature to constitute any firm legal basis for requiring Member States to subject themselves to supranational investigations of suspected

<sup>2</sup> One exception is the Ozone Regulation 2037/00, as noted by Jans, 2000, p 160.

violations of law or to carry out systematic inspections of installations and sites. Accordingly, there is no clear, effective legal or administrative structure at EC level to enable the Commission to be in a position to make systematic checks on Member States through the mechanism of investigations (see Wägenbaur, 1990, p 462).

The Commission has very occasionally dispatched officials and/or contracted scientific investigation teams to carry out site inspections in the context of Art 226 casework. However, it should be noted that this is possible only where the defendant Member State has agreed in advance or is in a position to be able to accept Commission scrutiny of affected sites. If the Member State and/or site owner refuses to submit to an inspection, the Commission may not carry out on-site investigation. In practice, such investigations are rare and in any event lack the element of surprise. On each occasion a suspected defendant is forewarned of an investigation request.

Even where in the rare event the Commission decides to send out an environmental inspection team, it is not that straightforward internally within the Commission to find the necessary funds for the investigation (see Grohs, 2004, p 30). For instance, in the aftermath of the *Kouroupitos* (2) litigation (Case C-387/97),<sup>3</sup> I recall during my period as an administrator dealing with legal issues in the DG Environment unit responsible for waste management<sup>4</sup> there being a situation of uncertainty and financial wrangle in mid-2001 as to which directorate within DG Environment would actually be responsible for funding the investigation of the waste sites in Chania, Crete. An inspection was considered necessary by the technical unit dealing with waste management issues to verify whether or not the Greek authorities had taken sufficient measures to implement the ECJ's second round judgment. Given the lack of a legal framework envisaging Commission environmental inspections, it was in any event difficult to access EU funding for such an inspection as there was, and still is, no official EU budgetary line for such work. Accordingly, whilst it may be the case that Member State refusals to accede to an EC-level environmental inspection are rare (Jans, 2000, p 169), this matters little given the relative paucity of genuine powers and resources at the disposal of the Commission to launch such investigations in appropriate cases.

The lack of investigatory powers afforded to the Commission reflects a long-standing scepticism and resistance by Member States towards contemplating any independent EC environmental inspectorate for the purposes of assisting in EC environmental law enforcement. The matter of environmental inspection in general is considered predominantly by Member States to be a

3 The case is discussed at length in Chapter 4.

4 At the material time, Unit A2 Sustainable Resources, Consumption and Waste (now Unit G4 Sustainable Production and Consumption).

domain exclusively reserved to the Member States; any attempts to introduce EC level initiatives has been resisted resisted as unwarranted incursions into matters perceived to be sovereign internal issues. For instance, they have steadfastly resisted attempts by the Commission to develop a supranational and independent dimension to inspections of installations (Demmke, 2001, p 29; Grohs, 2004, p 38). This has been rightly criticised as an emotionalisation of the sovereignty and subsidiarity principles, not least given that several other sectors of EC policy envisage EC-level inspectors, including in the areas of competition, veterinary health, fisheries, customs, and regional policy (Krämer, 2003, p 381).

The absence of investigatory powers afforded to the Commission in enforcement work raises the prospect of the Commission having in practice to be substantially, if indeed not overly, reliant on the co-operation of Member State administrations for supplying information on suspected violations and the state of environmental legislative implementation (see for example, Demmke, 2001, p 5). This raises a potential conflict of interest, which may materialise where national/regional/local authorities are reluctant to carry out inspections and/or enforcement activities on account of non-environmental reasons or pressures (see Winter, 1996, p 711 and Krämer, 1993, p 395). For instance, the *Kouroupitos* litigation<sup>5</sup> was protracted and made particularly difficult, not least because of the unreliability of information supplied by the local administration on the subject of compliance with EC waste management legislation. The incorporation of effective investigatory powers for the Commission has in the past attracted some degree of support from a number of quarters (House of Lords EC Select Committee Report 1991; Macrory, 1992 and Winter, 1996).

It has also been mooted in the not so distant past that the European Environment Agency (EEA)<sup>6</sup> might expand its remit to be able to engage as an independent environmental inspectorate (Wägenbaur, 1990, p 472; House of Lords EC Select Committee Reports 1991 and 1997). Currently, its core function is to provide information concerning the state of the environment, and this is based heavily on the supply of environmental data it receives from national authorities. Its original legal framework provided for a review to be conducted within two years of its inception as to whether it should be granted a role in the monitoring of EC environmental law. Notwithstanding initial support from the European Parliament in favour of developing a monitoring role in the early 1990s, both the Commission and Council of Ministers have not been persuaded that a change in the EEA's functions is warranted. The Commission and Council have decided to opt for a more informal process of encouraging better inspection standards at

5 Case C-387/97, discussed in Chapter 4.

6 Regulation 1210/90 (OJ 1990 L120/1), as amended.



national level,<sup>7</sup> the Commission being reluctant to promote the idea of an EC level environmental auditing body.<sup>8</sup> Currently, then, all inspection systems designed to follow up issues of compliance with EC environmental legislation are vested with Member States. The subject of environmental inspections at national level is considered in more detail in Chapter 11.

Member States are also vested with exclusive responsibility for reporting on the state of implementation of EC environmental legislation within their respective territories. Specifically, under the auspices of Directive 91/692, Member State authorities have been obliged as a standard requirement to provide the Commission with basic information via questionnaires on the implementation of EC environmental legislation within their respective territories. It is apparent that this system of reporting has had a number of drawbacks. One obvious disadvantage is the in-built conflict of interest set up by this type of scheme, where Member States are clearly going to be reluctant to spell out implementation shortcomings in full knowledge that this will attract potential litigation (Van den Bossche, 1996, p 388). Implementation reports, in practice, have also taken a considerable time to be completed by a number of Member States, which has hampered the Commission in being able to draw up sectoral reports on an EU-wide basis (Krämer, 2003, p 380). The questionnaires are also limited in the sense that they do not necessarily elicit all information pertinent to implementation problems. For instance, in respect of EC waste management legislation, questionnaires are designed principally to derive only the most basic information from the Member States on how they have put in place requisite infrastructure in order to implement the legislation (such as registration systems and waste plans). Important though that is, they do not require Member States to report on their experience in implementing environmental protection standards *vis à vis* the wider community (for example, steps taken to tackle illicit waste dumping scenarios). It is rare—if at all—that EC environmental legislation requires Member States to report on the degree of effectiveness of the implementing measures they have taken (see Demmke, 2003, p 334).

### 5.1.2 *Resources issues*

A long-standing problem facing the Commission has been the question of a lack of internal resources to deal with the number of environmental cases under Arts 226/228 (Macrory, 1992, p 363). In terms of personnel charged with the principal responsibility of following up complaints, own-initiative enquiries into suspected violations and preparing case dossiers (including letters of formal notice, LFNs, and reasoned opinions, ROs), the Legal Unit

7 Recommendation 2001/331 (OJ 2001 L118/41).

8 COM(1996)500, para 9.

dealing with infringements within the Commission's DG Environment has barely had more than one member of staff per Member State dedicated to deal with infractions. The latest reported figures indicate 16 full-time desk officers were employed as at 2004 for the EU-15 (excluding the 10 countries which acceded to the EU on 1 May 2004) (Grohs, 2004, p 33).<sup>9</sup> Matters appear to have improved in the sense that the Legal Unit does not appear now to need to rely on national experts being seconded to them on a temporary basis. However, this does not detract from the fact that the Commission is not adequately equipped in terms of personnel to take on the number of cases involved. Figures from the Commission's annual reports on monitoring the implementation of EC environmental law show that the environmental sector accounts for, on average, the largest proportion of Art 226 casework. Specifically, between 1999 and 2003 the proportion of environmental cases under consideration (in motion) has averaged 35 per cent of the total number of Art 226 cases actively investigated by the Commission. Over the same period, the proportion of infringement actions concerning EC environmental legislation opened annually by the Commission has averaged around a quarter of the total number of first round actions brought by the institution. In its Sixth Annual Survey on the Implementation and Monitoring of EC Environmental Law,<sup>10</sup> the Commission reported that by the end of 2004 the environmental sector accounted for the largest number of open investigations of alleged EC law infringements, namely 1,200 cases, which is about 27 per cent of all Commission Art 226 casework. The Legal Unit in DG Environment has also had to deal with on average the largest proportion of complaints about Member State infringements, averaging 40 per cent between 1998 and 2003 at about 500 per year. In 2004, this figure dropped to 336, but this still accounts for almost a third of all infringement complaints filed with the Commission services (31.1 per cent).<sup>11</sup> Tables 5.1–5.7 at the end of this chapter give further information on infringement case numbers. Against this backdrop, it is not difficult to see that the question of allowing for on-site investigations becomes particularly challenging from a Commission perspective.

### ***5.1.3 Complainants as sources of information on environmental law enforcement***

It has been evident for a number of years now that complaints to the Commission have become a crucially important source of information on EC law implementation matters. It has been noted generally that complainants

<sup>9</sup> Hattan records that 18 lawyers were employed in 2002: Hattan, 2003, p 285.

<sup>10</sup> SEC(2005)1055, 17.8.2005.

<sup>11</sup> COM(2005)570 Commission's XXnd Report on monitoring the application of Community Law (2004).

are of significant value to the Commission in assisting it in carrying out its supervisory functions under Arts 226/228 EC, particularly in a field such as environmental policy where the Commission has not been vested with any specific monitoring powers (Craig and De Búrca, 2003, p 398). The environment sector is no exception, where the complaints system presents itself as an opportunity for ordinary citizens and particularly environmental and other NGOs to seek to trigger legal action without having to incur legal costs that they would normally have to shoulder if they decided to take civil action before the national courts. As noted earlier, annual reports on monitoring EC environmental law published by the Commission<sup>12</sup> have indicated that over recent years (1998–2003) environmental complaints have constituted around 40 per cent of all complaints submitted to it from the public concerning non-compliance with EC law, consistently the highest number of complaints received for any policy sector. The growth of the number of complaints has been significant over time, numbering from fewer than 10 per year in the early 1980s to around 500 by the end of that decade (see Krämer, 2002, p 177; Wägenbaur, 1990, p 462). In its most recent annual report on the implementation of EC environmental law (Sixth Annual Survey for the year 2004 (SEC(2005)1055) see Tables 5.1–5.7), though, the Commission has noted a drop in the number of complaints from around 500 (2000–2003) to 336 (2004). However, it is too premature, to make conclusions as to whether this represents any significant trend in terms of a change in direction on the part of the Member States towards better compliance with EC environmental law.<sup>13</sup> Indeed, with the recent accession of 10 new Member States to the EU and the prospective entry of other states to the Union, it is likely that in the medium term the number of environmental complaints will rise.

Analysis of recent Commission reports suggests that information from complainants has been useful and has led to the triggering of a substantial proportion of environmental infringement actions. For the EU25, the Commission has reported that complaints account for some 38 per cent of the total infringements detected in 2004.<sup>14</sup> This figure undoubtedly underestimates their significance in the prosecution of bad application cases. Notwithstanding the undoubted fundamental importance of complainants as a source of information for the Commission services, a note of caution needs to be sounded. It is perhaps too easy to run away with a complacent view

12 These include annual Commission Reports on the monitoring of the application of Community Law as well as the Annual Commission Surveys on the implementation and enforcement of Community environmental law. A list of the most recent reports is provided at the end of this chapter.

13 Rather optimistically, the Commission appears to take a different opinion (see Sixth Survey for the year 2004, p.4: SEC(2005)1055).

14 COM(2005)570, p4.

that complainants may serve effectively as watchdogs on Member State implementation. Their involvement depends on a number of factors. In particular, the degree of legal, technical and/or financial capability of the potential complainant may often be crucially significant for it to be able to garner information and evidence. In addition, the parameters of environmental interest of a complainant will serve to determine the range of legislation covered. For instance, Grohs notes that few complaints affecting the chemicals, noise and air quality sectors are filed. She suggests that this may be because the legislation concerning the first two sectors is focused on delivering product norms and less at involving the wider public, whilst EC air quality legislation provides for few enforceable standards (Grohs, 2004, p 31).<sup>15</sup> She also notes that far more complaints affecting nature conservation issues (Habitats, Wild Birds and Environmental Impact Assessment Directives) are filed, which relate to standards the public can readily understand. This may also have something to do with a number of well-known NGEs tending to specialise in wildlife protection and conservation issues.

## **5.2 Limitations of legal structures underpinning Arts 226/228 EC**

The procedures envisaged for the prosecution of infringement actions, and especially those concerning EC environmental law, suffer from a number of serious shortcomings. The legal framework governing those procedures (principally Art 226 EC) has not changed since the inception of the European Union in 1957 and it may be questioned whether this structure is suited to providing the Commission with an effective legal mechanism in order to hold Member States to account. Whilst the Commission has sought in recent years to introduce some practical changes to the handling of its environmental casework, there is relatively little that can be done until the legal structures of the infringement process, and particularly those relating to Art 226, are amended. This would require unanimous approval from the Member States which, although a difficult task, has not proved impossible in the past when they agreed to the Treaty on European Union (TEU) 1992 introducing changes to the infringement structures, by incorporating the second round penalty procedure in the form of Art 228(2) EC. The following section explores some of the of the key problem areas.

### **5.2.1 Temporal aspects**

A major drawback of both first and second round infringement actions governed by Arts 226/228 EC is the very long time it takes on average for the Commission to be able to arrive at a legally binding resolution to a particular

<sup>15</sup> See also Krämer, 2003, p 273.

case. This is a factor that offers a distinct advantage to defendant Member States who may be able effectively to play for extra time without penalty in sorting out implementation difficulties. This raises questions about the (adequacy of) deterrence value attached to the current infringement action frameworks.

### *5.2.1.1 Length of infringement proceedings*

Wherever a Member State is determined to resist the Commission's view that it has failed to implement EC environmental law correctly, the scene is set for a very long litigious battle indeed. Recent studies indicate that it may take some six years before the Commission obtains a judgment from the ECJ under Art 226 EC after issuing a letter of formal notice to a defendant Member State. Krämer has assessed the average number of months taken as follows between the following time periods: 2000–01 (59 months); 1998–99 (68 months); 1995–97 (47 months); and 1992–94 (57 months) (Krämer, 2003, p 388). That is a considerable amount of time by any standards, but especially drawn out when considered in the context of environmental litigation (Williams, 1994, p 368). Without the possibility of the Commission being able to secure effective and relatively speedy legally binding measures to ensure correction of an implementation failure on the part of Member States, the utility of environmental litigation may be severely compromised or even defunct in certain cases where time may be of the essence. As Grohs aptly points out, 'much polluted water may have flowed under the bridge' before the Commission obtains a court ruling (Grohs, 2004, p 26).

In many respects, the core problem of drawn out proceedings lies with the fact that the legal framework contained in Arts 226/228 EC is ill-suited to dealing with the challenges thrown up by environmental litigation. Their fundamental design has not been changed since their inception, which is to encourage informal and discreet resolution of disputes between the Commission and Member States out of court and out of the public's gaze, if at all possible. This reflects a perception widely held in the early years of the EU that it would be considered a considerable political and diplomatic embarrassment for a Member State to be hauled up before the ECJ. Over time, the infringement procedure has no longer been seen as a means of last resort and is a commonplace enforcement mechanism (Audretsch, 1987, p 842; Barav, 1975, p 369; Bonnie, 1998; Weatherill and Beaumont, 1999, p 214). No specially tailored infringement procedure for the environment sector has been established to substitute Art 226. The result has been to deny the Commission the possibility of taking swift legal action in order to ensure due implementation of EC environmental legislation.

Under the Art 226 procedure it is the ECJ and not the Commission which has the power to determine the issue of compliance. The Commission has no powers to issue a defendant State with any binding instruction or penalty to

correct an implementation failure. The ECJ has interpreted its powers as enabling it to issue a declaration as to whether a Member State has failed to comply with EC law. In contrast, under the auspices of the former European Coal and Steel Treaty 1951 (ECSC), the Commission was vested with powers to take binding decisions against a Member State it considered to have violated ECSC law and could initiate a process to suspend the payment of ECSC funds as means of applying pressure on a defendant to effect compliance with the law (Art 88 ECSC). A Member State retained the right to appeal through annulment proceedings in the usual way if it were ever minded to object to such a Commission decision. This particular legal procedure was never in fact used by the Commission. Such a procedure would have significant advantages if employed in an environmental infringement context, in terms of having the potential to effect a swift and binding resolution to a dispute and carrying a strong element of pressure and deterrence (see also Wägenbaur, 1990, p 473). The power to issue a decision would enable the Commission to tailor binding instructions to the defendant to take corrective action, as warranted by the particular case at hand. It would also be more suited than Art 226 to addressing implementation failures of a more short-term nature as well as dealing with cases requiring urgent action. Some commentators have expressed concern that such a procedure would not be welcome in placing the Commission in the invidious position of being accuser, judge and executioner (Dashwood and White, 1989, p 413). Such concerns are unfounded, as the defendant Member State would have the standard automatic right of appeal by way of judicial review under Art 230 EC to the ECJ, which would have the power to annul an unlawful decision. In any event, such a procedure has been applied for many years in other law enforcement contexts at EC level, such as in the field of competition law,<sup>16</sup> without such concerns being raised by Member States. However, the Member States have so far shown no willingness to alter the current structuring of Art 226 by way of EC Treaty amendment. The changes introduced by virtue of the TEU to the infringement provisions in Art 228 EC confirmed the deep-rooted view held by Member States that Art 226/228 enforcement proceedings should retain fundamentally their status as a tool for negotiating—as opposed to imposing—resolutions in respect of non-compliance disputes. The penalty envisaged in the second round procedure in Art 228 may be imposed by the ECJ only after there has been an attempt to reach a friendly settlement through a pre-litigation process.

As matters currently stand, even in a clear-cut case of non-communication of an environmental directive, the cumbersome pre-litigation process in Art 226 has to be complied with, involving a LFN, a RO and opportunities for

16 E.g. Art 86(3) EC on state monopolies.

the defendant to be able respond on each occasion.<sup>17</sup> The internal workings of the Commission ensure that in practice it is rare, if not impossible, for such a case to be fast-tracked. The hierarchical nature of the decision-making process requires that the full College of Commissioners have the responsibility to decide each formal step taken in each proceeding. Currently, decisions on environmental infringements at College level are made every six months or so which does not allow for expedition of proceedings. As a consequence, the stated intention of the Commission to try to apply a two-month period for replies to LFNs and ROs is rarely, if ever, met in practice in first round environmental cases. Moreover, the position is compounded by the fact that the parties are not subject to any legally binding deadlines for completing the pre-judicial phase under either Art 226 or Art 228 proceedings. Thus, there is the possibility for a Member State to be able to drag out proceedings by, for instance, refusing to disclose information on a suspected infringement in a timely manner, without being subject to any penalty in so doing (Ibanez 1998a, para 2.1.4.). Accordingly, there have been calls for clear procedural rules to be promulgated under the auspices of Art 284 EC as a means of eliminating this tactic (Gaffney, 1998, p 126 and Ibanez 1998a). However, no such rules have been proposed, notwithstanding that they have been enacted in other Commission law enforcement contexts, such as competition law.

The current position applicable to the environmental sector effectively tolerates a Member State being able to build in a substantial amount of extra time for attaining compliance, over and above that which is foreseen and prescribed by EC environmental legislation. For instance, if the Commission decides to take an infringement action against a Member State on account of its failure to transpose an EC environmental directive into national law, if that Member State then gets round to notifying the Commission of transposition legislation before the expiry of the deadline for responding to the reasoned opinion, then the proceedings terminate without any penalty falling on the defendant for disrespecting the original implementation deadline prescribed by the legislation.

On the other hand, the informal pre-litigation phase of the Art 226 procedure does appear to be beneficial in some respects. For a considerable number of years, several commentators have noted that the vast majority of disputes are resolved without going to court (Barav, 1975, p 383; Audretsch, 1987, p 842; Dashwood and White, 1989, p 413). Estimates have fluctuated over the years, but it appears that around 10 per cent of Art 226 disputes culminate in being referred to the ECJ.<sup>18</sup> Commission annual reports on

17 However, the 2004 European Union Constitution does envisage introducing financial sanctions for first round actions in respect of non-communication cases: Art III-362(3) EUC.

18 See e.g. COM(2002)725 Commission Communication on Better Monitoring of the Application of Community Law, p 3.

monitoring EC law indicate that a substantial number of cases are resolved at pre-judicial stage and settled out of court. Specifically, the annual rate of referrals to the ECJ has been consistently and markedly lower than the number of infringement proceedings opened. Between 2000 and 2003, for instance, the average annual rate of total court referrals was 10.4 per cent of the number of proceedings opened annually. For environment cases the position was broadly similar. Between 2000 and 2003 the average annual rate of court referrals in environmental cases was 12.2 per cent of the number of proceedings opened annually.

Some commentators may feel ready to assume from these statistics that the high number of pre-trial case closures indicates a significant degree of efficiency and that Member States view the procedure as a deterrent.<sup>19</sup> However, the picture is more complex. There is little evidence to suggest that Member States consider the infringement procedures as such to be a major deterrent, not least in the environment sector. Were that the case, one would at least expect to see fewer non-communication or non-conformity actions being launched by the Commission. However, DG Environment reports on EC environmental law implementation reveal that at the end of 2004 there were 173 non-communication and 103 non-conformity infringement cases concerning EC environmental legislation, representing 30 per cent per cent and 18 per cent respectively of the total number of open infringements in the environmental sector.<sup>20</sup> It is very clear that Member States are highly inefficient in respecting implementation deadlines prescribed in EC environmental legislation. As at the end of 2003, it appears from data provided by the Commission that at least 95 ECJ judgments in the environmental sector alone had yet to be implemented and that second round proceedings were being processed against the Member States concerned.<sup>21</sup> In addition, it is impossible to know the reasons why cases are terminated during the pre-litigation phase as these are not as a rule divulged by the Commission. The Commission is unable to provide information as to whether, for instance, it has a high rate of satisfactory out of court settlement in bad application cases.

It should be noted, though, that the 2004 European Union Constitution (EUC) envisages making some significant changes in this regard. Under the EUC, the Commission will be able to apply to the ECJ in first round proceedings for the imposition of financial penalties on Member States that fail to notify measures designed to transpose the future equivalent of an EC environmental directive.<sup>22</sup> Such a change would serve to concentrate the

19 See e.g. comments by Dashwood and White, 1989, p 413.

20 COM(2005)570, op cit.

21 COM(2004)839, XXIIst Report on the monitoring of the application of Community Law, Annex V.

22 Art III-362(3) EUC.



minds of Member States to ensure that their transposition arrangements are completed substantially closer to the requisite deadline envisaged in EC legislation than is currently the case. However, it is unclear whether these changes will come into force in the foreseeable future, given the current difficulties experienced by certain Member States with ratification of the Constitution.

Leaving aside the factor of out of court settlements, it is clear that the Commission is currently not vested with adequate tools to effect a satisfactory legal outcome to an infringement of EC environmental law in the face of intransigence on the part of a Member State. The legal structure underpinning Art 226 is such that the enforcement system is effectively heavily reliant on Member States' preparedness to adhere to the principle of the rule of law.

### 5.2.1.2 *Interim measures*

The possibility of securing interim measures in the context of Art 226 proceedings was discussed in Chapter 3. The subject is of considerable importance when dealing with bad application scenarios that require particularly urgent action. The case law of the ECJ has confirmed that it is legally possible for the Commission to secure interim measures under Art 243 EC in the context of Art 226 proceedings, subject to it being able to demonstrate to the Court that it has a *prima facie* case, that the matter is urgent and that a failure to grant relief would effect serious and irreparable damage to the legal interest sought to be protected by the Commission if the parties waited until the date of judgment (Macrory 1992, p 357; Gray, 1979). Significantly, the ECJ has rejected the need for the Commission to deposit with it a financial security when filing a request for emergency measures before the Court (Case C-195/90R), something that would otherwise be expected in a civil action where a party pleads for injunctive relief pending judgment (see Hartley, 2003, p 313). The Court waived the requirement on the grounds that the Commission does not present it with a risk of non-payment due to insolvency.

In practice the Commission has rarely sought to apply for such relief measures. In the *Leybucht* litigation<sup>23</sup> discussed in Chapter 3, according to the Court the Commission failed to meet the test of urgency, where a substantial amount of works had already been carried out on the coastal site which was a host to wild birds. The Commission was adjudged as having left it too late to apply for emergency relief to require a cessation of building activity. The case highlights the need for the Commission to have access to good sources of information and evidence at a relatively early stage in any

23 Cases C-57/89R and 57/89.

dispute which might require interim measures (such as the need to order a cessation of unlawful building works on a protected nature site). As has already been pointed out, taking into account its lack of investigatory powers and other resources, the Commission is not really in a suitable position to be able to present a plea to the Court for such type of measures. Matters are made more difficult given the fact a plea for interim measures may be made to the ECJ only in relation to an action pending before the Court. Accordingly, it appears that the pre-litigation requirements of Art 226 have to be fulfilled before the Commission may approach the ECJ for relief, a process that may take some time (see Grohs, 2004, p 26; Krämer 2003, p 392). However, as was noted in Chapter 3, the ECJ has accepted the imposition of tight deadlines in Art 226 actions for responding to LFNs and ROs, so in theory the legal hurdles do not look insuperable in an appropriate case. In addition, there does not appear to be any internal structural problems that may bar the convening of emergency inter-service meetings between the Commission's DG Environment and the Legal Service to arrange for an expedited processing of a case warranting interim relief, even though there may appear to be a lack of clarity on specific internal procedures (Williams, 1994, p 369).

### ***5.2.2 Legal sanctions***

Another major problem concerning Art 226/228 EC infringement procedures is their lack of provision for the imposition of effective sanctions. This can be traced back to the origins of the infringement procedure, which was designed at the outset to secure, if possible, a friendly settlement outcome and minimise unnecessary tension between Member States with regard to the evolving European legal integration process. The position also reflects the degree of political and diplomatic sensitivity involved with the establishment of an international court, in terms of the degree of its 'reach' into what may be perceived, in orthodox public international law terms, as being within the sovereign internal domain of a nation state. In terms of international relations, it is rare for nation states to agree to submit to the jurisdiction of an international court on a mandatory basis, as the EU Member States have agreed to do under Arts 226/228 EC. It is rarer still for an international court to be issued with powers to impose sanctions as a means of enforcing its rulings. From a broader public international legal context, EC infringement proceedings may be viewed in a relatively positive light (for example, see Audretsch, 1987, p 854; Dashwood and White, 1989, p 388). However, this does not detract from the reality that without effective sanctions, the current EC infringement procedures are overly reliant on the goodwill and co-operation of Member States to adhere to their environmental obligations.

### 5.2.2.1 *Sanctions and Art 226 EC*

The first round Art 226 procedure is a particularly weak form of litigation tool in terms of providing any inducements for Member States to comply with their EC obligations. An effective outcome depends to a great extent on the co-operation of the defendant, particularly in bad application cases. As has already been mentioned, the Commission has no power of its own motion to take decisions in environmental cases to issue binding instructions to Member States, as it does in other fields such as competition law. Neither does it have powers to impose pecuniary-type penalties, as was the case in the coal and steel sector until the lapse of the ECSC Treaty in July 2002.<sup>24</sup> Moreover, it has no power of its own motion to order interim measures, unlike in other areas of EU administrative law such as competition law.<sup>25</sup>

The judgment of the ECJ itself under Art 226 is declaratory in nature. The Court's position is that Member States are obliged as a matter of EC law to give effect to its rulings within their internal legal orders, and has refused to grant interim relief against Member States which default on implementing its judgments. In the Court's view, an interim relief measure would simply duplicate what is already required to be carried out by its Art 226 judgment (Cases 24, 97/80R). However, it is clear that by the end of the 1980s the system of declaratory judgments was having little deterrent effect, with many Member States being on the receiving end of supplementary infringement actions because of failing to implement ECJ judgments. The Court has taken the approach of avoiding issuing defendant Member States with definitive instructions as to what they should do to achieve a state of compliance (*arrêt éducatif*) and instead simply affirm whether or not the defendant has perpetrated a violation of EC law. It has been mooted that the issuing of instructions would be within its current jurisdiction (for example, Audretsch, 1987 p 842; see also Mertens de Wilmars and Verougstraete, 1970, p 404). As has been pointed out, the issuing of instructions or guidance from the Court might be particularly useful in those environmental cases where it is not self-evident from a legal perspective what the appropriate remedial action is. Winter takes the example of the *Santona Marshes* cases (Case C-355/90), where it was not clear whether the effect of the Court's ruling was that building works carried out on an area that should have been designated as a special protection area (SPA) contrary to Art 4 of the Wild Birds Directive 79/409 should be removed or allowed to stay (Winter, 1996, p 715).

24 By virtue of Art 88 ECSC.

25 See Arts 81–82 EC in conjunction with Art 8 of Regulation 1/2003 (OJ 2003 L1/1).

### 5.2.2.2 *Sanctions and Art 228(2) EC*

As has been discussed in Chapter 4, the second round penalty infringement procedure Art 228(2) EC was incorporated into the EC legal order by virtue of the TEU with a view to enhancing the record of Member State implementation of EC law and in particular the levels of compliance with ECJ judgments. Prior to that amendment, the only legal means available to the Commission to seek to induce a Member State which had failed to implement an Art 226 ruling was to launch a fresh Art 226 action. Krämer notes that whereas in 1984 there was only one reported instance involving the environmental sector where the Commission had decided to take such action, by 1991 this had risen to 21 repeat infringement actions (Krämer, 1993, pp 430–433). However, even though Art 228(2) EC has introduced a marked change in that the ECJ is now vested with power to apply pecuniary sanctions to a Member State that defaults on an Art 226 judgment, it appears that the new legal procedure has not brought significant improvements in terms of speeding up Member State compliance rates, and this also applies to the environmental sector.

In practice, Article 228(2) EC has not appeared to have significantly deterred Member States from continuing to fall short when it comes to implementing EC law, including EC environmental legislation. Notably, the new infringement procedure has not induced Member States to ensure that they meet transposition deadlines for environmental directives any quicker. For instance, in respect of the Water Framework Directive 2000/60, none of the Member States had complied with the 22 December 2003 transposition deadline, and by the beginning of 2005 infringement actions were continuing against six Member States. Overall, the environmental sector accounts for the largest proportion of ongoing Art 226 infringement cases, namely 27 per cent (1,220) as at the end of 2004 according to Commission's annual monitoring report for that year.<sup>26</sup> It appears from data provided by the Commission that, as at the end of 2003, at least 95 ECJ judgments in the environmental sector alone had yet to be implemented and that second round proceedings were being processed against the Member States concerned.<sup>27</sup>

It is not that difficult to find reasons why the effect of Art 228(2) has thus far appeared to have been relatively minimal. A prime concern is the fact that the second round procedure does not reduce the length of the infringement procedure system itself. Before a Member State is faced with the prospect of receiving any penalty, the Commission is obliged to carry out a full pre-judicial

<sup>26</sup> COM(2005)570.

<sup>27</sup> COM(2004)839, XXIst Report on the monitoring of the application of Community Law, Annex V.

negotiation process akin to Art 226 EC. This means that it may be several months after the initial judgment before a Member State may face a pecuniary fine. In respect of the three cases that had run to Art 228(2) judgment as at the end of 2005, namely *Kouroupitos (2)*, *Spanish Bathing Waters (2)* and *French Fishing Controls (2)* (Cases C-387/97, C-278/01 and C-304/02 respectively), the total amount of time taken between the initial Art 226 LFN and the Art 228(2) court fine was approximately 11, 14 and 20 years respectively! The absence of the Commission's ability to secure a quick legal outcome after a Member State has defaulted on a court ruling has been sharply criticised (Macrory and Purdy, 1997, p. 43; Rawlings, 2000, p 23; Craig and De Búrca, 2003, p 401). Controversially, it appears that the Commission has also been vested with discretion as to whether to prosecute a second round action given that the pre-judicial phase procedure is worded identically to that contained in Art 226 EC, although this has been questioned by some (Bonnie, 1998, pp 537 *et seq.*; Theodossiou, 2002, pp 25 *et seq.*).

The nature of the sanctions available under the second round procedure is not really appropriately geared or tailored to securing implementation of EC environmental legislation. The pecuniary sanctions were introduced principally as a means of fining Member States in terms of their disrespect for the ECJ, not the EC norms in question (Bonnie, 1998, pp 537 *et seq.*). It is to a large degree a contempt of court procedure as opposed to a legislative enforcement mechanism, although as was seen in the Chapter 4, the Commission has sought to infuse the calculation methods applicable to Art 228 EC penalties with criteria that relate also to the nature and severity of the original legislative infringement.<sup>28</sup> A pecuniary penalty may be applicable only from when a Member State has been provided with a reasonable opportunity to implement the Art 226 EC court ruling. The second round procedure might have had more effect if it had employed the principle of being able to sanction a Member State as from the date the Commission originally issued an LFN to it under the initial Art 226 procedure. Such an approach has been applied for many years in the EC competition law sector. A fine which is imposed on a company for anti-competitive behaviour for breaching Arts 81/82 EC may run from the date the defendant is put on notice by the Commission, by way of a statement of objections, that it considers there has been a breach of Arts 81/82 EC and not just from the later date when an official decision is issued against the defendant after the hearing stage.<sup>29</sup> Accordingly, the pecuniary sanction system contained in Art 228

28 Namely, the 1996 Commission Memorandum on applying Article 228 of the EC Treaty (96/C 242/07) and the 1997 Commission Communication on the method of calculating the penalty payments provided for, pursuant to Art 228 of the EC Treaty (97/C 63/02), both of which have been endorsed as working tools for calculating penalty requests by the ECJ.

29 See Regulations 1/2003 (OJ 2003 L1/1) and 773/2004 (OJ 2004 L123/18).

EC is not designed to punish past illicit conduct (Theodossiou, 2002, pp 25 *et seq.*). Several commentators have criticised the sanctioning mechanism under Art 228(2) as being ill-suited to addressing the implementation failings of the defendant Member State. In an environmental context, it appears rather an unsatisfactory approach to try to quantify environmental damage in terms of monetary value; a more effective sanction would be to impose an obligation to remediate the damage caused (Winter, 1996, p 716; more generally Rawlings, 2000, p 23 and Theodossiou, 2002, pp 25 *et seq.*). The infringement procedure does not provide for the recovery or suspension of any EC environmental fund payments to the defendant Member State concerned, a sanction option that might well be more tailored and effective in securing compliance from the defendant (see for example, Winter, 1996, p 716; Krämer, 2003, p 391). Moreover, unless the ECJ actually imposes a sufficiently high periodic penalty, there is the danger that the pecuniary sanction system may fall into the trap of becoming a *de facto* tax on pollution (see comments Tesauro, 1992, p 489). It has been queried by some whether the levels of pecuniary sanctions are adequate to serve as an effective deterrent (Demmke, 2003, p 354).

Finally, there is uncertainty as to whether and how the ECJ may enforce collection of pecuniary sanctions under Art 228(2) in the face of an intransigent Member State. Thus far, there does not appear to be any indication that a Member State is likely to decide to refuse to pay any or part of fines imposed on it by the ECJ. However, this is not out of the question in the future and, in that event, it appears unlikely that the ECJ has jurisdiction to force the issue by ordering the withholding of EU funds until payment of fines are fulfilled (see Tesauro, 1992, p 488). Ultimately due payment of fines, as is the case with effecting due compliance with EC law, is a matter principally for Member States and depends on their preparedness to uphold the rule of law.

The only three Art 228 EC judgments to have been handed down by the ECJ at the time of writing have concerned environmental legislation.<sup>30</sup> These three judgments undoubtedly have had some psychological impact in terms of promoting Member States' awareness of the ultimate powers of the ECJ to impose pecuniary sanctions. It appears from presence of a low rate of judgments (only three after a decade of Art 228(2) being in force), that Member States will probably eventually wish to settle a dispute out of court to avoid a fine (Krämer, 2002b, p 181). Commission reports on the monitoring of EC law have noted that the vast majority of second round infringement proceedings are settled after the point where the Commission has referred a case to the ECJ and determined the level of penalty it wishes to request from the Court. As at the end of 2003, 76 per cent of cases for which a penalty

30 Cases C-387/97, C-278/01 and C-304/02.

request to the ECJ had been made had been settled before judgment (22 out of 29 cases). However, it also appears that settlement is reached relatively late, namely only when a case is pending before the ECJ itself and the financial penalty request has been crystallized. This is borne out by the fact noted earlier that there are a large number of unimplemented Art 226 judgments, including in the environmental sector where as at the end of 2003 in excess of 90 cases were being processed under the Art 228(2) procedure. It is therefore apparent that Art 228(2) has had a minimal deterrent effect as far as implementation of EC environmental law is concerned. If, as the evidence suggests, Member States' minds are seriously concentrated on correcting implementation failures only during the latter part of second round proceedings, this raises questions as to whether the first round infringement proceeding is perceived as little more than a trivial inconvenience or banal exercise by defendants (see for example, Tesauro, 1992, p 489).

### **5.3 The European Commission and conflicts of interest**

It is the Commission which is vested with the exclusive responsibility of deciding whether or not to prosecute an infringement case under Arts 226/228(2) EC. As confirmed by the ECJ on a number of occasions, the Commission has unfettered discretion in deciding whether or not to pursue an infringement case. A decision by the Commission not to prosecute a case is immune from legal challenge by a third party such as a private individual interested in seeing infringement proceedings commenced, either through annulment proceedings under Art 230 EC or by way of an action for failure to act under Art 232 EC (Cases 48/65 and 247/87). As a result, the Commission's responsibility and power as principal monitor of EC environmental law under Art 211 EC is all the more enhanced, this on top of the wide range of difficulties and challenges (legal, technical and financial) that other stakeholders already face in terms of seeking to enforce environmental obligations.

At a basic level, one can understand the reasons of the drafters of the EC Treaty in having accepted that the Commission should be vested with exclusive power to initiate enforcement proceedings under Art 226. The Commission was seen to be in a suitable position to act as an independent and impartial arbiter between Member States, an actor that would be placed at arm's length to supervise the implementation of the process of European legal integration, as promised to be undertaken by the constituent Member States. The Commission's tasks, as set out in Art 211 EC, underpin its supranational status. It is charged effectively with defending a collective interest ultimately expressed in the EU's founding treaties and derivative legislation, as opposed to representing any minority viewpoint, such as a particular national interest on behalf of which an individual Member States would normally be expected to represent and negotiate.

However, the decision to vest the Commission with the exclusive responsibility and role of seeking to ensure that Member States apply EC law has not been unproblematic. It is not so clear in practice whether the elements of independence and impartiality are adequately safeguarded. A major cause of concern is the fact that the Commission is charged with the responsibility of not only enforcing policy but also being responsible for its development as well. Since the EU's inception in 1957, the Commission has retained a principal role in the legislative decision-making process of the Union. For the vast majority of policy matters falling within the purview of the EU, notably those based within the first pillar<sup>31</sup> of the Union's constitutional structure, the Commission is vested with a monopoly of proposing legislative initiatives. The European Parliament has only a weak proposal function in this regard, virtually unused in practice to date, in being able only to request the Commission to present legislative proposals (Art 192 EC). The Commission also has significant powers at later stages during the EU legislative process in respect of first pillar measures. Specifically, in the context of co-decision legislative procedure (as set out in Art 251 EC), the standard first pillar legislative procedure applicable also to the promulgation of EC environmental legislation, the Commission has the power to force the Council of Ministers to vote on a unanimous basis in respect of any amendments tabled by the European Parliament with which it disagrees.

The multiplicity of tasks of the Commission, which cross over into executive, quasi-judicial and legislative territories, raises questions as to whether the institution is in a suitable position to be able to shoulder its enforcement responsibilities under Arts 226/228 in a sufficiently impartial manner. The lack of a clear demarcation between enforcement and policy positions of the Commission has raised concerns of a lack of accountability in infringement procedure decision making (Williams, 1994, p 352; Williams, 2002, p 271; Hattan, 2003, p 275). The conflation of policy innovation and law enforcement roles potentially leads the Commission into situations where decisions to launch or terminate infringement proceedings may become particularly vulnerable to the influence of political as opposed to enforcement motivations.

### ***5.3.1 College of Commissioners***

As a matter of principle, decisions over infringement matters must be channelled through and approved at the collegiate level of the Commission. Thus, any decision to commence infringement proceedings must receive the approval of the College of Commissioners, as is the case for decisions over subsequent legal steps in the proceedings (LFN, RO and ECJ referral). Given the plurality of roles assumed by the Commission, the infringement procedure may be

31 For a brief explanation of the three pillar structure of the EU's 'constitution', see Chapter 1.



characterised as being policy-sensitive as opposed to a purely technocratic process; formal decisions are not taken by a body exclusively charged with law enforcement responsibilities. Although on paper, decisions made by the College are to be taken on the basis of an absolute majority of the members (Art 219 EC), it is understood that in practice a consensual approach is adopted. Access to information on College decisions regarding infringements is not made public, so no hard evidence has ever been gleaned as to the particular dynamics—political or otherwise—that go to underpin a decision as to whether an action should commenced or taken to the next step.<sup>32</sup>

However, it has been suggested that the system has been vulnerable to individual Commissioners blocking, on political grounds, proposals to launch infringements, although no tangible proof has been brought to prove this has been the case (Macrory and Purdy, 1997, p 35). Alleged problems are said to have arisen where, for instance, an infringement action would interfere with the political portfolio or remit of a particular or a number of Commissioners. It has been suggested, for instance, that industrial policy considerations acted as a decisive influence to approve a 1994 merger in the European steel tubing sector, contrary to advice received from the Commission's competition law enforcement services (Merger Task Force).<sup>33</sup> Moreover, Williams, for instance, cites the example of a report in the *Independent* newspaper in August 1992 alleging that the then Commissioner for the Internal Market, Martin Bangemann, had provided assurances to the UK Home Secretary that no action would be taken in respect of the UK's policy on border controls at the time carried out with respect to EEA citizens, and that the then UK Secretary of State, John MacGregor had also secured a deal for the Commission to refrain from taking legal action under the auspices of the EIA Directive in the M3 motorway development of Twyford Down, although being unable secure an agreement over Oxleas Wood (Williams, 1994, p 354). She also cites another report in the *Independent* newspaper of 30 June 1992 which reported having been briefed that the former Commission President Delors was responsible for the early retirement of the Environment Commissioner, at the time Mr Ripa di Meana, on account of the latter's willingness to press for a number of environmental infringement actions. The report indicated that the move was taken in order to facilitate ratification of the Treaty on European Union 1992 (TEU). Concerns over the Commission's decision-making process at College level are set to continue for as long as it is charged with carrying out both policy development and law enforcement functions as well as retaining a policy of confidentiality in respect of its decisions over law enforcement.

32 See Chapter 9 for discussion on the EU's access to rules with respect to information held by EU institutions.

33 Mannesmann/Vallourec/Ilva Case IV/M.315 OJ 1994 L102/15.

To some extent concerns could be addressed if the Commission were to apply a distinctive decision-making procedure to law enforcement matters. In particular, one notable improvement could be the introduction of a process unique to law enforcement decisions which would guarantee that only purely legal reasons should be able to be raised for discussion at College level if a proposal for an infringement action were doubted by any Commissioner. Such concerns would logically have to be raised prior to a meeting of the College through the Commission Presidency, which is responsible for managing the Commission's Legal Service.

### 5.3.2 *The level of Directorate-General*

It is important to realise that within the Commission the vast majority of administrative work relating to infringement actions is taken below collegiate level. In practice, the vast majority of infringement cases are effectively 'rubber stamped' at College level where there is no dispute of any substance between Commissioners over a case or its implications, and no oral discussion takes place. Instead, proposals over infringement decisions are channelled through a written procedure up to the College from the level of Directorate-General within the Commission. Commissioners do not usually get to see the details of cases at College meetings, but are usually provided access to a brief résumé of the dispute. As was discussed in Chapter 3, this practice has been challenged unsuccessfully in the recent past before the ECJ. In a number of cases in the 1990s, Germany sought in part to defend itself by claiming that the Commission, as formally composed of the College of Commissioners, had acted *ultra vires* in having failed to take genuinely informed decisions relating to the processing of the action against it (see for example, Case C-198/97). Controversially, the Court held that the practice of making information on individual cases available to Commissioners, if they so wished to access it, was an adequate basis for the College to be able to proceed to making formal decisions over the Commission's next steps on the case(s) in question.<sup>34</sup>

Each particular Directorate-General, which has responsibility for a particular EU policy field within the Commission, is usually vested with its own legal unit and/or teams dedicated to preparing infringement dossiers. The Legal Unit within DG Environment deals with infringement cases,<sup>35</sup> and has the task of organising the day to day case management of infringement proceedings. It is the Legal Unit, in liaison with the Commission's Legal Service, which in principle determines whether or not a proposal should go before the College that infringement proceedings should be commenced.

<sup>34</sup> See critical comments from Weatherill and Beaumont, 1999, p 222.

<sup>35</sup> Currently Unit A2 DG ENV.

It is possible that political considerations may come to influence law enforcement casework at the level of Directorate General. For instance, one criticism has been that the Legal Unit is not vested with sufficient independence within DG Environment. Specifically, the Unit is housed in a directorate that also accommodates units responsible for environmental policy. On certain occasions conflicts of interest might arise between units within the directorate over infringement cases; some policy units may not wish to see an infringement action launched if it could result in an incursion into policy development (for example, if an infringement action were directed against a Member State whose vote might be key in securing approval for EU legislation at Council level, or where an infringement action might have the effect of depriving a particular Member State of funds for environmental projects). Williams has raised the concern that such a situation may well lend itself to a director being in a difficult position to adjudicate over the units' rival positions (Williams, 1994, p 364). At the time of writing, the Legal Unit is housed in Directorate A (Governance, Communication and Civil Protection). Perhaps a better organisational position would be to situate the Legal Unit, as a rule, under direct control of the Director-General of DG Environment, in order to avoid the possibility of such problems arising.<sup>36</sup>

It is also possible that on occasion, political considerations interfere with the decision-making process of the Legal Unit itself. In practice, it is the office holder of Head of Unit of the Legal Unit who is in a pivotal position to determine which cases should be processed to the next level or withdrawn. Technically, it is possible that their opinion could be overridden either by the director of the particular directorate in which the unit is located, the Director-General of DG Environment, or the Commission's Legal Service. However, this very rarely happens, which means that the office holder of Head of the Legal Unit has a particularly strong position in relation to decisions concerning the prosecution of infringements. There is nothing wrong with this, so long as the work of the office holder is not subject to non-law enforcement considerations, namely political interference. However, the experience of DG Environment in this respect has not been without disturbing incidents. For instance, it has been alleged that a former Head of the Legal Unit in the mid-1990s was removed from his post for reasons of political expedience, on account of him being perceived to be overly active in initiating environmental infringement action (see comments referred to in Williams, 1994, p 358; Scott, 1998, p 151).

In the more recent past, there have been instances where there appear to

36 As at end 2005, Directorate A of DG ENV of the Commission includes the following units: A1 Communications; A2 Infringements; A3 Legal Affairs and Governance; A4 Inter-institutional relations; A5 Civil Protection.

have been shortcomings within the Commission to safeguard the principle of political independence of the office holder of Head of the Legal Unit. In 2001 the European Ombudsman was very critical of the Commission and found it guilty of maladministration in the handling of an environmental infringement case where it had failed to intervene *vis à vis* the Head of the Legal Unit at the time who had maintained a senior political position within a national party of the defendant Member State involved (Greece) EO Decision 1288/99/OV), This case is discussed in Chapter 10 (10.1.3.2). The position of Head of the Legal Unit is particularly important when seen in the context of access to EU funds allocated to relatively poorer parts of the Union, namely, the Cohesion Funds and Structural Funds. As a matter of principle, a Member State will not be able to access such funding to support particular environmental projects in a sector in respect of which a Member State is considered to be in breach of EC rules. Accordingly, a decision as to whether an infringement case should be commenced or withdrawn may take on an especially significant financial dimension, in addition to its immediate environmental protection context. The safeguarding of the independence of the office holder of Head of Legal Unit is therefore of substantial importance. However, the Commission does not appear to have employed systems to ensure that this will necessarily happen so that a conflict of interest does not arise or be maintained in this fashion. To my knowledge, no steps were ever taken internally by the Commission in respect of the official concerned.<sup>37</sup>

Whilst working within DG Environment between 2001 and 2003, I came across a memorable situation which demonstrated to me that, on occasion, political considerations may interfere with the work of the Legal Unit. I was an official working within the unit responsible for waste management policy, dealing with legal issues. The matter in question arose in connection with the sinking of the *Prestige* oil tanker in November 2002. The vessel had got into difficulties in heavy weather off the Galician coast on 13 November 2002 before starting to leak fuel oil. A specialist salvage team was commissioned to take charge of the vessel and bring her under control. Reports from the media indicated that both the Spanish and Portuguese authorities had ordered the salvage team to tow the *Prestige* out into the Atlantic, contrary to the advice and request of the salvage team, which wished the tanker to be taken into port for repair. At one time the tanker was reported to be as close as three miles from the Galician coast. Between the 14 November and the date of her breaking up in the Atlantic on 19 November 2001, the salvage team were refused access to the nearest available Spanish and Portuguese ports. In following up the reports, I managed to gain confirmation of these events from the salvage company. Their assessment was that there was a much better chance for the oil pollution to be limited if the salvage could be

37 The official subsequently moved to work elsewhere in DG Environment of the Commission.

undertaken in the relative shelter of port as opposed to on the high seas in rough weather (at the time weather reports indicated a 30 knot SW wind and heavy rain). They reported to me that the Portuguese authorities were 'very clear in their opinion', in dispatching a navy vessel to the location of the *Prestige* and ordering the tanker to 'go in a westerly direction' (i.e. out to sea.). In the event, the tanker broke into two parts in heavy seas and sank releasing its cargo of 77,000 tonnes of heavy fuel oil into the Atlantic Ocean, which resulted in substantial pollution of the Atlantic coastlines of France, Spain and Portugal.

In my view this testimony pointed to there being a case for pursuing legal action against the Spanish and Portuguese authorities on the grounds that there had been a failure to apply the basic duty of care enshrined in Art 4 of the Waste Framework Directive 75/442 as amended, which requires Member States to take the necessary measures to ensure that waste (in this case the leaking fuel oil) is recovered or disposed of without endangering human health and without using processes or methods which could harm the environment. However, the executive level of the Legal Unit provided advice<sup>38</sup> to the Director-General on handling the case and recommended that no specific legal action be taken, notwithstanding conceding that an infringement of Directive 75/442 had taken place. The advice was highly contentious. Specifically, the advice from the Legal Unit considered that legal action under Art 226 EC should have been taken within days after the maritime incident, deeming that action launched at the time of it giving advice (within a month afterwards) would have been a 'post mortem' reaction. In effect, the Legal Unit considered the case to be one involving an historical breach of law, with the effect of rendering any litigation without purpose. In addition, the advice overtly pointed to the strong political sensitivity surrounding the case as a reason for not proposing legal action. In the event no legal action under Art 226 EC was initiated by the Environment Directorate-General, and as a consequence the College of Commissioners never received an opportunity to deliberate the case. The College therefore had no control over whether or not legal action should be brought or to assess the political implications of litigation.

A number of important and interesting issues are illustrated by this particular case. Notably, it is apparent that political considerations may feature in the internal decision-making process within the Commission services below College level to rule out pursuance of Art 226 litigation in certain cases deemed to be sensitive from a political perspective. In addition, the Legal Unit advice highlights the importance of being able to secure information and evidence quickly in very urgent cases, a matter that the Commission is not usually in a position to be able to do in view of its lack of investigatory

38 Internal correspondence handed to the author.

powers. The issue of the Commission taking action in respect of historical breaches was discussed in Chapter 3. Although not clear-cut, the available case law suggests that the ECJ will not determine that an action is inadmissible where a Member State has not taken the appropriate steps to remedy a particular breach of EC law and, as a consequence, remedial action is now impracticable on account of that failure. In the *Prestige* case, it was far from clear at the time of the Legal Unit's advice that the case was purely historical. There was plenty of evidence to suggest that the management of the oil slick arising from the break-up of the vessel on the part of the state authorities (and required by Directive 75/442) was ongoing and likely to be of a long-term nature. In addition, it could be argued that part of an appropriate package of remedial measures to be taken by the defendant might be considered to include the establishment of a national system to ensure that proper assistance to stricken vessels is offered in similar future cases. Leaving aside the legal question of admissibility of litigation in this case (namely a debate over whether the breach of law is purely historical), what is most important to have come out of the *Prestige* saga, as far as EU environmental law enforcement is concerned, is the relevance of political factors in determining whether legal action is recommended to be endorsed by the College of Commissioners.

The spectre of conflicts of interest arising within the Commission has caused some commentators to propose investing the responsibility for monitoring EC environmental law enforcement with a body other than the Commission or otherwise by setting up systems to ensure that law enforcement activities are separated from policy considerations (Williams 1994, pp 398–99). A number of possibilities could be considered. For instance, as far as a separate body is concerned, the remit of the European Environment Agency could be altered to take on more enforcement responsibilities. Alternatively, a special EC environmental law task force could be set up within the Commission services to establish *de facto* intra-institutional immunity from outside political interference and foster a more rigorous culture of independence of decision making on case management decisions.

#### **5.4 Prioritisation of cases and reform of the monitoring process**

A major issue which has confronted the Commission for a long period has been the question of how best to deal with the substantial amount of cases referred to it under Art 226 EC. The Commission has a relatively small team of lawyers charged with responsibility to oversee the implementation of EC environmental law, which has averaged out over the last 10 years at approximately one lawyer per Member State. The overseeing or monitoring duty covers three broad areas: checking that Member States have notified the Commission of national legislation designed to implement EC environmental legislation (non-communication casework); checking that such obligations

have been correctly transposed into national legislation (non-conformity casework); and responding to complaints and other evidence which indicates that EC environmental legislation has not been applied correctly on the ground (bad application casework). As has already been mentioned, the environmental sector accounts for the largest number of infringement cases managed by the Commission (1,220 cases in motion as at the end of 2004 accounting for 27 per cent of the total Art 226 EC caseload). The number of complaints of suspected Member State infringements of EC environmental law are amongst the highest filed for any EU policy sector (around 31 per cent in 2004).

The sheer quantity of environmental infringement casework alone has placed a great strain on the Commission's services employed to carry out the monitoring functions assigned to the institution (Demmke, 2003, p 344). In many respects, the increased caseload has underlined the reality that the Commission is never really going to be able to be in a position to shoulder, on its own, the responsibility of monitoring and enforcing due implementation of EC environmental law. Not only does it command a relatively small number of legal staff assigned to the subject of law enforcement, the Commission is not vested with any powers to carry out investigations of suspected cases of bad application of the law. Moreover, the core functions and work of the Commission, which tend to focus on broad picture policy issues and agendas of inter-state relations do not lend themselves to addressing issues which are predominantly local in nature. The primary responsibility lies with the Member States to ensure that norms pertaining to the European legal integration process are duly applied within their own frontiers; they are not only best placed to ensure that this occurs, they also have ultimate legal responsibility to realise compliance at national level (Art 10 EC). Accordingly, the Commission services are not in a position to offer a complete quality control service as far as ensuring due implementation of EC environmental law (Grohs, 2004, p 31).

As a consequence, the approach fostered at the beginning and even after the 1980s by the Commission to encourage complainants to come forward has come into question. A number of commentators have expressed the view that the Commission needs to engage in a prioritisation of cases it investigates. Some have been concerned with the prospect of the Commission enforcement work otherwise drifting towards being reactive as opposed to being strategic in outlook in terms of which infringement issues need to be addressed most (Macrory and Purdy, 1997, p 43; Macrory, 1996). Various suggestions have been made. One is that the Commission should concentrate on the cases that it is best suited to addressing, namely those that essentially revolve around transposition issues (non-communication and non-conformity) (Demmke, 2003, p 344; Ibanez 1998a, section 2.7.2.2) As we have seen, cases of non-communication and non-conformity are often the most straightforward infringement cases to deal with from the Commission's

perspective, given that the investigation is 100 per cent document based and need not involve on-site investigation. In another sense, these cases are more suited to be addressed by the Commission, as they relate more closely to the Commission's core overall functions which are to ensure that inter-state relations are compatible from the perspective of the EU project. Specifically, in ensuring that Member States have adopted the appropriate legal frameworks at national level to implement EC environmental legislation, the Commission addresses two key supranational objectives of the Union. It assists in ensuring that all Member States are in a position to contribute commensurately towards achieving a high level of environmental protection, in line with fundamental environmental policy objectives and tasks specified in Arts 2, 3 and 175 EC. In addition, it assists in ensuring that Member State legal systems are not liable to be in a position to distort competition within the single market on account of individual state failures to implement agreed environmental norms into national legislation. Accordingly, non-conformity and non-communication cases lend themselves to being addressed by the Commission, as they raise issues primarily of a federal-structural as opposed to local nature.

The proposal that the Commission's environmental infringement case-work should be prioritised so as to concentrate on transposition disputes would mean, as a direct consequence, a reduction in the number of bad application cases that the Commission investigates. Demmke has suggested that Commission resources in the environmental sector should be focused on addressing only the worst bad application cases which come to its attention, namely those where there is evidence to indicate deliberate flouting of environmental norms and repeat offender scenarios (Demmke, 2003, p 344; see also Ibanez, 1998a, section 2.7.2.2 and Grohs, 2004, p 31). Others have pointed out that the Commission is in too remote a position geographically—and from other perspectives—to be able to tap into the relevant local knowledge required to address such types of implementation disputes as a rule (Jans, 2000, p 169).

However, such a prioritisation strategy raises particular problems as far as environmental law enforcement work is concerned. By restricting the number of bad application cases that it is prepared to investigate, the Commission raises the prospect of narrowing the opportunities for private individuals to have access to environmental justice. The avenues available for stakeholders other than the Commission in being able to take legal action to uphold EC environmental law are currently limited, which means that the complaints system which currently feeds into the functioning of Arts 226/228 in the environmental sector takes on a particularly heightened degree of importance. The aspect of access to environmental justice for civil society is discussed in greater detail in Part Two of this book. Suffice it to say at this stage that private individuals and bodies (such as NGEOs) concerned to uphold EC environmental obligations have a number of difficult legal and other problems



to overcome in seeking to rely on EC environmental law themselves in order to seek to have it implemented and applied correctly at national level. In many instances, they will not be vested with the legal capacity to rely on EC environmental norms before national courts (the so-called 'direct effect doctrine'). The case law of the ECJ has recognised that individuals may be able to rely directly on such norms only where the norms are clear, precise and sufficiently unconditional in nature. In many instances, these criteria may not be fulfilled in the environmental sector where standards can be general or imprecise in nature (for example, very general duties pertaining to environmental stewardship, requirements to establish plans/programmes, provisions being subject to other open-ended conditions such as BATNEEC<sup>39</sup>). Even if environmental provisions are found to be directly effective, there are limits to their reach within the internal legal order of a Member State, depending on the legislative instrument in which they are contained. Notably, no person can enforce directly effective provisions contained in EC environmental directives against other private individuals, as the ECJ has barred the possibility of any horizontal direct effect of directives. With some exceptions, an EC directive constitutes the standard form of instrument that the EC legislature has used and continues to use when introducing Community-wide environmental standards intended to be binding. In the absence of there being a directly effective norm on which an individual may rely in a given case, it may be particularly difficult for private individuals to have legal standing (*locus standi*) to take legal proceedings in order to enforce EC environmental law, whether against other private parties, national authorities or even EU institutions. Aside from all the legal hurdles that lie in the way of legal action that might be sought at national level by private entities, one should not forget the often not inconsiderable technical and practical problems that may arise for private bodies considering environmental litigation as an option (for example, legal costs involved, difficulties connected with securing requisite evidence of non-compliance). In general, access to environmental justice at local level has been a major issue confronting the EU for a considerable time, a subject on which the Union has only relatively recently begun to introduce initiatives to try to address. These will be examined in Part Two of this book.

It has also been suggested that it might well be a false economy for the Commission to try to limit the number of suspected bad application cases which are brought to its attention. Such cases may lead to uncovering useful and more profound insights into the state of implementation of EC environmental law, which would not be gleaned simply through document-based transposition checks. The state of transposition of EC environmental law into the national laws of a Member State says little if anything about the

39 Best available technique not exceeding excessive cost.

state of actual practical implementation of those norms (Demmke, 2001, p 15). The possibility of individuals to be able to complain to the Commission about the ineffective level of response of a local environmental authority offers the opportunity for the Commission to follow up allegations of deficiencies in practical implementation at local level (information function) as well as providing the basis for a meaningful fall-back response against ineffective local environmental authority protection mechanisms (deterrence element). In addition, as pointed out by Winter, supervision by the Commission of bad application cases may enable it to canvass the guidance of the ECJ on the interpretation of key points of environmental law. These points of law may be crucial for development of policy as well as for detecting more profound differences in the state of implementation of EC environmental policy and law by the Member States (Winter, 1996, p 706). Accordingly, any decision to restrict the number of bad application case investigations undertaken by the Commission carries with it a number of implications that may not be easy to reconcile with the mandate under Art 211 EC provided to the Commission as guardian of the EC Treaty.

#### ***5.4.1 Commission responses to the issue of prioritisation***

The European Commission has for some time been alive to the problems and limitations posed by the Art 226/228 EC infringement procedures and has decided over the last decade or so to take certain steps to improve the handling and management of enforcement casework as well as to introduce alternative routes to securing better implementation records on the part of Member States.

##### *5.4.1.1 Recognition of the limits to Arts 226/228 EC and decentralisation of enforcement*

The Commission's 1996 Communication on Implementing Community Environmental Law<sup>40</sup> was the first time that the institution took stock of the issue of implementation, taking the opportunity to reflect on the limits of the Art 226 EC procedure as far as the environmental sector was concerned. The Commission quite rightly drew attention to the inherent limitations of the infringement procedure as a means of ensuring that Member States adhered to their EC environmental obligations. Amongst others, the following factors were noted by the Commission as limiting the efficacy of EC-level infringement procedures as far as environmental casework was concerned: the lengthy and formal nature of the procedure and lack of its being attuned to dealing with environmental cases; the practical impossibility for all infractions to be

40 COM(1996)500.

addressed through Art 226/228 EC procedures; the issue that infringement procedures may be targeted only against central governments which may not be immediately or directly responsible for implementation shortcomings in questions (such as in federal states where environmental protection competence is devolved to regional/local levels); the absence of an EC-level inspection system and the wide disparity and often poor level and delivery of national/regional/local inspection and environmental reporting mechanisms.<sup>41</sup>

In recognising the inherent limitations posed by Art 226/228 EC infringement procedures, the Commission chose to focus on alternative routes and methods in its 1996 Communication to enhance the state of Member State implementation of EC environmental law. In particular, the Commission was keen to stimulate work on developing better tools at national level to effect changes. These included developing minimum criteria across the EU on environmental inspections to be carried out by well-resourced national environmental authorities, the provision of more effective opportunities for the public to become involved in assisting law enforcement work and delivery of more effective sanctions at national level against persons perpetrating violations of EC environmental standards. With respect to the point concerning greater public involvement, the Commission indicated that it was keen to see more opportunities for the public to be able to register complaints within the Member States at suitable contact points, as well being assured of greater possibilities of access to local courts to enforce environmental legislation. We shall examine in Part Two of this book how the Commission has developed greater opportunities for more effective decentralised enforcement of EC environmental law. What is important to note is that the Commission chose, from the outset of its examination of EC environmental law implementation, not to go about seeking ways to enhance the existing infringement structures in any profound way. In many respects, that is to be regretted as the procedures could be improved in a number of ways, as the problems with the procedures highlighted in this and earlier chapters indicate. The Commission could have pressed for reform of the current infringement procedures alongside its calls for an expansion of decentralised routes to EC environmental law enforcement. One example could have been to request competence to be able to take action against sub-national authorities within federal states, thereby taking account of constitutional devolution of responsibility for the environment (for example, Macrory and Purdy, 1997, p 43; see also Ibanez, 1998a, section 2.7).

The call for achieving a greater decentralisation of responsibilities and roles associated with the enforcement of EC environmental law as advocated by the Commission's 1996 Communication raises a number of important issues. In many respects, the Commission's 'reality check' approach, in placing

41 COM(96)500 pp 4 *et seq.*

the infringement procedures in their practical context, is to be welcomed. It reminds stakeholders that the fundamental responsibilities for implementing Union law rests with the Member States, and not with the Commission; it is after all, the Member States who have undertaken to carry out EC environmental legislative commitments within their respective territories. In underlining how unrealistic it would be to expect a single supranational institution in the form of the Commission to be in any practical position to be primarily responsible for ensuring complete correct application of environmental obligations set at EC level, the Communication also brings home the importance of harnessing all other viable means to assist in this task. In particular, the pivotal importance of the capacities of local stakeholders (in particular environmental authorities and NGEOs) to affect compliance behaviour is appropriately highlighted. Moves toward enhancing decentralisation of EC environmental law enforcement has received widespread support, for a variety of reasons, including notably: the Commission's own limitations in being able to carry out enforcement work and local actors' potential or actual superior position in terms of familiarity with and access to locally relevant knowledge (for example, Jans, 2000, p 169; Hattan, 2003, p 286); the factor of local accountability and sovereignty/subsidiarity concerns, with the prospect of the Commission being perceived as an outsider interfering with internal matters (Demmke, 2003, p 338).

However, the case for decentralisation has a number of limits. For instance, an overly relaxed or restricted view of Art 226/228 EC enforcement could risk the objective of attaining commensurate levels of environmental protection systems within Member States, and undermine the aims of achieving a uniformly high level of environmental protection across Member States and absence of a distortion of competitive conditions as between those states (for example, see Harding, 1997, p 14). Demmke has taken the idea of decentralisation to the level of suggesting that the Commission should look to intervene only where a Member State fails in practice to comply with EC environmental law, namely to bring infringement proceedings where a Member State has breached substantive legal requirements. In particular, he suggests that the Commission should not take action where, for instance, a Member State has elected to implement EC environmental legislative instruments in an informal manner, such as through administrative circular. Accordingly, any legal action to insist on formal transposition of EC environmental obligations as contained in a directive into national legislation would, in his view, be an ineffective use of Commission resources if it could be shown that, in practice, implementation was in place (Demmke, 2003, p 15). However, as has been pointed out elsewhere, such confidence in the national position would be misplaced. Unless a national authority—as well as all other stakeholders operating within each Member State—are subject to clear, legally binding obligations that serve to implement minimum EC environmental protection standards, it is far from apparent how those

standards may be enforced with any degree of certainty or efficacy. For instance, as stated by the ECJ on a number of occasions, it is always possible for a public authority to be able to alter its commitment to environmental protection at whim if it is faced with only an administrative circular containing recommendations or guidance (Case C-131/88). Moreover, attempts to implement legislation through more informal means (such as administrative circulars, codes of conduct or environmental agreements) serves to undermine the rights of individuals that may be intended to be derived under the legislation conceived at EC level (for example, see Krämer, 1993, p 121; Krämer 2003, p 375).

#### *5.4.1.2 Prioritising and improving handling of infringement casework*

At the end of the 1990s, the Commission had decided to take certain steps to improve the case management of its infringement actions. Following on from the requests set out by the European Council at its meetings in Amsterdam in 1997 and in Cardiff in 1998 for prompter action in monitoring the application of EC law, the Commission responded by adopting some internal measures and practices to improve its working methods in relation to infringement proceedings. These were set out in a 1998 internal Communication document<sup>42</sup> issued by the Commission's Secretariat-General, under whose auspices the Commission's Legal Service is based. The Communication set out a number of general changes that would be made to the Commission's procedures. These included speeding up case handling, making Commission decisions more transparent and improving relations with the complainant. The latter two aspects will be discussed more fully in section 5.5. As regards speed, the Commission decided to ensure that in principle in future it would take a maximum of only one week to implement its decisions on infringement matters, as in many instances this had been allowed to drift so as to delay processing cases to the next procedural step. In the document the Commission also makes clear its intention to foster the practice of developing regular bilateral 'package' meetings between the Commission services and individual Member States, in order to assist in resolving disputes, as far as possible, out of court in an informal, potentially quicker and perhaps more meaningful manner than through the distant and formal means of communication of pre-litigation correspondence of LFN, RO and Member State observations. The practice has also developed in which LFNs have been processed quicker, so that, as a rule, the individual Commissioner together with Commission President are responsible for arranging for this step to be carried out. In its 2002 Communication on monitoring the application

42 SEC(1998)1733.

of EC law, the Commission has indicated that it is minded to introduce similar practice with respect to the RO stage.<sup>43</sup>

With the publication of its White Paper on European Governance in 2001,<sup>44</sup> the Commission made clear its intentions to effect more radical changes. Notably, it set out a basic programme for prioritising infringement casework. In the future, the Commission envisaged that it would target its law enforcement resources as from 2002 to addressing the following types of EC law infraction scenarios: transposition failures; cases involving fundamental principles of EC law; cases seriously affecting the Community interest or the interests that EC legislation had intended to protect; repeated implementation problems as well as cases involving the payment of EU funds. The White Paper also envisaged various flanking measures at national level as a means of enhancing EC law enforcement. Specifically, these included promoting better dialogue with Member States on enforcement issues, encouraging the establishment of twinning arrangements between older and new Member States in order to share best practice on implementation, fostering a change of perception held at national level by key players such as national authorities of the still widely held perception that EC law is 'foreign' law, and the establishment by Member States of networks of national bodies capable of dealing with disputes involving citizens and EC law.

Several of the ideas outlined in the White Paper were fleshed out more fully in the Commission's follow up Communication on Better Monitoring of the Application of Community Law,<sup>45</sup> published in May 2003. It clarified a number of details concerning the Commission's future strategy on law enforcement. With respect to Art 226 EC activities, the Communication identifies in more detail three priority areas for the Commission to concentrate on: infringements that undermine the foundations of the rule of EC law; infringements undermining the smooth functioning of the EU's legal system; and infringements consisting of transposition failures. As regards the first identified priority area, the 2003 Communication indicates that this would include Commission action against Member State challenges to the principles of primacy and uniformity of application of EC law; breaches of fundamental rights and freedoms of individuals protected under EC law, including environmental damage scenarios which have implications for human health and situations where the Union's financial interests are damaged (including violations of EC law in relation to projects receiving EU funding). As regards the second area of priority, the Commission signals that this would embrace the following infringement scenarios: violation of the EC's exclusive powers, repetition of infringements in the same Member State

43 COM(2002)725 Communication on the Better Monitoring of the Application of Community Law, section 3.5.

44 COM(2001)428. 45 COM(2002)725.

as well as cross-border infringements. Infringements falling outside the three priority areas would be deemed to be 'lower priority' areas not usually warranting Art 226 action. Instead, the Commission would introduce 'complementary' mechanisms to deal with disputes. Included within these complementary mechanisms would be the potential for greater scope for negotiation with Member States in order to arrive at out of court settlements: for example, 'package meetings', establishment of *ad hoc* contact points and dispute resolution mechanisms at national level for complaints; development of independent and specialised national authorities; initiatives to foster greater access to national courts for complainants.

The 2003 Communication also indicated that the Commission is keen to introduce more preventative strategies in the field of law enforcement, with a view to obviating the need to rely on the traditional reactive and often cumbersome effect of an infringement action. Specifically, a number of initiatives are mentioned: the issuing of Commission interpretative communications/guidelines on EC legislation, the fostering of further training at national level on EC legislative implementation for national administrations and courts, the establishment of twinning arrangements between Member States in order to share best practice; greater use of 'package meetings' and enhanced availability for the Commission as well as expert committee groups to issue guidance and advice on implementation issues to Member States prior to implementation deadline periods; reviews of certain EC rules that pose recurring implementation problems including giving consideration to a legislative initiative where appropriate. In addition to promoting further co-operation mechanisms with Member States, the Commission Communication also envisages developing more streamlined monitoring techniques including: requiring as standard in EU directives the delivery of concordance tables by Member States to accompany notification of national implementing legislation; the publication online of information pertaining to transposition deadlines, rates of transposition; the enabling of electronic communication of transposition measures under the auspices of the EUR Lex III project.<sup>46</sup> Additionally, the Communication favours expanding the publication of implementation records of Member State, with a view to promoting peer pressure on rates of compliance.

In the environmental sector, it appears that a number of measures identified in the Commission's general strategic documents for Art 226 actions have already been taken on board within the Commission's DG Environment. In particular, the Fifth Annual Survey on the Implementation and Enforcement of Community Environmental Law (2003),<sup>47</sup> drafted by the

46 Electronic notification of EC directives became operational in May 2004. Most Member States now use this system (See COM(2005)570, p 3).

47 SEC (2004) 1025.

Environment Directorate-General, has reported that the Commission services are investing more resources in a number of preventative-type steps including issuing implementation guidance documentation to accompany new legislation,<sup>48</sup> the holding of implementation seminars with national authorities on particularly complex legislative instruments, entrenchment of bilateral package meetings with individual Member States, publication of tables of compliance records, a commitment to ensuring delivery of more effective reporting on implementation of environmental legislation, as well as fostering information exchange between implementing national authorities. As regards the latter aspect, the report indicates that support will be channelled through IMPEL, the network for the Implementation of Environmental Law established as an informal mechanism between the Commission and Member States since 1992. The work of IMPEL is discussed in Chapter 11. Finally, the report also refers to the recent initiatives undertaken by the EU to improve access to environmental justice for the public, taken in alignment with developments at international level under the auspices of the 1998 Århus Convention (UNECE Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters). These initiatives will be discussed in Chapters 8 and 9.

Apart from the steps mentioned above intended to flank the traditional mechanism of the infringement procedure, such as preventative-type measures and peer pressure initiatives, it is less clear how DG Environment and its Legal Unit are to apply any changes in terms of prioritising infringement cases. Whilst the prioritisation agenda outlined in the 2001 White Paper and follow-up 2003 Commission Communication on Better Law Monitoring indicates that the Commission is to continue unabated its work in tackling transposition failings (non-communication and non-conformity), it is less clear what is going to happen in practice in relation to the future handling of bad application cases in the environment sector, the majority of which stem from information issued to the Commission by complainants (see Grohs, 2004, p 37). The situation is acutely important given the danger that application of a prioritisation agenda could leave a gap in terms of the Commission's abilities to fulfil its responsibilities of ensuring proper implementation of EC environmental law, taking account of the access to environmental justice problems noted earlier (see Hattan, 2003, p 279). The Commission's prioritisation strategy for infringement cases would appear to involve a restriction of intervention for the following environmental infraction scenarios: grave violations of fundamental environmental norms with implications for human health, systematic and repeat infringements in the same Member

48 The report gives the example of this being used in respect of Directive 2001/42 on the assessment of the effects of certain plans and programmes on the environment (Strategic Environmental Assessment) OJ 2001 L197/30.



State, deliberate breaches of EC environmental law by state authorities; breaches of EU financial rules in connection with environmental projects; breaches of a cross-border nature (for example, waste shipment violations, inter-state related pollution incidents). It would therefore appear that if the prioritisation agenda is applied in future, bad application cases will have to meet a notional level of seriousness/gravity before being allowed to proceed to the status of an Art 226 EC investigation. Unless complainants have a realistic chance to secure recourse to legal action at national level, the application of a prioritisation agenda will be tantamount to a denial of environmental justice and an abrogation of the Commission's responsibilities under Art 211 EC (see Hattan, 2003, p 279). Grohs indicates that, at the moment, it is not apparent that the volume of case management may be decreased in practice, given that cases falling within lower priority areas still need to be handled in accordance with good practice regarding responses to complaints (Grohs, 2004, p 31). However, that reassurance is not very convincing, because as is discussed in greater detail in section 5.5, the Commission is not obliged to take up and investigate any Art 226 case; it retains absolute discretion as to whether or not a case should be pursued.

At the time of writing, DG Environment is silent on how it is to apply the Commission's prioritisation agenda in the environmental sector and at what pace. However, it is clear that such a change in law enforcement activities and policy by the Commission's services needs very careful handling in order to avoid falling into the trap of creating an environmental implementation strategy that is counterproductive and lessens pressures on Member States to fulfil their environmental obligations.

## **5.5 Transparency and accountability**

An aspect of the Art 226/228 EC infringements procedure that has come in for considerable criticism is the extent to which they remain closed and elite dispute resolution processes, with relatively little possibility for public scrutiny and participation. It is, for instance, ironic that whilst complainants are recognised to constitute a key information source for the Commission in terms of its abilities to carry out its mandate to supervise implementation of EC law, complainants have been granted few rights in terms of influencing and accessing Commission documentation relating to the management of the infringement procedures. These rights will be discussed in Chapter 9. Some general points on this subject are made at this point.

### ***5.5.1 Transparency of decision making***

Currently, the Commission does not disclose much information relating to the pre-litigation phase of an Art 226 EC case. As has been discussed, it does not provide detailed reports on decisions taken not to launch infringement

proceedings. Neither does it publish LFNs, ROs or the pleadings before the ECJ at any stage; these documents are treated under current Commission policy as being, in principle, confidential and accordingly barred to persons other than the parties to the immediate disputes. Complainants are not considered to be parties for this purpose. On the other hand, press releases from the Commission are made disclosing in brief summary decisions concerning ROs and referrals to the ECJ. No press releases are usually made providing information about Commission decisions to issue LFNs, except those involving non-communication cases and the launch of Art 228 EC proceedings (see Grohs, 2004, p 29). A number of commentators have not been satisfied that the current policy of maintaining a closed process is justifiable. There have been, for instance, calls for the Commission to change its policy and publish in full pre-litigation documents (for example, Mastroianni, 1995, p 535; Grohs, 2004, p 38; Krämer, 2003, p 388), disclose complainant files (Williams, 1994, p 382) as well as publicise reasons for non-pursuit of cases (Hattan, 2003, p 287). As will be discussed in Chapters 9 and 10, EC law and policy in this area is gradually being subject to change in favour of a more open approach to document disclosure.

There are a number of reasons why the Commission should turn towards a more open approach to the prosecution of infringement cases, including in the environmental sector. First, decisions taken by the Commission on behalf of and paid for by the public to take or not to take action deserve public scrutiny, so that the decisions may be subject to a proper degree of accountability. In particular, it is important to be clear about the reasoning behind law enforcement decisions, not least in order to ensure that there is an opportunity to see that political reasons do not interfere with the decision-making process and that competent legal assessments are made internally within the Commission. Second, disclosure affords an appropriate degree of respect for the participatory rights of complainants, who also quite clearly have a legitimate interest in seeing that decisions are made on a sound footing. Finally, fuller disclosure would have the effect of applying more pressure on Member States to ensure that their records on implementation were improved (for example, disclosure of information on LFNs). At the very least, if LFNs were disclosed Member States would be subject to a greater amount of public scrutiny as to whether their positions in particular cases could be justified.

The Commission, however, has stuck resolutely to the position of refusing to subject its conduct relating to the pursuit of 'live' infringement proceedings to more openness or accountability. Two reasons in particular appear to have been key to the policy of non-disclosure. First, the Commission has always considered that the infringement procedures, as legal proceedings, should be subject to a strict policy of confidentiality that would apply normally to any litigious proceedings. The Commission appears to consider that the exchange of correspondence between respective parties as well as preparatory activities

on infringement cases should be treated as privileged material and not for public disclosure, as otherwise this could undermine the legal position and basic procedural rights of the respective parties in the case. It has, however, been disputed that disclosure of the Commission's case (for example the LFN and RO) would undermine any legal or environmental interest (Williams, 1994, p 382; see also Krämer, 2003, p 388)). Any justification suppressing disclosure of Commission analysis in the case on legal grounds does appear to be tenuous, or at the least formalistic. It should be borne in mind that the infringement procedures are unique proceedings in international law, and cannot be considered to be akin to standard legal proceedings that would be conducted at national level. In particular, the pre-litigation process under Art 226/228 EC is not conducted before the ECJ, it is a process of negotiation outside the courtroom. The second main defence for upholding the confidentiality of infringement proceedings is of a more pragmatic nature. The Commission maintains that if the principle of confidentiality were to be lifted in the context of Art 226/228 proceedings, the process of negotiation itself would become undermined. It would not be possible, so the argument runs, to create an environment in which the Member States and the Commission would feel confident in reaching a solution (see Weatherill and Beaumont, 1999, p 223). This ties in with the Member States' concern about the Commission not disclosing material they supply to it in the course of the prosecution of infringement proceedings.<sup>49</sup> However, this position also opens up possibilities for the Commission to use the procedure as a mechanism for negotiating unaccountable political trade-offs behind the scenes and for steering policy, as opposed to being simply focused on the question of law enforcement in the instant case. It is also questionable to what extent the Commission needs to retain confidentiality of its position in order to arrive at a satisfactory resolution of a case; there are strong arguments to suggest that a policy of full public disclosure on the part of the Commission of its own case would strengthen and not weaken its hand in putting pressure on Member States to rectify, or least seek to account for, suspected implementation deficiencies. It is quite clear that the infringement procedures are no longer seen to be significant diplomatic embarrassments by Member States and routes of last resort (*ultima ratio*) for the Commission; on the contrary, it has been the Member States which have expressed their clear wish to see enhancements to the procedures as a means of deterring non-compliant behaviour.

49 See Declaration 35 attached to the Treaty of Amsterdam 1997.

### 5.5.2 *Accountability to complainants*

A matter closely related to the general issue of transparency in the context of Art 226/228 EC proceedings is the question of the extent of participatory rights of complainants. Whilst the issue of complainants' rights will be dealt with in more detail in Part Two of the book as part of its focus on the role of private individuals in the enforcement of EC environmental law, it is useful to set out a few key points in brief here. Complainants constitute an important source of information for the Commission with regard to suspected infringements. In 2004, for instance, the Commission received 336 complaints of suspected environmental infringements, 31.1 per cent of all complaints registered with the Commission. Their information is particularly important in the context of bad application cases, in respect of which the Commission has few if any effective resources to investigate. However, notwithstanding their significance in terms of enabling the Commission to undertake a degree of supervision in this area, complainants are afforded relatively few participatory rights in the conduct of the infringement process itself.

Originally, the complainant was totally marginalised in the processing of Art 226 EC actions by the Commission. Historically, this may be explained by the fact that Art 226 was conceived on the basis of an essentially intergovernmental perspective of how disputes concerning implementation failures relating to international law should be handled. The aim of the process was to secure compliance if possible in a discreet, relative speedy, informal way, negotiated behind closed doors at international level; it was not designed to protect the position of complainants (see Rawlings, 2000, pp 8 *et seq.*). However, perceptions of the function of the infringement procedure and in particular how it should be conducted have changed considerably over time. With the rise of the importance of the complainant as an information source coupled with the development of an individual rights culture within the unfolding legal order of the EU, by the 1990s the traditional workings of the Art 226 procedure had come under strain. As a result in part from pressure from the European Ombudsman investigating cases of maladministration by the Commission in handling complaint files, the Commission has now introduced changes to its operational procedures in terms of handling complaints about suspected violations of Union law by Member States. These have been set out principally in its 2002 Communication on Relations with the Complainant in respect of infringements of Community Law.<sup>50</sup> The Commission has also published a standard complaints form,<sup>51</sup> which it recommends but does not

50 COM(2002)141. The Commission undertook some earlier changes on complainant relations in 1998 (see SEC(1998)1733 Improvement to the Commission's Working Methods in Relation to Infringement Proceedings, 15.10.1998).

51 OJ 1999 C119/5. Accessible online from the Commission's Secretariat-General's website: [www.europa.eu.int/comm/secretariat\\_general](http://www.europa.eu.int/comm/secretariat_general)

require complainants to use. Some basic information concerning the infringements procedure is contained in an explanatory memorandum on the back of the form. Complaints are to be filed first with the Commission's Secretariat-General, which will then process the matter internally and distribute files to be handled by the legal teams in the directorate-general responsible for the policy sector concerned in the complaint. The Legal Unit of the Environment Directorate-General dealing with infringements is the specialist team which handles complaints in relation to suspected breaches of EC environmental law within the Commission.

Under the Commission's current policy, it affords the complainant some basic procedural rights in relation to the management of an infringement procedure. These are listed in a number of paragraphs annexed to the 2002 Communication. They include maintaining an open approach as to who may lodge a complaint; anyone may file a complaint without charge.<sup>52</sup> The complaint must be submitted in writing and in one of the EU's official languages, and need not be submitted in any particular format although the Commission recommends use of its standard complaints form.<sup>53</sup> Complaints deemed likely to be investigated are to be recorded in a central registry.<sup>54</sup> Non-investigable complaints are defined<sup>55</sup> as including those: from anonymous correspondents which: fail to specify a particular Member State to which an allegation may be attributed; denounce actions of private persons unless the complaint reveals involvement or omissions to intervene by public authorities; fail to set out a grievance; set out grievances in respect of which the Commission has adopted a clear, public and consistent position which is also to be disseminated to the complainant; or which refer to a grievance that falls outside the scope of EC law. The complainant should receive an acknowledgement of receipt of the complaint within 15 working days of the Secretariat-General receiving the complaint.<sup>56</sup> The complainant is guaranteed anonymity, namely that their identity will not be revealed to a third party such as the defendant Member State unless they agree to disclosure.<sup>57</sup> They also have the right to ask for a meeting with Commission officials to provide a supplementary oral explanation of the grounds of their case, at their own expense.<sup>58</sup> A general target time limit of one year is set by the Commission for it to come to a decision whether to issue an LFN, otherwise the file will be usually closed.<sup>59</sup> The so-called 'one year' rule has come in for criticism in the past as being arbitrary, vulnerable to delaying tactics by Member States being prepared to stall co-operation on disclosing information about suspected bad application environmental infringements, as well as not allowing sufficient time to ascertain facts in complex cases (Williams, 1994, p 369).

52 Para 2 of the Annex to COM(2002)141.

53 Para 5, *ibid.*

54 Para 3, *ibid.*

55 Para 3, *ibid.*

56 Para 4, *ibid.*

57 Para 6, *ibid.*

58 Para 7, *ibid.*

59 Para 8, *ibid.*

The complainant is afforded a basic minimum of information as to the development of the case file, as revealed by the 2002 Communication. The Commission is to inform the complainant of the reasons for deciding not to register a complaint on grounds of non-investigability.<sup>60</sup> They are also to be informed of the steps taken in relation to their case after formal decisions have been taken in the infringements procedure.<sup>61</sup> If the Commission intends to propose that no further action be taken with respect to a complaint or file, unless there are exceptional circumstances (not defined), the Commission will provide the complainant with prior notice setting out its grounds, inviting the complainant to respond within four weeks.<sup>62</sup> Decisions to close cases which have not yet reached LFN stage may be carried out without discussion at College level through a simplified administrative procedure.<sup>63</sup> The simplified procedure applies also where: the Commission services consider the complaint to be groundless or irrelevant, there is insufficient material evidence, or where the complainant shows no interest in prosecuting the complaint further.<sup>64</sup> The complainant is informed where this procedure is to be used, but this is of little value as there is no right of appeal disclosed to challenge its application.<sup>65</sup>

The Communication makes it very clear that at all stages the Commission retains complete discretion over deciding matters relating to the complaint, in particular the desirability of opening or terminating proceedings.<sup>66</sup> The document reveals that it is in practice the legal teams of the individual Commission departments and not the College that are in substantive control over decisions to close files; in the case of the environment sector this is the Legal Unit of DG Environment dealing with infringements. It underlines, in effect, the central position of influence exercised by the Head of Legal Unit of DG Environment in relation to the handling of environmental complaints.

The 2002 Communication on complaints handling offers little helpful guidance on the question of complainants' rights to access documents in infringement cases. The Communication simply states that the matter is governed by the current Regulation 1049/2001 on access to documents<sup>67</sup> without providing any details as to whether any documents in Art 226 procedures may or are as a rule to be disclosed. The silence of the Communication indicates that the Commission's traditional view of maintaining confidentiality of infringement decisions, such as LFNs and ROs, is still very much in force. Principles of openness and accountability have, been incorporated into the constitutional fabric of the EU relatively recently, through amendments made to the EC Treaty. Specifically, Art 255 EC which was introduced by virtue of the 1997 Treaty of Amsterdam, sets out the basic position. Art 255(1) states:

60 Para 4, *ibid.*

61 Para 7, *ibid.*

62 Para 10, *ibid.*

63 Para 11, *ibid.*

64 Para 11, *ibid.*

65 Para 11, *ibid.*

66 Para 9, *ibid.*

67 Regulation 1049/2001 regarding public access to European Parliament, Commission and Council documents OJ 2001 L145/43.

1. Any citizen of the Union, and any natural or legal person residing in or having its registered office in a Member State, shall have a right of access to European Parliament, Council and Commission documents, subject to paragraphs 2 and 3.

The basic position in paragraph 1 is qualified. Article 255(2) EC provides for the Council to enact specific rules on the general principles and limits on grounds of public or private interest within two years of the entry into force of the Treaty of Amsterdam (that is, by 1 May 2001). Article 255(3) EC provides that each EU institution is to elaborate its own Rule of Procedure regarding access to documents. The innovations introduced by the Treaty of Amsterdam build on from earlier tentative political steps to move towards opening up EU decision-making processes.<sup>68</sup> The specific rules regarding public access to European Parliament, Commission and Council documents have now been established under Regulation 1049/2001.<sup>69</sup> These rules on access to documents and accompanying case law of the Court of Justice of the EC are examined in Chapter 9.

## **5.6 Statistical information on EC environmental infringement cases**

The Commission publishes two reports annually which provide information on recent developments concerning the state of implementation of and its monitoring of EC environmental law. Specifically, each year the Commission provides a formal and comprehensive report on its activities in relation to Arts 226/228 EC concerning the previous calendar year. This is known as the Commission's 'Report on monitoring the application of Community Law' and by the end of 2005 22 such reports had been published, the most recent ones being accessible on the Commission's Secretariat-General's website.<sup>70</sup> Each one contains a detailed summary of infringement actions commenced and pursued for each EU policy sector, including the environment, as well as information on the numbers of infringement actions brought against a Member State as well as on a sectoral basis. Since 1996, these reports have been complemented with more detailed annual surveys carried out by the Commission on the state of implementation of EC environmental law. At the time of writing, five annual surveys have been published, accessible from the Commission's DG Environment website.<sup>71</sup>

68 See e.g. Declaration 17 on the Right of Access to Information, attached to the Treaty on European Union 1992. See also the 1993 Inter-Institutional Declaration on Democracy, Transparency and Subsidiarity agreed between the three EU institutions involved in the legislative process.

69 Regulation 1049/2001, *op cit*.

70 [www.europa.eu.int/comm/secretariat\\_general/sgb/infringements](http://www.europa.eu.int/comm/secretariat_general/sgb/infringements)

71 [www.europa.eu.int/comm/environment](http://www.europa.eu.int/comm/environment)

Tables 5.1 to 5.7, which provide statistical information on recent developments in environmental infringement actions are based on information derived from the following Commission annual reports and surveys:

COMMISSION REPORTS ON MONITORING THE APPLICATION OF  
COMMUNITY LAW

XVIth Report (1998): (COM(1999)301)  
XVIIth Report (1999): (COM(2000)92)  
XVIIIth Report (2000): (COM(2001)309)  
XIXth Report (2001): (COM(2002)324)  
XXth Report (2002): (COM(2003)669)  
XXIst Report (2003): (COM(2004)839)  
XXIInd Report (2004): (COM(2005)570)

COMMISSION ANNUAL SURVEYS ON THE IMPLEMENTATION AND  
ENFORCEMENT OF COMMUNITY ENVIRONMENTAL LAW

First Annual Survey (Oct.1996–Dec.1997): (SEC(1999)592)  
Second Annual Survey (1998–1999): (SEC(2000)1219)  
Third Annual Survey (2000–2001): (SEC(2002)1041)  
Fourth Annual Survey (2002): (SEC(2003)804)  
Fifth Annual Survey (2003): (SEC(2004)1025)  
Sixth Annual Survey (2004): (SEC(2005)1055)

### 5.6.1 Statistical tables

#### *Infringements: Act 226 EC cases*

Table 5.1 Art 226 EC cases in motion in the environmental sector (EU15)

<i>As at end of year</i>	<i>Environmental Art 226 infringement cases in motion (numbers)</i>	<i>Total number of Art 226 infringement cases in motion (numbers)</i>	<i>Environmental Art 226 infringement cases in motion (% of total Art 226 cases in motion)</i>
1999	870	3,050	28.52*
2000	1,113	3,379	32.94*
2001	1,302	3,360	38.75*
2002	1,378	3,541	38.92*
2003	1,403	3,927	35.73*
2004	1,220	4,489	27.15*

\* Denotes highest proportion of Art 226 EC actions amongst all EC policy sectors.



*Table 5.2* Open Art 226 EC infringements by environmental sector (percentage breakdown) (EU15)

<i>As at year</i>	<i>Nature</i>	<i>Water</i>	<i>Waste</i>	<i>Air</i>	<i>EIA</i>	<i>Chemicals and biotech</i>
2001	26.3	13.9	20.6	13.3	9.4	9.6
2002	30.4	15.4	21.5	7.3	11.5	8.7
2003	15.6	19.3	21.6	24.6	7	8.3
2004	24.4	15.1	25.1	16.8	12.3	3.3

*Table 5.3* Open Art 226 EC infringements in the environment sector according to type of legal action (EU15)

<i>As at end of year</i>	<i>Non-communication Art 226 actions</i>		<i>Non-conformity Art 226 actions</i>		<i>Horizontal bad application Art 226 actions</i>	
	<i>%</i>	<i>Number</i>	<i>%</i>	<i>Number</i>	<i>%</i>	<i>Number</i>
2001	41.86	126	28.57	86	29.57	89
2002	37.89	97	34.77	89	27.34	70
2003	29.24	88	39.20	118	31.56	95
2004	30.35	173	18.07	103	51.58	294

The Sixth Annual Survey for 2004 discloses figures on all live bad application cases, not simply those which involve legal proceedings taken out against several Member States ('horizontal' cases). This makes statistical comparisons with earlier years challenging. From the figures presented for 2004, it appears that the number of non-communication cases is at an all-time high whilst non-conformity cases are higher than for 2001–02. These non-compliance indicators place a serious question mark over the Commission's bold assertion in the 2004 Survey that implementation 'has improved in recent years'.

*Table 5.4* Art 226 EC infringement actions in the environmental sector: numbers of case management decisions (EU15)

<i>Year</i>	<i>ROs (Reasoned Opinions)</i>		<i>ECJ referrals</i>	
	<i>Environmental sector</i>	<i>Total number for all policy sectors</i>	<i>Environmental sector</i>	<i>Total number for all policy sectors</i>
2000	114	460	39	172
2001	190	569	71	162
2002	137	487	65	180
2003	122	533	58	215
2004	101	453	45	202

***Infringements: Art 228 EC cases*****Table 5.5** Art 228(2) infringement actions in the environmental sector: numbers of case management decisions (EU15)

<i>Year</i>	<i>ROs ( Reasoned Opinions) Environmental sector</i>	<i>ECJ referrals</i>	
		<i>Environmental sector</i>	<i>Total number for all policy sectors</i>
2000	8	0	3
2001	7	3	3
2002	8	1	1
2003	11	1	2
2004	6	0	—

**Table 5.6** Art 228(2) EC infringement actions in the environment sector: number of cases in motion

<i>As at end of year</i>	<i>Environment sector</i>		<i>Total number of Art 228 cases in all policy sectors</i>
	<i>Number of cases</i>	<i>% of all Art 228 cases</i>	
1999	14	45*	31
2000	13	41*	32
2001	20	43*	47
2002	33	53*	62
2003	40	58*	69
2004	33	53*	73

\* Highest percentage amongst all EC policy sectors.

**5.6.2 Complaints****Table 5.7** Complaints about suspected Member State violations of EC environmental law (EU15)

<i>Year</i>	<i>Environment sector</i>		<i>Total number of complaints for all policy sectors</i>
	<i>Number of complaints</i>	<i>% of total complaints registered</i>	
1998	432	38.29	1,128
1999	453	34.71	1,305
2000	543	44.33	1,225
2001	587	45.15*	1,300
2002	555	38.78*	1,431
2003	505	39.15*	1,290
2004	336	31.11	1,080

\* Identifiable from Commission reports as highest % amongst all policy sectors.



## Part 2

# THE ROLE OF PRIVATE PERSONS IN ENFORCING EU ENVIRONMENTAL LAW

Section 1: Taking action at national level



## ENFORCEMENT OF EU ENVIRONMENTAL LAW AT NATIONAL LEVEL BY PRIVATE PERSONS: GENERAL LEGAL PRINCIPLES

Part Two of this book focuses on the rights of private persons under EC law to engage in the enforcement of EC environmental legislation and is divided into two sections. Section 1 comprises Chapters 6–8, which consider the impact of these rights at the level of the Member State. Section 2 contains Chapters 9–10 and examines the extent of private persons' rights to enforce such legislation against EU institutions. This particular chapter will focus on the general legal principles established by the ECJ that are of relevance in creating possibilities for private persons to enforce EC environmental law before the national courts of the Member States. Unlike the European Commission, private persons have not been vested with express powers under the EC Treaty to enforce legal commitments entered into by Member States at EC level. However, as will be discussed below, the European Court of Justice (ECJ) has developed a body of jurisprudence since the early 1960s confirming that private persons may, in certain circumstances, take legal steps to enforce certain norms established under the auspices of the EC Treaty. The Court has confirmed that the EC Treaty system has implicitly established a legal order in which individuals as well as Member States are integral constituents. As the ECJ case law has evolved, it has become increasingly clear that the Court's judicial development of rights for private persons to enforce EC norms before national courts and tribunals of the Member States has significant implications for the EC environmental sector.

It is important to note that the jurisprudence of the ECJ on enforceable rights for private persons extends only to those norms contained within the EU's first pillar, namely those contained within and passed under the auspices of either the EC Treaty or the Euratom Treaty. Private persons are not vested with any supranationally inspired rights to enforce the norms falling within the second and third pillars of the EU's constitutional framework, namely the provisions in Titles V and VI of the Treaty on

European Union (TEU) 1992,<sup>1</sup> as amended. Consequently, discussion of the role of private persons in law enforcement in Part Two will focus on the rights afforded to them under EC law to enforce EC environmental protection measures.

In Part One, we considered the legal tools available to the European Commission to enforce EC environmental law. As discussed, the Commission is vested with specific powers in the EC Treaty under Arts 226 and 228 EC to take legal action against Member States in respect of failures to implement its obligations under EC law within its national legal system, and these include environmental legislative instruments passed under the auspices of the provisions contained in Title XIX of the EC Treaty on a common environmental policy (specifically, on Art 175 EC). Notwithstanding a number of significant problems connected with Arts 226 and 228(2) EC and their application in practice, it is clear that the Commission is a key actor responsible for ensuring the due adherence by Member States to their legal commitments under the EC Treaty. Not only is the Commission vested with a clear legal mandate to ensure that the proper application of EC law is respected by Member States, it is also endowed with institutional means to follow up this commitment in the form of an internal law enforcement network principally within its Environment Directorate-General and Legal Service. The costs of legal action taken by the Commission are readily absorbed within its budget and, in practice, are not a factor influencing whether or not an action should be initiated. If the Commission's legal teams are agreed on the legal merits of a case, so long as there are no special political issues that might interfere, there is usually no bar to an infringement action being launched.

It is evident that private persons contemplating civil litigation to enforce environmental law at national level, notably non-governmental environmental organisations (NGEOs), are faced with considerably greater practical and financial hurdles. Of pre-eminent concern may be the problem of the cost of taking legal action, the complainant having to bear in mind that, in the event of losing the case, under national rules of civil procedure they will usually have to shoulder the legal costs of both parties. The amount of costs involved in pursuing litigation may well represent not only a considerable but also relatively prohibitive financial burden for a private complainant to shoulder (Somsen, 2001, p 326). These include not only legal and court fees, but also expenditure necessary to obtain, analyse and present often complex scientific evidence. For instance, NGOs may have to make difficult decisions over the allocation of scarce budgetary resources to further their

1 Specifically, Title V Provisions on a Common Foreign and Security Policy (Arts 11–28) and Title VI Provisions on Police and Judicial Co-operation in Criminal Matters (Arts 29–42) of the TEU.

policy goals; litigation may well have to compete with other political strategies to enhance environmental protection and awareness.

Moreover, given the lack of a specific power in the EC Treaty or its secondary legislation for individuals to enforce EC norms at national level, private litigants are reliant on the often ambiguous and open-ended state of the ECJ's case law regarding the extent of their EC law rights. As will be evident from the discussion in the chapters of this first section to Part Two, EC environmental law is affected by this legal state of affairs. Private litigants may have to take the risk of not knowing whether a particular EC environmental legislative obligation contained in a directive endows them with any legal rights to enforce it. Two important related legal issues arise in this context. First, there is the question as to whether private persons may be entitled to rely on a provision contained in EC environmental legislation before a national court in the context of legal proceedings, with the purpose of invoking it against another party (public or private). Second, there is the issue as to what extent private persons are entitled to access national courts to rely on such norms, namely the extent and terms of their access to national courts to seek environmental justice (legal standing to sue). This chapter will focus on the first of those issues, with a view to clarifying the existing ECJ case law on the rights of private persons to rely on EC environmental norms before national judicial bodies. Chapters 7 and 8 will consider the second issue, focusing on the extent to which case law of the ECJ and recent EC legislative initiatives provide rights to private persons to bring legal action before the national judiciary with a view to enforcing EC environmental law.

The uncertainty surrounding the extent of legal rights for private persons under EC law has exacerbated the subordinate role that private civil litigation has traditionally had to play in terms of environmental law enforcement (Krämer, 1991, p 48). In addition, private litigants are also hampered by the fact that they have no rights to investigate or inspect sites where they suspect violations of EC environmental law have occurred. Neither are they currently endowed with any rights to force environmental protection agencies (whether national or supranational) to use any inspection powers that they might have at their disposal. Finally, it should be noted that the personal scope of the private sector to engage in environmental enforcement issues is always going to be relatively limited on grounds of self-interest. Economic self-interest, the motivation that underpins most civil litigation, is a blunt and ineffective instrument for assisting in environmental law enforcement. Unless a violation of EC environmental law adversely affects a person's immediate property rights, physical personhood and/or economic interests, it is usually unlikely that they will be motivated and/or in a suitable financial position to undertake legal action. The important exception to this is, of course, the presence of NGEOs. However, as will be discussed later, even where NGEOs are keen to litigate in order to promote law enforcement, it is by no means certain that they will necessarily have the right to take civil



action in a particular case, given that a number of Member States employ restrictions on legal standing to pursue a case, confining rights of standing to sue to those deemed to be immediately affected by the defendant's in/activities. By way of contrast, the economic interest factor is a far more effective influence in other fields of EC law relating to the realisation of the single market (such as the free movement of goods, competition and state aids law). Business communities are far more likely to be ready to undertake legal action in order to enforce these areas of law, given that the norms will often coincide with their perceived fundamental economic interests.

Carefully tailored, though, the dynamic of self-interest may have a useful if limited role to play in environmental law enforcement. For instance, a business organisation complying with certain environmental protection standards has an obvious economic interest to see that its competitors within the EU do the same, mainly to ensure that other businesses do not free ride or engage in environmental dumping practices. Whether that economic interest is sufficiently great to stimulate private sector enforcement action of some sort depends on a number of factors, including the value placed by society on the protection standards, their economic cost to business organisations and the degree to which a compliant business entity may be able to detect environmental standards cheating by others.

These factors, amongst others, serve to underline the importance of placing private enforcement of EC environmental law in its proper practical context. Notwithstanding the gradual and not insignificant steps that have been made to date towards enhancing individuals' rights to enforce EC environmental norms, it is fair to say though that private litigation remains of limited value as a law enforcement tool. The Commission, in its mid-1990s review of securing better implementation of EC environmental law enforcement, quite rightly recognised these challenges as limiting expectations and qualifying the potential of the private sector to be engaged in the law enforcement process.<sup>2</sup>

However, it would be wrong to dismiss the potential of private litigation altogether as a complementary means of EC environmental law enforcement. Indeed, private litigation offers a number of advantages over the traditional reliance on the European Commission's infraction proceedings under Arts 226/228(2) EC, particularly when it comes to instances of specific violations of EC environmental law within a Member State, namely, 'bad application' cases (Somsen, 2001, p 311). Often the presence of individuals close to the site in question means that the plaintiff will be have more detailed and prompter knowledge of the environmental issues involved, although the absence of investigatory powers represents an obvious limitation. Private complainants are not affected by internal political conflicts over the pursuit

2 COM(96)500, p 11.

of litigation that may arise within the European Commission, an institution which is vested with the task of promoting often conflicting policy goals. Moreover, civil litigation (notably, judicial review proceedings) is unlikely to be as protracted as infringement proceedings brought by the Commission under Arts 226/228 EC. In several instances, the Commission has been either slow or incapable of using its powers to secure timely implementation of EC environmental instruments by Member States (Grant, Matthews and Newell, 2000, p 72). In particular, private litigants may well have better prospects of securing interim relief against defendants than the Commission, which considers the opportunities for obtaining injunctions in the context of infringement proceedings as a remote possibility. Moreover, as will be seen in later chapters, the European Commission has begun to propose legislative changes to further and enhance possibilities of private sector EC environmental law enforcement, notably by means of the Environmental Liability Directive 2004/35 as well as legislative initiatives intended to implement the 1998 UNECE Convention on access to information, public participation in decision making and access to justice in environmental matters (Århus Convention), within the EC legal order. Several of these changes are, at the time of writing, in the legislative pipeline and will take time to come into force. However, by the time these instruments are implemented at national level by the end of this decade, the EC legal framework and rights surrounding the prosecution of private environmental litigation will be significantly enhanced.

## **6.1 Direct effect and EC environmental law**

### **6.1.1 General introduction**

The European Court of Justice has been the EU institution primarily responsible for establishing and developing rights for private individuals to enforce European Community norms at national level. The EC Treaty itself is silent on the question of whether individuals may derive rights from its norms and secondary legislation. The orthodox understanding and approach in international law is to consider that only nation states and not their citizens may be considered to be subject to such an international agreement, not least where the agreement does not make any express provision to the contrary. However, the ECJ has interpreted the legal framework underpinning the first pillar of the EU, namely the law pertaining to the EC Treaty, as encompassing individuals as well as Member States as integral constituents within its remit. Its ground-breaking 1962 judgment in *Van Gend en Loos* (Case 26/62) constituted a key moment in the evolution of the EC's legal framework. The Court declared that it is implicit within the EC Treaty system that individuals may, in certain circumstances, derive rights under the treaty and enforce them directly before the national courts. The Court

rejected the argument supported by observations of three Member States (Belgium, Germany and Netherlands) that individuals would be able to enforce EC obligations only under the auspices of national laws that have implemented international obligations entered into by Member States at EC level. The radical doctrine of 'direct effect' of EC law had been born.

The case of *Van Gend* is one of the most important in EC law, as it constituted a radical departure from traditional understandings concerning the legal effects of an international agreement. It created the possibility for individuals to assert new rights gleaned from an internationally created system. From an environmental policy perspective, this jurisprudence has only relatively recently in the EU's history begun to have significant implications. As the doctrine of direct effect has been developed and refined by the ECJ since *Van Gend*, it has opened up possibilities for individuals, in addition to the European Commission, to enforce legally binding EC environmental commitments entered into by Member States.

The *Van Gend* ruling remains a leading judgment on the doctrine of direct effect. The case involved a dispute between the Dutch authorities and a private freight delivery company, *Van Gend en Loos*, over the imposition of a Dutch customs tariff unilaterally introduced in 1960. The company contested the legality of the tariff, which had been imposed on the import of a consignment of formaldehyde from Germany and appealed to the relevant appellate body, the Dutch *Tarifcommissie*. *Van Gend* submitted before the *Tarifcommissie* that the tariff was contrary to Art 12 EEC (now Art 25 EC), which prohibits Member States from introducing new tariffs after the entry into force of the EC Treaty (that is, after 1 January 1958). The *Tarifcommissie* decided to request a preliminary ruling from the ECJ under Art 234 EC as to whether Art 12 EEC had direct application within the territory of a Member State, with the effect of providing individual rights protected by the national courts.

The preliminary ruling procedure under Art 234 EC (formally Art 177 EEC) is a judicial procedure whereby national courts and tribunals may, and in certain circumstances, must seek the guidance of the ECJ on questions of EC law during the course of national legal proceedings. It stipulates that the ECJ has competence to provide preliminary rulings on questions concerning the interpretation of the EC Treaty, the validity and interpretation of acts of EC institutions and the European Central Bank as well as the interpretation of the statutes of bodies established by act of the Council where those statutes so provide. Article 234 EC also stipulates that, whereas lower national courts and tribunals have discretion to refer such questions to the ECJ, those courts and tribunals acting as final appellate bodies at national level are required to refer such questions raised in a case pending before them, to the ECJ. In brief, it has proved to be a critically important vehicle for the ECJ to develop its jurisprudence on the impact of EC law in the Member States (see for example, Craig and De Búrca, 2003, Ch 11; Hartley, 2003, Ch 9). Not

only has it provided the principal forum for the Court to declare the fundamental legal principles underpinning EC law, notably the possibilities for individuals to assert their rights under EC law before national courts, it has also enabled the ECJ to construct a hierarchical relationship between EC law and national legal orders and between itself and national courts. Specifically, it has been via the preliminary ruling procedure that the ECJ has declared the principle of supremacy (Case 6/64 *Costa v ENEL*), according to which EC law takes precedence over conflicting national rules and is to be respected by the national courts.

In *Van Gend*, the ECJ affirmed that Art 12 EEC produced direct effects and created individual rights which the Member States' courts must protect. The Court arrived at this conclusion by considering the spirit, general scheme and wording of provisions of the EC Treaty. It held that the objective of the EC Treaty to establish a common market, the functioning of which is of direct concern to many interested private parties in the territory of the Community, implies that the treaty was more than an agreement which simply created mutual obligations between the contracting parties.<sup>3</sup> The Court drew the following conclusion, which provides an underpinning of the direct effect doctrine in constitutional terms:

The conclusion to be drawn from this is that the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit in limited fields, and the subjects of which comprise not only Member States but also their nationals. Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer on them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way on individuals as well as on the Member States and on the institutions of the Community . . .<sup>4</sup>

The ECJ set out some criteria to assist in determining whether Art 12 EEC could have direct effect. The Court referred to the clear and unconditional nature of the prohibition contained in Art 12 EEC, as well as the fact that it

<sup>3</sup> The Court referred to other factors in support of this analysis, such as the reference in the treaty preamble to peoples and not only governments, the establishment of supranational institutions endowed with sovereign rights as well as the involvement of nationals of the Member States in the Community's functioning via the European Parliament and the Economic and Social Committee.

<sup>4</sup> [1963] ECR I pp 12–13.

was a negative obligation. Specifically, the provision was not qualified by the fact that its implementation was conditional on a positive legislative measure enacted under national law. Subsequent jurisprudence of the Court has refined the test for direct effect of the first pillar of EC law to comprise two principal elements, namely that the norm in question must be sufficiently clear and unconditional in nature. The 'negative obligation' criterion has been dropped.

Elsewhere in its jurisprudence, the ECJ has developed the principle of supremacy of EC law starting with the case of *Costa v ENEL* (Case 6/64), according to which obligations under the EC Treaty have precedence over conflicting national rules. In subsequent case law the ECJ has clarified that national courts are obliged to apply Community law in its entirety, protect rights which the latter confers on individuals and must set aside any provision of national law which conflicts with it, irrespective of whether the national rule was promulgated prior to or subsequent to the EC rule (for example, Case 106/77 *Simmenthal*). The combination of direct effect and supremacy provides individuals with the primary legal tools needed to assert their legal interests under EC law, including those under EC environmental law. However, as the subsequent discussion aims to show, these judicial developments have led only to a partially effective means for the public to use EC environmental law in the context of litigation conducted before national courts.

Given that the vast majority of legally binding EC environmental obligations is contained within the legislative instrument of the Community directive, this chapter will focus predominantly on how the ECJ has developed a core of rights for individuals to enforce provisions housed in the form of a directive. It is true that the EC Treaty itself contains a number of important general commitments on the part of the EU in respect of environmental protection. These include notably: Arts 2 and Art 175(2) EC (promotion of a high level of protection and improvement of the quality of the environment); Art 6 EC (environmental protection requirements to be integrated into the definition and implementation of Community policies and activities with a view to promoting sustainable development); Art 174(2) EC (EC environmental policy to be based on the principles of precaution, preventive action, rectifying environmental damage at source and the principle of 'polluter pays'). However, it is apparent from these provisions that they are drafted in broad terms and primarily designed to be political objectives for the purpose of assisting in the crafting of environmental policy at EC level, and therefore ill-suited in the main to be used in the context of enforcement litigation. A considerable margin of appreciation is afforded to the EU and its constituent Member States in respect of the manner of the implementation of these broadly worded and policy-oriented provisions. Accordingly, it is doubtful whether any of the environmental policy provisions in the EC Treaty meet with the criteria of sufficient precision and unconditionality necessary for the application of the direct effect doctrine (Krämer, 1996a, p 113). The extent to which the environmental principles set out in the EC Treaty's provisions

may be otherwise used as legal tools to ensure that EC environmental law is enforced is a matter which has received relatively little judicial attention. The existing ECJ case law sheds relatively little light on the legal effects that such principles have for the purposes of environmental law enforcement at national level. However, the ECJ has provided some general indications that they may well be relevant as residual interpretative tools in assisting analysis of whether Member States have adhered to EC environmental commitments (see for example, Cases C-2/90 *Wallonian Waste* and C-293/97 *Standley* on application of the principle of rectification of environmental damage at source). Undoubtedly, further case law is required for judicial light to be shed on the legal impact of EC Treaty environmental provisions.

Mention should also be made of the fact that the ECJ has confirmed that the doctrine of direct effect is applicable to secondary legislative instruments including Community directives. Article 249 EC (ex Art 189) lists the various instruments that the EU may use in order to implement policies included in the EC Treaty. In addition to directives, Art 249 EC refers to regulations and decisions as measures having binding effects. A regulation is defined in this provision as having 'general application', being 'binding in its entirety and directly applicable in all Member States'. A decision is defined as being 'binding in its entirety on those to whom it is addressed'. The ECJ has confirmed that both instruments are capable of having direct effects, subject to the standard criteria of sufficient precision, clarity and unconditionality being fulfilled (for example, Cases 34/73 *Variola*, 43/71 *Politi* (regulations) and 9/70 *Grad* (decisions)). The ECJ has also confirmed that directly effective provisions of regulations may be enforced against individuals as well as Member State authorities, given their legal characteristic of being 'generally binding' (see Case C-253/00 *Muñoz*). For the purposes of EC environmental policy implementation, the instruments of regulation and directive are most relevant where the EC legislative institutions wish to enact general binding legislation. The issue of direct effect of directives is discussed in the next section.

Article 175 EC, which provides the legal basis for the implementation of EC environmental policy, does not limit the range of legislative instruments that may be chosen for this purpose. Article 175 refers to 'action' 'provisions and 'measures' which may be adopted. Notionally, then, the EC legislative decision-making bodies have the legal possibility to choose between regulations and directives as legislative alternatives. However, whilst regulations are occasionally used to pass EC environmental legislation, they are used relatively infrequently. As a legislative tool, they are designed in principle to be a self-contained source of obligations for the implementation of policy. The ECJ has confirmed that the definition of regulation contained in Art 249 EC implies that Member States are not required to, and may not, seek to transpose regulations into their national legal systems by way of domestic implementing rules unless provisions within the particular regulation require additional legislative action at national level (Cases 39/72 *Commission v Italy*

and 50/76 *Amsterdam Bulb BV*). A regulation is intended, as a matter of principle, to be a self-executing instrument. From a political perspective, the use of the form of a regulation has proved to be a sensitive issue, Member States being fully aware that national parliaments are effectively bypassed in the legislative process, given that a regulation has the equivalent legal force to a national parliamentary statute. This may be contrasted with the legislative instrument of the EC directive, which requires the Member States themselves to enact national implementing legislation after a directive has been passed in order to complete the legislative process (Art 249(3) EC). The Member States' strong preference for EC legislation to take the form of directives where possible was expressed in a formal protocol attached to the EC Treaty by virtue of the Treaty of Amsterdam 1997.<sup>5</sup> Occasionally, Member States have agreed to the enactment of environmental policy in the form of regulations. The underlying reason for the adoption of a regulation is usually linked to the fact that the measure is closely related to matters affecting the circulation of goods and/or services within the EU, a matter that falls within the exclusive competence of the Community. Notable examples in the environmental sector include the Waste Shipment Regulation 259/93, Regulation 2037/00 on ozone depleting substances and Regulation 338/97 on trade in endangered species. Directives, though, are the favoured legislative instrument in general when it comes to the enactment of EC environmental legislation.

Decisions are rarely, if ever employed for the crystallization of EC environmental policy. Decisions are, in practice, addressed to particular entities, public or private. They are more suited as administrative tools to lend support to the implementation of a policy already clearly defined at EC Treaty or legislative level. As mentioned in Chapter 5, the EC Treaty does not provide the European Commission with the power to issue decisions against persons infracting EC environmental law, although this would be possible to arrange if the Member States so wished to amend the EC Treaty. The Commission has such a power in the sector of competition policy and state aids.<sup>6</sup> The EU has enacted legislation in order to enable the Commission to issue binding decisions against private persons acting in contravention of its competition rules under the auspices of Art 83 EC.<sup>7</sup>

### ***6.1.2 Criteria for direct effect and EC environmental directives***

Given the preponderance of EC environmental legislation being crafted in the legislative form of the directive, the rest of this chapter will consider

5 Protocol on the application of the principles of subsidiarity and proportionality, para 6.

6 See e.g., Arts 86(3) EC and 88(2) EC.

7 See notably: Regulation 1/2003 on implementation of the rules on competition laid down in Arts 81 and 82 of the Treaty (OJ 2003 L1/1).

the ECJ case law on direct effect of directives in more detail. It was not until the mid-1970s that the ECJ, in the *Van Duyn* case (Case 41/74) confirmed that the doctrine of direct effect applied to provisions contained in directives. Article 249(3) EC, the treaty provision which provides a basic definition of a directive, is silent on the issue of direct effect. As is the case with other sources of EC law, there is no mention of whether the EC Treaty authors intended there to be rights for individuals to enforce directives. Article 249(3) EC states:

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

In theory, the issue of direct effect should not need to come into play in the case of directives. The directive itself should not in principle be required to constitute a source of rights and obligations for individuals and public authorities operating within the territories of the Member States. For it is evident from the legislative framework and scheme set out in Art 249(3) EC, that the rules adopted at national level intended to implement a directive will be best suited to crystallizing the requirements of the directive into enforceable rights and obligations vis-à-vis individuals and state authorities. In effect, this provision would appear to imply that the directive itself constitutes an instrument which clarifies the commitments entered into by the Member State national governments, it being the governments' task to decide on and ensure the adoption of national rules to give concrete effect to the supranational commitments entered into. The reference to 'choice of form and methods' in Art 249(3) EC indicates that Member States have discretion to decide on the type of national law and administrative procedures necessary to ensure the directive's objectives are adhered to. They may use, for example, civil, criminal and/or public law mechanisms to construct specific duties and rights for individuals as means for transposing the requirements of directives into national law.

However, in practice, the issue of direct effect of directives is a very real issue, not least in the sector of environmental policy, where Member States have a poor record of ensuring that national implementing rules have been passed by the relevant transposition deadline stipulated in each directive and ensuring that they accord with the directive's requirements. The ECJ has been confronted with several cases referred to it from national courts where Member States have failed to implement a directive correctly by the end of the transposition deadline, and where individual claimants have sought to rely on particular provisions of the directive within the national legal order before the national courts. Until the *Van Duyn* judgment, several Member States were sceptical about the possibility of individuals being able to apply the doctrine of direct effect to provisions of directives, on the grounds that



Art 249(3) EC arguably implies that legal effects for individuals are to be derived solely from national implementation rules, the directive being an instrument solely binding on Member States. However, the ECJ has rejected this interpretation of the provision. In affirming the capability of directives to have direct effects, the Court has underpinned its jurisprudence on this issue by its so-called ‘estoppel’ reasoning. Specifically, the Court has consistently expressed the view that a Member State may not rely on its failure to implement a directive correctly on time against individuals (Case 148/78 *Ratti*).<sup>8</sup> The ECJ’s central argument has been that Member States should be prevented from taking advantage of their failures to adhere to a directive, and this is a theme that has influenced the development of its subsequent case law and served to define the reach of the direct effect doctrine into the context of application of EC directives (Krämer, 1991, p 40 and 1996a, p 112). In essence, the ECJ has considered the legal position from a pragmatic and contextual interpretative perspective, determining the impact of Art 249(3) EC in light of the overall spirit, scheme and context of the EC Treaty as opposed to its literal meaning. The teleological approach of the Court to treaty interpretation, used to unpack the legal meaning and effects of EC law, has been well documented and is now clearly established in practice as a constituent element of the legal foundations of EC law. It has been noted that the doctrine of direct effect developed by the ECJ has served as a means to enhance the effectiveness of EC law (Krämer, 1991, p 40 and 1996a, p 112), underpin the principle of the supremacy of EC law over conflicting national rules (Lenz, 2000, p 509) as well as promote its practicability and feasibility (Hartley, 2003, p 202).

It is appropriate at this stage to consider the criteria identified by the ECJ that need to be fulfilled in order for a provision of a directive to have direct effects, so that private persons may be able to rely on it before national courts. The ECJ has sought to strike a balance between the legitimate interests of both individuals and Member States in developing its jurisprudence on direct effect. Notably, the ECJ has limited the scope of direct effect to those first pillar norms (whether located in the EC Treaty or in secondary EC legislation) which have suitable legal characteristics to be relied on directly by individuals. Specifically, only those provisions of EC law, including those contained in directives, which are sufficiently clear, precise and unconditional are directly effective (Cases 8/81 *Becker*, C-194/94 *CIA Security*). As applied in the context of enforcing directives, the standard formula used by the ECJ is exemplified by the following extract applied in one of the leading environmental cases on direct effect, namely the *Difesa della Cava* case (Case C-236/92), which will be considered in more detail later:

8 Para 22 of judgment.

The [ECJ] has consistently held [. . .] that wherever the provisions of a directive appear, as far as their subject matter is concerned, to be unconditional and sufficiently precise, those provisions may be relied on by an individual against the State where the State fails to implement the Directive in national law by the end of the period prescribed or where it fails to implement the Directive correctly.<sup>9</sup>

The criteria for direct effect will be considered below, although it should be recognised that to some extent they overlap with one another.

#### 6.1.2.1 *Sufficient precision*

The criterion of sufficient precision has been included in the legal test for direct effect in order to exclude provisions which are ambiguous or too vague and general in nature to lend themselves to judicial application. Reference has already been made to the difficulties of arguing application of direct effect to EC Treaty provisions on the environment, given that they have been crafted in general and often open-ended terms. The ECJ's approach has been to ensure, as far as possible, that only those provisions of directives may have direct effects which clearly and unambiguously express the specific will of the EC legislature, without there being any significant room for competing interpretations of the relevant provisions. The ECJ's approach the criterion of sufficient precision is fulfilled where the material provision is 'set out in unequivocal terms'.<sup>10</sup> In essence, the provision in question must express a clear and precise requirement which does not afford Member States discretion in terms of what definitive result to achieve in any given case (see Krämer, 1996a, p 108). Applied to an EC environmental legal context, only relatively few provisions of EC environmental directives meet with these requirements. Examples of such provisions in environmental directives have been suggested in the literature as including very specific and self-contained environmental protection requirements imposed on Member States such as environmental quality controls, emission restrictions in the form of limit values, maximum allowable concentrations, product bans and industrial process prohibitions (see for example, Krämer, 1991, p 46) as well as specific prior consultation requirements in relation to activities affecting the environment (see for example, Sunkin, Ong and Wight, 2002, p 13; Jans, 1996, p 51). The Court has provided some support for this analysis, albeit rather indirectly, by indicating in the context of Art 226 EC infringement proceedings, that emission-limits set down in EC environmental law relating to groundwater (Case C-131/88 *Commission v Germany*, para 7 of judgment), sulphur dioxide in ambient air (Case C-361/88 *Commission v Germany*, para

9 Para 8 of judgment.

10 Case C-236/92 *Difesa*, para 10 of judgment.

16 of judgment) and lead in air (Case C-59/89 *Commission v Germany*), set out precise and detailed rules intended to create rights and obligations for individuals.

However, for various reasons, relatively few EC environmental provisions contained in directives, especially those passed in recent years, meet with the criteria of adequate clarity and sufficient precision. A key factor is that Member States have become increasingly wary, on grounds of economic cost, of agreeing to be subject to specific and quantitatively identifiable legal commitments on environmental protection or improvement within the standard two-year time period envisaged by the European Commission for the transposition of directives (see for example, Bell and McGillivray, 2000, Ch7). Unsurprisingly, Member State governments are frequently concerned about the impact of EC environmental legislation on the ability of companies within their territories to be able to meet economic costs of compliance with additional environmental quality controls. As a consequence, open-ended qualifications may become woven into legislative commitments on environmental protection, such as the term 'best available technology not entailing excessive cost' (BATNEEC) or similar phrases.<sup>11</sup> The effect of such clauses is to undermine clarity and precision from an enforcement perspective.

Other reasons also explain why relatively few clear and precise substantive environmental protection provisions exist in directives. For instance, in many instances the crystallization of environmental policy is decentralised, with Member States provided with substantial discretion over the contents of policy implementation. Examples of this include requirements under a directive to develop plans or programmes to enhance a general environmental objective. Such broad commitments reflect a degree of political sensitivity on the part of Member States to the issue of national sovereignty (such as expressed in the principle of subsidiarity in Art 5 EC),<sup>12</sup> where EU involvement in environmental matters not having an overtly obvious international dimension may receive a hostile reaction from Member States. They may also constitute recognition of the often long-term nature of introducing improvements to the quality of environmental media. Finally, since the 1990s, the EU has turned increasingly to consider the application of non-legislative forms of environmental policy implementation, in the wake of criticism that the traditional so-called 'command and control' techniques of mandatory stipulations in directives may be less effective than economic or market-oriented instruments in stimulating environmental improvements (such as

11 See for example, the definition of 'best available techniques' in Art 2(11) of the IPPC Directive 96/61.

12 See also the Protocol on Subsidiarity and Proportionality annexed to the EC Treaty, as incorporated by the Treaty of Amsterdam 1997.

local environmental taxes, trading permit schemes, voluntary ecological accreditation schemes).

#### 6.1.2.2 *Unconditionality*

The criterion of unconditionality serves to complement the first element in the direct effect test of sufficient precision. Its essential purpose is also to ensure that the reach of the doctrine of direct effect applies only to provisions of a directive that are unambiguous and provide no margin of discretion to Member States in their application. The presence of conditionality renders a provision wholly unsuited to be relied on directly before a judicial authority, otherwise the latter would be in the untenable position of having to presume specific policy decisions yet to be made by other authorities designated to do this task. The ECJ has defined the criterion of unconditionality as being where the provision in question is ‘not subject, in its implementation or effects, to the taking of any measure either by the EU institutions or by Member States’ (Case C-236/92 *Difesa*, para 9 of judgment). In other words, the Court has stressed the importance of the provision being a self-contained norm, whose requirements may be derived from its terms alone without being dependent on further measures needing to be taken either at EC or national level.

The ECJ has sought to clarify the parameters of the unconditionality criterion in a number of cases. Specifically, it has clarified that where it is possible to discern from the directive’s provision in question a clear minimum legal guarantee, then the criterion of unconditionality will be satisfied. A brief example serves to illustrate the point. Unconditionality was an issue in the *Becker* case (Case 8/81), a case involving the application of the Sixth VAT Directive 77/388<sup>13</sup> which Germany had failed to transpose into national law by the requisite deadline set out in the Directive. Under the Directive, Member States were required to exempt from VAT transactions involving the granting and negotiation of credit ‘under conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of the exemptions and of preventing any possible evasion, avoidance or abuse’. The German tax authorities had refused to waive VAT liability in respect of Ursula Becker, a person trading in the grant and negotiation of credit. When called on by the German Finance Court adjudicating the tax dispute for an interpretation of the effects of the provision of the Directive under the Art 234 EC procedure, the ECJ refused to concur with the German Government’s submission that it was not unconditional in nature. It held that the conditions attached to the provision, namely measures to be taken by Member States to prevent tax fraud, did not affect the definition of the

13 OJ 1977 L145/1.

subject matter or the exemption conferred in the provision; the tax exemption requirement, owing to its particular subject matter, could be severed from the 'general body of provisions and applied separately'.<sup>14</sup> The analysis of the ECJ of the unconditionality criterion was clearly underpinned by its 'estoppel' reasoning. Specifically, it held that Germany could not plead its own omission in taking precautionary anti-fraud measures in order to refuse to grant a taxpayer an exemption.<sup>15</sup>

However, the principles set out in this particular line of jurisprudence are not free from ambiguity. The carving out of a distinct minimum guarantee from within a particular provision of a directive may not be straightforward in practice, as exemplified in the *Francovich* case (Cases C-6, 9/90). This case involved the failure on the part of the Italian state to transpose Directive 80/987 on protection of workers in the event of insolvency (OJ 1980 L283/23). The Directive required Member States to ensure that employees of insolvent firms should be entitled to receive compensation for outstanding payments owed to them by the insolvent employer. Member States had a choice when implementing a range of formulae to calculate the maximum level of compensation. The Member State could choose to elect from three dates the date prior to which payments had to be made. Depending on the date chosen, Member States were entitled to restrict liability to periods of three months or eight weeks. In addition, Member States were entitled to set a ceiling on the level of liability as well as to introduce anti-fraud measures. Notwithstanding these array of options afforded to Member States, the ECJ held that they did not exclude the fact that a minimum guaranteed level of payment could be gleaned from the terms of the Directive. However, the Court held that the Directive was not directly effective for other reasons. Specifically, the Directive required Member States to establish the particular entities responsible for providing the guaranteed payments to affected employees. The Court held that, in the absence of the particular entities being established, the terms of the Directive were insufficiently precise to confer direct effect. It refused to hold that the Member State concerned should be construed to be directly liable as guarantor in the event of a transposition failure. The Court was not prepared to apply its 'estoppel' reasoning to this extent. However, the reasons for it not doing so are not explained. The case has the added special novelty of being responsible for introducing the remedy of state liability for persons suffering loss as a result of failures by Member States to transpose directives correctly. This may explain the decision of the Court to limit application of a 'minimum guarantee' analysis. The *Francovich* case will be examined in Chapter 7, when considering the remedy of state liability for breaches of EC environmental directives.

14 Paras 29 and 32 of judgment.

15 Para 33 of judgment.

6.1.2.3 *Sufficient precision and unconditionality applied to environmental cases*

Two environmental cases illustrate the considerable challenges often faced by complainants seeking to claim that provisions in an environmental directive have direct effects. These are the judgments of the ECJ in *Difesa della Cava* (Case C-236/92) and the *Enichem Base* (Case 380/87), both of which are examples of unsuccessful attempts to enforce different provisions contained in the general Waste Framework Directive (WFD) 75/442, as amended. *Difesa della Cava* involved an Italian NCEO and several individuals seeking, before the Italian courts, to overturn a decision of the Region of Lombardy to site a waste tip. During the course of judicial review proceedings, the Italian administrative tribunal decided to stay proceedings and request a preliminary ruling from the ECJ under Art 234 EC. Having doubts whether Italian law and practice to provide for the management of solid urban waste exclusively by method of disposal (namely, landfilling) was compatible with Art 4 of the WFD. The terms of Art 4 WFD, spread over two paragraphs, are as follows:

Member States shall take the necessary measures to ensure that waste is recovered or disposed of without endangering human health and without using processes or methods which could harm the environment, and in particular:

- without risk to water, air, soil and plants and animals,
- without causing a nuisance through noise or odours,
- without adversely affecting the countryside or places of special interest.

Member States shall also take the necessary measures to prohibit the abandonment, dumping or uncontrolled disposal of waste.

Amongst the questions referred to the ECJ from the Italian tribunal, was whether Art 4 WFD conferred individual rights which the national courts had to protect. The ECJ held that Art 4 does not provide directly effective rights for individuals, the criteria of sufficient precision and unconditionality not being fulfilled. Instead, it held that Art 4 essentially indicates a programme of environmental improvements to be followed by Member States, setting out objectives which they have to observe in the performance of more specific obligations contained elsewhere in the Directive on planning, supervision and monitoring of waste disposal undertakings. Art 4 merely constitutes, according to the ECJ, a provision defining the framework for action on waste treatment and does not require the adoption of specific measures or a particular method of waste disposal.

To the extent that the ECJ reached the correct legal outcome in respect of the specific circumstances of the case in *Difesa* is not in serious doubt.

Article 4 and the other provisions of the WFD do not set down any clear-cut obligations to ensure that waste management is conducted so as to minimise disposal operations. Its general safety requirements contained in Art 4 cannot be construed so as to imply a required hierarchy or prioritisation of waste management techniques to be applied in practice by Member States. Article 3 WFD, arguably a more relevant provision to the case at hand, contains a general obligation on Member States to encourage firstly the prevention and reduction of waste and secondly the recovery of waste or use of waste as a source of energy. However, this provision is insufficiently precise for one to be able to derive a minimum guarantee of best practice in waste management.<sup>16</sup> Accordingly, it is clear that no minimum guarantee of the application of better alternative waste management strategies (prevention, recycling, recovery, energy recovery) could be derived from the terms of Art 4 WFD (or elsewhere in the Directive), and the Court was correct to conclude that the Directive's provisions were not directly effective in the sense of being able to provide any assistance to the claims of the private litigants in this particular case.

However, the ECJ was incorrect in *Difesa* to conclude that Art 4 WFD as a whole is devoid of direct effects. Specifically, the criteria of sufficient precision and unconditionality appear to be fulfilled with respect to the prohibition on abandonment, dumping or uncontrolled disposal of waste contained in the second paragraph to Art 4. There is support in the academic literature that this part of the provision is directly effective (see for example, Krämer, 1996a, p 122; Holder, 1996, p 324; Hedemann-Robinson, 2003, p 100). With regard to the Court's own established jurisprudence, the legal analysis of the ECJ should have made clear that its findings would be without prejudice to the question as to whether the second paragraph of Art 4, clearly being not of a programmatic nature, could have been severed from the rest of the provision in accordance with *Becker* (in similar vein see Jans, 1996, p 59). More recently, the ECJ appears to have modified its position somewhat in the wake of recent specific illicit dumping of waste cases taken by the Commission against Italy and Greece (Cases C-365/97 *San Rocco* and C-387/97 *Kouroupitos (2)*), as discussed in Chapters 3 and 4. In those cases the Court recognised that Art 4 WFD contains an enforceable legal obligation on Member States to ensure that waste was not disposed of in an uncontrolled fashion. Specifically, it held in these cases that in principle it will be an indication that Art 4 is breached and the State's discretion exceeded in the event of a 'significant deterioration in the environment over a protracted period when no action has been taken by the competent authorities' (Case C-387/97, para 56 of judgment). Had the provision been entirely of a programmatic character as held earlier in *Difesa*, the Commission's action would not have

16 The word 'encourage' implies a substantial degree of discretion afforded to Member States as to how they apply waste management techniques in practice.

succeeded. However, the fact that the Court in these cases introduced the caveat that a protracted period of illicit behaviour is required before liability under Art 4 WFD is triggered, introduces an unnecessary and unhelpful element of uncertainty to the legal position as far as private litigants are concerned. It is not yet clear whether the ECJ has discontinued its apparent outright rejection in *Difesa* of direct effects for Art 4 WFD. If the ECJ has now impliedly accepted that the provision may have direct effects in limited circumstances, it is unclear in practice as to when a protracted period of illicit behaviour will have elapsed. In addition, the introduction of the element of a lengthy period of illicit pollution is detrimental from an environmental protection perspective and certainly not in accordance with the environmental objectives underpinning of the Directive, given that a single instance of uncontrolled dumping of hazardous waste may have profound, potentially even irremediable, adverse environmental effects.

Another environmental case which highlights difficulties that private litigants may encounter in practice when seeking to use the doctrine of direct effect is *Enichem Base* (Case 380/87). In this case a dispute arose over the legality of a decision made by the Italian municipality of Cinisello Balsamo to introduce a ban on the supply to consumers of non-biodegradable bags and other containers except those intended to collect waste. Article 3(2) of the 1975 Waste Framework Directive 75/442 (WFD) requires Member States to inform the Commission of any measures they intend to take to achieve the aims set out in the first paragraph of Art 3, which, as noted earlier, obliges them to take appropriate measures to encourage the prevention, reduction and recovery of waste as well as its use as a source of energy. In this case, the ban on the sale of plastic bags had not been notified to the Commission. One of the questions referred to the ECJ by the Italian administrative tribunal adjudicating the dispute was whether Art 3(2) conferred a right on individuals enforceable before national courts to annul or suspend national measures which conflicted with its terms. At first sight that question might be considered worthy of an answer in the affirmative, given that the requirement contained in the provision appears to fulfil the criteria of sufficient precision and unconditionality. However, the ECJ rejected that view, coming to its conclusion by using a broader contextual analysis of its overall function. It considered that the purpose of Art 3(2) for Member States was to inform the Commission in good time of any draft rules within the scope of the provision, without there being any procedure for monitoring its application or making implementation of the planned rules conditional on agreement by the Commission or its failure to object. The ECJ further held that neither the wording nor the purpose of the provision provided support for the view that failure by the Member States to observe their notification obligation renders unlawful the rules adopted.<sup>17</sup>

<sup>17</sup> Paras 21–22 of judgment.



With respect, the reasoning of the ECJ is rather weak. It is perfectly plausible for an opposing interpretation of the Directive's provision to apply. In particular, it should be noted that Art 3(2) makes reference by way of analogy to Directive 83/189<sup>18</sup> laying down a procedure for the provision of information in the field of technical standards and regulations. The Technical Standards Directive requires Member States to notify the Commission of the draft of any measures which might constitute barriers to inter-state trade contrary to the EC Treaty, notably Arts 28–30 EC on the free movement of goods within the single market. Under the Directive, there is a minimum standstill period of three months during which Member States are required to abstain from introducing such measures into national law whilst the Commission and other Member States have an opportunity to assess the proposals. The ECJ has held in a number of relatively recent cases starting with the *CIA Security* judgment (Case C–194/94) that individuals may rely on the standstill provision of the Directive and enforce it before national courts, with the latter being required to disapply measures that have been introduced without being notified in advance or applied in conformity with the terms of the Directive (see section 6.1.4.4 below).

Admittedly, as the ECJ notes in its judgment in *Enichem Base*, Art 3(2) WFD does not provide for a detailed standstill formula. However, that in itself should not detract from the clear implication indicated in the provision, that the prior notification obligation contained in Art 3(2) should be considered as being closely linked with the function of the prior notification obligation as contained in the technical standards directive. Moreover, as the ECJ itself acknowledged in *Enichem Base*, the purpose of the WFD, in addition to contributing to the attainment of EC policy objectives concerning the protection of health and the environment, is to harmonise the legislation of the Member States regarding waste disposal in order to avoid barriers to intra-EU trade and inequality of competition resulting from the disparities between such provisions (para 7 of judgment). The judgment of the ECJ in *Enichem Base* underlines the significance of the factor of contextual interpretation of EC law in applying the criterion of sufficient precision.

The cases above highlight the degree of legal uncertainty often faced by private litigants when seeking to prove to national courts that the core criteria of direct effect (sufficient precision and unconditionality) of provisions contained in environmental directives are fulfilled. In particular, complainants shoulder the burden of being able to prove that the material provision(s) in question are unconditional in the sense of constituting a severable minimum guarantee of conduct on the part of Member States as well as being able to satisfy the ECJ that the legal context in which the provision is situated does not disqualify it from being suitable for the application of the direct effect doctrine.

18 Subsequently replaced by Directive 98/34.

#### 6.1.2.4 *Transposition deadline and direct effect*

Usually, directives may not have direct effects until the elapse of the deadline provided by them for transposition of their requirements into national law. The ECJ confirmed this basic principle in one of the first environmental cases to come before it, namely in *Ratti* (Case 148/78). The case involved an Italian trader of solvent and varnish products who wished to rely on two directives concerning mandatory labelling of certain chemical products as a defence to criminal charges brought against him by Italian authorities: Directive 73/173 on labelling of solvents and Directive 77/728 on labelling for varnishes. Italy had failed to implement both Directives. Existing Italian legislation at the time required additional information for varnishes and labels to be provided on product labels other than that required by the Directives. At the material time when the case came to court, only the transposition deadline pertaining to the Directive on solvent labelling had elapsed. In a preliminary ruling, the ECJ confirmed that individuals may not be able to rely on the doctrine of direct effect before the end of the transposition deadline where the Member State in question had not enacted any legislation to implement the directive.

In its more recent jurisprudence, the ECJ has refined its position in cases where Member States have enacted internal legislation intended to implement a directive prior to the transposition deadline and whose provisions are contrary to the directive's requirements. This issue arose in the *Inter-Environnement Wallonie* case (Case C-129/96). InterEnvironnement Wallonie (IEW), an NGEIO based in the Wallonian Region of Belgium, sought to annul a Wallonian legislative Order enacted to give effect to a 1991 Directive amending the Waste Framework Directive (WFD) 75/442, namely Directive 91/156. IEW submitted that the Order infringed Art 11 of the WFD as amended, in that it automatically excluded certain installations from being required to obtain a waste permit, namely those who operated waste collection, pre-treatment, disposal or recovery as an integral part of an industrial process. The case reached the Belgian *Conseil d'Etat* on appeal, which considered that the Order was not in compliance with the terms of EU waste management legislation, specifically Art 11 WFD in conjunction with Art 3 of Directive 91/689 on hazardous waste, which stipulate special EC-level application procedures for an exemption to be granted. The national court questioned the ECJ as to what extent, if at all, a Member State was entitled to adopt legislation contrary to the terms of a directive before the elapse of the transposition deadline. The ECJ held that it follows from the duties of co-operation set out in Art 10 EC that Member States were obliged to refrain from taking any measures 'liable seriously to compromise the result prescribed'.<sup>19</sup> The national court would have to assess the individual

19 Para 45 of judgment.

circumstances and consider whether the measures in question purport to constitute a full transposition of a directive, their effects in practice and of their duration time. If so, the court would have to consider whether the measures might give rise to the presumption that the result required by a directive will not be achieved on time.<sup>20</sup> Conversely, the national court should recognise that Member States have a right to adopt transitional measures or implement a directive in stages; in such cases, incompatibility of such measures with the terms of the directive would not necessarily compromise the result required to be attained under a directive.<sup>21</sup> It should be borne in mind that national courts form a constituent part of the concept of 'Member State' and are obliged, according to well-established ECJ jurisprudence, as part of the general obligations contained in Art 10 EC, to set aside national measures pleaded before them which contravene EC law.

The ECJ has confirmed that the direct effect doctrine may be relied on in two main types of scenarios after the transposition deadline of a directive has elapsed. First, the classic application of direct effect is where the Member State has failed to pass any national legislation to implement a directive by the transposition deadline. Second, the ECJ has also confirmed that the doctrine applies also where Member States have adopted transposition legislation but the latter is incomplete and/or in conflict with the terms of the directive in question (Case 51/76 *Verbond*, Case C-118/94 *Regione Veneto*). Accordingly, the ECJ has confirmed that the directive will have residual legal effects, so long as a Member State has failed to implement its EC legal obligations accurately.

#### 6.1.2.5 *Subjective individual rights and direct effect*

It has been a long-standing debate, still not clearly resolved in the ECJ's case law, as to whether the doctrine of direct effect can be used only where the material provisions contained in directives purport to, expressly or impliedly, grant substantive rights for the benefit of individuals. The debate has sometimes been referred to in terms of a distinction between subjective and objective direct effect. Subjective direct effect envisages that, in addition to the criteria of sufficient precision and unconditionality, the EC legislative provision(s) in question must, impliedly or expressly, grant particular rights to the benefit of individuals. Objective direct effect, in contrast, envisages a position whereby persons are entitled to use the direct effect doctrine where the criteria of sufficient precision and unconditionality are fulfilled, it being irrelevant whether or not they are intended to bestow personal substantive rights under the provision(s) concerned. The issue is of crucial importance to a policy field such as environmental law, where several EC directives

20 Paras 47–48 of judgment.

21 Para 49 of judgment.

on environmental protection contain no, or only an indirect, connection to individual personal rights (see for example, Davies, 2004, p 102). Classic examples include directives on nature protection, namely the Wild Birds Directive 79/409 and Habitats Directive 92/42, whose provisions are principally intended to benefit wildlife conservation, as opposed to any specific anthropogenic interests.

The debate has close links with the issue of the evolution of discussions concerning legal standing (*locus standi*) in proceedings involving judicial review of public administrative conduct (see for example, comments by Sunkin, Ong and Wight, 2002, p 16). In judicial review proceedings, whether it be in the context of national proceedings or proceedings at EC level, the issue of deciding how to set an appropriate limit to the personal scope of potential complainants in any given dispute is a politically sensitive subject. On the one hand, arguments grounded in safeguarding an adequate level of democratic accountability of state decision-making point towards constructing a judicial review framework which provides a relatively flexible and open system for allowing interested citizens to seek annulment of measures they consider to be contrary to the law. On the other hand, arguments grounded in ensuring that the democratically elected governments should not be unduly constrained in implementing policy point in favour of ensuring that the range of persons who should be entitled to seek legal review of state decision-making should be confined to those with clearly identified personal legal interests.

The issues of direct effect and legal standing are legally distinct matters and should not be confused with one another (see Jans, 1996, p 77), as was done in the judgment of the High Court in relation to the dispute over the failure to apply the Environmental Impact Assessment (EIA) Directive 85/337 in relation to the motorway project at Twyford Downs in the United Kingdom.<sup>22</sup> Whereas the subject of direct effect determines whether or not an individual may rely on a particular EC norm in the context of legal proceedings brought either by them or against them (whether civil, criminal or administrative), the issue of legal standing is a matter which determines whether or not a particular person has a legal right to bring a legal action before a court (such as judicial review or a civil action against a decision of the state or public authority). The doctrine of direct effect does not in itself determine who may bring a particular action in order to enforce EC law. That is primarily a matter to be determined by the laws of the Member States, although the ECJ has, in its more recent jurisprudence, provided some important new legal innovations in this regard, as will be discussed at the end of this chapter.

22. *Twyford Parish Council v Secretary of State for the Environment and another* (1992) 1 CMLR 286–88.

The jurisprudence of the ECJ has not satisfactorily resolved the issue as to whether the presence of substantive individual rights should feature as a criterion in the direct effect doctrine. On the one hand, there are a number of indications that the ECJ would reject a narrowly defined doctrine of direct effect; that is, one confined to instances where EC law confers subjective rights for individuals. The criteria established by the ECJ itself to determine direct effect do not specifically include reference to a subjective legal interest dimension, the Court having consistently referred to the elements of sufficient precision and unconditionality as integral elements to the direct effect doctrine. Moreover, the inclusion of a subjective rights element to the doctrine would run counter to the overall approach of the ECJ in working to ensure that the legal framework underpinning the EC Treaty is effective in terms of ensuring that the legal commitments entered into by Member States are adhered to. Such a limitation would also undermine the ‘estoppel’ line of reasoning employed by the ECJ in relation to directives.

In addition, in at least one environmental case, the ECJ appears to have rejected the argument that directives must be intended to confer subjective rights on individuals. Specifically, in the *Grosskrotzenburg* case (Case C-431/92), the ECJ rejected the German Government’s submission that the direct effect of the provisions of directives could materialise only where they confer rights on individuals.<sup>23</sup> The case arose in the wake of a complaint to the Commission that certain public authorities in Germany had acted in breach of the EIA Directive 85/377 by failing to carry out an environmental impact assessment prior to the construction of an extension to an existing thermal power station. Consequently, the Commission brought an infringement action against Germany, submitting that Arts 2, 3 and 8 of the Directive had been breached. Germany had, at the time, failed to transpose the EIA Directive by the requisite deadline stipulated in the Directive. The German Government submitted that, irrespective of whether those particular provisions in the Directive were sufficiently precise and unconditional, the German authorities were not obliged to apply them directly because none of them were intended to confer rights on individuals. Article 2 lays down a general obligation for Member State authorities to undertake an EIA in relation to certain projects; Art 3 sets out the content of the EIA, lists the factors to be taken into account by the relevant authorities whilst leaving some discretion regarding the manner of carrying out assessments in individual cases; whilst Art 8 requires national authorities to take on board information obtained in the course of the assessment for the purposes of appraising whether or not to grant development consent. The German Government was effectively arguing that its national authorities were not obliged to adhere to the terms of those particular provisions in the absence

23 Paras 24–25 of judgment.

of national transposition legislation, and would be bound only by national implementing legislation which transposed the particular terms of the Directive. The ECJ rejected this submission, holding that the particular provisions of the Directive unequivocally imposed an obligation on the national authorities responsible for granting development consent to carry out an EIA.<sup>24</sup> The ECJ did not find it necessary to comment on whether the particular provisions were in fact directly effective. Nevertheless, it is clear from this judgment that Member State authorities, as are Member State governments, bound by EC directives irrespective of whether they have direct effects or not.

The case of *Regione Veneto* (Case C-118/94) would appear to lend clearer support for the view that the ECJ favours the objective as opposed to subjective conception of direct effect. In this environmental case, certain Italian NGEs took legal action against the regional authority for Veneto in order to annul its decision to fix the hunting calendar for 1992/3 on a basis, which they submitted, contravened the terms of the Wild Birds Directive 79/409. By way of derogation from the general hunting ban contained in Art 5 of the Directive, Art 7(1) of the Directive stipulates that Member States may authorise the hunting of bird species listed in its Annex II. In addition, Member States may, exceptionally, authorise the hunting of other birds under strict conditions set out in Art 9 of the Directive. The complainants submitted that the calendar for the Veneto region had authorised the hunting of species not listed in Annex II of the Directive, without complying with the conditions of Art 9. In its preliminary ruling in relation to the case, the ECJ confirmed, in relation to one of the conditions under which Art 9 of the Directive authorises Member States to derogate from the hunting ban set out in Arts 5 and 7, that individuals would be able to rely on sufficiently precise and unconditional provisions of a directive against any authority of a Member State where the State has failed to implement the Directive in national law by the end of the transposition period, or implements it in incorrectly (para 19 of judgment). This advice to the national referring court gave a strong indication that the doctrine of direct effect was pertinent to a case even where, as in this one, anthropocentric legal interests were not at stake.

Commentators seem somewhat divided over whether the direct effect doctrine is based on a 'subjective' or 'objective' basis. Krämer, for instance, has argued that the ECJ has indicated that the express or implied inclusion of individual substantive rights in an EC norm are a prerequisite to the capacity of private persons being able to use the direct effect doctrine (Krämer, 1996a, p 109 and 2003, p 386). The case of *Enichem Base*, discussed above, might appear to lend support to that argument. However, Jans disagrees

24 Para 40 of judgment.

with this analysis, holding that the ECJ has not stated that this is to be a requirement, whilst also making the point that the assertion of direct effect is easier if the relevant provision is closely linked to the protection of clearly defined individual interests such as public health protection or free trade (Jans, 1996, pp 62 and 79). Lackhoff and Nyssens submit that in the light of the *Grosskrotzenburg* case, the ECJ has clarified that the direct effect doctrine is based on an objective as opposed to subjective basis (Lackhoff and Nyssens, 1998, p 396). Others are unclear on the ECJ's position (for example, Davies, 2004, p 102).

Notwithstanding the current relative state of controversy and confusion that surrounds this issue, it appears that the ECJ has recently begun to introduce new elements into its jurisprudence which may now have effectively bypassed or sidestepped the debate over subjective and objective direct effect, as well as arguably the core criteria traditionally associated with direct effect. Specifically, the ECJ appears to have developed its jurisprudence so as to focus more on the duties of national courts to uphold directives relied upon by individuals, as a means of ensuring that EC law, and in particular EC environmental law, is upheld. The leading case in this significant new judicial approach is the *Kraaijeveld* case (Case C-72/95), which will be explored in section 6.1.3.3. The next two sections will examine the various persons and entities against whom individuals may enforce directly effective provisions of EC environmental directives before national courts and tribunals.

### ***6.1.3 Applying direct effect of directives against public authorities***

#### ***6.1.3.1 General points***

One of the key limitations developed by the ECJ in relation to the application of the direct effect doctrine as applied to provisions of directives is the range of persons and entities against whom the doctrine may be relied upon before national courts. The Court has made a basic distinction between, on the one hand, enforcement of directives against public authorities and, on the other hand, against private persons. Whereas it has confirmed that individuals may directly rely on provisions of directives which meet the criteria for direct effect against state authorities (so-called 'vertical' direct effect) it has ruled out the possibility of the direct effect doctrine being used by individuals against other individuals (so-called 'horizontal' direct effect) (for example, Case 152/84 *Marshall (I)*) or by the state authorities against individuals (so-called 'inverse' vertical direct effect) (for example, Case 80/86 *Kolpinghuis*).

The principal reason for these limitations may be traced to the ECJ's understanding of the legal nature and purpose of the directive as an EU legislative instrument as well as its 'estoppel' reasoning referred to earlier. The ECJ's

analysis of the legislative process envisaged in Art 249(3) EC when the EU selects a directive in order to crystallize policy into a legally binding format, interprets from this provision that directives are not intended, as a matter of principle, to be addressed to individuals. The provision refers to directives being binding on the Member States to whom it is addressed. It is evident from the wording and structure of Art 249(3) that the treaty authors saw the completion of the entire legislative process finalised only when national legislation is adopted in order to implement the requirements of a directive into national law, particularly when one compares the provision with the description of the impact of regulations described in Art 249(2) EC. National implementing legislation is clearly required from the wording in Art 249(3) EC to translate the directive's requirements into rights and responsibilities for the general public located within the jurisdiction of each Member State. As already noted above, the Court has developed the doctrine of direct effect in the context of directives as a means of ensuring that Member States are not in a position to take advantage of the fact that they have failed to implement their EU obligations correctly and/or on time. However, it has refused to extend the doctrine to encompass directly effective obligations for individuals, on grounds that the latter are not expected to take responsibility when a Member State has failed to honour its supranational legal commitments (see for example, Case C-91/92 *Dori*).

As will be discussed below, it is evident that recent jurisprudence from the ECJ has begun to blur the distinction between vertical and horizontal effects of directives, which has important ramifications for the prosecution of civil litigation undertaken by individuals with the purpose of altering the behaviour of private individuals so as to ensure that legally binding commitments contained in EC environmental directives are upheld.

#### 6.1.3.2 *Vertical direct effects*

As noted above, the ECJ has laid down the general principle that Member States are not entitled to rely on their failure to transpose directives into national law in order to evade legally binding commitments contained in directives which are couched in sufficiently precise and unconditional terms. Accordingly, the ECJ has confirmed that individuals may rely on such provisions either as plaintiffs or defendants against Member State government agencies which seek to enforce domestic legislation which conflicts with the directly effective terms of a directive (Cases 8/81 *Becker*, 148/78 *Ratti*). Since then, the ECJ's case law has expanded considerably the range of situations that may be described as vertical direct effect scenarios.

Notably, the ECJ has confirmed that the *ratione personae* of what may be deemed to be the 'Member State' should be construed broadly. In a number of cases, the Court held that individuals could rely on directly effective provisions in directives against a series of public authorities, not only those



located at the heart of central government such as government departments (as in the first case on the direct effect of directives, Case 41/74 *Van Duyn*). For instance, the ECJ has accepted that direct effect could be evoked in disputes against local authorities (Case 103/88 *Costanzo*), even where such an authority acted in its capacity as employer as opposed to public policy decision maker (Case 152/84 *Marshall* (1)), police authorities (Case 222/84 *Johnston*) and universities (Case C-419/92 *Scholz*). It had become clear in a relatively few years after the Court's initial case law on the subject of direct effect of directives, that emanations of the state as well as its central branches were subject to the doctrine.

The Court set out a basic test for determining the parameters to the definition of 'Member State' for the purpose of vertical direct effect of directives in the *Foster* case (Case C-188/89). That case concerned a dispute between an employee of British Gas plc and the company which had been recently privatised at the time. The employee, Ms Foster, sought to challenge the legality of the company's policy to require compulsory retirement of women at 60 and men at 65. Specifically, the employee submitted that the policy contravened the EC's Equal Treatment Directive 76/207,<sup>25</sup> which requires that Member States ensure that the principle of equal treatment between men and women is applied in relation, *inter alia*, to working conditions in the workplace. A key question was whether or not the employee could rely on the Directive in her case against British Gas plc. The Court set out the following framework for the national court adjudicating the dispute to apply to determine the issue:

(18) . . . [T]he Court has held in series of cases that unconditional and sufficiently precise provisions of a directive could be relied on against organisations or bodies which were subject to the authority or control of the State or had special powers beyond those which result from the normal rules applicable between individuals.

. . .

(20) It follows [. . .] that a body, whatever its legal form, which has been made responsible, pursuant to a measure adopted by the State, for providing a public service under the control of the State and has for that purpose special powers beyond those which result from the normal rules applicable in relations between individuals, is included in any event among the bodies against which the provisions of a directive capable of having direct effect may be relied on.

This judgment makes it clear that privatised utilities are most likely to come under the definition of an emanation of the State for the purposes of direct

25 OJ 1976 L39/40.

effect. This has important ramifications for the environment sector where in several Member States privatisation of utilities affecting environmental quality has been completed or is being actively considered, such as in the water, energy and transport sectors.

From an environmental sector perspective, it has been particularly significant that the ECJ acknowledged that local or regional authorities are to be considered a constituent part of the Member State for the purposes of vertical direct effect, given that it is common to find a strong element of devolution or decentralisation in terms of environmental policy decision making within Member States. It meant that authorities were provided with a definitive legal obligation under EC law to ensure that unambiguous and self-contained environmental commitments entered into at EC level and enshrined in directives were enforced at local level, in so far as those commitments fell within their field of jurisdiction at national level. As will be addressed in the final part to this chapter, the ECJ has gone further to confirm that a general legal obligation on Member State authorities flows from Art 10 EC to ensure that they apply EC law and legislation which falls within the scope of the jurisdiction allocated to them under national law, irrespective of whether or not the provisions of the directive in question are directly effective (see for example, the *Grosskrotzenburg* case (Case C-431/92) and Case C-72/95 *Kraaijeveld*). This particular development of the ECJ's jurisprudence has profound implications, given that the duty arises irrespective of whether an individual takes legal action against the relevant authority, or whether the norm in question meets the standard criteria of direct effect of sufficient precision and unconditionality.

It has been argued that the credibility of the 'estoppel' line of reasoning, so heavily used by the Court to justify its jurisprudence on conferral of direct effects of directives, has been stretched to the limit with the expanded notion of the Member State (see for example, Hartley, 2003, p 216). Specifically, one might question whether a local council, for instance, should be expected to assume legal responsibility for the failure on the part of a relatively remote central government of the Member State in question to carry out its obligations in promulgating correct transposition legislation on time. A far more convincing line of argument to support the imposition of direct effect on public authorities would be to focus on the ECJ's understanding of the EC Treaty as having created a unique supranational legal order comprising both Member States and resident individuals coupled with the need to enhance the effectiveness of the enforcement and supremacy of EC law within Member States' territories as far as possible, whilst at the same time recognising that the argument of *effet utile* should not go so far so as to introduce obligations for individuals who have no immediate links with or represent the exercise of State authority.

### 6.1.3.3 *Limited Member State discretion and 'vertical' effects of directives*

Within the last decade, the ECJ appears to have developed a new dimension to its traditional jurisprudence on direct effect in the context of directives. Specifically, the Court has confirmed in a number of cases that Member State courts have been obliged to apply provisions of EC environmental directives relied on by individuals in the context of national legal proceedings against state entities, even though the provisions would not appear to meet the standard core criteria of direct effect of sufficient precision and unconditionality. In these particular cases, the Court has been careful to avoid references to the direct effect doctrine in its legal analysis, choosing instead to focus on the obligations of national courts and tribunals to apply EC law in circumstances where a state entity is relying on a national legal position which is not in conformity with an EC environmental directive.

The leading case in this particular line of ECJ jurisprudence is the *Kraaijeveld* case (Case C-72/95). That case involved a failure by the Dutch authorities to adhere to the terms of the EIA Directive 85/337 in relation to a particular construction project. Specifically, certain private companies including Aannemersbedrijf P.K. Kraaijeveld BV sought to annul the decision by the South Holland Provincial Executive to approve a zoning plan siting the reinforcement of certain dyke works designed to protect inland areas from storm tides. An effect of the planned dyke works would have been the closure of access for Kraaijeveld to navigable waterways, upon which its business operations were dependent. Under Dutch law at the time, no environmental impact assessment was carried out because the size of the works fell below the minimum<sup>26</sup> set by national legislation for an EIA to be mandatory. Kraaijeveld, supported by the European Commission, submitted that the omission of an impact assessment contravened the terms of the EIA Directive.

The legal backdrop to the case involved a rather nuanced understanding of the EIA Directive's provisions. The particular project in question fell within the remit of Annex II to the EIA Directive,<sup>27</sup> in respect of which Member States were afforded a certain amount of discretion in determining the organisation of impact assessment procedures. Specifically, Art 4(2) of the Directive states that Annex II projects are to be subject to an impact assessment 'where Member States consider that their characteristics so require' and 'to this end could specify certain types of projects as being subject to an assessment or may establish the criteria and/or thresholds necessary' to determine which projects are likely to be subject to an assessment. Article 4(1), in conjunction with Annex I to the Directive, specifies projects in respect of which an impact assessment is mandatory. Article 2(1) of the Directive contains a distinct

26 Less than 5km in length with a cross-section of least 250m<sup>2</sup>.

27 Annex II para 10(e) canalisation and flood relief works.

obligation in relation to all prospective projects likely to have significant effects on the environment. Article 2(1) states:

Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue *inter alia* of their nature, size or location are made subject to an assessment with regard to their effects.

These projects are defined in Art 4.

The Dutch court adjudicating the dispute referred a number of questions to the ECJ under the preliminary ruling procedure in Art 234 EC. Specifically, the national court enquired whether Art 2(1) in conjunction with Art 4(2) imposed an impact assessment obligation on each Member State in respect of projects covered by Annex II which would have significant effects on the environment, notwithstanding that such projects fall below minimum thresholds set by a Member State for an EIA to be required. In addition, it also requested the ECJ to confirm whether such an obligation is directly effective.

The ECJ answered the first question in the affirmative. It considered, in essence, that the effect of Art 2(1) was to limit Member States' discretion conferred in Art 4(2) of the Directive. Specifically, it ruled that a Member State's legislation having the effect of automatically exempting certain dyke construction projects from the requirement of an EIA would exceed the limits of the Member State's discretion conferred under Arts 2(1) and 4(2) of the Directive, unless all projects excluded could, when viewed in their entirety, be regarded as not being likely to have significant effects on the environment.<sup>28</sup>

However, the Court did not address the issue of direct effect in clear or specific terms. Instead, it referred in general terms to the conduct of judicial review proceedings to be carried out by the adjudicating national court, given the circumstances presented to it. The ECJ first reiterated its previous jurisprudence confirming the obligation on Member States to take all necessary measures to achieve the result prescribed by a directive set out by Art 249(3) EC as well as the particular directive itself. Following on from that initial general position, the ECJ underlined that the duty to take all appropriate measures, whether general or particular, is binding on all the authorities of the Member States including, for matters within their jurisdiction, the courts.<sup>29</sup> The ECJ stated, in accordance with previous jurisprudence, that it would be incompatible with the binding effect attributed to a directive under Art 249 EC to exclude, in principle, the possibility that the obligation which it imposes may be invoked by the individuals concerned. The Court underlined that the effectiveness of directives would otherwise be undermined:

<sup>28</sup> Para 53 of judgment.

<sup>29</sup> Para 55 of judgment.

In particular, where the Community authorities have, by directive, imposed on Member States the obligation to pursue a particular course of conduct, the useful effect of such an act would be weakened if individuals were prevented from taking it into consideration as an element of Community law in order to rule whether the national legislature, in exercising the choice open to it as to the form and methods for implementation, has kept within the limits of its discretion set out in the Directive.<sup>30</sup>

Finally, the ECJ addressed the element of discretion afforded to the Member State authorities in relation to Arts 2(1) and 4(2) of the Directive. From an orthodox standpoint, the margin of discretion conferred to Member States in those provisions appears arguably too wide to fulfil the criteria of sufficient precision and unconditionality inherent in the test of direct effect. For instance, the reference to ‘significant effects on the environment’ in Art 2(1) is not legally defined in the Directive and inherently involves a judgment to be made by competent authorities in each case (that is, at what particular point the threshold of ‘significance’ is reached). In addition, there is a strong element of discretion contained in Art 4(2), which stipulates the principle that Annex II projects are to be subject to an impact assessment ‘where Member States consider that their characteristics so require’. Nevertheless, crucially, the ECJ did not consider the presence of considerable discretionary powers on the part of Member States to be a bar or relevant consideration for the national court to take into account when carrying out its duties under Art 249(3) EC:

The fact that in this case the Member States have a discretion under Arts 2(1) and 4(2) of the Directive does not preclude judicial review of whether the national authorities exceeded their discretion [...].<sup>31</sup>

If that discretion has been exceeded and consequently the national provisions must be set aside in that respect, it is for the authorities of the Member State, according to their respective powers, to take all the general or particular measures necessary to ensure that projects are examined in order to determine whether they are likely to have significant effects on the environment and, if so, to ensure that they are subject to an impact assessment.<sup>32</sup>

There is little doubt that the ECJ in *Kraaijeveld* extended the range of possibilities for individuals to be able to enforce EU (environmental) directives. It is clear that the ECJ requires the national court in this instance to ensure,

30 Para 56 of judgment.

31 Para 59 of judgment.

32 Para 61 of judgment.

in the context of annulment proceedings brought by individuals against a State authority, that the legal duty set down in the Directive is adhered to. In this case, the legal duty distilled by the Court from the Directive's provisions was a duty on the part of the Member State and its competent authorities to ensure that any project which would generate significant environmental effects would be subject to an impact assessment. The ECJ effectively recognised the enforceability by individuals of a public law duty imposed on Member State authorities under Arts 2(1) and 4(2) of the Directive. Not only did the relevant local planning authorities have a duty to ensure that an assessment would be carried out, but also national courts had a concomitant legal duty to set aside decisions taken by such authorities which exceeded the margins of their discretion under those provisions. Scott has aptly described this judgment of the Court in terms of the ECJ creating a 'public law effect' to directives, in respect of which individuals have new legal rights to uphold. Several commentators have speculated whether the ECJ has created a new source of legal enforceability of directives, to apply alongside direct effect. Some intimate that this recent line of jurisprudence might be best described as lying outside the realm of direct effect, having in effect constituted a new and distinct legal doctrine (Somsen, 2001, p 341; Krämer, 2002a, at 68). Other commentators opine that the ECJ has extended the doctrine of direct effect to include a new branch of legal principle which precludes Member States from exceeding limits to discretion as set out in EC law (for example, Jans, 1996, at 50). Others remain uncertain of the Court's position, noting that the ECJ did not comment on the impact of its judgment in relation to existing direct effect jurisprudence (for example, Hilson, 1999, p 133; Davies, 2004, p 174).

Whatever the correct position, it is clear that the ECJ has moved the legal discussion pertaining to private enforcement of EU (environmental) directives beyond a purely subjective individual rights context (Prechal and Hancher, 2002, p 94). Specifically, it is evident from the judgment that individuals may rely on the *Kraaijeveld* case in order to enforce legal duties enshrined in directives intended to benefit the collectivity of society, as opposed to specific or exclusively individual legal interests. Moreover, the ECJ has also clarified that legal duties set out in directives containing substantial elements of discretion afforded to Member States may be enforced by individuals where the national authorities have failed to exercise the discretion within the legal boundaries set by the Directive. There has been disquiet from some quarters concerning the implications of the judgment. Wyatt, for instance, doubts the conclusions reached by the Court on the grounds that the decision as to whether or not an impact assessment should be carried out in relation to Annex II projects involves a complex analysis of factors and policy choices and is ill-suited to judicial adjudication (Wyatt, 1998, p 18). However, the implications of the judgment may not necessarily be intended to spread into the sphere of policy in this way. In *Kraaijeveld*

itself, the basic criticism pointed to the fact that the national legal position did not ensure that an EIA would be carried out in respect of projects having significant environmental impacts. If the ECJ is referring to the exceedance of discretion in this narrow manner, and there are grounds in its reasoning to suggest that this is the case, the judgment in *Kraaijeveld* arguably is not that far removed from the classical conceptual lines of thought in relation to direct effect. According to this reading of the ECJ's ruling it has effectively distilled a minimum legal guarantee contained in the terms of a directive, which is not conditional on further measures at national or supranational level: the guarantee that a legal framework is in place to ensure that projects likely to have significant legal effects should be subject to an impact assessment. However, this still leaves the element of ascertaining what the term 'significant effects' means in practical legal terms. It would appear that the ECJ might have effectively considered that this particular phrase would be defined at national level. If so, the ECJ's ruling in *Kraaijeveld* could be summarised as requiring a national court to set aside national threshold rules or criteria that excluded Annex II projects from being subject to an impact assessment where they would have significant effects on the environment, as normally understood under national law.

Since the *Kraaijeveld* judgment, the ECJ has fortified the range of possibilities for individuals to rely on directives before national courts in order to enforce Member State obligations designed to promote the public as opposed to individual interests. For instance, the ECJ reiterated in *Linster* (Case C-287/98) the general point that national courts would be entitled to take the provisions of the EIA Directive into account in order to review whether the national legislature had kept within the limits of discretion afforded to it under the terms of the Directive.<sup>33</sup> That particular case involved the failure on the part of Luxembourg to ensure that an impact assessment and public consultation was carried out in relation to a motorway project, a project falling under Annex I to the EIA Directive. The ECJ's subsequent judgment in *WWF v Bozen* (Case C-437/97) was more significant, in developing the scope of application of the ECJ's ruling in *Kraaijeveld*. In that case, the Italian branch of the World Wildlife Fund sought judicial review before the Italian courts of a planned construction project intended to extend the length of an existing airport runway in the Region of Bozen. The length of the runway fell short of the minimum requirement in the EIA Directive for a mandatory impact assessment as an Annex I project (2.1km). Instead, the project fell within ambit of Art 4(2) and Annex II as a project where Member States had a certain degree of discretion as to whether or not to require an impact assessment. The relevant Italian planning rules applicable to the project provided for a simplified impact study to be considered by a

<sup>33</sup> E.g., para 38 of judgment.

conference of the Region's executive officials a procedure not envisaged in the EIA Directive. The study failed to carry out an investigation into the impact of the project in terms of noise and atmospheric changes, elements that would have to be incorporated into an impact assessment within the meaning of the EIA Directive.<sup>34</sup> Neither did the national procedure involve a consultation of the public as required under Art 6 of the Directive. The Italian administrative court which was charged with hearing the case referred a number of questions to the ECJ under the preliminary ruling procedure, including: (a) whether in the case of a project requiring an impact assessment under the Art 2 of the Directive permitted the use of an impact assessment procedure other than envisaged in its provisions; and (b) whether individuals would be able to rely on Arts 2(1) and 4(2) of the Directive directly before the national court in order to set aside national rules or decisions which conflicted with the terms of the Directive.

The ECJ's replies in *WWF v Bozen* to the two questions were clear and emphatically in favour of the plaintiff. First, the Court confirmed that where a project required an impact assessment under the terms of the EIA Directive, a procedure alternative to the one envisaged in the Directive would not be permitted, otherwise it would undermine the environmental protection objective underpinning the Directive.<sup>35</sup> The ECJ's response to the second question served to entrench its analysis and findings in the *Kraaijeveld* case in relation to the possibility of private enforcement of Arts 2(1) and 4(2) of the Directive. It held:

Articles 4(2) and 2(1) of the Directive are to be interpreted as meaning that, where the discretion conferred by those provisions has been exceeded by the legislative or administrative authorities of a Member State, individuals may rely on those provisions before a court of that Member State against the national authorities and thus obtain from the latter the setting aside of the national rules or measures incompatible with those provisions. In such a case, it is for the authorities of the Member State to take, according to their relevant powers, all the general or particular measures necessary to ensure that projects are examined in order to determine whether they are likely to have significant effects on the environment, and if so, to ensure that they are subject to an impact assessment.<sup>36</sup>

The judgment underlines that individuals are indeed entitled to rely on the

<sup>34</sup> As set out in Arts 3, 5–10 of the EIA Directive respectively.

<sup>35</sup> Para 53 of judgment. The Court also considered that the exemption provided in Art 1(5) of the Directive in respect of national legislative acts, given that the Italian law approving regional development of the airport extension did not include the elements necessary to assess the environmental impact of the project.

<sup>36</sup> Para 71 of judgment.



provisions of a directive before a national court to ensure that a national authority is held to account if it exceeds the limits of discretion afforded to it by the Directive when actively exercising its judgment as to whether and what type of steps or measures are to be taken in a particular case. Accordingly, individuals were entitled in *WWF v Bozen* to rely on Arts 2(1) and 4(2) of the EIA Directive before the national courts in the context of judicial review proceedings in order to have set aside the application of an imperfect impact assessment procedure conducted in relation to the Bozen airport runway extension.

The judgment in *WWF v Bozen* served to expand the reach of the judgment in the *Kraaijeveld* case. *Kraaijeveld* concerned a situation where national rules did not provide for an impact study to be carried out for certain types of projects. The ECJ made clear that this automatic block to the application of an impact assessment procedure would be contrary to the terms of the Directive, unless it meant that the exclusion from assessment viewed as a whole would not include projects likely to have significant environmental effects. The *WWF v Bozen* case involved a different set of circumstances and issues. Specifically, it concerned whether individuals could use the Directive's provisions to challenge the legality of a particular impact assessment procedure undertaken under the auspices of national rules, on the grounds that the process constituted an exceedance of the discretionary limits afforded to Member State authorities by the EIA Directive.

The ECJ's legal reasoning in *Kraaijeveld* and *WWF v Bozen* has also has been echoed and affirmed in other cases. Specifically, the illicit waste dumping judgments in *San Rocco* and *Kouroupitos (2)* (Cases C-365/97 and C-387/97), as referred to in Chapters 3 and 4, appear to have confirmed that the second paragraph in Art 4 of the Waste Framework Directive 75/442, as amended, contains a legally enforceable obligation, notwithstanding the Court's earlier dismissal of the provision having any direct effects in the *Difesa* judgment. In *Kouroupitos (2)*, the Court accepted that the safety obligations contained in Art 4(2) were capable of being enforced, in terms of legal action being brought against a Member State where the latter had presided over a 'significant deterioration in the environment over a protracted period when no action has been taken by the competent authorities'.<sup>37</sup>

Another recent judgment of the ECJ, also involving the environmental policy sector, appears to have confirmed the expansive approach taken in *Kraaijeveld* in determining the parameters of legal effects that may be construed from provisions of EC directives. Specifically, in the *Landilijke Vereniging* case (Case C-127/02) two environmental associations sought judicial review before the Dutch courts to annul a decision taken by Dutch

37 Case C-387/97, para 55 of judgment. See also Case C-365/97 para 67 of judgment.

authorities to grant fishing permits to persons wishing to engage in mechanical cockle fishing in an inland water zone known as the Waddenzee, an area designated as a protected nature site. The plaintiffs submitted that the decision infringed both the Wild Birds Directive 79/409 and Habitats Directive 94/43, given that cockle fishing would disturb specific protected breeding sites and food sources for oyster catchers and other wild wading birds. The Dutch court handling the dispute referred a number of legal questions to the ECJ, including whether the key provision relevant to the case, Art 6(3) of the Habitats Directive, had direct effects. Article 6(3) of the Directive, which had not been transposed into Dutch law, specifies that:

Any plan or project not directly connected with or necessary to the management of a site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.

The national court also enquired as to what extent the precautionary principle, one of the environmental protection principles mentioned in Art 174 EC, was applicable in terms of the operation of the Habitats Directive to the particular facts of the case.

In respect of the first question the ECJ replied in terms akin to the *Kraaijeveld* judgment, by emphasising the responsibilities of the national court in applying EC legal obligations. The Court interpreted the question as essentially being whether a national court may examine whether or not the limits of discretion of the competent authorities with regard to the provision has been correctly transposed into national law. It answered in the affirmative,<sup>38</sup> having confirmed that national courts, as integral constitutional parts of the Member States, were obliged under Art 249 EC(3) as well the directive concerned to take all measures, general and particular, necessary to achieve the result prescribed by the Directive for matters falling within their jurisdiction:

As regards the right of an individual to rely on a directive and of the national court to take it into consideration, it would be incompatible with the binding effect attributed to a directive by Art 249 EC to

<sup>38</sup> Para 65 of judgment.

exclude, in principle, the possibility that the obligation which it imposes may be relied on by those concerned. In particular, where the Community authorities have, by directive, imposed on Member States the obligation to pursue a particular course of conduct, the effectiveness of such an act would be weakened if individuals were prevented from relying on it before their national courts, and if the latter were prevented from taking it into consideration as an element of Community law in order to rule whether the national legislature, in exercising the choice open to it as to the form and methods of implementation, has kept within the limits of its discretion set by the Directive (see *Kraaijeveld and others*, paragraph 56). That also applies to ascertaining whether, failing transposition into national law of the relevant provision of the Directive concerned, the national authority which has adopted the contested measure has kept within the limits of its discretion set by that provision.<sup>39</sup>

In holding that these considerations applied to Art 6(3) of the Directive, the ECJ did not address the factors of sufficient precision or unconditionality as being relevant to its analysis of the extent of legal effects flowing from the provision. Notwithstanding the imprecise nature of the provision's terms, in particular the reference to 'likely' in the first sentence of Art 6(3), the Court confirmed that individuals could rely on it before national courts in order to challenge national authority decision making.

In respect of the question concerning the interpretation and application of the precautionary principle, the Court confirmed that the competent authorities had an implicit obligation to respect the principle in connection with exercising judgment over the application of Art 6(3) of the Habitats Directive. The ECJ referred to the principle as one of the foundations underpinning the commitment to a high level of environmental protection governing EC environmental policy, in accordance with Art 174(2) of the EC Treaty. Notwithstanding the absence of an express legal reference to the principle and its specific application in the Directive, the Court was prepared effectively to interpret that it was necessarily an integral component of the Directive, given that the Directive was predicated on the environmental principles that formed core elements of EC environmental policy. Accordingly, competent authorities were obliged to apply Art 6(3) in light of the precautionary principle. Article 6(3) based the obligation to carry out an impact assessment on the project or plan in question being 'likely to have a significant effect' on the site's management. The ECJ considered that such authorities were obliged under the first sentence of the provision to carry out an impact assessment if there were either a probability or a risk

<sup>39</sup> Para 66 of judgment.

that the project/plan would have significant effects.<sup>40</sup> In assessing the factor of risk, the precautionary principle would be applicable, so that an authority would have to make a finding that a risk was present if significant effects could not be excluded on the basis of objective information such as scientific studies. Specifically, in cases of doubt as to absence of significant effects an impact assessment would have to be carried out. Such an interpretation, the Court held, was consonant with the promotion of the biodiversity objective underpinning the Directive (paras 44–45 of judgment). The Court used similar reasoning to require incorporation of the precautionary principle into the authorisation criteria specified in the second sentence of Art 6(3). Only where no ‘reasonable scientific doubt’ existed over the absence of adverse effects to the integrity of the site would authorisation for the plan/project be allowed to be granted.<sup>41</sup> Elsewhere, the Court has held that the precautionary principle is implicitly incorporated into the obligations contained in environmental directives. An example is the *Fornasar* case (Case C–318/98), where the ECJ held the principle to be an implicit part of the management of waste obligations contained in Art 4 of the Waste Framework Directive 75/442.<sup>42</sup>

Since *Kraaijeveld*, the ECJ has made an important contribution in assisting courts and national authorities in determining key factors to be taken on board when exercising discretion under the auspices of environmental directives. By implication, the environmental principles specified in Art 174(2) are relevant in this regard. Effectively, the ECJ has enhanced the potentiality of these principles to be enforced at national level, in that their incorrect application may be subject ultimately to judicial scrutiny in the context of judicial review proceedings brought by private persons in respect of planning decisions made by national authorities covered, *inter alia*, by the EIA, Habitats and/or Wild Birds Directives, or indeed in respect of any decisions involving discretionary assessment coming under the auspices of EC environmental legislation.

#### **6.1.4. Reliance on directives against private persons**

Whereas the ECJ has been prepared to hold that rights for individuals may exist to enforce EC directives, so far it has resolutely refused to contemplate the possibility of individuals deriving obligations directly from their provisions. The essential reasons for this limitation to the application of direct effect have been outlined in section 6.1.3.1. The consequences of this judicial position are far-reaching. A brake has been effectively placed on the possibility of enforcement action being taken either by public authorities or by private legal persons against non-state actors in order to uphold EC environmental

40 Para 43 of judgment.

41 Para 59 of judgment.

42 Para 37 of judgment.

legislation. The personal scope of the term ‘private person’ includes natural persons as well as business and non-profit making private legal entities, including limited and public limited companies, partnerships, sole traders and trusts.

#### 6.1.4.1 *Inverse vertical effects of directives*

In line with its position of ruling out the possibility of the doctrine of direct effect being able to confer obligations on private persons, the ECJ has confirmed on a number of occasions that state authorities are barred from relying directly on provisions of directives against private persons in order to ensure that the instrument’s requirements are respected within the Member States. Such a scenario is often referred to as one envisaging an ‘inverse effect’ of a directive, namely the possibility of legal obligations contained in directives being enforced against individuals by public authorities as opposed to the other way round, which is the classical situation of ‘vertical’ direct effect. The Court has stuck to its basic initial position constructed in the 1980s (Case 152/84 *Marshall (1)*) that the legal characteristics of a directive implicitly rule out such a legal effect occurring, noting in particular that the definition of a directive in Art 249(3) EC speaks only of such instruments being binding on their addressees, namely Member States, as to the result to be achieved.

There have been several instances where national authorities have sought to rely on EC environmental directives against the private person with a view to ensuring that minimum environmental protection standards are upheld. National courts have frequently referred questions to the ECJ as to whether they may refer to environmental directives for this purpose. In a long line of cases, commencing with the *Pretore di Salò* case (Case 14/86) the Court has continued to rule out this as a possibility. Most of the cases concern whether public authorities may use environmental directives in the context of criminal investigations and prosecutions targeted at instances of illicit acts of pollution. Such authorities have, on occasion, sought to rely on provisions in environmental directives in order to establish, confirm or enhance criminal liability of private persons in respect of their activities. In *Pretore di Salò*, an Italian investigating magistrate referred a number of questions to the ECJ concerning the interpretation of Directive 78/659 on fresh water quality, as part of the magistrate’s judicial investigation into various acts disrupting the course and quality of the Chiese river (erection of dams and instances of dangerous substance discharges). On its own initiative, the ECJ made it clear that the Directive could not be considered as a source of legal obligation binding on private persons in the context of criminal liability, where the Directive had not been transposed into national law:

[. . .] Directive 78/659 of 18 July 1978 cannot, of itself and independently of a national law adopted by a Member State for its implementation, have the effect of determining or aggravating the liability in criminal law of persons who act in contravention of the provisions of that directive' (para 20 of judgment).

On other occasions, the ECJ has expressly barred the use of the direct effect doctrine by public authorities against private persons. For instance, in a series of waste management related cases, the Court has confirmed that environmental protection authorities may not rely on EU waste directives in order to prosecute polluters (Cases 372–4/85 *Traen*; Case C–168/95 *Arcaro*; Case C–304/94 et al *Tombesi*; Case C–235/02 *Saetti* and Case C–457/02 *Niselli*). In *Traen*, for instance, three criminal actions had been taken against operators of waste disposal companies as well as a driver, for having disposed of waste in fields without being in possession of a permit. The accused had been charged with infringing a 1981 Belgian Decree of the Flanders Region intended to implement the Waste Framework Directive (WFD) 75/442. The Belgian court, unsure as to whether Flemish legislation was compatible with particular provisions of the Directive, referred a number of questions to the ECJ under the preliminary ruling procedure of Art 234 EC. The WFD provisions in question stipulate that Member States are required to establish a system of supervision and control over waste disposal activities (Arts 8–12).<sup>43</sup> Notably, Art 8 stipulates that any undertaking treating, storing or tipping waste on behalf of third parties must be in possession of a permit from the national competent authorities, designated by Member States, and Art 12 provides that undertakings are required to supply certain information to such competent authorities.

The Belgian court wished to know from the ECJ whether an undertaking carrying waste and an owner of land receiving waste from third parties were required to obtain a waste permit from the competent national authorities by virtue of the provisions of the Directive. In addition, the court wished to know whether the terms of the Directive could apply directly to undertakings or whether its provisions were dependent on, *inter alia*, the adoption of implementing rules. The ECJ confirmed that the Directive could not of itself impose obligations on individuals,<sup>44</sup> drawing from its general position in *Marshall (I)* (Case 152/84) that a directive may not of itself impose obligations on individuals.

43 The Waste Framework Directive 75/442 was subsequently amended by Directive 91/156, resulting in a change of nomenclature to the Articles contained in the Directive as well as substantive amendments to a number of provisions.

44 Paras 24–26 of judgment.

#### 6.1.4.2 *Horizontal direct effect and directives*

The ECJ has also ruled out the possibility of private persons being able to enforce directives against other individuals before national courts. In the leading case of *Marshall (I)* (Case 152/84) the ECJ held that the doctrine of direct effect could not be used in the context of litigation fought out between two private parties. That case concerned the breach of EC employment legislation, namely the Equal Treatment Directive 76/207.<sup>45</sup> Specifically, Ms Marshall, an employee of a local health authority in the UK, had been required to retire from her place of employment at the age of 60. The authority's policy was to apply a different retirement age for male staff (65), which did not appear to contravene national law at the time. Marshall took legal action before an industrial tribunal, submitting that her dismissal from employment violated the terms of the 1976 Directive, specifically Art 2 thereof which requires Member States to ensure that the principle of equal treatment between the sexes as regards working conditions is adhered to within their respective territories. Whilst the ECJ, in a preliminary ruling, held that Marshall could rely on the provision of the Directive against organs of the state (which included for this purpose a local authority) it clarified that a directive may not of itself impose obligations on individuals. The Court held that it was irrelevant in what capacity the organ of state was acting in the material case at hand (for example, as employer or as public authority), holding that vertical direct effect could not be confined to situations where state-controlled authorities were simply taking decisions on behalf of the state.

The ECJ has confirmed the exclusion of horizontal direct effects of directives in a number of judgments subsequent to *Marshall (I)* (for example, Cases C-91/92 *Dori*, C-192/94 *El Corte Ingles* and C-97/96 *Daihatsu*). It is clear that the position adopted by the Court limits the range of possibilities of EC environmental legislation being enforced in the Member States (for example, Krämer, 2003, p 386). Neither environmental protection authorities nor private persons (such as NGEOs) may be able to rely on the requirements set out in directives in order to enforce them directly against private persons acting in violation of those legal commitments. Given the clarity and steadfastness of the ECJ's position, it is no surprise that a case on horizontal direct effect of an environmental directive has yet to appear before the Court.

The case law has come in for a certain amount of criticism from certain quarters. For instance, in *Marshall (I)* the UK Government opined that if the complainant would be able to use direct effect against her public employer, this would mean that the application of the doctrine of direct

45 OJ 1976 L39/40.

effect as applied to norms contained in directives would result in some arbitrary results. Specifically, in the employment sector, employees of the private sector would be granted fewer rights under EC law than their counterparts working in public sector jobs. The ECJ responded to that point by noting that a Member State should not be allowed to take advantage of its failure to transpose directives with such an argument, and was in a position to rectify such a state of affairs by properly transposing its obligations into national law (see para 51 of Case 152/84 *Marshall (1)*). Others have not been convinced by the Court's reasoning and have suggested that its denial of horizontal direct effects flowing from directives is ill-founded (for example, Craig, 1997b; Lackhoff and Nyssens, 1998; Tridimas, 1994) as well as the opinions of three Advocates-General: namely, Van Gerven, Jacobs and Lenz in Cases C-271/91 *Marshall (2)*, C-316/93 *Vaneetveld* and C-91/92 *Dori* respectively.

A number of reasons have been put forward to suggest a re-think on the legal issue and to apply horizontal direct effect to directives. Several of the key arguments are set out in Craig's seminal commentary which may be briefly referred to here. Specifically, he raises the point that the interpretation of the Court regarding Art 249(3) EC appears rather formalistic; the provision does not specifically rule out the possibility of directives binding individuals other than its addressees. In addition, he notes that the conferral of horizontal direct effect would not serve to abolish the distinction between directives and regulations, given that the former need not be addressed to all Member States. Furthermore, since the entry into force in 1993 of the Treaty on European Union (TEU) all EC directives are now required to be published in the Official Journal of the EU, so that individuals may have full knowledge of their contents from the outset of their entry into force; the principle of *nulla poena sine lege* is therefore arguably no longer relevant to the debate. In addition, it is clear that the ECJ's case law has stretched its 'estoppel' line of reasoning to breaking point, in that public authorities derive obligations under the existing direct effect doctrine despite the absence of any culpability on their part in terms of the Member State's failure to enact transposition legislation accurately reflecting the requirements of a directive and/or on time.<sup>46</sup> Finally, he correctly points out that the ECJ has conferred horizontal direct effects to certain EC Treaty norms which specifically contain instructions directed solely at Member States (for example, Art 141 EC on equal pay for male and female workers). Other commentators, however, have criticised the ECJ for applying the direct effect doctrine at all to directives, given the fact they are not, unlike regulations, described in the EC Treaty to be directly applicable (Hartley, 2003, p 206).

The coherence of the well-established position of the ECJ on excluding the possibility of directives creating legally enforceable obligations against

46 See also Tridimas, 1994.



individuals has come into further question on account of recent judicial developments. Specifically, as will be explored below, the Court has appeared to confirm that in particular limited situations individuals may be subject to burdens as a result of the reliance on directives by other individuals.

#### 6.1.4.3 '*Triangular*' situations: indirect inverse effects

One of the instances in which individuals may be subject to clear and foreseeable adverse implications as a result of reliance on a directive, is the situation often referred to as a 'triangular' situation. A triangular scenario involves three players: a complainant who is a private individual, a defendant who is a state organ and a third party who is a private person. Typically, in such a situation, the complainant is aiming to alter the conduct of a private third party, and is able to achieve this by seeking to rely on an EC directive against a state authority in order to achieve this result. This litigation technique may prove to be a very effective way to evade the ECJ's exclusion of horizontal direct effect for directives. In the environmental sector, a triangular situation may arise in a number of contexts where state authorities are involved in the licensing of the targeted activity as required by EC environmental legislation, such as in relation to building development or the approval of certain industrial activities such as waste management operations (for example, landfilling of waste or waste incineration operations).

An interesting example of this arose in the recent case of *Delena Wells* (Case C-201/02). In this case Wells, a private land owner, contested a decision by the UK Secretary of State for Transport, Local Government and the Regions to approve the grant of planning consent for the operation of a neighbouring quarry mine in Conygar, Wales, without having undertaken a prior environmental impact assessment. Under UK legislation at the material time, an impact assessment was not required in respect of old mines whose operations dated back before entry into force of the EIA Directive 85/337 (namely, before 3 July 1988). The Conygar mine had originally been granted planning permission in 1947, then fell into disuse for some 37 years before the site operators wished to revive operations by securing renewal of planning permission. Wells sought judicial review of the Secretary of State's decision not to revoke or modify the planning permission granted by the mineral planning authority in view of the fact that the planning permission process had not undergone an environmental impact assessment. The High Court hearing the case, referred a number of legal questions to the ECJ under the preliminary ruling procedure, including whether such a project would have to be subject to an impact assessment under the EIA Directive and, if so, whether it would be open for a private person to rely on the EIA Directive in this case, bearing in mind the limitations imposed by the ECJ in its jurisprudence in relation to the application of direct effect of directives in horizontal situations.

By way of initial comment, the ECJ confirmed that there is an obligation under Art 2(1) in conjunction with Art 4(2) of the EIA Directive to subject the reopening of a disused quarry mine to an impact assessment. It held that this was not a situation where a key planning permission decision was decided before the entry into force of the Directive; instead, the renewal of planning permission which was taken place after that point served to replace the terms and substance of the initial original consent.

This left the question as to whether Wells could be allowed to invoke the Directive against the Secretary of State's decision, notwithstanding the foreseeable adverse consequences that would arise for another private person if she were successful in so doing. Specifically, an annulment of the approval of consent would render the planning permission decision void and bar the mining operator from commencing quarrying activity. The ECJ held that legal certainty did prevent directives from creating obligations for individuals (as confirmed in Case C-152/84 *Marshall (I)*), including the situation where there is a Member State obligation directly linked to the performance of another obligation falling under the Directive on a third party (as in Case C-97/96 *Daihatsu*). However, the Court made a distinction and exception where the invocation of direct effect against a state authority had 'mere adverse repercussions on the rights of third parties, even if the repercussions are certain'.<sup>47</sup> This was the case with respect to Wells' legal action against the Secretary of State, the adverse economic effects of which would be felt by the mining operators. As the ECJ pointed out, similar situations had already arisen in other cases which had come before it, such as the effects of its rulings in *Costanzo* (Case 103/88) and *WWF v Bozen* (Case C-437/97), both which have been referred to earlier in this chapter. One could also mention in this context another case discussed earlier, namely the *Landilijke Vereniging* case (Case C-127/02), which also involved potentially adverse repercussions for businesses which had applied to the Dutch authorities to engage in cockle fishing in the Waddenzee.

There is some considerable debate in the literature as to whether this body of jurisprudence developed by the ECJ is tantamount to the establishment, through the back door, of horizontal direct effects of directives in limited circumstances. Certainly, the rationale of the Court appears to tread a very fine line in distinguishing between vertical and horizontal case situations. On the one hand the ECJ appears to rule out the reliance on directives by individuals against state authorities in order to enforce the latter to secure the fulfilment of specific duties envisaged in the Directive for private persons. Such was the case for instance in *Daihatsu* (Case C-97/96) where the ECJ held that a complainant company could not rely on a provision in the First Companies Directive 68/151<sup>48</sup> in order to apply to a competent authority

47 Para 57 of judgment in *Delena Wells*.

48 OJ English Special Edition 1968 (I), p 41.

(a local court) to impose penalties on a private person who had failed to ensure full disclosure of its annual accounts, a duty that Member States had been required to ensure was carried out under the terms of the Directive. On the other hand, the Court has, as discussed above, desisted from intervening against the use of vertical direct effect against state authorities in cases where clear adverse repercussions for private third parties are likely to result, but who are not envisaged as having any specific obligations to be established under the Directive's terms.

This distinction appears to be difficult to justify and is arbitrary in nature. In particular, in the context of EC environmental legislation, it is evident that some licensing arrangements required by environmental directives may fall either side of the distinction made in *Delena Wells*. For instance, it would appear in the light of that judgment that individuals would be able to invoke the impact assessment requirements contained in the EIA Directive, as well site development procedures contained in the Habitats Directive, against state authorities in order to seek a cessation of development plans and projects proposed by a private person. This is notwithstanding that the EIA Directive envisages certain duties for the developer in relation to the EIA procedure (for example, see Art 5(1)). However, it appears doubtful from the judgment in *Delena Wells* that an individual would be able to take legal action against a state authority and rely on the terms of the Waste Framework Directive 75/442 in order to restrain the activities of a waste management operator who has failed to obtain a waste permit from the authorities in accordance with the Directive's requirements—given that the terms of the Directive specifically refer to duties of such operators to obtain a permit. Arguably, the position adopted by the Court should be the exact reverse, given that the consequences envisaged for private individuals are spelled out clearly in the case of directives such as the Waste Framework Directive and are thus more transparent than those whose 'side effects' for individuals are less predictable.

The literature appears somewhat divided on the issues surrounding triangular situations. Jans, for instance, disagrees with the idea that inverse effects emanating from vertical direct effect case scenarios should be equated with horizontal direct effect, given that the direct effects flow from the rights which the complainant derives, and burdensome effects emanate from the failure by the Member State authorities to fulfil their EU obligations (Jans, 1996, p 68). Wyatt also agrees that the situations cannot be equated with one another (Wyatt, 1998, pp 15–16). However, Colgan supports the contrary opinion, focusing in particular on the fact that it is usually the case in such triangular situations that a private person as opposed to state authority will be subject to a detriment, which runs counter to the 'estoppel' reasoning of the ECJ (Colgan, 2002, p 556). Lackhoff and Nyssens also submit that triangular situations involving adverse consequences for third parties are equivalent to horizontal direct effect scenarios, bearing in mind that the

litigation concerned is motivated to seek the same result: namely, the cessation of activities of one or more identifiable private persons (Lackhoff and Nyssens, 1998, pp 405–06).

Apart from the academic controversy that surrounds the ECJ's evolution of indirect horizontal effects of directives through cases such as *Delena Wells*, it is clear that this body of jurisprudence does have potentially profound implications for the future enforcement of some elements of EC environmental legislation. However, the horizontal effects of directives effectively tolerated by the ECJ do not appear to encompass those environmental directives which specifically envisage Member States crystallizing specific duties for individuals into national legislation. This appears an arbitrary distinction to make, and runs counter to the otherwise consistent approach of the ECJ not to allow Member States to pray in aid the distortionary effects that may be generated on the market as a result of an individual being allowed to invoke a provision of a directive against a state authority (see for example, Case 152/84 *Marshall (I)*). In principle, it should not matter whether any reference to duties of individuals are contained in directives. If a norm in a directive meets the criteria of direct effect or sets down limits on the exercise of Member State discretion for specific scenarios then, in accordance with the reasoning underpinning much of the ECJ's case law on legal effects of directives, individuals should be entitled to enforce such provisions before national courts against competent authorities that have failed to ensure that they are adhered to in matters falling within their jurisdiction. Inevitably, there will be some 'adverse' economic consequences for some private persons if a competent authority is taken to court to ensure that EC environmental legislative requirements are respected. However, that is in essence a factor which does not have any substantial bearing on the legal position, given that adverse economic effects are going to result for various sectors of the economy and in society whenever public policy is executed. In line with the comments made by Jans noted above, the root of the problem lies with Member States failing to uphold their EU obligations, a situation that may be readily resolved by them. It does not lie with the fact that the direct effects jurisprudence of the ECJ may give rise to individual burdens as well as rights (Jans, 1996, p 68).

#### 6.1.4.4 *Incidental horizontal effects*

A brief reference should also be made to another branch of the ECJ's case law on legal effects of directives that appears to undermine its orthodox position on ruling out horizontal effects of directives. In a few cases since the 1990s, the ECJ has appeared to create an exception to the rule and endorse the possibility of individuals being able to enforce certain types of directives against other private persons before national courts. The cases have been commonly referred to as those which the ECJ has appeared to legitimate

'incidental' horizontal effects between private parties engaged in a civil legal dispute. This emerging body of case law may be distinguished from the triangular situation described in the previous situation, where an individual seeks to effect changes to the conduct of another private person by bringing legal action against a state authority. However, it is far from clear what the long-term implications of this jurisprudence are on the main body of case law on direct effect. Too few judgments have so far emerged which give a clear indication of its parameters.

The leading case in this branch of jurisprudence is the *CIA Security* case (Case C-194/94). The complainant, CIA Security, brought libel proceedings against two rival companies which alleged that one of its security alarm products failed to adhere to Belgian legislative requirements. The defendants brought counterclaims, including a request for an order to restrain CIA Security from continuing to operate as a trader in alarm systems in view of the fact that CIA Security had not been granted authorisation as a security firm and had not received approval for its security alarm product as required under Belgian legislation. The Liège Commercial Court hearing the case, decided to refer a number of questions to the ECJ concerning the compatibility of the material Belgian legislation with the Technical Standards Directive 83/189 laying down a procedure for the provision of information in the field of technical standards and regulations (now replaced by Directive 98/34). Under the terms of the Technical Standards Directive,<sup>49</sup> Member States are required to notify the Commission and other Member States of draft technical regulations containing technical specifications laying down mandatory characteristics of products other than those implementing EC legislation. Member States are required to refrain from adopting the draft regulations for a three month standstill period, during which the Commission and Member States have an opportunity to assess whether the draft regulations might have adverse implications for the free movement of goods within the EU. The standstill period is extended to six months in the event that either the Commission or a Member State is of the opinion that the draft measures must be amended in order to eliminate or reduce barriers to trade that they might create. Effectively, the Directive constitutes a mechanism through which the Commission is able to monitor the legislative activities of Member States that might interfere with the core principles of the internal market, namely the fundamental principle of free circulation of goods within the Union.

In the *CIA Security* case, the Belgian legislation in question had not been notified to the Commission prior to its promulgation, in breach of the Directive. A key question referred to the ECJ by the Belgian court was whether it was required to refuse to apply a national technical regulation not

49 See especially Arts 8-9 of the Directive.

communicated to the Commission in accordance with the Technical Standards Directive. The ECJ held that the notification provisions in the Directive met the criteria of direct effect, being sufficiently precise and unconditional. The Court affirmed that national regulations which contravened the notification provisions of the Directive are inapplicable against individuals, notwithstanding the absence of an express provision to this effect in the EC legislative instrument.<sup>50</sup> In coming to this conclusion, the ECJ took particular account of the core aim of the Directive to protect the freedom of goods by preventive control and that notification was essential to fulfil that purpose. It contrasted this position with that of the notification procedures envisaged in the Waste Framework Directive 75/442, which it had held in the *Enichem Base* case (Case 380/87) as not supporting an intention to render national rules unlawful which had not been notified prior to their enactment.<sup>51</sup> Finally, the ECJ made use of its *effet utile* reasoning in order to assist in the justification of its conclusions. Specifically, the Court held that the effectiveness of EC controls over technical regulations of Member States would be enhanced if the breach of notification obligations contained in the Directive were to be interpreted as meaning that a substantial procedural defect had occurred so as to render the regulations inapplicable against individuals.<sup>52</sup>

Although the ECJ's judgment itself formally steers clear of engaging in the issues associated with horizontal direct effect, it is clear that the effect of its decision is to legitimise the enforcement of a directive by an individual against another before a national court. In so doing, the Court makes use of the principle of *effet utile* and stresses the duties of the national court in interpreting EC Law, instead of referring to its traditional 'estoppel' reasoning. This is not surprising because it is difficult to see how the Belgian State, as opposed to private litigants, is seeking to take advantage of a position that contravenes an EC directive.

In *Unilever Italia* (Case C-443/98) the Court has extended the reach of its judgment in *CIA Security* by confirming that the failure to adhere to the standstill period in the Technical Standards Directive is sufficient to render a national technical regulation inapplicable against individuals, even though the measure may have been notified to the Commission. The case involved a contractual dispute between two parties over the supply of a quantity of olive oil to Italy, which was in conformity with EC but not Italian labelling rules. The Italian rules had entered into force prior to the elapse of the standstill period envisaged under the Directive. The ECJ held that national courts were obliged, in the context of civil proceedings between individuals, not to apply a national rule in contravention of the Directive's notification

50 Para 54 of judgment.

51 As discussed in section 6.1.2.3, this conclusion of the Court is debatable.

52 Para 48 of judgment.

procedures. It sought to differentiate the Technical Standards Directive from other directives so as to constitute a special legal situation in which the standard rule on horizontal direct effect did not apply. The ECJ pointed out in this context that, unlike most other directives, the Technical Standards Directive does not envisage transposition of its requirements into national law and has concluded that it does not create substantive rights or obligations for individuals. The Directive simply entitles individuals to invoke it in order to have national law set aside (Case C-443/98 *Unilever Italia*).<sup>53</sup>

The Court has, however, appeared to set limits as to the possibilities of individuals being able to invoke the Technical Standards Directive to the detriment of other private persons. Specifically, in the *Lemmens* case (Case C-226/97), the ECJ ruled out the possibility of a private individual relying on the Directive in order to render inapplicable a measure that did not hinder the use or marketing of a product within the internal market. It held that the failure to notify national regulations did not have the effect of rendering unlawful the use of a product in conformity with the national regulations.<sup>54</sup> In that case, a Dutch national had sought to undermine the evidence of his criminal conviction for drink driving, by submitting that the Dutch legislation on breathalyser apparatus had not been notified to the Commission. The ECJ thereby made clear that the purpose of its judgment in *CIA Security* was to enhance the effectiveness of the principle of free movement of goods as furthered by the Directive. One may contrast the approach of the ECJ in *CIA Security* and *Lemmens* with the *Enichem Base* case (Case 380/87) discussed earlier in this chapter, where the Court refrained from using the effectiveness principle in coming to its legal conclusions in that case.

A few other cases involving different EU policy areas have had the effect of legitimising enforcement of certain directives as between individuals. One such example is the *Bernaldez* case (Case C-129/94). The case concerned the extent of civil liability under the auspices of Directive 72/166 on motor vehicle insurance, as amended. As in *Lemmens*, the case involved an instance of drink driving; a Spanish driver had caused property damage to a third party whilst driving under the influence of alcohol. In the context of criminal proceedings brought against the driver Bernaldez, the Spanish criminal court referred to the ECJ for advice as to whether Spanish insurance rules were in compliance with the Directive. Spanish insurance law purported to absolve a car insurer from liability in respect of property damage caused by an intoxicated driver. Article 3(1) of the Directive stipulates that, subject to certain derogations not covering the subject matter addressed by the Spanish legislation, Member States are to take all appropriate measures to ensure that civil liability in respect of the use of vehicles is covered by insurance. That obligation has been developed and refined further by directives sub-

53 See para 51 of judgment in *Unilever Italia*.

54 Para 35 of judgment.

sequent to the 1972 Directive, to include compulsory cover specifically in respect of physical and property damage sustained in the event of a motor vehicle accident. The ECJ held that Art 3(1) of the first Directive, as amended, precluded an insurer from being able to rely on national statutory provisions or contractual clauses to refuse to compensate third part victims of an accident caused by the insured vehicle (para 20 of judgment). Another example is the *Pafitis* case (Case C-441/93) in which original shareholders of a Greek bank brought civil action against the bank and new shareholders in respect of a decision to raise capital. The decision, which had been sanctioned under the auspices of Greek legislation (Presidential Decree), had failed to respect the terms of an EC directive (Directive 77/91) which required the convention of a general shareholders' meeting to decide such a capital increase. In a preliminary ruling, the ECJ held that the Directive precluded national rules which permitted an increase in capital. Similarly, in *Smithkline Beecham* (Case C-77/97), the ECJ held, in the context of a dispute between two private parties over the marketing of a brand of toothpaste, that an EC directive on the marketing of cosmetics prevented the application of national legislation restricting particular types of toothpaste marketing in contravention of the directive's requirements.

The emergence of a number of cases involving 'incidental' horizontal effects of directives in the context of legal disputes between individuals has caused a good deal of confusion as well as speculation in the literature as to whether the ECJ is in effect beginning to retreat from its orthodox position of being opposed to horizontal direct effect of directives. It appears that so far it has done so clearly only in relation to the application of the Technical Standards Directive, by virtue of its jurisprudence in the *CIA Security* and *Unilever Italia* cases. Some, however, have questioned this might be genuinely the case, on the basis that had the competent authorities in this line of cases sought to enforce their national rules against persons such as *CIA Security*, the latter would be able to use the concept of vertical direct effect to shield themselves from liability under national law (see Hartley, 2003, p 214). Hilson and Downes have sought to reconcile the case law with the ECJ's traditional position by pointing out the 'public law' elements evident in the cases; namely, that one of the private parties to the dispute was seeking to enforce national public statutory rules (Hilson and Downes, 1999, p 127). Other commentators have pointed out that a common feature of the cases appears to be that the ECJ is keen to prevent private persons from being able to exercise an unfair advantage over others, as a result of a failure on the part of a Member State to adhere to its obligations under directives. The provisions of national rules which conflict with an EC directive are set aside with the result that a private person is subject to a liability or disadvantage had the national legislation correctly transposed the EC legislation in the first place (Craig and De Búrca, 2003, p 221; Arnall, 1999, p 1). This interpretation of judicial developments has close links with Advocate-General



Leger's analysis in his Opinion in the *Linster* case (Case C-287/98), in which he has made the distinction between a directive being invoked by an individual in order to substitute as opposed to exclude a rule of national law in conflict with a directive. However, the ECJ has so far not adopted that distinction.

The above-mentioned interpretations of ECJ case law have not, however, managed to square the circle and find a credible distinction between the incidental horizontal effect cases and orthodox judgments on horizontal direct effect of directives. For instance, the 'public law' analysis has been criticised for failing to account for the instances where one private party has sought to enforce contractual obligations on another (Craig and De Búrca, 2003, p 225). The 'substitution-exclusion' distinction floated by Advocate-General Leger does not provide a comprehensive account of the case law. For instance, as was discussed earlier in the chapter, the ECJ failed to apply such a distinction in the *Enichem Base* case (Case 380/87), a case where the ECJ had an opportunity to apply its incidental effects reasoning. The judgment in *El Corte Ingles* (Case C-192/94) provides another example where the ECJ did not instruct the national court to disapply the part of the Spanish Civil Code which prevented the complainant from securing an appropriate remedy against a finance company in line with the rights envisaged under the terms of the Directive in question, but instead held to the line that directives could not have horizontal direct effects. Moreover, the ECJ has not taken up the 'substitution-exclusion' formulation, even when provided with the opportunity to do so. Even if adopted by the Court at some stage, the application of a 'substitution-exclusion' test would, in any event, generate an arbitrary and unfair division between success and failure in terms enforcing directives by private parties within the Member States. Whereas individuals would not be able to enforce their rights in those Member States which had not adopted any legislation to implement a directive, individuals in other Member States which had adopted (conflicting) national rules would potentially be in a more advantageous position in potentially being able to ensure that the directive could be enforced by having the conflicting national rules set aside by national courts. Finally, the case law on incidental horizontal effects appears to run counter to the ECJ's traditional instructions to Member State courts on the issue of interpreting national legislation in line with directives (indirect effect). This area will be addressed in section 6.2.

The above outline of the ECJ's case law on incidental effects of directives indicates that it has delivered some recent judgments which are difficult to reconcile with traditional principles pertaining to direct effect of directives. Of particular concern appears to be the level of uncertainty as to when the Court will be prepared to instruct a national court to disapply a national rule in conflict with a directive, where the case referred to it from the national court concerns a legal dispute between private litigants. The only element of certainty appears to be its preparedness to apply a different set of criteria consistently in relation to the Technical Standards Directive. It is difficult

to see how this particular line of cases may or will assist in the private law enforcement of EC environmental directives against private persons which contravene environmental protection requirements contained in such legislative instruments.

In the light of these judicial developments, the state of the law is at an uncertain and unclear stage. In principle, though, it would now appear at least conceivable that a private individual or entity might be able to use the judgments in *Bernaldez*, *Pafitis* and *Smithkline Beecham* as precedents for the purpose of assisting the pursuit of civil action<sup>55</sup> or, where permitted under national law, a private prosecution against companies whose activities have been legitimised by national rules in conflict with EC environmental legislation. However, given the fact that environmental law enforcement in general is heavily dependent, from both a technical as well as a practical perspective on the ability of public law agencies to intervene to uphold legally binding environmental protection standards, any legal opportunities facilitating the possibility for private actors to enforce EU environmental law against private operators is likely to have a relatively slight impact for the foreseeable future in terms of enhancing the state of compliance with the law. Factors such as legal costs, length of proceedings, complexity of subject matter, paucity of powers to obtain and/or search for hard evidence of non-compliance all serve to make the horizontal enforcement scenario of EC environmental directives in the form of a legal action between private disputants a pretty rare event. Instead, private enforcement of environmental directives via the ‘triangular’ route described in section 6.1.4.3 would appear to be a much more fruitful course of action to undertake.

## 6.2 Indirect effect and EC environmental law

Distinct from its direct effects jurisprudence, the ECJ has developed another body of case law intended to assist individuals as well as public authorities in being able to secure proper enforcement of EC directives at national level. Specifically, the Court has established that a basic legal duty under EC law befalls the national courts, in particular derived from the general obligations flowing from both Arts 10 EC and 249(3) EC, to construe national law in line with the requirements of EC directives in so far as is possible. This body of precedent established by the ECJ has become known as the legal doctrine of ‘indirect effect’ or ‘sympathetic interpretation’ in EC law. The doctrine has traditionally been relevant and of some use to individuals who have been unable to use the doctrine of direct effect, on account of the fact that the material provisions of the directive they wish to enforce may not fulfil the standard criteria of sufficient precision and unconditionality.

<sup>55</sup> E.g. a nuisance action in the context of disputes between neighbouring landowners.

### 6.2.1 *General points*

The doctrine of indirect effect, as it has become known, was first clearly applied by the ECJ in the case of *Von Colson* (Case C-14/83). The case involved the application of the Equal Treatment Directive 76/207, which requires, *inter alia* that Member States ensure that equal working conditions for men and women are respected by employers. Specifically, the plaintiff Ms Von Colson, had suffered sexual discrimination in having been rejected for a position as a social worker in a German male prison on account of her being female. She sought to claim compensation through civil action before the German courts. Article 6 of the Directive, the relevant provision on remedies in respect of breaches of equal treatment principles set out in the Directive, is couched in general terms as requiring Member States to ensure that claimants are enabled 'to pursue their claims by judicial process after possible recourse to other competent authorities'. Notably, the provision does not specify a particular remedy or range of remedies that must be afforded to a claimant; this matter is left to the Member States to determine. Von Colson's judicial remedy available under German law at the time appeared to be based on traditional principles of compensation relating to tortious claims, namely the right to claim for losses on a retrospective basis (that is, those losses actually sustained as a result of the illicit act until judgment). Compensation in respect of loss of employment opportunity was potentially ruled out, although the national court hearing the case considered the national legal position to be ambiguous. If compensation is to be construed on an actual loss basis, Von Colson would have merely been entitled to reimbursement of the travel and postal expenses involved in securing her job interview. The national court referred some questions to the ECJ for a preliminary ruling, including advice on the nature of judicial remedy required to be afforded to victims of sex discrimination under Art 6.

The ECJ initially confirmed that Art 6 was insufficiently precise an provision to have direct effects. However, it held that it contained an implicit obligation on Member States to ensure that judicial remedies afforded to victims of discrimination were to be effective so as to constitute a sufficient deterrent to employers not to engage in discriminatory practices and policies in the working environment. The Court proceeded to hold that the national courts were obliged under a basic duty of EC law to construe national legislation and in particular its provisions intended to implement the Directive 'in the light of the wording and purpose of the Directive in order to achieve the result referred to in [Article 249(3) EC]'.<sup>56</sup> However, later in its judgment the Court added an important qualification to the duty, namely that a

<sup>56</sup> Para 26 of judgment.

national court is obliged to construe national law to be in accordance with the terms of directives 'in so far as it is given discretion to do so under national law'.

The ECJ has further refined the general principles of the indirect effect doctrine since the *Von Colson* case. Specifically, in *Marleasing* (Case C-106/89) it confirmed that the doctrine also applies to cases involving exclusively private litigants, so that individuals are able to use the doctrine to their advantage against other private persons. That case also confirmed that the doctrine applied irrespective of when national legislation is passed, whether before or after the Directive's entry into force. The ECJ has thereby confirmed that the legal effect of a directive cannot be negated by any existing national constitutional principles which stipulate that later statutes shall take precedence over earlier ones.<sup>57</sup>

The principles of indirect effect elaborated in the case law of the ECJ have had less impact on the operation of national law than the direct effect doctrine. This is because, as far as indirect effect is concerned, the Court has qualified the application of the supremacy principle in the context of indirect effect. Specifically, it has made the application of indirect effect conditional on the extent to which the law of a Member State permits its courts to construe national legislation in line with the terms of directives. For instance, under rules of construction of national legislation applied by the UK courts, it appears that the judiciary are not prepared to distort the meaning of a statute so that it be in accordance with an EC directive where this would conflict with the ordinary meaning of the national legislation (see for example, House of Lords judgments in *Duke v GCE Reliance* [1987] and *Webb v EMO Cargo* [1995]). Exceptions; though; may be made to this rule where the national legislation is clearly intended to transpose a directive (*Litster* [1990]). Whilst the UK courts have indicated that they will be prepared to accommodate the indirect effect doctrine in cases where the national legislation is ambiguous or otherwise open to interpretation, it is clear that they will not interpret a domestic statute *contra legem*, as this would be a step tantamount to undermining the fundamental UK constitutional principle of parliamentary sovereignty.

Accordingly, it can be seen that the case law of the ECJ on indirect effect does not impose an absolute duty on national courts to construe national law in line with EC directives, but one conditional on the requirements of Member State's rules on statutory construction. Although the indirect effect doctrine therefore serves to artist in underpinning the general principle of supremacy of EC law (see Krämer, 1996a, p 122), it invokes a softer enforcement of that principle than the direct effect doctrine. The indirect

57 See also on this point Cases 91/92 *Dori*, C-334/92 *Wagner Miret* and C-54/96 *Dorsch Consult*.

effect doctrine does, however, have the advantage over the doctrine of direct effect of being able to be used in order to assist in the enforcement of non-directly effective provisions of directives. It may also be used by both private persons as well as state authorities. However, as will be evident from the next section 6.2.2, the latter have, in practice, only limited possibilities to apply it in order to enforce directives against individuals in criminal law contexts.

### **6.2.2 *Indirect effect and criminal liability***

In a series of judgments the ECJ has clarified that there are specific limits to the extent to which the indirect effect doctrine may be used in order to enforce requirements contained in directives against private persons. This issue has arisen on a number of occasions, directly and indirectly, in connection with criminal prosecutions taken against individuals in respect of failures to adhere to particular minimum environmental protection standards.

A primary example is the *Arcaro* case (Case C-168/95). The case concerned the prosecution of a legal representative of a precious metals company in connection with the violation of Italian criminal law on industrial discharges of dangerous substances into a river. The Italian criminal legislation in question had been enacted with a view to implementing a number of EC directives on dangerous substance discharges, including Directives 76/464 on pollution caused by certain dangerous substances discharged into the aquatic environment, as well as Directive 83/513 on pollution emission limit values and quality objectives for cadmium discharges. Arcaro was prosecuted under the Italian law for failing to apply for a discharge authorisation in respect of his company's operations. Article 3 of Directive 76/464 provides that all discharges of substances listed in its Annex 'shall require prior authorisation of the competent authority concerned'. However, the Italian legislation made a distinction regarding authorisations between new plants and those existing before its entry into force (old plants). Exceptionally, old plants would not have to apply for authorisation for discharges until the adoption of specific ministerial decrees on emission limits, which had not yet been passed. Arcaro submitted that his plant was an old plant for the purposes of the Italian law and would not be obliged to obtain a discharge authorisation until adoption of ministerial decrees on emission limits pertaining to such plants. The Italian magistrates court hearing the case decided to refer to the ECJ for advice on whether the Directive was directly effective and whether any other method of procedure could be used to achieve elimination from national legislation of provisions incompatible with EC law.

On the issue of direct effect, the Court reiterated its established position from earlier cases (such as Cases 80/86 *Kolpinghuis* and 14/86 *Pretore di Salò*) that the doctrine of direct effect could not be used to secure criminal liability of individuals:

[T]he Court has also ruled that a directive cannot, of itself and independently of a national law adopted by a Member State for its implementation, have the effect of determining or aggravating the liability in criminal law of persons who act in contravention of the provisions that directive [. . .].<sup>58</sup>

Turning to the national court's second question, the ECJ noted initially that no method of procedure under EC law existed that allowed a national court to eliminate national rules contrary to a directive. However, it then confirmed the specific interpretative obligations under EC law that national courts were to fulfil when construing national law. Specifically, it confirmed the general principle set out in *Marleasing* that national courts, called on to interpret national law, are required to do so, as far as possible, in the light of the purpose and wording of the directive in order to achieve the result pursued by that directive (para 41 of judgment). The ECJ then held that there was a limit to that particular duty:

However, that obligation of the national court to refer to the content of the Directive when interpreting the relevant rules of its own national law reaches a limit where such an interpretation leads to the imposition on an individual of an obligation laid down in a directive which has not been transposed or, more especially, where it has the effect of determining or aggravating, on the basis of the Directive and in the absence of a law enacted for its implementation, the liability in criminal law of persons who act in contravention of that directive's provisions.<sup>59</sup>

The impact of the *Arcaro* judgment in terms of the enforcement of EC environmental directives against private persons is significant. The Court has effectively ruled out the possibility of either a private person or state authority using the doctrine of indirect effect in order to require national courts to interpret national environmental legislation in line with EC environmental directives so as to compel individuals and private legal persons to adhere to legislative obligations enshrined in those directives. This limitation of the application of indirect effect also applies where national law is ambiguous, namely a situation where an interpretation in accordance with the terms of the directive would not constitute a distortion to the ordinary meaning of the national provision(s) concerned. The judgment may also appear, given its broad terms, to exclude the possibility of state authorities applying either the indirect or direct effect doctrines to determine or aggravate liability under national administrative law or civil law in respect of

58 Para 37 of judgment.

59 Para 42 of judgment.

breaches of environmental standards stipulated in EC environmental directives. If the aim of legal action at national level is to achieve enforcement of an obligation under a directive, the mode of how that enforcement is to be achieved should not affect the basic position favoured by the ECJ in general, that obligations for individuals should not flow from directives, but instead from national implementing legislation. It would appear, though, that outside the context of criminal liability and the enforcement of specific obligations in directives, the application of the indirect effect doctrine may be used with the consequence of private persons being subject to a detriment of some kind (for example, Case C-456/98 *Centrosteeel*, Case C-240-244/98 *Océano*).

The ECJ has not taken up a suggestion by Advocate-General Saggio to modify and simplify the existing principles of indirect effect by requiring national courts as a general principle to exclude the application of national rules which conflict with provisions in EC directives, whilst not substituting them with the contents of the conflicting provisions of directives unless these are directly effective in relation to the case at hand (see his Opinion in Case C-240-244/98 *Océano*). Such a proposal would, however, if accepted, result in liabilities and burdens arising for private individuals which would not otherwise be envisaged under national law (see Craig, 2003, p 218) and would fall into the trap of imposing duties on individuals effectively in a retrospective manner, an aspect which the ECJ has been particularly sensitive to in the context of criminal liability (see for example, Cases C-74,129/95 *Procura della Repubblica v X* and its reference to the fundamental right of individuals contained in Art 7 of the Council of Europe's European Convention on Human Rights and Fundamental Freedoms (ECHR) 1950.<sup>60</sup>

### 6.3 Concluding remarks

The exploration in this chapter of the ECJ's case law reveals that the Court has developed some important legal principles concerning the rights and responsibilities of stakeholders involved in the enforcement of EC environmental law. Significantly, the doctrine of direct effect in combination with the principle of EC law supremacy has established the possibility for private individuals to be able to rely on sufficiently precise and unconditional provisions of environmental directives which guarantee minimum public health and or environmental protection standards directly against Member State authorities. The case law on direct effects of directives has been further

60 Art 7(1) ECHR states: 'No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed'. See Art 49 of the EU Charter of Fundamental Rights 2000, which includes these guarantees.

refined by the ECJ to enable private entities (such as NGEOS) to rely on provisions in directives that limit the scope of discretion afforded to public authorities regarding their decisions affecting the environment, such as in the area of environmental impact assessment where Member State authorities are obliged to ensure that a project listed in Annex II of the EIA Directive is subject to prior impact assessment if it is likely to have 'significant effects' on the environment. In other words, the ECJ has confirmed that private persons may rely on such provisions in EC directives before national courts in order to ensure that the exercise of discretion by public authorities has not been exceeded. The Court's jurisprudence has also developed a body of precedent, still unfolding, concerning the extent of the obligations incumbent on national courts to construe national legislation in line with EC law (the 'indirect effect' doctrine).

Whilst opening up legal avenues enabling private persons to enforce EC environmental legislation, the ECJ's case law has some notable limitations. In relation to the direct effect doctrine, the ECJ has ruled out the possibility of directives in themselves imposing obligations on individuals. This restricts the possibilities of state agencies as well as private persons being able to enforce requirements in EC environmental directives against private polluters who fail to adhere to those requirements, where the Member State has not implemented the requirements of the Directives correctly into national law and/or by the requisite deadline (issues of inverse and horizontal direct effect). In relation to the indirect effect doctrine, the ECJ has curtailed its application so as to exclude the possibility of allowing it to be used in national courts in order to determine or aggravate criminal liability on the part of a private person. Once again, this places a brake on the possibility of EC environmental law being enforced more effectively against private polluters. However, it should be recognised that the ECJ has established these particular limitations for essentially sound legal reasons, namely because at its root an EC directive is a legislative instrument addressed to Member States and not to private individuals. Accordingly, responsibility for ensuring that the requirements of directives are carried out fall primarily on the shoulders of Member States and their representative governments, not on private individuals. In the event of a failure on the part of a Member State to transpose a directive's requirements correctly into national law, the ECJ is understandably reluctant to displace the legal responsibility for that transposition failure onto private individuals and companies.

These limitations raise questions as to whether the instrument of a directive is the most appropriate legal form in which to house EC environmental protection requirements, given Member States' relatively poor implementation record in relation to EC environmental directives that has existed in essence since the inception of an environmental policy dimension at Community level.



## ACCESS TO JUSTICE AT NATIONAL LEVEL FOR BREACHES OF EU ENVIRONMENTAL LAW (1): THE ROLE OF THE EUROPEAN COURT OF JUSTICE

As was explored in Chapter 6, the European Court of Justice (ECJ) has developed several possibilities for private individuals to be able to rely on EC norms before national courts, with a view to enforcing these against persons whose conduct infringes the legal requirements stipulated in those norms. Specifically, it has confirmed that in principle individuals may rely on EC provisions that are sufficiently precise and unconditional before national courts of the EU Member States (direct effect doctrine), in the context of litigation either prosecuted or defended by them. The ECJ has also confirmed that individuals may be entitled to require national courts to enforce EC norms which, although providing Member State authorities with a considerable degree of discretion, have found to have been infringed by virtue of a state authority having exceeded the limits of discretion afforded under the EC provisions concerned (for example, Case C-72/95 *Kraaijeveld*). In addition, the ECJ has clarified that national courts are under a general duty, in so far as is possible, to interpret national legislative rules in line with the requirements of the EC Treaty and secondary legislative provisions covering the same subject matter (indirect effect doctrine). However, the above-mentioned legal principles are of relatively limited practical use in themselves without there being a clear legal framework in place to facilitate the access of individual claimants to national courts and tribunals as well as to ensure the provision of an effective judicial remedy in the event of the individual's legal action being successful.

The purpose of this chapter and Chapter 8 is to explore the ways and means by which EC law has been developed in order to provide the foundations of such a framework. This particular chapter will focus specifically on the role that the ECJ has played in developing a body of basic, general procedural rights for individuals, and responsibilities of Member State authorities to secure remedies in the event of breaches of EC law, including

EC environmental norms. In addition to the general legal principles established by its case law in shaping the basic legal rights of private persons as well as obligations of state authorities under EC law (principally the doctrines of direct and indirect effect as well the supremacy principle), the ECJ has developed a body of rules affecting the scope and nature of judicial remedies to be made available to individuals at national level for the purpose of upholding EC law.

Chapter 8 will look beyond the contribution that the ECJ has made in terms of developing procedural rights and remedies for private individuals and consider how the most recent EC legislative measures and initiatives have set in train a raft of important changes in terms of the legal possibilities for private EC environmental law enforcement at national level. As will be seen, these changes have come principally as a means of implementing an important recent international environment agreement, namely the 1998 UNECE Århus Convention on access to information, public participation in decision making and access to justice in environmental matters, of which the European Community and its constituent Member States are contracting parties. Specifically, the particular EU measures to be considered include the Commission's 2003 proposal for a directive on access to justice in environmental matters,<sup>1</sup> currently passing through the EC legislative process, and EC Directive 2003/4 on public access to environmental information, both of which constitute important components of the EU's aim to implement the 1998 Århus Convention. In addition, Chapter 8 will consider the private law enforcement implications of EC Directive 2004/35 on environmental liability with regard to the prevention and remedying of environmental damage.

## **7.1 General principles of procedural autonomy under EC law**

The starting point for analysing judicial remedies at national level from the perspective of general principles developed by the ECJ is to recognise that the EC Treaty system, as originally conceived, was clearly not devised with any specific view of providing or altering the conditions for access to courts and legal remedies afforded to individuals under Member States' national law. The EC Treaty contains no provisions that expressly address the issue of administration of justice at national level, in so far as this may affect the practical application of EC norms. For some considerable period after the inception of the European Economic Community in 1957, it was assumed that the Member States had retained exclusive competence in matters of determining the availability of rights of action as well as remedies for private plaintiffs to enforce EC law at national level. It appeared for a significant period of time that the ECJ had accepted this to be a correct interpretation

1 COM(2003) 624.

of the constitutional relationship agreed between Member States and the European Community under the auspices of the EC Treaty. For some twenty years or so after the entry into force of the EEC Treaty, the ECJ held, in various cases, that it was for the particular national legal systems of the Member States to determine the extent to which private persons should have access to justice before national courts to enforce EC norms, including notably the setting up of controls on legal standing to sue, and the range of remedies to be made available to successful private litigants. In the relative early years of its jurisprudence, the ECJ confirmed that Member States had in essence retained autonomy in terms of how to set up legal procedures at national level in order to safeguard private persons' rights under EC law (see for example, Case 6/60 *Humblet*; Case 13/68 *Salgoil*). Whilst the ECJ was initially prepared to develop the scope of individual rights under EC law in terms of whether or not a particular EC norm conferred direct legal benefits or burdens on individuals (in/direct effect doctrines), it was reluctant to interfere with aspects of civil and criminal procedure under national law.

However, over time the ECJ refined its position and clarified that the principle of procedural autonomy recognised by EC law was not absolute. Instead, having regard to the general duties of co-operation incumbent on Member States under Art 10 EC to ensure fulfilment of the legal obligations derived from the EC Treaty, the ECJ has qualified the basic position of national autonomy in relation to access to justice and remedies with two important general principles: namely, the guarantee of non-discrimination and the assurance that the exercise of EC rights must be made a genuine possibility in practice (for example, Case 33/76 *Rewe*). The current position of the Court on the general meaning of procedural autonomy may be summed up by reference to the following extract from one of its more recent judgments:

In the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from the direct effect of Community law. However, such rules must not be less favourable than those governing similar domestic actions nor render virtually impossible or excessively difficult the exercise of rights conferred by Community law.<sup>2</sup>

Since the initial clarification made by the ECJ of those twin qualifications to the principle of Member State autonomy in relation to national legal proceedings, the EU has expanded its remit on a number of fronts. In particular, the ECJ has developed its jurisprudence on the role and responsibilities of

<sup>2</sup> Para 17 of judgment in Case C-430/93 *Van Schijndel*).

authorities of the Member States, judicial as well as administrative in nature, with regard to the question of affording appropriate remedies for individuals whose EC rights have been breached. This case law will be examined more closely in section 7.2 below. More recently, the Court has broken away from the traditional position of procedural autonomy in a more radical fashion, in having established the right for private individuals in certain circumstances to seek compensation in respect of loss sustained as a result of a serious breach of EC law by a Member State (state liability). This relatively recent legal innovation is considered in section 7.3, with a view to exploring its implications for private enforcement of EC environmental law at national level.

## **7.2 Remedies at national level: general principles developed by the ECJ**

Notwithstanding its reticence in the early years of the European Community to interfere in the area of ‘procedural autonomy’, the ECJ has subsequently developed a number of general legal principles pertaining to Member State responsibilities in remedying breaches of EC law. Mention has already been made in the previous section of the obligations confirmed by the Court that Member States have to ensure that their national rules which afford remedies to individuals in respect of breaches of EC law must meet the requirement of equal treatment (that is, the procedures must be equivalent to those applicable in respect of analogous situations involving breaches of national law) as well as ensuring that the national procedures concerned offer a genuine opportunity for a claimant to uphold their EC rights (that is, must not be in such a state as to render it in practice virtually impossible to secure a remedy). However, the Court has moved beyond these two important qualifications and has developed other general principles on remedies drawn out from the general duties of good faith under Art 10 EC.

### ***7.2.1 Duties on national courts to provide remedies***

One area of development in the ECJ’s case law on remedies has been to expand the extent to which national courts and tribunals are required under EC law to ensure that effective remedies are provided to plaintiffs who are successful in claims that EC law has been breached. Notably, it appears that in a number of cases the ECJ has established that national courts are obliged, in certain circumstances, to take steps to provide individuals with adequate judicial remedies in order to enable them to uphold their directly effective rights. Specifically, the Court has required national courts to set aside national rules preventing claimants from being able to secure effective remedies that would otherwise be available under national law. A few examples serve to illustrate this point. In *Marshall* (2) (Case C-271/91) for instance, a sex discrimination case concerning adequacy of compensation

under Art 6 of the Equal Treatment Directive 76/207,<sup>3</sup> the ECJ held that national courts were obliged without qualification to construe national legislation in line with Art 6 in order to ensure that an individual employee received an adequate remedy in respect of a breach by her state employer of her directly effective rights to equal treatment under other provisions of the Directive. Article 6 contains a general obligation on Member States to ensure that measures are introduced into their national legal systems necessary to enable claimants of sex discrimination within the workplace to pursue their claims by judicial process after possible recourse to other competent authorities. Article 6 is itself clearly not directly effective. In *Marshall's case*, United Kingdom law at the time imposed a ceiling of £6,250 on the amount of damages that could be awarded by a UK industrial tribunal in respect of a claim of unequal treatment on grounds of sex. No such ceilings applied with respect to the jurisdiction of UK courts (notably, the English and Welsh High Court) in awarding compensation for other types of civil wrong. In its preliminary ruling on legal questions submitted to it from the UK industrial tribunal hearing the employment dispute, the ECJ considered the fixing of an upper limit of damages to be in conflict with the requirements of Art 6, and required the industrial tribunal to set aside the limit when awarding damages. This represented a significant shift from its previous jurisprudence on Art 6, where it had held that national courts were under a duty only 'in so far as possible' to construe national law to be in line with the EC provision (see Case 140/83 *Von Colson*).<sup>4</sup>

In the case of *Factortame (1)* (Case C-213/89), the ECJ confirmed that the UK courts were bound under Art 10 EC to set aside a rule in UK law which excluded the possibility of persons being able to obtain interim injunctions against the national government which infringed the directly effective right of freedom of establishment under the EC Treaty (Art 43 EC). The ECJ has therefore developed a general principle that courts are under a general duty to afford the maximum range of generally available remedies under national law to persons relying on directly effective EC rights in disputes heard by them (that is, to adopt a 'maximalist' position when it comes to the question of judicial remedies in the event of such a person whose directly effective rights have been breached).

However, the Court has not usually applied the same approach in situations where the provision of EC law relied on by a private litigant is not directly effective. The discussion in Chapter 7 on the doctrine of indirect effect revealed that traditionally the ECJ will require national courts to interpret

3 OJ 1976 L39/40.

4 See also Case C-180/95 *Draehmpohl*, where the ECJ confirmed that unconditional obligations on national courts flow from Art 6 of the Equal Treatment Directive 76/207 so as to preclude the application of national laws imposing ceilings on compensation.

national law in line with a non-directly effective provision of EC directives only in so far as is possible under the rules of national law on statutory interpretation (for example, Cases C-106/89 *Marleasing* and C-91/92 *Dori*). In these situations, the ECJ has not deduced from Art 10 EC that national courts are, as a matter of basic principle, under duties to take steps to secure effective judicial remedies for breaches of non-directly effective provisions of EC directives, where national law precludes the possibility of its rules being interpreted in line with a non-directly effective provision of a directive. By way of exception, and as was discussed in Chapter 6, the ECJ has held that individuals may rely on provisions in EC directives directly against state authorities before national courts, notwithstanding that the provisions may not necessarily fulfil the traditional criteria of direct effect (sufficient precision and unconditionality), as has been the case with respect to Arts 2(1) and 4(2) of the Environmental Impact Assessment (EIA) Directive, as discussed in Chapter 6 (see for example, Cases C-72/95 *Kraaijeveld*, C-437/97 *WWF v Bozen*, C-287/98 *Linster* and C-127/02 *Landelijke Vereniging*).

It is also clear that the ECJ has not interpreted the duties incumbent on the courts and tribunals under Art 10 EC to take steps to ensure adequate remedies are provided in respect of breaches of EC law to be an absolute and automatic obligation in all instances. Instead, the general duties of co-operation in good faith are qualified by the principle of procedural autonomy, which means that national courts and tribunals have to operate as far as possible in accordance with national rules governing the procedures and outcomes on applications for judicial remedies. With the notable exception of the ECJ's jurisprudence on state liability,<sup>5</sup> the aim of the ECJ's jurisprudence has not so much been to establish remedies *de novo*, but has instead required national courts and remedies to set aside any exceptions or derogations incorporated into national procedures which serve to prevent a particular remedy or set of remedies being available that would otherwise be available under national law in respect of contraventions of EC law. The principle of procedural autonomy sets limits to the extent to which courts and tribunals are required to apply EC law as well as securing effective remedies in relation to its breach. The following example serves to illustrate this point. The ECJ has held that national courts and tribunals which are not in general empowered under national rules of judicial procedure to raise points of (EC) law of their own motion, are not required to consider or apply the relevance of EC law to the case at hand where the parties to a dispute have not themselves raised them in court (Case C-430/93 *Van Schijndel*). On the other

5 The major exception is the jurisprudence of the ECJ on state liability, which has created the existence of a right to a specific legal remedy and conditions for its application under EC Law in the event of a serious breach of EC rules. This particular legal area and its implications for EC environmental law enforcement will be addressed in the next section.

hand, the ECJ has also confirmed (for example, Case C-72/95 *Kraaijeveld*) that where national law obliges or entitles a court or tribunal to raise of its own motion pleas in law based on a binding national law, then those judicial bodies are obliged to examine of their own motion whether the legislative or administrative authorities of the Member State have acted lawfully according to the requirements of EC law in the context of a legal dispute concerning the legality of the relevant authorities' behaviour.<sup>6</sup> The effect of these rulings of the ECJ may lead to a fracturing of responsibilities of courts and tribunals in relation to EC law in the various Member States, in so far as they enable Member States to confer different levels of procedural rights on private persons engaged in civil litigation. This does not assist in the EC's project of securing the means to achieve a high level of environmental protection throughout the EU. On the other had, the rulings are nevertheless compatible with one another when considered in the context of the procedural autonomy principle fostered by the Court. The effect of these rulings is to signal acknowledgement of the independence of Member States to determine whether its judicial bodies are to be invested with passive (adversarial based) or active (investigative) roles and responsibilities, these to be determined solely in accordance with local legal heritage and tradition.

It should be borne in mind that the ECJ has set clear limits to the principle of procedural autonomy. Its qualifications ultimately require courts and tribunals to take steps to intervene where existing national judicial remedies for breaches of EC law are of a less favourable nature than those provided in respect of similar situations but internal to the Member State (equivalence principle) or where the national rules render impossible or excessively difficult in practice (effectiveness principle). The latter principle may be of particular relevance in the context of private enforcement of EC environmental law, where plaintiffs may encounter a number of procedural burdens which may be unreasonable in the circumstances for them to shoulder. Such was the case in the *Lappel Bank* litigation (Case C-44/95) where the NGEORoyal Society for the Protection of Birds (RSPB) sought judicial review of a decision before the High Court in respect of a decision by the UK Secretary of State for the Environment to exclude an area of inter-tidal mudflats known as Lappel Bank from falling within a designated local special protection area (SPA) for the purposes of the Wild Birds Directive 79/409. Pending outcome of the judicial review proceedings, the RSPB sought interim relief from the High Court by way of an injunction or judicial declaration to prevent development of a port on the mudflats. Under English law, as confirmed by the House of Lords' judgment in the case, a financial guarantee (cross-undertaking in damages) is to be usually

<sup>6</sup> Para 60 of judgment.

provided by the plaintiff in order to cover loss of profit incurred by the defendant as a result of such relief being granted pending final judgment, this being recoverable if the plaintiff's case ultimately proves successful. However, the RSPB was not in a financial position to be able to offer such an undertaking, with the result that the purpose of litigation effectively collapsed, the site not being required to be preserved until final judgment. In the course of legal proceedings, the ECJ confirmed in a preliminary ruling to the House of Lords that the UK had violated the terms of the Wild Birds Directive 79/409 in having failed to classify the mudflats within the ambit of the SPA. That proved to be pyrrhic victory, given that development had already commenced on the mudflat area. The national procedural requirement of a cross-undertaking in damages effectively meant that the RSPB was unable to secure an appropriate remedy in respect of a breach of EC environmental law. It has been argued that the jurisprudence of the ECJ on remedies would not go as far as to require a national court to set aside requirements for a financial deposit where interim relief is requested (Scott, 1998, pp 164–65). However, it is also arguable that the ECJ's case law on procedural autonomy requires, by virtue of Art 10 EC, a national court to set aside the application of such a rule where national law provides the national court with discretion to require a deposit of financial security and the plaintiff has fulfilled the other core requirements attending requests for interim relief, these being essentially that the plaintiff has made out a *prima facie* case that an infringement of law has occurred, the matter is proven to be urgent with a substantial risk of the plaintiff (or his case) suffering irrevocable damage unless interim relief is granted. The requirement to put down a cross-undertaking in damages in this case effectively rendered the prosecution of civil action by the RSPB impossible.

### ***7.2.2 Duties of non-judicial Member State authorities to provide adequate remedies***

Another branch of the jurisprudence of the ECJ on remedial responsibilities has now established as a matter of general principle that it is incumbent on all emanations of the Member States, not simply the national courts and tribunals, to remedy breaches of EC law. In the context of a number of environmental disputes the ECJ has made reference to this general legal principle which, it has concluded, is an implicit obligation under EC law to be drawn from Art 10 EC (for example, Cases C–72/95 *Kraaijeveld*, C–318/98 *Fornasar* and C–201/02 *Delena Wells*). As the Court confirmed in the *Delena Wells* case:

[I]t is clear from settled case law that under the principle of co-operation in good faith laid down in Article 10 EC the Member States are required to nullify the unlawful consequences of a breach of



Community law [. . .] Such an obligation is owed, within the sphere of its competence by every organ of the Member State concerned.<sup>7</sup>

In the *Delena Wells* case, referred to in Chapter 6 in relation to the direct effect doctrine, a private plaintiff sought judicial review before the High Court of a decision by the UK Secretary of State for Transport and Local Government to authorise planning consent in respect of a request to resume mining operations at a quarry that had laid dormant for a considerable period. Under UK planning legislation, plans for the resumption of operations in old dormant mines and quarries were, in certain circumstances, exempt from any requirement to undergo an impact assessment. The High Court referred a number of questions concerning the interpretation of the EIA Directive 85/337 to the ECJ under the preliminary ruling procedure in Art 234 EC, including whether the Directive precluded such development from being excluded from an impact assessment and, if so, whether the Member State was under a duty to remedy its failure to adhere to the terms of the Directive. In affirming that such an exemption amounted to a breach of the Directive, the ECJ set out some general principles regarding the obligations of national authorities involved in the application of EC rules concerning environmental impact assessment procedures to rectify the consequences of their decisions breaching EC rules:

[I]t is for the competent authorities of a Member State to take, within the sphere of their competence, all the general or particular measures necessary to ensure that projects are examined in order to determine whether they are subject to an impact assessment [. . .]. Such particular measures include, subject to the limits laid down by the procedural autonomy of the Member States, the revocation or suspension of a consent already granted, in order to carry out an assessment of the environmental effects of the project in question as provided for by Directive 85/337.

The Member State is likewise required to make good any harm caused by the failure to carry out environmental impact assessment.<sup>8</sup>

What is to be concluded from this line of jurisprudence of the ECJ is that Art 10 EC imposes a general legally binding duty on Member States, including emanations of the state such as local authorities as well as national or regional government departments and agencies, to ensure that breaches of EC law that fall within their particular area of jurisdiction are remedied. Accordingly, a state authority competent to issue licences to persons to engage in industrial and/or commercial activities is specifically required

7 Para 64 of judgment.

8 Paras 65–66 of judgment.

under Art 10 EC to take steps to remedy the situation where it has applied licensing conditions in contravention of EC environmental law. A state authority charged with the responsibility of overseeing the compliance by private and public entities with environmental standards prescribed by law is obliged under Art 10 EC to take steps to remedy a situation where it has failed to ensure that the requirements of EC environmental law are adhered to. Although such an authority may not, as was discussed in Chapter 6, invoke the requirements of EC environmental directives against private persons where these have not been transposed correctly into national law (no ‘inverse vertical direct effect’ of directives), the state authority is nevertheless required to seek other ways and means of ensuring that the requirements of EC law be fulfilled. In particular, it is obliged to take steps to remedy breaches of EC law that arise as a result of its own decision making or actions.

For example, if a public authority issued a licence or permit for a particular industrial project in contravention of EC environmental requirements, steps taken by it on its own initiative to remedy the situation and ensure compliance with the requirements, such as by amending the terms of or revoking the licence, would represent fulfilment on the authority’s part of compliance with its duties under Art 10 EC. In addition, it would be incumbent on the relevant public authority or authorities charged with enforcing environmental law within the relevant Member State to take steps, as necessary, to require that a situation of compliance with EC environmental legislation materialised. Although adverse effects of an amendment or revocation of a licence issued in contravention of EC law may well be sustained by the licensee, this should not be considered in legal terms to constitute a situation of a public authority seeking to enforce a directive directly against a private individual, which would not be possible given that the ECJ has held that directives may not impose specific obligations on individuals. Instead, it would be a scenario where action is taken to ensure that a public authority’s activities are in compliance with EC environmental legislation. The effects felt by the licensee would be ancillary, an inevitable consequence of the measures taken to render the actions of a public authority in conformity with EC requirements, and therefore not blocked by the principle that directives may not have direct effects against private persons (for example, see Case C–201/02 *Delena Wells*).

The duty of co-operation imposed on public authorities under Art 10 EC is thus both wide-ranging and profound. In an environmental protection context, the ECJ has clarified in cases such as *Kraaijeveld* and *Delena Wells*, that competent authorities of the Member States responsible for protecting the environment or taking decisions affecting the environment in areas covered by EC law are to take all necessary measures to ensure fulfilment of EC environmental legislative obligations falling within their particular area of jurisdiction. This may take any number of forms. For instance, it may include putting pressure on a national and/or regional government to take legislative measures to transpose EC environmental directives. It may include

notifying the European Commission of a breach of EC environmental law where law enforcement action is not undertaken at national level to remedy a breach of EC environmental law. The Commission may then commence infringement proceedings against the Member State concerned under Arts 226/228 EC. It is important to recognise that the duty of co-operation incumbent on Member State authorities exists as a general stand-alone legal responsibility and that it is not somehow determined by the extent to which private persons are able to bring legal proceedings against an emanation of the state for failure to enforce EC environmental law in a particular case. Competent state authorities have duties to secure effective remedies to infractions of EC environmental law, irrespective of whether the rules of law in question may be invoked by private individuals.

The above-mentioned duties under Art 10 EC on Member State authorities to ensure due compliance with EC environmental legislation may, accordingly, be used to good effect by private persons engaged in enforcement of EC environmental legislation. Specifically, competent authorities may be reminded of their obligations to take remedial action to correct breaches of EC environmental law that have emanated from decisions and/or activities of public authorities. The various responsibilities of Member State authorities in relation to EC environmental law enforcement are addressed in further detail in Part Three of the book.

### **7.3 State liability for breaches of EC environmental law**

Until relatively recently, it was thought that the ECJ would avoid creating or compelling Member States to create specific rights of action and/or remedies at national level in order to enable private persons to enforce their EC rights. Consonant with its now well-established principle of procedural autonomy, the initial position of the ECJ was indeed to confirm that the EC Treaty was not intended to create new remedies in the national courts in order to ensure the observance of EC law, other than those already in existence in the respective national legal systems of the Member States. It supported its arguments by referring to the absence of any such new actions and remedies set out in the EC Treaty, contrasting this with the EC Treaty's provisions expressly conferring rights on individuals to take legal action<sup>9</sup> against the EC institutions (for example, Case 158/80 *Rewe*).<sup>10</sup> The two qualifications to procedural autonomy noted in section 7.2 require Member States, if necessary, to effect changes to their national procedural rules, namely to render them suitable to address breaches of EC law in a fashion equivalent to that afforded already in relation to breaches of national law of a similar nature, as well to ensure that private persons have a genuine possibility

9 Arts 230, 232 and 235 EC.

10 Para 44 of judgment.

of enforcing their EC rights. Until relatively recently, the ECJ's jurisprudence appeared to exclude the creation of specific rights of action under EC law for private persons to use in order to to ensure observance of Community law. However, in its judgment in the *Francovich* case (Cases C-6, 9/90), the ECJ signalled a radical departure from the case law on this issue by specifically establishing an individual's right to bring an action before national courts for compensation in respect of serious breaches of EC law perpetrated by Member States (namely, the creation of Member State liability). In the wake of this ruling, the Court has proceeded to establish a legal framework on state liability, which national courts are to apply in respect of claims brought before them by individuals.<sup>11</sup> Before considering the implications of this case law for the environmental sector (section 7.2.2), the key legal principles underpinning state liability in respect of breaches of EC law will be examined.

### ***7.3.1 General legal criteria for proving state liability under EC law***

In *Francovich* (Cases 6, 9/90) two private individuals brought civil actions against Italy in respect of a failure on the latter's part to transpose on time a particular employment rights directive, namely Directive 80/987 on the protection of employees in the event of insolvency of their employer. Under the terms of the Directive, Member States are obliged to guarantee that employees are to receive a minimum amount of compensation in respect of outstanding unpaid salary claims against their insolvent employer. The national court hearing the legal dispute referred questions to the ECJ under the preliminary ruling procedure in Art 234 EC, including whether the Italian State was required to pay the plaintiff's the minimum guaranteed payments, notwithstanding the absence of any transposition legislation.

By way of initial comment, the ECJ held that the Directive's provisions requiring a minimum financial guarantee payment to insolvent employees were not directly effective. Given that the Directive specifically vested the Member States with discretion as to which entity at national level would be liable to make the relevant payments and how that entity would be financed, according to the Court the criteria for direct effect (that is, sufficient precision and unconditionality) were not fulfilled. Nevertheless, the ECJ went on to confirm that, notwithstanding the absence of direct effect in the case, the private plaintiffs had a right under EC law to seek compensation from the Italian State through the Italian courts. The Court drew from general findings made in its previous case law about the nature and implications of the EC Treaty in order to reach this conclusion: specifically, its clarification of the unique and autonomous nature of the EC legal system integrated

11 See e.g. Case C-319/96 *Brinkmann*, at para 26 of judgment.

into the Member States' own legal systems and which their national courts are bound to apply, its finding that subjects of the EC legal system comprise individuals as well as Member States, as well as its previous rulings to the effect that national courts' tasks under EC law include the responsibility to apply EC legal provisions in areas falling within their jurisdiction, ensure that those provisions take full effect and protect the rights which they confer on individuals.<sup>12</sup> The Court then proceeded to use the interpretative tool of *effet utile* to submit that 'inherent in the system of the Treaty' exists the principle that a Member State should be liable for loss and damage caused to individuals as a result of breaches of EC law for which the state can be held responsible<sup>13</sup> and that individuals have a right to reparation<sup>14</sup> in respect of such losses and damage from the state:

The full effectiveness of Community rules would be impaired and the protection of the rights which they grant would be weakened if individuals were unable to obtain redress when their rights are infringed by a breach of Community law for which a Member State can be held responsible.

The possibility of obtaining redress from the Member State is particularly indispensable where, as in this case, the full effectiveness of Community rules is subject to prior action on the part of the State and where, consequently, in the absence of such action, individuals cannot enforce before the national courts the rights conferred on them by Community law.<sup>15</sup>

The Court has referred in subsequent cases to the factor of effectiveness, as well as other grounds, as justification for its interpretation that state liability is implicit in the system of the EC Treaty. The need to ensure effective rights protection is cited, for instance, in subsequent state liability cases of *Brasserie du Pecheur* (Case C-46/93)<sup>16</sup> and *Dillenkofer* (Case C-178/94).<sup>17</sup> Other grounds have included ensuring the need for uniformity of application of EC law within the Member States (Case C-46/93 *Brasserie du Pecheur*)<sup>18</sup> and the requirement in Art 220 EC incumbent on the ECJ to ensure that EC law is observed (Case C-46/93 *Brasserie du Pecheur*).<sup>19</sup>

In *Francovich* (Cases 6, 9/90), the ECJ set out the three core elements that constituted collectively the legal criteria to be fulfilled in seeking financial redress in respect of illicit statal conduct. These are as follows: first, that the result prescribed in the particular directive should entail the grant of rights to individuals; second, that it should be possible to identify the content of

12 Paras 31–32 of judgment.

13 Para 35 of judgment.

14 Para 39 of judgment.

15 Paras 33–34 of judgment.

16 Paras 20–39 of judgment.

17 Para 22 of judgment.

18 Para 33 of judgment.

19 Ibid.

the rights on the basis of the Directive's provisions; and thirdly, the existence of a causal link between the breach of EC law by the Member State and the loss and damage suffered by third parties.<sup>20</sup> The Court thereby set out the framework for national courts and tribunals to apply in respect of individual claims of state liability. Whilst it made clear that Member States would be responsible for establishing particular national legal procedures to provide for implementation of the principle of state liability, it held that the Member States' discretion in so doing is tempered by the requirements to ensure that the procedures are not less favourable to claimants than those in relation to similar claims under national law and are not crafted so as to render it virtually impossible or excessively difficult for a claimant to obtain reparation.<sup>21</sup> Accordingly, it is evident that the principle of procedural autonomy has been heavily curtailed and qualified in *Francovich*; not only are Member States required to establish a particular right of action and remedy but they are also subject to requirements regarding its fairness and efficacy.

Since *Francovich*, the ECJ has had the opportunity to offer further clarification and refinement to the legal elements that need to be fulfilled for state liability to be proved. In the leading case of *Brasserie du Pecheur* (Case C-46/93), the ECJ confirmed that a Member State would be liable to pay compensation in respect of loss or damage sustained by an individual on account of any serious breach of EC law by the Member State, not simply by failure to transpose directives correctly. The Court identified that the conditions for liability were from now on to be understood as follows:

[. . .] Community law confers a right to reparation where three conditions are met: the rule of law infringed must be intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link between the breach of obligation resting on the State and the damage sustained by the injured parties.<sup>22</sup>

The ECJ thereby introduced a qualification to the second component of liability, namely that the breach of law had to be shown to be 'sufficiently serious'. The Court thereby clarified that Member States would not be automatically liable in respect of each and every breach of EC law, but only those deemed to be of a sufficiently grave nature. It is clear from the case law on state liability that the ECJ has specifically limited exposure of Member States to liability in respect of EC law in a number of ways. Not all breaches of EC law may give rise to a duty on the part of States to provide reparation. In particular, the Court has restricted liability on three fronts: the EC provision in question

20 Para 40 of judgment. See also C-178/94 *Dillenkofer*, para 22 of judgment.

21 Para 43 of judgment. See also C-46/93 *Brasserie du Pecheur* para 73 of judgment.

22 Para 51 of judgment.

must be intended to create individual rights, the breach must be of a sufficiently serious nature and there must be evidence of a direct causal link between the breach by the State and loss or damage sustained by an individual or individuals. The three criteria may be viewed accordingly as filter mechanisms, designed to exclude claims not regarded as significantly important for the ECJ to warrant liability on the part of Member States. The various legal components to state liability will be now examined in more detail below.

### *7.3.1.1 Rule of EC law must be intended to confer rights on individuals*

The first criterion of state liability constitutes perhaps the most significant limitation to the application of the rules on state liability under EC law. The ECJ has confirmed that the EC norm in question that is alleged by a plaintiff to have been infringed must have been intended by its authors to create rights for individuals. So far in its case law, the ECJ appears to have confirmed that at least three types of EC provisions fulfil this criterion: namely, those which are expressly designed to create new substantive or procedural rights for individuals (for example, Cases C-6, 9/90 *Francovich*, C-178/94 *Dillenkofer* and C-140/97 *Rechberger*), those which are directly effective (for example, Joined Cases C-46/93 *Brasserie du Pêcheur* and C-48/93 *Factortame* (3)) as well as those whose effects will have readily foreseeable and immediate economic benefits for individuals (for example, Case C-319/96 *Brinkmann*), a case which involved questions on the interpretation of the second directive on turnover taxes for manufactured tobacco (Directive 79/32).<sup>23</sup> It is clear that breaches of EC norms which are not intended to confer individual rights will not be caught by the current rules on state liability. In particular, breaches of EC norms which are intended to benefit society in general, as opposed to enhancing the welfare of individuals, will not be subject to the liability regime. The implications of this limitation for the environmental sector will be examined in section 7.3.2.1.

### *7.3.1.2 Sufficiently serious breach of EC law*

In *Brasserie du Pêcheur* (Case C-46/93), the ECJ provided some guidelines and factors to be taken into account by the national courts in individual cases in determining whether a particular Member State has in fact perpetrated a sufficiently serious breach:

[. . .] the decisive test for finding that a breach of Community law is sufficiently serious is whether the Member State [. . .] concerned manifestly and gravely disregarded the limits of its discretion.

23 OJ 1979 L10/8.

The factors which the competent [national] court may take into consideration include the clarity and precision of the rule breached, the measure of discretion left by that rule to the national or Community authorities, whether the infringement and the damage caused was intentional or involuntary, whether any error of law was excusable or inexcusable, the fact that the position taken by a Community institution may have contributed towards the omission, and the adoption or retention of national measures or practices contrary to Community law.<sup>24</sup>

These guidelines and factors have become entrenched as key principles to establishing liability on the part of Member States. The Court's clarification of the criterion of sufficient seriousness identifies that it is not necessary to establish specific subjective intention on the part of the defendant State in order to prove a manifest and grave violation of EC law. The test for a finding of fault on the part of a defendant Member State is focused on an essentially objective as opposed to subjective appraisal of the State's behaviour in the circumstances. As the ECJ made clear in *Brasserie du Pêcheur*, reparation for loss or damage may not be made conditional on fault (intentional or negligent) on the part of the organ responsible for the breach.<sup>25</sup> Accordingly, some violations of EC law are deemed automatically to be inexcusable, given the clear and uncontroversial nature of the EC legal obligations incumbent on a Member State. These include failures to transpose directives into national law on time (for example, Cases C-6, 9/90 *Francovich*, C-178/94 *Dillenkofer*), failure to respect a basic and fundamental legal requirement of one of the provisions of EC law (for example, Case C-48/93 *Factortame* (3)) and failure to respect a legal position settled already the ECJ in a previous ruling (for example, C-46/93 *Brasserie du Pêcheur*).

In particular, where no discretion is afforded to Member States in fulfilling their EC obligations, the criterion of sufficient seriousness is in principle likely to be met. An example of where the issue of discretion arose is the *Hedley Lomas* case (Case C-5/94). The UK Government had decided to restrict the export of live animals to Spain for slaughter, having been convinced that animals were being ill-treated in Spanish slaughterhouses contrary to Directive 74/577 on stunning of animals before slaughter.<sup>26</sup> *Hedley Lomas* (Ireland) Ltd, a company whose business involved live sheep exports from the UK, challenged the legality of a decision of the then Ministry of Agriculture, Fisheries and Food to refuse to issue it with an export licence to Spain. *Hedley Lomas* submitted that the export ban contravened Art 29 EC (ex Art 34), which prohibits as between Member States quantitative restrictions on exports and measures having equivalent effect. Well-established

24 Paras 55–56 of judgment.

25 Para 80 of judgment.

26 OJ 1974 L316/10.



jurisprudence of the ECJ had already confirmed that the provision was directly effective, so that persons engaging in cross-border trade encountering export restrictions imposed by national law would be able to rely on the prohibition directly before national courts and enforce it against the competent authorities of the Member State of export. In the *Hedley Lomas* case, the ECJ, in a preliminary ruling under Art 234 EC, set out the following guideline in assisting in determining the presence of a sufficiently serious breach:

[...] where, at the time when it committed the infringement, the Member State in question was not called on to make any legislative choices and had only considerably reduced, or even no, discretion, the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach.<sup>27</sup>

In concluding that the UK had been guilty of a serious breach of EC law, the ECJ noted that the UK had not been in a position in the particular case to produce any proof of non-compliance with the Directive in the Spanish installations where animals covered by the export licence were destined to be slaughtered. Article 30 EC (ex Art 36) affords Member States the opportunity to derogate from the prohibition contained in Art 29 EC on grounds, *inter alia*, relating to the protection of the life and health of animals. However, that derogation is subject to the express qualification in Art 30 EC that prohibitions or restrictions on inter-state trade 'shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States'. In effect the ECJ had concluded from the circumstances that the UK had clearly exceeded its discretion set out under EC law pertaining to the free movement of goods.

On the other hand, where there is ambiguity in EC law in relation to the correct interpretation of an obligation under EC law, or where otherwise a Member State has good reasons for considering that the true meaning of a provision of EC law is different from the correct interpretation, then the ECJ has indicated that it is unlikely for circumstances to be present in which it may fairly be stated that any breach committed by a Member State is to be regarded as 'serious' (for example, Cases C-392/93 *BT* and C-424/97 *Haim* (2)). For instance, the ECJ concluded that there was no sufficiently serious breach in the *BT* case where a provision in a telecommunications directive contained ambiguous wording and the UK's implementation of the Directive had not been subject to any questioning or legal action by the European Commission (see also Case C-319/96 *Brinkmann*, discussed in section 7.3.1.5).

<sup>27</sup> Para 28 of judgment.

### 7.3.1.3 Attribution of liability

Case law subsequent to *Francovich* (Case 6, 9/90) has confirmed that the right to reparation from a Member State under the principle of state liability is not only triggered by illicit conduct on the part of a Member State's central government (for example, in failing to transpose a directive correctly or introducing legislation contrary to EC law). The ECJ has confirmed that state liability may arise in respect of actions and omissions by emanations of the state which contravene requirements of EC law. It has employed a wide definition of the state for this purpose, akin to its approach in the direct effect doctrine discussed in Chapter 6. Accordingly, liability may arise as a result of decisions on the part of public authorities at central or local levels (for example, see Cases C-424/97 *Haim* (2); C-127/95 *Norbrook*; C-319/96 *Brinkmann*; and C-118/00 *Larsy*). Recently, the ECJ has even confirmed that state liability may arise on account of a failure on the part of a national court of final appeal to enforce EC law (Case C-224/01 *Köbler*). The ECJ has clarified that, although liability may arise from the conduct of any number of institutions within the public sector (including judicial, executive or legislative branches of government) the Member State remains liable as a single entity. Whilst the Member State has the responsibility to organise internally how the system of state liability is to operate, it is clear that the national legal proceedings used for this purpose must accord with the standard qualifications to the principle of autonomy regarding the administration of justice at national level. Specifically, they must employ procedures and remedies at least commensurate with existing provisions used to render state authorities legally and financially accountable to individuals; these must neither be impossible nor excessively difficult in practice to use (for example, Cases C-6, 9/90 *Francovich*,<sup>28</sup> C-46/93 *Brasserie du Pêcheur*,<sup>29</sup> and C-261/95 *Palmisani*<sup>30</sup>).

### 7.3.1.4 Loss and damage

The ECJ has made clear that it is prepared to adopt a relatively wide interpretation of what may be deemed to be loss or damage sustained by an individual as a result of a breach of EC law by Member States. Loss or damage may include any economically quantifiable detriments suffered as a result of a breach, prospective as well as historic in nature. A right to reparation is not confined to losses sustained as a result of physical injury or damage to property as it is in some national civil law systems (for example, as is the case in respect of the foundations to the law of tort in England and Wales). Accordingly, a private person is entitled to reparation in respect of past and/or future pure economic losses (such as loss of commercial profits)

28 Para 43 of judgment.

29 Para 73 of judgment.

30 Para 27 of judgment.

as a result of a failure by the Member State to adhere to EC rules of law (Case C-46/93 *Brasserie du Pêcheur*).<sup>31</sup> The general principle enunciated here by the ECJ is that reparation ‘must be commensurate with the loss of damage sustained’, albeit that it is for the national legal systems of the Member States to set criteria or the extent of reparation.<sup>32</sup> Member States are entitled to limit the extent of reparation in order to take account of whether the plaintiff showed reasonable diligence in mitigating his loss and whether he availed himself of all available legal remedies, although they are not permitted to limit the amount of damages simply to account for losses sustained after judgment finding an infringement.<sup>33</sup>

### 7.3.1.5 Causation

The ECJ has also developed some important ancillary rules on the determination of the third element to state liability, namely proof of a causal link between Member State breach and loss and/or damage sustained. It has, for example, confirmed that a defendant State authority may not plead that there is no direct causal link on account of imprudent conduct by a third party or exceptional or unforeseeable events. In the *Rechberger* case (Case C-140/97) a holiday travel company had failed to anticipate the high level of demand for a particular travel offer sponsored by an Austrian newspaper and as a result applied for bankruptcy proceedings to be initiated against itself, leaving several holiday makers out of pocket having paid deposits and/or the total costs of travelling in advance. The Austrian Government had failed to implement Directive 90/314 on package travel, holidays and tours<sup>34</sup> on time. The Directive requires Member States to ensure that holiday travel providers supply travellers with a guarantee by way of insurance contract or bank guarantee to ensure that in the event of insolvency of the travel provider any monies paid by the traveller to it in advance of the holiday would be reimbursed. The ECJ confirmed that once a direct causal link has been established by the national court between loss or damage sustained and the Member State’s breach, then state liability may not be precluded by imprudent third party conduct or by exceptional or unforeseeable results.<sup>35</sup>

The ECJ has also had an opportunity to provide some guidance on state liability situations involving more than one state authority. One such instance was in the *Brinkmann* case (Case C-319/96). The case involved a German company, Brinkmann Tabakfabriken GmbH, which sold rolled tobacco products known as ‘Westpoint’ in the European Union, including in Denmark. Unlike ordinary cigarettes, Westpoint tobacco products required

31 Para 87 of judgment.

32 Case C-46/93 *Brasserie du Pêcheur*, para 90 of judgment.

33 Case C-46/93 *Brasserie du Pêcheur*, paras 84–85 and 95 of judgment.

34 OJ 1990 L158/59.

35 Para 75 and 77 of judgment.

the consumer to roll paper around a stick of pressed rolled tobacco. The company took legal action before the Danish courts in respect of a decision taken by the Danish Ministry of Fiscal Affairs (Skattenministeriet) on the basis of a determination by its VAT Board (Momsnævnet) that imports of Brinkmann's rolled tobacco products should be classified as cigarettes for the purposes of VAT classification. Under Directive 79/32 on turnover taxes for manufactured tobacco,<sup>36</sup> cigarettes are defined as 'rolls of tobacco capable of being smoked as they are and which are not cigars or cigarillos'. Brinkmann submitted that its products did not constitute cigarettes for the purposes of VAT classification under the Directive, but instead 'smoking tobacco' which would be subject to a lower rate of VAT. Denmark had not transposed the Directive into national law.

In a preliminary ruling, the ECJ confirmed that the Skattenministeriet had misinterpreted the EC legislative definition of cigarette in this instance. Of particular interest in the case from the perspective of state liability was the Court's analysis of the criterion of causal link. Specifically, the ECJ held that in this case it could not be argued that state liability could be founded on the argument that failure to transpose the Directive into national law was the cause of losses sustained by Brinkmann, given that the competent national authorities had sought to give immediate effect to the Directive in practice. There was no direct causal link between failure to transpose the Directive and breach of its requirements (para 29 of judgment). The ECJ went on to confirm that, although technically the Danish tax authorities had breached the terms of the Directive by misconstruing the definition of 'cigarette' for the purposes of VAT classification, the breach in itself was not sufficiently serious, given that their interpretation was not 'manifestly contrary' to the Directive's wording. Accordingly, the plaintiff had no grounds to sue for reparation from the Danish State under the EC rules on state liability.

The *Brinkmann* judgment of the ECJ is particularly important, because it confirms that state liability may flow from the decisions taken by any state or public authority. A Member State is accountable, from a legal perspective, in respect of sufficiently serious breaches of EC law perpetrated from any quarter of the public sector and must offer a genuine opportunity for adversely affected individuals to bring claims for reparation in respect of loss or damage resulting from such breaches. A national government, for instance, will not be able to submit that there is no direct causal link on account of the breach having been taken by a local as opposed to central state authority. It is, though, a matter for the Member State's legal system to determine how to apportion liability within the public sector.

36 OJ 1979 L10/8.

### 7.3.2 *State liability and EC environmental law*

It is evident from the overview provided above of the key legal elements that constitute the current body of rules on state liability under EC law, that they offer but very limited opportunities for private persons to use them as tools of environmental law enforcement. In several respects, the current rules on state liability developed by the ECJ do seem ill-suited to providing an effective remedy in respect of breaches of EC environmental legislation (see Prechal and Hancher, 2002, p 108). The main reason appears to lie with the inherent anthropocentric bias of the rules themselves, which are tailored to accommodate individual human legal interests as opposed to being capable of supporting environmental protection requirements. This becomes readily apparent when one considers the key criteria for liability: namely, that the EC norm must be intended to create individual rights; that the breach must be sufficiently serious; that there must be a proof of a direct causal link between breach and damage; as well as the monetary nature of the remedy to be offered if liability is established.

#### 7.3.2.1 *Rights intended to be created for individuals*

The first criterion of state liability, namely that the EC norm in question must be intended to create rights for individuals, has potentially significant implications for the environmental policy sector. Many, if not most, of the requirements on environmental protection enshrined in EC environmental legislation are designed to benefit the collective good, and are not clearly or specifically targeted at enhancing the legal interests of the individual or particular individuals. For instance, the requirements contained in the Waste Framework Directive 75/442, as amended, for Member States to take measures to encourage, *inter alia*, the prevention, reduction and recovery of waste (Art 3) are designed to improve the ability of society in general to manage its waste more efficiently and safely as well as to assist in conserving resources and preserving natural open spaces. The benefits to be reaped from the attainment of this obligation are to be felt by the community in general, and may not be readily interpreted as enhancing rights of the individual. Other environmental instruments at EU level are not even targeted at the welfare of humans, but are designed to protect the natural environment, such as the habitats of wild animal species (for example, the Wild Birds Directive 79/409 and the Habitats Directive 92/43).

Admittedly, there are exceptions in EC environmental legislation which lend themselves to be interpreted in an individual rights context. These include requirements which have a direct connection with human legal interests such as public health (for example, minimum water quality requirements contained in the Bathing Water Directive 76/160) or express guarantees of public consultation in respect of site development (for example, EIA

Directive 85/337). They also include provisions in EC law which are directly effective. In the main, though, it may be fairly stated that environmental legislation does not lend itself readily to be depicted as a body of rules intended to uphold individual rights.

However, notwithstanding the clear current limitations of the 'individual rights' criterion, for two principal reasons it may be premature to consider that this will remain such a difficult legal hurdle in the long-term future. One is that there is reason to consider that the case law of the ECJ may in future amend the existing criteria for liability. The second reason lies in the recent development of an environmental dimension to human rights analysis at European level. These will be considered in turn.

One should bear in mind that the ECJ's case law on state liability, as is the case in respect of all of its key principles and doctrines, is subject to evolution in accordance with the changing requirements of the EC Treaty itself. It is no surprise that the ECJ has focused attention initially on individual rights protection in the context of state liability. Its principal motivation thus far in developing the rules on state liability has been quite evidently to ensure that the EC legal order is respected as effectively as possible within the territories of the Member States, an order which the Court has depicted since *Van Gend en Loos* (Case 26/62) as comprising not only the Member States as contracting parties but also the individuals located within the Union affected by the rules underpinning the EC Treaty. Chapter 6 showed how the ECJ has sought to develop a body of rights for individuals in order to enable them to rely on EC provisions contained in directives before national courts and tribunals (direct and indirect effect doctrines). The development of rules on state liability has served to enhance the rights of individuals to enforce EC provisions intended to safeguard or promote their specific legal interests. In particular, in relation to EC directives, state liability plugs a gap left open by the direct and indirect effect doctrines. This is evident from the *Francovich* case, in which both doctrines were of no use to the private plaintiffs seeking to rely on legal commitments entered into by the Italian State under the Insolvency Protection Directive 80/987<sup>37</sup> to guarantee them a minimum amount of outstanding salary payments.

It is evident that the EC Treaty system has changed significantly since its original conception in the 1950s. Its original core purpose centred on promoting a specific anthropocentric interest, namely the establishment of a common market. Environmental protection was not cited as a specific goal of the overall aspiration of an 'ever closer union among the peoples of Europe' in the original version of the EC Treaty. However, since the mid-1980s, it is evident that the political priorities of the European Union have been formally amended to take account of new environmental protection

37 OJ 1980 L283/23.

aims and objectives of that international organisation. Specifically, by virtue of the Single European Act 1986, the Treaty on European Union 1992, the Treaty of Amsterdam 1997 and the Treaty of Nice 2001, the EU has steadily developed stronger political commitments and an accompanying legal framework intended to foster European supranational co-operation on environmental protection issues. In particular, Art 2 EC has been amended to establish that ‘a high level of protection and improvement of the quality of the environment’ as well as ‘sustainable development’ constitute integral political objectives of the European Community. In addition, it is now a fundamental principle of the EC Treaty that environmental protection requirements are to be integrated into the definition and implementation of Community policies and activities (Art 6 EC). These constitutional changes to the EC Treaty indicate that over time the overall EC political—and consequently legal—order has been amended so as to embrace environmental protection requirements as well as interests of immediate economic concern to individuals. It is evident that the contemporary legal architecture of the EU could be described as containing a strong environmental dimension within its constitutional framework (see for example, Winter, 2002).

Bearing this in mind, it would appear that the first criterion developed by the ECJ on state liability does not lend itself to assisting in the achievement of the environmental protection dimension underpinning the fundamental objectives of the EC Treaty. Much of the case law of the ECJ on individual rights protection (for example, direct and indirect effect as well as state liability) has been justified on the basis of ensuring that the norms constituting the EC legal order are enforced effectively as possibly within the territories of the Member States. It may therefore be more appropriate for the ECJ in future to focus on reappraising whether its existing legal principles and doctrines pertaining to the proper enforcement of EC law at national level adequately reflect the requirements of a supranational legal order which places environmental protection amongst the fundamental tasks assumed by the EC. In some respects, it may be argued that the ECJ has already undertaken some steps to accommodate environmental protection requirements within the range of rights afforded to individuals to engage in enforcement of EC law. Specifically, as was noted in the previous chapter, the *Kraaijeveld* case (Case C-72/95) appears to have loosened the traditional requirements of the direct effect doctrine in order to enable private persons to enforce adherence to impact assessment requirements contained in the EIA Directive 85/337. It may be the case that the ECJ may come to adjust the existing criteria regarding state liability with a view to achieving the same ends.

Even if the ECJ maintains the first criterion as a condition for a finding of state liability, there is a second reason to consider that in the long term it may not necessarily constitute such a significant legal hurdle in respect of environmental cases. Specifically, it is submitted that the evolving state of human rights protection within the EC legal order may present interesting

possibilities in this regard. Until relatively recently, environmental protection was not considered to form any direct links with the subject of human rights protection. For instance, the environmental protection rights do not feature expressly in any of the classic international human rights instruments, such as the UN Declaration on Human Rights 1948,<sup>38</sup> the International Covenant on Economic, Social and Cultural Rights 1966<sup>39</sup> and the International Covenant on Civil and Political Rights 1966.<sup>40</sup> Whilst the 1972 UN Declaration on the Human Environment<sup>41</sup> in Stockholm sought to establish an internationally recognised general principle of a human rights dimension to the environment, subsequent international political developments have failed to entrench this into treaty format. Indeed the follow up 1992 UN Declaration<sup>42</sup> at Rio in the UN Conference on Environment and Development refers merely to human ‘entitlement’ as opposed to any ‘right’ to a healthy and productive life in harmony with nature. At European level, the central regional human rights instrument, the Council of Europe’s European Convention on Human Rights and Fundamental Freedoms (ECHR) 1950,<sup>43</sup> similarly does not expressly provide for any human rights with respect to the state of the environment. Likewise, the EC Treaty and its secondary measures have been hitherto silent on the issue of human rights with respect to the environment.

However, the legal picture may well be changing with the advent of a new generation of human rights instruments affecting the EC legal order. Specifically, in 2000 the Heads of State of the EU signed a formal declaration on human rights intended to shape the future political decision making of the Union, namely the Charter of Fundamental Rights of the European Union.<sup>44</sup> Although the Charter is formally speaking a political and not a legally binding instrument, there is no doubt that it has profound significance in terms of being an integral component of the Union’s constitutional architecture. Article 37 of the Charter, housed in the section entitled ‘Solidarity’ stipulates:

*Art 37. Environmental Protection*

A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development.

Although Art 37 does not itself expressly refer to individual rights, it is clear that the EU Heads of State intended to endow its requirements with the

38 UN Doc A/811.

39 6 ILM (1967) 360.

40 6 ILM (1967) 368.

41 UN Doc. A/CONF/48/14/REV.1.

42 UN Doc. A/CONF.151/26/REV.1.

43 213 UNTS 221.

44 OJ 2000 C364/1.



fundamental quality and status of a human rights provision, given that Art 37 is enshrined within a human rights instrument.

In October 2004, the EU Member States signed the Treaty establishing a Constitution for Europe (the European Union Constitution, EUC). Part Two of the EUC incorporates the 2000 EU Fundamental Rights Charter, including the Charter's provision on environmental protection (replicated in the Constitution as Art II-37 EUC). In the absence of ratification on the part of all of the EU Member States, the EUC will not formally take effect to amend the existing legal framework of the Union. Given the recent rejections of the EUC in the French and Dutch referenda held in May and June 2005 respectively, it appears at the time of writing that it will not be ratified by all Member States as required and its future is thus in doubt. However, that being said, it should be pointed out that the specific incorporation of fundamental rights within the EUC marks an important stage in the development of fundamental rights at EU level. Specifically, their inclusion within the EUC indicates that Member States have moved beyond the point of a political declaration (Charter on Fundamental Rights) into the realm of a binding public international obligation (signed international treaty) to recognise environmental protection as a fundamental right.

Bearing these recent constitutional developments in mind, the role of the ECJ in interpreting their significance is going to be critically important. In the past, the ECJ has shown itself prepared to develop its jurisprudence on human rights protection within the EC legal order, notwithstanding the absence of any specific legal commitment in the EC Treaty to protect human rights. In a variety of cases tracing back to the 1970s, the ECJ has confirmed the implicit presence of human rights forming part of the general principles of law underpinning the EC Treaty system, partly on the basis that the EC institutions had signed up to human rights declarations, notwithstanding these being of a politically as opposed to legally binding nature, and partly on the basis that all the Member States were party to the ECHR 1950 (see for example, Cases 4/73 *Nold*, 36/75 *Rutili*, 118/75 *Watson*). Given that the Member States have now committed themselves in international law, by virtue of their signature to the EUC 2004, to ensuring that the requirement to ensure the environment is protected to a high level is treated as being in the nature of a human right, it is open for the ECJ to conclude that human rights protection within the EC legal order has a clearly articulated environmental dimension. Specifically, the ECJ could now conclude that the environmental protection legislation passed by the EU is recognised by the Member States to have an inherent human rights element. Accordingly, such an interpretation would enable the ECJ to conclude that all legally binding commitments entered into by the Member States to enhance environmental quality are by definition designed, albeit in part, to create individual rights. The first criterion of the rules on state liability under EC law would therefore be met.

All this, of course, is not to say that the ECJ will definitely shift or otherwise amend the boundaries set by the first criterion to state liability along the lines suggested above. What is pertinent is that it would be open for the ECJ to develop its jurisprudence to modify the current appreciation of the first criterion or even abandon it, in a way that would be consonant with its existing approaches to developing new legal possibilities of enforcing EC law by private persons. In so doing, it might also thereby make available legal opportunities for a broader range of stakeholders to hold Member States legally accountable for failures to adhere to EC environmental legislation. Specifically, a relaxation or broadening out of the 'individual rights' criterion could make it easier for NGEOs and even public agencies involved in environmental protection to be able to use the rules on state liability to ensure that activities damaging to the environment which are in contravention of EC environmental legislation are effectively remedied. At the moment, though, it seems that the 'individual rights' criterion does not appear to anticipate private litigants taking legal action against Member States in order to protect the rights of third parties. The current EC framework on state liability appears to expect, if not require, that only personally adversely affected individuals should be entitled to bring legal action before the national courts. As a consequence, only a limited range of persons would appear to have a clear right to be vested with legal standing to pursue a state liability case, namely individual victims of illicit state conduct. Other stakeholders motivated to engage in environmental law enforcement may well, as result of this procedural requirement on standing, be barred from taking any action under national procedural rules.<sup>45</sup>

### 7.3.2.2 *Criterion of a 'sufficiently serious' breach*

The second legal component to state liability under EC law, namely that the breach of EC law must be sufficiently serious in order to trigger state liability, also serves to restrict the range of possibilities for legal action to be taken by private persons to enforce EC environmental legislation. The criterion makes clear that only certain types of breaches of EC law, including EC environmental legislation, are potentially open to the possibility of a state liability claim. This confirms that Member States are not to be made automatically liable to offer remedies in respect of all infractions of EC environmental legislation; there is no strict liability in the sense of there being an automatic duty to remedy breaches of environmental protection norms under the rules

45 This issue has arisen in the past in connection with discussions over the range of persons who may use the direct effect doctrine in the context of judicial review proceedings in England and Wales. E.g., the approach taken by McCullough J in the Twyford Down dispute: *Twyford Parish Council v Secretary of State for the Environment* (1990).

of EC state liability. In its defence, the criterion of 'seriousness' aims to serve a practical purpose in helping to ensure that national courts as well as the ECJ are not bounden to adjudicate on trivial cases nor are overwhelmed with casework. However, it is important that the criterion of 'seriousness' is carefully and clearly defined in order to ensure that claimants are not confronted with a condition which is neither in want of sufficient legal certainty nor prone to being capable of filtering out meritorious cases.

Depending on how it is to be interpreted, one might argue with some justification that the introduction of the criterion of sufficient seriousness is prone to falling short of the overall constitutional requirements binding on the EU in relation to its environmental policy. Specifically, it is important that the criterion is defined sufficiently clearly and strictly so as to be in accordance with the objective of the EC Treaty to attain a 'high level' of environmental protection,<sup>46</sup> as well as with other general environmental principles set out in Art 174(2) EC, including notably the principles of 'polluter pays', precaution and of preventive action. Otherwise, Member States might be able to evade responsibility for implementing EC environmental law correctly within their respective territories. This is a plausible scenario if the criterion were to be defined in a broad and/or ambiguous manner by the ECJ. For, as was discussed in Part One of this book, it is unrealistic in practice to expect that the European Commission is able or even willing to launch infringement proceedings under Art 226/228 EC in all environmental protection cases. Even if infringement proceedings are launched, they take a substantial length of time (years) before a Member State may end up being subject to specific pecuniary sanctions. Whilst environmental authorities at national level may be available to enforce EC environmental legislation, this is not possible where national law has not provided them with the relevant legal powers and resources in order to do this. For instance, a national environmental authority has little or no opportunity to take action against a private polluter whose activities infringe the requirements of an EC environmental directive that has not been correctly implemented into national law (see doctrines of direct and indirect effect discussed in Chapter 6).

The ECJ has, to some extent, sought to accommodate these concerns by confirming that a failure to transpose a directive, whose provisions are unambiguous, correctly into national law constitutes *per se* a sufficiently serious breach for the purposes of state liability. Liability will be automatic in these cases, irrespective of the degree of adverse consequences in practice for the environment. However, the criterion is particularly prone to the charge of legal uncertainty in so-called 'bad application' cases, where Member States and national authorities have failed to discharge their duties to

46 As set down in Arts 2 and 174(2) EC.

implement the specific environmental protection requirements of an EC directive in practice. Specifically, how much pollution would have to be emitted before a 'sufficiently serious' breach is deemed to have been committed in an individual case? The simple formula of sufficient seriousness is unhelpful in this regard and needs clarification and refinement by the ECJ, in order to assist national courts apply it to the facts of individual instances of detected illicit pollution. Otherwise, the ambiguity of the legal position may well serve to act in practice as a deterrent to persons contemplating enforcement litigation. In accordance with the requirements of attaining a high level of protection of the environment, any breach of EC environmental legislation should be deemed to constitute a 'sufficiently serious' breach for the purposes of state liability.

The dangers of drawing up a vague and loose criterion for state liability have been illustrated elsewhere in the ECJ's jurisprudence. Specifically, a similar problem of interpretation has emerged in the context of the Commission enforcing general requirements of EC waste management law, as discussed in Part One of the book. The ECJ has held that the general and core environmental and public health safety duties contained Art 4(2) of the Waste Framework Directive 75/442 may be said to be infringed only where there is a 'significant deterioration in the environment over a protracted period when no action has been taken by the competent authorities' (Cases C-365/97 *San Rocco* and C-387/97 *Kouroupitos* (2)). The inclusion of the term 'significant deterioration' does nothing to assist in the Commission's task of knowing at what point to intervene with legal action against a Member State under Arts 226/228 EC. In addition, the criterion of 'significant deterioration' undermines the object of the preventive action principle set out in Art 174(2) EC which mandates the EU institutions and Member States when implementing EC environmental law, *inter alia*, to ensure that action is taken, so far as practicable, to prevent environmental harm taking place where this is likely to otherwise occur or become worse.

### 7.3.2.3 *Direct causal link*

In practice, proving a direct causal link between a breach of EC environmental law and damage or loss may prove to be a particularly difficult hurdle for private litigants to overcome in certain types of cases. On the one hand, causation is not a significant issue if the root of the problem lies in a failure to transpose an EC environmental directive on time and/or correctly. Likewise, if a case centres on the failure by state authorities to implement the provisions of directives correctly, it is clear that they may rely neither on the factor of imprudent third party conduct (Case C-140/97 *Rechberger*) nor on the existence of unforeseeable events (Case C-319/96 *Brinkmann*) as a defence to liability. However, in certain types of bad application cases, the

task of the plaintiff to be able to prove a direct causal link may prove very challenging.

In particular, this may arise in so-called ‘multiple source’ cases where it is not clear from a scientific perspective as to the precise source of loss or damage sustained by the plaintiff. For instance, there may well be a lack of scientifically verifiable evidence that a failure on the part of a Member State to implement the requirements of EC air quality legislation designed to curb air pollutant emissions from road vehicles is in fact predominantly or partially to blame for a specific case of ill-health of an individual (for example, asthma or other lung-related diseases). It may be perfectly plausible to consider a range of causes in respect of a particular medical condition, one of which may include pollutant emissions from road vehicles. It is apparent that in these types of situations the ECJ may well have to align the third criterion of state liability to fit with the requirements of environmental principles recognised in the EC Treaty, such as the precautionary and preventive action principles (Art 174(2) EC), in order to see that EC environmental law is applied properly and effectively in the Member States (see Art 220 EC).

The Court has already acknowledged that Member States are required to take account of principles such as the precautionary principle in the context of implementing EC environmental directives (see for example, Case C-127/02 *Landelijke Vereniging*). In that particular case, the ECJ was required to interpret the meaning of Art 6(3) of the Habitats Directive 92/43, which requires Member States to subject a plan or project ‘likely to have a significant effect’ on the management of a protected habitat site, even though it is not directly connected with or necessary to the management of the site concerned. The ECJ proceeded to interpret the meaning of ‘likely’ (that is, probability) on the following basis:

In the light, in particular, of the precautionary principle, which is one of the foundations of the high level of environmental protection pursued by Community policy on the environment, in accordance with the first subparagraph of Article 174(2) EC, and by reference to which the Habitats Directive must be interpreted, such a risk exists if it cannot be excluded on the basis of objective information that the plan or project will have significant effects on the site concerned [...] Such an interpretation of the condition to which the assessment of the implications of a plan or project for a specific site is subject, which implies that in case of doubt as to the absence of significant effects such an assessment must be carried out, makes it possible to ensure effectively that plans or projects which adversely affect the integrity of the site concerned are not authorised, and thereby contributes to achieving, in accordance with the third recital in the preamble to the Habitats Directive and Article 2(1) thereof, its main aim, namely, ensuring biodiversity

through the conservation of natural habitats and of wild fauna and flora.<sup>47</sup>

This jurisprudence has potentially profound implications for future interpretation and application of EC environmental legislation. The ECJ has appeared to confirm that the precautionary principle is relevant in relation to the implementation of all environmental legislation adopted under the auspices of Art 175 EC. As is the case in respect of the Habitats Directive 92/43, express reference to the principle is not required to be incorporated in the legislation itself; this will be implicit by virtue of the fact that the principle is an inherent part of EC environmental policy under Art 174(2) EC. The Court has yet, though, to consider if and how the precautionary principle should be applied in the context of a state liability case involving a breach of EC environmental law. The application of the principle may well prove to be crucial in terms of the degree to which plaintiffs of environmental damage may be able to negotiate successfully the difficulties associated with disputes over the credibility of scientific evidence on a suspected cause of environmental damage.

The requirement to prove a direct causal link between Member State and loss or damage, as currently crafted by the ECJ, is challenging from an environmental perspective in other ways in respect of bad application cases. In particular, a Member State government and/or its environmental protection authorities may wish to deny responsibility for environmental damage where the physical damage may be immediately attributed to a third party which is not an emanation of the state. A direct causal link may be legitimately refuted where the Member State concerned has transposed the relevant minimum EC legislative standards into national law by way of public statute so as to be applicable to all potential and actual polluters located within its territory and which contains adequate enforcement systems such as penalties of a sufficiently deterrent nature (see for example, Case C-68/88 *Commission v Greece*). However, it is clear that a causal link may not be denied where a Member State has failed to transpose an EC environmental directive into national law and a private company within the Member State contravenes the requirements of the directive, given that directives are not legally binding on private persons.

#### 7.3.2.4 *Loss, damage and reparation*

Two other elements to the current case law on state liability present significant obstacles to private persons being able to use the principles of state liability in environmental disputes. These concern firstly the legal specification of loss or

47 Para 44 of judgment.

damage sustained and secondly the type of remedy that may be available to a successful litigant in a state liability action. Both elements are closely inter-linked, the root of the problem lying with the ECJ's limitation on the type of remediation that is afforded to a successful claimant who has proved that environmental loss and/or damage has been sustained as a direct result of a breach of EC environmental law by the Member State and/or its authorities.

Since its first ruling on state liability in *Francovich* (Cases 6, 9/90), the ECJ has appeared to have consistently restricted the nature of the remedy for state liability claims to be a monetised and wholly economic conception of remediation. The standard approach of the Court has been to refer to Member States' obligation to pay 'reparation' to individuals who have sustained loss or damage. This model of economic remediation is clearly based on an anthropocentric perception of the degree to which legal responsibilities are imposed on Member States under EC law. Specifically, the ECJ has predicated its entire approach to the principle of state liability on the basis that individuals should be afforded adequate guarantees in being able to enforce rights that have been agreed at Community level for their specific and immediate economic benefit. It is no coincidence that the case law of the ECJ on state liability has been developed subsequent to its jurisprudence on direct and indirect effect; the state liability principles have been designed quite evidently in order to ensure that individuals are able to uphold EC norms intended to protect their specific economic interests *vis à vis* the Member State authorities before the national courts. In effect, the state liability case law seeks to provide a minimum remedy for breaches of norms of EC law that seek essentially to bring economic benefits for individuals, especially where the doctrines of direct and indirect effect may not be able to be used in a particular case. The ECJ's case law on state liability has accordingly limited the scope of remedy to one of monetary reparation. In addition, it is clear that the ECJ has limited the concept of loss or damage envisaged to being one that may be characterised as being personal to the plaintiff and quantifiable in terms of a monetary value. Such legal conceptions of loss, damage and remediation are quite evidently ill-suited to offering private litigants a suitable legal remedy in cases involving damage to the environment.

#### REPARATION AS A LEGAL REMEDY IN ENVIRONMENTAL CASES

First and foremost, the remedy of monetary reparation is not usually going to prove to be an effective legal remedy in an environmental protection context. The most optimal solution from an environmental perspective is to harness law enforcement procedures so as to secure cessation of damaging activities and restoration of the site concerned to its state prior to being damaged by illicit activity. Any order by a national court or tribunal requiring the defendant Member State authorities to transfer a monetary form of reparation to the plaintiff, who has proven damage resulting from a breach of

EC environmental law, is tantamount to a form of taxation for illicit pollution. Taxation effectively legitimises the activities or behaviour of the defendant. Such a remedy obviously does not further environmental protection objectives; the reparation does not require or necessarily involve environmentally restorative steps to occur. In addition, the assessment of environmental damage in monetary terms may often be a notoriously difficult if not impossible enterprise to undertake, where the monetary reparation is not going to be calculated on the basis of need to restore the damaged environment and/or where the particular environmental damage is irrevocable. For it is not, in principle, possible to quantify objectively in monetary terms the degree of harm sustained to the environment. For these reasons, the availability of injunctive relief would prove a far more effective remedy in many instances involving illegal environmental degradation (see for example, Prechal and Hancher, 2002, p 108).

#### CONCEPTIONS OF 'LOSS' OR 'DAMAGE' IN ENVIRONMENTAL CASES

In addition, the legal concept of 'loss' or 'damage' appears from the ECJ's case law thus far to be confined to harm personal to the plaintiff, namely to be identified as falling within the plaintiff's exclusive domain. This would typically include loss or damage sustained in respect of the claimant's physical person and/or legal interests in land or goods. The requirement that harm must be shown to have been perpetrated to the proprietary realm of the plaintiff seriously limits the possibilities for the private sector to seek effective judicial remedies in respect of environmental damage. It effectively excludes the possibility of private entities using the right of action developed by the ECJ in respect of illicit statal conduct to ensure the national courts order a remedy in respect of environmental damage, irrespective of whether the plaintiffs have a legal proprietorial interest in the affected geographical location. The right of action is instead predicated on the readiness of a legal proprietor, whose property interests may be adversely affected by statal conduct, to launch litigation before the national courts. Accordingly, the possibility of NGEOS and others being able to sue the state for effective remedies in respect of breaches of EC environmental is severely undermined.

The rules on EC Member State liability developed by the ECJ effectively exclude private entities from being able to sue on behalf of the environment wherever environmental damage may be perpetrated within the EU. The rules fail to recognise that the environment and the need for its protection are issues which respect neither frontiers nor legal conceptions of ownership. EC environmental legislation is intended to deliver benefits for society as a whole. The breach of such legislation violates the public interest. The ECJ's current rules on state liability for breaches of EC law are focused, however, on securing remedies for breaches of law intended to further the legal interests of individuals as opposed to collective interests. This constitutes a serious



limit on the ability of the EU's ruler on state liability to deliver the necessary legal tools to enable private entities to uphold EC environmental law at national level.

In addition, the existing legal conception of relevant 'loss' or 'damage' appears to be restricted in a temporal sense, so that judicial remedial assistance is limited in time so as to be able to intervene only at the stage where harm has already been perpetrated. The ECJ's case law is firmly rooted at the moment in traditional conceptions of tortious liability, where a remedy is to be provided in the event of harm having taken place. Accordingly, private litigants would not be able to use the right of action in situations where environmental damage is a realistic likelihood or even definite possibility. Scenarios of loss or damage considered to be material from the current orthodox legal perspective are limited to instances where environmental harm has occurred. A private party may not initiate action on the basis that loss or damage to the environment is (most) probable to arise as a result of illicit statal behaviour. This temporal limitation runs counter to fundamental principles of environmental protection grounded in the EC Treaty, in particular the principles of preventive action and precaution (Art 174(2) EC).

In summary, it is evident from the above analysis that the current rules developed by the ECJ on a right of action in respect of state liability for breaches of EC law are, for the most part, wholly unsuited for the purpose of securing an effective remedy in respect of actual or potential illicit damage to the environment. The origins of the rules are clearly rooted in the ECJ's long-standing quest since the *Van Gend en Loos* case to develop the emerging *sui generis* EC legal order on a footing that encompasses individuals as well as Member States. However, the Court has yet to ensure that the rules on state liability adequately reflect the transition of the EU's constitutional framework to one which, since the adoption of amendments by virtue of the Single European Act 1986, has recognised that a high level of environmental protection constitutes a prominent dimension to the process of European integration under the aegis of the EC Treaty. The EU self-evidently is no longer simply an anthropocentric concern.<sup>48</sup>

Bearing in mind these constitutional changes, there is a compelling case on grounds of *effet utile* to argue that the Court expand the remit of state liability under EC law in order to encompass a requirement that Member States are to effect suitable remedies to remedy environmental damage for which they or their competent authorities are responsible. The ECJ has developed a right of action in respect of state conduct under EC law, notwithstanding the absence of any specific or express provision that this is to be provided in the

48 For an excellent discussion on anthropocentric values in national and international environmental law, see Gillespie, 1997, Ch 1.

provisions of the EC Treaty. Rights of action are provided in the EC Treaty to seek review of illicit conduct on the part of EC institutions,<sup>49</sup> but not in respect of activities and omissions by Member States that breach EC law. The Court has nevertheless held since *Francovich* that such a right of action is to be implied from the EC Treaty, principally on the basis of the general ‘good faith’ provisions contained in Art 10 EC and that the right of action serves to promote the effectiveness of legally binding EC rules, as agreed between Member States. Given that the nature of the EC legal order is one that now contains a clear environmental protection dimension, it would be arbitrary on the Court’s part to decide to limit state liability as being a legal mechanism incapable of holding Member States to account in respect of those breaches of EC environmental law for which they and/or their national competent authorities are directly responsible. Accordingly, it is incumbent on the ECJ to shape the state liability rules so that they represent an effective remedy *vis à vis* Member States who fail to ensure that EC environmental protection standards are upheld within their territory. Otherwise, the jurisprudence of the ECJ on state liability will fail to ensure that the rights and remedies to be drawn from the EC Treaty are equipped to be effective in upholding the legally binding guarantees on environmental protection that Member States agree to in the form of EC secondary measures.

#### 7.4 Concluding remarks

From the overview and discussion provided above, there is no doubt that the ECJ has made, and continues to make, significant contributions in terms of developing the scope and depth of private persons’ rights and interests to uphold norms of EC law at national level. The qualifications that it has made to the principle of procedural autonomy have substantially assisted individuals in being able to rely on the doctrines of direct and indirect effect of EC law before national courts. The state liability jurisprudence of the Court has also ensured that Member States are held to account for serious failures on their part to ensure that EC law is implemented, including most notably in situations where direct and indirect effect may not be available as legal tools to assist in ensuring that erroneous application of EC law is corrected.

However, it is also clear that the ECJ’s jurisprudence on procedural autonomy has significant limitations when applied in the context of private enforcement of EC environmental law. In particular, the Court’s jurisprudence concerning the principle of procedural autonomy suffers from the disadvantage that the legal implications of several of its rulings are uncertain given that the Court often sets out broad and general precedents in relation to the provision of remedies for breaches of EC law. The reach of

49 Arts 230, 232 and 235 EC in conjunction with 288 EC.

the general principles that it has set down in previous cases is often difficult to determine and is not in practice readily taken on board by competent Member State authorities. Frequently, national courts may have to resort to the time-consuming and, for the litigants, added cost of the preliminary ruling procedure under Art 234 EC, in order to gain definitive advice from the ECJ as to the extent of procedural rights and responsibilities of EC law in the material circumstances at hand. The *Lappel Bank* litigation provides a good example of uncertainty as to whether or not the requirement of a national rule of legal procedure exceeds the limits of autonomy given to Member States regarding the administration of justice at national level where these involve administering the application of EC law. The UK House of Lords in that case did not refer either to the ECJ for advice as to whether EC law would require the national requirement of a cross-undertaking in damages to be set aside, which underlines a separate but important related issue that the Art 234 EC procedure is not a right of the parties to seek assistance from the ECJ, but ultimately a facility for the national courts to use if they consider a point of EC law to be relevant to the case at hand. That litigation also demonstrated another key weakness of the principle of procedural autonomy, namely that it does not provide a self-contained right for individuals to gain access to justice before a national court. Instead, the principle is predicated on a fundamental recognition that the Member States retain sovereignty to determine the particular legal suits that individuals may bring before the national judiciary and the remedies they may claim to effect changes to the conduct of other parties that may be found to be in breach of EC law.

The ECJ's jurisprudence on state liability harbours different problems and challenges. Although it does establish a right of a private person to take legal action at national level in order to uphold certain norms of EC law, something that the traditional general legal principles on procedural rights developed by the ECJ did not do (such as the direct and indirect effect doctrines as well as the general principles on procedural autonomy), the right is limited in scope and potential to enhance private enforcement of EC environmental law. The existing legal criteria established for state liability, in being anthropocentric in outlook, do not lend themselves to being appropriate in the context of environmental litigation. The ECJ has not crafted the state liability rules so as to provide private persons with a right to seek due enforcement of EC environmental norms. Instead, the rules have been shaped so as to provide a personalised remedy in monetary form for individual plaintiffs as opposed to a remedy that upholds EC law for the benefit of society as a whole. Whilst they may offer some assistance in the context of litigation involving breaches of EC environmental law that result in damage to physical health or economic loss to individuals, the rules on state liability offer no help in terms of holding Member States to account for breaches of EC environmental law that result in environmental damage that may not be

somehow easily categorised or classified in terms of incursions into human legal interests. Thus, for instance, the current legal framework for state liability under EC law is therefore of little use in supporting private litigation which seeks to ensure that Member States enforce EC legislation on nature protection. In addition, state liability is no assistance in the context of disputes over compliance with EC environmental law where the adverse environmental impact of a breach does not affect a person's specific legal interests.

What is certain is that the ECJ's case law on procedural rights and remedies is, at best, only partially adequate in being able to provide a suitable legal framework for private persons to enforce EC environmental law in practice and gain an appropriate remedy from Member State authorities. The Court has not yet developed its jurisprudence in the areas of access to justice and remedies sufficiently to take account of the fact that the nature of the EC legal order has changed into one in which environmental protection interests feature alongside purely anthropocentric concerns of the individual. Whilst there are signs in the ECJ's jurisprudence that the Court is perhaps beginning to evolve the current body of general legal principles on rights and remedies to a position that emphasises Member State responsibilities in upholding EC legally binding commitments, as opposed to focusing principally on the particular interests of claimants in their capacity as individuals, this judicial process is both an uncertain enterprise and one in which legal development is gradual in nature.

This leads appropriately into a discussion of the recent legislative developments at EC level that have occurred within the last couple of years, which when implemented are set to offer significant legal changes to the current framework of rules relating to private enforcement of EC environmental law. These legislative innovations are discussed in Chapter 8.

## ACCESS TO JUSTICE AT NATIONAL LEVEL FOR BREACHES OF EU ENVIRONMENTAL LAW (2): EC LEGISLATION ON ACCESS TO NATIONAL COURTS AND ENVIRONMENTAL INFORMATION

Since the millennium, several environmental protection legislative initiatives have been undertaken at EC level, which over the next few years are set to introduce important new procedural as well as substantive rights for private persons to be able to assist in the enforcement of EC environmental legislation at national level. The initiatives enhance both rights of access to national administrative and judicial procedures bodies as well as rights to access information on the environment. As such, they are set to serve as an important addition to the growing body of jurisprudence of the European Court of Justice on general procedural and substantive rights that flow from EC law, discussed in the previous two chapters. The current chapter will focus on assessing the contribution that this recent wave of legislative instrumentation is to make in terms of enhancing a private person's access to environmental justice under EC law.

As far as the area of access to justice is concerned, a number of EC measures have been introduced with the purpose enhancing the rights of individuals and other private entities to access courts and tribunals in the event of disputes over the correct application of EC environmental legislation. In policy terms, arguably the most significant of these instruments is the Commission's 2003 Draft Directive on access to justice in environmental matters,<sup>1</sup> at the time of writing proceeding through the EC legislative process. It is a 'horizontal' measure in the sense that it is designed to apply generally across environmental sectors. However, in so far as other EC rules apply in relation to specific sectors and contexts, the Draft Directive will not be applicable. It

1 COM (2003)624 final, of 24.10.2003.

contains provisions granting rights for individuals and other private entities, in particular non-governmental environmental organisations (NGEOs), to have access to specific types of administrative and judicial review procedures. Such procedures are intended principally to serve as mechanisms to enable private entities to hold Member State public authorities to account in relation to administrative acts or omissions in breach of EC environmental legislation. In addition, the Draft Directive also requires Member States to grant members of the public rights of access to administrative or judicial review proceedings in order to challenge acts and omissions by private persons in breach of EC environmental legislation. The Draft Directive is complemented by other recent EC measures providing access to justice rights that are more specific in terms of sectoral coverage and/or context. These include Directive 2003/4<sup>2</sup> on public access to environmental information and repealing Directive 90/313, as well as Directive 2003/35<sup>3</sup> on public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Directives 83/337 on environmental impact assessment and 96/61 on integrated pollution prevention and control (IPPC). In addition, Directive 2004/35<sup>4</sup> on environmental liability with regard to the prevention and remedying of environmental damage confers specific rights on private persons to access particular administrative legal review procedures. These procedures are intended to enable such persons to liaise with and hold to account those competent authorities designated by Member States to ensure that occurrences of environmental damage or imminent threats of such damage caused by operators of certain activities are remedied or prevented by them respectively.

In terms of rights concerning access to information on the environment, the position at EC level has been recently transformed by Directive 2003/4 on public access to environmental information and repealing Directive 90/313. Directive 2003/4 provides members of the public with rights to access information on the environment held by Member State public authorities. It also obliges Member States to make available and disseminate to the public a range of legislative, policy and scientific documentation and assessments on the environment. Such information may be particularly useful in gleaning evidence of compliance or non-compliance with EC environmental norms, and as such constitutes an important integral factor in terms of a private person's capabilities of being in a suitable position to pursue legal steps to enforce EC environmental law.

A good deal of this new EC legislation has been inspired by and drawn from the United Nations Economic Commission for Europe's (UNECE)

2 OJ 2003 L41/26.

3 OJ 2003 L156/17.

4 OJ 2004 L143/56.

Convention on access to information, public participation in decision making and access to justice in environmental matters, agreed on 25 June 1998 in Århus, Denmark (hereinafter referred to as the 'Århus Convention').<sup>5</sup> The Århus Convention entered into force on 30 October 2001. At the time of writing<sup>6</sup> it has 37 contracting parties and 40 signatories. As far as EU participation in the Convention is concerned, the European Community<sup>7</sup> together with so far 21 EU Member States,<sup>8</sup> have ratified the convention. The Århus Convention seeks to promote the development of individual rights in relation to environmental affairs in three areas: access to environmental information, public participation in environmental decision making and access to environmental justice.<sup>9</sup> It preserves the right for contracting parties to introduce or maintain measures offering more generous individual rights than those contained in the convention.<sup>10</sup>

In order to implement the three elements of the Århus Convention (commonly referred to as its three pillars), in October 2003 the European Commission brought forward a package of specific legislative proposals designed to bind both the Member States as well as the EC institutions. Several of the proposals have now been passed in the form of EC legislation. At the time of writing, a few proposals still had to complete the legislative process. The Draft Directive on access to justice in environmental matters, Directive 2003/35 on public participation and Directive 2003/4 on public access to environmental information comprise the package of measures designed to implement the three pillars of the Århus Convention at Member State level. The 2003 Draft Regulation on the application of the provisions of the Århus Convention on access to information, public participation in decision making and access to justice in environmental matters to EC institutions and bodies<sup>11</sup> is intended to implement the Århus agenda as far as the operations of EC institutions and the Community's other organs are concerned. This particular chapter will focus on the EC measures taken to implement the Århus Convention at Member State level as well as the impact of Directive 2004/35 on environmental liability, in terms of assisting

5 2161 UNTS 447. For the text of the Århus Convention: [www.unece.org](http://www.unece.org)

6 December 2005.

7 Council Decision 2005/370 of 17.2. 2005 on the conclusion on behalf of the European Community of the Convention on access to information, public participation in decision-making and access to justice in environmental matters (OJ 2005 L124/1).

8 Germany, Greece and Ireland have signed but not yet ratified the Århus Convention. Slovakia has not signed the Århus Convention.

9 For an overview, see European Commission Rapid Press Release MEMO/03/210, Brussels, 20.10.2003 as well as the Commission's DGENV webpage on the Århus Convention: [www.europa.eu.int/comm/env/environment/arhus/index.htm](http://www.europa.eu.int/comm/env/environment/arhus/index.htm)

10 See Art 3(5) Århus Convention.

11 COM(2003)622, of 24.10.2003.

private persons to gain access to environmental justice at national level.<sup>12</sup> Chapter 9 will consider the prospective impact of the Draft Regulation at EC institutional level. The origins and main aims of Directive 2004/35 on environmental liability are distinct from the package of EC measures proposed in 2003. However, it does address, in part, issues that cut across those taken up by the Århus Convention, notably access to justice in the context of the prevention and remediation of environmental damage.

## 8.1 Access to justice in environmental matters and the EU

Broadening access to justice in the environmental protection sphere has been an item on the political agenda of the EU for quite a period of time, dating back to the early 1990s (Dette, 2004, p 13). Before the Århus Convention was agreed in 1998, the European Commission had, for instance, already noted its concern with the relative lack of legal avenues for private persons, including NGEOS, to seek redress for breaches of EC environmental legislation at national level. The restrictive nature of rights of legal standing (*locus standi*) for private persons to take legal proceedings against acts or omissions by state authorities before an independent court or review body in a number of EU Member States is an example of this, such rights commonly being predicated on the plaintiff having to show that they have personal legal interest over other members of the public to justify their access to court. Arguments in support of such restrictions tend to centre on concerns to avoid courts being flooded with disputes (the so-called ‘floodgates’ argument), and there is often an inbuilt presumption within the system that a claim is most likely to be unmeritorious where the plaintiff has no specific and direct legal interest in its outcome. Such an argument carries little or no weight in relation to environmental litigation; particularly where illicit environmental damage is diffuse and has not resulted in adverse legal effects solely to any particular individual or group of individuals.

The position on legal standing is fractured amongst the Member State’s legal systems, with some systems allowing for a right of action (*actio popularis*) in environmental law enforcement litigation and others adopting more restrictive regimes based on the plaintiff being able to demonstrate either an impairment of an individual right or other sufficient interest (see Dette, 2004, p 11). Other major hurdles include ones of an essentially evidential nature (access to information), cost of financing litigation as well as limits on possibilities of obtaining interim relief. In its seminal Communication on the state of implementation of EC environmental law in 1996, the Commission

<sup>12</sup> Chapter 12 will consider the implications of Directive 2003/4 from the perspective of Member State competent authorities charged with responsibility to follow up infringements of EC environmental legislation.



proposed that policy changes in the area of legal standing were needed to facilitate access of NGEOS in particular to participate in the process of EC environmental law enforcement.<sup>13</sup> The Commission's views have been supported both by the Council of Ministers<sup>14</sup> and the European Parliament.<sup>15</sup>

However, there is little doubt that it has been the Århus Convention which has been the main political driving force behind the recent package of legislative measures at EC level on promoting access to justice in the environmental sphere. For, notwithstanding a political commitment incorporated within the EU's Fifth Environmental Action Programme (1993–2000) to propose a measure on access to environmental justice, no proposal was officially made by the Commission during the lifetime of that programme (Krämer, 2003, p 144). It was not until 2003 that an official legislative proposal was tabled by the European Commission.

As mentioned in the introduction to this chapter, one of the three pillars of the Århus Convention is a legally binding commitment on the part of its contracting parties to grant the public access to justice as a means of assisting in the enforcement of environmental law. In broad terms, Art 9 of the Convention stipulates that each party is to ensure that in three types of situations members of the public should have access to independent legal review of decisions, omissions and acts concerning the following areas: access to environmental information (Art 9(1)); public participation in certain decisions relating to the environment (Art 9(2) and contraventions of environmental law by public authorities or private persons (Art 9(3)). The latter provision and its follow up by the EC constitute the particular focus of concern in this and the next section of this chapter. Article 9(3) of the convention stipulates the following general binding commitment:

3. [. . .] [E]ach party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.

The provision is couched in general terms, leaving a lot of discretion in the hands of contracting parties as to how its requirements are to be implemented by them. In particular, it is important to note that the contracting parties reserved for themselves the right to determine the specific requirements of legal standing to be fulfilled by members of the public in order to be in a

13 COM(96)500 p 11.

14 Council Resolution on the drafting, implementation and enforcement of Community environmental law (OJ 1997 C321/1).

15 European Parliament Resolution on a communication of the Commission on implementing Community environmental law (OJ 1997 C167/92).

position to pursue environmental litigation against a private or public defendant. The ‘public’ is defined in the convention to include natural or legal persons and ‘in accordance with national legislation, their associations, organisations or groups’ (Art 1(4)). Accordingly, the convention itself does not strictly speaking require the parties to establish a general citizen’s right of action to enforce environmental law, but instead leaves it to the contracting parties to determine the particular requirements for legal standing in any given case. However, it is evident from the wording of Art 9(3) that parties are to be encouraged to facilitate access to justice. The obligation, as crafted, is evidently intended to encourage parties to introduce systems sympathetic to facilitating access to justice to a wide range of claimants; in particular, this is emphasised by the reference to the words ‘if any’ in the provision.

The commitment to access to justice is supported by flanking provisions in the Convention which contain some generally worded requirements on the conduct, expense and transparency of procedures relating to the areas covered by Art 9. Article 9(4) stipulates some minimum general requirements that must be respected by the relevant administrative or judicial review procedures, namely that they:

[...] shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive. Decisions under this article shall be given or recorded in writing. Decisions of courts, and whenever possible of other bodies, shall be publicly accessible.

Article 9(5) ensures that the public is to be provided with access to information about such procedures and that the parties are to ‘consider’ the establishment of appropriate mechanisms to remove or reduce financial and other barriers to access to justice. This requirement is reinforced more broadly in the general provisions of Art 3 of the Convention. Specifically, Art 3(2) obliges contracting parties to endeavour to ensure that officials and authorities assist and provide guidance to the public in seeking access to justice, and Art 3(3) requires the parties to promote public education and awareness on how to obtain information on access to justice. Although these flanking provisions are very general in nature and leave considerable room for legal interpretation, they contain in essence a core requirement for parties to ensure that their relevant administrative review and judicial procedures are appropriately advertised and structured so as to ensure that the public is aware of them and is in a genuine position to be able to use them to good effect without having to face unnecessary or insurmountable financial or procedural hurdles. Collectively, such provisions contain an important body of fundamental general legal principles that are to underpin national implementation of independent legal review mechanisms of environmental acts or omissions that breach national environmental law.

The EC, as a contracting party to the Århus Convention, is in the process of completing the necessary steps to implement those commitments within the territory of the EU in relation to the enforcement of EC environmental law. It has recently ratified the convention.<sup>16</sup> For the purposes of the convention, EC law constitutes a source of 'national law' for the EU Member States as well as the European Community as contracting parties of the convention.

## **8.2 Proposed EC directive on access to justice in environmental matters**

In October 2003, the Commission presented the European Parliament and Council of Ministers with a legislative proposal to implement the third pillar of the Århus Convention in the form of a draft directive. As a measure to be based on Art 175 EC, the Draft Directive on access to justice in environmental matters<sup>17</sup> (hereinafter referred to as the 'Draft AJEM Directive') is at the time of writing working its way through the EC legislative process and may be expected to be passed sometime in 2006/7. It requires a qualified majority vote of approval in the Council of Ministers as well as the assent of the European Parliament.<sup>18</sup> Based on the core legal structures and requirements foreseen in the Århus Convention, the Draft AJEM Directive fleshes out in detail how the Member States are to implement the Århus legal principles on widening access to environmental justice as far as the enforcement of EC environmental law is concerned. In addition to having to transpose the Draft AJEM Directive's requirements into national law in relation to the application of EC environmental legislation, Member States have the additional option in the draft instrument to enact national legislation so as to apply the Draft AJEM Directive's requirements in respect of their own environmental laws that have been established independently of EC environmental law.<sup>19</sup> As a general point, given that the legal basis of the Draft AJEM Directive is Art 175 EC, Member States are to remain competent to be able introduce or maintain measures more generous than the minimum of access to justice rights granted in the legislative proposal.<sup>20</sup>

Addressed to the EU Member States, the purpose the Draft AJEM Directive is to establish a set of binding provisions under EC law to ensure access to justice in environmental proceedings for both 'members of the public' as

16 Council Decision 2005/370 on the conclusion, on behalf of the EC, of the Convention on access to information, public participation in decision-making and access to justice in environmental matters (OJ 2005 L124/1).

17 COM(2003)624.

18 As required by the 'co-decision' legislative procedure set out in Article 251 EC.

19 See Arts 2(1)(g) in conjunction with Art 2(2) Draft AJEM Directive.

20 By virtue of Art 176 EC.

well as ‘qualified entities’ (Art 1). Environmental proceedings are defined as meaning the administrative or judicial review proceedings in environmental matters before a court or other independent body established by national law, excluding proceedings in criminal matters, and concluded by a binding decision (Art 2(f)). ‘Members of the public’ are defined broadly to mean ‘one or more natural legal persons and in accordance with national law, associations, organisations or groups made up by these persons’. This definition embraces a very wide notion of the European public, given that it is not predicated on the criteria of nationality, residence, number of persons involved or particular legal forms. ‘Qualified entities’ are a special category of private persons vested with distinct enforcement rights under the Draft AJEM Directive. The provisions concerning their establishment are considered in detail in section 8.2.1. below. The Draft AJEM Directive sets out a broad-ranging legal framework to ensure that members of the public as well as qualified entities have specific rights to hold public authorities as well as private persons to account by way of taking environmental proceedings in respect of acts or omissions to act in contravention of EC environmental law. In addition, it also provides such persons with the right to request a public authority to undertake an internal review of conduct alleged to have contravened EC environmental law.

### 8.2.1 ‘Qualified entities’

The Draft AJEM Directive creates a special legal group of private bodies known as ‘qualified entities’. The term ‘qualified entities’ is defined in Art 2(c) of the Draft AJEM Directive as meaning any association, organisation or group whose objective is to protect the environment and which is recognised by individual Member States under a specific procedure set out in Art 9. Article 9(1) stipulates that Member States are to adopt a special procedure to ensure an ‘expeditious’ recognition of such entities, either on a case by case basis (*ad hoc*) or under an advance dedicated recognition procedure, where they fulfil specific requirements as set out in Art 8 of the Draft AJEM Directive. Member States are to set up the procedures involved for recognition, determine the competent authorities responsible for deciding on recognition as well as ensuring that rejections of requests for recognition shall be subject to independent review laid down in law.<sup>21</sup>

Article 9(1) of the Draft AJEM Directive specifies four mandatory criteria to be met before a body is to be competent as a qualified entity, namely it must: (a) be an independent, non-profit-making legal person whose objective is to protect the environment;<sup>22</sup> (b) have an organisational structure enabling it to ‘ensure the adequate pursuit of its statutory objectives’;<sup>23</sup> (c) have been legally

21 Arts 9(2)–(4) Draft AJEM Directive.

22 Art 8(a) Draft AJEM Directive.

23 Art 8(b) Draft AJEM Directive.

constituted and have worked actively for the protection of the environment in conformity with its statutes for a period to be determined by the Member State but no longer than three years;<sup>24</sup> and (d) have its annual statement of accounts certified by a registered auditor for a period to be determined by the Member State in which it is constituted.<sup>25</sup> Surprisingly, the Draft AJEM Directive does not address the conditions under which Member States may withdraw recognition; no specific safeguards are set out to protect qualified entities from being subject to an arbitrary withdrawal from recognition by a Member State. On the other hand, one may reasonably imply from the unconditional terms crafted in Art 8 that qualified entities have a right to maintain their entity status, as long as they fulfil the criteria set out in Art 8. Any deviation from this basic right would, in accordance with standard jurisprudential analysis of the ECJ, have to be construed narrowly. Accordingly, it would not be unreasonable to assume that a withdrawal of qualified entity status would be subject to the usual scrutiny criteria of equality and proportionality employed as general principles of EC law in situations where Member States derogate from individual rights provided under EC law (see for example, Cases 11/74 *Union des Minotiers* and 44/79 *Hauer*).

It is probable that the provisions in Arts 8–9, in intending to confer specific rights on persons interested in becoming a qualified entity for the purpose of the Draft AJEM Directive, will have direct legal effects for applicant bodies in the event that a Member State fails to transpose its requirements into national law. For, notwithstanding that a Member State may argue that the terms of the provisions do not meet the standard criteria of sufficient precision or unconditionality, as would normally be expected for the doctrine of direct effect to apply, it is at least arguable from the ECJ's recent case law that their absence would not necessarily be fatal to the argument that individuals may be able to rely directly on its provisions before national courts and tribunals. Specifically, in the *Kraaijeveld* ruling (Case C–72/95) and related jurisprudence discussed in Chapter 6, the ECJ has held that private persons are entitled to rely on provisions in EC environmental directives where it is clear that a Member State has exceeded the margin of discretion conferred to it by the terms of the Directive. A clear exceedance of discretion would be where a Member State has failed to enact legislation to set up a recognition procedure. On the other hand, it may be more doubtful whether a private applicant could be able to rely on the obligation of expedition to assert that a particular procedure is unduly protracted and in contravention of Art 9.

As briefly mentioned, qualified entities are to have special rights of legal standing, over and above those vested in the members of public, in taking legal steps to enforce EC environmental law. The object behind the creation

24 Art 8(c) Draft AJEM Directive.

25 Art 8(d) Draft AJEM Directive.

of a special status of ‘qualified entity’ is to vest those NGEOS having the requisite organisational capability and experience in relation to environmental protection issues with a special role in terms assisting in ensuring that EC environmental law is complied with by public authorities. The proposed rights of such entities to take legal action will be discussed in detail in the next sections.

### **8.2.2 *The right to take environmental proceedings***

The Draft AJEM Directive envisages a number of situations where both members of the public as well as qualified entities are to have specific rights to initiate environmental proceedings in respect of contraventions of EC environmental law. As in the Århus Convention, such proceedings are subject to general principles of propriety and fairness. Article 10 of the Draft AJEM Directive effectively replicates the conditions set out in Art 9(4) of the convention:

Member States shall provide for adequate and effective proceedings that are objective, equitable, expeditious and not prohibitively expensive.

Decisions under this Directive shall be given or recorded in writing, and whenever possible shall be publicly accessible.

It is notable and regrettable that the Draft AJEM Directive has not fleshed out in more detail the general requirements of Art 9(4) of the Århus Convention. In particular, no specific provisions are included concerning financial assistance (for example, legal aid) or addressing particular procedural requirements that may constitute in practice severe obstacles encountered by private claimants, such as requirements of cross-undertakings in damages in the event of interim relief being requested as in the *Lappel Bank* litigation (Case C-44/95) referred to in Chapter 7. No specific reason is provided why the Draft AJEM Directive’s provisions are crafted in such a general manner. However, it is evident from reading the Explanatory Memorandum accompanying the Draft AJEM Directive that the Commission has expressed its concern not to stray into territory that it might consider to be within the exclusive purview of Member States under the principle of subsidiarity, as set out in Art 5 EC. However, in this instance, it is submitted that the Commission has been excessively deferential to a perception that Member States should retain autonomy in this particular area. It is self-evident that without clear-cut minimum standards on the conduct, management and financing of legal proceedings some Member States may offer substantially better conditions for private law enforcement than others. Although that is a scenario envisaged generally in terms of EC environmental law, where Member States as a matter of principle retain the option of adopting stricter measures in favour

of protecting the environment,<sup>26</sup> the position adopted in the Draft AJEM Directive Art 10 is one where there is a genuine danger of some Member States not perceiving any need to take any specific new steps so as to facilitate access to justice when it may be patently obvious that without legislative change the legal procedural requirements in certain Member States will continue to act as a *de facto* deterrent to the launch of private law enforcement actions. That outcome would not only undermine the third pillar project of the Århus Convention but also compromise the EC's constitutional commitment to attaining a high level of environmental protection throughout the territory of the Community. It might be the case that, sometime after the Draft AJEM Directive is eventually promulgated, the Commission might decide to take infringement proceedings in particular instances where it considers Member States have failed to take specific action to transpose Art 10. However, the mechanisms of Arts 226/228 EC are hardly the most efficient of mechanisms in this respect, given the factors of legal uncertainty of outcome as well as the cumbersome and lengthy procedures involved. Under Art 11 of the Draft AJEM Directive, Member States are to report on the experience gained in the application of the Directive. This might or might not provide useful information on good and poor practice in this regard. However, the reporting requirements as set out in the draft text are very general and may not address these important practical issues. In addition, there is no Committee structure envisaged within the terms of the Draft AJEM Directive to take up such issues for the purpose of an ongoing review of the instrument. It is submitted, therefore, that at the very least the Commission should issue some detailed recommendations or other soft law guidance to accompany Art 10 from the outset, in order to ensure that Member States are aware of what is expected. In particular, the term 'not prohibitively expensive' calls for clarification.

In relation to acts and omissions of private persons which are in breach of EC environmental law, under Art 3 of the Draft AJEM Directive Member States are required to ensure that members of the public, 'where they meet the criteria laid down in national law', are to have access to environmental proceedings to challenge such conduct. This provision, laying down a requirement for a 'horizontal' right of action in environmental matters, is very broadly worded leaving much discretion to the Member States to decide how they set about implementing it into national law. In particular, Member States remain in essence virtually free to determine issues of legal standing as well as interim relief, although they are subject to the general overarching requirements for proceedings contained in Art 10. It is also noticeable that no special enforcement rights are granted to qualified entities in horizontal

26 The principle is also specifically enshrined in recital 13 of the Preamble to the Draft AJEM Directive.

law enforcement work. In its Explanatory Memorandum accompanying the Draft AJEM Directive, the Commission refers to the subsidiarity principle in particular as restraining it from providing more detailed provisions.<sup>27</sup> Although always an important factor to bear in mind, it is questionable again whether the Commission has struck the correct balance between, on the one hand, ensuring as much respect for procedural autonomy of Member States over the administration of justice as is reasonably possible against, on the other hand, the need to ensure that EC environmental protection objectives crystallized in the Draft AJEM Directive are going to be sufficiently implemented across the EU in a credibly consistent manner.

Articles 4–5 of the Draft AJEM Directive set out the rights of members of the public and qualified entities to have legal standing to bring environmental proceedings in respect of administrative acts and omissions in breach of EC environmental law. Article 4 addresses the rights of members of the public. Specifically, it requires Member States to ensure a right of the public to have access to environmental proceedings, which is to include the availability of interim relief, where such persons either have a ‘sufficient interest’<sup>28</sup> or where they ‘they maintain the impairment of a right, where the administrative procedural law requires this as a precondition’.<sup>29</sup> The Draft AJEM Directive specifies that Member States, ‘in accordance with the requirements of their law and with the objective of granting broad access to justice’, retain competence to determine the fulfilment of either of these criteria (Art 4(2)). Crucially, Member States are to retain significant controls over the structuring of legal standing requirements under the current draft provisions. It is wholly unclear to what extent the caveat in Art 4(2) of ‘in accordance [. . .] with the objective of granting broad access to justice’ could be a meaningful legal obligation in practice, given its very general nature and capacity to be interpreted in any number of ways. Whether it may ever be enforceable in the context of Art 226/228 EC proceedings is for this reason rather doubtful.

Article 5 of the draft legislative instrument specifies the extent to which ‘qualified entities’ may have legal standing to bring environmental proceedings. Article 5(1) specifies that such entities recognised by a Member State in Art 9 may, subject to certain conditions, have access to environmental proceedings, including interim relief, even though the entity may not necessarily have a sufficient interest or have a right impaired as would otherwise be required of members of the public when issuing legal proceedings to challenge the legality of public authority conduct as envisaged in Art 4. The conditions for the qualified entity to be able to take proceedings are that the subject matter of dispute is specifically covered by the ‘statutory activities’ as

27 COM(2003)624 p 12.

28 Art 4(1)(a) Draft AJEM Directive.

29 Art 4(1)(b) Draft AJEM Directive.



well as within the 'geographical area of activities' of the qualified entity concerned. Although not expressly stipulated, it appears implicitly clear from the wording and legislative context of the provision that the qualified entity will be responsible for determining the remit of its activities in terms of material scope and geographically. The home Member State will not be able to interfere in the autonomy of the entity to set its own corporate objectives.<sup>30</sup>

Article 5 also provides the possibility of qualified entities being involved in transboundary disputes. Specifically, Art 5(2) stipulates that a qualified entity recognised in one Member State is entitled to bring 'internal review' in another Member State under the conditions of Art 5(1). Effectively, this entitles the entity to be able to bring environmental proceedings in another Member State as of right, so long as the subject matter of the dispute falls within the specific geographical area and activities of the entity.<sup>31</sup> It should not be confused with the special public authority internal review procedure envisaged in Art 6 of the Draft AJEM Directive, considered in section 8.2.3. below. Carefully thought through, the mutual recognition principle enshrined in Art 5(2) potentially could be used to excellent effect by NGEs facing legal standing difficulties in a particular Member State. Thus, a qualified entity in one Member State would be entitled to legal standing in the relevant courts and/or tribunals competent to carry out independent legal review of public authority action in any other Member State, so long as the bringing of such proceedings would fall within the scope of the entity's activities and geographical area (as defined by its statutes). The wording in Art 5(2) appears sufficiently precise and unconditional to satisfy the criteria of direct effect, so all Member State authorities including judicial organs would be obliged automatically to recognise the legal standing of the entity, even if this were to conflict with any existing national procedural rules that would otherwise block or impede its access to judicial review.

The legal standing rights accorded to members of the public and qualified entities to be able to take environmental proceedings constitutes an important advance on the existing position of procedural rights granted to private persons under EC law. In particular, the important issue of availability of interim relief is addressed in relation to the acts and omissions of public authorities, albeit not in relation to conduct of private defendants. Accordingly, the Commission proposal goes further than the neutral position of the Århus Convention in this regard. The rights of qualified entities constitute a significant advance in terms of the possibilities of private law enforcement of EC environmental law. Under the Draft AJEM Directive, such entities will be

30 This interpretation is supported by reference to Art 8 of the Draft AJEM Directive, which refers to the entity's statutes in the possessive mode ('its statutes').

31 See Explanatory Memorandum (COM(2003)624 p 13).

able to take legal proceedings against public authorities acting in breach of EC environmental legal requirements without having to face the traditional procedural hurdles commonly applied under national administrative law of having to prove a direct personal interest in the subject matter of the dispute. Article 5 of the draft is designed to enable them to be vested with legal powers to take either administrative or judicial review proceedings at national level with a view to enforcing EC environmental legislative requirements, as claimants with privileged (automatic) legal standing.

### **8.2.3 *Right to request an internal review***

A second type of procedural right of review of public authority conduct is provided in Art 6 of the Draft AJEM Directive, intended to complement the rights to environmental proceedings granted in Arts 4–5. Specifically, members of the public as well as qualified entities, who consider that an administrative act or omission is contrary to EC environmental law are entitled under this particular provision to make a request for an internal review to a competent public authority, subject to them having legal standing to do so in accordance with Arts 4–5.<sup>32</sup> Member States are free to designate the public authority to be charged with the responsibility of carrying out the internal review; it need not be the state authority responsible for the act or omission. The time limit for submitting internal review requests is to be determined by the Member States, but the limit must not be shorter than four weeks following the date of the alleged administrative act or, in the case of an omission to act, after the date when an administrative act was required by law.<sup>33</sup> In practice, given its relative speed, informality and low cost, the internal review mechanism is going to be invoked prior to any decision to launch environmental proceedings

Article 6(2)–(4) of the Draft AJEM Directive specifies the format and basic timetable of the internal review procedure to be carried out by the competent public authority. First, unless the request is ‘clearly unsubstantiated’, the authority is required in principle to make a decision on the matter within a period of no later than 12 weeks after receipt of the request. Specifically, this must be either a written decision on the requisite measure to be taken to ensure compliance with EC environmental law or on the authority’s refusal to agree with the request. Addressed to the person having made the request, the decision must explain the reasons for its conclusions.<sup>34</sup> If, however, the authority considers that it is going to be unable to meet the 12-week deadline, it is to inform the applicant as soon as possible and in any

<sup>32</sup> Art 6(1) first paragraph Draft AJEM Directive.

<sup>33</sup> Art 6(1) second paragraph Draft AJEM Directive.

<sup>34</sup> Art 6(2) Draft AJEM Directive.

event by the end of the 12-week period of the reasons for the delay, as well as when it intends to issue a final decision.<sup>35</sup> However, the authority must not misinterpret the 12-week deadline as being a standard date for delivery of a decision. The authority is instead under a general obligation under Art 6(2) to issue a written decision ‘as soon as possible’ and in any event to strive to meet the deadline with ‘due diligence’.<sup>36</sup> Article 6(4) of the Draft AJEM Directive underlines this point in laying down a general obligation on the authority to make a final decision on the request ‘within a reasonable time-frame’, bearing in mind the nature, extent and gravity of the subject matter in issue. This obligation is clearly intended to induce competent authorities to be alive to considerations of urgency in any given case, where time may be crucially important from an environmental protection perspective (for example, in ‘bad application’ cases). In addition, Art 6(4) stipulates an absolute deadline for the authority to make a decision on the request: within 18 weeks of receipt of the initial request. Finally, the provision stipulates that applicants are to be informed of the decision.

Whilst the Draft AJEM Directive sets out a reasonable and clear timetable framework for the processing of internal reviews, there is some room for further clarification on practical aspects that may arise. In particular, the text does not formally address the position where an authority considers that it has insufficient information from the applicant to meet the 18-week deadline. Would an authority be entitled to ‘stop the clock’ in such circumstances? Such issues have arisen in the context of appraisals of notifications of waste shipments to competent national authorities under the Waste Shipment Regulation 259/93 and are currently being subject to detailed clarification in the current revision of the Regulation. In addition, provision is also made for the event of unspecified requests for access to information on the environment under the auspices of Directive 2003/4 on public access to environmental information.<sup>37</sup> However, it is submitted on the whole that the current framework in the Draft AJEM Directive is appropriate as it stands, subject to certain conditions being in place. A competent authority is not vested with any power to ‘stop the clock’ after receiving a sufficiently substantiated request. The request procedure expressly takes on board the point that an applicant will not necessarily be in a position to disclose all relevant facts relating to a particular environmental case; that will depend on the degree to which it is able to obtain relevant environmental information in relation to the administrative act or omission in question, an issue which is addressed in section 8.4. below. It is incumbent on the competent authority

35 Art 6(3) Draft AJEM Directive.

36 Ibid.

37 Art 3(3) Directive 2003/4.

to use its position of authority to verify the true state of affairs, factually and legally.<sup>38</sup>

It is apparent that the internal review mechanism has the potential to offer significant practical advantages over the option of formal legal proceedings, from the perspective of members of the public and qualified entities. The major advantages include relative low cost, informality and speed of the procedure compared with a court action. However, the Draft AJEM Directive does not specify whether or how much applicants are to be required to pay in terms of administrative fees for an internal review; this is a matter left for Member States. This is regrettable because, of course, a very high fee could act as a deterrent to meritorious requests. Inexplicably, the general principles of Art 10 of the draft extend only to the conduct of environmental proceedings. In addition, the internal review process does not guarantee an independent review to be conducted by an authority distinct from that of the authority responsible for a disputed act or omission. The designation of the competent authority is a matter for Member States. To a great extent, the effectiveness of the internal review mechanism is going to depend heavily on the procedures adopted by Member States.

#### ***8.2.4 The role of direct effect and the Draft AJEM Directive***

One of the most significant implications of the Draft AJEM Directive concerns its potential impact on the relative importance of the direct effect doctrine in the context of EC environment law enforcement action undertaken by private persons. If properly transposed into national law, the effect of the Draft AJEM Directive will be to facilitate the access of private entities to national courts and tribunals for the purpose of enforcing EC environmental legislation. Such litigants will not have to show that the EC norms that they seek to enforce are directly effective, given that the Draft AJEM Directive secures for them the right of access to court on the basis of legal standing criteria, not on the basis of the structure of the substantive EC environmental legislation in question.

As outlined in the previous sections, the main aim of the Draft AJEM Directive is to provide members of the public and qualified entities with various rights to take action in the event that they suspect a breach of EC environmental law has taken place within a Member State. Specifically, the Draft AJEM Directive refers to breaches of 'environmental law', which is defined in Art 2(g) as meaning:

38 The position may be contrasted with the regulation of transboundary shipments of waste under Regulation 259/93, where the body required to notify an export of waste is in a suitable position to be cognisant of all the material details of the waste shipment and disclose this to a competent authority of the importing country.

Community legislation and legislation adopted to implement Community legislation which have as their objective the protection or the improvement of the environment, including human health and the protection or the rational use of natural resources, [. . .]

The provision proceeds to provide a broad, non-exhaustive list<sup>39</sup> of examples of sources of EC environmental legislation, which is clearly intended to indicate the comprehensive nature of the definition. The list comprises the following areas: water protection; noise protection; soil protection; atmospheric protection; town and country planning and use; nature conservation and biological diversity; waste management; chemicals including biocides and pesticides; biotechnology; other emissions, discharges and release in the environment; environmental impact assessment; access to environmental information and public participation in decision making. Legislation for these purposes includes EC measures intended to ratify international agreements, such as the recent Council Decision 2005/370<sup>40</sup> to implement the Århus Convention. As already mentioned, Member States have the option of including sources of environmental law that are exclusively internal to their national legal systems with the definition of 'environmental law', that is, those which are not intended to implement, or whose material scope is not covered by, EC environmental legislation.<sup>41</sup>

The rights accorded under Arts 3–6 of the Draft AJEM Directive require Member States to provide members of the public and qualified entities who fulfil the requisite legal standing requirements to have access to environmental proceedings and/or an internal review procedure in relation to acts and omissions 'in breach of environmental law'. The provisions therefore do not require claimants to demonstrate, in addition to the legal standing requirements, that the EC environmental norms that they consider to be infringed in any given case are directly effective. Instead, they specify that such persons are entitled to challenge the legality of acts or omissions simply on the grounds that they are in breach of environmental law. Prospectively, this constitutes a profound change to the existing system of private law enforcement of EC environmental law. As discussed in Chapter 5, traditionally the possibilities for individuals to be able to rely on norms contained in EC Directives before national courts and tribunals has been developed on the basis of the doctrine of direct effect, by virtue of the jurisprudence of the ECJ. From the perspective of environmental law enforcement, the implications of the direct effect doctrine have been largely restrictive as opposed to facilitative. With the exception of norms containing clear self-contained and unconditional obligations, individuals have hitherto effectively been

39 Art 2(1)(g) Draft AJEM Directive.

40 OJ 2005 L124/1.

41 Art 2(2) Draft AJEM Directive.

denied the opportunity to take legal action to uphold EC environmental law. However, the Draft AJEM Directive quite rightly removes this unwarranted precondition for enforcement of EC environmental law. There are good reasons to open up possibilities for private persons to hold state authorities to account wherever the latter fail to adhere to legally binding EC environmental protection obligations. In particular, this means that law enforcement mechanisms are enhanced and made more efficient, as the private sector becomes enabled to be more involved to complement existing casework carried out by public enforcement institutions at national and supranational levels.

The factor of enhancing effectiveness of the practical application of EC environmental legislation is a key feature underpinning the motivation behind the Draft AJEM Directive.<sup>42</sup> The Commission has for a number of years recognised the lack of existing genuine possibilities at national level in the Member States for private persons, including notably NGEOS, to engage actively in enforcement of EC environmental protection legislation.<sup>43</sup> Accordingly, the Draft AJEM Directive's ambition to remove the requirement of direct effect, as a precondition for private law enforcement, may be seen as an integral element of the Commission's long-standing aspiration to facilitate better access to environmental justice at national level.

### **8.3 Other access to justice instruments in environmental matters at EC level**

The Draft AJEM Directive is set to constitute the EC's major general instrument on access to environmental justice. However, other EC legislative instruments have been recently promulgated which also contain specific access to justice provisions. The relationship between these measures and the Draft AJEM Directive is addressed by Art 1, which stipulates that the general AJEM Directive is to apply without prejudice to other, more specific EC legislation on access to justice in environmental matters (see Art 1, second paragraph).

42 As indicated in the Explanatory Memorandum to the legislative proposal (see COM(2003)624 pp 4–5).

43 See for example, COM(96)500 Commission Communication on Implementation of EC Environmental Law; Commission's First, Second and Third Annual Surveys on Implementation of EC Environmental Law (SEC(1999)592, SEC(2000)1219 and SEC(2002)1041; and the Council Decision on EC's Sixth Action Programme on the Environment (OJ 2002 L242/1).

### ***8.3.1 Access to justice in relation to environmental information and environmental decision making***

In following up implementation of the Århus Convention, specific provisions on access to justice in environmental matters have already been enacted in the context of the first and second pillar areas of the convention, namely access to information and public participation in environmental decision making. Accordingly, access to justice clauses have been incorporated in Directive 2003/4 on public access to environmental information, as well as in Directive 2003/35 on public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Directives 83/337 on environmental impact assessment and 96/61 on integrated pollution prevention and control (IPPC).

The implementation of the AJEM provisions contained in Directive 2003/4, which is examined in detail in the section 8.4.1 of this chapter, requires Member States to ensure that an applicant for environmental information from competent national authorities has access to an administrative review procedure<sup>44</sup> as well as recourse to a court of law or another independent and impartial body established by law, the latter's decisions being binding on the public authority holding the information.<sup>45</sup> The administrative review procedure is required to be 'expeditious' as well as 'either free of charge or inexpensive'. Although rather vaguely worded, these latter requirements constitute a significant advance on the position under the legislation preceding Directive 2003/4, where Member States were simply required in broad terms to provide the availability of a 'judicial or administrative review' of any decision by a competent authority regarding access to information requests.<sup>46</sup>

Directive 2003/35 provides that, in accordance with the relevant legal system of the Member States and subject to specific requirements of legal standing, members of the public concerned (which includes certain qualifying non-governmental organisations) shall have access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of the revised Environmental Impact Assessment (EIA) Directive 85/337 and IPPC Directive 96/61.<sup>47</sup> Such procedures are required also to be 'fair, equitable, timely and not prohibitively expensive' and that practical information about access to them is disseminated to the public. However, Member States, retain full powers to

44 Art 6(1) Directive 2003/4.

45 Art 6(2) Directive 2003/4.

46 See Art 5 of former Directive 90/313 on the freedom of access to information on the environment (OJ 1990 L158/56).

47 Arts 3(7) and 4(4) Directive 2003/35.

determine at what stage decisions, acts or omissions may be challenged. As regards the requirements for legal standing, members of the public concerned are required to demonstrate, in accordance with national law, that they either have a ‘sufficient interest’ or maintain the ‘impairment of a right’ where this is required under national law. Non-governmental organisations which meet certain criteria set out in Arts 1(2) and 10a of the amended EIA Directive and Arts 2(14) and 15a of the amended IPPC Directive have a special dispensation in being deemed automatically to fulfil the requirements for legal standing. These provisions refer to NGOs in their definition of ‘the public concerned’ in the following terms:

[. . .]; for the purposes of this definition, non-governmental organisations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest;

The access to justice provisions in Directive 2000/35 are therefore fairly similar in nature to those relating to the legal standing requirements for environmental proceedings in respect of public authority acts and omissions under the Draft AJEM Directive, in that certain NGOs are provided with the possibility of privileged access rights to legal review of decisions over and above the general public.

### ***8.3.2 Access to justice under Directive 2004/35 on environmental liability (EL Directive)***

Another important and recent source of EC law relating to access to environmental justice is Directive 2004/35 on environmental liability with regard to the prevention and remedying of environmental damage<sup>48</sup> (hereinafter referred to as the ‘EL Directive’), passed in April 2004. The principal aim of this instrument is to establish, in accordance with the ‘polluter pays’ principle, a legal framework for the purpose of ensuring that Member States are equipped with the requisite legal tools in order to ensure that operators carrying out certain industrial-related activities and causing actual or threatened damage to the environment are legally held to account. The environmental liability regime established under the Directive focuses exclusively on securing the prevention and remediation of damage to the environment. It does not affect existing rights that private persons enjoy under the civil law of the Member States to compensation and other remedies in relation to impairment to the environment that causes damage to their personal legal interests (such as physical well-being or property rights in land).<sup>49</sup> At the

48 OJ 2004 L143/56.

49 See recital 11 to the preamble and Art 3(3) of the EL Directive.



time of writing, the deadline for implementing the EL Directive had not yet expired. Member States are required to transpose it into national law by 30 April 2007.<sup>50</sup>

The EL Directive focuses on the key role that public authorities of the Member States are to play in taking requisite action in order to ensure that such operators take appropriate preventive or remedial steps in relation to environmental damage caused or threatened as a result of their activities. Member States are required to designate competent authorities to ensure that the requirements of the EL Directive are fulfilled (hereinafter referred to as 'competent authorities').<sup>51</sup> Given the fact that the environmental liability requirements contained in the Directive are ones principally for the competent authorities to enforce, the contents of the EL Directive will be considered in detail in Chapter 12 covering Member State authorities' responsibilities for EC environmental law enforcement. However, it is important also to mention it in the context of law enforcement undertaken by private entities, because the EL Directive provides important procedural rights for individuals. Specifically, Arts 12–13 of the Directive contain specific rules which confer a distinct law enforcement role on private entities such as NGEOs. The EL Directive's provisions on private law enforcement mechanisms are structured on a basis akin to that employed in the Draft AJEM Directive, in so far as they are directed to reviewing public authority conduct. The provisions concerned are structured on a two-tier basis: internal and external review. Specifically, (certain) individuals and other private entities are vested with rights to request a competent authority to investigate instances of alleged environmental damage<sup>52</sup> as well as having rights to seek independent legal review of the acts, decisions or omissions of a competent authority.<sup>53</sup> However, unlike the Draft AJEM Directive, the EL Directive does not provide any specific procedural rights for private entities to seek legal review and redress from other private entities in respect of environmental damage caused or threatened by the latter. These two provisions will be examined in turn.

### 8.3.2.1 *Rights of private entities to request action under the EL Directive*

Article 12 of the EL Directive provides certain private entities with the right, in certain circumstances, to request a competent authority to undertake action in relation to instances of environmental damage or imminent threat of environmental damage alleged to have occurred in contravention with the Directive's requirements. In principle, two criteria must be fulfilled before the competent authority is compelled to undertake a review of such a request, namely those relating to the legal standing of the applicant(s) and the supply

50 Art 19 EL Directive.

51 Art 11 EL Directive.

52 Art 12 EL Directive.

53 Art 13 EL Directive.

of relevant information in support of the request. However, Member States are entitled to waive any or all these requirements in relation to cases of imminent threat of damage.<sup>54</sup>

Article 12(1) addresses the aspect of legal standing. By virtue of this provision, only certain private entities are entitled to submit to the competent authority observations relating to alleged cases of actual or threatened environmental damage and file requests for action. Specifically, standing to file a request is granted to natural or legal persons:

- (a) affected or likely to be affected by environmental damage, or
- (b) having a sufficient interest in environmental decision making relating to the damage or, alternatively,
- (c) alleging the impairment of a right, where administrative procedural law of a Member State requires this as a precondition[.]

Subject to one significant qualification, the EL Directive specifies that the definitions of ‘sufficient interest’ and ‘impairment of a right’ are to be matters left to national law of the Member States.<sup>55</sup> The qualification is in relation to the position of NGEOs, which are vested with less restrictive rights of standing, as set out in the third paragraph of Art 12(1):

To this end, the interest of any non-governmental organisation promoting environmental protection and meeting any requirements under national law shall be deemed sufficient for the purpose of subparagraph (b). Such organisations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (c).

The impact of this qualification is to open up the possibility for NGEOs to be able to file requests for action, even though they or their members’ personal legal interests or assets may not be affected or impaired in some way by the environmental damage. This is an important clause, as it does not predicate the right of request on a local ‘residency’ requirement that may otherwise be set down by national law. The phrase ‘meeting any requirements under national law’ refers to any particular requirements laid down by Member States’ general laws on the incorporation and registration of bodies that would apply to such NGOs. It is evident from the legislative background to the EL Directive that the phrase is not intended to permit Member States to establish special standing requirements for NGEOs for filing Art 12 requests.<sup>56</sup> That

<sup>54</sup> Art 12(5) EL Directive.

<sup>55</sup> Art 12(1) second paragraph EL Directive.

<sup>56</sup> See the Commission proposal for the EL Directive (COM(2002)17) which refers to the right of any ‘qualified entity’ to file a request for action. ‘Qualified entities’ are defined in the proposal as meaning ‘any body or organisation which, according to the criteria, if any, laid

would be a misinterpretation of the phrase. It is not clear why legal standing requirements have had to be laid down in respect of natural or legal persons. Indeed, it might be thought that it would be in the interests of competent authorities to be open to receive any well-founded information on environmental damage, irrespective of the source of that information, a view held by the Commission in relation to the filing of complaints to it that may lead it to open Art 226/228 EC proceedings against Member States. The view that a filter is needed in order to ensure that competent authorities are not flooded with ill-founded requests is not convincing. For, as is discussed below, such authorities are not required to pursue any request other than which is adjudged by them to be plausible. The incorporation of legal standing requirements does not sit well with the EC Treaty requirement of ensuring a high level of protection, nor with the spirit if not the letter of the Århus Convention. One could argue that the legal standing requirements set out under Art 12(1) of the EL Directive contravene the requirements in Art 5(1)(a) of the Århus Convention, which requires contracting parties to ensure that their public authorities possess and update environmental information which is relevant to their functions. Legal standing requirements restrict the possibilities for competent authorities to be able to ensure that they have the best possible means of securing information pertinent to their areas of responsibility that is both up to date and comprehensive in scope and depth.<sup>57</sup>

Article 12(2)–(3) of the EL Directive stipulate the requirements pertaining to the supply of information that must accompany any request for action. Article 12(2) specifies that the request must contain ‘relevant information and data supporting the observations’ submitted in relation to environmental damage. Article 12(3) specifies that a competent authority is obliged to consider only those observations and requests which ‘show in a plausible manner that environmental damage exists’. These provisions confirm that requests must be sufficiently supported by credible information of some kind before a competent authority is under a duty to review whether or not to take action. It is important to note that the burden of proof is relatively low, and probably no more onerous than a requirement to show reasonable suspicion of damage. A more onerous burden would be difficult to reconcile with the

down in national law has an interest in ensuring that environmental damage is restored. Bodies and organisations whose purpose, as is shown by the Articles of incorporation thereof, is to protect the environment shall be deemed to have an interest’. Similarly, the discussion of recognition of environmental NGO rights in the context of Draft AJEM Directive has revolved around the legal status of such an NGO as a corporate body, as opposed to any nexus between it and the subject matter of a particular dispute.

57 In this sense, one could argue that there is a conflict between Art 12(1) EL Directive and Art 8 AEI Directive.

precautionary and preventive principles,<sup>58</sup> both being fundamental principles of EC environmental policy and law.<sup>59</sup> Significantly, the observations do not have to provide any evidence that of itself determines individual culpability; the person making the request is required only to provide the authority with plausible information about the existence of damage. This is important, given that private persons filing requests are not usually going to be in any position, legally, technically or financially, to be able to deduce the source of environmental damage. Attribution of liability under the EL Directive is a matter for competent authorities to establish, not those who file requests for action.

Article 12(3)–(4) of the EL Directive contains some general provisions regarding the administrative procedural steps to be taken once an admissible request has been filed with a competent authority. Article 12(2) specifies that the authority is to consider the observations and request for action, and ‘give the relevant operator an opportunity’ to comment on them. Article 12(3) requires the authority ‘as soon as possible’ and in accordance with national law to inform the person who filed the request of its decision to accede to or refuse the request for action. The notification must provide the reasons on which the decision is grounded. Regrettably, no timetable is set down in the Directive for the completion of these procedures. Unlike the Draft AJEM Directive, the EL Directive does not require competent authorities to meet any specific deadline to react to requests from the concerned public.<sup>60</sup> This may cause unnecessary confusion and delay in their operation. Best practice would be for the authorities to apply, in principle, the time limits for responding to requests for internal review under Art 6 of the Draft AJEM Directive, although this is not required to be so under the terms of the EL Directive. In cases of imminent threat of environmental damage, the EL Directive provides that these particular procedural requirements need not apply before an authority decides to take action,<sup>61</sup> namely the obligation to hear the relevant operator(s) involved and notify persons requesting action.

#### *8.3.2.2 Right to subject a competent authority's conduct to legal review under the EL Directive*

In addition to granting the right to request action from a competent authority, the EL Directive also confers a right to persons to seek independent legal review of the authority's conduct. Specifically, Art 13(1) of the Directive

<sup>58</sup> As set out in Art 174(2) EC.

<sup>59</sup> Indeed, the Commission proposal for the EL Directive did not refer to any filter requirement based on plausibility (Art 11 of COM(2002)17).

<sup>60</sup> The Commission's draft proposal for the EL Directive envisaged a 4-month deadline (Art 11(3) of COM(2002)17).

<sup>61</sup> Art 12(5) EL Directive.

states that persons granted the right to file requests for action must also have access to a court or other independent and impartial public body competent to review the procedural as well as substantive legality of decisions, acts or omissions of competent authorities in relation to the requirements of the Directive. The right to seek review is accordingly very wide ranging in that its remit applies to all formal aspects of a designated competent authority's work in relation to carrying out the EL Directive, not just in respect of its decisions whether or not to act in relation to requests to take action.

However, Art 13(1) of the EL Directive is made subject to a rather broad qualification in Art 13(2), to the effect that the EL Directive is to operate 'without prejudice to any provisions of national law which regulate access to justice' or national provisions that require administrative review procedures to be exhausted prior to recourse to judicial proceedings. The extent of the intended effect of this particular exception clause in relation to Art 13(1) is not entirely clear, but it appears to offer Member States the possibility of adopting or maintaining a restrictive stance on the legal standing of private persons seeking judicial review of administrative conduct. In so far as it does this, Art 13(2) legitimises an unwarranted limitation on access to environmental justice. It would have been more in keeping with the objective of promoting access to environmental justice if the access formula contained in Art 12(1) of the Directive could have also been applied in Art 13.

### *8.3.2.3 Impact of the EL Directive on access to environmental justice*

Given that the implementation deadline<sup>62</sup> in respect of the EL Directive has, at the time of writing, not yet elapsed, it is premature to speculate with any degree of certainty as to the degree of practical impact the instrument is going to have in terms of assisting in the enforcement of EC environmental legislation. It is also worth noting in this context that the EL Directive contains a specific temporal limit as regards the scope of its application. Specifically, it does not apply to damage caused by an emission, event or incident that transpires prior to 30 April 2007 (the implementation deadline) or in respect of any emission, event or incident which, although occurring after 30 April 2007, derives from a specific activity which took place and ended prior to that date.<sup>63</sup>

On the one hand, it appears that the right to request action and legal review enshrined in Arts 12–13 of the EL Directive will enable a number of NGEOS to become more readily involved in the review processes without having to negotiate through unclear or onerous legal standing requirements that may exist under some current national procedural rules of Member States. It is also evident that Member States will have to ensure that persons

62 30.4.2007 (Art 19(1) EL Directive).

63 Art 17 EL Directive.

with standing have the opportunity to subject the conduct of a competent authority to procedural as well as substantive legal scrutiny before an independent body whose decisions are to be binding on the competent authority. Such a body must be capable of ensuring that the competent authority not only adheres to procedural rights of private persons filing requests or persons subject to investigation, it must also ensure that the substantive decisions taken by the authority accord with the EL Directive as well as with other EC environmental legislation. Accordingly, existing legal review procedures under national administrative law may have to be extended where review bodies are unable to conduct a comprehensive legal review as envisaged by the Art 13(1) of the EL Directive.

On the other hand, there are several features of the EL Directive that give some cause for concern in terms of their impact on access to justice. For instance, the Directive does not, in contrast with the Draft AJEM Directive, stipulate any requirements regarding the maximum level of administrative fees and legal costs that may be levied on persons using the review procedures. Member States appear to remain free to determine the amount charged. If set at too high a level, they may well act as a significant deterrent to persons wishing to request action or seek legal review of a competent authority's conduct. In addition, the EL Directive fails to set a clear timetable in respect of the handling of a request for action. The timetable will be set according to national rules and there is no guarantee that these will be sufficiently swift, commensurate with the degree of urgency attached to any particular case. Moreover, given that Member States are required to take the step of designating their own competent authorities to carry out the requirements of the Directive, it is doubtful whether either Arts 12 or 13 are sufficiently unconditional in order to qualify as directly effective provisions; individuals will therefore probably not be able to enforce them in the absence of national transposition legislation which designates a competent authority.<sup>64</sup> Accordingly, the effectiveness of the EL Directive's access to justice provisions depends a good deal on the particular detailed procedural provisions adopted by individual transposition legislation. The EL Directive provides for the opportunity of an EC-wide review of its application to commence a few years after the deadline for its implementation. Specifically, Art 18 requires the Commission to present a report to the European Parliament and Council by the end of April 2014, compiled principally on the basis of reports from the individual Member States submitted to it by the end of April 2013.

<sup>64</sup> See for example, Cases C-6, 9/90 *Francovich*

## 8.4 Access to environmental information held by Member State authorities

EC law established a basic individual right to access environmental information in the early 1990s in the form of Directive 90/313 on the freedom of access to information on the environment, which Member States had to implement by the end of 1992. The EU therefore already had adopted a body of rules on access to information by the time the Århus Convention was signed in June 1998. The Århus Convention, however, represented an advance for the EC in this particular area of environmental policy, setting down a number of general and specific requirements for its contracting parties going substantially beyond those stipulated in the 1990 Directive.

As mentioned at the outset of this chapter, it is the first of the three pillars underpinning the Århus Convention that addresses issues of access to environmental information. Articles 4–5 of the Convention, which comprise the core provisions concerning access to information, focus on public access to environmental information from two main angles, namely active as well as reactive responsibilities of contracting parties. First, Art 4 sets down a number of minimum requirements relating to establishment of a right of the public to access information on the environment held by public authorities (reactive type obligations). Second, Art 5 stipulates a number of obligations for contracting parties with a view to ensuring that environmental information is collected on an up to date basis as well as disseminated efficiently (active type obligations). In addition, Art 3 houses some important general requirements related to the subject of access to information, including the right of applicants for information to be free from penalty, persecution or harassment in asserting their convention rights<sup>65</sup> as well as the right of any person to have access to information as prescribed by the convention, regardless of their citizenship, nationality, domicile or location of registered seat in the case of a legal person.<sup>66</sup> In addition, contracting parties are required to ensure that the public receives guidance and assistance when seeking to access environmental information, in the form of education and environmental awareness campaigns as well as help from officials and authorities.<sup>67</sup> These provisions have been implemented at EC level principally through Directive 2003/4, which will be considered in section 8.4.1.

### 8.4.1 Directive 2003/4 on public access to environmental information (AEI Directive)

As a means of structuring the implementation of the Århus Convention's access to information provisions into national law of the Member States, on 28 January 2003 the EC promulgated Directive 2003/4<sup>68</sup> on public access to

65 Art 3(8).

66 Art 3(9).

67 Art 3(2)–(3).

68 OJ 2003 L41/26.

environmental information and repealing Council Directive 90/313 (hereinafter referred to as the ‘AEI Directive’). Under the AEI Directive,<sup>69</sup> Member States are obliged to ensure that they have transposed its requirements into national law by 14 February 2005,<sup>70</sup> the point in time when its predecessor, Directive 90/313, was repealed.<sup>71</sup> In several respects, the AEI Directive builds on the foundations created by Directive 90/313, which laid down important and novel rights of access to information on the environment held by Member State public authorities.<sup>72</sup> However, the AEI Directive has also introduced a new dimension to the area of access to information with a raft of requirements relating to the collection and public dissemination of environmental information by Member States and their competent authorities; Directive 90/313 laid down only a rather general and vague commitment in this respect.<sup>73</sup> In alignment with the Århus Convention, the objectives of the AEI Directive are to introduce two main sets of obligations for Member States: the establishment of a right of access to environmental information as well as the setting up of systems to ensure an efficient collection and dissemination of information to the public.<sup>74</sup> In accordance with the Århus Convention, the AEI Directive specifies that Member States retain the right to maintain or introduce measures that provide for broader access to information than that required by its provisions.<sup>75</sup>

#### *8.4.1.1 Right of access to environmental information under the AEI Directive*

Article 3 of the AEI Directive establishes the ground rules pertaining to a Community law right of access to environmental information. Specifically, Art 3(1) lays down a general and fundamental obligation on Member States to ensure that public authorities are to make available ‘environmental information’ held either by or for them to any applicant, without the latter being required to state any particular interest in order to justify a request for information.

69 The AEI Directive entered into force on 14.2.2003 (Art 12).

70 Art 10 AEI Directive.      71 Art 11 AEI Directive.

72 Directive 2003/4 contains an Annex providing a correlation table of provisions relating to the former Directive 90/313 and itself. For a useful insight into the implementation challenges arising from Directive 90/313, see Krämer, 2002, pp 135 *et seq.*

73 Art 7 of Directive 90/313, which required Member States to provide only general information to the public on the state of the environment.

74 Art 1(a)–(b) AEI Directive.

75 See recital 24 of the preamble to the AEI Directive, which corresponds with Art 3(5) of the Århus Convention. Given that the AEI Directive is an environmental measure based on Art 175 EC, Member States are, in any event, vested with the competence under the EC Treaty to pass or maintain measures that afford stricter environmental protection in the policy sector concerned, so long as they are compatible with the EC Treaty. They must notify the European Commission of such measures (see Art 176 EC).



The right is far-reaching, given the Directive's broad definitions of its key terms. Specifically, 'applicant' is defined to include 'any natural or legal person' requesting environmental information.<sup>76</sup> 'Environmental information' is defined very broadly indeed<sup>77</sup> to cover a wide range of information on: the state of the elements of the environment and their mutual interaction, such elements including air and atmosphere, water, soil, land, landscape and natural sites, biological diversity and its components such as GMOs; factors affecting or likely to affect environmental elements; measures and activities affecting or likely to affect or intended to protect the above-mentioned factors and/or elements; reports on implementing EC environmental legislation; cost-benefit and other economic analyses and assumptions used within the framework of above-mentioned measures or activities; and on the state of human health and safety, and conditions of human life, cultural sites and built structures inasmuch as they are affected by environmental elements.<sup>78</sup> In alignment with the Århus Convention,<sup>79</sup> 'public authority' is defined broadly to include not only government and public administration (with the possibility of Member States being able to exempt bodies engaged in judicial or legal review of decisions regarding access to information requests) but also natural and legal persons performing public administrative functions or otherwise having public responsibilities or functions in relation to the environment.<sup>80</sup> Accordingly, the right of access to information is secured even if Member States seek to delegate, transfer or contract out information and information services to private entities.<sup>81</sup> It also constitutes a particular application of the integration principle set out in Art 6 of the EC Treaty, which provides that environmental protection requirements are to be integrated into the definition and implementation of EC policies and activities.<sup>82</sup>

Article 3(2)–(4) of the AEI Directive specifies the procedural rules incumbent on Member States' public authorities to observe in relation to responding to requests for information. Subject to a list of exceptions provided in Art 4 of the Directive, Member States are required to ensure that as soon as possible and at the latest within a month after receipt of a request for environmental information, such information is to be made available to the applicant.<sup>83</sup> However, this deadline may be extended, where volume and complexity of the information so require. In such cases, applicants are to be notified as soon as possible, and in any event before the end of the initial one-month

76 Art 2(5) and recital 8 of the preamble to the AEI Directive.

77 The EC definition is more extensive than that provided in Art 1(3) of the Århus Convention.

78 Art 2(1) and recital 10 of the preamble to the AEI Directive.

79 Art 2(2) of the Convention.

80 Art 2(2) and recital 11 of the preamble to the AEI Directive.

81 See recital 12 of the preamble to the AEI Directive.

82 See recital 11 of the preamble to the AEI Directive.

83 Art 3(2)(a) AEI Directive. See also recital 13 of the preamble to the Directive.

period.<sup>84</sup> If a request is formulated in too general a manner, public authorities must notify the applicant within a month of receipt of the initial information application of the need to specify the request as well as assist the applicant in this task.<sup>85</sup> Refusals of requests of information, either in full or in part, must be furnished to applicants together with reasons for a rejection within one month of receipt of a request.<sup>86</sup> Refusals must be notified in writing or electronically if the request is in writing, or if the applicant so requests and must contain reference to the applicant's rights to have the decision reviewed.<sup>87</sup> Member States are under a general duty to make reasonable efforts to ensure that environmental information at their disposal is held in forms or formats which are readily accessible and reproducible electronically,<sup>88</sup> and to ensure that information is to be made available where possible in a form or format requested by the applicant.<sup>89</sup> These procedural requirements correspond largely with those stipulated in the Århus Convention.<sup>90</sup>

Under Art 3 and other provisions of the Directive, Member States are also required to take certain steps to ensure that the mode and manner of reacting to requests for information are both user-friendly and constructive. Specifically, Art 3(5) of the AEI Directive requires Member States to ensure that its public administration takes steps to assist applicants requesting information by requiring officials to be supportive, that it provides publicly accessible lists of relevant public authorities and that practical arrangements are put in place to ensure access rights may be effectively exercised.<sup>91</sup> In addition, Member States are to require their public authorities to disseminate adequate information and advice to the public about their access to information rights.<sup>92</sup> Access to public registers or lists established for this purpose must be free of charge.<sup>93</sup> Any charges Member States levy for the supply of requested information must 'not exceed a reasonable amount' and must be made publicly available in a schedule of such administrative fees and information as to the circumstances in which they may be imposed.<sup>94</sup> Recital 18 of the preamble to the AEI Directive indicates that this implies as a general rule that charges may not exceed actual costs of reproducing material and that requirements

84 Art 3(2)(b) AEI Directive. Compare with Art 3(4) of former Directive 90/313, which simply set a 2-month deadline for public authorities to reply to information requests.

85 Art 3(3) AEI Directive. 86 Art 3(4) third paragraph AEI Directive.

87 Art 4(5) AEI Directive. 88 Art 3(4) second paragraph AEI Directive.

89 Art 3(4) first paragraph (a)–(b) AEI Directive.

90 See notably Art 4(1), (2) and (7) of the Århus Convention.

91 Art 3(5) (a)–(c) AEI Directive, which is the counterpart to Art 5(2) of the Århus Convention.

92 Art 3(5) final paragraph, AEI Directive. See Art 3(2) of the Århus Convention.

93 Art 5(1) AEI Directive, corresponding with Art 5(2)(c) of the Århus Convention. This constitutes an advance on Directive 90/313, which addressed the issue of fees only from the perspective of the supply of information (Art 5).

94 Art 5(2)–(3) AEI Directive, corresponding with Art 4(8) of the Århus Convention.

for advance payment should be limited. However, the recital also concedes that a commercial rate and advance payment may be charged where necessary in order to guarantee the continuation of collection and publication of such information. If information can be separated from parts exempted from disclosure, then the Member State must ensure that its public administration discloses the non-exempted parts.<sup>95</sup> In the event of receiving a request for information that it does not hold, a public authority is obliged as soon as possible thereafter either to inform the applicant of the relevant authority which it believes holds the information concerned or itself transfer the request to the authority concerned.<sup>96</sup>

Article 4(1)–(2) of the AEI Directive provides a definitive list of exceptions to the duties to disclose environmental information enshrined in Art 3, which corresponds with the Århus Convention's set of derogations.<sup>97</sup> Member States are entitled but not required to refuse access to information on the basis of such exceptions. Article 4(1) specifies a number of general grounds justifying rejection of a request for information, namely that the information requested: is not held by or for the public authority receiving the request;<sup>98</sup> is 'manifestly unreasonable';<sup>99</sup> is formulated in too general a manner;<sup>100</sup> concerns material, documents or data not yet completed or finalised;<sup>101</sup> or relates to internal communications, bearing in mind the public interest served by disclosure.<sup>102</sup> Article 4(2) provides a list of grounds for refusing information requests where certain specific public interests would be adversely affected. Specifically, the interests protected are: confidentiality of public authority proceedings, in so far as confidentiality is protected by law;<sup>103</sup> international relations, public security or national defence;<sup>104</sup> the course of justice, the ability of any person to receive a fair trial or the ability of a public authority to carry out a criminal or disciplinary enquiry;<sup>105</sup> confidentiality of commercial or industrial information where protected by national or EC law to protect a legitimate

95 Art 4(4) and recital 17 of the preamble to the AEI Directive, corresponding with Art 4(6) of the Århus Convention.

96 Art 4(1)(a), second sentence AEI Directive, corresponding with Art 4(5) of the Århus Convention.

97 Specifically, Arts 4(3)–(4) of the Convention.

98 Art 4(1)(a) AEI Directive. However, as noted earlier the authority is required in this event to assist the applicant in tracing the information source.

99 Art 4(1)(b) AEI Directive.

100 Art 4(1)(c) AEI Directive. However, as noted earlier, the authority is under a duty to assist the applicant to specify their request under Art 3(3).

101 Art 4(1)(d) AEI Directive. In such an event, the recipient of the request is required to identify the authority preparing the material and the estimated time required for completion by virtue of Art 4(1), final paragraph.

102 Art 4(1)(e) AEI Directive.

103 Art 4(2)(a) AEI Directive.

104 Art 4(2)(b) AEI Directive.

105 Art 4(2)(c) AEI Directive.

economic interest (such as statistical confidentiality or tax secrecy);<sup>106</sup> intellectual property rights;<sup>107</sup> confidentiality of personal data or files of a natural person where the person has not consented to public disclosure and where such confidentiality is protected by national or EC law;<sup>108</sup> interests or protection of a person volunteering information without being under a legal duty to do so, where they have not consented to public disclosure;<sup>109</sup> and the protection of the environment (such as location of rare species).<sup>110</sup>

Some of the exceptions listed in Art 4(2) are subject to an important caveat. Specifically the exceptions relating to confidentiality as well as the protection of the environment<sup>111</sup> are not applicable where a request concerns information on emissions into the environment.<sup>112</sup> This particular qualification is partially reflected in the Århus Convention,<sup>113</sup> and serves to boost the rights of access to information particularly pertinent to issues connected with environmental law enforcement. Whether or not this qualification is compatible with privacy rights recognised under the EU Charter of Fundamental Rights (Arts 7–8) and the Council of Europe's European Convention on Human Rights and Fundamental Freedoms (Art 8) is potentially debatable, in so far as disclosures contain information about particular persons. However, it is submitted that it is questionable, to say the least, how disclosure of information pertinent to the state of the environment may be held to be undermining fundamental human rights, and in any event the EU institutions as well as the Member States have a considerable margin of discretion within the legal framework of privacy protection to carry out their responsibilities of protecting the environment as a matter of general interest.<sup>114</sup>

Whilst Art 4 of the AEI Directive provides several grounds enabling a public authority to refuse a request, it is important to note in this context the clear legal limits relating to their scope. Specifically, the AEI Directive requires that the grounds for refusal cited in Art 4 are interpreted restrictively. In each individual case, the public authority in receipt of a request for information must engage in weighing the public interest of disclosure as

106 Art 4(2)(d) AEI Directive. 107 Art 4(2)(e) AEI Directive.

108 Art 4(2)(f) AEI Directive. By virtue of Art 4(2) third paragraph, Member States are also specifically required in this context to respect Directive 95/46 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ 1995 L281/31).

109 Art 4(2)(g) AEI Directive. 110 Art 4(2)(h) AEI Directive.

111 Namely, the exceptions cited in Art 4(2)(a),(d),(f),(g) and (h) of the AEI Directive.

112 Art 4(2) second paragraph, third sentence of the AEI Directive.

113 In the context of protecting confidentiality of commercial and industrial information under Art 4(3)(d) of the Århus Convention.

114 See Art 52 of the EU Charter and Art 8(2) ECHR. The margin is subject, in particular, to the principle of proportionality recognised in the human rights jurisprudence of the ECJ as well as the ECHR.

against the interest served by a refusal of a request.<sup>115</sup> In addition, the list of exceptions contained in Art 4 constitutes an exhaustive list; Member States are not entitled to rely on grounds other than the ones expressly stated in the AEI Directive. Disclosure of information should be the general rule of thumb, subject only to the specific derogations set out in the Directive.<sup>116</sup> This accords with the general approach of the ECJ when interpreting derogations from fundamental rights in EC law, namely to apply a strict and narrow interpretation to any derogations provided.<sup>117</sup> Finally, where a Member State does decide to provide for exceptions to the access to information rights, the AEI Directive entitles it to draw up a publicly accessible list of criteria for the purpose of steering public authorities on how to determine individual requests for information.<sup>118</sup> Such a list of criteria would be of value to all parties involved in order to provide as much clarity and consistency with respect to public authority practice in relation to some of the more general and undefined exceptions listed in Art 4 of the AEI Directive (for example, clarification of requests deemed to be ‘manifestly unreasonable’). Self-evidently, though, such criteria laid down at national level must not serve or lead to undermine the integrity of the parameters set down in Art 4 in relation to the exceptions. In order to minimise dangers of this sort, the Commission would be well advised to be involved in drawing up recommendations and guidance on criteria setting, a strategy that would be in accordance with its focus on stimulating good practice in terms of implementing EC environmental legislation under the auspices of the EU’s Sixth Environmental Action Programme (2001–2010).

#### *8.4.1.2 Public dissemination of environmental information under the AEI Directive*

Articles 7–8 of the AEI Directive serve to implement the requirements flowing from Art 5 of the Århus Convention on collection and dissemination of environmental information to the public at large, as far as EU Member States and their public authorities are concerned. Article 7 of the Directive contains various obligations concerned with the organisational aspects of Member State collation of information with a view to rendering it transparent and in a suitable format for public dissemination. Article 8 focuses on qualitative aspects of the information garnered.

115 Art 4(2) second paragraph, first and second sentences of the AEI Directive, corresponding with Art 4(4) second paragraph of the Århus Convention.

116 See recital 16 of the preamble to the AEI Directive.

117 See for instance Case C–321/96 *Mecklenburg*, where the ECJ applies this approach in relation to the AEI Directive’s predecessor, namely Directive 90/313.

118 Art 4(2) third paragraph AEI Directive.

As far as the collection of environmental information is concerned, Art 7 of the AEI Directive requires Member States to ensure that they make available a number of sources of environmental information to the public, subject to Member States being able, at their option, to use the exceptions specified in Art 4.<sup>119</sup> In alignment with the Århus Convention, three types of information are addressed in this regard: legal and policy-related texts; information on the condition of the Member State's environment, and information to be disseminated in the event of threats to human health or the environment. Article 7(2) specifies that the following legal and policy documentation should be made available as a minimum: texts of international agreements, EC law as well as national law on the environment;<sup>120</sup> policies, plans and programmes relating to the environment;<sup>121</sup> progress reports on implementation of environmental law when prepared in electronic form by public authorities;<sup>122</sup> reports on the state of the environment;<sup>123</sup> data or data summaries derived from the monitoring of activities affecting or likely to affect the environment;<sup>124</sup> authorisations with a significant environmental impact and environmental agreements or a reference to a place where such information may be requested or found;<sup>125</sup> environmental impact studies and risk assessments concerning environmental elements or a reference to a place where such information may be requested or found.<sup>126</sup> Article 7(3) requires Member States to publish at regular intervals, not exceeding four years, 'national and, where appropriate, regional or local reports on the state of the environment'. Such reports must include information concerning the quality of as well as pressures on the environment.<sup>127</sup> Although it is evident from this provision that Member States are provided with discretion to compile reports at regional and local levels on the state of the environment in accordance with their particular constitutional requirements, it is also clear from its wording and aims that, collectively, the reports published must at least offer nationwide coverage in terms of information on environmental quality and pressures. By virtue of Art 7(4) of the AEI Directive, Member States are obliged to take necessary measures to ensure that, in the event of an imminent

119 Art 7(5) AEI Directive, corresponding with Art 5(10) of the Århus Convention.

120 Art 7(2)(a) AEI Directive, corresponding with Art 5(5)(a)–(c) of the Århus Convention.

121 Art 7(2)(b) AEI Directive, corresponding with Art 5(5)(a) of the Århus Convention.

122 Art 7(2)(c) AEI Directive, corresponding with Art 5(5)(a) of the Århus Convention.

123 Art 7(2)(d) in conjunction with Art 7(3) AEI Directive. See counterpart provision Art 5(3)(a) and 5(4) of the Århus Convention.

124 Art 7(2)(e) AEI Directive. See counterpart provision Art 5(7)(a) of the Århus Convention.

125 Art 7(2)(f) AEI Directive, corresponding in part with Art 5(7)(a)–(b) of the Århus Convention.

126 Art 7(2)(g) AEI Directive, corresponding in effect with Art 5(7)(a)–(b) of the Århus Convention.

127 The corresponding stipulation of the Århus Convention (Art 5(4)) provides contracting parties with the option of producing such reports on a 3- or 4-year basis.

threat to human health or the environment, caused either naturally or from human activity, all information held by public authorities that could assist in the prevention or mitigation of harm arising from the threat concerned is disseminated immediately.<sup>128</sup> Self-evidently, this provision requires Member States to take active precautionary steps to ensure that their authorities are in a suitable position to provide this information in a timely fashion if such a situation arises. This implies that that relevant information is to be organised and stored on the basis that its dissemination may be readily be accessed when required.

Article 7 of the AEI Directive also seeks to ensure that Member States organise the collation of environmental information held by public authorities in a way that readily lends itself to being disseminated to the general public. The first paragraph of Art 7(1) lays down a general obligation in this regard, stipulating that public authorities are to organise their environmental information with a view to its 'active and systematic' public dissemination, in particular by means of computer telecommunication and/or electronic technology (for example, via the internet) where this available. Member States are under a concomitant general duty to ensure that environmental information 'progressively' becomes available in electronic databases readily accessible to the public via public telecommunications networks,<sup>129</sup> although this obligation does not apply to information collected before the entry into force of the AEI Directive (14 February 2003).<sup>130</sup> Further encouragement for Member States to promote the use of electronic systems as a means of storing as well as communicating environmental information is provided in Art 7(6) of the AEI Directive, which stipulates that Member States may fulfil the collection and organisational requirements of Art 7 as a whole by creating relevant webpage links to internet sites hosting required information.

In terms of other organisational aspects, the AEI Directive does not include any provisions to follow up those contained in the Århus Convention on establishing a system of publicly accessible computerised pollution inventories. This is because the EU has already proceeded to develop a central, standardised European database system providing information on certain pollution emissions. Under Art 5(9) of the Århus Convention, contracting parties are obliged to take steps to provide over time a 'coherent, nationwide system of pollution inventories or registers on a structured, computerised and publicly accessible database compiled through standardised reporting'.<sup>131</sup> This latter provision has enormous potential in facilitating enforcement of agreed environmental emission standards, given that such databases could

128 This corresponds with the duties under Art 5(1)(c) of the Århus Convention.

129 Art 7(1) second paragraph of the AEI Directive, corresponding with Art 5(3) of the Århus Convention.

130 Art 7(1) third paragraph of the AEI Directive.

131 Art 5(9) Århus Convention.

provide a detailed account of emissions generated by particular countries, regions, conurbations and even individual plants, depending on the range and depth of information made available on such a database system. On 21 May 2003, a Protocol on Pollutant Release and Transfer Registers (PPRTR) was agreed to be adopted as a supplementary instrument to the Århus Convention and, as at the time of writing, has 37 signatories. As far as the European Union is concerned, at the time of writing the EC together with 23 Member States have so far signed Slovakia and Malta had not signed by the end of 2005. Sixteen ratifications are required for the PPRTR to enter into force.<sup>132</sup>

In line with these developments under Århus, the EU has recently established the EPER database (European Pollutant Emission Register), a free online database system available to the public via the European Environment Agency's (EEA) website.<sup>133</sup> Launched in February 2004, EPER provides information supplied by participating states on pollution emanating from some 10,000 industrial installations located in the EU and Norway. The database is intended to create an extensive internet portal to information about regional and localised environmental pollution covering the complete area of the EU as well as the European Free Trade Association by 2008.<sup>134</sup> Formally speaking, the EPER database was required to be set up by virtue of the IPPC Directive 96/61, but the idea of setting up emissions inventories dates back at least to the 1992 Rio Earth Summit. The following data is to be made accessible through EPER on a tri-annual basis from the EU Member States and other EPER-participating countries relating to the emissions to air and water of 50 industrial pollutants from 56 types of industrial activity: emissions from a specific industrial site by name/postal code/address/location; industries in specific countries or by a specific activity; and emissions by name of pollutant. It also provides general information on reported pollutants including the impacts on environment and health. The European Commission also intends to upgrade the EPER and transform it into a more comprehensive public register by 2009. This future online register, to be called the European Pollutant Release and Transfer Register (EPTR), will cover 91 pollutants from 65 different industrial activities emitted to air, water and land. It will also provide information on the management operations by installations concerning solid waste and waste water as well as disseminate information about pollution from diffuse sources (for example, traffic, aviation, shipping, agriculture). Reporting will be conducted on an annual basis instead of the current tri-annual reporting framework for EPER. The EPTR

132 At the time of writing in 2005, there were no ratifications. Further information may be obtained from: [www.unece.org/eve/pp/ecprotocol.htm](http://www.unece.org/eve/pp/ecprotocol.htm)

133 EPER's website: [www.eper.cec.eu.int](http://www.eper.cec.eu.int)

134 See European Commission Press Releases (Rapid Database): IP/04/249, Brussels, 23.2.2004; MEMO/04/234 and IP/04/1196, Brussels, 8.10.2004; IP/05/854, Brussels, 6.7.2005.



register is intended to serve to implement the EC's signature in May 2003 to the UNECE Protocol on Pollutant Release and Transfer Registers.

One of the most crucial components of the AEI Directive relates to obligations in Art 8 concerning the quality of environmental information collated and disseminated to the public. Its predecessor, Directive 90/313 did not include any specific provisions regarding the qualitative state of environmental information. Specifically, Art 8(1) sets out the following key requirement:

1. Member States shall, so far as is within their power, ensure that any information that is compiled by them or on their behalf is up to date, accurate and comparable.

This general obligation<sup>135</sup> applies to the contents of the three types of information sources to be disseminated under Art 7. In addition, it is submitted that it is of legal relevance in connection with the disclosure of environmental information by public authorities to the public on request under Art 3 of the AEI Directive.<sup>136</sup> Article 8(1) inherently requires Member States to ensure that adequate financial, technical and human resources are made available to their competent authorities so as to ensure fulfilment of the critically important criteria of temporal currency as well as factual accuracy of environmental information disseminated or disclosed. However, the provision is subject to the qualification that Member States are to carry out its obligations 'so far as is within their power'. This indicates that Member States retain a considerable margin of discretion in terms of fulfilling the criteria, in particular determining the level of resources to be allocated from the public purse into improving existing environmental information collection and analysis systems. It would, though, be inaccurate to suggest that this caveat renders the obligations in Art 8(1) of the AEI Directive without any legal force. In particular, the provisions require, at the very least, Member States to take active steps to consider in a serious and meaningful way possibilities (administrative as well as technical) of improving environmental data collection, and provide a reasoned justification for conclusions that they make in relation to these considerations. A failure to undertake these minimum

135 This requirement corresponds with the more general and limited requirement set out Art 5(1)(a) of the Århus Convention that 'public authorities possess and update environmental information which is relevant to their functions'.

136 In response to information requests, public authorities are obliged by virtue of Art 8(1) (in the author's opinion) to disclose at least the most recent information they have at their disposal. In addition, such authorities should in principle ensure that any information disclosed is of current value so that it is of meaningful assistance in terms of enabling them to fulfil their particular functions assigned under national law. This latter obligation is, however, subject to the caveat 'in so far as is within their power' contained in Art 8(1).

steps would constitute a violation of Art 8(1), and would be in all probability justiciable before the national courts of the Member States under the terms of the *Kraaijeveld* jurisprudence (Case C-72/95), as discussed in Chapter 6.

Article 8(2) of the AEI Directive includes the second of the Directive's provisions on qualitative aspects of environmental information. It requires public authorities, in the context of a request for information on the environmental impact of particular factors specified in Art 2(1)(b) of the Directive,<sup>137</sup> to supply on request details regarding the authority's methods of analysis of the impacts. Specifically, they are to report to the applicant on the place where the following may be found that have been used to compile environmental information: measurement procedures, including methods of analysis; sampling; pre-treatment of samples. Alternatively, applicants may be referred to a standardised procedure where this is used. This particular provision is designed to ensure that scientific analysis conducted by public authorities of human activities affecting the environment is rendered as transparent as possible, for instance in relation to analysis of exposure to particular emissions into air, water and/or soil from industrial installations. Disclosure of such information opens up the possibility for individuals to subject public authority monitoring of environmental quality and safety to rigorous scrutiny, and as such constitutes an important right for individuals to ensure that the legal commitments on quality entered into under Art 8(1) are adhered to.<sup>138</sup>

#### 8.4.1.3 *Impact of the AEI Directive on EC environmental law enforcement*

Given that the deadline for transposing the AEI Directive has passed only relatively recently, it is probably premature to speculate on the extent of the Directive's practical impact in assisting in the enforcement of EC environmental legislation. In several Member States it is evident that national legal systems and administrative policy and practice have not yet caught up with the requirements of the Directive.

For as far as implementation of the AEI Directive is concerned, according to latest European Commission press reports<sup>139</sup> at the time of writing, seven Member States had received second written warnings from the Commission

137 Art 2(1)(b) AEI Directive, a component of the definition of 'environmental information' refers to: 'factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a)'.

138 See recital 20 of the preamble to the AEI Directive, which notes that disclosure of methodology of information compilation is important in assessing the relative quality of the information.

139 European Commission 'Rapid' Press Release Service ([www.europa.eu.int/rapid/press](http://www.europa.eu.int/rapid/press)) document IP/05/892, Brussels, 11.7.2005.

under Art 226 EC in having failed to notify legislation intended to implement the AEI Directive: Belgium, France, Greece, Hungary, Italy, Luxembourg and Spain.<sup>140</sup> Even where Member States have so far failed to transpose the AEI Directive into national law, it is clear that this will not be a bar to the legal operation of many of its provisions within their territories. Specifically, it is evident that a number of the Directive's provisions satisfy the criteria for direct effect so that in particular private persons are entitled to rely on the rights of access to information guaranteed under Arts 3 and 7 (2) of the AEI Directive directly within the national legal order and enforce them against Member State public authorities holding environmental information. It is foreseen that Member States are to issue national reports on their experience with the new Directive by 14 February 2009, which will then be used as source material for a subsequent EC-wide report compiled by the Commission, which will consider whether there might be any need for legislative revision.<sup>141</sup>

There is little doubt that the AEI Directive has the potential to offer a great deal in terms of assisting the opportunities of enforcement of EC environmental legislation by private persons, including notably NGEOS. Specifically, the Directive provides individuals and NGOs with a very useful tool in seeking to establish the extent to which the private as well as the public sectors of the national economy are acting in compliance with minimum binding environmental standards, as agreed and set at EC level. In particular, the right of access to environmental information held by public authorities enables private individuals to determine to what extent such authorities are seeking to act on information they receive in monitoring the state of the environment, in particular from monitoring the types and quantities of emissions and discharges from industrial entities. If a public authority responsible for enforcing adherence to an EC environmental norm within the territory of a Member State is found wanting in this respect, private individuals have the opportunity to complain to the European Commission with a view to promoting the use of Art 226 EC enforcement proceedings against the Member State involved, and/or seek independent legal review before the relevant national authorities and courts, either under the auspices of existing national procedures, if available, or by virtue of the prospective system of rights to access to environmental justice envisaged under the Draft

140 More information will be forthcoming on the state of implementation of the AEI Directive in the Commission's Seventh Annual Survey on the implementation and enforcement of EC environmental law for the calendar year 2005, which will be published in mid-2006. The Report will contain a definitive list of transposition legislation of the Member States in respect of EC environmental legislation required to be implemented in 2005, which includes the AEI Directive.

141 Art 9 AEI Directive. This review process lends itself to feeding into the amendment and review of compliance procedures provided in Arts 14-15 of the Århus Convention.

AJEM Directive, discussed in section 8.2. Accordingly, the AEI Directive provides an incentive here for Member States to ensure that appropriate action is taken by public authorities to ensure that instances of activities found not to be in compliance with EC environmental norms are addressed satisfactorily.

On the other hand, much of the success of the AEI Directive will depend on the relative efficiency as well as effectiveness of public authorities in fulfilling the requirement underpinning the Directive to ensure that the quality of environmental information that they collect is up to date and accurate (as required under Art 8(1) of the Directive). It is important not to lose sight of the fact that it is public authorities entrusted with environmental protection duties as opposed to private individuals and associations that are vested with legal powers to inspect sites as well as having the technical and financial resources to make effective use of these powers. Given these factors, the role of the private person in enforcing EC environmental law is never going to be as significant as that of a public authority. Nevertheless, the AEI Directive endows the public with certain rights which may be used potentially to good effect in inducing public authorities involved in environmental law enforcement to carry out their work effectively where evidence of a violation of an EC environmental standard is publicly accessible. In addition, the access to information rights provided in the AEI Directive offer the chance for private individuals to put pressure on public authorities to carry out up to date assessments of the state of the environment, where individuals consider that there are environmental protection concerns raised by the absence of information concerning a particular area or activity. One clear example of a deficit of information in the United Kingdom would be the longstanding paucity of information available on the handling and management of fly ash from municipal waste incinerators, a residue containing extremely high levels of toxic elements such as dioxins, which have potentially very serious adverse health effects when coming into contact with humans or animals. In addition, uncontrolled management of this fraction of waste may have serious long-term detrimental consequences for the environment, for instance if disposed of in an uncontrolled fashion so as to be liable over time to seep through soil and contaminate groundwater. Concerns have abounded as to where such fly ash is actually deposited in the UK and whether its waste management is compatible with EC waste legislation, notably the health and safety requirements of the Waste Framework Directive (WFD) 75/442, as amended.<sup>142</sup>

The AEI Directive does not address two aspects of the Århus Convention which are targeted at environmental information provided by the private commercial as opposed to public sector. Specifically, under Art 5(6) of the

<sup>142</sup> Art 4 WFD.

Convention, contracting parties are required to 'encourage' operators whose activities have a significant impact on the environment to inform the public 'regularly' of the environmental impact of their activities, 'where appropriate' by way of voluntary eco-labelling or eco-auditing schemes or by other means. The EC has already adopted voluntary measures in this regard,<sup>143</sup> so the AEI Directive did not, strictly speaking, need to take specific action here. This rather soft clause in Århus therefore offers nothing new in terms of substance for the EC, and contains a fundamental flaw in failing to introduce either any element of compulsion or clear incentive (such as through fiscal credits) as a means of ensuring that in practice such persons are likely provide consumers with a full and fair disclosure of the environmental impact of their activities. Article 5(8) of the Århus Convention requires contracting parties to develop mechanisms with a view to ensuring that sufficient product information is made available to the public so that the latter is in a suitable position to make informed environmental choices. The EC has already adopted a number of measures requiring environmental information to be incorporated in labels of certain products (Krämer, 2003, pp 230–326; Onida, 2004, p 129), such as warnings in relation to dangerous chemicals,<sup>144</sup> batteries,<sup>145</sup> GMOs<sup>146</sup> as well as quality-related information regarding organic agricultural produce<sup>147</sup> and energy consumption.<sup>148</sup> However, this particular provision in the Århus Convention is an important requirement for the EC, given that the latter has a long way to go to ensure that relevant environmental information is provided to consumers in relation to all products containing substances which constitute a threat to the environment, and in relation to the production processes of products which may have significant adverse impacts on the environment.

## 8.5 Concluding remarks

There is little doubt that the recent package of EC measures designed to implement the Århus Convention at national level together with Directive 2004/35 on environmental liability (EL Directive) have enhanced the possibilities for

143 See Regulation 1980/00 on a revised Community eco-label award scheme (OJ 2000 L237/1) and Regulation 1836/93 allowing voluntary participation by companies in the industrial sector in a Community eco-management and audit system (OJ 1993L168/1), as amended by Regulation 761/01 (OJ 2001L114/1).

144 Directive 67/548 on the classification, labelling and packaging of dangerous substances (OJ 1967 L196/1), as amended.

145 Directive 91/157 (OJ 1991 L78/38), as amended.

146 Regulation 258/97(OJ 1997 L43/1). 147 Regulation 2092/91 (OJ 1991 L198/1).

148 Directive 92/75 on the conservation of energy and other resources by household appliances (OJ 1992 L297/16) and Directive 99/94 relating to the availability of consumer information on fuel economy and CO<sup>2</sup> emissions in respect of the marketing of new passenger cars (OJ 2000 L12/16).

civil society to become more involved and influential in the enforcement of EC environmental legislation. Endowed with rights to seek legal review of acts and omissions of Member State authorities affecting the environment as well as with rights to obtain information on the state of the environment held by public authorities of the Member States, private persons are now better equipped with legal tools to hold public authorities to account in respect of their activities affecting the environment. Apart from the EL Directive, the legislation takes on board the financial constraints faced by such entities, including NGEOS, when contemplating undertaking enforcement strategies through legal processes. Admittedly, the Draft AJEM Directive adopts a relatively weak stance in terms of enhancing possibilities for private persons to be able to enforce EC environmental legislation directly against other private persons. However, this is mitigated to some extent by the rights granted by the EL Directive to private persons to request action by competent Member State authorities to take appropriate legal steps against persons contravening EC environmental legislation. In summary, notwithstanding the various technical drawbacks and limitations discussed above, the existing and prospective wave of EC measures addressing access to justice issues at national level in response to the Århus Convention provide a more solid legal foundation for the private enforcement of EC environmental legislation in the future.



## Section 2: Taking action at EU level





## PRIVATE ENFORCEMENT OF EU ENVIRONMENTAL LAW AT EU INSTITUTIONAL LEVEL (1): ACCESS TO JUSTICE AND INFORMATION

Alongside the various rights that private persons have in seeking to enforce European Community environmental legislation at Member State level, the EC legal system also provides certain rights and administrative procedures for civil society to take to ensure that EU institutions also adhere to their legal obligations pertaining to environmental protection. The objective of this chapter and Chapter 10 in Part Two is to examine these particular rights and procedures in detail, with a view to assessing their degree of effectiveness in being able to provide private persons, including notably non-governmental environmental organisations (NGEOs), a genuine opportunity to hold to account EU institutional decision-making affecting the environment. Specifically, this chapter will examine the various core legal rights available to private persons for the purpose of supervising the conduct of non-judicial EU institutions impacting on environmental protection issues. Chapter 10 will consider the particular complementary administrative complaints procedures that are in place at EU level for civil society to use in order to monitor and question particular aspects of EU environmental decision-making.

This chapter will consider two key sources of EC law that permit private individuals to exercise a degree of legal control over the decision-making processes and measures adopted at EC level. Specifically, section 9.1 seeks to examine the various existing EC Treaty provisions either entitling or effectively enabling private persons to take steps to obtain judicial review of the activities of EU institutions dealing with environmental issues. For the purposes of this chapter, references to EU institutions mean the institutions listed in Art 7 of the EC Treaty, unless otherwise indicated (European Commission, Council of the EU, European Parliament, Court of Justice and Court of Auditors). Section 9.2 assesses the various rights afforded to private individuals at EC-level for the purpose of accessing information held by EU institutions and bodies concerning environmental matters. Both main

sections also assess the prospective impact of certain draft EC legislation currently working its way through the EC's legislative process, which is set to make notable changes to the existing legal picture regarding access to environmental justice and information.

The draft legislation concerned is intended to implement the provisions of the 1998 United Nations Economic Commission for Europe's (UNECE) Convention on access to information, public participation in decision making and access to justice in environmental matters (the Århus Convention)<sup>1</sup> at EC level. The Århus Convention has already been discussed in some detail in Chapter 8 with regard to its impact on the legal systems of the EU Member States through the medium of EC environmental law. In addition to ensuring that the legal systems of the Member States adhere to the Convention's requirements, the EU has also been mindful of the need to make certain that the institutions and bodies of the Union also adhere to the Convention's requirements on access to environmental justice and information as well as those in relation to participation in decision making. As part of this process, the European Community has recently ratified the Århus Convention in the form of a Council decision.<sup>2</sup> In addition, in October 2003 the European Commission proposed a draft regulation<sup>3</sup> (hereinafter referred to as the 'Draft Århus Regulation') intended to provide the necessary detailed implementing provisions binding on the Union's supranational institutions and bodies. As at the end of 2005, the proposal had not yet been approved by the EC's legislative institutions, and was in the middle of being processed via the relevant legislative process.<sup>4</sup> This chapter will consider the Draft Århus Regulation's impact in relation to the areas most closely associated with EC environmental law enforcement, namely access to justice and information. As will be discussed in detail below, the Draft Århus Regulation is set to have a significant impact on the operations of the non-judicial institutions and bodies of the EU, particularly in relation to the issue of access to environmental justice.

## 9.1 Access to environmental justice at EU level

An integral part of the agenda to implement the access to environmental justice principles established by the 1998 Århus Convention, as applied

1 2161 UNTS 447. For the text of the convention see: [www.unece.org](http://www.unece.org)

2 Decision 2005/370 on the conclusion, on behalf of the European Community of the Convention on access to information, public participation in decision making and access to justice in environmental matters (OJ 2005 L124/1).

3 COM(2003)622 Commission proposal for a Regulation on the application of the provisions of the Århus Convention on access to information, public participation in decision making and access to justice in environmental matters to EC institutions and bodies, 24.10.2003.

4 Namely, the co-decision procedure under Art 251 EC, as envisaged in Art 175(1) EC for EC environmental measures.

within the context of the EU, is to ensure that civil society has genuine possibilities of ensuring that EU institutions are held to account under law in respect of their activities affecting the state of the environment. As mentioned earlier, the European Community's signature to, and subsequent ratification of, the 1998 Århus Convention has set in train legislative steps designed to enhance the possibilities of private persons being able to enforce EC environmental protection legislation *vis à vis* its own supranational institutions, in the form of the Draft Århus Regulation.

This first section of the chapter examines the state of EC rules relating to access to environmental justice at EC level in two stages, namely the situations applicable pre- and post-implementation of the Århus Convention. First, the current range of EC Treaty provisions providing rights of action against EU institutions under EC law as well as other relevant judicial review mechanisms are considered. The provisions are also examined in light of relevant treaty changes envisaged to be made to them by virtue of the 2004 European Union Constitution.<sup>5</sup> Second, the prospective impact of the Draft Århus Regulation on the current EC legal framework pertaining to access to environmental justice is assessed.

### ***9.1.1 Access to justice under the current EC Treaty system (pre-Århus Convention)***

Under the current legal framework of the EC Treaty,<sup>6</sup> a number of provisions provide a limited range of possibilities for private persons to take legal action directed against certain EU institutions where such persons consider that an institution has acted in contravention of EC law. These particular provisions will be examined below, with a view to assessing their relevance to the environmental policy sector. To date, and from the perspective of private litigants, the particular provisions have not been subject to significant amendment since their original incorporation in the 1957 Treaty of Rome, a time when environmental protection policy did not specifically feature within the political or legal framework of the European Economic Community. The texts of the relevant EC Treaty provisions on private individuals' rights to take legal action against the Community have remained the same for almost half a century. This has been a major factor that has served to restrict possibilities for the development at EC level of a viable system of access to environmental justice.

Before referring to the various EC Treaty provisions relevant to judicial review of EU institutional action and omissions, it is worth briefly clarifying the role of the EU's judicial institution in this context.

<sup>5</sup> Treaty establishing a Constitution for Europe (OJ 2004 C310, 16.12.2004).

<sup>6</sup> Namely, that as at the end of 2005 pending promulgation by the EC legislature of the Draft Århus Regulation and pending full ratification of the 2004 European Union Constitution.

The EU's judicial institution is formally known as the Court of Justice. The Court is comprised of two main judicial bodies, namely the European Court of Justice (ECJ) and the Court of First Instance (CFI). As noted in Part One of this book, the ECJ has jurisdiction to decide actions brought by the European Commission against Member States under Arts 226/228 EC. The CFI is competent to hear cases brought by private persons against acts or omissions of the European Community's institutions, and appeals from the CFI may be made to the ECJ on points of law.<sup>7</sup> Finally, the ECJ has jurisdiction to provide rulings on questions of EC law and on the validity of EC measures referred to it by national courts.<sup>8</sup> From an institutional perspective, the ECJ and CFI are elements of a single institution (Court of Justice). Within this particular institutional setting, there is a clear system of hierarchy between the CFI and ECJ, underpinned by the fact that the latter may overrule the former on points of EC law. As will be explored below, differences have recently emerged between the CFI and ECJ over the interpretation of certain EC Treaty provisions concerning private persons' rights to take legal proceedings against EU institutions. At the heart of this difference lies a long-standing legal debate related to the adequacy of these provisions in securing civil society an adequate range of genuine possibilities to seek judicial review of Community acts.

The material EC Treaty provisions include the following rights of private persons to take specific types of legal proceeding before the CFI, namely: a right under Art 232 EC to bring an action before the CFI in respect of failure to act by either the European Parliament, European Commission or Council of the EU; a right to seek annulment under Art 230 EC of a legally binding act adopted jointly by the European Parliament and the Council of the EU, or adopted solely by either the Council, Commission, European Central Bank or of an act of the European Parliament intended to have binding effects *vis à vis* third parties; and a right under Arts 235 and 288(2) EC to seek compensation in respect of acts or omissions caused by EU institutions, the European Central Bank or their servants in the performance of their duties. In addition, Art 234 EC provides the legal mechanism by which national courts may, and under certain circumstances are obliged, to refer to the ECJ for a preliminary ruling on questions of correct interpretation of EC law as well as on questions of validity of EC measures. This latter procedure has proved to be of use to private individuals, in certain types of cases, wishing to seek judicial review by the ECJ of measures taken by EU institutions.

In practice, the existing range of rights and remedies provided under the EC Treaty for private persons offers relatively little opportunity to hold EU institutional in/action to account, including notably legislative and

7 Art 225 EC.

8 Art 234 EC.

administrative acts or omissions of EU institutions relating to the environmental protection field. The restrictions on access to justice have in large part been underpinned by the judicial interpretation of the relevant treaty provisions provided by the jurisprudence of the ECJ and CFI. This has served to curtail possibilities for private persons to seek review of measures taken by EU institutions affecting the environment that might otherwise have been implied from the relevant treaty provisions.

#### *9.1.1.1 Art 232 EC—legal proceedings in respect of a failure to act*

Article 232 EC offers private persons certain limited rights to bring an action before the CFI where they consider that either the European Parliament, Council of the EU or the European Commission have, in breach of EC law, failed to act. Whereas the Member States and EC institutions are granted an automatic right to be able to present a case at court (so-called ‘privileged applicants’), private persons’ legal standing to sue is subject to fulfilment of certain conditions. As non-privileged applicants, private persons may have legal standing to bring an action only where the particular institution in question ‘has failed to address to that person any act other than a recommendation or an opinion’.<sup>9</sup>

For a number of reasons, this particular legal proceeding offers little or no opportunity for private persons to seek judicial review of those omissions of EU institutions considered by them to contravene EC law relating to environmental protection. Specifically, on a number of occasions private individuals have sought unsuccessfully to use Art 232 EC as a basis for overturning decisions on the part of the European Commission not to begin infringement proceedings against a Member State under Art 226 EC. This is an issue of direct relevance to EC environmental law enforcement, given that Art 226 proceedings constitute a key legal mechanism at EC level whereby Member States may be held to account for failures to implement EC environmental legislation correctly. The ECJ and CFI have, though, confirmed on a number of occasions that such legal action is inadmissible.<sup>10</sup> The CFI has pointed out that the obligations of the Commission contained in Art 226 does not require it specifically to take any measures in relation to private persons as ‘addressees’ in the sense referred to in Art 232 EC. Instead, from a legal perspective, the proceedings relating to the application of Art 226 EC involve an exclusively bilateral relationship between the Commission and the respective Member State.<sup>11</sup>

<sup>9</sup> Art 232(3) EC.

<sup>10</sup> See for example, Cases 4/69 *Lütticke*, 247/87 *Star Fruit*, C-371/89 *Emrich*, T-479 and 559/93 *Bernardi* and T-201/96 *Smanor*, confirmed on appeal in Case C-317/97P *Smanor*.

<sup>11</sup> Case T-479/93 and T-559/93 *Bernardi*, at para 31 of judgment.

One notable example from the available jurisprudence is *Star Fruit Co.* (Case 247/87) where a Belgian company brought Art 232 EC proceedings against the Commission for failing to take up its complaint that French import controls on bananas were incompatible with free movement of goods rules under EC law and bring Art 226 EC proceedings against France. The ECJ, in rejecting the company's claim, held that according to the scheme of Art 226 EC the Commission is not bound to commence proceedings but instead has a discretion so to do, which effectively excludes the possibility of interpreting the existence of a right for individuals to require it to adopt a specific position.<sup>12</sup> The ECJ also went further by holding that even where the European Commission decides to commence Art 226 EC proceedings and issues a reasoned opinion, with which a Member State decides not to comply within the deadline set by the opinion, the Commission has the right, but not the duty, to apply to the ECJ for a declaration that the alleged breach of EC obligations has occurred.<sup>13</sup> The bold conclusion of the Court that the Commission has total discretion appears rather questionable, given the Commission's specific duties to safeguard the application of EC law laid down in Art 211 EC and the stipulation in Art 226 EC itself that the Commission 'shall' deliver a reasoned opinion if it considers a Member State has failed to fulfil an obligation under the EC Treaty. On the other hand, Art 226 EC states that the Commission 'may' bring proceedings before the ECJ, which arguably points in favour of an ultimate power of discretion on the Commission's part as to whether it should proceed to the litigation stage of the infringement procedure. The latter interpretation appears to conflict with and undermine the earlier clear wording<sup>14</sup> in the text of Art 226 EC indicating a legal duty of the Commission to commence legal action in the event of it detecting a breach of EC law. Accordingly, a more appropriate interpretation of the word 'may' would be that it simply indicates competence on the part of the Commission to refer to the ECJ and does not relate to any special discretion. However, given the well-established position of the ECJ on this matter, it would appear that a specific amendment would have to be made to Art 226 EC in order for a delimitation of discretion on the Commission's part to occur. In view of its similar structure to Art 226 EC, the same considerations apply in respect of follow-up infringement proceedings under Art 228 EC.

Formally speaking, private persons have no legal rights under Art 232 EC to require that any complaints they lodge with the Commission about an alleged breach of law by a Member State will be assessed and that a decision on the matter will be provided to them. Articles 226 EC (and 228(2)

12 Para 11 of judgment.

13 Para 12 of judgment.

14 Namely, with the reference to 'shall' in Art 226 EC indicating a duty as opposed to a discretion to take action.

EC) do not provide for any specific procedural rights of complainants in this regard. However, as will be discussed in the next chapter, complainants have the opportunity of eliciting a reasoned response from the Commission by way of filing a complaint against the Commission with the European Ombudsman.

The approach taken by the Court of Justice on the position of legal standing of complainants under Art 232 EC is difficult to defend. It does not take into account the practical reality that a considerable fraction of the infringement procedure work by the Commission is primarily driven by information provided by private persons alleging breaches of EC law by or within Member States. For the EU25, the Commission has reported that complaints account for some 38 per cent of the total infringements detected in 2004.<sup>15</sup> This figure most certainly underestimates complainants' contribution in detecting cases of 'bad application' of EC law, given that the Commission is heavily dependent on the supply of evidence and information on infringements of this type from the general public. Complainants are an integral and central element of the practical functioning of the infringement procedures. Therefore to hold that they are not 'parties' to infringement actions taken under the auspices of Art 226 EC is an unduly formalistic conclusion to make, one that does not reflect the realities of casework dynamics or legitimate expectations for transparency in Community decision making.

Outside the context of Art 226/228 EC proceedings, the legal action in respect of failures to act under Art 232 EC procedure also has little practical value for private persons seeking to ensure that EU institutions adhere to EC environmental law. As already mentioned, in order to have legal standing to pursue legal action under that provision, private persons must demonstrate that the EC institution, contrary to EC law, failed to address a decision to them personally. Given that legislative and administrative measures taken at EC level in relation to environmental protection are normally general in scope and nature and/or addressed to Member States, this condition will rarely, if ever, be fulfilled by a private applicant in the context of Art 232 EC proceedings.

The amendments envisaged to be made to Art 232 EC by the 2004 European Union Constitution are relatively minor.<sup>16</sup> Whilst widening the scope of EU organs that may be the subject of 'failure to act' proceedings,<sup>17</sup> the Constitution does not alter the current conditions concerning legal standing for private individuals under Art 232 EC.

15 COM(2005)570, p 4.      16 Art III-367 EUC.

17 Jurisdiction is widened under Art III-367(1) EUC to include scrutiny of allegedly illegal omissions by the European Central Bank and other 'bodies, agencies, offices and agencies of the Union.'



### 9.1.1.2 Art 230 EC—annulment proceedings

Article 230 EC constitutes the principal mechanism for seeking judicial review of EC institutional decision-making. Whereas Art 232 EC is the relevant procedure for dealing with institutional omissions to act, Art 230 EC provides a judicial review procedure in respect of acts, other than recommendations or opinions, taken jointly by the European Parliament and the Council of the EU, or solely either by the Council, European Commission, or European Central Bank. In addition, action may be taken in respect of acts of the European Parliament where these are intended to produce legal effects *vis à vis* third parties.

The object of the proceedings is to seek annulment of acts considered by claimants to be in contravention of EC law. Under Art 231 EC, if an annulment action proves to be well-founded, the relevant act will usually be declared void by the Court of Justice.<sup>18</sup> As is the case with Art 232 EC, private persons wishing to bring annulment proceedings before the CFI have non-privileged status, in that they must fulfil specific conditions in order to have legal standing to sue. Specifically, Art 230(4) EC provides the possibility for natural or legal persons to be able to bring proceedings only against a decision specifically addressed to them or against a decision which, although in the form of a regulation or decision addressed to another person, is of ‘direct and individual concern’ to them.

One of the principal reasons behind the restrictions imposed on legal standing for private applicants evidently lies in a concern on the part of those having drafted the original EEC Treaty to ensure that the legislative system of the Community should not be encumbered by litigation sponsored by interest groups or individuals. The EC Treaty provisions on access to justice under Arts 230 and 232 EC have been drafted clearly with a view to ensuring that the Community legislature should be able to pass general legislation in the public interest without fear of the possibility of minority interest litigation placing legal certainty of these measures into question. No doubt also the legal standing rules have been crafted with a view to ensuring that the Court of Justice will not be overly burdened by legal challenges to Community action. Whilst there is arguably some merit underlying these concerns, in so far as they relate to EC acts of a general legislative nature, they are far less convincing when applied in relation to the administrative conduct of EU institutions. One of the enduring problems with the issue of legal standing for private persons in relation to Arts 230 and 232 EC actions has been the fact that the EC Treaty does not make any distinction

<sup>18</sup> Special rules apply in the case of regulations, where the Court has the power to state which of the effects of a regulation declared void shall be considered definitive, if it deems this necessary (Art 231 EC, second paragraph).

between legislative and non-legislative types of Community measures, and, as a consequence, the rules on private litigants' legal standing to sue has been to date unduly restrictive.

In the context of EC environmental law enforcement, the possibilities for private litigants being able to comply with the legal standing requirements in Art 230(4) EC are very restricted. In practice, private persons wishing to challenge institutional acts on the grounds that they contravene EC environmental law, are faced with the task of proving that the disputed act concerned is of 'direct and individual concern' to them personally in order to gain access to court (given that the act will most likely not be addressed specifically to them). The EC measure in question is most likely to be an act of a general nature, such as a legislative instrument relating to or affecting environmental protection standards, or an administrative decision concerning the management of a particular environmental site. The ECJ has interpreted the phrase 'individual concern' narrowly. In the leading case of *Plaumann* (Case 25/62), it defined the term to mean:

Persons other than those to whom a decision is addressed may only claim to be individually concerned if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed.<sup>19</sup>

The 'Plaumann' formula, which has remained intact despite considerable academic and judicial criticism, has served to restrict most severely the possibilities of private persons seeking to take annulment proceedings under Art 230 EC, particularly in the context of environmental law enforcement. This is because the criterion of 'individual concern', as interpreted by the ECJ, has required private litigants to demonstrate that they are affected by the act in question in a way that is clearly uniquely different to the effects felt by other persons. Accordingly, a private person will have no opportunity to seek annulment of a supranational institutional act they consider to breach EC environmental law, unless they are able to demonstrate that it impact affects them in a manner different from other persons. In practice this is almost impossible to prove, as a cursory overview of the available case law shows.

In the past, several unsuccessful attempts have been made to bring annulment Art 230 EC proceedings against the European Commission in respect of decisions it has made relating to the management of complaints made against Member States of infringements of EC law. As with cases brought under the auspices of Art 232 EC, the ECJ and CFI have consistently ruled

<sup>19</sup> Para 107 of judgment.

out the possibility of persons being able to seek a review of the decision-making of the Commission under the auspices of Art 226 EC. Such actions have been ruled inadmissible on the grounds that decisions relating to Art 226 case management, such as the closure or discontinuation of an infringement file by the Commission, are acts that are not deemed to be of direct and individual concern to private persons.<sup>20</sup> That the private person may have been the sole source of information for the Commission in relation to the subject matter of the dispute, or that the private person concerned has entered into a dialogue with the Commission services about allegations of illegal conduct on the part of a Member State are not factors that distinguish the person individually in the sense prescribed by Art 230(4) EC, according to Court of Justice jurisprudence. Unless either the EC Treaty or EC legislation provides persons with specific procedural rights *vis à vis* an EU institution, such as prior consultation, as part of the preparatory phase leading to an administrative decision to be taken by that institution, the Court of Justice is not prepared to consider that a person entering into a dialogue with the relevant institution will be able to meet the requirement of 'individual concern' under Art 230(4) EC.<sup>21</sup> Such is the case in the field of EC competition law, where third parties are provided with specific procedural rights to register their views with the Commission prior to it taking decisions relating to the anti-competitive status of other persons' business activities or a Member State's state aid.<sup>22</sup>

In confirming the wide discretion afforded to the Commission by Art 226 EC in deciding whether or not to proceed with a particular infringement case, the jurisprudence of the ECJ and CFI has effectively ruled out the possibility of a substantive review of such decision making under Art 230 EC.<sup>23</sup> Accordingly, there appears to be no possibility under the current legal framework of Art 230 EC for private persons to challenge Commission decisions relating to the handling of infringement cases. The same considerations apply with respect to decisions relating to the 'second round' infringement procedure under Art 228 EC. The clarity of the case law has deterred efforts by private persons such as NGEOS from seeking to use Art 230 for this purpose. This was reflected in the *An Taisce* case (Case T-461/93), when two NGEOS decided to drop part of an annulment action which sought review of the decision by the Commission not to take action against

20 See e.g., Cases 247/87 *Star Fruit*, T-479 and 559/93 *Bernardi*, T-201/96 *Smanor*, as confirmed on appeal to the ECJ in C-317/97P.

21 See e.g., Case T-94/04 *EEB*, at para 57 of judgment.

22 See Arts 7(2) and 27 of Regulation 1/2003 on the implementation of the rules of competition laid down in Arts 81 and 82 of the Treaty (OJ 2003 L1/1) and for example, Case 27/76 *Metro (I)*, and Art 20 of Regulation 659/99 on rules for application of Art [87] of the EC Treaty (OJ 1999 L831/1) and for example, Case 169/84 *COFAZ*.

23 See e.g., Case C-87/89 *Sonito*.

Ireland under Art 226 EC. This case concerned a decision by the Irish authorities to approve the development of a visitor centre at Mullaghmore, allegedly made in contravention of the terms of the Environmental Impact Assessment (EIA) Directive 85/337.

The foreclosure of the possibility for the public to be able to challenge Commission decisions not to take infringement proceedings against Member States has been questioned. For instance, Krämer has suggested that the current position should be modified so as to afford persons the opportunity to refer infringement cases to the ECJ, where the Commission has decided to reject the possibility of Art 226 EC proceedings (Krämer, 1996b, p 13). As discussed in Chapter 5, the possibility exists that political factors may come to influence Commission decisions on infringement issues, given the plurality of roles of the Commission within the EU's institutional setting. It therefore appears especially problematic to maintain the Commission's monopoly over decisions to prosecute Art 226/228 EC proceedings, given that the legal merits of a case may not always hold sway.

Private persons have also faced great difficulties in seeking to challenge the legality of Community decision making affecting environmental protection issues in contexts other than Arts 226/228 EC. For instance, in the *Stichting Greenpeace* case (Case T-583/93), a number of local residents as well as the environmental NGO Greenpeace sought to annul a decision taken by the Commission to agree to co-finance two power station projects in the Spanish Canary Islands under the auspices of the European Regional Development Fund. The claimants considered that the development projects had been approved at local level in contravention of the requirements of the EIA Directive 85/337. Under EC rules, the award of such Community funding is predicated on a project application being compatible with the requirements of EC law.<sup>24</sup> Greenpeace and other private persons brought an action under Art 230 EC with a view to annulling the decision to award funding from the EC budget. The CFI rejected the action as inadmissible, holding that the applicants had failed to show that they had the requisite legal standing to bring the case. Although the applicants were able to demonstrate a particular personal connection with the immediate geographical area concerned, such as proving personal residency on the islands affected by the projects or local residency on the part of several of the Greenpeace members, this was insufficient to demonstrate 'individual' concern for the purposes of Art 239(4) EC. The CFI held that the decision to award funding was a measure whose effects impinged on the local community generally and in the abstract; the

24 As required by Art 12 of Regulation 1260/1999 concerning the general provisions for the structural funds (OJ 1999 L161/1), as amended. At the time of the *Stichting Greenpeace* case, this obligation was crystallized in Art 7 of a predecessor Regulation 2052/88 (OJ 1988 L185/9).

applicants were not able to demonstrate that the Commission's act had affected them in a manner different from that felt by the rest of the local community.<sup>25</sup> In the absence of there being specific procedural guarantees set out in either EC Treaty provisions or EC legislation for the benefit of the persons such as the applicants, the CFI held that the applicants could not be deemed to be individually concerned on the basis of their involvement at EC level in making enquiries with the Commission relating to the projects. Accordingly, the fact that the applicants submitted a complaint to the Commission about the projects, filed requests for information concerning the disclosure of information relating to the Commission's decision to award funding, and/or entered into a dialogue with Commission services about the subject matter of the dispute were irrelevant factors in this regard.<sup>26</sup> The CFI's decision was upheld on appeal to the ECJ.<sup>27</sup>

In a number of other environmental cases, annulment actions brought by private persons to challenge acts by EC institutions have been declared inadmissible on similar grounds of lack of legal standing. These have included actions to challenge the legality of Community acts relating to conservation measures required in the fishing industry,<sup>28</sup> the control of trans-frontier shipments of waste,<sup>29</sup> allocation of funding under the EC's financial instrument for the environment (the LIFE programme<sup>30</sup>) to a Member State for the purposes of establishing an interregional nature park,<sup>31</sup> the decision by the European Investment Bank to co-finance a road project,<sup>32</sup> as well as the legality of Commission approval under the auspices of the Euratom Treaty of nuclear weapons testing in French Polynesia.<sup>33</sup> All the cases have floundered on the issue of individual concern. A recent example is the *European Environmental Bureau (EEB) case* (Case T-94/04), decided in November 2005. In that case the EEB, together with certain other NGEOS and trade unions, sought to annul a Commission directive<sup>34</sup> amending Directive 91/414 concerning the placing of plant protection products so as, *inter alia*, to approve the use of paraquat as a herbicide. The EEB considered the Commission's directive to have been passed *ultra vires*, on the basis that it contravened the human and animal health safety requirements and procedures set out under Directive 91/414 pertaining to approval of plant

25 Para 54 of judgment.

26 See especially paras 56 and 61 of judgment.

27 Case C-321/95P.

28 See Cases C-131/92 *Arnaud*, T-138/98 *ACAV* and C-263/02P *Jégo-Quéré*.

29 Case T-475/93 *Buralux SA*, as confirmed on appeal in Case C-209/94P.

30 Governed currently by Regulation 1655/2000 (OJ 2000 L192/1).

31 Case T-117/94 *Associazione Agricoltori della Provincia di Rovigo*.

32 Case T-460/92 *Tate et al.*

33 Case T-219/95R *Danielsson*. The provisions on taking annulment proceedings under the auspices of the Euratom Treaty (Art 146 EAEC) mirror those of Art 230 EC.

34 Directive 2003/112 (OJ 2003 L321/32).

protection products. The CFI ruled that the action was inadmissible, on the grounds that the EEB and other applicants lacked legal standing to bring the case. Specifically, it ruled that the EC measure in dispute affected them in their objective capacity as entities active in the protection of the environment, workers' health and/or as property holders<sup>35</sup> in the same manner as any other person in the same situation. The CFI held that these capacities were not of themselves sufficient to meet the standard requirements of individual concern for the purposes of Art 230(4) EC.<sup>36</sup> In addition, the CFI reaffirmed its position that unless specific procedural guarantees were granted to the benefit of the applicants under the EC Treaty or legislative provisions, the requirement of individual concern would not be fulfilled. The fact that the EEB had acquired special advisory status within the EU institutions and other applicants had special legal standing rights under Member State systems of administrative law were not relevant in this regard, according to the Court.<sup>37</sup>

One of the key criticisms that has been levelled at the Court of Justice's approach to the issue of private persons' legal standing to sue under Art 230(4) EC has been that the Court's interpretation of that provision has effectively acted as a block to the possibility of Community acts being subject to effective judicial scrutiny. In the *Stichting Greenpeace* litigation and other cases, the applicants submitted that, applied in an environmental protection context, the rules on legal standing interpreted in accordance with the standard 'Plaumann formula' would mean that realistically no person would ever be in a position to challenge Community acts that contravened EC environmental law. The applicants invited the Court of Justice to reappraise the legal standing rules and reinterpret them in a light that would reflect the general legal principle set down in earlier cases that the rules underpinning the EC legal order must ensure effective judicial protection for private persons.<sup>38</sup> The principle of the need to guarantee effective judicial protection has been enshrined in Art 47 of the EU's Charter of Fundamental Rights 2000, as recognised by the Court of Justice.<sup>39</sup> In the *Danielsson* case (Case T-219/95R) involving an action to annul Commission approval of the testing of French nuclear devices in French Polynesia, the applicants unsuccessfully pleaded that the ECJ's relaxation of the legal standing rules in the *Les Verts* case (Case 294/83) should apply in their case. In the *Les Verts* ruling, the ECJ held that a parliamentary grouping was entitled to seek annulment of a decision

35 One of the environmental NGO applicants (Svenska Naturskyddsföreningen) owned a farm in Sweden, arguing that the licensing of paraquat could have an adverse effect on the conservation and other environmental protection objectives it applied to the operation of the farm.

36 Paras 53–54 of judgment. 37 See paras 56–59 of judgment.

38 For instance, Case 222/84 *Johnston*.

39 See e.g., Case T-177/01 *Jégo-Quéré*, at para 42 of judgment.

of the European Parliament, even though Art 173 EEC (the predecessor provision to Art 230 EC) did not at the material time include acts of the European Parliament as being within its scope. The ECJ ruled that legal standing to sue should be granted to the parliamentary grouping, on the grounds that a complete system of legal remedies and procedures was necessary to permit the Court to review the legality of measures adopted by EU institutions. However, the ECJ has rejected calls for that analysis to apply in relation to private persons seeking to annul Community measures, on the ground that a complete system of remedies is offered for the purpose of challenging such acts, by virtue of the preliminary ruling procedure under Art 234 EC. The preliminary ruling procedure, which is discussed in section 9.1.1.4, offers the opportunity for Member States' national courts to refer to the ECJ on questions concerning the correct interpretation and legal validity of EC measures.

That judicial reasoning was reaffirmed in the *Stichting Greenpeace* case by the ECJ on appeal, which held that a legal vacuum had not been created by virtue of the CFI's ruling that the annulment action was inadmissible. In that case the ECJ considered that, in bringing legal proceedings at national level in order to challenge the administrative authorisations granted by the Spanish authorities to the developers, Greenpeace had the possibility of invoking the application of the EIA Directive 85/337 and thereby protecting rights afforded to it under that EC legislative instrument. If necessary, in the course of those national proceedings, the national court could refer to the ECJ for a question of interpretation of EC law under the auspices of the preliminary ruling procedure. The heart of the ECJ's argument was that the possibility of private litigants being able to gain access to it via the mechanism of the preliminary ruling procedure ensured that a complete and effective system of judicial protection was guaranteed.<sup>40</sup> The Court considered that, at root, Greenpeace's legal actions at national and EC levels were concerned with enforcement of the EIA Directive, and accordingly the preliminary ruling procedure offered itself as a judicial mechanism to ensure that the EC judiciary would be able to review its correct interpretation and therefore assist in its proper application.

However, for various reasons, that judicial argument contains a number of fundamental flaws, as recognised in the academic literature as well as by certain members of the Court of Justice itself. First and foremost, the availability of the preliminary procedure in the *Stichting Greenpeace* litigation would not actually have resulted in a judicial review of the Commission's decision to award EC funds to the two power station projects. National proceedings would simply have been able to focus on the legality of the administrative decisions taken at national authority level (Ward, 2001, p 154; Williams, 2002, p 275). Second, recourse to the preliminary ruling procedure

40 Para 33 of judgment in Case C-321/95P *Stichting Greenpeace*.

is not necessarily straightforward and presents its own particular procedural difficulties (see Craig, 2003, pp 498 *et seq*). Notably, whilst it is a mechanism which empowers and to some extent obliges the national courts to refer to the ECJ for definitive advice on questions of EC law, it does not provide any specific rights for individuals to require this to happen. The possibility of invoking the preliminary ruling procedure also depends on the extent to which the rules on legal standing at national level permit a private litigant to bring proceedings relating to the enforcement of EC environmental law before the relevant national courts, an area where EC law is still very much at a developmental stage to a large extent.<sup>41</sup> In addition, in several cases private litigants would only be able to question the validity of specific EC legislation at national level if they decided to provoke legal action being taken against them by national authorities as a result of their contravening national measures intended to implement the relevant EC legislation. Moreover, it takes a considerably longer period of time for litigants to obtain a judgment on the legal validity of an EC measure from the ECJ using the preliminary ruling procedure than it does using annulment proceedings before the CFI under Art 230 EC. This is principally because the preliminary ruling procedure involves litigants having to take an indirect route to the Court of Justice, namely via legal proceedings regulated under national law before a national court or tribunal. The preliminary ruling procedure is discussed in more detail below (see section 9.1.1.4).

Several of these criticisms were recently taken up by the CFI in the *Jégo-Quéré* case (T-177/01), which involved an action for annulment brought by private persons against a Community regulation stipulating that emergency conservation measures be taken in relation to the fishing of hake in EU waters. The applicant, a French fishing concern, objected to fact that the regulation prohibited the use of mesh nets with holes under a diameter of 10mm. The CFI held that the standard interpretation of ‘individual concern’ in Art 230(4) EC had the effect of denying in practice effective judicial protection of rights of private persons, such as those relating to the applicant. The Court was supported in its view by an opinion provided by Advocate-General Jacobs in a separate case,<sup>42</sup> at the time pending before the ECJ on appeal from an earlier judgment of the CFI. The CFI held that the definition of individual concern should be reappraised, and considered that it should be widened to be predicated on the ability of an applicant to be able to show that an EC measure ‘affects his legal position in a manner which is both definite and immediate, by restricting his rights or by imposing obligations on him’. However, in subsequent rulings the ECJ has held that such a reinterpretation of Art 230(4) EC is not possible within the current framework of the EC Treaty, and that a specific amendment is required to be made

41 See Chapters 7–8.

42 Opinion of Advocate-General Jacobs in Case C-50/00P *UPA*.



to the treaty provision by agreement of the Member States under the procedure envisaged in Art 48 of the Treaty on European Union (TEU) 1992 for revising the EU's founding treaties.<sup>43</sup> Accordingly, the ECJ has indicated that the 'Plaumann formula' will remain applicable pending such changes and has set aside the CFI's judgment in *Jégo-Quéré*.<sup>44</sup> The interpretation by the ECJ that a revision to the EC Treaty is required before changes may be made to Art 230(4) EC has been rightly criticised as ill-founded, given that the current wording of that provision is open-ended enough to be interpreted along the lines suggested by the CFI in *Jégo-Quéré* (see, for instance, comments by Biernat, 2003, p 41 and Ragolle, 2003, p 101).

The judicial debate concerning legal standing issues pertaining to Art 230 EC actions was subsequently taken up in the context of the negotiations within the Convention on the Future of Europe, the forum established in 2001 to deliberate the contents of a possible revision to the current EU constitutional framework. The resulting political agreement in the form of the European Union Constitution (EUC), as signed in October 2004 by the Member States' Heads of Government, envisages a degree of relaxation of the legal standing rules relating to annulment actions. Specifically, Art III-365 EUC contains the Constitution's provisions on annulment proceedings. With one exception, those provisions maintain the general rule that private persons must show that they are directly and individually concerned by acts of the EU. The exception stipulates that private persons are to be entitled to seek judicial review against a 'regulatory act which is of direct concern to him or her and does not entail implementing measures'.<sup>45</sup> The provisions under the European Union Constitution that reclassify measures taken at EC level into a hierarchy of legislative and non-legislative acts<sup>46</sup> indicate that the exception to the general rule on legal standing for private persons will apply only in relation to non-legislative measures.

Accordingly, the changes envisaged by the EU Constitution are closely aligned to the CFI's suggested reappraisal of Art 230(4) EC in *Jégo-Quéré*. Where, however, the CFI's formula in *Jégo-Quéré* did not appear to open up readily the possibility of public interest litigation such as that brought in *Stichting Greenpeace* under Art 230 EC, the CFI's formula requiring specific evidence of effects on the applicant in terms of rights being curtailed or obligations being imposed (see Usher, 2003, p 585), the wording incorporated in Art III-365 EUC appears more open-ended and accordingly, potentially at least, more amenable to flexible judicial interpretation. This would permit NGEOs and other persons having specific connections<sup>47</sup> with the environmental site affected by an EC measure in question to hold the European

43 See e.g., Case C-50/00P *UPA*.

44 Case C-263/02P *Jégo-Quéré*.

45 Art III-365(4) EUC.

46 Arts I-33 to 39 EUC.

47 E.g., residing close to the site or having worked on the site for a significant period of time.

Commission to account in respect of administrative-type decisions made in relation to environmental protection issues pertaining to specific sites and factual situations. The provisions in Art III-365 EUC would not, however, change the position with respect to the immunity currently enjoyed by the Commission regarding the handling of infringement files against Member States. Whether or not the changes envisaged by the EU Constitution on legal standing come into force remains in doubt, given the current political problems pertaining to its ratification by the Member States.

### 9.1.1.3 Arts 235 and 288(2) EC—non-contractual liability of EC institutions

In certain circumstances, private persons are entitled to seek compensation from an EU institution where the latter causes damage as a result of a breach on its part of EC law. The provisions contained in Arts 235 and 288(2) EC collectively constitute the legal framework establishing the parameters of non-contractual liability of EU institutions *vis à vis* private persons. Article 288(2) EC stipulates that in the case of non-contractual liability, the European Community is to make good any damage caused by its institutions or by its servants in the performance of its duties and Art 235 confers jurisdiction on the Court of Justice in such legal disputes.<sup>48</sup> For a number of reasons, procedural and conceptual, this particular right of action is ill-suited to assisting in the private enforcement of EC environmental law, namely litigation brought against EU institutions by private entities such as NGEOs in the public interest.

The procedural conditions applicable to the operation of non-contractual liability actions under the auspices of Arts 235 and 288(2) EC pose considerable difficulties for private persons seeking to hold EU institutions to account in respect of their actions or omissions in relation to the environment. Specifically, the ECJ has confirmed that the conditions for establishing liability under those provisions are the same as in respect of liability for Member States,<sup>49</sup> namely that the rule of law infringed must be intended to confer rights on individuals, the breach must be sufficiently serious, and there must be a direct causal link between the breach of the obligation resting on the particular EU institution and the damage sustained by the injured parties.<sup>50</sup> Claimants must therefore be able to show that individual rights have been breached and that damage must be shown to have been sustained by them personally.

48 Non-contractual liability actions against EC institutions brought by private persons are to be lodged with the CFI.

49 See e.g., Case C-46/93 *Brasserie du Pêcheur*,

50 See e.g., Cases C-352/98P *Bergaderm*, T-160/03 *AF Con Management* and C-198/03P *Commission v CEVA*.

From the perspective of environmental interest litigation, these conditions are unlikely to be capable of being met by private litigants bringing an action in relation to measures taken at EC level affecting the environment. First, the Community measures in issue will most likely be crafted on the basis of being applicable generally so as to affect the collective interest. Accordingly, an action brought by a private person to seek compensation on behalf of the environment in respect of an illegal act or omission on the part of the Community might well fail on the ground that they will not be able to demonstrate that a personal right is at stake. It is not evident from available case law of the Court of Justice that a breach of EC environmental legislation *per se* constitutes a breach of an individual right.

Whilst protection of the environment is included amongst the rights contained in the EU's Charter on Fundamental Rights adopted in 2000, the relevant provision is crafted in broad terms without reference to a specific individual right. Article 37 of the Charter stipulates solely that a high level of environmental protection and improvement of the quality of the environment must be integrated into the EU's policies and ensured in accordance with the principle of sustainable development. The text re-states commitments already set out in the existing constitutional fabric of the EU. In any event, the Charter is not a legally binding document. Accordingly, it is fairly clear that the current EC legal framework does not consider environmental protection in terms of protection of individual rights. An action might conceivably have more chances of success in overcoming the 'individual rights' condition if a claimant were able to demonstrate that the purpose of a disputed environmental measure was, at least in part, to confer or enhance rights for individuals (for example, improve public health standards).<sup>51</sup> Second, the claimant would also have to show a direct causal link between the conduct of the EU institution in question and the damage sustained. This may prove problematic, where the intervention of an EU institution is simply to authorise or support activities sponsored or licensed by other parties, such as Member State authorities. Third, it may not be possible for a private litigant to be able to specify or quantify the environmental damage sustained sufficiently precisely in accordance with standard requirements of non-contractual liability procedures.

It is clear that non-contractual liability actions brought in respect of failures to take infringement proceedings against Member States under Arts 226/228 EC are inadmissible in light of the jurisprudence of the ECJ and CFI. The ECJ and CFI have affirmed on a number of occasions that the Commission has discretion to institute infringement proceedings against Member States under Art 226 EC. Even where a Member State might be considered objectively to

51 See e.g., comments of the ECJ in Case 131/88 in relation to the rights of individuals under the Groundwater Directive 80/68 (para 7 of judgment).

have breached EC environmental legislation, the Commission has no legal duty to bring enforcement proceedings according to the existing case law (Case 247/87 *Star Fruit*). An action for damages based on Art 235 EC, whilst usually constituting an autonomous form of action, is to be declared unfounded where it seeks in effect to nullify the effects of allegedly unlawful acts, an application for the annulment of which under Art 230 EC has been declared inadmissible.<sup>52</sup> Accordingly, such a non-contractual liability action would most likely be deemed inadmissible by the CFI on the grounds that a breach of EC law would not have been committed on the part of the Commission, given the latter's wide discretion to decide whether or not to launch infringement proceedings.<sup>53</sup> In addition, given that the root of the particular environmental problem in such cases will lie fundamentally with the issue of Member State non-compliance with EC environmental law, it will be inherently difficult to show that a Commission failure to take up infringement proceedings constitutes a direct cause of illicit environmental damage.

Apart from above-mentioned procedural difficulties associated with Arts 235 and 288(2) EC, recourse to non-contractual liability litigation by environmental interest litigants is problematic from a more profound conceptual perspective. The objective of a non-contractual liability action against an EU institution, as currently structured under EC rules and as recognised by the existing case law of the Court of Justice, is to seek remedy in the form of damages (that is, monetary compensation). However, such a remedy is clearly not suited to addressing environmental problems that motivate environmental interest litigation. Specifically, monetary compensation does not of itself secure any remediation of environmental damage sustained as a result of illicit in/action. The award of compensation does not mean that such payment should, or even may, be used to rectify environmental damage caused as a result of an institution's illicit in/action.

Accordingly, it is apparent that Arts 235 and 288(2) EC do not offer appropriate judicial remedies to secure rectification of environmental damage caused by illegal EC institutional in/action. The 2004 EU Constitution does not envisage making any specific changes to the current legal architecture of non-contractual liability.<sup>54</sup> However, one might question whether the current legal position accords with the EC Treaty stipulation that environmental protection requirements be integrated into the definition and implementation of Community policies and activities.<sup>55</sup> It is fair to say, though, that these conceptual difficulties arise in relation to the prosecution of non-contractual civil liability actions in general, and not simply at EC level.

<sup>52</sup> Cases T-479 and 559/93 *Bernardi*, at paras 38–39 of judgment.

<sup>53</sup> See also Cases 4/69 *Lütticke*, T-479 and 593/93 *Bernardi* and T-201/96 *Smanor*, confirmed on appeal in Case C-317/97P *Smanor*.

<sup>54</sup> Arts III-370 and III-431 EUC. <sup>55</sup> As required by Art 6 EC.

Recently, the EU has taken legislative steps to address the environmental protection shortcomings of existing civil liability mechanisms at national level through Directive 2004/35 on environmental liability with regard to the prevention and remedying of environmental damage (EL Directive). This particular measure is discussed in detail in Chapter 12.

9.1.1.4 *Art 234 EC—the preliminary ruling procedure*

Article 234 EC provides a mechanism through which national courts of the Member States may be able to refer questions on EC law to the ECJ that may arise in the context of national judicial proceedings. By way of response to the questions referred to it, the ECJ is vested with the power to provide rulings on those legal questions. The ECJ's ruling is referred to in the text to Art 234 as a 'preliminary ruling', which reflects the fact that the ruling is issued prior to the referring national court applying it to the particular case in its definitive judgment. Whilst formally being a procedure involving solely the national court and the ECJ on points of law, in practice it has for various reasons come to be seen as an alternative means for private persons to seek review of the due application and interpretation of EC law.

Article 234(1) EC vests the Court of Justice with jurisdiction to give preliminary rulings concerning *inter alia* the interpretation of the EC Treaty<sup>56</sup> as well as the validity and interpretation of acts of the EU institutions and the European Central Bank.<sup>57</sup> As far as the interpretation of EC law is concerned, it is evident from the discussion in Chapter 6 that the preliminary ruling procedure has had a crucially important role to play in allowing the ECJ to determine the impact of EC law, including EC environmental legislation, within the legal systems of the EU Member States.<sup>58</sup> In this respect, the preliminary ruling procedure offers opportunities for private litigants to seek to challenge the way in which national authorities interpret and accordingly apply EC environmental legislation, notwithstanding that the European Commission may refuse to take infringement proceedings against a Member under Arts 226/228 EC.<sup>59</sup>

In addition, the preliminary ruling procedure is also relevant in providing the opportunity for judicial review of Community acts affecting the environment. Article 234(1)(b) EC specifically endows the ECJ with the authority to determine questions concerning the legal validity of EC measures. Various judgments of the ECJ have served to ensure that the preliminary ruling procedure may be used as a potential means of securing judicial

56 Art 234(1)(a) EC.      57 Art 234(1)(b) EC.

58 For an overview of the impact of the preliminary ruling procedure in an environmental protection context, see Somsen (2001).

59 See e.g., Cases 80–81/77 *Ramel*.

review of Community measures. In order to ensure that the application of EC law is carried out as uniformly as possible within the Member States, the ECJ has held that all national courts and tribunals are, as a matter of general principle, required to refer to it questions concerning the validity of Community acts.<sup>60</sup> By way of exception, a national court may decide in certain limited circumstances to grant interim relief in respect of the application of EC measures, notably if the national court harbours serious doubts about the validity of the measure, refers the matter to the ECJ, considers the Community interest, adheres to any relevant CFI or ECJ judgment relevant to the subject matter of the dispute, and if the interim relief is necessary to prevent serious and irreparable damage to the applicant.<sup>61</sup> This jurisprudence qualifies the wording of Art 234 EC, which specifies that courts and tribunals other than those against which there is no judicial remedy have discretion as opposed to an obligation to refer questions to the ECJ. Its effect is to enable litigants in national proceedings to ensure that questions concerning the validity of EC measures raised in the course of those proceedings and relevant to the case are referred to the ECJ. National courts and tribunals have no discretion over whether or not to make a reference to the ECJ in such circumstances. The ECJ has also confirmed that its preliminary rulings have legal effects for the whole of the Community legal order, and not just on the referring national court.<sup>62</sup> Nevertheless, national courts and tribunals retain the option of referring questions of EC law to the ECJ, even though the ECJ may have provided a previous ruling relating to the subject matter of legal enquiry.<sup>63</sup>

The ECJ jurisprudence has opened up possibilities of private litigants using the preliminary ruling procedure to seek judicial review before the ECJ of EC measures affecting the environment. It has, for instance, been of considerable assistance to persons seeking to challenge the legality of EC measures on environmental protection that have adversely affected their personal economic position and existing legal rights. Accordingly, preliminary rulings have been obtained from the ECJ, for example, on the substantive legality of EC regulations on conservation measures in the fishing industry<sup>64</sup> and Regulation 3093/94 on ozone depleting substances,<sup>65</sup> where the private litigants concerned would not have had legal standing to take annulment proceedings in respect of those legislative instruments under Art 230 EC. However, as was discussed in section 9.1.1.2, it is debatable for a number of reasons to regard the preliminary ruling procedure as a judicial mechanism

60 Case 314/85 *Foto Frost*.

61 See e.g., Cases C-465/93 *Atlanta*, C-143/88 and 92/89 *Zuckerfabrik Süderdithmarschen* and C-334/95 *Kruger*.

62 See Case 66/80 *International Chemical Corporation*. 63 *Ibid*.

64 Case C-405/92 *Mondiet*. 65 Case C-341/95 *Bettati*.

equivalent to the right to take annulment proceedings in respect of Community acts under Art 230 EC. Notably, as was exemplified in discussions relating to the *Stichting Greenpeace*<sup>66</sup> and *EEB*<sup>67</sup> litigation in section 9.1.1.2, the preliminary ruling procedure does not allow private persons the possibility of reviewing all Community acts affecting the environment. Specifically, those cases underline the point that the preliminary ruling procedure cannot be used to review the validity of EC measures that are not binding on the parties to national legal proceedings connected with a request for a preliminary ruling under Art 234 EC. Access to the preliminary ruling procedure is also dependent on the extent to which private litigants have legal standing to bring national proceedings before national courts or tribunals to question the application or validity of EC environmental legislation. Rules on legal standing may vary considerably between EU Member States, which raises issues concerning the degree to which EC environmental legislation may be monitored under sufficiently uniform conditions in the EU at private litigant level.

### ***9.1.2 The Draft Århus Regulation and access to environmental justice at EC level***

It is clear that, with the European Community's membership of the 1998 Århus Convention, specific legislative changes are required to be introduced to the current EC legal framework in order to enhance the degree to which civil society is able to hold EU institutions to account by way of review procedures relating to their environmental decision-making (De Lange, 2003). Specifically, Art 9(3) of the Århus Convention requires contracting parties to ensure that members of the public, or at least those meeting any qualifying criteria laid down in their rules of law:

are to be afforded access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.

The European Community, as a contracting party to the Århus Convention and having ratified the convention in 2005, is therefore bound by its provisions under both international and EC law. Accordingly, the references to 'national law' and 'public authorities' in Art 9(3) of the Århus Convention are to mean EC law and EU institutions and bodies respectively, in so far as the application of that provision affects the European Community.<sup>68</sup> The

66 Cases T-585/93 and C-321/95P.

67 Case T-94/04.

68 As far as EU Member States who are contracting parties to the convention are concerned, the term 'national law' means both EC as well as national law. (See Chapter 8.)

European Commission has sought to take on board the implications of Art 9(3) for the EU institutions in the form of the Draft Århus Regulation, referred to at the beginning of this chapter.

The Draft Århus Regulation contains a set of provisions which, if approved by the EU legislature, are set to institute some changes to the current state of EC rules on rights of private persons to ensure that EU institutions and bodies adhere to EC environmental law. One of its purposes is, in implementing the Århus Convention, to grant access to justice in environmental matters at EC level.<sup>69</sup> Specifically, Title IV of the draft instrument (Arts 9–13) confers special rights on certain types of private legal persons to trigger the commencement of special legal review procedures where they consider that an EU institution or body, not acting in either a judicial or legislative capacity, has acted in contravention of EC environmental legislation. A two-stage process is envisaged whereby such qualifying persons are to be entitled, first to request such institutions and bodies to undertake an internal review of administrative acts and omissions where they consider that such conduct amounts to a breach of EC environmental legislation and, second, if dissatisfied with the institution's or body's response, to take certain legal proceedings before the Court of Justice under Arts 230 or 232 EC, as appropriate in the circumstances.<sup>70</sup>

#### *9.1.2.1 Material and personal scope of the Draft Århus Regulation's access to justice provisions*

It is important from the outset to be clear about the personal and material scope of the access to justice provisions contained within the Draft Århus Regulation. For the draft instrument seeks to open up legal review of Community activities affecting environmental matters only to a limited extent.

#### PERSONAL SCOPE

The Draft Århus Regulation specifies that only 'qualified entities' who have legal standing may take advantage of the review procedures set out in its access to justice provisions. The criteria for recognising qualified entities are laid down in Arts 12–13 of the draft instrument. Specifically, four basic conditions must be fulfilled in order for a person to achieve 'qualified entity' status, namely that the person must: be an independent and non profit-making legal person having the objective to protect the environment;<sup>71</sup> be active 'at Community level';<sup>72</sup> have been legally constituted for over two

69 Art 1(d) Draft Århus Regulation.

71 Art 12(a) Draft Århus Regulation.

70 Arts 9 and 11 Draft Århus Regulation.

72 Art 12(b) Draft Århus Regulation.



years and have, during that period, been actively pursuing environmental protection in accordance with its internal statutes;<sup>73</sup> and have an annual statement of accounts for the previous two years certified by a registered auditor.<sup>74</sup> The draft instrument further specifies that entities active in the form of several co-ordinated associations or organisations with a structure based on membership must cover at least three Member States in order to be deemed active at EC level.<sup>75</sup> Clearly, the criteria have been shaped so as to target NGEOS. Natural persons, informal associations and citizens' groups, profit-based entities as well as national public authorities are excluded.

Rather curiously, the draft text seeks to exclude entities composed of multiple associations or organisations where these do not operate in at least three Member States. At the same time, it does not apply this particular criterion to entities composed of a single personage. No definition or specific guidance is provided in the draft text as to what is meant by the term 'active at EC level'. Article 13, though, envisages the Commission drawing up necessary provisions to ensure recognition of qualified entities, which will no doubt have to provide clarification on this issue. As it stands, the term is rather ambiguous. It might suggest that an entity is required to have some minimum amount of input, connection or contact with the EU institutions involved in environmental policy development. Alternatively, the term might simply imply that an entity is required to show an active interest in relation to the application of EC environmental measures at local level. That entities have to comply with specific formal requirements of being in the form of a legal person, having drawn up a formal constitution of environmental objectives, having at least two years' experience in environmental protection activities and having subjected itself to regular audit indicate that the Commission's aim is to limit qualification to a relatively small number of experienced and well-resourced NGOs, no doubt with a view to minimising the possibility—as it would see it—for the review procedures being flooded with claims. The explanatory memorandum to the draft legislation indicates that there has been some opposition to the Commission's concern to limit the range of persons able to use the review procedures, doubts being expressed with respect to the view that a widening of access to the procedure would raise the prospect of EU institutions being overburdened with cases.<sup>76</sup> It remains to be seen whether legislative amendments will be made on this front to widen the scope of persons eligible to use the legal review procedures.

Qualified entities are required under the Draft Århus Regulation to have legal standing in order to take advantage of the review procedures. The conditions for legal standing are defined in Art 10 of the Draft Århus Regulation and are in reality a mere formality for qualified entities. The conditions are

73 Art 12(c) Draft Århus Regulation.

74 Art 12(d) Draft Århus Regulation.

75 Art 12, final sentence, Draft Århus Regulation.

76 COM(2003)622 p 7.

that the entity is recognised as a qualified entity under Arts 12–13 and that the subject matter of which a request for a review is made is covered by the entity's statutory activities.<sup>77</sup> Provided the environmental protection objectives of the entity are drafted in sufficiently broad terms in the entity's internal statutes, this latter requirement should not prove to be difficult to fulfil.

Qualified entities with legal standing will be able to commence the special review procedures in respect of a limited range of activities of EU institutions and bodies. Specifically, the procedures will not apply to situations where the EU's institutions act in either a legislative or judicial capacity.<sup>78</sup> Accordingly, qualified entities will not have special standing to challenge the legality of EC legislative decision making or judgments of the ECJ or CFI.

#### MATERIAL SCOPE

The types of EU institutional activity that may be subject to legal review under Title IV of the Draft Århus Regulation are administrative acts and omissions. This reaffirms the exclusion mentioned above of the review procedures being used to scrutinise acts either of a legislative or judicial nature. Typically, the type of measure that would fall within the material remit of the Title IV provisions would be administrative decisions delegated to an EU institution under the auspices of EC legislation, such as decisions by the European Commission to authorise particular activities by Member States. Examples of such decision-making would include the Commission issuing opinions on questions of overriding public interest relating to proposed development on sites protected under the Habitats Directive 92/43,<sup>79</sup> deciding to award funding for a particular development project under the auspices of the EC structural<sup>80</sup> and/or cohesion funds,<sup>81</sup> or granting approval to waive the permit requirements in respect of particular hazardous waste management operations under the Hazardous Waste Directive 91/689.<sup>82</sup>

The Draft Århus Regulation specifies that qualified entities may invoke the Title IV review procedures where they are of the opinion that 'environmental law' has been breached.<sup>83</sup> The term 'environmental law' is defined as meaning any EC legislation having as its objective the protection or the improvement of the environment including human health and the protection or rational use of natural resources. The effect of the definition is to exclude consideration

77 Arts 10(a) and (b) Draft Århus Regulation.

78 Art 2(1)(c) in conjunction with Art 9(1) Draft Århus Regulation.

79 See Art 6(4) Habitats Directive 92/43.

80 Regulation 1260/99 (OJ 1999 L161/1), as amended.

81 See Art 8 of Regulation 1164/94 (OJ 1994 L130/1), as amended.

82 See Art 3(2) Hazardous Waste Directive 91/689.

83 Arts 9 and 11 Draft Århus Regulation.

of EC Treaty provisions relating to environmental protection and would appear also to exclude reference to international agreements binding on the European Community. The explanatory memorandum to the proposal indicates that, in order to count as 'environmental law', the legislative objective of any particular piece of EC legislation would have to include one of the objectives contained in Art 174 EC.<sup>84</sup> This indicates, quite rightly, that EC environmental legislation may be based on EC Treaty provisions other than Art 175 EC and still constitute 'environmental law' for the purposes of the Draft Århus Regulation. Notable examples would include single market measures designed to improve the environmental quality of products or goods,<sup>85</sup> agricultural measures designed to improve ecological standards in farming activities,<sup>86</sup> or measures dealing with environmental improvements in the transport sector.<sup>87</sup>

The terms of the Draft Århus Regulation do not provide qualified entities with legal standing to commence a review of any decisions or omissions on the part of the European Commission relating to the operation of infringement proceedings against Member States under Arts 226/228 EC. As noted above, the right of qualified entities to begin the Title IV legal review procedures is predicated on the existence of administrative acts or omissions on the part of EU institutions or bodies, considered by the entity to be in breach of EC environmental legislation. Review of decisions in relation to infringement dossiers are accordingly ruled out, given that the legal obligations governing the Commission's actions with respect to its management of infringement cases are contained within the EC Treaty, namely in Arts 211 and 226/228 EC, and not within the EC secondary legislation. Accordingly, the Draft Århus Regulation preserves the Commission's discretion to determine whether or not to commence an infringement action against a Member State in relation to a suspected breach of EC environmental law.

The failure by the access to justice provisions within the Draft Århus Regulation to cover European Commission decisions in relation to the management of infringement files against Member States suspected of breaches of EC environmental legislation constitutes a significant limitation of the draft instrument. Arguably, this omission fails to ensure due implementation of the 1998 Århus Convention's requirements in relation to access to environmental justice, specifically Art 9(3) of the convention. The implications of the terms of Art 9(3) of the Convention for the EC are that (qualifying) persons are to be afforded the opportunity to challenge acts and omissions by the institutions and bodies of the EC which violate the requirements of EC law relating to the environment. Under Art 211 EC the European Commission is charged with a legal obligation under the EC Treaty to ensure

84 COM(2003)622 p 10.

85 Based on e.g., Art 95 EC.

86 Based e.g., on Art 37 EC.

87 Based e.g., on Art 71 EC.

that the treaty provisions and measures taken by EU institutions under its auspices are applied. This particular legal obligation accordingly requires the Commission to ensure that EC environmental legislation is adhered to. Articles 226 and 228 EC provide the procedural mechanisms to enable the Commission to fulfil that obligation with respect to its duties to monitor the application of EC law by Member States. Where a dispute arises between a complainant and the Commission as to whether a violation of EC environmental law has occurred within a particular Member State, that legal debate automatically raises a question as to whether the Commission has properly discharged its legal responsibilities under Art 211 EC. Accordingly, in line with the requirements of Art 9(3) of the Århus Convention, such persons should in principle be offered the opportunity to challenge decisions by the Commission in relation to the handling of infringement cases. The necessity for affording persons the opportunity to seek independent review of such Commission decisions is underpinned by the fact that the political as well as enforcement functions of the Commission constitute a structural conflict of interest that, on occasion, may serve to undermine the application of objective legal analysis in relation to a particular infringement dossier. This problem was highlighted in Chapter 5. Without a review procedure in place, the current institutional position and power of the Commission under the EC Treaty effectively enables it to be in a position of closing down infringement proceedings for political as opposed to legal reasons without being held accountable for such action.

#### *9.1.2.2 Review procedures under the Draft Århus Regulation's access to justice provisions*

As mentioned earlier, the Draft Århus Regulation's access to justice provisions offer qualified entities the opportunity to start a special two-stage legal review process, where they consider that EU institutions' or bodies' administrative acts or omissions breach EC environmental legislation. The stages comprise first an internal review to be conducted by the EU institution or body concerned followed, where necessary, by appropriate legal action before the Court of Justice. The review procedures are accordingly structured on a similar footing to that applicable in relation to the proposed EC rules on access to environmental justice with respect to the acts and omissions of Member State authorities,<sup>88</sup> as discussed in Chapter 8.

The first stage of the review process is set out in Art 9 of the Draft Århus Regulation. Specifically, the draft text envisages that qualified entities may file a request for internal review to the relevant EU institution or body. The request is to be made in writing and within four weeks of the adoption of the

<sup>88</sup> COM(2003)624final, of 24.10.2003.

relevant administrative act or, in relation to omissions, within four weeks of the date when an administrative instrument should have been adopted. In addition to specifying the alleged breach of EC environmental legislation, the request is to identify the content of the internal review being sought.<sup>89</sup> On receipt of a request, the EU institution or body is obliged to consider it unless 'clearly unsubstantiated', and is in principle to have 12 weeks to make a decision in writing as to whether or not it accedes to the request. The decision is to be addressed to the qualified entity filing the request and is to provide an explanation of the reasons underpinning the decision.<sup>90</sup> The 12-week period may be extended, on notification to the qualified entity, but only up to a maximum of 18 weeks by which time a decision must be taken.<sup>91</sup>

If the qualified entity is dissatisfied with the internal review response from the EU institution or body concerned, it has the opportunity to invoke the second stage of the review process. Specifically, the entity may commence an annulment action in accordance with Art 230(4) EC, for the purpose of enabling the CFI to review the substantive and procedural legality of an internal review decision.<sup>92</sup> If the Court finds the action to be well-founded, it will declare the decision void.<sup>93</sup> Where the EU institution or body has failed to make an internal review decision within the allotted deadlines set down in Art 9 of the Draft Århus Regulation, qualified entities are to be entitled to bring an action before the Court of Justice under the auspices of Art 232(3) EC.<sup>94</sup> Article 232 proceedings will be made with a view to obtaining a judicial declaration from the Court that the failure to issue a decision to them is in breach of EC law, and therefore will impose legal pressure on the institution or body to issue a decision. If the qualified entity is dissatisfied with the decision then made by the institution or body concerned, they will have the opportunity of bringing annulment proceedings under Art 230 EC. It should be noted in this context that EU institutions<sup>95</sup> are specifically required by virtue of Art 233 of the EC Treaty to take the necessary measures to comply with judgments of the Court of Justice made against them under either Art 230 or 232 EC. In the case of decisions rendered void by the Court under Art 230, the institution concerned is obliged to eradicate the effects of the measure found to be void.<sup>96</sup> Failure to comply with this obligation within a reasonable time period will entitle the qualified entity to have further recourse to Arts 230 or 232 EC proceedings, as appropriate, with a view to ensuring that the institution takes the necessary steps to eradicate its violation of EC environmental legislation.<sup>97</sup>

89 Art 9(1) Draft Århus Regulation.

90 Art 9(2) Draft Århus Regulation.

91 Art 9(3)–(4) Draft Århus Regulation.

92 Art 11(1) Draft Århus Regulation.

93 Art 231 EC.

94 Art 11(2) Draft Århus Regulation.

95 The obligations set out in Art 233 EC do not cover Community bodies, only institutions.

96 See e.g., Cases T-480, 483/93 *Antillean Rice Mills*.

97 See e.g., Case T-387/94 *Asia Motor France*.

## 9.2 Access to environmental information held by EU institutions

Since the early 1990s the EU has developed a framework of rules designed to facilitate access for members of the general public to information held by its non-judicial supranational institutions. This framework has now had some opportunity to begin to mature and contains a relatively detailed set of provisions, legal principles developed by the CFI as well as a number of guidance documents published by the European Commission. The access to information legal framework is principally contained in Regulation 1049/2001 regarding access to European Parliament, Council and Commission documents,<sup>98</sup> which became applicable on 3 December 2001<sup>99</sup> (hereinafter referred to as 'Regulation 1049'). As will be elaborated in this section of the chapter, Regulation 1049 contains some important rules concerning rights of access to information relevant to legal action taken or contemplated to be taken by the European Commission against Member States under Arts 226/228 EC. If access to such information is permitted, this presents the possibility not only for private persons to seek to scrutinise whether or not the Commission has assessed correctly whether or not an infringement by a Member State in respect of EC environmental law has occurred, but also for them to be able to use information that may be contained within the Commission's infringement files for other purposes, such as in connection with the pursuit of litigation at national level in relation to the file's subject matter. Before exploring Regulation 1049 in detail, it is necessary to place this instrument in its historical context and take brief stock of the main political and legislative developments that have ensued over the past decade in relation to the subject of access to information held by EU institutions.

Historically, the development of an access to information legal regime at EU level arises largely as a result of the clear political will expressed on the part of the Member States within the text of the TEU 1992 to develop a legal culture of transparency of decision making at EU level,<sup>100</sup> specifically in relation to the administrative and legislative processes employed by the legislative institutions of the Union: namely the European Commission, European Parliament and Council of the EU. In the wake of follow-up declarations made by the European Council during the United Kingdom's Presidency in 1992,<sup>101</sup> the EU promulgated a number of measures in 1993–94 intended to bind its political institutions to a code of conduct on disclosure of documents. Specifically, measures on access to information were taken

98 OJ 2001 L145/43. 99 Art 19 Regulation 1049.

100 See Declaration No 17 on the right of access to information incorporated in the TEU 1992.

101 See European Council declaration in Birmingham (October 1992) 'A Community close to its citizens' (EC Bulletin 10–1992, p 9) and its subsequent statement on transparency in Edinburgh (December 1992) (EC Bulletin 12–1992, p 7).

in relation to the European Commission (Decision 94/90<sup>102</sup>), Council of the EU (Decision 93/731<sup>103</sup>) and European Parliament (Decision 97/632<sup>104</sup>). These rules remained in force until replaced by Regulation 1049. Whilst technically obsolete, the practical experience and judicial interpretations gleaned in relation to the early decisions remains of considerable practical value, given that a good deal of the basic principles contained within their respective frameworks has been carried over into Regulation 1049.

It was not until the Treaty of Amsterdam 1997 that the EC Treaty was amended so as to include a specific set of provisions concerning access to information. Notably, Art 255 EC (ex Art 191a) was introduced into the EC Treaty framework<sup>105</sup> to provide specifically for a right of access to information and as a legal basis for the enactment of detailed ancillary legislation. Article 255 provides:

1. Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to European Parliament, Council and Commission documents, subject to the principles and conditions to be defined in accordance with paragraphs 2 and 3.

2. General principles and limits on grounds of public and private interest governing this right of access to documents shall be determined by the Council, acting in accordance with the procedure referred to in Article 251 within two years of the entry into force of the Treaty of Amsterdam.<sup>106</sup>

3. Each institution referred to above shall elaborate in its own Rules of Procedure specific provisions regarding access to documents.

Article 255 provided the legal basis for the enactment of Regulation 1049 in 2001, which fleshes out in detail the specific rights of individuals and responsibilities of the three political EU institutions in relation to access to information held by the latter. The CFI has confirmed that Art 255(1) is not directly effective, given that the rights it refers to are conditional on the promulgation of specific legislation.<sup>107</sup> Both Art 255 and Regulation 1049 require the three institutions to amend their respective internal Rules of Procedures so as to be in accordance with the requirements over access

102 OJ 1994 L340/43 as amended by Decision 96/567 (OJ 1996 L247/45).

103 OJ 1993 L340/43 as last amended by Decision 2000/527 (OJ 2000 L212/9).

104 OJ 1997 L263/27.

105 Located within Chapter 2 (Provisions common to several institutions) of Title I. Provisions Governing the Institutions of the EC Treaty.

106 Namely, by 1.5.2001.

107 See Case T-191/99 *Petrie*, para 34 of judgment).

to information.<sup>108</sup> The European Commission has amended its Rules of Procedure in order to accommodate these legislative changes and to ensure that detailed practical arrangements are in place for its administrative staff to adhere to the Regulation's provisions.<sup>109</sup> The other two political institutions have also made relevant amendments to their Rules of Procedure.<sup>110</sup>

The issue of enhancing access to environmental information has been fostered over the last decade under the auspices of the EU's developing environmental political strategies, and is now specifically endorsed as a commitment in the Union's Sixth Environmental Action Programme 2001–2010.<sup>111</sup> From an environmental policy perspective, significant developments have also been brought about through the European Community's adherence to the 1998 Århus Convention, which has provided the basis for driving legislative change at national and at EC level in order to implement its requirements, which include improving the extent to which the general public has access to a reliable and a wider range of environmental information held by public authorities. As far as access to environmental information held by the EU institutions are concerned, though, Regulation 1049 is set to remain the central governing legislative instrument.

### ***9.2.1 Regulation 1049 on public access to information***

Regulation 1049 is the principal legal instrument governing public access to information held by the EU's political<sup>112</sup> institutions: European Commission, Council of the EU and European Parliament. Given that the rules have been housed within the form of a regulation, it is evident that a number of significant legal effects flow as a result. Regulations are defined in the EC Treaty (Art 249(2) EC) to have general application, to be binding in their entirety and to be directly applicable within all the Member States. Accordingly, Regulation 1049 constitutes an instrument which is legally binding on the relevant EU institutions. Moreover, as a self-executing legislative instrument, it has legal application directly within the national legal systems of the Member States and may be relied on directly by private individuals. Under the terms of the doctrine of direct effect, as discussed in Chapter 6,

108 Art 255(3) EC and Art 18(1) Regulation 1049, the latter requiring this to be done by 3.12.2001.

109 Commission Decision 2001/937 amending its rules of procedure (OJ 2001 L345/94).

110 See European Parliament Decisions of 13.11.2001 and 14.5.2002 amending Parliament's Rules of Procedure (OJ 2002 C140E/116) together with the Bureau Decision on public access to European Parliament documents (OJ 2001 C374/1), as well as Council Decision 2001/840 amending the Council's Rules of Procedure (OJ 2001 L313/40).

111 See recital 15 and Art 3(9) of Decision 1600/2002 laying down the Sixth EAP (OJ 2002 L242/1).

112 'Political' in the sense of having specific legislative powers under the EC Treaty.



the (several) norms contained within Regulation 1049 that are sufficiently precise and unconditional may be enforced by individuals against the EU institutions concerned.

### 9.2.1.1 *Scope and definitions*

As the central piece of EC legislation on information disclosure pertaining to the three legislative institutions of the Union, Regulation 1049 constitutes the mechanism by which the principles, conditions and limits relating to the general provision for a right of access to information contained in Art 255(1) EC are laid down.<sup>113</sup> Specifically, it constitutes a crystallization of the commitment set out in the EC Treaty<sup>114</sup> to legislate on a detailed framework of rules.

As far its beneficiaries are concerned, the Regulation mirrors the commitment set out in Art 255 that Union citizens as well as any natural or legal person resident or having its registered office within a Member State have a basic right of access to documents of the three institutions.<sup>115</sup> Article 2(2) of the Regulation provides the possibility for the institutions' Rules of Procedure to broaden the personal scope of beneficiaries, to include natural or legal persons not residing or having a registered office in a Member State. The European Commission's Rules of Procedure specifically provide such persons with a right of access.<sup>116</sup>

The material scope of Regulation 1049 is also broadly defined. Possession as opposed to authorship is the key element here. Specifically, the general right of access applies 'to all documents held by an institution'; namely, 'documents drawn up by it or received by it and in its possession'.<sup>117</sup> This means that the right of access, in principle at least, applies to documents drawn up by third parties falling within the possession of the three institutions, such as those emanating from Member States.<sup>118</sup> Member States, though, have the right to request that institutions do not disclose documents held by them without their consent.<sup>119</sup> The range of documentation made subject to the Regulation's rules on disclosure is very widely defined to mean any content concerning a matter relating to the policies, activities and decisions falling within an institution's 'sphere of responsibility'.<sup>120</sup> Content may be held in any medium, such as written on paper, stored electronically or recorded visually or audio-visually. The effect of the definition is to ensure maximum inclusion of documentation, namely all documented material

113 See recital 4 and Art 1(a) Regulation 1049.

114 Art 255(2) EC. 115 Art 2(1) Regulation 1049.

116 Art 1, second subparagraph Commission Decision 2001/937 (OJ 2001 L345/94).

117 Art 2(3) Regulation 1049. 118 See Art 3(b) Regulation 1049.

119 Art 4(5) Regulation 1049. 120 Art 3(a) Regulation 1049.

pertinent to the business of the particular supranational institution. This covers virtually all documentation held or used by the three EU institutions, irrespective of whether they fall under the remit of the first, second or third pillars of the current EU constitutional framework.

Under Regulation 1049, the three institutions are obliged to provide information and assistance to citizens on how and where applications for access to documents may be made.<sup>121</sup> Relatively recently, the EU has established a number of mechanisms in order to advertise and facilitate use of the right to access information. In addition to publishing a User's Guide,<sup>122</sup> each institution has established dedicated websites providing advice and information on relevant procedures.<sup>123</sup> The construction of the institutions' systems for delivering documentation has been based very much on the idea of developing electronic means of corresponding with applicants, considered to be the most speedy and direct route for individuals to search for relevant information. Under the Regulation, each institution is obliged, as far as possible, to make documents directly accessible to the public either in electronic form or via a register.<sup>124</sup> The Regulation requires most EC legislative material to be published in the Official Journal of the EU,<sup>125</sup> which itself is electronically accessible on the EU's website.<sup>126</sup> In practice, the three institutions have set about this by establishing registers of documents in publicly accessible electronic databases, located at the above-mentioned websites, whereby each document is referenced with a number, subject matter and/or a short description of its contents. Given that such registers had to be established only relatively recently, it is not surprising that their content is currently relatively limited in scope and time. Principally, the registers contain legislative and other internal policy-related documentation of the three institutions drawn up since 2000. Other documents, such as those with more restrictive status or older policy-related documentation, are usually kept separately in a more decentralised fashion with the relevant administrative departments responsible for their drafting. For instance, documents relating to the processing of infringement files relating to Arts 226/228 EC are kept separately by the relevant legal units of the respective Directorates-General of the European Commission. For infringement files concerning environment cases, these are stored in the law library of the Environment Directorate-General used

121 See Arts 6(4) and 14 Regulation 1049.

122 *Access to European Parliament, Council and Commission Documents—A User's Guide* (OOPEC 2002), available on the European Commission's website, see fn 123.

123 European Commission website: [www.europa.eu.int/comm/secretariat\\_general/sgc/acc\\_doc/index\\_en.htm](http://www.europa.eu.int/comm/secretariat_general/sgc/acc_doc/index_en.htm) European Parliament website: [www4.europarl.eu.int/registre/recherche/Menu.cfm?langue=en](http://www4.europarl.eu.int/registre/recherche/Menu.cfm?langue=en) Council of the EU website: [www.ue.eu.int/en/summ.htm](http://www.ue.eu.int/en/summ.htm) under 'Transparency'.

124 See Arts 11 and 12(1) Regulation 1049. 125 Art 13 Regulation 1049.

126 [www.europa.eu.int](http://www.europa.eu.int) under 'Documents' (EUR-Lex) heading.

principally by the Legal Unit. Documentation held by the EU dating over 30 years are housed in special archives hosted by the three institutions and are normally made freely available to the public.<sup>127</sup>

Regulation 1049 contains provisions requiring the submission of annual reports on its application, including the number of cases in which institutions have refused to grant access to documents, the reasons for such refusals and the number of sensitive documents not recorded in institutional registers.<sup>128</sup> The Commission has at the time of writing submitted three annual reports relating to the years 2002,<sup>129</sup> 2003<sup>130</sup> and 2004.<sup>131</sup> The reports, in providing general information largely of a statistical nature, reveal that requests for environmental information have consistently constituted a significant proportion of requests (7.41 per cent in 2003). The sectors of indirect tax, customs, internal market, competition, and environment constitute the sectors attracting most applications for information, comprising collectively some 40 per cent of all access requests.

In addition to the submission of annual reports, the Regulation also required the Commission to submit, by the end of January 2004, a report on the implementation of the principles of the instrument, with a view to making recommendations including, if necessary, proposals for legislative revision.<sup>132</sup> The Commission's implementation report<sup>133</sup> based on this provision provides a useful overview to date of the operational aspects of the Regulation. It does not make any specific recommendations for revising the Regulation.

#### 9.2.1.2 *Key procedural aspects*

Regulation 1049 sets out a detailed framework of the procedures applicable for handling requests for access to information. As an integral part of the motivation underpinning the instrument to present a more user-friendly service to the general public, the Regulation stipulates relatively short deadlines for the turnaround of assessment of information requests, a step that constitutes a notable change from the requirements set down in the predecessor EC decisions over access to information held by the Commission, Council of the

127 Special reading rooms are provided by each institution for the purpose of inspecting archived documents. The relevant contact email addresses for requesting access to archived material are: ARCHInfo@europarl.eu.int (European Parliament); archives.centrales@consilium.eu.int (Council) and archis@cec.eu.int (Commission).

128 Art 17(1) Regulation 1049. 129 COM(2003)216 final.

130 COM(2004)347 final. 131 COM(2005)348 final.

132 Art 17(2) Regulation 1049.

133 COM(2004)45 Commission report on the implementation of the principles in EC Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents, 30.1.2004.

EU and the European Parliament. It remains to be seen in the long term whether the civil servants within the respective institutions, in particular those working within the European Commission which is the recipient of most requests, are going to be able to meet its requirements, bearing in mind other responsibilities that the personnel usually have to fulfil. The Regulation envisages a two-stage administrative procedure for handling information requests. Specifically, this entails initial processing of applications and, where necessary, a follow-up processing of confirmatory applications in the event that the institution initially refuses to grant access and the applicant wishes the institution to reconsider its position.

In order to be admissible, applications for accessing documentation must comply with a number of basic conditions. Specifically, applications must be filed with the relevant institution in written form, including electronically by email,<sup>134</sup> be in one of the official languages of the EC<sup>135</sup> and be made in a sufficiently precise manner in order for the institution to be able to identify the relevant document.<sup>136</sup> Applications to the Commission may be sent either to its Secretariat-General or the relevant Directorate-General or department responsible for the area covered by the request. In order to ensure that the request reaches the appropriate recipient within the Commission, it is normally best policy to send applications to the Secretariat-General, which will then forward the request to the appropriate department or unit concerned. In practice, applications will need to be made only where the institutional registers do not contain the relevant information. Where an application is imprecise, the institution is to request clarification from the applicant and provide assistance, as far as is appropriate.<sup>137</sup> A special procedure applies in relation to requests for very long documents or large quantities of documentation, whereby the institution is to confer informally with the applicant in order to come to a 'fair' solution. This particular procedure, essentially of a pragmatic nature, may well involve applicants having to assist in the inspection and copying process, in order to alleviate what would be unreasonable administrative burdens placed on the institution's human and other resources. In most instances, such a mechanism will not be triggered, unless the particular subject matter is very broad or involves a particularly lengthy and detailed project.<sup>138</sup>

134 The relevant email addresses for requests for information are: [register@europarl.eu.int](mailto:register@europarl.eu.int) (European Parliament); [access@concilium.eu.int](mailto:access@concilium.eu.int) (Council) and [sg-acc-doc@cec.eu.int](mailto:sg-acc-doc@cec.eu.int) (European Commission).

135 Art 314 EC. There are 20 official languages covering the linguistic diversity of the 25 countries of the EU.

136 Art 6(1) Regulation 1049.      137 Art 6(2) Regulation 1049.

138 Regulation 1049 does not provide guidance on what constitutes a very long document or large quantities of documentation. For an example of an extreme case, see the Case T-2/03 *Verein für Konsumenteninformation*, where the applicants sought to have access to a competition file which reportedly ran to at least 47,000 pages.

Admissible applications for information are subsequently subject to initial processing within the relevant EU institution.<sup>139</sup> Within the European Commission, this usually means that this is undertaken by the staff within the relevant Directorates-General responsible for the area covered by the request, namely under the supervision of the relevant Directors-General and/or heads of individual units.<sup>140</sup> The Legal Unit of the Environment Directorate-General will normally initially handle requests for information concerning environmental infringement files. The relevant technical units within that Directorate-General will usually deal with requests for other types of environmental information held by the Commission. An acknowledgement of receipt is dispatched as soon as the application is registered.<sup>141</sup> Within 15 working days<sup>142</sup> of registration, the institution shall either grant access or, in a written reply, state reasons for the total or partial refusal of the applicant's request and inform the applicant of his right to reply to confirm the request; that is, make a 'confirmatory application'.<sup>143</sup> Failure on the part of the institution to reply within the time limit automatically entitles the applicant to send a confirmatory application.<sup>144</sup> The 15-working day deadline shortens the turnaround time which was allowed under the legislation prior to Regulation 1049, (one month).<sup>145</sup> The period may be extended by 15 working days in respect of applications for accessing very long documents or very large quantities of documentation, so long as the applicant is notified in advance and the notification is fully reasoned.<sup>146</sup>

On notification of a partial or total refusal to provide access, the applicant is obliged submit a confirmatory application within 15 working days requesting the institution to reconsider its initial position and it is important that this deadline is adhered to.<sup>147</sup> This is because failure to submit a confirmatory application within this period has the effect of closing the possibility of appealing against the institution's response; the applicant is deemed to have accepted the position adopted by the institution concerned. Confirmatory applications sent belatedly are technically inadmissible. It is, of course, open to the institution to waive this deadline but, all other things being equal, it is not obliged so to do.

Once in receipt of a valid confirmatory application, the institution concerned has 15 working days either to grant access to the relevant documentation or, again through written reply, to provide reasons for a total or partial refusal to grant such access.<sup>148</sup> As is the case with initial processing, the

139 Art 7 Regulation 1049.

140 See Arts 3(3) and 10 Commission Decision 2001/937.

141 Art 3(1) Commission Decision 2001/937.

142 This works out in practice to mean three calendar weeks.

143 Art 7(1) Regulation 1049.

144 Art 7(4) Regulation 1049.

145 See Art 2 of Commission Decision 94/90.

146 Art 7(3) Regulation 1049.

147 Art 7(2) Regulation 1049.

148 Art 8(1) Regulation 1049.

period is extendable by a further 15 working days with respect to requests for very lengthy documentation.<sup>149</sup> In the latter event, the reply shall inform the applicant of his rights to take annulment proceedings under Art 230 EC and/or file a complaint of maladministration with the European Ombudsman under the auspices of Art 195 EC. Failure by the institution to send a timely response is to be considered a 'negative reply', which automatically entitles the applicant to have recourse to the above-mentioned appeal procedures.<sup>150</sup>

Where an application for information is successful, either through voluntary institutional disclosure or by virtue of a positive outcome on appeal, the applicant has a number of options to access the relevant documentation. Specifically, he may either inspect them at the institution's premises (known as 'on the spot consultations') or require copies (hard photocopy or electronic) to be dispatched to him.<sup>151</sup> Whereas no charge may be made in respect of consultations, copies of fewer than 20 A4 pages and direct access in electronic form or via an institutional register, the institution concerned may otherwise charge applicants for the costs of producing and sending copies.<sup>152</sup>

### 9.2.1.3 *Exceptions*

Regulation 1049 contains some important exceptions to the general rule that institutionally held documentation should be disclosed to the public on request. In particular, certain exceptions are particularly relevant to applications for information concerning infringement files against Member States. The main exceptions are contained in Art 4 of the Regulation and may be broadly divided into ones that are absolute or qualified in nature.

As a matter of general principle, the exceptions are to be interpreted narrowly by the institutions concerned.<sup>153</sup> This approach is underpinned by the requirement contained in the Regulation that if only parts of the requested documentation are covered by an exception, the remainder are to be released to the applicant.<sup>154</sup> In addition, exceptions are to apply for only as long as protection from disclosure is justified.<sup>155</sup> Exceptions may apply for up to a maximum of 30 years, although even this period may be extended in certain limited cases.<sup>156</sup>

149 Art 8(2) Regulation 1049.      150 Art 8(3) Regulation 1049.

151 Art 10(1) Regulation 1049. Special requirements for visually impaired applicants are taken into account (such as the supply of large print or Braille copies): see Art 10(3).

152 As above.

153 As has been well-established by the Court of First Instance. See eg. Case T-110/03 *Sison*, para 45 of judgment.

154 Art 4(6) Regulation 1049.      155 Art 4(7) Regulation 1049.

156 Specifically, documents relating to privacy, commercial interests or 'sensitive' documents (as defined in Art 9 of the Regulation).

Some exceptions within the Regulation are absolute in nature, which means that a refusal must be issued without qualification where the documentation requests are covered by their terms. These include requests for information, the disclosure of which would undermine the protection of the public interest in safeguarding public security, defence and military matters, international relations or the financial, monetary or economic policy of either the Community or a Member State.<sup>157</sup> In tandem with this provision, special supplementary rules are set out in respect of sensitive documents, protecting an essential interest of the EU or a Member State<sup>158</sup> (notably within the context of public security, defence and military areas). Disclosure must also be refused where this would undermine the protection of the 'privacy and the integrity of the individual',<sup>159</sup> where in particular this would conflict with EC legislation on personal data protection. Member States have the possibility of requesting institutions not to disclose documentation in their possession that originates from the Member State concerned.<sup>160</sup> This restriction on disclosure may be of particular relevance in the context of accessing infringement files, which may contain a considerable amount of information and data emanating from national authorities and/or government departments. At the time of writing, the legal effect of this provision is subject to an appeal before the ECJ,<sup>161</sup> the CFI having recently ruled that a Member State's 'request' requires the Commission to refrain from disclosing documents in its possession originating from that Member State.<sup>162</sup> Other third party authors of documents have no special blocking rights. Where there is doubt as to whether third parties' documents are covered by an exception contained in Art 4(1)–(2) of the Regulation, third parties are to be consulted by the institution concerned with a view to assessing whether or not an exception applies.<sup>163</sup>

Other exceptions contained within Regulation 1049 are qualified, in the sense that the institution concerned is obliged to engage in a particular process of evaluating whether or not on balance the documentation concerned should be disclosed in the public interest. These provisions are of particular relevance in relation to enquiries concerning access to information regarding steps taken by the European Commission to process infringement files against Member States suspected of violating EC environmental legislation. Specifically, these exceptions are contained in Art 4(2)–(3) of the Regulation which stipulate:

157 Art 4(1)(a) Regulation 1049.

158 Art 9 Regulation 1049.

159 Art 4(1)(b) Regulation 1049.

160 Art 4(5) Regulation 1049. For a recent example of where access to Member State documentation was denied on this ground, see Case T-187/03 *Scippacercola*.

161 C-64/05P *Sweden v Commission*.

162 Case T-168/02 *IFAW Internationaler Tierschutz-Fonds GmbH*

163 See Art 4(4) Regulation 1049 and Art 5 Commission Decision 2001/937.

2. The institutions shall refuse access to a document where disclosure would undermine the protection of:

- commercial interests of a natural or legal person, including intellectual property,
- court proceedings and legal advice,
- the purpose of inspections, investigations and audits, unless there is an overriding public interest in disclosure.

3. Access to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.

Access to a document containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned shall be refused even after the decision has been taken if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.

The framework applicable to these particular qualified exceptions is structured so as to place responsibility principally on the applicant to demonstrate that disclosure should be granted. Once the institution identifies to its satisfaction that an application is covered by an exception cited in Art 4(2)–(3) of the Regulation, then in practice it will be for the applicant to adduce reasons and/or evidence to show that there is an 'overriding public interest in disclosure'.

As far as access to information concerning law enforcement material is concerned, the exceptions contained in the second and third indents of Art 4(2) are most relevant. Specifically, access to infringement files of the European Commission compiled under the auspices of Arts 226/228 EC that have not yet reached the stage of being brought before the ECJ fall under the exception of 'investigations' referred to in the third indent. The 2004 Commission report on the implementation of the Regulation reveals that the 'investigation' exception is the most frequent ground used for rejecting application for access to information.<sup>164</sup> Documentation relating to infringements which are pending before the ECJ as well as legal opinions issued by the Commission's Legal Service or other sources selected by the Commission, come under the headings of 'court proceedings' and 'legal

164 COM(2004)45. The Commission refers to 35.9% of refusals to access information being based on the 'investigation' exception (para 3.4.3).



advice' respectively. With a few exceptions, the documentation falling under the exceptions contained in Art 4(3) concerns internal preliminary discussions, studies and/or deliberations carried out within the institution and which is of a policy-oriented as opposed to litigious nature. The following sections will examine in detail how these exceptions are to be applied in practice in relation to requests for access to information concerning environmental infringement files drawn up by the Commission, from the perspective of available judicial guidance and current administrative practice.

### **9.2.2 Court of First Instance (CFI) rulings on access to information**

To a considerable extent the legal framework contained in Regulation 1049 relevant to law enforcement material shares textual similarities and resonances with the regime applicable under the preceding legislation of the early 1990s, with the result that a good deal of the practical administrative experience and judicial interpretation from the CFI applicable under the former rules remains pertinent. Notably, the former codes of conduct on access to documents applicable to the Commission and Council of the EU contained specific and general exceptions to disclosure in the public interest that were interpreted at an early stage by the CFI to cover access to files of the Commission handling suspected infringements of EC law by Member States. In a series of cases, the Court has developed a number of basic legal principles pertaining to questions on access to infringement files, which continue to serve as guidance on the parameters of the current public interest exceptions contained in the Regulation.<sup>165</sup> As will be seen in section 9.2.4., the Commission has developed its administrative practice on the basis of these principles.

The leading case to date on questions of access to environmental law enforcement information held by the Commission is the *WWF UK* case (Case T-105/95). The case concerned a dispute over the compatibility of a proposed construction in 1991 of a visitor's centre in the Burren National Park at Mullaghmore, Ireland with EC environmental legislation, specifically the EIA Directive 85/337. The project was to be partly financed by the EC's structural funds. WWF UK also considered that authorisation of funding would be in conflict with the Community's rules on structural funding of projects and filed a complaint with the European Commission. The Commission considered the complaint and announced in 1992 that it did not intend to initiate infringement proceedings against Ireland under Art 226 EC. A legal challenge was then launched under Art 230 EC to annul the decision of the Commission to refrain from taking legal action against

165 For an overview of these cases affecting the environmental sector, see e.g. Williams (2002) pp 279 *et seq.*

Ireland. As discussed in section 9.1.1.2, this legal action proved ultimately to be unsuccessful on the grounds that the applicants lacked legal standing to bring an action.<sup>166</sup> Subsequently, in 1994, WWF UK requested access to the Commission's documents relating to the examination of the Mullaghmore project, relying on the provisions contained within the former Decision 94/90 on public access to Commission documents. The Commission refused to disclose access to the content of its infringement dossier in relation to the case, submitting that the Decision provided exceptions relating to the disclosure of documentation in the public interest where inspections or investigations were involved and in relation to protecting the need to maintain confidentiality of Commission internal proceedings.

The ensuing judgment of the CFI set down a number of important general principles pertaining to the disclosure of documentation covered by exceptions relating to the public interest. Notably, the Court confirmed as a fundamental principle that exceptions to right of access to information set out in EC legislation should be construed and applied strictly in a manner that does not defeat the operation of the general rule that access should be granted; exceptions should not be interpreted so as to render the underlying objective of securing greater transparency of Community decision making impossible.<sup>167</sup> This particular principle has been affirmed consistently by the CFI,<sup>168</sup> and carried through by the Court to apply in relation to the current access to information regime under Regulation 1049.<sup>169</sup> In addition, where the institution in question is granted a margin of discretion as to whether to accept or reject the request for information under the terms of the rules governing access, the CFI confirmed in the WWF UK case that the institution was obliged to engage in an evaluation process with a view to striking a genuine balance between, on the one hand, the interests of the citizen in obtaining disclosure and, on the other, the public interest crystallized in the exception which required protection of confidentiality of the documentation in the institution's possession.<sup>170</sup>

The CFI then addressed itself to the question as to whether the Commission was justified in refusing disclosure of its file relating to the investigation of the Mullaghmore visitor site, an investigation which could have led to the opening of Art 226 EC enforcement proceedings. The Court considered that the public interest exception contained in Decision 94/90 justified in principle the application of a wide-ranging bar to access to infringement files, taking into particular account the interests of Member States subject to investigation:

166 Case T-461/93 *An Taisce* and *WWF UK*. 167 Para 56 of judgment.

168 See e.g., Cases T-309/97 *The Bavarian Lager Company* (para 39 of judgment), T-92/98 *Interporc* (para 38 of judgment).

169 See e.g., Case T-110/03 *Sison* (para 45 of judgment). 170 Para 59 of judgment.

In this regard, the Court considers that the confidentiality which the Member States are entitled to expect of the Commission in such circumstances warrants, under the heading of protection of the public interest, a refusal of access to documents relating to investigations which may lead to an infringement procedure, even where a period of time has elapsed since the closure of the investigation.<sup>171</sup>

The CFI did not specifically justify why non-disclosure should continue for a period even after closure of an investigation. One possible explanation may be that closure of a file may be considered to be provisional, in the sense that the Commission has the opportunity to reopen its file at any stage.<sup>172</sup> Whilst this may be true theoretically, in practice closure of a Commission infringement file is usually definitive, unless and until new facts or evidence are presented which lead it to make different conclusions. Regrettably, the CFI did not even specify the parameters for determining how long non-disclosure of a closed file could continue.

Notwithstanding its interpretation in favour of non-disclosure, the CFI underlined that the rules on access to information required the Commission to provide the applicant with reasons for its position, and could not shelter behind a mere abstract statement of non-disclosure in the public interest. Specifically, the Court spelt out that the Commission was obliged, at the very least, to indicate by reference to categories of documentation, the reasons why it considered the documents requested were related to the possible opening of an infringement procedure.<sup>173</sup> Furthermore, the subject matter of the documents should be indicated and particularly whether they involve inspections or investigations relating to a possible infringement action being launched. The CFI was mindful, though, as it saw it, of the need on the part of the Commission not to provide ‘imperative reasons’ justifying application of the public interest exception in relation to all documents, where dissemination of the reasons would undermine the purpose of the exception, namely effectively disclose the content of the particular document in question. In relation to the issue of providing adequate reasoning, the Court noted that Art 253 EC (ex Art 190) requires the Commission to state the reasons on which it bases its decisions, for the purpose of permitting interested parties the justification for the measure in order to be able to defend their rights and to enable the Community judiciary to be able to exercise its power to review the legality of the decision.<sup>174</sup>

171 Para 63 of judgment.

172 See SEC(2003)260/3 Commission Working Paper on public access to documents relating to infringement proceedings (28.2.2003) at section E.3.

173 Paras 64 and 74 of judgment.

174 Para 66 of judgment.

In this particular case, the CFI annulled the Commission's decision to reject disclosure, on grounds that the Commission had not provided adequate reasons for considering the relevant documentation requested were all related to a possible infringement proceeding. However, it is clear that that conclusion amounted to a pyrrhic victory for the applicants, given that the CFI had provided a framework under which the Commission could prospectively quite easily justify the non-disclosure of key documentation contained in infringement files; namely any document that might possibly be relevant in the assessment as to whether infringement action could be taken. This would include, for instance, legal analysis as well as any evidence gleaned from inspections and investigations either by the Commission or third parties (for example, scientific reports/audits, witness statements).

Subsequent case law has reaffirmed and underpinned the CFI's position that access to infringement files should be heavily restricted. In the *Bavarian Lager* case (Case T-309/97) the applicant wished to gain access to a draft reasoned opinion of the Commission. In this particular case, the Commission had decided to suspend the continuation of Art 226 EC proceedings against the UK over a dispute relating to the free movement of goods, after having considered that the UK was taking appropriate steps to ensure that its legislation was in line with Art 28 EC. The Commission announced that the case would be definitively closed once the relevant domestic legislation had been altered to comply with EC law. The applicant was denied access to the draft reasoned opinion on grounds relating to the exception based on public interest in Decision 94/90. The CFI held that non-disclosure of the preparatory document in question was justified, and fleshed out the bare reasoning provided in the earlier *WWF UK* judgment. Specifically, the Court clarified the point made in *WWF UK* that Member States subject to investigation are entitled to expect confidentiality from the Commission:

The disclosure of documents relating to the investigation stage, during the negotiations between the Commission and the Member State concerned, could undermine the proper conduct of the infringement procedure inasmuch as its purpose, which is to enable the Member State to comply of its own accord with the requirements of the Treaty or, if appropriate, to justify its position (see Case-191/95 *Commission v Germany* [1998] ECR I-5449) could be jeopardised. The safeguarding of that objective warrants, under the heading of protection of the public interest, the refusal of access to a preparatory document relating to the investigation stage of the procedure under Art [226] of the Treaty.<sup>175</sup>

175 Para 46 of judgment.

Accordingly, it appears from the case law that the justification for non-disclosure of infringement documentation rests fundamentally on the need, as the Court perceives it, to preserve the strong emphasis on negotiation with a view to securing a friendly settlement between the Commission and Member State, contained within the framework of Art 226 EC proceedings. The concern appears to be that access by a third party to these negotiations could undermine the system of facilitating an open dialogue characteristic of such proceedings. In this particular case, the CFI noted that, at the time when the applicant requested access to the draft reasoned opinion, the case had not yet been definitively closed, merely suspended pending completion of the necessary domestic legislative changes to be made on the part of the UK. Given these particular circumstances, namely that the proceedings were still technically 'live' at the time of the request, the Court's reasoning appears far more convincing and lends itself as an important refinement to the bold and open-ended statement made in *WWF UK* that non-disclosure could be preserved 'even where a period of time has elapsed since closure of the investigation'.

In the *Petrie* case (Case T-191/99), the CFI had further opportunities to develop its position on the question of access to infringement dossiers held by the Commission. In this case, the applicant was dissatisfied with the handling by the Commission services of his complaint against certain employment practices at Italian universities. Specifically, he had considered that Italian universities were guilty of failing to adhere to previous ECJ rulings<sup>176</sup> by continuing to organise employment contracts for foreign language lecturers on a basis that infringed the terms of the free movement of workers provisions under EC law, notably Art 39(2) EC, namely by indirectly discriminating against migrant workers on the basis of nationality. The Commission took up his complaint and initially issued a letter of formal notice and a reasoned opinion against Italy under Art 226 EC. However, subsequently the Commission decided to recast its heads of complaint against Italy and recommenced the pre-litigation procedure in 1998, before bringing an action ultimately before the ECJ. The applicant, dissatisfied with the amendments made to the Commission's terms of complaint against Italy, requested access to the Commission's file on the case. The Commission rejected the request and the applicant brought an action for annulment of that decision before the CFI. In line with its previous rulings, the CFI upheld the Commission's refusal to provide access to the infringement file. The Court underlined that confidentiality had to be maintained in order to preserve the objective underpinning enforcement proceedings, namely that an amicable settlement should be facilitated between the Member State and Commission, whenever possible. Such a settlement could be achieved up

176 Notably, Case C-332/91 *Allue* [1993] ECR I-4309.

until judgment of the Community judiciary adjudicating the particular infringement action. Accordingly, access to pre-litigation documents relating to inspections and investigations could be refused in such circumstances.<sup>177</sup> In this context, the CFI also held that the applicant's submission that access should be provided on the grounds of securing him a fair hearing was unfounded. The Court considered that this general legal principle recognised in EC law (*audi alteram partem*) was inapplicable in the circumstances, given that the applicant was not technically a party to infringement proceedings.<sup>178</sup>

In the *Interporc II* case (Case T-92/98),<sup>179</sup> the CFI clarified the meaning of the term 'court proceedings' contained in Decision 94/90 and now enshrined in Art 4(2) second indent of Regulation 1049. The case concerned an investigation by the German authorities and an analysis by the Commission of suspected customs fraud. The Commission refused access to a number of documents relating to its inquiries, including documentation concerning pending litigation before the Community judiciary. The CFI held that the term 'court proceedings' covered disclosure of contents of documents drawn up by the Commission solely for the purposes of specific court proceedings, and would include pleadings or other documentation lodged with the Court, internal documents concerning the investigation of the case before the Court as well as correspondence concerning the case between the Directorate-General concerned leading the file and the Commission's Legal Service or a lawyer's office. The Court based its interpretation on the need to protect work done within the Commission as well as confidentiality and safeguarding of the doctrine of professional legal privilege for lawyers.

The legal analysis of the CFI in *WWF UK* and subsequent judgments relating to disclosure of infringement files are of key importance in interpreting the public interest exceptions in Art 4(2) of Regulation 1049, notwithstanding that they were delivered when Decision 94/90 on public access to Commission documents was still in force. This is not surprising, given that the provisions contained in the Regulation on law enforcement materials are only slightly more detailed than those in the 1994 Decision and are based on the same fundamental principles of achieving a balance between securing maximum transparency of decision making and the narrowly defined public interest exceptions. The CFI has made it clear in a number of cases since the entry into force of Regulation 1049 that the general principles established in its case law relating to the public interest exceptions contained in the previous legislation continue to apply in relation to the Regulation.<sup>180</sup>

Brief mention must also be made to current developments before the CFI and ECJ concerning the effect of the provision in Art 4(5) of Regulation

177 Paras 68–69 of judgment.

178 Para 70 of judgment.

179 Confirmed on appeal in Case C-41/00P.

180 See e.g., Cases T-2/03 *Verein für Konsumenteninformation* and T-110/03 *Sison*

1049 in relation to requests by a Member State to restrict the disclosure of documents held by the European Commission originating from that Member State. The Commission has taken the view that the effect of Art 4(5) is to provide Member States with a veto over disclosure. This position was challenged recently before the CFI in the *Internationaler Tierschutzfonds* case (Case T-168/02). In that case, an NGE0 had requested the Commission to disclose a range of documents pertaining to the Commission's decision in 2000 to authorise Germany to declassify a particular site known as the Mühlenberger Loch from protection under the auspices of the Habitats Directive 92/43. The purpose of declassification was to enable enlargement of an aircraft factory as well as reclamation of part of an estuary for conversion into a runway extension. The Commission refused to disclose information it had obtained from the German authorities without their prior agreement. In its judgment relating to the applicant's action for annulment of the Commission's decision to refuse disclosure in November 2004, the CFI agreed with the Commission's interpretation that prior agreement of a Member State was required before disclosure could go ahead. The Court took particular note of the fact that the Member States had attached a Declaration<sup>181</sup> to the Treaty of Amsterdam 1997, which noted that the principles and conditions on access to information contained in Art 255(1) EC will allow Member States to request the Council or Commission not to communicate to third parties a document originating from that Member State without its prior agreement.

In February 2005, the Swedish Government lodged an appeal against the CFI's judgment, taking the view that the wording of Art 4(5) of the Regulation did not stipulate an authorship rule in favour of Member State documentation, but that such documentation would be subject to the standard openness rules required by the Regulation (Case C-64/05P). The Swedish Government is supported by the Dutch and Danish governments in its interpretation of the Regulation, favouring a broadening of access to information. In opposition to this interpretation, the Commission is supported by the UK Government. It appears difficult to accept an interpretation of Art 4(5) of the Regulation essentially different from the one held by the CFI, albeit that the wording in the English language is rather curious in referring to the term 'request', which does not lend itself, from a linguistic perspective, to indicate a power of command on the part of Member States. Nevertheless, it appears clear from the context and intention underpinning the provision that Member States are intended to be vested with rights to block access. There is possibly room to construe the provision to limit the power of veto to situations where the Member States make it clear from the moment of submitting documentation to one of the political EU institutions that disclosure is to be restricted.

181 Declaration No 35 annexed to the Final Act of the Treaty of Amsterdam 1997.

If the ECJ confirms the CFI ruling, as was made clear in the litigation before the CFI the effect is likely to mean a fracturing of the extent to which Member State documentation held by the Commission is likely to be made publicly available. Access is likely to be predicated on the degree of administrative transparency fostered by individual Member States, which is currently subject to wide variation.

### ***9.2.3 The European Ombudsman (EO) and access to information***

Applicants located within the EU who consider that they have been unfairly denied access to information held by any of the three political EU institutions have the opportunity to appeal to the European Ombudsman (EO).<sup>182</sup> Under Art 195 EC, the EO is charged with the responsibility of investigating complaints made to him concerning instances of maladministration on the part of non-judicial EU institutions and bodies.<sup>183</sup> The role and impact of the EO are examined in detail in Chapter 10. However, it is relevant at this stage to highlight briefly the EO's particular function in relation to access to information issues.

As is made clear in Regulation 1049, if one of the three legislative EU institutions refuses to disclose information held by them to an applicant who has submitted to them a confirmatory application, the institution is obliged to inform the applicant of his/her right to appeal to the EO and the CFI.<sup>184</sup> The EO is charged with the mandate under the EC Treaty to investigate cases of alleged 'maladministration' on the part of a non-judicial EU institution or body, which includes notably the European Commission, European Parliament and Council of the EU. The term 'maladministration' is not defined in the EC Treaty or in secondary legislation. In broad terms, the EO has interpreted it to mean a situation where a public body fails to act in accordance with a rule or principle that is binding on it.<sup>185</sup> Essentially, this means that the EO's task, when investigating complaints of maladministration made to him, is to verify the absence or presence of institutional compliance with the law as well as with principles of good administrative practice to which the institution has bound itself. In practice, the latter have been derived from general principles of EC administrative law developed over the years by the Court of Justice. Where an applicant who is denied access to information decides to elect the judicial route of appeal (that is, bring annulment proceedings before the CFI under Art 230 EC), this has the effect

182 Unlike the rights of access to information held in the possession of the three legislative EU institutions, the right to complain to the EO does not extend to natural persons resident outside the EU nor to legal persons who do not have a registered office within the EU. See Art 1(3) of Commission Decision 2001/937.

183 See the EO website: [www.euro-ombudsman.eu.int](http://www.euro-ombudsman.eu.int)

184 Art 8(3) Regulation 1049.

185 EO Annual Report 1997 (OOPEC 1998).



of automatically terminating the EO's jurisdiction with respect to the case. The EO will not take up any complaint which is or has been the subject of current legal proceedings,<sup>186</sup> otherwise his mandate would encroach on the independence and powers of judicial bodies. Hence, an applicant may not elect to appeal to both the EO and the CFI.

There are certain advantages in taking an appeal to the EO rather than to the CFI in an access to information dispute. From a costs perspective, the appeal mechanism to the EO is free of charge and representation by a qualified legal practitioner is not required. In addition, it appears that the EO is, on average, able to deliver a final decision quicker than with cases before the CFI (that is, usually within a year or less, as opposed to 18 months or more).

However, appeals to the EO have also definite shortcomings. It should be noted that natural persons resident outside the territory of the EU and legal persons without a registered office within the EU do not have a right of recourse to the EO; no such obstacle applies in relation to annulment proceedings brought before the CFI. In addition, the EO's decisions are not legally binding and any interpretation of EC law by the Ombudsman is subject to the qualification that definitive legal interpretations of Community law and legislation are made by the EU's judicial institution, namely the Court of Justice as composed of the ECJ and CFI. Accordingly, the EO has, as a matter of basic principle in line with CFI jurisprudence, upheld refusals on the part of the European Commission to disclose infringement dossiers.<sup>187</sup>

Having said that, the EO has indicated that he is prepared to explore the parameters of the phrase 'overriding public interest' in relation to the qualified exceptions contained in Art 4(2)–(3) of Regulation 1049, subject to compliance with any principles or limits laid down in available CFI or ECJ jurisprudence. This was illustrated in an allegation of maladministration made to the EO in 2002 about the handling of a complaint made to the European Commission relating to a suspected breach of EC legislation within the UK concerning the non-life insurance sector.<sup>188</sup> The complainant, a private investor in the Lloyd's insurance market who had made considerable financial losses (a 'Name'), had contacted the Commission alleging that the UK had failed to correctly implement the EC Directive 73/239 on non-life insurance. He requested access to the Commission's letter of formal notice subsequently sent to the UK, but was denied access on the grounds of the public interest exception cited in the third indent of Art 4(2) of Regulation 1049. The EO's decision, whilst formally upholding the Commission's

186 Art 195(1) EC, second subparagraph.

187 Decision of the EO on complaint 2229/2003/MHZ against the European Commission, which concerned a request for a disclosure of a letter of formal notice issued under Art 226 EC.

188 Decision of the EO on complaint 1437/2002/IJH against the European Commission.

decision to refuse to disclose the legal document, is noteworthy for its close scrutiny of the reasons for non-disclosure and whether or not on balance there was an overriding public interest to grant access. The EO accepted that in principle the complainant had established a 'significant public interest in disclosure', given that disclosure in this case would make it possible for the public to check the accuracy of information supplied to the Commission from the UK authorities for the purpose of analysing compliance with EC law and 'thereby enhance the effectiveness of the Art 226 procedure'.<sup>189</sup> The EO accepted, in this context, that a considerable amount of information supplied to the Commission would have emanated directly from the Lloyd's insurance market itself and a question would accordingly arise as to the objectiveness of that information supply. However, the EO considered that this particular concern was met by the fact that the Commission services were able to set about verifying the accuracy of the information from a number of internal and external sources (for example, UK court judgments, petitions to the European Parliament, official UK parliamentary and government reports as well as in-house expertise on auditing arrangements and legal issues). As a result, the EO was not persuaded that the complainant had adduced a case for there to be an overriding public interest in disclosure, given that the issue of verification of information was satisfactorily addressed, in his opinion, by the Commission's range of working methods and resources involved in assessing the case.

In another case, a scientific researcher had sought to gain access to a legal opinion drawn up by the Commission's Legal Service on the relationship between the Euratom Treaty and the EC Treaty in relation to the rules on state aids contained in Arts 87–89 EC.<sup>190</sup> His request was rejected on the basis of the second indent of Art 4(2) of Regulation 1049, namely that the opinion constituted 'legal advice' for the purposes of the Regulation. It was not apparent that the legal opinion had been drafted with the view to contemplating the commencement of any specific legal proceedings on the part of the Commission. The EO agreed with the Commission's view in holding that non-disclosure was covered by the public interest exception in the second indent. In assessing whether there was nevertheless any overriding interest in requiring that access to the information be granted, the EO accepted that scientific interest on the part of the applicant in gaining access to the material constituted a public interest, this was not sufficient to be 'overriding' in the sense required by the Regulation. The EO, in disagreement with the applicant, considered that under the framework of the Regulation it was incumbent on the applicant and not on the Commission to come forward with submissions intended to persuade the case for an overriding

189 See para 2.5 of EO Decision.

190 Decision of the EO on complaint 412/2003/GG against the European Commission.

public interest in disclosure. In addition, the EO did not accept that the fact that the opinion in question was drawn up two years before the applicant's request was material; the age of the document in this instance did not raise any presumption that access should be granted.

In one notable respect, the EO has sought to develop a particularly innovative interpretation in favour of disclosure in relation to certain types of legally related documentation held by an institution. Specifically, the EO has confirmed that, in his view, legal opinions emanating from the Legal Service within the Council of the EU relating to draft legislative instruments are not covered by the exception of 'legal advice' contained in the second indent of Art 4(2) of Regulation 1049, but instead by the public interest protection clauses in Art 4(3).<sup>191</sup> In his view, when the legislative process has finished, access to a legal opinion of the Council could be refused only where the institution was able to demonstrate that disclosure would seriously undermine its decision-making process, and even if this could be done this would then be subject to the possibility of this being rebutted by a complainant establishing an overriding public interest in disclosure. The EO's position appears to run counter to an earlier interim ruling by the CFI, where the President of the CFI in the *Norup Carlsen* case (Case T-610/97) had found that the Council's refusal to disclose access to the opinions of legal services concerning draft legislation did not appear to breach the code of conduct binding on the Council at the time under Decision 93/731. The EO considered that the CFI's interim ruling in that case did not have any bearing on the interpretation of Regulation 1049, whose provisions in Art 4(3) were not reflected in the previous legislation. In addition, the EO considered that there were additional special legal reasons which required non-disclosure in that case, given that the public release of the documents concerned would have had a prejudicial impact on the outcome of the main legal proceedings in question. Another factor raised by the EO was the fact that at the material time of the *Norup Carlsen* case, Art 255 EC had not yet been amended<sup>192</sup> to include the general requirement on the Council to take steps to allow greater access to its documents where it acts in a legislative capacity.

Given the non-binding nature of the EO's decisions and the relatively recent enactment of Regulation 1049, it is not altogether clear to what extent the EO is able to influence the practice of the three legislative institutions of the EU in relation to access to information issues. Where the EO takes a decision based on his own interpretation of the rules underpinning Regulation 1049, and where there is no available case law from the CFI on the material

191 See Special Report from the EO to the European Parliament following the draft recommendation to the Council of the EU in complaint 1542/2000/(PB)SM and the EO's Draft recommendation to the Council in complaint 1015/2002/(PB)IJH.

192 By virtue of the Treaty of Amsterdam 1997.

points of law, it is unclear to what extent, if at all, the political EU institutions, notably the Commission and Council, are prepared to adopt his recommendations. It is perhaps regrettable that the EC Treaty does not provide the EO with more ‘teeth’ to back up his decisions. This could take the form of conferring legal force to his decisions, or possibly creating a special procedure to obtain a confirmatory declaration from the CFI on legal interpretations of the Regulation in particular cases.<sup>193</sup>

#### ***9.2.4 Access to information relating to infringement proceedings: practice of the Commission***

Since the promulgation of Regulation 1049, in 2003 the European Commission has published some useful guidance in the form of a Working Paper<sup>194</sup> setting out how it intends to apply the rules of the legislative instrument in practice in relation to applications for access to documents contained within its infringement files. In taking on board the available case law of the CFI as well as relevant decisions of the European Ombudsman, the Working Paper fleshes out in greater detail as to when and which material may be disclosed. In addition, the Commission’s 2004 review report on the implementation of the Regulation provides a cursory overview of recent judicial and administrative developments in relation to the application of the public interest exceptions to court proceedings, legal advice and investigations.<sup>195</sup>

In line with the existing jurisprudence of the CFI, the Working Paper specifies that the public interest exception concerning ‘investigations’ would continue to apply wherever an infringement file is ‘live’, namely has neither been definitively closed during the pre-litigation phase nor discontinued during the litigation phase<sup>196</sup> of proceedings under Arts 226/228 EC.<sup>197</sup> By way of contrast, the Commission indicates in the Working Paper that it is prepared to apply a ‘presumption of accessibility’ in relation to infringement dossiers where a case has been either closed or discontinued definitively. In taking on board the CFI’s judgment in the *WWF UK* case that access may be refused even where a period of time has elapsed since the closure of an investigation concerning the issue of Member State compliance with EC law,

193 Perhaps akin to the ‘fast track’ litigation procedure contained in Art 95(9) EC which gives the Commission the possibility to refer directly to the ECJ if it considers that a Member State is abusing its powers to maintain or introduce stricter measures than those contained in an EC measure harmonising an area of law relating to the operation of the internal market.

194 SEC(2003)260/3 Commission Working Paper on public access to documents relating to infringement proceedings, 28.2.2003.

195 COM(2004)45, 30.1.2004, at section 3.4 (Exceptions subjected to a public interest).

196 Namely, where an action has been brought and is currently pending before the ECJ.

197 See paras 30–31 and 35 of the Working Paper.

the Commission indicates in the Working Paper that a decision as to when disclosure of a file should be granted in such circumstances 'should be decided on a case-by-case basis, the basic principle being the broadest possible access and a restrictive interpretation of the exceptions.'<sup>198</sup> The Commission notes, however, that the investigation exception contained in the third indent of Art 4(2) of Regulation 1049 could continue to apply if disclosure could jeopardise another investigation under way. A presumption of accessibility is also declared in the Working Paper to apply after a judgment has been handed down by the ECJ under Art 226 EC. However, it indicates that this presumption may be reversed on a case by case basis, and this would be relevant in respect of joined cases, or when negotiations with Member States are being pursued with a view to achieving compliance, bearing in mind that these may ultimately lead to second round Art 228 EC proceedings against the Member State concerned.<sup>199</sup> In practice, this will mean logically that the Commission will not be prepared to disapply wholly the public interest exception contained in the third indent to Art 4(2) of the Regulation after an Art 226 EC judgment has been made by the ECJ, which finds that a defendant Member State has breached EC law. The Working Paper, though, makes clear that the application of the exception will be limited to protecting the post-226 negotiation phase between itself and the Member State concerned.

A table of categories of documents relating to infringement files that may be the subject of access to information requests and analyses how access in relation to these is governed under the terms of Regulation 1049 is also provided in the Working Paper.<sup>200</sup> According to the table, the following documents are considered covered by the 'investigation' public interest exception contained in the third indent of Art 4(2) of the Regulation: complainant's correspondence and replies from the Commission services; correspondence between the Commission and Member State concerned; internal Commission documentation including notes provided by the Commission's services and infringement forms; the letter of formal notice and reasoned opinion. Legal advice, such as that from the Commission's Legal Service (or elsewhere) is deemed to be covered by the 'legal advice' public interest exception contained in the second indent of Art 4(2) of the Regulation. Documents drawn up for the purpose of any specific court proceedings, such as written submissions to the ECJ, are treated as falling under the 'court proceedings' exception contained in the second indent to Art 4(2). Finally, the Commission indicates in the table that other more administrative and/or policy-oriented type documents, such as special minutes of the *chefs de cabinet* of the Commissioners, those of the College of Commissioners as

198 Para 33 of the Working Paper.

199 Para 34 of the Working Paper.

200 At p 12 of the Working Paper.

well as minutes of ‘package’ meetings with Member States over compliance issues in general, are to be assessed under the auspices of Art 4(3) of the Regulation dealing with internal preparatory Commission deliberations.

The Working Paper provides a useful insight into the approach of the Commission in handling requests for documentation contained in its infringement files, including those relating to environmental cases. Given that the declared aim of the Working Paper is to facilitate and standardise the processing of requests for such material,<sup>201</sup> it represents an appropriate benchmark against which administrative practice of the Commission may be scrutinised. In this sense, it is a particularly useful document which the European Ombudsman may refer to in assessing whether or not Commission services’ handling of information requests relating to law enforcement dossiers passes muster or is tantamount to maladministration in any given case.

### ***9.2.5 The Draft Århus Regulation and access to environmental information***

As mentioned in the introduction to this chapter, since the promulgation of Regulation 1049 a supplementary set of EC rules concerning access to information held at EC level has been drafted as a means of implementing the 1998 Århus Convention with respect to the Community’s institutional framework. The Draft Århus Regulation<sup>202</sup> proposed by the European Commission in 2003, and at the time of writing subject to legislative scrutiny, seeks to introduce a number of measures additional to those contained in Regulation 1049 in order to ensure that the Community’s commitments under the Århus Convention are implemented. Specifically, these are contained within Title II of the Draft Århus Regulation (Arts 3–7), entitled ‘Access to Environmental Information’.

Notwithstanding the prospective impact of the Draft Århus Regulation, it is fair to say that Regulation 1049 is set to remain the principal legal mechanism dealing with access to environmental information held at EC level. The fundamental purpose of the Draft Århus Regulation’s provisions in Title II is to complement and to a limited extent supplement rather than replace those of Regulation 1049. The Commission’s position is that the rules contained within it serve to ensure that its institutional legal framework complies with the Århus Convention ‘to a great extent’.<sup>203</sup> With one qualification taken on board by the Draft Århus Regulation, this is certainly the case with respect to the matter of securing rights for the general public to have access to environmental information held by the legislative institutions of the EU, in that the minimum requirements on procedural rights pertaining to information access as contained in Art 4 of the Århus Convention are

201 Para 2 of the Working Paper. 202 COM(2003)622.

203 Recital 12 to Draft Århus Regulation.

met. However, in its current form, Regulation 1049 subjects only the three legislative EU institutions to its requirements, namely the European Parliament, Commission and Council. The Draft Århus Regulation proposes to extend the application of Regulation 1049 to 'EC institutions and bodies', defined as meaning public institutions, bodies, offices or agencies established by or on the basis of the EC Treaty and performing public functions except when and the extent to which they act in a judicial or legislative capacity.<sup>204</sup> The impact of this change would mean that a far greater range of EC bodies would become formally subject to the access to information rules under Regulation 1049 than at present, and would, for instance, notably include organs such as the European Environment Agency (EEA) and the European Maritime Agency, as well as other entities that may hold environmental information, such as the European Ombudsman, EU Information Offices and missions. Whether this amendment would invoke immediately obvious and significant practical changes to current operational procedures at EC level is open to debate. For instance, the EEA has a long-standing practice of readily disclosing environmental information to the public. It is likely that the impact of the change will be more subtle, difficult to predict but potentially also profound, in the sense that there may be more opportunity to gain access to Member State data and perhaps even positioning on detailed environmental questions. The extent to which this is likely to occur will depend significantly on the outcome of the current legal dispute over the question of interpreting Art 4(5) of Regulation 1049 on the extent to which restrictions may be imposed on access to documentation originating from a Member State.

In addition to extending the institutional scope of Regulation 1049, the Draft Århus Regulation introduces other provisions designed to flank the existing access to information legal structures. Specifically, these include obliging those EC institutions and bodies not in receipt of information requested by an applicant, either to inform that person of the relevant EC institution or body or Member State public authority to which it believes it is possible to apply for the relevant information, or to transfer the request directly to the relevant entity and inform the applicant of this decision accordingly.<sup>205</sup> The Draft Århus Regulation also seeks to oblige EC institutions and bodies to organise environmental information<sup>206</sup> relevant to their respective functions and which is held by or for them with a view to ensuring that it is actively and systematically disseminated to the public, in particular

204 See Arts 2(c) in conjunction with Art 3 Draft Århus Regulation.

205 Art 6 Draft Århus Regulation.

206 The meaning of 'environmental information' in the Draft Århus Regulation is broadly defined (Art 2(1)(e)) and mirrors the one contained in Art 2(1) of Directive 2003/4 on public access to environmental information and repealing Directive 90/313 (OJ 2003 L41/26), which is discussed in Chapter 8.

through electronic means such as via publicly accessible registers.<sup>207</sup> These are to be constructed along the lines envisaged in respect of registers intended to provide general information pertinent to the EU under Arts 11–12 of Regulation 1049. The EC institutions and bodies may use internet links in order to ensure that information systems are not duplicated.<sup>208</sup> The environmental information to be made available in Community databases or registers includes: progress reports on the implementation of legal obligations at national, EC and international level as well as on policies, plans and programmes relating to the environment; reports on the state of the environment to be published at intervals not exceeding four years; data or data summaries obtained from monitoring activities affecting the environment; authorisations with a significant impact on the environment as well as environmental agreements; and environmental impact studies and risk assessments concerning environmental elements.<sup>209</sup> As regards qualitative obligations, the Draft Århus Regulation requires environmental information to be updated, accurate and comparable<sup>210</sup> and the institutions to supply, on request, data concerning the measurement procedures used to compile environmental information.<sup>211</sup> Finally, there is provision concerning co-operation between Member State authorities and EC institutions and bodies on provision of environmental information to the authorities in the event of an imminent threat to health or the environment, with a view to enabling the public to take action as may be appropriate in the particular circumstances of an emergency.<sup>212</sup>

### **9.3 Impact of the EU's access to environmental justice and information framework in relation to EU institutions: some reflections**

It is evident from the above exploration of the various EC legal rights of private persons enabling them to obtain judicial review of Community in/action in relation to the environment as well accessing environmental information held by EU institutions, that the current legal position is in a state of flux. The EU is in the middle of a process of aligning its rules governing those legal areas to those contained in the 1998 Århus Convention through internal legislation, specifically the Draft Århus Regulation that is set to enter into force during 2006/07 after being approved jointly by the European Parliament and Council of the EU, acting in their respective legislative capacities. The Draft Århus Regulation contains provisions that are set to introduce significant changes to the existing limited possibilities for civil society to be able to access the Court of Justice in order to seek legal

207 Art 4 Draft Århus Regulation.

209 Art 4(2) Draft Århus Regulation.

211 Art 5(2) Draft Århus Regulation.

208 Art 4(3) Draft Århus Regulation.

210 Art 5(1) Draft Århus Regulation.

212 Art 7 Draft Århus Regulation.



review of certain institutional measures considered to be in breach of EC environmental legislation.

### ***9.3.1 Access to environmental justice at EU level: prospects***

The current range of EC Treaty procedures offering opportunities for legal challenges to be made against non-judicial EU institutions' measures affecting the environment contain conditions that unduly restrict private persons' rights to obtain judicial review of such measures by the Court of Justice. The rights to take legal action against those EU institutions, as contained in Arts 230, 232 and 235 EC, are fundamentally ill-suited to allowing private persons and associations a genuine opportunity to take action in order to ensure that supranational institutional conduct adheres to the requirements of EC environmental law.

They have been crafted on the basis of classic liberal ideas of affording opportunities for persons to be able to defend their individual rights. Liberal notions of safeguarding the position of the individual constitute the philosophical underpinning of these procedures. Since their incorporation within the original 1957 EEC (now EC) Treaty, the rules on legal standing applicable to such persons have not been subject to any amendment. They have not been adjusted to take into account the incorporation of environmental protection requirements that have featured expressly as an integral part of the EU's constitutional framework since the Single European Act 1986. The result, as exemplified in the *Stichting Greenpeace* and *EEB* cases, has been to deny the opportunity for environmental interest groups to be able to bring legal proceedings with a view to ensuring that EC environmental law is adhered to at EC level. The rules of legal standing in these provisions continue to reflect the markedly outdated assumption that the sole object of the emerging EU is to construct a vision of European market integration, so that possibilities should be provided to enable private persons operating within the emerging single market to defend their personal, economically grounded legal interests through legal means. The rules on legal standing do not allow for the possibility that private persons may wish to defend other legal interests, such as environmental protection requirements. Similar problems attend the non-contractual liability action under Art 235 EC. It has been constructed and developed on the basis of defending solely the liberal conception of the individual, namely that the action should be predicated on the basis of enabling private persons to assert personal rights and be able to obtain an economically attuned remedy for incursions into such individual rights, namely monetary compensation. This civil liability mechanism is clearly not suited to remedying environmental torts committed by EC institutions.

The Draft Århus Regulation, however, does contain provisions that are set to address a number of problems concerning the state of access to environmental justice at EC level. Specifically, certain qualifying environmental

protection groups will be able to use new internal and judicial review procedures in order to challenge administrative decisions taken by non-judicial EU institutions affecting environmental issues. Ultimately, qualified entities will have the power to seek annulment of certain institutional acts that contravene EC environmental legislative requirements. These prospective changes to the current EC rules on judicial review of Community acts will go a considerable way to meeting the broad-ranging access to justice requirements set out in Art 9(3) of the Århus Convention. Most administrative decisions on environmental issues taken by the key supranational institutional players at EC level, notably those taken unilaterally by the European Commission, will be subject to the new legal scrutiny and challenge procedures. However, the Draft Århus Regulation's review procedures fail to include a right of a qualifying environmental protection organisation to require review of Commission decisions in relation to the handling of files relating to alleged Member State infringements of EC environmental law. Arguably, this omission fails to meet the requirements of Art 9(3) of the Århus Convention.

### ***9.3.2 Access to environmental information at EU level: prospects***

With the promulgation in 2001 of Regulation 1049, the EC has established a legal framework that serves to a considerable extent to align its internal rules on access to environmental information with the requirements of the Århus Convention. These are set to be underpinned further when the Draft Århus Regulation enters into force. In the main, civil society is offered a reasonably extensive platform of rights to be able to gain access to environmental information held by EC institutions.

The rules contained in Regulation 1049 contain a number of public interest exceptions, offering considerable opportunity for EC institutions to restrict the disclosure of information they possess in relation to environmental matters. The exceptions have been subject to criticism that their coverage of material is unduly broadly worded (see De Leeuw, 2003). For the most part, the public interest exceptions contained in the Regulation reflect those housed in the relevant counterpart provisions of the Århus Convention (Art 4(3)). However, the absolute exception clause relating to Member State documentation contained in Art 4(5) of Regulation 1049 appears difficult to justify and is an exception not specifically addressed in the Århus Convention. In addition, it may be argued with some force that the broad restrictions on access to legal documentation and analysis by non-judicial EU institutions represent a potential barrier to securing effective transparency of decision making within the EC. This applies particularly in the context of the handling of infringement files under Arts 226/228 EC by the Commission, whose decision-making processes in this area are potentially vulnerable to interference by internal political considerations on account of the multiplicity of roles performed by that institution. Having said that, the recent Commission

Working Paper on public access to documents relating to infringement proceedings<sup>213</sup> offers a realistic compromise in this field, by committing the Commission to release information contained on those of its files that it decides not to pursue. This commitment, although not strictly required by the current EC rules on access to information contained in Regulation 1049 and the available jurisprudence of the Court of Justice (including the *WWF UK* judgment), constitutes an important step forward in creating mechanisms to enhance public confidence in the objectivity of Commission decision-making in the area of infringement actions. Any decision on the part of Commission services to drop environmental infringement proceedings against a Member State is now open to public scrutiny, barring special circumstances. Access to such information may be of considerable use in assessing the prospects of success of taking legal proceedings at national level in order to enforce EC environmental legislation. As noted earlier, private persons are left without any possibility of obtaining judicial review of a Commission decision to drop proceedings. They may, however, turn to the European Ombudsman to initiate a maladministration investigation regarding such decision taken by the Commission services, as will be discussed in Chapter 10.

213 SEC(2003)260/3.

## PRIVATE ENFORCEMENT OF EU ENVIRONMENTAL LAW AT EU INSTITUTIONAL LEVEL (2): ADMINISTRATIVE COMPLAINTS PROCEDURES AND OTHER POSSIBILITIES

As discussed in Chapter 9, the rights of private persons to seek judicial review of EC decision making are limited in scope and effectiveness, in particular with respect to decisions over infringement cases. Because of restrictive rules on legal standing to sue, there is virtually no effective legal means available to private persons to challenge the validity of such measures before the Court of Justice. Under the EC Treaty system, private individuals have nevertheless possibilities to invoke special administrative procedures at EC level to review Community measures on environmental matters whose legal or political validity they may wish to question. These procedures serve to complement the various legal proceedings and mechanisms contained in the EC Treaty relating to judicial review of acts and omissions of EC institutions, referred to in some detail in Chapter 9.

This chapter will outline various procedures open to members of the public seeking to obtain administrative or political review of EC environmental decision making from non-judicial EU bodies. The most important of these review bodies are the European Ombudsman and European Parliament. The European Ombudsman is charged with hearing complaints about maladministration on the part of non-judicial EU institutions and bodies, such as the European Commission. Whereas Chapter 9 discussed the role of the Ombudsman in relation to complaints concerning lack of access to environmental information held by EU institutions, this chapter will focus on his role in hearing complaints concerning the handling by the European Commission of suspected cases of infringements of EC environmental law. The European Parliament, within the context of its supervisory functions, offers the possibility for members of the public to present it with petitions on EC issues of personal concern to them, including matters relating to non-compliance with

EC law. Section 10.1 will concentrate on the review role of the European Ombudsman. Section 10.2 considers assistance that may be provided by the European Parliament in connection with complaints against EU institutional in/action concerning the environment. The final sections assess the extent to which other EU bodies exercise any review functions.

### 10.1 The European Ombudsman (EO)

The European Ombudsman (EO) constitutes an important institutional resource for private individuals seeking to hold the European Commission to account over its decisions in connection with the application of Arts 226/228 EC enforcement proceedings against Member States for infractions of EC environmental law. If any individual is dissatisfied with the Commission's response to their complaint that an infringement of EC environmental legislation has occurred and a request for legal action to be undertaken against a Member State, then that person may consider appealing to the EO.

The EO has competence to investigate alleged instances of maladministration on the part of non-judicial EU institutions or bodies vested with powers under the EC Treaty. The office of the EO<sup>1</sup> is a relatively recent institutional innovation. The EO's remit also extends to seeking to enhance the relations between EU institutions and the general public, and part of this mission involves striving to improve standards of service within the EU's administrative apparatus. The legal framework of the EO was established in 1992 by virtue of amendments made to the EC Treaty under the auspices of the Treaty on European Union (TEU).<sup>2</sup> An Ombudsman is appointed by the European Parliament after each parliamentary election. The appointment lasts for the duration of the Parliament's term of office, namely five years, with the possibility that the incumbent may be reappointed.<sup>3</sup> The first EO, Jacob Söderman, was appointed by the European Parliament in 1995<sup>4</sup> and, after eight years in office, was succeeded in April 2003 by P. Nikiforos Diamandouros. The EO has a dedicated website which hosts a considerable amount of historical, analytical and practical information about his operational activities.<sup>5</sup>

The legal framework which governs the functions of the EO is contained principally in Art 195 EC and European Parliament Decision 94/262 on the regulations and general conditions governing the performance of the

1 The official title of the post is 'Ombudsman of the European Union'. However, in practice the office holder is referred to as the 'European Ombudsman'.

2 See Arts 21 EC, second sentence, and 195 EC.

3 Art 195(2) EC, first sub-paragraph. 4 OJ 1995 L225/17.

5 Namely: [www.euro-ombudsman.eu.int](http://www.euro-ombudsman.eu.int) This website contains the EO's decisions, annual reports, standard complaint form, rules pertaining to the EO's activities as well as a substantial bibliography on the Ombudsman's role.

Ombudsman's duties<sup>6</sup> (hereinafter referred to as the 'EO Statute'). The right to complain to the EO has been recently elevated to fundamental rights status under the auspices of the Charter of Fundamental Rights of the EU 2000,<sup>7</sup> as now incorporated in Part II of the Treaty establishing a Constitution for Europe 2004.<sup>8</sup> This provision is underpinned by the right to good administration, also contained in the Charter.<sup>9</sup>

From the perspective of private enforcement of EC environmental law, the EO constitutes an important source of assistance, in terms of ensuring that the European Commission takes relevant steps to follow up complaints concerning suspected cases of infringements of EC environmental legislation. As was discussed in Chapter 5, the European Commission receives a substantial number of complaints from private individuals about alleged breaches of environmental law each year. Under the current legal framework of the EC Treaty, such persons have no specific procedural or substantive rights to ensure that their particular case is properly assessed by the Commission.<sup>10</sup> Where a person is dissatisfied with the response of the Commission in relation to the submissions and evidence it has put forward of alleged infringements of EC environmental law, they may nevertheless turn to the EO for assistance if the EO accepts that the response of the Commission has been tantamount to maladministration. In taking up such a case, the EO's task is then to liaise with the parties involved (complainant and Commission) with a view to making appropriate recommendations, and if possible steering the dispute towards a friendly settlement. In this respect, the EO constitutes a means for private persons to seek to hold the European Commission to account over shortcomings in relation to its duty to safeguard the application of European Community law, including EC environmental law, under Art 211 EC. Complaints against the European Commission constitute the bulk of the EO's work (69.1% in 2004), and complaints about the handling of Art 226 EC infringement proceedings by the Commission represent some 7% of alleged cases of maladministration.<sup>11</sup>

Whilst formally independent of one another, the European Parliament

6 OJ 1994 L113/15. 7 OJ 2000 C364/1. See Art 43.

8 Art II-103 EU Constitution. As at the time of writing, the EU Constitution is not yet in force. See Chapter 1.

9 Art 41.

10 In contrast with specific rights of appeal granted to complainants in other sectors, notably in the competition field as developed by the ECJ. See Art 27 of Regulation 1/03 on the implementation of the rules of competition laid down in Arts 81 and 82 of the Treaty (OJ 2003 L1/1); Art 18 of Regulation 139/04 on the control of concentrations between undertakings (OJ 2004 L24/1); Art 20 of Regulation 659/99 laying down detailed rules for the application of Art 87 of the EC Treaty (OJ 1999 L83/1).

11 The EO's Annual Report 2004 (OOPEC 2005) pp 22–23 of Executive Summary.

and EO have close institutional links with one another. The principal EC Treaty provisions governing the remit of the EO are contained within the relevant chapter concerned with identifying the parameters of the Parliament's powers and responsibilities.<sup>12</sup> The European Parliament is the EU institution responsible for electing and overseeing the workings of the EO,<sup>13</sup> including inspecting the EO's annual and individual reports on the outcome of his inquiries.<sup>14</sup> In addition, the Parliament is responsible for establishing the rules governing the performance of the EO's duties, subject to Council approval and after gaining the opinion of the European Commission. Ultimately, it is the Parliament that may trigger a procedure which may lead to the dismissal of the incumbent office holder, if he is no longer capable of fulfilling the conditions for performing EO duties or is guilty of serious misconduct. The ECJ decides whether or not the EO may be dismissed.<sup>15</sup> Finally, the seat of the EO is that of the Parliament.<sup>16</sup> The close nexus between the EO and the European Parliament underlines a key constitutional function of the EO, to contribute to a greater level of democratic accountability of non-judicial institutions and bodies at EC level engaged in decision making relating to policy development or application of existing EC rules.

The decision by the Member States to amend the EC Treaty and incorporate an ombudsman regime within the constitutional framework of the Union was part of a broader package of initiatives brought in by the TEU in (1992) to begin to enhance the role, participation and civic rights of individuals in relation to the activities and institutional workings of the Union.<sup>17</sup> Accordingly, the establishment of the EO was accompanied by other amendments to the EC Treaty designed to construct a clear citizenship dimension to European supranational politics. These include the construction of EU citizenship predicated on possession of nationality of a Member State,<sup>18</sup> the rights of EU citizens to move and reside freely within the Member States' territories,<sup>19</sup> active and passive electoral rights of EU citizens in relation to municipal and European Parliament elections irrespective of location of residence within the EU,<sup>20</sup> the rights of EU citizens to receive consular protection in third countries from any other Member State where their own

12 Specifically: Part Five (Institutions of the Community) Title I. Provisions governing the Institutions Chapter 1: The Institutions Section 1: The European Parliament: Arts 189–201 EC.

13 Art 195(2) EC, first sub-paragraph.

14 Art 195(1) EC, second and third sub-paragraphs. Art 3(7)–(8) EO Statute.

15 Art 195(2) EC, second sub-paragraph.

16 Art 13 EO Statute. Accordingly, the EO is located in Strasbourg. His office is at 1, avenue du Président Robert Schuman, B.P.403, 67001 Strasbourg Cedex, France.

17 See, in particular, Part Two of the EC Treaty (Citizenship of the Union): Arts 17–22 EC.

18 Art 17 EC.

19 Art 18 EC.

20 Art 19 EC.

Member State is not represented in the host third country,<sup>21</sup> the right of EU citizens to petition the European Parliament on matters coming within the Community's fields of activity,<sup>22</sup> and the right of EU citizens to correspond with EU institutions and bodies in any official language of the EC.<sup>23</sup> Amongst the most significant political rights to emerge from this citizenship package are the right of complaint to the EO and the right of petition to the European Parliament. Unlike other citizenship rights under the Community, these rights are not confined to persons possessing at least one nationality of the Member States of the Union. The relevant EC Treaty provisions<sup>24</sup> expressly entitle any natural or legal person who is residing or who has its registered office within one of the Member States to be able to exercise the rights of complaint and petition.

### ***10.1.1 General remit and powers of the EO***

In seeking to uncover maladministration of non-judicial EU institutions and bodies, exercising competences under the EC Treaty the EO may commence his investigations either on a passive or proactive basis. First, from a passive perspective, the EO must act on the submission to it of a complaint of maladministration from any EU citizen or any natural or legal person residing or having its registered office within one of the Member States.<sup>25</sup> The complaint may be made via the intermediary of a Member of the European Parliament if the petitioner agrees,<sup>26</sup> which effectively means that complaints to the Ombudsman may be channelled to him via the mechanism of the right of petition.<sup>27</sup> Such persons have a right to submit complaints to the EO either directly or via a Member of the European Parliament.<sup>28</sup> Second, from a proactive perspective, the EO is obliged to launch own-initiative investigations with a view to clarifying any suspected maladministration which has come to his attention.<sup>29</sup> The EO is heavily dependent on the general public for information concerning maladministration within the EC institutions and bodies, as complaints constitute the vast bulk of sources of information for EO investigations, the EO's own-initiative inquiries comprising but a fraction of its caseload.<sup>30</sup>

21 Art 20 EC.                      22 Art 21 EC, first sentence.                      23 Art 21 EC, third sentence.

24 Arts 194–195 EC.                      25 Art 195(1) EC and Art 2(2) EO Statute.

26 Art 195(1) EC, second sub-paragraph. See also EO Annual Report 1995 (OOPEC 1996) at section II.2.1).

27 See Art 194 EC.                      28 Ibid.

29 Art 195(1) EC, second sub-paragraph and Art 3(1) EO Statute.

30 For instance, in 2004 the EO launched 351 inquiries of which only eight were own initiatives (2.3%) (EO Annual Report 2004—Executive summary and statistics (OOPEC 2005) p 22).



### 10.1.1.1 *The concept of maladministration*

The specific mandate of the EO is to investigate and assess alleged or suspected cases of maladministration in the activities of EC Treaty institutions or bodies, except in relation to judicial activities of the ECJ or CFI. The work of the EO does not extend beyond this remit, such as assessing the activities of national authorities involved in the administration and/or application of EC law. This point does not appear to be well understood by the general public, as the EO's annual reports testify; the vast majority of complaints to the EO fall outside his mandate.<sup>31</sup> Where a complaint is targeted at the activities of a national authority in connection with the implementation of EC law, the complainant is usually advised as a matter of course by the EO to file a petition to the European Parliament or to appraise the European Commission of the matter.<sup>32</sup> This situation is to be distinguished, from one where an individual is dissatisfied with the response of the European Commission in addressing their submissions that a breach of EC law has occurred within a particular Member State; the appropriateness of the response of the Commission is a legitimate subject for EO scrutiny where the individual considers that it amounts to maladministration.

Maladministration is defined neither in the EC Treaty nor in the EO's Statute. Through its annual reports to the European Parliament, the EO has developed a broad working definition of the term 'maladministration' to mean a situation where a public body fails to act in accordance with a rule or principle that is binding on it.<sup>33</sup> Over the years, the EO has sought to crystallize better what is meant by the term 'maladministration', with a view to providing clearer guidance on administrative standards for EU officials. Most recently, the EO has published a voluntary *European Code of Good Administrative Behaviour*,<sup>34</sup> approved by the European Parliament,<sup>35</sup> designed to be used by non-judicial EC Treaty institutions and bodies with a view to seeking to ensure that their administrative systems are suitably structured so as to minimise risks of maladministration arising. Spanning 26 articles, the Code incorporates a range of principles on good administrative conduct to be applied by EU officials, notably on the following aspects: ensuring lawfulness of decisions;<sup>36</sup> absence of discrimination;<sup>37</sup> proportionality of

31 The percentage of complaints not within the EO's mandate, as revealed in the EO's Annual Reports to the European Parliament, has been as follows: 1996 (65%), 1997 (73%), 1998 (69%), 1999 (73%), 2000 (72%), 2001 (71%), 2002 (72%), 2003 (75%), 2004 (74.8%).

32 EO Annual Report 1995 (OOPEC 1996) section II.2.2.

33 EO Annual Report 1997 (OOPEC 1998).

34 The European Code of Good Administrative Behaviour (OOPEC 2005).

35 European Parliament Resolution of 6.9.2005.

36 Art 4 of the *European Code of Good Administrative Behaviour*.

37 Art 5, *ibid*.

decisions;<sup>38</sup> absence of abuse of power;<sup>39</sup> application of impartiality and independence;<sup>40</sup> objectivity in decision taking;<sup>41</sup> respect for legitimate expectations, consistency and tendering advice;<sup>42</sup> acting fairly<sup>43</sup> and being courteous;<sup>44</sup> replying in the language of the citizen requesting assistance;<sup>45</sup> providing an acknowledgement of receipt and indicating the competent official;<sup>46</sup> obligation to forward correspondence to relevant specialist department(s);<sup>47</sup> respecting the right to be heard and to make statements;<sup>48</sup> ensuring that no more than a reasonable time limit elapses prior to taking decisions;<sup>49</sup> duty to state grounds of decisions;<sup>50</sup> indication of the possibilities of appeal;<sup>51</sup> notification of decisions to persons concerned;<sup>52</sup> adherence to EC rules on data protection;<sup>53</sup> rules on provision of information<sup>54</sup> and access to documents<sup>55</sup> on request; and keeping of adequate records.<sup>56</sup> In its current state the Code is purely voluntary and not legally binding on EC Treaty institutions and bodies. However, the EO has made it clear<sup>57</sup> that he takes account of its rules and principles when investigating cases of suspected maladministration so, effectively, it has already entered into practice. The EO has indicated his desire to see the Code become a formally legally binding instrument, and not merely a source of optional guidance for Community officials<sup>58</sup> and one code amongst several applicable to the various institutions and bodies.<sup>59</sup> Such a step would constitute a welcome advance on the existing position, given that the EO has no formal legal powers to require administrative changes to take place in the wake of a finding of maladministration (see section 10.1.1.2) and private individuals have virtually no rights at EC level to enforce minimum standards of good administration by EC Treaty institutions and bodies.

It is evident that the Ombudsman's expectations of minimum standards

38 Art 6, *ibid.*

39 Art 7, *ibid.*

40 Art 8, *ibid.*

41 Art 9, *ibid.*

42 Art 10, *ibid.*

43 Art 11, *ibid.*

44 Art 12, *ibid.*

45 Art 13, *ibid.*

46 Art 14, *ibid.*

47 Art 15, *ibid.*

48 Art 16, *ibid.*

49 Art 17, *ibid.* The provision stipulates a two-month period as a general rule. Where for reasons of complexity a matter cannot be determined within that time period, the official is to inform the person requesting assistance of that fact 'as soon as possible', with a definitive decision to be made thereafter 'in the shortest possible time'.

50 Art 18, *ibid.*

51 Art 19, *ibid.*

52 Art 20, *ibid.*

53 Art 21, *ibid.*

54 Art 22, *ibid.*

55 Art 23, *ibid.*

56 Art 24, *ibid.*

57 *European Code of Good Administrative Behaviour*, p.8. See fn. 36

58 Currently, it would appear that Art 22 of the EC Treaty could constitute the appropriate legal basis for adoption of a legislative proposal designed to enact the code (although this requires unanimity in the Council of the EU and ratification at Member State level). Prospectively, Art III-398 of the EU Constitution would appear to provide a more straightforward legal basis, if and when the Constitution enters into force (requires instead only a qualified majority vote in the Council).

59 The European Parliament's Committee on Petitions has also strongly recommended the Commission to adopt the *European Code of Good Administrative Behaviour* (A6-0276/2005: Report on the annual report on the activities of the EO for the year 2004) of 29.2.2005).

of administrative behaviour incorporate a number of basic legal principles established within the EC legal order and developed by the ECJ, in particular requiring respect for: basic procedural rights of persons subject to administrative procedures (for example, disclosure of information, opportunity to receive a fair and timely hearing); fundamental rights; and adherence to other legal requirements (for example, application of correct interpretation of EC law, ensuring that EU institutional action is *intra vires*).

Notwithstanding the wide scope afforded to the term ‘maladministration’ by the EO, it is important to recognise its limits. This is particularly important in connection with scrutiny over the exercise of the European Commission’s powers in relation to the prosecution of infringement proceedings under Arts 226/228 EC. The EO has made it clear that complaints to it of a political rather than administrative nature are regarded as inherently inadmissible. For instance, he will not review the merits of legislative in/action on the part of the EU’s legislative institutions. In addition, it is clear that it is not the task of the EO to undermine the inherent discretion afforded to the European Commission over whether or not to commence infringement proceedings against a Member State. As recognised by the ECJ and discussed in Chapter 9, this is a matter for the exclusive prerogative of the Commission. Were the EO to interfere with this discretion, such a move would be tantamount to undermining the established jurisprudence of the ECJ, something that the Ombudsman is specifically barred from doing. Accordingly, were the Commission ever to declare to a complainant that it has made a purely political decision not to take up a particular case, notwithstanding the legal merits of the complainant’s submission, such a decision would ultimately be immune from a charge of maladministration, given that EC rules allow the Commission to adopt such a position.

However, the Commission has never expressed the view publicly that such a decision over an infringement case under Arts 226/228 EC has been made on such a basis, and maintains the position that, all things being equal, it is able and willing to fulfil its guardianship role under Art 211 EC wherever the legal merits of case warrant legal action to be taken against a Member State. As was noted in Chapter 5, the Commission has consistently welcomed information from the public on breaches of EC law, including EC environmental law, and has expressed the view that this information is a primary source of assistance in connection with its monitoring responsibilities. Accordingly, in practice, the EO is able to scrutinise Commission rejections of complaints of alleged breaches of EC law, given that the reasons proffered by the Commission will normally be based on legal as opposed to political considerations (legal interpretation and/or on weight of supporting evidence). The EO’s position has consistently been that the Commission may not hide behind its prerogatives under Arts 226/228 EC, where its decisions are predicated on essentially legal considerations. By virtue of the EO’s authority, complainants have a right to expect that their submissions of illegal Member State

conduct are fully and correctly analysed by the European Commission. The EO has developed a number of principles of good administration in this regard, which are explored in detail in section 10.1.3 below.

As far as complaints against the European Commission over allegations of breaches of EC environmental law are concerned, the term ‘maladministration’ covers two main aspects of the Commission’s law enforcement work. These relate to procedural and substantive aspects of the Commission’s handling of such allegations. Procedural matters concern the extent to which the European Commission services have addressed a complainant’s allegation of a breach of EC environmental law by or within a particular Member State in accordance with principles of good administration, as recognised by the EO. Specifically, the EO may assess the degree to which the Commission has kept the complainant adequately informed of progress in the handling of their file, the timeliness of correspondence with the complainant and the adequacy and clarity of reasoning provided by the Commission in making a decision on the complaint. Substantive issues relate to whether the EO agrees with the Commission’s interpretation of EC environmental law and/or evaluation of the relevant evidence made available to the Commission in support of an allegation of a breach of EC law. This latter aspect of the dimension to maladministration is important, given that it effectively provides a complainant with the opportunity to force the Commission to undergo a review of its decision(s) in relation to the complaint.

Whilst it is clear that the ultimate determination of points of EC law are to be decided by the ECJ,<sup>60</sup> the EO—just like the European Commission—is entitled to offer legal opinion on the effect of any aspect of EC environmental law. Such opinions may well, and from time to time do, differ from those held by the Commission. If the EO is in agreement with a complainant over the existence of an infraction of EC environmental law, and makes this clear in his report, the effect of this divergence of viewpoint is likely to place the Commission under some pressure to review any previous decision rejecting a complainant’s allegation. For, whilst the Commission is not strictly bound to adhere to EO findings,<sup>61</sup> the fact that the EO is a person in possession either of

60 Art 234 EC. This is also made clear in the EO Statute: see Arts 1(3) and 2(1) EO Statute. In addition, the EO takes care to make this clear when providing legal opinions on particular complaints in the EO annual reports.

61 In practice, in relation to legal issues concerning environmental cases, the European Commission will usually defer to the legal analysis of the Legal Unit of the Environment Directorate-General (DG ENV) and/or the Commission’s Legal Service. Where there is a dispute within DG ENV over a particular point of law (e.g., between the Legal Unit and one or more technical units), then occasionally the matter may be deferred to the Commission’s Legal Service for ‘arbitration’, unless the Director-General of DG ENV decides that the matter is to be determined internally within DG ENV (which may well mean in practice that the view of the Legal Unit holds sway).

legal qualifications necessary for the highest judicial office in their own Member State or has the acknowledged competence and experience to undertake the office of Ombudsman<sup>62</sup> lends a considerable degree of authority to any legal opinion that he may proffer in relation to a particular case. The authority of the EO is further underpinned by the fact that his position is one of complete independence.<sup>63</sup> Unlike the Commission, the EO does not have to weigh up political as well as legal implications of commencing infringement proceedings. As was outlined in Chapter 5, the Commission's position over infringement proceedings may, on occasion, be vulnerable to political influence, not least given that it is vested with responsibility under the EC Treaty framework for proposing legislation and developing policy. A decision to launch infringement proceedings may or may not have political implications in relation to the Commission being able to push through related policy initiatives. It is not without significance that the EO Statute endows the Ombudsman with the same rank as a judge of the ECJ or CFI in terms of remuneration, allowances and pension.<sup>64</sup> It would be accordingly an act in contravention of the spirit, if not the letter, of the constitutional framework of the EU, if the Commission were not to undertake a thorough review of a case file in respect of which its conclusions differed markedly from that of the EO.

#### *10.1.1.2 Legal powers of the EO*

The range of legal powers afforded to the EO in order to carry out his work is relatively modest and limited. On the one hand, the EO is vested with substantial powers to access information from EC Treaty institutions and bodies under investigation. However, the EO has no formal powers to sanction such institutions or bodies in the event of his finding an instance or instances of maladministration.

The EO has substantial legal powers for the purpose of facilitating his investigations into suspected cases of maladministration. Under the EO Statute, EC Treaty institutions and bodies are required to disclose to the EO information he has requested and provide him with access to relevant files, unless they are able to prove that disclosure or access should be denied 'on duly substantiated grounds of secrecy'.<sup>65</sup> Similarly, subject to a qualification in relation to documents classified as secret, they are to deliver up to the EO documents originating in a Member State, after informing the latter concerned.<sup>66</sup> Classified documents originating in a Member State may be divulged to the EO only with Member State consent.<sup>67</sup> The EO also has

62 Art 6(2) EO Statute.

63 Art 195(3) EC and Art 9 EO Statute.

64 Art 10(2) EO Statute.

65 Art 3(2) EO Statute, first sub-paragraph.

66 Art 3(2) EO Statute, third sub-paragraph.

67 Art 3(2) EO Statute, second sub-paragraph.

powers to require Member State authorities to assist with his investigations where he so requests. Specifically, they are under a duty to provide the EO with ‘any information that may help to clarify instances of maladministration’ on the part of EC Treaty institutions or bodies, subject again to a qualification where information is classified as secret.<sup>68</sup> The EO is obliged as a matter of general principle to treat documents he obtains in the course of inquiries as confidential and may not as a matter of course disclose their contents to other persons, including the complainant.<sup>69</sup> Where an EC Treaty institution or body or a Member State authority fails to provide relevant information, the EO must inform the European Parliament, which is under a consequent duty to ‘make representations’ with a view to securing disclosure.<sup>70</sup> In practice, this mechanism is not a relevant consideration, given that experience has shown that requests for disclosure of information are respected. The EO’s annual reports to date do not reveal any instance of this clause having to be used in relation to environmental cases.<sup>71</sup>

The EO has no legal powers to impose sanctions on EC Treaty institutions or bodies found guilty of maladministration. Specifically, the EO has no powers to issue legally binding instructions or impose financial or other sanctions on infracting EC institutions or bodies. Arguably, this factor constitutes a substantial inherent weakness within the legal framework of the EO, given that there is no clear binding mechanism for ensuring that instances of maladministration will be actually addressed by the defendant EC Treaty institution or body concerned, that steps will be taken by the latter to avoid similar errors being committed or that complainants are to be suitably compensated for instances of maladministration. Instead, at the end of his investigation and assessment, the EO is obliged to make a report to the European Parliament and is entitled ultimately only to make recommendations with respect to individual cases.<sup>72</sup> The EO’s recommendations are published in the annual reports of his activities. Accordingly, bad publicity is the only weapon that the Ombudsman has at his disposal in order to try to hold

68 Art 3(3) EO Statute. The Member State may disclose the information provided the EO undertakes not to divulge it.

69 Art 287 EC. See also Art 4(1) EO Statute. Exceptionally, under Art 4(2) of the EO Statute, the EO is obliged to contact competent national authorities where he learns of facts which he considers might infringe criminal law of a Member State as well as, if appropriate, the Community institution or body responsible for the relevant official(s) involved in maladministration. The EO likewise may notify the Community institution or body responsible for an official whose conduct may be questioned from a disciplinary perspective.

70 Art 3(4) EO Statute.

71 In the unlikely event that the European Commission were to refuse to disclose information relevant to a complaint before the EO, the EO would, in any event, be entitled to undertake legal proceedings against the Commission under Arts 230 and 232 of the EC Treaty before the Court of First Instance in order to secure disclosure.

72 See Art 195(1) EC second sub-paragraph in conjunction with Art 3(6)–(7) EO Statute.

EC Treaty institutions and bodies, such as the European Commission, to account in respect of their administrative conduct. Whether or not this is effective or sufficient is open to question. Given that the role of the EO does not appear to be widely known amongst the general public, it would seem questionable whether the factor of adverse publicity in an annual report is sufficiently effective in ensuring that instances of maladministration are appropriately rectified and lessons are taken on board for the future. One might argue that, in the absence of a right of appeal from the EO, the absence of EO powers to issue legal sanctions is justified. However, that is not a cogent argument for justifying the absence of sanctioning powers for the EO in perpetuity. Any such increase in legal powers would enhance the Ombudsman's position as independent arbiter and would, as a matter of basic principle, have to be accompanied by appropriate procedural safeguards such as rights of appeal, especially where EO reports make reference to the conduct of specified EU officials.<sup>73</sup>

A characteristic feature of the EO's activities is that they are carried out in a spirit of inter-institutional co-operation, as opposed to adversarial combat. The EO Statute stipulates<sup>74</sup> that 'as far as possible', the Ombudsman is to try to seek a 'solution' with the relevant institution or body concerned, with a view to eliminating the instance of maladministration and satisfying the complaint. To some extent, this resonates with the orientation of the infringement procedures in Arts 226/228 EC towards achieving friendly settlement between the European Commission and defendant Member States over violations of EC law. However, unlike Arts 226/228 EC, which provide the European Commission with the possibility of bringing legal action before the ECJ, the EO has no recourse to law to enforce his findings of maladministration. The EO has no possibility of undertaking litigation against an institution or body with a view to compelling the latter to change its administrative behaviour. Specifically, there is no duty owed to the EO by the institution or body to take remedial action within the meaning of the legal procedure contained in Art 232 EC. The recommendations of the EO are not binding on EC Treaty institutions or bodies. There is neither any possibility of the EO being able to take legal action by way of annulment proceedings under Art 230 EC against an institution or body that decides to ignore all or part of such recommendations. In a nutshell, the EO must rely on the factor of adverse publicity that may arise against EC Treaty institutions and bodies guilty of maladministration in order to be sure of effecting a change in their behaviour.

73 See Art 47 of the Charter of Fundamental Rights of the EU 2000.

74 Art 3(5) EO Statute.

*10.1.1.3 Exclusion of EO from legal proceedings*

The EO's remit does not include scrutiny of the judicial activities of the ECJ and CFI. This exclusion serves to preserve the exclusive powers of the ECJ and CFI to provide definitive interpretations of EC law as well as to respect the European Community's existing legal frameworks and systems of ensuring impartiality of its judiciary. Alongside this particular exception to the EO's remit lies a related exclusion, namely the exclusion of the Ombudsman from interfering with current or concluded legal proceedings. Similar justifications underpin this particular exclusion, namely to ensure that the role of judicial bodies is not undermined by virtue of the EO's office. Article 195 EC specifically rules out the possibility of the EO investigating complaints and other cases where the alleged facts are or have been the subject of 'legal proceedings'.<sup>75</sup> The phrase 'legal proceedings' is not defined in the treaty provision. To some extent, the meaning of this phrase is fleshed out in the EO Statute. Article 1(3) of the EO Statute precludes the EO from intervening in cases before courts or from questioning the soundness of a court's ruling. Article 2(7) of the EO Statute requires the EO to consider a complaint to it to be inadmissible and to file definitively the outcome of any enquiries carried out where legal proceedings are 'in progress or concluded' concerning the facts of the complaint.

Accordingly, it is clear that operational decisions of the European Commission concerning issues related to enforcement of EC environmental law fall within the remit of the Ombudsman, so long as the matter is not or has not been subject to the formal commencement of legal proceedings under Arts 226/228 EC. There is some ambiguity as to when 'legal proceedings' may be said to commence under the auspices of the infringement procedures. Quite clearly, legal proceedings may not be said to have commenced where the Commission has decided not to issue a letter of formal notice against a Member State. The EO procedure will accordingly be relevant to those persons whose complaints to the Commission about alleged breaches of EC environmental law have been rejected by the Commission from the outset. In practice, this will cover the vast majority of complaints against the Commission over issues concerned with EC environmental law enforcement. It is also clear that the EO may not scrutinise cases where these have been referred by the Commission to the ECJ under Arts 226/228 EC for a definitive ruling. However, it is less clear whether the EO has a mandate to scrutinise cases where the Commission has decided to drop infringement action against a Member State during the initial administrative phase of the Arts 226/228 EC procedure. In other words, does the EO have jurisdiction to investigate whether the Commission has been guilty of maladministration when the

<sup>75</sup> Art 195(2) EC, second paragraph.



Commission closes infringement action after either issuing a letter of formal notice or reasoned opinion?

Bearing in mind the wording and context of the EO Statute, it is submitted that ‘legal proceedings’ refer only to situations where the Commission has formally brought an action before the European Court of Justice. The exclusion of ‘legal proceedings’ is clearly meant to complement the related exception contained in the EO Statute, namely that the EO may not scrutinise judicial activities of the Court of Justice or other courts. Article 1(3) of the EO Statute stipulates that the EO may not intervene in cases ‘before courts’ or ‘question the soundness of a court’s ruling’. Scrutiny by the EO of Commission decision making during the initial administrative phases of the Arts 226/228 EC procedures does not compromise these requirements, given that the ECJ is not seised of a case at that stage, this being entirely dependent on the decision of the Commission subsequent to the issue of a reasoned opinion. Moreover, the administrative phase of these two infringement procedures cannot be equated with the classic form of legal proceeding, given that their progress is contingent on negotiation between Commission and Member State and are not exclusively subject to legal considerations. The Commission, as a political entity within the EU, is in charge of managing the administrative phase; responsibility does not lie with the ECJ. Were the Commission able to escape EO scrutiny after simply issuing a letter of formal notice, this would open up a significant loophole in the system of maladministration supervision under EC law. Finally, in alignment with well-established general principles of EC law developed by the ECJ itself, exceptions to fundamental rights in EC law should be interpreted narrowly in favour of the individual, not the defendant administrative organ charged with breaches of such rights. The Charter of Fundamental Rights of the European Union has elevated the EO complaints system<sup>76</sup> and principle of good administration<sup>77</sup> to the status of fundamental rights. Accordingly, it is submitted that the Commission should not be immune from EO scrutiny where it has only issued a letter of formal notice and/or reasoned opinion before deciding to close a particular infringement case.

### ***10.1.2 The EO’s complaints procedure: key aspects***

The complaints procedure before the EO is relatively informal and straightforward, there being relatively few procedural requirements and steps

<sup>76</sup> Art 47 Charter of Fundamental Rights of the European Union 2000.

<sup>77</sup> Art 41, *ibid.*

involved.<sup>78</sup> The procedure is usually triggered by an individual complainant, although theoretically the EO may initiate investigations on an own-initiative basis. It is not possible to determine accurately how long the entire process of an appeal to the Ombudsman may take; this will depend on a number of factors, including the complexity of the file and degree of co-operation forthcoming from the institution or body under the spotlight. However, as a rough estimate, it would appear from the EO annual reports that environmental complaints filed from private individuals against the Commission take in the region of anywhere between one and two years. The EO complaints process is usually document-driven, thus normally involving exclusively a written exchange of correspondence between the EO and other parties concerned.

In order to ensure that their case is admissible, complainants are required to ensure, in particular, that they meet three principal formal conditions before filing a complaint with the EO. First, the complaint is to be submitted within 'two years of the date on which the facts on which it is based came to the attention of the person lodging the complaint'.<sup>79</sup> From an EC environmental law enforcement perspective, this means that persons must usually file their complaints with the EO within two years of receiving notification of the decision by the Commission rejecting their submissions that a breach of EC environmental legislation has occurred or otherwise definitively closing an infringement file. Notwithstanding this temporal requirement, it is open for the EO to pursue an 'out of time' case on the basis of an own-initiative inquiry if he deems that the case warrants an investigation. Second, the complainant must be able to demonstrate to the EO that their recourse to the Ombudsman must have been 'preceded by the appropriate administrative approaches to the institutions and bodies concerned'.<sup>80</sup> As far as EC environmental law enforcement complaints are concerned, the responsibilities of the complainant in this regard are nominal and straightforward. The EO has held that once a person has lodged a complaint with the Commission about an alleged infringement of EC environmental law, then it is reasonable for that person to expect to be informed as to the progress of that complaint being processed by the Commission services without having to chase after information and updates from the Commission.<sup>81</sup> The complainant must have at least once contacted the Commission and communicated their submission of alleged breach of law in full. Third, the

78 A summary of the complaints procedure is set out in the EO Annual Reports (see e.g., EO Annual Report 1995 at section I.3). Guidance on EO complaints procedure is provided on the EO website.

79 Art 2(4) EO Statute. 80 Ibid.

81 Decision on complaint 596/97/JMA 'Montes Obarenes-Tolono Mine (EO Annual Report 1998 p 146).

complaint to the EO must reveal the identity of the person lodging the complaint as well as disclosing the object of the complaint.<sup>82</sup> The person lodging the complaint may request that his identity remain confidential.<sup>83</sup> Apart from meeting these formal conditions, it is self-evident that the complainant must also be able to submit relevant and sufficient legal argument and evidence in support of their case to the Ombudsman in order to persuade the latter of the merits of commencing an investigation.

If the EO considers that the complaint is admissible and appears to be supported by sufficient grounds to conduct an inquiry, he will then carry out a preliminary investigation. His first step will be to inform the relevant EC Treaty institution or body of the complaint that has been lodged against it immediately,<sup>84</sup> requesting it to provide him with a preliminary opinion (known as a ‘first opinion’) of its views within three months.<sup>85</sup> On receipt of the first opinion, in practice the EO forwards a copy normally to the complainant, who then has the opportunity to provide comments within one month. If, after assessing the first opinion and comments, the EO is minded to consider that there is a *prima facie* case of maladministration, he will endeavour to work to achieve a friendly settlement with the institution or body concerned. This may involve requests from the EO to the institution or body for supplementary explanation of facts. If, however, that phase fails to achieve a satisfactory outcome so that the EO retains the view that maladministration has occurred, then he will inform the institution or body concerned and draw up draft recommendations where he deems this necessary. The institution or body will be afforded three months to submit a detailed opinion.<sup>86</sup> Unless the institution or body takes the necessary steps to resolve the matter in accordance with the EO’s draft recommendations, the EO is then obliged to send a report to the European Parliament and institution or body concerned, which may contain recommendations.<sup>87</sup> Finally, the complainant will be informed by the EO of the outcome of his inquiries as soon as possible, and will be informed of the opinions expressed by the institution or body as well as the EO’s recommendations.<sup>88</sup>

Reports of the EO, including annual reports, are published in the Official Journal of the EU as well as on the EO’s website. The EO has the option to make a variety of comments, conclusions or recommendations in his reports. These are intended to be tailored to the degree of seriousness attending the conduct of the EC Treaty institution or body concerned. In addition to making findings of maladministration or the absence thereof, the

82 Art 2(3) EO Statute.      83 Ibid.      84 Art 2(2) EO Statute, final sentence.

85 Art 195(1) EC, second sub-paragraph.      86 Art 3(6) EO Statute.

87 Art 195(1) EC second sub-paragraph and Art 3(7) EO Statute.

88 Art 195(1) EC second sub-paragraph and Arts 2(9) and 3(7) EO Statute.

EO may make complementary critical and/or further remarks on the performance of EC Treaty institutions or bodies in carrying out their administrative tasks.

### *10.1.3 Complaints to the EO against the Commission in environmental cases*

Since its inauguration in 1995, the office of the EO has had the opportunity to consider a number of cases filed to it from private persons against the European Commission in relation to its handling of their complaints about alleged instances of EC environmental law infringements. Most complaints reported have typically concerned projects and developments which have allegedly failed to comply with environmental impact assessment requirements in accordance with EIA Directive 85/337 as amended, or activities or omissions which have allegedly led to breaches of EC nature protection legislation. Table 10.1 provides a summary of the various selected environmental complaints taken up in the EO's Annual Reports 1995–2004.

*Table 10.1* Complaints to the EO about the European Commission's handling of allegations of breaches of EC environmental legislation (1995–2004)

<i>EC environmental legislation</i>	<i>Complaints<sup>89</sup> reported in EO Annual Reports (1995–2004)</i>	<i>Individual EO decisions on complaints</i>
Bathing water quality (Directive 76/160)	1 (cited in EO Annual Report 1996)	235/16.11.95/JMC-fr 'Blue flag status (PT)'
EIA (Directive 85/337)	9 (cited in EO Annual Reports 1996, 1997, 1999, 2001 and 2002)	206/27.10.95/HS/UK and others 'Newbury Bypass (UK)'; 132/21.9.95/AH/EN 'M40 Motorway (UK)'; 472/6.3.96/XP/ES/PD 'Itoiz dam'(SP); 106/97/PD 'RCF Lake District'; 1338/98/ME 'EIB funding of Hungarian M0 orbital motorway' (HUN); 1288/99/OV 'Parga water treatment plant'(GR); 493/2000/ME 'Skälderviken railway' (S); 767/2001/GG 'Athens-Marathon road' (GR); 39/2002/OV 'Angelsey Motor Racing Track'(UK).

89 The table identifies which complaints raise particular issues of EC environmental law.

Table 10.1 continued

<i>EC environmental legislation</i>	<i>Complaints reported in EO Annual Reports (1995–2004)</i>	<i>Individual EO decisions on complaints</i>
EC nature protection legislation (Directives 79/409 and 92/43)	9 (cited in EO Annual Reports 1997, 1998, 1999, 2000, 2001 and 2004)	701/3.7.96/JE/UK/KT ‘Newbury Bypass’(UK); 596/97/JMA ‘Montes Obarenes-Tolono Mine (SP)’; 472/6.3.96/XP/ES/PD ‘Itoiz dam’(SP); 298/97/PD ‘Southport shoreline sea defence’(UK); 1062/97/OV ‘Sea turtles on Zakynthos’ (GR); 813/98/(PD)/GG ‘Southport shoreline coastal road’ (UK); 493/2000/ME ‘Skälderviken railway’ (S); 271,77/2000/(IJH)MA ‘Access to UK waste reports’; 2183/2003(TN)(IJN) ‘Botniabanan railway’
Co-financing of environmental projects (Regulation 1164/94)	3 (cited in EO Annual Reports 1998, 1999, 2002)	250/97/OV ‘Kalamitisi sewage works project’ (GR); 1152/97/OV ‘Windfarm project Wales’ (UK); 1288/99/OV ‘Parga water treatment plant’(GR).
Access to information	3 (cited in EO Annual Reports, 2000, 2001 and 2004)	396/99/IP ‘Enichem site’ (I); 271,77/2000/(IJH)MA ‘Access to UK waste reports’ (UK); 2183/2003(TN)(IJN) ‘Botniabanan railway’(S)
European Investment Bank	1 (cited in EO Annual Report 2002)	1338/98/ME ‘EIB funding of Hungarian M0 orbital motorway’(HUN)

The texts of the individual decisions of the EO, including those relating to environmental issues, may be inspected on the EO’s website. As at the end of 2005, the EO’s register<sup>90</sup> of decisions indicated that he had taken 55 decisions relating to complaints concerning environmental matters.

90 The register is accessible on the EO’s website: [www.euro-ombudsman.eu.int/decision/en](http://www.euro-ombudsman.eu.int/decision/en)

### 10.1.3.1 *The EO's substantive analysis of EC environmental law*

As part of his remit into investigating maladministration, the EO is entitled to scrutinise the interpretation of EC law made by the European Commission in its evaluation as to whether infringement proceedings should be launched against a Member State under Arts 226/228 EC. The EO has consistently confirmed that maladministration includes situations where non-judicial EC institutions and bodies interpret and/or apply EC law incorrectly. This point is emphasised in the EO's model *European Code of Good Administrative Behaviour*, which stipulates that EU officials are to ensure that their decisions are lawful.<sup>91</sup> The environmental sector is no different. Accordingly, the complaints procedure before the EO has effectively offered private individuals an appeal against legal determinations made by the Commission on allegations of incorrect implementation of EC environmental legislation.

In the bulk of cases reported so far, it appears that the EO has upheld the Commission's legal analysis in relation to complainant's submissions of incorrect implementation of EC environmental law. However, on occasion the EO has disagreed with the Commission over interpretations of EC environmental law and this may be a critical issue in determining whether or not the Commission has been guilty of maladministration. A notable example has been in relation to assessing the extent to which the EIA Directive 85/337 applies to development projects whose origins pre-date the implementation deadline<sup>92</sup> of the Directive (so-called 'pipeline projects'). For instance, in one particular case involving the approval of a sewage works in Greece,<sup>93</sup> the EO criticised the Commission for considering that the particular development project fell outside the scope of the EIA Directive on the grounds that official approval for its construction was given prior to the 1988 implementation deadline. The EO considered that the legal analysis carried out by the Commission was flawed, given that the national administrative documentation relied on by the Commission to justify its conclusions did not purport to approve the project specifically, but instead was merely tantamount to a preparatory study. Approval was provided by the Member State government much later, and after the implementation deadline. Another example involved the interpretation of the Habitats Directive 92/43, where the EO disagreed with the Commission's position that certain provisions of the Directive would become operational in respect of a habitat site only once a Member State had formally notified that site under the Natura 2000 network-notification scheme, the reasoning of the EO being that the deadline

91 Art 4 *European Code of Good Administrative Behaviour* 2005 (OOPEC 2005).

92 Namely 3.7.1988.

93 EO Decision on complaint 1288/99/OV 'Parga water treatment plant' (reported in EO Annual Report 2002 (OOPEC 2003)).

for meeting the obligation to draw up a list of protected sites contained in the Directive had already elapsed.<sup>94</sup>

*10.1.3.2 The EO's scrutiny of the European Commission's procedures in handling complaints about non-compliance with EC environmental law*

The manner in which the European Commission handles complaints about purported infractions of EC environmental law has been a topic of significant concern to the EO over the years. The issue of procedural propriety on the part of the Commission has taken up the bulk of the EO's work on investigating maladministration in relation to environmental issues. Over time, the EO has developed a number of principles of good administration intended to improve the standard of administrative management of complaints of breaches of EC environmental law by the European Commission. Most if not all of these have now been incorporated within the EO's *European Code of Good Administrative Behaviour*. The EO has been an important influence in raising the standards of administrative responses within the Commission regarding complaints against Member States over issues relating to compliance with EC law, including EC environmental law.

When the EO first started operational duties, the European Commission offered only minimal standards of care and service to persons submitting complaints about Member State infractions of EC law. Specifically, the Commission services would be only prepared to register a complaint, send an acknowledgement of receipt and indicate that it would inform the complainant of the outcome of its assessment (no time frame given). No commitment was offered by the Commission to update the complainant on the progress of their complaint, involve the complainant in the Commission's investigations or inform the complainant of the grounds of the Commission's final decision. In several instances, complainants were informed of a decision only after the Commission had issued a press release on the subject. There was no system to ensure that the complainant had a right to offer comment to the Commission about its conclusions prior to a formal decision being taken by the College. Such a state of affairs was unsurprisingly liable to generate mistrust and disillusion with the early approach taken by the Commission in relation to the handling of complaints (Williams, 1994 p 359).

Within a few months of his appointment, the first EO decided to take steps to ensure that administrative standards were improved in terms of complaints handling by the the Commission. In the wake of a series of

94 See EO Decision on complaint 813/98(PD)/GG 'Southport shoreline coastal road' (EO Annual Report 2000).

own-initiative inquiries as well as other cases,<sup>95</sup> the EO persuaded the Commission to amend its procedures in 1997. Specifically, complainants were able thereafter to present observations to the Commission before the latter could decide to close a particular file.<sup>96</sup> As noted in Chapter 5, the Commission has sought to take a number of steps to improve the handling of its complaints procedures since the late 1990s,<sup>97</sup> and this has culminated in the publication of a 2002 Commission Communication on Relations with the Complainant in respect of infringements of Community Law.<sup>98</sup> The procedural commitments for the benefit of complainants set out in the 2002 Communication are discussed in Chapter 5 and need not be repeated here.

The EO annual reports have revealed a number of profound procedural failings of the Commission in handling complaints about alleged breaches of EC environmental law. It is worth noting the various principles of good administration that the EO has felt necessary to establish or confirm when uncovering instances of maladministration by the Commission services responsible for handling infringement files. Most, if not all, of these principles are based on common sense, and it is revealing that these findings have had to be even formally announced by the EO in the context of investigations of maladministration:

*Responsibility to provide regular information and feedback to the complainant on the progress of the complaint.* On a number of occasions, the EO has criticised the Commission for having failed to provide the complainant with regular updates as to how their particular complaint is progressing.<sup>99</sup> On some occasions, months had elapsed without there being any Commission feedback, notwithstanding regular enquiries on the complainant's part.<sup>100</sup> The Commission has on a number of occasions been criticised for failing to respond to the complainant's submissions within a reasonable period of time. This latter point has now been addressed in the 2002 Commission Communication where the complainant may expect an initial reply within 15 working days of receipt of the complaint. In addition, the normal rule is that Commission services

95 See for example, EO Decision on complaint 995/98/OV 'Macedonian Metro Joint Venture' (EO Annual Report 2001).

96 European Commission, 15th Report on monitoring the application of Community law (1997) (OJ 1998 C250/1 p 10).

97 The Commission undertook some earlier changes on complainant relations in 1998 (see SEC(1998)1733 Improvement to the Commission's Working Methods in Relation to Infringement Proceedings, 15.10.1998).

98 COM(2002)141.

99 E.g., EO Decision on complaint 596/97/JMA 'Montes Obarenes-Tolono Mine' (EO Annual Report 1998).

100 E.g., EO Decision on complaint 250/97/OV 'Sewage works Kalamatsi' (EO Annual Report 1998).



handling complaints of breaches of EC law should decide within one year whether formal action should be taken up in relation to the case.

*Responsibility to provide complainant with reasons why a decision is taken by it (for example, to close an infringement file).* The EO has held that the Commission is guilty of maladministration where it refuses to divulge the reasons for rejecting a complaint of a breach of EC environmental law.<sup>101</sup>

*Responsibility to involve the complainant in site visits where carried out by the Commission to assess a complaint.* The EO has held that normally complainants should be informed about investigative site visits and be invited to participate in them, unless the site visit is unlikely to be material to a Commission investigation.<sup>102</sup>

*Responsibility to address all the submissions made by the complainant.* The EO has confirmed that it is good administrative practice for the Commission to respond to each and every point raised by complainants in their submissions to the Commission.<sup>103</sup>

*Responsibility to provide complainant/inquirer access to documents, except those which are secret or drawn up as part of judicial proceedings.* The EO has confirmed that the Commission should, as a matter of good administrative practice, provide individuals with access to documents, subject to the caveat of secrecy and where they are pertinent to judicial proceedings or specific investigations.<sup>104</sup> The EO's decisions in this field are now subject to the application of Regulation 1049/2001 on access to documents, considered in Chapter 9. It remains to be seen, though, to what extent the EO will require disclosure of Commission documents drawn up during the administrative phase of Arts 226/228 EC proceedings. It is questionable whether the Commission should be able to block access to documents during this phase, not least given that the EO expects the Commission to disclose fully the reasons, legal or other, underpinning its decisions to reject the complainant's submissions.

*Responsibility to address individual complaints impartially.* One of the most extraordinary reports ever to be published by the EO was a case

101 E.g., EO Decisions on complaint 132/21.9.95/AH/EN 'M40 Motorway' (EO Annual Report 1996), on complaint 472/6.3.96/XP/ES/PD 'Itoiz Dam' (EO Annual Report 1998), on complaint 106/97/PD 'RCF Lake District' (EO Annual Report 1999), and on complaint 493/2000/ME 'Skälderviken' (EO Annual Report 2001).

102 E.g., EO Decision on complaint 298/97/PD 'Southport shoreline sea defence' (EO Annual Report 1999).

103 E.g., EO Decision on complaint 39/2002/OV 'Anglesey Motor Racing Track' (EO Annual Report 2002).

104 E.g., EO Decision on complaints 271,277/2000/(IJH)MA 'Access to waste reports' (EO Annual Report 2001) and on complaint 2183/2003(TN)(IJN) 'Botniabanan railway link' (EO Annual Report 2004).

relating to the Community funding of a sewage and biological treatment works project in Parga, Greece.<sup>105</sup> A complaint had been lodged with the Commission that the project had not been subject to an EIA in conformity with the EIA Directive 85/337. The initial view of the Commission in March 1997 was that the project fell within the remit of the EI Directive 85/337 and that there had been a violation of that legislation. However, in 1998, the position of the Commission services in relation to the case changed. In mid-1998, it considered that approval had been granted in respect of the project in 1986, before the implementation deadline of Directive 85/337. Accordingly, it considered that the project fell outside the remit of the directive. The effect of that decision was to permit the award of EC funding in respect of the project under the auspices of the Cohesion Fund. The complainant was not informed of the Commission's decision to drop the case or award funding. In fact a letter was sent to the complainant at the end of 1998 indicating that the Commission services had not decided the matter and would continue to consider her submissions. It was evident from the investigations of the EO that a conflict of interest underpinned the change of mind of the Commission services. Specifically, a new Head of the Legal Unit of the Commission's Environment Directorate-General had been appointed in 1997/8 of Greek nationality. At the time, he held a position of influence within a political party in Greece, the New Democracy Party, as adviser for European affairs and had noted on the complainant's file in mid-1998 that the case should be dropped. As Head of the Legal Unit, his conclusions on the file would have been decisive within the Commission. It was he who sent the complainant the letter in December 1998 indicating falsely that the case was still being investigated. He subsequently went on leave, a factor that the Commission sought to plead indicated his distance from the particular file in question.

Understandably, the EO's reaction was scathing, holding that the management of the case and the inherent conflict of interest arising amounted to a clear case of maladministration. The EO addressed the case in no uncertain terms:

The Ombudsman considers that, from the point of view of the complainant, who did not know that the official in question was on annual and later on unpaid leave on personal grounds, and who had moreover recently received a letter signed by the official on 9 December 1998 stating that the case was still being investigated, there appear to be sufficient reasons to mistrust the impartial and proper handling of the case by the Commission and to question that the official in

105 EO Decision on complaint 1288/99/OV 'Parga sewage works project'

question did not conduct himself solely with the interests of the Communities in mind. In fact it would be difficult for any citizen in any Member State not to doubt the impartiality of the Commission's actions as the Guardian of the treaty if a Commission official who is deeply involved in dealing with an infringement case also holds a post in a political party in the very Member State that the case concerns and acts publicly in that capacity at a time when the case is being dealt with. In the eyes of European citizens, this kind of incident may put at risk the reputation of the Commission as Guardian of the Treaty, responsible for promoting the rule of law.<sup>106</sup>

In the Parga sewage works complaint, the EO was content to accept that the Commission's new procedures in relation to complaints handling and in the Commission's handbook for its officials announced in 2001 would mean that such a situation would not arise in the future.<sup>107</sup> The Commission's follow-up in relation to the EO's decision and critical remarks is quite revealing. In relation to the official concerned, no specific action was ever reported to have been taken.

## 10.2 The European Parliament (EP)

In addition to the European Ombudsman, the European Parliament (EP)<sup>108</sup> represents, albeit to a relatively limited extent, a useful point of reference and assistance for private persons seeking to enforce EC environmental legislation. In addition to its primary role as a legislative institution alongside the Council of the EU, the EP does have a general function to play in supervising the delivery of EC policies. A number of political powers are granted to the EP, with a view to facilitating this particular role. These include being able to require the Commission to submit to questioning,<sup>109</sup> a duty to discuss the annual general reports submitted by the Commission,<sup>110</sup> a power to issue a motion of censure on the activities of the Commission leading to the resignation of the College of Commissioners,<sup>111</sup> receiving and taking up petitions on aspects of Community activities on behalf of private persons,<sup>112</sup> monitoring the work of the European Ombudsman<sup>113</sup> and establishing temporary committees of inquiry to investigate alleged contraventions or maladministration

<sup>106</sup> Ibid, p 104.

<sup>107</sup> Art 4(2) EO Statute obliges the Ombudsman to notify immediately the competent national authorities via the Permanent Representations of the Member States and, if appropriate, the Community institution with authority over the official or servant concerned with a view to waiving any existing diplomatic-type immunity, if he learns of facts which he considers 'might relate to criminal law', such as fraudulent activity. In this case, though, the EO did not consider it necessary to make any reference to this provision in his report.

<sup>108</sup> The EP's website is: [www.europarl.eu.int](http://www.europarl.eu.int) <sup>109</sup> Art 197 EC, third sub-paragraph.

<sup>110</sup> Art 200 EC. <sup>111</sup> Art 201 EC. <sup>112</sup> Art 194 EC. <sup>113</sup> Art 195 EC.

in the implementation of Community law.<sup>114</sup> The degree of political influence that the EP may be able to exercise in relation to other political institutions of the EU such as the Commission as well as in relation to Member States may be of some assistance in connection with a private law enforcement campaign, such as raising the political profile and prominence of a particular dispute.

The EP, though, has no specific legal powers to assist in the process of enforcing EC environmental legislation at national level, which makes its role here rather indirect and complementary in nature. In addition, the EP does not have any legal powers to hold the Commission to account in respect of its decisions whether or not to take infringement proceedings against a Member State under Arts 226/228 EC. In relation to complaints about the Commission's conduct over law enforcement issues, the relevant point of reference is usually the European Ombudsman.

### ***10.2.1 Right of petition***

The right of citizens to contact the EP and request it to take action by way of petition is laid down in the EC Treaty.<sup>115</sup> Specifically, the right to petition the EP is set out in Art 194 of the EC Treaty. In common with the right of complaint to the EO, the right of petition is extended to a very wide range of persons. The right is not predicated on possession of any specific nationality of a Member State, but is conditional on the residency of the petitioner within the EU.<sup>116</sup> However, in contrast with EO complaints, the material scope of petitions is much broader and may concern any matter coming within the EC's fields of activity affecting the petitioner directly. The criteria for admissibility are therefore relatively relaxed. Accordingly, environmental petitions may cover policy or legal issues and/or matters relating to the performance of an EC Treaty institution or national authority in connection with the development or implementation of EC environmental law. Art 194 EC states:

Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have the right to address, individually or in association with other citizens or persons, a petition to the European Parliament on a matter which comes

<sup>114</sup> Art 193 EC.

<sup>115</sup> For an overview of the current workings of the petitions system, see A5-0088/2001 Committee on Petitions' Report on the institution of the petition at the dawn of the 21st century, 19.3.2001 (Doc. PE 232.710).

<sup>116</sup> The right is stated in the EC Treaty to be (also) one of a catalogue of rights afforded to EU citizens under Part Two of the Treaty, namely Art 21 EC, first sentence.

within the Community's fields of activity and which affects him, her or it directly.

A notable feature of the right of petition is the fact that it does not compel the EP to take action. Discretion is afforded to the Parliament to determine what steps, if any, it chooses to take on receipt of a petition. This may be contrasted with the position of the EO, whose position is more circumscribed. The EO is required under the EC Treaty to undertake enquiries into specific complaints in respect of which 'he finds grounds'.<sup>117</sup> Under the EO Statute he is obliged to 'conduct all the enquiries which he considers justified to clarify any suspected maladministration'.<sup>118</sup> Accordingly, once a complainant presents information and evidence that indicates maladministration has taken place, the EO is under a basic duty to conduct enquiries. No such formal duties apply to the EP in the context of the right of petition.

The EP's website<sup>119</sup> provides information on the procedures involved for submitting petitions and their processing. Petitions, which may be submitted by post or email and in respect of which there is no administrative fee charged, are entered into a special Parliamentary register and are announced at plenary sittings of the EP. The title and a summary of each petition are made available in a publicly accessible database, provided the sponsor(s) of the petitioner agree(s). The petitioner(s) may request the EP to preserve the petition's confidentiality, in which case only MEPs will have access to the relevant records of the file kept in the Parliament. Admissible petitions will be referred to the EP's Committee on Petitions, which will then determine what action, if any, should be taken next. It is envisaged that usually within a period of three months of its receipt, a petition will be registered with the EP and be subject to a preliminary admissibility assessment. The annual number of petitions tabled has exceeded 1,000 since 2001. A total of 1,313 petitions were tabled in the 2003/04 parliamentary year.<sup>120</sup> Although a petition may be legitimately sponsored by a single person, it is self-evident that the EP's political interest will be more likely to be aroused the more signatures there are attached to a particular petition. This is implicitly affirmed in the Committee on Petitions' annual reports on petitions, which lists as an annex those petitions filed bearing 1,000 or more signatures. The EP's Standing Committee on the Environment, Public Health and Food Safety will not usually address itself to petitions concerning environment matters. Its principal task is to scrutinise environmental policy issues, such as specific legislative initiatives from the Commission. It has, though, on occasion and not on any systematic

117 Art 195(1) EC, second sub-paragraph.

118 Art 3(1) EO Statute.

119 [www.europarl.eu.int](http://www.europarl.eu.int)

120 A6-0040/2005 Committee on Petitions Report on its deliberations during the parliamentary year 2003/04, 11.2.2005, p 16.

footing, of its own initiative requested information and explanation from the Commission in relation to the progress on particular infringement files<sup>121</sup> or on more general aspects of infringement proceedings. Private individuals have no specific rights to request this standing committee to take up a petition or other request.

As far as petitions regarding the enforcement of EC environmental legislation are concerned, the Committee on Petitions has a number of options open to it to address the particular matter raised. If the petition concerns an instance of an infringement of EC environmental law within a particular Member State, the Committee will normally seek to refer the matter to the European Commission if the latter has not already been contacted by the petitioner, given that it is the Commission and not the EP that is vested with specific powers and responsibilities under the EC Treaty for taking legal action to ensure that EC law is duly applied (Art 211 in conjunction with Arts 226 and 228 EC). If the petition relates to a complaint against the Commission about a failure on its part to investigate an alleged breach of EC environmental law at national level, the Committee will normally seek to refer the matter to the European Ombudsman, in order to avoid duplication of roles and in recognition of the fact that the EO (unlike the EP) has specific powers to access information and documents relevant to an investigation of a case of suspected maladministration. At the same time, the Petitions Committee may wish to take steps to inquire further into an alleged violation of law not taken up by the Commission, with a view to coming back to the Commission at a later date with any new information or evidence it may glean in the interim. This may take the form of a recommendation to the EP from the Petitions Committee that a temporary specific Committee of Inquiry be established to look into the affair. The role of the Committee of Inquiry is referred to in section 10.2.3. Where the Petitions Committee decides to look into specific cases of alleged infringements, it may be able to lend some degree of political support and bring pressure to bear on behalf of petitioners. For instance, it may decide to send a delegation to the Member State concerned, with a view to alerting the relevant authorities to the salient issues involved.<sup>122</sup>

Not all environmental petitions may or need relate to a violation of EC law. For instance, in the wake of several hundred petitions against a

121 E.g., in spring 2001 the Committee was keen to probe the Commission services about the state of progress by Greece to comply with the ECJ's judgment in the *Kouroupitos* case (Case C-387/97).

122 For example, in petition 1106/2002 concerning risks of pollution of the Toce river and Lake Maggiore from the former Enichem de Pieve Vergonte industrial plant in Italy, a delegation of the Committee was dispatched to meet with representatives of the Italian Ministry of the Environment (reported in A6-0040/2005 Committee on Petitions Report on its deliberations during the parliamentary year 2003–2004, 11.2.2005).

proposed hydrological project in Spain,<sup>123</sup> the Committee organised two public hearings in relation to the matter, providing stakeholders with an opportunity to present their assessment of the particular development. This type of initiative opens up the possibility for greater public and media deliberation on major environmental impacts of strategic development projects, as well as providing the opportunity to explore the ramifications and extent of EC environmental law (here the EIA Directive 85/337) and provision of EU funding (for example, Cohesion Funds).

### ***10.2.2 Parliamentary questions***

Under the EC Treaty, the EP has the power to file questions to the European Commission. Specifically, under Art 197 EC, third sub-paragraph, the Commission is obliged to reply either orally or in writing to questions put to it either by the EP or individual Members of the EP. Questions have been submitted to the Commission on a range of environmental policy issues over the years. Just as the right of petition is not absolute in the sense that it does not guarantee the petitioner that follow-up action will take place, there is no enforceable right for private individuals to require that specific questions are tabled by the EP or its MEPs. Instead, the decision whether or not a question is to be put to the Commission rests exclusively with the recipient of the request, namely the EP or individual MEP(s) as appropriate to the particular case.

Not infrequently, Parliamentary questions arise which seek to draw the European Commission's attention and response to alleged breaches of EC environmental legislation. Such questions may serve a useful function in galvanising political attention and, to some degree, public awareness of particular instances of implementation failures. However, in themselves, such questions are unlikely to trigger a Commission investigation. Not only are the questions usually very brief, providing nothing but the barest of details of a case, but they are also usually submitted without accompanying evidence. Without detailed supportive information and evidence, the Commission is unlikely to undertake an investigation and may invite these to be supplied to it by way of response. Accordingly, a written question in itself may well not be sufficient to trigger the opening of an Arts 226/228 case file by the Commission.

Some parliamentary questions on enforcement-related issues may carry greater practical significance. In particular, this may be the case where the question relates to the interpretation of EC environmental legislation, such as the scope or definition of specific terms contained in EC environmental directives. Answers provided by the Commission may have some value as creating 'precedents' on the approach taken by it *vis à vis* the enforcement of

123 Ibid, p 13 (Spanish Hydrological Plan diverting River Ebro).

a particular norm under Arts 226/228 EC. In addition, the response from the Commission may serve as a useful benchmark for national authorities and others in applying EC environmental legislation.

### *10.2.3 EP temporary Committees of Inquiry*

Within the particular EC Treaty section governing the EP's institutional foundations there lies a special procedure for the establishment of a temporary Parliamentary Committee of Inquiry that may enquire into alleged breaches or poor administrative management of implementation of EC law. In contrast with the EC Treaty provisions on the European Ombudsman, which focus on the conduct of non-judicial EC institutions or bodies, the provisions on the committee of inquiry concern themselves with legal or administrative failures at national level. The material provision is Art 193 EC,<sup>124</sup> first sub-paragraph, which states:

In the course of its duties, the European Parliament may, at the request of a quarter of its Members, set up a temporary Committee of Inquiry to investigate, without prejudice to the powers conferred by this Treaty on the institutions or bodies, alleged contraventions or maladministration in the implementation of Community law, except where the alleged facts are being examined before a court and while a case is still being subject to legal proceedings.

At the end of its investigation, the Committee of Inquiry is to submit a report before disbanding.<sup>125</sup> Detailed provisions on the operation of the EP's right of inquiry are to be determined by agreement between the EP, Council and Commission.<sup>126</sup> Accordingly, in theory, it is possible for the EP to set up a temporary Committee of Inquiry to investigate misapplication of EC environmental norms at national level, a process independent from the Commission's infringement procedures under Arts 226/228 EC.

However, the Committee of Inquiry procedure is a rather unwieldy and rarely used mechanism. First, as with other EP political rights, the launch of the Committee of Inquiry process is one predicated on consent of sufficient opinion within the EP (a quarter of its membership), and may not be commandeered as of right by other persons. Second, the condition of securing consent from at least a quarter of MEPs means that it will be rare that the procedure will be engaged, and most unlikely in relation to environmental cases affecting just one Member State. Third, the Committee of Inquiry is not endowed with any specific powers under the EC Treaty for

<sup>124</sup> See also Rule 176 of the EP's Rule of Procedures, 15th ed. 9.9.2005.

<sup>125</sup> Art 193 EC, second sub-paragraph.

<sup>126</sup> Art 193 EC, third sub-paragraph.



requiring any specific steps to be taken on the part of Member State authorities.<sup>127</sup> The absence of such powers serves to raise questions over the utility and credibility of such a procedure being employed in environmental cases. The treaty stipulates that the Committee of Inquiry is required to file a report at the end of its deliberations; any conclusions contained in the reports are effectively reliant on the effect of adverse publicity to ensure that they are adhered to. The author is not aware of any Committee of Inquiry having been convened to examine suspected infringements of EC environmental law. In the past, temporary EP Committees of Inquiry have been set up to investigate suspected instances of breaches of EC law and maladministration in the fields of BSE and the Community Transit System in 1996/97.

#### ***10.2.4 The EP and Arts 226/228 EC infringement proceedings***

Just as is the case with private persons, the EP does not have any specific legal powers to hold the European Commission to account over decisions whether or not to commence infringement proceedings against Member States under Arts 226/228 EC in respect of suspected breaches of EC environmental legislation. The EP has no special legal standing or rights either to require the Commission to take legal proceedings under Art 232 EC or annul any decision on the part of the Commission not to start legal action under Art 230 EC. The Commission retains sole discretion under the EC Treaty provisions to decide such matters and these decisions are immune from judicial review at EC level; the EP has no legal standing to take Member States to court over infractions of EC law.

### **10.3 The European Environment Agency (EEA)**

Although the European Environment Agency (EEA)<sup>128</sup> is not a body within the EC to which private persons may turn in order assist them in the enforcement of EC environmental legislation, it is worth making a brief reference to it here in order to clarify its particular role in relation to Community environmental policy. At its inception in the early 1990s, there was substantial discussion as to whether or not it would take on enforcement-related work. Since the end of the 1990s, though, this particular debate has ebbed away within the EU's political institutions. However, it may well be possible that discussions arise again in the future, depending on there remaining sufficient satisfaction with and support for the current EC Treaty framework which endows the

127 In addition, the EP is not vested with having any specific powers in other EC Treaty provisions *vis à vis* Member States' activities (in connection with implementation of EC policies).

128 The EEA's website is: [www.eea.eu.int](http://www.eea.eu.int)

European Commission with the dual roles of 'guardian' of the EC Treaty and Community institution charged with environmental policy development.

Formally established in 1993 with its seat in Copenhagen, the EEA is an agency of the EC charged with responsibility for providing the EU institutions and Member States with reliable scientifically based information on the environment.<sup>129</sup> Among other things, this provision of information is to enable the EU to be in a position to frame and implement 'sound and effective environmental policies'.<sup>130</sup> From a Community policy perspective, the EEA's information role is very important in terms of delivering data that covers the entire territory of the EU and which is to be measured in a harmonised fashion at national level. As information provider, the EEA is also required to gather and process data in order to make it possible to describe the present and foreseeable state of the environment, from the perspectives of environmental pressures, quality and sensitivity.<sup>131</sup> In order to be able to glean the relevant information, the EEA draws on the support of the relevant national authorities of the Member States which collate information on the environment. Under its founding regulation, the EEA is charged with establishing a European environment information and observation network (EIONET),<sup>132</sup> which is the inter-institutional structure intended to deliver the relevant scientific information. Collectively, the EEA and the 'national focal points' that co-ordinate and transmit information to be supplied to the agency at national level constitute the essential foundations of the EIONET. The EEA has its own website which contains links to its published information on the state of the European environment.<sup>133</sup>

In the early 1990s there was some support for the development of an independent European environmental inspectorate, endowed with specific powers to be integrally involved in the monitoring and supervision of EC environmental legislative requirements. At the time, both the European Commission and the European Parliament considered that the establishment of a European Environment Agency could open up the way for an independent supranational entity becoming involved in supervisory work relating to EC environmental legislative implementation. However, the Council of the EU did not agree to the inclusion of such a mandate for the EEA's list of functions. The Community legislation setting up the EEA did, though, specifically refer to the possibility, at a later date, of supervisory functions being assigned to the EEA.<sup>134</sup> However, the Commission did not take up this issue

129 See Regulation 1210/90 on the establishment of the European Environment Agency and the European environment information and observation network (OJ 1990 L120/1).

130 Art 2(ii), *ibid.*      131 Art 3, *ibid.*      132 Arts 1, 2(i) and 4, *ibid.*

133 EEA website: [www.eea.europa.eu/](http://www.eea.europa.eu/)

134 See Art 20 of Regulation 1210/90 on the establishment of the European Environment Agency and the European environment information and observation network (OJ 1990 L120/1), as amended by Regulation 93/1999 (OJ 1999 L117/1).

in subsequent years when submitting draft amendments to the EEA's statutes.<sup>135</sup> In 1997, the Council Testated its clear rejection of the establishment of a centrally and supranationally organised system of European environmental inspectors.<sup>136</sup> As a consequence, the statutes governing the operations of the EEA have so far not entered into the terrain of law enforcement.

The EEA does, however, host an electronic tool on its website that will become increasingly useful in connection with enforcement of EC environmental legislation, namely the EPER database (European Pollutant Emission Register), a free online database system available to the public since February 2004,<sup>137</sup> details of which are discussed in Chapter 8.

#### **10.4 The Council of the EU and individual Member States**

Whilst the Council of the EU is a key player alongside the EP in the legislative process of enacting EC environmental legislation, it does not exercise any specific supervisory function in relation to the enforcement of EC environmental law. This is not that surprising, given that it is the EU institution that represents the collective interests of Member States in European Union affairs. As is the case with the EP, the Council of the EU has no legal standing (under Arts 226/228 EC or other EC Treaty provisions) to take legal action against individual Member States that have infringed EC law. Neither is it vested with legal powers under either Art 230 or Art 232 EC to challenge Commission decisions over the launch of or refusal to launch infringement proceedings before the ECJ.

As was outlined in Chapter 2, individual Member States are theoretically vested with legal power to bring enforcement proceedings against other Member States over infractions of EC law before the ECJ. However, in political practice this legal power is rarely if ever used, Member States preferring to defer to the Commission to take legal action. In any event, in practice, several Member States have relatively poor records on timely implementation of EC environmental law so it is most unlikely that any Member State is going to be willing to invest resources in assisting in the promotion of law enforcement.

Accordingly, neither the Council of the EU nor individual Member States constitute appropriate bodies within the EC legal system for private persons to turn to for assistance in connection with the practical enforcement of EC environmental law.

135 As published in the Official Journal of the EU: OJ 1997 C255/9 and OJ 1998 C123/6.

136 OJ 1997 C321/1. This position was recently endorsed in recital 5 of Recommendation 2001/331 providing for minimum criteria for environmental inspections in the Member States (OJ 2001 L118/41).

137 EPER's website address is: [www.eper.cec.eu.int](http://www.eper.cec.eu.int)

### 10.5 Concluding remarks

Notwithstanding the fact that there are a number of institutions and bodies other than the European Commission involved in the development of environmental policy at EC level, with the exception of the European Ombudsman none of them involve themselves to any significant extent in the task of supervising due enforcement of EC environmental legislation. Even the EO's role here is limited, being unable to take direct action in relation to any breach of EC environmental law or compel others to take steps. Both of the administrative systems employed by the EO and the EP, which offer some scope for receiving and addressing private individual complaints about non-compliance with EC law, are reactive in nature. Neither is equipped to address compliance issues on a proactive or systematic basis. Accordingly, in practice, persons seeking to request the EU to take action in relation to suspected infringements of EC environmental law are very largely dependent on the European Commission's services for assistance in this regard.

The European Ombudsman has exercised a notable degree of influence on the development of the European Commission's management of complaints from the public against Member State infractions of EC environmental legislation. Without the Ombudsman's scrutiny of the Commission, there is little doubt that the Commission would not have come to revise its procedures for the handling of complaints in a more transparent, fair and accountable manner. In general, most of the principles of good administration elaborated by the EO in its decisions have usually been taken up and adopted by the Commission within the context of its own procedures, although it is fair to say that this process usually takes a considerable amount of time to bed down in practice. For the future, a significant test will be whether the EU will decide to adopt the EO's *European Code of Good Administrative Behaviour* and see that its principles are enshrined in Community law so as to be formally binding on EC Treaty institutions and bodies such as the Commission. A legally binding code of conduct will not only then be enforceable by the EO, but also by complainants who will have specific legal EC rights that they will be able to defend. The current position is unsatisfactory, not least because there appears to be no clear mechanism for ensuring that EC Treaty institutions and bodies adhere to recommendations and take on board critical remarks made in respect of their conduct by the Ombudsman.

The EO has accordingly acquired an important, if albeit ancillary, role within the existing EC legal framework for assisting private individuals in seeking to persuade the Commission to pursue instances of violations of EC environmental law against Member States. It remains to be seen whether the current system of auditing EU administrative conduct for maladministration will be enhanced in the future.

The European Parliament has been less able to influence the management of EC environmental law enforcement at either Community or national level. Its impact has been more diffuse and diverse in nature. The mandate with which it has been provided under the EC Treaty for investigating alleged instances of maladministration or contravention of EC rules of law at national level via committees of inquiry (Art 193 EC) has been rarely used. The EP's Committee on Petitions, though, does regularly attend to queries and requests submitted by members of the public in relation to Community environmental matters. However, the work of the EP's Committee on environmental matters concerns itself predominantly with political as opposed to legal issues. The Committee operates on the basis that it is not intended to duplicate work or functions carried out by other EC bodies. Accordingly, complaints it receives against the Commission are referred to the EO and petitions relating to instances of alleged breaches of EC law at national level are passed on to the Commission. Finally, the mechanism of parliamentary questions directed at the Commission is also of limited assistance in the field of law enforcement.

The remaining entities that have notable roles in Community environmental policy development have little or no formal involvement in supervision of the due application of EC environmental law. These include the EEA, the Council of the EU and the individual Member States themselves. It remains to be seen whether political interest will re-emerge at EU level for the expansion of the current remit of the EEA into the area of law enforcement. It is interesting to note that the emerging European Pollutant Emission Register database system is housed within the EEA's website, a monitoring and information system intended at least in part to facilitate close monitoring of individual installation's environmental performance and compliance with EC environmental legislation. However, a specific law enforcement role is not likely to be vested in the EEA (such as inspection powers) as long as there is insufficient political will at EU level to address the conflicts of interest inherent in the multiple roles accorded to the Commission in EC matters under Art 211 EC: legislative,<sup>138</sup> executive<sup>139</sup>

138 The Commission's legislative role in environmental affairs relates to its monopoly over presenting legislative proposals (see Art 175 in conjunction with Art 251 EC) as well as power to alter the balance of power within the legislative process under the so-called 'co-decision' procedure set out in Art 251 EC which is applicable to the environmental sector (if the Commission issues a negative opinion on EP-proposed amendments to its proposal, the Council of the EU may adopt them only by way of unanimity). See Art 211 EC, third indent.

139 The executive dimension to the Commission's activities lies principally in its predominant role in the shaping of Community policies as well as strategic position in relation to the passage of delegated legislation (see the 'comitology' procedures for the adoption of technical measures under Decision 99/468 (OJ 1999 L184/23). See Art 211 EC, second and fourth indents.

and quasi-judicial.<sup>140</sup> The 2004 EU Constitution does not contain any provisions requiring structural changes to the Commission's current institutional position within the Union.

140 The quasi-judicial role of the Commission in the environmental sector manifests itself in the fact that it is the Commission, which has both responsibility (Art 211 EC first indent) and power to bring legal proceedings against Member States over infractions of EC environmental legislation (Arts 226 and 228 EC).



## Part 3

# THE ROLE OF MEMBER STATES IN ENFORCING EU ENVIRONMENTAL LAW





## ENFORCEMENT OF EU ENVIRONMENTAL LAW BY NATIONAL AUTHORITIES (1): GENERAL PRINCIPLES AND ENVIRONMENTAL INSPECTION RESPONSIBILITIES

This final part of the book considers the legal role and responsibilities of EU Member State authorities in enforcing EC environmental legislation. In several respects, the particular national authorities charged by their Member States with the task of overseeing the practical implementation of environmental protection legislation are crucially important actors involved in monitoring and ensuring due compliance with such legislation. In Parts One and Two of the book, the enforcement roles of the European Commission and civil society were considered. For various reasons, it is evident that neither of these entities is ever going to be best placed to engage in being the most important or effective source for overseeing active compliance with EC environmental law.

As a centralised institution vested with limited legal and human resources, it is wholly unrealistic to expect the European Commission alone to be able to enforce EC environmental law across the EU. It is endowed with legal powers to take legal proceedings against Member States in respect of infringements of EC law under Arts 226 and 228 EC, which may ultimately culminate in a defendant Member State being fined. However, the Commission has no specific powers to carry out its own investigations on the ground of suspected cases of breaches of EC environmental law. Specifically, it is not vested with powers to access affected sites or require persons suspected to be involved to disclose information. Neither does it have sufficient personnel or financial resources to carry out regular inspections. It is dependent principally on complainants and Member States for information and evidence relating to cases of 'bad application' of EC environmental legislation, namely specific individual instances of infringements of the legal requirements of such legislation. The Commission, though, is best placed to

monitor the correct transposition of EC legislation into national law, given that such monitoring is essentially based on evaluating publicly available documentation in the Member States (that is, transposition legislation) and, bearing in mind its legislative role, the Commission is able to command an in-depth understanding of the parameters of particular EC legislative requirements. Moreover, the enforcement by a single institution, where feasible, aids consistency of approach in terms of law enforcement.

Given their relative lack of resources in terms of finance, scientific and technical expertise, legal powers as well the absence of a clear and immediate economic motivation for private sector involvement, it is to be expected that private individuals and organisations are never likely to have more than a useful ancillary role in terms of assisting in EC environmental law enforcement. This role is not insignificant and, as was discussed in detail in Chapter 8, is actively being facilitated and promoted by the EU.

Compared with the European Commission and private individuals, the national environmental protection authorities of the Member States appear best placed, for a number of reasons, to undertake the bulk of law enforcement work in relation to specific cases of 'bad application' of EC environmental legislation. First, they are better placed geographically than the Commission to oversee compliance and understand its particular challenges within their own jurisdictions. Second, given that the authorities are established by virtue of national legislation, their structures are underpinned by a strong sense of local legitimacy and democratic accountability. Third, such authorities are commonly specifically vested with the purpose, resources and powers to oversee compliance with environmental legislation. Fourth, given the third point, it is evident that such authorities have usually acquired considerable experience and expertise in environmental law enforcement matters at local level. All these reasons underline the seminal importance of national public authorities in environmental law enforcement work in general, not only in relation to EC environmental legislation. Of course, the relative efficacy of national authorities is conditional on their being suitably resourced and independent from external interference that might otherwise raise conflicts of interest.

Chapters 11–13 explore the extent to which the EU has developed specific responsibilities for the Member States and their public authorities to undertake law enforcement duties in respect of EC environmental legislation. By way of introduction, this chapter provides an overview of general aspects. Specifically, it focuses on the various general duties that arise under EC law for Member States and their authorities engaged in environmental protection to implement and enforce EC environmental norms. In addition, it examines the various political developments that have emerged at EU level in relation to discussions on establishing minimum criteria on environmental inspections at national level. Chapters 12 and 13 focus on recent EC legislative initiatives that are intended to introduce in the short- to medium-term

specific obligations on Member States and authorities to impose civil and criminal liability on persons found to have perpetrated serious violations of EC environmental protection standards.

### **11.1 General implementation duties of national authorities under EC law**

Member States, including their national authorities, have certain general duties under EC law to take the necessary steps to ensure that the legally binding commitments entered into by Member States under the EC Treaty and its secondary legislation are fulfilled. These duties, based on general provisions in the EC Treaty, have been developed by European Court of Justice (ECJ) jurisprudence over a number of years and are in a process of continual, gradual evolution. This section of the chapter reflects on the extent to which these duties apply also to national authorities of the Member States, specifically those entrusted with the task of protecting the environment. These duties may be analysed in terms the extent that they require national authorities to take active steps to ensure that EC environmental law is properly applied (positive responsibilities) and to what extent they require them to respond to requests to take action by third parties (passive responsibilities).

#### ***11.1.1 Positive legal responsibilities of national authorities under Art 10 EC***

As far as EC environmental legislation is concerned, the most basic implementation obligation concerns the duty to ensure that EC environmental directives, the preferred legislative tool for the passage of environmental legislation at EC level, are properly transposed on time into national law by way of appropriate national implementing legislation. This duty flows directly from Art 249(3) of the EC Treaty and is the responsibility of the Member States, as represented by their respective national governments. National authorities do not carry any responsibility for transposition of directives; this is a matter for national governments to secure via the relevant national, regional and/or local legislative processes within the particular nation state.

However, EC law also imposes an additional and deeper level of implementation obligation on Member States, namely the general duty to ensure that in practice EC law is respected and therefore applied within their respective territories. The ECJ has held on numerous occasions that this general responsibility under EC law falls not only on Member States but also on the competent authorities of the Member States charged with the task of implementing policy in practical terms. It has been the ECJ that has confirmed that the EC Treaty requires Member States to ensure practical as well as legal implementation of EC rules of law within their respective territories. This obligation has been held by the Court to flow from the general provisions on Member State co-operation in Art 10 of the EC Treaty, which states:

Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the EC. They shall facilitate the achievement of the EC's tasks.

They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty.

The ECJ has established that a number of obligations flow from Art 10 EC. Specifically, Member States and their competent authorities are obliged to afford assistance to the European Commission in connection with the assessment of complaints made to the Commission concerning alleged violations of EC law, with a view to enabling the Commission to be in a suitably informed position to decide whether or not to bring infringement proceedings against a Member State under Art 226 EC (for example, Case C-365/97 *San Rocco*). In addition, independently of European Commission involvement, Member States and their competent authorities are required under this provision according to the Court's established case law to take active steps to ensure that EC measures falling within their area of jurisdiction is correctly applied. Thus, the ECJ has confirmed that the duty of co-operation in this context requires Member States to ensure that they proceed in respect of EC law infringements with the same diligence as that which they bring to bear in implementing corresponding national laws (for example, Case 66/88 *Commission v Greece*). This implies that Member States must ensure that inspection and monitoring systems employed by national authorities to detect infringements of national environmental legislation must also be applied in relation to the supervision of binding EC environmental legislative obligations. The ECJ has also established that the co-operation duty under Art 10 EC includes ensuring that infringements of EC law are penalised effectively, so that effective, proportionate and dissuasive sanctions are used (for example, Case C-354/99 *Commission v Ireland*).

However, the duties arising under Art 10 EC on Member States and competent authorities to take active steps to ensure that EC environmental legislation is adhered to are subject to significant qualifications. Given that the vast majority of EC environmental legislation is passed in the form of EC directives, it is important to note the importance of Member States adopting timely and accurate transposition legislation. In the absence of an EC directive being transposed correctly into national law, the national environmental protection authorities have practically no possibility of enforcing their terms against the public at large. For, as was discussed in Chapter 6, the ECJ has held that EC directives do not have binding effects for private persons (for example, Case 152/84 *Marshall (I)*). Accordingly, Member State authorities may not rely on the doctrine of direct effect in order to enforce directly effective provisions of EC directives against private persons (for example, Case 14/86 *Kolpinghuis* and Case 80/86 *Pretori di Salo*).

In addition, authorities may not seek to use the doctrine of indirect effect in order to punish individuals for transgressing norms of EC directives. It will be recalled that the doctrine of indirect effect, which emanates from the ECJ's case law, is in essence a duty on emanations of the Member States (including national courts as well as Member State government departments and authorities) to interpret national legislation in alignment with EC law covering the same policy field, in so far as this is possible (for example, Case 106/89 *Marleasing*). However, in the *Arcaro* case (Case C-168/95) the ECJ ruled out that national courts were obliged under Art 10 EC to interpret national legislation in line with an EC environmental directive, wherever such an interpretation would have the effect of determining or aggravating, on the basis of the directive and in the absence of a law enacted for its implementation, the liability in criminal law of persons who act in contravention of that directive's provisions. It is for these reasons that, to a great extent, national authorities charged with the task of environmental protection are dependent on national law endowing them with suitable powers to ensure that EC environmental rules can be enforced at local level. Their general responsibilities under Art 10 EC do not extend to using EC environmental directives in order either to determine or aggravate liability of persons in respect of breaches of EC directives.<sup>1</sup> The position is different in relation to EC regulations, which are defined as being directly applicable and generally binding under Art 249(2) EC. National authorities are entitled to rely on directly effective provisions of EC environmental regulations against private persons. However, the instrument of the EC regulation is relatively rarely used in the context of EC environmental law, although there are some important examples in relation to environmental policy areas closely connected with international trade.<sup>2</sup>

Notwithstanding these limitations, this does not mean that Member States and competent authorities acting in the environmental protection area may not take any active steps to assist in the enforcement of EC environmental legislation where these have not been transposed correctly into national law. The duty of co-operation under Art 10 EC requires Member States and competent authorities to undertake all steps possible to supervise implementation of such legislation, subject to the qualifications mentioned above in relation to the doctrines of direct and indirect effect. This means that national environmental protection authorities are obliged, at the very least under Art 10 EC, to take active steps to ensure that they may be able to verify

1 Whether or not authorities may use the doctrine of indirect effect in order to impose civil liability on a private person is not clearly settled by the ECJ's case law. It is unlikely that this could be possible, given that the ECJ has ruled out the use of direct effect to determine criminal or civil liability of individuals. See Chapter 6.

2 Notably, the Waste Shipment Regulation 259/93, CITES Regulation 338/97 and the Ozone-depleting substances Regulation 2037/00.

whether or not a breach of an EC environmental norm has taken place, using their existing powers of inspection granted under national law, notwithstanding that the EC norm has not been transposed into national law. In such a case, the authorities would be under a duty at least to inform the European Commission of the facts and evidence, who may then decide to pursue the matter further by way of infringement proceedings against the Member State concerned under Art 226 and Art 228 EC. Whilst the national authority would not be taking action specifically against the person(s) responsible for breaching EC environmental standards and therefore acting in accordance with ECJ jurisprudence, it would at the same time be fulfilling its enforcement responsibilities as far as is possible. Accordingly, national authorities are not powerless to act in the absence of legislation transposing EC environmental directives; they have concrete legal duties under Art 10 EC. However, the author is not aware that these principles have been made operational in practice at national authority level. National authorities of the Member States in general do not appear to be appraised of their legal responsibilities relating to implementation of EC environmental law by either the European Commission or Member States. A communication from the European Commission to this effect would be appropriate in the circumstances.

In Chapters 12–13, two recent EC legislative initiatives will be discussed which are intended to introduce specific obligations on Member State environmental protection authorities to take steps to enforce EC environmental legislation. These are Directive 2004/35<sup>3</sup> on environmental liability with regard to the prevention and remedying of environmental damage (the EL Directive) and the Commission's proposal for a Directive on the protection of the environment through criminal law<sup>4</sup> which seek to oblige Member State authorities to impose civil and criminal sanctions respectively on persons found to have breached certain minimum legally binding EC environmental protection standards.

### ***11.1.2 Passive legal responsibilities of national authorities under EC law***

There are a number of other general and specific EC legal duties on national authorities in connection with implementation matters, which are more of a passive or a reactive character. Specifically, EC law contains a set of legal obligations on Member State authorities requiring them to assist third parties in various ways who decide to take either administrative or legal action in order to enforce EC environmental law.

It is important to note that individuals are able to invoke a number of important general principles of EC law against national environmental

3 OJ 2004 L143/56.

4 COM(2001)139, of 13.3.2001.

protection authorities. Notably, private persons may rely on directly effective provisions of EC directives against public authorities, as discussed in Chapter 6 (see for example, Case 103/88 *Costanzo*). More recently, the ECJ has expanded this line of jurisprudence to include the right of private individuals to hold national authorities to account where they fail to carry out responsibilities assigned to them, which involve the exercise of discretion. The rights of individuals to be able to rely on certain provisions of EC environmental directives was used to good effect in the case of *Kraaijeveld* (Case C-72/95) in order to assist in the enforcement of an EC environmental directive. In that case, the ECJ held that a private individual could rely on Art 2(1) in conjunction with Art 4(2) of the Environmental Impact Assessment (EIA) Directive 85/337 in order to seek rectification of a failure on the part of a competent national authority to assess whether or not a particular development should be subject to an environmental impact assessment. The Court ruled that the authority concerned was obliged to undertake such a review, notwithstanding that national law did not provide it with specific jurisdiction so to do. Where an EC environmental directive provides Member States with duties involving the evaluation of various factors, and therefore incorporates a strong element of discretion or choice on the part of national authorities, the ECJ has ruled that private individuals may rely on them before the national courts in order to ensure that national authorities do carry out those duties, irrespective of whether national law specifically provides them with jurisdiction so to do (see for example, Case C-437/97 *WWF v Bozen*).

Even where the effect of a national authority's action to adhere to the application of the direct effect doctrine would be to create specific disadvantages for particular private persons, the ECJ has held that a national authority must nevertheless apply the directly effective provision concerned. The Court has rejected the view that such a situation is tantamount to enforcing directives against private individuals. This legal point was confirmed in the recent *Delena Wells* case (Case C-201/02), also discussed in Chapter 6. That case involved a private person being able to rely on requirements in the EIA Directive in order to challenge the legality of a grant of planning permission to a private mining company to reopen a dormant quarry. Similar considerations apply in relation to the application of indirect effect. Specifically, where a person is able to use the indirect effect doctrine in order to amend the conduct or policy of a national authority so as to be in alignment with EC environmental legislation, it is immaterial from an EC legal perspective whether the adverse effects of that amendment of conduct or policy, as a result of the litigation taken against the public authority, leads to any adverse implications for specific private persons.

In addition to the doctrines of direct and indirect effect, Member State authorities are also subject to the legal disciplines of the rules on state liability under EC law. Accordingly, as was discussed in Chapter 7, authorities are liable to pay compensation to individuals in respect of damage caused to



them as a direct result of breaches by the authorities of requirements in EC law entailing the grant of individual rights (see for example, Cases 6, 9/90 *Francovich* and C-424/97 *Haim*). Given that most EC environmental legislation does not entail the grant of individual rights, the potential impact of state liability rules under EC law on environmental protection authorities appears to be very limited in the light of the rules on liability set out in current ECJ jurisprudence.

There are interesting possibilities for national authorities to be able to adapt these passive obligations and put them onto a more active footing. For instance, it would be legitimate and appropriate for national authorities to amend their existing policies and practices to the extent that they could avoid possible legal action taken against them for failing to invoke EC environmental legislative rules. In particular, an authority would be perfectly entitled to amend its environmental decision making practices (for example, planning application, waste licensing, discharge permitting) in order to accord with EC environmental legislative requirements irrespective of whether or not national transposition legislation required this to happen, as has been clarified by the ECJ in its case law. Although any such amendments may well involve actually or potentially certain detrimental consequences for specific individuals, in that an amendment might well require a stiffening of existing environmental protection requirements set locally, it is submitted that this would not fall foul of the ECJ's case law barring the invocation of directives against individuals. Instead, such a move on the part of an authority would be to ensure that private persons could not seek to require it to evade its responsibilities of applying EC rules to the fullest extent possible as required under Art 10 EC. However, it is unlikely that many authorities would be keen risk employing such a policy without firmer legal foundations (that is, set out in a specific legislative text). For, notwithstanding the fact that the duty of co-operation in Art 10 EC undoubtedly incorporates particular legal obligations for national authorities involved in implementing EC rules of law, it is apparent that this legal source of EC law is really too general and vague of itself to establish a sufficiently clear set of implementation and enforcement obligations for national authorities.

Recently, the EU has introduced a number of legislative initiatives intended to impose specific responsibilities of a passive or reactive character on Member State environmental protection authorities. A notable example is in relation to access to environmental information and access to environmental justice. As was discussed in Chapter 8, the EC has recently enacted or proposed a number of legislative instruments designed to confer specific rights of a procedural-type nature to persons seeking to monitor and/or enforce implementation of EC environmental legislation. Under Directive 2003/4<sup>5</sup> on public

5 OJ 2003 L41/26.

access to environmental information and repealing Directive 90/313 (AEI Directive), designated national authorities are responsible for divulging information relating to a wide variety of environmental matters held by them on request. Under a number of other legislative instruments, Member State authorities are obliged to act on complaints or requests to act in relation to suspected violations of EC environmental law, notably the Commission's 2003 Draft Directive on access to justice in environmental matters<sup>6</sup>. The EL Directive 2004/35<sup>7</sup> on environmental liability with regard to the prevention and remedying of environmental damage confers specific rights on private persons to access particular administrative legal review procedures and is discussed in detail in Chapter 12.

### *11.1.3 The principle of subsidiarity*

An important factor in debates over the extent to which EC law should intervene to regulate the activities of Member State authorities involved in implementing EC norms at national level is the principle of subsidiarity. The principle was formally incorporated into the EC Treaty (Art 5(2) EC) by virtue of the Treaty on European Union (TEU) 1992. It was intended to serve as a check on the extent to which the EC could develop its common policies and encroach on areas considered by Member States to be within the exclusive domain of the nation state. Article 5(2) states:

In areas which do not fall within its exclusive competence, the EC shall take action in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States acting alone and can, therefore, by reason of the scale or effects of the proposed action, be best achieved by the EC.

The principle has had considerable influence on the course of discussions over the extent to which the EU should harmonise standards in relation to the aspect of implementation and enforcement of EC environmental law. Until recently, the dominant opinion within the EU has been that Member States should retain, in principle, autonomy over the means and manner in which they implement EC law, including EC environmental legislation. This position has resonances with the ECJ's approach to the issue of judicial remedies discussed in Chapter 7, where the Court has recognised a principle of procedural autonomy of Member States. Whether one agrees or not with this view is essentially a political question, predicated on the degree to which one

6 COM(2003)624 final, of 24.10.2003.

7 OJ 2004 L143/56.

accepts that the EU should have supranational competence to act in a specific policy area.

Recently, this particular viewpoint, held by most of the Member States, has been qualified by the recent adoption at EC level of two environmental legislative instruments, which are specifically designed to regulate the activities of national authorities charged by the Member States with environmental protection duties. These are the Directive 2004/35<sup>8</sup> on environmental liability with regard to the prevention and remedying of environmental damage (EL Directive) and the Commission's proposal for a Directive on the protection of the environment through criminal law,<sup>9</sup> both of which are discussed in detail in Chapters 12 and 13.

The remainder of this chapter will consider the political developments at EU level that have fostered closer co-operation amongst Member States over issues connected with administrative implementation and enforcement of EC environmental law.

## 11.2 The IMPEL network

Since its origins in the early 1990s, the European Network for the Implementation and Enforcement of Environmental Law (known as the 'IMPEL network') has had an increasingly significant role to play in developing initiatives at EU level to promote co-operation between the competent authorities of the various EU Member States charged with the responsibility of implementing and enforcing EC environmental legislation. Essentially, IMPEL is an informal network of European regulators and is an entity independent of the European Union and its institutional structures.<sup>10</sup>

As at the end of 2005, the IMPEL organisation was composed of representatives of environmental regulatory bodies from 30 member countries: the 25 EU Member States,<sup>11</sup> two countries due to accede to the Union in the near future (Bulgaria, Romania), two countries which are candidates to join the Union (Croatia and Turkey) as well as one country of the European Free Trade Association (Norway).<sup>12</sup> IMPEL membership is likely to increase in line with greater EU enlargement and negotiation of closer association with its neighbouring countries.

8 OJ 2004 L143/56. 9 COM(2001)139, of 13.3.2001.

10 IMPEL website: [www.europa.eu.int/comm/environment/impel/index.htm](http://www.europa.eu.int/comm/environment/impel/index.htm)

11 The Environment Agency for England & Wales is indicated as the UK representative in IMPEL.

12 The other EFTA countries which have signed the EEA Agreement have been invited to join IMPEL but have so far not taken up this offer: namely, Iceland and Liechtenstein.

### *11.2.1 Overview of IMPEL's organisation and activities*

The IMPEL network was originally established as a forum principally for regulatory authorities of the EU Member States to meet to discuss issues connected with implementation and enforcement of EC environmental legislation. Its work is essentially project based, in that various individual members acting alone or as part of particular assigned working groups will carry out and report on specific aspects of policy implementation or enforcement. IMPEL convenes twice a year<sup>13</sup> in the form of plenary meetings where the entity's core business is addressed: reports are discussed and future work programmes of the network are determined. Between its plenary meetings its activities are steered and represented by a committee of selected member countries (usually five or six) on a rotational basis.<sup>14</sup> IMPEL's secretariat is based within the offices of the European Commission's Environment Directorate-General in Brussels, and its activities are in substantial part financed by the Commission through the EC's budget. Although formally independent of the EU's institutional structures, over the passage of time the IMPEL network has come to represent an established source of information and advice for the European Commission in relation to matters connected with the responsibilities and activities of national authorities charged with implementing and enforcing EC legislation as well as rules of the European Economic Area (Oporto) Agreement 1992<sup>15</sup> on environmental protection. The European Commission, represented by its Environment Directorate-General,<sup>16</sup> is a member of the IMPEL network and shares the role of chair in its plenary meetings. The annual activities of IMPEL are also published in the Environment Directorate-General's Annual Surveys on the Implementation and Enforcement of EC Environmental Law, and the Commission hosts its website. The IMPEL network also organises major conferences for a broader audience on aspects of implementation and enforcement of EC environmental law.<sup>17</sup>

The work of IMPEL has evolved considerably over the last decade. Its core objectives were recently set out in a paper<sup>18</sup> agreed to by its membership at a

13 Usually held in June and December each year.

14 Referred to rather curiously as the 'enlarged troika'.

15 The Oporto Agreement 1992 is an international free trade area agreement between the Contracting Parties of the European Free Trade Association except Switzerland (Iceland, Norway and Liechtenstein), EU Member States and the European EC.

16 Currently, Unit A3 of Directorate A (Legal Affairs and Governance) DGENV.

17 Conferences have been held in Austria (2000) on the theme of compliance and enforcement and in the Netherlands (2003) on the subject of IMPEL at work. At the time of writing the next conference is in 2006, but no specific details were available. See website: [www.europa.eu.int/comm/environment/impel/conferences.htm](http://www.europa.eu.int/comm/environment/impel/conferences.htm)

18 The paper entitled 'The Role and Scope of IMPEL' (dated November 2002), is published on IMPEL's website: [www.europa.eu.int/comm/environment/impel/about.htm](http://www.europa.eu.int/comm/environment/impel/about.htm)

plenary meeting in 2002 in Santiago de Compostela, Spain.<sup>19</sup> The paper identifies the network's mission statement, which is to 'protect the environment by the effective implementation of European Environmental law'. Its core objectives are defined in the paper as being to: create the necessary impetus for existing, prospective and candidate EU Member States to make progress on ensuring a more effective application of environmental legislation, as well as to promote the exchange of experience and greater consistency of approach in the implementation, application and enforcement of environmental legislation, with a special emphasis on EC environmental legislation.<sup>20</sup>

As far as its activities are concerned, the network has been keen to maintain its focus on supporting projects as the mainstay of its work. Projects have involved a wide range of subjects, but have usually concerned or touched on the following areas and issues of EC environmental law implementation/enforcement: training of environmental inspectors, establishing minimum criteria for environmental inspections, exchanging experience and information on implementation and enforcement activities, fielding and relaying views on the coherence and practicality of current and prospective EC environmental legislation. Projects have involved sectoral as well as more general aspects of implementation of EU environment legislation and policy, all of which have been published on the IMPEL website.<sup>21</sup> As far as sectoral work is concerned, notable areas of ongoing interest for the IMPEL network have been in connection with detecting illicit trafficking of waste under the auspices of the EU's transfrontier shipment of waste Regulation 259/93 as well as identifying good practice in permitting systems and compliance mechanisms under the auspices of the IPPC Directive 96/61 and other EC legislation such as waste management legislation.<sup>22</sup> More general cross-sectoral reports have concentrated on developing good practice and/or minimum criteria in relation to environmental inspections (for example, inspection regimes, training and qualifications of inspection staff, peer review reports). Project work is in principle steered by working groups of members in so-called 'cluster' systems, which combine interrelated project work and provide informal fora for discussion and development of new ideas.<sup>23</sup>

19 These objectives reflected statements made in IMPEL's Multi-Annual Work Programme for the period 2002–06, which was determined at Namur, Belgium, in December 2001.

20 'The Role and Scope of IMPEL', para. 2. See fn. 18.

21 [www.europa.eu.int/comm/environment/impel/reports.htm](http://www.europa.eu.int/comm/environment/impel/reports.htm)

22 See, for instance, in the IMPEL's Work Programme 2005 the various projects connected with fostering co-operation between regulators on transfrontier shipment of waste issues (e.g., TFS Seaport projects).

23 Current cluster groups include ones focusing on: training and exchange of information; transfrontier shipment of waste (IMPEL TFS); new Member States and candidate countries; better and more simplified legislation. See [www.europa.eu.int/comm/environment/cluster.htm](http://www.europa.eu.int/comm/environment/cluster.htm) and Commission's Sixth Annual Survey on the Implementation and Enforcement of EC Environmental Law 2004 (COM(2005)1055).

Until recently, the IMPEL network did not have a formal legal connection with the operation of the EC's involvement in environmental protection policy. However, the network received formal legal recognition and a legal basis for its activities in the context of the EU's Sixth Environmental Action Programme (EAP) 2001–2010.<sup>24</sup> Specifically, the role of IMPEL is mentioned in the last indent of Art 3(2) of Decision 1600/02 laying down the Sixth EAP, a provision which commits the Programme to promote more effective implementation and enforcement of EC environmental legislation. The role of IMPEL has been identified by the European Commission<sup>25</sup> with the fulfilment of two aspects of this provision, as crystallized in two indents of Art 3(2) reproduced below:

*Art 3*

*Strategic approaches to meeting environmental objectives*

The aims and objectives set out in the Programme shall be pursued, inter alia, by the following means:

[. . .]

2. Encouraging more effective implementation and enforcement of EC legislation on the environment and without prejudice to the Commission's right to initiate infringement proceedings. This requires:

— [. . .]

— promotion of improved standards of permitting, inspection, monitoring and enforcement by Member States;

— [. . .]

— improved exchange of information on best practice on implementation including by the European Network for the Implementation and Enforcement of Environmental Law (IMPEL network) within the framework of its competencies;

The specific reference to the IMPEL network in the Sixth EAP is both new and significant. First, it has established a formal recognition of the involvement of the IMPEL network in the area of implementation and enforcement of EC environmental law. This recognition serves to entrench what had been evident in practice since the late 1990s. Notably, the IMPEL network's project work on establishing guidelines for minimum criteria of environmental inspections was relied on substantially by the Commission when proposing a specific policy initiative on the subject, which was adopted by the EC in the

24 Decision 1600/2002 laying down the Sixth EC Environment Action Programme (OJ 2002 L242/1).

25 See e.g. the Commission's Sixth Annual Survey on the Implementation and Enforcement of EC environmental law (COM(2005)1055) p 26.

form of a non-binding recommendation in 2001<sup>26</sup>, which is considered in detail in section 11.2.2. Second, the focus on IMPEL in the context of the Sixth EAP's strategy on meeting its environmental objectives marks a recognition on the part of the EU that the European Commission is not necessarily expected nor required to become politically engaged in supervising the overall approach of national authorities of the EU Member States in EC environmental law. It is fairly clear that, within the current span of the Sixth EAP, the Commission now views the IMPEL network as the entity best placed to deliver strategies on enhancing the effectiveness of national authorities' performance on supervising the enforcement of EC environmental legislation. The endorsement of the IMPEL network's activities are epitomised by a publicised letter of May 2000 from the former Environment Commissioner Wallström to the IMPEL network, in which she considers it to have a 'key role in the implementation of EC environmental law, a priority for the Commission'.<sup>27</sup>

Recently, the remit of the IMPEL network appears to have begun to expand its activities considerably beyond its traditional remit of focusing on issues connected with implementing existing EC environmental legislation. For the first 10 years or so of its existence, the network appears to have concerned itself mostly with detailed practical regulatory aspects of the work of national authorities charged with responsibility for implementing EC environmental legislation. Projects were focused, more or less exclusively, on considering issues and experiences concerned with the day to day practice of implementation by such European regulatory bodies, epitomised by its project work in relation to minimum criteria for environmental inspections, which led to the EC passing a Recommendation on the subject in 2001<sup>28</sup> (discussed in section 11.3). However, recently, it appears that the remit of IMPEL has broadened out to incorporate a specifically policy-oriented dimension. Specifically, since 2003 the network appears to have decided to establish a new field of activity dedicated to considering ways and means of making 'better and more simplified' EC environmental legislation. This new development opens the way for IMPEL to provide political opinions on the desirability of new and existing EC environmental legislation. In its Fifth Annual Survey on the Implementation and Enforcement of EC Environmental Law,<sup>29</sup> the European Commission reported on a 2003 IMPEL project entitled 'Impel Better Legislation Project'. The project report's main conclusions were to recommend that a number of changes be made to the existing EC legislative process for new legislation, namely that: more individuals with

26 Recommendation 2001/331 providing for minimum criteria of environmental inspections in the Member States (OJ 2001 L118/41).

27 The letter of 23.5.2000 is accessible from the IMPEL network's website: [www.europa.eu.int/comm/environment/impel/wallstrom.htm](http://www.europa.eu.int/comm/environment/impel/wallstrom.htm)

28 Recommendation 2001/331. 29 SEC(2004)1025, of 27.4.2004.

practical experience should be involved in the law making process; it should become standard practice to review all related EC legislation, international conventions and ECJ case law prior to launching a legislative initiative; the coherence of legislation should be assessed during the Commission's extended impact assessment of its proposals; an overall, strategic approach should be employed to broad sectors of environmental policy; that definitions should be clear and unambiguous, especially in framework legislation, and particularly when they determine some key aspect of the scope of a measure or define regulatory requirements; and that IMPEL could be involved in examining drafts at an early stage and commenting from the perspective of enforceability and practicability.<sup>30</sup> A similar broad remit for IMPEL is suggested with respect to appraising existing EC legislation.<sup>31</sup> The Commission's subsequent Sixth Annual Survey on the Implementation and Enforcement of EC Environmental Law<sup>32</sup> revealed that in 2004 the IMPEL network decided to follow up this and other related recent work by establishing a dedicated working group of members or a new 'cluster' to focus actively on the simplification of regulation in the context of environmental policy in the EU.<sup>33</sup>

This new dimension of IMPEL network's work constitutes a clear and qualitatively significant departure from its initial brief<sup>34</sup> in the early 1990s. No longer simply concerned with implementation issues in terms of the regulatory chain, the network appears to have expanded its attention upstream and adopted a political dimension in seeking to influence the specific contents of existing and new EC environmental legislation. On the other hand, this modification of its activities was heralded already some time ago, when the Council, in a 1997 Resolution,<sup>35</sup> specifically encouraged the IMPEL network to expand its activities to include scrutiny of legislative proposals from the Commission.

In order to fully appreciate the extent to which the IMPEL network has gained in political significance within the context of EC policy on implementation and enforcement of its environmental policy, it is useful to reflect on the key milestones and debates that have been associated with the network's establishment.

### *11.2.2 Origins and development of IMPEL*

It is clear that the IMPEL network has not always operated in a partnership role with the European Commission. Its very inception was marked with controversy. At the time when the network was formally launched in 1992

30 Ibid, at section 1.3.2. of Chapter II.

31 Ibid.

32 SEC(2005)1055, of 17.8.2005.

33 Ibid, at section 1.3.3. of Chapter II.

34 See comments of A. Duncan 'The History of IMPEL' (2000) p 5 on earlier concerns within IMPEL about the Commission drawing on it for advice about specific policy proposals.

Published on the IMPEL website: [www.europa.eu.int/comm/environment/impel/about.htm](http://www.europa.eu.int/comm/environment/impel/about.htm)

35 OJ 1997 C321/1.



under the auspices of the then United Kingdom Presidency of the European Council, the European Commission had indicated very different ideas about who should be vested with the formal task of discussing and developing ideas on securing a more effective manner of implementation of EC environmental law at national level of the Member States.

Specifically, in the early 1990s the European Commission had appeared to favour the development of a European environmental inspectorate, endowed with specific powers to be integrally involved in the supervision of adherence to EC environmental legislative requirements. The idea of establishing a central European supervisory body is not without precedent elsewhere in EC administrative law, notably in the field of competition where, since 1962, the European Commission has been vested with extensive powers to investigate business premises, access corporate documentation and impose fines on persons found guilty of breaching EC competition law.<sup>36</sup> Indeed, the establishment of the European Environment Agency (EEA) in 1993 opened up a genuine possibility for this body to become involved in implementation and enforcement aspects. The European Parliament and Council could not agree on this issue at the outset of the EEA's operations. By way of compromise, the EC legislation setting up the EEA specifically referred to the possible development of supervisory functions being assigned to it at a later date.<sup>37</sup> However, the Commission did not take up this issue in subsequent years when submitting amendments to the EEA's statutes,<sup>38</sup> presumably owing to continued stiff resistance on the part of the Council of Ministers who could block any such development. In 1997, the Council reaffirmed its clear disapproval of the establishment of a centrally and supranationally organised system of European environmental inspectors.<sup>39</sup> As a consequence, the statutes governing the operations of the EEA have not expanded into the sector of law enforcement.

Until 1993, the European Commission had no formal involvement in the workings of the emerging independent and loose intergovernmental-based framework of a network of European regulators. At its first official meeting in Chester, UK, in November 1992, the network of national environmental authorities convened without the Commission being an official participant.

36 See Regulation 17/62 implementing Arts 8[1] and 8[2] of the EC Treaty (OJ Sp Ed 1959–62, 87) as replaced by Regulation 1/2003 on the implementation of the rules of competition laid down in Arts 81 and 82 of the Treaty (OJ 2003 L1/1).

37 See Art 20 of Regulation 1210/90 on the establishment of the European Environment Agency and the European environment information and observation network (OJ 1990 L120/1), as amended by Regulation 93/1999 (OJ 1999 L117/1).

38 As published in the Official Journal of the EU: OJ 1997 C255/9 and OJ 1998 C123/6.

39 OJ 1997 C321/1. This position was recently endorsed in recital 5 of Recommendation 2001/331 providing for minimum criteria for environmental inspections in the Member States (OJ 2001 L118/41).

It had been encouraged to be set up on an informal basis by the Environment Council at its meeting in October 1992. The Commission adopted an observer role, reflecting on how to proceed to fulfil its particular mandate under the auspices of the then Fifth Environmental Action Programme to establish an implementation and enforcement network of environmental inspectors and enforcement bodies of the Member States and the Commission, with assistance when necessary from the EEA.<sup>40</sup> During these initial months of the network's operations, an informal and consensus-based culture of decision-making was established, one that was grounded according to the wishes of its participant Member State representatives. Its core task was to provide a mechanism for the exchange of information and experience between environmental agencies in the EU in order to address issues of mutual concern and to enhance the quality of the environment.

By the time the European Commission decided to participate in the operations of the network in December 1993,<sup>41</sup> network members were reportedly wary of Commission involvement. For instance, in his paper on IMPEL's history, Allan Duncan of the English and Welsh Environment Agency notes that Member State representatives were keen to retain the informal and facilitative nature of the entity, and avoid the introduction of new elements that might transform it into a body that would undertake an auditing role of the Member States' national authorities.<sup>42</sup> The Commission's participation did appear to effect a temporary broadening of the remit of the network to include focus on ways to ensure better implementation and enforcement by national authorities, including: the elaboration of national legislation and action programmes as required by EC environmental legislation; the administrative and technical tasks of translating environmental standards into specific requirements such as issuing permits; monitoring of compliance and enforcement of environmental requirements.<sup>43</sup>

However, in 1997 the organisational structure of IMPEL was amended again,<sup>44</sup> notably in the wake of a Council Resolution<sup>45</sup> which has been adopted in response to the Commission's Communication on implementing EC environmental law.<sup>46</sup> The Resolution, whilst endorsing the existing work of the network, at the same time called for a broadening of the scope of its mandate

40 OJ 1993 C138/5, Ch9.

41 Temporarily referred to as ECONET (EC Network for the Implementation and Enforcement of Environmental Law) at the end of 1993 before being renamed as the IMPEL network in late 1994.

42 Duncan, p 5. See fn. 34.

43 Ibid, p 4 as well as SEC(99)592 First Annual Survey of the Commission on the Implementation and Enforcement of EC environmental law 1996–1997, p 15.

44 For details, see SEC(2000)1041 Second Commission Annual Survey on Implementation and Enforcement of EC Environmental Law, Ch II.

45 OJ 1997 C321/1. 46 COM(96)500, of 22.10.1996.

to include giving advice on Commission legislative proposals for EC legislation, in particular where the input of practical experience is necessary. By 1999, IMPEL had settled its organisational arrangements, reaffirming its initial informal and flexible nature and focusing on project-based activities.

### ***11.2.3 Brief appraisal of IMPEL's impact***

The brief account above of the evolution of the IMPEL network underlines that its development has not been uncontroversial. In particular, for a period of time in the early 1990s it was evident that the Commission and Council were engaged in a struggle over determining to what extent the EU should become involved in supervising the day to day implementation of EC environmental legislation by national competent authorities. The IMPEL network represents a model of seeking to enhance effectiveness of application of such legislation on the basis of intergovernmental consensus, informality, flexibility and voluntarism. To a limited extent, this model is no doubt of some considerable use. In particular, the exchange of information and experience on practical issues connected with implementation of existing EC legislation as well as the opportunity to develop cross-boundary partnerships on implementation issues is clearly of benefit in terms of promoting a dialogue on best practice and understanding of different regulatory approaches applicable at national level in the Union.

However, the benefits of using this informal intergovernmental approach become far less apparent when used a locus for debate on policy issues which are pivotal to ensuring the establishment of an effective application of EC environmental legislation, such as developing minimum standards for inspections or qualification of inspectors, or providing opinions on the desirability of existing EC environmental legislation. It is at that stage that the work of a body such as IMPEL shifts from a being of a technical, implementation-oriented nature to one which considers broader policy debates, discussions which should already feature in the form of governmental input at the level of Council of the EU.<sup>47</sup> Although admittedly difficult to draw the line in practice, the distinction between technical input and policy appraisal is an important one to apply, not least from the perspective of accountability and transparency.

At the beginning of the 1990s, the European Commission and European Parliament clearly envisaged that the activities of national authorities had to be shaped on the basis of some element of compulsion, such as mandatory independent audit and specific legal requirements on inspections and enforcement. It is evident, though, that the looser, informal and inter-

<sup>47</sup> See comments of A Duncan 'The History of IMPEL' (2000) p 5 relaying his concerns about IMPEL falling into the trap of duplicating the work of 'national policy-making colleagues'. See fn. 34.

governmental model of co-operation fostered by IMPEL has so far prevailed, culminating in the 2001 non-binding Recommendation providing for minimum criteria of environmental inspections in the Member States (2001/331) (EI Recommendation), which was heavily based on IMPEL input and which is discussed in section 11.3.

The European Commission's initial hostility to IMPEL appears to have faded, particularly since the express incorporation of the IMPEL network into the EU's Sixth Environmental Action Programme 2001–2010. Indeed, it seems to be keen to embrace the network's activities within its own agenda of appraising law enforcement issues. With the Sixth EAP, it appears that the Commission has effectively set itself on track to delegate responsibility to IMPEL to provide ideas on overall strategy with regard to crystallizing and evolving the responsibilities of national authorities in implementing and enforcing of EC environmental law. This raises the prospect of serious conflicts of interest emerging, given that the persons in charge of shaping the contours of responsibility for implementation are to be effectively those directly or indirectly involved in carrying out that very task. It is far from clear how the current informal and flexible self-regulatory nature of IMPEL can hope to constitute an impartial framework for ensuring that Member State authorities carry out their supervisory and enforcement functions according to minimum effective standards across the Union. The very essence of the IMPEL network appears to be predicated on the avoidance of the imposition of compulsory standards in areas of implementation and enforcement, either by way of legislative requirements or by way of external impartial audit.

The increased prominence of IMPEL has effectively quelled discussion within the legislative EU institutions, notably within the European Commission, as to whether there should be greater supranational controls in respect of law enforcement at national level. The Council has made it clear that it is firmly opposed to the establishment of an EC Treaty institution or organ vested with powers to carry out on-site inspections in relation to instances of alleged breaches of EC environmental legislation. In the context of that discussion, it has been evident that IMPEL is also opposed to such an inspectorate system. In addition, the influence of IMPEL has also been to dispel any serious strategic thought within the Commission to establishing a set of general, legally binding minimum requirements under EC legislation that national authorities must adhere to when inspecting installations, investigating suspected cases of breaches of EC environmental law and imposing specific sanctions. The 2001 non-binding Recommendation 2001/331 reflects IMPEL's approach, whereby Member States are encouraged but not required to adhere to specific inspection and follow-up procedures when confronted with infringements of EC environmental protection standards.

However, the position of the Commission has not been really consistent. On the one hand, at a general level, the IMPEL model of regulatory governance appears to be endorsed by it. On the other hand, there have been

specific legislative initiatives brought to the table by the Commission, a number of which have been already promulgated, which specify in significant detail requirements of action on the part of national authorities in certain situations. The most notable recent examples of EC environmental legislative initiatives requiring national authorities to take specific measures in enforcing EC environmental protection norms are the EL Directive 2004/35 on environmental liability with regard to the prevention and remedying of environmental damage<sup>48</sup> and the Commission's proposal for a Directive on the protection of the environment through criminal law,<sup>49</sup> both of which are discussed in Chapters 12 and 13. Both measures require Member States to designate national authorities to take specific steps of a civil and punitive nature against persons perpetrating significant violations of EC environmental legislation.

In addition, the EC has enacted a number of other pieces of EC environmental legislation which sets down specific requirements for national authorities involved in environmental protection policy implementation and law enforcement. These include the recent package of measures introduced at EC level to implement the requirements of the 1998 United Nations Economic Commission for Europe's (UNECE) Convention on access to information, public participation in decision making and access to justice in environmental matters (Århus Convention) at EU Member State level as discussed in Chapter 8, namely: the Commission's 2003 Draft Directive on access to justice in environmental matters;<sup>50</sup> Directive 2003/4<sup>51</sup> on public access to environmental information and repealing Directive 90/313 as well as Directive 2003/35<sup>52</sup> on public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Directives 85/337 on environmental impact assessment and 96/61 on integrated pollution prevention and control (IPPC). In addition, a few EC legislative instruments have set specific organisational arrangements to be adhered to by national authorities in the event of serious environmental accidents, such as Directive 96/82 on the control of major-accident hazards involving dangerous substances<sup>53</sup> and the Commission's proposed directive on mining waste.<sup>54</sup> This raft of legislation indicates that in several respects the Commission has decided to intervene and steer the operations of national environmental protection authorities by way of supranational legislative control, as opposed to informal agreement under the auspices of IMPEL.

It is also notable that IMPEL has begun to expand its project work into the area of scrutinising EC environmental legislative proposals. To what

48 OJ 2004 L143/56. 49 COM(2001)139, of 13.3.2001.

50 COM(2003)624final, of 24.10.2003. 51 OJ 2003 L41/26.

52 OJ 2003 L156/17. 53 OJ 1997 L10/13. 54 COM(2003)319, 2.6.2003.

extent its scrutinising role is going to be of significant influence within the Commission remains as yet unclear. However, it appears that the Member States have now effectively opened up a new avenue of lobbying the Commission on policy development, albeit in an indirect manner and one which has no transparency nor tangible element of accountability. Instead of being an entity capable of auditing the activities of Member State authorities in ensuring that EC environmental legislation is upheld at national level, the IMPEL network has instead become in part at least an instrument with which the Member States to 'auditing' the approach of the Commission with respect to policy development.

### **11.3 Recommendation 2001/331 on environmental inspections (EI Recommendation)**

Recommendation 2001/331 providing for minimum criteria for environmental inspections in the Member States (hereinafter referred to as the 'EI Recommendation') represents the only general measure at EC level to date addressing itself specifically to responsibilities of national authorities in monitoring compliance with EC environmental legislation. As was mentioned in section 11.2, there are also a number of recent legislative instruments that provide specific requirements for national authorities in relation to implementation and law enforcement. However, these measures address themselves rather to specific instances of detected implementation failure and/or are confined to certain environmental situations. They do not purport to set out a general framework of the operational responsibilities of national authorities to monitor the due application of EC environmental law. Their very existence, though, does serve to undermine the validity of the reference in the recitals<sup>55</sup> to the EI Recommendation that a non-binding guidance instrument should be used as a means of respecting the principles of proportionality and subsidiarity enshrined in Art 5 of the EC Treaty.

It is clear that these principles do not and should not prevent the EU from taking legislative action to harmonise standards on the implementation and/or enforcement of EC environmental law, where such action is justified. A common set of minimum implementation and enforcement standards applicable to the work of national authorities charged with duties to oversee application of EC rules on environmental protection is justified on the basis of maintaining the EC Treaty's commitment to a high level of environmental protection as well as on the grounds of preventing wide variations in the quality of national regulatory governance distorting conditions of competition within the internal market. Those aims could not be attained through independent national regulation.

<sup>55</sup> Recital 21 of Recommendation 2001/331.

### ***11.3.1 General aspects: implementation and scope of the EI Recommendation***

The EI Recommendation bears all the hallmarks of the informal and voluntary approach favoured by the IMPEL network, whose project work on inspections was instrumental in assisting the European Commission construct its contents at draft stage. Given that its provisions are housed within the legislative instrument of a recommendation, they have no legally binding effects.<sup>56</sup> Accordingly, Member States and their authorities are not formally required to adhere to the minimum criteria, and there is no possibility for either the Commission under Arts 226/228 EC or other persons to take any legal action against a Member State that fails to adhere to its minimum recommended standards. Paragraph X of the EI Recommendation stipulates that EU Member States 'should' inform the Commission of its implementation in their respective jurisdictions within 12 months after publication of the instrument, namely by 27 April 2002. In the Commission's Fourth Annual Survey on the Implementation and Enforcement of EC Environmental Law for 2002, no information is provided on the state of progress of implementation.<sup>57</sup> In the absence of specific details on the state of transposition it is not evident to what extent that Member States are taking note of its contents. It has been pointed out that the use of a recommendation as an instrument in EC environmental policy generally has had little if any proven impact on EC or national environmental law (Krämer, 2003, p 54). This is not surprising, given the lack of any legal compulsion being imposed on Member States, backed up by the possible threat of infringement litigation from the Commission, with possibilities of financial penalties being sanctioned for non-compliance under Art 228 EC.

In paragraph IX of the EI Recommendation, there is the possibility of the Commission being able to come forward with a legislative initiative in the form of a directive, in the wake of a review of the operations of the Recommendation. The review is to be conducted on receipt of Member State reports on the experience gained with the Recommendation to the Commission, these to be issued to it by 27 April 2003.<sup>58</sup> The reports, which are recommended but not required to be made available to the public, are to include the following information: date about staffing and resources of inspection authorities; role of the inspection authorities in the setting up and implementation of inspection plans; summary details of inspections carried out, number of site visits made, proportion of site visits made and estimated

<sup>56</sup> Art 249(5) EC.

<sup>57</sup> A specific chapter is dedicated to information on the state of transposition of directives due to be transposed in the year examined by the Commission Annual Surveys on Implementation and Enforcement of EC Environmental Law.

<sup>58</sup> Para VIII EI Recommendation.

length of time before all controlled installations by type have been inspected; summary data on degree of compliance as appeared from inspection data; summarised account of actions taken as a result of serious complaints, accidents, incidents and occurrences of non-compliance; and an evaluation of the relative success or failure of inspection plans. To date, the Commission has not commented on the state of progress of these reports or its review of the Recommendation.

In line with the views of the IMPEL network and the Council of the EU, the personal scope of the EI Recommendation is limited to considering inspection criteria and standards to be followed by national public authorities, as well those entities to whom inspection responsibilities may have been delegated.<sup>59</sup> The EI Recommendation does not address itself specifically to the issue of qualifications of environmental inspectors. It does, however, touch on the issue of conflicts of interest, specifying that where national authorities decide to delegate tasks of inspections to other persons, they are to ensure that the latter have no personal interest in the outcome of the inspection process.<sup>60</sup> The general provisions on inter-authority co-operation in paragraph III<sup>61</sup> of the instrument would suggest that the aspect of inspection qualifications lends itself to further discussion within the IMPEL network. The IMPEL network has generated a report in 2003 on best practices on training and qualification of environmental inspectors.<sup>62</sup>

The EI Recommendation does not concern itself with issues related to EC level inspectorates or inspection systems. The exclusive focus on national authority inspection reflects the erroneous view underpinning the Recommendation that the principles of subsidiarity and proportionality do not warrant an EC-level inspection system.<sup>63</sup> The view is erroneous because it does not reflect existing EC policy on environmental law enforcement. As was discussed in Part One of this book, the European Commission is vested with specific legal responsibilities to ensure that EC law is applied,<sup>64</sup> which includes notably application of the law within the individual Member States. To this end, the EC Treaty has vested the Commission with specific powers to take infringement proceedings against those Member States found to have been in breach of EC law,<sup>65</sup> and this includes scenarios where a Member State fails to take action against a person infringing EC legislative

59 See in particular para II(4)(a)–(b) of EI Recommendation.

60 Para II(3)(b) EI Recommendation.

61 See in particular para III(2) on inter-authority assistance (including the exchange of officials) and III(4) on Member States reporting and offering advice on inspectorates and inspection procedures.

62 Available for inspection on the IMPEL website: [www.europa.eu.int/comm/environment/impel/reports.htm](http://www.europa.eu.int/comm/environment/impel/reports.htm)

63 Recital 5 of EI Recommendation.

64 Art 211 EC.

65 Arts 226/228 EC.



requirements. However, EC legislation has never been enacted in order to assist the Commission specifically in investigating and/or punishing suspected infringements of EC environmental law, although legislation has been passed to provide just such assistance in other areas of EC administrative law (such as EC competition law). The EI Recommendation does not address genuine investigation difficulties that the Commission may well face in the course of following up complaints or own-initiative cases of suspected infringements of EC environmental legislation in the Member States, such as refusals to grant it access to documents, witnesses and affected sites. This represents a missed opportunity, as the Recommendation could have included provisions on co-ordination of inspection work between the Commission and national authorities, with a view to fleshing out in practice the duties owed by Member States in respect of Commission enforcement responsibilities under Art 10 EC.

The EI Recommendation's material scope covers the inspection of those 'industrial installations, enterprises and facilities whose air emissions and/or water discharges and/or waste disposal or recovery activities are subject to authorisation, permit or licensing requirements under EC law', without prejudice to any specific inspection provisions in existing EC legislation.<sup>66</sup> Accordingly, the EI Recommendation concerns itself with the inspection of those installations recognised to pose significant risks to the environment and subject to specific legislative controls. These installations, referred to as 'controlled installations'<sup>67</sup> in the Recommendation, would typically include industrial production and processing plants, power plants, sewage works and major waste management facilities such as municipal waste incinerators, recycling plants and landfill sites. The material scope of the EI Recommendation covers a classic and a core area of environmental protection authority business, namely large industrial-related installations. It does not, though, establish an inspection framework for other sites that are also subject to EC legislative control, such as the monitoring of special protection areas of protected species.<sup>68</sup> In addition, the EI Recommendation does not provide detailed criteria for inspection systems related to illicit trafficking in environmental goods, resources and services regulated by EC environmental legislation, such as the transfrontier shipment of waste<sup>69</sup> or endangered species.<sup>70</sup> As regards illegal cross-border environmental practices, the EI Recommendation merely includes a general clause of furthering inter-authority co-operation, urging Member States to 'encourage', in co-operation with

66 Para II(1)(a) EI Recommendation.

67 Para II(1)(b) EI Recommendation.

68 As regulated in particular by the Wild Birds Directive 79/409 and Habitats Directive 92/43.

69 As regulated by the Waste Shipment Regulation 259/93, currently being revised.

70 As regulated by Regulation 338/97 on the protection of wild fauna and flora by regulating trade therein.

IMPEL, the co-ordination of inspections with regard to installations and activities that might have significant transboundary impact'.<sup>71</sup>

### *11.3.2 The EI Recommendation's minimum criteria for inspections*

The EI Recommendation breaks down the minimum criteria for inspections of controlled installations into four main organisational aspects: planning; site visits; reporting, as well as investigations of serious instances of non-compliance with EC environmental legislation. The criteria are intended to provide a clear and comprehensive set of basic procedures to be employed by all Member State national authorities, with a view to ensuring that inspection systems are effective, transparent and are not of such variance across borders so as to represent a factor that may distort conditions of competition within the single market.<sup>72</sup> Most of the criteria are self-evidently straightforward and common sense. However, given the wide variety of political stances and effectiveness of administrative systems adopted by the Member States in relation to environmental protection policy,<sup>73</sup> the setting out of a common code of conduct is clearly justified.

#### *11.3.2.1 Planning*

As regards planning aspects, paragraph IV of the EI Recommendation sets out some guidelines with a view to ensuring that Member States organise inspections in advance in a systematic, comprehensive and transparent manner. The relevant plan(s)<sup>74</sup> for inspections are to ensure that all the territory of the Member State is covered as well as the controlled installations located within it. In addition, plans are to be made available to the public in accordance with EC access to information legislation. The Recommendation stipulates that they should be compiled on the basis of a number of general factors and considerations:<sup>75</sup> relevant EC legal requirements; a register of controlled installations within the plan's area; a general assessment of major environmental issues and appraisal of compliance performance by controlled

<sup>71</sup> Para III (3) EI Recommendation.

<sup>72</sup> See recitals 7–8 to the preamble of the EI Recommendation.

<sup>73</sup> For a brief insight into the degree of variety of systems of environmental inspections at national level within the EU, see the 2003 report of the IMPEL secretariat 'Short overview of the organisation of inspection in the EU Member States, Norway and acceding and candidate countries', available on IMPEL website: [www.europa.eu.int/comm/environment/impel/about.htm](http://www.europa.eu.int/comm/environment/impel/about.htm)

<sup>74</sup> Plans may be national, regional and/or local depending upon the constitutional structure of the Member State.

<sup>75</sup> See Para IV(3)–(4) EI Recommendation.

installations in the plan area; information of previous inspections if available as well as available information on specific sites and installations; and an assessment of controlled installations' environmental risks and impacts in terms of emissions and discharges. It provides a check-list<sup>76</sup> of minimum requirements to be provided in each plan: definition of geographical coverage, specification of time period for inspections to be carried out, specific provisions for its revision, the identification of sites or types of installation covered; prescription of programmes for routine inspections and procedures for non-routine inspections; and provision for co-ordination between inspecting authorities, where relevant.

### 11.3.2.2 *Site visits*

Paragraph V of the EI Recommendation establishes as a minimum inspection requirement that sites of controlled installations should be subject to visits from national inspection authorities. The provision sets out a number of basic requirements applicable to all site visits: a check is made to verify compliance with EC legislative requirements; appropriate arrangements are in place to co-ordinate operations where more than one inspection authority is involved; visits are to be reported and inspectors are to have legal rights of access to 'sites and information'.<sup>77</sup> Site visits are divided into two types: routine and non-routine. Routine inspections are defined as those carried out as part of a planned inspection programme, whereas non-routine inspections are referred to as site visits carried out in relation to a limited range of special circumstances, namely visits made in connection with: a response to a complaint; an application for renewal or modification of an existing authorisation, permit or licence; or an investigation into accidents, incidents and occurrences of non-compliance.<sup>78</sup>

In respect of routine site visits, the Recommendation stipulates that Member States should carry out these 'regularly',<sup>79</sup> with a view to inspecting the full range of environmental impacts in conformity, *inter alia*, with EC environmental legislative requirements and with a view to reviewing the effectiveness of existing authorisation arrangements.<sup>80</sup> It also advocates that an educational and informational approach to be pursued in connection with routine inspections, so that the opportunity is taken for installation operators' knowledge of EC legislative requirements and environmental impacts of their activities to be enhanced where required.<sup>81</sup> This latter aspect constitutes an interesting application of educational/informational approaches or techniques in connection with the issue of implementation and enforcement.

76 Para IV(5) EI Recommendation.

77 Para V(1) EI Recommendation.

78 Para II(3)(a) and (b) EI Recommendation.

79 Not defined in the Recommendation.

80 Para V(2)(a) and (c) EI Recommendation.

81 Para V(2)(b) EI Recommendation.

Under the EI Recommendation, non-routine site visits are also to be carried out by national inspection authorities. Paragraph V(3) specifies that Member States should carry out non-routine site visits in the following circumstances: in the investigation of ‘serious’ environmental complaints, accidents, incidents and occurrences of non-compliance as soon as possible after being notified;<sup>82</sup> and ‘where appropriate’ in connection with determinations over the issue, re-issue, renewal or modifications of authorisations, permits or licences.<sup>83</sup> The carrying out of non-routine site visits is obviously important for the purpose of constructing a credible inspections framework. Self-evidently, they represent an important factor in promoting a culture of ‘round the clock’ compliance amongst operators and introduce an element of deterrence against those operators tempted to evade compliance, such as demonstrating compliance solely at the time of routine, planned inspections for which they have most probably received advanced warning. The element of deterrence is perceived as a valuable weapon in the armoury of inspection systems by the EI Recommendation.<sup>84</sup>

However, the provisions in the Recommendation on non-routine visits are insufficiently proactive. Notably, the occurrence of such visits is only foreseen in circumstances where the national inspection authority reacts to a specific incident or event, such as a complaint. The limited definition of ‘non-routine’ is not consonant with the requirements of the precautionary or preventive principles enshrined in the EC Treaty, which highlight the need to minimise the occurrence of environmental damage where possible. The essence of a genuinely effective non-routine inspection policy should accordingly include a strong element of surprise as well as random selection of target. Such a policy would enhance the factor of deterrence significantly, and accordingly improve the authorities’ chances to secure an improved state of compliance. Elsewhere in EC administrative law, national authorities as well as the European Commission have powers to launch own-initiative investigations on a proactive basis under the auspices of EC competition policy, precisely with that purpose in mind.<sup>85</sup>

Another shortcoming with the EI Recommendation’s provisions on site visits is the lack of specificity regarding the range of powers of investigation that need to be afforded to inspection authorities. The instrument contains instead a general stipulation about the need for authorities to have a ‘legal right of access to sites and information’, but this is not defined in any detail and is left to Member States to implement. Specifically, no details are provided about the extent of the right of access and whether this should be

82 Para V(3)(a)–(b) EI Recommendation.

83 Para V(3)(c)–(d) EI Recommendation.

84 See recital 7 of the preamble to the EI Recommendation.

85 See Regulation 1/2003 on the implementation of the rules laid down in Arts 81 and 82 of the EC Treaty (OJ 2003 L1/1).

subject to any restriction. No definition is provided of the terms ‘site’ or ‘information’. Yet these factors could prove of crucial importance in particular individual cases of non-compliance in securing evidence.

It is telling that the range of investigatory powers afforded to the Commission and national authorities under the auspices of the Regulation 1/2003 on implementing Arts 81 and 82 EC was not used as a basis for modelling powers for authorities in the context of environmental inspections. That Regulation, which came into force in May 2004, provides the Commission with powers to investigate cases of suspected non-compliance of EU anti-trust provisions, namely to: request information; take witness statements; inspect premises, equipment, books and records, land and means of transport; seal premises, books or records; to require representatives or staff of an inspected entity to explain facts or documents relating to the subject matter of the inspection; and to inspect in certain circumstances the homes of directors, managers and other members of staff of the inspected entity, in certain circumstances, where reasonable suspicion exists that relevant information is being stored there.<sup>86</sup> The Commission may require national competition authorities to carry out investigations.<sup>87</sup> The Regulation backs up these investigatory powers with powers of the Commission to impose sanctions on persons failing to co-operate with the investigation.<sup>88</sup> In addition, special provision is provided for interim relief in urgent cases.<sup>89</sup> Similar powers are vested in national competition authorities.<sup>90</sup> Some Member States, including the UK, have complemented the pecuniary sanctions underpinning the Regulation with criminal sanctions.<sup>91</sup> In contrast, the EI Recommendation does not delineate in any detail the range and depth of legal investigatory powers that it considers should be vested in environmental inspection authorities, a factor that serves to undermine the element of deterrence that should underpin a credible inspection regime.

### 11.3.2.3 *Reporting*

The EI Recommendation contains a number of provisions concerning reporting by national inspection authorities. Paragraph VI concerns reporting on site visits. Specifically, each site visit is to be followed up by a report detailing the inspection data findings with regard to compliance and evaluation of next steps (for example, whether enforcement proceedings are required or a decision over authorisation of an activity is to be taken).<sup>92</sup> Such reports are to be made in writing, disclosed to the operator(s) of the

86 Arts 18–21, *ibid.*

87 Art 22(2), *ibid.*

88 Arts 23–24, *ibid.*

89 Art 8, *ibid.*

90 Art 5, *ibid.*

91 Under the aegis of the UK’s Competition Act 1998 and Enterprise Act 2002.

92 Para VI(1) EI Recommendation.

controlled installation and made publicly available within two months of the date of the inspection.<sup>93</sup> As mentioned earlier in this section, paragraph VIII of the Recommendation sets down some guidelines on the contents of feedback reports to be filed by the Member States with the Commission in relation to the experience with the Recommendation. As at the time of writing, it was not apparent that any information on such reports had been made publicly available, notwithstanding that these should have been notified to the Commission by 27 April 2003. It is evident that this aspect of reporting of inspections and its dissemination to the public is also now subject to the requirements of the EL Directive 2003/4<sup>94</sup> on public access to environmental information and repealing Council Directive 90/313, as discussed in Chapter 8.

#### *11.3.2.4 Investigations of serious cases of non-compliance*

Paragraph VII of the EI Recommendation stipulates that Member States should ensure that the investigation of serious accidents, incidents and occurrences of non-compliance with EC environmental legislation is carried out. Specifically, investigations should be conducted with a view to: clarifying the causes of the event, assessing environmental impact, ascertaining responsibility for the event and its consequences; mitigating and where possible remedying environmental impacts through deciding the appropriate action to be taken by operator(s) and/or authorities; deciding on action to prevent further adverse events of non-compliance; taking enforcement proceedings, where appropriate; and ensuring that the operator takes appropriate follow-up action.

These particular provisions should be read in close conjunction with those of the EC Directive 2004/35 on environmental liability with regard to the prevention and remedying of environmental damage,<sup>95</sup> which entered into force on 30 April 2004. This directive, discussed in detail in Chapter 12, vests the competent national authorities with powers and responsibilities to require operators of certain installations found liable for serious violations of specified EC environmental legislation to take action in order to fund the prevention of threatened environmental damage and/or the rehabilitation of affected sites. The Directive also empowers the authorities themselves to undertake preventive or restorative measures. Crucially, though, the Directive does not address the investigatory activities of national authorities, a matter devolved to individual Member States. Similar considerations apply in relation to the European Commission's proposal for a directive on environmental criminal

93 Para VI(2) EI Recommendation.

94 OJ 2003 L41/26.

95 OJ 2004 L143/56. See also Directive 96/82 on the prevention of industrial accidents (OJ 1997 L10/13).

liability<sup>96</sup> discussed in Chapter 13, which also devolves responsibility to the individual Member States to investigate cases of suspected criminal activity.

#### **11.4 Environmental inspections and EC environmental legislation: concluding remarks**

From the above discussion of the impact of general EC legal obligations incumbent on Member States Art 10 EC as well as the policy developments that have materialised at EC level in relation to the subject of investigation and inspection, it appears evident that Member State authorities are under relatively few clear or effective legally enforceable duties under EC law to ensure that EC environmental legislation is effectively monitored and enforced. The aspects of implementing, monitoring and enforcing EC environmental at national level by the competent Member State authorities charged with environmental protection responsibilities remains a matter essentially shaped by national as opposed to EC law. Member States have remained resolutely opposed so far to any moves to harmonise minimum standards of environmental inspection systems.

Whilst Art 10 of the EC Treaty does establish some general obligations on Member States and their authorities to undertake measures to ensure fulfilment of their obligations under EC law, the extent to which these obligations influence the manner in which Member State authorities set about enforcing EC environmental legislation in practice is in essence unclear and in a state of flux. The lack of legal certainty as to the precise manner and extent to which Art 10 EC is relevant in appraising the policy and law on environmental inspections at national level is compounded by the fact that the traditional approach in EC affairs on striking a balance between the supra-national interests of the European Union and sovereign concerns of Member States in the context of implementing common policies of the Union, has been to recognise a substantial margin of appreciation for Member States in determining how exactly they wish to implement EC legal commitments. The incorporation of the principle of subsidiarity into the EC Treaty by virtue of the TEU in 1992 was evidently a move on the part of the Member States to entrench this approach. In the environmental policy context, national autonomy in relation to the implementation of EU environmental legislation has been underpinned by the practice on the part of the EU legislative institutions to use the legislative instrument of the EC directive for implementing policy. Article 249(3) EC, which provides a definition of an EC directive, describes them as being binding on Member States as addressees but leaving the addressees choice 'over form and method'. This has been

96 COM(2001)139, Commission Proposal for a Directive on the protection of the environment through criminal law of 13.3.2001.

taken to mean that Member States have, in principle, discretion over the type of legal method used to implement such an EC legislative instrument. Where, for instance, EC environmental legislation imposes a minimum environmental standard, Member States have usually been endowed with the choice as to how they wish to see it enforced under national law (for example, using administrative, criminal and/or civil law mechanisms). The substantial degree of autonomy traditionally left to Member States in determining the mode of implementation of EC environmental legislation has also included decisions concerning the establishment and application of procedures and other organisational arrangements that relate to monitoring and supervision of such legislation. Accordingly, the application of Art 10 EC in relation to matters concerning mode of implementation remains a politically sensitive issue, given that it raises questions about the balance of competencies struck under the auspices of the EC legal system between the EC and Member States.

It is true that the ECJ has established some basic ground rules on the relevance of Art 10 EC to the aspect of implementation. Its rulings to date are though of rather general import, whose practical value is not yet really well established or recognised generally. However, it is already clear from the existing ECJ jurisprudence that Art 10 EC does impose a general, legally binding obligation on national implementing authorities to undertake all measures possible to ensure that EC measures are adhered to. However, of itself, Art 10 EC does not provide national authorities with the requisite powers they may need to set about upholding EC norms. In particular, it does not provide the authorities with any specific or general powers to investigate suspected cases of breaches of EC environmental legislation. These would need to be fleshed out either by distinct EC or national legislation.

Problems also arise when national authorities seek to enforce EC directives against persons breaching their terms, as the ECJ has also developed case law that restricts the abilities of such authorities to rely on legally binding standards contained in directives against private persons. Specifically, the ECJ's case law on the doctrines of direct and indirect effect serve to restrict the capabilities of national authorities to enforce EC environmental legislation. As was discussed at the beginning of this chapter and in detail in Chapter 6, the ECJ has effectively ruled out the possibility of public authorities being able to enforce a directive either directly or indirectly against persons considered by the authorities to have infringed the requirements contained in the directive. Given that the vast majority of EC legislative instruments are crafted in the format of the EC directive, this means that national authorities' capabilities of enforcing EC environmental law have to a large extent been dependent on whether and to what extent enforcement powers are conferred on them under national law and to what extent EC environmental legislation has been properly transposed into national law.



Enforcement would be much simpler from a legal perspective, had the EU chosen to use the form of an EC regulation to implement its common policy on the environment. Regulations are described in Art 249(2) EC as being directly applicable in all Member States and have general application. The case law of the ECJ has confirmed that, where provisions of regulations meet the criteria of direct effect, they may be enforceable against private persons. However, as a rule, Member States have preferred the EC to use the instrument of the directive, in order to maximise the role of national governments and legislatures in the construction of legislation based on EC level commitments. The constitutional sensitivities of Member States in response to the development of greater EC involvement in regulation of policies, including that concerned with the environmental sector, has resulted in a legally complex and evolving set of arrangements between the Member States and the EC over delivery of environmental policy.

Member States' concern with subsidiarity and loss of sovereignty has greatly influenced the development of the EU's approach to the organisation of environmental inspections. Although initially disputed by the European Commission and Parliament as being the appropriate setting for conducting policy discussions and negotiating political strategy on this subject, the inter-governmental arena of the IMPEL network as opposed to supranational forum of the EC legislature appears to have established itself as a pre-eminent site in practice (if not on paper) for determining the extent and pace of agreement in relation to environmental inspection and investigation standards and procedures. Yet the incremental, informal and intergovernmentalist approach of the IMPEL model has not resulted in any notable legal enhancement of Member State systems supervising the implementation of EC environmental legislation.

The principal achievement of the IMPEL network to date in forging agreement on minimum standards in terms of supervising implementation of EC environmental legislation by national authorities has been a solitary soft law instrument with limited remit on minimum criteria for environmental inspections, namely the 2001 EI Recommendation. The EI Recommendation has a number of notable drawbacks in terms of its ability to deliver on minimum criteria for inspections. As a soft law instrument, its non-binding nature means that none of its provisions may be guaranteed to be implemented by any or all of the Member States, neither can they be enforced by either the Commission or private persons. This is arguably the most significant shortcoming. Such a state of affairs is hardly satisfactory, as it opens up the possibility of Member States employing different sets of inspection systems with wide variations in terms of their effectiveness. In addition, most of the instrument's provisions are general in nature with considerable discretion afforded to Member States over their precise interpretation. A notable example of this is its brief reference relating to legal powers for inspection authorities in connection with the carrying out of non-routine site visits. Furthermore,

the remit of the Recommendation is limited to covering inspections of certain installations; it does not address inspection criteria in relation to other locations vulnerable to adverse environmental impacts and protected under EC environmental legislation, such as protected habitat areas.

It has been aptly commented that discussions within the EU on creating an environmental inspectorate system at the level of the European Commission have been 'emotionalised as being an intrusion on national sovereignty' (Krämer, 2003, p 381). It also reflects the nature of debate and progress within the EU on the subject of establishing minimum standards on inspection procedures. The obsession of Member States in maintaining a distorted view of subsidiarity has effectively blinded their reason on this subject. In fact, as argued earlier, the principle of subsidiarity does not in fact bar EC involvement in the discussions over the means by which its laws are implemented at national level.

According to the subsidiarity principle enshrined in the EC Treaty Art 5(2), the EC has a legitimate interest in deciding to become involved in shaping the mode of implementation and enforcement of EC environmental law at national level, to the extent that it is apparent that unilateral national policies are liable not to be able on their own to deliver implementation sufficiently effectively across the Union. The establishment of effective inspection and enforcement systems are obviously central to the delivery of a credible and potent policy of the EC on the environment. Environmental standards contained in legislation are virtually meaningless unless backed up by systems which are able to detect non-compliance adequately and sanction offenders. If Member States are permitted to establish their inspection systems on their own independently of EC involvement, there is a risk that the key objectives underpinning EC environmental legislation will begin to unravel. First, the objective of attaining a high level of environmental protection across the Union, enshrined as a clear constitutional commitment in the EC Treaty,<sup>97</sup> is liable to be unduly compromised, with the strong possibility of at least some Member States employing relatively inefficient inspection systems, especially where environmental protection is not perceived to be a political priority. Second, a wide variation of inspection systems may lead to accusations from those Member States keen to set high standards of 'environmental dumping' on the part of other Member States which preside over ineffective monitoring systems. These two key objectives, attainment of a high standard of protection and securing appropriate 'level playing field' conditions for the operation of the EC's single market, cannot be achieved by unilateral Member State action. For these reasons alone, EC legislative action on minimum inspection standards, whether or not an EC inspectorate is developed, is entirely warranted under the principle of subsidiarity.

<sup>97</sup> Arts 2, 6 and 174(2) EC.

In several respects, the particular interpretation of subsidiarity and emphasis on national sovereignty used to justify the predominance of the intergovernmentalist approach in determining progress on intra-EU co-operation with regard to environmental inspections is wearing rather thin. For, most recently, the EC has either proposed or adopted a number of legislative initiatives that specifically address issues of implementation of EC environmental legislation. Specifically, these include the package of measures adopted in order to implement the access to justice and information requirements contained in the UNECE 1998 Århus Convention, as discussed in Chapter 8, as well as two measures concerning liability of persons for breaching EC environmental law, discussed in the next two chapters. All of these measures specifically impose legally binding obligations on national authorities in connection with aspects of implementation and enforcement. They underline the point that the application of the subsidiarity principle does not entail a complete exclusion of EC involvement in these particular policy areas.

It therefore remains to be seen whether the Commission will take up the opportunity provided in paragraph to IX of the EI Recommendation to carry forward its agenda on inspection criteria in the form of legislative harmonisation under EC law. In addition, it will be particularly interesting to see how the IMPEL network will continue to feature in this policy process. At the moment, given the fact that the Sixth EAP specifically incorporates the IMPEL network within the context of development of EU policy on implementation and enforcement and the political endorsement it has gained from within the European Commission in this regard,<sup>98</sup> the likelihood is that, as with the EI Recommendation, delivery of policy on inspections may well rely heavily on IMPEL input and accordingly will reflect an informal and voluntary approach to such issues. It is submitted that this approach constitutes an abrogation of the responsibilities incumbent on the European Commission under Art 211 EC to ensure that EC environmental law is applied effectively across the Union.

98 Such as the open letter of former Environment Commissioner Wallström of 23.5.00 endorsing IMPEL's work. See [www.europa.eu.int/comm/environment/impel/wallstrom.htm](http://www.europa.eu.int/comm/environment/impel/wallstrom.htm)

## ENFORCEMENT OF EU ENVIRONMENTAL LAW BY NATIONAL AUTHORITIES (2): ENVIRONMENTAL CIVIL LIABILITY

The subject of environmental liability has only very recently emerged as a significant new dimension to the subject of EC environmental law enforcement. The EU passed a legislative instrument on environmental civil liability in 2004<sup>1</sup> and is in the process of assessing a draft directive on environmental criminal liability.<sup>2</sup> Both instruments seek to place national authorities of the Member States at centre stage in terms of enforcing their requirements, and are designed to enhance existing legal powers afforded to public authorities to hold persons to account who have been found to have caused serious infringements of certain environmental protection requirements under EC environmental law. The aim of this particular chapter will be to assess the extent of the new civil liability framework introduced at EC level, whilst Chapter 13 will focus on criminal liability policy developments.

As is widely recognised, liability regimes are not necessarily suitable instruments for dealing with environmental impairment caused by human activity (see for example, Krämer, 2003, pp 169–70; Daniel, 2003, pp 236–41).<sup>3</sup> They are not, in any sense of the imagination, a panacea for achieving an optimal system of enforcement of environmental protection law. For instance, the frequently diffuse nature of certain types of pollution may make it difficult for authorities, or others, to determine their sources and

1 Directive 2004/35 on environmental liability with regard to the prevention and remedying of environmental damage.

2 COM(2001)131 Commission proposal for a Directive on the protection of the environment through criminal law, as amended by COM(2002)544.

3 See also the European Commission's comments in its White Paper on Environmental Liability (COM(2000)66 p 11).

therefore individual polluters.<sup>4</sup> In addition, the tool of liability does not offer a suitable mechanism for dealing with widespread pollution of the environment where society itself has chosen to tolerate such activity and several actors are clearly responsible (good examples are air pollution and adverse impacts on climate change arising from traffic and urban dwelling emissions). Moreover, liability mechanisms do not usually contain a preventive action dimension, but apply only after environmental damage has occurred. Notwithstanding these caveats, the liability regimes recently introduced and proposed by the EU offer some innovative supplementary legal mechanisms that may at least serve to assist in deterring serious instances of illicit environmental pollution and in holding such persons to account for causing or threatening to cause such pollution.

To date, there is no general global agreement on minimum standards regarding civil liability for transboundary or non-transboundary pollution or damage.<sup>5</sup> There are, however, a number of international conventions in specific environmental sectors that provide for civil liability frameworks,<sup>6</sup> several of which are not yet in force.<sup>7</sup> Regional initiatives within Europe have sought to develop greater international co-operation in this environmental policy field. To date, both the Council of Europe and the EU are the only international organisations which have either tabled or agreed to general cross-sectoral international instruments on liability in respect of environmental damage.

4 Although appropriate configuration of the rules on onus of proof for liability may be of considerable assistance here.

5 For a recent analysis of public international legal developments on civil liability for environmental harm, see e.g., Boyle (2005).

6 Namely, in the sectors of marine pollution: 1977 Convention on Civil Liability for Oil Pollution resulting from Exploration for and Exploitation of Seabed Mineral Resources; 1992 Convention on Civil Liability for Oil Pollution; 1992 Convention on an International Fund for Compensation Fund of Oil Pollution Damage; 1996 Convention on Liability and Compensation for the Carriage of Hazardous and Noxious Substances by Sea; 2001 Convention on Civil Liability for Bunker Oil Damage; carriage of dangerous goods: 1971 Convention on Civil Liability in the Field of Maritime Carriage of Nuclear Material; 1989 Convention on Civil Liability for Damage caused during Carriage of Dangerous Goods by Road, Rail and Inland Navigation; the nuclear industry; 1960 Paris Convention on Third Party Liability in the Field of Nuclear Energy and 1963 Brussels Supplementary Convention; 1963 Vienna Convention on Civil Liability for Nuclear Damage; 1971 Convention on Civil Liability in the Field of Maritime Carriage of Nuclear Material; 1988 Joint Protocol on the Application of the Paris and Vienna Conventions; industrial accidental pollution of transboundary rivers and lakes: 2003 UNECE Kiev Protocol on Civil Liability and Compensation for Damage caused by Transboundary Effects of Industrial Accidents on Transboundary Waters; and shipment of hazardous waste: 1999 Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Waste.

7 For an overview, see e.g., Daniel, 2003.

## 12.1 The Council of Europe's 1993 Lugano Convention

The Council of Europe's 1993 Convention on civil liability for damage resulting from activities dangerous to the environment<sup>8</sup> (hereinafter referred to as the Lugano<sup>9</sup> Convention) constitutes an important milestone in the historical development of European initiatives, including those of the EU, on environmental civil liability.

Although there were a number of international agreements addressing civil liability issues in relation to specific environmental sectors prior to its adoption,<sup>10</sup> the Lugano Convention was the first international instrument of its kind to attempt to set out a comprehensive framework for liability in respect of environmental damage, and the first to focus on the need for legal systems to employ environmental protection-oriented sanctions on persons found liable of causing significant environmental damage.

From an EU perspective, the Lugano Convention is now largely only of historical interest. A number of EU Member States indicated relatively early on that they had serious reservations about acceding to it, notably Denmark, Germany and the United Kingdom.<sup>11</sup> Over a number of years after the Convention was tabled for signature, the EU Member States remained divided as to whether to adopt it as an appropriate model for the basis of a common liability framework. Of the nine signatories to the Convention, seven are EU Member States.<sup>12</sup> However, no nation state has proceeded to ratify the convention, and it may not enter into force unless at least three Member States do so.<sup>13</sup> More significantly, since the recent adoption in 2004 of specific EC rules on environmental civil liability in the form of Directive 2004/35 on environmental liability with regard to the prevention and remedying of environmental damage,<sup>14</sup> the Lugano Convention is no longer relevant in respect of civil liability issues arising from environmental damage caused and occurring within the territory of the EU. Article 25(2) of the Lugano Convention stipulates that as regards the mutual relations of its contracting parties who are also members of the European Community, EC rules are to apply and not those of the convention. Whilst the Lugano Convention may theoretically retain some potential relevance in connection with relations between the EU Member States and other countries, the current political reality is that the Convention is unlikely to be of much, if any, significance in

8 European Treaty Series No.150. The Convention together with an official Explanatory Report of its contents see the Council of Europe's website: [www.conventions.coe.int](http://www.conventions.coe.int)

9 The convention was opened for signature in Lugano, Switzerland, on 21.6.1993.

10 Such as in relation to marine oil pollution and nuclear sectors. For an overview and analysis of these agreements, see e.g. Birnie and Boyle (2002), Chs 7 and 9.

11 As noted in the European Commission's White Paper on Environmental Liability (COM(2000)66 p 25).

12 Namely, Cyprus, Finland, Greece, Italy, Luxembourg, Netherlands and Portugal.

13 See Art 32(3) Lugano Convention. 14 OJ 2004 L143/56.

this context either, given the long-standing division between EU Member States over its utility. Accordingly, bearing in mind its limited practical influence on current EC law, only a brief reference to the Lugano Convention's core provisions need be set down here. Many of its provisions have provided a useful backdrop to discussions on liability at EC level, and some have effectively been adopted within Directive 2004/35.

The Lugano Convention aims to ensure 'adequate compensation' in respect of environmental damage caused by operators in control of specified dangerous activities<sup>15</sup> as well as providing means of prevention and remediation of such damage.<sup>16</sup> The concept of damage is interpreted broadly to include, in addition to the standard heads of damage of personal injury and damage to property assets, loss or damage by impairment to the environment reflected by the cost of 'reasonable' measures taken by persons to prevent or minimise loss to, or to reinstate, the environment.<sup>17</sup> Liability of operators is to some extent strict in the sense that a plaintiff need not prove fault or negligence but only that the operator caused damage.<sup>18</sup> However, operators have the opportunity to be exempt from liability if they are able to prove one of a number of specified situations that excuse them from liability, and several of these are related to fault-related concepts. The exemptions include damage occurring as a result of acts of war, natural disasters, third party intervention committed with intent to cause damage, compliance with an order from a public authority, pollution 'at tolerable levels under local relevant circumstances', a dangerous activity taken lawfully in the interests of persons suffering damage or as a result of fault on the part of the victim of damage.<sup>19</sup>

Regarding the issue of causation, whilst the Lugano Convention does not specify any particular presumptions of a causal link between damage and defendant to be made by courts, the Convention requires that the burden of proof on the plaintiff is to be varied according to the relative risk of the activity. Specifically, courts are required to take into account the 'increased danger of causing such damage inherent in the particular activity' when considering evidence of causality.<sup>20</sup> This provision is designed to assist victims of damage seeking compensation in discharging the onus of proof, a factor of crucial importance in cases where pollution is diffuse and may be difficult to trace with certainty to a particular source. Liability under the Lugano Convention is based on the principle of joint and several liability where more

15 As elaborated in Art 2 and Annexes I–II Lugano Convention. These include production and handling of dangerous chemical substances, certain genetically modified organisms, genetically modified micro-organisms as well as the operation of waste management installations. Nuclear-related incidents and carriage of goods scenarios are excluded from the scope of the convention (Art 4).

16 Art 1 Lugano Convention.

17 See Arts 2(7)–(10) Lugano Convention.

18 Arts 6(1) and 7(1) Lugano Convention.

19 Arts 8–9 Lugano Convention.

20 Art 10 Lugano Convention.

than one operator is involved, with detailed provisions on apportionment so as to afford operators the opportunity to limit liability accordingly, if they are able to prove that their activities caused only part of the damage.<sup>21</sup>

Liability is also subject to specific temporal limits. In principle, actions for compensation must be brought within three years of the claimant's actual or constructive knowledge of the damage, and no civil litigation may be brought more than 30 years after the date of the incident causing the damage.<sup>22</sup> In addition, the convention is structured so that liability is predicated fundamentally on a non-retroactive footing, in applying to incidents occurring after the convention's entry into force.<sup>23</sup>

In addition to containing provisions on determining the parameters of liability, the Lugano Convention also incorporates some interesting flanking provisions. One aspect of the Convention that has stimulated protracted discussion is its approach to the issue of financial cover for operators. Specifically, it contains a soft requirement for contracting parties to ensure 'where appropriate' that operators of dangerous activities participate in 'a financial security scheme' or to have a 'financial guarantee up to a certain limit' to cover liability.<sup>24</sup> The issue of whether to impose mandatory financial cover on operators and, if so, whether this should be capped, has proved to be a difficult one to resolve, not least within the EC where this is subject to ongoing review. The vagueness of the Lugano Convention's requirement reflects the degree of disagreement over this matter. On the one hand, an obligation for mandatory financial cover appears to be beneficial in entrenching the 'polluter pays' principle, in seeking to avoid the prospect of the general taxpayer being required to pay for the cost of taking measures to rehabilitate contaminated sites where an operator becomes insolvent or cannot be identified. On the other hand, a number of stakeholders in this debate have been cautious about accepting mandatory cover without at least further reflection, some wary of the relative lack of settled experience with the specific financial markets involved and others sceptical of the prospect of placing caps on liability as being sufficiently in alignment with the 'polluter pays' principle.<sup>25</sup>

The Lugano Convention also contains a number of provisions on rights to access to information on environmental matters.<sup>26</sup> The provisions on access

21 See Arts 6(2)–(4), 7(3) and 11 Lugano Convention.

22 Art 17 Lugano Convention.

23 Art 5 Lugano Convention.

24 Art 12 Lugano Convention. Caps or monetary thresholds of liability are employed in certain international conventions on civil liability relating to environmental damage, such as in the context of oil pollution of the marine environment: see the 1992 Conventions on Civil Liability for Oil Pollution Damage and Convention on an International Fund for Oil Pollution Compensation as well as 2001 Convention on Bunker Oil Damage.

25 See e.g., assessment of financial security in the Commission White Paper on Environmental Liability (COM(2000)66 pp 23–24).

26 Ch III Lugano Convention (Arts 13–15).



to information from public authorities have now been effectively succeeded by those in the 1998 UNECE Århus Convention on access to information, public participation in decision making and access to justice in environmental matters,<sup>27</sup> as discussed in Chapter 8. However, the Lugano Convention contains an interesting provision, not followed up specifically under the Århus agenda, guaranteeing by court order that victims of damage may have access to specific environmental information held by operators.<sup>28</sup> Finally, the Lugano Convention contains detailed provisions on jurisdiction, recognition and enforcement of court judgments for the purposes of addressing scenarios of environmental damage involving more than one contracting party.<sup>29</sup>

What is particularly evident from the structuring of the Lugano Convention is that, in terms of law enforcement, its provisions are predominantly focused on addressing procedural and substantive aspects of civil litigation brought by private plaintiffs. The Convention does not specifically provide for procedures which public authorities may use to remediate environmental damage. Although this is not explicitly expressed in the Convention itself, it is apparent that there is an assumption underlying its provisions that it is the private as opposed to the public sector that is to hold operators to account under its civil liability framework. This assumption is borne out by Art 18 of the Convention which provides certain rights to non-governmental environmental organisations (NGEOs). Under this provision, associations or foundations whose statutes aim at the protection of the environment have the right to request the following: the prohibition of an unlawful dangerous activity that poses a grave threat of environmental damage or that the operator be ordered to take preventive measures or measures of reinstatement.<sup>30</sup> The convention defers to contracting parties to establish the recipient of the request and provide rules on requests that may be deemed by them to be inadmissible.<sup>31</sup> No specific requirements are set down in the Convention on responsibilities of public authorities to investigate or address actual or suspected incidents of environmental damage. The Convention simply offers parties the option of allowing 'competent public authorities' to be heard in relation to a request for action.<sup>32</sup> Accordingly, under the Lugano Convention it is for the parties to determine what action, if any, will be taken by public authorities with a view to requiring an operator who causes actual or threatened environmental damage to take preventive or remedial action.

The consequences of the Lugano Convention focusing predominantly on the position of private plaintiffs is that its provisions do not specifically require environmental damage to be addressed where operators are found liable. The outcome of civil litigation in respect of environmental damage, as guided by

27 2161 UNTS 447. See UNECE website: [www.unece.org](http://www.unece.org)

28 Art 16 Lugano Convention.

29 Arts 19–24 Lugano Convention.

30 Art 18(1) Lugano Convention.

31 Art 18(2)–(3) Lugano Convention.

32 Art 18(4) Lugano Convention.

the Convention's provisions, is very much a matter to be determined by the individual private plaintiff. Contracting parties have the option to structure their domestic civil liability frameworks so as to incorporate an element of public authority enforcement, but this is not specifically required or even addressed in the convention. As a result of these factors, it is evident that the Lugano Convention contains a clear anthropocentric bias in relation to issues of liability for environmental damage. In practice, the convention's provisions continue to work with the traditional approach of national and international civil liability systems by centering legal focus on securing compensation for human victims of environmental damage, specifically in respect of injury to personhood and/or property. The subject of remediation of adverse effects to the environment is thereby effectively treated as a matter of subsidiary importance within the context of its particular civil liability framework.

As will be explored in the subsequent sections, the focus of the Lugano Convention on providing assistance to private litigants (as victims of environmental damage scenarios) may be contrasted with the approach followed in the legislation recently adopted by the EC on environmental liability. Under the EL Directive 2004/35, public authorities are placed at the heart of civil liability law enforcement. Legal aspects of civil litigation brought by private persons against polluters are not addressed by the EC's rules on civil liability. This reflects the view that enhancing existing traditional mechanisms of civil litigation may not be effective in ensuring that instances of serious environmental damage, as perpetrated by identifiable polluters, is in fact rectified.

## **12.2 Developments of EC environmental policy on environmental civil liability**

As mentioned above, it was only in 2004 that the EU decided to pass legislation intended to introduce a common EC legal framework on environmental liability in the form of Directive 2004/35. Discussions on the development of EC rules to harmonise Member States' laws on the subject of environmental civil liability date back at least to the mid-1980s, notably in the wake of the fire at the Sandoz plant in Basel, Switzerland, in 1986 which caused extensive damage to the Rhine. This particular section will outline some of the key developments that have ultimately led to the promulgation of rules on environmental civil liability at EC level.<sup>33</sup>

33 The Commission's DG ENV provides information on all the relevant policy documents involved in the negotiation of a common EC liability framework: [www.europa.eu.int/comm/environment/liability/index.htm](http://www.europa.eu.int/comm/environment/liability/index.htm)  
For overviews of the evolution of EC policy in this area, see e.g., Hedemann-Robinson and Wilde, 2000, and Krämer, 2003 pp 167–70.

Since the incorporation of provisions for a common policy on the environment into the EC Treaty by virtue of the Single European Act 1986, the European Commission has been keen to explore ways and means to use the concept of civil liability to enhance a number of the key environmental principles woven into the EC Treaty's legal fabric. Of relevance in this regard are: the principle that preventive action should be taken, that the polluter should pay for costs incurred to the environment, environmental damage should as a priority be rectified at source, and the precautionary principle.<sup>34</sup>

During the course of the 1990s, the European Commission spearheaded debate on the subject of environmental civil liability at EC level. Discussions with Member States and other stakeholders were substantial and lasted for a considerable period. In May 1993, the Commission published its Green Paper on remedying environmental damage,<sup>35</sup> a document which mapped out possible alternative strategies that the EC could follow up, and invited feedback on them. In the wake of that document, the Commission received feedback from various stakeholders, including Member States, other EC institutions and organs as well as from business and NGO groups. This culminated in the Commission firming up its analysis and views on the possibilities for an EC legislative regime on environmental liability, in the form of its White Paper on environmental liability, published in February 2000.<sup>36</sup> In the White Paper, the Commission signalled its preference for a specific and comprehensive EC legal framework in the form of a directive and ruled out other options previously tabled: notably, EC accession to the Lugano Convention or an EC regime limited to cross-border instances of environmental damage.

In ruling out accession to the Lugano Convention, the Commission noted the split amongst EU Member States on its utility, the perception held by a number of Member States and several industrial lobby groups that its provisions were unduly wide, as well as the fact that the Convention addresses environmental damage in a relatively unspecific way, neither requiring restoration nor providing any criteria for carrying out remedial measures or evaluating such damage.<sup>37</sup> Those in favour of a limited set of EC rules covering only transboundary damage had sought to draw support from the principle of subsidiarity<sup>38</sup> to underpin their arguments. According to this principle,

34 As enshrined in Art 174(2) EC. The precautionary principle was incorporated into the EC Treaty by virtue of the TEU, whereas the other environmental principles were introduced by virtue of the SEA.

35 COM(93)47 Commission Communication 'Green Paper on Remedying Environmental Damage', of 14.5.1993.

36 COM(2000)66 Commission Communication 'White Paper on Environmental Liability', of 9.2.2000.

37 COM(2000)66 p 25.

38 As enshrined in Art 5(2) EC. For details on subsidiarity see Protocol No.30 annexed to the EC Treaty on Subsidiarity and Proportionality (inserted by the Treaty of Amsterdam 1997).

enshrined in Art 5(2) of the EC Treaty, the EC is to take action in areas not falling within its exclusive competence, only if and in so far as the objectives of the proposed action at EC level cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the EC. This argumentation was countered by the Commission, which argued convincingly that a framework limited to transboundary damage would have failed to take on board the fact that pollution occurring within the territory of a single Member State might well have environmental protection implications for the EU region as a whole, such as damage to protected species or habitat. In addition, a multiplicity of liability regimes would serve to undermine the principle of equal treatment of persons carrying out commercial operations within the single market. In effect, the principle of subsidiarity proved to be an argument in favour of the adoption of policy on civil liability at EC level, given that the environmental policy issues at stake could not adequately be addressed through independent national policies alone.<sup>39</sup>

Although the European Commission's 2000 White Paper was not accompanied by a specific draft proposal for an EC directive, it was clear at that stage that the Commission had formed, at least in part, some ideas of the contours of a liability regime. Several of these were drawn from the Lugano Convention, but some were intentionally very different. For instance, the White Paper indicated that an EC legislative initiative would ensure that liability for environmental damage would involve ensuring that compensation obtained would be required to be used for the purpose of restoration of environmental damage.<sup>40</sup> In addition, it proposed that liability would be structured on a two-tier basis, targeting two different types of activity causing environmental damage. Specifically, liability would be strict in relation to activities deemed to be an inherent risk to the environment, and based on fault in relation to other activities deemed non-dangerous.<sup>41</sup> Liability for non-dangerous activities would, though, only relate to biodiversity damage. Accordingly, the extent of personal liability envisaged by the White Paper was wider than that envisaged by the Lugano Convention, in addressing also the behaviour of operators of non-dangerous activities. The Commission noted that this extended coverage of liability was justified, given the vulnerability of protected species and sites covered under EC environmental nature protection legislation, which could easily be damaged by activities other than those considered inherently risky to the environment.<sup>42</sup> The White Paper also

39 For a different view on the adequacy of the explanations provided by the Commission in respect of subsidiarity in connection with an EC framework on environmental liability, see Farnsworth (2004).

40 COM(2000)66 p 21 (section 4.6).

41 COM(2000)66 pp 16–17.

42 Ibid.

ruled out mandatory insurance cover, in order to allow a period of experience to develop for markets under any EC framework. Nevertheless, it appeared not to rule out the possibility of introducing caps to liability for natural resources damage, although at the same time submitted that this would 'erode' application of the effective application of the 'polluter pays' principle.<sup>43</sup>

After its White Paper, the Commission, at the beginning of 2002, submitted a formal proposal<sup>44</sup> for an EC directive on environmental liability.<sup>45</sup> The proposal adopted a radically different approach from the Lugano Convention and, to a considerable extent, from the direction indicated in the White Paper. The Commission's proposal focused on applying the principle of liability to ensure that those found legally responsible for causing significant environmental damage would be required to take or fund the necessary measures to ensure that the damaged environment would be restored as close to its condition prior to the occurrence of damage as is feasible. Aspects to do with harm perpetrated to persons, such as personal injury or damage to property, were not addressed by proposed directive, on the grounds that such considerations do not specifically or satisfactorily address the issue of correcting environmental impairments and that national legal systems already had civil liability regimes for traditional damage.<sup>46</sup>

In addition, the proposal allocated the primary task of enforcing the proposed civil liability framework on public authorities of the Member States. This aspect reflected a convincing practical as well as philosophical perspective underpinning the proposal. From a practical perspective, it is clear that public authorities are in the best position to ensure that the environment is protected, given that they have far greater levels of resources than private litigants to investigate, assess and follow up instances of illicit pollution. From a philosophical point of view, placement of primary enforcement responsibility in the hands of public authorities reflects the view that the environment is a collective good (Krämer, 2003, p 168) that needs protection for its own sake, and not one that should be subject to commodification or assessment made on the basis of economic value. The environmental protection focus of the legislative proposal was underpinned by its requirements that competent authorities were to be charged with the ultimate responsibility of

43 COM(2000)66 p 24.

44 COM(2002)17 Commission proposal for a directive on the prevention and restoration of significant environmental damage, 23.1.2002.

45 For analyses of the Commission's proposal, see: Jones, 2002; Lee, 2002; Krämer, 2003 pp 167–169; and Farnsworth, 2004.

46 COM(2002)17, pp 16–17.

ensuring that significant environmental damage be rectified, even where an operator may not be found liable or be capable of funding the costs for such restoration to take place.<sup>47</sup>

During the course of its passage via the legislative process at EC level,<sup>48</sup> the Commission proposal was subject to various amendments, culminating in its promulgation in April 2004. The resulting legislative instrument, Directive 2004/35, is subject to detailed discussion in the next sections.

### **12.3 Directive 2004/35 on environmental liability (EL Directive)**

On 21 April 2004, the European Commission adopted a legislative instrument on civil liability in relation to environmental damage. Directive 2004/35 on environmental liability with regard to the prevention and remedying of environmental damage<sup>49</sup> (hereinafter referred to as the EL Directive) entered into force on 30 April 2004.<sup>50</sup> Member States are required to transpose the EL Directive into national law by 30 April 2007 and notify the Commission of the text of the main provisions of the national rules in the field covered by the EL Directive.<sup>51</sup> The first EC instrument of its kind, the EL Directive specifies the parameters of civil liability of certain persons whose activities either have caused or are likely to imminently cause environmental damage. It also determines the role and responsibilities of competent public authorities, to be designated by the Member States, which are to ensure that its requirements are fulfilled. In addition, the legislative instrument also provides the possibility for private individuals and entities to become involved in assisting in the task of enforcing its obligations. The latter provisions are discussed in Chapter 8.

One of the most striking features of the EL Directive is the specific emphasis it places on addressing the remediation of environmental damage, as opposed to other types of harm such as loss or damage to persons. Earlier international efforts on co-operation in the field of environmental civil liability placed substantial if not equal attention on legal aspects of personal loss that might often be closely connected in situations involving environmental damage. This broader approach to the issue of environmental liability is reflected in the Council of Europe's Lugano Convention as well as the initial discussions within the EU itself on crafting a suitable civil liability

47 See Arts 4(5)–(6) and 5(5)–(6) of the proposed directive (COM(2002)17, pp 8–9).

48 Namely, via the co-decision process under Art 251 EC which requires the joint agreement of the European Parliament and Council of the EU.

49 OJ 2004 L143/56.

50 The date of its publication in the EU's Official Journal, as specified in Art 20 EL Directive.

51 Art 19 EL Directive.

framework.<sup>52</sup> However, the EL Directive specifically excludes from its scope any remediation in respect of harm to persons that may arise from damage caused to the environment: namely, personal injury, economic loss and/or damage to private property.<sup>53</sup> In addition, it stipulates that none of its provisions are to give rights to private parties to receive compensation as a consequence of actual or an imminent threat of environmental damage.<sup>54</sup> As a result, rights to obtain compensation or other remedies in respect of personal loss or damage, as provided under the civil liability rules of the various national legal systems of the Member State, are unaffected by the EL Directive. Accordingly, two sets of civil liability rules apply in relation to environmental damage: the existing national civil laws of the Member States as well as the rules on environmental liability under the EL Directive. However, the EL Directive does permit Member States to rule out the possibility of a defendant facing financial liability under both systems of civil liability in respect of the same environmental damage, and where the object of civil litigation involves the defence of property interests.<sup>55</sup> Specifically, 'double recovery of costs' may be ruled out in a situation where legal action is brought by a competent national authority to recover costs of preventing or remedying environmental damage under the auspices of the Directive at the same time as a civil action is being brought by another party on account of damage sustained to their property rights.

Arguably, there are a number of shortcomings with the narrow approach to environmental civil liability adopted by the EL Directive. The development of an EC legal framework on environmental civil liability was an opportunity for the EC to facilitate the enforcement of its environmental norms with the assistance of the private sector, to the extent that private property interests of individuals and environmental protection goals could coincide with one another. Specifically, the EL Directive could have provided useful legal assistance to individuals wishing to take civil action to gain judicial relief in respect of personal harm sustained as a result of environmental damage. Under the existing civil laws of several Member States, it is evident that private claimants may well face a number of difficult legal hurdles to overcome in proving civil culpability under traditional rules of tortious responsibility in respect of harm sustained to their own person or their physical property (such as goods, fixed assets or territory), as a result of damage as diffuse as environmental pollution. Particularly difficult problems

52 See e.g., the Commission's Green and White Papers on environmental liability: COM(93)47final, Commission Communication on Remedying Environmental Damage (14.5.1993) and COM(2000)66 final, Commission Communication 'White Paper on environmental liability' (9.2.2000) especially p 15.

53 See recital 14 of the preamble to the EL Directive.

54 Art 3(3) EL Directive.

55 See Art 16(3) EL Directive.

may arise in relation to a claimant having to shoulder the burden of proof in having to be able to attribute blame on an individual defendant. Under the civil laws of several Member States, claimants are usually required to prove on the balance of probabilities that the defendant's conduct may be attributed to having caused the harm sustained. Given that the source of environmental pollution may be hard to trace, a number of insuperable evidential difficulties may arise for plaintiffs in certain cases. For instance, it may well be difficult from a scientific perspective for a person to identify with certainty the source of harm in terms of its physical properties; the source may well be mixed in environmental media with a combination of possible agents that may or may not be capable of causing harm individually or collectively. The epidemiology of environmental damage may well be problematic. In addition, even if the physical properties of the substance causing harm can be identified scientifically, there may well be difficulties in showing to the satisfaction of a court that its release into the environment has in fact been perpetrated by a specific entity, where the substance may potentially have been emitted from any one of a number of possible locations. Finally, claimants are often faced with other legal hurdles that could make it difficult in practice to prove that a defendant breached a legal duty of care in environmental cases. Specifically, claimants may have the onus of proof to show that the defendant's conduct is at fault or negligent in some respect. This particular burden presents difficulties and challenges in terms of a claimant's ability, legally and scientifically, to be able to access as well as analyse complex environmental information. Regrettably, the EL Directive does not address these legal problems and challenges and, in so doing, neglects to harness the potential contribution that rules on civil liability in respect of personal harm may bring to bear in terms of assisting in the deterrence and remedying of environmental damage. However, it cannot be ruled out that the EC might, at some point in the future, address itself again to the 'personal damage' dimension of environmental liability.

On the other hand, this particular shortcoming should be placed into its proper context. Quite rightly, the EL Directive focuses on the role of national competent authorities as the principal means of ensuring that operators adhere to their responsibilities to prevent and remediate environmental damage.<sup>56</sup> Given the evidential difficulties raised in attributing liability to specific persons, it is realistic to consider that in practice public authorities as opposed to private persons are in the best position to enforce the Directive's requirements. National public authorities are vested with powers and resources that individuals do not command. Specifically, public authorities involved in environmental protection matters are vested with powers to inspect sites and premises. In addition, they have access to financial, scientific,

<sup>56</sup> See recital 15 to the preamble and Art 11 EL Directive.



information-related and legal resources necessary to carry out investigations as well as to take steps to enforce environmental norms, such as in the form of granting, amending and/or withdrawing of permits or taking legal action (whether criminal or administrative in nature). Moreover, it is not the case that a private civil action will actually serve to secure remediation of environmental damage. The principal, if not exclusive, focus of civil litigation brought by an individual whose personal legal interests have been harmed is to secure a remedy in respect of the losses or impairments sustained regarding those particular personal assets. Whilst improvements to procedural rules concerning private civil litigation may arguably have some deterrent effect on perpetrators of environmental damage, it is clear that the use of tort law in its traditional context may not lead to the remediation of a damaged site from an environmental protection perspective. Instead, a remedy may be provided in the form of monetary compensation, which may not be adequate or in fact used for the purpose of restoring a site to its condition prior to the period it was damaged (see also Lee, 2002, p 192). The focus of the EL Directive on the role of public authorities reflects a strong theme of realism that underpins its provisions, namely an intention to enable the maximum degree of practical application of effective environmental liability principles at national level.

A final introductory point to note on the EL Directive is that, in alignment with the EC Treaty,<sup>57</sup> it expressly permits Member States to maintain or adopt more stringent provisions than its own in relation to the prevention and remediation of environmental damage as well as extend liability in respect of human activity not covered by its provisions.<sup>58</sup> Accordingly, Member States are entitled to apply stricter civil liability rules.

### *12.3.1 Scope of liability under the EL Directive*

The overall purpose of the EL Directive is to establish a viable legal framework of environmental liability based on the 'polluter pays' principle.<sup>59</sup> The legislative instrument concerns itself with civil liability of persons causing environmental damage, specifically their financial liability to provide the funds for costs required to prevent or remedy environmental damage for which they are responsible.<sup>60</sup> The subject of criminal environmental liability is addressed in a separate legislative initiative at EC level, and is discussed in Chapter 13. Under the provisions of the EL Directive,<sup>61</sup> the primary degree of legal responsibility for attending to environmental damage is required to lie with the person responsible for damage. The position adopted is in accordance with the 'polluter pays' principle, recognised as an integral

57 Art 176 EC.

58 Art 16(1) and recital 29 to preamble of the EL Directive.

59 Art 1 EL Directive.

60 See recital 2 to the preamble of the EL Directive.

61 See in particular Art 1 and recital 18 to the preamble of the EL Directive.

part of EC environmental policy as well as other common policies.<sup>62</sup> Accordingly, Member States are not, as a matter of principle, entitled to elect to fund the restoration of damaged environmental sites by drawing from the public purse. Responsibility for taking appropriate preventive or remedial steps must rest first with the polluter. State-funded intervention is permitted under the EL Directive only in certain exceptional circumstances, where the application of ‘polluter pays’ is not practicable. A complementary aim of the Directive is to provide a suitable legal framework to enable national authorities to be in a position to take necessary steps to ensure that persons engaging in particular activities, which cause actual or an imminent threat of environmental damage, are held accountable for their actions.

The scope of liability under the EL Directive is determined in broad terms in Art 3. Specifically, that provision specifies that the Directive applies in respect of environmental damage caused by certain occupational activities and to instances of imminent threat of such damage occurring arising as a result of such activities. Its application is predicated on national competent authorities being able to identify and assess actual or prospective damage, the activity and/or substance responsible for such damage as well the polluter(s) involved.<sup>63</sup>

The fact that the instrument seeks to address liability also in the context of imminent threats of environmental damage reflects a desire to apply the EC environmental principle that preventive measures should be taken.<sup>64</sup> This constitutes recognition of the fact that a liability framework that requires action to be taken only at the stage where environmental damage has materialised falls short of an effective environmental protection response. In particular, this is clear where damage may have irrevocable adverse consequences for the state of the environment in some way, such as permanent loss of a particular ecologically sensitive habitat (that is host to a protected species) on account of irremediable pollution of environmental media located at the site (for example, deep subsoil or water resource contamination).

### *12.3.1.1 Operators of occupational activities*

Not all types of anthropic activity may give rise to liability under the EL Directive. The scope of liability is limited to cover activities that are considered to pose the greatest threats to the environment. As a starting point, the Directive makes clear that only ‘occupational’ activities fall within its remit.<sup>65</sup> Such activities are defined broadly to mean ‘any activity carried out in the course of an economic activity, a business or an undertaking, irrespective

<sup>62</sup> See Arts 6 and 174(2) EC.

<sup>63</sup> See recital 13 of preamble to, and Art 4(5) of, the EL Directive.

<sup>64</sup> Art 174(2) EC.

<sup>65</sup> Art 3 EL Directive.

of its public or private, profit or non-profit character'.<sup>66</sup> This broad definition effectively embraces any industrial, commercial or professional operation carried out by persons, charities, companies or public bodies, whether involving the production or provision of services, goods or works. Accordingly, any activities of individuals carried out in a purely private and domestic capacity outside the arena of gainful employment or self-employment are not covered by the Directive.

The EL Directive adopts a two-tier approach to liability. In respect of certain types of occupational activity listed in Annex III of the Directive, deemed to carry particularly serious risks to the environment, liability for actual or threatened environmental damage is strict and covers a wide range of types of damage. In respect of other occupational activities, however, the scope of liability is confined to cover a narrower range of environmental harm and is predicated on proof of fault or negligence. Specifically, liability is structured under Art 3(1) of the EL Directive to cover environmental damage or the following different scenarios of environmental damage:

- (a) environmental damage caused by any of the occupational activities listed in Annex III, and to any imminent threat of such damage occurring by reasons of those activities.
- (b) damage to protected species and natural habitats caused by any occupational activities other than those listed in Annex III, and to any imminent threat of such damage occurring by reason of those activities, whenever the operator has been at fault or negligent.

The Directive clarifies that this liability formula is subject to any stricter EC rules adopted in relation to any of the activities falling within its remit.<sup>67</sup> As a result of the delimitation of liability set out in Art 3(1), it is evident that in practice it is going to be relatively rare for operators of activities other than those listed in Annex III of the EL Directive to be subject to environmental liability. The coverage in Art 3(1)(b) is usually going to be of immediate relevance to persons professionally engaged in operations closely involved with or located adjacent to protected habitats (such as those professionally engaged in activities involving agricultural, forestry, environmental media or wildlife protection management). Annex III contains a list of 12 categories of occupational activity, which either directly or indirectly inhere substantial risks to the environment if mismanaged. These include: activities of installations subject to permits under the auspices of the IPPC Directive 96/61;<sup>68</sup>

66 Art 2(7) EL Directive.

67 Art 3(2) EL Directive.

68 Directive 96/61 on integrated pollution prevention and control (OJ 1996 L257/26) as amended. See para 1 of Annex III EL Directive.

waste management operations involving waste and hazardous waste, as subject to EC legislative requirements, as well as the transboundary shipment of waste requiring an authorisation or which is prohibited under EC legislation;<sup>69</sup> discharges into and manipulation of water resources that require prior authorisation under EC environmental legislation;<sup>70</sup> the manufacture, use, storage, processing, filling, release into the environment and on-site transport of certain dangerous chemical substances and products whose applications are subject to controls under EC rules;<sup>71</sup> transportation by road, rail, inland waterway, sea or air of dangerous or polluting goods subject to EC legislative controls;<sup>72</sup> the operation of installations subject to authorisation under EC air pollution emissions legislation;<sup>73</sup> and any contained use involving genetically modified micro-organisms or any deliberate release into the environment, transport or placing on the market of GMOs as subject to EC legislative restrictions.<sup>74</sup>

The EL Directive's provisions refer to liability falling on 'operators' of occupational activities covered by Art 3. Specifically, it is the operator who is subject to particular legal obligations under the Directive to take preventive or remedial steps arising from actual or an imminent threat of environmental damage<sup>75</sup> and who is financially liable for the costs incurred in meeting these obligations.<sup>76</sup> The definition of 'operator' under the EL Directive is crafted in a deliberately broad manner, to ensure that it covers persons operating or in control of the activity:

'operator' means any natural or legal, private or public person who operates or controls the occupational activity or, where this is provided for in national legislation, to whom decisive economic power over the technical functioning of such an activity has been delegated, including the holder of a permit or authorisation for such an activity or the person registering or notifying such an activity.<sup>77</sup>

It is evident from this definition that there may well be more than one person involved in the pursuit of a particular occupational activity, such as a company in charge of a particular project who subcontracts work to other legal or natural persons. In such cases, the definition of 'operator' indicates that liability is on a joint and several basis. The reference to control may be particularly important in the context of corporate liability for other reasons, as it

69 Paras 2 and 12 of Annex III. Sewage sludge from urban waste water treatment plants used for spreading operations in agriculture is excluded from Annex III, subject to such waste being treated to an 'approved standard' (this is not defined).

70 Paras 3–6 of Annex III.

71 Para 7(a)–(d) of Annex III.

72 Para 8 of Annex III.

73 Para 9 of Annex III.

74 Paras 10–11 of Annex III.

75 Arts 5–7 EL Directive.

76 Art 8 EL Directive.

77 Art 2(6) EL Directive.

covers those persons who have legal or *de facto* decisive influence over the occupational activity of a company engaged in a disputed activity. This would include persons having a controlling shareholding in a company as well as persons in charge of a company in administration or the subject of insolvency procedures. It would probably include executive officers in charge of taking strategic decisions over corporate activity (for example, a board of company directors). However, no definition of 'control' is provided in the EL Directive. But, in line with the aims and objectives of the Directive, it is clear that the term should be interpreted broadly so as to encompass all persons involved in making, or having the opportunity to exert a decisive influence over, decisions on the management of occupational activities of a corporate entity. No doubt this particular aspect of the Directive may well be taken up in litigation over the interpretation of 'operator' at some stage in the future.

### 12.3.1.2 *Environmental damage*

Liability under the EL Directive is also determined according to the types of environmental damage covered by the legislative instrument. Operators of Annex III activities have a broader duty of care to the environment under Art 3 of the EL Directive than persons engaged in other occupational activities. 'Damage' is defined broadly in the Directive to mean 'any measurable adverse change in a natural resource or measurable impairment of a natural resource service which may occur directly or indirectly'.<sup>78</sup>

In respect of occupational activities not covered by Annex III the operator's duty of care extends only to 'protected species and protected habitats', as clarified in Art 3(1)(b) of the EL Directive. These are defined in the Directive to mean: species mentioned in Art 4(2) or listed in Annex I of the Wild Birds Directive 79/409, or listed in Annexes II and IV of the Habitats Directive 92/43;<sup>79</sup> the habitats of species mentioned in Art 4(2) or listed in Annex I of the Wild Birds Directive, or listed in Annex II of the Habitats Directive;<sup>80</sup> the natural habitats listed in Annex I to the Habitats Directive;<sup>81</sup> the breeding sites or resting places of species listed in Annex IV to the Habitats Directive;<sup>82</sup> and any habitat or species not listed in the above Annexes to the Wild Birds and Habitats Directives where a Member State has designated them for equivalent purposes.<sup>83</sup> Damage to such species and habitats is defined as meaning damage having significant adverse effects on reaching or maintaining their favourable conservation status,<sup>84</sup> except where such damage has

78 Art 2(2) EL Directive.

79 Art 2(3)(a) EL Directive.

80 Art 2(3)(b) EL Directive.

81 Ibid.

82 Ibid.

83 Art 2(3)(c) EL Directive.

84 'Favourable conservation status' of natural habitats and species is defined in Art 2(4)(a) and (b) EL Directive respectively.

resulted from acts authorised under the auspices of EC nature protection legislation or equivalent national conservation laws.<sup>85</sup> A detailed set of criteria apply in the Directive to determine the existence of significant damage.<sup>86</sup>

Operators of Annex III activities are liable in respect of causing 'environmental damage' or creating an imminent threat of such damage arising. The definition is defined broadly, but also introduces a threshold of 'significance' in relation to the legal concept of damage, which attenuates somewhat the extent of liability. Specifically, environmental damage is defined as including: damage to protected species and natural habitats;<sup>87</sup> water damage that significantly adversely affects their ecological, chemical and/or quantitative status and/or ecological potential;<sup>88</sup> and land damage that involves any land contamination creating a significant risk of human health being adversely affected as a result of in/direct introduction of substances, preparations, organisms or micro-organisms in, on or under land.<sup>89</sup> Whilst damage to the environmental medium of air is not directly incorporated within the terms of the definition, it is clear that it would be inaccurate to conclude from this that air pollution falls outside its scope. In particular, liability will arise where air emissions perpetrate damage to water, land or protected species or habitats.<sup>90</sup>

### 12.3.1.3 Causation issues

Liability under the EL Directive is predicated on the ability of Member State competent authorities being able to attribute responsibility for environmental damage or an imminent threat of its occurrence to a particular person. Article 4(5) of the Directive stipulates that its requirements apply only where it is possible to establish a causal link between damage and the activities of individual operators.<sup>91</sup> This requires that competent authorities, charged with the responsibility to fulfil the duties set out in the Directive, have to procure evidence on two crucial issues, namely evidence to identify with sufficient certainty the activities and/or substance(s) causing actual or threatened environmental damage and the individual operators responsible for such activities and/or substances.<sup>92</sup> Given the often diffuse nature of environmental pollution, these procedural hurdles may well prove very

85 Art 2(1)(a) EL Directive.

86 See Annex I in conjunction with Art 2(1)(a) and (14) EL Directive.

87 Art 2(1)(a) EL Directive.

88 Art 2(1)(b) EL Directive.

89 Art 2(1)(c) EL Directive. For the purposes of assessing land damage, the use of risk assessment procedures are deemed desirable in the Directive to determine likely adverse effects on human health: see recital 7 of preamble to EL Directive.

90 As underlined by recital 4 to the preamble of the EL Directive.

91 Curiously, this clause is housed in Art 4 which is entitled 'Exceptions'.

92 See Art 11(2) EL Directive.

significant in influencing the enforcement capabilities and strategies of national competent authorities. As the EL Directive realistically recognises:

Not all forms of environmental damage can be remedied by means of the liability mechanism. For the latter to be effective, there needs to be one or more identifiable polluters, the damage should be concrete and quantifiable, and a causal link should be established between the damage and the identified polluter(s). Liability is therefore not a suitable instrument for dealing with pollution of a widespread, diffuse character, where it is impossible to link the negative environmental effects with acts or failure to act of certain individual actors.<sup>93</sup>

The EL Directive does not provide any specific guidance on the manner in which evidence is to be garnered or assessed. Notably, it does not expressly make reference to the use of the precautionary principle in determining possible sources of damage. The principle may be of relevance if and when competent authorities are faced with scenarios of actual or prospective environmental damage, where the source is not clearly established from a scientific perspective.<sup>94</sup> The Directive's silence might imply that such evidential issues are to be determined solely in accordance with national rules of civil or administrative procedure, which may or may not have recourse to the precautionary principle in some form. However, it should be noted that under the EC Treaty, EC policy is to be based on the precautionary principle under Art 174(2) EC, and accordingly this general principle is pertinent to the application of the EL Directive. However, it is unclear to what extent this principle requires national courts to assess evidence offered in relation to the question of attribution of liability in any particular way. Hitherto, institutional discourse at EC level on the precautionary principle has focused on the extent to which its application is relevant to EC legislative decision-making processes.<sup>95</sup> Whether it is acceptable from a subsidiarity perspective for the EL Directive to tolerate a divergence amongst Member States' legal systems on application of the principle in relation to evidentiary issues relating to civil or criminal liability is questionable.

93 Recital 13 of the preamble to the EL Directive.

94 As the European Commission has noted, '[r]ecourse to the precautionary principle presupposes that potentially dangerous effects deriving from a phenomenon, product or process have been identified, and that scientific evaluation does not allow the risk to be determined with sufficient certainty' (COM(2000)1 final, Commission Communication on the precautionary principle (2.2.2000) p 3).

95 See e.g., COM(2000)1 final and Case C-157/96 *The Queen v MAFF*; Case C-180/96 *UK v Commission*; Case T-199/96 *Bergadem* and Case T-70/99 *Alpha Pharma Inc.*

*12.3.1.4 Fault and negligence*

The liability regime employed by the EL Directive does not impose a level of legal responsibility on operators akin to strict liability. There are a number of fault-based qualifications to liability which may serve to exonerate an operator's culpability totally or serve to excuse the operator from having to bear the costs for rehabilitating a contaminated site or one threatened with environmental damage. In essence, the EL Directive applies the onus of proof on issues of fault differently for Annex III operators and other operators, in order to variegate the relative stringency of liability in accordance with the perceived level of environmental risk associated with the particular type of occupational activity.

## OPERATORS OF ANNEX III ACTIVITIES

Where actual or the imminent threat of environmental damage is caused by an Annex III operator, it is in principle irrelevant whether the damage is as a result of the operator's fault or negligence. Liability is triggered on a finding of environmental damage attributable to such an operator irrespective of such factors. As a consequence, the operator is obliged to take appropriate steps as prescribed in Arts 5–7 of the EL Directive to either preserve the site's environmental state or, if that is too late, to rehabilitate any damaged site. Moreover, as a matter of first principle, the operator is obliged to bear the cost of these measures.<sup>96</sup> To this extent, the liability of such operators appears strict, the concept of fault being to this extent irrelevant.

However, Art 8 of the EL Directive provides certain fault-based exemptions for operators in relation to their financial liability to bear the cost of either maintaining or rehabilitating a site subject to actual or threatened imminent environmental damage. These exemptions place the onus of proof on operators to show that, for particular reasons, they are not to blame for instances of actual or the threat of imminent damage. Specifically, operators are automatically exempted from having to bear preventive or remedial costs in two situations where they are able to prove that the damage or threat has been caused either by a third party and occurred notwithstanding the application of appropriate safety measures on the operator's part,<sup>97</sup> or as a result of compliance with a compulsory order or instruction from a public authority other than one consequent on an emission or incident caused by the operator's activities.<sup>98</sup> In such circumstances, Member States are required to ensure that operators are able to recoup costs they have incurred. Moreover, Member States have the option under the Directive to exempt operators from having to bear

96 Art 8 EL Directive.

97 Art 8(3)(a) EL Directive.

98 Art 8(3)(b) EL Directive.



the costs of remedial action taken where the latter is able to demonstrate that s/he was not at fault or negligent and that the damage was caused by either of the following two scenarios: an emission or event explicitly authorised under national rules implementing EC environmental legislation specified in Annex III;<sup>99</sup> or an emission or use of a product in the course of an activity which the operator demonstrates was not considered likely to cause environmental damage according to the current state of scientific and technical knowledge<sup>100</sup> ('state of the art' defence). Member States also have the option to require that their competent authorities take the necessary preventive or remedial measures with respect to affected sites instead of operators, where the latter are not required to bear the costs of such measures under the Directive.<sup>101</sup>

However, it is important to note that it may well be difficult in practice for an Annex III operator to discharge the burden of proof in relation to fault, especially in relation to third party intervention cases. The 'state of the art' defence provides an incentive for operators to acquire a technology for the application of their activities that is proven to be least risky to the environment, and thus accords with the general environmental principle underpinning the EC that the EC should aim to promote a high level of environmental protection.<sup>102</sup> Crucially, the incentive is not weakened by any reference to a caveat of words to the effect 'not entailing excessive costs'; such a caveat would have undermined the impact of the Directive considerably. The onus of proof is set according to the standards normally applicable under national civil procedure,<sup>103</sup> and this is usually based on a test centred on the balance of probabilities. Finally, Member State authorities have the option not to seek to recover any costs in respect of preventive or remedial steps that they have undertaken in the event that the process to recover such costs exceeds the recoverable sum itself.<sup>104</sup>

#### OTHER OPERATORS NOT ENGAGING IN ANNEX III ACTIVITIES

The concept of fault and negligence are central features of the liability of operators of occupational activities not covered by Annex III of the EL Directive. In contrast with the situation applicable to Annex III occupational activities, it is incumbent on the Member State's competent authorities to prove that such operators were at fault or negligent in causing actual or an imminent threat of damage to protected species or natural habitats.<sup>105</sup>

99 Art 8(4)(a) EL Directive. 100 Art 8(4)(b) EL Directive.

101 See Arts 5(4) and 6(3) EL Directive. 102 Arts 2 and 174(2) EC.

103 In accordance with the ECJ's jurisprudence on the limits to Member State's procedural autonomy, national rules of procedure intended to implement EC legislation must be effective, proportionate and be equivalent to similar procedures applied at national level: see discussion in Chapter 7 to this book.

104 Art 8(2) second para EL Directive. 105 Art 3(1)(b) EL Directive.

### 12.3.1.5 *Temporal scope of liability*

The EL Directive limits the scope of liability temporally, in a retrospective as well as a prospective sense. First, in concert with the Lugano Convention and in contrast with US ‘Superfund’ rules on civil liability,<sup>106</sup> the Directive rules out the application of its rules retrospectively. Specifically, the application of the Directive does not cover damage caused by an emission, event or incident taking place before the deadline set for its transposition, namely 30 April 2007.<sup>107</sup> Neither does it apply to damage caused by an emission, event or incident which, although taking place after 30 April 2007, derives from an activity that took place and finished prior to that date.<sup>108</sup> Second, the Directive excludes liability in a prospective sense. Specifically, the Directive does not apply in relation to damage occurring more than 30 years after the relevant emission, event or incident, which caused it to occur.<sup>109</sup>

In addition, Art 10 of the EL Directive sets a time limit on how long a competent authority is entitled to initiate proceedings in order to recover costs of preventive or remedial measures undertaken in order to address environmental damage. Specifically, the authority has five years to commence recovery proceedings, starting either from the date when the measures have been completed or when the liable operator has been identified, whichever is the later date.<sup>110</sup>

### 12.3.2 *Exceptions to liability*

In addition to the above-mentioned limitations and qualifications to liability established by various provisions of the EL Directive, Art 4 of the Directive specifies a number of exceptions to the application of its requirements. The exceptions relate to specific instances of *force majeure*, policy areas already subject to international civil liability rules as well as politically sensitive areas involving national security issues. Specifically, the EL Directive excludes from its remit actual or imminent threats of environmental damage caused by either:

- (a) Activities relating to war<sup>111</sup> or activities whose purpose is otherwise to serve national defence or international security;<sup>112</sup>

106 Organised under the auspices of The Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) 42 USC 103. For further discussion on CERCLA and its influence on the European Commission’s work, see the explanatory memorandum to the Commission’s proposal for a directive on environmental liability (COM(2002)17).

107 Art 17, first indent, EL Directive.

108 Art 17, second indent, EL Directive.

109 Art 17, third indent, EL Directive.

110 Art 10 EL Directive.

111 Art 4(1)(a) EL Directive.

112 Art 4(6) EL Directive.

- (b) Irresistible natural phenomena<sup>113</sup> (that is, natural disaster scenarios) or activities exclusively intended to protect areas from such phenomena;<sup>114</sup>
- (c) Incidents covered by existing international civil liability conventions addressing oil pollution of the marine environment or the carriage of dangerous goods, as listed in Annex IV of the Directive;<sup>115</sup> or
- (d) Nuclear risks or activities covered by the Euratom Treaty or international conventions on liability for nuclear-related incidents, as listed in Annex V of the Directive.<sup>116</sup>

In addition, the EL Directive's application is without prejudice to the rights of operators to limit their liability in accordance with national laws implementing the 1976 Convention on Limitation of Liability for Maritime Claims and on the 1988 Convention on Limitation of Liability in Inland Navigation.<sup>117</sup> The EL Directive makes clear that the Commission is to review the exceptions relating to marine and nuclear sectors in the context of its report on the application of the legislative instrument by 30 April 2014.<sup>118</sup> This signals that their continued exception from the EC liability framework may not necessarily be permanent, and will be assessed instead in the light of experience in terms of the effectiveness of existing procedures.

### ***12.3.3 Extent of liability: an operator's specific obligations***

Another key and distinctive feature of the EL Directive is the set of obligations it lays down to be performed by operators found to be liable under the terms of causing actual or an imminent threat of environmental damage. In contrast with the approach adopted by other international instruments addressing civil liability in respect of harm to the environment, the EL Directive does not use the sanction of monetary compensation. Instead, it obliges liable operators to take certain steps to either prevent or remediate damage as well as fund the costs required to ensure their due completion. Accordingly, the EL Directive's approach is fully in line with the 'polluter pays' principle, in the sense that payment procured from the polluter is guaranteed to be targeted at either ensuring that threats to the environment are averted, or restoring damaged environs to the condition they were in prior to the time when they were damaged by the activities of the polluter. The traditional sanction of monetary compensation, used in civil law systems as the principal means to provide recompense in relation to loss or damage, has a number of deficiencies from an environmental protection perspective. In

113 Art 4(1)(b) EL Directive.      114 Art 4(6) EL Directive.

115 Art 4(2) in conjunction with Annex IV of the EL Directive.

116 Art 4(4) in conjunction with Annex V of the EL Directive.

117 Art 4(3) EL Directive.      118 Art 18(3) EL Directive.

particular, two major problems arise where monetary compensation is the remedy used to address environmental torts, namely: difficulties of ensuring that any level of compensation provided is adequate recompense for damage sustained as well as the absence of any controls as to what purpose compensation will be directed (restoration of the environment as such may not be desired by a claimant with a personal injury claim or claims in respect of loss or impairment to their property interests). The approach adopted by the EL Directive is intended to avoid civil liability being perceived as a *de facto* tax on occupational activity, namely an inconvenient financial burden as opposed to a deterrence to operators intending to engage in activities that will either damage or cause an imminent threat of damage to the environment.

Articles 5–8 of the EL Directive contain specific environmental protection obligations for liable operators. The principal obligations concern those in relation to preventive measures (Art 5) and remedial action (Arts 6–7). The obligations, of course, are conditional on the competent authority already having been able to establish that a particular operator has caused specific environmental damage on account of its occupational activities. The EL Directive respects the basic procedural guarantees that would normally be expected in the event of a person being subject to an adverse decision by a public authority. Specifically, it stipulates that any decision taken under its auspices imposing preventive or remedial action is to be notified immediately to the operator concerned.<sup>119</sup> Notification of the decision will include citation of the precise grounds on which it is based as well as information on the legal remedies and their relevant time limits available to the operator under national law.<sup>120</sup>

### 12.3.3.1 *Preventive action*

Preventive action under the EL Directive is relevant in situations where environmental damage has not yet occurred. Specifically, Art 5(1) stipulates that where environmental damage has not yet occurred but there is an imminent threat of such damage arising, the operator (responsible for the threat) must ‘without delay take the necessary preventive measures’. ‘Preventive measures’ are defined in the EL Directive to mean any measures undertaken in response to an event, act or omission that has created an imminent threat of environmental damage, with a view either to its prevention or minimisation.<sup>121</sup> Operators are to be obliged, as a minimum, by Member States to notify the national competent authority forthwith if an imminent threat is not dispelled by preventive measures.<sup>122</sup> Competent authorities are required

119 Art 11(4) EL Directive.

120 Ibid.

121 Art 2(10) EL Directive.

122 Art 5(2) EL Directive.

to ensure that the obligations in relation to preventive action are taken by the operator concerned and have powers to supervise and control the manner of their execution.<sup>123</sup> The EL Directive does not specifically require competent authorities to be vested with powers to seek injunctive relief from national courts in urgent cases. However, that Member States should vest them with such powers is implicit from the provisions of the Directive conferring power on competent authorities to require that preventive measures be taken, which in many instances may have to be taken urgently. Unless the authority is able to support its decisions by threat of court order, their credibility and effectiveness will be actually or potentially undermined. Accordingly, it is evident that Member States will have to ensure that emergency judicial or equivalent relief is available, otherwise this will be tantamount to violation of the duties of co-operation on their part, contained in Art 10 EC. It may well have been wiser, though, from the perspectives of transparency and legal certainty, for emergency relief provisions to have been set out expressly in the terms of the Directive.

### 12.3.3.2 Remedial action

Where environmental damage has occurred, operators are under an obligation to carry out measures designed to remedy the effects of the damage. Articles 6–7 and Annex II of the EL Directive provide a detailed set of obligations in this regard. Article 6(1) lays out three key duties for operators to fulfil in the event of environmental damage occurring: to notify the competent authority immediately of all relevant details;<sup>124</sup> to take measures to contain the extent of the damage;<sup>125</sup> and to take measures necessary to remediate damage sustained.<sup>126</sup> As is the case with preventive measures, competent authorities are vested with powers to oversee the performance of an operator's obligations to take remedial action.<sup>127</sup>

The EL Directive provides detailed arrangements with a view to ensuring that remedial measures are carried out in a way that is most suitable to local environmental conditions and requirements. Safeguards are placed in the Directive's legal framework to ensure that a suitably clear, effective and accountable deliberative process is undertaken prior to the instigation of remedial action.<sup>128</sup> These include the following mandatory basic requirements: that a plan is to be drafted on a strategy of action; that the plan accords with minimum standards as set out in the EL Directive; that the operator must defer to the competent authority (as an impartial actor) for

123 Art 5(3)–(4) Directive. 124 Art 6(1), *chapeau*, EL Directive.

125 Art 6(1)(a) EL Directive. 126 Art 6(1)(b) EL Directive.

127 Arts 6(2)–(3) and 7(2)–(4) EL Directive.

128 As contained in Art 7 in conjunction with Annex II of the EL Directive.

final decisions over implementation of restorative measures; and that the implementation of remedial action accords with the EL Directive's minimum standards. The key stages of this process will be briefly examined below.

The first key stage concerns planning for remediation by the operator and notification of this to the competent authority. In accordance with the 'polluter pays' principle, the operator is to draw up an appropriate plan to remediate a contaminated site. Specifically, the operator is obliged to identify potential remedial measures and submit them to the competent authority, unless the latter has already intervened by carrying out remedial work itself.<sup>129</sup> The draft plan is to be in accordance with a detailed set of requirements laid out in Annex II of the EL Directive. Annex II lays out a common framework to be followed in determining the appropriate measures to be applied for remedying environmental damage. It applies two sets of ground rules: one set in relation to the remediation of land damage,<sup>130</sup> the other in relation to scenarios involving damage to water, protected species or natural habitats.<sup>131</sup>

Remediation of the latter types of damage is to be achieved on the basis of seeking to restore the environment to its 'baseline condition', a concept defined as meaning the condition at the time of the damage of the natural resources and related services that would have occurred but for the environmental damage, estimated on the basis of the best information available<sup>132</sup> (namely the *status quo ante*). In addition, remediation requires that any significant risks to human health caused by the damage should also be removed.<sup>133</sup> The restorative principle employed in the Annex is to be achieved by various types of measures, which are designed to ensure that a state of environmental conditions is attained which is as close as possible to the baseline condition: namely, through the use of 'primary', 'complementary' and 'compensatory' measures. Primary measures<sup>134</sup> are the measures returning the damaged natural resources and services to or towards the baseline condition, and these measures are to be used as a priority over complementary measures. Complementary remedial action<sup>135</sup> involves action taken to compensate for the fact that primary remediation does not result in fully restoring the natural resources or services. Compensatory remediation<sup>136</sup> concerns any steps (not involving monetary payment to the public) taken to compensate

129 Art 7(1) EL Directive.

130 Annex II para 2 EL Directive.

131 Annex II para 1 EL Directive.

132 Art 2(14) EL Directive. This approach is, of course, in full alignment with standard principles applied in respect of the remediation of civil wrongs under national civil law systems.

133 See para 1 of Annex II EL Directive.

134 See paras 1(a) and 1.1. of Annex II EL Directive.

135 See paras 1(b) and 1.2. of Annex II EL Directive.

136 See paras 1(c) and 1.3. of Annex II EL Directive.

for interim losses of natural resources or related services that occur since the date of damage until primary remediation has achieved its full effect. In terms of identifying remedial measures to be employed, primary measures are to be considered first.<sup>137</sup> The Annex provides a set of criteria and ancillary requirements to assess in individual cases which particular type of remedial option, based on 'best available technologies', should be used and when these should cease.<sup>138</sup>

In terms of remediation of land damage, Annex II stipulates fewer requirements under its framework. The central focus of the land damage remediation is to ensure that the affected site no longer poses a significant risk to human health.<sup>139</sup> As a minimum, relevant contaminants are to be removed, controlled, contained or diminished with a view to eliminating serious health risks. Scientific risk assessments are to be carried out to ascertain the state of risk, based on analyses of soil and contaminant-type and pollutant concentrations.

The second key stage of the remediation process involves the competent authority. Under the EL Directive, it is the national competent authority which is vested with the task of determining the particular remedial measures to be implemented and in what order.<sup>140</sup> In the event of the occurrence of multiple sources of environmental damage which are unable to be remedied simultaneously, the authority is charged with the task of determining which particular aspect of damage is to be addressed first. Various factors have to be taken into account for an evaluation of priorities to be made, namely: the nature, extent and seriousness of the instances of damage concerned; possibilities of natural recovery; and risks to human health.<sup>141</sup> As an integral part of its decision-making process, the authority is obliged to invite observations from persons actually or likely to be affected by the damage (in any event those whose land would be subject to remedial action), persons having a sufficient interest in environmental decision making relating to the damage, or persons alleging the impairment of a right as result of the damage.<sup>142</sup> In accordance with the general principles of EC law,<sup>143</sup> this means that competent authorities are required to afford a genuine opportunity for people to submit comments prior to remedial action being taken, at the very least in relation to measures designed to effect long-term remediation if not necessarily in relation to urgent containment measures that may well be required to be effected immediately.

137 See para 1.2 of Annex II EL Directive.

138 See para 1.3 of Annex II EL Directive.

139 Para 2, Annex II EL Directive. See also recital 7 to the preamble of the EL Directive.

140 Art 7(2) EL Directive.

141 See Art 7(3) EL Directive.

142 Art 7(4) EL Directive.

143 See e.g., Case 17/74 *Transocean*.

### 12.3.3.3 *Operator's financial liability for preventive and remedial action*

In accordance with the 'polluter pays' principle, the EL Directive imposes a general requirement on Member States to ensure that the operator (found liable for actual or threatened environmental damage) pays the cost of any preventive and/or remedial measures taken.<sup>144</sup> By way of complement to this obligation, national competent authorities are required as a rule to recover costs that they have incurred in relation to any such action they may have taken in response to the damage.<sup>145</sup> Certain exceptions, however, apply in relation to these fundamental requirements, where the operator is able to prove lack of fault or negligence in specified situations.<sup>146</sup> These are referred to in section 12.3.1.4.

Under the EL Directive, operators are not required to provide for sufficient financial security in the event of the occurrence of actual or threatened environmental damage. Unsurprisingly, the aspect of advance financial cover was the subject of considerable scrutiny in the preparations leading up to the passage of the Directive. An obligation for Annex III operators to secure adequate insurance cover or provide equivalent financial guarantees would have reinforced the 'polluter pays' principle underpinning the legislative instrument. For without adequate financial security in place, it is evident that several operators might well be unable to meet the often extensive financial cost involved to effect appropriate remediation of serious instances of environmental damage. The financial consequences flowing from the insolvency of a liable operator are that any funds used to clean up environmental damage would not be able to be drawn from the polluter. Instead, rehabilitation costs would have to be met in practice from other sources, such as from local and/or general taxpayers, a prospect that would run counter to the 'polluter pays' principle.

Instead of any specific financial security obligations being incorporated within its legal framework, the approach of the EL Directive is cautious and facilitative, as was the Commission's 2000 White Paper. Specifically, it contains only a very soft requirement for Member States to 'encourage' the development of financial security instruments and markets suitable for providing cover for operators.<sup>147</sup> The Commission is to review this area over the next few years and provide a report by 30 April 2010, reserving the possibility to come forward after that point with proposals for a mandatory system of financial security. It may be the case that the recent launch in 2005 of the EC's emissions trading scheme on greenhouse gas emissions may well provide a boost to accelerated development of market interest and financial services in 'green' securities in the European Union. However,

144 Art 8(1) EL Directive.

145 Art 8(2) EL Directive.

146 Namely, those cited in Arts 8(3)–(4) EL Directive.

147 Art 14(1) EL Directive.



such developments remain speculative in the absence of any clear regulatory framework requiring mandatory financial cover.

The EL Directive does not provide for specific rules on cost allocation in cases involving multiple sources of environmental damage. Apportionment of liability for costs between operators found to have been jointly responsible for causing a particular instance of environmental damage is a matter devolved to the Member States.<sup>148</sup> It is clear, though, from the terms of the EL Directive that, subject to the rules under national law that may apply on apportionment, each operator found to be liable for damage is so, effectively, on a joint and several basis. No hierarchy of liability is made according to the status of a particular operator (for example, producer, retailer, holder, owner).

#### ***12.3.4 Competent authorities: principal enforcers***

From a law enforcement perspective, it is important to note that the EL Directive invests Member States with central responsibility for overseeing the implementation of its civil liability requirements. A central plank of its legal framework is the predominant role afforded to Member State authorities in ensuring that operators adhere to their environmental liability obligations. Specifically, Art 11 requires Member States to designate the ‘competent authority(ies)’ responsible for fulfilling the duties provided for in the EL Directive.<sup>149</sup> Competent authorities are charged with two principal tasks: verification of liability and supervision of remediation.

First, such authorities have the duty to establish which operator has caused actual or threatened environmental damage.<sup>150</sup> In order to fulfil this duty, it is self-evident that such authorities need to be vested with the necessary inspection and investigatory powers. The EL Directive does not specify in detail any such powers that must be accorded to the authorities involved; this is a matter devolved to Member States. Under general duties of co-operation owed by Member States to the EC flowing from Art 10 EC, it is clear from that provision and ECJ jurisprudence that Member States are required to ensure that authorities are endowed with effective powers and resources to enable them to fulfil their EC environmental legal responsibilities (for example, Case C-365/97 *San Rocco*), in this case relating to the identification

148 Art 9 EL Directive. See also recital 22 to the preamble of the EL Directive which indicates that Member States might consider imposing differential levels of financial responsibilities on producers than on users of products.

149 Art 11(1) EL Directive.

150 Art 11(2) EL Directive. Where third parties, as opposed to the operators themselves, are directly responsible for actual or threatened environmental damage, Member States are required to endow competent authorities with powers to require such parties to carry out necessary preventive or remedial measures (Art 11(3) EL Directive).

of sources of damage. However, it is regrettable that the EL Directive did not spell out a minimum list of mandatory investigatory powers, given that detection and identification of sources of damage and threats of damage are obviously crucially important to achieve the aims underpinning any environmental liability regime, whether civil or criminal. This would have been beneficial from a number of perspectives. Member States would be left in no doubt as to what is required with regard to the fulfilment of this responsibility (legal certainty and uniformity of application of law). More importantly, there would be reduced scope for Member States to vest authorities with an inadequate range of investigatory powers (issue of effectiveness). Currently, the EC has passed only a non-binding recommendation on minimum criteria for environmental inspections as discussed in Chapter 11.<sup>151</sup>

Second, the competent authorities are obliged under the EL Directive to ensure that environmental obligations set out in the Directive are in fact fulfilled. Principally, this means that such authorities have a responsibility to assess the state of actual or threatened damage and determine the relevant rehabilitative measures to be taken.<sup>152</sup> As regards assessment of damage, competent authorities may require operators to carry out their own assessment and supply any information or data required.<sup>153</sup> In relation to rehabilitation aspects, the EL Directive provides competent authorities with a number of enforcement powers to oversee such measures to ensure that they are taken in full compliance with the minimum environmental standards required under the Directive.<sup>154</sup> Accordingly, the EL Directive stipulates that competent authorities are required to have a pivotal involvement in the management of all cases involving any remedial action as well as certain types of cases that may involve the application of preventive measures.

As far as preventive measures are concerned, Art 5 specifies that competent authorities are vested with a range of specific powers in scenarios where an operator is unable to dispel an imminent threat of environmental damage. Operators are required to inform the authority immediately if such a situation arises.<sup>155</sup> On notification of such a situation, competent authorities may at any time:

- (a) require the operator to provide information on any imminent threat of environmental damage or in suspected cases of such an imminent threat;

151 Recommendation 2001/311 providing for minimum criteria for environmental inspections in the Member States (OJ 2001 L118/41).

152 Art 11(2) EL Directive.

153 Art 11(2) final sentence EL Directive. See also specific powers of competent authorities to require disclosure of information from operators: Arts 5(1), (3)(a) and 6(1), 2(a) EL Directive.

154 As set out in Annex II EL Directive. 155 Art 5(2) EL Directive.

- (b) require the operator to take the necessary preventive measures;
- (c) give instructions to the operator to be followed on the necessary preventive measures to be taken; or
- (d) itself take the necessary preventive measures.<sup>156</sup>

As far as remedial action is concerned, Art 6 of the EL Directive endows competent authorities with similar wide-ranging powers for the purpose of overseeing their proper enforcement. Operators are obliged to inform such authorities of any incidents of environmental damage.<sup>157</sup> Competent authorities may take any of the following decisions in relation to such damage:

- (a) require the operator to provide supplementary information on any damage that has occurred;
- (b) require the operator to take or give instructions to the operator concerning all practicable steps to immediately control, contain, remove or otherwise manage the relevant contaminants and/or any other damage factors in order to limit or to prevent further environmental damage and adverse effect on human health, or further impairment of services;
- (c) require the operator to take the necessary remedial measures;
- (d) give instructions to the operator to be followed on the necessary remedial measures to be taken; or
- (e) itself take the necessary preventive measures.<sup>158</sup>

From the above, it is apparent that competent authorities have wide-ranging powers to intervene and supervise rehabilitation of contaminated sites. As a matter of principle, competent authorities are obliged to ensure that liable operators carry out necessary works.<sup>159</sup> However, the EL Directive provides a degree of flexibility where the authority is faced with difficulties in requiring operators to take action. Specifically, competent authorities are entitled to take preventive or remedial action themselves where the operator fails to take action as required, cannot be identified or is not required to bear the costs of preventive or remedial action under the Directive.<sup>160</sup> They may empower third parties to carry out these tasks.<sup>161</sup>

However, from an environmental protection perspective, the discretion afforded to competent authorities arguably falls short of what one might

156 Art 5(3) EL Directive.

157 Art 6(1), *chapeau*, EL Directive.

158 Art 6(2) EL Directive.

159 See Arts 5(4) first sentence and 6(3) first sentence EL Directive.

160 See Arts 5(4) second sentence and 6(3) second sentence EL Directive.

161 See Art 11(3) EL Directive.

expect to be undertaken by them in these circumstances. Specifically, the Directive leaves open the possibility of environmental damage not being rectified in these circumstances; competent authorities have no obligation to ensure that a contaminated site is to be in fact rehabilitated if an operator is not liable or able to pay. Arguably, such a position is not consonant with basic environmental protection principles underpinning EC environmental policy: notably, attainment of a high level of environmental protection and even the ‘polluter pays’ principle. As regards ‘polluter pays’, it is self-evident that persons causing damage (operators or intervening third parties) should bear, in the first instance, legal responsibility for clean-up operations. However, where such persons do not have legal responsibility for a particular reason established in the EL Directive, such as absence of fault on their part, or they cannot be identified by competent authorities, it is not clear that the rest of society should be allowed to escape the responsibility of ensuring rehabilitation of affected sites. In some sense, albeit in an indirect sense, society does bear a degree of responsibility in having legitimised the practice of occupational activities known to bear environmental risks. Viewed realistically, the ‘polluter pays’ principle involves a chain of responsibility, as opposed to focusing singularly on particular persons most directly responsible for environmental damage. Regrettably, the EL Directive does not reflect the fact that society in general, in addition to individual operators, bears some responsibility for the consequences of environmental damage. A ‘chain of responsibility’ approach would have been for the EL Directive to introduce requirements for competent authorities to ensure that, where the immediate polluter is unable to pay for the cost of remedial action, contaminated sites are to be subject to effective remedial action, as appropriate, in order for baseline conditions to be regained. As mentioned earlier,<sup>162</sup> the Commission’s original proposed directive in 2002 did contain a clear legal requirement for Member States to ensure that requisite preventive or restorative measures were carried out, irrespective of whether or not a particular operator is found liable and is able to pay for the restorative costs involved.

### ***12.3.5 Cross-border liability scenarios***

The EL Directive contains provisions relevant to where environmental damage affects more than one Member State. Article 15 of the Directive lays down a general duty on Member States to co-operate with one another with a view to ensuring that preventive and/or remedial action is taken in the event of such a situation occurring, including the requirement to provide information to affected Member States.<sup>163</sup> In addition, under this provision

<sup>162</sup> See section 12.2 above.

<sup>163</sup> See Arts 15(1)–(2) EL Directive.

Member States are entitled to recover costs incurred by them in relation to preventive or remedial measures taken in respect of damage occurring within their borders but not caused within them. In such instances, Member States must adhere to the procedural and other requirements set out in respect of recovery of costs under the Directive.<sup>164</sup> The EL Directive clarifies that its provisions are without prejudice to the existing EC rules on conflicts of laws.<sup>165</sup>

### *12.3.6 Legal effects of the EL Directive*

Following on from the discussion in Chapters 6–7 about the legal effects of EC directives in the national legal systems of Member States, it is clear that the effectiveness of the EL Directive will depend greatly on the extent to which Member States adhere to their obligations under Art 249(3) EC to transpose its provisions into national law correctly by the implementation deadline of 30 April 2007.

Without transposition legislation, the EL Directive will have limited legal effects at national level. For, in the absence of national legislation designed to transpose the EL Directive's provisions into Member States' domestic law, the obligations contained in the EL Directive may not be enforced directly against those operators who are private persons before the national courts.<sup>166</sup> The position is different in respect of public sector operators or those operators deemed to be an emanation of the state.<sup>167</sup> In accordance with the ECJ's jurisprudence on state liability,<sup>168</sup> as discussed in Chapter 7, private persons may be able to seek compensation for damage sustained by them as a result of a Member State's failure to transpose the EL Directive correctly. The application of EC rules on state liability in respect of the EL Directive is doubtful, though, given that one of the three central requirements for proving state liability requires a breach of EC law specifically intended to confer rights on individuals. It is clear that the EL Directive's primary aim is to protect the environment, and not grant specific rights for individuals as such. This is reflected by the fact that monetary compensation in respect of personal loss or damage is excluded from its remit, and the Directive does not confer procedural rights to individuals to enforce the liability provisions

<sup>164</sup> Art 15(3) EL Directive.

<sup>165</sup> Specifically Regulation 44/01 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L12/1) as amended by Regulation 1496/02 (OJ 2002 L225/13). See recital 10 to the preamble and Art 3(2) EL Directive.

<sup>166</sup> Directives may not be invoked directly against private persons under the ECJ's doctrine of direct effect of EC law, either by other private persons (e.g., Case 152/84 *Marshall (1)*) or by public authorities (Case 14/86 *Pretore di Salò*).

<sup>167</sup> See e.g., Case C-188/89 *Foster*.

<sup>168</sup> See e.g., Cases C-6, 9/90 *Francovich*.

before national courts or tribunals.<sup>169</sup> Moreover, under the ECJ's current jurisprudence on the doctrine of indirect effect of directives, as discussed in Chapter 6, it appears doubtful whether a competent authority may act on the basis that existing national legislation on environmental civil liability should be interpreted in line with the EL Directive's requirements, where this leads to the imposition or aggravation of liability of operators.<sup>170</sup>

Accordingly, the European Commission will have to be especially vigilant to ensure that the EL Directive's provisions are transposed correctly and on time into the national legal systems of the Member States, and make effective use of the enforcement proceedings available to it under Arts 226/228 EC in the event that Member States fall short of these basic requirements.

## 12.4 Environmental civil liability and the EU: concluding remarks

With its implementation deadline not yet elapsed, it is no doubt premature to draw any definitive conclusions on the legal apparatus used in the EL Directive. Its operation in practice remains to be seen. However, it is submitted that some comments may be made already at this relatively early stage of the Directive's career, specifically on the way in which its legal architecture has been constructed.

In a number of respects, it is clear that the EL Directive employs a unique and refreshingly pragmatically oriented approach in applying the legal concept of civil liability to an environmental context. Characteristics that one might associate traditionally with a civil liability framework, such as the element of monetary compensation and the predominant role of private persons holding perpetrators of civil wrongs to account, do not feature in the EL Directive. The orthodox remedy of monetary compensation is excluded from the range of available legal remedies. Instead, the Directive's remedies of preventive and remedial action are targeted at ensuring that actual or threatened environmental damage is rectified. A central role is allocated to competent authorities in enforcing the requirements of the EL Directive; the traditional reliance on the private plaintiff as the principal source for the prosecution of civil litigation is dropped.

These aspects in the EL Directive are to be welcomed, as they lend a far

169 On the other hand, it is also possible to construe the EL Directive in a different and broader perspective, namely that it crystallizes the EU's commitment of enhancing fundamental rights of citizens: see Art 37 of the Charter of Fundamental Rights of the Union which commits the Union to attain a high level of environmental protection and improvement to environmental quality in accordance with the principle of sustainable development.

170 See e.g., Case C-168/95 *Arcaro*. At the time of writing, the law on indirect effect leaves substantial doubt as to whether or not the ECJ's case law on limiting indirect effect of directives applies solely to a criminal liability context. See Chapter 6 of this book for details of this legal debate.

greater level of credibility to its environmental protection aims being achieved in practice. As far as remedies are concerned, the Directive is wholly justified in requiring operators to take action to prevent harm occurring and/or to restore damaged sites as far as possible to the environmental conditions they were subject to prior to the occurrence of damage. An award of monetary compensation alone may be inadequate to attain this task and/or might be directed to other purposes. The pivotal role assigned to competent authorities as principal enforcers of the EL Directive's requirements is justified for a number of reasons. Competent authorities are far better placed than private persons to secure and assess information relating to environmental damage. It is clear that public authorities usually have greater legal,<sup>171</sup> human and financial<sup>172</sup> resources as well as experience in this regard. In addition, the motivations of competent authorities will be usually in closer alignment with environmental protection aims than those of private litigants, whose aim may well be principally to secure financial recompense for damage sustained to their assets. The central involvement of public authorities in enforcing the Directive's liability provisions introduces a significant element of public law-type obligations and arrangements into the overall legal framework. As a consequence, the EL Directive should arguably be described as establishing a set of liability rules based on modern administrative legal principles and practice as opposed to classical principles emanating from the law of civil obligations (see also Jones, 2002, p 6; Lee, 2002, p 196).

Admittedly, the EL Directive does have a number of shortcomings, as is evident from the earlier detailed overview of its contents. For instance, the legislative instrument does not require operators to make provision for any specific type or level of financial cover in respect of an environmental incident. Neither does it specifically require operators to plan for emergencies in advance. However, arguably these aspects may well be taken up in practice, given that they tie in with the economic interests of operators seen in the light of the obligations imposed on them by virtue of the Directive. The Commission noted in its explanatory memorandum to its 2002 draft proposal for a directive that its own research had indicated that clean-up liability is already insurable within the EU and is accordingly available on the open market.<sup>173</sup> It intimated that it was not minded to introduce compulsory insurance cover based on caps, given that it was wary of setting limits too low to be consonant with the 'polluter pays' principal. The EL Directive requires the subject of financial security to be kept under review and assessed in the light of experience, so it is also clear that the Commission remains open-minded on this issue. A more significant shortcoming of the EL Directive is

171 For instance, through the use of investigatory powers established under public law, such as on-site inspections.

172 In terms of funding investigations and litigation.

173 COM(2002)17, p 9.

that it does not require competent authorities, acting on behalf of society in general, to ensure that environmental damage is remedied where operators or third parties escape liability. Arguably, this constitutes an omission on the EC's part to hold society to account where immediate polluters are excused from personal liability or cannot be found. On the other hand, it may well be the case that Member States may elect to ensure that their transposition of the EL Directive involves mandatory intervention by the competent authority or other publicly sponsored actors in such circumstances. Other problems with the Directive include the lack of guidance on evidential issues in cases of scientific uncertainty (that is, use of the precautionary principle) as well as the absence of provisions on the role of civil liability actions brought by private persons.

Notwithstanding these points, it would appear that the EL Directive represents a positive development in terms of enhancing the existing legal machinery on EC environmental law enforcement. It has established a legal framework that is suited to attend to environmental problems arising from instances of serious environmental damage that may be capable of being attributed to specific economic actors. It is now up to the Member States to see that its provisions are transposed into national law in a way that will enable the liability regime to operate effectively. The extent and manner in which Member States invest appropriate levels of resources into their designated competent authorities, in terms of legal, financial, technical and personnel resources, will have a significant bearing on the degree to which the EL Directive will be effective in practice.



## ENFORCEMENT OF EU ENVIRONMENTAL LAW BY NATIONAL AUTHORITIES (3): ENVIRONMENTAL CRIMINAL LIABILITY

Moves to promote co-operation at international level on the use of criminal law as a means to enforce environmental law have only relatively recently emerged onto the political agenda. So far, such discussions and legal developments have taken place predominantly within a European context, although various sources of international criminal law do target particular types of serious environmental crime.<sup>1</sup> This chapter will focus on the impact of various recent political and legal developments that have occurred within the EU to promote greater and more formal co-operation between its Member States in relation to addressing instances of serious environmental criminal conduct causing actual and potential grave harm to the environment and/or to human, animal and plant health. By way of initial background, attention will be devoted briefly to considering the influence of the Council of Europe in stimulating international co-operation and debate in this area.

### **13.1 Council of Europe Convention on the Protection of the Environment through Criminal Law (PECL Convention) 1998**

Prior to EU policy developments on environmental crime, the Council of Europe had been active in promoting discussion on establishing a framework for regional co-operation in this area since the beginning of the 1990s. These discussions culminated in the Council of Europe opening for signature in November 1998 the European Convention on the protection of the

<sup>1</sup> Such as the United Nations Convention on the Law of the Sea 1982 (Art 218 on marine pollution offences) and the Statute of the International Criminal Court 1998 (Art 8 on environmental war crimes). For an overview of developments in international environmental criminal law, see Birnie and Boyle, 2002, pp 284–285.

environment through criminal law<sup>2</sup> (hereinafter referred to as the PECL Convention).

The aim of the PECL Convention is to develop a common criminal policy on protecting the environment<sup>3</sup> and is the first international instrument of its kind on the subject.<sup>4</sup> Its main feature is the obligation on contracting parties in Art 2 to ensure that certain activities presenting risks to the environment are to be criminalised, in so far as they are committed intentionally.<sup>5</sup> Most of the activities targeted include those which are unlawful under existing national environmental law or contrary to a decision taken by a competent authority and which either cause death or serious personal injury or substantial damage to the quality of air, soil, water, animals or plants, or alternatively create a significant risk of harm taking place. In principle, Contracting parties are obliged to criminalise intended and grossly negligent conduct, having the option to extend criminal liability to situations where such activities are committed 'with negligence'.<sup>6</sup> Criminal culpability based on negligence may, however be excluded in limited cases (see Art 3(3)). In addition, the PECL Convention also targets other unlawful activities committed either intentionally or negligently, which risk adversely affecting the environment. Such acts include unlawful interference with protected habitats of wildlife or the unlawful handling or killing of protected flora or fauna, as well as the breach of legally binding environmental standards according to national law.<sup>7</sup> However, contracting parties are not required to criminalise such behaviour, having the option to apply other types of sanctions less punitive in nature. Specifically, such acts may be dealt with through 'administrative offences, liable to sanctions or other measures under ... domestic law'.<sup>8</sup>

This structuring of environmental offences reflects a notable shortcoming of the PECL Convention, in that it requires criminalisation of behaviour only where the conduct may be proved to have resulted in or is likely to result in substantial damage of some kind. It does not take a preventive and precautionary view in relation to activities considered inherently dangerous to the environment, but instead adopts an approach that requires concrete evidential proof of the actual or probable outcome of a significantly adverse result. This approach has the drawback of introducing an evidential hurdle that is not necessarily straightforward to establish; no guidance is provided

2 Council of Europe Convention No.172, of 4.11.1998. The text as well as an explanatory report are available on: [www.conventions.coe.int](http://www.conventions.coe.int).

3 See second recital to the preamble of the PECL Convention.

4 For detailed analysis on the convention, see Selin, 2003.

5 Art 2 also requires the criminalisation of aiding and abetting the European Commission of such acts (see Art 2(2)).

6 Art 3, *ibid*. Contracting parties have the option when ratifying to limit liability for Art 2 offences to situations involving 'gross negligence'.

7 Art 4, *ibid*.

8 Art 4, first para, *ibid*.

on what is meant by the term 'substantial'. In addition, it introduces a level of uncertainty that is beneficial to those found to have been responsible for carrying out activities deemed to give rise to a high level of risk to the environment. In effect, the threshold of 'substantial' damage introduces a *de facto* defence which would not otherwise apply necessarily in the context of environmental administrative law. As will be seen in the later sections of this chapter, the EC legislative initiative on environmental crime takes a more precautionary and proactive position with regard to this point, seeking to ensure that the trigger for criminal culpability is in alignment with that applicable in respect of breaches of EC environmental legislation.

Notwithstanding the limitation noted above, the PECL Convention also contains a number of positive features. Some particularly useful provisions are contained within the Convention that serve to flank the core Articles determining the scope of environmental offences. Specifically, these include clarification on the extent of criminal jurisdiction<sup>9</sup> of contracting parties. Jurisdiction for a contracting party is established where an offence is committed either on its territory, on board a vessel that flies its flag or has been registered in its territory, or where the offence is committed by one of its nationals outside its territory unless the conduct is carried out in a state that does not criminalise the behaviour. Articles 6–8 of the PECL Convention set down requirements relating to the range of sanctions to be used by contracting parties in respect of conduct outlawed by the Convention. Article 6 stipulates that the offences relating to death or serious personal injury are to be subject to criminal sanctions, taking into account the gravity of the offence, including custodial punishment and pecuniary sanctions. Contracting parties have the option to stipulate that reinstatement of the environment is to be used as an additional sanction.<sup>10</sup> Unless excluded at the time of signature or ratification, contracting parties must also confiscate 'instrumentalities and proceeds' relating to the offences.<sup>11</sup> In addition, the Convention also introduces a rather general and soft obligation with respect to corporate liability. Specifically, Art 9 requires contracting parties to adopt measures 'as may be necessary' in relation to corporate criminal or administrative liability, where contracting parties have not opted out of this requirement at the stage of signature or ratification. Article 11 of the PECL Convention is a particularly interesting provision, providing the option for contracting parties to make a declaration to the effect that they are to grant any group, foundation or association aiming at the protection of the environment the right to participate in criminal proceedings. Although purely facilitative and only general in nature, the Article sets down an interesting first precedent in international environmental criminal law in terms of promotion of the legal role of the non-governmental environmental organisation (NGEO) sector in the arena of

9 Art 5, *ibid*.

10 Arts 6 in conjunction with Art 8, *ibid*.

11 Art 7, *ibid*.

environmental criminal law enforcement.<sup>12</sup> Finally, the PECL Convention includes an important, if rather general, clause obliging contracting parties to afford each other ‘the widest measure of co-operation’ in the context of investigations and judicial proceedings concerning PECL Convention offences. This Article is especially important in laying secure legal foundations for international police and judicial co-operation in the context of cross-border environmental crime, namely where the perpetrators and/or effects of the activities are located in more than one jurisdiction.

As at the end 2005, the PECL Convention had been signed by 13 states.<sup>13</sup> However, only one of the signatories had proceeded to ratify the agreement.<sup>14</sup> Eleven of the signatories are EU Member States. In order to enter into force, the PECL Convention requires three ratifications or at least three signatures made without reservation as to ratification, acceptance or approval.<sup>15</sup> It has been suggested that the relatively slow generation of interest amongst the Council of Europe membership for the PECL Convention may be because of its general character and the fact that several Council of Europe member countries already employ many of its provisions.<sup>16</sup> The fact, though, that the Convention touches on sensitive policy issues closely identified with national sovereignty (that is, the area of criminal policy) is also surely another important factor to take on board here. In particular, several states may be wary of committing themselves to projects designed to harmonise minimum standards on criminal culpability, given that such issues are traditionally viewed as matters falling within the exclusive domain of national parliaments in accordance with orthodox perceptions of the foundations of democratic governance. However, such wariness is unwarranted in the case of the PECL Convention. For it is clear that the PECL Convention gives considerable discretion on the part of contracting parties to determine crucial aspects of criminal liability including the rules on criminal procedure as well as on sentencing. Moreover, the degree of harmonisation agreed on culpability is pretty limited and relatively uncontroversial, with a number of significant qualifications contained in the PECL Convention; for example: contracting parties are only obliged to target behaviour that is committed intentionally or with gross negligence (with exceptions), and culpability arises only in cases of actual or likely death or serious personal injury or ‘lasting’ environmental deterioration. Finally, it is clear that broad and proportionate moves to

12 Rather surprisingly and disappointingly, the EU legislative initiatives on environmental crime have not taken up this aspect, despite the fact that granting rights of legal standing to private persons features strongly in the EU’s agenda to implement the 1988 UNECE Århus Convention on access to information, public participation in decision-making and access to justice in environmental matters, as discussed in Chapter 8.

13 Austria, Belgium, Denmark, Estonia, Finland, France, Germany, Greece, Iceland, Italy, Luxembourg, Romania and Sweden.

14 Estonia.

15 Art 13, *ibid*.

16 Birnie and Boyle, 2002, p 283.

harmonise minimum standards on environmental criminal policy are justified, given the evident actual or potential transboundary impacts of serious environmental crime, whether this be in relation to the scope of environmental damage caused by a particular incident (for example, illegal discharge into a river cutting across international borders) or in relation to the cross-border movements of the perpetrator to escape environmental justice.

It does appear that there may be a realistic chance for the Convention to enter into force within the next few years, albeit that this would be rather belated. Indeed, very recent political and judicial developments within the EU on the area of environmental crime, as discussed in the next sections of this chapter, may well serve to increase interest on the part of several EU Member States for the entry into force of the PECL Convention.

### **13.2 EU policy developments on environmental crime: the political and constitutional backdrop**

As far as EU involvement in criminal matters is concerned, the position on the competence of the EU institutions to take measures on environmental crime has been relatively uncertain.<sup>17</sup> Until very recently, no jurisprudence of the ECJ existed on the question as to whether the EU is legally competent to enact criminal measures in the environmental or other common policy fields as set out under the provisions of the EC Treaty. However, in its landmark judgment on 13 September 2005 (Case C-176/03 *Commission v Council*), the ECJ held that the EU institutions are competent to enact EC legislative measures designed to harmonise certain aspects of criminal laws of the Member States in relation to environmental policy. The grounds and implications of the judgment, considered in 13.5.1, are profound and are not confined to the environmental sector. They also extend to other common policy areas under the EC Treaty that are silent on the issue of competence in relation to the enactment of criminal law measures (that is, they have not expressly excluded EC competence in this respect). Most of the Member State governments, though, have been of the firm opinion that criminal policy is a matter completely outside the range of activities that could be pursued under the auspices of the EC Treaty. It remains to be seen whether their views will be swayed by this judgment.

There were a number of grounds that appeared to lend support to the Member States' viewpoint that the EC does not have competence to harmonise aspects of criminal policy. In particular, the key provisions of the EC Treaty, listing the purposes and activities of the European Community<sup>18</sup> do

17 For a detailed overview of the historical background of EU policy developments, see Comte, 2003.

18 Arts 2-3 EC.

not refer to the creation of a common policy on crime. None of the common policies in the EC Treaty, including environmental policy, make any overt reference to the possibility of enactment of measures of a criminal law nature. In addition, there are specific references in EC Treaty provisions relating to particular common policies which expressly exclude the possibility of EC measures affecting the application of national criminal law and administrative justice: Title X on Customs Co-operation (Art 135 EC) and Title II Financial Provisions on Fraud (Art 280(4) EC). These exclusions have been made in relation to two common policies recently incorporated within the EC Treaty<sup>19</sup> that have well-established and obvious close connections with criminal law enforcement work. Clearly, the intention behind these specific exclusions was to ensure that Member States retained exclusive competence in criminal policy in these areas. It was not considered necessary to introduce exclusions right across the board to cover other common policies. Without doubt, Member States considered that no legal competence is impliedly vested in the EC to harmonise criminal law in other common policy sectors governed under the auspices of the EC Treaty, not least given the absence of any clear or definitive moves on the part of the EU legislature to indicate that this would be expected or required.

Moreover, the only specific references to co-operation within the EU membership on criminal matters are contained within the third pillar of the Union's constitutional arrangements, namely in the provisions of Title VI to the Treaty on European Union on Provisions on Police and Judicial Co-operation in Criminal Matters (Arts 29–42 TEU). The objective of Title VI is set out in Art 29 TEU, which stipulates that the Union's objective is to provide citizens with a high level of safety within an area of freedom, security and justice by developing common action amongst the Member States in criminal matters and by preventing and combating racism and xenophobia. That objective is stated in the provision to be achieved, *inter alia*, by preventing and combating crime, organised or otherwise, through 'approximation' where necessary, of rules on criminal matters in the Member States, in accordance with Art 31(e). Article 31(e) TEU states that common action on judicial co-operation in criminal matters is to include 'progressively adopting measures establishing minimum rules relating to the constituent elements of criminal acts and to penalties in the fields of organised crime, terrorism and illicit drug trafficking'. Article 34(2) TEU requires the Council of the EU to take measures to promote co-operation, using the appropriate form and procedures set out in Title VI. This particular provision stipulates that, to that end, the Council may, acting unanimously on the initiative of any Member State or the Commission, adopt a number of different measures including framework decisions, as set out in Art 34(2)(b). Article 34(2)(b) TEU confirms that the Council may:

19 By virtue of the Treaty of Amsterdam 1997.

(b) adopt framework decisions for the purpose of approximation of the laws and regulations of the Member States. Framework decisions shall be binding on the Member States as to the result to be achieved but shall leave to the national authorities the choice of form and methods. They shall not entail direct effect;

The operability of Title VI provisions is subject to the important qualification that they do not encroach on the provisions contained in the EC Treaty. In particular Art 29 TEU stipulates that it applies 'without prejudice to the powers of the European Community'. Article 47 TEU confirms this by stating that nothing in the Treaty on European Union shall affect the treaties establishing the European Communities or the subsequent international accords that have modified or supplemented them. This raises the question of whether the EC Treaty provisions, in the absence of provisions to the contrary, confer implied competence on the EU's legislative institutions to pass measures relating to criminal law in order to promote the common policies contained in the EC Treaty.

Several Member States consider that the EC Treaty does not imply such legislative powers on the part of EU institutions, including in relation to the area of environmental policy. The balance of powers between the EU institutions and Member States, as struck under the auspices of the EC Treaty, might appear to support the view that Member States would be exclusively competent to decide whether or not to apply criminal law to any particular common policy in the absence of an EC Treaty conferring express powers on the European Community to approximate aspects of criminal policy. In particular, the division of labour between the EU institutions and Member States in relation to the fulfilment of the aims of the EC Treaty has been carefully and sensitively refined over the years on the basis that, whilst the overall objectives and requirements of EC common policies are to be determined at the EU institutional level, Member States have the responsibility to determine how those objectives and requirements should be achieved at national level. This position appears to be reinforced by Art 249(3) EC, which provides the definition of an EC directive, the principal legislative vehicle for the crystallization of many EC common policies, including EC environmental policy. Whilst an EC directive is binding on the Member States to whom it is addressed, it leaves them the choice as to form and method of implementation. The conclusions that several Member States have drawn from this provision is that EC directives reaffirm the general position on the relationship between the European Community and Member States under the EC Treaty, namely that they retain competence to determine how to implement EC law at national level. Specifically, it was widely assumed that Member States retained exclusive competence to determine whether, for instance, national administrative, civil and/or criminal law would be used to enforce EC norms at national level.

The ECJ's jurisprudence on the balance of competencies and responsibilities between Member States and the Community prior to its judgment in Case C-176/03 *Commission v Council* also appeared to be in alignment with this view. Whilst the Court had gone as far as holding that the general duties of good faith under Art 10 EC require Member States to ensure that EC legislative requirements intended to apply to the activities of natural and/or legal persons are enforced by effective, dissuasive and proportionate sanctions (for example, Cases C-68/88 *Commission v Greece*; C-77/97 *Smithkline Beecham*; C-186/98 *Nunes* and C-354/99 *Commission v Ireland*), its case law did not given any clear indication that any particular type of sanction could be required to be applied under EC law in any given case to enforce a specific EC legislative requirement. Indeed, the Court had confirmed earlier in its case law that the areas of criminal law and criminal procedure were in general matters for the Member States (for example, Case 203/80 *Casati*). The Court did confirm on a number of occasions that such laws may be affected by Community law, but this jurisprudence appeared merely to restate the basic principle that Member State rules are subject to the principle of supremacy of EC law, not to infer that the EC had competence to regulate specifically matters of criminal law or criminal procedure (see for example, Case C-226/97 *Lemmens*). However, until its groundbreaking judgment in September 2005, the Court had not had the opportunity to adjudicate specifically on the question as to whether Art 175 EC could be interpreted so as to imply the promulgation of measures affecting the area of criminal liability.

Member States have also considered that the retention of exclusive competence over criminal policy may be inferred from the principles of subsidiarity and proportionality enshrined in Art 5 EC. Article 5(2) EC states that in areas not falling within the exclusive competence of the European Community (such as environmental policy), the Community is to take action, in accordance with the subsidiarity principle, 'only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community'. This provision is flanked in Art 5 with related duties on the Community to act within the limits of its powers<sup>20</sup> as well as to adhere to the principle of proportionality, namely to confine its actions to what is necessary to achieve the objectives of the Community.<sup>21</sup> The Protocol on Subsidiarity and Proportionality,<sup>22</sup> as annexed to the EC Treaty in 1997 by the Treaty of Amsterdam, fleshes out in more detail the interpretation of the application of the principles of subsidiarity and proportionality in relation to EC activities. Paragraph 7 of the

20 Art 5(1) EC.

21 Art 5(3) EC.

22 Protocol No.30 (Subsidiarity and Proportionality).



Protocol sets out general guidelines on the arrangements that are to be employed at national level for the implementation of EC policies:

Regarding the nature and extent of Community action, Community measures should leave as much scope for national decision as possible, consistent with securing the aim of the measure and observing the requirements of the Treaty. While respecting Community law, care should be taken to respect well established national arrangements and the organisation and working of Member States' legal systems. Where appropriate and subject to the need for proper enforcement, Community measures should provide Member States with alternative ways to achieve the objectives of the measures.

The above EC Treaty provisions on subsidiarity and proportionality are broadly worded, and their practical interpretation depends largely on political as opposed to legal judgment. As such, they offer little in the way of determining definitively whether the EU has any competence under the EC Treaty to enact criminal policy measures, for instance in the area of environmental protection. The thrust of the provisions appears to imply that, in principle, competence should lie at Member State level, although there may be exceptions where either the scale or effects of a proposed measure indicate their attainment is better served by using the instrument of EC legislation. In particular, it is evident that an unduly wide variety of approaches and degree of severity of sanctions used in the various legal systems of the Member States to address serious violations of EC environmental legislation, could undermine the principle that a high level of environmental protection should be attained throughout the EU. In addition, it could be argued that very wide differences in responses to environmental threats could undermine the original core EC Treaty objective, which was to ensure a realisation of a single market within the combined territories of the Member States, where the laws of the various national legal systems would not distort the conditions for competition or unduly impair circulation of factors of production within the EU area.<sup>23</sup> In addition, it is not evident that the actual and potential transboundary nature of environmental pollution is best served through retention of exclusive autonomy for Member States over criminal law. The actual and potential transboundary implications of serious instances of pollution, environmental as well as economic, provide sound reasons for justifying moves towards effective international co-operation in this area. The policies of a single state are invariably going to fail to ensure that the environmental and health problems arising from such activities are dealt with satisfactorily, given that the environment neither knows nor

23 See in particular Arts 2, 3(c) and (g), and 14 EC.

respects any international frontier and given that the '1992' single market project<sup>24</sup> has resulted in the practical abolition of systematic internal border controls on movement of goods across most areas of the Union.

### **13.3 The EU's third pillar initiative: the 2003 Framework Decision**

Given the initial uncertainty of the EU's constitutional position on competence in relation to criminal policy combined with the political sensitivities of several Member States in relation to the issue of any development of criminal policy under the aegis of the EC Treaty, it is not surprising that the first policy initiative on the subject of environmental criminal emerged under the auspices of the third pillar to the EU constitutional framework, namely Title VI of the Treaty on European Union (TEU). The European Council had originally placed the issue of intra-EU co-operation on environmental crime onto the political agenda of the Union at its summit in Vienna in December 1998. It endorsed the Action Plan<sup>25</sup> of the Council of the EU and European Commission on implementation of the EC Treaty's and Treaty on European Union's provisions on realising an area of freedom, security and justice within combined territories of the Member States, which specifically indicated that environmental crime, with its 'strong cross-border implications', should be approached in an equally efficient way throughout the Union.<sup>26</sup> However, the subject of environmental crime was not subsequently followed up in the context of programmes to realise an area of freedom, security and justice within the EU.

Instead, by way of independent initiative on the part of the Danish Government, a draft Framework Decision on combating serious environmental crime<sup>27</sup> was presented for the consideration of Member States under the auspices of Title VI TEU (Arts 29, 31(e) and 34(2)(b) as the legal basis), drawn up on the basis of the framework adopted by the PECL Convention. By way of reaction, and just before the Council came to decide on the third pillar measure, the European Commission in early 2001 decided to adopt a rival proposal under the auspices of the first pillar of the EU constitutional framework, namely a Draft Directive on protection of the environment through criminal law.<sup>28</sup> The Commission considered that the objects and requirements of the draft framework decision encroached on the powers vested in the EC institutions over environmental affairs as set out in Title XIX of the EC Treaty (principally, in this context Arts 174–175 EC). It was of the opinion that the development of co-operation within the EU in the field of environmental

24 See Art 14 EC.

25 Vienna Action Plan (OJ 1999 C19/1).

26 See point 18 of the Action Plan, *ibid*.

27 OJ 2000 C39/4, 11.2.2000.

28 COM(2001)139final, 13.3.2001.

criminal policy should be furthered on the basis of European Community law.<sup>29</sup> The effect of the European Commission proposal was to delay the Council's deliberation of the third pillar proposal and stimulate Member State reflection on the EC initiative. Both draft measures proceeded through their respective legislative deliberative processes in parallel. In January 2003, the Council of the EU adopted the third pillar proposal as Framework Decision 2003/80/JHA on the protection of the environment through criminal law<sup>30</sup> (hereinafter referred to as the Framework Decision). In its preamble to the Framework Decision, the Council notes that the number of votes within the Council of the EU was insufficient to meet the required threshold in order to approve the European Commission's first pillar initiative.<sup>31</sup> In addition, the Council submitted that it considered that the form of a Framework Decision based on the third pillar was the appropriate legal instrument to use.<sup>32</sup>

In several respects, the Framework Decision closely aligns itself with the aims and provisions set out in the PECL Convention. This is not surprising, given that both international instruments follow an intergovernmental as opposed to supranational Community approach to the issues relating to environmental criminal policy. Most notably, like the PECL Convention, the Framework Decision requires proof of evidence of actual or likely significant human or environmental harm as an integral element of its framework on intentional criminal culpability.<sup>33</sup> It requires Member States to criminalise both intentional as well as seriously negligent conduct.<sup>34</sup> It also requires the punishment of persons who participate in or instigate criminal conduct.<sup>35</sup> In addition, it makes specific provision for the application of extradition procedures as well as requiring Member States to assert jurisdiction in relation to criminal conduct of their own nationals committed extraterritorially.<sup>36</sup>

As a result of the legal proceedings brought by the European Commission against the Council of the EU over the correct legal basis for the promulgation of environmental criminal measures at EU level, the Framework Decision as crafted has been annulled and is now of predominantly historical interest. It may be the case, though, that some of its provisions, such as those on corporate liability, may be of some influence in the context of any prospective legislative negotiations on the Draft EC Directive on the protection of the environment through criminal law. In addition, the

29 See also European Commission Staff Working Paper 'Establishment of an *acquis* on criminal sanctions against environmental offences' (SEC(2001)227, 7.2.2001).

30 OJ 2003 L29/55, 27.1.2003.

31 Namely, a qualified majority as required under the co-decision procedure in Art 251 EC.

32 See recital 7 of the preamble to the Framework Decision.

33 Art 2 Framework Decision.

34 See Art 3, *ibid*.

35 Art 4, *ibid*.

36 Art 9, *ibid*.

Member States remain free to pass a third pillar measure on aspects of criminal policy that fall outside the scope of EC competence under Art 175 EC, such as in relation to jurisdiction, co-operation in relation to investigation of prosecution of cases with multi-jurisdictional dimensions as well as extradition issues.

### **13.4 Draft EC Directive on the Protection of the Environment through Criminal Law (Draft PECL Directive)**

In early 2001 the European Commission came forward with a proposal for a Directive on the protection of the environment through criminal law<sup>37</sup> (hereinafter referred to as the Draft PECL Directive). After receiving comments from the European Parliament<sup>38</sup> and in the absence of any from the Council, the Commission decided to present a slightly revised version of the Draft Directive at the end of September 2002.<sup>39</sup> Unless otherwise stated, this section will refer to the amended draft text.<sup>40</sup>

In its explanatory memorandum to the initial version of the Draft PECL Directive, the European Commission identifies a number of reasons for the need for its initiative. Specifically, the memorandum considers that existing sanctions as currently established by the Member States are not always sufficient to secure full compliance with Community law; in particular, it points out that not all the Member States criminalise serious breaches of EC environmental legislation.<sup>41</sup> The questionable state of EC environmental law enforcement in the Member States is also underlined by the relatively high propensity of complaints to the Commission about alleged instances of infractions of EC environmental legislation by Member States as well as the considerable number of enforcement proceedings brought against Member States by the Commission under Arts 226/228 EC (Comte, 2004, p 44). The European Commission notes elsewhere that there is evidence of organised crime in two environmental sectors in particular: illicit trade in protected species and illicit shipment and disposal of hazardous waste.<sup>42</sup>

The memorandum also notes that in several instances of ‘severe non-observance’ of EC environmental legislative requirements, perpetrators of such breaches are not subject to sufficiently dissuasive and effective penalties,

37 COM(2001)139, of 13.3.2001.

38 OJ 2003 C127E/120 (Document ref: P5\_TC1-COD(2001)0076).

39 COM(2002)544final, 30.9.2002. In accordance with Art 250(2) EC, the Commission is entitled to revise legislative proposals so long as the Council has not acted.

40 Regrettably, there is no official consolidated version of the amended draft. All the legislative documents leading up to and including the amended draft proposal may be located on the EU's Pre-Lex website: [www.europa.eu.int/prelex](http://www.europa.eu.int/prelex)

41 COM(2001)139, p 2.

42 SEC(2001)227 Staff Working Paper, p 4. See also Comte, 2004, p 44.

notwithstanding the existing general duties incumbent on Member States under Art 10 EC to ensure that effective, dissuasive and proportionate sanctions are to be applied, as recognised in well-established ECJ jurisprudence.<sup>43</sup> The Commission goes on to consider that in many cases only criminal penalties will be able to provide a sufficiently dissuasive effect, bearing in mind their relatively strong quality and expression of social disapproval as well as the fact that administrative or civil sanctions may well be effectively redundant in situations of insolvency or where the financial attraction of committing illicit pollution is particularly strong.<sup>44</sup> In addition, the Commission also recognises that criminal prosecution and investigatory procedures normally offer a wider and more effective range of powers to competent national authorities charged with the responsibility of policing criminal norms as opposed to those of an administrative or civil nature. In addition, the Commission notes that a criminal investigation and prosecution process provides an additional safeguard of impartiality, in that the investigating and/or prosecuting authorities are not likely to have been involved in issuing permits to the defendant in connection with their activities which have been related to environmental criminal damage. The explanatory memorandum reveals that the aims of the Draft PECL Directive are distinct from those underpinning the PECL Convention and Framework Decision. Whereas the EC initiative is intended to enhance the enforcement of EC environmental legislation, the intergovernmental instruments are designed to set down minimum standards in relation to serious environmental crime (see Faure, 2004, p 28).

The reasons proffered by the European Commission to justify its proposal are of particular interest in that they focus exclusively on environmental protection interests that resonate with those identified in the EC Treaty, such as the commitment to ensure a high level of environmental protection throughout the Union<sup>45</sup> and the 'polluter pays' and preventive principles.<sup>46</sup> The classic reasons for Community intervention, such as potential and actual transboundary impacts of environmental pollution as well as their potentially adverse implications for the operation of the single market, are not expressly cited in support of the legislative initiative, neither in the explanatory memorandum nor in the preamble to the Draft PECL Directive itself.

The concentrated environmental protection focus of the Draft PECL Directive is reflected in its purpose, identified in Art 1:

43 Such as Cases C-77/97 *Smithkline Beecham* and C-186/98 *Nunes*.

44 The Commission has been criticised for the lack of evidence on its part that criminal law is specifically required to enhance effective application of EC environmental law: see Faure, 2004, p 27.

45 See Arts 2 and 174(2) EC.

46 As contained in Art 174(2) EC.

The purpose of this Directive is to ensure a more effective application of Community law on the protection of the environment by establishing throughout the Community a minimum set of criminal offences.

The provision does not refer to ancillary purposes often cited in connection with EC environmental protection. It could, for instance, have referred to the need to ensure the erasing of actual or potential distortions to the operation of the single market triggered by virtue of wide variations in terms of severity of sanction applied at national level to enforce Community environmental standards; in addition, it could have also referred to the need to address transboundary implications of environmental pollution in an effective and equitable manner. In an evident implicit reference to the principle of subsidiarity, the Draft PECL Directive clarifies that its remit is solely to ensure effective application of EC environmental legislation; this affirms that the enforcement of national environmental laws adopted independently of EC law and in areas not covered by EC environmental legislation remains within the exclusive purview of Member State jurisdiction.

#### ***13.4.1 Environmental offences under the Draft PECL Directive***

The core provision of the Draft PECL Directive is Art 3, which requires Member States to criminalise a number of breaches of EC environmental law. This Article (in paras (a)–(g)) stipulates a list of activities to be treated as criminal offences, in so far as they constitute intentional or seriously negligent breaches of certain EC environmental rules. The rules are those contained in a list of 51 pieces of EC environmental legislation set out in an Annex to the Draft Directive. Under the Draft PECL Directive, the participation in or instigation of such activities are to be criminalised by Member States.<sup>47</sup> The activities concern:

- (a) the discharge of hydrocarbons, waste oils or sewage sludge into water;
- (b) the discharge, emission or introduction of a quantity of materials into air, soil or subsoil or surface or underground water and the treatment, disposal, storage, transport, export or import of hazardous waste;
- (c) the discharge of waste on or into land or into water, including the operation of a landfill;
- (d) the possession, taking, damaging, killing or trading of or in protected wild fauna and flora species, parts thereof or derived products;

<sup>47</sup> Art 4 of Draft PECL Directive.

- (e) the significant deterioration of a protected habitat;
- (f) trade in or use of ozone-depleting substances;
- (g) the operation of a plant in which a dangerous activity is carried out or in which dangerous substances or preparations are stored or used.<sup>48</sup>

Compared with the Draft PECL Directive, the approach taken in the Council's annulled Framework Decision 2003/80/JHA on establishing criteria for criminal environmental offences was significantly different. Taking its lead from the 1998 Council of Europe's PECL Convention, the EU Framework Decision sought to impose a number of qualifications to the offences it wished to see created at national level. Operators of intended activities targeted by the Decision were to be subject to criminal liability only if these result in actual or probable significant injury to persons and/or significant deterioration and/or damage to the environment.<sup>49</sup>

With one exception,<sup>50</sup> the Draft PECL Directive does not provide for any threshold of significant harm, but instead predicates liability on any thresholds of significant impact established in the EC environmental legislation referred to in the Annex. There are clearly well-founded reasons for this approach. In a number of instances, a mere breach of an environmental requirement set out in EC environmental legislation will be sufficient to give rise to liability, without reference to whether or not actual harm is proven to be likely or actually occurs. An example would be exceedances of pollution limit values set down in the Dangerous Substances Directive 76/464 or failure to comply with the prohibition on uncontrolled disposal of waste oils in the Waste Oils Directive 75/439 as amended. The explanatory memorandum to the Draft PECL Directive clarifies that its approach to culpability reflects the degree to which EC environmental law represents a serious risk for the environment. In addition, whereas the threshold of liability is clear and legally certain in the Draft PECL Directive, there is considerable ambiguity and margin of discretion left to Member States under the terms of the Framework Decision.<sup>51</sup> The introduction of requirements to prove criminal liability, additional to those required under existing EC environmental legislation to prove the existence of a breach of law, may well serve to undermine in practice the stringency of the existing *acquis communautaire* and therefore undermine the prospects for enhancing the effectiveness of enforcing an environmental protection regime (Comte, 2003, p 153).

48 Art 3 of Draft PECL Directive.

49 See Arts 2–3 of Framework Decision 2003/80/JHA.

50 Art 3(e) Draft PECL Directive.

51 The Framework Decision does not define the terms 'substantial deterioration' or 'substantial damage' in relation to environmental elements.

The criteria for culpability are stricter under the Draft PECL Directive in another sense. Article 3 of the Draft Directive requires Member States to criminalise particular breaches of EC environmental legislative rules. It would appear to be immaterial for this purpose whether or not any given environmental rule incorporated within an EC directive has been already transposed correctly into national law. Article 3 requires Member States to prosecute private operators for breaches of EC environmental rules, even in situations where the Member State concerned may not have transposed the particular EC environmental directive containing the rule correctly, or at all, into national law. If the Draft PECL Directive is correctly transposed into national law as required, then it will enable Member State public authorities charged with enforcing its requirements, to have the power to bring prosecutions against persons found to have acted either intentionally or with serious negligence in contravention of the EC environmental legislation listed in the Annex to the Draft Directive. Article 3 therefore has the potential to ameliorate the impact of the rule set down in the ECJ's jurisprudence that EC directives may never be used either to determine or aggravate criminal liability (see for example, Case C-168/95 *Arcaro*).<sup>52</sup> This would significantly enhance the potential effectiveness of EC environmental law enforcement, as public authorities would be able to carry out supervision of EC environmental legislation in a comprehensive manner by virtue of the transposition legislation relating to the Draft PECL directive. In contrast, the Framework Decision qualifies culpability in relation to all but one<sup>53</sup> of its environmental offences on the basis that the activities in question must be 'unlawful', which would have the effect of ruling out any conviction based on a violation of an EC environmental directive that had not already been transposed into national law.

The Draft PECL Directive and the Framework Decision differ as regards their respective lists of offences. Whereas the Framework Decision addresses itself to activities relating to the production of ionising radiation and management of radioactive substances, the Draft PECL Directive does not seek to create any environmental offences concerning nuclear-related activity. The explanatory memorandum notes that such activity would have to be addressed under the auspices of the Euratom Treaty, indicating that the latter is *lex specialis* so that Art 175 EC would not constitute an appropriate legal basis for any measure relating to criminalisation of activities involving civil nuclear power. On the other hand, the Framework Decision, in contrast

52 The rule concerning 'inverse effect' of EC directives, as discussed in Chapter 6.

53 The exception is contained Art 2(a) of the Framework Decision, which requires automatic criminalisation of the discharge, emission, or introduction of a quantity of substances or ionising radiation into air, soil or water which causes death or serious injury to any person.



with the Draft PECL Directive, failed to criminalise significant deterioration of a protected habitat.

### ***13.4.2 Sanctions under the Draft PECL Directive***

In addition to defining the parameters of environmental offences, the other main strand to the Draft PECL Directive concerns its provisions on the application of sanctions to persons found to have committed an offence under Art 3. In reiterating the general legal obligation, already established in EC law by virtue of ECJ jurisprudence, on Member States to ensure that violations of its terms by persons are to be punished by ‘effective, proportionate and dissuasive’ sanctions, Art 4 of the Draft PECL Directive makes an important distinction between natural and legal persons in this respect. As regards natural persons, the draft legislative provision requires Member States to use specifically criminal sanctions, including custodial punishment ‘in serious cases’.<sup>54</sup> Such cases are not defined in the text, leaving this as a matter for the Member States’ criminal legal systems to determine.

As far as legal persons are concerned, Member States are not required to apply criminal sanctions but instead are to provide ‘where appropriate’ for the following range of penalties, which may also be applied to natural persons: fines, exclusion from state assistance, temporary or permanent disqualification from commercial practice, placement under judicial supervision, and winding up orders.<sup>55</sup> In common with the Council of Europe’s PECL Convention and the EU Framework Decision, the Draft PECL Directive does not specifically require criminal penalties to be applied to legal persons. Given the range and depth of punitive-type sanctions provided, this arguably makes little significant difference in practice,<sup>56</sup> bearing in mind that custodial punishment is not an option. The Draft PECL Directive could arguably have been far clearer about the position of company employees and particularly senior executive officers in affirming, as do the PECL Convention<sup>57</sup> and EU Framework Decision,<sup>58</sup> that corporate liability should not exclude criminal liability of natural persons.

### ***13.4.3 Degree of proposed harmonisation under the Draft PECL Directive***

It is immediately apparent from the preparatory documents relating to and actual text of the Draft PECL Directive that the European Commission has taken care not to include any provisions that might clearly be said to encroach on several aspects that would normally be considered to constitute

54 Art 4(a) PECL Directive. 55 Art 4(b), *ibid*.

56 For a different view, see Faure, 2004, p 23.

57 Art 9(2) PECL Convention.

58 Art 6(2) Framework Decision.

matters falling within the exclusive sovereignty of the Member States. From the outset of this particular environmental policy project, the Commission has considered that there are significant limits on the extent of EC competence in the area of criminal policy. The Commission does not consider that all aspects of environmental criminal law and procedure may be subject to harmonisation under the auspices of Art 175 EC. Instead, it has been of the view that, as a matter of general principle and subject to narrow exceptional circumstances, Member States retain exclusive jurisdiction over criminal policy under the legal order of the EC Treaty. The Commission considers that, exceptionally, Community competence may be implied where it may be demonstrated that criminal law is effectively the only genuine means of guaranteeing that EC law is enforced.<sup>59</sup> However, before the landmark ruling of the ECJ in relation to the inter-institutional conflict over the legality of the Framework Decision, this legal standpoint had not been confirmed by the ECJ.<sup>60</sup>

The Draft PECL Directive reflects very much the European Commission's concerns not to exceed the limits of jurisdiction currently afforded to the EU legislative institutions in the field of environmental criminal policy. First, and quite properly in accordance with the principle of shared competence applicable to environmental matters under the EC Treaty, the draft text focuses only on the enforcement of European Community environmental legislation. In addition, it is particularly important to recognise that the draft instrument leaves a good deal of discretion to the Member States over various key aspects relating to criminal liability issues affecting EC environmental legislation. Notably, Member States retain jurisdiction to determine criminal procedures and types of criminal sanctions subject to the standard qualifications of effectiveness, proportionality and dissuasiveness, as well as having discretion to apply non-criminal sanctions in the case of defendant corporations. Moreover, key elements of culpability are left for Member States to determine unilaterally; notably definitions of intent, serious negligence, participation and instigation. The Commission has been guided here by the principle of subsidiarity<sup>61</sup> as well as the (related) requirements of Art 249(3) EC relevant to the definition of a Community directive. In addition, the Commission has recognised that under the current EU legal framework, competence in relation to matters concerning territorial jurisdiction, extradition as well as international co-operation in policing and prosecution, are matters to be addressed under the third as opposed to first pillar, namely Title VI of the Treaty on European Union,<sup>62</sup> so long as specific

59 COM(2001)227, European Commission Staff Working Paper, p 4. See fn. 42.

60 For overviews on the historical legal position, see Krämer, 2002a, pp 82 *et seq* and Comte, 2003, p 150.

61 See explanatory memorandum to Draft PECL Directive: COM(2001)139, p 4.

62 *Ibid*, p 5.

competencies in these areas have not been transferred from the third pillar to the first pillar.<sup>63</sup> In several respects, the Commission's legislative proposal is a measured attempt at harmonisation in the environmental criminal law field, leaving several key aspects of policy to be determined at national level.

### 13.5 The ECJ's ruling in Case C-176/03 *Commission v Council*

As a result of the Council's promulgation of the Framework Decision in 2003, the European Commission decided in March 2003<sup>64</sup> to take legal action against the Council. Specifically, the Commission brought an action before the ECJ under Art 35 of the Treaty on European Union 1992 to annul the Framework Decision, and was supported in its efforts by both the European Parliament<sup>65</sup> and advisory EC Economic and Social Committee.<sup>66</sup> Under Art 35(6) TEU the ECJ has jurisdiction to review the legality of framework decisions and decisions passed under the auspices of Title VI TEU on Police and Judicial Co-operation in Criminal Matters in actions brought by a Member State or the European Commission. The action must be brought within two months of the publication of the measure on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this treaty or of any rule of law relating to its application, or misuse of powers.

The grounds of legal objection centred on lack of competence and treaty infringement, the Commission submitting that various provisions contained in the Framework Decision encroached on the existing legislative powers vested in the European Community under the auspices of the EC Treaty, in violation of Art 47 TEU. It is important to note the significance of Art 47 TEU. This Article specifies that provisions contained in the Treaty on European Union 1992, which include the provisions in Title VI TEU as well as measures passed under their auspices, shall not affect the EC Treaty or its subsequent amendments. It therefore requires that the existing range of legal

63 See Art 42 TEU (so-called 'passarelle' provision).

64 See European Commission Rapid Press Release: IP/03/461, Brussels, 31.3.2003. See summary in Official Journal of the EU: OJ 2003 C135E/21.

65 Prior to the European Commission's initiative, the Parliament had initially given a favourable opinion in July 2000 in relation to the Danish intergovernmental initiative (OJ 2001 C121/494). However, when the Commission's proposed PECL Directive was submitted to it, the Parliament considered that the EC, as opposed to the Member States under the third pillar, had competence to adopt legislation on environmental crime (see EP Opinions of 9.4.2002 on the Draft PECL Directive and Framework Decision, Docs T5-0147/2002 and T5-0151/2002 respectively).

66 The Committee considered its right to be consulted on draft Community environmental legislation under Art 175 in conjunction with Art 262 EC had been infringed. It has no expressly guaranteed consultation rights in relation to proposals made under the auspices of the Title VI TEU, the EU's third pillar.

powers vested in EC institutions under the EC Treaty be preserved and that the legislative powers created under the Treaty on European Union may not be used in any way that might encroach on the actual or potential reach of the policy jurisdiction afforded to the European Community. Accordingly, the fact that Title VI TEU introduced specific new powers to develop political co-operation in areas of criminal policy may not be used as an argument to imply that EC Treaty powers have been effectively transferred to an intergovernmental arena.

Of course, the crucial legal question to be answered in this litigation was to determine to what extent the EC Treaty confers on the EU legislative institutions powers to enact measures in the sphere of environmental criminal policy. Essentially, at least five major factors had to be addressed by the ECJ in coming to its decision on this issue. First, the EC Treaty does not expressly state one way or another whether powers to harmonise matters of criminal policy are vested in the EU's legislative institutions. Would the Court imply from this that the Member States had definitively decided that no criminal policy powers could be inferred? Second, two provisions introduced relatively recently into the EC Treaty framework contain clauses which exclude the passage of Community measures that 'concern the application of national criminal law or the national administration of justice': Art 135 EC (customs co-operation) and Art 280 EC (common policy to counter fraud of EC funds). The Court needed to assess what legal conclusions could be drawn from these exclusions, in terms of their impact on EC competence in the environmental policy sector. Two conflicting interpretations could be drawn from these particular provisions. On the one hand, it could be argued that the Member States had seen fit to exclude competence over criminal policy affecting two particular common policies, implicitly accepting that such powers could be read into other common policy provisions in the EC Treaty. On the other hand, it could be inferred from these specific exclusions that the Member States had seen the need to exclude criminal policy competence only in these particular common policy areas, given that only these particular common policy fields bear a clearly proximate relationship with matters of criminal law enforcement. This latter interpretation would imply that the other common policies do not have any sufficiently direct nexus with criminal policy to warrant an interpretation that decisions over crime fall within their scope. Third, prior to this litigation, the ECJ had developed its case law on Member State implementation responsibilities under Art 10 EC on the footing that the mode of implementation was, in principle, a matter for them and not the Community to determine. At the same time, the Court's jurisprudence had evolved to clarify that this principle of procedural autonomy was subject to the caveat of effectiveness, proportionality and equivalence (see Chapter 7). Would it be consistent for the Court to accept that the EU has implicit competence to harmonise criminal policy affecting EC common policies? Fourth, unlike the EC Treaty, the Treaty of European Union

contains specific provisions on police and judicial co-operation in criminal matters. Would the ECJ be able to infer from these developments in respect of the EU constitutional framework that the Member States intended that criminal policy competence be split between the first and third pillars, namely between the EC Treaty and Title VI TEU, or that EU co-operation on criminal policy be solely conducted under the auspices of Title VI? Fifth, if the ECJ were to accept that the EU has competence to pass EC measures on environmental crime, the Court needed to determine to what extent the Community had implied competence so to do.

The case has been one of the most hotly contested in recent years, with no less than 11 Member States applying to the ECJ to be able to make interventions in support of the defendant, the Council of the European Union.<sup>67</sup> It is not difficult to see the reasons for the controversy. What was at stake was an issue that determined the degree to which the EU legislative institutions have EC Treaty powers to intervene in a policy field traditionally and fundamentally associated as being within the exclusive sovereign domain of the nation state, namely the legal possibilities for the nation state to be able to use criminal law and penal sanctions against its own nationals and other persons located within its borders. The effect of accepting that the EU has such implied powers in this domain would mean that national parliaments of the Member States would, at least to some extent, become sidelined or bypassed in the crafting of such policy, with all the implications this would entail in relation to arguments and debates over democratic accountability and EU governance. This raises the difficult question as to what extent should the key EU legislative decision makers, namely the European Parliament, as a directly elected parliamentary chamber, and the collectivity of directly elected governmental representatives in the form of the Council of the EU, be considered adequate surrogate institutions to national parliaments on these matters? In addition, the controversy is heightened given the lack of any specific mandate provided in the EC Treaty for its supranational institutions to engage in environmental criminal policy development. To what extent would Member States accept judicial interpretation of the implied powers of the EC in such a sensitive policy field? One is reminded of the famous judgment of the German Constitutional Court (Bundesverfassungsgericht) in the *Brunner*<sup>68</sup> case in October 1993 over whether the Treaty on European Union 1992 was compatible with the German Constitution, namely its Grundgesetz (Basic Law). Although the German Constitutional Court held that in its view the balance of powers struck by the TEU between the EU and Member States was one that in fact did not undermine the legal integrity of the

67 Denmark, Finland, France, Germany, Greece, Ireland, Netherlands, Portugal, Spain, Sweden and the UK.

68 *Brunner v The European Union Treaty* [1994] 1 CMLR 57.

Basic Law,<sup>69</sup> it sent a warning shot across the bows of the EU ship. Specifically, it issued this warning concerning future extensions to implied powers of the Community:

Inasmuch as the Treaties establishing the European Communities, on the one hand, confer sovereign rights applicable to limited factual circumstances and, on the other hand, provide for Treaty amendments . . . this distinction is also important for the future treatment of individual powers. Whereas a dynamic extension of the existing Treaties has so far been supported on the basis of an open-handed treatment of Article [308 EC] as a competence to ‘round off the Treaty’ as a whole, and on the basis of considerations relating to the ‘implied powers’ of the Communities, and of Treaty interpretation as allowing maximum exploitation of Community powers (*effet utile*), in future it will have to be noted as regards provisions of enabling provisions by Community institutions and agencies that the Union Treaty as a matter of principle distinguishes between the exercise of sovereign power conferred for limited purposes and the amending of the Treaty, so that its interpretation may not have effects that are equivalent to an extension of the Treaty. Such an interpretation of enabling rules would not produce any binding effects for Germany.<sup>70</sup>

The German Constitutional Court was referring to the use of Art 308 EC, which provides the possibility for the EU to take appropriate measures to attain one of the objectives of the Community and the EC Treaty has not provided the necessary powers. The operation of Art 308 EC is subject to unanimity being obtained within the Council of the EU, effectively providing each Member State with a veto over whether such powers should be granted. In the context of the litigation brought before the ECJ in Case C-176/03, the key legal question was to determine whether Art 175 EC confers the EU with competence to pass EC measures on environmental crime. Decision-making under the auspices of Art 175 EC is to be conducted on the basis of qualified majority voting in the Council, which means that, in theory at least, a minority of Member States may be outvoted and subject to legally binding measures on matters falling within the scope of that provision. Seen from this perspective, the constitutional implications of the litigation on environmental criminal policy competence are all the more profound, given that the standard mode of Council decision-making is by way of qualified majority voting under the auspices of the co-decision legislative procedure,<sup>71</sup> which

69 As required by Art 38 of the German Basic Law.

70 Para 99 of *Brunner* judgment, op cit.

71 Art 251 EC.

is the procedure applied in respect of the vast majority of EC common policies.

Prior to the ECJ's ruling, Advocate-General Colomer gave his Opinion<sup>72</sup> as *amicus curiae* to the ECJ on 26 May 2005. The Advocate-General considered that the Member States had exceeded their powers under Title VI TEU in enacting the 2003 Framework Decision, and recommended to the ECJ that this measure should be annulled. At the heart of his analysis, he considered that the EC Treaty had not ruled out the possibility of EC measures being passed on criminal policy. In his view, criminal policy could not necessarily be considered to be, in absolute terms, a substantive policy in its own right, but one that may also be seen in instrumental terms, as a means of supporting or implementing the execution of a particular distinct policy goal, such as protection of the environment.<sup>73</sup> Whilst accepting that as a matter of principle national legislative authorities were in the most appropriate position to assess the feasibility, appropriateness and effectiveness of a 'punitive response', in paragraph 49 of his Opinion he qualifies this in stating:

It must be recalled that upholding Community law is the responsibility of the Community institutions, although nothing prevents them from urging the Member States to penalise conduct which contravenes the law. It is only in so far as the most appropriate response cannot be provided – because the [EC] institutions do not have the information necessary to take a decision – that the task falls to the national legislatures. Conversely, if there are self-evident criteria for determining the 'effective, proportionate and dissuasive penalty', there is no substantive reason preventing the party which has competence in the sphere from making the decision.

The Advocate-General proceeded to examine whether environmental protection, a European Community policy field, required 'the shield of criminal law'.<sup>74</sup> First, he took into account the prominence that environmental protection had achieved within the context of international relations, including that of the EC. In so doing, he recognised that over time environmental protection policy had become an 'essential objective of the Community system', a matter of global concern and a subject that affects fundamental rights and interests of citizens. Having confirmed that environmental protection constituted an integral and key policy of the Community, he proceeded to analyse whether powers to harmonise environmental criminal policy existed within

72 As at the time of writing, not yet reported. Available on the EU's EUR-LEX website ([www.europa.eu.int/eur-lex](http://www.europa.eu.int/eur-lex)) and ECJ's website ([www.curia.eu.int](http://www.curia.eu.int))

73 See fn. 37 of his Opinion.

74 Cited in para 51 of his Opinion.

the legal framework of EC competence on environmental affairs. His analysis was based on a straight comparison with environmental policies pursued at national level:

States use criminal codes as a last resort in defending themselves against the threat to the values which sustain coexistence, and have in recent years determined that certain types of conduct which damage the natural environment are to be criminal. If the aim is to attain a high level of protection and to improve the quality of life (Article 2 EC), it seems reasonable that Community law, through the powers entrusted to the institutions in order to achieve those ends, must in certain cases avail itself of criminal penalties as the only effective, proportionate and dissuasive response.<sup>75</sup>

The Advocate-General, in concert with the arguments proffered by the European Commission, considered that administrative responses would not ensure appropriate protection of the environment in instances of serious damage. He accepted that the criminal quality of a penalty would represent extra pressure on prospective polluters capable of inducing them to comply with environmental standards relating to activities highly dangerous to the environment.<sup>76</sup> As regards the scope of European Community competence on environmental criminal policy, the Advocate-General submitted that the EC had jurisdiction to require Member States to apply criminal punishment in respect of serious violations of EC environmental law, given that administrative measures might well not serve as an effective deterrent to such behaviour. This reasoning tied in with the established jurisprudence of the ECJ that the Community was entitled to ensure that effective, proportionate and dissuasive measures are used at national level in order to implement Community objectives.<sup>77</sup> He comments:

The power to impose civil, administrative or criminal sanctions must be classified as an instrumental power in the service of the effectiveness of Community law.<sup>78</sup>

He dismissed the argument that Title VI TEU had any legal bearing on his interpretation of EC competence. In his view, Title VI provisions did not confer 'universal jurisdiction' on Member States to harmonise national criminal law, but instead were limited to conferring limited powers relating to certain offences of a transboundary nature, as opposed to providing jurisdiction on the harmonisation of national criminal laws in general.<sup>79</sup> In addition,

75 Para 72, *ibid.*

76 Para 74, *ibid.*

77 See Paras 83–84, *ibid.*

78 Para 84, *ibid.*

79 Paras 80–82, *ibid.*



the Advocate-General considered that the exception provisions in Arts 135 EC and 280 EC did not exclude the creation of Community rules on criminal law, but merely the power to apply them.<sup>80</sup> Having made these points, it is was but a short step for him to conclude that the Framework Decision had contravened Art 47 TEU in encroaching on the jurisdiction of the EC, in having sought to approximate the national criminal legal systems of the Member States in relation to environmental crime.

Following on from the Advocate-General's Opinion, the European Commission was ultimately successful in its legal action. The ECJ decided in a judgment of 13 September 2005<sup>81</sup> that the Framework Decision infringed Art 47 TEU and that it should be annulled (Case C-176/03). In determining that legal issue, the ECJ, like the Advocate-General, had to address the crucial question as to whether and to what extent, if at all, the European Community has competence to enact measures concerning environmental crime. Regrettably, the reasoning of the ECJ is extremely brief and compressed, the material passages of its judgment spanning fewer than 20 brief paragraphs. This is surprising, given the legal complexities as well as constitutional sensitivities involved.

However, in broad terms it is clear that the ECJ's judgment is in close accordance with the Advocate-General's Opinion. Whilst holding that as a general rule, neither the rules of criminal law or procedure fall within the Community's competence,<sup>82</sup> the Court proceeded to confirm that this position does not completely exclude Community jurisdiction over environmental criminal policy:

However the last-mentioned finding [that as a general rule, neither criminal law nor the rules of criminal procedure fall within the Community's competence] does not prevent the Community legislature, when the application of effective, proportionate and dissuasive criminal penalties by the national authorities is an essential measure for combating serious environmental offences, from taking measures which relate to the criminal law of the Member States which it considers necessary in order to ensure that the rules which it lays down on environmental protection are fully effective.<sup>83</sup>

The above paragraph of its judgment underlines that the ECJ focuses predominantly if not exclusively, as does the Advocate-General in his Opinion, on the importance of the Community being able to ensure effective

80 Para 78, *ibid.*

81 Case C-176/03 *Commission v Council*. As at the time of writing, not yet reported. Available on the EU's EUR-LEX website ([www.europa.eu.int/eur-lex](http://www.europa.eu.int/eur-lex)) and ECJ's website ([www.curia.eu.int](http://www.curia.eu.int)).

82 Para 47 of ECJ ruling. 83 Paragraph 48, *ibid.*

implementation of its policies as an integral component of the common policy on environmental protection based in Title XIX of the EC Treaty. The Court essentially implies a power of the EC in Art 175 EC to determine the mode of implementation of its environmental policy, where it considers that only one particular implementation strategy will be able to fulfil the objectives of that policy effectively. In this sense, decisions on environmental criminal policy become subsumed within the scope of the common policy, to the extent that such decisions serve to promote the most effective implementation of that policy. This means in practice that, according to the Court, the EC has competence to enact measures on environmental criminal policy where the policy involves combating serious environmental criminal conduct. It is implicit from the Court's brief legal analysis that it accepts the deterrence analysis presented to it by the European Commission. The ECJ considered that it could not be inferred from the exclusion clauses contained in Arts 135 and 280 EC that harmonisation of criminal law under the auspices of the legal framework pertaining to the Community's environmental policy sector should be ruled out.<sup>84</sup> However, the ruling does not explain how the ECJ comes to this conclusion.

### *13.5.1 Appraisal of the ECJ's ruling in Case C-176/03*

Both Advocate-General Colomer's Opinion as well as the ECJ's ruling are problematic from a number of legal perspectives. In particular, both legal analyses fail to address the textual evidence in the EC Treaty and the Treaty on European Union that suggest Member States have not specifically and unequivocally intended to transfer competence to the Community legislative institutions in relation to criminal policy. It is evident from the historical evolution of the EU that Member States have consistently and indeed increasingly asserted the importance of delimiting the express as well as implied powers of the EC to the extent necessary to fulfil EC Treaty objectives.<sup>85</sup> Such concerns stem from the legitimate fundamental premise that the EU's political parameters should be determined ultimately by the Member States as masters of the treaties that constitute the legal foundations of the EU. Criminal policy is a matter commonly considered as one of the most central and fundamental elements for the construction, maintenance and development of a nation state. Recognised as one of the most powerful levers of governmental power over citizens, the use of criminal law within democratic states has been inexorably subject to national parliamentary controls as a means of entrenching a fundamental constitutional check on the exercise of

<sup>84</sup> Paragraph 52, *ibid.*

<sup>85</sup> Most notably expressed in the form of the subsidiarity principle incorporated into the EC Treaty by virtue of the Treaty on European Union 1992.

executive power. Given this context, it is striking and indeed surprising that neither the Advocate-General nor the ECJ seek to address the clear concerns and implications for democratic accountability in their analysis of the case.

The Advocate-General's reasoning is questionable from a number of perspectives. First and foremost, he accepts without question the proposition that the remit of Community environmental protection policy in relation to criminal policy should be subject to a test of effectiveness alone. He does not address the more fundamental issue that the Member States have not accepted unequivocally the transfer of sovereign powers to the Community in the area of criminal policy. Instead, he employs a federalist framework of analysis in making comparisons with the practice of Member States in relation to environmental crime. Such reasoning fails to address the fact that the EC is not akin to a federal state system, but instead is founded on a unique system of integration between its constituent Member States based on a unique confederal model of governance, which only to a limited extent shares characteristics with that of a nation state system. In addition, his analysis of the impact of the exclusion clauses in Arts 135 and 280 EC is unconvincing. The clauses could not sensibly have been incorporated within the EC Treaty with a view to excluding the Community from being involved solely in the practical application of criminal measures. The Member States would have taken this as read, given the orthodox and well-understood position of the European Community and national institutions in relation to their respective responsibilities for implementing EC law. It is evident that a logical reading of those clauses, given the broader constitutional and political backdrop to the relationship between the EC and Member States in respect of the fulfilment of Community objectives, was that Community competence should not interfere in any respect with national criminal law in those particular policy fields.

The ECJ's judgment has similar shortcomings to those of the Advocate-General's. It effectively oversimplifies the question of legal interpretation placed before it. Whilst the approach of the ECJ undoubtedly served to promote the effective application of the Community's common policy on environmental protection, it is evidently unsafe from a democratic accountability perspective for the Court to assume that approximation powers on environmental criminal policy may be taken as implicitly incorporated within the range of policy competencies vested in the EC legislature under Art 175 EC. Notably, it cannot be unambiguously inferred from the EC Treaty's text that Member States intended this to happen. The ECJ should have been especially reticent in being prepared to make such a finding of law, not least given the political and national constitutional and civil liberty sensitivities involved. Moreover, the effect of the ECJ's decision is to confirm that such a transfer of competencies has been made by implication to the EC on the basis of qualified majority voting in the Council. This means that a Member State government and its parliament(s) may be outvoted on the issue as to

whether personal conduct should be criminalised. The position is further compounded by the fact that in practice, the ECJ's controversial judgment is effectively entrenched within the system of EU governance, given that unanimity on the part of the Member States is required to amend the EC Treaty and amend the effects of such an ECJ ruling.

A far more convincing approach of the ECJ would have been to have taken on board the broader constitutional implications of its decision, with a view to ensuring that its interpretation of the EC Treaty was in full accordance with its democratic underpinnings. Instead, the analysis adopted by the ECJ (and Advocate-General) appears to have focused only on one element of the legal factors involved, namely the need to establish that powers vested in supranational institutions in the EC Treaty are interpreted so as to ensure that these are able to be carried out as effectively as possible. In accordance with its long-standing teleological approach to interpreting Community law, the ECJ has consistently sought to draw out a meaning providing the most effective means to achieve the aims and objectives underpinning the particular rules of law (the *effet utile* style of reasoning).<sup>86</sup> Such a method of statutory interpretation is clearly very well established for the purposes of construing Community law, and it is clear that the Court is drawing on this interpretative technique in the litigation concerning Community powers in relation to environmental criminal policy. Considered from this perspective, the ECJ's analysis appears to hold some legal merit. Notably, the Draft PECL Directive does appear to take a serious account of the requirement to focus on the need to demonstrate good reasons to justify the imposition of criminal liability for breaches of Community environmental legislation. In some respects, the *effet utile* style of reasoning ties in with the principle of proportionality, given that its application involves the EU legislature to be required to ensure that implied powers are used only to further or enhance common policy objectives and measures.

However, what the ECJ and Advocate-General fail to do is to address the implications for democratic governance that flow from such an interpretation. Without any evidence of an express or clearly implied transfer of powers from nation state to supranational system of governance based on majority voting in the context of such a constitutionally sensitive area, it is highly problematic to apply the *effet utile* style of reasoning without heavy qualification and caution. It would have been appropriate for the ECJ to acknowledge the evident democratic challenges posed by an implied legal basis of Art 175 EC, which does not require unanimous voting in the Council (that is, does not provide Member States with an opportunity to veto such

86 For comments on the ECJ's approach to statutory interpretation, see Craig and De Búrca, 1998, pp 86–95 and Hartley, 2003, pp 79–83.

a proposed measure). It is noteworthy in this respect that the roles of national parliaments and electorates have been considerably enhanced in recent years in the EC Treaty precisely in order to promote greater levels of democratic accountability of decision making at EC level.<sup>87</sup> Given these circumstances, it would have been more appropriate for the Court to consider how best to proceed in the light of both factors; namely, *effet utile* and democratic accountability. On the one hand, the *effet utile* approach lends support for the view that a certain amount of implied powers to approximate criminal policy could be legitimately inferred from Art 175 EC. It is plausible to consider that the criminalisation of conduct perpetrated with intent or gross negligence that risks causing or actually causes serious damage to the environment would enhance the effectiveness of existing mechanisms intended to enforce EC environmental legislation. In particular, it would not only signal the depth of social disapproval for activities and therefore carry an educational and moral message, but would open up opportunities to deter such activities more effectively through the use of more intense investigatory powers and severe penalties. On the other hand, the concern regarding democratic accountability lends support for the view that the application of Art 175 EC would restrict national sovereignty in a novel and fairly radical manner that is insufficiently supported by the text of the EC Treaty. As master of the treaties, it is the Member States who have to approve any move from national electoral decision-making over policy to the level of a supra-national construction of *demos* based on qualified majority voting. The ECJ's ruling effects such a move without the clear support of the Member States. Accordingly, the conclusion drawn by Commission President Barraso from the ECJ's ruling, namely that in his view the judgment strengthens democracy and efficiency in the European Union,<sup>88</sup> is highly questionable.

One possible alternative legal solution to the dispute that would have sought to reconcile the interests of effectiveness and accountability could have been for the ECJ to have required that a special *sui generis* legislative process be applied under the auspices of the EC Treaty to environmental criminal matters. The Court could have adjudicated that the co-decision procedure under Art 175 EC would be applicable in that, so far as possible, it is commensurate with democratic accountability requirements needed to be respected in this case. This would imply that the Council would have to decide environmental criminal policy decisions under Art 175 EC on the basis of unanimity and not qualified majority vote. Such an outcome would

87 See in particular Art 205(4) EC, as introduced by virtue of The Treaty of Nice 2001 and the Protocol (9) to the EC Treaty on the role of national parliaments, annexed to the EC Treaty by virtue of the Treaty of Amsterdam 1997.

88 As quoted in the European Rapid Press Release 'Court of Justice strengthens democracy and efficiency in European Community lawmaking' IP/05/1136, Brussels, 13.9.2005.

accommodate both factors important in the interpretation of Community competence: *effet utile* as well as democratic accountability. Specifically, whilst under this legal formulation environmental criminal matters would fall under the auspices of the EC Treaty and not Title VI TEU, they would be decided in accordance with existing legitimate expectations on the part of Member States that they have the option to veto any proposed measures to harmonise criminal policy in relation to environmental protection. Conceivably, Art 308 EC might have been considered as a possible legal basis by the ECJ for Community approximation measures. However, sole reliance on Art 308 EC would not be appropriate, given that this would result in a downgrading of the European Parliament's legislative position in relation to such a policy.

As their respective legislative procedures are mutually incompatible, it might be considered legally impossible to apply both Arts 175 and 308 EC as a joint legal basis. Previous ECJ jurisprudence indeed lends support for this view (Case C-300/89 *Titanium Dioxide*). However, the combination of the two EC Treaty Articles into a hybrid form would nevertheless appear to present a potentially reasonable solution in the circumstances. Such a solution would have strong resonances with previous ECJ jurisprudence when the Court was faced with democratic accountability issues in connection with ascertaining the legal basis of Community environmental legislation. Specifically, in Case C-300/89 *Titanium Dioxide*, the ECJ held that the factor of increased involvement of the European Parliament in one of the potential legal bases for Community action on the environment was material in determining that Art 100A of the EC Treaty (now Art 95 EC) should be used instead of Art 130r EC (now Art 175 EC) for the promulgation of Directive 78/176 on titanium dioxide waste. In other contexts involving issues related to democratic accountability of EC action, the ECJ has been prepared to apply special unwritten legal procedures in order to accommodate these concerns. Accordingly, in Cases 294/83 *Les Verts* and C-70/88 *European Parliament v Council*, the ECJ was prepared to imply legal standing for a particular European parliamentary grouping and for the European Parliament respectively to be able to challenge EC institutional conduct that affected their respective legal interests, even though such rights of action were not expressly set down in the EC Treaty at the material time when the plaintiffs wished to file their actions for annulment with the Court.

However, it is submitted that even if the ECJ were to have interpreted a special EC legislative procedure to be applicable in this case in order to retain the national veto, it is not evident that constitutional courts of the Member States would necessarily have been prepared to accept such a compromise position. For example, this is evident from the strong position taken by the German Constitutional Court on the extension of implied powers for the Community in the *Brunner* case, as referred to earlier.

### 13.6 Prospects for EU environmental criminal law?

At the time of writing, it is too early to predict with any degree of certainty the legal and political implications of the ECJ's ruling in Case C-176/03 *Commission v Council* in terms of the future progress and direction of EC environmental criminal policy. The indications are, though, that the ECJ judgment may well represent all but a pyrrhic victory for the European Commission which brought annulment proceedings as well as the European Parliament which supported it in taking legal action. Through litigation pursued before the ECJ they have ensured that any policy developments on measures to harmonise substantive aspects of environmental policy will have to be channelled through the first pillar decision-making mechanisms of the EU, namely under the auspices of Art 175 EC. However, any such measures are subject to the approval of the Council of the EU by way of qualified majority vote, and it is not evident yet that such a majority exists.

There are good reasons to suspect that the Member States, as represented in the Council of the EU, might well maintain their considerable reluctance to accept environmental criminal policy co-operation on the basis of the first pillar of the EU's constitutional framework. In particular, it would be surprising if Member States did not take into account the fact that they may well face substantial domestic constitutional as well as political difficulties in being able to implement a PECL directive into national law. An interpretation of the ECJ in favour of Community competence would be unlikely to provide sufficient authority in itself. The recent rejection in mid-2005 by France and the Netherlands of the EU Constitution agreed to by Member State governments in 2004 signals that European electorates are increasingly cautious and sceptical about accepting further moves to intensify European political integration. Needless to say, the reaction in certain quarters of the United Kingdom's press to the judgment has been predictably severe in the extreme.<sup>89</sup> The UK Government appears to be reluctant to change its view that the Draft PECL Directive exceeds the competence afforded to the EC under Art 175 EC.<sup>90</sup> In addition, even if Member States were to agree to the passage of EC legislation on environmental criminal liability, it is quite possible that a number of the Member States such as Germany may well face domestic legal constitutional difficulties in being able to transpose such legislation into national law. This in turn could raise serious questions about the legal certainty and validity of such Community legislation and jeopardise

<sup>89</sup> *The Times* newspaper's leading article of 14.9.2005 entitled 'Legal Trespass' considered that the ECJ has 'gravely undermined the sovereignty of EU states' and described the judgment in the following caustic and exaggerated terms: 'Democracy yesterday suffered a grievous defeat in a court whose contempt for sovereignty verges on the criminal'.

<sup>90</sup> As indicated in the following report in *The Times* newspaper on 13.9.2005: 'Landmark ruling gives Brussels the power to set criminal law'.

the fundamental principle of uniformity of application of EC law within the European Union.

As a result of such considerations, it is quite possible that several EU Member States may now look to the Council of Europe's PECL Convention instead of the EU as the means for furthering regional international co-operation on measures designed to tackle serious environmental crime. In addition to being based on an intergovernmental footing, the PECL Convention also incorporates provisions on matters that an EC initiative may not embrace, such as those on jurisdiction, procedural aspects, prosecution management as well as extradition. In this sense the PECL Convention has the distinct advantage of being a regional international legal instrument in Europe capable of addressing issues on environmental criminal policy in a far more cohesive and comprehensive manner than any single EU measure could. Under the current constitutional framework of the EU, various aspects of policy co-operation over environmental criminal policy would have to be founded on distinct legal bases and legislative procedures, depending on whether proposals covered policy areas addressed within the scope of Art 175 EC or Title VI TEU, as clarified by the ECJ. The diverse legislative procedures would culminate in distinct pieces of legislation concerning the same policy field, each with its own separate policy agenda as well as legal effects. The political and legal relationship between the two instruments would be complex. The bifurcated nature of EU decision-making processes involved in relation to environmental criminal policy does not lend itself to readily comprehensible, effective or transparent policy development (see Comte, 2003, p 153). However, it is unrealistic from a political perspective to expect that the Member States will in the foreseeable future contemplate any strategy intended to unify the legal basis for EU action around Art 175 EC,<sup>91</sup> given the current lack of collective political will amongst the EU Member States to deepen European legal integration generally within the political context and legal framework of the EU. In any event, the Council of Europe Convention is close to entry into force, requiring but two more ratifications as at the time of writing. This is likely to occur far more quickly than any resolution of the complex political and legal implications that flow as a result of the ECJ's ruling in Case C-176/03 *Commission v Council*. For a number of reasons, political, legal as well as practical, it would appear more fruitful to pursue European regional co-operation on environmental criminal policy within the forum of the Council of Europe than the European Union. Whilst the PECL Convention undoubtedly is a less effective instrument for tackling serious environmental crime in terms of political and legal impact than the current Draft PECL Directive proposed by the European Commission under Art 175 EC, there at least appears a greater likelihood of the former entering

91 E.g., by transferring existing Title VI TEU competencies to the first pillar under Art 42 TEU.



into force and being internalised within the national legal systems of the EU Member States.

Yet, notwithstanding these factors, it is also conceivable that Member States might be persuaded to accept the legal interpretation of the ECJ on Community competence,<sup>92</sup> although this is doubtful. The new political dynamics surrounding the change from 15 to 25 Member States since May 2004 is likely to play a major role in this regard. However, the political picture has not had sufficient time to settle in order to facilitate the prediction of an outcome on that front. Whatever collective action the EU Member States decide to take in the immediate to medium-term future, it is bound to be a fascinating period for this particular area of emerging EU environmental politics and law. Finally, although the European Union Constitution 2004 does offer the prospect of a unified single legislative procedure for harmonisation of environmental criminal liability at EU level on the basis of qualified majority voting,<sup>93</sup> the prospects for the EUC's ratification by all Member States now look bleak given the recent rejections by the French and Dutch citizens in referenda held in May and June 2005 respectively on the Constitution.

92 A view held by Faure, 2004, p 18.

93 See Arts III-271 and 272 EUC relating to the Constitution's Section on Judicial Co-operation in Criminal Matters in its third part.

## EU ENVIRONMENTAL LAW ENFORCEMENT: REFLECTIONS

As part of its analysis of the various EU legal arrangements that provide the framework for the enforcement of EU environmental law, this book has sought to assess the extent to which this framework is adequate in harnessing the primary actors interested in enforcement work. Specifically, its exploration of the field has considered the roles of the European Commission, private persons and Member State national authorities. Whereas the Commission has almost exclusively assumed the mantle of responsibility for EC environmental law enforcement for a considerable number of years, it is evident that private persons and national authorities have recently acquired, and are in the stage of acquiring, significant powers under EC law to become more actively and effectively engaged in law enforcement work. This shift in terms of power and responsibility is to be welcomed, as it has always been highly unrealistic as well as conceptually problematic to assume that the Commission, on its own and in its current state, is both capable and suited to fulfil the challenging task of ensuring due application of EC environmental legislation throughout the territory of the European Union.

This is not to deny that the Commission has a key role to play in enforcement of EC environmental law. On the contrary, there are some good reasons to support the view that this should remain the case. In particular, given its supranational and therefore central institutional status within the polity of the EU, the Commission is arguably well-suited to ensuring that Member States' national laws accord with EC environmental legislation. The system employed from the outset of the EU to require Member States to notify the Commission of their national legislation designed to implement EC directives is both logical and effective. The Commission's services are in a good position to supervise and ensure that the transposition of EC environmental directives is carried out by Member States. Independent from Member State interests, the Commission's role of scrutinising national transposition legislation gives Member States confidence that supervision will be carried out on the basis of equal treatment and more effectively than would be the case under a system of peer review between the Member States themselves.

However, the Commission's law enforcement function faces a number of problems and limitations in other respects.

From a practical perspective, it is clear that the powers afforded to the Commission under the infringement procedures contained in Arts 226 and 228 EC are not as effective as they might be. In a number of respects, it could be said that the Commission is being forced to work with one hand tied behind its back. First, the infringement procedures are unduly cumbersome and slow to take effect in practice. Member States are provided with too much time to ensure that their laws comply with EC rules. The pre-litigation phase is overly deferential to the defendant Member State, in requiring the Commission to issue it with two formal written warnings before an application may be made to the ECJ. In practice, this often transpires to be three warnings with the issuing of an informal 'pre-letter of formal notice' by the Commission prior to the commencement of the infringement procedure. Only one warning should be required. In non-conformity cases this is underlined by the fact that the Member States have already had a considerable period of time granted by each directive to allow for transposition to take place. Second, the Commission is not vested with any specific powers to carry out on-site investigations into suspected cases of bad application of EC environmental law. As a consequence, its legal services are wholly reliant on evidence supplied to them by complainants and national authorities before they will usually be in any position to assess whether a case should be brought under Art 226 EC. This is totally unsatisfactory, given that private persons (as complainants) will not usually be vested with any legal powers to inspect sites and it may be the case that national authorities may, for political reasons, be reluctant to intervene. The conferral of investigative powers to the Commission for environmental casework, along the lines granted to its services in the competition law field since the early 1960s, is long overdue. A Commission power to undertake surprise inspections of installations and other sites suspected of being the locus for EC environmental law infringements would lend the current system of law enforcement a much-needed element of deterrence and credibility. Third, the Commission's services dealing with environmental infringement casework are understaffed, with two lawyers (if lucky) attending to all infringements for a Member State. One has to bear in mind here that complaints against Member States in connection with implementation of EC environmental legislation number amongst the highest for any policy sector (31.1 per cent in 2004). Unless the situation regarding human resources is radically improved, the Commission will continue to be overstretched in dealing with its infringement casework or be forced to make controversial changes to its current approach to assessing cases. If the position over the number of staff within the Commission's Environment Directorate-General's Legal Unit for infringements remains the same, the likelihood is that the Commission will focus increasingly on dealing with non-conformity cases, with less resources being devoted to 'bad

application' casework. Such a development would be highly unwelcome, bearing in mind the often very considerable financial and legal obstacles that complainants may face in taking legal action at national level and the possibility that national authorities might not be in a position to take enforcement action themselves (because of resources issues or political factors). Fourth, the limitations inherent in supranational supervision of EC law should not be overlooked either. It is obviously not realistic to expect the Commission to intervene in all bad application cases throughout the EU, now numbering 25 countries. In terms of bad application cases, the Commission's role should be sensibly confined to addressing infringements on the grounds which lend themselves to being addressed at EC level. These could include cross-border pollution scenarios, 'precedent'-type cases involving important unresolved issues of EC environmental law, cases involving gross violations of EC environmental legislation and/or of core legal requirements, and cases where otherwise it is evident that no legal action is likely to be taken at national level. In its recent Communication on Better Monitoring of the Application of Community Law<sup>1</sup> the Commission, in 2003, publicly indicated that it intends to prioritise its Art 226 casework generally by concentrating on infringements that undermine the foundations of the rule of EC Law, undermine the smooth functioning of the EU's legal system, and infringements consisting in transposition failures. However, it is not yet clear in practice how these guidelines are to apply to environmental cases.

The impact of the 'second round' infringement action under Art 228(2) EC has been relatively modest, and this comes down to the structuring of the enforcement procedures themselves. From a positive perspective, the introduction of financial penalties for breaches of EC obligations under this provision offers a far more effective form of sanction to be applied in respect of breaches EC environmental law than simply the traditional judicial declaration of illegality from the ECJ. Unfortunately, declarations of illegality do not in practice cut much ice, at least in the short to medium term after a judgment has been handed down by the Court of Justice. Sadly, experience shows that the imposition of financial sanctions are far more likely to concentrate the minds of national governments than international court judgments on the rule of international law. Minds were certainly concentrated at the recent judgment of the ECJ on the application of Art 228(2) EC (Case C-304/02 *French Fishing Controls (2)*), in which France received a daily penalty of €57,761,250 for each six months it continued to fail to adhere to an earlier 'first round' judgment against it (relating to implementation of EC measures requiring the imposition of conservation measures in the fishing industry) and a lump sum fine of €20 million. No less than 16 Member States elected to make observations to the ECJ in this case. However, behind

1 COM(2002) 725.

the headline figures lie some real concerns with this procedure. For instance, the onus of proof in second round proceedings is on the Commission to prove non-compliance with a first round judgment. This confers an unwarranted benefit on defendant Member States, who should instead have the burden to demonstrate compliance with a first round judgment. In addition, the penalties applicable under the Art 228(2) procedure may be set only with reference to the time after first round judgment, not after the date when it was found by the ECJ that an infringement of EC environmental law had occurred. Finally, it appears fairly clear that Member States are able to play the system, in stringing out second round proceedings up to the last minute until the elapse of the deadline for responding to the second round reasoned opinion. If they comply before that deadline, no sanctions may be imposed even though a lot of unnecessary environmental damage may have been perpetrated as a result of the Member State's non-compliance up until that point. Given these and other structural weaknesses in the second round procedure, further reform of the infringements procedures is required. The 2004 European Union Constitution takes a step in the right direction by proposing to enable the ECJ to impose fines in first round non-communication cases. However, much more still needs to be done.

The institutional structure of the European Commission also presents problems from a law enforcement perspective. From the discussion in Chapter 5, it is evident that the multiplicity of tasks incumbent on the Commission may serve, on occasion, to clash with its duty to ensure the application of EC law under Art 211 EC. Specifically, alongside its law enforcement role, the Commission is charged with political and legislative responsibilities under the EC Treaty. Since the inception of the EU, the Commission has been vested with exclusive power to propose EC legislation in the vast majority of common policy sectors of the Community. It also has powers to exercise a notable influence on the EC legislative process itself. Specifically, it may force the Council of the EU to decide on the basis of unanimity if it disagrees with European Parliament amendments made to environmental legislative proposals adopted under the co-decision procedure set out in Art 251 EC. These and other factors have come to entrench the Commission's central position of influence with respect to decisions over policy development within the EC. Occasionally, for a variety of reasons, the dual functions of policy development and law enforcement may conflict with one another. For instance, the Commission may be placed in the position of having to decide whether to undertake legal action against a Member State based on the legal merits or to abstain from launching proceedings on account of a need to garner support from the particular Member State, such as to secure its votes in the Council of the EU with respect to an un/related policy measure. These sometimes conflicting pressures may be felt at every level of the Commission, both at College as well as departmental level. Although rare, such a conflict of interests may come to be felt in crucially important cases, enough to

undermine the credibility of the Commission to deliver justice impartially when most wanted.

For this reason, the current position of the Commission's law enforcement role needs to be reviewed. At the very least, the Commission must be required to organise its legal teams dealing with infringement actions in a viable independent setting. That could mean, for instance, creating a separate Directorate-General (DG) for Infringements or merging the infringement teams with the Commission's Legal Service, which is mainly responsible for representing the Commission before the ECJ and delivering binding internal legal opinions in the event of a dispute over the interpretation of EC law between two DGs. In addition, it might well mean that the Commission President, under whose immediate authority the Commission's Legal Service operates, has to provide an undertaking publicly that Legal Service work is not to be subject to the Presidency's political influence and that the College is to adhere to legal analysis supplied by the Legal Service. Formally, the College would still take the decisions on infringement cases. Alternatively, and perhaps a more satisfactory solution from a theoretical perspective, would be to divest the Commission of responsibility for its environmental law enforcement work and to confer this on an independent agency at EC level, such as the European Environment Agency. The first suggestion, to stick with the Commission's law enforcement function, is more practicable than the second, in the sense that no specific EC Treaty changes would need to be made. Currently, the EC Treaty does not empower the Commission to delegate its decision-making in law enforcement matters and a treaty change would require the unanimous consent of and ratification by the Member States. The first suggestion would involve restructuring the internal working arrangements of the Commission services onto a footing that would reflect better the existing requirement of the EC Treaty that the Commission should ensure that EC law is applied.

The role of civil society in enforcing EC environmental law has until recently received little serious attention from the EU institutions and Member States. For several years, the Commission has acted *de facto* as the primary representative of the public in taking steps to ensure that EC environmental legislation is correctly implemented at national level. However, private persons have acquired some limited rights to rely on EC environmental legislative norms before national courts by virtue of the ECJ's progressive jurisprudence on direct and indirect effect in particular (notably ECJ rulings in cases such as Cases C-72/95 *Kraaijeveld* and C-201/02 *Delena Wells*). In addition, recourse to the European Ombudsman on grounds of maladministration has offered some inroads for the public to scrutinise EU institutional decision-making in relation to the environment. However, it has been the recent adoption of various legislative initiatives at EC level designed to implement the 1998 UNECE Århus Convention on access to information, public participation in decision-making and access to justice in environmental matters which

has transformed the legal position of private persons, particularly non-governmental environmental organisations (NGEOs), wishing to engage in supervision of EC environmental law. Specifically, private persons have acquired or are due to acquire a range of important rights to access justice and environmental information at national level by virtue of the Draft Directive on access to justice in environmental matters;<sup>2</sup> Directive 2003/4<sup>3</sup> on public access to environmental information and repealing Directive 90/313 (AEI Directive); Directive 2003/35<sup>4</sup> on public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Directives 83/337 on environmental impact assessment and 96/61 on integrated pollution prevention and control; and Directive 2004/35<sup>5</sup> on environmental liability with regard to the prevention and remedying of environmental damage (EL Directive). In addition, recent legislative steps have been taken to vest private persons with improved rights to supervise EU institutional decision-making affecting the environment in the form of the Commission's 2003 proposal for a Regulation on the application of the provisions of the Århus Convention on access to information, public participation in decision-making and access to justice in environmental matters to EC institutions and bodies (the Draft Århus Regulation)<sup>6</sup> and Regulation 1049/2001 regarding access to European Parliament, Council and Commission documents.<sup>7</sup>

Notwithstanding the fact that these particular legislative changes represent a considerable improvement from the previous position, they need to be set in context. First, the new wave of EC legislation on access to environmental justice does contain some flaws. In particular, private persons are not vested with any rights under the legislation (specifically, the Draft Århus Regulation) to seek judicial review of a Commission decision not to take up enforcement proceedings against a Member State under Art 226 EC as requested by a complainant. This is unsatisfactory and arguably an omission in contravention of the Århus Convention (Art 9(3)). The multiplicity of tasks that the Commission is charged to fulfil underlines the need to ensure that civil society has a possibility at the very least of seeking independent review of a failure on the Commission's part to take action under Art 226 EC. There is an element of double standards here, given that the EL Directive provides private persons with certain rights to challenge omissions on the part of national authorities to take legal action against persons liable for disrespecting the requirements of EC environmental protection rules. Second, whilst the increase in range and depth of supervisory rights for NGOs and other private persons under EC law is to be welcomed, they should not be perceived as a panacea for the ills in the current system of EC environmental law

2 COM (2003)624final, 24.10.2003.

3 OJ 2003 L41/26.

4 OJ 2003 L156/17.

5 OJ 2004 L143/56.

6 COM(2003)622.

7 OJ 2001 L145/43.

enforcement. It should always be recognised that the capabilities of the private sector to engage in environmental law enforcement are going to be relatively limited, both from a legal and financial perspective. Specifically, the absence of investigatory powers for private persons to inspect premises as well as difficulties in acquiring legal standing at national level to take action directly against private polluters are examples of considerable legal obstacles often faced by NGEOS in contemplating public interest litigation in relation to bad application cases. The burden of shouldering high legal and court fees may prove just as significant a barrier. Realistically, the most effective form of enforcement action that NGEOS and other private persons can undertake is to put pressure on the relevant authorities at national and international level to take action. In several respects, the recent wave of EC legislation on access to environmental justice and information takes this factor on board in constructing various review mechanisms to be made available to private persons and, in particular, certain types of qualifying NGEOS.

Just as in the case of the civil society, the enforcement role of Member State authorities has been substantially underplayed at Community level in relation to EC environmental legislation. The legal duty on Member States to implement EC law, including EC environmental legislation, derives from the EC Treaty itself<sup>8</sup> and has existed since the inception of the EU for almost half a century. However, Member States have never readily accepted the legal reality that the duty to ensure implementation of EC law at national level includes a duty to ensure that it is applied in practice as well as being incorporated formally within the body of national rules of law. Whilst the ECJ has made this point clear over time (for example, Case C-431/92 *Grosskrotzenburg*), until recently the EU had not sought to crystallize this obligation into legislative detail. However, the adoption of the EL Directive in 2004 as well as the recent Commission proposal for an EC Directive on the Protection of the Environment through Criminal Law<sup>9</sup> (Draft PECL Directive) has changed the picture quite significantly. Both legislative instruments seek to impose specific binding obligations on authorities designated by the Member States to take legal action—civil as well as criminal—in the event of persons breaching EC environmental protection rules. This is a most welcome development, because it specifically requires Member States to internalise their EC environmental obligations into their respective national legal orders with a view to ensuring that the obligations are adhered to in practice. That being said, there remains considerable room to develop further enforcement-related obligations on national authorities. Specifically, at the moment, EC law does not require national authorities charged with environmental protection management within their respective jurisdictions to ensure a minimum level of monitoring and inspections of environmentally

8 See Arts 10 and 249 EC.

9 COM(2001)139, as amended by COM(2002)544final.



sensitive installations and sites. Neither the EL Directive nor the Draft PECL Directive addresses the key issue of detection and accordingly prevention of environmental damage. The current EI Recommendation 2001/331<sup>10</sup> providing for minimum criteria of environmental inspections in the Member States is non-binding and lacks sufficient precision and coverage, and needs to be firmed up into binding legislative form.

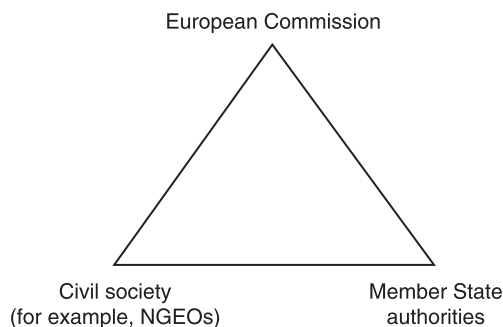
It is apparent that in recent times the EU has been moving closer to a situation in which it recognises that the task of ensuring adherence to its rules on environmental protection should be spread widely amongst interested parties. The traditional over-reliance on the European Commission as ‘guardian’ of EC environmental norms has become gradually overtaken by a welcome, albeit rather belated, sense of realism that both civil society and, in particular, national authorities of Member States have major enforcement roles to play. The EU’s moves towards enhancing a three-dimensional perspective to environmental protection supervision constitute a significant advance in terms of adding credibility as well as democratic accountability to decisions taken in the area of EC environmental law enforcement. The three-dimensional perspective involves the harnessing of three key resources to assist in law enforcement: the European Commission, civil society and Member State authorities.

A number of positive features emerge from the enhancement of a tripartite system of supervision. First, it is clear that each enforcement actor is able independently to contribute significantly to enforcement work. The European Commission is particularly well positioned to oversee that Member State governments implement their legally binding EC environmental obligations into law. Without being endowed with legal powers and other resources to carry out investigatory work, its role in bad application casework will remain limited and heavily dependent on the supply of information and evidence from either civil society or national authorities. Private persons, in particular NGEOS, are particularly well-positioned to monitor compliance with EC environmental law at national level in areas of environmental protection regulation that are subject to public consultation (for example, project development) or where evidence of illicit pollution may be accessible to public scrutiny or otherwise readily apparent (for example, illicit waste deposition, encroachment of protected nature sites). Private persons may be able to draw the public authorities’ attention (whether national environmental protection authorities or the Commission) to such instances of bad application. They also may be able to monitor, alongside the Commission, the current state of transposition of EC environmental legislation and put political pressure on national governments as well as the Commission to act where needed. Member State authorities charged with environmental

10 OJ 2001 L118/41.

protection responsibilities under national law have an especially important role to play in terms of enforcing EC environmental law. Usually, given their financial resources and legal powers to investigate sites and prosecute offenders, they are best placed to tackle instances of bad application of EC environmental law. Second, the tripartite nature of this enforcement framework involves an interactive and constructive relationship between all three parties. Each of them may decide to take unilateral action in respect of infringements and/or engage in co-operative strategies or partnerships with the others. In addition, each party may be able to engage in some form of useful supervision of the others' performance in law enforcement work (for example, NGEOS regarding Commission decisions on infringement cases in relation to Arts 226 and 228(2) EC, the Commission in relation to decisions by Member State authorities). The interactive and interdependent nature of the agents engaged in EC environmental law enforcement work may be usefully depicted in simple diagrammatic form (see Figure 14.1). Each law enforcement agent is represented as a point in the triangle, signifying their individual importance to the overall legal framework for supervising compliance with EC environmental law as well as indicating the importance of interaction between the constituent agents in terms of enhancing quality of law enforcement performance as well as accountability in decision-taking. Above all, each agent is linked to one another by a common interest, namely to ensure compliance with EC environmental protection standards.

Before ending this book, it is perhaps apt to make at least a few remarks on how the role of law should be perceived to fit within the broader contemporary debates in the EU and elsewhere about selecting the best means to secure ever better compliance with accepted minimum environmental standards. Within various academic and professional circles involved in environmental politics, it is not uncommon to hear the view that the use of centralised mechanisms to secure societal compliance with environmental protection goals, such as law enforcement and regulation, represents an outmoded and in practice ineffective approach to governance. The use of



*Figure 14.1* The relationship of the agents in the tripartite system of supervision.

market instruments, such as economic incentives in the form of fiscal measures, are proffered as superior and even as substitute mechanisms over 'command and control' approaches in influencing society's behaviour towards the environment. It is important to stress that these policy tools of environmental governance should be seen as complementary to one another and not as alternative strategies for environmental protection policy. Lawyers would be the first to admit that recourse to law to uphold environmental protection standards is not necessarily the most efficient or effective mechanism at society's disposal to protect the environment. For, notwithstanding that the threat of law enforcement may, if structured effectively, contain an element of deterrence and therefore have some preventive impact, its application is usually undertaken as a means of last resort in order to respond to illicit conduct that has already transpired and which may already have had profound and even irremediable effects on the state of the environment. It is clear that other enforcement strategies geared to promoting the prevention of environmental damage should also be fostered alongside legal initiatives, such as educational guidance and other culturally based initiatives. Yet law represents an important and fundamental environmental protection policy component, not least given that markets contain no inherently dominant and stable long-term economic interests to safeguard the state of the environment. In any event, as far as the enforcement of EC environmental law is concerned, its use in the past has been unduly hampered by an unduly narrow vision as to who should undertake the law enforcement role. To end on an optimistic note, the recent wave of EC legislative initiatives according civil society and national authorities far more opportunities and responsibility in this regard, seem set to improve matters significantly.

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# INDEX

- access to justice 268–9, 301–2, 304–10, 344–5, 349–50
- access to environmental information
  - held by EU institutions 377–403
  - CFI rulings 388–95
  - draft Århus Convention and 401–3
  - European Ombudsman and 395–9
  - exceptions 385–8
  - procedural aspects 382–5
  - Regulation 1049 and 379–88
  - relating to infringement proceedings 399–400
- access to environmental information held by Member State authorities 330–44
- impact of AEI directive on environmental law enforcement 341–4
- public dissemination of environmental information 336–41
- right of access under AEI directive 331–6
- complaints procedures
  - European Ombudsman 420–30
  - European Parliament 430–1
- draft Århus Regulation and 370–6
  - access to environmental information held by EU institutions and 401–3
  - material scope 373–5
  - personal scope 371–3
  - review procedures 375–6
- EC Treaty system 351–70
  - annulment proceedings 356–65
  - legal proceedings in respect of failure to act 353–5
  - non-contractual liability of EU institutions 365–8
  - preliminary ruling procedure 368–70
  - other instruments 321–9
    - environmental information and decision making 321–9, 322–3
    - environmental liability directive 323–9
  - proposed directive on 310–21
    - direct effect and 319–21
    - qualified entities 311–13
    - right to request internal reviews 317–19
    - right to take environment proceedings 313–17
  - prospects 403–6
- accountability 199–202
- administrative measures 97
- Advocates-General 34
- amicus curiae* 34
- annulment proceedings 356–65
- application to Court of Justice 85–9
  - contents of Court application 85–8
  - temporal aspects 88–9
- attribution of liability 285
- ‘bad application’ cases 40, 41–2, 43, 72, 187, 189
- best available technology not entailing excessive cost (BATNEEC) 222
- breaches of environmental law 40–4
  - by another Member State 93–4
  - detection 46–7
  - enforcement proceedings *see* proceedings (enforcement)
  - historical breaches 61–5
  - state liability 278–301, 302–3
    - attribution of liability 285
    - causation 286–7, 295–7

- breaches of environmental law (*Cont.*)
  - general legal criteria for proof of state liability 279–87
  - loss and damage 285–6, 297–301
  - rights intended to be conferred on individuals 282, 288–93
  - sufficiently serious breach of EC law 282–4, 293–5
- business activities, civil liability and 493–6
- casework handling improvements 192–6
- causation
  - civil liability 497–8
  - state liability and 286–7, 295–7
- civil liability 479–80, 513–15
  - Council of Europe's Lugano Convention 1993 481–5
  - developments of EU policy on 485–9
  - directive on environmental liability 489–513
    - causation issues 497–8
    - competent authorities 508–11
    - cross-border liability scenarios 511–12
    - environmental damage 496–7
    - exceptions to liability 501–2
    - fault and negligence 499–500
    - legal effects 512–13
    - operator's financial liability for preventive and remedial action 507–8
    - operators of occupational activities 493–6
    - operator's specific obligations 502–8
    - preventive action 503–4
    - remedial action 504–6
    - scope of liability 492–501
    - temporal scope of liability 501
- collegiality and Commission decision making 59–69
- Committees of Inquiry, European Parliament 435–6
- competition policy 44
- complainants 186
  - accountability to 199–202
  - as sources of information 165–7
- complaints procedures
  - European Ombudsman 420–3
  - complaints against Commission 423–30
  - European Parliament 430–1
  - Committees of Inquiry 435–6
  - Parliamentary questions 434–5
  - right of petition 431–4
- conflicts of interest, European Commission 178–85
- College of Commissioners 179–81
- Directorate-General level 181–5
- constitution of the European Union (EU) 21–4
- co-operation duty 57–9, 161–2
- Council of Europe
  - Convention on the Protection of the Environment through Criminal Law 516–20
  - Lugano Convention 1993 481–5
- Council of the EU 12, 438
- Court of Auditors 12
- Court of First Instance (CFI) 12, 352
  - rulings on access to information 388–95
- criminal liability 516
  - draft PECL directive 527–33
    - degree of proposed harmonisation 532–3
    - environmental offences 529–31
    - sanctions 531–2
- ECJ's ruling in Case C-176/03 *Commission v Council* 534–45
  - appraisal 541–5
- Framework Decision (2003) 525–6
- indirect effect and 264–6
- PECL Convention 516–20
- political and constitutional background 520–4
- prospects for EU environmental criminal law 545–8
- damage 285–6
  - civil liability 496–7
  - preventive action 53–4
  - remedial action 504–6
- de minimis* type arguments 94–6
- decentralisation of enforcement 189–92
- decisions
  - access to justice in relation to environmental decision making 322–3
  - to take legal action 59–69
    - collegiality and Commission decision making 65–8

- Commission immunity from judicial review 68–9
- delays in taking legal action and historical breaches 61–5
- legal justification needed 60–1
- transparency of Commission decision making 196–8
- defendants
  - observations regarding letter of formal notice (LFN) 74–5
  - observations regarding reasoned opinions (ROs) 80–5
  - period for observations to be submitted 80–4
  - taking observations into account 84–5
- submissions in enforcement proceedings 89–104
- adequacy of implementation of EU environmental law 96–103
- breach by another Member State 93–4
- de minimis* type arguments 94–6
- element of fault 93
- internal problems facing Member States 92–3
- temporal arguments 103–4
- delays in taking legal action 61–5
- detection of breaches of environmental law 46–7
- direct effect 98, 213–18, 451
  - application against public authorities 234–47
  - general points 234–5
  - limited Member State discretion 237–47
  - vertical direct effects 235–47
- criteria for 218–34
  - subjective individual rights and 230–4
  - sufficient precision 221–3, 225–8
  - transposition deadline and 229–30
  - unconditionality 223–4, 225–8
- horizontal direct effect 250–2, 255–61
- proposed directive on access to justice 319–21
- vertical direct effects 235–47
  - inverse 248–9
- directives 19, 20–1, 44
  - ‘bad application’ cases 40, 41–2, 43, 72, 187, 189
  - direct effect *see* direct effect
  - indirect effects *see* indirect effects
  - non-transposition cases 40, 41, 46, 72, 187
  - reliance on directives against private persons 247–61
  - horizontal direct effect 250–2
  - incidental horizontal effects 255–61
  - inverse vertical effects 248–9
  - triangular situations 252–5
  - transposition deadline 229–30
- discretion
  - decision to take legal action 59–69
  - collegiality and Commission decision making 65–8
  - Commission immunity from judicial review 68–9
  - delays in taking legal action and historical breaches 61–5
  - legal justification needed 60–1
  - limited Member State discretion on direct effect of directives 237–47
- dumping, environmental 97–8
- employment, civil liability and 493–6
- enforcement of environmental law 4–6, 549–58
  - European Commission and 27, 29–36
  - role as primary law enforcer 29–31
  - general legal framework 27–9
  - impact of AEI directive on environmental law enforcement 341–4
  - Member States and 37–40, 445–7, 474–8
  - civil liability *see* civil liability
  - general implementation duties 447–54
  - IMPEL network 195, 454–65
  - passive legal responsibilities 450–3
  - positive legal responsibilities 447–50
  - Recommendation 2001/31 on environmental inspection 465–74, 476–7
  - subsidiarity principle 453–4, 476, 477, 523
- proceedings *see* proceedings (enforcement)
- environmental policy and law 1–4, 10–11, 15–16
  - adequacy of implementation 96–103
  - breaches *see* breaches of environmental law

- environmental policy and law (*Cont.*)
  - enforcement *see* enforcement of environmental law
  - EO's substantive analysis of EU environmental law 425–6
  - legal bases for environmental measures 16–19
  - types of environmental measures 19–21
- European Commission 12, 27, 29–36, 549–50
  - access to information relating to infringement proceedings and 399–400
  - accountability to complainants 199–202
  - collegiality and Commission decision making 59–69
  - complaints to Ombudsman against 423–30
    - EO's scrutiny of Commission's procedures 426–30
    - EO's substantive analysis of EU environmental law 425–6
  - conflicts of interest 178–85
    - College of Commissioners 179–81
    - Directorate-General level 181–5
  - detection of breaches of environmental law 46–7
  - enforcement proceedings 31–6, 45–6, 159–61
    - accountability to complainants 199–202
    - Commission's discretion in deciding to take legal action 59–69
    - conflicts of interest 178–85
    - core elements 47–51
    - financial penalties 112, 113–15, 117–24, 132–7, 144–51, 152–5, 174–8
    - 'first round' 31, 32–5, 45–6
    - pre-litigation procedure 33, 47–9, 51–85
    - prioritisation of cases 185–96
    - reform of monitoring process 185–96
    - 'second round' *see* 'second round' proceedings
    - statistical information on 202–5
    - structure and format of proceedings 32–5
    - transparency of decision making 196–8
  - immunity from judicial review 59–69
  - investigations 43, 57–9, 161–7
    - complainants as sources of information 165–7
    - investigatory and inspection tools 161–4
    - resources issues 164–5
  - role as primary law enforcer 29–31
  - transparency of decision making 196–8
- European Court of Justice (ECJ) 10, 12, 213, 268, 352
  - see also* proceedings (enforcement)
- European Environment Agency (EEA) 13, 163, 402, 436–8, 460
- European Ombudsman 408–39, 439
  - access to environmental information and 395–9
  - complaints against Commission 423–30
    - EO's scrutiny of Commission's procedures 426–30
    - EO's substantive analysis of EU environmental law 425–6
  - complaints procedures 420–3
  - concept of maladministration 395–6, 412–16
  - exclusion from legal proceedings 419–20
  - general remit and powers 411–20
  - legal powers 416–18
- European Parliament 12, 430–6, 440
  - Committees of Inquiry 435–6
  - enforcement proceedings and 436
  - right of petition 431–4
- European Pollutant Emission Register (EPER) 339
- European Pollutant Release and Transfer Register (EPRTTR) 339
- European Union (EU) 9–10
  - environmental policy and law 1–4, 10–11, 15–16
    - adequacy of implementation 96–103
    - enforcement *see* enforcement of environmental law
    - legal bases for environmental measures 16–19
    - types of environmental measures 19–21
  - historical development 11–12

- institutions *see* institutions of the European Union (EU)
- law 10–11
- proposed constitution 21–4
- three pillar framework 13–15
- evidence, pre-litigation procedure 52–7
- failure to act, legal proceedings in respect of 353–5
- fault 93
  - civil liability 499–500
- financial penalties 112, 113–15, 156–7, 174–8
  - case law 132–7, 144–51, 152–5
  - Commission guidance on 117–24
- ‘first round’ proceedings 31, 32–5, 45–6
- historical breaches of environmental law 61–5
- historical development of the European Union (EU) 11–12
- horizontal direct effect 250–2, 255–61
- IMPEL network 195, 454–65
  - appraisal of impact 462–5
  - origins and development 459–62
  - overview 454–9
- implementation 189
  - defence submission on adequacy of 96–103
  - reporting on 164
- incidental horizontal effects 255–61
- indirect effects 261–6, 449
  - criminal liability and 264–6
  - general points 262–4
  - inverse 252–5
- individuals 266–7, 407–8
  - access to justice by *see* access to justice
  - direct effect 98, 213–18
  - criteria for 218–34
  - enforcement proceedings brought by 209–13
    - annulment proceedings 356–65
    - non-contractual liability of EU institutions 365–8
    - preliminary ruling procedure 368–70
  - in respect of failure to act 353–5
  - reliance on directives against private persons 247–61
  - horizontal direct effect 250–2
  - incidental horizontal effects 255–61
  - inverse vertical effects 248–9
  - triangular situations 252–5
  - rights intended to be conferred on individuals 282, 288–93
  - subjective individual rights and direct effect 230–4
- information
  - access to environmental information held by EU institutions 377–403
  - CFI rulings 388–95
  - draft Århus Convention and 401–3
  - European Ombudsman and 395–9
  - exceptions 385–8
  - procedural aspects 382–5
  - Regulation 1049 and 379–88
  - relating to infringement proceedings 399–400
  - access to environmental information held by Member State authorities 330–44
  - impact of AEI directive on environmental law enforcement 341–4
  - public dissemination of environmental information 336–41
  - right of access under AEI directive 331–6
  - access to justice in relation to environmental information 322–3
  - complainants as sources of 165–7
  - statistical information on environmental infringement cases 202–5
  - transparency of Commission decision making 196–8
- infringement proceedings *see* proceedings (enforcement)
- inspections, Recommendation 2001/31
  - on 465–74, 476–7
  - criteria for inspections 469–74
  - implementation and scope of Recommendation 466–9
  - investigations of serious cases of non-compliance 473–4
  - planning 469–70
  - reporting 472–3
  - site visits 162, 470–2

- institutions of the European Union (EU) 12–13
  - access to environmental information held by EU institutions 377–403
  - CFI rulings 388–95
  - draft Århus Convention and 401–3
  - European Ombudsman and 395–9
  - exceptions 385–8
  - procedural aspects 382–5
  - Regulation 1049 and 379–88
  - relating to infringement proceedings 399–400
  - non-contractual liability 365–8
  - see also* individual institutions
- interim relief 104–11, 172–3
- internal reviews, right to request 317–19
- inverse indirect effects 252–5
- inverse vertical direct effects 248–9
- investigations 43, 57–9, 161–7
  - complainants as sources of information 165–7
  - investigatory and inspection tools 161–4
  - resources issues 164–5
  - see also* inspections
- judicial review 327–8
  - annulment proceedings 356–65
  - Commission immunity from 59–69
- law of the European Union (EU) 10–11
- letter of formal notice (LFN) 33, 36, 48, 49, 51, 70–5
  - defendant's observations 74–5
  - Member State's responses to 74–5
  - purpose and degree of precision 70–3
- Lex II project 194
- liability
  - civil liability *see* civil liability
  - criminal liability *see* criminal liability
  - criteria establishing liability 155–6
  - environmental liability directive 323–9
    - impact on access to environmental justice 328–9
    - right to subject competent authority's conduct to legal review 327–8
    - rights of private entities to request action 324–7
  - non-contractual liability of EU institutions 365–8
  - state liability 278–301, 302–3
    - attribution of liability 285
    - causation 286–7, 295–7
    - general legal criteria for proof of state liability 279–87
    - loss and damage 285–6, 297–301
    - rights intended to be conferred on individuals 282, 288–93
    - sufficiently serious breach of EC law 282–4, 293–5
  - limitation periods 61
  - loss 285–6, 297–301
- maladministration 395–6, 412–16
- Member States 438
  - access to environmental information held by Member State authorities 330–44
    - impact of AEI directive on environmental law enforcement 341–4
    - public dissemination of environmental information 336–41
    - right of access under AEI directive 331–6
  - duties of state authorities to provide remedies 275–8
  - enforcement of EU environmental law by 37–40, 445–7, 474–8
    - civil liability *see* civil liability
    - general implementation duties 447–54
  - IMPEL network 195, 454–65
  - passive legal responsibilities 450–3
  - positive legal responsibilities 447–50
  - Recommendation 2001/31 on environmental inspection 465–74
  - subsidiarity principle 453–4, 476, 477, 523
- enforcement proceedings brought against 31–6
  - application to Court of Justice 85–9
  - Commission's discretion in deciding to take legal action 59–69
  - core elements 47–51
  - defence submissions 89–104
  - 'first round' 31, 32–5, 45–6
  - pre-litigation procedure 33, 47–9, 51–85
  - 'second round' *see* 'second round' proceedings

- structure and format of proceedings 32–5
- enforcement proceedings brought by 37–40
- internal problems 92–3
- liability for breach of environmental law 278–301, 302–3
  - attribution of liability 285
  - causation 286–7, 295–7
  - general legal criteria for proof of state liability 279–87
  - loss and damage 285–6, 297–301
  - rights intended to be conferred on individuals 282, 288–93
  - sufficiently serious breach of EC law 282–4, 293–5
- limited discretion on vertical direct effect 237–47
- responses to letter of formal notice (LFN) 74–5
- see also* national courts
- national courts
  - access to justice 268–9, 301–2, 304–10
  - other instruments 321–9
  - proposed directive on 310–21
  - duties to provide remedies 271–5
  - procedural autonomy principle 269–71
- negligence, civil liability 499–500
- non-communication cases 41, 43
- non-conformity cases 41, 43
- non-contractual liability of EU institutions 365–8
- non-transposition cases 40, 41, 46, 72, 187
  - evidence and onus of proof 53–4
- Ombudsman *see* European Ombudsman
- package meetings 38, 40
- penalties *see* sanctions
- petitions, to European Parliament 431–4
- polluter pays principle 323, 492–3, 507
- precision, as criterion for direct effect 221–3, 225–8
- pre-letter of formal notice (pre-LFN) 33, 49
- preliminary ruling procedure 368–70
- pre-litigation procedure 33, 47–9, 51–85
  - Commission's discretion in deciding to take legal action 59–69
- collegiality and Commission decision making 59–69
- Commission immunity from judicial review 59–69
  - delays in taking legal action and historical breaches 61–5
  - legal justification needed 60–1
- duty of co-operation 57–9, 161–2
- evidence and onus of proof 52–7
- investigations 43, 57–9, 161–7
  - complainants as sources of information 165–7
  - investigatory and inspection tools 161–4
  - resources issues 164–5
- letter of formal notice (LFN) 33, 36, 48, 49, 51, 70–5
  - defendant's observations 74–5
  - Member State's responses to 74–5
  - purpose and degree of precision 70–3
- reasoned opinions (ROs) 33, 34, 48, 49, 51, 75–85
  - content 76–7
  - deadline for compliance 77–8
  - defendant's observations 80–5
  - general requirements and effects of RO 76–80
  - subsequent amendments 79–80
  - taking into account Member State's responses to LFN 78–9
- preventive action 53–4, 503–4
- prioritisation of cases 185–96
- private persons *see* individuals
- procedural autonomy principle 269–71
- proceedings (enforcement)
  - access to information on 399–400
  - annulment proceedings 356–65
  - application to Court of Justice 85–9
  - contents of Court application 85–8
  - temporal aspects 88–9
- brought by Commission 31–6, 159–61
  - accountability to complainants 199–202
  - application to Court of Justice 85–9
  - Commission's discretion in deciding to take legal action 59–69
  - conflicts of interest 178–85
  - core elements 47–51
  - defence submissions 89–104
  - financial penalties 112, 113–15, 117–24, 132–7, 144–51, 152–5



- proceedings (enforcement) (*Cont.*)
  - brought by Commission (*Cont.*)
    - 'first round' 31, 32–5, 45–6
    - interim relief 104–11, 172–3
    - pre-litigation procedure 33, 47–9, 51–85
    - prioritisation of cases 185–96
    - reform of monitoring process 185–96
    - 'second round' *see* 'second round' proceedings
    - statistical information on 202–5
    - structure and format of proceedings 32–5
    - transparency of decision making 196–8
  - brought by individuals 209–13
    - annulment proceedings 356–65
    - non-contractual liability of EU institutions 365–8
    - preliminary ruling procedure 368–70
    - in respect of failure to act 353–5
  - brought by Member State 37–40
  - conflicts of interest 178–85
    - College of Commissioners 179–81
    - Directorate-General level 181–5
  - defence submissions 89–104
    - adequacy of implementation of EU environmental law 96–103
    - breach by another Member State 93–4
    - de minimis* type arguments 94–6
    - element of fault 93
    - internal problems facing Member States 89–104
    - temporal arguments 103–4
  - European Parliament and 436
  - exclusion of Ombudsman from 419–20
  - interim relief 104–11, 172–3
  - limitations of legal structures 167–78
    - interim measures 172–3
    - legal sanctions 173–8
    - temporal aspects 167–73
  - litigation phase 85–9
    - contents of Court application 85–8
    - temporal aspects 88–9
  - preliminary ruling procedure 368–70
  - pre-litigation procedure 33, 47–9, 51–85
    - Commission's discretion in deciding to take legal action 59–69
    - duty of co-operation 57–9, 161–2
    - evidence and onus of proof 52–7
    - investigations 43, 57–9, 161–7
    - letter of formal notice (LFN) 33, 36, 48, 49, 51, 70–5
    - reasoned opinions (ROs) 33, 34, 48, 49, 51, 75–85
    - prioritisation of cases 185–96
    - reform of monitoring process 185–96
    - in respect of failure to act 353–5
    - right to take environment proceedings 313–17
    - 'second round' proceedings 32, 34, 35–6, 112–13, 155–8
      - case law 124–44
      - criteria establishing liability 155–6
      - financial penalties 112, 113–15, 117–24, 132–7, 144–51, 152–5, 156–7, 175–8
      - general legal framework 113–17
    - temporal aspects 88–9, 167–73
      - application to Court of Justice 88–9
      - defence submissions 103–4
      - length of infringement proceedings 168–72
  - proof, onus of 52–4
  - public authorities, direct effect of
    - directives against 234–47
    - general points 234–5
    - limited Member State discretion 237–47
    - vertical direct effects 235–47
  - public dissemination of environmental information 336–41
  - reasoned opinions (ROs) 33, 34, 48, 49, 51, 75–85
    - content 76–7
    - deadline for compliance 77–8
    - defendant's observations 80–5
      - period for observations to be submitted 80–4
      - taking observations into account 84–5
    - general requirements and effects of RO 76–80
    - subsequent amendments 79–80
    - taking into account Member State's responses to LFN 78–9
  - regulations 19, 20
  - remedial action 504–6

## INDEX

- remedies 271–8
  - duties of national courts 271–5
  - duties of state authorities 275–8
  - reparation 298–9
  - see also* sanctions
- reparation 298–9
- reporting
  - on implementation 164
  - on inspections 472–3
- resources issues, investigations 164–5
- sanctions 173–8
  - draft PECL directive 531–2
  - financial penalties 112, 113–15, 156–7, 174–8
    - case law 132–7, 144–51, 152–5
    - Commission guidance on 117–24
- ‘second round’ proceedings 32, 34, 35–6, 112–13, 155–8
  - case law 124–44
    - determination of penalty payment 132–7, 144–51, 152–5
    - French Fishing Controls (2) case 151–5
    - Kouropitos (2) case 125–37
    - procedural and substantive issues 127–32, 139–44, 151–2
    - Spanish Bathing Waters (2) case 137–51
  - criteria establishing liability 155–6
  - financial penalties 112, 113–15, 156–7, 175–8
    - case law 132–7, 144–51, 152–5
    - Commission guidance on 117–24
    - general legal framework 113–17
  - site visits 162, 470–2
  - state liability for breach of
    - environmental law 278–301, 302–3
    - attribution of liability 285
    - causation 286–7, 295–7
    - general legal criteria for proof of state liability 279–87
    - loss and damage 285–6, 297–301
    - rights intended to be conferred on individuals 282, 288–93
    - sufficiently serious breach of EC law 282–4, 293–5
  - subsidiarity principle 453–4, 476, 477, 523
- temporal aspects of enforcement
  - proceedings 88–9, 167–73
  - application to Court of Justice 88–9
  - defence submissions 103–4
- transparency of decision making 196–8
- unconditionality, as criterion for direct effect 223–4, 225–8
- vertical direct effects 235–47
  - inverse 248–9