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Enforcement Actions under EU Law: The New Member States

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Introduction

Through the infringement procedure, provided for by Article 226 of the Treaty establishing the European Community (TEC), the Commission can stimulate Member States to comply effectively with their obligations under Community law.² In cases of non-compliance, the Commission may bring Member States before the Court of Justice of the EC (ECJ). Indeed, the Commission may use this possibility because it is the “guardian of the Treaty” and has to ensure the proper application of Community law, in line with Article 211 TEC.

The White Paper on European Governance published by the Commission in 2001³ emphasises that the primary responsibility for applying Community law lies with national administrations and courts in the Member States. Therefore, the primary objective of enforcement actions against Member States is to monitor their compliance and to respond to cases of non-compliance. However, through adequate exercise of its discretion and improved cooperation with Member States, the Commission aims to encourage them to comply voluntarily with Community law as quickly as possible. Furthermore, under the current Commission’s strategic objectives for the period 2005-2009, prompt and adequate transposition and vigorous pursuit of infringements are considered critical to the credibility of European legislation and the effectiveness of policies.⁴

The infringement procedure is of crucial importance to the new Member States and of high relevance to the candidate countries that have applied for accession to the EU. On the one hand, they have to adopt the whole *acquis* upon accession with only few transitional periods granted in a limited number of areas. New Member States have already submitted a large number of transposition notifications to the Commission. On the other hand and despite their huge efforts, new Member States experience considerable difficulties in implementing directives and other EC legislative instruments. The process of implementation is a challenging stumbling block for all new Member States.

This paper will focus on the recent and main trends in the application of enforcement actions against new Member States, not only taking an empirical angle (infringements by Member States and by sectors) but also involving analytical reasoning. This analysis serves to present the fundamentals and relevance of the infringement procedure in the framework of the enlarged European Union (the object of the first part of this paper) where administrations of the new Member States will have to adopt this new way of thinking and of implementing know-how (addressed in the second part) while acquiring a better understanding of the principal characteristics of the EC/EU’s legal system (direct effect, supremacy, indirect effect, state liability) and of the EC’s general principles of law. Therefore, the second part of the paper will also focus on justifications deemed acceptable by the ECJ and others that are considered inadmissible.

New Member States have to adjust to the requirements of the *acquis* (possibilities of opting out are not included in the Accession Treaties) and this obligation applies to all independent state institutions (including the judiciary where reforms represent a prerequisite for accession by some candidate countries). Efficient further implementation of the *acquis* and adequate understanding of the infringement procedure will facilitate new Member States’ (and candidate countries’) integration in the EU and, eventually, make their accession a success.

2. By way of preliminary and quite important legal remark, it should be emphasised that the infringement procedure does not exist under Pillar II (CFSP) and Pillar III (Police and Judicial Cooperation in Criminal Matters).

3. “European Governance – A White Paper” (COM (2001) 428).

4. See the European Commission’s Strategic Objectives 2005-2009, COM (2005) 12 final, p. 5.

I. The Bedrock of the Infringement Procedure

Instead of discussing all the details of the infringement procedure and subsequent steps, this part will focus on a number of relevant aspects that are most problematic or most important to the old as well as new Member States and candidate countries.

A. *RATIONE PERSONAE*

The issue of who is entitled to institute proceedings under Article 226 has been widely debated. The Commission is the only one (together with the Member States under Article 227) that is authorised to bring Member States that fail to comply with Community obligations before the ECJ. Natural and legal persons are not allowed to institute proceedings under this procedure. The rationale behind the Treaty's prohibition is that individuals have other possibilities for direct action before their national courts. Hence, the ECJ has established fundamental principles to help private parties enforce their rights. The principle of state liability is the last and logical continuation of the ECJ's teleological construction comprising the principles of direct effect and indirect effect. Through the state liability principle and by restricting private parties' direct access to the ECJ in the context of other proceedings,⁵ the European legislator and the ECJ have endeavoured to prevent the latter from becoming overloaded, thus avoiding a situation like that at the European Court of Human Rights.⁶

Another "remedy" for the prohibition for individuals to bring cases against Member States before the ECJ is the possibility they have had since the 1993 Treaty of Maastricht to lodge complaints directly with the European Ombudsman or to petition the European Parliament (EP) (Art. 21 TEC). Petitions are often presented at the same time as complaints to the Commission. Statistics show that between one quarter and one third of the petitions is related to or gives rise to infringement proceedings.⁷

Depending on the circumstances, the Committee on Petitions of the EP has different options to successfully close the dossier concerned. These options vary from asking the Commission to provide information about compliance with the relevant Community legislation, to referring the petition to other EP committees for further action, submitting a report to the EP to be voted on in a plenary session, drawing up an opinion and asking the President of the EP to forward it to the Council and/or European Commission for action, forwarding the petition – via the EP President – to the appropriate national authorities, and last but not least, organising a fact-finding mission in the relevant country.⁸

Furthermore, according to Article 195 TEC, any natural and legal person can send complaints to the European Ombudsman about instances of maladministration at the Community institutions or bodies,

5. In the framework of the action for annulment (Article 230 TEC) and the action for failure to act (Article 232 TEC) natural and legal persons face considerable difficulties as regards admissibility before the ECJ since they have to prove their individual and direct concern.

6. Individuals are automatically entitled to bring a case before the European Court of Human Rights in Strasbourg after having exhausted all possible internal remedies.

7. See the 23rd Annual Report of the Commission on monitoring the application of Community law (2005), Brussels, 24 July 2006, COM (2006) 416 final. See also the Commission Communication to the European Parliament and the European Ombudsman on relations with the complainant in respect of infringements of Community law, Brussels, 20 March 2002, COM (2002) 141 final.

8. This useful information and other related aspects can be found in the Citizens' Guide to European Complaint Mechanisms that aims to help individuals and NGOs to successfully use existing institutional mechanisms to protect their rights and to ensure effective and adequate use of public funds. The Guide was published in September 2006 by CEE Bankwatch Network with the financial support of the European Commission.

with the exception of the Court of Justice and the Court of First Instance acting in their judicial role. This includes cases involving complaints against Member States brought and dealt with by the Commission in an unsatisfactory way. Though it is true that the Commission has full discretion in investigating and further proceeding with complaints received under the infringement mechanism of Article 226 TEC, the European Ombudsman's role in promoting good administration in this process has clearly increased in recent cases.⁹ To set a good example of public service, the European Ombudsman deals with complaints as quickly as possible. It aims to acknowledge the receipt of complaints within one week, to decide whether to open an inquiry within one month and to close inquiries within one year.¹⁰

However, while the rationale behind the restriction regarding individuals' direct access to the ECJ could be regarded as adequate considering the abovementioned reasons, another issue is raising controversy. Indeed, private parties are barred from intervening before the ECJ to support the Commission's conclusions in enforcement actions against Member States, even in cases where complaints are lodged by the parties applying for intervention.¹¹ This contradicts the stated objective to increase transparency and to develop EU policies closer to the citizens.

B. *RATIONE MATERIAE*

The Commission is entitled to bring cases before the ECJ in each of the areas of Community activity.¹² As we will try to demonstrate below, the bulk of complaints and subsequent actions brought before the ECJ involves concerns about the environment, the internal market, agriculture or consumer protection. However, traditional economic considerations are increasingly supplemented by social and fiscal issues.¹³

This pattern is confirmed by the landmark *Marks and Spencer* ruling. In this case, the ECJ ruled that the British retail company should be compensated by the UK taxation scheme for losses suffered in other Member States where it has shops in order to ensure the full exercise of its right of free establishment.¹⁴ This and some other judgments have given rise to much criticism from Member States accusing the ECJ of systematically expanding European competencies to areas of mixed or purely national prerogatives.¹⁵

The possibility for the Commission to bring cases in all areas of Community law excludes from the material scope of the infringement procedure all aspects of EU law (Second and Third Pillar). According to Article 226 TEC, Member States that fail to fulfil an obligation **under this Treaty** (i.e. the TEC) can be subject to an infringement procedure. Furthermore, in this respect no jurisdiction has been granted to the ECJ by the Treaty on the European Union (TEU), which may be considered as unfortunate considering the very important developments in the above areas, particularly the rapidly-adopted and evolving Third Pillar instruments.

The reluctance of Member States to confer jurisdiction on the ECJ may be explained by the highly sensitive nature of the provisions in this field. It should be noted that the majority of the instruments are adopted with a security rationale, which is part of the Member States' prerogative powers. Therefore, logical reference can be made to Article 35(5) TEU, which denies jurisdiction to the ECJ as regards measures related to the maintenance of law and order and the safeguarding of internal security. The practical application of this provision may give rise to breaches of Member States' obligations arising from, for instance, non-communitarised parts of the Schengen *acquis*. The rights of individuals could be jeop-

9. See the speech of the European Ombudsman, Mr P. Nikiforos Diamandouros, to the Committee on Petitions of the European Parliament, Brussels, 13 September 2006. Also see the Ombudsman's annual and special reports.

10. See for further information the abovementioned Citizens' Guide.

11. Carlos Botelho Moniz, *Overview of the Mechanisms of Enforcement of Community Law*; Jean Mischo, *L'émergence du principe de la responsabilité de l'Etat*.

12. See, *inter alia*, the abovementioned 23rd Annual Report of the Commission on monitoring the application of Community law, .

13. See EU Observer, 13 February 2006. For further developments as regards infringement proceedings in the area of competition, refer to Frank Montag, "The Case for a Radical Reform of the Infringement Procedure under Regulation 17", *European Competition Law Review* 8, 1996. For further developments as regards infringement proceedings in the area of the environment, see Sibylle Grohs, "Commission Infringement Procedure in Environmental Cases", *Europe and the Environment*, Publications Ludwig Krämer.

14. Case C-446/03 of 15 December 2005.

15. See the statement of the then Austrian Chancellor in EU Observer, 13 February 2006.

ardised and, by not granting jurisdiction to the ECJ, full respect and compliance with human rights and fundamental freedoms (in our example, the free movement of people) cannot be fully ensured.¹⁶

1. The author of the incriminating act

The Commission may decide to launch proceedings against Member States that infringe on or do not fully comply with their Community obligations. The scope of the concept of “state” covers central government but also regions and federal districts, public undertakings (in which case connections with the state are decisive), public administration, the legislature and the judiciary. Although the inclusion of the latter could be considered as a potential breach of the principle of separation of powers and the independence of the judiciary, it is interesting to see what the ECJ’s response might be in this respect.

The Köbler case partially addressed the controversial issue of the judiciary’s liability. This judgment elaborates on the principle of state liability before national courts and does not deal with enforcement proceedings before the ECJ.¹⁷ However, it is important to point out that the ECJ has recognised the possibility for individuals to obtain “redress in the national courts for the damage caused by the infringement of those rights owing to a decision of a court adjudicating at last instance”.¹⁸ The latter statement could be used in other cases under the infringement procedure *per se*. It is of crucial importance, in particular for new Member States, to refer to future cases of the ECJ that deal with such controversial issues as the potential liability of the judiciary.

2. Type of measure

A Member State can be brought before the ECJ because of an action (for instance an internal legislative act that incorrectly implements a directive) but also of an omission (failure to transpose a directive or failure to ensure free movement of goods¹⁹). Non-binding acts may also be taken into consideration by the Commission when assessing the relevant infringement (such as publicity campaigns) or individual acts (e.g. public procurement). This list is non-exhaustive and may also comprise all kinds of administrative and judicial practices.

As regards the broad concept of breach of Community law, all sources of Community law can be considered as an acceptable basis: primary law, secondary law, conventional law, general principles of law and ECJ case law. An element which is worth mentioning at this stage of the analysis and which is of high relevance to the new Member States and candidate countries is the capacity of public administrations. Covered by the 1993 Copenhagen criteria for membership, this capacity is not specifically mentioned in the 90,000 pages of the *acquis communautaire*. Therefore, if following their accession new Member States break commitments which were undertaken during the pre-accession phase but which are not legally part of the *acquis*, there is no obvious remedy, and natural or legal persons cannot rely on their rights under the *acquis* and cannot expect the Commission to bring such breaches before the ECJ.²⁰

Other derogations falling outside the scope of the infringement procedure as described in Article 226 TEC, can be found in the area of the Economic and Monetary Union (EMU). According to Article

16. Such a problem could arise in the context of the application of Article 2 of the Schengen Implementation Convention which allows Member States to restore controls at internal borders for a limited period of time and after consulting the other contracting parties. What if a Member State decides to re-establish internal border controls for more than one or two months, putting forward justifications related to the maintenance of public order and internal security, in which case the ECJ will not have jurisdiction to deal with this matter?

17. Case C-224/01 *Köbler v. Austria*, 30 September 2003.

18. *Ibid.* §36.

19. See, for instance, Case C-265/95 *Commission v. France*, in which the French authorities failed to fulfil their obligations by not ensuring the free cross-border movement of Spanish strawberries. It is interesting to note that, following repeated disruptions by demonstrations and blockades hindering the free movement of goods, Regulation 2679/98 (known as the “Strawberry” Regulation) was adopted in order to allow the effective implementation of the free movement of goods throughout the EU. It requires Member States to notify the Commission of potential risks of blockades and to take the necessary and appropriate measures to ensure the exercise of the fundamental freedoms. Still, problems subsist because the Regulation did not fix a deadline for the parties to remove potential obstacles and it did not provide for any sanctions for Member States failing to act in this respect.

104(10) TEC, the right to bring actions against Member States for excessive government deficits may not be exercised within the framework of the Article 226 procedure. Thus, if new Member States do not fully comply with the Maastricht criteria and are not getting ready to join the EMU, the use of the infringement procedure will be precluded.

Mention should be made of several other “special” infringement procedures, where, in derogation from the provisions of Articles 226 and 227, the Commission (and/or a Member State) can directly refer a matter to the ECJ without going through the prior informal procedure led by the Commission under Article 226 TEC. An example is the procedure of Article 237(d) TEC, where the ECJ is competent to rule on infringement proceedings instituted by the Council of the European Central Bank against national central banks for possible non-compliance with their obligations. Other examples can be drawn from Article 298 TEC (improper use of security derogations), Article 95(9) TEC (law approximation in the area of the internal market) or Article 88(2) TEC (state aid that is incompatible with the common market)

The large majority of infringement proceedings concerns problems encountered by Member States in transposing and implementing directives.²¹ The Commission has taken several measures to adequately remedy problems encountered in the transposition, implementation and enforcement of directives. These include the regular publication of a calendar for transposition, containing a list of directives to be transposed and notified by Member States, the Commission’s Internal Market Scoreboard and the annual reports issued by the Commission that monitor the application of Community law.²²

The integrated system of electronic notification of national measures for the transposition of directives is a mechanism that became operational on 3 May 2004, following the accession of ten new Member States. It is designed to facilitate and speed up the notification of transposition measures adopted by Member States. In 2005, the Netherlands and Sweden joined the electronic system, and preparations to join were at an advanced stage in France, the last Member State to accede to the system. The system was also adapted to enable Bulgaria and Romania to meet their pre-notification obligations for directives included in the *acquis communautaire*. Accordingly, both countries notified the first measures at the end of 2005.²³

As a result of the progress made in notifying national transposition measures, by January 2005 an average of 97.69% had been notified by the 25 Member States, and this percentage increased in the course of the year and reached 98.92% in November 2005.²⁴ More relevant and specific data, in particular relating to the new Member States, is provided and analysed in the second part of this paper.

C. INFRINGEMENT PROCEEDINGS *PER SE* AND THE COMMISSION’S DISCRETION

The concept of infringement is an objective one and not dependent on the prior existence of fault. By launching an enforcement action against a Member State, the Commission is not asking the ECJ to recognise a Member State’s intention to breach the law but to deliver a declaratory judgment on the latter’s failure to comply with its Community obligations. Such actions can, on the one hand, be launched following complaints against Member States by natural and legal persons. On the other hand, the Commission can detect infringements on its own, further to investigations or via the media, press reports, etc.

20. *The Economist*, “Through the Looking Glass”, 2 December 2006, p. 31. The article discusses Polish and Slovak new legislation that makes it easier for politicians to control the civil service by giving them more power to appoint top civil servants. Yet, the Commission has other legal tools (for instance arising from the obligation to establish independent national regulators or market surveillance procedures) to exercise pressure on Member States to improve various aspects of their administrative structures.

21. The focus on directives is explained by the fact that almost 80% of the infringement proceedings before the ECJ concern directives. For further analysis of this statement, refer to Phedon Nicolaides and Helen Oberg, “The Compliance Problem in the European Union”, *EIPASCOPE* 2006/1, European Institute of Public Administration, Maastricht.

22. These and other “complementary” mechanisms have been thoroughly analysed in the EPC Working Paper No. 25, Lorenzo Allio and Marie-Hélène Fandel, *Making Europe work: improving the transposition, implementation and enforcement of EU legislation*, Brussels, June 2006.

23. See the abovementioned 23rd Annual Report of the Commission on monitoring the application of Community law.

24. *Ibid.*

1. The complaint

The Commission lacks resources to carry out systematic and comprehensive checks on the transposition, implementation and enforcement of Community law. Therefore, anyone may lodge complaints with the Commission about measures adopted, omissions in adopting them or practices attributed to a Member State which are considered incompatible with a provision or a principle of Community law. It is essential to underline that there is no requirement for complainants to prove their interest in instituting proceedings or to prove their individual and direct concern in the matter concerned. In this respect, the infringement procedure differs from the procedure for annulment (Article 230 TEC) and the procedure for failure to act (Article 232 TEC) where the demonstration of individual and direct concern is the main stumbling block for natural and legal persons who wish to bring a case directly before the ECJ.

Potential infringements are recorded in a single register irrespective of how the breach has been revealed. The Commission has committed to contacting complainants and informing them in writing following each Commission decision (formal notice, reasoned opinion, referral to the ECJ or closure of the case) about the steps taken in response to their complaint.²⁵ The Ombudsman has also made a draft recommendation to the Commission to deal with complaints diligently and without undue delay.²⁶ Still, a case dealt with under the infringement responsibility of the Commission takes at least one to two years before being brought before the ECJ and it takes another two to three years before a judgment is delivered by the ECJ.

More relevant and noteworthy statistics can be found in the 2005 annual report of the Commission on monitoring the application of Community law. According to this report, the total number of infringement proceedings initiated by the Commission decreased in 2005. Furthermore, as regards the 25 Member States, the number of proceedings for failure to notify transposition measures decreased by 29% compared with the previous year. This decrease can also be explained by the fact that the 2004 figures related not only to the regular monitoring of failure to transpose directives by the 15 old Member States but also to the monitoring of failure by the ten new Member States to notify transposition measures in respect to the whole pre-accession *acquis*. These data are analysed in more detail in the second part of this paper.

2. The different steps of the procedure – Exercise of the Commission's discretion

2.1 Article 226 TEC

Several subdivisions of the infringement proceedings can be mentioned: some pundits refer to a two-step procedure (administrative and judicial proceedings), others divide it into four different stages²⁷:

- The pre-contentious (also called *pre-226*) stage during which negotiations with the Member State give the latter the opportunity to explain its position and to reach a compromise with the Commission.
- If the matter is not resolved informally in the first phase, the Member State will be formally notified of the alleged infringement by means of a *letter of formal notice* sent by the Commission. The Member State is usually given two months to reply, except in cases of urgency, and the Commission normally decides within a year either to close a case or to proceed.
- If, after the previous stage and following negotiations with the Member State, the matter is undecided, the Commission may issue a *reasoned opinion*. The reasoned opinion clearly sets out the grounds regarding the alleged infringement and marks the beginning of the time period within which the Member State must comply with the recommendations of the Commission in order to avoid judicial proceedings.

25. See the abovementioned Commission Communication to the European Parliament and the European Ombudsman on relations with the complainant in respect of infringements of Community law.

26. See the abovementioned speech of the European Ombudsman, 13 September 2006.

27. For further clarification, refer to P. Craig and G. de Burca, *EU Law Text, Cases and Materials*, Oxford University Press, 2003, p. 400.

- If the Member State does not adopt measures within the time period stated in the reasoned opinion, the Commission will be entitled to bring the case before the ECJ, this being the fourth and final judicial stage.

It is very important to underline the total discretion conferred on the Commission in the exercise of its responsibilities under Article 226 TEC. The Commission is free to decide when and against which Member State to start infringement proceedings. The Court will examine only whether the Member State has failed to fulfil its Community obligations and will not assess the Commission's interest in bringing the action. The absence of a specific motivation or proven interest in bringing proceedings against a Member State will not affect the admissibility of the enforcement proceedings. The ECJ has consistently reiterated that it refuses to consider if the Commission's discretion under Article 226 is "wisely exercised".²⁸ The Commission should be free to start proceedings and bring actions before the ECJ at its convenience, in keeping with its role as the guardian of the Treaties.

However, an observation should be made about the ECJ's different approaches towards the infringement procedure and the action for failure to act (Article 232 TEC). As regards the time period for initiating proceedings, the Court has refused to apply the concept of reasonable time under Article 226 proceedings while it is always applied under Article 232 TEC, even if the provision does not state any time limit.²⁹ Last but not least, in the framework of the above considerations, the ECJ has also rejected the possibility of challenging a reasoned opinion before the ECJ. Consistent case law determines that a reasoned opinion is not subject to an action for annulment because it is not binding, following the classification of the different legal instruments provided for by Article 249 TEC.

As stated earlier, the ECJ can issue a declaratory judgment (referring to an identical formula in every such ruling), holding that a Member State has failed or has not failed to fulfil its Community obligations. In its judgment, the ECJ may neither annul national legislative acts nor prescribe specific measures to be taken by the Member State. One month after the judgment, the Commission will normally send an "administrative letter" to the Member State, requesting information about the content and timing of the measures to be adopted to comply with the judgment.³⁰ If the Commission does not receive any feedback or does not consider the reply satisfactory, it may proceed with the application of Article 228 TEC. Before focusing on this possibility, involving the imposition of a penalty payment and/or a lump sum, we will briefly analyse the procedure of Article 227 TEC.

2.2 Article 227 TEC

According to Article 227 TEC, a Member State which considers that another Member State has failed to fulfil an obligation under the Treaty (TEC) may bring the matter before the ECJ. Under this procedure the complainant Member State is not required to first contact the other Member State but must refer the matter to the Commission. The latter then has to take the same steps as under the Article 226 procedure, after giving both Member States the opportunity to present their views and to make oral and written submissions.

If the Commission has not delivered a reasoned 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 issue from being brought before the ECJ. If the Commission takes the view that there is no breach, it may be presumed that the complainant Member State can still refer the matter to the ECJ even though the Treaty provision is not explicit in this respect.

It is not surprising that Article 227 has been scarcely used considering the obvious diplomatic considerations at stake. Moreover, by avoiding using it Member States tolerate each other's failures to comply with Community obligations. It is worth mentioning the successful dispute between France, supported by the Commission, and the UK over a fishing dispute.³¹

28. See, *inter alia*, the judgment in Case C-200/88 *Commission v. Greece*; for a more detailed analysis on this issue, refer to the relevant chapter in P. Craig and G. de Burca, *EU Law Text, Cases and Materials*, mentioned above.

29. The ECJ has referred to a reasonable time period in infringement cases only and strictly in cases where there is a risk that the rights of the defence may be prejudiced. See in this respect Case C-74/82 *Commission v. Ireland*.

30. See the abovementioned EPC Working Paper No. 25.

31. Case C-141/78, *France v. UK*.

2.3 Article 228 TEC

This provision concerns the second infringement procedure (after the ECJ has delivered its first judgment under Article 226). It gives the ECJ the possibility, provided for by the Maastricht Treaty, to impose a lump sum and/or a penalty payment to be paid by the Member State which has not complied with its first judgment.³²

The procedure to be followed is almost identical to the Article 226 procedure. If the Commission learns (through all possible means described in Part I, C) that the Member State has failed to comply with the first judgment and does not consider the Member State's response/observations satisfactory, it may start a new infringement procedure. It may send another letter of formal notice to the Member State in question, followed by a reasoned opinion and, eventually, a reference to the ECJ.

The Treaty does not provide explicit criteria as regards the determination of the penalty payment or lump sum. In practice, the Commission proposes the amount of the penalty, but the ECJ is not bound by this and has full discretion to fix a specific amount to be paid by the Member State. For the sake of legal certainty and to increase transparency, the Commission issued three Communications on the application of Article 228,³³ in which it clarifies the criteria used to calculate the penalty payment; these criteria refer to the seriousness of the infringement, to the consequences of the infringement as far as general and individual interests are concerned, and to the duration of the infringement and the capacity to pay of the Member State concerned.

The Commission Communication of December 2005, which replaces the 1996 and 1997 Communications, clarifies the application of Article 228, following the groundbreaking ECJ judgment of July 2005, *Commission versus France*.³⁴ While Article 226 of the Treaty stipulates that the ECJ may impose a lump sum **or** penalty payment (i.e. not stipulating the cumulative application of both), in this case the ECJ decided to impose both a penalty payment and a lump sum. It allows this possibility, particularly in cases where the breach of Community law obligations has both continued for a long period and is likely to persist, which was the case here. In this respect, the ECJ pointed out that if "the competent authorities of a Member State could systematically refrain from taking action against the persons responsible for such infringements, both the conservation and management of fishery resources and the uniform application of the common fisheries policy would be jeopardised".³⁵

Therefore, since this judgment, the imposition of both penalty payments and lump sums is to be expected. A penalty payment would have a persuasive function in inducing compliance with Community law in the future. Imposing a lump sum would have a dissuasive effect, to address the illegal conduct in the past.

32. The first judgment in which the ECJ resorted to this option and imposed a penalty payment was in Case C-240/98 *Commission v. Greece*. The ECJ imposed a penalty payment of €20,000 on Greece for each day's delay in the adoption of the measures necessary to comply with the previous judgment in C-45/91.

33. The first Communication dates from 1996 (96/C 242/07), the second from 1997 (97/C 63/02) and the most recent one from 2005 (2005/C 16/58).

34. Case C-304/02. For further information on this case, also refer to the Commission's MEMO/05/482, Brussels, 14 December 2005.

35. Case C-304/02, *ibid*.

II. Article 228 TEC and its Application to New Member States

According to the Commission White Paper on European Governance of 2001,³⁶ the application of Community law by Member States is still incomplete and unsatisfactory. The Commission moreover encourages the use of new harmonisation instruments such as mutual recognition and the rule of the country of origin. It thus issued a Communication³⁷ that sets three priority criteria which have to be used in deciding when to launch infringement proceedings. These must reflect the seriousness of the potential or known failure to comply with legislation and are listed as follows: infringements which undermine the foundations of the rule of law; those that undermine the smooth functioning of the EU's legal system and, last but not least, those consisting in the failure to transpose, or in the incorrect transposition of directives.

Indeed, if the three abovementioned conditions are met, proceedings will be launched by the Commission. Of course, the Commission has full discretion and decides on the length of each step of the procedure. The regular two months before, or sometimes even following, the sending of the letter of formal notice or the issuing of the reasoned opinion are very often extended to one year or more in order to give the Member State enough time to resolve the issue. While these efforts aim to avoid judicial proceedings through cooperation between the Commission, as guardian of the Treaties, and the Member States, some Member States persistently try to intentionally delay the pre-litigation phase of the procedure by not replying to Commission's letters, by providing the Commission with incomplete information or by simply finding ways to extend the already cumbersome proceedings.

The Member States that joined in May 2004 as well as Bulgaria and Romania (EU members since 1 January 2007) shall avoid taking deliberate advantage of the length of the infringement proceedings in order to delay transposition or correct implementation. Undoubtedly, they are perfectly allowed to rely on various arguments to justify their failure to comply with their Community obligations. Nevertheless, they should be aware of the ECJ's consistent reluctance to accept State pleas on different occasions, the result being that the current number of arguments admitted as justification is quite limited. An interesting question relates to the possibility offered to Member States to submit defence elements other than those presented in the administrative procedure.³⁸ This possibility, as mentioned earlier, is not granted to the Commission, whose application will be declared inadmissible if elements other than those included in the reasoned opinion are raised before the ECJ.

A. EXAMPLES OF STATE JUSTIFICATIONS

It is very difficult to compile an exhaustive list of state defences before the ECJ, but there are some recurrent arguments that can be briefly presented in this paper. For instance, *force majeure* has often been invoked in relation to domestic provisions, legislative practices or particular circumstances (e.g. dissolution of the Parliament³⁹) but has nearly always been rejected by the Court. An exception where the

36. White Paper on European Governance, mentioned above.

37. See the abovementioned Communication, COM (2002) 725 final.

38. See, *inter alia*, Case C-414/97 *Commission v. Spain*. Refer also to P. Craig and G. de Burca, *EU Law Text, Cases and Materials*, Oxford University Press, 2003, p. 425.

39. Case C-144/97 *Commission v. France*.

latter plea was taken into consideration was the case of a bomb attack in Italy, in which “insurmountable difficulties” in complying with EC obligations were presented.⁴⁰ However, any other domestic practices or circumstances or the short transposition period would not be accepted by the ECJ.

Another argument has often been put forward by most Member States, trying to prove their goodwill and the absence of the intention of wrongdoing. The ECJ has repeatedly emphasised that infringement proceedings are “objective in nature”. Hence, the Commission is not required to submit evidence of inertia or conflict with EU law, and the Member States do not have to reject arguments to that effect. Thus, it does not matter whether the failure to comply is deliberate or not, major or minor or results from non-compliance with a Treaty provision or secondary legislation instrument. In all the latter cases, infringement proceedings will result in a declaratory judgment comprising an identical formula as mentioned above.⁴¹

Several Member States have pleaded that the Community measure on which the infringement procedure is based should be declared illegal. They have argued that the illegality of the EC instrument justifies their failure to act and therefore Commission’s applications to that end before the ECJ should be rejected. On the one hand, the ECJ has objected to the relevance of this argument by referring to the possibility of bringing a direct action for annulment under Article 230 TEC. This provision imposes a strict deadline for launching an application (2 months), which is a very tight time limit, rendering the use of the annulment procedure quite difficult. On the other hand, there is the interesting possibility of relying on another plausible action that has been accepted by the ECJ, namely the plea of illegality under Article 242 TEC.⁴² In that case, the Community measure is declared inapplicable, but the ECJ has only allowed this possibility in the case of regulations⁴³ while rejecting it where decisions and directives are concerned.⁴⁴

In any event, the ECJ will always reject a defence to the effect that other Member States are also infringing the law (whether the specific breach concerns non-transposition, lack of or incorrect implementation). Two considerations should be raised in this context. **Firstly**, EC law has established a new legal system whereby EC provisions create rights (and obligations) that individuals can enforce directly before their national courts, which is not possible under traditional international law.⁴⁵ Individuals have also been declared direct subjects of EC law, which is another difference with the existing international legal system, whose subjects are the Member States.

Another difference stemming from the above is the application of the principle of reciprocity, which may be accepted under international law but not under EC/EU law. Member States cannot deny compliance with EC primary or secondary law (with particular emphasis on another important source of EC law, namely ECJ case law) by using other Member States’ non-compliance as an argument. Such an application of the principle of reciprocity might not only affect their sovereign interests but also have an adverse effect on individuals’ rights created by the contested provision.

Secondly, as stated earlier, the Commission has full discretion as to which Member State should be brought before the ECJ. For instance, for the same failure to act the Commission may institute infringement proceedings against one Member State while giving another Member State more time to comply with the EC provisions. This will depend on the persuasive and adequate efforts made by the Member State to convince the Commission of their willingness to adhere to all their Community obligations quickly and in the most efficient way. Again, reference to the principle of reciprocity will be irrelevant in a case brought before the Court.

40. Case C-33/69 *Commission v. Italy*. For a further analysis on this issue, refer to P. Craig and G. de Burca, *EU Law Text, Cases and Materials*, Oxford University Press, 2003, mentioned above.

41. See above, I B 2.1.

42. See P. Craig and G. de Burca, *EU Law Text, Cases and Materials*, Oxford University Press, 2003, mentioned above.

43. See Case C-258/89 *Commission v. Spain*.

44. See respective cases C-183/91 *Commission v. Greece* and C-74/91 *Commission v. Germany*.

45. The ECJ established this in 1963 in the most groundbreaking of its rulings, Case C-26/62 *Van Gend en Loos*.

B. RECENTLY INITIATED INFRINGEMENT PROCEEDINGS AGAINST NEW MEMBER STATES

1. Administrative stage

The Copenhagen criteria of 1993 stipulate that all obligations arising from the *acquis* should be met. In practice, this means that upon accession the whole body of EC/EU law should be incorporated. While this has been one of the most decisive criteria for the accession of the new Member States, meeting it has been quite difficult and various transitional periods have been requested. The Commission has given the Member States that joined in 2004 some time to comply with their Community obligations.

However, following the 2004 enlargement, the Commission started infringement proceedings against some Member States. Some relevant examples should be mentioned at this point in order to underline the Commission's main areas of concern as regards non-compliance with specific obligations. The list below is not exhaustive but seeks to give an overview of the main policy objectives to be achieved by the new Member States. Thus, in July 2005, the Commission started infringement proceedings against the Czech Republic⁴⁶ for non-implementation of the 2001 Copyright Directive. This Directive is an essential benchmark in updating EU copyright law and in providing an adequate level of copyright protection for authors and other right-holders in the digital environment. It had to be adopted before 22 December 2002 and the Commission therefore sent a letter of formal notice to the Czech authorities requesting them to provide exhaustive information on the ongoing implementation of the Directive.⁴⁷

Furthermore, the European Commission decided to institute infringement proceedings against 13 Member States for failure to transpose one or more of the eight Internal Market Directives into national law.⁴⁸ The Commission sent reasoned opinions to some new Member States – the Czech Republic and Latvia for non-transposition of Directive 2002/87 on the supplementary supervision of credit institutions, which is a priority measure under the Financial Services Plan.⁴⁹ The Czech Republic also received another reasoned opinion for non-transposition of Directive 2001/24 on the reorganisation and winding up of credit institutions.⁵⁰ As long as this Directive is not fully implemented by all Member States, there will be a risk of conflicting jurisdictions, and equal treatment of creditors in the different Member States will not be guaranteed.

Last but not least, the Czech Republic was also sent a reasoned opinion for non-communication of national measures to transpose and implement Directive 2001/17 on the reorganisation and winding-up of insurance undertakings.⁵¹ The Directive is designed to guarantee the protection of policyholders in such instances and the Czech Republic was required to implement the Directive by the date of accession, 1 May 2004.

Estonia is another new Member State which received a reasoned opinion, namely for non-transposition of Directive 2000/46 on the taking up, pursuit of and prudential supervision of the activity of electronic money institutions.⁵² The Directive coordinates the conditions of exercise of the business of electronic money institutions and provides for a specific prudential supervisory regime aimed at ensuring their financial integrity and sound operation. It thus sets a level playing field for operators in this area to the benefit of bearers of electronic money issued throughout the EU.

The Commission also decided to send reasoned opinions to Latvia and the Slovak Republic for non-communication of national measures as regards Directive 98/84 (on the legal protection of services based on, or consisting of, conditional access – “the Conditional Access Directive”).⁵³ These two Member

46. For the sake of clarification, the actions mentioned also concern some of the old Member States. However, solely the new MS will be referred to.

47. See IP/05/921, Brussels, 13 July 2005.

48. See IP/05/1037, Brussels, 3 August 2005.

49. The reasoned opinion being, as already explained, the last step before the Commission takes the Member States to the ECJ.

50. See IP/05/1037, Brussels, 3 August 2005, mentioned earlier.

51. *Idem*.

52. *Idem*.

53. *Idem*.

States were to have communicated the national measures by 1 May 2004, the date of their accession to the EU.

Reasoned opinions were sent to Cyprus, the Czech Republic, Lithuania, Slovakia and Slovenia for not having transposed Directive 2003/41 on the activities and supervision of institutions for occupational retirement provision into their national laws, or for having done so only partially.⁵⁴ The Directive should have been transposed by all Member States by 23 September 2005.

Reasoned opinions were also sent to Cyprus, Estonia and Malta regarding non-implementation of the Resale Right Directive, which is intended to ensure that authors of graphic art get a share of the profit made from the successive sales of their original works of art by art market professionals.⁵⁵ The Directive was adopted in 2001 and Member States had until 1 January 2006 to adopt national measures implementing it.

The Commission moreover sent reasoned opinions to Latvia, Malta, Poland and Slovakia (and to some old Member States) for non-implementation of Directive 2004/48 on the enforcement of intellectual and industrial property rights.⁵⁶ Furthermore, reasoned opinions were sent to Estonia and Slovenia for the continued non-communication of national measures transposing one or more of the Public Procurement Directives. The deadline for complying with the provisions of these Directives expired on 31 January 2006.⁵⁷

Concluding this brief overview of cases, a relevant observation at this stage of the analysis is that the internal market (encompassing the realisation of the four fundamental freedoms), the successful implementation of the main competition provisions and important social policy considerations are still priorities, encouraging the Commission to start early infringement proceedings in order to foster compliance with Community law by new Member States.

2. Judicial stage

This part concerns the final stage of the infringement procedure and, as we will try to demonstrate, there are not many cases involving new Member States that have already been referred to the ECJ. Furthermore, the cases that have been referred are very recent and it is important to emphasise the current acceleration in the Commission's initiatives to refer new Member States to the ECJ.⁵⁸ This acceleration is perfectly justified and furthers efforts made during the pre-litigation phase in requesting the new Member States to speed up as well as improve the quality of their compliance with obligations arising from Community law.

• *The Czech Republic*

The first case, in which the Commission referred the Czech Republic to the ECJ, concerned the field of environment and the protection of consumers. The action was brought on 14 March 2006, requesting the Court to declare that by not taking the legal and administrative measures necessary to comply with Directive 2002/49/EC relating to the assessment and management of environmental noise, the Czech Republic failed to fulfil its Community obligations.⁵⁹

The Commission also decided to refer the Czech Republic to the ECJ over its partial communication of national measures implementing Directives 78/686 and 93/16 on the mutual recognition of the diplomas of doctors and dentists respectively.⁶⁰ The Directives apply both to establishment and to the freedom to provide services on a temporary basis. To promote the freedom to provide services by the professionals in question, provision has been made for a simpler procedure than that required for estab-

54. See IP/06/503, Brussels, 19 April 2006.

55. See IP/06/900, Brussels, 30 June 2006.

56. See IP/06/1354, Brussels, 12 October 2006.

57. *Idem*.

58. Indeed, only one case was brought before the ECJ in 2005 (*Commission v. Estonia*) and 13 actions were brought in 2006 (4 against the Czech Republic, 2 against Estonia, 2 against Malta, 3 against Poland and 2 against Slovakia). These statistics are drawn from the ECJ 2006 Annual Report, Luxembourg 2007. In addition, 2 cases were brought against Malta in February 2007 and 1 case against Hungary in January 2007 (see below).

59. See the action brought before the ECJ, *Commission v. Czech Republic*, C-140/06.

60. See IP/06/14, Brussels, 10 January 2006, mentioned earlier.

lishment. Indeed, the Czech Republic adopted various measures to implement the above Directives and notified the Commission accordingly, but none to promote the temporary provision of services by professionals established in other Member States. Both cases were brought before the ECJ by the Commission on 4 May 2006.⁶¹

The latter are the two first actions which the Commission brought against a new Member States that have proven successful before the ECJ: in two very recent judgments, of 18 January 2007, the ECJ declared that the Czech Republic failed to comply with its obligations arising from the two abovementioned Directives and consequently the latter was condemned to pay the costs.

The fourth case, brought by the Commission on 30 January 2006 against the Czech Republic for non-implementation of the 2001 Copyright Directive,⁶² was removed from the Register following the compliance of the Czech authorities with an order of the President of the Court.⁶³

- **Estonia**

An action launched by the Commission bringing Estonia before the ECJ concerns the failure to comply with the obligations under Directive 2003/55 concerning common rules for the internal market in natural gas by notifying only in part the laws necessary to transpose it into national law. Following the subsequent compliance by the Estonian authorities, the President of the Court issued an order to remove this case from the Register.⁶⁴

In a parallel area, subject to further liberalisation, the Commission adopted a reasoned opinion addressed to the Estonian authorities, following their failure to transpose on time Directive 2002/39 on the further opening to competition of Community postal services.⁶⁵ While acknowledging that Estonia is taking active steps to adopt appropriate national measures to transpose the Directive, the Commission declares regretting the delay in introducing national legislation; the period prescribed for transposing the Directive into national law expired on 31 December 2002.

Indeed, reform of the postal sector is considered one of the key elements of the Lisbon Strategy, aimed at transforming the EU into the most knowledge-based and competitive economy in the world. Following the unsatisfactory reply from the Estonian authorities, the Commission decided to refer Estonia to the ECJ further to the lack of national transposition measures as regards Directive 2002/39.⁶⁶ The action was brought on 5 April 2006 and the Commission requested the ECJ to declare that Estonia has failed to fulfil its obligations under this Directive and to order Estonia to pay the costs.⁶⁷

Another case brought by the Commission before the ECJ is the action taken against Estonia on 22 September 2006. The form of order sought is that the ECJ declares that Estonia has failed to fulfil the obligation under Directive 2002/14 establishing a general framework for informing and consulting employees in the European Community to notify all the laws, regulations and administrative provisions necessary for transposition of the Directive.⁶⁸

- **Hungary**

Hungary was referred to the ECJ on 29 January 2007. The Commission's application seeks a declaration by the ECJ that, by not adopting or not notifying the laws, regulations or administrative provisions necessary to implement Directive 2003/109 concerning the status of third-country nationals who are long-term residents, Hungary has failed to fulfil its obligations.⁶⁹

It is interesting to point out that this case is the first brought against a new Member State in the context of the progressive establishment of a European Area of Justice, Freedom and Security, which cur-

61. See two actions brought before the ECJ, *Commission v. Czech Republic*, cases and judgments rendered on 18 January 2007, C-203/06 and C-204/06.

62. Previous administrative steps adopted by the Commission as mentioned above, see footnote 46.

63. See the action brought before the ECJ, *Commission v. Czech Republic*, C-46/06 and the order of the President of the Court of 28 September 2006.

64. See the action brought before the ECJ, *Commission v. Estonia*, Case C-351/05 and the subsequent order of the President of the Court of 31 May 2006.

65. See IP/05/1037, Brussels, 3 August 2005, mentioned earlier.

66. See IP/06/14, Brussels, 10 January 2006.

67. See the action brought before the ECJ, *Commission v. Estonia*, Case C-178/06.

68. See the action brought before the ECJ, *Commission v. Estonia*, Case C-397/06.

69. See the action brought before the ECJ, *Commission v. Hungary*, Case C-30/07.

rently is the most rapidly evolving area of EC/EU law. This area covers various areas of the First Pillar (visas, asylum, immigration and judicial cooperation in civil matters) and Third Pillar (police and judicial cooperation in criminal matters). While, as explained earlier, enforcement actions are not possible in the framework of the Third Pillar, new Community competencies provided for by Title IV of the Treaty of Amsterdam allow the adoption of many legal instruments, and non-compliance with the latter can give rise to enforcement actions. In particular, the Directive in question represents a major step in the development of the common immigration policy.

It is plausible that other actions for non-compliance by new Member States with instruments arising from Title IV TEC will follow because of the rapidly evolving *acquis* in this area, the complexity of the latter and the sensitivity of some of the issues tackled. It is important to bear in mind that the new Member States do not have the possibility to derogate from provisions in this area, unlike some old Member States (Denmark, the UK and Ireland).

- **Latvia**

The Commission decided to refer Latvia to the ECJ for non-communication of national measures transposing Directive 2002/87 on the supplementary supervision of credit institutions, insurance undertakings and investment firms in a financial conglomerate.⁷⁰ Once properly implemented by all Member State, the Directive will benefit consumers, depositors and investors in the EU by stimulating financial market efficiency and increasing competition. The transposition period expired on 11 August 2004. Latvia has transposed the main legal texts but has not yet adopted the required implementing measures and was sent a reasoned opinion in July 2005. The Commission has not yet referred this case to the ECJ.

- **Malta**

Another recent example concerns the announced referral of Malta to the ECJ for not having transposed the Insurance Mediation Directive 2002/92 into its national law.⁷¹ This Directive should have been transposed by 15 January 2005 and is part of the Financial Services Action Plan. Malta has communicated some national measures but has indicated that further national legislation is needed. The Commission has not yet referred this case to the ECJ.

Another interesting example in the area of the environment (which will certainly give rise to more new Member States being referred to the ECJ in the future) is the referral of Malta by the Commission to the ECJ on 10 March 2006 for non-compliance with the obligations arising from Directive 2002/96 on waste electrical and electronic equipment.⁷² The action brought by the Commission against Malta on 14 December 2006 concerned the latter's failure to comply with its obligations under Article 11 of Directive 96/59 as read in conjunction with Article 54 of the 2003 Act of Accession.⁷³

Two new cases were brought against Malta on 13 and 15 February 2007 respectively whereby the Commission asked the Court to declare that, by not adopting or not notifying the laws, regulations or administrative provisions necessary to comply with Directive 2003/110 (on assistance in cases of transit for the purposes of removal by air) and Directive 2003/86 (on the right to family reunification), Malta has failed to fulfil its obligations.⁷⁴ The two cases concern instruments falling under Title IV TEC and, as explained earlier in the context of the first case against Hungary, the two Directives in question represent important steps in the development of the common asylum and immigration policy. The above-mentioned considerations would therefore also apply in these cases.

- **Poland**

Poland was taken to the ECJ by the Commission for failure to comply with its obligations in the area of freedom of establishment. An action was brought on 16 October 2006 for non-compliance with Directive 74/556 laying down detailed provisions concerning transitional measures relating to activities, trade in and distribution of toxic products and activities entailing the professional use of such products including activities of intermediaries.⁷⁵ A parallel case in the same area was brought on the same day for Poland's

70. See IP/06/503, Brussels, 19 April 2006, mentioned earlier.

71. *Ibid.*

72. See the action brought before the ECJ, *Commission v. Malta*, Case C-136/06.

73. See the action brought before the ECJ, *Commission v. Malta*, Case C-508/06.

74. See the actions brought before the ECJ, *Commission v. Malta*, respective Cases C-79/07 and C- 87/07.

failure to comply with Council Directive 74/557/EEC on the freedom of establishment and freedom to provide services in respect of activities of self-employed persons and of intermediaries engaging in the trade and distribution of toxic products.⁷⁶

Last but not least, an action was brought by the Commission against Poland on 11 October 2006 regarding industrial policy. The Commission has requested the ECJ to recognise that by not ensuring actual availability of at least one comprehensive directory and one comprehensive directory enquiry service in accordance with the requirements set out in Article 5(1) and (2) and Article 25(1) and (3) of Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services, Poland has failed to fulfil its obligations.⁷⁷

- **Slovakia**

Slovakia was also brought before the ECJ in 2006, on two occasions. The first action was brought by the Commission on 6 February 2006 for failure to transpose or notify national measures necessary to comply with Directive 76/914 on the minimum level of training for some road transport drivers. Following Slovakia's subsequent compliance, the President of the Court issued an order to remove this case from the Register.⁷⁸

The second action against Slovakia was referred to the ECJ on 27 February 2006 for non-compliance with Directive 96/48 on the interoperability of the trans-European high-speed rail system. A judgment was rendered on 8 February 2007, in which the Court declared that Slovakia failed to fulfil its obligations under this Directive.⁷⁹

- **Slovenia**

Following the reasoned opinion sent to Slovenia in April 2006, as mentioned earlier, to which Slovenia has not replied, the Commission stated its intention to refer Slovenia to the ECJ for not having transposed Directive 2003/41 on the activities and supervision of institutions for occupational retirement provision into its national law.⁸⁰ The Commission has not yet referred this case to the ECJ.

So far, the Commission has not referred four of the ten new Member States that joined in 2004 to the ECJ: Cyprus,⁸¹ Latvia,⁸² Lithuania and Slovenia.⁸³ However, the latter Member States have to rapidly ensure full compliance with their Community obligations, mainly in areas where an infringement procedure has already been started against them through letters of formal notice or reasoned opinions in the pre-litigation phase (see previous chapter). Last but not least, it should be underlined that a number of cases have been removed from the Register of the ECJ, following the subsequent compliance by the Member States in question (see above). Such orders are issued by the Court's President, upon the recommendation of the Commission, which in such cases normally requests that Member States are condemned to pay the costs.

75. See the action brought before the ECJ, *Commission v. Poland*, Case C-423/06.

76. See the action brought before the ECJ, *Commission v. Poland*, Case C-422/06.

77. See the action brought before the ECJ, *Commission v. Poland*, Case C-416/06.

78. See the action brought before the ECJ, *Commission v. the Slovak Republic*, Case C-69/06 and the subsequent order of the President of the Court of 23 February 2007.

79. See the action brought before the ECJ, *Commission v. the Slovak Republic*, Case C-114/06 and the subsequent judgment of the Eighth Chamber of the Court.

80. See IP/06/900, Brussels, 30 June 2006.

81. It is interesting to note two applications by Cyprus against the Commission in the area of agriculture.

82. Despite footnote 69, see above.

83. Despite footnote 79, see above.

Conclusion

Among the tasks entrusted to the Commission under Article 211 TEC is that of ensuring the proper and uniform application of Community law. According to this provision, the Commission can start infringement proceedings against Member States that fail to comply with obligations arising from various Community instruments. The procedure comprises two phases – an administrative phase (encompassing pre-226 letters, letters of formal notice and reasoned opinions) and a judicial phase. The latter starts when the Commission brings the Member State before the ECJ, which may or may not declare that the Member State has failed to comply with requirements stipulated in the instrument in question.

Since the enlargement in 2004 to eight countries from Central and Eastern Europe as well as Cyprus and Malta, and that of 2007 to Bulgaria and Romania, the Commission has taken a further stance in guaranteeing the successful implementation of Community law by these new Member States. Several infringement proceedings have recently been launched, with a first judgment of the ECJ delivered on 18 January 2007. The new Member States (including those that acceded most recently, Bulgaria and Romania) as well as the candidate countries that seek membership are required to make further major efforts and to demonstrate sound and intelligent policy making in order to ensure full compliance with the *acquis*. The latter is absolutely necessary, though admittedly the rapidly evolving and increasingly complex Community law does not make it easy. This constitutes an, in my view, unique opportunity to make a success of the fifth enlargement and to aspire to a prosperous enlarged Europe.