

WORKING DOCUMENTS

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## REVAMPING THE EUROPEAN UNION'S ENFORCEMENT SYSTEMS WITH A VIEW TO EASTERN ENLARGEMENT

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## THE EU ENLARGEMENT SERIES

### *Published titles*

- Eric Philippart and Monika Sie Dhian Ho, *The Pros and Cons of 'Closer Co-operation' within the EU; Argumentation and Recommendations*, WRR Working Documents no. W104, The Hague (also available in French).
- A.J.G. Verheijen, *Administrative Capacity Development; A Race against Time?*, WRR Working Documents no. W107, The Hague.
- Richard H. Jones, *Educating for an Open Society; Higher Education Reform in Central and Eastern Europe as a Catalyst for the Emergence of a Sustainable Democratic Market Economy*, WRR Working Documents no. W108, The Hague.
- Jacques Pelkmans, Daniel Gros, and Jorge Núñez Ferrer, *Long-run Economic Aspects of the European Union's Eastern Enlargement*, WRR Working Documents no. W109, The Hague.
- D.M. Curtin and R.H. van Ooik, *Revamping the European Union's Enforcement Systems with a View to Eastern Enlargement*, WRR Working Documents no. W110, The Hague.

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- Eric Philippart and Monika Sie Dhian Ho, *Peddalling against the wind; Strategies to Strengthen the EU's Capacity to Act in the Context of Enlargement*, WRR Working Documents no. W115, The Hague.

## PREFACE

This study addresses the European Union's legal order with a view to the EU's eastern enlargement. The authors argue that future membership of Central and Eastern European countries will severely strain the application, enforcement and supervision of EU law. This is why they scrutinise and evaluate various possible reforms to mitigate this pressure on the EU's legal order. On the basis of the evaluations, the authors present ways to revamp the European Union's enforcement and supervisory systems.

This working document has been written for the project 'Enlargement of the EU to Central and Eastern Europe', which the Netherlands Scientific Council for Government Policy (WRR) is currently undertaking. As such, it contributes to answering the central questions of this project: to what extent will enlargement increase (disruptive) diversity within the Union, and, hence, to what extent will reform of existing institutions and practices be needed to maintain their effectiveness, legitimacy and cohesion?

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	<b>Preface</b>	3
	<b>1 Background and parameters of the report</b>	9
<b>Part A</b>	<b>Legal force of European Union law for CEECS</b>	17
	<b>2 Purpose and structure of Part A</b>	19
	<b>3 Actual accession as a precondition for the legal force of EU law in the CEECS</b>	21
	<b>4 Flexibility as an instrument to avoid incorporation perils</b>	27
	4.1 Non-applicability of the <i>existing</i> acquis upon accession	27
	4.2 Non-applicability of <i>new</i> acquis after enlargement	28
	4.3 Post-enlargement: specific flexibility provisions	30
	4.4 General assessment (and sophisticated harmonisation techniques as an alternative)	31
<b>Part B</b>	<b>Transposition of EU law into the national legal orders of (new) Member States</b>	37
	<b>5 Purpose and structure of Part B</b>	39
	<b>6 The obligation to bring national law in conformity with EU law</b>	41
	<b>7 Possible reforms to the EU system</b>	45
	7.1 The choice of the legal instrument	45
	7.1.1 What kind of community legislation?	45
	7.1.2 A calculated choice of legal instrument under the other EU pillars?	47
	7.2 EU assistance to the CEECS legislators	49
<b>Part C</b>	<b>Application and enforcement of EU law by national administrative authorities</b>	53
	<b>8 Purpose and structure of Part C</b>	55
	<b>9 The current state of affairs: decentralised enforcement is the rule</b>	57
	<b>10 Centralisation of enforcement tasks?</b>	61

<b>11</b>	<b>Another point of departure: application of EU law by national administrations</b>	65
<b>Part D</b>	<b>Supervision of the correct application of EU law</b>	69
<b>12</b>	<b>Purpose and structure of Part D</b>	71
<b>13</b>	<b>EC law and national procedural law</b>	75
13.1	The principle of procedural autonomy	75
13.1.1	Limitations in the Court's case law	75
13.1.2	Legislative limitations	76
13.2	Consequences for the organisation and operation of the CEEC judiciary	77
13.3	Reforms designed to enhance effective judicial protection in the Member States	78
<b>14</b>	<b>The national court at work: supervision and application of EU law</b>	81
14.1	Direct effect and supremacy of EC law	81
14.2	Consequences of the principles of direct effect and supremacy for the CEEC judiciary	83
14.3	Possible changes: taking away supervisory tasks from the national judiciary?	84
14.4	The 'respectful' approach: EU assistance to the judiciary of the CEECS	85
14.5	Assessment of the supervisory functions of the CEEC judiciary in an enlarged Union	86
<b>15</b>	<b>Requests for assistance: the preliminary ruling procedure</b>	91
15.1	The current situation: three preliminary reference procedures after Amsterdam	92
15.2	Preliminary references after enlargement	93
15.3	Possible reforms: the restrictive approach	94
15.3.1	Limitation of the national Courts empowered to refer	95
15.3.2	Introduction of a filtering system at the central level?	96
15.3.3	Filtering at the national level	97
15.4	Reforms aimed at strengthening the system of preliminary references	97
15.4.1	Bringing the special reference procedures in line with the general procedure	98
15.4.2	A further 'de-filtering' of preliminary questions?	101
15.4.3	A right of appeal for parties to the main proceedings?	102

15.5	The Court of First Instance and preliminary references	103
15.6	Comments and assessment	105
<b>16</b>	<b>Breach of community law obligations by Member States</b>	<b>113</b>
16.1	Brief analysis of the infringement procedure	114
16.2	The infringement procedure after enlargement	114
16.3	Watering down the infringement procedure	116
16.3.1	No longer compulsory jurisdiction?	116
16.3.2	From judicial to administrative supervision?	117
16.4	Further improvements to the infringement procedure	117
16.4.1	An accelerated infringement procedure?	118
16.4.2	Extension of the infringement procedure to the other EU pillars	119
16.5	Transfer of jurisdiction to the Court of First Instance	120
<b>17</b>	<b>Administrative supervision: serious breaches of fundamental EU principles by Member States</b>	<b>125</b>
17.1	Brief analysis of the supervisory mechanism	125
17.2	The impact on the (new) Member States	127
17.3	Possible reforms: from administrative to judicial supervision?	128
<b>18</b>	<b>General conclusions and recommendations</b>	<b>133</b>
	<b>List of abbreviations</b>	<b>139</b>



## 1 BACKGROUND AND PARAMETERS OF THE REPORT

At the end of 1999 the Helsinki Summit confirmed, following earlier political statements, that accession negotiations should begin with thirteen candidates, including ten Central and Eastern European Countries (CEECs).<sup>1</sup> The European Council thus blurred the initial distinction made between a leading group of six countries (Czech Republic, Estonia, Hungary, Poland, Slovenia, Cyprus) and another group of six countries which would possibly accede at a later stage (Bulgaria, Latvia, Lithuania, Romania, Slovakia, Malta).<sup>2</sup>

This firm political commitment inevitably entails substantial change, both in the candidate states and within the legal and institutional systems of the European Union itself. The reforms required in the Central and Eastern European States are framed by the three criteria laid down by the European Council in 1993 at Copenhagen. These are that membership of the European Union requires:

- 1 that the candidate state has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities,
- 2 the existence of a functioning market economy, as well as the capacity to cope with competitive pressure and market forces within the Union, and
- 3 the ability to take on the obligations of membership, including adherence to the aims of political, economic and monetary union.<sup>3</sup>

9

At a later stage these requirements were worked out in greater detail by the various EU institutions in the process placing numerous very specific obligations on the candidate countries. The first Copenhagen criterion appears to embrace all kinds of *political* requirements, such as the obligation on Romania to reform its child care institutions.<sup>4</sup> The European Council's dictate to banish *Das Kapital* meant, inter alia, that the Eastern candidates were (*de facto*) forced to introduce legislation on such 'capitalist' matters as intellectual property rights and public procurement procedures.<sup>5</sup> The third general criterion ('the ability to take on the obligations of membership') embraces the obligation for the CEECs to transpose, apply, and supervise the entire body of EU law. In order to perform the requisite incorporation activities properly, it is obvious that the new members should have sound legislative, administrative and judicial entities at their disposal.<sup>6</sup> These 'hardware' requirements can therefore be viewed as part and parcel of the third Copenhagen criterion. In practice, however, the requirement that the CEECs should have sufficient administrative and judicial capacity is seen as an additional fourth criterion. The reason is that it was only at a later stage, at the 1995 Madrid Summit, that the candidate countries were 'requested' to adapt their administrative structures so as to guarantee the harmonious implementation of Community policies after membership.<sup>7</sup>

It is however not only the would-be members but also the European Union itself which will have to undergo change in order to be ready for the next enlargement.

It is generally recognised that the institutional structures that were created for an economic Community of only six Member States are no longer adequate for a political Union of fifteen states, let alone some twenty-five or even thirty members.<sup>8</sup>

With a view to introducing the requisite institutional changes the Intergovernmental Conference (IGC) on institutional reforms was convened at the beginning of the year 2000. The three so-called 'left-overs' from the Amsterdam IGC in 1997 are prominent on the agenda (size and composition of the European Commission, the weighting of votes in the Council of the EU, further extension of qualified majority voting in the Council), as well as other related institutional issues, such as the functioning of the EU Courts (Court of Justice and Court of First Instance), the further extension of the scope of the co-decision procedure in order to strengthen the powers of the European Parliament (including, in particular, the coupling of co-decision with qualified majority voting in the Council), and, perhaps, the splitting of the EU Treaties into two parts. Moreover, it seems that a few political issues will be added to the agenda as well, such as the idea to adopt a Charter on fundamental human rights and the creation of a common defence policy.<sup>9</sup>

It follows that the distinction made in the Amsterdam Treaty between limited adjustment (in the case of accession of at least one new member) and fuller reforms (where membership of the Union would exceed twenty members) has lost its significance.<sup>10</sup> The new goal is to address all questions relating to the proper functioning of an international organisation that will change fundamentally through enlargement. If no major mishap occurs in the planning, the Treaty of Nice will form the apotheosis of the intergovernmental conference by agreeing on necessary amendments to the Treaties by the end of 2000.<sup>11</sup>

Given these crucial on-going developments it is understandable that virtually all the attention – in particular in political circles – is focused on this process of enlarging the Union. Moreover it is certain that for the next five years or so, the central focus will continue to be directed at the many *pre*-accession perils.

Despite these current realities, this report will not analyse and discuss the problems which may arise during the current *pre*-accession period. Rather, the focus and thrust of our report relates to the period after the accession of some, if not all, of the countries in Central and Eastern Europe has actually taken place. In this *post*-accession period – which presumably will start somewhere around 2005 – it is generally believed that the actual *application and enforcement* of EU law in the new Member States will constitute one of the major problems. This explains why the theme of our report relates primarily to the issues of application and enforcement of EU law in the *post*-accession period. More specifically, the report focuses on the extent to which certain structural or endemic problems in the new Member States may force the European Union to adapt or modify its application and enforcement systems.

It is not without significance that both the European Council and the Council of Ministers have already emphasised the importance of the matter. They stress that the incorporation of the so-called *acquis communautaire* into national legislation is not in itself sufficient to ensure that the obligations of membership are fulfilled; the new Member States will also be required to guarantee that this *acquis* is actually applied according to the same standards as those which apply generally within the Union. The view from the EU is clearly that there is a strong need for “incorporating the *acquis* into legislation and actually implementing and enforcing it”.<sup>12</sup>

Of course, it can never be expected that it would only be the current fifteen members of the Union which would be required to take the implementation and enforcement of EU law seriously. The crucial point is, however, *how* such effective implementation and enforcement by the new members should be guaranteed, given the hypothesis that at the time of accession these countries will probably not be able to ensure the full and perfect incorporation of EU law into their national legal orders.

Starting from the assumption that the next enlargement will indeed be ‘sub-optimal’ mainly in terms of the administrative capacity of the new members to apply the *acquis* as a matter of daily practice as well as the capacity of the national judiciary to supervise the application of EU law by administrative authorities, this report purports to go beyond the rather obvious observation that there will be a serious enforcement problem in the accession aftermath. Several suggestions for reform, from the viewpoint of the EU itself and its legal system, will be discussed and analysed. This will include not only ideas which are currently ‘popular’ in political circles but also ideas which aim at strengthening the Union’s enforcement and compliance systems.

In order to discuss these issues in a structured manner, a distinction is made between the several phases of – what we refer to as – the process of *incorporation* of EU law into the national legal orders of (new) Member States. Incorporation covers different stages relating to the way in which EU law becomes an integral part of a domestic legal order.

The first relevant stage of the incorporation process relates to the question whether or not a certain part of EU law has *legal force* for a (new) Member State. If this is not the case then the subsequent stages of the incorporation process (that is, transformation, application and supervision) do not have to be considered. This means that our attention must first and foremost focus on the question if and how EU law acquires legal force in and for a certain Member State. In this context the issue of flexibility is briefly discussed from the limited perspective of its putative role as an instrument to avoid problems relating to the transformation, application and supervision of EU law in the legal orders of the CEECS (Part A).<sup>13</sup>

Once a certain part of EU law has indeed acquired legal force for a given Member State, it is assumed that this Member State has subsequently the legal obligation to

incorporate that part (primary and/or secondary EU law) into its national legal order. The other parts of the study (B-D) therefore depart from the assumption that a CEEC is indeed under a legal obligation to give full effect to specific parts of the Union's *acquis*. With regard to this situation, it is useful to analyse the tasks and roles of Montesquieu's three traditional powers within a state (legislative, administrative and judicial).

Part B of the study thus focuses on the role and tasks of the national *legislator* in the incorporation process. Its central task is to ensure that national legislative provisions are in conformity with EU law. This duty often requires the *transposition* of EU law provisions into national legislative provisions. Part C concentrates on the role of national administrative organs (national ministries, Competition Boards, et cetera). Very often it is their responsibility to ensure that EU law is correctly *applied* in daily life, usually vis-à-vis individuals (citizens, entrepreneurs, firms, et cetera). Part D of the study deals with *supervisory* functions, usually to be exercised by *judicial* organs. As far as EC/EU law is concerned, both the national courts (at the decentralised level) and the two Courts in Luxembourg (at a central level) perform these supervisory tasks. As we are mainly concerned with (projected) incorporation perils in the CEECs, the focus is on judicial supervision of *national acts*.

12

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Upon closer consideration, it, however, appears that EU law also embraces various forms of – what might be called – *administrative* supervision. This form of supervision is not exercised by an independent judicial body (at national or Union level) but by political entities, in particular by the Council of Ministers of the EU. One of these forms of administrative supervision is discussed in greater detail, namely in case of serious and persistent breaches by Member States of certain fundamental principles (Article 7 TEU). The reason is that the Amsterdam Treaty inserted this provision precisely with a view to the next enlargement (although current Member States – for example Austria – might be subject to this supervisory mechanism as well).

The report is structured in the above manner so as to facilitate the central purpose of the study, namely to discuss various possibilities for reforming existing EU enforcement and supervisory systems which may be necessary in view of the coming, unprecedented, enlargement.

Most parts of the study follow a similar approach. First the existing legal situation, in a Union of fifteen Member States, is analysed (although rather briefly). The focus is on describing and considering possible *reforms* to the existing legal situation (for example judicial procedures) which may be necessary in an enlarged Union.

If necessary, a distinction is drawn between two different groups of possible reforms: those aiming at a 'weakening' of the present situation (seen from the point of view of effective incorporation and protection of EU law at the national level), and reforms aiming at a further strengthening of existing mechanisms and structures. The study therefore strives towards more objectivity than some of the documents which have been recently submitted by various EU institutions in the framework of the IGC on institutional reforms.

## NOTES

- <sup>1</sup> Conclusions of the Helsinki European Council (10 and 11 December 1999), Chapter I, point 4.
- <sup>2</sup> This distinction was still made in, for example, the Commission's Agenda 2000. The missing country, namely Turkey, was only considered to be a potential candidate for EU membership at the Helsinki Summit. The European Council's conclusions are, however, much more reluctant as compared to the intentions regarding the other twelve candidates. The human rights situation and the Turkish 'occupation' of Cyprus continue to constitute the key problems (cf. points 4, 9 and 12 of the Helsinki Conclusions).
- <sup>3</sup> Bull. *c* (1993/6), p. 12 (point I.13).
- <sup>4</sup> See the Second Regular Report from the Commission on Romania, 13 October 1999 (Chapter B.2).
- <sup>5</sup> See, for example, the Commission's Opinion, First and Second Report on Bulgaria. From the latest report it appears, in any event, that this candidate has made good progress in the two areas mentioned, at least as far as the adoption of formal legislation is concerned.
- <sup>6</sup> See below for a more precise definition of these terms (transposition, application, supervision, incorporation).
- <sup>7</sup> See the Madrid conclusions, under III, point A. See also A.J.G. Verheijen (2000), *Administrative Capacity Development for EU membership: A Race Against Time?*, WRR Working Documents no. W 107, The Hague
- <sup>8</sup> In this report, the terms 'European Union (law)' and 'European Community (law)' are deliberately distinguished. It is, however, not the purpose of the report to explain – once again – the complex three-pillar-structure of the post-Amsterdam European Union. On the matter, see e.g. T. Heukels, N. Blokker and M. Brus (1998) (eds.), *The European Union after Amsterdam. A Legal Analysis* Kluwer.
- <sup>9</sup> For the Commission's contribution to the discussions, see, in particular, its opinion of 26 January 2000, entitled *Adapting the Institutions to make a success of enlargement*. See also its earlier contribution of 10 November 1999 (*Adapting the Institutions to make a success of enlargement: a Commission contribution to the preparations for the Inter-Governmental Conference on institutional issues*). Regarding the idea to 'reorganise' the Treaties, see in particular the Report by R. von Weizsäcker, J. Dehaene and D. Simon, 'The Institutional Implications of Enlargement', Report to the European Commission, Brussels, 18 October 1999 (Report Dehaene). For the priorities of the Dutch government, see the note *IGC-2000: een agenda voor de interne hervormingen van de Europese Unie* (TK, 1999-2000, 21 501-20, no. 101, p. 13).
- <sup>10</sup> See the Protocol on the institutions with the prospect of enlargement of the European Union. Article 1 of this Protocol stipulates that, at the date of entry into force of the first enlargement, the Commission shall comprise one national of each Member State, provided that, by that date, the weighting of the votes in the Council has been modified. According to Article 2 an IGC shall be convened in order to carry out a comprehensive review of the Treaty

provisions on the composition and functioning of the institutions, at least one year before EU membership exceeds twenty. See also the critical Declaration by Belgium, France and Italy on this Protocol (*OJ* 1997 C 340: 111 and 144) and P. VerLoren van Themaat (2000) 'Enkele problemen voor de komende IGC', NTER 34.

- <sup>11</sup> See the Helsinki Conclusions, point 15.
- <sup>12</sup> Helsinki Conclusions, point 11. On the definition of the terms 'acquis of the Union' and 'acquis communautaire', see paragraph 3.
- <sup>13</sup> The wider implications of the concept of flexibility are not addressed here as they constitute the subject matter of Eric Philippart and Monika Sie Dhian Ho (forthcoming) *Peddalling against the wind; Strategies to Strengthen the EU's Capacity to Act in the Context of Enlargement*, WRR Working Documents no. W115.



## **PART A**

### **LEGAL FORCE OF EUROPEAN UNION LAW FOR CEECS**



## 2 PURPOSE AND STRUCTURE OF PART A

Before discussing the various stages of the incorporation process, it should first be stressed that the CEECS will only be required to transpose, apply and supervise EU law if this body of 'external' law has gained *legal force* for and in these countries. If not, the incorporation of EU law would be irrelevant, since there would be no formal legal obligation on the CEEC authorities to respect EU law. It is logical therefore in this perspective to pay attention first to the question when and how EU law gains legal force for these countries. It transpires on closer examination that in fact *two conditions* have to be met. First, quite obviously, these countries should actually join the Union. Assuming that, by the time of accession, the Union has not changed its forms of membership (affiliated, associated, etc.), in principle, all EU law provisions will gain legal force for a new member (paragraph 3).

If this first condition is met, then an EU law provision will only gain legal force in a (new) Member State if it is declared *applicable* to this country. This can be viewed as the second condition and it is in this regard that some attention is given to the issue of flexibility (or: 'closer co-operation'). Even if it is certainly not the principle objective of this study to analyse the various forms of flexibility,<sup>1</sup> some attention should in our view be given to the relationship between this 'input' issue and the 'output' issue of incorporation. Flexibility may have the concrete consequence that the output (the final EC or EU decision) does not apply to a certain country. It would follow that no problems regarding the incorporation of EU law in the national legal order could arise in these circumstances (paragraph 4).

## NOTES

- <sup>1</sup> See Eric Philippart and Monika Sie Dhian Ho (forthcoming) *Pedalling against the wind; Strategies to Strengthen the EU's Capacity to Act in the Context of Enlargement*, WRR Working Documents no. W115.

### 3 ACTUAL ACCESSION AS A PRECONDITION FOR THE LEGAL FORCE OF EU LAW IN THE CEECS

Although one gets the strong impression that the candidates are already bound to assume all EU membership obligations, this is – at least from the legal point of view – certainly not the case. The Copenhagen criteria, for example, are not legally binding on any of the candidates, as they are embodied in a unilateral document of an EU organ.<sup>1</sup> This is also the case with regard to Commission opinions, White Papers, (regular) Reports and suchlike. At the moment, the only legal obligations on the CEECS can be found in the respective Europe Agreements, since these agreements were concluded with each of the candidates and have actually entered into force.<sup>2</sup> They can be characterised as bilateral agreements, between the EU and its current Member States on the one hand, and one of the ten Eastern candidates on the other.<sup>3</sup>

Despite the limited legal rights and obligations for the CEECS contained in these Europe Agreements, one may speak of a much broader *de facto* obligation for these countries to align their legal systems to almost all EU standards. After all, if the candidates do not take the third Copenhagen criterion very seriously, accession at a later stage seems rather unlikely.

Be that as it may, it is only upon actual accession that the entire (existing) body of EU law will formally acquire formal legal force for the CEECS. Although this is not explicitly stated in the EU Treaty, it can be deduced from the fact that the Union recognises only one form of membership, namely *full* membership. Unlike many other international organisations, the Union does not recognise associated or affiliated memberships. States are either in or they are out. The fact that the Accession Treaties may exempt the new members from certain obligations, does not detract from the general principle that accession to the Union entails the acceptance by the new Member State of all legal obligations.<sup>4</sup>

The 'entire body of EU law' may also be referred to as the *acquis of the Union*. Although rather vague, this *acquis* (of the Union) can be described as all legal rules originating from the Union as a separate legal entity.<sup>5</sup> More concretely, it embraces rights and obligations contained in the EU Treaty, that is, all provisions of the three so-called EU pillars as well as the provisions of the (three) general titles. It further covers the thousands of decisions of the EU institutions, the secondary law of the Union.<sup>6</sup> Last but certainly not least, the existing case law of the EU Courts forms part and parcel of the *acquis* of the Union. The CEECS, once admitted as new members, will therefore also have to comply with the existing jurisprudence of the Court of Justice and the Court of First Instance, including its case law on such fundamental principles as direct effect, supremacy and state liability.<sup>7</sup>

Given that the Court's jurisdiction is mainly related to the first pillar of the Union (the EC Treaties), the entire body of case law can also be included, more specifically, within the *acquis communautaire*. This, often used, term refers to all aspects of traditional European Community law (EC Treaties, secondary Community law, case law of the Court). The term *acquis communautaire* should therefore be seen as only a part – albeit an important one – of the broader concept of the *acquis* of the Union. This distinction emphasises that the newcomers will have to accept existing law in the fields of the Common Foreign and Security Policy (CFSP) and Police and Judicial Co-operation in Criminal Matters (PJCC) as well.

It is difficult indeed to predict whether or not this first condition for EU law to gain legal force in the CEECS (whether the CEECS will actually accede to the Union) will ever be fulfilled. Let us just conclude that the actual accession of any new member cannot as yet be taken for granted. Article 49 of the EU Treaty stipulates that the unanimous approval of the Council (that is, in practice, the fifteen Heads of State and Government of the Member States) is necessary. Moreover, the agreement between the current Member States and the applicant State concerning the conditions of admission must be ratified by all contracting States in accordance with their constitutional requirements. In some Member States ratification means that a prior referendum on enlargement of the Union to the East will need to be held.<sup>8</sup> It follows that one sole government, or the majority of the population of just one Member State could block the accession of any CEEC for a long period of time, if not indefinitely. In the past a similar ratification requirement already brought the Union on the brink of an impossible situation when a majority of the Danish population refused to accept the Maastricht Treaty. The main Danish concerns at that time related to the Maastricht provisions on citizenship, foreign policy and - more generally - to the idea of losing too much sovereignty.<sup>9</sup>

This time the obligation to accept free movement of persons (with CEEC nationality, including workers and economically inactive persons) may become one of the biggest political issues. Even though the Accession Treaties will certainly provide for long transitional periods,<sup>10</sup> one day after enlargement the movement of workers can no longer be restricted. After all, Article 39 EC explicitly stipulates that “freedom of movement for workers shall be secured within the Community”.<sup>11</sup>

In any event, in 'high' political circles, a strong will exists to expand the Union into a larger political and economic entity. The firm political commitment displayed at the Helsinki European Council has already been referred to. Some years earlier the Madrid European Council stated that enlargement is “both a political necessity and a historic opportunity for Europe”.<sup>12</sup> And according to the European Parliament “there can be no question of delaying the enlargement process, remembering in particular the hardships suffered by Central and Eastern European Countries through more than forty years of dictatorship”.<sup>13</sup>

If we view the perspective of enlargement from the vantage point of the acceding States themselves, a similar optimistic picture can be painted. Political leaders and governments of many Eastern European countries have described membership of the Union as a 'top political priority'.<sup>14</sup> Yet, more recently there are some signs that a number of these countries may wish to break the spell and re-discuss the desirability of EU membership. One of the main reasons for this tendency towards a more critical approach is that some of these countries have discovered the one-way nature of the EU membership process, leaving very little room for the candidates to achieve their specific wishes and priorities.

At any rate, from the *legal* point of view, actual accession constitutes the first condition for EU law to gain legal force in the CEECS. If this hurdle is taken, all parts of EU law will, in principle, have legal force for these new members. Only at a later stage will the issue of providing exceptions to this fundamental principle (namely flexible legislation) be relevant.

## NOTES

- <sup>1</sup> See on the legal status of this document: P.C. Müller-Graff, 'The Legal Framework for the Enlargement of the Internal Market to Central and Eastern Europe' (1992) *Maastricht Journal*, 192, at 198.
- <sup>2</sup> The Agreements concluded with Hungary (*OJ* 1993 L 347/1) and Poland (*OJ* 1993 L 348/1) entered into force on 1 January 1994. A year later the Europe Agreements with Romania (*OJ* 1994 L 357: 1), Bulgaria (*OJ* 1994 L 358: 1), the Czech Republic (*OJ* 1994 L 360: 1) and Slovakia (*OJ* 1994 L 359: 1) entered into force (on 1 February 1995). Three years later, on 1 February 1998, the Baltics followed (Latvia, *OJ* 1998 L 26: 1; Lithuania, *OJ* 1998 L 68: 1; Estonia, *OJ* 1998 L 68: 1). Slovenia closed ranks (*OJ* 1999 L 51: 1; entry into force on 1 February 1999).
- <sup>3</sup> Supervision is mainly exercised by the Association Councils, bodies established by the various Europe Agreements.
- <sup>4</sup> See further the next paragraph (where 'flexible' decision-making is seen as an instrument to create exceptions to this general principle). Only if the ideas on different forms of Union's membership are realised, before the next enlargement round, this general principle would alter significantly. See, for example, the Sicco Mansholt Lecture of former commissioner F. Andriessen ('Towards a continental Union: a turning-point?', 15 May 1996).
- <sup>5</sup> Assuming that, indeed, the Union may be considered as a separate entity (an international organisation) in international public law. On this much debated issue, see for example D. Curtin and I. Dekker (1998) 'The EU as a 'Layered' International Organization: Institutional Unity in Disguise', p. 83 in P. Craig and G. de Búrca *The Evolution of EU Law*; B. de Witte (1998) 'The Pillar Structure and the Nature of the European Union: Greek Temple or French Gothic Cathedral?' in Heukels, Blokker, Brus (eds.), *The European Union after Amsterdam. A Legal Analysis*, Kluwer; Von Bogdandy and Nettesheim (1996) 'Die Europäische Union: Ein einheitlicher Verband mit eigener Rechtsordnung', *EuR* 3; O. Dörr (1995) 'Zur Rechtsnatur der Europäischen Union', *EuR* 334.
- <sup>6</sup> Hence, not only the 'ordinary' EC Regulations and Directives, but also, e.g., CFSP joint actions or PJCC framework decisions. See further on these legal instruments, paragraphs 7.1.1 and 7.1.2.
- <sup>7</sup> See further paragraph 14.1. On the characterisation of these two courts as Community institutions and/or Union organs, see further D. Curtin and R. van Ooik (1999) 'Een Hof van Justitie van de Europese Unie?', *SEW* 24-38.
- <sup>8</sup> Thus, from the viewpoint of the Union, it is for *national* (constitutional) law to determine whether or not a referendum is necessary. In the Netherlands, for example, such referenda were never held, although one may wonder whether this Dutch policy should not be reconsidered given the extreme importance of the next round of accessions.
- <sup>9</sup> It took the creation of a 'special' position for the Danish, as well as a second referendum, to make a (very small) majority of the Danish population say 'yes' to the Maastricht Treaty. On the issue, see e.g. C. Goybet (1993) 'L'Europe après le référendum Danois', *RMCUE* 389; D. Curtin and R. van Ooik, 'Denmark and the Edinburgh Summit: Maastricht without Tears', in D. O'Keefe and P.

Twomey (1993) *Legal Issues of the Maastricht Treaty*, Chancery. It should be added that the context was slightly different, since the ratification requirement of Article 48 (ex Article N) EU on Treaty amendments was at stake.

- <sup>10</sup> Regarding Spanish and Portuguese workers, the Acts of Accession laid down a transitional period of six years (Article 56(2) of the Act of Accession of Spain and Article 216(2) of the Act of Accession of Portugal). At a later stage this period was reduced to five years. See Regulation 2194/91/EEC of 25 June 1991 on the transitional period for freedom of movement of workers between Spain and Portugal, on the one hand, and the other Member States, on the other hand (OJ 1991 L 206: 1).
- <sup>11</sup> Under the Europe Agreements, no such freedom of movement of (CEEC) workers exists, although a limited exception has been created in favour of 'key personnel'. See, e.g., Articles 37 and 52 of the EC-Poland Agreement. The provisions on the freedom of establishment are more 'liberal' as they contain national treatment clauses (e.g. Article 44(3) of the EC-Poland Agreement). Whether or not these provisions have direct effect - in the sense that they confer on self-employed persons, having CEEC nationality, the right on a residence permit - is currently *sub judice*. See Case C-63/99 *Gloszczuk* (OJ 1999 C 121/22); Case C-235/99 *Kondova* (OJ 1999 C 246/15); Case C-257/99, *Barkoci and Malik* (OJ 1999 C 256/2); Case C-268/99 *Jany a.o.* (OJ 1999 C 265/4).
- <sup>12</sup> Presidency Conclusions – Madrid European Council, 15 and 16 December 1995.
- <sup>13</sup> Report on the preparation of the reform of the Treaties and the next Inter-governmental Conference, Final A5-0058/1999, 10 November 1999 (the so-called Dimitrakopoulos/Leinen Report).
- <sup>14</sup> See, for example, the Regular Report of October 13, 1999 on Poland (Chapter B.1).



## 4 FLEXIBILITY AS AN INSTRUMENT TO AVOID INCORPORATION PERILS

In this report, flexibility is considered as a *means* to create exceptions to the general rule that the entire body of EU law gains legal force for a (new) member. If and when such an exception is created, the Member State concerned will not have to incorporate this part of EU law and, as a consequence, problems relating to transposition, application and supervision cannot arise.

If flexibility is viewed from this perspective, issues such as the categorisation of the various forms of flexibility or a detailed examination of the conditions of Article 11 TEC are of less importance.<sup>1</sup> What we are rather interested in for the purposes of the present report is the more specific question of the extent to which flexibility can offer a means of avoiding incorporation perils in the new Member States. In this regard, it is useful to draw a distinction between the existing *acquis* and the new *acquis* which will arise after accession.

### 4.1 NON-APPLICABILITY OF THE *EXISTING* ACQUIS UPON ACCESSION

For the incoming members various forms of flexibility could be agreed upon in order to avoid problems with the transposition, application and supervision of existing EU law. Most likely, such forms of flexibility will be laid down in the various Accession Treaties. Transitional periods can only offer a temporary solution, as some time after accession the legal obligations concerned (e.g. regarding free movement of persons or regarding state aid) will in any event gain legal force. More structural exemptions would offer a 'better' solution, at least if they are seen as a means of avoiding incorporation problems.

In this regard, a strong argument in favour of such structural exemptions is the fact that the Union's present legal order already contains a significant number of different forms of so-called pre-determined flexibility. Examples can be found in the Protocols on the position of the UK and Ireland, and Denmark. These Protocols stipulate that acts adopted under Title IV of the EC Treaty (on asylum, immigration, etc.) shall, in principle, not be binding on these three Member States and such acts shall not be applicable to them. Logically, these countries do not take part in the adoption of Title IV acts.<sup>2</sup> In a similar way, it could be stated (in the Accession Treaties) that Title IV and decisions taken under this Title, in principle, do not apply to the new Member State in question. It would in these circumstances be for the individual Member State concerned to determine whether and to what extent it wishes to be bound by such Community acts.

Another (controversial) example, introduced by the Maastricht Treaty, was the 'opt-out' of the UK in the field of social policy. The Protocol and Agreement on

Social Policy did not apply to this Member State, nor did – at the secondary level – the Directives adopted under these arrangements. As a result, an important part of the Community's social legislation (initially) did not apply to this country.<sup>3</sup> Although the Amsterdam Treaty put an end to the special position of the UK,<sup>4</sup> similar arrangements could be revived in one or more Accession Treaties.

In any event, it is suggested that this form of flexibility ('pre-determined') can only offer a limited solution to the expected incorporation perils. From the various pre-accession documents it clearly appears that the candidates are required to accept almost the entire *acquis* of the Union which will exist at the moment of accession. This includes, *inter alia*, the acceptance of the entire Schengen *acquis*<sup>5</sup> even though three of the current Member States have obtained 'special' treatment in this regard.<sup>6</sup> Few exceptions to the rule seem therefore to be acceptable to the EU. If such exceptions are accepted at all the general view is that they should be limited in time. Hence, a clear preference for transitional periods over more structural opt-outs exists.

#### 4.2 NON-APPLICABILITY OF *NEW ACQUIS* AFTER ENLARGEMENT

As far as *new EU* legislation is concerned, that is, legal acts adopted after the accession of the CEECs, the general flexibility clauses of the Amsterdam Treaty (Title VII, Article 11 TEC, Article 40 TEU) offer good prospects to avoid the problems related to the transposition, application and supervision of EC/EU law in and by the new members. These Treaty provisions on 'closer co-operation' essentially aim at enabling the institutions to adopt *secondary* legislation which does not apply to all Member States (although it should apply to at least a majority of the Member States).<sup>7</sup> For present purposes, it is important to assess whether these Amsterdam clauses can really provide an adequate means of avoiding incorporation problems in the CEECs. Of course, the pending enlargement was precisely one of the major reasons why the new provisions on closer co-operation were inserted into the EC Treaty and the EU Treaty. It was feared that the increased heterogeneity between the Member States would paralyse the Union's legislative processes.<sup>8</sup> In its opinion of 26 January 2000, the Commission stressed once again that countries wishing to intensify their co-operation should not be hampered by other members lagging behind.<sup>9</sup> Flexibility should in its view constitute the ultimate solution to the wish to both 'deepen' and 'widen' the Union.

There are, nevertheless, several reasons which support the view that the general Amsterdam provisions only offer a limited solution to the expected difficult incorporation problems in the CEECs.

First, a major legal obstacle to flexible decision-making is that the Treaty contains numerous *conditions* which have to be fulfilled before a Community or Union act

may be adopted in this manner. Flexibility under the EC Treaty in particular, is subject to a number of strict conditions. These include the requirement that closer co-operation does not concern areas which fall within the exclusive competence of the Community (Article 11(1)(a) EC) and that closer co-operation does not 'affect' Community policies, actions or programmes (article 11(1)(b) EC).

If these requirements are indeed taken seriously, it seems that there is very little room for adopting 'flexible' decisions under the EC Treaty. In particular, Directives and Regulations adopted under Article 95 EC ('internal market legislation') must apply to *all* Member States, as the establishment and the functioning of the internal market must be considered as an area which falls within the exclusive competence of the Community. Likewise, the CEECS will have to be bound by Community acts in the field of commercial policy (based on EC competence,<sup>10</sup> so that secondary legislation in this field – adopted after the accession of the CEECS – cannot restrict its scope *ratione territorii* to just a few Member States. This means in effect that only relatively few areas are left open to flexible arrangements. Areas such as environmental protection and the harmonisation of (direct and indirect) taxes are often quoted as examples where flexible legislation could take place.<sup>11</sup>

Secondly, even where the Amsterdam provisions (renewed or not) allow for flexible solutions, a majority of the Member States may prefer to 'outvote' the minority, instead of adopting a decision which merely applies to them. After all, closer co-operation can easily occasion distortions of competition, for instance if only a few Member States are required to adopt stringent rules on the emission of CO<sub>2</sub>. For economic reasons therefore a majority of the Member States may be very reluctant to resort too easily to the Amsterdam provisions on flexibility but rather use qualified majority voting (QMV) as a means to 'suppress diversity'.<sup>12</sup> Consequently, in areas such as social policy and public health, the CEECS have to bear in mind that they may be bound by secondary acts. In case the Council indeed decides by a majority, the final decision will apply to *all* Member States.

Of course, this route can only be followed if the Treaty provision used as the legal basis for the secondary act in question does indeed provide for QMV. However, most legal bases of the EC Treaty already provide for majority voting. Moreover, by the time the first wave of new guests enter the European structure, the number of legal bases providing for majority voting will probably have increased further, since this is one of the central institutional issues of the IGC 2000. The main reason for this development is that political and/or economic interests of the various members of the Council will become so diversified that the working of the Union can easily be blocked. It therefore seems that general support is emerging for the idea that qualified majority voting in the Council should become the rule, subject to only a few exceptions for some fundamental or highly sensitive issues.<sup>13</sup>

In this respect it should be stressed that the formal possibility of QMV does not mean that Members States are actually outvoted. *Political* will is in addition re-

quired among the members of the Council to outvote a minority, in the event that this is considered necessary or desirable. In the past this political will was clearly absent, so that there never was a real risk of being bound involuntarily, even if QMV was formally possible. In important areas such as agriculture and transport policy this was indeed the case already before the end of the transitional period (1970).<sup>14</sup> These days, however, the influence of the so-called Luxembourg Compromise has considerably diminished. The members of the Council have become less reluctant to outvote their minority colleagues and thus bind them involuntarily. In this way the British were told that it was a good thing to introduce maximum work hours; the Dutch were obliged to protect biotechnological inventions; and the Germans will have to ban tobacco advertisements, since the relevant Directive was adopted by a majority. Cases subsequently brought before the Court (under Article 230 EC) in order to challenge the legal basis of such decisions are usually unsuccessful.<sup>15</sup>

#### 4.3 POST-ENLARGEMENT: SPECIFIC FLEXIBILITY PROVISIONS

Apart from the general provisions on flexibility, mentioned above, the EU Treaty also contains some more specific provisions which enable the institutions to adopt secondary acts which do not apply to all Member States. Again, these provisions are examined from a specific point of view, namely to assess to CEEC.

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An example to be found in the Community pillar is the possibility that only 'certain' Member States will participate in supplementary programmes in the field of research and technological development. The general rules applicable to these supplementary programmes will be adopted by the Council, including rules on the dissemination of knowledge and access by other Member States.<sup>16</sup> As regards CFSP decision-making, the provision on 'constructive abstention' could be considered as a form of flexibility. In principle, decisions under Title V are binding on all Member States, even if a Member States abstains in a vote. In that event, however, the Member State concerned may 'qualify' its abstention by making a formal declaration under Article 23 (1) TEU. In that case, the Member State is not obliged to apply the CFSP decision in question, although it should accept that the decision commits the Union.

In the third pillar, *conventions* on PJCC issues constitute the most important example. They only have to be adopted by at least half of the Member States, and they shall enter into force for those Member States only (Article 34(2)(d) TEU). It, however, seems that this provision can only offer a temporary solution, as it is also stated that *the* Member States must ratify PJCC conventions. Hence, Article 34(2)(d) TEU seems to contain the traditional 'multiple-speed' form of flexibility; it only provides a means to avoid incorporation problems within the CEECs for a certain period of time.

Moreover, Article 34 can only result in the inapplicability in a new Member State of conventions established *after* its accession. Third pillar conventions which have already entered into force *upon* accession, will probably have to be acceded to by the new Member States as they form part and parcel of the existing *acquis* of the Union. Article 34 TEU does not provide a solution for a new Member wishing to 'escape', for example, its obligations laid down in the Europol Convention. As this Convention entered into force prior to Amsterdam (under the JHA version of the third pillar),<sup>17</sup> the new Member States, in principle, have to become a party to this important Convention. Only specific arrangements in the Accession Treaties could change this state of affairs.<sup>18</sup>

#### 4.4 GENERAL ASSESSMENT (AND SOPHISTICATED HARMONISATION TECHNIQUES AS AN ALTERNATIVE)

At the present moment it seems that there is only limited room for the would-be members to escape the obligation to adopt the entire existing *acquis* of the Union. The EU institutions have made it perfectly clear that, in principle, they will have to take over the entire body of EU law as it will stand on the moment of accession (including the entire Schengen *acquis*). Time will tell whether the Accession Treaties, nevertheless, contain substantial exceptions to this general principle.

Regarding post-accession legislation, the importance of the general flexibility clauses of the EC/EU Treaty should not be underestimated. Nevertheless, a significant part of the yet to be developed Union legislation – acts adopted after actual accession – *will* gain legal force for the CEECS, and therefore will have to be incorporated as such. There are, indeed, additional means for avoiding incorporation problems (cf. the specific provisions discussed in paragraph 4.3), but these flexible provisions relate to *specific* areas of EU policy.

Of course, the strict requirements of, in particular, Article 11 TEC could be 'relaxed' by amending the Treaty prior to accession. In this respect discussions are already going on, mainly in the framework of the current IGC on institutional reforms. The Commission, for example, proposes that at least *one third* of the Member States may establish closer co-operation between themselves and that the 'Accord of Amsterdam' should be deleted.<sup>19</sup> It is however rather unlikely that closer co-operation will be extended to such key areas as the functioning of the internal market (including the four freedoms) and the Community's commercial policy. Thus, the flexibility provisions will not always function as a means of avoiding the problems related to the incorporation of EU law in the CEECS.

Given the limited possibilities and (economic) disadvantages of post-accession flexibility, one may wonder whether the adoption of *minimum* norms by the EU does not constitute a preferable compromise. All Member States (including the

CEECS) would be required to ensure that the minimum EC norm is respected - in this respect incorporation problems may still occur. But only the 'willing and able' Member States would have the possibility to adopt more stringent rules in their national legislation. Regarding this 'extra', the CEECS, or most of them, would not encounter incorporation EC legislates by means of Directives, the final result of this legal technique would be (more or less) uniform legislation in all Member States up to a certain minimum, plus stricter legislation in only a few Member States.

This sophisticated legal technique has already been used by the EC in the past, notably in 'semi-economic' areas such as social policy, consumer protection and environmental protection. The Treaty even obliges the institutions to merely lay down minimum norms in these areas.<sup>20</sup> In internal market legislation (acts based on Article 95 EC), on the other hand, the institutions quite often opt for so-called *complete* harmonisation. This means that Member States, in principle, do not have the possibility to maintain or introduce more stringent rules.<sup>21</sup> A cumbersome procedure (laid down in paragraphs 4 to 9 of Article 95 EC) has to be followed, including a positive decision from the Commission, to make sure that more stringent rules may continue to exist. It may therefore be very difficult for a Member State to maintain or adopt stricter rules in its own legal system.<sup>22</sup>

In an enlarged Union it may be necessary to have recourse to this legal method much more often, be it as an alternative to 'ordinary' flexible decision-making under the general provisions of the Amsterdam Treaty (consumer policy, environmental protection, etc.) or as an alternative to complete harmonisation in case the Article 11 conditions exclude the adoption of 'flexible' acts (for example internal market legislation). The main objective for probably all CEECS would be to reach only the required *minimum* EC level. Other Member States, often those which already have a high level of protection, would be free to maintain or introduce 'better' national rules.

Apart from minimum harmonisation, the legal technique of so-called *optional* harmonisation may also constitute an interesting option available from the arsenal of legislative methods already employed in the EC context. The term 'optional harmonisation' has to date mainly been used in the context of the free movement of *goods*. This type of harmonisation entails that goods which fulfil the technical requirements of the Directive in question (often mentioned in extensive lists in the Annex to the Directive) must be able to circulate freely within the entire Community. Such Directives do not, however, forbid the production of the same goods in accordance with national standards. These goods, not complying with the technical requirements as laid down in the Directive, can only circulate in the territory of the Member State where they have been produced. Other Member States are not obliged to accept imports of these goods, at least not on the basis of the Directive.<sup>23</sup> It is therefore the manufacturer – and not the Member State – who has been given

the possibility to choose: he may either produce in accordance with EC standards, or with local standards.<sup>24</sup>

As this harmonisation technique is so specifically tied up with the context within which it was developed, namely the free movement of goods, it cannot (yet) be considered as an alternative to closer co-operation within the meaning of the new Amsterdam provisions, given the fact that the freedom of movement of goods (probably) falls within the area of *exclusive* Community competence.<sup>25</sup> Nevertheless, it can be viewed as a more flexible solution than the technique of complete (or total) harmonisation, which does not leave the manufacturer the choice of opting for either EC standards or local standards.<sup>26</sup>

More recently it seems that the term 'optional harmonisation' is also used in a quite different meaning, namely the one non-specialists on the free movement of goods would expect: it is up to the Member States to decide whether or not they implement all or certain provisions of the 'optional' EC/EU measure in national legislation. If the term is understood in this sense, the technique of optional harmonisation could be fruitfully used in several areas of EU policy-making activity. PJCC framework decisions, for example, could provide that Member States are only obliged to implement certain provisions of this act, leaving it to these states to decide whether or not they implement the other parts. In case of complete discretion, one may however wonder whether the institutions should not adopt a common position or some other soft law act, such as an action plan. In any event, there is already some evidence in recent months that in the context of EU policies on Police and Judicial Co-operation in Criminal matters some suggestions have been made along these lines in the ongoing debate on criminal law harmonisation in the EU. Such ideas are complementary to recent initiatives on employing the principle of 'mutual recognition', borrowed from the area it has originally been developed, the free movement of goods, in the context of certain aspects of criminal law procedure. We will return to consideration of this important recent trend in the concluding chapter.

## NOTES

- <sup>1</sup> Cf., e.g., A. Stubb (1996) 'A Categorization of Differentiated Integration', *JCMS* 34: 283; C.D. Ehlermann (1996) 'Increased Differentiation or Stronger Uniformity', p. 27 in J. Winter a.o. (eds.) *Reforming the Treaty on European Union*, Asser Instituut, The Hague. On the conditions for closer cooperation (as laid down in Article 11 TEC), see, e.g., H. Kortenbergh (1998) 'Closer Cooperation in the Treaty of Amsterdam', 35 *CML Rev.* 833.
- <sup>2</sup> See Articles 1 and 2 of the two Protocols.
- <sup>3</sup> An example is Directive 94/45/EC on UK as it was adopted under Article 2(2) of the Agreement on social policy (*OJ* 1994 L 254/64). It should be noted that these special arrangements did not exclude the UK entirely from European social legislation. The EC institutions could also make use of the legal bases of the EC Treaty, in particular Article 118 A EC (now, after amendment, Article 137(1) EC) on health and safety of workers. For example, the UK was bound by the provisions of the Directive on working time (Directive 93/104/EC, *OJ* 1993 L 307/18) as it was adopted - by a qualified majority vote - under this former EC Treaty base. The UK's legal basis objections were rejected by the Court, see Case C-84/94 *UK v Council* [1996] ECR I-5755.
- <sup>4</sup> See Article 2 (58) of the Amsterdam Treaty.
- <sup>5</sup> Cf. Article 8 of the Protocol integrating the Schengen acquis into the framework of the European Union (stating that "the Schengen acquis and further measures taken by the institutions within its scope shall be regarded as an acquis which must be accepted in full by all States candidates for admission"). See also point 25 of the conclusions of the Tampere European Council, 15 and 16 October 1999 ("As a consequence of the integration of the Schengen acquis into the Union, the candidate countries must accept in full that acquis and further measures building upon it").
- <sup>6</sup> Cf. the Editorial Comments, (1999) 36 *CML Rev.* 1119 ("The Tampere summit: The ties that bind *or* The Policemen's Ball") where it is rightly pointed out that "the position of the United Kingdom, Denmark and Ireland becomes ever more anomalous in this context".
- <sup>7</sup> See, in particular, Article 43(2) TEU, stating that Member States shall apply, as far as they are concerned, the acts and decisions adopted for the implementation of the co-operation in which they participate. Therefore, the Amsterdam provisions are not suited to create a special position for the CEECS upon accession.
- <sup>8</sup> Cf. for example, G. Gaja (1998) 'How Flexible is Flexibility under the Amsterdam Treaty?' *CML Rev.* 855, 859; H. Kortenbergh (1998) 'Closer Cooperation in the Treaty of Amsterdam' *CML Rev.* 833, 835.
- <sup>9</sup> "Adapting the Institutions to make a success of enlargement", p. 39.
- <sup>10</sup> Case 41/76 *Donckerwolcke* [1976] ECR 1921, at paragraph 32. On the scope of Article 113 (now Article 133 EC), see in particular Opinion 1/94 [1994] ECR I-5267. See also J. Bourgeois (1995) 'The EC in the WTO and Advisory Opinion 1/94: An Echnernach Procession', *CML Rev.*, p. 763; and O. Blin (1998) 'L'article 113 CE après Amsterdam', *RMCUE*, p. 447.

- <sup>11</sup> See, for example, J. Wouters (1998) 'Flexibiliteit in de Eerste Pijler', p. 29 in T.M.C. Asser Instituut, *Flexibiliteit en het Verdrag van Amsterdam*, The Hague. On the idea to 'relax' the strict conditions of Article 11 TEC, see paragraph 4.4.
- <sup>12</sup> This term is used in Philippart and Sie Dhian Ho (forthcoming).
- <sup>13</sup> See, for example, the Commission Opinion of 26 January 2000 on the IGC 2000, p. 20 and the report of Von Weizsäcker, Dehaene and Simon, *The Institutional Implications of Enlargement*, Report to the European Commission, Brussels, 18 October 1999, p. 8.
- <sup>14</sup> See Articles 43(2) and 75(1) of the original *EEC* Treaty.
- <sup>15</sup> See, respectively, Case C-84/94 *UK v Council* [1996] ECR I-5755; Case C-377/98 *Netherlands v EP and Council* (pending); Case 376/98, *Germany v EP and Council* (pending). For a recent overview of the legal basis perils: H. Cullen and A. Charlesworth (1999) 'Diplomacy by Other Means: The Use of Legal Basis Litigation as a Political Strategy by the European Parliament and Member States', *CML Rev.*, p. 1243.
- <sup>16</sup> See Article 168 EC.
- <sup>17</sup> For the text of this Convention, and the accompanying Act of the Council of 26 July 1995, see *OJ* 1995 C 316, p. 1. The Europol Treaty entered into force on 1 October 1998; Europol became operational on 1 July 1999 (*OJ* 1999 C 185, p.1)
- <sup>18</sup> Cf. the previous paragraph (on the non-applicability of existing EU *acquis*).
- <sup>19</sup> See the Commission's Opinion of 26 January 2000 on the current IGC (*Adapting the Institutions to Make a Success of Enlargement*), p. 33-34 and p. 53-55. The first proposal requires an amendment to Article 43(1)(d) TEU; the second idea – Member States would no longer have the right to oppose the granting of an authorisation to establish closer co-operation - requires amendments to Article 40(2) TEU and Article 11(2) TEC.
- <sup>20</sup> Articles 137(5), 153(5) and 176 of the EC Treaty, respectively (EC measures in these three areas shall not prevent any Member State from maintaining or introducing more stringent protective measures).
- <sup>21</sup> See, for example, Article 7 of the First Directive on Trade Marks (*OJ* 1989 L 40, p. 1), which obliges Member States to provide for Community-wide exhaustion of trade-mark rights, nothing more and nothing less. Hence, as this Directive embodies a *complete* harmonisation of the rules relating to the rights conferred by a trade mark, Member States may no longer maintain legislation providing for so-called world-wide exhaustion of these intellectual property rights. See Case C-355/96 *Silhouette* [1998] ECR I-4799.
- <sup>22</sup> See, for example, Case C-319/97 *Kortas*, judgment of 1 June 1999. As Swedish legislation on a certain colour for use in foodstuffs (E 124) was more stringent than EC law (namely Directive 94/36, *OJ* 1994 L 237, p. 13, providing for complete harmonisation) the Swedish authorities had to await the decision of the Commission under Article 100 A(4) EC (now, after amendment, Article 95(6) EC. Meanwhile, the more stringent rules could not be applied. Several years later the Commission gave a negative decision (Decision 1999/5/EC, *OJ* 1999 L 3, p. 13), thus requiring Sweden to abolish its complete ban on the use of colour E 124.

- <sup>23</sup> On the basis of primary EC law such an obligation may however still exist: Article 28 EC, on the prohibition of quantitative restrictions on imports and measures having equivalent effect, applies; and the Member State concerned cannot justify its import restrictions on the basis of Article 30 EC or one of the so-called Rule Of Reason-exceptions. See further the impressive analysis by Curall (1984) 'Some Aspects of the Relation between Articles 30-36 and Article 100 of the EEC Treaty, with a Closer Look at Optional Harmonisation', *YEL* 169.
- <sup>53</sup> See also R.H. Lauwaars and J.M. Maarleveld (1987) *Harmonisatie van wetgeving in Europese organisaties*, Kluwer, p. 152.
- <sup>25</sup> Cf. paragraph 4.2.
- <sup>26</sup> Cf. P.J. Slot (1996) 'Harmonisation', *EL Rev.* 378, at 383.

## **PART B**

**TRANSPOSITION OF EU LAW INTO THE NATIONAL LEGAL ORDERS  
OF (NEW) MEMBER STATES**



## 5 PURPOSE AND STRUCTURE OF PART B

The term 'transposition' refers to the process of bringing national legislation of a certain Member State into conformity with those parts of EU law which have acquired legal force for that Member State. Transposition is therefore an activity which has to be performed, mainly, by the national legislative authorities. This obligation essentially results from the fact that EU law takes precedence over national law. It is relevant therefore to first address the case law of the Court regarding the relationship between EC law and national law (paragraph 6).

The main purpose of this part is, however, to analyse possibilities for reform of the process of transposition of EU law by national legislative authorities, in the light of the upcoming enlargement. In this respect, attention is given to the choice of the legal instruments by the EU institutions and to the various forms of assistance which the EU can provide to the legislative authorities of the CEECS (paragraph 7).



## 6 THE OBLIGATION TO BRING NATIONAL LAW IN CONFORMITY WITH EU LAW

Already as far back as 1964, the Court of Justice ruled that the integration of provisions which derive from the Community into the laws of the Member States make it impossible for these states to accord precedence to any unilateral and subsequent measure over a legal system accepted by them on a basis of reciprocity. Such a national measure cannot therefore be inconsistent with the Community legal system. The executive force of Community law cannot vary from one state to another and the obligations undertaken under the Treaty would not be unconditional, but merely contingent, if they could be called in question by subsequent legislative acts of the Member States. The Court therefore concluded that the law stemming from the Treaty, an independent source of law, could not be overridden by domestic legal provisions, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question.<sup>1</sup>

Although lawyers tend to relate this case law on the principle of supremacy to the role of the national *courts*,<sup>2</sup> the Court's general wording also has extremely important consequences for national legislators. In fact, they have to ensure that all parts of national legislation become *and* remain in line with all EC Treaty obligations. In this respect, it is stressed that concepts such as direct effect and state liability were only developed because national legislators did not perform their duties properly. Direct effect and state liability should be considered, essentially, as forms of sanctions to be imposed on the legislator. The existence of these sanctions does not, however, release the national legislator from its duty to transpose EU law correctly. Thus, the fact that a provision of an EC Directive may be relied upon before the national court by individuals, does not exempt the national legislator from the obligation to adopt implementing measures within the period prescribed in the Directive.<sup>3</sup>

With regard to the transposition of the acts of the EU institutions (into national legislative provisions) a distinction should be made between Regulations and Directives. Because a Regulation is 'directly applicable' (Article 249 EC), the Member States are not permitted, in principle, to transpose the contents of a Regulation into national legislation. According to the Court, such implementing measures would create uncertainty as to the legal nature of the applicable provisions and they would jeopardise the simultaneous and uniform application of the Regulation in the entire Community. Only where the Regulation itself provides for the adoption of implementing rules, the Member States may transpose its provisions into national legal rules.<sup>4</sup> In general, the entry into force and application of Regulations are *independent* of any measure of reception into national law.<sup>5</sup>

Regulations therefore have the most direct impact on the national legal order, as they usually do not need any intervention by the national legislatures for their application. Although Regulations do not need formal transposition into national laws or regulations, the provisions of a Regulation should, of course, be *applied* by national administrative agencies.<sup>6</sup> Directives, on the other hand, often require positive action on the part of the national legislators. Directives are merely binding with regard to the objective to be achieved, but leave it to the Member States to choose the 'form and method' (Article 249 EC). In practice, this means that the Member States must bring into force the laws, regulations and administrative provisions necessary for them to comply with the Directive in question. These implementing measures should have legally binding force, which implies that implementation of a Directive through circulars or administrative practices is not good enough.<sup>7</sup> Directives are therefore a particularly useful device for the *harmonisation* of national laws within a certain area or with regard to a certain topic.

- <sup>1</sup> Case 6/64 *Costa v ENEL* [1964] ECR 585.
- <sup>2</sup> On this issue, see paragraph 14.2.
- <sup>3</sup> Case 102/79 *Commission v Belgium* [1980] ECR 1473, 1487.
- <sup>4</sup> See, for example, Case 93/71 *Leonesio* [1972] 288. Cf. R.H. Lauwaars (1983) 'Implementation of Regulations by National Measures', *LJET* 41.
- <sup>5</sup> Cf. Case 34/73 *Variola* [1973] ECR 981, paragraph 10.
- <sup>6</sup> See, e.g., Case 17/67 *Neumann* [1967] ECR 441.
- <sup>7</sup> See, e.g., Case C-361/88, *Commission v Germany* [1991] ECR I-2567 (the so-called TA Luft case, discussed by C. Langenfeld and S. Schlemmer-Schulte (1991) 'Die TA Luft – kein geeignetes Instrument zur Umsetzung von EG-Richtlinien', *Euzw*, p. 622).



## 7 POSSIBLE REFORMS TO THE EU SYSTEM

The formal transposition of EU law into national legislation of the candidate countries does not seem to be the most problematic issue, at least in comparison with the expected problems related to the actual application and enforcement of EU law. Already during the pre-accession period, the Regular Reports from the Commission on the situation in the candidate countries show that, generally speaking, all countries have made good progress on the alignment of their legislation to the Union's *acquis*. Upon closer examination it appears however that in numerous specific policy areas national legislation has still not been brought into line with EU law. In particular, a number of EC Directives have not yet been transposed into national legislation. In the field of free movement of goods a large number of candidates still have to start transposing the so-called New Approach Directives, as well as the directives on product safety and product liability. In the sensitive area of environmental protection, a majority of the candidates have not yet begun implementing Directives on chemicals, genetically modified organisms, and noise.<sup>1</sup>

The new Member States are however not only obliged to bring their national law into line with the existing *acquis*; after accession they will also have to ensure that national law stays in line with new EC legislation. It is therefore important to examine what the EU can do in order to ensure that the new members will actually comply with the obligation that national law is and remains in conformity with EU law.

### 7.1 THE CHOICE OF THE LEGAL INSTRUMENT

A first option to be considered relates to the type of acts which are at the disposal of the EU institutions in order to give shape to the various Union policies. The central question in this context is whether there are possibilities of avoiding the obligation to transpose EU law into national legislative provisions, and thus to avoid the 'co-operation' of national legislators.

As the various EU pillars provide for very different legal instruments, a distinction is made between the EC pillar on the one hand (paragraph 7.1.1) and the two non-Community pillars on the other (paragraph 7.1.2).

#### 7.1.1 WHAT KIND OF COMMUNITY LEGISLATION?

A first option to avoid any transposition problem is to adopt legally non-binding Community acts, such as opinions, recommendations, conclusions, announcements, et cetera. It however seems that in the 'hard core' areas of Community policy, a significant trend towards the adoption of 'soft' law is not very likely.

After all, in its fifty years of existence the Communities have very often exercised their attributed powers by way of legally binding acts, such as Directives and Regulations. Eastern enlargement is neither very likely to change this state of affairs, nor do we believe it is a preferable option.

In some specific areas of Community policy, not belonging to the 'core acquis', there may however be some room to depart from the traditional Community method of 'dictating from above'. Areas such as culture or education can be cited as examples, as well as the policy areas that have been transferred from pillar three to Title IV of the EC Treaty: immigration and asylum policy as well as co-operation in civil matters. During the previous period (Maastricht-Amsterdam) decisions on these matters were often adopted in the non-binding form of common positions, conclusions, et cetera. To a certain extent this policy of convincing instead of dictating could be continued in the post-Amsterdam era, although it should be added that the recent trend clearly goes in the opposite direction. In their so-called Vienna Action Plan the Council and the Commission indicated that the new title IV of the EC Treaty should 'produce' a significant number of binding acts on the sensitive issues mentioned above. The 1968 Brussels Convention, for example, will be 'transformed' into a legally binding EC Regulation.<sup>2</sup>

In cases where the EC institutions have decided to adopt legally binding measures of general application, they can opt for either a Regulation or a Directive.<sup>3</sup> As was pointed out above, the important difference between these legal instruments is that only Directives need to be transposed into the national laws of the Member States. Given this important difference, the EC institutions could more often make use of Regulations when legislating in certain policy areas. The cumbersome process of adopting the required implementing legislation could thus be avoided.

Whether an intensified use of Regulations will be adopted (after enlargement) remains an open question. The current Member States seem to prefer the use of Directives, rather than Regulations, precisely because Directives still need further implementing legislation at the national level and thus the involvement of national governments and (often) parliaments is guaranteed.<sup>4</sup> In the Protocol on subsidiarity and proportionality, for example, the preference for (broadly drafted) Directives is clearly laid down: "Other things being equal, directives should be preferred to regulations and framework directives to detailed measures".<sup>5</sup>

An intensified use of Regulations would probably require an amendment of a few Treaty provisions: a minority of the current Treaty Articles stipulate that a specific legal instrument, for example Directives or Decisions, should be used. Implementing measures on, for example, the mutual recognition of diploma's or on company law still need to be adopted in the form of EC Directives.<sup>6</sup> Most of the existing enabling provisions, however, use general terms like 'decisions' or 'measures'.<sup>7</sup> These terms encompass the various types of Community acts listed in Article 249 EC,

both the binding ones (Directives, Regulations, Decisions) and the non-binding decisions (Opinions, Recommendations).

From the foregoing we conclude that a significant use of Regulations, instead of Directives, probably cannot be expected and, moreover, will not offer a satisfactory solution for the expected transposition problems by CEEC legislators. There apparently does not exist sufficient political support to adopt 'genuine' European laws much more often; an amendment of several legal bases would be necessary; and, of course, problems relating to the application and supervisory stages would remain to exist.

#### 7.1.2 A CALCULATED CHOICE OF LEGAL INSTRUMENT UNDER THE OTHER EU PILLARS?

The question arises whether a 'calculated' choice of the legal instrument could provide an adequate solution to transposition problems where the Union legislates in the areas of CFSP and PJCC. As far as legislation under the *second* pillar is concerned (CFSP) this issue does not seem to be of great significance: CFSP decisions, by their very nature, will hardly ever require implementing national measures of a legislative nature. Rather the Member States have to ensure that their foreign policies are in conformity with the CFSP instruments, such as joint actions and common positions.<sup>8</sup> The latter requirement implies that national administrations may have to apply and enforce CFSP decisions and, perhaps, the national judiciary can supervise the correct application of these second pillar instruments by national administrative agencies.<sup>9</sup> Action on the part of the legislative authorities, however, will often not be necessary.

47

In criminal matters - the central subject matter of the third EU pillar - there does not seem to be much scope for 'smart' legal instrument choices either, at least as far as the legally binding acts are concerned. Since Amsterdam, the third pillar legal instruments are listed in Article 34(2) TEU.<sup>10</sup>

The *common position* - the first instrument of the list - should, in general, be considered as part of the Union's soft law as they are used to define 'the approach of the Union to a particular matter'. The non-binding nature of this instrument can also be deduced from the fact that the European Parliament does not have to be consulted by the Council prior to the adoption of common positions (Article 39 TEU). Moreover, the Court does not have jurisdiction to give preliminary rulings on the interpretation or validity of common positions (Article 35 TEU). This confirms that the drafters of the Amsterdam Treaty did not intend to create a legally binding and enforceable EU act.

Of course, these characteristics make the PJCC common position the perfect legal instrument to conduct a policy of convincing rather than dictating in the area of criminal law matters.<sup>11</sup> It however seems that the Council may also adopt other

types of non-binding legal instruments. Perhaps in this context in particular, it is possible to envisage the formulation at EU level of non-binding model codes of law or 'restatements'. These could bring together in a comprehensible fashion the various aspects of a particular subject (for example, the law of criminal procedure) gleaned from the 'best practices' at the national level. The idea behind such softer initiatives is to present a clear alternative to a legislative technique of harmonisation in areas where it is felt inappropriate (criminal law in general?). This alternative would aim to 'learn from' the various national law systems and to draw up a type of restatement of the best practices. Such a code or restatement could have a role in assisting CEECs when considering appropriate national legislation from the wider perspective of enforcing and applying EU law in general. Moreover, such alternative instruments could have a role in reducing harmful divergence between Member States and bringing about more convergence in practice as an alternative to the route of legislative harmonisation. There are of course downsides to this technique but we submit that at the very least it constitutes a route worthy of further exploration. Just as the Principles of European Contract Law (the so-called Lando Principles) may indeed ultimately form the basis of a European Contract Law<sup>12</sup> there could be a similar initiative to draw up 'Principles of Criminal Law' or 'Principles of Police Law'. The initiation, funding and providing of technical assistance to support such a process, could conceivably be entrusted to the Commission, although it is suggested that the actual task of drawing up the provisions of such Principles should involve recognised independent experts in the respective fields.

If and when the EU institutions have, however, decided that this soft law approach does *not* offer the best solution in the case concerned, they will have to use one of the other legal instruments of Article 34(2) TEU. From the description of the characteristics of (PJCC) *framework decisions* it is clear that this instrument is intended to produce legally binding effects and that it should be implemented at the national level. Hence, like EC Directives, the PJCC Framework Decisions heavily depend on the co-operation of the legislators of the Member States.<sup>13</sup>

The PJCC *decision* (within the meaning of Article 34(2)(c) TEU) more or less resembles the EC Regulation, as it is stated that such decisions shall be binding, presumably 'in their entirety'. On the other hand, they may not be used for the approximation of the laws of the Member States and no mention is made of the 'general applicability' of these decisions. The analogy with the EC regulation is therefore probably not as great as it seems at first sight. Finally, the PJCC *Conventions* (Article 34(2)(d) TEU) cannot be considered as 'genuine European laws' either. For their entry into force, it is required that Member States shall adopt these conventions in accordance with their respective constitutional requirements.

All in all, the two non-Community pillars provide for quite different legal instruments and seem to lack a legal instrument along the lines of the EC Regulation. In these ‘flanking’ policy areas it appears that the EU institutions can only shape their policies in very close co-operation with national legislative authorities (including those of the CEECS). The adoption of genuine ‘European laws’ which do not require transposition in national legislation does not seem possible. Only as regards the choice between soft law and hard law, the non-Community pillars, and in particular the third pillar, provide the EU institutions with sufficient options.

## 7.2 EU ASSISTANCE TO THE CEECS LEGISLATORS

The intensified use of Regulations by the EC institutions should be considered as only a moderate contribution to the goal of better transposition. The same holds true for the adoption of non-binding measures, in particular where the functioning of the internal market is concerned. It should therefore be acknowledged that the primary responsibility for the correct transposition of (legally binding) EU law remains in the hands of the *national* legislative authorities, including those in the new Member States (government, administrations, and/or the national parliaments, depending on how a Member State decides to implement EU law).

Given this division of responsibilities, the major contribution the Union can make in ensuring that the system continues to function effectively would be to provide assistance to the CEECS legislatures. Such assistance could take different forms, such as monitoring the transposition process, giving legal and economic advice, or stimulating the CEEC legislatures to bring (and keep) their laws in line with EU law. Of course, already during the current pre-accession period the EU institutions and the Member States strongly emphasise this – what might be called – ‘softer’ approach to the CEECS transposition problems. One of many examples is provided by the Union’s effort to make the candidates develop systems for ensuring that draft legislation conforms to EU standards. From the various Regular Reports it appears that some candidates have already made good progress in this respect. In Latvia, for example, the national parliament has taken measures to increase the capacity to assess the compatibility of draft legislation with EC law.<sup>14</sup> In Slovenia, on the other hand, the legislative process continues to be slow: every law requires three readings in the national parliament and instabilities within the coalition slow down parliamentary decision making.<sup>15</sup>

Although not really sensational, this ‘softer’ solution of giving assistance to the CEECS legislatures may prove to be the only realistic option in the long run. This approach clearly acknowledges the primary responsibility of the *national* legislators to adopt and amend legislative provisions to keep their national laws in line with EC law, just as it has always been. The Union can only play a ‘secondary’ role, that is, it can offer assistance and monitor the process of transposition in these countries.

## NOTES

- <sup>1</sup> See, e.g. the annex to Council decision 1999/857/EC on the principles, priorities, intermediate objectives and conditions contained in the Accession Partnership with the Republic of Bulgaria (*OJ* 1999 L 335: 48).
- <sup>2</sup> See further paragraph 15.4.1.
- <sup>3</sup> Leaving aside the so-called *sui generis* decisions of the EC institutions, which sometimes can be considered to be binding acts of general application as well (such as the Socrates decision). Decisions within the meaning of Article 249 EC are usually used in individual cases.
- <sup>4</sup> Cf. T. Koopmans (1995) 'Regulations, directives, measures', p. 691 in O. Due, M. Lutter, J. Schwarze (Hrsg.), *Festschrift für Ulrich Everling* Baden-Baden: Nomos.
- <sup>5</sup> Point 6 of the Protocol on the application of the principles of subsidiarity and proportionality (*OJ* 1997 C 340: 105). See also the opinion of the Committee of the Regions on 'better lawmaking' (*OJ* 1999 C 374/11). At point 3.4 this advisory body "repeats the need to give priority to directives over regulations thus enabling Member States and local and regional authorities to choose the most appropriate legislative instruments with which to achieve the objectives set at European level".
- <sup>6</sup> See Articles 47(1) and 44 EC, respectively. It should be added that an amendment to these Treaty Articles (aiming at expanding the legal instruments at the disposal of the institutions) is unnecessary if the EC institutions are allowed to fall back on another legal basis which *does* mention the desired legal instrument. In the *Massey-Ferguson* Case (8/73, [1973] ECR 897) the Court, indeed, seemed to accept this construction: Article 235 EEC (now Article 308 EC) could be used as the legal basis for the *Regulation* concerned, since Article 100 EEC (now Article 94 EC) merely provided for the adoption of *Directives*.
- <sup>7</sup> See e.g. Article 95 EC ('measures' concerning the internal market), Article 308 EC ('appropriate measures') and the legal bases of the new Title IV ('measures' on asylum, immigration policy, judicial co-operation in civil matters, etc.).
- <sup>8</sup> See Article 14(3) TEU, which stipulates that joint actions shall commit the Member States in the positions they adopt and in the conduct of their activity. With regard to common positions, Article 15 TEU imposes on Member States the obligation to ensure that their national policies conform to these common positions.
- <sup>9</sup> Something which essentially depends on whether or not these CFSP decisions may be invoked before the national courts. On the question of direct effect of CFSP decisions, see further paragraph 14.1. In general on the legal status and binding force of CFSP decisions, see R.A. Wessel (1999) *The European Union's Foreign and Security Policy*, Kluwer, Chapter 5.
- <sup>10</sup> For a good description of the legal instruments of the revamped third pillar, see J. Monar (1998) 'Justice and Home Affairs in the Treaty of Amsterdam: Reform at the Price of Fragmentation', *EL Rev.* 320.
- <sup>11</sup> Cf. the previous paragraph.

- <sup>12</sup> See further, Busch and Hondius (2000) 'Een nieuw contracten-recht voor Europa: de Principles of European Contract Law vanuit Nederlands perspectief', *NJB*, 837- 848.
- <sup>13</sup> See, for example, the Commission's proposal for a Council Framework Decision on combating fraud and counterfeiting of non-cash means of payment (*OJ* 1999 C 376 E: 20). With regard to implementation, this draft decision contains the usual obligation: "Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Framework Decision [...]" (Article 7).
- <sup>14</sup> Second Regular Report on Latvia, Chapter B.1.
- <sup>15</sup> See the Second Regular Report from the Commission on Progress towards Accession of Slovenia, 13 October 1999, Chapter B, section 1.1.



## **PART C**

### **APPLICATION AND ENFORCEMENT OF EU LAW BY NATIONAL ADMINISTRATIVE AUTHORITIES**



## 8 PURPOSE AND STRUCTURE OF PART C

The formal transposition of EU law into the national legal orders of the new Member States is just a first step; the implemented rules should also be applied and enforced by national administrative authorities in daily life. As was mentioned earlier, both the European Council and the Council of Ministers strongly emphasise this requirement. The third part of this report is therefore concerned with the problems regarding the application of EU law by national administrative entities. First it is stressed that for its enforcement, Community law heavily depends on administrative structures and organisations set up at the *national* level. Only in very few cases do the authors of the Treaties choose for a centralised means of enforcing substantive EC rules (paragraph 9).

The coming enlargement may, however, require the development of new ways of ensuring that Community law (and Union law) is correctly applied and enforced within the Member States. A rather far-reaching solution would be to choose for some form of *centralised* enforcement in many areas of Community/Union policy. In this respect attention is given to the identity of the central executive organ – Commission or independent agencies – and to the scope of its (executive) powers (paragraph 10). As, in our view, it must be seriously questioned whether this is a realistic option, a second, less radical, solution will be discussed. This latter solution takes as its departure point the status quo that the application and enforcement of EU law remains in the hands of *national* administrative authorities but ensures that the Community as such strongly backs and supports these administrations in a manner which would go beyond current realities (paragraph 11).



## 9 THE CURRENT STATE OF AFFAIRS: DECENTRALISED ENFORCEMENT IS THE RULE

In almost all areas of Community policy-making the administrative authorities of the Member States are responsible for applying and enforcing Community law obligations. This responsibility can be deduced from Article 10 (ex 5) of the EC Treaty, according to which the Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of the EC Treaty or resulting from action taken by the Community institutions. Member States should also facilitate the achievement of the Community's tasks and they are required to abstain from any measure which could jeopardise the attainment of the Treaty objectives.<sup>1</sup> In important fields of Community activities, such as agriculture, it is therefore for the *national* administrative authorities to ensure the day-to-day application and enforcement of the many agricultural measures in relation to private individuals. The European Commission may, for example, prohibit all imports of Japanese fish for sanitary reasons. It is however a task for the national agencies to confiscate illegal imports. Therefore private firms will be confronted with civil servants from the national department of agriculture, not with Commission's officials.<sup>2</sup> Likewise, the Community's structural policy is essentially applied and enforced in a decentralised way. The considerable amounts of money from the Community's European Social Fund (ESF), for example, are paid to the national employment services. It is their task to distribute the financial assistance among the various individual beneficiaries.<sup>3</sup>

57

Only in few cases does Community law provide for some form of centralised way of enforcing substantive rules. The most well-known example is, of course, the power of the European Commission to apply and enforce the EC rules on competition policy vis-à-vis private companies. The Commission is responsible to ensure compliance with the prohibitions laid down in Article 81 EC (cartels between undertakings) and Article 82 (abuse by an undertaking of a dominant position within the common market). The Commission is also empowered to exempt certain cartels from the general prohibition of Article 81(1) EC.<sup>4</sup>

Although this is the most well-known example, it should be added that a few other central agencies have been set up as well to apply EU rules in specific policy areas. In the area of intellectual property rights (IPR), for example, the regulation on the Community trade mark has established the Office for Harmonisation in the Internal Market (Trade Marks and Designs).<sup>5</sup> Still, most decisions on IPR have taken the form of Directives, and are therefore enforced and applied at the national level.<sup>6</sup>

A few years ago, some suggestions were made of initiating a far-reaching 'agen-cification' of the Commission and its tasks across various policy-making areas; in other words, of 'farming-out' many of the tasks of the Commission to independent agencies which would be given powers over specific policy making areas and, pos-

sibly enforcement related powers.<sup>7</sup> Such proposals for reform were essentially inspired by a desire to curtail significantly the role and influence of the Commission in the current constitutional set-up. They are not logically in line with the current situation where a number of 'independent agencies' with limited powers have been set up in an ad hoc fashion.<sup>8</sup> No serious consideration seems to have been given to the radical agencification proposals and our view is that such a far-reaching approach would be very difficult to rhyme with a more constitutional and coherent overall approach imbued with more accountability and a stronger system of checks and balances than is currently the case. Moreover, even within the constraints of the current system there has been a veritable explosion of European agencies but this trend has not weakened the role of national administrations but rather has resulted in a phenomenon of 'copinage technique' between Community and national officials.<sup>9</sup>

From this brief analysis of the current state of affairs it follows that, if things would remain the way they are now, the administrative authorities of the CEECs will acquire enormous responsibilities after accession to the Union. They will become responsible for the correct application of most of the Community rules within their own territory, on matters as diverse as for example the import of bananas from third countries,<sup>10</sup> driving and rest periods for truck drivers<sup>11</sup> or the exchange of university students.<sup>12</sup>

## NOTES

- <sup>1</sup> See, for example, Case 50/76 *Amsterdam Bulb* [1977] ECR 137, paragraph 32. Cf. J. Temple Lang (1990) 'Community Constitutional Law: Article 5 EEC Treaty', *CML Rev.*, p. 645.
- <sup>2</sup> For an interesting illustration of this division of tasks, see Case C-183/95, *Affish* [1997] ECR I-4315.
- <sup>3</sup> This decentralised system often gives rise to legal disputes between Member States and the Commission. See, for example, Case C-84/96 *Netherlands v Commission*, judgment of 5 October 1999 (not yet reported).
- <sup>4</sup> See Article 83 EC and, for more detailed provisions, Regulation No 17: First Regulation implementing Articles 85 and 86 of the Treaty (*OJ*, English Special Edition, Series I (1959-1962), p. 87).
- <sup>5</sup> Regulation 40/94/EC of 20 December 1993 on the Community trade mark (*OJ* 1994 L 11, p. 1).
- <sup>6</sup> For example the First Trade Mark Directive (earlier mentioned in the context of complete harmonisation, see paragraph 4.4).
- <sup>7</sup> See in particular the work by F. Vibert, *A Constitution for Europe*, and proposals made by the (sceptic) European Constitutional Group prior to the Maastricht IGC.
- <sup>8</sup> See, most recently, E. Chiti (2000) 'The emergence of a Community administration: the case of European Agencies', *CML Rev.* 309, and references cited therein. See also the discussion of the Meroni case in the next paragraph.
- <sup>9</sup> See, in particular, Chiti, *op.cit.* at p.342.
- <sup>10</sup> Cf. Regulation 404/93/EEC (*OJ* 1993 L47, p.1).
- <sup>11</sup> Cf. Regulation 3820/95/EEC on the harmonisation of certain social legislation relating to road transport and Regulation 3821/85 on recording equipment in road transport (*OJ* 1985 L 370: 1 and 8, as amended). For the actual enforcement of these Regulations by national police forces, see the reports of the Commission on the implementation of the Regulations (e.g., COM (95) 713 final). For a specific case, namely the implementation of the Regulations by the Gendarmerie of the port of Antwerp, see Case C-29/95 *Pastors v Belgian State* [1997] ECR I-285.
- <sup>12</sup> From Article 5 of the Socrates decision (819/95/EC, *OJ* 1995 L87/10) it appears that both the Commission and the Member States are responsible for the implementation of the Socrates programme.



## 10 CENTRALISATION OF ENFORCEMENT TASKS?

The most far-reaching solution would be to *centralise* the application and enforcement of Community law in most areas of EC competence. This would mean that the Commission (or some other central enforcement agency) would acquire a central role in the application process. An important advantage of this approach would be that Union law, and in particular Community law, would become less dependent on capacities and qualities of national administrative agencies for its application in practice. Just as the undertaking which abuses its dominant position on the Community market should be afraid of the Commission and less of national competition authorities, the farmer would be confronted, primarily, with Commission officials. Civil servants from the national Ministry of Agriculture would merely play a supportive role or no role at all. These examples illustrate that centralised application should only be considered an 'advantage' - as compared to the current system of decentralised application - if one has little faith in the capacity of national agencies to apply EC/EU law effectively, in particular vis-à-vis individuals.

It must, however, seriously be questioned whether centralisation to any significant extent is a realistic option. The Commission already now lacks the necessary resources to perform all its monitoring tasks properly. More centralisation after enlargement would only be possible if the Commission were given much more financial resources and manpower. It is highly uncertain whether the Member States (including the new ones) would accept greater enforcement powers by the Commission, as they feel this would be tantamount to a considerable loss of sovereignty. Several recent documents adopted by Member States' representatives highlight the politically sensitive nature of the issue. The Maastricht Conference stressed that it must be for each Member State to determine how the provisions of Community law can best be enforced in the light of its own particular institutions, legal system and other circumstances.<sup>1</sup> The Essen European Council stated that the administrative implementation of EC law shall, in principle, be the responsibility of the Member States in accordance with their constitutional arrangements.<sup>2</sup> The Madrid European Council stressed the need for the candidate countries to adjust their administrative structures to ensure the harmonious operation of Community policies after accession.<sup>3</sup> And at the Amsterdam summit the principle of enforcement of Community law at the national level was, once again, 'confirmed' by the High Contracting Parties.<sup>4</sup>

The Commission itself does not seem to be greatly in favour of more centralisation. The Opinions and Regular Reports, stressing the need to reinforce the administrative capacity of the candidates would be quite irrelevant if, after enlargement, EU law was to be enforced in a centralised way. More specifically, in the field of competition policy, until now the most important example of enforcement at Community level, the Commission encourages decentralisation of the application and enforcement of the competition rules. The main reason being that "it is inconceivable that, in an enlarged European Union, undertakings should have to notify,

and the Commission examine, thousands of restrictive practices".<sup>5</sup> Such decentralisation in the field of competition policy would make national administrative agencies competent to decide on restrictive practices with cross-border effects, and would therefore "dramatically change the present system of enforcement of Community competition law".<sup>6</sup> Moreover, rather than ever more powers being conceded to the centre (i.e. the Commission), the trend in the field of competition law is one of significantly accrued contacts among competent national authorities themselves. This will go so far in the future as to link all the national administrative agencies by means of a network with a common database.

Regarding the exercise of administrative functions by independent agencies (other than the Commission), the *Meroni* case of the Court may in any event be regarded as defining fairly precise and narrow parameters.<sup>7</sup> In this case the Court ruled that it is not allowed to delegate discretionary powers, implying a wide margin of discretion, to bodies other than those which the Treaty has established. Otherwise the "balance of powers which is characteristic of the institutional structure of the Community" would be negatively affected. On the other hand, the delegation of "clearly defined executive powers" to such bodies/agencies is in the Court's view acceptable, as a delegation of this kind would not render the guarantee of institutional balance ineffective.

62

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It therefore seems to follow that the *Meroni* case constitutes another obstacle to any 'genuine' agencification, as discussed in the previous paragraph. Only the creation of agencies with a strict mandate – such as, presumably, the Office for Harmonisation in the Internal Market – seems possible under the *Meroni* criteria. Another way to avoid 'Meroni objections' is to establish bodies without any real power of decision-making but whose primary purpose is, for example, the gathering of information. A Community organ such as the Monitoring Centre for Racism and Xenophobia (in Vienna) therefore would not seem to fall under the type of agencies the Court had in mind in *Meroni*.<sup>8</sup> Finally, the drafters of the Treaty may decide to insert a clear *Treaty* provision on a certain EC or EU agency/organ. In that event the Court will probably not object, as the institutional balance was modified by the 'Masters of the Treaties' themselves. The constitutional position of a body such as Europol is therefore unproblematic, at least in relation to the Court's *Meroni* case, since this EU organ was given an explicit Treaty base by the Maastricht Treaty.

Finally, it should be noticed that centralisation of enforcement tasks would have important consequences for the system of judicial protection: the supervisory tasks of the national judiciary would be transferred to the EU Courts in Luxembourg. This not unimportant consequence will be discussed later, in the framework of supervision by judicial organs.<sup>9</sup>

## NOTES

- <sup>1</sup> See the Declaration on the implementation of Community law (annexed to the Final Act of the Maastricht Treaty).
- <sup>2</sup> Essen Conclusions, under the heading « Subsidiarity ».
- <sup>3</sup> Madrid Conclusions, Part A, Introduction.
- <sup>4</sup> See the Declaration relating to the Protocol on the application of the principles of subsidiarity and proportionality (*OJ* 1997 C 340: 140).
- <sup>5</sup> White Paper on modernisation of the rules implementing Articles 85 and 86 of the EC Treaty (*OJ* 1999 C 132: 1), point 48.
- <sup>6</sup> B.J. Rodger (1999) 'The Commission White Paper on modernisation of the rules implementing Articles 81 and 82 of the E.C. Treaty', *EL Rev.*, p. 653. In the Netherlands, the *Nederlandse MededingingsAutoriteit* (Dutch Competition Authority) would have to take over these enforcement tasks from the Commission. Cf. M.R. Mok (1999) 'Naar 'modernisering' van het Europees kartelbeleid', *SEW*, p. 314.
- <sup>7</sup> Case 9/56 *Meroni v High Authority* [1957-1958] ECR 133. Cf. R.H. Lauwaars (1979) 'Auxiliary organs and agencies in the EEC', *CML Rev.* 365.
- <sup>8</sup> Cf. Article 2 of Regulation 1035/97 (*OJ* 1997, L 151/1): "The prime objective of the Centre shall be to provide the Community and its Member States [...] with objective, reliable and comparable data at European level on the phenomena of racism, xenophobia and anti-Semitism [...]".
- <sup>9</sup> See Part D, paragraph 14.3.



## 11 ANOTHER POINT OF DEPARTURE: APPLICATION OF EU LAW BY NATIONAL ADMINISTRATIONS

Since the Community is already moving away from centralised application and enforcement of EC law, it may be more appropriate to acknowledge that also in an enlarged Union, most rules originating from the EC/EU will have to be applied and enforced by *national* administrative authorities. It is not purported to deprive national administrations of their enforcement tasks; rather the point of departure is to assist these agencies in the tasks assigned to them post-accession. As the problems regarding (sectoral and horizontal) administrative capacities in the candidate countries are extensively discussed in a report by Verheijen<sup>1</sup>, we will merely make some remarks from the perspective of the European Union system itself.

Starting from the premise that decentralised enforcement is inevitable, the Union could adopt specific rules – in secondary legislation – on how the national administrations should apply EC law. This would include specific EC rules on the *sanctions* which could be imposed on individuals by national administrations. This method has already been followed in the past, notably in the area of agricultural policy and the functioning of the internal market. Regarding agriculture, acts of the Council (based on Article 37 EC) and acts of the Commission (adopted in the exercise of its executive functions) often contain provisions as to the sanctions which national administrations should impose in the event that individuals breach the relevant substantive EC rules. The Court has clearly approved this practice by stating that the competence to adopt rules on sanctions is a corollary of the power to adopt substantive (agricultural) rules.<sup>2</sup>

65

Given the fact that decentralised application and enforcement will in all likelihood remain at the core of the Union's legal system, the second point to be stressed is that the Union can CEEC administrations. The Union, as well as its current Member States, would in this approach assist the new members in developing institutions, human resources and management skills for effectively implementing and applying the *acquis* to the same standards as the fifteen 'old' members. Numerous such 'coaching' initiatives to assist the new Member States have already been undertaken in the framework of the pre-accession strategy, in particular the bringing together of administrative agents from the current and the candidate countries (the so-called process of 'twinning'). One of many examples of such twinning activities is the project on strengthening institutional capacity in the Latvian environmental sector in order to enable Latvia to implement and enforce EU environmental legislation in areas such as water and waste.<sup>3</sup> Community financial assistance for these (and other) projects is given through the three pre-accession instruments Phare, ISPA and Sapard.<sup>4</sup> The funding under the Phare programme (now) focuses on the main priorities for the adoption of the *acquis*, i.e. building up the administrative and institutional capacities of the applicant states.<sup>5</sup>

After enlargement, these support activities will have to go on for a long period of time. Accession implies that the new members can participate in (even) more incentive measures provided by the EU. With regard to the establishment of an 'area of freedom, security and justice', for example, the EU institutions have adopted several programmes aimed at enhancing the effective application, at the national level, of the relevant Treaty provisions (Title IV EC and Title VI TEU) and the subsequent Council decisions. The OISIN programme, for instance, offers a framework to develop and enhance co-operation between police, custom and other law enforcement authorities of the Member States, notably by providing such authorities with a greater insight into the working methods of their counterparts.<sup>6</sup> The Falcone programme is specifically concerned with the combat of organised crime; this programme provides for exchanges, training and co-operation for the persons responsible in the action against organised crime.<sup>7</sup> The STOP programme contains an exchange programme for persons responsible for combating trade in human beings and sexual exploitation of children.<sup>8</sup> The Odysseus programme established a framework for training, information, study and exchange activities in the areas of asylum and immigration policy.<sup>9</sup> The general objective of this programme is to extend and strengthen existing co-operation between the administrations of the Member States in the matter of asylum, immigration, the crossing of external borders and the security of identity documents.

Effective implementation also requires the establishment of structures for evaluating the application and enforcement of the *acquis* of the Union in the various (new) Member States. The existing decision on collective evaluation of the implementation of the *acquis* in the area of Justice and Home Affairs could be taken as an example.<sup>10</sup> In any event, this overview of 'coaching' programmes in a specific field of EC/EU policy clearly illustrates that decentralised application and enforcement of the law is (still) very much the rule.

## NOTES

- <sup>1</sup> A.J.G. Verheijen (2000) *Administrative Capacity Development for EU Membership: A Race against Time?*, WRR Working Document no. W107, The Hague.
- <sup>2</sup> See, in particular, Case C-240/90 *Germany v Commission* [1992] ECR I-538.
- <sup>3</sup> Cf. Commission Memo 98/74, Brussels, 19 October 1998 (*Twinning - a partnership for enlargement*). Many other examples are listed in Chapter B, point b of the Commission's Regular Reports of 13 October 1999.
- <sup>4</sup> The Phare programme was set up by Regulation 3906/89 (*OJ* 1989 L 375: 11), but was amended several times in order to extend economic assistance to other candidate countries. These amendments are contained in Regulation 2698/90 (*OJ* L 257: 1), Regulation 3800/91 (*OJ* L 357: 10), Regulation 2334/92 (*OJ* L 227: 1), Regulation 1764/93 (*OJ* L 162: 1), Regulation 1366/95 (*OJ* L 133: 1), Regulation 463/96 (*OJ* L 65: 3) and Regulation 753/96 (*OJ* L 103: 5). For the Sapard programme (Special Accession Programme for Agriculture and Rural Development), see Regulation 1268/1999 (*OJ* 1999 L 161: 87). The structural instrument ISPA (Instrument for Structural Policies for Pre-Accession) can be found in Regulation 1268/1999 (*OJ* 1999 L 161: 87).
- <sup>5</sup> See Council Regulation 1266/1999 on co-ordinating aid to the applicant countries in the framework of the pre-accession strategy and amending Regulation (EEC) No 3906/89 (*OJ* 1999 L 161: 68).
- <sup>6</sup> Cf. Article 2 of Joint Action 97/12/JHA (*OJ* 1997 L 7: 5). This programme defines 'Law enforcement authorities' as all public bodies existing in Member States which are responsible under national law for preventing, detecting and combating criminal offences.
- <sup>7</sup> *OJ* 1998 L 99.
- <sup>8</sup> *OJ* 1996 L 322.
- <sup>9</sup> Joint Action 98/244/JHA of 19 March 1998 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, introducing a programme of training, exchanges and co-operation in the field of asylum, immigration and crossing of external borders (*OJ* 1998 L 99: 2).
- <sup>10</sup> Joint action 98/429/JHA of 29 June 1998 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, establishing a mechanism for collective evaluation of the enactment, application and effective implementation by the applicant countries of the *acquis* of the European Union in the field of Justice and Home Affairs (*OJ* 1998 L 191: 8).



## **PART D**

### **SUPERVISION OF THE CORRECT APPLICATION OF EU LAW**



## 12 PURPOSE AND STRUCTURE OF PART D

Montesquieu already foresaw that an independent judicial authority within the national state system might be necessary to supervise the application of legal provisions by, in particular, the administration. Taking up this idea, the original Treaty of Rome provided for certain supervisory mechanisms where independent judicial organs play a central role. As far as EC law is concerned, both the national courts and the Courts in Luxembourg (Court of Justice, Court of First Instance) perform these supervisory roles.

From the viewpoint of individuals (citizens and private undertakings) the *national* judiciary plays a pivotal role in safeguarding their Community law rights. This stems from the fact that in most areas of Community policy the legal rules are applied and enforced by administrative authorities at the national level. As a consequence, disputes will usually arise between individuals and the authorities of a Member State. In this situation individuals do not have direct access to the Courts in Luxembourg; they will have to initiate proceedings before the competent national judge. Most disputes in the field of migration law, for example, and all so-called *Francovich* actions (state liability for breaches of Community law) belong to this category of *vertical* disputes (individual versus Member State). Apart from these vertical conflicts, the national judiciary is also competent to hear and determine cases between individuals. In these *horizontal* disputes questions of Community law may arise as well, in particular in the fields of labour law, company law and consumer law.

71

With regard to the situations where Community law is supervised by the national judiciary (vertical and horizontal disputes) a distinction is made between three relevant stages.

First, the influence of EC law on national *procedural* law is examined. In principle, the *organisation and operation* of the national courts is a matter for the Member States to regulate. This so-called principle of national procedural autonomy means that it is for the Member States to adopt specific procedural rules on time limits, the division of jurisdiction between various national courts, whether or not a right of appeal should exist, etc. (paragraph 13).

As the second relevant phase we designate the stage when the national (CEEC) judge is at work. During this stage the central issue is the supervision (and hence the application) of legal rules emanating from the Union, sometimes on the national court's own motion, but usually at the request of parties involved in the legal proceedings before it. During this stage the national courts may be confronted with all kinds of substantive Community law provisions and with fundamental principles of Community law. In order to illustrate the heavy responsibilities and necessary attitude changes for the CEEC judiciary, the consequences of the principles of supremacy and direct effect for these judges will be examined. These fun-

damental Community law principles are scrutinised since they apply across the broad spectrum of EC policies. In all areas of EC policy (transport, internal market, agriculture etc.) the CEEC judiciary will have to take them into account (paragraph 14).

During the course of proceedings before the national court, it may appear that it cannot handle final judgment without having solved a question of EC law. For this situation, Community law has always offered the national court the possibility to request the Court of Justice for assistance. Through *preliminary questions* it may obtain a ruling of the Court on the interpretation or validity of Community law (and, since Amsterdam, of certain parts of Union law). The third relevant stage therefore relates to the dialogue between the national court and the EC Court of Justice (paragraph 15).

Supervisory tasks have also been attributed directly to the Court of Justice and the Court of First Instance. They shall ensure that in the interpretation and application of the EC Treaty the law is observed (Article 220 EC). In order to perform this task properly, the Courts have been given quite extensive competences to settle disputes in so-called direct actions. It is, however, not the purpose of this report to analyse the EU system of direct remedies (let alone the system of judicial protection in its entirety). As we are merely concerned with incorporation problems at the national level, the focus is in particular on the pivotal infringement procedure of Articles 226-228 EC (paragraph 16).

72

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Finally, as was already mentioned in the introduction to the study, one important example of *administrative* EU principles, including human rights, it is up to the Council (and not the Court) to impose certain sanctions on the Member State concerned (paragraph 17).

The structure we thus have adopted for this part of the report is designed to shed some light in particular on possible reforms of the system of judicial supervision. A number of ideas and proposals on this issue have been put forward in recent years and months. Some of these ideas essentially aim to alter fundamentally the existing structures, other proposals follow a more balanced approach.

Most of the ideas of the Court of Justice and the Court of First Instance themselves, as formulated in their paper 'The Future of the Judicial System of the European Union' (January 2000) and subsequently in their 'Contribution to the Intergovernmental Conference' (March 2000), fall within the category of 'restrictive' proposals. Other contributions acknowledge that enlargement demands a reduction of the Court's workload through institutional reform, but at the same time they stress that such reform should not jeopardise effective judicial protection.

Such a balanced approach can be found in, for example, the Commission's Opinion on institutional reforms.<sup>1</sup> The Commission highlights the serious problems relating to the caseload of the Court; on the other hand it emphasises that effective judicial review should be secured, quality and consistency in judicial practice should be maintained, and it should be guaranteed that EU law is complied with throughout the Union.<sup>2</sup> The Due Report may also be rated among the more balanced and constructive approaches, as will become clear in this part of this study.<sup>3</sup>

## NOTES

- <sup>1</sup> See the Commission's Opinion of 26 January 2000 on the next IGC (*Adapting the Institutions to make a success of enlargement*).
- <sup>2</sup> See p. 16 of the Commission's Opinion.
- <sup>3</sup> *Report by the Working Party on the Future of the European Communities' Court System*, January 2000 (hereinafter referred to as the Due Report). Although this report was prepared for the European Commission, it should be taken as only expressing the Working Party's views.

## 13 EC LAW AND NATIONAL PROCEDURAL LAW

### 13.1 THE PRINCIPLE OF PROCEDURAL AUTONOMY

The Court has consistently held that it is for the Member States to ensure the legal protection which individuals derive from the direct effect of Community law. This means that 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 directly effective Community law provisions.<sup>1</sup> It is therefore in principle a matter for the Member States to lay down in their *national* laws the procedural rules governing the manner in which individuals will actually be able to enforce their Community law rights. Such procedural rules include rules relating to time limits for bringing actions before the national judge, rules on what kind of court is competent to hear and determine the proceedings (local, regional, specialised court), rules on the right of appeal, et cetera.<sup>2</sup>

The principle of procedural autonomy often has the effect of causing differences among the various Member States in the actual level of judicial protection provided for individuals. The protection of one and the same substantive Community law right may vary from state to state, due to differences in the procedural laws of the Member States.<sup>3</sup> For example, although individuals in all Member States are entitled to recover sums levied by a Member State in breach of substantive EC law provisions, divergent national rules on time limits for bringing actions before the competent national court may prevent individuals in a few Member States from actually getting their money back.<sup>4</sup> Likewise, whether or not individuals enjoy the right to appeal judgments of (national) courts of first instance is determined by national procedural rules.

This principle of national procedural autonomy has, however, been mitigated by the Court of Justice and the Community legislator. They have restricted the freedom of the Member States to adopt and amend procedural rules on the operation of their own judiciary in various ways.

#### 13.1.1 LIMITATIONS IN THE COURT'S CASE LAW

The Court of Justice has restricted the freedom of the Member States in this area by stating that procedural rules governing actions for enforcing Community law rights must not be less favourable than those governing similar domestic actions (the principle of non-discrimination or assimilation). Moreover, such procedural rules must not render virtually impossible or excessively difficult the exercise of rights conferred on individuals by Community law (the principle of effectiveness).<sup>5</sup> The latter requirement – among lawyers known as the second *Rewe* condition – has in particular been further teased out by the Court in a number of cases. In the

*Heylens* case the Court ruled that access to a national court should exist in any event, at least where this is indispensable for individuals to protect their EC rights (in casu rights related to free movement of workers).<sup>6</sup> This right of *access to justice* can be considered as an elaboration of the second *Rewe* criterion, as no access to a judicial organ surely makes it 'virtually impossible' and 'excessively difficult' to exercise Community law rights. The judgment in the *Heylens* case also seems to embrace the right of individuals to have access to a judicial body which is completely *independent* from the government and the administration.

More recent case law strongly emphasises that judicial remedies at the national level should really be *effective*. In the *Factortame* case, for example, concerning the compatibility of national legislation with Community law on the right of establishment, the Court held that national courts had to be able to grant interim relief and to suspend the application of the disputed national legislation until such time as the Court could deliver its judgment.<sup>7</sup> Similar interim legal protection should be offered to individuals who contest the validity of secondary Community law (such as directives, regulations and decisions) before national courts.<sup>8</sup>

Another very far-reaching example is the *Emmott* case. The Court ruled that a Member State may not rely on a limitation period under national law as long as a Directive, in breach of which certain charges have been wrongly levied, has not been properly transposed into national law.<sup>9</sup> Probably because this statement was a bit too radical, in subsequent cases the Court returned to its 'second generation' case law and stated that the *Emmott* solution was merely justified "by the particular circumstances of that case".<sup>10</sup>

### 13.1.2 LEGISLATIVE LIMITATIONS

In the second place, a number of Community decisions have limited the discretion of the Member States to lay down procedural rules for the judicial enforcement of EC law. A relatively modest step has been to lay down explicit provisions on the individual's right of *access* to an independent judicial organ for the purpose of enforcing the substantive provisions of the act in question. An example can be found in the Second Directive on equal treatment for men and women. This Directive requires Member States to ensure a right to *judicial* protection for persons who consider themselves wronged by failure to apply to them the principle of equal treatment; they must have the right to pursue their claims "by judicial process after possible recourse to other competent authorities".<sup>11</sup>

Another well-known example is the Directive on review procedures to the award of public supply and public works contracts. This act obliges the Member States, *inter alia*, to guarantee that measures taken by review bodies can be the subject of judi-

cial review by another body which is a court within the meaning of Article 234 EC and which is independent of both the contracting authority and the review body.<sup>12</sup>

Some other Community acts go a step further by laying down specific requirements regarding the *proceedings* before the national courts. An example is the Directive on the burden of proof in cases of discrimination based on sex. It obliges Member States to take measures to ensure that, when the employee has established facts from which it may be presumed that there has been direct or indirect discrimination, the national court must order the *employer* to prove that there has been no breach of the principle of equal treatment.<sup>13</sup>

### 13.2 CONSEQUENCES FOR THE ORGANISATION AND OPERATION OF THE CEEC JUDICIARY

Despite these jurisprudential and legislative limitations, it is clear that Member States are still left with a considerable margin of discretion regarding the way in which they organise their own judicial system. This freedom relates both to the 'hardware' aspects (the institutional set-up of the national judiciary) and to the 'software' aspects (the way in which the national courts should work; rules of procedure, time limits, division of competences, et cetera). To a very large extent it will therefore be for the CEECs themselves to organise their own judicial systems. For example, whether disputes in the field of labour law are to be dealt with by the ordinary courts of first instance or by specialised labour courts is a matter for the CEEC legislative authorities to decide. The same goes for the important issue of constitutional review. It is for the national laws of the CEECs to determine whether (supreme) courts have to power to declare statutory laws invalid for breach of the national constitution.

Community law does not interfere with these issues as it merely requires the CEEC legislator not to adopt discriminatory procedural rules (first Rewe condition), nor to adopt rules which make it (almost) impossible for individuals to enforce their substantive EC rights (second Rewe condition). Seen from the perspective of the EU, most of the recent reforms of the judicial infrastructure in the CEECs<sup>14</sup>, therefore fall within the competence of these states.

Nevertheless, the existing case law of the Court, and in particular the second Rewe requirement, may have an important impact on some of these new members. As was outlined above, the requirement that it should not be too difficult to enforce EC law rights includes the right of access to a national court which is completely *independent* from the administration. Although most Eastern European countries have (recently) guaranteed this independence,<sup>15</sup> this case law would cause serious problems for Slovakia, for example, as the judges in this candidate country are still far from independent, due to an initial four-year probation period and excessive

powers of the Ministry of Justice with respect to the nomination and removal of Slovakian judges.<sup>16</sup>

### 13.3 REFORMS DESIGNED TO ENHANCE EFFECTIVE JUDICIAL PROTECTION IN THE MEMBER STATES

As the previous paragraph showed, the supervision of Community law by national courts heavily relies on procedural rules adopted by the Member States. If we assume that in the new Member States these judicial structures for enforcing Community law rights will not be optimal for many years to come, it may be necessary to put less emphasis on the principle of procedural autonomy but, instead, to further develop the two minimum requirements, in particular the principle of effectiveness. This could happen in the following manner.

In the first place the *Court of Justice* could become even more 'active' than it is already today, in particular by interpreting the requirement that national procedural rules must not render virtually impossible or excessively difficult the exercise of Community law rights conferred on individuals in a stricter fashion. The Court could, for example, return to its earlier Emmott way of thinking and hence reject the 'softer' approach in Steenhorst-Neerings after all.

78

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In the second place the *Community legislator* could become more active in this respect. As was outlined above, only a few legal instruments actually contain detailed rules as to how EC law must be enforced before the national judiciary. Most decisions of the institutions, however, only prescribe in very general terms that Member States should implement and enforce the provisions of the act in question. Such general statements do not always include the (explicit) possibility that individuals must have access to an independent judicial organ. For example, the Directive on restrictions on free movement of workers for reasons of public policy, public security or public health does not require the Member State to provide a right of appeal to a court of law.<sup>17</sup> Thus, decisions on matters such as the refusal to renew a residence permit or the expulsion of EC workers from the territory of a Member State, may be taken by administrative authorities, without a possibility of review by an independent judicial body. This example clearly illustrates that not only the Court but also the Community legislator can further contribute to the strengthening of legal protection of individuals before national courts.<sup>18</sup>

## NOTES

- <sup>1</sup> See, in particular, Case 33/76 *Rewe v Landwirtschaftskammer Saarland* [1976] ECR 1989 and Case 45/76 *Comet v Produktschap voor Siergewassen* [1976] ECR 2043.
- <sup>2</sup> For an overview of the Court's case law on this issue, see, e.g., C. Boch and R. Lane (1992) 'European Community Law in National Courts: A Continuing Contradiction', *LJIL* 171.
- <sup>3</sup> Cf. D. Curtin (1992) 'The Decentralised Enforcement of Community Law Rights. Judicial Snakes and Ladders', p. 33 in D. Curtin and D. O'Keefe, *Constitutional Adjudication in European Community and National Law. Essays for the Hon. Mr. Justice T.F. O'Higgins*, Butterworths.
- <sup>4</sup> Provided that such time limits are applied in a non-discriminatory way and that, due to their length, they do not make it "virtually impossible or excessively difficult" for individuals to exercise their Community law rights. On these limitations, see further the next paragraph. Cf. Case 199/82 *San Giorgio* [1983] ECR 3595 and Joined Cases C-192/95 to C-218/95 *Comateb* [1997] ECR I-165. See also A.F. Tatham (1995) 'Restitution of Charges and Duties Levied by the Public Administration in Breach of European Community Law: A Comparative Analysis', *EL Rev.* 146.
- <sup>5</sup> See, in particular, the *Rewe/Comet* Cases (mentioned in paragraph 13.1). Further on this issue, see, for example, A. Biondi (1999) 'The European Court of Justice and Certain National Procedural Limitations: Not such a Tough Relationship', *CML Rev* 1271; R. Crawford Smith (1998) 'Remedies for Breaches of EU Law in National Courts: Legal Variation and Selection', p. 287 in P. Graig & G. de Búrca, *The Evolution of EU Law*.
- <sup>6</sup> Case 222/86 *Heylens* [1987] 4097, paragraphs 14-17.
- <sup>7</sup> Case C-213/89 *The Queen v Secretary of State for Transport, ex parte Factortame and Others* [1990] ECR I-2433. This judgment caused much public debate in the UK as national law did not provide for any form of interim legal protection against decisions of the Crown. Therefore there were no laws to suspend; rather, the Court forced the national judge to create a new legal action of its own accord. See further J. Schwarze 'Vorläufiger Rechtsschutz im Widerstreit von Gemeinschaftsrecht und nationalem Verwaltungsverfahrens- und Prozessrecht', p. 389 in *Festschrift Bodo Börner*; L. Papadias (1994) 'Interim Protection under Community Law before the National Courts. The Right to a Judge with Jurisdiction to Grant Interim Relief', *LIEI* 153.
- <sup>8</sup> Joined Cases C-143/88 and C-92/89 *Zuckerfabrik Süderdithmarschen and Zuckerfabrik Soest* [1991] ECR I-415 (paragraph 20).
- <sup>9</sup> Case C-208/90 *Emmott* [1991] ECR I-4269.
- <sup>10</sup> See, in particular, Case C-338/91 *Steenhorst-Neerings* [1993] ECR I-5475 and Case C-188/95 *Fantask* [1997] ECR I-6783. On the various 'generations' which can be discerned in this respect, see D. Curtin and K. Mortelmans (1994) 'Application and Enforcement of Community Law by the Member States: Actors in Search of a Third Generation Script', p. 423 in D. Curtin and T. Heukels (eds.), *Institutional Dynamics of European Integration. Essays in Honour of Henry G. Schermers*, Dordrecht: Nijhoff.

- <sup>11</sup> See Article 6 of Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (*OJ* 1976 L 39: 40).
- <sup>12</sup> Article 2(8) of Council Directive 89/665/EEC on the co-ordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (*OJ* 1989 L 395: 30). A similar specific provision is contained in Directive 92/13/EEC, the 'procedural' Directive on procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (*OJ* 1992 L 76: 23).
- <sup>13</sup> See Article 4 of Council Directive 97/80/EC on the burden of proof in cases of discrimination based on sex (*OJ* 1998 L 14: 6). Since this Directive was adopted under the Social Protocol, it does not apply to the UK. However, its scope of application was extended to this Member State by Directive 98/52/EC (*OJ* 1998 L 205: 66). UK on 22 July 2001.
- <sup>14</sup> On these reforms see E. Blankenburg (forthcoming) *Legal Culture in Five Central European Countries*, WRR Working Documents W111, The Hague.
- <sup>15</sup> See, for example, the latest Regular Report on Poland (Chapter B.1).
- <sup>16</sup> See the Second Regular Report on Slovakia, Chapter B, section 1.1. It is still uncertain whether the situation will have improved upon accession. As the Commission Report points out, a constitutional amendment is necessary to modify the nomination and removal procedure for judges, and to remove the probation period.
- <sup>17</sup> See Article 9 of Directive 64/221/EEC of 25 February 1964 on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health (*OJ*, English Special Edition 1963-1964: 117).
- <sup>18</sup> Leaving aside the possibility that the Court will declare Article 9 of the Public Policy Directive invalid because it does not guarantee access to an independent judicial body, contrary to its more recent Heylens case law (discussed in paragraph 13.1.1). In the *Shingara* case, Advocate General Ruiz-Jarabo Colomer concluded that for this reason Article 9 should, indeed, be declared invalid. The Court did not address this sensitive issue at all. See Joined Cases C-65/95 and C-111/95 *Mann Singh Shingara and Abbas Radion* [1997] ECR I-3343.

## 14 THE NATIONAL COURT AT WORK: SUPERVISION AND APPLICATION OF EU LAW

After accession the CEEC courts will have to supervise, and therefore interpret and apply, numerous EC law provisions. Just as their colleagues in the old Member States, they will become the 'first aid' *juges de droit communautaire*. By the time accession actually takes place this traditional role of the national judiciary may even have been codified in the text of the EC Treaty.<sup>1</sup>

The purpose of this section of our report is to highlight the responsibilities and requisite changes in mentality incumbent on the CEEC judiciary by discussing the consequences of the principles of supremacy and direct effect. As was mentioned earlier, these fundamental Community law principles are scrutinised because they apply across the broad spectrum of EC policies.

### 14.1 DIRECT EFFECT AND SUPREMACY OF EC LAW

As was pointed out above, the Court has ruled that all provisions of Community law (primary and secondary EC law) take precedence over all provisions of national law (adopted before or after the relevant Community provision came into force).<sup>2</sup> To the national courts and private individuals this principle of supremacy is, however, only of practical importance if a provision of EC law has *direct effect*, meaning that it is suitable to be invoked directly by individuals before the national courts. In its case law the Court held that EC law provisions which are unconditional and sufficiently precise, and which do not require further implementation by EC institutions or by the Member States, may indeed be invoked before the national court.<sup>3</sup>

The question of direct effect becomes important each time the provisions of Community law are more favourable to individuals than the relevant provisions of national law. In that event, a directly effective EC provision confer on individuals rights which they can enforce in the courts of a Member State and which that national court must protect. The consequences of the principles of direct effect and supremacy *for the national courts* were clearly laid down by the Court of Justice in its Simmenthal judgment: "Every national court must, in a case within its jurisdiction apply Community law in its entirety and protect rights which the latter confers on individuals and must accordingly set aside any provision of national law which may conflict with it, whether prior or subsequent to the Community rule".<sup>4</sup> Thus, the question of direct effect is essentially unrelated to the regime laid down in the Member States' constitution. Even where the constitutions provides for a so-called dualist regime, it should adopt a monist view as far as the incorporation of Community law is concerned.

In the course of time the Court ruled that numerous provisions of EC law do indeed entail direct effect. It all started with the E(E)C Treaty provisions. The Court acknowledged the direct effect of the Treaty Articles on customs duties on imports, the freedom to provide services, the freedom of establishment and the free movement of workers.<sup>5</sup> Some of the Treaty provisions may be invoked vis-à-vis individuals as well.<sup>6</sup>

More recently, the focus is on directly effective provisions in *secondary* Community law. Notably the direct effect of EC Directives has been the subject of considerable attention. Though Directives should be addressed to Member States (Article 249 EC), the Court ruled that Directives may confer rights on individuals which they can enforce before the national courts. The provisions of Directives, as far as their subject matter is concerned, should be unconditional and sufficiently precise and the period for their implementation should have expired. If these conditions are met, individuals may invoke Directives vis-à-vis Member State authorities (but not against other natural or legal persons).<sup>7</sup>

Other interesting nuances have emerged in the field of the EC's external relations. It appears that international agreements to which the Community is a party contain quite a lot of directly effective provisions. The Co-operation Agreement between the EEC (and its Member States) and Morocco, for example, contains a national treatment clause in the field of social security which may be invoked by Moroccan workers before the Member States' judges.<sup>8</sup> The Court's case law on the direct effect of the Turkish Association Agreement (and decisions of the EEC-Turkey Association Council) is another example of how the Court ensures that individuals (in casu Turkish workers and their families) can effectively ensure their own judicial protection.<sup>9</sup>

With regard to the direct effect of second and third pillar law (i.e. the provisions of Titles V and VI of the TEU as well as secondary acts adopted on the basis of these Titles) the matter is somewhat more complicated. As the Court does not have jurisdiction in *second* pillar issues, the question whether or not a CFSP provision has direct effect probably will have to be answered on the basis of *national* (constitutional) rules relating to the incorporation of international law into the domestic legal order. This would mean that in Member States with a dualist system, CFSP decisions could never be invoked directly by individuals before national courts. In monist countries (such as, for example, the Netherlands) this is different on the basis of national (constitutional) law.<sup>10</sup> The issue of direct effect of CFSP decisions does not, however, seem to be of great importance to the national judiciary. CFSP decisions usually deal with the external relations of the Union (its foreign policy vis-à-vis third countries) and therefore CFSP decisions will not be 'unconditional and sufficiently precise' for individuals to rely on before the national courts. Very often such foreign policy decisions are not intended to govern the position of individuals in their relationships with other individuals or with Member States.<sup>11</sup>

*Third* pillar decisions are of much more direct relevance to individuals as they have to deal with criminal law matters. Such PJCC measures may contain clear and unconditional provisions which are capable of being invoked by private parties before the national courts. Unfortunately there is a small problem: the Amsterdam Treaty explicitly laid down that the most important PJCC instruments (framework decisions and decisions) “shall not entail direct effect”.<sup>12</sup> National judges are therefore explicitly forbidden from applying these third pillar measures in favour of individuals, even if a PJCC (framework) decision would entail clear and precise obligations for the Member States.

#### 14.2 CONSEQUENCES OF THE PRINCIPLES OF DIRECT EFFECT AND SUPREMACY FOR THE CEEC JUDICIARY

The case law of the EU Court on supremacy and direct effect will probably have very drastic consequences for the judges in the CEECs. Under the communist regimes, the constitution of most of these countries provided for a *dualist* regime so that these judges were forbidden from giving precedence to provisions of international law over conflicting provisions of their national laws. As a result, it has been impossible for individuals to rely directly, before the CEEC courts, on provisions of international law.<sup>13</sup>

Upon accession, things will have to change considerably, as least as far as Community law is concerned. In case of a conflict between EC law and national law, the CEEC judge should give preference to Community law, regardless of what its own constitution says on the relationship between international law (including EU law) and national law (monist or dualist system).<sup>14</sup> Hence, even where there still exists a dualist regime at the national level, the CEEC court should side aside any conflicting national provision on its own motion, provided that the EC provision invoked by the individual entails direct effect.<sup>15</sup> Moreover, the latter question – whether or not a provision of EC law has direct effect – is to be answered, in the final instance, by the Court and Justice and not by the CEEC judge itself.<sup>16</sup>

For example, in the CEECs many discriminatory provisions in the field of taxation still exist.<sup>17</sup> If these legislative provisions are not amended upon accession, it is very likely that individuals will invoke the Treaty prohibition on discrimination in this area (contained in Article 90 EC). According to the Court, this Treaty provision entails direct effect,<sup>18</sup> which means that the discriminatory provisions in the legislation of the CEECs may not be applied by the CEEC judiciary. As a result, the application of such provisions by the administrative authorities (the tax authorities in particular) would become meaningless, as other individuals would also seek legal protection in the national courts.

Another Treaty provision which will probably have very serious consequences for the new Member States is Article 141 (ex 119) EC on equal pay for men and women. According to this provision each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied. Despite the fact that this Treaty provision merely speaks of a 'principle', the Court ruled that individuals may invoke the prohibition of discrimination with regard to pay directly before the national courts *vis-à-vis* the Member States. Moreover, this Treaty provision may also be invoked against other individuals (private employers), although Article 141 (ex 119) EC is merely addressed to 'each Member State'.<sup>19</sup>

This (not uncontroversial) case law of the Court means that the national judges in the CEECs are refrained from applying discriminatory provisions relating to the payment of male and female workers, whether contained in national legislative provisions or in arrangements of a civil nature. Moreover, the principle of equal *treatment* of male and female workers was worked out in a series of EC Directives. The prohibitions contained in these secondary acts (relating to vocational training, et cetera) may be invoked by individuals before the national courts as well, at least against Member State authorities.<sup>20</sup> A striking example is the recent *Kreil* case, where the Court ruled that a general exclusion of women from the military services of a Member State (the *Bundeswehr*) is contrary to the Second Directive on equal treatment.<sup>21</sup>

### 14.3 POSSIBLE CHANGES: TAKING AWAY SUPERVISORY TASKS FROM THE NATIONAL JUDICIARY?

From the various Regular Reports it cannot be deduced that the public in the CEECs enjoys great confidence in the quality of the national judiciary. In Romania, for example, many complaints from individuals relate to problems with the judiciary and not the administration. Individuals therefore rather lodge complaints with the national Ombudsman, which is "seen more as an alternative Supreme Court rather than an Ombudsman".<sup>22</sup> After accession, a lack of confidence in the judiciary is even more unacceptable, as all courts will be responsible for correctly applying the entire *acquis communautaire*. This inevitably requires the trust and confidence of the public in the quality of the national courts.

If we assume that the situation will not improve considerably for the years to come, a radical solution might be envisaged: should the Union not take away much of the supervisory responsibilities from the national courts, and put them in the hands of the EU Courts instead? This objective arguably could be achieved by centralising the application of EU law, that is, by giving the power to apply EC law to a *central* administrative entity (notably the European Commission). If the European Commission were to apply Community law *vis-à-vis* individuals much more often,

this would automatically make the Courts in Luxembourg competent to decide on their disputes. Individuals could no longer lodge their complaint with the national courts, as these complaints would be addressed to a European institution. They would have to make use of direct legal actions, in particular the action for annulment of decisions of the Commission (Article 230 EC).

In areas where Community law is already applied by a central institution, we see, indeed, that it is for a central court (the Court of First Instance) to supervise the actions of that institution, and not for the national courts. Complaints of individual firms against Commission decisions in the field of competition policy are lodged with the Court of First Instance, as is the case with appeals against decisions of the Office for Harmonisation in the Internal Market.<sup>23</sup> Thus, as was already briefly mentioned earlier, a centralisation of application of Community law will also have important consequences for the judicial protection of individuals. The Polish firm would no longer be able to lodge its complaints with the regional court at Warsaw, but would be required to travel the long road to Luxembourg in order to sue the Commission there.

This is, in our view, an important reason for considering carefully whether centralisation of supervisory tasks is really a desirable option. An even more important reason is that the workload of the Court would increase to an unbearable extent, given the vast amount of vertical and horizontal disputes (see further the next paragraph).

#### 14.4 THE 'RESPECTFUL' APPROACH: EU ASSISTANCE TO THE JUDICIARY OF THE CEECS

It is thus highly unlikely that the central role for the judiciary in the new Member States in supervising the correct application of EU law can be avoided. The only remaining solution is probably to further improve – what is usually termed – the 'capacity' of the judiciary in the new Member States to deal with EU law. Although this means, once again, that the Union can only play a *supportive* role, the importance of it should not be underestimated.

The *training* of the judges in EU law should be considered as one of the most important means to improve this judicial quality; by making these judges more familiar with EU law, the chances of EU law being correctly applied by the courts and tribunals in the CEECS increase. Indeed, this is neither a radical solution nor a completely novel one, but probably the 'respectful' approach of offering assistance to these courts is the only reasonable solution open to the Union. After all, Community law has always heavily relied on the quality of the national judiciary. The next enlargement round will not bring about radical changes, for the simple reason that the Courts in Luxembourg do not have the capacity to handle all cases be-

tween individual parties (horizontal) and all cases between individuals and Member States (vertical). Moreover, it is rather improbable that the two Community Courts themselves would support the acquisition of such new tasks, having regard for the ideas set out in their two reports (referred to in paragraph 12).

The option discussed here boils down to a continuation of the efforts which have already been undertaken to improve the CEEC judges' knowledge and understanding of EU law by offering financial assistance, training, et cetera. Currently such assistance is provided mainly under the Phare programme; once the CEECs have become a member of the Union, several other financial support programmes will be open to them. Programmes which specifically are directed towards the legal professions are the Robert Schumann-programme<sup>24</sup> and the Grotius-programme.<sup>25</sup> The EU institutions probably do not possess the competence to prescribe such courses as a matter of obligation for national judges, nor to prescribe the exact content of such courses, since the Community must 'fully respect' the responsibility of the Member States for the content of teaching and the organisation of education systems.<sup>26</sup>

It is thus left to the discretion of the (new) Member States whether courses in European law are obligatory or not, and what their exact content should be. Using this discretion, some of the CEECs have decided that candidates applying for the office of judge must qualify in the field of EU law (Lithuania, for example); in other CEECs, however, knowledge of EU law is not yet a formal prerequisite to become a judge (Hungary).<sup>27</sup>

#### 14.5 ASSESSMENT OF THE SUPERVISORY FUNCTIONS OF THE CEEC JUDICIARY IN AN ENLARGED UNION

From the preceding paragraphs it appears that soon after accession the judiciary in the CEECs will have to assume full responsibility for supervising the application of numerous provisions and principles of both primary and secondary Community and Union law. In exercising these supervisory functions, the CEEC judges will, of course, have to interpret and apply the relevant EC provisions. Though they will be entitled to ask the EU Court for assistance (see the next paragraph), they must also be able to identify questions of EU law on their own, in particular during the initial stages of the cases brought before them. The 'horizontal' principles of direct effect and supremacy have been discussed in order to illustrate that the judiciary carries a special responsibility to ensure that EC rights for individual are actually enforced.

As there are some doubts as to whether the CEEC judges are really equipped to perform this new task, one could imagine that important parts of the jurisdiction of these courts would be transferred to the central level (Court of Justice, Court of First Instance). This does not seem on closer examination a very realistic option

nor indeed a desirable one. A major objection is that individuals are more familiar with the national judicial system than with the judicial organs and proceedings in Luxembourg. A more practical objection is that substantive centralisation of supervisory tasks would further increase the already gigantic workload of the Luxembourg courts. The best solution therefore in our view consists in the continuation of the process of 'backing up' the courts and tribunals in Eastern Europe. After enlargement as well, the Union should continue its efforts aimed at judicial 'institution building'. The supporting measures mentioned above (Schumann, Grotius) constitute important means of achieving this goal.

It is certain that significant positive effects will only be produced in the longer term. The first years after accession will see numerous problems in the supervision of European law by the judiciary in the new Member States. It is, for example, rather unlikely that the extremely complex EC rules on intellectual property rights will be applied correctly by all judicial bodies in the ten (or more) new members.<sup>28</sup> After all, having lived so many years under a communist regime these judges are not really familiar with concepts such as trade marks, brands and copy rights. In this respect it must be said that, although the supervision by the CEEC judiciary will certainly not be perfect, one should also place faith in the ability of these judges to adapt themselves to their new legal surroundings. A lack of knowledge and understanding of EU law is not an entirely new phenomenon. Even the Dutch judiciary is at times 'accused' of insufficiently taking Community law into account, despite the fact that the Netherlands is one of the founding fathers of the Union.<sup>29</sup>

## NOTES

- <sup>1</sup> See the French version of Article 234(1) EC, as proposed by the Due Working Party : “Les juridictions des Etats membres sont [...] juges des questions de droit communautaire qu’elles rencontrent dans l’exercice de leurs compétences nationales.” The English translation seems to be more ‘neutral’: “The courts of the Member States shall rule on the questions of Community law which they encounter in the exercise of their national jurisdiction.”
- <sup>2</sup> See paragraph 6 (on the consequences of the principle of supremacy for national legislators).
- <sup>3</sup> See, e.g., Case 26/62 *Van Gend & Loos* [1963] ECR 3.
- <sup>4</sup> Case 106/77 *Simmenthal* [1978] ECR 629.
- <sup>5</sup> Case 26/62 *Van Gend en Loos* [1963] ECR 1; Case 33/74 *Van Binsbergen* [1974] ECR 1299; Case 2/74 *Reyners* [1974] ECR 631; Case 36/74 *Walrave-Koch* [1974] ECR 1405.
- <sup>6</sup> Regarding the free movement of workers (Article 39 (ex 48) EC), see Case C-415/93 *Bosman* [1995] ECR I-4921 and Case 36/74 *Walrave-Koch* [1974] ECR 1405. Admittedly, in these cases certain civil arrangements of a *collective* nature were at stake, so that one could argue that the Court has not yet explicitly acknowledged the ‘pure’ horizontal effect of Article 39 EC. Cf., e.g., J. Stuyck in his contribution to the *Liber Amicorum Roger Blanpain* (1998, Die Keure), p. 65. The famous *Defrenne II* Case will be dealt with below (paragraph 14.2).
- <sup>7</sup> See, *inter alia*, Case 8/81 *Becker* [1982] ECR 53, paragraph 25; Case 103/88 *Fratelli Constanzo* [1989] ECR 1839. On the denial of so-called horizontal direct effect of EC Directives see, in particular, Case 152/84 *Marshall I* [1986] ECR 723 and Case C-91/92 *Faccini Dori* [1994] I-3325.
- <sup>8</sup> Case C-18/90 *Kziber* [1991] ECR I-199. On the direct effect of a similar non-discrimination clause in the Cooperation Agreement between the EEC and Algeria, see Case C-58/94 *Yousfi* [1994] ECR I-1353.
- <sup>9</sup> On the direct effect of Decision No. 1/80 of the EEC-Turkey Association Council see, for example, Case C-192/89 *Sevince* [1990] ECR I-3461. On the direct effect of Article 3(1) of Decision No. 3/80 of the Association Council (equal treatment of Turkish nationals in the field of social security), see Case C-262/96 *Sürül*, judgment of 4 May 1999. This judgment has severe (financial) consequences for the Member States’ social security systems, for example for their rules on *Kindergeld*. In the Netherlands, Turkish nationals successfully relied on Decision No. 3/80, following the Court’s – rather unexpected – acknowledgement of the direct effect of Article 3(1) of this Decision (cf. Case C-277/94 *Taflan-Met* [1996] ECR I-4085).
- <sup>10</sup> See Articles 93 and 94 of the Dutch constitution. Because of the Dutch monist view on the relationship between international and national law, the *Costa/ENEL* case law of the Court did not cause great troubles.
- <sup>11</sup> See, however, Case T-349/99 *Miskovic v Council* and Case T-350/99 *Karic (Family) v Council* (pending, OJ 2000, C 79/35-36). The applicants challenge the choice of legal base: the CFSP decision by which they were put on a list of persons being subject to an obligation of non-admission in the territory of the

Member States should have been based on Title IV of the EC Treaty. The issue of direct effect is therefore not at stake.

- <sup>12</sup> Article 34(2)(a) and (b) TEU.
- <sup>13</sup> See H.G. Schermers and N.M. Blokker (1995) *International Institutional Law*, 3rd ed., p. 947-960. The issue of direct effect should not be confused with the obligation of States to respect its obligations under international treaties to which it is a party.
- <sup>14</sup> Assuming that the Court will not be prepared, merely for the benefit of the new members, to change its 'monist' views as laid down in the *Van Gend & Loos* line of case law. See also the Protocol on subsidiarity and proportionality: the application of these two principles "shall not affect the principles developed by the Court of Justice regarding the relationship between national and Community law".
- <sup>15</sup> Cf. the *Simmenthal* case, discussed in paragraph 14.1. See also the Conclusion of Advocate General Cosmas in the *Wijsenbeek* Case (C-378/97, judgment of 21 September 1999), points 53-54.
- <sup>16</sup> Using the preliminary ruling mechanism in case this question has not been answered by the Court of Justice already. See further paragraph 15.
- <sup>17</sup> Cf., e.g., the Regular Reports from the Commission of 13 October 1999 on Hungary (Chapter A).
- <sup>18</sup> Case 57/65 *Lütticke II* [1966] ECR 346, at 354. Article 90(1) EC (ex Article 95) states that no Member State shall impose, directly or indirectly, on the products of other Member States any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products.
- <sup>19</sup> Case 43/75 *Defrenne II* [1976] ECR 2. For critical comments, see e.g. P. Craig and G. de Búrca, *EU Law*, 2nd ed., 1998, p. 173.
- <sup>20</sup> The reason being that EC Directives can only have vertical direct effect, see the cases mentioned in paragraph 14.1 (*Marshall I* and *Faccini Dori*).
- <sup>21</sup> Case C-285/98 *Tanja Kreil v Germany*, judgment of 11 January 2000 (not yet reported). More specific exclusions are, however, not contrary to this Directive. See Case C-273/97, *Sirdar v UK*, judgment of 26 October 1999 (dealing with the exclusion of women from the UK Royal Marines). See further J.A. Kammerer (2000) 'Gleichberechtigung am Gewer' EuR 102-118.
- <sup>22</sup> Second Regular Report on Romania, Chapter B.1.
- <sup>23</sup> The jurisdiction of the Court of First Instance was vested by Article 63 of Regulation 40/94/EC of 20 December 1993 on the Community trade mark (OJ 1994 L 11: 1). On 8 July 1999, the CFI delivered its first judgment under this new jurisdiction in the Baby-dry case. See Case T-163/98 *The Procter & Gamble Company v Office for Harmonisation in the Internal Market (Trade Marks and Designs)*.
- <sup>24</sup> Decision 1496/98/EC of the European Parliament and of the Council of 22 June 1998 establishing an action programme to improve awareness of Community law within the legal professions (Robert Schumann project) (OJ 1998 L 196: 24).
- <sup>25</sup> Joint Action 96/636/JHA of 28 October 1996 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, on a programme of incentives and exchanges for legal practitioners (OJ 1996 L 287: 3). This

programme was established in order to foster mutual knowledge of legal and judicial systems and to facilitate judicial co-operation between Member States. This programme comprises training, exchange and work-experience programmes, organisation of meetings, studies and research, and distribution of information.

- <sup>26</sup> See Article 149 (ex 126) EC. Cf. J. Shaw (1999) 'From the Margins to the Centre: Education and Training Law and Policy', p. 555 in P. Craig and G. de Búrca *The Evolution of EU Law*, Oxford; K. Lenaerts (1994) 'Education in European Community Law after Maastricht', *CMLRev.* 7.
- <sup>27</sup> See the Second Regular Reports from the Commission on these countries (Chapter B.1 of the Lithuania report; Chapter B.1 of the Hungary report).
- <sup>28</sup> See also the Commission's White Paper on the Preparation of the Associated Countries of Central and Eastern Europe for Integration into the Internal Market of the Union (*COM* (95) 163 final). The Commission stresses that intellectual property is an area which will create new requirements for the CEEC judges, both in terms of training and of adapting judicial processes to allow cases to come to court more quickly (point 4.30).
- <sup>29</sup> See, in particular, A.W.H. Meij, 'Europese rechtspraak in de Nederlandse rechtspleging: Impressies uit Den Haag en Luxemburg', p. 133 in *Internationale rechtspraak in de Nederlandse rechtsorde* (Handelingen NJV, 1999-I).

## 15 REQUESTS FOR ASSISTANCE: THE PRELIMINARY RULING PROCEDURE

During the course of proceedings before the national court, it may appear that the court cannot deliver final judgment without having solved a question of EU law. In such circumstances Community law has always offered the national court the possibility of requesting the Court of Justice for assistance. By putting a preliminary question under Article 234 (ex 177) EC it may obtain a ruling of the Court of Justice on the interpretation of EC law, or on the validity of a Community act. Recently, the Amsterdam Treaty has complicated the situation as it added two 'special' preliminary rulings procedures to the text of the Treaties (Article 68 TEC and Article 35 TEU).

First the main elements of these three preliminary reference procedures are briefly described (paragraph 15.1). On the basis of the description of the current situation, it is assessed how the preliminary ruling procedures will function after Eastern enlargement (paragraph 15.2). In the light of this assessment, two categories of possible reforms are examined.

The first category brings together several ideas and proposals which essentially would result in the 'weakening' of the preliminary reference procedure (as compared with the present situation). Such ideas have been advocated, in particular, by the Court of Justice itself.<sup>1</sup> The underlying idea is to reduce the heavy workload of the Court and enlargement is seen as one of the main reasons for a further increase of cases under Article 234 EC (paragraph 15.3).

Attention is also given to the possibility that the preliminary ruling procedures could be further *strengthened*. This second group of ideas and proposals emphasises that effective and rapid judicial protection for individuals is even more important in an enlarged European Union than it already is in the Union of fifteen Member States (paragraph 15.4).

At the end of this paragraph, some attention is devoted to the idea of transferring jurisdiction under Article 234 EC from the Court of Justice to the Court of First Instance (CFI). The idea to give the CFI the competence to give preliminary rulings is addressed separately, since it should be considered as a more or less 'neutral' proposal. It is difficult to predict whether or not such (partial) transfer would result in better judicial protection for individuals (paragraph 15.5).

## 15.1 THE CURRENT SITUATION: THREE PRELIMINARY REFERENCE PROCEDURES AFTER AMSTERDAM

The preliminary ruling procedure of Article 234 (ex Article 177) EC is of particular importance to individuals as they are usually involved in legal disputes with other individuals or with Member State authorities. In these situations no direct access to the Courts in Luxembourg exists, the firm or citizen will have to bring legal proceedings before the competent *national* court. In case these national courts are confronted with questions of Community law, they are entitled – and sometimes obliged – to ask for the assistance of the EU Court. The latter may assist the national judges by giving an authoritative interpretation of the EC Treaty or of secondary legislation and by ruling on the validity of the acts of the EC institutions.<sup>2</sup> Thus, citizens and private companies can usually only obtain a judgment of the EC Court in an *indirect* way, that is, through the intermediary of the national court.

With regard to the role of the national courts, Article 234 EC lays down two general rules. First, the court of a Member State against whose decisions there is still a judicial remedy under national law (the lower courts) *may* ask the EU Court to interpret a rule of Community law or to rule on the validity of an act of the institutions, if it considers that such ruling is necessary for it to give final judgment. As an exception to this rule, lower courts are *obliged* to refer where they entertain serious doubts as to the validity of a Community act.<sup>3</sup>

92

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The general rule for the supreme (or highest) courts of the Member States – i.e. courts whose decisions are no longer open to appeal – is that they are obliged to make references to the Court of Justice if they consider that a decision of the Court is necessary to enable them to give final judgment.<sup>4</sup> This obligation to refer constitutes a crucial mechanism for ensuring that Community law is interpreted and applied in a uniform manner throughout the entire Union. Nevertheless, the Court has accepted three exceptions to the rule: highest courts are entitled – but not obliged – to refer if the Court has already ruled on the same or a similar question (*acte éclairé*),<sup>5</sup> if the correct interpretation of a rule of Community law is obvious (*acte clair*),<sup>6</sup> or if the highest court is asked to grant interim relief.<sup>7</sup>

The Treaty of Amsterdam added two ‘special’ preliminary ruling procedures to the Treaties, one in the first pillar (Article 68 EC) and one in the third pillar (Article 35 TEU). Questions under Article 68 EC must deal with the issues mentioned in Title IV of the EC Treaty (visa, asylum, immigration but also judicial co-operation in civil matters). More specifically, these preliminary questions must relate to the interpretation of the provisions of Title IV or the interpretation or validity of acts of the EC institutions adopted under Title IV. Under Article 68 EC the highest courts of the Member States are entitled and, at the same time, obliged to request the Court to give a preliminary ruling in case they consider a ruling necessary. Lower courts

are not mentioned in this Treaty provision, which implies that they are neither entitled, nor obliged to refer.

The most important difference between the two EC procedures thus relates to the position of the lower courts in the various Member States. They were always used to having a direct link to the Court in Luxembourg, something which they often used: in recent years, approximately 75 per cent of all preliminary questions has emanated from the lower courts.<sup>8</sup> After Amsterdam, no such direct link exists where questions on asylum, visa policy and – not to be forgotten – European civil law are raised before them. In fact, the lower courts will have to tell parties before them, that they should exhaust all national judicial remedies. Only then it becomes possible to refer to 'Luxembourg'.<sup>9</sup>

The second preliminary reference procedure, introduced by the Amsterdam Treaty, is to be found in the third pillar on police and judicial co-operation in criminal matters. According to Article 35(1) TEU the Court has jurisdiction to give preliminary rulings on the validity and interpretation of framework decisions and decisions,<sup>10</sup> on the interpretation of conventions established under Title VI of the EU Treaty and on the validity and interpretation of the measures implementing them.<sup>11</sup> This jurisdiction is, however, not compulsory *per se*: any Member State has been given the power to accept or refuse the Court's jurisdiction to give preliminary rulings under Article 35 TEU. Four of the present Member States (UK, France, Ireland and Denmark) have, indeed, rejected any jurisdiction of the Court to rule on the validity or interpretation of the third pillar decisions mentioned above. As a result, the national courts of these four states are neither entitled nor obliged to refer to the Court.<sup>12</sup>

Once a Member State has (voluntarily) accepted the Court's jurisdiction, it may specify that either any of its courts may request the Court to give preliminary rulings, or that only its highest courts may do so. Hence, in neither case does the EU Treaty impose an *obligation* on the highest national courts to ask the Court for preliminary rulings. This is of course a significant difference with the two Community reference procedures. Member States are, however, entitled to lay down in their *national* law an obligation for their highest courts to refer questions on PJCC matters to the Court of Justice.<sup>13</sup>

## 15.2 PRELIMINARY REFERENCES AFTER ENLARGEMENT

It is no exaggeration to say that the functioning of the Article 234 EC preliminary ruling procedure constitutes the 'hard core' of the present crisis regarding the EC's system of judicial protection. Due to the increase in cases brought under Article 234 EC, the average duration of preliminary procedures has already increased considerably: 12,6 months in 1983; 17,4 months in 1990; 21,4 months in 1998.<sup>14</sup> Hence, a national judge who decides to ask the Court of Justice for assistance will

have to wait some two years before an answer is received from 'Luxembourg'. Of course, this delay is hardly acceptable, given the fact that the Article 234 procedure constitutes the main channel for national courts to turn to the Court of Justice. At the same time, the legal protection of thousands of individuals is negatively affected as they very often do not have direct access to the Court.<sup>15</sup> There are two main reasons for the increase in caseload under Article 234 EC. First, in the course of time the Community has gained legislative competences in more and more policy areas. Secondly, the various accessions contributed significantly to the increase in workload and hence to the increase of the average duration.<sup>16</sup>

It is rather obvious that the next enlargement of the Union will bring a further increase in the number of cases brought under Article 234 EC. According to Kapteyn, the Dutch judge at the Court of Justice, the number of preliminary references may double or even triple in the next ten years to come.<sup>17</sup> This is the main reason why it is argued that it will be necessary to introduce radical changes in order to cope effectively with the requests for help from the national judiciary in the longer run (see further paragraph 15.3).

Further, it is noted that *before* actual accession, the judicial organs of the CEECS are not (yet) entitled, nor obliged, to refer question on EC law to the Court in Luxembourg. All three provisions (Article 68 EC, Article 234 EC and Article 35 EU) refer to courts and tribunals "of a Member State", which implies that the interpretation of, in particular, the Europe Agreements is a matter for the CEECS judiciary alone. Therefore, the Hungarian Supreme Court was probably not entitled to request the Court for assistance when it had to decide on the compatibility of certain provisions of the Hungarian constitution with the EC-Hungary Europe Agreement.<sup>18</sup>

The courts of the current Member States, on the other hand, do have the power (or even the obligation) to refer questions on the interpretation of these Agreements to the Court of Justice as they form an 'integral part' of Community law.<sup>19</sup>

### 15.3 POSSIBLE REFORMS: THE RESTRICTIVE APPROACH

In this paragraph several possibilities to reform the preliminary reference procedure are discussed. They have in common that they aim at reducing the caseload of the Court but, at the same time, have the result of weakening the judicial protection of individuals. The Court of Justice itself has put forward such 'restrictive' ideas, inter alia by delivering a paper entitled *The future of the Judicial System of the European Union*. Of course, the coming enlargement is not the only reason for reforming the Article 234 procedure in order to reduce the Court's caseload. Already years ago it was asked whether the preliminary ruling procedure had become a victim of its own success.<sup>20</sup> Later, the extension of the Community's

fields of activity contributed to a further increase in workload under Article 234 (ex 177) EC.

### 15.3.1 LIMITATION OF THE NATIONAL COURTS EMPOWERED TO REFER

At present every court of a Member State is empowered to make preliminary references to the Court under Article 234 EC, whereas the highest courts are bound to refer. In order to reduce the workload of the Court the number of national courts empowered to make references could be limited. As was pointed out above, the Treaty of Amsterdam already provides for two examples of such limitations. In the area of visas, asylum and immigration only the highest national courts are empowered and obliged to make preliminary references (Article 68 EC). In the area of police and judicial co-operation in criminal matters, any Member State which has accepted the Court's jurisdiction may specify that either any of its courts may request the Court to give preliminary rulings, or that only its highest courts may do so (Article 35 TEU).

In an enlarged Union it may prove necessary to introduce similar restrictions in the general provision of Article 234 EC as well. One option is to reserve the power and obligation to make references under this Treaty provision to supreme courts alone (as is already the case as far as questions on asylum and immigration are concerned).<sup>21</sup> Another option would be to replace the obligation for highest judges to ask for preliminary rulings (in the third paragraph of Article 234 EC) by a mere possibility to do so. A third option is to follow the rules laid down in the Protocol on the interpretation by the Court of the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.<sup>22</sup> According to this Protocol, only national courts of first instance are excluded from asking the Court for preliminary rulings on the interpretation of this Convention. Courts of appeal are entitled to refer, whereas certain highest courts of each Member State (specifically mentioned in the Protocol) are obliged to make preliminary references to the Court.<sup>23</sup>

These various options have the 'advantage' of reducing the workload of the Court, probably to a significant extent since in the last few years approximately 75 per cent of all preliminary questions emanated from lower judges.<sup>24</sup> It should however be stressed that the general procedure of Article 234 EC is used, by national judges, to ask the Court for clarification of the 'hard core' of Community law. Questions under Article 234 EC deal with the interpretation of the concept of internal market, the interpretation of the EC rules on competition policy, common policies such as agriculture or transport, the interpretation or validity of environmental measures, etc. Therefore, limitations regarding access to the Court would have the effect of seriously jeopardising the uniform application and interpretation of the most important parts of Community law. At the same time, individuals would be deprived

of effective judicial protection to a considerable extent, as most of the cases involving citizens or private firms are dealt with by the national courts.

We therefore believe that all national courts should retain the right to ask the Court of Justice for help under Article 234 EC, including the courts and tribunals of the CEECs once they have acceded to the Union.<sup>25</sup> Moreover, it is indispensable to maintain the *obligation* to refer for the national courts against whose decisions there is no judicial remedy under national law. Without such obligation a body of national case law not in accordance with the rules of Community law could come into existence in any given Member State.<sup>26</sup>

### 15.3.2 INTRODUCTION OF A FILTERING SYSTEM AT THE CENTRAL LEVEL?

At present, it is for the national judges to decide if and when questions on the interpretation or validity of Community law are referred to the Court in Luxembourg. Once the national court has decided to ask the Court of Justice for assistance, the latter is, in principle, obliged to answer these questions.<sup>27</sup> Only in exceptional circumstances will the Court refuse to reply. This is the case where the national judge does not provide the Court with sufficient information on the factual and legal background of the main proceedings,<sup>28</sup> or where the answer of the Court is not really necessary for the national judge to solve the dispute before him.<sup>29</sup>

Hence, to a very large extent the Court of Justice cannot control its own workload under Article 234 EC. Essentially, the central Community Court is dependent on the judicial substructures in the Member States. Against this background several ideas have been put forward to give the Court of Justice the right to decide which of the preliminary questions need to be answered by it on account of, for example, their novelty, complexity or importance. Such a power of the Court essentially boils down to the introduction of a *filtering system* at the central Union level. The advantages of such a central *a certiorari* system are quite obvious: a reduction of workload and therefore more room for the Court to concentrate on the really important preliminary questions, that is, those which require novel interpretations, elaboration of fundamental principles, a statement on the validity of a Community act, et cetera.

On the other hand, there are some serious objections to the idea of introducing a filtering system at the Court's level. First, a rather obvious objection is that the judicial protection of individuals may be affected in a negative way. Second, a right of selection would in fact create a *hierarchical* relationship between the Court of Justice and the national courts. The unilateral right of one court to refuse to answer questions emanating from other courts does not fit into a system of judicial *co-operation*.<sup>30</sup> In this respect the Due Report rightly points out that there exists

an important difference with the legal system of the United States.<sup>31</sup> The American *a certiorari* system<sup>32</sup> is clearly embedded in a hierarchical legal system: the US Supreme Court may refuse to give a ruling on a question emanating from an subordinate American court. In the European Union, on the contrary, there does not exist a hierarchy between the EU Court of Justice and the national courts of the Member States.<sup>33</sup>

### 15.3.3 FILTERING AT THE NATIONAL LEVEL

Another possibility to reduce the workload of the Court is to create judicial bodies at the *national* level which would – in one way or the other – be responsible for ‘dealing with’ preliminary references from courts within their area of territorial jurisdiction. A common feature of the various ideas on the establishment of – what might be termed – Regional EU Courts is that they would have to consist of judges specialised in the law of the Union, in particular European Community law. They would also have the task of gathering the various preliminary questions emanating from the (subordinate) courts in the territory.

With regard to other aspects the ideas differ greatly, in particular on the *link* (via preliminary questions) between the Regional Court and the Court of Justice. In this respect the most radical idea is to abandon any link and give to the Regional EU Court the right to give the final preliminary judgment on the interpretation or validity of EC law. We can be very brief about this radical modality: as it essentially comes down to a complete transferral of preliminary jurisdiction from the central level (Court of Justice) to the regional level (some 25, or even more, Regional EU Courts) the idea can be rejected from the outset. Without any direct link to the Court of Justice, the supervision of EC law would become totally decentralised and hence the uniform application throughout the Union would become a fiction.

Most of the ideas on the creation of Regional EU Courts, however, rightly assume that (at least) these courts should have access (via preliminary questions) to the Court in Luxembourg.<sup>34</sup> The courts ‘subordinate’ to the Regional Courts would, however, no longer have the competence to turn to the Court of Justice directly. This variant may therefore be seen as a kind of filtering system at the *national* level.<sup>35</sup>

## 15.4 REFORMS AIMED AT STRENGTHENING THE SYSTEM OF PRELIMINARY REFERENCES

The ideas on reforming the preliminary reference mechanism discussed in the previous paragraph are essentially aimed at making the procedure more ‘effective’ and thus reducing the caseload of the Court. From the point of view of *individuals*, however, such proposals essentially result in a less effective and less rapid protec-

tion of EU law rights. As it can be expected that the preliminary ruling procedure will become the most important (indirect) way for thousands of CEEC individuals (citizens, entrepreneurs, etc.) to obtain an authoritative judgment of the Court of Justice, there is also a need to address the question how this unique procedure could be strengthened in practice.

Some of the many ideas put forward on how to improve the system of preliminary references – seen from the standpoint of individuals (natural and legal persons) – are explored below. In the first place one can defend the thesis that the two special preliminary reference procedures, introduced by the Amsterdam Treaty, should be adapted in order to bring them into line with the ‘traditional’ preliminary ruling procedure of Article 234 (ex 177) EC (paragraph 15.4.1).

At the other end of the spectrum from the proposals to introduce some kind of filtering system one could argue that the ‘filters’ which the Court has already introduced should be removed. We are referring to the case law according to which the Court refuses to answer preliminary questions because its judgment is not necessary for the national court to give final judgment (‘hypothetical’ cases) or because the national court does not provide sufficient information as to the background of the dispute before him (paragraph 15.4.2).

Finally, some brief attention is given to the ‘old’ idea of introducing a right of appeal to the Court of Justice for parties to the main proceedings, in case they believe the national court concerned misinterpreted EC law (paragraph 15.4.3).

#### **15.4.1 BRINGING THE SPECIAL REFERENCE PROCEDURES IN LINE WITH THE GENERAL PROCEDURE**

As was outlined above, the main difference between the two preliminary reference procedures contained in the EC Treaty (Articles 68 and 234 EC) relates to the power of the lower courts to refer questions to the Court of Justice. Under the general procedure of Article 234 EC each and every lower court is entitled to ask the Court of Justice for assistance; under the specific procedure of Article 68 EC all these lower courts are excluded from making references to the Court. Bringing the Article 68 EC procedure in line with Article 234 EC would involve extending the power to refer questions on asylum, immigration and civil law to all branches of the national judiciary (court of first instance, appeal courts, regional courts, etc.). We believe that there are strong reasons supporting such an extension, even though this would certainly further increase the workload of the Court. The main argument is that Title IV deals with matters which are of particular interest to private citizens. This includes not only third country nationals (probably mainly asylum seekers) but also, since Title IV includes co-operation in civil matters, numerous citizens with EU nationality.

The Treaty provisions of Title IV themselves (Article 61-69 TEC) do not seem of direct interest to these groups of individuals since, essentially, all of them have the character of providing a legal basis, e.g. Treaty provisions which enable the EC institutions to adopt secondary legislation.<sup>36</sup> By the time of accession however the EC institutions will probably have exercised the powers conferred upon them by these Treaty provisions. In other words, at the moment of accession the EC institutions, acting under Title IV, will have adopted numerous (legally binding) secondary acts. For example, following the Vienna Action Plan,<sup>37</sup> 'hard' secondary law on such sensitive issues as the readmission of third-country nationals and the right to family reunification is now being prepared.<sup>38</sup> From the civil law area several remarkable developments can be reported as well. The well-known Brussels Convention on jurisdiction and enforcement of judgments in civil and commercial matters will probably be 'transformed' into a Regulation, based on Title IV.<sup>39</sup> Another important example is the initiative of Germany and Finland for a Council Regulation on insolvency procedures.<sup>40</sup>

Thus, courts, lawyers and individuals concerned with migration and civil law (including those in the CEECS) will have to get used to the idea that a considerable part of 'their' legal rules will originate from the Community. This however should be accompanied by the possibility to obtain rapid decisions of the Court on the interpretation or validity of acts adopted under Title IV of the EC Treaty.<sup>41</sup>

The realisation of this proposal would require a Treaty amendment, *in concreto* a very simple one: the deletion of Article 68 EC.<sup>42</sup> No amendment of Article 234 EC would be necessary as Title IV forms part and parcel of 'this Treaty' (within the meaning of Article 234, under a). The Court's jurisdiction to give a ruling concerning "the validity and interpretation of acts of the institutions of the Community" (Article 234, under b) would include the competence to rule on the validity and interpretation of acts which are based on Title IV of the EC Treaty (once Article 68 EC has been removed from the text of the EC Treaty). It however remains an open question whether the Treaty will actually be amended in this way. The fact that the text of Article 68 EC does not mention (national) courts of first instance, nor appeal courts, was not a haphazard omission; it was the explicit intention of the drafters of the Amsterdam Treaty to limit the number of judicial bodies empowered to make references, given the fact that preliminary questions under Article 68 EC deal with sensitive issues such as immigration, asylum and visa policy.<sup>43</sup>

With regard to the preliminary ruling procedure of the *third pillar* (Article 35 TEU) more fundamental reforms would be necessary to bring this procedure in line with the general preliminary reference procedure of Article 234 EC. First and foremost, the jurisdiction of the Court under Article 35 TEU would have to be made compulsory, in the sense that Member States would no longer have the right to make a declaration accepting the Court's jurisdiction or not. Nevertheless, we believe that there are good reasons for such a change, mainly because it is not unlikely that

many of the CEECS will refrain from accepting the Court's jurisdiction in third pillar matters. After all, Title VI of the Union Treaty is concerned with the extremely sensitive issue of police and judicial co-operation in criminal matters.

Like Title IV of the EC Treaty, the Third Pillar will have been worked out by numerous secondary acts once the first wave of newcomers accedes. The Vienna Action Plan has already made clear that the Union should adopt much more legally binding decisions on police and justice co-operation.<sup>44</sup> In particular, PJCC framework decisions on sensitive issues such as the combat of fraud, terrorism and criminal offences against children will have become part and parcel of the Union's acquis. Recently a number of proposals for third pillar acts has been put forward by the Commission and Member States on such delicate issues as the combat of fraud of non-cash payments and the protection against counterfeiting in connection with the euro.<sup>45</sup>

If the Court's jurisdiction under Article 35 TEU is made compulsory – something which, of course, cannot be taken for granted – some more sophisticated issues in relation to the Article 35 TEU procedure may be considered.

First, the Court's jurisdiction could be extended in order to give it the competence to rule on the *interpretation of PJCC Treaty provisions*. At present, it seems that the Court does not have jurisdiction to give preliminary rulings on the interpretation of 'primary PJCC law' as the list mentioned in Article 35(1) TEU seems to be exhaustive. In this respect the Court's jurisdiction is clearly more limited than its jurisdiction under Article 234 EC, given the fact that under Article 234(a) EC the Court has jurisdiction to give preliminary rulings concerning "the interpretation of this Treaty". Future case law will have to prove whether the prohibition to interpret primary PJCC law is really workable. For example, how can the Court rule on the validity of a framework decision without interpreting PJCC Treaty provisions first, in particular the PJCC Treaty provision which serves as the legal basis for this framework decision?<sup>46</sup>

Second, an *obligation* to refer could be imposed on the highest national courts by the EU Treaty directly. As was pointed out earlier, the Amsterdam Treaty left it to the discretion of the Member States (which have accepted the Court's jurisdiction under Article 35 TEU) to determine whether or not their supreme courts are bound to refer. The concrete result of this kind of 'flexibility' is that, at the moment, the highest courts of only seven of the eleven Member States which have accepted the Court's jurisdiction under Article 35(1) are bound to refer.<sup>47</sup>

#### 15.4.2 A FURTHER 'DE-FILTERING' OF PRELIMINARY QUESTIONS?

Contrary to the idea of introducing some kind of filtering system, one could also imagine that the existing 'filters' be removed. As was already mentioned above, we are referring to the case law of the Court according to which it refuses to answer preliminary questions where the national court merely addresses a 'hypothetical' matter and where it does not provide the Court with sufficient background information.<sup>48</sup>

The first exception is not a serious option, as the Court is not a legal advisor which delivers "advisory opinions on general or hypothetical questions". Instead, it is a judicial organ which assists the national courts in the resolution of genuine disputes.<sup>49</sup> Hence, the preliminary rulings procedure cannot be used by national judges as a kind of training course in EU law. For that purpose other means exist, such as the Phare, Schumann and Grotius programmes.

The second exception, however, raises more concerns. Where a national court does not provide the Court of Justice with sufficient information on the factual and legal background of the case before it, the Court chooses not to answer the questions. However, instead of declaring an unsatisfactory question inadmissible, the Court could request the national court to provide it with additional information on the factual and legal background of the case.<sup>50</sup> Such a change of the Court's 'policy' would be of great importance to the CEEC judiciary and to the parties before them.<sup>51</sup> It may be expected that the first years after accession the CEEC judiciary has to increase significantly its familiarity with EU law. Given its extremely complex and diverse nature, some understanding and tolerance will need to be displayed at the difficulties facing the CEEC judiciary. Otherwise the judges of the new members may not, or no longer, be inclined to ask the Court for help. Indeed, "national judges are scarcely encouraged to co-operate in the application of EC law if their requests for preliminary rulings are sent back as inadmissible".<sup>52</sup>

Going one step further, preliminary questions emanating from *quasi-judicial* bodies (such as arbitration tribunals, Ombudsmen, administrative appeal organs) must also be mentioned. Until now, their questions are declared inadmissible by the Court as they do not emanate from a 'court or tribunal' within the meaning of Article 234 EC.<sup>53</sup> In case of doubt, the Court will take a number of factors into account in order to determine whether a national body is a court or tribunal in the sense of Article 234 EC and, hence, whether or not it is empowered to refer. These factors include, in particular, whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent.<sup>54</sup>

The application of these criteria will usually lead to the conclusion that arbitration tribunals are not empowered to refer, even though they may have to decide on the interpretation of EC law.<sup>55</sup> Probably the same conclusion must be drawn with re-

gard to the institute of the Ombudsman, an institution which is of particular importance to many individuals in the Eastern European Countries.

The introduction of such a 'de-filtering system' – that is, giving the right to refer to quasi- or semi-judicial organs – would have the advantage of obtaining more quickly a judgment from the Court of Justice. Still, extending the power to make references to the Court to all kinds of quasi-judicial bodies may be considered 'a bridge too far', as it could increase the case load of the Court significantly.

#### 15.4.3 A RIGHT OF APPEAL FOR PARTIES TO THE MAIN PROCEEDINGS?

In order to enhance the legal protection of parties to the main proceeding, they could be given a direct right of appeal to the Court of Justice where they believe a national court has incorrectly interpreted or applied a rule of Community law. Such a right of appeal could be confined to incorrect interpretations of EC law by supreme courts as only the courts of last instance are under an obligation to refer.<sup>56</sup> Such a right of appeal could provide an adequate means to address alleged breaches of Treaty provisions, for example breaches of Article 234(3) TEC. As was pointed out earlier, the latter provision obliges supreme courts to make references to the Court. Yet, quite often highest courts take the position that one of the exceptions to the rule applies, for example the *acte clair* exception, whereas a party to the main proceedings argues that the correct interpretation of the Community rule concerned is not evident at all.<sup>57</sup> In the present situation private parties have no further legal remedies in this situation. This dependence on the 'good-will' of the national judge has even been described as the 'inherent weakness' of the preliminary ruling mechanism.<sup>58</sup>

This right of appeal could also include alleged incorrect interpretations of existing case law of the Court of Justice by national courts. For example, the view of the *Bundesverfassungsgericht* that it has the power to declare secondary EC law inapplicable in the territory of Germany is clearly not in conformity with the Court's *Fost-Frost* judgment.<sup>59</sup>

An important advantage of a right to appeal is that it would provide an effective corrective to breaches of Article 234(3) EC by highest judges, in particular against unjustified applications of the *acte clair* theory. As a result, Community law may be interpreted and applied incorrectly for many years. An example is the (former) view of the French *Conseil d'Etat* that EC Directives do not have direct effect, a matter which was considered to be so obvious that no reference to the Court of Justice was made.<sup>60</sup> Nevertheless, a few years earlier the latter had already ruled that EC Directive could be invoked by individuals against Member States authorities.<sup>61</sup>

The main objection to this proposal is, however, that the nature of the preliminary reference procedure would alter dramatically. The Court has always emphasised that this procedure establishes a form of 'judicial co-operation', which requires that the national court and the Court of Justice, both keeping within their respective jurisdiction, make direct and complementary contributions to the working out of a decision.<sup>62</sup> If parties to the main proceedings were given a right of appeal, the national judges would essentially become subordinate to the Court of Justice and hence the nature of the 'partnership' would change irrevocably. For this reason we do not believe that it would be a good idea to introduce such a right of appeal, despite the clear advantages in terms of individual legal protection.

## 15.5 THE COURT OF FIRST INSTANCE AND PRELIMINARY REFERENCES

Article 225 (ex Article 168a) of the EC Treaty explicitly states that the Court of First Instance (CFI) shall not be competent to hear and determine questions referred for a preliminary ruling under Article 234 EC. The increase in the number of preliminary references caused by, *inter alia*, the Union's enlargement may however constitute a reason to reconsider the law as it stands. Should not the CFI be given the power to give preliminary rulings in at least certain specific fields of EC policy?

Although the idea seems to be quite attractive and to have acquired some currency,<sup>63</sup> we would stress that a (partial) transfer of jurisdiction could seriously jeopardise the uniform interpretation and application of EC law. The Court of Justice would have the final word on the interpretation and validity of certain parts of EC law (presumably the 'hard core' of Community law, including the provisions on the four freedoms of the internal market), whereas the Court of First Instance would give the final (preliminary) judgment on the interpretation or validity of other parts of Community law (presumably more specific issues, such as intellectual property legislation and the very complex rules on the Common Customs Tariff). Although these two judicial organs belong to the same institution (the 'Court of Justice' within the meaning of Article 7 EC), it cannot be ruled out that the Court of First Instance interprets 'its' part of EC law in a different way than the Court of Justice does. Practice in the field of direct actions indeed shows that their views do not always match: a number of judgments of the Court of First Instance delivered under Article 230 EC (direct actions for annulment of secondary acts) has been annulled by the Court of Justice at a later stage.<sup>64</sup>

Of course, one may argue that the danger of inconsistent case law may be offset by the simultaneous introduction of a right of appeal to the Court against preliminary rulings of the CFI. After all, it is also possible to appeal against a judgment of the CFI delivered in direct actions.<sup>65</sup> The final word would then remain in the hands of just one central Community judge, namely the Court of Justice (as an organ, not as an EC institution).

Still, the serious disadvantage is that such a right of appeal would excessively prolong a large number of preliminary ruling procedures. National courts and the parties before them already have to wait some two years before they get an answer from 'fairy-tale land'; where under the new system an appeal is lodged against the CFI's preliminary judgment (but by who?), this period may be extended with another two or three years period. Mainly for this reason, the two Courts themselves argue that a transfer of jurisdiction to the Court of First Instance should, in principle, not be accompanied by a right of appeal to the Court of Justice. Only in case it is necessary to "safeguard the unity and coherence of Community law", the Court of Justice should have the power to review preliminary rulings given by the Court of First Instance.<sup>66</sup>

Indeed, we would agree that if and when jurisdiction is transferred to the CFI, the possibility of appeal should be ruled out, except perhaps in some exceptional circumstances. Because of this reason, together with the fact that the views of the two Courts may not always be identical (see above), we believe that the drafters of the Treaty should be very reluctant in transferring heads of jurisdiction under Article 234 EC to the CFI.

Only in very specific cases should such a transfer be considered, in particular where this would really speed up the preliminary ruling procedure (as compared to the situation where the Court of Justice is competent to deliver all preliminary rulings). The existing expertise at the CFI would have to be the central criterion (intellectual property, competition cases, etc.), and not so much criteria such as 'the importance of the matter' or 'constitutional relevance'. Our most important point however remains that if the CFI were to acquire jurisdiction to give preliminary rulings, it should be the sole responsibility for the Court of First Instance to deliver judgment (and hence no right of appeal). The risk that the Court of Justice might have decided in a different way must then be accepted.

The realisation of the proposal to transfer jurisdiction to the CFI would require an amendment of the EC Treaty because, as was pointed out above, the Treaty now explicitly excludes any jurisdiction of the Court of First Instance with regard to preliminary rulings. A rather modest step would be to give the Council the right to decide on the conferral of (limited) jurisdiction on the Court of First Instance.

The IGC 2000 would then merely have to decide on the principle, that is, create the possibility of a transfer. It would be for the Council to adopt the specific decisions at a later stage: what type of cases should be transferred to the CFI?

This modest option is preferred by the two Courts themselves. In their contribution to the IGC 2000, they state that in their view the second paragraph of Article 225 EC should read as follows: "The Court of First Instance may also be called upon to hear and determine questions referred for a preliminary ruling pursuant to Article 234, in certain matters to be defined in accordance with the conditions laid

down in paragraph 3". Under the latter paragraph the Council should act unanimously, at the request of the Court of Justice and after consulting the European Parliament and the Commission.

## 15.6 COMMENTS AND ASSESSMENT

Considering the various 'restrictive' ideas discussed above, it seems that only a very 'soft' variant of filtering systems can be recommended. National courts could be encouraged to develop considerable reluctance to turn to the Court of Justice for assistance. First and foremost they should be required to consider whether the proposed question really raises important questions of interpretation of EC law, whether or not the question has already been answered in the past, and whether they could not interpret the EC provision concerned on their own. In short, they should seriously consider whether they really cannot solve the puzzle on their own. It would, however, remain a matter for the national court *alone* to decide whether it refers or not; the Court in Luxembourg would, in this view, not be given the possibility to give a second (binding) opinion as to the 'importance' of the question and, therefore, it would not have the right to declare the preliminary question inadmissible after all. In fact, the Court would have no real sanctions at its disposal but would merely have to rely on greater self-restraint on the part of the national judiciary.

This opinion comes close to the ideas formulated by Advocate General Jacobs,<sup>67</sup> the Dutch judge at the Court of First Instance<sup>68</sup> as well as the Due Working Group. The latter proposes to add to the text of the Treaties the requirement that the lower judges, before exercising their discretion to make a reference, should assess the importance of the question for Community law and should consider whether there exists a reasonable doubt as to how the Court of Justice will respond.<sup>69</sup> Regarding the supreme courts, it is suggested that a similar provision be added: they would be obliged to refer when they consider that the question raises a sufficiently important issue of Community law and where there exists a reasonable doubt as to how the Court would answer.<sup>70</sup>

This not very radical change could potentially be of great importance to the CEEC judges in the sense that from the very outset they would be encouraged to make selective and occasional use of the resources offered by the preliminary reference facility. At the same time they would be encouraged to familiarise themselves with the considerable existing body of Court case law on the various subjects and to develop a facility to apply that body of case law in practice to the different factual situations with which they are confronted.

## NOTES

- <sup>1</sup> An important part of its 1999 Report is dedicated to the Article 234 procedure. See in particular Chapters II and IV of this Report.
- <sup>2</sup> See Article 234 EC, under (a) and (b). The jurisdiction of the Court under point (c), to give preliminary rulings concerning the interpretation of the statutes of bodies established by an act of the Council, is hardly of any importance in daily practice.
- <sup>3</sup> Cf. Case 314/85 *Foto-Frost* [1987] ECR 4199. The Due Group rightly proposes to codify this ruling: "A national court or tribunal shall consult the Court of Justice where it proposes not to apply an act of Community law on the grounds that the latter is invalid" (Article 234(5) TEC, as proposed). Under certain conditions the lower courts may, however, suspend the application of national implementing measures temporarily. See Joined Cases C-143/88 and C-92/90 *Zuckerfabrik Süderdithmarschen and Zuckerfabrik Soest* [1991] ECR I-415 and Case C-465/93 *Atlanta* [1995] ECR I-3761.
- <sup>4</sup> Although this necessity requirement is not explicitly mentioned in the third paragraph of Article 234 EC, the Court has ruled that the highest courts have the same discretion as any other national court to ascertain whether a decision on a question of Community law is necessary to enable them to give judgment. See Case 283/81 *Cilfit* [1982] ECR 3415, at paragraph 10.
- <sup>5</sup> Joined Cases 28, 30 and 69/62 *Da Costa en Schaake* [1963] ECR 31 and Case 283/81 *Cilfit* [1982] ECR 3415.
- <sup>6</sup> This was for the first time acknowledged in the *Cilfit* case, albeit under strict conditions.
- <sup>7</sup> Case 107/76 *Hoffmann-La Roche* [1977] ECR 957; Joined Cases 35 and 36/82 *Morson en Jhanjan* [1982] ECR 3723.
- <sup>8</sup> Due Report, p. 12.
- <sup>9</sup> A restriction which deserves some critical comments (see further paragraph 15.4.1).
- <sup>10</sup> Within the meaning of Article 34(2)(b) and Article 34(2)(c) TEU, respectively. On the legal characteristics of these important third pillar instruments, see paragraph 7.1.2.
- <sup>11</sup> This last word 'them', in our view, merely refers to measures implementing *conventions*, adopted in accordance with Article 34(2)(d) TEU. Hence, the Court does not seem to have jurisdiction to interpret or rule on the validity of measures implementing framework decisions and decisions. See further, A. Albers-Llorens (1998) 'Changes in the Jurisdiction of the European Court of Justice under the Treaty of Amsterdam', *CML Rev.* 1273.
- <sup>12</sup> See the 'Information concerning the date of entry into force of the Treaty of Amsterdam' (OJ 1999 C 120/4).
- <sup>13</sup> See the Amsterdam Declaration on Article 35 of the Treaty on European Union (No. 10).
- <sup>14</sup> Due Report, p. 7.

- <sup>15</sup> Cf. paragraph 12 (on vertical and horizontal conflicts).
- <sup>16</sup> Due Report, p. 3.
- <sup>17</sup> P.J.G. Kapteyn (1999) 'Om het behoud van een goed werkend systeem van prejudiciële verwijzingen', *SEW*, p. 280, at 283.
- <sup>18</sup> On this remarkable judgment (the Hungarian constitutional court ruled that there was indeed a conflict), see J. Volkai (1999) 'The Application of the Europe Agreement and European Law in Hungary: the Judgment of an Activist Constitutional Court on Activist Notions', *Harvard working paper No. 8/99* (to be obtained from the Internet: <http://www.law.harvard.edu/programs/JeanMonnet/papers/papers99.html>).
- <sup>19</sup> See Case 12/86 *Demirel* [1987] ECR 3719. As was pointed out above (paragraph 3), four courts have actually used the preliminary ruling mechanism to obtain a ruling on the interpretation of the Europe Agreements.
- <sup>20</sup> Cf. T. Koopmans (1987) 'La procédure préjudicielle, victime de son succès?', p. 347 in Capotorti et al. (eds.), *Du droit international au droit de l'intégration*, (Liber Amicorum Pescatore).
- <sup>21</sup> A view which is popular among a number of German authors. See P.J.G. Kapteyn (1998) 'The Court of Justice after Amsterdam', in T. Heukels, N. Blokker and M. Brus, *The European Union after Amsterdam. A Legal Analysis*, Kluwer., 139, 140 (with further references).
- <sup>22</sup> *oJ* 1975 L 240, p. 28 (amended several times).
- <sup>23</sup> See Articles 2 and 3 of the Protocol; Article 2(1) lists the supreme courts which are bound to refer. This Brussels Protocol will be repealed (for thirteen Member States) once the Brussels Convention has been transformed into a Regulation adopted under Title IV TEC. See further paragraph 15.4.1.
- <sup>24</sup> See the Due Report, p. 12.
- <sup>25</sup> Cf. the Due Report which rejects the suggestion to limit the number of national courts 'sans hésitation' (p. 12-13). See also the 1995 Report of the Court on Certain Aspects of the Application of the Treaty on European Union (Proceedings of the Court of Justice and the Court of First Instance, no. 15/95, 22 to 26 May 1995), where the Court characterises the Article 234 procedure as the veritable cornerstone underlying the operation of the internal market. The Court therefore stresses that any court should be able to make references (paragraph 11). The 1999 Report sticks to this outspoken opinion ('The Future of the Judicial System of the European Union', Chapter IV, paragraph 3(i)).
- <sup>26</sup> Cf. Case 107/76 *Hoffmann-La Roche v. Centrafarm* [1977] ECR 957 (at paragraph 5).
- <sup>27</sup> See, for example, Case C-415/93 *Bosman* [1995] ECR I-4921 (paragraph 59); Case C-200/97 *Ecotrade* [1998] ECR I-7907 (paragraph 25) and Case C-254/98 *TK-Heimdienst Sass*, judgment of 13 January 2000 (paragraph 13).
- <sup>28</sup> See, for example, Joined Cases C-320-322/91 *Telemarsicabruzzo* [1993] ECR I-393.
- <sup>29</sup> See Case 244/80 *Foglia* [1981] ECR 3045. This case law will be discussed more extensively in the framework of the ideas on 'de-filtering', see paragraph 15.4.2.

- <sup>30</sup> One of the main characteristics of the present preliminary reference procedure, see further paragraph 15.4.3.
- <sup>31</sup> Due Report, p. 21.
- <sup>32</sup> Cf. T. Koopmans (1991) 'The Future of the Court of Justice of the European Communities', *YE 11*: 15.
- <sup>33</sup> See also P. Craig and G. de Búrca (1998) *EU Law*, 2nd ed., p. 447-448.
- <sup>34</sup> See, for example, J.P. Jacqué and J. Weiler (1990) 'On the Road to European Union – A New Judicial Architecture: An Agenda for the Intergovernmental Conference', *CML Rev.* 27: 185. See also the 1995 Report of the Court on Certain Aspects of the Application of the Treaty on European Union (Proceedings of the Court of Justice and the Court of First Instance, no. 15/95, 22 to 26 May 1995).
- <sup>35</sup> See further paragraph 15.6 for our own ideas on the various forms of 'filtering'.
- <sup>36</sup> See Articles 61-63 and 65 EC, which all empower the Council to adopt secondary legislation. Article 67 EC contains the decision-making procedures, Article 68 EC is concerned with the Court's jurisdiction to give preliminary rulings. Hence, it does not seem that individuals can rely on any of these Treaty articles before national courts. See also paragraph 14.1 (on the requirement that Treaty provisions must be 'unconditional and sufficiently precise' in order to have direct effect).
- <sup>37</sup> "Action Plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice" (*OJ* 1999 C 19: 1).
- <sup>38</sup> Initiative of Finland with a view to the adoption of a Council Regulation determining obligations as between the Member States for the readmission of third-country nationals (*OJ* 1999 C 353: 6); Proposal from the Commission on a Council Directive on the right of family reunification (*COM* (1999) 638 def.). Both the initiative and the proposal are based on Article 63(3) of the EC Treaty.
- <sup>39</sup> See the Commission's proposal for a Council Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (*OJ* 1999 C 376 E: 1). As "judicial co-operation in civil matters having cross-border implications" (Article 65 EC) forms part and parcel of Title IV, this proposal is based on Article 61 EC (in conjunction with Article 65 EC).
- <sup>40</sup> *OJ* 1999 C 7: 2.
- <sup>41</sup> As far as the Brussels Convention is concerned, the transformation into a Regulation (under Title IV of the EC Treaty) would even diminish the legal protection of individuals: under the present Protocol on the Court's jurisdiction, *appeal courts* are entitled to refer.
- <sup>42</sup> As, in our view, the Article 68 EC procedure should be considered as a *lex specialis* in relation to the Article 234 EC procedure, lower judges cannot use the latter procedure to refer questions on Title IV issues anyhow. Moreover, it seems that Member States cannot 'unilaterally' declare that their lower judiciary is entitled to refer questions on immigration matters under Article 68 EC. The main reason is that the Treaty does not contain a declaration similar to the declaration on Article 35 TEU (mentioned at the end of paragraph 15.1).

- <sup>43</sup> Witness, e.g., the clear statements on this matter by the Dutch government on the occasion of the ratification of the Amsterdam Treaty (TK 1997-1998, 25 922 (R 1613) nr. 3: 20-21).
- <sup>44</sup> Action Plan of the Council and the Commission on how to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice (OJ 1999 C 19: 1).
- <sup>45</sup> See the proposal from the Commission for a Council Framework Decision on combating fraud and counterfeiting of non-cash means of payment (OJ 1999 C 376 E: 20), and the initiative of Germany with a view to the adoption of a Council framework decision on increasing protection by penal sanctions against counterfeiting in connection with the introduction of the euro (OJ 1999 C 322: 6). Both the proposal and the initiative are based on Article 34(2)(b) of the TEU.
- <sup>46</sup> See in this respect also, albeit in a slightly different context, Case C-221/88 *Busseni* [1990] ECR I-495. The Court ruled that it had jurisdiction to rule on the *interpretation* of (primary and secondary) ECSC law, although Article 41 of the ECSC Treaty merely empowers the Court to give preliminary rulings on the *validity* of acts of the Commission and the Council.
- <sup>47</sup> Namely the supreme courts of the Benelux countries, Germany, Italy, Austria and Spain. In Greece, Portugal, Finland and Sweden all courts (including the supreme courts) are entitled but not obliged to refer. See the "Information on the entry into force of the Amsterdam Treaty" (OJ 1999 C 120/24).
- <sup>48</sup> Cf. paragraph 15.1.
- <sup>49</sup> Case 244/80 *Foglia v Novello* [1981] ECR 3045 ('Foglia II'). See also the comments by D. Wyatt, (1982) 7 *EL Rev.* 186. For a different view, see G. Bebr (1980) 'The Existence of a Genuine Dispute: An Indispensable Precondition for the Jurisdiction of the Court under Article 177 EEC Treaty?', 17 *CML Rev.* 525.
- <sup>50</sup> Cf. D. O' Keeffe (1998) 'Is the Spirit of Article 177 under Attack? Preliminary References and Admissibility', *EL Rev.*, p. 509. See also T. Kennedy (1993) 'First Steps Towards a European *Certiorari*?', *EL Rev.* 18 :121.
- <sup>51</sup> According to the Court itself, this change would require an amendment of its Rules of Procedure, namely the insertion of a provision comparable to Article 96(4) of the Rules of Procedure of the EFTA Court. This provision explicitly states that the EFTA Court may ask the national court for clarification. See the Court's 1999 Report on the future on the EU judicial system, p. 12.
- <sup>52</sup> C. Barnard and E. Sharpston (1997) 'The Changing Face of Article 177 References', *CML Rev.* 1113, at 1169.
- <sup>53</sup> See, in particular, Case C-24/92 *Corbiau* [1993] ECR I-1277 (concerning a fiscal administrative organ, not acting as the independent 'third party' responsible for solving the dispute).
- <sup>54</sup> See, in particular, Case C-54/96 *Dorsch Consult* [1997] ECR I-4961. For an overview of the older case law on this specific point, see W. Alexander and E. Grabandt (1982) 'National Courts Entitled to Ask Preliminary Rulings under Article 177 of the EEC Treaty: The Case Law of the Court of Justice', *CML Rev.* 413.

- <sup>55</sup> See Case 102/81 *Nordsee* [1982] ECR 1095. For critical comments, see, in particular, G. Bebr (1985) 'Arbitration Tribunals and Article 177 of the EEC Treaty', *CML Rev.* 489.
- <sup>56</sup> Cf. paragraph 15.1. Where the objections relate to a judgment of a lower court, parties to the main proceedings would first have to exhaust the judicial remedies under national law.
- <sup>57</sup> Divergence of views may also relate to the question whether or not a decision of the Court of Justice is really 'necessary' to enable the highest court to give final judgment, or to the application of the theory of *acte éclairé*. Cf. paragraph 15.1.
- <sup>58</sup> G.F. Mancini and D.T. Keeling (1991) 'From *cilfit* to ERT: The Constitutional Challenge Facing the European Court', *Yearbook of European Law* 1.
- <sup>59</sup> See the *Maastricht Urteil* of the German constitutional court (published in *EuGRZ* 1993: 29).
- <sup>60</sup> See the *Cohn-Bendit* case, published in (1979) *RTDE* 157. The Shell-Berre decision (*CMLR* 1964, p. 464) constitutes another example of the unwillingness of this national court to refer questions to Luxembourg. In that case the *Conseil d'Etat* held that the French system of import duties on mineral was not contrary to Article 37 EEC on State monopolies.
- <sup>61</sup> See e.g. Case 41/74 *Van Duyn v. Home Office* [1974] ECR 1337. See also the case law mentioned in paragraph 14.1.
- <sup>62</sup> See, for example, Case 16/65 *Schwarze v Einfuhr und Vorratsstelle Getreide* [1965] ECR 877 and Case C-361/97, *Nour* [1998] ECR I-1301. See also the Due Report, which rightly points out that a right of appeal would "debase the entire system of cooperation established by the Treaties between national courts and the Court of Justice" (p. 13).
- <sup>63</sup> See the Due Report and the IGC Contribution of the Courts, discussed below.
- <sup>64</sup> See, e.g., the judgments in the Van der Wal Case (Joined Cases C-174/98P and C-189/98P and Case T-83/96).
- <sup>65</sup> This idea was put forward by the Dutch Advisory Council on International Affairs in its report on the IGC on institutional reforms (*De IGC 2000 en daarna. Op weg naar een Europese Unie van dertig lidstaten*, No. 12, January 2000, p. 33).
- <sup>66</sup> See their contribution to the IGC 2000, p. 4.
- <sup>67</sup> Case C-338/95 *Wiener* [1997] ECR I-6495. He argues that a reference would be most 'appropriate' where the question was one of general importance, or where the ruling was likely to promote the uniform interpretation of EC law. A reference would be least appropriate where there was an established body of case law (*acte éclairé*) or where the point was a very narrow one.
- <sup>68</sup> A.W.H. Meij (1999) 'Europese rechtspraak in de Nederlandse rechtspleging: Impressies uit Den Haag en Luxemburg', in *Internationale rechtspraak in de Nederlandse rechtsorde*, Handelingen NJV, 1999-I: 133.
- <sup>69</sup> See the new last sentence of Article 234(3) TEC, as proposed: "When determining whether to consult the Court of Justice, *the national court or tribunal* shall in particular take account of how important the question is to Community law and whether or not there is a reasonable doubt as to the answer to

that question” (Due Report, p. 53). Emphasis added in order to underline that it is for the national court alone to assess whether its question is really important and whether the answer to it is not too obvious.

- <sup>70</sup> “... that court or tribunal [the supreme court] shall bring the matter before the Court of Justice, provided that the question is of sufficient importance to Community law and that there is reasonable doubt as to the answer to that question” (Article 234(4) TEC, as proposed by the Reflection Group).



## 16 BREACH OF COMMUNITY LAW OBLIGATIONS BY MEMBER STATES

Since the very beginning of the process of European integration the Commission has been given the power to bring Member States before the Court of Justice for failing to fulfil their obligations under the EC Treaty (Article 226 EC, ex Article 169 EC). Extensive attention should be given to this form of direct action as it can be expected that the infringement procedure will become the most important *centralised* way for ensuring that the new Member States respect their Treaty obligations. It is quite remarkable that little attention has been given to the functioning of this procedure after enlargement, although it may be expected that the infringement procedure will significantly contribute to a further increase of caseload of the Court. The present focus is on the expected flow of preliminary questions from Eastern European judges. Nevertheless, the 'bottom-up' way presupposes that 'vigilant' individuals are prepared to institute legal proceedings; that national courts are prepared to refer to Luxembourg; and that there is a provision of Community law which is suitable of being invoked by private individuals. Action by the Commission under Article 226 EC, on the other hand, does not depend on legal actions undertaken at the national level. Moreover, in the framework of Article 226 proceedings it is irrelevant whether or not the EC law provisions at stake have direct effect. This means that the Commission may bring infringement actions for breach of 'diffuse' acts such as many environmental directives.<sup>1</sup>

113

A brief discussion of the main elements of the present procedure (para. 16.1) is necessary to explain why the Article 226 EC procedure will have a considerable 'impact' on the new Member States (para. 16.2).<sup>2</sup> The next step is to explore several options for reforming the Article 226 procedure, starting from the presumption that the new Members will, indeed, very often be brought before the Court by the Commission. Once again, a distinction is made between reforms which are intended to weaken the infringement procedure (as compared with its present functioning) and ideas which emphasise that in an enlarged Union it is even more important to bring recalcitrant Member States easily and quickly to justice. Ideas which go in the first direction, for example, are those developed on the compulsory nature of the procedure, or the central role which Article 226 EC assigns to the Court of Justice (para. 16.3). In the opposite direction, we find reforms such as the extension of the current procedure to the two non-Community pillars, and – as the Due Report proposes – the idea to reverse the roles of the Commission and the Member States during the judicial phase of the infringement procedure (para. 16.4). Finally, some attention is given to the possible transfer of jurisdiction under Article 226 EC to the Court of First Instance (para. 16.5).

## 16.1 BRIEF ANALYSIS OF THE INFRINGEMENT PROCEDURE

As the central 'guardian of the Treaties', the Commission must ensure that the provisions of the EC Treaty and the measures taken by the EC institutions pursuant thereto are applied (article 211 EC). In order to perform this task the Commission has been given, *inter alia*, the power to bring any Member State before the Court of Justice if the Commission considers that it has failed to fulfil an obligation under the EC Treaty. Before doing so, the Commission must give notice to the State concerned of its objections; it must give the Member State the opportunity to submit its observations and – if the matter cannot be settled – the Commission should deliver a reasoned opinion. After the completion of this so-called administrative phase, the Commission may bring the matter before the Court of Justice if the Member State concerned does not comply with the specific obligations laid down in its reasoned opinion.<sup>3</sup> This second stage of the infringement procedure – the judicial stage – ends with the judgment of the Court, stating that the Member States has or has not breached one of its EC obligations. If the Court finds that the Member State concerned has indeed failed to fulfil its obligations – for example the non-implementation of a Directive – that State shall be required to take the necessary measures to comply with the judgment of the Court.<sup>4</sup>

In practice, however, Member States quite often do not (fully) comply with these judgments of the Court. The Maastricht Treaty therefore reinforced the infringement procedure by giving the right to the Court to impose lump sums or penalty payments on the Member State concerned.<sup>5</sup> Although, until now, the Court has never imposed a pecuniary sanction upon a Member State (under Article 228(2) EC), this is likely to change in the near future: in several pending cases the Commission requests the Court to impose quite impressive sanctions on Member States for not implementing previous judgments under Article 226 EC.<sup>6</sup>

## 16.2 THE INFRINGEMENT PROCEDURE AFTER ENLARGEMENT

It can reasonably be expected that, soon after enlargement, the infringement procedure will be used quite often by the Commission to make the new Member States respect their EC obligations. On the one hand these countries have to accept (almost) the entire *acquis communautaire* as well as most of the new legislation to be adopted after accession. On the other hand these new members will probably not be ready to actually comply with all of their Treaty obligations, nor to implement each and every Community decision perfectly.

These actions of the Commission will often result in a (binding) judgment of the Court stating that the Member State in question has indeed failed to comply with its obligations. Several reasons supporting this expectation can be referred to.

First, the Court has accepted that infringement proceedings may be brought against a Member State where it does not actually apply and enforce Community law, even though its formal legislation is in conformity with EC law. Notably in the field of environmental protection, the Court is prepared to 'lift the veil' and see whether the relevant environmental standards are actually applied in day-to-day life.<sup>7</sup> Thus, the new Member States run the risk that the Commission will initiate infringement proceedings, when administrative authorities have not ensured that implemented legislation is actually applied and enforced in practice, even if the national legislature has done its job (by incorporating EU law - notably Directives - into national legislation correctly).

Secondly, the Court hardly ever accepts *justifications* put forward by Member States for breaching their EC obligations. It is settled case law that a Member State may not plead provisions, practices or circumstances existing in its internal legal system in order to justify a failure to comply with its Community law obligations. An old but still striking example is the so-called Belgian wood case,<sup>8</sup> where the Belgian *government* argued that it was not to blame for the failure to respect its obligations under Article 95 of the EEC Treaty (non-discrimination in the field of taxes). The delay was entirely caused by the Belgian *parliament* which had been unable to adopt the necessary legislative amendments in time (to eliminate the discrimination complained of by the Commission). The Court nevertheless 'condemned' Belgium, stating that the obligations arising from the Treaty devolve upon the Member States *as such*. Therefore, the liability of a Member State under Article 226 EC remains, irrespective of the state agency whose action or inaction causes the failure to fulfil its obligations; even in the case of a constitutionally independent institution.<sup>9</sup> Only where it is 'absolutely impossible' for a Member State to fulfil its obligations, the Court will accept this justification.<sup>10</sup>

Finally, the Court has recently ruled that proceedings under Article 226 EC may also be brought against a Member State where the infringement of EC law essentially emanates from actions by *private* individuals. In the case concerned<sup>11</sup> French farmers had destroyed agricultural products from other Member States. The Commission initiated an infringement procedure against the French state for breach of Article 28 EC (which prohibits quantitative restrictions and all measures having equivalent effect). Despite the French objections, the Court ruled that Article 28 does not prohibit solely measures emanating from the State which create restrictions on trade between Member States; this provision also applies where a Member State *abstains* from adopting the measures required in order to deal with obstacles to the free movement of goods which are not caused by that State. The fact that a Member State *abstains* from taking action to prevent obstacles to the free movement of goods that are created by actions by private individuals on its territory is just as likely to obstruct intra-Community trade as a 'positive' act of the state.<sup>12</sup>

### 16.3 WATERING DOWN THE INFRINGEMENT PROCEDURE

In the Court's 1999 report on the future of the judicial system most attention is devoted to the expected increase of workload under Article 234 EC (preliminary rulings). For the reasons mentioned in the previous paragraph, it cannot be excluded that the infringement procedure of Article 226 EC may cause an even greater increase in the workload of the Commission and the Court. This awesome perspective may one lead to the conclusion that reforms to the existing infringement procedure, aiming at its 'watering down', are indispensable.

#### 16.3.1 NO LONGER COMPULSORY JURISDICTION?

A fundamental change would be to let Member States decide whether or not they accept the Commission's power to bring infringement procedures against them. Changing the obligatory nature into a voluntary one, *only* for the new members from Eastern Europe, would, of course, meet with forceful opposition from the current fifteen members. And rightly so, as this kind of 'flexibility' would pose a very serious threat to the uniform respect for EC law by all member states, and, moreover, it could easily result in severe distortions of competition. If, for example, only the Dutch government could be brought before the Court for failure to comply with its obligations under the Nitrates Directive, but not the Polish government for the same kind of breach, farmers in the latter country would gain considerable economic advantages.<sup>13</sup> We believe therefore that this kind of differentiation should be ruled out, as it would seriously endanger the uniform application and enforcement of Community law in the Member States and would create unacceptable distortions of competition in the (enlarged) Community/Union.

If one thinks along the lines of making the infringement procedure a voluntary one, such a reform should 'benefit' all members, the current and the new ones alike. The advocates of this 'renewal' could point to the fact that the current infringement procedure is really unique in the law of international organisations. Nowhere else has an independent organ of an international organisation been given the (compulsory) power to bring Member States of that organisation before an independent judicial organ. Another possible argument in this regard is that within the Union there already exists a precedent, namely the preliminary ruling procedure under the third pillar. As was pointed out earlier, Member States *may* accept the Court's jurisdiction under Article 35 TEU but are not obliged to do so.<sup>14</sup>

Given the unique nature of the infringement procedure in the law of international organisations and despite the fact that a precedent already exists in EU law, we strongly believe that Member States should *not* be given the discretion to accept or refuse the Commission's right to bring actions against them for infringement of EC law obligations. The main argument is that the procedure of Article 226 EC con-

stitutes the most important means for the Commission to detect infringements of the 'hard core' of EC law.

Apart from the fact that it is undesirable to change the nature of the jurisdiction of the Commission and, hence, of the Court, it is also highly unlikely that the compulsory nature of the infringement procedure will be changed on the sole assumption that the new members from Eastern Europe will frequently fail to comply with their obligations under the EC Treaty.

### 16.3.2 FROM JUDICIAL TO ADMINISTRATIVE SUPERVISION?

A somewhat less radical idea on how to 'water down' the current infringement procedure relates to the question which entity should be entitled to give final judgment on infringements of EC law by Member States. The power to give the final word could be transferred from the Court of Justice to a non-judicial body, for example the Council of Ministers of the EU. Judicial supervision would thus be turned into a form of *administrative* supervision.<sup>15</sup> In fact, the EC Treaty already provides for such forms of supervision by non-judicial bodies. One of the provisions on EMU stipulates that Member States shall avoid excessive budget deficits. Where a Member State breaches this obligation it is for the *Council* to take measures for the deficit reduction and it can impose certain sanctions if such measures are not taken. It is explicitly stated that the right of the Commission to bring action under Article 226 EC may not be exercised.<sup>16</sup>

117

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It may however be doubted whether one can speak of a 'trend' in this direction. In this respect it should be repeated that the general procedure of Article 226 EC is used to bring Member States before the Court for infringing the core parts of EC law. We therefore certainly would not advocate the introduction of this form of administrative supervision. More generally, administrative supervision entails significant disadvantages in a constitutional system as it erodes at a very fundamental level the system of checks and balances.

### 16.4 FURTHER IMPROVEMENTS TO THE INFRINGEMENT PROCEDURE

It can also be argued that the infringement procedure should be strengthened instead of being weakened, given the fact that the new members will probably often breach their Community obligations, possibly even more often and more seriously than the present Member States. Several measures qualify for consideration in this perspective.

A first possibility is to 'speed up' the infringement procedure in order to bring Member States more quickly to justice. At the moment the average duration of this kind of direct action is almost two years,<sup>17</sup> a length which is hardly acceptable if

one takes into account the fact that the infringement procedure is the central means to make Member States comply with their EC obligations (para. 16.4.1).

A second option worth considering is to introduce a similar procedure in the two non-Community pillars. At present, the Commission does not have the power to bring Member States before the Court for breach of obligations in the fields of foreign policy and co-operation in criminal matters (para. 16.4.2).

#### 16.4.1 AN ACCELERATED INFRINGEMENT PROCEDURE?

As was pointed out above, the infringement procedure consists of an administrative phase and a judicial phase. The length of the entire procedure could be reduced considerably if the first, administrative phase was skipped. Such a solution would not be completely new, as the EC Treaty already provides for an accelerated infringement procedure, albeit only in some specific situations.<sup>18</sup> Such a generalised change, which would require an amendment of the Treaty, would probably encounter fierce opposition from the (new) Member States. It is precisely the administrative phase which gives them the opportunity to oppose the objections of the Commission, or to comply with the Commission's demands, for instance by amending their national laws. Eliminating this phase would force Member States into contentious judicial proceedings almost without warning.

118

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Another argument which could be put forward in this respect is that the Article 226 action is not the only procedure for rapidly putting an end to infringements of EC law by Member States: individuals as well may take action against their Member State by relying, before the national court, on the EC rule which has been breached. As the Court already ruled in 1963, the fact that Article 226 (ex 169) EC enables the Commission to bring before the Court a State which has not fulfilled its obligations, does not mean that individuals cannot plead these obligations before a national court. Otherwise all direct legal protection of individual rights would be removed.<sup>19</sup>

Another way to bring Member States more quickly to justice is to 'copy' the infringement procedure of the Treaty establishing the European Coal and Steel Community (ECSC Treaty) and insert it into the EC Treaty. According to Article 88 of the ECSC Treaty the Commission shall record the failure of a Member State to fulfil an obligation under the ECSC Treaty in a reasoned decision. Subsequently, it is up to the *Member State* concerned – and not the Commission – to initiate proceedings before the Court within two months of notification of the reasoned decision of the Commission. If the Member State does not bring an action before the Court, the infringement has been established definitively and it is required to comply with the Commission's decision. If the Member State *did* take action

(within two months) but its action is dismissed by the Court, it should comply with the Court's judgment.<sup>20</sup>

If the EC Treaty would *reverse* the roles of the Commission and the Member States in this way, it may be expected that fewer cases would be brought before the Court. Only in the event that a Member State has sound arguments to contest the Commission's view would it initiate the judicial phase. In most cases, however, Member States would in fact take no further action since they usually admit that they are 'wrong'.<sup>21</sup> In this situation the Member State would be required to take the necessary measures to comply with the Commission's decision; a judgment of the Court would not actually be handed down.

For this reason – fewer cases will reach the Court – the Due Report considers an extension of the present ECSC infringement procedure (to the EC Treaty) as the most favourable solution.<sup>22</sup> The report rightly adds that the current EC rules on the Court's power to impose pecuniary sanctions (Article 228(2) EC) should remain in existence.<sup>23</sup> Under this new regime, the second infringement procedure could be initiated by the Commission where a Member State does not comply with its decision on the original infringement, provided that this decision has become final (because the Member State has not brought the case before the Court within two months). This second infringement procedure could also be initiated by the Commission where the Member State concerned *does* contest the Commission's original allegations before the Court, but where the Court rejects its objections.

#### 16.4.2 EXTENSION OF THE INFRINGEMENT PROCEDURE TO THE OTHER EU PILLARS

The traditional infringement procedure of Article 226 (ex 169) EC is merely an adequate means to address breaches of *Community* law, that is, breaches of EC Treaty provisions or breaches of the provisions of acts of the EC institutions. At the present moment there is no possibility for the Commission to bring Member States before the Court for breaching their obligations under the other two EU pillars.<sup>24</sup> It is nevertheless quite legitimate to question whether the Commission should not be given a similar right in the areas of CFSP and PJCC.

First, as was already pointed in a different context,<sup>25</sup> the two non-Community pillars will probably have produced an impressive set of 'hard' law at the moment the first wave of new members will be admitted. Is it not logical to *complement* these far-reaching decision-making powers with an effective compliance mechanism at the central level? The common position on Indonesia, for example, clearly lays down that the export of weapons, ammunition and military equipment to Indonesia is forbidden.<sup>26</sup> A Member State which would sell weapons to Indonesia, despite the Union's embargo, could be brought before the Court if the infringement procedure were to cover all areas of *Union* law. At present, such possibility

does not exist as the arms exporting Member State does not breach a *Community* law obligation.<sup>27</sup>

A second argument for introducing second and third pillar infringement procedures is that most of the decisions adopted under Titles V and VI TEU do not have direct effect. In particular, the most important PJCC decisions (framework decisions, decisions) cannot be invoked directly by private litigants before the national courts, even if the provisions of such third pillar decisions would be perfectly clear and unconditional.<sup>28</sup> As a consequence, the Court's (innovative) idea to stimulate the 'vigilance' of the citizens by means of the direct effect of Community law<sup>29</sup> does not offer a satisfactory solution as far as PJCC decisions are concerned. This makes the introduction of a centralised enforcement mechanism even more necessary in our view.

## 16.5 TRANSFER OF JURISDICTION TO THE COURT OF FIRST INSTANCE

Until now, only the Court of Justice is competent to deliver judgments under Article 226 EC.<sup>30</sup> The next accession may however require a (partial) transfer to the *Court of First Instance* of jurisdiction to hear and determine this kind of direct action. In practice, most of these cases under Article 226 EC do not raise any complex or controversial legal issues, as Member States usually admit that they have indeed breached one of their obligations. Notably in the many cases where a Member State is accused for non-implementation of EC Directives, the only defence is that due to internal practices it was 'too late'. For this reason, most judgments under Article 226 EC are delivered by the Court sitting in chambers of three or five judges.

Given this state of affairs, which presumably will not change significantly after Eastern enlargement, there seem to be good reasons to transfer jurisdiction to the CFI once the Union consists of some 25 or more members. This transfer should however be accompanied by a right of appeal for the Commission and the Member States against the CFI's judgment. In this way the intervention of the Court of Justice is secured and, hence, consistency can be guaranteed.<sup>31</sup>

From their contribution to the IGC 2000, it can be deduced that the two Courts themselves would EC is (partially) transferred to the CFI. As a rule, these Courts wish to maintain a right of appeal against judgments of the CFI in direct actions; only in case the matter has already been judicially considered (Community trade mark cases, staff cases if such cases were to be dealt with by a board of appeal) recourse to the Court of Justice may be restricted.<sup>32</sup>

Unlike the elimination of the administrative phase (discussed above), the transfer of jurisdiction to the CFI could be realised without amending the Treaty. A decision

of the Council would be sufficient, although the Council would be required to act by unanimity and only at the request of the Court of Justice and after consulting the European Parliament (Article 225(2) EC). The Treaty therefore already provides for a rather flexible response to future developments.

## NOTES

- <sup>1</sup> See, for example, Case C-431/92 *Commission v Germany* [1995] ECR I-2189 ('Grosskrotzenburg'), paragraph 26.
- <sup>2</sup> For much more detailed analyses, see e.g.: H.A.H. Audretsch, *Supervision in European Community Law* (1986); A. Dashwood and R. White (1989) 'Enforcement Actions under Articles 169 and 170 EEC', *ELRev.* 388; A. Evans (1979) 'The Enforcement Procedure of Article 169 EEC: Commission Discretion', *EL Rev.* 442; R. Mastroianni (1995) 'The Enforcement Procedure under Article 169 of the EC Treaty and the Powers of the European Commission: Quis Custodiet Custodes?', *European Public Law*: 535.
- <sup>3</sup> The Court of First Instance is not competent to deal with infringement procedures. For ideas on a redistribution of jurisdiction, see further paragraph 16.5.
- <sup>4</sup> See Articles 226 and 228 EC. Under Article 227 EC, Member States may sue other Member States for not fulfilling Community law obligations; this legal action is however hardly ever used in practice. The only example until now is Case 141/78 *France v UK* [1979] ECR 2923 (Fishery Case), a second one is however pending before the Court: Case C-388/95 *Belgium v Spain* (OJ 1996 C 46/5).
- <sup>5</sup> Article 228(2) EC (ex Article 171(2) EC). Cf. J.A. Usher (1996) 'Compliance with Judgments of the Court of Justice of the European Communities', p. 87 in M.K. Bulterman and M. Kuijer, *Compliance with Judgments of International Courts*.
- <sup>6</sup> See Case C-122/97 *Commission v Germany*; Case C-387/97 *Commission v Greece*; Case C-197/98 *Commission v Greece*; Case C-373/98 *Commission v France*.
- <sup>7</sup> See, for example, Case C-431/92 *Commission v Germany* [1995] ECR I-2189 ('Grosskrotzenburg'), para 19-22.
- <sup>8</sup> Case 77/69 *Commission v Belgium* [1970] ECR 237.
- <sup>9</sup> Case 77/69, paragraph 15.
- <sup>10</sup> See for example Case C-56/90 *Commission v UK* [1993] I-4109, paragraph 46 and Case C-198/97 *Commission v Germany*, judgment of 8 June 1999.
- <sup>11</sup> Case C-265/95 *Commission v France* [1997] ECR I-6959.
- <sup>12</sup> Case C-265/95, paragraphs 30-31.
- <sup>13</sup> Despite the fact that the Dutch have great difficulties in correctly implementing this directive (Council Directive 91/676/EEC of 12 December 1991 concerning the protection of waters against pollution by nitrates from agricultural sources, OJ 1991 L375: 1), the Commission has issued its reasoned opinion (within the meaning of Article 226 EC) on 3 August 1999 and has subsequently brought the matter before the Court. On these implementation problems see, e.g., *TK, 1999-2000, 26 840, no. 3*.
- <sup>14</sup> Cf. paragraph 15.1.
- <sup>15</sup> For the opposite idea ('from administrative to judicial supervision'), see paragraph 17.3. For the idea to transfer jurisdiction to the CFI, see paragraph 16.5.

- <sup>16</sup> See Article 104(10) EC. Actions under Article 227 EC (brought by another Member State) are excluded as well.
- <sup>17</sup> See the data in the Court's 1999 Report, p. 29.
- <sup>18</sup> See Articles 88(2), 95(9) and 298.
- <sup>19</sup> Case 26/62 *Van Gend & Loos* [1963] ECR 1. The other way round, the fact that a EC provision has direct effect - and therefore can be invoked by individuals before the national court - does not mean that the Commission cannot initiate proceedings under Article 226 EC. See, for example, Case 168/85 *Commission v Italy* [1986] ECR 2945. See also the introduction to this paragraph.
- <sup>20</sup> If not, in both cases the Commission, with the assent of the Council, may impose certain sanctions on the Member State concerned (suspend payments; authorise other Member States to take measures in order to correct the effects of the infringement). See Article 88(3) of the ECSC Treaty.
- <sup>21</sup> For this reason (Member States usually do not contest the Commission's allegations) most Article 226 judgments are delivered by chambers of the Court, composed of only three or five judges. From the academic point of view, these judgments are often of very little interest.
- <sup>22</sup> Due Report, p. 25.
- <sup>23</sup> Because copying the ECSC regime on sanctions (Article 88 (3) ECSC) would mean that the *Commission* – and not the Court – would be given the power to impose sanctions on Member States for not complying with the initial judgment of the Court.
- <sup>24</sup> Only the procedures of Article 35(7) TEU more or less resemble the infringement procedures of Articles 226 and 227 EC. According to this PJCC Treaty provision, the Court has jurisdiction to rule on disputes between Member States regarding the interpretation or the application of third pillar acts (listed in Article 34(2) TEU) whenever such dispute cannot be settled by the Council within six months. The Court also has jurisdiction to rule on disputes between Member States and the Commission but only regarding the interpretation or the application of PJCC conventions (established under Article 34(2)(d) TEU).
- <sup>25</sup> Cf. paragraph 15.3.1.
- <sup>26</sup> Common Position 1999/624/CFSP (*OJ* 1999 L 245: 53).
- <sup>27</sup> It must be added that CFSP decisions on economic sanctions, not involving export of weapons, are usually implemented by Community law instruments (Regulations adopted pursuant to Article 301 EC). A Member State acting in breach of such Regulations can therefore be brought before the Court under the normal procedure of Article 226 EC. Regarding the Indonesia example, see Regulation 2158/1999 (*OJ* 1999 L 265: 1; based on Article 301 EC).
- <sup>28</sup> See paragraph 14.1.
- <sup>29</sup> Case 26/62 *Van Gend & Loos* [1963] ECR 1, at 25.
- <sup>30</sup> See Article 3 of Council Decision 88/591/ECSC, EEC, Euratom establishing a Court of First Instance of the European Communities (*OJ* 1988 L 319: 1, as amended). See also the Rules of Procedure of the Court of First Instance (*OJ* 1991 L 136: 1, as amended).

- <sup>31</sup> In its 1999 Report the Court does not express a clear view on this matter. Regarding direct actions, the Court states that the possibility cannot be ruled out that it may become necessary, if the volume of cases continues to grow, to review the basis on which jurisdiction is allocated between the two Community courts and to transfer further heads of jurisdiction to the CFI ('The future of the judicial system of the European Union': 19-20).
- <sup>237</sup> See point 2 ('Filtering of appeals') of the contribution of the two Courts to the IGC 2000. Note that this part does not relate to the filtering of preliminary references under Article 234 EC; it merely deals with the question whether or not a system for filtering appeals against judgments of the CFI should be introduced.

## 17 ADMINISTRATIVE SUPERVISION: SERIOUS BREACHES OF FUNDAMENTAL EU PRINCIPLES BY MEMBER STATES

The Amsterdam Treaty solemnly proclaimed that “the Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States” (Article 6(1) TEU). Although this lofty statement may not come as a complete surprise – it could be considered as a mere reiteration of earlier declarations and case law – the insertion of this new EU provision is of such great practical importance since it is linked to a number of institutional provisions.

First, respect for the Union’s most fundamental principles constitutes the main condition for any accession. According to Article 49 TEU only a European State which respects the principles set out in Article 6(1) TEU may apply to become a member of the Union. The prospect of Eastern enlargement was one of the main reasons for inserting this new requirement. Although a similar condition for accession was already laid down by the Copenhagen European Council in 1993 (the stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities), the additional ‘value’ of Article 49 TEU is that it forms part and parcel of the Union’s primary law and therefore lays down legally binding norms. It should however be admitted that the ‘real’ value of Article 49 TEU depends to a very large extent on the interpretation given to this provision by the fifteen Member States: they decide whether an Eastern European country satisfies the substantive requirements of Article 6 TEU and thus whether or not this country will be admitted as a new member.

125

The second institutional provision is of interest *after* the actual accession of a new member: respect for the principles of Article 6(1) TEU should be secured within the framework of the supervisory mechanism of Article 7 TEU. In case a member breaches one or more of the fundamental Union principles, it may be confronted with certain *sanctions* which can be imposed by the Council of Ministers of the European Union. As this report focuses on the post-accession period, the procedure of Article 7 TEU will be analysed in some further detail (para. 17.1). Subsequently the impact of this new sanction mechanism on Member States is discussed (paragraph 17.2) and a few possible reforms, in particular regarding the role of the Court, are considered (paragraph 17.3).

### 17.1 BRIEF ANALYSIS OF THE SUPERVISORY MECHANISM

The procedure laid down in Article 7 TEU can be divided into three parts. During a first stage the Council should determine the *existence* of a ‘serious and persistent’ breach by a Member State of one or more of the fundamental principles mentioned

in Article 6 TEU (cited above). The Council should meet in the composition of the Heads of State or Government and they should act by unanimity. Logically, the vote of the representative of the government of the Member State concerned (not necessarily one of the CEECs but also – for example – Austria) is not taken into account.<sup>1</sup> The Council should act on a proposal by one third of the Member States or by the Commission, after it has invited the Member State concerned to submit its observations. Although the ‘co-operation’ of the Commission is thus not required, the Council cannot act unilaterally: it is not without significance that the Council should obtain the *assent* of the European Parliament prior to the adoption of the decision determining that a serious and persistent breach exists.

Where a determination on the existence of a serious breach has been made, the Council shall, at a second stage, decide on the *sanctions* to be imposed. The Council may (not *must*) decide to “suspend certain of the rights deriving from the application of this [EU] Treaty” to the Member State in question, including the voting rights of that Member State in the Council.<sup>2</sup> This decision on the imposition of sanctions is to be taken by a qualified majority, again without taking into account the (weighted) votes of the Member State concerned.<sup>3</sup>

Although the types of sanctions are rather vaguely described – apart from the suspension of voting rights – presumably the drafters of the Amsterdam Treaty had the suspension of financial advantages in mind, notably the suspension (or withdrawal) of the attractive sums of money from the various structural funds. In our view, Article 7 sanctions cannot take the extreme form of suspension of EU membership as such. Such a complete exclusion cannot be considered to be a suspension of a right “deriving from the application of the Treaty”. Moreover, an ‘exit provision’ should explicitly be introduced by way of Treaty amendment, as the possibility to ‘throw a member out of the Union’ should have a very clear legal base.

Finally, at a third stage, the Council may decide to *vary or revoke* the measures it has taken on the suspension of rights in order to respond to subsequent changes.

For the sake of completeness, it is noted that the sanction mechanism described above, should be distinguished from two other human rights issues recently under debate in the Union. The first is the idea of accession of the European Communities (or the European Union) to the European Convention on the protection of Human Rights (ECHR). This idea does not seem very relevant to the issue discussed here, namely the protection of fundamental rights at the *national* level. This accession would primarily affect the Union’s institutions; their acts and measures would have to be in conformity with the ECHR and, if not, the Strasbourg supervisory mechanism may be put in motion against them.<sup>4</sup> Thus, even if the EC would have the competence to accede to the Human Rights Convention,<sup>5</sup> breaches of human rights *by national authorities* would still have to be brought to the at-

tention of the Strasbourg Court under the 'ordinary' complaint procedure of Article 34 ECHR.<sup>6</sup>

More recently, the Cologne European Council came up with the idea of drawing up a 'Charter of Fundamental Rights of the European Union'.<sup>7</sup> Although both the contents and the legal status of this document are still far from clear,<sup>8</sup> it would seem that the Charter – like the EC/EU accession to the ECHR – would primarily affect the acts of the U institutions (and, possibly, acts and measures of other EC/EU organs, such as Europol).<sup>9</sup> Massive human rights violations by national authorities – such as, presumably, the discrimination of the Roma population in many CEECS – would still be dealt with by the 'supreme' Council under Articles 6 and 7 TEU, as the Charter would only apply to human rights violations committed by central EC/EU entities.

If, however, the personal scope of application of the EU Charter would also cover human rights violations committed by national entities – an option which in our view is to be preferred –<sup>10</sup> then there is a risk that the Charter will overlap with the Article 7 TEU mechanism. Should human rights violations by national authorities, such as police forces, be dealt with under the Charter (including its enforcement mechanism) or by the Council under Article 6(1) in conjunction with Article 7 TEU? In order to come to a meaningful delineation, it could however be stated in the EU Charter that it merely covers *ad hoc* violations of human rights. The imposition of sanctions by the Council under Article 7 TEU would then still have a useful place in the EU system of protection of human rights, namely as an instrument to address massive and more structural human rights violations.

## 17.2 THE IMPACT ON THE (NEW) MEMBER STATES

From this brief analysis it clearly follows that, at present, the *Council* (in its 'highest' composition) plays a predominant role in case a Member State is accused of seriously and persistently breaching one or several of the most fundamental EU principles. The first of the various decisions – regarding the determination of a serious breach – must be taken by 'all but one'. It must therefore be seriously questioned whether this system of sanctions will function effectively in an enlarged Union. Moreover, Article 6 TEU formulates the principles in a rather general and vague way. Does, for example, the treatment of children in Romania or the treatment of the Russian minority in Estonia amount to a 'serious and persistent breach' of the principle of respect for human rights? Likewise, the treatment of the Roma Minority of a number of the candidates is worrisome. But will the Council really be prepared to impose sanctions on countries like Bulgaria or Romania? Because of this political context, the actual impact of the Article 6/7 mechanism is very hard to predict.

Another factor complicating the assessment is that the (vast majority of the) Member States may decide to impose 'informal' sanctions on the renegade, thus escaping the official route which was introduced by the Amsterdam Treaty. In this respect it should be said that the recent Austria sanctions have created a bad precedent. By opting for the 'extra-EU' route, fourteen Member States circumvented the procedural guarantees of Article 7 TEU. In particular, the European Parliament was not asked to give its assent, nor was the Austrian government invited "to submit its observations". Moreover, by doing it the unofficial way, the central criterion of Article 7 was not given serious attention: does government participation of a democratically elected political party amount to a 'serious and persistent' breach of one of the fundamental EU principles of Article 6 TEU?

### 17.3 POSSIBLE REFORMS: FROM ADMINISTRATIVE TO JUDICIAL SUPERVISION?

Given the strong political influence in cases of breaches of fundamental EU principles by Member States, it is important to consider whether there are ways to improve the supervisory mechanism.

One way to improve the application of the procedure of Article 7 EU could be to involve the *Court* in a much more intensive way. The current system of administrative supervision would then change into a 'traditional' system of judicial review. We however believe that it is still too early to propose such a fundamental change. Practice must first of all teach us how the Council in its highest composition will actually deal with serious breaches of fundamental rights and principles, both by the older and the new members.

Another important argument for maintaining the status quo for the time being, is that the Court of Justice can play an important role in the protection of fundamental rights anyway. As is well known, the Court has always played this crucial role, despite the absence in the Community legal order of a written list of specific human rights (such as the freedom of expression and the right to family life). It did so by ruling that fundamental rights form an integral part of the general principles of Community law whose observance the Court must ensure. In order to identify the content of these fundamental rights, the Court draws 'inspiration' from the constitutional traditions common to the Member States and from international human rights treaties, in particular the 1950 European Convention on Human Rights. As a result, the Court will not accept Community measures (such as Regulations and Decisions) which are incompatible with the human rights thus recognised and guaranteed.<sup>11</sup> The Maastricht Treaty codified this body of case law in Article F(2) TEU (now Article 6(2) TEU: "The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as

they result from the constitutional traditions common to the Member States, as general principles of Community law". The Amsterdam Treaty added that the Court has jurisdiction in relation to Article 6(2) TEU.<sup>12</sup>

With regard to *national* legislation, however, the Court is more reluctant. It will only rule on the compatibility of that legislation with fundamental rights-- as unwritten principles of Community law -- where national legislation "falls within the field of application of Community law". This will be the case where national law was specifically designed to implement or secure compliance with rules of Community law.<sup>13</sup> Where national legislation lies outside the scope of Community law, the Court will rule that it has no jurisdiction to assess the compatibility of that legislation with fundamental rights. Indeed, in several cases the Court has held that for this reason it had no jurisdiction.<sup>14</sup>

On the basis of this analysis we conclude that turning the Article 7 mechanism into a form of judicial supervision would not make much of a difference. Moreover, the Court would have to decide on very sensitive political issues since Article 6 deals with serious and persistent breaches and not with *ad hoc* violations of fundamental rights.

## NOTES

- <sup>1</sup> Article 7(1) and (4) TEU. On the infamous Austria case, see further paragraph 17.2.
- <sup>2</sup> Article 7(2) TEU. See also Article 309(1) EC, stating that the decision to suspend the voting rights of a Member State includes the suspension of voting rights with regard to the EC Treaty.
- <sup>3</sup> Article 7(2) and (4) TEU. A qualified majority is therefore defined as the same proportion of the weighted votes of the other members of the Council as laid down in Article 205(2) TEC (that is, some 70 per cent).
- <sup>4</sup> Complaints relating to acts of the EC institutions were declared inadmissible by the (former) Strasbourg Commission as the Community was (and is) no party to the Convention. See, for example, the Commission's decision of 19 January 1989, *Dufay v European Communities*, No. 8030/77, DR 13, 231 and decision of 9 February 1990, *M and Co v Germany*, No. 13258/87, DR 64, 138.
- <sup>5</sup> Cf. Opinion 2/94 [1996] ECR I-1759, where the Court ruled that not even Article 308 EC provides an adequate legal base for accession. Regarding accession by the *Union*, the additional problem is whether or not this 'entity' enjoys international legal personality. Cf., e.g., N. Blokker and T. Heukels (1998) 'The European Union: Historical Origins and Institutional Challenges', p. 9, 25 in Heukels, Blokker, Brus (eds.) *The European Union after Amsterdam*, Kluwer.
- <sup>6</sup> Article 34 of the European Convention states that the Strasbourg Court "may receive petitions from any person, NGO or group of individuals claiming to be victim of a violation *by one of the High Contracting Parties* of the rights set forth in this Convention" (emphasis added).
- <sup>7</sup> See the Conclusions of the European Council in Cologne (3 and 4 June 1999), in particular Annex IV.
- <sup>8</sup> Consideration of whether, and if so how, the Charter might be integrated into the Treaties will be left until after the whole process of drafting is complete. The Tampere Summit (15 and 16 October 1999) merely decided on the composition of the body to elaborate on a draft Charter (see the Annex to the Tampere Conclusions).
- <sup>9</sup> This can be deduced, inter alia, from the European Council's statement that "protection of fundamental rights is a founding principle *of the Union* and an indispensable prerequisite for *her* legitimacy" (Annex IV of the conclusions of the Cologne European Council; emphasis added).
- <sup>10</sup> See also D. Curtin (2000) 'The "EU Human Rights Charter" and the Union Legal Order: The "Bans" before the Marriage?', in D. O'Keefe (ed.) *Liber Amicorum Gordon Slynn*.
- <sup>11</sup> See, e.g., Case C-260/89 *ERT* [1991] I-2925 and Opinion 2/94 [1996] ECR I-1759. For a general overview of the Court's case law, see, e.g., G.C. Rodriguez Iglesias (1995) 'The Protection of Fundamental Rights in the Case Law of the Court of Justice of the European Communities', CJEL 169.

- <sup>12</sup> See Article 46(c) TEU. See also Case C-17/98 *Emesa Sugar*, decision of 4 February 2000 (nyr), at paragraph 9.
- <sup>13</sup> See, in particular, Case C-144/95 *Maurin* [1996] ECR I-2909, paragraph 12. In general: D. Curtin, 'Constitutionalism in the European Community. The Right to Fair Procedures in Administrative Law', *Liber Amicorum O'Reilly*, p. 293.
- <sup>14</sup> See, for example, Case C-299/95 *Kremzow v Austrian State* [1997] ECR I-2629 and Case C-309/96 *Anibaldi* [1997] ECR I-7493.



## 18 GENERAL CONCLUSIONS AND RECOMMENDATIONS

Enlargement to the East will impose an enormous strain on the traditional way to which the European Union has become accustomed working. One rather obvious, but limited, way to secure adequate adaptation is to ensure in the current IGC, that the EU institutions and some of its procedures are adapted in order to meet the heady numerical challenge posed by significant expansion to the East.

In our view the most profound problem is the fact that the legal and administrative systems of the countries in question are simply not used to the challenges that they will be expected to meet once the accession process is successfully completed. What will this reality mean for the hitherto sacrosanct principles of Community law and in particular for its extensive reliance on the legal and administrative systems of Member States? To what extent will this new phenomenon require change in the system of the EU itself? Surprisingly these key questions have received little in-depth examination and have barely been the subject of serious inquiry to date. At the same time the significance of the answers is not modest. In our view the response of the EU and of its legal and administrative systems to the coming challenges will constitute the litmus test for the nature and scope of the future evolution of the EU.

Already prior to enlargement certain trends can be signalled which provide key indications of the directions in which solutions and possible answers can be sought. One response is to *avoid* the entire incorporation issue as much as possible. If important parts of the Union's *acquis* are not declared applicable to the CEEC then there obviously can be no incorporation problem (and hence no application and enforcement problem).<sup>1</sup>

133

Many ideas are already in circulation which go in this direction, ranging from the development of a 'core *acquis*' for the internal market<sup>2</sup> to Giscard d'Estaing and Helmut Schmidt's suggestion that the 'Euro-countries' should intensify their co-operation to such an extent that they create their own institutions in order to take the integration process substantially further.<sup>3</sup>

In addition, the flexibility clauses of the Amsterdam Treaty provide a means of avoiding incorporation problems after accession. The current ideas to relax the conditions of Article 11 TEC would surely form a partial solution in this regard and must be considered as a likely outcome of the current intergovernmental process. Yet, as we have seen, this 'solution' also has serious disadvantages, both of an economic and of a legal nature.<sup>4</sup> Moreover, even if closer co-operation is possible under the (less restrictive) conditions laid down by the Treaties, the CEECS may nevertheless be bound by secondary legal instruments if the majority of Member States decide to outvote the minority. Regarding the core areas falling within the EC Treaty this alternative route seems to be irrelevant in any event, since these areas will continue to be excluded from the closer co-operation process.<sup>5</sup>

Despite the existence of a range of options which can be made attractive in a colourful 'flexibility' kaleidoscope<sup>6</sup> we proceed on the assumption that important parts of the existing and new *acquis* will acquire legal force for the new Member States and that all aspects of the incorporation process will become relevant in those circumstances. This report has sought to highlight the fact that for its incorporation into national legal orders, EC/EU law has always heavily relied upon the quality, capacities and willingness of national entities, both administrative and judicial.<sup>7</sup>

Even in those areas where considerable powers of enforcement have been imposed on a central institution (for example, the Commission) the trend is not towards enhancement of those centralised powers but rather of further and at times rather radical *decentralisation* of those very powers, especially in the light of enlargement. The example of the recent White paper of the Commission in the field of competition policy speaks volumes in this respect. Moreover it indicates quite clearly that such far-reaching decentralisation is not to be understood as constituting part of what will ultimately be a hierarchical relationship (in this instance with the Commission) but rather of creating and reinforcing horizontal networks of information and analysis among *national enforcement authorities*.<sup>8</sup>

The fact that there has been over the course of the past decade or two a considerable increase in the number of Community Agencies which operate in specific policy-making areas does not indicate in any sense a trend away from decentralisation of general enforcement and application tasks. Rather the latter phenomenon can as well be categorised in 'partnership' terms with national authorities and other national actors. Moreover it must at all times be recalled that within the scope of *Community* powers at any rate the remit of such agencies is very discrete. In other words, the functions of such Agencies are either technical in nature or informational and they do not enjoy independent decision-making powers which challenge the institutional balance between the various EU institutions.<sup>9</sup>

At the same time, some qualitative differences may be discerned with regard to the situation in non-EC policy-making areas and in particular with regard to police co-operation and judicial co-operation in criminal matters. In these areas a somewhat different trend seems to give more decision-making powers to 'organs' in this context. Europol is a rather far-reaching and obvious example; other examples fall more within the normal EC model of collecting information and 'networking' (Eurodac and Eurojust, for example). In any event it is clear that there is more discretion in these areas for the EU to prefer a more centralised mode of co-operation. At the same time the transformations in the executive sphere "have not had as a consequence a shift from decentralisation to centralisation, but rather have determined the emergence of networks aggregating domestic administrations, national experts, private bodies and supranational administrations in order to achieve specific objectives".<sup>10</sup>

As it is likely that this state of affairs will, *grosso modo*, still exist in a Union of some 25 members, the EU institutions can probably only play a secondary role. Co-operation, backing up, monitoring are the catchwords in this regard; primary responsibility for the transposition, application and supervision of EU law will however remain in the hands of the national state powers.<sup>11</sup> For example, shutting down of the Bulgarian nuclear power plants cannot be unilaterally imposed by the Commission; a review of child care institutions will remain the primary responsibility of Romanian administrative organs (health inspection services); and the actual treatment of the Russian minority in the Baltic countries will very much depend on the quality and willingness of national administrative and judicial organs.

From the perspective of the Union certain choices in terms of legislative or other techniques can assist the process of assisting the legislators and administrators of the new members in better incorporation of EU law as well as developing the requisite 'hardware' that will facilitate that process. Of particular importance to these national authorities is the question whether the Union decides to adopt non-binding rules or 'hard' law.<sup>12</sup> We highlighted the fact that within the core of the internal market legislative techniques are available which do enable some degree of diversity to be maintained in individual Member States (in particular the techniques of optional and minimum harmonisation).<sup>13</sup>

With regard to the newer areas of EU policy making, which embrace extremely sensitive areas of national sovereignty and which are often highly culturally specific (for example, criminal law, police law), we encourage the EU to support a process of developing common principles within certain areas of the law. These principles could function as role models for the new CEECs when it comes to adapting their relatively new legal systems to the strains and demands of full EU membership.<sup>14</sup>

135

Much attention has been devoted to possible reforms to the EU's judicial system from the perspective of enlargement. The general conclusion is that one should be reluctant in demolishing the work that has been done in the last fifty years or so. The coming enlargement could even be considered as an important reason for further improving the system, precisely in the interest of the millions of new 'citizens of the Union'. Hence, it was emphasised that the issue of the workload of the Court should be balanced against the interests of these individuals (and, to a somewhat lesser extent, the CEEC judges).<sup>15</sup>

More specifically, we discussed and expressed our views on several judicial actions which are of particular relevance to the national actors. Regarding judicial supervision exercised by national courts, both the Court of Justice and the Community legislator could make a contribution to further improving access to justice at the national level, as well as improving the effectiveness of national legal proceedings.<sup>16</sup> Expectations should, however, not be too high since the principle of nation-

al procedural autonomy will continue to occupy a central place. This means that to a very large extent the new members will be free to build and renovate their judicial buildings.<sup>17</sup> The more radical solution of centralisation of judicial review could remove this Member States' freedom, but any genuine centralisation is not only an unrealistic option but would also increase the workload of the two EU Courts to an unbearable degree.<sup>18</sup>

Considerable attention has, therefore, been given to the three preliminary reference mechanisms which directly link the national courts to the Court of Justice. In line with our general idea on being reluctant in destroying what has been reached so far, it was argued that only a soft variant of 'filtering' could be considered: national courts could be encouraged to become more reluctant in asking the Court for help.<sup>19</sup> Other more radical ideas, such as the limitation of national courts empowered to refer, 'hardcore' filtering by the Court, deletion of the written phase, and also conferral of jurisdiction on the CFI, should in principle be rejected.<sup>20</sup> It could even be argued that there is some room for further improvements, in particular by amending the two special preliminary reference procedures. In this respect it was emphasised that there are good reasons for

- 1 making lower courts competent to refer questions on asylum matters to Luxembourg,
- 2 giving the Court compulsory jurisdiction regarding preliminary rulings on criminal matters, and
- 3 introducing in the same area of Union policy the rule that supreme courts are bound to refer in case they consider a judgment of the Court on the interpretation or validity of PJCC law necessary.<sup>21</sup>

In addition, the Court could become less strict in case national courts do not provide sufficient background information, earlier referred to as the process of removing the existing filters (or 'de-filtering').<sup>22</sup>

The resulting problems regarding the Court's workload should be solved, primarily, in the organisational sphere: more financial resources for one of the most important judicial organs in Europe; more personnel (in particular for the translation of judgments in all official EU languages); more judgments delivered by chambers of the Court; and also, for example, more power for the Court to amend its own Rules of Procedure.

Although we fully realise that an emphasis on the interests of national (CEC) courts and private (and public) litigants is not very popular at the moment, this is indeed the best path to follow, as will become clear in the future. The alternative – strict conditions regarding admissibility of preliminary references, or even no possibility at all – will seriously endanger the uniform interpretation and application of EU law in a Union which has got used to the idea that it consists of a very large and diverse group of members.

Regarding direct actions, the impact of the so-called infringement procedure on the new members was emphasised.<sup>23</sup> In the light of this assessment it was argued that it is quite legitimate to question whether the Commission should not be given a right to bring Member States before the Court for breaches of CFSP and/or PJCC obligations. Moreover, unlike the preliminary reference procedure, it seems a good idea to transfer jurisdiction under Article 226 EC to the CFI. Of course, a right of appeal for the Commission and the Member State concerned should be introduced simultaneously.<sup>24</sup>

Regarding the potentially sensational sanction mechanism for serious and persistent breaches of fundamental EU principles, we argued that first time must tell how this procedure will operate in practice. Only at a later stage a change from administrative to judicial supervision might be envisaged. Remaining the status quo in this way would mean that the Court of Justice continues to exercise its supervisory functions in relation to ad hoc violations of fundamental (human) rights – violations on a larger scale and of a more structural nature remain the primary responsibility of the ‘highest’ Council.<sup>25</sup>

All in all, the role of the Court in the construction of the evolving EU legal order is a pivotal one. Its fundamental constitutional task of fleshing out the appropriate balance between the requirements of unity and the reality of ever-increasing diversity is one which must be taken seriously and which it must be given a chance to perform.

The overall conclusion is that there are no simple solutions to the expected problems regarding the various aspects of the process of incorporating EU law into the national legal orders of the many newcomers. This is essentially because there exists a very serious tension between, on the one hand, the ‘high’ political wish to enlarge the Union in an unprecedented way, and, on the other hand, ‘low’ political issues such as the actual application, enforcement and supervision of EU law in Eastern Europe. This does not mean however that in the struggle to find the appropriate balance between unity and diversity the unique integrative force of the EU as a highly sophisticated international organisation must be changed beyond recognition.

## NOTES

- <sup>1</sup> Cf. Part A, in particular paragraph 4.
- <sup>2</sup> Cf. J Jacques Pelkmans, Daniel Gros, and Jorge Núñez Ferrer, *Long-run Economic Aspects of the European Union's Eastern Enlargement*, WRR Working Documents no. W109, The Hague.
- <sup>3</sup> “Euro-landen’ moeten voortouw nemen in Europa”, *NRC*, 20 April 2000.
- <sup>4</sup> Cf. paragraph 4.2.
- <sup>5</sup> Cf. paragraphs 4.2 and 4.4.
- <sup>6</sup> Cf. Eric Philippart and Monika Sie Dhian Ho, *Peddalling against the wind; Strategies to Strengthen the EU's Capacity to Act in the Context of Enlargement*, WRR Working Documents no. W115, The Hague.
- <sup>7</sup> Cf., in particular, paragraphs 9, 12 and 13.1.
- <sup>8</sup> Paragraphs 9 and 10.
- <sup>9</sup> Discussed in relation to the Meroni case, see paragraph 10.
- <sup>10</sup> See, Chiti, *op.cit.*, at p.342.
- <sup>11</sup> Cf., in particular, paragraphs 7.2, 11 and 14.3.
- <sup>12</sup> Cf. paragraph 7.1 (regarding the legal instruments of the three EU pillars).
- <sup>13</sup> Cf. paragraph 4.4.
- <sup>14</sup> Cf. paragraph 7.1.1 (regarding new areas of Community policy) and paragraph 7.1.2 (regarding the Union's policy in criminal matters).
- <sup>15</sup> Cf., in particular, paragraphs 12 and 15.6.
- <sup>16</sup> Cf. paragraph 13.3.
- <sup>17</sup> Cf. paragraphs 13.1 and 13.2.
- <sup>18</sup> Cf., in particular, paragraphs 14.3 -14.5.
- <sup>19</sup> Cf. paragraph 15.6.
- <sup>20</sup> Cf., respectively, paragraphs 15.3.1, 15.3.2 and 15.3.3, and 15.5.
- <sup>21</sup> Cf. paragraph 15.4.1.
- <sup>22</sup> Cf. paragraph 15.4.2.
- <sup>23</sup> Cf. paragraph 16.2.
- <sup>24</sup> Cf. paragraphs 16.4.2 and 16.5.
- <sup>25</sup> Cf. paragraph 17.3.

## LIST OF ABBREVIATIONS

Bull. EC	Bulletin of the European Communities
CEEC	Central and Eastern European Country
CFI	Court of First Instance of the European Communities
CFSP	Common Foreign and Security Policy
CJEL	Columbia Journal of European Law
CMLR	Common Market Law Reports
CML Rev.	Common Market Law Review
EC	European Community
ECHR	European Convention on the Protection of Human Rights and Fundamental Freedoms
ECR	European Court Reports
ECSC	European Coal and Steel Community
EEC	European Economic Community
EFTA	European Free Trade Association
EL Rev.	European Law Review
EMU	Economic and Monetary Union
ESF	European Social Fund
Euratom	European Atomic Energy Community
EuzW	Europäische Zeitschrift für Wirtschaftsrecht
EU	European Union
EuGRZ	Europäische Grundrechte Zeitschrift
EuR	Europarecht
Europol	European Police Office
IGC	Intergovernmental Conference
JCMS	Journal of Common Market Studies
JHA	Justice and Home Affairs
LIEI	Legal Issues of European Integration
LJIL	Leiden Journal of International Law
NGO	Non-Governmental Organization
NJB	Nederlands Juristenblad
NTER	Nederlands Tijdschrift voor Europees Recht (Netherlands Journal of European Law)
OJ	Official Journal of the European Communities
PJCC	Police and Judicial Cooperation in Criminal Matters
RMCUE	Revue du Marché Commun et de l'Union européenne
RTDE	Revue Trimestrielle de Droit Européen
SEW	Sociaal-Economische Wetgeving
TEU	Treaty on European Union
TK	Tweede Kamer (Lower House, the Netherlands)
UK	United Kingdom

WRR	Wetenschappelijke Raad voor het Regeringsbeleid (Netherlands Scientific Council for Government Policy)
WTO	World Trade Organization
YEL	Yearbook of European Law