e - law

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MESSAGE FROM THE CHAIRMAN

It's once again time for the annual UKELA membership renewal which you should receive by post shortly. It really helps us if you can return your renewal form and subscription promptly which saves the cost of chasing you up.

There is plenty on offer for members in 2005 with the conference in Edinburgh on June 17th – 19th likely to be a highlight. We have also organised two training sessions with the Association of Personal Injury Lawyers – details elsewhere in e-law. The moot final will be held in the spring and we'd welcome support from members who can come and encourage our younger members.

On that theme members can help with some vital work promoting UKELA and also helping students gain a real insight into environmental law. We are preparing a Powerpoint presentation which we would like you to take to your old universities, colleges and law schools. This may be of interest, not just to law students, but also those studying geography or environmental disciplines. We are happy to help with this as it's an excellent way of encouraging a new generation of environmental lawyers or promoting interest for those who want to an environmental career. Please contact the Executive Officer, Vicki Elcoate (details at the end of e-law) if you are interested in this scheme.

The working parties and regional groups need your support and interest in 2005. Some have had very successful years and made a real influence on the environmental law agenda. Others suffer from a lack of volunteer input and would welcome your help. Details of all the groups are on the website www.ukela.org.

On the environmental law agenda for 2005 are some potentially exciting changes in access in environmental justice. You can read more about the recent conference on the key issues of costs, civil penalties, information and an environmental tribunal later in e-law. The environmental litigation working party is leading for UKELA on access to justice and would welcome your support. Please contact the convenors whose details are on the website.

We are determined that 2005 will be the year UKELA gets its e-library on environmental law under way. The necessary funding is now all that is needed. We have already held talks with senior officials in various Government departments and will pursue various funding mechanisms.

UKELA also plans to continue working towards an independent environment agency in Northern Ireland. We are involved, with other NGOs in the province, in providing briefings and enabling discussion on a comprehensive range of issues relating to environmental governance. UKELA's new Northern Ireland working party demonstrates our commitment to this process. I have visited Northern Ireland to discuss the formation of an independent environment agency and UKELA are assisting in the organisation of a 'Chatham House' roundtable discussion between various senior stakeholders.

You will also shortly receive the election notice for places on the UKELA Council. Please do consider putting yourself forward. If you want to discuss what is required please do not hesitate to contact me.

Finally, may I take the opportunity to wish you a Happy Christmas and New Year and, hopefully, a good break over the festive season.

Andrew Wiseman
Trowers & Hamlins
UKELA chair

INDEPENDENT ENVIRONMENT AGENCY REPORT FINDINGS WELCOMED

UKELA has welcomed the findings of a consultation exercise in Northern Ireland, which has come out overwhelmingly in support of establishing an independent environment agency.

In research published last May, UKELA found that environmental protection in Northern Ireland required urgent reform and recommended a package of reforms to address a legacy of environmental failings. The UK already faces costly fines through the European courts for failing to enforce environmental legislation.

A coalition of voluntary organisations has been consulting on what form of regulation is needed in Northern Ireland and the majority of respondents are calling for an independent regulator to be established.

"The Government must now listen to people's concerns in Northern Ireland", said Andrew Wiseman, chair of UKELA. "An independent body would have the teeth and resources that are currently lacking. It would also act as an environmental champion, raising awareness about why raising environmental standards is good for business and the public. UKELA believes this should be a tailor-made body to fit the special circumstances in Northern Ireland. We urge the Government to make a commitment to look at this issue as a matter of urgency."

NORTHERN IRELAND – WORKING PARTY

UKELA has set up a new working party – on Northern Ireland environmental law and governance. Its remit is to provide advice to UKELA on environmental law issues relevant to Northern Ireland with a particular focus on environmental governance.

Any member of UKELA with expertise in Northern Ireland is welcome to join. There is no requirement to attend meetings and most communications are electronic.

Its 2004 – 2005 priorities are:

1. Advising UKELA on its engagement in the ongoing review of environmental governance in Northern Ireland and working to secure an independent regulatory body
2. Discussing and then advising on what form an independent body should take and what its responsibilities should be
3. Helping UKELA work with other NGOs who share UKELA's objectives in Northern Ireland
4. Providing expert speakers when possible for events
5. Monitoring the implementation of EC legislation in Northern Ireland and advising UKELA when to make representations about any shortfalls

The Northern Ireland group is a working party, not a regional group, as it does not plan to have regular meetings in Northern Ireland nor provide a social/networking forum. Instead it plans to focus on topical issues and seek to influence them in the context of UKELA's overall aims. Most exchanges will be by email, although all working party members will be invited to UKELA run events in Northern Ireland. Working party members are free to circulate material to other party members and provide updates, exchange information etc which may be of interest to the group. Working party members can make suggestions at any time about the work of the group and telephone meetings can be convened when necessary.

The convenor of the working party is Dr Brian Jack, School of Law, Queen's University of Belfast, Northern Ireland, BT7 1NN, email b.jack@qub.ac.uk.

If you are interested in joining please contact him. More information on the website, www.ukela.org.

ACCESS TO ENVIRONMENTAL JUSTICE REFORMS ON THE WAY

Environment Minister Elliot Morley MP told a conference on November 30th that he was committed to improve access to environmental justice and set out his priority list of reforms. These will be discussed at the next meeting of the inter-departmental ministerial group on the environment, which Mr Morley chairs.

Mr Morley said: "tackling environmental injustice – which is a real and substantive problem in the UK is a key theme of the Sustainable Development Strategy".

The conference was also told that the EU would ratify the Aarhus Convention, on access to environmental justice, by the end of the month and the UK would ratify it in the spring.

Several UKELA members at the conference, which was organised by Defra, the Environmental Law Foundation and the Law Society, made contributions on the issues of costs, provision of information, the environmental tribunal and civil penalties. UKELA's position statement on costs is set out below – disappointingly neither Mr Morley nor Harriet Harman, the Solicitor-General, took up the costs challenge. UKELA's proposal to set up an e-library received overwhelming support and we now wait to see if the Government will back up its words with the funding needed to get the project off the ground.

Mr Morley said his reforms aimed to reduce the overall regulatory burden and provide more flexible options for dealing with environmental offences.

Civil Penalties

His main announcement – which he said could be the subject of an environmental justice bill after the general election – was bringing in civil penalties for some environmental breaches. He said: "even small lapses can lead to lasting environmental damage. This is not an easy option but would mean cases could be dealt with quickly without recourse to the courts and allow for resources to be focused on more serious offences". He said it meant polluters would face up to the consequences of their actions at an earlier stage.

Defra lawyer Jonathan Robinson provided more information on how civil penalties might work, saying they would be designed to provide a more proportionate response to regulatory breaches. The key questions to be looked at include:

- Why is the solution not higher fine?
- Is it right to decriminalise more serious breaches?
- Do higher penalties not merit the procedural safeguards of the criminal courts?

UKELA will now want to take a view on the proposals, particularly

- where the line will be drawn between civil and criminal breaches,
- should penalties be fixed or variable

- who should impose the penalties
- whether there should be some hypothecation of the penalty income towards environmental improvement
- human rights aspects
- directors' liability etc.

There is likely to be a consultation paper on these issues.

Specialist magistrates and judges

In the short term Mr Morley said that special and improved training on environmental matters could be provided and "ticketing" of suitably qualified magistrates and judges introduced. Harriet Harman, the Solicitor General, also said that some bench legal advisers could be trained as environmental specialists. The magistrates' "Costing the Earth" guidelines could be extended to include judges.

Community Involvement

Both Elliot Morley and Harriet Harman saw community involvement as crucial. It was suggested that there should be a community involvement statement presented in environmental cases, by community representatives. Harriet Harman said: "this makes environmental crime more than an issue of protection – it's also about people's quality of life". She suggested courts could issue environmental clear up orders, or environmental improvement orders (if the problem had already been cleared up) to the offender. The local community could identify what needed to be done.

Advice and information

Elliot Morley said that only by providing access to advice and information could the general public contribute to making policy. He wants to see the best practice in the provision of public information on environmental law so all can access it easily and cheaply – if not for free. UKELA's proposal for an e-library fits the bill.

Costs

UKELA told the conference that the current costs rule, whereby the loser generally pays the winner's costs, acts as a barrier to starting environmental judicial review cases brought in the public interest. The full position statement is set out below. Defra lawyer Tim Jewell said that there were good reasons for the loser pays principle – costs are there to indemnify the successful and it was a question of fairness. Having a pre-emptive cost order may prevent the court from coming to a particular decision and prevent justice. Richard Buxton, solicitor, told the conference that a disproportionate amount of time was spent on the costs issue and that the loser pays principle is a barrier to justice. The loser pays principle was designed to secure settlement but this was very unusual in environmental cases. Costs are high, unpredictable and there is potential liability for a second set of costs (which if, for example, a developer uses a big city firm could be enormous). There was now no insurance against this and only rarely Legal Aid.

Environmental Tribunal

UKELA had previously supported the recommendations of a report by Professor Richard Macrory and Michael Woods that an environmental tribunal should be set up. Ministers put this firmly on the back burner – Elliot Morley saying it would be considered in the longer term, whilst Harriet Harman was unsupportive of the idea (although because she generally appeared to be against tribunals, which is not

the government's official view). UKELA will continue to urge Ministers to carry out the additional research that is necessary in reaching a government view on this long-debated subject. This would look at the benefits and costs of setting up and running a tribunal. Ticketing of judges was not felt to amount to the same thing but could be seen by the government as enough. Lord Justice Carnwath, Senior President of Tribunals, said specialisation was vital and the government's view was that tribunals were user-friendly and accessible.

The UKELA position statement on costs

Can be found on the UKELA website at : http://www.ukela.org/press_releases/index.html

GARNER LECTURE 2004

THE CHALLENGE OF THE IMPLEMENTATION OF THE ENVIRONMENTAL *ACQUIS COMMUNAUTAIRE* IN THE NEW MEMBER STATES

George KREMLIS, Head of the Unit Legal Affairs and Governance, Directorate-General for the Environment, European Commission [*]

1. Introductory comments

The greatest ever enlargement of the European Union took place on 1 May 2004, with the accession of ten new Member States, extension of the EU territory by twenty-three per cent and a population increase of twenty per cent.

A strong emphasis has been put on compliance by the applicants for EU membership with the existing body of EC legislation (*acquis communautaire)*. Fulfilment of the so-called Copenhagen Criteria, adopted at the European Council in Copenhagen in 1993, was closely monitored and was the main condition for closure of enlargement negotiations, which took place again in Copenhagen nine years later, in December 2002. In fact, monitoring continued right until the actual accession date.

As a result, all new Member States are now presumed to have harmonized their legislation to EU standards and to comply with the membership obligations. Of course, as with previous EU enlargements, a number of unilateral transitional periods have been granted to the new Members (including in the field of environment), and the EU has also "benefited" from a number of multilateral transitional periods (e.g. for free movement of workers or the Schengen *acquis*); and it will take several years before the new countries meet the Maastricht criteria allowing them to participate in the Monetary Union. Another unique feature was the provision of pre-accession financing through ISPA, Phare and SAPARD; indeed around €3.5 billion are expected to be spent in the new Member States, Bulgaria and Romania on the environment during 2000-06. However, all in all, this biggest ever EU enlargement is also believed to be the most carefully prepared.

This paper will consider what will be the likely implementation of EC environmental legislation in the new Member States and, consequently, in the whole European Union, and what are the measures required to prevent erosion of EU environmental policy or the emergence of a "second-class" EU membership. The starting point focuses on the implementation record of the environmental *acquis*, in the EU-15. It will be

[*] *The opinions expressed in this paper are personal and do not engage the European Commission.*

followed by the description of a number of factors, specific to the new Member States, which may impact significantly on the degree of compliance with environmental obligations. Last but not least, possible avenues of tackling these challenges and to complete the task of smoothing phasing the ten new Members into the day-to-day business of the EU will be considered.

It is important to realize that the group of countries that has just acceded to the European Union is rather heterogeneous because of their historical background, their economic development, their administrative culture and capacity and the state of their environment. Notwithstanding the above, it is expected that the implementation challenge of environmental legislation will affect all new Members in a similar way.

2. The deficit of implementation of the environmental *acquis* in the old Member States

EU environmental policy and legislation has been gradually shaped since the 1970s and is traditionally competing "for a place in the sun" with the economic policies, in particular the single market ("growth and competitiveness versus environmental protection"). A number of important judgments of the European Court of Justice helped to identify the mutual position of the two streams of EU policy: the most recent examples include case C-30/01 *Commission v. United Kingdom* (judgment of 23 September 2003) on the application of single market legislation with environmental components for Gibraltar or the ongoing litigation in the case C-320/03 *Commission v. Austria* concerning environmentally driven restrictions of transport through the Alps.
The environmental *acquis*[1] amounts to 561 pieces of binding legislation,[2] out of which 201 Directives which the Member States are obliged to transpose, implement and enforce. Moreover, the field of environmental legislation is a dynamic one, since a few new pieces of legislation are adopted every year to review existing legislation or to cover new areas (e.g. the "Århus package" with the view to the "ratification" by the EU of the Aarhus Convention).

2.1. Specificity of EC environmental legislation

There are some peculiarities of environmental directives which distinguish them from other areas of Community law and which are important to understand the reasons for the implementation deficit in the Member States.
First of all, EC environmental directives are characterised by a number of secondary obligations (i.e. obligations that have to be complied with at a later stage after entry into force of a directive). Therefore, ensuring compliance is not just a case of transposition, as in some other areas. Instead it is necessary to ensure that action is also taken at a later stage, e.g. adoption of plans and programmes, designations or establishment of protected zones and areas, etc. Some of the secondary obligations also imply construction of infrastructure and major investment (urban wastewater treatment, drinking water, landfills, waste incineration plants etc.).

Secondly, compliance with EC environmental law is often related to the use of EC funding (namely LIFE, Structural Funds, Cohesion Fund, Trans-European Networks and the pre-accession funds) or to funding from European Investment Bank loans. When it is required to be informed of projects, the Commission carries out a scrutiny of the utilisation of EC funds to ensure that projects conform with Community policy and legislation, especially for environment, competition and public procurement – see Article 12 of Council Regulation (EC) No. 1260/99 laying down general provisions on Structural Funds,[3] Article 8.1 of

[1] Based mainly on Article 175 of the EC Treaty, but also on Articles 95 and 308 of the EC Treaty
[2] Data from CELEX database, 19 May 2004; including all amendments and technical adaptations
[3] OJ L 161, 26/06/1999, p. 1

Council Regulation (EC) No 1164/94 establishing a Cohesion Fund,[4] as amended, and for the TENs Article 7 on Compatibility of Council Regulation 2236/95 as amended)[5].

However, cohesion policy is implemented in a decentralised way, and therefore the Commission is only made aware of the largest projects (Cohesion Fund and Large European Regional Development Fund (ERDF) projects).

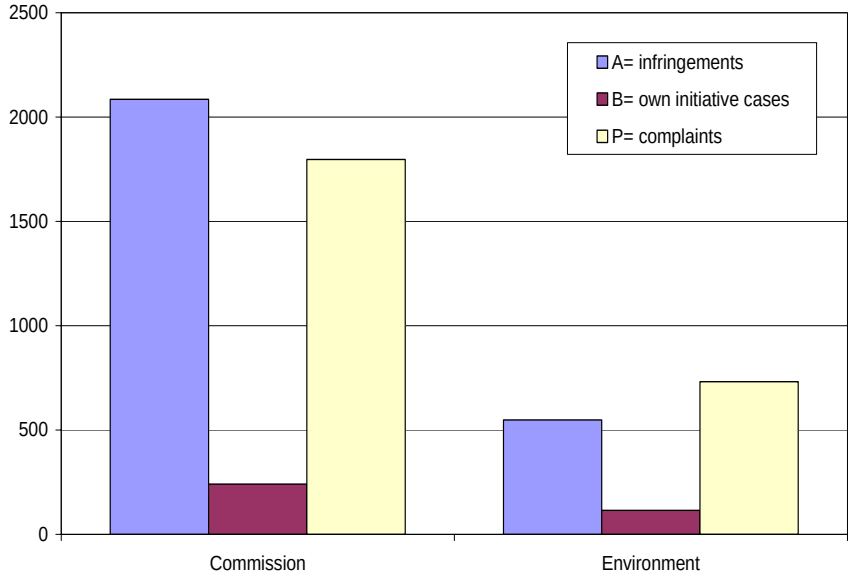
Finally, many pieces of EC environmental legislation have a strong public participation component (directives: EIA, SEA, Seveso, IPPC and Water framework). This will be further stressed by the forthcoming "ratification" (conclusion) by the EC of the Århus Convention (Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, adopted in Århus, Denmark, on 25 June 1998), whose three pillars require not only public access to environmental information and public participation in decision-making involving environmental matters, but also public access to justice in this domain. Directives corresponding to the three pillars have been adopted (for the two first) or are likely to be adopted (for the third pillar), to implement the Århus Convention within the European Union legal order.

2.2. The extent and types of problems in relation to the application of EC environmental legislation

It should be said at the outset that the environment is a "regular customer" as regards the infringement procedure established by Articles 226-228 of the EC Treaty, accounting for approximately 26 per cent of all infringement cases investigated by the Commission (see *Figure 1* below). Many of the infringement cases which reach the European Court of Justice concern the environment, including the first two judgments of the European Court of Justice under Article 228 of the EC Treaty whereby penalties were imposed on Member States (Case C-387/97 *Commission v. Greece*, judgment of 4 July 2000, and Case C-278/01 *Commission v. Spain*, judgment of 25 November 2003).[6,7] This is why more effective implementation and enforcement of Community legislation on the environment is one of the priorities of the Sixth Environmental Action Programme.[8]

Figure 1: Open cases investigated by the Commission and by DG Environment

[4] OJ L 130, 25/05/1994, p. 1
[5] OJ L 228, 23/09/1995, p. 1
[6] In case C-387/97 a daily penalty of € 20,000 has been paid into the EU budget for a period of 8 months (from 4 July 2000 to 26 February 2001) until the situation has been remedied; in case C-278/01, an annual penalty of €624,150 per each 1% of inshore bathing areas not complying with the Directive will be payable on the basis of the report for the 2004 bathing season)
[7] It is interesting to note that the new Member States are well aware of the possible penalties under Article 228 of the EC treaty, whose objective is to have a deterrent effect; some of them (like the Czech Republic) have even gone so far as to decide at Government level that any penalties will have to be paid from the budget of the Ministry responsible for the particular obligation that has been infringed.
[8] Decision No 1600/2002/EC of the European Parliament and of the Council laying down the Sixth Community Environment Action Programme, OJ L 242, 10/09/2002, p. 1



Source: European Commission, DG ENV

There are a number of sectors of the environmental legislation which lead to more implementation problems than others:[9] nature protection, water and air quality, waste management, and environmental impact assessment (see *Table 1*). In nature protection, the main problems include non-conformity of transposing legislation, insufficient designation of Natura 2000 sites, incorrect assessment of plans and projects affecting the protected sites, and breaches of requirements for strict protection of species. The water quality issues mainly relate to secondary obligations, such as designation of protected zones, adoption of pollution reduction programmes, or construction of sewerage and wastewater treatment systems, while drinking water problems occur in few areas of the EU. Most problems with air quality, on the other hand, concern lack of transposition or failure to report to the Commission. Non-conformity of legislation and lack of adoption of management plans are the most typical issues in the waste sector, together with the operation of illegal landfills in several Member States. Finally, concerns about environmental impact assessment stem mainly from complaints and are largely procedural, since Directive 85/337/EEC[10] is a procedural one; the material aspects would refer to obligations from the legislation in other sectors, such as the two major nature protection Directives.[11]

Table 1: Open cases (complaints and infringements) in five main problematic areas of implementation of EC environmental legislation

[9] For details, see Fourth Annual Survey on the implementation and enforcement of Community environmental law – 2002; Commission Staff Working Paper SEC(2003)804
[10] OJ L 175, 05/07/1985, p. 40
[11] Directive 79/409/EEC, OJ L 103, 25/04/1979, p. 1, and Directive 92/43/EEC, OJ L 206, 22/07/1992, p. 7

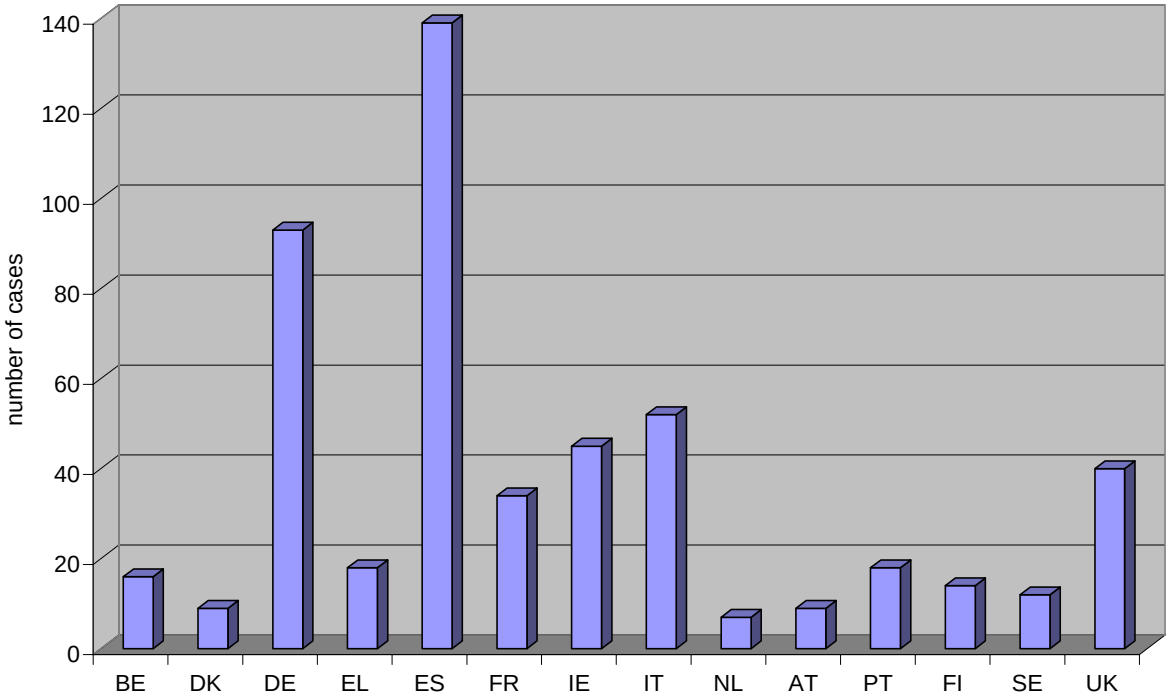
	Total	Impact	Nature	Waste	Water	Air	Other
Non-communication	**59**	0	3	8	9	31	8
Non-conformity	**120**	27	29	28	20	8	8
Bad application	**945**	153	446	136	113	66	31
Total	**1124**	180	478	172	142	105	47

Source: European Commission, DG ENV, Situation 19/10/2004

High level of public participation in environmental decision-making is also reflected in the number of complaints that citizens lodge with the Commission as regards breaches of EC environmental legislation (see *Figure 2*). While the great majority of complaints do not turn into the full infringement procedure (67% are closed), they still represent an important source of infringement cases (two thirds of all environmental infringement cases between 1999 and 2003 originated in complaints). *Figure 2* below suggests that while there is a certain relationship between population size and number of complaints for each Member State, there are some Member States (such as Ireland) where citizens are more active in complaining to the Commission than elsewhere. As regards content, most complaints concern failures in nature protection (52 %; this includes assessment of plans and projects, designation of protected areas, strict protection of species), followed by environmental impact assessment (19%). However, it should be stressed that the number of complaints does not necessarily mirror the implementation deficit in a given Member State[12].

Figure 2: Number of environmental complaints registered per Member State in 2003

[12] The Commission's reliance on complaints from private individuals to trigger implementation cases may sometimes cause a certain bias towards countries with active NGOs and citizens. This may result in more cases occurring for these Member States than for Member States with comparable but less highlighted problems.



Source: European Commission, DG ENV

The available statistics demonstrate that compliance with EC environmental legislation still proves to be difficult in the EU-15 and the number of infringements per year does not seem to diminish. The Commission tries to take proactive measures in order to avoid initiating infringement procedures; such proactive measures are: package meetings, during which complaints and infringement cases are discussed with the authorities of the Member States, (central, regional and in the case may be local); bilateral or multilateral proactive meetings to explain how Member States should comply with their obligations; various guidance documents; or reminder letters on adoption of new directives and deadlines for their transposition. The work of IMPEL, the informal network of the Member States and the Commission for the implementation and enforcement of environmental law, has also helped to ensure consistent implementation and enforcement of the *acquis* throughout the Community, mainly through exchange of information, training of inspectors and development of best practice. Of course, the different breaches vary in seriousness and the aim of the Commission is to focus its attention on pursuing serious breaches of a systematic nature rather than on individual procedural omissions or isolated individual cases of bad application, which are often the subject of complaints from citizens. An upstream approach which identifies systemic shortcomings is preferred to a downstream one which tackles the sequels. But in any case there is already a clear implementation gap of the environmental *acquis* in the EU 15 and this has to be tackled through a combination of both proactive and enforcement means.

3. Challenges of implementation of the environmental *acquis* in the new Member States (EU-10)

As already mentioned, this enlargement is arguably the best prepared ever, since preparations for membership have been monitored by the Commission for the seven years prior to accession (starting with the Opinions on Application for Membership of the European Union of the candidate countries, on July 1997). Publication of annual reports of the Commission on the progress of individual applicant countries in harmonising legislation and practice with the EU was always high on the political agenda and criticisms of slow progress appeared on the front pages of newspapers. The monitoring continued even after signature of the Accession Treaty, with the possibility for the EU to impose safeguard measures

should the pace of harmonisation not be maintained. A series of bilateral consultation meetings undertaken in February 2004 was aimed to resolving remaining gaps in accession preparations.

However, given the rather unsatisfactory record of compliance with EC environmental law by the EU-15, it can be expected that the new Member States will face similar problems. Up to now only five complaints were addressed to the Commission against certain of the EU-10 (CZ, HU, MT, PL, SL), while a total number of ten open cases (complaints and own initiative cases) are currently investigated (2 CZ, 2 CY, 2 HU, 2 MT, 1 PL, 1 SI). Currently, the major problem for the new Member States is the transposition deficit during this relatively short post-accession period, especially for the directives which had to be transposed by the accession date. To tackle it, a new Commission Communication, dated 20.10.04, proposes a temporary special empowerment procedure to review and follow-up on notifications of national implementing measures which should have been made to the Commission but have not, covering the period from 1 May (accession date) to 31 October, 2004. This new empowerment procedure aims to deal with all of these directives that have not been transposed yet, through the initiation of accelerated infringement procedures, against both the EU-10 and the EU-15. (See table 4).

Table 4: State of communication of transposing legislation

NEW MEMBER STATES	Environmental Directives for which the transposition period has expired	Environmental Directives for which transposing legislation has been communicated	Communication ratio per Member State
Czech Republic	176	128	72,73
Estonia	170	157	92,35
Cyprus	176	171	97,16
Latvia	180	179	99,44
Lithuania	183	182	99,45
Hungary	178	172	96,63
Malta	172	161	93,60
Poland	172	162	94,19
Slovenia	179	172	96,09
Slovakia	179	163	91,06
TOTAL	1765	1647	93,27

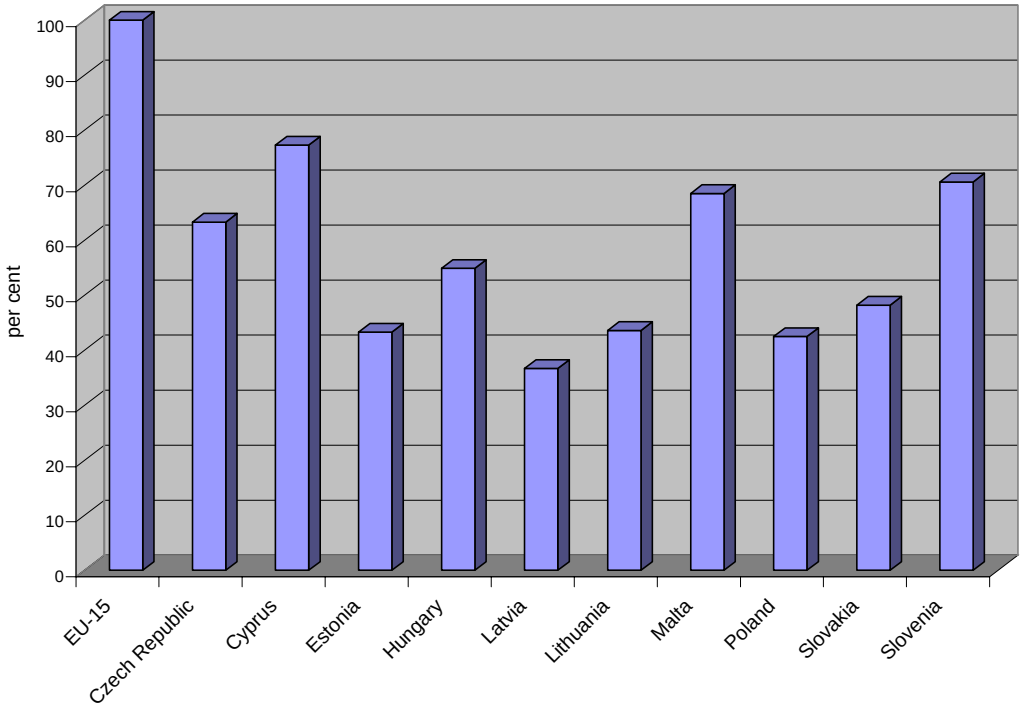
Source: European Commission, SG, reference date: 31/08/2004

In addition to this transposition deficit it is expected that other implementation problems will occur in the new Member States once the transposing legislation is in place and has to be applied on the ground. Even more than in the old EU Members, environment seems to be low on the political agenda of the EU-10. This was already apparent in the pre-accession period when various political and economic lobbies were trying to bypass or at least delay adoption of legislation transposing EC environmental directives and budgetary allocations for environmental protection were decreasing ; it will be difficult to change this "état d'esprit", at least in the short term. To a large extent it will depend on the EU influence through the EU Sustainable development strategy and the implementation of the 6th EAP and on a "sustainability culture" to be developed throughout the EU.

A major challenge is obviously the financing of approximation. The cost of compliance with the investment-heavy environmental *acquis* for the ten acceding countries is estimated to amount to approximately €50-80 billion. To this can be added a further €30 billion for Bulgaria and Romania. The urban Waste Water Treatment Directive alone will require major investments of around €15 billion. To achieve full implementation the new Member States will have to spend on average between 2% and 3%

of GDP on environment in the coming years. However, current expenditure is generally well below this target.[13]

Figure 3: GDP of new Member States in relation to EU-15 average (PPS; 2003 forecast). The differences of GDP, as appeared below, will lead to higher or lower impacts on the national budgets as regards environmental infrastructure and capacity requirements in the different new Member States.



Source: Eurostat

The EU will help implementation and practical application by providing resources from EC funds. € 21.7 billion will be made available to the new Member States from the Structural Funds and the Cohesion Fund until the end of the current budgetary period (31.12.2006), and of this € 3 billion from the Cohesion Fund is earmarked for the environment, while other environmental projects can be co-financed from the main Structural Funds. These contributions, together with the pre-accession funding from the Phare, ISPA and SAPARD instruments, should significantly contribute to financing implementation measures. Experience in the EU-15 shows that national budgets must also be set aside, and indeed should be more substantial, and that the private sector should also be involved under the so-called “concession” or “self-financed” projects (examples: waste management, drinking water).

Apart from finding sufficient financial resources to cover remaining investment needs and the co-financing of EC-funded projects, two other challenges emerge in relation to EC funding. The first is so-called *conditionality*, i.e. compliance of co-financed projects with EC environmental legislation and policy. Another issue, which is specific for the new Member States, is the establishment of adequate administrative capacity to prepare ‘pipelines’ of projects of sufficient quality and to properly manage the use of EC funds.[14] Close attention to these issues has proved essential for improving the utilisation of EC funds by the beneficiary Member States and should be seen as a priority also by the new Members.

[13] Communication from the Commission to the Council and the European Parliament on 2003 Environment Policy Review, COM(2003) 745 final, published as the 2003 Environmental Policy Review, page 81.
[14] Communication from the Commission on the challenge of environmental financing in the candidate countries, COM (2001)304 final, p. 3

Adequate administrative structures will be necessary not only for managing EC funding, but also to ensure correct implementation and practical application on the ground of EC environmental law in general. Many environmental directives require issuing of permits, monitoring of pollution and fulfilment of secondary obligations. A number of authorities, both horizontally and vertically, are typically involved in implementing these obligations and they need to be adequately staffed and well coordinated. A total of 86 twinning projects under Phare were carried out in the Central and Eastern Europe candidate countries between 1998 and 2003 to strengthen their administrative capacity and to provide training. The preparedness of administrations to cope with obligations arising from EU membership has also been checked through peer reviews (visits by officials from the Member States and the Commission to assess preparedness for implementation of EC legislation) in 2002 and 2003, as part of the monitoring of accession preparations.

Other possible drawbacks are deficiencies in law enforcement and a lack of legal culture, in what used to be called "countries in transition". Disobedience of legislation is not seen by these societies as a negative feature, especially when it does not affect private individuals or property. Harm to state property or to the public interest is generally better accepted by the people. This may be particularly relevant for compliance with nature protection obligations, since it is more difficult to calculate the monetary value of damage caused to natural features and to identify the affected "un-owned" environment. However, it is fair to say that there are positive trends in these countries, and people are starting to discover the importance of non-material assets, such as clean rivers or biological wealth.

Finally, only slow progress is being made by the new Member States towards ensuring effective public participation in environmental decision-making. Of course the EC legislation directly related to participative democracy (e.g. on environmental impact assessment or access to information) has been transposed into national legislation, but experience shows that practical application lags behind. Assaults on the basic principles of public participation were experienced when transposing legislation containing such provisions, during the legislative process (such as the transposition of the nature directives in the Czech parliament). We may therefore expect a number of complaints from citizens of the new Member States concerning access to environmental information and public participation in decision-making.

4. Measures to face the enlargement challenges

Since 1 May 2004, the ten new Member States have been subject to the same obligations as the EU-15. They have to comply with EC legislation, the national legislation transposing directives in force had to be notified by that date and practical compliance must be ensured as well. Specific arrangements apply only in accordance with the transitional periods agreed during the accession negotiations and spelled out in the Act of Accession[15] (see *Table 2*). Should the new Member States fail to comply with their obligations, the Commission may initiate the infringement procedure under Article 226 of the EC Treaty. Similarly, the Commission has a duty to investigate complaints lodged by EU citizens or NGOs against the new Member States.

[15] Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded, OJ L 236, 23/09/2003, p. 33

Table 2: Transitional periods for the new Member States and for Bulgaria and Romania

	TRANSITIONAL PERIODS AS CONTAINED IN THE ACT OF ACCESSION											
Directive	**CY**	**CZ**	**EE**	**H**	**LT**	**LV**	**PL**	**SLO**	**SK**	**MT**	**BG***	**RO***
Air												
Volatile org. compounds			2006		2007	2008	2005 2006		2007	2004	2009 2011	2009
Sulphur content of fuel												
Waste												
Incineration of waste				2005					2006			2009
Shipment of waste							2007				2009	
Packaging	2005	2005		2005	2006	2007	2007	2007	2007	2009	2011	2009
Landfills			2009			2004	2012				2014	2016
Asbestos						2004						
Water												
Urban waste water	2012	2010	2010	2015	2009	2015	2015	2015	2015	2007	2014	2021
Nitrates												2013
Discharge of substances							2007		2006	2007 2005		2014 2021
			2013			2015						
Drinking water												
Nature												
Birds										2008		
Industrial Pollution												
Large combustion plants		2007		2004	2015	2010	2017 2010	2011	2007 2011	2005	2014 2011	2011 2014
IPPC												2014
VOCs from solvents												
Radiation Protection												
Ionising radiation relating to medical exposures						2005	2006					

* BG & RO: longer transposition periods have been requested by the two applicants for certain of the directives listed.

The Act of Accession of the ten new Member States also sets a number of intermediate targets within the agreed transitional periods. This is the first enlargement where such an arrangement has been made with the new Member States, with the aim of gradually fulfilling EC legal obligations rather than waiting until the (sometimes extensive) transitional periods elapse. The fulfilment of intermediate targets will be monitored as a matter of priority; non-compliance with these targets may trigger infringement procedures.

A number of measures have been taken both generally and in the environmental field to prevent the possible opening of infringements immediately after accession. As concerns transposing legislation, the acceding countries were invited to use the pre-notification database for gradual storage of transposing legislation in electronic form, so as to avoid a backlog of notifications on the date of accession. The largest part of the transposing legislation has been notified in this way and is now considered officially notified to the Commission (see Table 4, above). The obligation for the ten new Member States to have implemented by far the greater part of the whole existing *acquis* from 1 May 2004 also has created a one-off increase in the yearly volume of required national notifications of legal measures implementing directives. The number of national notifications required each year is expected to rise from around 2.500 to some 17.000 this year. Given that many notifications contain several different legal acts, this will

increase the number of measures annually communicated to the Commission from around 5.000 to some 25.000 in 2004, at a conservative estimate.

Two systematic approaches have been used by the Directorate-General for the Environment of the Commission with the view to compliance with environmental legislation. Shortly before accession a series of environmental proactive meetings were held in all the new Member States to explain to the national authorities responsible for compliance and enforcement how complaint and infringement procedures work in practice, how to prevent escalation of infringements and how to communicate effectively on these matters with the Commission. Those meetings were highly appreciated by all the new Member States, as they provided first-hand practical information and contact with Commission counterparts on compliance with EC environmental law. Such meetings can provide a solid basis for bringing infringements to an end in the most effective way, and can also be followed by package meetings and other specific meetings as currently organised with the existing Member States.

DG Environment has also launched a systematic conformity check for the ten new Member States, building on similar experience with the EU-15. The objective is, within the next two years, to analyse transposing legislation for the main Directives and remove any non-compliance at an early stage, through close collaboration between the Commission and the Member States concerned and infringement procedures, if necessary.

Concerning complaint and infringement procedures, the same priorities as for the EU-15 will apply, in line with the White Paper on European Governance[16] and the Commission Communication on Better Monitoring of Community Law.[17] The first priority will be the non-communication cases (failure to communicate transposing measures), followed by the cases of non-conformity (based on the conformity checking exercise) and horizontal bad application cases (secondary obligations, transitional periods contained in the Act of Accession, including intermediate targets to be met, and conditionality of EC funding). Such prioritisation approach will not necessarily exclude the handling of all complaints received, as required by the EC Treaty and by the Commission Communication to the European Parliament and the European Ombudsman on the relations with the complainants in respect of infringements of Community law.[18] These complaints can be handled by alternative means (e.g. package meetings) and the complainants should be encouraged to use the available national means of redress (Ombudsman, access to justice, mediation, etc.). Recourse to such means can improve the possibility of finding solutions on the ground, which are more directly relevant to complainants' interests and are also more cost effective in comparison to the initiation by the Commission of an infringement procedure against a Member State, which can very often take more than four years, before the European Court of Justice delivers its judgment (the Article 226 one).

5. Conclusions

This paper has tentatively examined the difficulties that the new Member States are very likely to face in complying with their obligations under EC environmental legislation. The key messages could be summarized as follows.

1. During the period prior to accession, the maximum possible was done, under the close surveillance of the Commission. Therefore all obligations should in theory have been formally fulfilled by 1 May 2004. However, a transposition deficit has occurred, so we can expect that there will be failures, gaps and omissions.

[16] COM(2001)428 final, p. 25
[17] COM (2002)725 final, p. 11
[18] COM(2002)141 final

2. It is natural that there will be infringements and that the Commission will receive complaints from citizens from the new Member States; this has been the case with all previous EU enlargements. It is also likely that the number of cases will grow gradually rather than all at once. Experience with the EU-15 shows that the more public awareness you raise the more complaints are triggered as citizens better understand their rights.

3. The spectrum of problems, complaints and infringement cases against the new Member States, is not expected to differ significantly from the situation in the EU-15. It is also likely that they will concern similar issues, although there may be some specific aspects, such as the requirements to implement the investment-heavy environmental *acquis*, inadequate administrative capacity or the lack of a legal culture, which might cause some variations compared to the "business-as-usual" in the EU-15.

4. Limiting the escalation of infringements will require effective use of proactive measures as described above, including bilateral meetings with the national authorities to discuss complaints, infringement cases or difficulties in implementation. The same is of course valid for the existing Member States.

5. EC funding should, as far as possible, be prioritised for co-financing measures to bring about compliance with obligations of the environmental *acquis*. Good project preparation will have to be ensured. In turn the *acq*uis itself must also be respected for the construction and financing of infrastructure projects.

6. Finally, the performance of the countries which have just acceded to the European Union will be under strong scrutiny; this is the biggest ever enlargement and the new Member States are less developed compared to the EU-15 average and thus there will be more development pressures on the environment and substantial EC financing for economic and social cohesion purposes. The success or failure of this enlargement will be crucial for deciding on potential future enlargements of the EU – and the more successful it is, the more likely it is to help reverse the current Eurosceptic trends in the old and the new Member States, especially with the view of the ratification of the European Constitution.

MOBILE PHONE UPDATE

Background history

T Mobile (UK) Ltd & Others v First Secretary of State & Another [2004] EWHC 1713 (Admin)

T Mobile sought planning permission to construct a 25-metre high mobile phone mast and head frames near three schools in Harrogate in order to extend the reach of existing phone transmission. The local planning authority refused permission on the ground that the proposed structures would unreasonably detract from the residential amenity of neighbouring houses and local facilities, contrary to the aims of the local plan. T Mobile subsequently appealed to the planning inspector. The inspector concluded that T Mobile had failed in adequately proving the safety of the structures, and the appeal was dismissed on the basis of concerns over the perception of health risks.

T Mobile challenged the validity of the planning inspector's decision in the High Court, claiming that it had provided sufficient reassurances of safety, and that this had been reflected by its compliance with standards set by the International Commission on Non Ionising Radiation Protection (ICNIRP).

On 23 June 2004, the Queen's Bench Division (Administrative Court) quashed the planning inspector's decision, and granted T Mobile permission to construct the mast and frames. Deputy High Court Judge,

Sir Richard Tucker, held that it was clear that T Mobile had satisfied the criteria set by the ICNIRP, and had given sufficient reassurances of safety. It had also been established that there would be no material harm to living conditions in the surrounding vicinity. Furthermore, the Court concluded that the planning inspector had misunderstood PPG8 in his interpretation that it was an open-ended guideline, and had failed to give adequate reasons for his decision.

Proceedings in the Court of Appeal

T Mobile (UK) Ltd & Others v First Secretary of State & Another CA (Civ Div) 12/11/2004
The Secretary of State appealed against the decision of the Queen's Bench to grant permission, claiming that on a proper construction of PPG8, an *actual* health risk was distinct from a *perceived* health risk given that the guideline specifically referred to them separately as amounting to material planning considerations in telecommunications. The Secretary of State contended that, in light of this distinction, the inspector was entitled to take into account perceived health risks, notwithstanding the fact that the proposed structures satisfying the ICNIRP requirements.

Dismissing the appeal, the Court upheld the Queen's Bench decision, concluding that the planning inspector had misunderstood the guidance contained in PPG8. Lord Justice Pill, Lord Justice Mummery, and Lord Justice Laws held that preventing the construction of the mast could not be justified on the ground that it posed a serious risk to public health. The mast is to be assembled within 400 metres of Woodfield Community Primary School, St Robert's Primary, and Granby High School.

LONDON MEETINGS

The recent London meeting, "The Changing Face of Environmental Due Diligence" was well attended by UKELA members.

Daniel Lawrence of Freshfield Bruckhaus Deringer described the increasing role for environmental lawyers at an earlier stage in transactions. He said investors were increasingly focused on environmental risk, some players were more risk averse and public disclosure requirements were increasing, resulting in a greater emphasis on due diligence. There were also an increasing number of transactions across jurisdictions.

Freya Phillips of the URS Corporation described a move from compliance with existing legislation to quantification of liability and concerns about risks to reputation. Increasing focus on corporate responsibility was changing the focus of environmental due diligence.

The next UKELA London meeting, on the subject of asbestos, will be held on 27th January 2005 at the central London offices of Norton Rose. More details will be posted onto the website and sent direct to members after Christmas.

All meetings are held early evening.

UKELA AND THE ASSOCIATION OF PERSONAL INJURY LAWYERS

UKELA and the Association of Personal Injury Lawyers are pleased to offer two essential environmental law updates next spring and booking is now open.

Practice and Procedure is on 2nd February and Hot Topics and Latest Issues on 13th April

Speakers are:

Stuart Bell, Nottingham Trent University
Professor Robert Lee, Co-Director Centre for Business Relationships, Accountability, Sustainability and Society, Cardiff University
Richard Buxton, Solicitor
Professor Stephen Tromans, Barrister, 39 Essex Street Chambers, Specialist in Environmental Law
Owen Lomas, Allen & Overy
Angus Innes, Head of Prosecution Team, Environment Agency
David Travers, Barrister, 6 Pump Court Chambers
Robert McCracken QC, Barrister, 2 Harcourt Buildings

The cost for each half-day session is £111.63 with a discount for attending both events.

A flyer with a booking form is attached to this mailing.

EDITORIAL ASSISTANT

Elen Stokes has very kindly volunteered to assist with the production of E-Law and will be writing a regular column for E-Law giving brief updates on current news in environmental law.

Elen graduated from the University of Bristol with an LL.B degree in July 2002. In October 2002, she won a scholarship to undertake her PhD at Cardiff Law School. She works in association with the ESRC-funded centre for Business Relations, Accountability, Sustainability and Society (BRASS).

Professor Bob Lee supervises Elen's PhD, and her thesis focuses primarily on the role of the precautionary principle in securing responsibility for long-term impacts of environmental decision-making. She is particularly interested in assessing the practical implications of the 'definitional deficit' of the precautionary principle; examining the impact of risk society literature on its operational success; and determining its (potential and actual) role in the BSE crisis. More broadly, Elen's thesis has a strong focus on the marginalisation of scientific uncertainty, and the inherent tensions between regulation and factual incertitude.

If you would like to contribute to this feature, or have any suggestions about its contents, please contact Elen by email: StokesER@cardiff.ac.uk

THE ENVIRONMENT? CHARITABLE M'LORD!

In another step towards greater transparency, the Charity Commission has improved access to its decisions. New or significant decisions are now listed, explained and summarised according to name and subject area on the Charity Commission website.

One example listed is the Commission's decision to register the Environment Foundation. The charity's objective is to promote sustainable development, which previously was not seen as

charitable. But the Commission recognised the need to move with the times and the significance of modern concerns like sustainable development. So it registered the charity.

http://www.charitycommission.gov.uk/tcc/issueguide.asp

UK ENVIRONMENTAL LAW ASSOCIATION
Registered Charity number: 299498, Company limited by guarantee: 2133283

For information about working parties and events, including copies of all recent submissions contact.

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E - LAW

The editorial team want articles, news and views from you for the next edition due to go out in February 2005. All contributions should be dispatched to Catherine Davey as soon as possible by email at: Catherine.Davey@stevens- bolton.co.uk no later than 11 February 2005.

Letters to the editor will be published, space permitting