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Ludwig Krämer

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European Legal Studies/Etudes Européennes Juridiques
Dijver 11 | B-8000 Brugge, Belgium | Tel. +32 (0)50 47 72 61 | Fax +32 (0)50 47 72 60
E-mail law.info@coleurop.be | www.coleurop.be

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Prof. Dr. Ludwig Krämer

Infringement procedures under the EC Treaty

Little attention is paid, until now, to the duration of environmental procedures under Articles 226 and 228 EC Treaty, though these procedures are the only instrument at the disposal of the European Commission to enforce the application of EC environmental law[1]. Indeed, the Commission itself has no possibility to impose a fine or a penalty payment against a Member State, or to withhold sums under the Structural Funds, where a Member State persistently infringes Community environmental law. Rather, the Commission is obliged to first issue a Letter of Formal Notice against a Member State which infringes Community law. Where the infringement is not repaired, the Commission may issue a Reasoned Opinion against the Member State, and if also this does not lead to the compliance with EC law, it may appeal to the Court of Justice[2]. At this moment, it may also ask for interim measures on which only the Court of Justice may decide.

The judgment by the Court is declaratory: the Court states, if it finds a case of non-compliance, that the Member State in question has infringed its obligations under Community law, by not doing this or that. It is then up to the Member State to take the necessary measures in order to bring its national law in line with the requirements of Community law. Where the Member State does not do so, the Commission may send, under Article 228 EC Treaty, a second letter of formal notice, then a second reasoned opinion and, should this not be successful, seize the Court of Justice a second time. The Court may then, in its judgment under Article 228 EC Treaty and on request of the Commission, impose a lump sum or a penalty payment on the Member State in question.

These provisions apply to all three forms of national infringements, i.e. cases, where a Member State did not transpose EC secondary legislation into its national legal order (non-transposition), where the Member State transposed secondary EC legislation in an incomplete or incorrect way (incorrect transposition), or where a Member State did not correctly apply primary or secondary Community law in concrete cases (incorrect application). Of course, nothing prevents the Commission from bringing a case against a Member State which groups aspects of incorrect transposition with aspects of incorrect application. Nevertheless, the differentiation is of use, because the object of litigation in the case of incorrect transposition is of purely legal nature, while in the case of incorrect application the practice of a Member State, at national, regional or local level, is examined by the Commission and, subsequently, by the Court.

The duration of litigation is also of interest in other cases. Article 230 EC Treaty concerns those cases, where an action is brought against a Community institution or body. In these cases, no pre-judicial procedure is foreseen, and thus, the overall duration of the procedure is much shorter. Also in the cases of Article 234 EC Treaty, where a national court asks the EC Court of Justice for a preliminary ruling, no pre-judicial procedure is required.

One would have wished that in cases of Articles 242 and 243 EC Treaty which concern interim measures, the Commission would be allowed to ask the Court for such interim measures, without having first to send letters of formal notice and reasoned opinions. However, these provisions do not provide for an exception to

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[1] For previous years see L. Krämer, Statistics on environmental judgments by the EC Court of Justice, Journal of Environmental Law 2006, p.407, with further references.

[2] For details see Article 226 EC Treaty.

Articles 226 and 228. It will be shown below that the pre-judicial phase of litigation – the issuing of letters of formal notice and of reasoned opinions – normally takes a long time; this then leads to the situation that the Commission, when finally the application to the Court is made, has great difficulties to explain that interim measures are necessary in view of the urgency of the case or the threat to the environment. This is the underlying reason, why in the more than thirty years between 1976 and 2007, only 10 environmental procedures had been brought to the Court which asked for interim measures[3].

The Commission does not normally publish the letter of formal notice or the reasoned opinions which it issues[4]. It also refuses to give, under the EC provisions on access to documents[5] or access to environmental information[6], access to them on request. In this attitude, it appears to be supported by the Court of First Instance which agreed with the Commission that the refusal to give access allowed the Member State in question and the Commission to find an amicable solution to the problem in question[7]. The Court of First Instance did not discuss that just the publication of letters of formal notice and reasoned opinions might facilitate such an amicable solution. The Court of Justice did not yet decide on this question.

The following contribution gives some statistical data on the duration of environmental procedures – pre-judicial and judicial – under the different Treaty provisions. The contribution concentrates on the years 2006 and 2007. Data on previous years which have been published earlier will be used to show trends in the duration.

"Environmental" cases are understood in a material sense. Thus, where, for example, a case deals with the question, whether a Member State is entitled to adopt national legislation on air emissions by cars that deviates from existing EC legislation, the case is considered to be an environmental case, though the interpretation of Article 95(4) and (5) EC Treaty is at stake – and the Court of Justice's own classification system would range such a case under "institutional matters" or "free circulation of goods". Generally, this classification gives good results; sometimes, though, doubts might exist, whether a product-related directive should be classified as an "environmental" or a "free circulation of goods" act of legislation.

Number and legal basis of judgments

In 2006 and 2007, there were 115 judgments on environmental matters delivered, more than in any earlier two-year period. On average, the Court delivered about one environmental judgment per week (Table 1).

Table 1: Number of Decisions in environmental matters 1976-2007

1976	1	1987	12	1998	34
1977	-	1988	9	1999	23
1978	-	1989	3	2000	21
1979	-	1990	11	2001	23
1980	3	1991	17	2002	47
1981	3	1992	7	2003	56
1982	7	1993	12	2004	63

[3] See Table 3 below.

[4] See L. Krämer, Access to letters of formal notice and reasoned opinions in environmental law matters, European Environmental Law Review 2003, p.197.

[5] See on that Article 255 EC Treaty and Regulation 1049/2001, OJ 2001, L 145 p.43.

[6] See Regulation 1367/2006, OJ 2006, L 264 p.13.

[7] Court of First Instance, Cases T-105/95, WWF v. Commission, ECR 1997, p.II-313; T-191/99, Petrie a.o. v. Commission ECR 2001, p.II-3677.

1983	1	1994	14	2005	43
1984	4	1995	7	2006	52
1985	5	1996	29	2007	63
1986	1	1997	20	Total	587

The increase of decisions over the last years is mainly due to the fact that the Commission examines more systematically the cases of non-transposition and of incorrect transposition and, furthermore, that individual persons apply more frequently to the Court.
The 115 judgments were divided on the different sectors of environmental law as follows (Table 2).

Table 2: Decisions concerning the different sectors of environmental law 1976-2007(all legal bases)

Period	Waste	Water	Nature	Products	Horizontal Acts	Air Climate	Impact Assessment	Noise	Total
1976-1991	23	18	13	8	4	6	-	-	72
1992-1994	11	6	9	4	-	1	2	-	33
1995-1997	13	7	10	13	8	3	3	-	57
1998-1999	9	19	5	7	5	2	7	3	57
2000-2001	8	15	11	4	3	2	1	-	44
2002-2003	27	14	14	19	18	3	4	4	103
2004-2005	41	17	16	12	4	9	7	-	106
2006-2007	20	12	30	9	12	17	12	3	115
Total	152	108	108	76	54	43	36	10	587

As can be seen, the greatest number of cases during 2006-2007 concerned nature protection issues. In eight of the total of 30 cases, individual persons had applied to the Court, because they opposed the inclusion of their land property in the EC-lists of Natura 2000 which groups habitats of fauna and flora of Community interest. They were all unsuccessful, as the Court declared that they were not directly and individually affected by such a decision[8]. In view of legal consequences which flow from the Commission's decision on lists of Community interest, I am rather of the opinion that individual persons do have standing under Article 230 EC Treaty.
Waste matters rank second in 2006-2007, though in the overall period 1976-2007, they continue to occupy a lead position. Waste treatment and disposal remains a problem in most Member States – not only in Italy – and the shared competence between administrations at local, regional, national and Community level does not facilitate environmentally sound waste management practices. The reviewed EC legislation on waste[9] is not likely to change much of this situation.

[8] See for example Court of First Instance, Cases T-136/04 Fhr.v.Cramer v. Commission, ECR 2006, p.II-1805; T-150/05 Sahlstedt v. Commission, ECR 2006, p.II-1851; T-117/05 Rodenbröker v. Commission, ECR 2006, p.II-2593; T-122/05, Benkö v. Commission, ECR 2006, p.II-2939.

[9] See Regulation 1013/2006 on the shipment of waste, OJ 2006, L 190 p.1; Directive 2006/66 on batteries, OJ 2006, L 266 p.1, and in particular the imminent adoption of the revision of Directive 2006/12 on waste, OJ 2006, L 114 p.9

Table 2 clearly demonstrates the low priority of noise legislation in the Community. Noise is of considerable concern to numerous people in the EC, and the main source of noise is transport – which is a common EC policy. Yet, EC measures on noise are scarce and do not follow a consistent strategy, and this is even reflected in the number of court decisions on noise which concern lack of transposition or incorrect transposition, but not the application of noise protection levels.
Table 3 shows the legal basis of the Court's Decisions. It demonstrates the important role of the Commission in enforcing the application of Community environmental law (Articles 226 and 228 EC Treaty) which remains the significant aspect of the Table. As regards environmental law, the Commission almost has a monopoly for taking actions

Table 3: Legal basis of the Court's Decisions 1976-2007 (Number of cases)

Period	Art.226	Art.227	Art.228	Art.230	Art.232	Art.234	Art.242,243	Art.225(appeal)	Total
1976-1991	50	-	1	3	-	17	1	-	-
1992-1994	14	-	4	9	-	6	-	-	-
1995-1997	30	-	-	5	-	15	2	3	1
1998-1999	37	-	-	2	-	17	-	1	-
2000-2001	28	-	1	2	-	11	1	-	1
2002-2003	77	-	1	9	-	15	1	-	-
2004-2005	85	-	-	4	-	16	1	-	-
2006-2007	70	-	-	25	-	12	4	3	1
Total	391	-	7	59	-	109	10	7	3

in Court. All the more it is regrettable, that the procedures under Article 226 and 228 are so non-transparent. Indeed, the Commission does not lay accounts on its actions. Its annual reports on the monitoring the application of Community law[10] are unhelpful. They do not explain, why actions were started, they do not detail the pre-judicial procedures under Articles 226 and 228 – the dispatch of letters of formal notice is only mentioned, where a Member State has not communicated its national transposing legislation; where a Member State has incorrectly transposed the legislation or where it does not apply environmental legislation in practice, the Commission keeps this information confidential – and the basis of tables and statistics changes frequently so that comparisons from one year to the other are hardly possible. Letters of formal notice and reasoned opinions are only exceptionally made public.
The Commission's quasi-monopoly in enforcing EC environmental law also becomes obvious when one considers actions by environmental organisations against the breach of EC environmental law. Indeed, the three cases where environmental organisations were involved in 2006-2007, concerned the request from national courts for a preliminary ruling[11]. In practice, access to the EC Courts is not possible

[10] See last Commission, Monitoring the application of Community law 23rd Report, for 2005, COM (2006) 416; 24th Report, on 2006, COM(2007) 398.
[11] Cases C-60/05 WWF v. Lombardia, ECR 2006, p.I-2147; C-138/05 Milieufederatie, ECR 2006, p.I-8339; C-244/05 Bund Naturschutz, ECR 2006, p.I-8445.

for environmental organisations which have, in the past, seen all their actions declared inadmissible, as they were considered not to be directly and individually concerned by the breach of EC environmental legislation[12]. This practice appears not to be in compliance with the provisions on access to justice of the Aarhus Convention[13] which, after its ratification by the EC, is part of EC law and binds the EC institutions, including the EC Courts.
Table 4 differentiates Court judgments against Member States, based on Article 226 and 228 EC Treaty. For the years 2006-2007, Italy ranks top. The Table illustrates the policy of the Scandinavian States Denmark, Sweden and, to a lesser degree, Finland, to avoid, if any possible, negative judgments by the Court of Justice, by ensuring that compliance measures are taken; the contrast between Denmark on the one hand and Ireland and Great Britain on the other hand which all joined the EU in 1973, is as noticeable as the contrast between Austria and Sweden/Finland which all three joined the EU in 1995. The same active policy to ensure compliance is ensured by the Netherlands. Generally, however, Table 4, as all the other Tables in this paper, should be viewed as showing some trends rather than allowing too precise conclusions.

Table 4: Environmental judgments against Member States 1976-2007 (Articles 226 and 228 EC Treaty)

	1976 -1991	1992 -1994	1995 -1997	1998 -1999	2000 -2001	2002 -2003	2004 -2005	2006 2007	Total
Italy	15	2	5	5	3	9	16	16	71
Belgium	14	4	6	6	3	6	5	4	48
France	6	1	2	3	7	14	7	2	42
Germany	9	4	8	5	1	6	6	1	40
Spain	1	2	1	4	2	11	8	6	35
Greece	1	1	5	3	3	4	8	4	30
UK	-	2	-	1	2	7	7	7	26
Luxembg	1	1	2	2	1	7	-	10	24
Ireland	-	-	-	1	2	7	5	6	21
Portugal	-	-	-	7	2	2	6	4	21
Netherld	4	1	-	1	1	3	5	-	15
Austria			-	-	1	-	7	5	13
Finland			-	-	-	1	3	5	9
Denmark	2	-	-	-	-	1	1	-	3
Sweden			-	-	1	-	1	-	2
Malta							-	1	1

It might be interesting to compare this Table 4 with the Table on environmental cases which were submitted by national courts to the Court of Justice for a preliminary ruling (Article 234 EC Treaty). These cases are listed in Table 5.

Table 5: Preliminary rulings in environmental matters 1976-2007 (grouped according to the Member State of the requesting court)

	1976-1991	1992-1994	1995-1997	1998-1999	2000-2001	2002-2003	2004-2005	2006-2007	Total

[12] The landmark cases are T-585/93 Greenpeace v. Commission ECR 1995, p.II-2205 and C-321/95P Greenpeace v. Commission ECR 1998, p.I-1651.

[13] Convention on access to information, public participation in decision-making and access to justice in environmental matters (Aarhus Convention) of 25 June 1998. The EC ratified this Convention by Decision 2005/370, OJ 2005, L 124 p.1.

Italy	6	2	6	4	2	1	4	2	27
Netherld.	5	-	2	5	1	2	3	2	20
France	4	2	1	-	2	2	1	1	13
Belgium	1	1	4	1	-	-	4	-	11
Germany	-	1	-	3	2	-	3	1	10
UK	-	-	1	1	1	2	1	2	8
Sweden			1	1	1	1	-	3	7
Finland			-	1	-	3	-	-	4
Austria			-	-	-	4	-	-	4
Denmark	-	-	-	1	1	-	-	1	3
Luxembg	-	-	-	-	1	-	-	-	1
Spain	-	-	-	-	-	-	-	-	-
Portugal	-	-	-	-	-	-	-	-	-
Ireland	-	-	-	-	-	-	-	-	-
Greece	-	-	-	-	-	-	-	-	-
Total	16	6	15	17	11	15	16	12	108

It is not surprising that Italian and Dutch courts top this list. Indeed, Italian courts are – at the latest following the role in the "mani pulite"-events in the 1990s – known for their creative ingenuity and intellectual curiosity. This is probably the reason, why they actively explore, be it via requests for a preliminary ruling, what kind of legal arguments EC environmental law offers. As regards the Netherlands, about three quarters of their gross national products stems from foreign trade. In that country, EC environmental law is frequently seen as an opportunity and, in any way, as part of the national provisions which aim at the optimisation of environmental protection.

. Germany, with the largest population, sophisticated environmental legislation and a very great number of courts, submitted remarkably few cases for a preliminary ruling; these figures reflect the generally rather reserved attitude of the German judiciary and legal profession in general with regard to EC environmental law.

The four Member States Spain, Portugal, Ireland and Greece, as well as the twelve Member States which joined the European Union in 2004, have not yet been the cause of any preliminary ruling from the Court of Justice in environmental matters.

Article 228(1) EC Treaty states that a Member State shall take the necessary measures in order to comply with the statements of a judgment by the Court of Justice. The European Commission regularly publishes a list of judgments of the Court of Justice which had not yet been complied with by the Member States at the end of each year. With the increase of the number of judgments in environmental matters (see on that Table 1), also the overall figures of non-compliance increased. At the end of 2005, 81 judgments, and at the end of 2006 66 judgments had not yet complied with[14]. Table 5 lists the evolution of the last five years.

Table 5: Number of judgments that had not been complied with by the end of the year (all legal bases)

Member State	2002	2003	2004	2005	2006
France	13	17	18	14	7
Italy	6	6	14	12	8
Ireland	8	6	8	9	7
Spain	4	6	4	9	7
UK	4	3	6	7	8
Belgium	6	8	6	5	3
Greece	4	4	5	7	6

[14] Annual reports on monitoring application (note 10, above), each time annex V.

Luxembg	5	6	1	-	6
Portugal	1	3	5	4	4
Germany	3	4	5	3	1
Austria	1	1	4	5	5
Netherld	2	4	4	3	-
Finland	-	1	3	2	3
Sweden	1	1	2	1	1
Denmark	-	1	1	-	-
Total	58	71	86	81	66

Of course, the figures for the different years may not be cumulated. Nevertheless, Table 5 shows that the above-mentioned four States Denmark, Sweden, Finland and Netherlands also attach some political importance to quickly comply with the judgments of the Court of Justice. In France, Italy, Ireland and Spain, such a policy seems to be less a priority.

Duration of procedures

The duration of litigation before the Courts is of particular interest for economic operators, but also for environmental organisations, administrations and lawyers. Table 6 shows the duration during the years 2006-2007.

Table 6: Duration of Court litigation 2006-2007 (in months, figures rounded)

Legal Basis	Number of cases	Longest duration	Shortest duration	Average
Article 226	70	39	5	18
- lack of transposition	15	14	5	9
- incorrect transposition	21	34	6	19
- incorrect application	34	39	5	21
Article 230	25	50	2	21
- Court 1st Instance	21	50	2	21
- Court of Justice	7	34	12	23
Article 234	12	36	9	19

On average thus, Court procedures under Article 226 take 18 months, under Article 230 21 months and under Article 234 19 months. Where the action concerns a case of lack of transposition, the procedure takes 9 months only.

The duration of Court litigation under Article 226 has not significantly changed during the last fifteen years, as can be seen from Table 7. This is different from actions under Article 230 – the duration varied between 14 and 33 months – and Article 234, where the variation was between 16 and 24 months. Overall, for all three legal bases, a reduction of the duration as compared to the previous period 2004-2005 can be observed.

Table 7: Duration of Court litigation 1992-2007 (in months, figures rounded)

Period	Article 226	Article 230	Article 234
1992-1994	22	14	18
1995-1997	14	20	16
1998-1999	20	29	23
2000-2001	21	16	24
2002-2003	19	33	26

2004-2005	20	30	22
2006-2007	18	23(1st Inst:21)	19

For procedures under Article 226 EC Treaty which oppose the European Commission and a Member State, the duration of the litigation before the Court itself might be misleading, because in all cases, the litigation before the Court has to be preceded by a pre-judicial procedure. This procedure is, as mentioned above, opened by the dispatch of a Letter of Formal Notice[15] to which the Member State in question may answer. When the Commission considers the infringement of Community law not yet to be ended, it may issue a Reasoned Opinion to which the Member State again may react. Only then may the Commission make an application to the Court.
Table 8 indicates the duration of procedures under Article 226, from the dispatch of the Letter of Formal Notice till the judgment of the Court:

Table 8: Duration of procedures under Article 226 in 2006-2007 from the dispatch of the Letter of Formal Notice till the Court's judgment (figures in months and rounded)

Procedure	Number of cases[16]	Longest duration	Shortest duration	Average
Lack of transposition	12 (of 15)	35	21	26
Incorrect transposition	18 (of 21)	98	22	51
Incorrect application	31 (of 34)	109	26	52
Total	61 (of 70)	109	21	47

This means that the procedure under Article 226 EC Treaty takes, on average, almost four years – really a long time.
With regard to previous periods, this time-span has not significantly been reduced, as appears from Table 9:

Table 9: Duration of procedures under Article 226 in the years 1992-2007 (from dispatch of the letter of formal notice till the Court's judgment; figures in months and rounded)

Period	Number of cases	Longest duration	Shortest duration	Average
1992-1994	14	85	36	57
1995-1997	30	87	27	47
1998-1999	37	120	21	68
2000-2001	28	128	22	59
2002-2003	77	147	15	45
2004-2005	85	168	19	47
2006-2007	61	108	15	47

This long duration of litigation has several effects: First, Member States which do not correctly transpose or apply EC environmental legislation, can be ensured that it

[15] The term "letter of formal notice" is not found in Article 226 which does not require a specific form for the begin of the infringement procedures; however, the term is generally used. The Court appears to require a written form of notice in all cases, for reasons of legal certainty.

[16] Only those cases were included in this Table, where the precise date of the dispatch of the Letter of Formal Notice could be determined. The total number of cases in 2006-2007 is set in brackets.

takes a while before they are called to order by the judgment of the EC Court of Justice, with all its negative publicity. This effect is increased by the fact that the Commission often does not start the procedure under Article 226 EC Treaty as soon as the national incorrect legislation is adopted or as soon as there is a concrete case of non-application. Rather, the delay between the enactment of the national legislation and the begin of the infringement procedure is frequently quite considerable[17].

Second, this problem of delays becomes even more important in cases of Article 228 EC Treaty. In 2006-2007, there were no such cases decided in environmental matters. Since 1992, the Court of Justice had decided, overall, six environmental cases under Article 228 and its predecessor, Article 171 EC Treaty. The average time-span between the dispatch of the letter of formal notice under Article 226 and the judgment under Article 228 was 136 months, thus more than eleven years[18].

It is clear that such delays do not have much of a deterrent effect on Member States, inciting them to comply with Court judgments – and, this should not be forgotten, to adequately protect their environment! - as quickly as possible.

This observation might sound abstract and theoretical. A concrete example, though, is the case of the present waste problems in the Italian region of Campania (Naples). The EC procedure against Italy for non-compliance with EC waste law started in 1987[19], but was later discontinued. More than twenty years later, Italy still does not comply with its legal requirements.

Though the length of procedures under Articles 226 and 228 EC Treaty may not have a deterrent effect on Member States by inducing them to align their legislation and practice to EC environmental law, it certainly has a deterrent effect on the EC Commission, in the sense that the Commission does not even start proceedings against a Member State. This happens in particular, where cases on the lack of application of EC environmental law are in question. The construction of a motorway without an environmental impact assessment, the refusal to grant access to environmental information, the realisation of infrastructure projects within a natural habitat – there are numerous cases of this kind, where the Commission does not begin or pursue infringement procedures, because a judgment from the Court would come at a stage, when the environmental impairment has occurred and cannot be repaired – when “the infringement is consumed”, as it is called in the Brussels jargon.

Table 10 tries to elucidate the reasons for the length of procedure, differentiating between the pre-Court procedure – from the dispatch of the Letter of Formal Notice till the application to the Court – and the procedure before the Court.

Table 10: Average duration of procedures under Article 226 in 2006-2007 (in months; figures rounded)

	Pre-Court procedure	Court procedure	Total duration
Lack of transposition	16	8	24
Incorrect transposition	33	21	54
Incorrect application	27	23	50
Total	28	19	47

[17] See, for example case C-376/06 Commission v. Portugal, ECR 2007, p.I-78, where this period was 26 months.

[18] See cases C-345/92, Commission v. Germany, ECR 1993, p.I-1115 (duration 109 months); C-174/91, Commission v. Belgium, ECR 1993, p.I-2275 (duration 106 months); C-366/89, Commission v. Italy, ECR 1993, p.I-4201 (duration 175 months); C-291/93 Commission v. Italy, ECR 1994, p.I-859 (duration 120 months); C-378/97 Commission v. Greece, ECR 2000, p.I-5047 (duration 134 months); C-278/01, Commission v. Spain, ECR 2003, p.I-14141 (duration 170 months).

[19] See case C-33/90, Commission v. Italy, ECR 1991, p.I-5698 and, for the background L.Krämer, European Environmental Law Casebook, London 1993, p. 387.

These data show that in all cases the pre-Court procedure was longer than the procedure before the Court itself. Part of the explanation is certainly that the Commission is obliged to clarify the facts of a case which is often done during the pre-Court procedure; and this takes time, all the more, when Member States do not answer requests for information or are otherwise reluctant to assist the Commission.
However, in the cases of lack of transposition and incorrect transposition, the factual side of a specific case does not offer specific difficulties. Indeed, where a Member State has not transposed an environmental directive into its national law, the legal situation is quite clear and one might imagine that the Commission clarifies this situation before it starts the procedure under Article 226 EC Treaty.
The situation of incorrect transposition has to be examined merely under legal aspects, too: the national legislation must be compared with the environmental directive, as to whether it is correct and whether it covers the whole of the territory of a Member State. This is best done before infringement procedures start. Then, however, it is not clear, why the Commission needs, on average, more than two and a half years before it applies to the Court (incorrect transposition) and 16 months in those cases, where no national legislation exists.
Table 11 shows that in the past, the pre-Court procedure was always longer than the Court procedure and never shorter than two years. Also, the duration of the procedure before the Court was remarkably stable during the last ten years.

Table 11: Comparison of the average duration of procedures under Article 226 EC Treaty between 1992 and 2007 (in months; figures rounded)

Period	Pre-Court procedure	Court procedure	Total duration
1992-1994	35	22	47
1995-1997	33	14	47
1998-1999	48	20	68
2000-2001	38	21	59
2002-2003	26	19	45
2004-2005	27	20	47
2006-2007	28	19	47

In order to further explore the origin of the delays in these procedures, the cases where the length of procedure between the dispatch of the letter of formal notice and the Court judgment exceeded 80 months, underwent a more detailed scrutiny. The 80-month length is admittedly arbitrary; however, it allows comparisons with previous years.
In 2006-2007, there were five cases which took, overall, more than eighty months, as is shown by Table 12.

Table 12: Court judgments under Article 226 with a total duration of more than 80 months between the dispatch of the letter of formal notice and the judgment (in months; figures rounded)

Date, number of judgment	Date Letter of Formal Notice	Reply by Member State	Date Reasoned Opinion	Reply by Member State	Application to the Court	Total duration of procedure
28-6-07 C-235/04 Comm. v.	26-1-00	18-5-01	31-1-01	17-4-01	4-6-04	53+36 = 89 months; Nature Conservation

Spain						
12-7-07 C-507/04 Comm. v. Austria	13-4-00	26-7-00	17-10-03	23-12-03	28-12-04	56+31= 87 months; Nature Conservation
13-12-07 C-418/04 Comm. v. Ireland	11-11-98		24-10-01		29-9-04	72+37= 109 months; Nature Conservation
18-12-07 C-195/05 Comm.v. Italy	22-10-99	11-6-01	11-7-03	4-11-03	2-5-05	62+32= 94 months; Waste Management
10-5-07 C-508/04 Comm.v. Austria	13-4-00	27-7-00	17-12-03	23-12-03	8-12-04	56+29= 85 months; Nature conservation

The Table shows that the main cause of delay in these procedures is the failure by the European Commission to decide on or execute the next step in the procedure. Indeed,

- in case C-235/04, 38 months passed between the answer of the Member State to the Reasoned Opinion and the application to the Court;
- in case C-507/04, 39 months passed between the answer of the Member State to the Letter of Formal Notice and the dispatch of the Reasoned Opinion;
- in case C-418/04, 37 months passed between the dispatch of the Letter of Formal Notice and that of the Reasoned Opinion; and another 35 months passed between the dispatch of the Reasoned Opinion and the Application to the Court;
- in case C-195/05, 25 months passed between the Member State's answer to the Letter of Formal Notice and the dispatch of the Reasoned Opinion; and another 18 months passed between the Member State's answer to the Reasoned Opinion and the application to the Court;
- in case C-508/04, 41 months passed between the Member State's answer to the Letter of Formal Notice and the dispatch of the Reasoned Opinion.

Such delays cannot be explained by lack of human resources, translation problems or other administrative circumstances, all the more as three of the five cases concerned the incorrect legal transposition of an EC directive into national legislation; thus, there were no matters of fact to be clarified.

The Commission never even tried to explain such delays – which have been existing since years and are, with regard to administrative behaviour, only the tip of the iceberg. It had already been mentioned above that procedures which take, on average, 47 months, simply are too lengthy. The Commission, though, keeps the precise internal provisions on the procedure under Article 226 EC Treaty confidential. Of course, its annual reports on the monitoring the implementation of Community law do not discuss such items as the length of procedure, and the separate reports on the monitoring the implementation of environmental legislation are also silent on this issue.

In this context, the quasi-monopoly of the Commission to bring cases on environmental matters before the Court of Justice gains all its weight: if the Commission delays procedures to protect the environment or does not take steps

under Articles 226/228 EC Treaty at all – who then will protect the environment? Environmental organisations and individual persons have practically no access to the Court of Justice. True, the European Union is not a State and one should not be too surprised that there is nobody else to ensure the enforcement of *European* law or to protect the *European* environment. Yet, the EU Treaty mentions the European general interest as a value to be protected[20]. And all experience shows that Member States which perceive EC (environmental) laws all too often as "foreign laws"[21], have a limited interest to protect the environment in cases of conflict with other, planning or economical, interests

Concluding remarks

The data for 2006-2007 on environmental judgments by the EC Court of Justice confirm the trends of previous years: The number of environmental judgments delivered by the Court increase. Article 226 remains by far the principal legal basis for the Court decisions, which underlines the important role of the Commission in ensuring the application of EC environmental law. Court actions of one Member State against the other do not exist in environmental law; the Member States prefer to leave it to the European Commission to take action against a specific Member State. The number of actions based on Article 230 EC Treaty increased, though all applications of individual persons against the inscription of their land on the list of natural habitats of Community interest were rejected as inadmissible.

Most judgments were given against Italy which also was the most often condemned by the Court since 1976. In this overall list follow with Belgium, France and Germany three other of the original six EC Member States. They are followed by Spain which only joined the EC in 1986. Remarkable is the low number of judgments which were given against Denmark, Sweden and Finland, as well as against the Netherlands which is also one of the original six Member States.

The duration of litigation before the Court – 18 to 20 months - remains stable since about ten years. The same is true for the duration of the procedure under Article 226 – pre-Court procedure *and* Court litigation – which takes, on average, 47 months, thus almost four years. The duration of procedures appears unacceptably long, in particular as regards cases of lack of transposition of EC legislation into national law (average 26 months) and the incorrect transposition (average 51 months). The pre-litigation procedure takes more time than the procedure before the Court itself. A closer look at cases which took more than 80 months reveals that the length of procedure is essentially due to delays for which the European Commission is responsible.

The lessons to learn from these data appear clear: the European Commission has a quasi-monopoly in enforcing EC environmental law and bringing cases before the Court of Justice. The best remedies against monopolistic situations are well known from economic policy:

(1) Transparency. This means that the Commission should publish the rules and provisions which govern the EC infringement procedures.

(2) Openness. This means that the Commission should publish the Letters of Formal Notice and Reasoned Opinions which it decides against Member States. At present, these decisions are kept confidential, with no convincing arguments. The Commission goes even so far to keep confidential the legal studies which it undertakes to examine Member States' correct transposition of EC legislation[22]

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[20] See Article 213 EC Treaty.

[21] Commission, European Governance, A White Paper, COM (2001) 428, p.25.

[22] See European Parliament, Resolution of 21 February 2008, no 7: "The European Parliament.. is not satisfied with the Commission's answer concerning the confidentiality of

(3) Competition. This means that the Commission should present legislative proposals which allow environmental organisations and individual persons to have legal standing before the Court of Justice in environmental matters. And the European Parliament and the Council should speedily adopt such proposals, in order to at last comply with the requirements of the Aarhus Convention in this regard.

What happened instead in 2006-2007 is that the Commission decided not to look at (environmental) complaints any more, but to concentrate on the non-transposition of Community legislation, on non-compliance with judgments of the Court (Article 228 EC Treaty, and on cases which raise fundamental problems[23]. As environmental complaints constitute by far the largest source of information for the Commission as regards the application of EC environmental legislation in practice within the 27 Member States, the Commission deliberately changed its policy to seriously control the effective application of EC environmental law. In my opinion, this reduction is not compatible with Article 211 EC Treaty which requires the Commission to ensure that EC law, including EC environmental law, is not only transposed into national law, but that it is "applied".

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the conformity studies; calls once more on the Commission to publish on its website the studies requested by the various Directorate-Generals on the valuation of the conformity of national implementation measures with Community legislation" (http://www.europarl.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+PG-TA).

[23] See Commission, COM (2007) 502. See on that European Parliament (note 22, above) no.19: "The European Parliament.. observes that the Commission is often the only body left to which citizens can turn to complain about the non-application of Community law; is therefore concerned that, by referring back to the Member States concerned (which is the party responsible for the incorrect application of Community law in the first place), the new working method could present a risk of weakening the Commission's institutional responsibility for ensuring the application of Community law as the "guardian of the Treaty" in accordance with Article 211 of the EC Treaty.

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