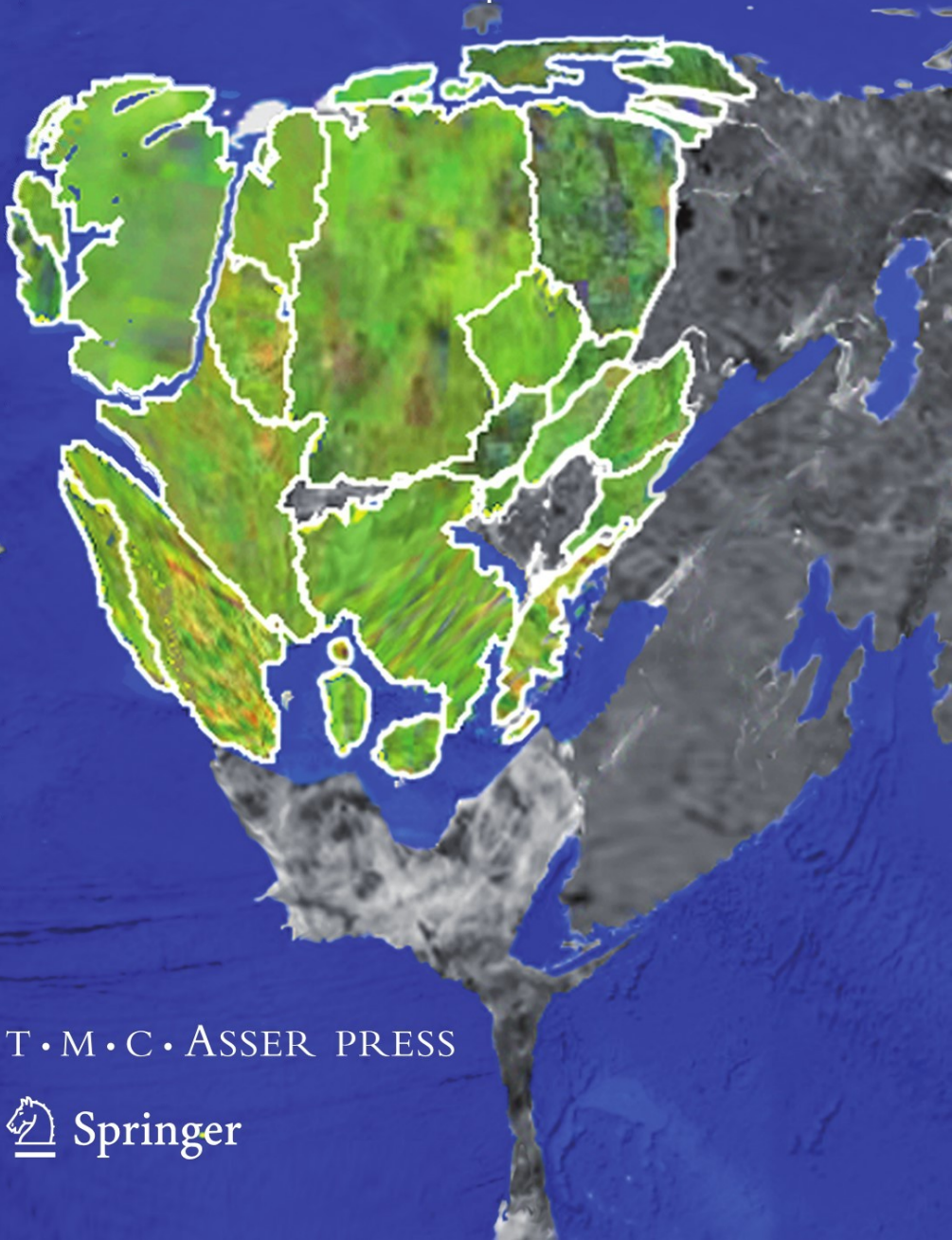


Leonardo Massai

# THE KYOTO PROTOCOL IN THE EU

European Community and Member States  
under International and European Law



T · M · C · ASSER PRESS

 Springer

# The Kyoto Protocol in the EU

Leonardo Massai

# The Kyoto Protocol in the EU

European Community and Member States  
under International and European Law

T · M · C · A S S E R P R E S S

 Springer

Dr. Leonardo Massai  
Via di Galceti 111  
59100 Prato  
Italy  
e-mail: Leonardo.massai@gmail.com

ISBN 978-90-6704-323-6

e-ISBN 978-90-6704-571-1

DOI 10.1007/978-90-6704-571-1

© T.M.C. ASSER PRESS, The Hague, The Netherlands, and the author 2011

Published by T.M.C. ASSER PRESS, The Hague, The Netherlands [www.asserpress.nl](http://www.asserpress.nl)

Produced and distributed for T.M.C. ASSER PRESS by Springer-Verlag, Berlin Heidelberg

No part of this work may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, microfilming, recording or otherwise, without written permission from the Publisher, with the exception of any material supplied specifically for the purpose of being entered and executed on a computer system, for exclusive use by the purchaser of the work.

The use of general descriptive names, registered names, trademarks, etc. in this publication does not imply, even in the absence of a specific statement, that such names are exempt from the relevant protective laws and regulations and therefore free for general use.

*Cover design:* eStudio Calamar, Berlin/Figueres

Printed on acid-free paper

Springer is part of Springer Science+Business Media ([www.springer.com](http://www.springer.com))

*To my family*

# Preface

In a period when the international community is fully committed to seek an appropriate solution to respond to the threat of climate change, the role and example provided by the international climate regime composed of the United Nations Framework Convention on Climate Change (UNFCCC) and the Kyoto Protocol is still relevant in the field of international environmental law and within the existing multilateral environmental agreements. It is my view that the rules, procedures, instruments and particularities of the international climate regime are and will remain innovative and pioneer in many aspects, whatever will be the structure and details of the post-2012 agreement.

The participation of the European Community (EC) and the Member States in the international climate change regimes is a complex and unique issue. In the case of the Kyoto Protocol, this is rendered more complicated by two considerations: the fact that for the purposes of Article 4 of the Protocol, the membership of the EC and Member States is frozen at a particular point in time; and the enlargement of the European Union of 1 May 2004 and 1 January 2007. It is only by addressing the architecture of the Kyoto Protocol and the various types of obligations established both under international and European law that one is able to identify the responsibility of the European Community and the Member States in the event of non-compliance with those obligations.

This dissertation is dedicated to all those who gave their time, support and insights during the research and writing process. Much credit lies with my family. I am especially indebted to Professor Michael Bothe for his precious advice and support, countless inspiring discussions, invaluable feedback and firm encouragement. Furthermore, I would like to express my gratitude to Professor Eckard Reh binder for his endorsement and feedback. Special thanks also go to the T.M.C. Asser Institute for the support. Finally, the last remark is for Alessandra Becattini who brilliantly interpreted the re-sized version of Europe based on the level of greenhouse gas emissions provided by Worldmapper.

The Hague, July 2010

Leonardo Massai

# Contents

<b>1</b>	<b>Introduction</b> . . . . .	<b>1</b>
 <b>Part I</b>		
<b>2</b>	<b>The EU Enlargement</b> . . . . .	<b>13</b>
2.1	History . . . . .	13
2.2	Legal Basis . . . . .	14
2.3	The Enlargement Procedure . . . . .	19
2.4	The Treaty of Accession . . . . .	21
2.5	The Environmental <i>Acquis</i> . . . . .	22
<b>3</b>	<b>The International Climate Change Regime</b> . . . . .	<b>29</b>
3.1	Climate Change . . . . .	29
3.2	The United Nations Framework Convention on Climate Change (UNFCCC) . . . . .	32
3.3	The Kyoto Protocol . . . . .	39
3.4	The Kyoto Protocol: Key Aspects . . . . .	45
3.5	The Kyoto Protocol: Rules of Implementation . . . . .	48
<b>4</b>	<b>The EC and the Member States in the Kyoto Protocol</b> . . . . .	<b>51</b>
4.1	The External Competence of the European Community in the Field of Environmental Protection . . . . .	51
4.1.1	Mixed Agreements and Environmental Protection . . . . .	56
4.2	The EC in the International Climate Regime . . . . .	61
4.3	EC Greenhouse Gas Emissions Limitation and Reduction Commitments Under the Kyoto Protocol . . . . .	67
4.3.1	History of the EU Burden Sharing Agreement . . . . .	67
4.4	Greenhouse Gas Emissions in the EU . . . . .	70

4.5	Central and Eastern European Countries and the International Climate Regime . . . . .	86
4.5.1	Malta and Cyprus . . . . .	88
4.5.2	Certain Degree of Flexibility. . . . .	89
4.6	GHG Emissions Surplus in the New Member States . . . . .	92
4.7	Article 4 of the Kyoto Protocol . . . . .	96
4.7.1	The Blocking Clause . . . . .	99
4.7.2	Addressing Responsibility. . . . .	103
4.8	Conclusions. . . . .	104
<b>5</b>	<b>The Flexible Mechanisms of the Kyoto Protocol . . . . .</b>	<b>107</b>
5.1	International Flexibility and Annex I Parties . . . . .	107
5.2	Emissions Trading . . . . .	109
5.3	International Emissions Trading. . . . .	110
5.4	EU Emissions Trading System. . . . .	114
5.5	Differences between the EU ETS and IET . . . . .	117
5.6	The Other Flexible Mechanisms . . . . .	120
5.6.1	Joint Implementation . . . . .	122
5.6.2	Clean Development Mechanism. . . . .	123
5.6.3	JI and CDM Projects in the EU. . . . .	125
5.7	JI and CDM in Central and Eastern Europe . . . . .	128
5.8	Conclusions. . . . .	132

## Part II

<b>6</b>	<b>EC Compliance with the International Climate Regime. . . . .</b>	<b>137</b>
6.1	The Non-Compliance Regime of the Kyoto Protocol . . . . .	137
6.1.1	Legal Basis and Amendment Dilemma. . . . .	141
6.1.2	Organisation . . . . .	142
6.1.3	Consequences . . . . .	144
6.2	The Monitoring, Reporting and Verification Obligations . . . . .	149
6.2.1	National System . . . . .	150
6.2.2	GHG Annual Inventory . . . . .	151
6.2.3	National Communication . . . . .	153
6.2.4	Initial and Final Reports. . . . .	157
6.2.5	Registries . . . . .	164
6.3	Eligibility Requirements to Participate in the Flexible Mechanisms. . . . .	167
6.4	The Quantified Emission Limitation and Reduction Commitments (QELRCs) . . . . .	168
6.5	Supplementarity. . . . .	170
6.6	EC Legislation for Compliance with the Kyoto Protocol Obligations. . . . .	173



- 6.6.1 EU Legislation on Monitoring, Reporting and Verification Obligations . . . . . 174
- 6.6.2 EU Legislation and Eligibility Requirements. . . . . 180
- 6.6.3 EU Legislation on the Reduction of Greenhouse Gas Emissions. . . . . 181
- 6.7 Compliance of the EC and Member States with the Kyoto Protocol Obligations . . . . . 188
  - 6.7.1 Compliance with the Monitoring, Reporting and Verification Obligations . . . . . 193
  - 6.7.2 Compliance with the Eligibility Requirements. . . . . 200
  - 6.7.3 Compliance with the Limitation and Reduction Commitments . . . . . 205
  - 6.7.4 Cases before the Compliance Committee . . . . . 208
- 6.8 EC and Member States Responsibility for Failure to Comply with the Obligations of the Kyoto Protocol . . . . . 210
  - 6.8.1 GHG Emission Limitation and Reduction Commitments . . . . . 218
  - 6.8.2 Monitoring, Reporting and Verification Obligations and Eligibility Requirements. . . . . 226
- 6.9 Consequences of a Failure by The EC and the Member States to Comply with Community Law . . . . . 231
- 6.10 Conclusions. . . . . 236
- 7 The EC Principle of Loyal Cooperation and the Obligations of the Kyoto Protocol. . . . . 241**
  - 7.1 The Legal Value of General Principles in Community Law . . . . . 242
  - 7.2 The Principle of Loyal Cooperation . . . . . 244
  - 7.3 The *Lex Specialis* Dichotomy . . . . . 247
  - 7.4 The Application of the Principle of Loyalty to the Kyoto Protocol Obligations. . . . . 252
    - 7.4.1 The Duty of Cooperation and Mixed Agreements . . . . . 252
    - 7.4.2 Climate Change and Community Objectives. . . . . 253
    - 7.4.3 EC Legislation to Fulfil the Obligations of the Kyoto Protocol. . . . . 257
  - 7.5 Article 10 TEC and the Duties of the Member States According to Case Law . . . . . 261
    - 7.5.1 Article 10 TEC and External Competence . . . . . 263
    - 7.5.2 The Role of National Authorities. . . . . 268
  - 7.6 The Principle of Loyal Cooperation and Similar Principles in the Member States: a Comparative Law Reflection . . . . . 270
    - 7.6.1 The Case of Belgium . . . . . 270
    - 7.6.2 The Case of Spain . . . . . 272
    - 7.6.3 The Principle of *Bundestreue* in Germany . . . . . 273
    - 7.6.4 Comparative Law Reflections . . . . . 276

- 7.7 Article 10 TEC and the Duties of the Member States in View of Compliance by the EC and the Member States with the Kyoto Protocol Obligations . . . . . 278
  - 7.7.1 Duty to Take any Reasonable Effort . . . . . 279
  - 7.7.2 Preference to the EC and EU15 Under the International Emissions Trading (Duty to Abstain) . . . . . 281
  - 7.7.3 Jeopardising the Participation of the EU in the Flexible Mechanisms . . . . . 285
- 7.8 Conclusions. . . . . 285
- 8 Conclusions . . . . . 289**
  - 8.1 Monitoring, Reporting and Verification Obligations . . . . . 292
  - 8.2 Eligibility Requirements . . . . . 294
  - 8.3 Limitation and Reduction Commitments . . . . . 295
  - 8.4 Kyoto Protocol Obligations in the EU . . . . . 296
  - 8.5 Greenhouse Gas Emissions Limitation and Reduction Commitments in the EU . . . . . 298
  - 8.6 Monitoring, Reporting and Verification Obligations and Eligibility Requirements in the EU . . . . . 301
  - 8.7 Article 10 EC Treaty . . . . . 303
  - 8.8 New Member States . . . . . 305
- Bibliography . . . . . 309**
- Annexes . . . . . 317**
  - 1 United Nations Framework Convention on Climate Change . . . . . 317
  - 2 Kyoto Protocol to the United Nations Framework Convention on Climate Change . . . . . 343
  - 3 Decision 2/CMP.1 . . . . . 367
  - 4 Decision 27/CMP.1. . . . . 403
  - 5 Relevant Treaty Articles . . . . . 417
  - 6 Council Decision 2002/358/EC . . . . . 427

# List of Abbreviations

## A

AAU	Assigned Amount Units
AGBM	Ad Hoc Group on the Berlin Mandate
AIE	Accredited Independent Entities
AIJ	Activities Implemented Jointly
AOSIS	Alliance of Small Island States
AP	Accession Partnerships

## B

BAPA	Buenos Aires Plan of Action
BSA	Burden Sharing Agreement
BVerfG	Bundesverfassungsgericht (German Constitutional Court)

## C

CAP	Common Agricultural Policy
CCAP	Centre for Clean Air and Policy
CCPM	Common and Coordinated Policies and Measures
CCPMs	Coordinated and Common Policies and Measures
CDM	Clean Development Mechanism
CEEC	Central and Eastern European Countries
CER	Certified Emission Reduction
CG11	Central Group 11
CHP	Combined Heat and Power
CITL	Community Independent Transaction Log
CO <sub>2</sub>	Carbon Dioxide
COP	Conference of the Parties of the UNFCCC
COP/MOP	Conference of the Parties serving as Meeting of the Parties

CPR Commitment Period Reserve  
 CRF Common Reporting Format

## D

DESA Department of Economic and Social Affairs  
 DFP Designated Focal Point  
 DNA Designated National Authority  
 DOE Designated Operational Entity

## E

EAEC European Atomic Energy Community  
 EATD European Allowance Trading Directive (2003/87/EC)  
 EB Executive Board  
 EBRD European Bank for Reconstruction and Development  
 EC European Community  
 ECCP European Climate Change Programme  
 ECHR European Court of Human Rights  
 ECJ European Court of Justice  
 ECR European Court Report  
 ECSC European Coal and Steel Community  
 EEA European Environment Agency  
 EEC European Economic Community  
 EIB European Investment Bank  
 EIT Economies in Transition  
 EJIL European Journal of International Law  
 EPA Environmental Protection Agency  
 ERT Expert Review Team  
 ERU Emission Reduction Unit  
 ET Emissions Trading  
 EU10 EU candidate countries before the enlargement of 1 May 2004  
 excluding Malta and Cyprus  
 EU15 EU Member States before the enlargement of 1 May 2004  
 EU12 EU candidate countries before the enlargement of 1 May 2004  
 EU25 EU Member States after the enlargement of 1 May 2004  
 EU27 EU Member States after the enlargement of 1 January 2007  
 EUA European Union Allowance  
 EURATOM European Atomic Energy Community  
 EUROSTAT Statistical Office of the European Communities  
 EU ETS European Emissions Trading System

**F**

FAO Food and Agriculture Organisation

**G**

GATT General Agreement on Tariff and Trade

GDP Gross Domestic Product

GEF Global Environment Facility

GHG Greenhouse Gases

GIS Green Investment Scheme

**I**

ICEP Integrated Climate and Energy Package

IEA International Energy Agency

IET International Emissions Trading

ILC International Law Commission

INC Intergovernmental Negotiating Committee

IPCC Intergovernmental Panel on Climate Change

IPPC Integrated Pollution Prevention and Control

ITL International Transaction Log

**J**

JI Joint Implementation

JRC Joint Research Centre

JISC JI Supervisory Committee

JUSSCANNZ Coalition of non-EU Annex I Parties, guided by Japan, the United States of America, Switzerland, Canada, Australia, Norway and New Zealand

**K**

KP Kyoto Protocol

**L**

ICER Long-term Certified Emission Reduction

LDC Least Developed Countries

LULUCF Land Use, Land-Use Change and Forestry

**M**

MEA	Multilateral Environmental Agreement
MoU	Memorandum of Understanding
MRV	Monitoring, Reporting and Verification

**N**

NAP	National Allocation Plan
NGO	Non-governmental Organisation
NIR	National Inventory Report
NOAA	National Oceanic and Atmospheric Administration
NPAA	National Plan for the Adoption of the Acquis

**O**

OECD	Organisation for Economic Cooperation and Development
OJ	Official Journal of the European Union

**P**

PAM	Policies and Measures
POPs	Persistent Organic Pollutants

**Q**

QELRC	Quantified Emission Limitation and Reduction Commitment
-------	---

**R**

RDP	Report on Demonstrable Progress
REC	Regional Environment Centre
REIO	Regional Economic Integration Organisation
RMU	Removal Unit

**S**

SAR	Second Assessment Report of the IPCC
SBI	Subsidiary Body for Implementation
SBSTA	Subsidiary Body for Scientific and Technological Advice
SCCF	Special Climate Change Fund

**T**

TAR	Third Assessment Report of the IPCC
tCER	Temporary Certified Emission Reduction
TEC	Treaty of European Community
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the EU

**U**

UN	United Nations
UNCBD	United Nations Convention on Biological Diversity
UNCCD	United Nations Convention to Combat Desertification
UNCED	United Nations Conference on Environment and Development
UNDP	United Nations Development Programme
UNECE	United Nations Economic Commission for Europe
UNEP	United Nations Environment Programme
UNFCCC	United Nations Framework Convention on Climate Change
UNITAR	United Nations Institute for Training and Research

**W**

WCP	World Climate Programme
WMO	World Meteorological Organisation
WRI	World Resources Institute
WTO	World Trade Organisation

# Chapter 1

## Introduction

Climate change is often associated with the word ‘global’: climate change is a global phenomenon, climate change is a global threat. According to the majority of scientists, climate change is mainly caused by global warming, i.e., the increase of atmospheric concentrations of greenhouse gas emissions (GHG) mainly due to anthropogenic activities. Climate change is definitively one of the most serious environmental challenges of the Twenty-first century. This is confirmed not only by increasing scientific evidence, but also by the huge attention from the media as well as politicians, stakeholders and citizens. There are two main reasons for the increasing general interest in the issue of global warming. First, the frequency of adverse effects in the ecosystem due to the warming of the earth is constantly increasing. The report on worldwide greenhouse gas concentrations released by the National Oceanic and Atmospheric Administration (NOAA) in 2005 announced an increase in the level of these gases by 1.25% in 2005 compared to the previous year, and by 21.5% compared with 1990 levels; the findings of the Fourth Assessment Report of the Intergovernmental Panel on Climate Change (IPCC) clearly stated that the ‘warming of the climate system is unequivocal [...] global GHG emissions due to human activities have grown since pre-industrial times, with an increase of 70% between 1970 and 2004 [...] most of the observed increase in global average temperatures since the mid-20th century is very likely due to the observed increase in anthropogenic GHG concentrations.’ Second, the Kyoto Protocol, the major instrument adopted by the international community to respond to the phenomenon of climate change, entered into force on 16 February 2005, establishing GHG reduction commitments for all industrialised countries which have accepted it. Furthermore, the Kyoto Protocol set the stage for climate-friendly objectives, policies and strategies to be defined with a view to the post-2012 phase.

The leading role assumed by the European Community (EC) in the international climate regime in terms of adopted and planned policies and measures, as well as ambitious greenhouse gas emissions reduction targets, is mainly due to the constant and decisive efforts of the European Commission, especially since 2001,



the year in which the US decided to leave the process of ratification of the Kyoto Protocol. Quite unexpectedly, in 2001 in Marrakech—the location of the yearly international talks on the development of rules aimed at the implementation of the Kyoto Protocol, the 7th Conference of the Parties of the United Nations Framework Convention on Climate Change (UNFCCC)—the Commission presented a fundamental legislative package including three proposals: (1) the details of the future ratification of and commitment to the Kyoto Protocol by the EC and the Member States, COM(2001)579<sup>1</sup>; (2) the foundations of the European Climate Change Programme (ECCP) aimed at the development of European policies and measures to combat climate change in line with the international obligations, COM(2001)580<sup>2</sup>; and (3) the proposal for the establishment of a Europe-wide system for the exchange of greenhouse gas emission allowances commonly defined as EU Emissions Trading System (EU ETS), COM(2001)580.<sup>3</sup> Since then, the EC has even reinforced its strong interest in the establishment of a solid and concrete response from the international community to climate change. This is confirmed by the international negotiations and talks on the future of the Kyoto Protocol following the first commitment period of 2008–2012, namely on the definition of, among others, new binding greenhouse gas emission reduction commitments for industrialised and non-industrialised countries in the post-2012 phase. The leading role of the EC in the international negotiations on the post-2012 phase is confirmed by many European documents and official positions, among which the Presidency Conclusions of the 2007 European Spring Council (8–9 March 2007). The latter identifies important binding targets and measures aimed at ensuring that the global average temperature will not exceed pre-industrial levels by more than 2°C by 2100. The Integrated Climate and Energy Package (ICEP) adopted by the EU heads of state and government in March 2007 included the following targets.

- Reduction of greenhouse gas emissions by 30% for developed countries by 2020 in respect of 1990 levels, provided that an international agreement is adopted on this issue.
- Reduction of greenhouse gas emissions by 20% for EU27 by 2020 compared with 1990 levels regardless of the decisions adopted at the international level.
- Increase of the share of renewable energy in the energy consumption by 20% by 2020.

---

<sup>1</sup> Proposal of the Commission for a Council Decision concerning the approval, on behalf of the European Community, of the Kyoto Protocol to the United Nations Framework Convention on Climate Change and the joint fulfilment of commitments thereunder, COM(2001)579, Brussels, 23 October 2001.

<sup>2</sup> Communication from the Commission on the implementation of the first phase of the European Climate Change Programme, COM(2001)580, Brussels, 23 October 2001.

<sup>3</sup> Proposal of the Commission for a Directive of the European Parliament and of the Council establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC, COM(2001)581, Brussels, 23 October 2001.

- Reduction of energy consumption through energy efficiency improvements by 20% by 2020.
- Increase of the share of biofuels in EU transport fuel consumption by 10% by 2020.

The Kyoto Protocol established different obligations for developed and developing countries (Annex I and non-Annex I parties) on the basis of the principle of common but differentiated responsibilities: the industrialised part of the world must take the lead in solving the problem of global warming. On the other hand, developing countries are also urged to contribute to solving this global environmental problem but with a lower degree of responsibility. The EC and the Member States are included in the list of Annex I Parties to the UNFCCC, with the exception of Malta and Cyprus, and have all ratified both the UNFCCC and the Kyoto Protocol. On the basis of Article 4 of the Kyoto Protocol, the EC and the 15 EU states member at the moment of the negotiations and ratification of the Kyoto Protocol agreed on the joint target for the reduction of their level of greenhouse gas emissions of 8% by 2008–2012 compared with 1990 levels. This commitment is valid for the 15 countries who were a member of the EU in 1998 when the Kyoto Protocol was negotiated, and thus excludes the 12 new Member States which joined the EU in 2004 and 2007. The focus of this study is on the different legal issues related to the participation in and implementation of the Kyoto Protocol by the EC and the Member States, taking into account the role, status and responsibility of the Member States before and after the two latest enlargements of the Community: 1 May 2004 and 1 January 2007. In this context, particular attention is paid to the main obligations of Annex I parties under the Kyoto Protocol, namely the monitoring, reporting and verification obligations, the eligibility criteria and the limitation and reduction commitments. Amongst others, this book attempts to shed some light on the jungle of abbreviations and short forms frequently utilised in Community and international law describing the international climate regime. In this respect, a perfect example is provided by the following different terms which are used in this book to identify the European Union and the Member States.

- EU10: EU candidate countries before the enlargement of 1 May 2004 excluding Malta and Cyprus.
- EU15: EU Member States before the enlargement of 1 May 2004.
- EU12: EU candidate countries before the enlargement of 1 May 2004.
- EU25: EU Member States after the enlargement of 1 May 2004.
- EU27: EU Member States after the enlargement of 1 January 2007.

The aim of this book is therefore quite ambitious: it is an attempt to clarify the main legal issues in international and European law related to the participation in and implementation of the Kyoto Protocol by the EC and the Member States. Key questions addressed are: to what extent are the (new and old) Member States bound by their membership of the EU in respect of all the obligations deriving from the Kyoto Protocol? What is the role of EC legislation in this regard? What

are the consequences under international and European law for the EC as a whole in the event of non-compliance by the Member States with the international obligations created by the Kyoto Protocol? And do the EU15 and EU12 share the same level of responsibility in respect of the compliance by the Community with the obligations of the Kyoto Protocol?

In other words, this book is intended to address various legal questions whose evidence and importance are the direct result of the following considerations: (1) the decision of the EU15 to be jointly committed to the reduction of greenhouse gas emissions under the Kyoto Protocol; (2) the text of Article 4 of the Kyoto Protocol which does not recognise any alteration in the composition of the EU prior to 31 December 2012; (3) the enlargement of the EU to 27 Member States (2004 and 2007); (4) the division of responsibility between the EC and the Member States in the implementation of the Kyoto Protocol; and (5) the consequences for the EC and the Member States in the event of a failure to comply with the Kyoto Protocol obligations.

The nature and composition of the EU as well as the strong commitment of the Community and the Member States to the fight against climate change are studied in full detail in this book. The case of the EU and climate change and the participation of the Community and the Member States in the international climate regime can be used to understand the dynamics of the EU's external relations in other relevant areas of Community interest (e.g., international trade). To this end, the final goal of this book is not only to provide a thorough assessment of the obligations and responsibility issues arising from the Kyoto Protocol and facing the EU, but also to shed some light on the complexity of the current EU constitutional structure and, where necessary, on the need for reforms.

In the transposition and implementation of EU law and policy in the field of climate change the EC's structural problem emerges, namely the fact that the EC is a regional economic international organisation, a community composed of 27 countries with substantial political, historical and economic differences. The Member States do not always correctly implement decisions, directives and regulations adopted at the Community level in their national systems, and the problem of the quality of the implementation of EC legislation is still very present. Furthermore, in the field of environmental protection, harmonisation has been more difficult to achieve after the fifth and sixth enlargement of the EU (2004 and 2007). This is due to the fact that before the accession, the level of environmental standards and legislation in place in the new Member States was, in many cases, not in line with the EU levels.

Regarding global warming, the structural differences among the Member States are shown, for instance, by the yearly reports published by the European Environment Agency (EEA) on the release and trends in greenhouse gas emissions in the atmosphere at both Community and national level. The EEA reports have confirmed the significant discrepancies among the Member States in their efforts to mitigate climate change. Two of the latest reports of the EEA available at the time of writing were released in 2008 and provide an estimation of the greenhouse gas emission levels in the EC and the Member States in relation to the reduction

obligations of the Kyoto Protocol. The first is the annual European Community greenhouse gas inventory 1990–2006 and inventory report 2008, prepared in accordance with the monitoring, reporting and verification obligations created by the Kyoto Protocol for Annex I parties. The report referred to the greenhouse gas emissions in the EU in 2006 and confirmed a continuation of the slight reduction trend which started in 2005.

Sectors which contributed most to the cut of GHG emissions in 2006 were households and offices, which registered a lower consumption of gas and oil in 2006. Member States that achieved significant GHG emission reductions were France, Italy and the UK, thanks to a warmer winter and higher gas prices. Carbon dioxide emissions from electricity, heat production and transport increased in 2006. However, the trend in EU greenhouse gas emissions in the years before the beginning of the first commitment period clearly shows that the EC and the EU15 are well behind the international targets (–2.7% compared with the –8% target under the Kyoto Protocol).

However, since 2008, the EEA and the European Commission have been confident that the Kyoto Protocol reduction obligations will be overachieved (–11.3%) but only in the event that the EU Member States implement all existing and additional measures; use the flexible mechanisms of the Kyoto Protocol; and include the offsetting of greenhouse gas emissions through land use, land-use change and forestry (LULUCF) activities. Finally, the Community's compliance with the EU-wide reduction commitment will be ensured by the overachievement of individual targets by some Member States.

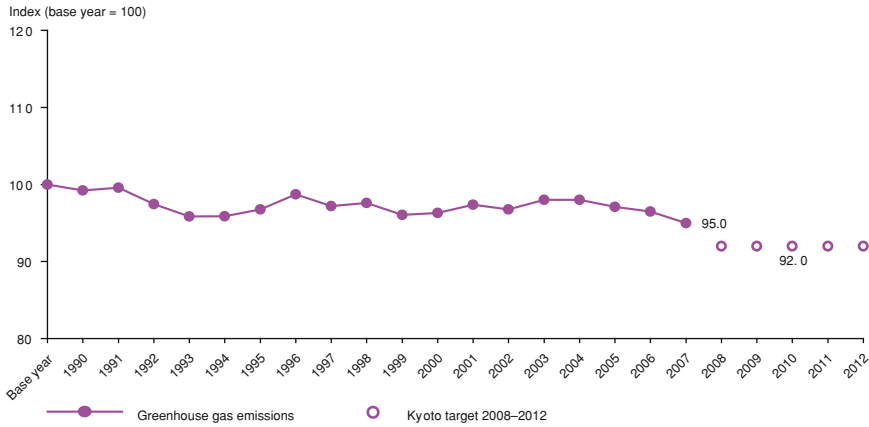
The latest EEA report available at the time of writing was released on 29 May 2009: the annual EC greenhouse gas inventory 1990–2007 and inventory report 2009. In accordance with the EEA findings, the following trends in greenhouse gas emissions in the EU were highlighted:

- GHG emissions EU15 2006–2007: –1.6%;
- GHG emissions EU15 1990–2007: –4.3%;
- GHG emissions EU27 2006–2007: –1.2%;
- GHG emissions EU27 1990–2007: –9.3%.

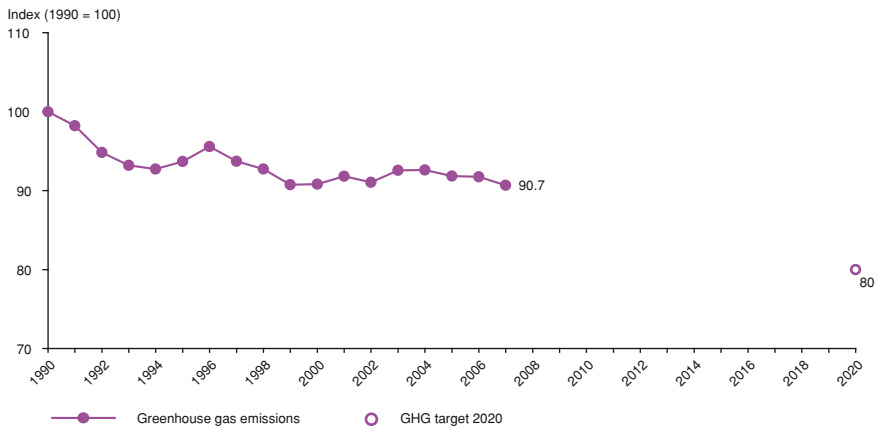
The level of greenhouse gas emission concentrations in the new EU Member States is historically lower than in the EU15, which is due to the fact that the Kyoto Protocol has allowed those countries a big margin of economic development and less stringent reductions targets. Whether the new Member States will catch up with the EU15 as regards the reduction obligations of the Kyoto Protocol is an open question. However, the data on the level of greenhouse gas emissions in the EU provided by the EEA confirm the differences between the EU15 and the EU12 where it concerns the Kyoto Protocol reduction commitments.

The following two graphs (Figs. 1.1, 1.2) included in the 2009 EEA report indicate the difference in the aggregate level of emissions between the EU15 and the EU27.

However, this book does not aim to provide an estimation of whether or not the EC and the Member States will be able to meet their greenhouse gas emission reduction targets under the Kyoto Protocol, nor is this of any relevance for the



**Fig. 1.1** EU15 greenhouse gas emissions and 2008–2012 projections



**Fig. 1.2** EU27 greenhouse gas emissions in 1990–2006 compared with the Kyoto Protocol targets

legal considerations that follow. The objective of this book is to address and explain all the different legal questions arising from the participation of the EC and the Member States in one of the most complicated and innovative international treaties in the field of global environmental protection. It is therefore not crucial to identify whether or not, at the end of the first commitment period of the Kyoto Protocol, the EC and the Member States will be in compliance with the Kyoto Protocol obligations. What is more relevant for us is the study of the division of responsibility between the Member States and the Community in the event of non-compliance by the EC and the Member States with the obligations created by the international climate regime. This issue assumes particular relevance in the case of

mixed agreements, that is to say, where the Community and the Member States are party to an international treaty, which is usually the case when the matter regulated by the treaty is not falling within the exclusive competence of the EC. This book may therefore contribute to the legal theory and practice in EU and international law in relation to the participation of the EC and the Member States in a mixed agreement and consequently the issues of responsibility and liability for compliance. Moreover, considering the EU enlargement of 2004 and 2007 and the fact that to a certain extent the Kyoto Protocol does not recognise this territorial change, the study also focuses on the role of and legal implications for the new Member States as regards the obligations of the EC and the Member States under the Kyoto Protocol. In this sense, the principle of loyalty provided for in Article 10 of the EC Treaty is studied in relation to the obligations of the Community and the Member States under an international treaty. Given the scarcity of literature and legal studies on the application of the EU general principle laid down in Article 10 TEC, this book aims to enrich the science of Community law in this respect. Article 10 TEC is addressed in connection with the obligations created for the Member States and the Community by a multilateral environmental agreement (MEA). To this end, the applicability of Article 10 TEC is studied in order to determine to what extent Member States are required either to directly assist the European Community in the achievement of its objectives or to avoid any action which could jeopardise the same objectives.

The contribution and assistance that the new Member States could provide to the European Community and the EU15 in complying with the greenhouse gas emissions reduction commitments under the Kyoto Protocol are significant. This aspect can be considered from two perspectives: first, the EC and the Member States are responsible under international law in terms of compliance with the Kyoto Protocol obligations, and second, the Member States are bound by EC law to comply with the international climate regime. Accordingly, the book is divided into two parts. The first part is rather descriptive but essential to understand the complicated aspects of the participation of the EC and the Member States in the international climate regime. The second part concerns more directly the main legal questions addressed, and some legal theories are expressed.

[Chapter 2](#) presents a general introduction to the key aspects of the last two EU enlargements, focusing on the *acquis communautaire* and the obligations for the acceding countries in the field of environmental protection and climate change. This is relevant for the development of our discussion in the sense that the new Member States joining the EU face a comprehensive set of obligations which, in the field of climate policy, need to be considered in relation to the international obligations established under the international climate regime. [Chapter 3](#) provides an overview of the international climate regime. In particular, the legal details and main aspects of the UNFCCC and the Kyoto Protocol are examined. Particular emphasis is put on the institutional structure and the decision-making process created by the international climate regime, as well as on the differentiated set of commitments for developing and developed countries. Finally, [Chap. 3](#) refers to the three most innovative parts of the Kyoto Protocol in the field of international

environmental law: the market-based approach, which takes the form of flexible mechanisms as instruments to facilitate part of the required reduction of greenhouse gas emissions; the recognition of forestry-related activities (land use, land-use change and forestry, LULUCF) as a pool to absorb carbon dioxide equivalent emissions and the possibility for Annex I parties to take account of these activities in the reduction obligations; and the establishment of an ad hoc non-compliance procedure. [Chapter 4](#) focuses on the participation of the EC and the Member States in the UNFCCC and the Kyoto Protocol and the nature of the joint commitment under Article 4 of the Protocol. This chapter is fundamental for understanding the different status and position of the EC, EU15 and EU12 in the Kyoto Protocol. To this end, the details of the participation of the EC and the Member States in the UNFCCC and the Kyoto Protocol are addressed, focusing in particular on the different status of Malta and Cyprus, as well as on the legal issues arising from the inclusion of the EC and the Member States in the list of Annex I parties. Moreover, the EU's internal distribution (EU Burden Sharing Agreement, BSA) of the greenhouse gas emission reduction obligations is discussed, with a particular focus on the division between the EU15 and the EU12. Furthermore, the past and future trends in the levels of greenhouse gas emissions in the EU15 and the EU12 are considered, in particular in relation to the surplus of greenhouse gas emission reductions available in the new Member States. In respect of the main legal questions addressed in [Chap. 4](#), the issue of the determination of competences of the EC and the Member States under the Kyoto Protocol is considered, as well as the division of responsibilities in the event of non-compliance by the EC and the Member States with the Kyoto Protocol obligations. Finally, the details of the blocking clause included in Article 4 of the Kyoto Protocol and the implications for the EC following the latest two enlargements are discussed. The first part of this book ends with [Chap. 5](#) on the flexible instruments established at both international and European level to offer Annex I parties, and therefore the EC and the Member States, the possibility to comply with some of the international obligations under the Kyoto Protocol not only through the adoption of domestic policies and measures, but also by using the market-based mechanisms designed to reduce greenhouse gas emissions abroad—Joint Implementation (JI), Clean Development Mechanism (CDM) and Emissions Trading (ET). In particular, the potential of and experience with JI and CDM projects in the new Member States are addressed, as well as the issue of the decreased attractiveness of hosting JI projects in the new Member States due to their accession to the EU (Figs. 1.1, 1.2).

The second part of this book discusses the issues of responsibility and liability of the EC and the Member States in the event of non-compliance with the obligations established under the Kyoto Protocol. This issue is addressed from both the international law and the European law perspective. [Chapter 6](#) focuses on the obligations created by the Kyoto Protocol for Annex I parties and the consequences of non-compliance. In respect of the EC and the Member States, the main legal questions addressed in [Chap. 6](#) concern the composition of the EC in relation to the different obligations under the international climate regime. Also, the consequences of the failure to comply with those obligations by the EC, the

EU15 and the EU12 are discussed and the position of the different actors at the EU level is clarified. Furthermore, the EC legislation and policy adopted in response to the obligations arising from the Kyoto Protocol are assessed. Finally, the issue of responsibility for the failure to comply with the main obligations under the international climate regime is considered from the viewpoint of EC law. The book concludes with [Chap. 7](#), which looks at the applicability of Article 10 TEC in respect of the Member States in non-compliance with the obligations of the Kyoto Protocol. Starting from the assessment of the scope of Article 10 EC Treaty and the jurisprudence of the European Court of Justice regarding the enforcement of this principle, the different obligations of the Kyoto Protocol are considered and for each the applicability of Article 10 TEC is tested.



# Part I

# Chapter 2

## The EU Enlargement

### 2.1 History

Since the establishment of the European Coal and Steel Community (ECSC) in 1952, the European integration process has constantly developed both in terms of the increasing number of nations joining the European Union and in terms of revisions and amendments of the founding Treaties in order to better match the needs and necessities of the European states and citizens. The merging of the institutions of the ECSC, the European Economic Community (EEC) and the European Atomic Energy Community (EAEC) in 1967 was the first big EU reform, establishing a single Commission, a single Council of Ministers as well as the European Parliament. At the time, there were six members of the EEC, the so-called founding countries Belgium, Germany, Luxembourg, France, Italy and the Netherlands. The next step in the history of the European treaties, i.e., the adoption of the Single European Act in 1986 modifying the founding treaties and introducing qualified majority voting, was accepted by the European Community which had been enlarged to 12 Member States—Denmark, Ireland and the United Kingdom (1973), Greece (1981), and Spain and Portugal (1986). A complete new era for the Community started in the early 1990s with the adoption of the Treaty of Maastricht in 1992 and with the launch of the internal market on 1 January 1993. The Treaty of Maastricht established the three-pillar structure, introducing a pillar on Common Foreign and Security Policy and a pillar on Police and Judicial Cooperation, which, together with the European Community, constituted the foundation of the European Union. Moreover, co-decision power for the European Parliament was introduced by the Treaty of Maastricht. In the meantime, the European Council of Copenhagen adopted, in 1993, an important decision on the enlargement of the EU towards the east and established a list of eligibility criteria to be fulfilled by applicant states. Austria, Finland and Sweden entered the EU on 1 January 1995, and the Treaty of Amsterdam, introducing minor modifications to the existing structure of the EU Treaty, was adopted in 1997.

In respect of the requirements for membership and the procedural aspects related to the EU enlargement included in the text of the Treaty, ex Article 237 of the EEC Treaty, stating that ‘every European state can apply for membership’, was changed several times in accordance with the Treaty modifications of the Single European Act, the Treaty of Maastricht and, finally, the Treaty of Amsterdam, which introduced a list of criteria for membership under Article 49 EU Treaty (TEU).

In 2001, the Treaty of Nice laid down the structural and institutional changes to the founding treaties required in order to ensure that the EU would function properly after the 2004 and 2007 enlargements to 27 Member States.

## 2.2 Legal Basis

The biggest and most important enlargement in the history of the EU was concluded with the accession of 12 Central and Eastern European countries<sup>1</sup> on 1 May 2004 and on 1 January 2007. Today, the express legal basis for the enlargement of the EU can be found in Articles 49 and 6 of the Treaty on European Union (ex Article O TEU).<sup>2</sup> Article 49 TEU includes an additional requirement for membership to be fulfilled by the applicant state in comparison with the pre-Amsterdam enlargement procedure, namely the reference to the basic principles of the EU enunciated in Article 6 TEU. Article 49 requires that ‘any European State which respects the principles set out in Article 6(1) may apply to become a member of the Union’. The principles stated in Article 6 are ‘liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law’.<sup>3</sup> It is important to stress that Article 49 begins with the word ‘European’, thus first establishing a geographical condition to be fulfilled by the applicant state. The interpretation of this geographical condition is quite open, since there is no legal certainty regarding

---

<sup>1</sup> The new EU Member States are Bulgaria, Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Romania, Slovakia and Slovenia. In the context of this dissertation, the term new Member States refers to these 12 countries. Further to the different listing of parties within the international climate regime, the EU15 refers to Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden and the United Kingdom, the EU12 to the new Member States and the EU10 to the new Member States with the exception of Malta and Cyprus.

<sup>2</sup> Any European State which respects the principles set out in Article 6(1) may apply to become a member of the Union. It shall address its application to the Council, which shall act unanimously after consulting the Commission and after receiving the assent of the European Parliament, which shall act by an absolute majority of its component members. The conditions of admission and the adjustments to the Treaties on which the Union is founded which such admission entails shall be the subject of an agreement between the Member States and the applicant State. This agreement shall be submitted for ratification by all the contracting States in accordance with their respective constitutional requirements [Article 49 TEU (ex Article O)].

<sup>3</sup> The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States [Article 6 TEU (ex Article F)].

the borders of the European continent, and the case of Turkey clearly shows the difficulty of dealing with states whose political, historical and cultural boundaries may be interpreted differently by the rest of the EU Member States.

Before final agreement on the text of the Treaty of Amsterdam was reached, the European Council of Copenhagen (1993) decided on the eligibility rules and obligations for membership of the EU. The so-called Copenhagen criteria responded to the necessity that the accession process should imply harmonisation of all national legislation with European Community law. In Copenhagen, the European heads of state and government acknowledged, for the first time, the possibility of a European Union enlarged to the east. On the basis of the common principles of Community law and the practice of the Member States, the Copenhagen criteria set the rules to be fulfilled by the candidate states to become members. The Copenhagen criteria have been codified over the years by the European institutions through the adoption of adequate Community legislation, as well as by the jurisprudence of the European Court of Justice (ECJ or the Court) and the European Court of Human Rights (ECHR). The three accession criteria to be satisfied by the applicant states in order for the European Council to decide to open negotiations on accession are:

- stability of institutions guaranteeing democracy, the rule of law, human rights, and respect for and protection of minorities (political);
- existence of a functioning market economy and the capacity to cope with competitive pressure and market forces within the Union (economic);
- ability to take on the obligations of membership, including adherence to the aims of political, economic and monetary union (*acquis communautaire*).

The political criteria indicated above have been codified in the EU Treaty in Article 6, which states that ‘the Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law.’ Article 49 of the EU Treaty defines the procedure for the accession of new states to the European Union and explicitly recalls the principles of democracy, human rights and the rule of law agreed in Copenhagen. An application for membership shall be addressed to the Council, which acts with the full support of the Commission and the Parliament (absolute majority of its component members).

Although the economic criterion is not mentioned in Article 49 EU Treaty, a few scholars distinguish in the EC Treaty a specific reference to such a criterion, namely in Article 4(1) which requires the Member States to adopt an economic policy based on, inter alia, the principle of an open market economy with free competition, or even in Articles 2 and 3(1)(g), which include among the general tasks and the activities of the Community the establishment of a ‘common market’, the promotion of ‘a high degree of competitiveness and convergence of economic performance’, and finally, the establishment of ‘a system ensuring that competition in the internal market is not distorted’.<sup>4</sup> In this regard, it is important to bear in

---

<sup>4</sup> See Hoffmeister 2002a, b.

mind that the main goal of the European leaders in Copenhagen in 1993 was not to establish stringent and hard, measurable economic criteria for the Central and Eastern European states. On the contrary, for those countries accession to the EU should be considered the starting point of establishing a market economy.

Finally, the new Member States are required to comply with the so-called *acquis communautaire*: i.e., they shall accept the legal rules already binding on the existing Member States as of the date of accession. These are the obligations adopted within the framework of the Common Foreign and Security Policy (second pillar) and Justice and Home Affairs (third pillar) as well as resulting from the activities of the European institutions within the framework of the first pillar, notably secondary EC legislation. Additionally, the *acquis communautaire* encompasses all instruments related to Community legislation, such as ECJ jurisprudence and agreements with third states by which the Community is bound. Under the *acquis communautaire*, accession countries are obliged to harmonise national legislation with EU regulations. The implementation of the *acquis communautaire* by the new Member States shall concern two different aspects: firstly, the incorporation and transposition of all relevant and existing EU legislation into the national law systems, and secondly, its full implementation. In respect of the latter, the European Commission is very active in trying to ensure that not only Community legislation is incorporated into the national juridical framework, simply by transposition, but above all, that it works effectively and correctly. Two issues regarding the accession requirements are particularly relevant to the topic addressed in this book, i.e., the compliance by the European Community and the Member States with the international climate regime: firstly, the identification of the environmental *acquis* directly and indirectly related to European climate policy, and secondly, the consequences of the enlargement for the multilateral environmental agreements to which the Community and the Member States are contracting parties—in this case the UNFCCC and the Kyoto Protocol.

Immediately after a state's submission of its official request for accession to the Council, the European Commission is in charge of the preliminary verification of the applicant's ability to meet the criteria for membership. If the Commission's opinion is positive, it is the Council that is called upon to decide unanimously whether to grant that country or group of countries a negotiating mandate and eventually decide the date on which the negotiations between the candidate states and the Member States will be opened.

The process of EU enlargement to the east began in 1990 when the EC proposed that the former Central and Eastern European countries (CEECs) together with Malta and Cyprus sign the so-called *Europe Agreements*, a special form of Association Agreements<sup>5</sup> in order to establish closer collaboration and free trade between the EU and those states, and to prepare the

---

<sup>5</sup> According to [Article 310 (ex Article 238) of the EC Treaty], the European Community can conclude association agreements with a non-Member State, or a union of states or an international organisation.

ground for full membership of the Union.<sup>6</sup> The Europe or Association Agreement represents the first official step of the pre-accession strategy and builds upon the bilateral relations between the applicant state and the European institutions. However, the main element of the pre-accession strategy is the Accession Partnership (AP). The AP is a legal instrument prepared by the Council on the basis of the Commission's annual reports on a candidate country's progress towards accession,<sup>7</sup> and it is this document which drives the new Member States in the accession procedure and requirements. The AP establishes the priorities and objectives to be pursued by the candidate country before accession. In order to comply with the obligations included in the Accession Partnership, the candidate country adopts the National Plan for the Adoption of the Acquis (NPAA).

Of the group of the 2004 new Member States, Hungary, Poland, the Czech Republic and the Slovak Republic were the first countries to sign a Europe Agreement with the EC in 1991, later followed by the remainder of the former CEECs. A pre-accession strategy based on the decisions of the European Councils following 1991 was designed at the Essen European Council (1994) where the European leaders decided to bring together into one single group those countries that had already signed a Europe Agreement with the European Community. Applications for membership of the EC were formally presented by the associated states according to the following timetable:

1. 1991: Cyprus and Malta;
2. 1994: Hungary and Poland;
3. 1995: Czech Republic, Romania, Slovak Republic, Lithuania, Latvia, Estonia and Bulgaria;
4. 1996: Slovenia.

Originally, the last EU enlargement was divided into two phases: the first wave of accession foreseen for 2003–2006 included Cyprus, the Czech Republic, Estonia, Hungary, Poland and Slovenia, while the second wave of countries scheduled to join the EU in 2005–2010 comprised Bulgaria, Latvia, Lithuania, Malta, Romania and the Slovak Republic. This orientation was the result of the European Commission's opinions on the application for EU membership of the CEECs that had signed the Europe Agreements concluded on 15 July 1997 in accordance with Article 49 of the EU Treaty. The Commission considered the progress of the applicant states towards compliance with the negotiation and accession criteria, as well as the political and economic differences among the applicant states.<sup>8</sup>

---

<sup>6</sup> Steiner and Woods 2001, p. 12; Weatherill and Beaumont 1999, p. 8.

<sup>7</sup> The Accession Partnership concept was first developed at the 1996 Dublin European Council and then defined in more detail by the Commission in the document 'Agenda 2000: for a stronger and wider union', COM(1997)2000, Brussels, 16 July 1997.

<sup>8</sup> In 1993, Cyprus as well as Malta had already received a favourable opinion as to their application for membership. Malta's application was suspended in 1996 because of the change of government and then resubmitted in 1998.