The Old Dog Learns New Tricks: Reinvigorating Infringement Proceedings to Enhance the Effectiveness of EU Law

Steve Peers and Marios Costa

Abstract

The procedure for infringement of (what is now) EU law has been around since the foundation of the Communities. Yet it has not remained unchanged, most recently being amended by the Treaty of Lisbon. Over a decade later, and with current developments in the application of financial sanctions and in the enforcement of the rule of law in Member States, it becomes pressing to evaluate the significance of the amendments. Consequently, this paper assesses firstly whether the infringement process is now playing an increasing role in the effectiveness of EU law – not only in relation to the implementation of the amendments in the Treaty of Lisbon, but also in light of recent case law on strengthening interim measures in infringement proceedings. Secondly, the paper examines the impact of the infringement proceedings upon the enforcement of the rule of law within the Union. Finally, the paper considers whether changing the division of jurisdiction between the EU courts in the infringement proceedings would help or hinder their contribution to the effectiveness of EU law.

Introduction

The procedure for infringement of (what is now) EU law has been around since the foundation of the Communities. Yet it has not remained unchanged, most recently being amended by the Treaty of Lisbon. Over a decade later, and with current developments in the application of financial sanctions and in the enforcement of the rule of law in Member States, it becomes pressing to evaluate the significance of the amendments. Consequently, this paper assesses firstly whether the infringement process is now playing an increasing role in the effectiveness of EU law – not only in relation to the implementation of the amendments in the Treaty of Lisbon, but also in light of recent case law on strengthening interim measures in infringement proceedings. Secondly, the paper examines the impact of the infringement proceedings upon the enforcement of the rule of law within the Union. Finally, the paper considers whether the changes regarding the division of jurisdiction between the EU courts over those proceedings process would help or hinder their contribution to the effectiveness of EU law.

Background

The initial version of the infringement procedure (Articles 169-171 EEC) provided for a process of obtaining a ruling of the Court of Justice that a Member State was breaching (then) EEC law. However, it was relatively ineffective, in that it did not provide for any specific consequence if a Member State failed to give effect to such a judgment, besides the Court ruling again that the Member State in question had not given effect to the prior judgment (Article 171 EC).[1] In practice, the limited impact of the infringement process was rendered less important as the Court of Justice developed means of applying Community law (as it was then) in the national court, *inter alia* via the doctrines of supremacy, direct effect, indirect effect and damages liability.

However, the Treaty drafters nevertheless decided to strengthen the infringement process. First of all, the Maastricht Treaty provided for the possibility of the Court to impose a lump sum (to penalise prior failure to comply with its previous judgment) or a penalty payment (to encourage compliance with its subsequent judgment) if its prior infringement judgment was not complied with (Article 171 EC, as amended; Article 228 EC following the Treaty of Amsterdam).[2] The Commission issued guidance on

[1] On the ineffectiveness of the original provision, see M.A. Theodossiou, 'An Analysis of the Recent Response to Non-compliance with the Court of Justice judgments: Article 228(2) EC', ELRev 27 (2002) 25.

[2] For the legal background see I. Kilbey, 'Financial Penalties Under Article 228(2) EC: Excessive Complexity?', CMLRev 44 (2007) 743.

interpretation of this provision in 1996-1997,[3] taking a cautious approach by withdrawing applications to the Court if a Member State complied with the prior ruling, and eschewing the possibility of requesting the Court to impose a lump sum to penalise prior lack of compliance.[4] The Court's first judgment applying these rules was in 2000,[5] but the most dramatic development came in 2005,[6] when the Court ruled that regardless of what the Commission requested it to do, it could impose a penalty payment *and* a lump sum, thus enhancing the effectiveness of the process by deterring Member States from delaying their compliance with its prior judgment. As a consequence, the Commission changed its policy,[7] systematically requesting that the Court impose both a lump sum and a penalty payment, and declining to withdraw cases pending before the Court even in the event of compliance with the prior judgment, asking the Court to impose a lump sum to penalise the period of non-compliance instead.[8] The CJEU delivered a number of rulings developing this case law.[9]

The second amendment to the rules, made by the Treaty of Lisbon, did two things to enhance its contribution to the effectiveness of EU law.[10] First of all, it simplified the procedure of requesting the Court to apply penalties for failure to comply with a prior judgment by skipping the stage of issuing a reasoned opinion to the Member State concerned (Article 260(2) TFEU). On this basis, the CJEU has continued to give rulings judging whether a Member State has complied with a prior infringement judgment or not – in effect normalising the application of sanctions to Member States on the basis of Article 260(2).[11] These judgments are more and more frequently delivered by smaller chambers of the Court, without an Advocate-General's opinion.

This case law has clarified that the revised rules apply to proceedings which were underway before the Treaty of Lisbon entered into force, and that with the abolition of the reasoned opinion stage, the Court now assesses whether Member States complied with its prior judgment at the point where Member States had to respond to the Commission's original letter to the Member State concerned, triggering the start of the Article 260(2) process, rather than (as before) the point when Member

---

[3] OJ 1996 C 242/6. See also the communication on calculation of penalties: OJ 1997 C 63/2.

[4] On Commission policy on infringement proceedings from 1993 to 2009, see M. Smith, "Inter-institutional Dialogue and the Establishment of Enforcement Norms: A Decade of Financial Penalties Under Article 228(2) EC (now Article 260 TFEU)", *European Public Law* 16 (2010) 547.

[5] Case C-387/97 *Commission v Greece* ECLI:EU:C:2000:356.

[6] Case C-304/02 *Commission v France* ECLI:EU:C:2005:444.

[7] For analysis see Wenneras, 'A New Dawn for Commission Enforcement under Article 228 and 226 EC: General and Persistent (GAP) Infringements, Lump Sums and Penalty Payments', *CMLRev* 43 (2006) 31, at 50-61.

[8] SEC (2005) 1658, 13 Dec 2005.

[9] Cases: C-278/01 *Commission v Spain* ECLI:EU:C:2003:635; C-177/04 *Commission v France* ECLI:EU:C:2006:173; C-119/04 *Commission v Italy* ECLI:EU:C:2006:489; C-503/04 *Commission v Germany* ECLI:EU:C:2007:432; C-70/06 *Commission v Portugal* ECLI:EU:C:2008:3; C-121/07 *Commission v France* ECLI:EU:C:2008:695; C-568/07 *Commission v Greece* ECLI:EU:C:2009:342; C-109/08 *Commission v Greece* ECLI:EU:C:2009:346; C-369/07 *Commission v Greece* ECLI:EU:C:2009:428; C-457/07 *Commission v Portugal* ECLI:EU:C:2009:531; C-407/09 *Commission v Greece* ECLI:EU:C:2011**:**196; and C-496/09 *Commission v Italy* ECLI:EU:C:2011:740. Note also that a potential Article 228 proceeding does not mean that applicants can never have access to documents relating to Article 226 infringement proceedings: see Case T-36/04 *API v Commission*, ECLI:EU:T:2007:258, upheld on appeal in Joined Cases C-514/07 P, C-528/07 P and C-532/07 P, ECLI:EU:C:2010:241. For detailed analysis of the case law, see Jack, 'Article 260(2) TFEU: an effective judicial procedure for the enforcement of judgments'?, E.L.J. 2013, 19(3), 404-421.

[10] For initial analysis of the Lisbon rules, see Peers, 'Sanctions for Infringement of EU Law after the Treaty of Lisbon', *European Public Law* 18 (2012) 33 and Wenneras, 'Sanctions against Member States under Article 260 TFEU: alive, but not kicking?', C.M.L. Rev. 2012, 49(1), 145-175.

[11] Cases: C-610/10 *Commission v Spain* ECLI:EU:C:2012:781; C-184/11 *Commission v Spain* ECLI:EU:C:2014:216; C-241/11 *Commission v Czech Republic* ECLI:EU:C:2013:423; C-270/11 *Commission v Sweden* ECLI:EU:C:2013:339; C-279/11 *Commission v Ireland* ECLI:EU:C:2012:834; C-374/11 *Commission v Ireland* ECLI:EU:C:2012:827; C-533/11 *Commission v Belgium* ECLI:EU:C:2013:659; C-576/11 *Commission v Luxembourg* ECLI:EU:C:2011:773; C-95/12 *Commission v Germany* ECLI:EU:C:2012:676; C-76/13 *Commission v Portugal* ECLI:EU:C:2014:2029; C-196/13 *Commission v Italy* ECLI:EU:C:2014:2407; C-243/13 *Commission v Sweden* ECLI:EU:C:2014:2413; C-378/13 *Commission v Greece* ECLI:EU:C:2014:2405; C-653/13 *Commission v Italy* ECLI:EU:C:2015:478; C-167/14 *Commission v Greece* ECLI:EU:C:2015:684; C-367/14 *Commission v Italy* ECLI:EU:C:2015:611; C-557/14 *Commission v Portugal* ECLI:EU:C:2016:471; C-584/14 *Commission v Greece* ECLI:EU:C:2016:636; C-328/16 *Commission v Greece* ECLI:EU:C:2018:498; C-388/16 *Commission v Spain* ECLI:EU:C:2017:548; C-626/16 *Commission v Slovakia* ECLI:EU:C:2018:525; C-93/17 *Commission v Greece* ECLI:EU:C:2018:315; C-205/17 *Commission v Spain* ECLI:EU:C:2018:606; C-251/17 *Commission v Italy* ECLI:EU:C:2018:358; C-261/18 *Commission v Ireland* ECLI:EU:C:2019:955; C-576/18 *Commission v Italy* ECLI:EU:C:2020:202; and C-298/19 *Commission v Greece* ECLI:EU:C:2030:133.

States had to respond to the reasoned opinion.[12]The deletion of the reasoned opinion stage reinforces Member States' obligation to begin compliance with the prior judgment immediately, and complete it as soon as possible.[13]

As for substantive issues, a previous 'clean record' of a Member State (ie no previous cases of failures to comply with a judgment) is a mitigating factor when setting the level of a fine, as is the limited nature of harmonisation set by the legislation concerned.[14] Also, the ongoing economic crisis justified a reduction in fines to be imposed.[15] The end of the system of weighted votes in the Council in 2017, with its replacement by a double majority system, means that only ability to pay should be a consideration in calculating fines.[16] Finally, the Council does not need to wait for an Article 260 ruling to take account of Member States' irregularities when setting fishing quotas.[17]

Secondly, the Treaty of Lisbon added a new possibility for sanctions (Article 260(3) TFEU), allowing the Court to impose a penalty payment or lump sum even in the absence of a prior judgment, in the specific case where a Member State had not notified measures transposing a Directive:

> When the Commission brings a case before the Court pursuant to Article 258 on the grounds that the Member State concerned has failed to fulfil its obligation to notify measures transposing a directive adopted under a legislative procedure, it may, when it deems appropriate, specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances. If the Court finds that there is an infringement it may impose a lump sum or penalty payment on the Member State concerned not exceeding the amount specified by the Commission. The payment obligation shall take effect on the date set by the Court in its judgment.

The Commission issued guidance on its interpretation of the new provisions in 2010,[18] initially taking a more emollient approach to the application of Article 260(3) than it had (eventually, after prompting from the Court) taken with regard to (what is now) Article 260(2). Its initial policy – which resembled its initial policy for the application of Article 260(2) – was not usually to request the Court to impose lump sums to penalise prior lack of compliance to notify measures transposing a Directive, and to withdraw pending cases in the event that a Member State notified transposition measures while the case was pending. Unlike Article 260(2), there was no possibility for the Court to 'toughen up' the Commission's approach, as it is bound to impose a penalty 'not exceeding the amount specified by the Commission'.

However, despite the absence of any possibility to be prompted by the Court, at the end of 2016, the Commission decided to toughen its policy anyway, to strengthen the effectiveness of EU law in the context of ensuring that Member States transpose Directives on time.[19] Its rationale was that despite the introduction of Article 260(3) by the Treaty of Lisbon, 'Member States continue to miss transposition deadlines', with a 19% increase in the number of cases open at the end of 2015 compared to the end of 2014 . The Commission also stated that 'Member States fail to take action to transpose a directive until very late in the court proceedings brought against them by the Commission, thus obtaining substantial extra time in which to fulfil their obligations.'

So '[i]n the light of experience', the Commission changed its practice to match its approach to Article 260(2),'systematically asking the Court to impose a lump sum as well as a periodic penalty payment'. It followed that where a Member State transposed the Directive in the midst of Court proceedings, 'the Commission will no longer withdraw its action for that reason alone'. While a penalty payment would

---

[12] Case law starting with C-610/10 *Commission v Spain (ibid).* However, if a reasoned opinion was issued before the entry into force of the Treaty of Lisbon, the Court still assessed compliance at the date set to respond to the reasoned opinion: Case C-533/11 *Commission* v *Belgium* (*ibid*).
[13] Case C-241/11 *Commission v Czech Republic* (*ibid*).
[14] Case C-270/11 *Commission v Sweden* (*ibid*).
[15] Case law starting with Case C-279/11 *Commission v Ireland* (*ibid*).
[16] Case C-93/17 *Commission v Greece* (*ibid*).
[17] Case C-611/17 *Italy v Council* ECLI:EU:C:2019:332.
[18] OJ 2011, C 12/1.
[19] OJ 2017, C 18/10. Note that Art. 260(3) only applies to *legislative* directives, not those adopt by means of implementing or delegated powers: see Jack, n. 9 above.

no longer be relevant, a lump sum could still penalise 'the duration of the infringement up to the time the situation was rectified'.[20]

Article 260(3) case law

As with Article 260(2) when it was first applied, the Commission's initial willingness to withdraw Article 260(3) cases when Member States complied with their obligations meant that there was a delay until the first judgment of the Court on the new provision.[21] It took until 2019 for the first Court of Justice ruling on Article 260(3),[22] and two further judgments followed in July 2020.[23] There were also Advocate-General's opinions in two further cases, before the Commission withdrew them.[24]

High-speed networks was the first ruling of the Court on the interpretation of the financial sanctions pursuant to Article 260(3) TFEU. The case related to the non-adoption (and non-notification) by Belgium of a directive concerning high-speed electronic communication networks. The Advocate-General suggested that the rationale behind Article 260(3) TFEU is to penalise *only* failures to comply with a judgment declaring the non-notification of the transposition measures. This interpretation differed from the argument advanced by the Commission, suggesting that it is rather the failure to notify transposition measures *per se* that may result in the imposition of financial sanctions by the Court.[25] The Advocate-General relied upon the *travaux préparatoires* of the European Convention on the Future of Europe 'to grant the Commission the possibility of initiating before the Court both (in the same procedure) proceedings for failure to fulfil an obligation pursuant to Article [258 TFEU] and an application to impose a sanction. If, at the Commission's request, the Court imposes the sanction in the same judgment, the sanction would apply after a certain period had elapsed from the date the judgment was delivered, if the defending State did not comply with the Court's ruling. … This would enable the procedure in particular for sanctions in cases of "non-communication" of a national transposition measure to be simplified and speeded up'[26]. Finally, the Advocate-General argued that Article 260(3) TFEU applies only to the cases of non-notification and not to cases of incorrect or incomplete notification.

The Court decided rightly, in light of the principle of effectiveness, not to follow the opinion of the Advocate-General, and interpreted widely the 'obligation to notify measures transposing a directive' in Article 260(3) TFEU to cover precisely and in full detail all the transposing measures *per se*. In the Court's view, the purpose of Article 260(3) would be frustrated if a Member State could satisfy its obligations by means of only partial transposition of a Directive or irrelevant transposition of it (i.e. notifying a new national immigration law as sufficient to transpose a Directive on energy regulation).[27] On the other hand, the Court ruled that, taking account of the background to the drafting of Article 260(3), it could not apply to *incorrect* transposition of a Directive.[28] The Court applied its case law on Article 260(3) by analogy as regards the time period when it examined Member States' liability for

---

[20] The new policy applied to all cases where the decision to send the formal notice was taken after publication of the Communication.

[21] A number of cases were withdrawn, namely Cases: C-245/12 *Commission v Poland*; C-330/12 *Commission v Poland*; C-330/12 *Commission v Poland*; C-331/12 *Commission v Poland*; C-406/12 *Commission v Slovenia*; C-407/12 *Commission v Slovenia*; C-532/12 *Commission v Luxembourg*; C-545/12 *Commission v Cyprus*; C-109/13 *Commission v Finland*; C-111/13 *Commission v Finland*; C-203/13 *Commission v Romania*; C-240/13 *Commission v Estonia*; C-241/13 *Commission v Estonia*; C-405/13 *Commission v Romania*; C-406/13 *Commission v Romania*; C-217/14 *Commission v Ireland*; C-236/14 *Commission v Ireland*; C-302/14 *Commission v Belgium*; C-329/14 *Commission v Finland*; C-545/15 *Commission v Poland*; C-489/16 *Commission v Luxembourg*; C-36/18 *Commission v Greece*; C-61/18 *Commission v Bulgaria*; C-116/18 *Commission v Romania*; C-164/18 *Commission v Spain*; C-165/18 *Commission v Spain*; and C-206/18 *Commission v Poland*. Pending at time of writing: Case C-628/18 *Commission v Slovenia*. For scepticism about the effectiveness of Art. 260(3) in light of the Commission's initial policy, see Varnay, 'Sanctioning under article 260(3) TFEU: much ado about nothing?', E.P.L. 2017, 23(2), 301.

22 Case C-543/17 *Commission v Belgium (High-speed networks)* ECLI:EU:C:2019:573.

[23] Cases C-549/18 *Commission v Romania* ECLI:EU:C:2020:563 and C-550/18 *Commission v Ireland* ECLI:EU:C:2020:564.

[24] Cases C-320/13 *Commission* v *Poland* EU:C:2014:2441 and C-569/17 *Commission* v *Spain* EU:C:2019:271.

[25] Opinion of Advocate General Szpunar in *Commission v Belgium* (C-543/17, ECLI:EU:C:2019:322) para 38.

[26] Opinion of Advocate General Szpunar in *Commission v Belgium* (C-543/17, ECLI:EU:C:2019:322) para 50.

[27] *Commission v Belgium* (C-543/17, ECLI:EU:C:2019:573) para 59.

[28] *Commission v Belgium* (C-543/17, ECLI:EU:C:2019:573) para 60.

penalties and the criteria for the level of penalties.[29] In fact, it ruled that *any* case where a Member State failed to notify the Commission fully of transposition of a Directive was serious enough to consider the application of penalties.[30] Finally, the Court decided that it had jurisdiction to impose fines from the date of the judgment, not a later date only as proposed by the Advocate-General.[31] Unlike the Advocate-General, the Court necessarily conceived of Article 260(3) as a mechanism to penalise Member States for *non-transposition of Directives*, not a mechanism for the *non-compliance with judgments*; and it explained its interpretation of the scope of Article 260(3) as a means of 'ensuring the effective application of EU law', balanced with an opportunity for Member States to rebut the argument that they had incorrectly transposed the substance of a Directive.[32]

As mentioned above, in July 2020 the Court delivered two further rulings on the issue of financial sanctions. Both *Commission v Ireland* and *Commission v Romania* concerned the the failure of transposition and notification of the Directive on the prevention of the use of the financial system for money laundering or terrorist financing purposes.[33] The Court concluded that by the end of the deadline set by the Commission in the reasoned opinion, these Member States had not notified transposition measures to the Commission. It also emphasised that the Commission possesses prerogative powers in the remit of the infringement proceedings which include the decision to request the imposition of penalties pursuant to Article 260(3) TFEU, and is not required to state reasons for the decisions to bring proceedings on the basis of Articles 258 and 260 TFEU, although it is required to state reasons for the amounts of financial penalties which it requests the Court to impose.[34] Nevertheless, the Court reminded us that the decision (not) to impose financial sanctions is exclusively taken by the Court, provided that a Member State had indeed failed to notify the transposition of a Directive as defined by the case law.

These judgments then endorsed the Commission's new policy, described above, of requesting lump sum penalties even when Member States had fully notified transposition of a Directive during the course of Article 260(3) TFEU Court proceedings against them.[35] Making another analogy with the case law on Article 260(2) TFEU, the Court explained that the purpose of lump sums was to penalise the original non-compliance, whereas penalty payments were intended to ensure compliance with the subsequent judgment. The Court explicitly argued that this was necessary to deter Member States from not complying with Directives by their transposition date, pointing to Romania's total failure and Ireland's nearly complete failure to transpose the Directive until a late point in the Court proceedings.

The Court reiterated, from its *High-Speed Network* ruling, that all failures to notify transposition of a Directive are 'serious', but added that the failure to notify transposition of the money laundering Directive was 'particularly serious' due to its effect on the financial system. The seriousness was 'reinforced' by the total and near-complete failures to notify transposition.[36]

Moreover, the time period to assess the liability of a Member State to pay a lump sum in such cases is not (as under Article 258, and when deciding on Article 260(3) penalty payments) the deadline to respond to the Commission's reasoned opinion, but the earlier date of the *deadline to transpose the Directive*. Here the Court expressly argued that this was necessary to ensure the 'effectiveness' of EU law, also confirming explicitly what was implicit in the *High-Speed Networks* judgment: the 'trigger' for Article 260(3) proceedings is not a failure to *comply with a judgment*, but a failure to *notify transposition of a Directive on time*.[37] Finally, since the transposition deadline for the Directive fell after the announcement of the Commission's new policy, Member States could not claim that they had insufficient warning of the new policy.[38]

---

[29] *Commission v Belgium* (C-543/17, ECLI:EU:C:2019:573) para 61 and 78.
[30] *Commission v Belgium* (C-543/17, ECLI:EU:C:2019:573) para 85.
[31] *Commission v Belgium* (C-543/17, ECLI:EU:C:2019:573) para 92.
[32] Compare para. 58 of the judgment to paras. 74-75 of the Opinion.
[33] N. 23 above.
[34] *Commission v Romania*, paras 48-56; *Commission v Ireland*, paras 58-66.
[35] *Commission v Romania*, paras 67-68; *Commission v Ireland*, paras 77-78.
[36] *Commission v Romania*, paras 73 and 75; *Commission v Ireland*, paras 82 and 84.
[37] *Commission v Romania*, paras 80-81; *Commission v Ireland*, paras 91-92. Indeed, with great respect, one underlying flaw in the logic of the Opinion in *High-Speed Networks* (n. 25 above) was why, if the drafters of Article 260(3) only intended to intended to punish Member States that failed to comply with the Court's judgment in such cases, they also provided for the possibility of imposing lump sums.
[38] *Commission v Ireland*, para 94.

Overall, the 2019 and 2020 judgments are a significant victory for the application of the principle of effectiveness to Article 260(3) TFEU. They confirm its application not only to irrelevant but to partial notification of transposition of Directives, avoiding the prospect that Member States can avoid liability by notification of transposition of just a few parts of a Directive. Equally, they confirmed the Commission's new policy towards requesting lump sums, avoiding the prospect that Member States can avoid liability by notifying transposition late in the Court proceedings. And the logic of describing Article 260(3) as a process for enforcing *Directives*, not *judgments*, justifies not only the imposition of lump sums as such, but the existence of liability for non-notification dating back to the initial deadline to apply the Directive. There is a real sense that the Court, like the Commission, is getting fed up with delays in the transposition of Directives.

Because its case law on Article 260(3) TFEU is new, the Court has not yet had to grapple with the question of what happens if a Member State and the Commission dispute whether an Article 260(3) ruling has been complied with, and therefore whether a penalty payment should still be collected. However, there is Article 260(2) case law on this point, and given that the Court has already drawn several analogies between Article 260(2) and (3), this case law should logically apply by analogy too. As this case law is intrinsically connected with the division of jurisdiction over infringement cases within the EU judicial system, it is considered further below.

Article 258 interim measures

It might be thought that the two express provisions in the Treaties were the only bases on which the Court can impose financial penalties in infringement proceedings. However, the Court has recently ruled that there is a third possibility, in the context of a request for interim measures during an infringement proceeding.

According to the Court, where the Commission requests interim measures and the criteria to award them are satisfied (*prima facie* case, urgency, and balance of interests), it might in some cases be possible to order financial penalties as well. The interim measures order concerned the protection of the environment in a Polish forest from irreparable damage,[39] where the Commission alleged that a financial sanctions order was necessary because Poland had already breached its obligations in a previous interim measures ruling in the same case.[40] It asked for a penalty payment for as long as Poland refused to comply with the second interim measures ruling, without suggesting a specific amount, but recommending that 'the amount be determined taking into account the reduction of the area of tree cover in the protected habitats'. On the other hand, Poland argued that Article 279 TFEU, which provides for interim measures, makes no express reference to penalty payments.

However, the Court adopted a broader interpretation of Article 279, holding that it 'confers on the Court the power to prescribe any interim measures that it deems necessary in order to ensure that the final decision is fully effective'. In the Court's view, that provision grants it a 'a broad discretion' to decide 'having regard to the circumstances of each case, to specify the subject matter and the scope of the interim measures requested, and also, if it deems appropriate, to adopt, where necessary of its own motion, any ancillary measure intended to guarantee the effectiveness of the interim measures that it orders'. This included the power to 'ensure the effectiveness of' an interim measures ruling, which could entail 'provision for a periodic penalty payment to be imposed should that order not be respected by the relevant party'.

As for Poland's argument that Article 260 is *lex specialis* and *a contrario* as regards financial penalties, meaning that the Commission would have to bring an Article 258 case then an Article 260(2) case to enforce compliance with its interim measures order by that route, the Court dismissed it on the grounds that it would diminish the effectiveness of EU law, 'being an essential component of the rule of law, a value enshrined in Article 2 TEU and on which the European Union is founded'. It followed that the Court, when considering an interim measures decision, could decide to require a periodic penalty payment to enforce its ruling if it considered that the 'circumstances of the case'

[39] Case C-441/17 R *Commission* v *Poland* EU:C:2017:877. For comments see Van Elsuwege and Gremmelprez, 'Protecting the rule of law in the EU legal order: a constitutional role for the European Court of Justice', E.C.L. Review 2020, 16(1), 8 at 20-22.
[40] Case C-441/17 R *Commission* v *Poland* EU:C:2017:622.

required it in the interests of effectiveness. The prospect of such a payment 'encourages the relevant Member State to comply with the interim measures ordered', therefore 'enhances the effectiveness of those measures and guarantees the full effectiveness of the final decision, thus falling entirely within the ambit of the objective of Article 279 TFEU'. Moreover, it would not prejudge the final judgment in the main proceedings.

On the facts of this case, the Court believed that there was sufficient doubts about whether Poland might comply with its ruling, without being necessary to decide on whether it was complying with the previous ruling, and so imposed a penalty payment. It set out a process to that end: Poland would notify the Commission within fifteen days of measures it took to comply with the second interim measures ruling. If the Commission believed that these measures were insufficient, it would have the burden of proof to show non-compliance, and the Court would decide the point in a new interim measures order. If the Court found non-compliance, it would order a penalty payment of at least €100,000 a day, until compliance was achieved.

This judgment is another remarkable example of the Court being willing to endorse an ambitious interpretation of the Treaty in the name of the effectiveness of the infringement process. The obvious textual argument based on an *a contrario* or *lex specialis* interpretation of Article 279 compared to Article 260 was disregarded in favour of a purposive argument about making the interim measures process as effective as possible. There were some limits on the decision, in order to provide some due process for the Member State concerned: a fine could not be imposed in practice until the Member State had an opportunity to comply with the new ruling, and the Commission had convinced the Court that it failed to do so.

The Court would not necessarily follow the template in this judgment if it were again asked to impose a fine to enforce an interim measures ruling. Note that the Court did not find it necessary to decide on whether its prior interim measures ruling was being breached; it was sufficient that it had doubts as to whether its second ruling would be complied with. So a failure to comply with a prior interim measures ruling is not a precondition of ordering a fine; indeed the Court does not suggest that the *existence* of a prior interim measures ruling is a necessary condition. It is arguable that a penalty payment could be imposed even without a prior ruling, as long as there is doubt that the current ruling might not be complied with. Also it is not clear whether the Court would necessarily insist on the same procedural route to assess whether a Member State was complying with its interim measures ruling; arguably the particular process which it set out in the 2017 judgment was fashioned to fit the circumstances of this specific case. The Court made no reference to potentially imposing a lump sum penalty. In fact there seems no good reason why such a remedy would be necessary in the context of ensuring compliance with an interim measures judgment, given that lump sums are designed for a different legal context (penalising failure to comply with judgments or notify application of Directives on time).

Finally, what happens if a Member State and the Commission dispute whether an interim measures ruling should be complied with, and therefore whether a fine should still be collected? Arguably, again this issue should be decided by analogy with the Article 260(2) case law on this point, discussed below.

Infringement procedures and the rule of law

Recently the infringement process (sometimes in parallel with preliminary rulings on similar issues) has become a key feature in the debate over whether the rule of law is sufficiently guaranteed by Member States – paralleling the proposed (but not yet agreed) use of the Article 7 TEU process to warn or sanction Member States for their breaches of EU law.

First of all, as regards Poland, a series of cases brought by the Commission have challenged the reorganisation of the judiciary in that Member State, arguing that it infringed judicial independence and therefore the rule of law. This built upon a prior CJEU ruling (on the basis of a preliminary ruling) that a potential issue with judicial independence *in general* was a concern for EU law, because a lack of judicial independence raised a systematic risk that EU law would not be properly enforced in the national judicial system.[41]

[41] Case C-64/16 *Associação Sindical dos Juízes Portugueses* ECLI:EU:C:2018:117. See Pech and Platon, 'Judicial Independence Under Threat: The Court of Justice to the Rescue in the ASJP Case', 55 CMLRev (2018)

These cases (which have been paralleled by preliminary ruling cases)[42] have concerned in turn the independence of the Supreme Court,[43] the ordinary courts,[44] and the disciplinary chamber of the Supreme Court.[45] In two of these cases, the Commission obtained interim measures rulings against Poland.[46] This case law has established that although infringement proceedings can raise arguments about the independence of the judiciary as a whole, preliminary rulings need to show a link between the alleged lack of independence and an EU law dispute before the national court.[47]

As well as these cases specifically focussed on the rule of law in a Member State's judicial system, the Commission has also brought proceedings which are generally understood to have a link to broader concerns about the rule of law in a Member State. This is most obviously the case with Hungary, which is also the subject of an attempt to trigger an Article 7 'yellow card' process.[48] These cases have concerned: the compulsory retirement of judges and prosecutors,[49] the early end to the tenure of the independent data protection supervisor,[50] restrictions on foreign support for NGOs,[51] the *de facto* forced removal of the Central European University,[52] and aspects of asylum proceedings, including criminalisation of asylum assistance.[53] By comparison with the Polish cases – where interim measures have been requested where necessary – there have been so such requests as regards Hungary (although the case on compulsory retirement of judges and prosecutors was expedited).

A further batch of infringement cases, brought by the Commission against Member States which objected in principle to the application of the EU's temporary system for the relocation of asylum seekers during the perceived 'refugee crisis', also raised questions of the rule of law as regards Member States' defiance of their obligations.[54]

In light of the Court's expansive reading of its jurisdiction to rule on national judicial independence, while there is some scope for the 'ordinary' jurisdiction of the CJEU to be used as a kind of 'conventional weapon' as regards the rule of law in Member States, as long as Member States are unwilling to use the 'nuclear weapon' of sanctions on the basis of Article 7 TEU, there are limits to the effectiveness of this approach. First of all, the deterioration of the rule of law, or the EU policy closely linked to it, may be irreparable in the absence of a request for interim measures.[55] For instance, the

---

p. 1827 and Bonelli and Claes, 'Judicial serendipity: how Portuguese judges came to the rescue of the Polish judiciary', 14 EuConst (2018) p. 622.

[42] Decided cases: Joined Cases C-585/18, C-624/18 and C-625/18 *A. K. and others*. EU:C:2019:982. Withdrawn cases: C-537/18 *Krajowa Rada Sądownictwa* EU:C:2020:136; C-668/18 *BP*; and C-763/19 to C-765/19 *D.S. and Others v S.P. and Others*. No need to adjudicate: Case C-522/18 *Zakład Ubezpieczeń Społecznych* ECLI:EU:C:2020:42. Inadmissible: C-558/18 and C-563/18 *Miasto Łowicz* ECLI:EU:C:2020:234. Pending Cases: C-623/18 *Prokuratura Rejonowa w Słubicach*; C-824/18 *AB and others*; C-487/19 *W.Ż*; C-508/19 *M.F. v J.M.*; C-748/19 to C-754/19 *Prokuratura Rejonowa w Mińsku Mazowieckim and others*; C-55/20 *Ministerstwo Sprawiedliwości*; and C-132/20 *Getin Noble Bank.* We are grateful to Professor Laurent Pech for compiling this data. For discussion, see Elsuwege and Gremmelprez, n. 39 above at 23-5.

[43] Case 619/18 *Commission v Poland* ECLI:EU:C:2019:531. The Court took the view that there was no need to adjudicate in Case C-522/18 (ibid) as a result of this judgment.

[44] Case C-192/18 *Commission v Poland* ECLI:EU:C:2019:924.

[45] Case C-791/19 *Commission v Poland*, pending. See also the preliminary ruling judgment in *A. K. and others* (n. 42 above).

[46] Cases 619/18 R *Commission v Poland* ECLI:EU:C:2018:1021 and C-791/19 R *Commission v Poland* ECLI:EU:C:2020:277. The former case was also expedited (EU:C:2018:819), as were the preliminary rulings in *Miasto Łowicz* (ECLI:EU:C:2018:923), *A.K.* (ECLI:EU:C:2018:977), *BP* (ECLI:EU:C:2018:1003), and *Zakład Ubezpieczeń Społecznych* (ECLI:EU:C:2018:786), all n. 42 above.

[47] *Miasto Łowicz* (n. 42 above).

[48] In the case of Hungary, the process has been started by the European Parliament, and Hungary has challenged the legality of the start of that process: Case C-650/18 *Hungary v European Parliament*, pending.

[49] Case C-286/12 *Commission v Hungary* ECLI:EU:C:2012:687.

[50] Case C-288/12 *Commission v Hungary* ECLI:EU:C:2014:237.

[51] Case C-78/18 *Commission v Hungary* ECLI:EU:C:2020:476.

[52] Case C-66/18 *Commission v Hungary*, pending.

[53] Cases C-808/18 *Commission v Hungary* and C-821/19 *Commission v Hungary*, both pending.

[54] Joined Cases C-715/17, C-718/17 and C-719/17 *Commission v Poland, Hungary and Czech Republic* ECLI:EU:C:2020:257.

[55] This is partly ameliorated for some justice and home affairs cases, where it is possible to fast-track a case referred from a national court. The recent judgment in Joined Cases C-924/19 PPU and C-925/19 PPU *FMS and Others v Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos*

CEU has left Hungary while the Commission's case is pending, and the restructuring of the data protection supervisor was not stopped. Nor has the Commission made use, in this field, of the possibility of requesting financial penalties as a means to enforce the Court's interim measures rulings. Certainly, the Commission's approach has not stemmed broader concerns about the rule of law in those two countries, as evidenced by the Court's case law on references from national courts asking about the independence of courts and detention conditions in Poland and Hungary respectively.[56]

Also, in this field, the infringement proceedings process works in tandem with references for a preliminary ruling, as well as the willingness of national courts to apply its case law (derived from either type of jurisdiction) without necessarily needing to refer all disputes to the CJEU. But there is a 'Catch-22' here, to the extent that one of the main rule of law concerns is the diminishing independence of the national judiciary. This means that infringement proceedings may have to play a bigger role in this field – and the reluctance of the Commission to act more decisively so far means that their full potential to contribute to the effectiveness of EU law has been lacking. It could be argued, for instance, that financial penalties imposed by the Court in this field could complement or apply as at least a partial substitute for a legislative mechanism linking EU funding to rule of law issues.[57]

Art 258/260 and the EU judicial system

The increase in the volume of cases concerning Article 260 TFEU has raised questions about the subsequent enforcement of Article 260 judgments. Those judgments – as well as broader systemic concerns about the effective operation of the EU judicial system – have fed into recent discussion of reform of that system. We will consider those two developments in turn.

First, if an Article 258 judgment against a Member State has arguably not been implemented by that Member State, this can be pursued by means of an Article 260 proceeding – and/or possibly by means of State liability action in national courts.[58] But what if an *Article 260 judgment* has arguably not been implemented?

This issue has been clarified, as regards Article 260(2),[59] by case law of the General Court, and on appeal by the Court of Justice. The leading case is *Portugal v Commission*,[60] in which Portugal challenged the Commission's attempt to collect an Article 228 (now Article 260) fine on the grounds that it had complied with the judgment concerned. According to the General Court (upheld on appeal by the Court of Justice),[61] the Commission has responsibility to collect fines imposed by the EU courts pursuant to Article 228 (now Article 260), because these are sums owing to the EU budget, in accordance with the EU's financial regulations. A Member State could bring annulment actions against such Commission decisions, applying general EU rules because the Treaties did not establish any special procedure for settling disputes of this nature. However, when hearing such a case, the General Court could not impinge upon the Court of Justice's exclusive jurisdiction to determine whether there was an infringement of EU law, so it could only rule on issues relating to an infringement to the extent that they had already been decided by the Court of Justice. Portugal had repealed a national law to comply with the Article 228 judgment, but the Commission queried whether this genuinely complied with that judgment. However, if the Commission and Member State disagreed on whether the new legislation complied with the Member State's EU law obligations, the Commission had to bring new proceedings pursuant to Article 226 (now 258), in order to protect the procedural

---

Idegenrendészeti Főigazgatóság (ECLI:EU:C:2020:367) was ultimately decided before the pending Case C-808/18 (ibid), despite some overlap of issues.

[56] Cases C-216/18 PPU *Défaillances du système judiciaire* EU:C:2018:586 (and see now Case C-354/20 PPU *Openbaar Ministerie (Indépendance de l'autorité judiciaire d'émission*, pending); and Cases C-404/15 and C-659/15 PPU *Aranyosi and Căldăraru* EU:C:2016:198, followed by Case C-220/18 PPU *ML* EU:C:2018:859.

[57] See the proposal along these lines (COM (2018) 234, 2 May 2018), which is not yet agreed.

[58] On the issue of overlap of State liability via national courts and sanctions in the infringement process, see Peers (n. 10 above) at 49-51.

[59] As noted above, this case law should logically be applicable by analogy where the Commission and a Member State dispute whether a Member State has fully complied with an Article 260(3) judgment, or an interim measures ruling applying penalty payments.

[60] Case T-33/09, ECLI:EU:T:2011:127, concerning Case C-70/06 (n. 9 above).

[61] Case C-292/11 P, ECLI:EU:C:2014:3.

rights of the Member State pursuant to Article 226 and the exclusive jurisdiction of the Court of Justice to assess whether a breach of EU law had taken place.

However, it cannot be assumed from this initial judgment that the Commission is required to have recourse to fresh infringement proceedings every time there is a dispute with a Member State about whether it has complied with an Article 228 (now 260) judgment. In *France v Commission*,[62] the General Court agreed that the Commission had sufficient evidence to conclude that France had not complied with its obligations to implement an Article 228 judgment concerning enforcement of fishing law. In *Italy v Commission*,[63] Italy failed to convince the Court that it had done enough to recover unlawful State aid, as required by an Article 260 judgment. In *Portugal v Commission*, the Commission successfully collected a penalty payment relating to the earlier Portuguese litigation discussed above, having confined its decision to the time period before the amendment to national law came into force.[64] Portugal also lost another challenge, having failed to convince the General Court that it had correctly applied a previous judgment on a telecoms universal service obligation.[65] Furthermore, several challenges by Member States to Commission decisions collecting fines in this context have been withdrawn.[66]

While this case law initially suggested that the EU courts had created a new complication that might limit the effectiveness of the Article 260 process, the subsequent judgments have limited the impact of the initial ruling, indicating that Member States cannot so easily challenge the collection of penalty payments by means of a weak argument that they have complied with the judgments against them. The prospect of litigation on this issue has moreover been simplified with the recent reform of the EU judicial system – to which we now turn.

Division of jurisdiction

The recent case law on the follow up of Article 260 TFEU judgments was an issue, along with the infringement procedure as a whole, when the division of jurisdiction between the Court of Justice and the General Court was amended in 2019. The Court of Justice, which proposed an amendment to its Statute involving changes to the jurisdiction of the two EU courts,[67] was loath to transfer any of its jurisdiction over preliminary rulings to the General Court, on the grounds that preliminary rulings are a central part of the EU judicial system, and there was a need to decide them quickly.[68] However, the Court of Justice did suggest shifting jurisdiction over infringement actions in principle to the General Court, on the grounds that they resembled direct actions against the EU institutions (which the General Court already largely had jurisdiction over), in that both types of proceedings involved detailed assessment of alleged facts.[69] However, the proposal provided for exceptions: infringement actions based on the TEU or on EU Justice and Home Affairs law. The Court's explanatory memorandum referred to cases about an alleged breach of the Charter of Fundamental Rights as an example of an infringement proceeding based on the TEU, but this was confusing, as infringement proceedings alleging a breach of the Charter are more commonly linked to the TFEU (or legislation adopted on the basis of the TFEU).[70]

It would also have been possible for the General Court, on its own motion or at the request of a party, to refer an infringement proceeding to the Court of Justice if 'the case calls for a decision of principle or where exceptional circumstances so justify' (subject to a time limit for doing so); these concepts were not further defined. Furthermore, the proposal would not have transferred jurisdiction over Article

[62] Case T-139/06, ECLI:EU:T:2011:605, concerning Case C-304/02 (n. 6 above).
[63] Case T-268/13, ECLI:EU:T:2014:900, concerning Case C-496/09 (n. 9 above).
[64] Case T-810/14, ECLI:EU:T:2016:417, concerning Case C-70/06 (n. 9 above).
[65] Case T-733/15, ECLI:EU:T:2017:225, concerning Case C-76/13 (n. 11 above).
[66] See Cases T-378/08 *Portugal v Commission* (also concerning Case C-70/06) and Cases T-105/12 and T-260/12 *Greece v Commission* (concerning Case C-109/08, n. 11 above).
[67] Council doc 7586/18, 28 March 2018.
[68] See the report on this issue in Council doc 15995/17, 21 Dec 2017. This report was drawn up pursuant to Art 3(2) of Reg 2015/2422 ([2015] OJ L 341/14), which doubled the membership of the General Court in a bid to address delays in the judicial process (point 2 in the preamble) but anticipated that the EU judicial system might need to be revised in future as a consequence (point 13 in the preamble). See also Reg 2016/1192 ([2016] OJ L 200/197), abolishing the Civil Service Tribunal.
[69] Art 1(1) of the Court proposal, which would have added an Art 51(2) to the Court's Statute.
[70] For instance, see the judgment in Case C-78/18 *Commission v Hungary*, ECLI:EU:C:2020:476, concerning the limitations on support for NGOs in Hungary.

260 cases. Finally, to avoid lengthening the proceedings unduly, the Court also proposed that in the case of appeals of the General Court's judgments in infringement proceedings to the Court of Justice, the latter Court would always give a final ruling, without any possibility of referring the case back to the General Court.[71]

Despite these exceptions and safeguards, the Court's proposal was not well received. In the view of the Commission,[72] the transfer of jurisdiction over infringement actions was objectionable because it would have only a small impact on the Court of Justice's workload, proceedings between EU institutions and Member States are in principle reserved to the Court of Justice, a two-tier system could lengthen proceedings and thereby undermine the purpose of infringement proceedings, and the proposed exceptions were unclear and would not achieve their objectives. The Court therefore backed off its proposal to change jurisdiction as regards infringement proceedings,[73] deferring the issue to a planned broader review of the General Court's jurisdiction,[74] and inviting the Council and European Parliament to focus on the other aspects of its proposal.

Those other aspects were uncontroversial, and were adopted the following year.[75] They consist of a 'leave to appeal' system where a General Court judgment followed a quasi-judicial administrative appeal process, for example as regards the EU trade mark,[76] and a simplification of the judicial process as regards actions brought against the Commission's attempt to enforce an Article 260 judgment (cf the case law discussed above).[77] The latter actions no longer go to the General Court, but are reserved for the Court of Justice. The rationale for this change is that it is too complicated for the General Court to rule on such issues,[78] although as the Court of Justice noted in its proposal, this change will also expedite such proceedings in order to bolster the effectiveness of the infringement procedure.[79] The 2019 amendments explicitly foresee examining whether to transfer jurisdiction over infringement proceedings to the General Court in light of the 2020 report on the Courts' functioning.[80]

As far as infringement procedures are concerned, the 2019 amendments dodged the bullet (for now) of becoming more ineffective due to a longer two-tier judicial process, and will also benefit from skipping a judicial tier as regards disputes over enforcement of Article 260 judgments. It remains to be seen whether the former reprieve is short-lived, in light of the bigger review of the Courts' functioning coming in 2020. The strongest argument from the Commission against the change is that it would have lengthened proceedings,[81] although that could be addressed, at least for simpler cases, by extending to appeals of infringement proceedings a leave to appeal process similar to that adopted in 2019 for certain other appeals to the Court of Justice.[82] The Commission's other arguments are less persuasive: even if the Court of Justice's workload is not relieved much by the transfer of jurisdiction, every little helps; disputes between Member States and EU institutions are *not* reserved in principle to the Court of Justice;[83] and exceptions to jurisdiction are bound to be ambiguous to an extent as they

[71] Art 1(3) of the Court proposal, which would have amended Art 61 of the Court's Statute.
[72] COM (2018) 534, 11 July 2018, paras 10-30.
[73] Council doc 11180/18, 16 July 2018.
[74] Art 3(1) of Reg 2015/2422 provides for a further review of the functioning of the General Court, based on a report to be drawn up by December 2020. The Commission had also proposed to defer the issue on this basis, with a view to assessing the impact of the final tranche of additional General Court judges, who were appointed in 2019.
[75] Reg 2019/629 ([2019] OJ L 111/3). See previously the revised draft in Council doc 11887/18, 6 Sep 2018, and the Commission opinion in Council doc 13587/18, 26 Oct 2018, the Council's general approach in Council doc 13588/18, 31 Oct 2018, and the text agreed with the European Parliament in Council doc 5190/19, 11 Jan 2019.
[76] Art 1(2) of Reg 2019/629, inserting a new Art 58a into the Statute of the Court.
[77] Art 1(1) of Reg 2019/629, inserting a new Art 51(c) into the Statute of the Court.
[78] See point 3 in the preamble to Reg 2019/629.
[79] See point 5 in the preamble to the Court's proposal.
[80] See point 5 in the preamble to Reg 2019/629.
[81] Note that the European Parliament had similar objections to lengthening proceedings and the marginal reduction in the Court's workload, also preferring to defer the issue to 2020: report A8-0439/2018, 6 Dec 2018.
[82] While the rationale of the leave to appeal process is that the parties challenging EU action have already enjoyed two tiers of review of an EU body's action, it might be argued that the multiple phases of the infringement process equally provide for sufficient pre-judicial protection of Member States' interests.
[83] Indeed, Art 256 TFEU reserves such cases in principle to the General Court, and the exceptions to this rule in Art 51 of the Statute of the Court are expressly referred to as a 'derogation'.

need to be applied on a case by case basis.[84] On the other hand, the Court's arguments for its proposal as regards the General's Court's expertise in assessment of facts failed to acknowledge that infringement proceedings relate to national law, rather than acts of the EU institutions, and in that sense are akin to preliminary rulings – which, of course, fall within the jurisdiction of the Court of Justice.

Conclusions

The decade after the Treaty reforms to Article 260 TFEU have certainly shown evolution in how the process applies in practice – both speeding up proceedings for non-compliance with a previous judgment, and laying the foundations for more effective enforcement of Member States' obligations to notify transposition of Directives by their deadline. The CJEU's case law has made major recent contributions to the latter development, as well as introduced financial penalties as a potential tool in the enforcement of interim measures rulings. Moreover, the recent amendments to the CJEU's jurisdiction have both avoided complicating infringement proceedings in general and simplified one aspect of their application.

It remains to be seen, however, whether sanctions in infringement proceedings will, despite these developments, make a major contribution to compliance with judgments and Member States' timely application of their EU law obligations. In the particular field of the rule of law, the sensitivity of the issue plus the degree of opposition from Member States suggests that infringement proceedings, as they are currently applied, are not themselves the solution. Whether a different approach to sanctions in this field, and/or a more political approach to solving the problem, would have more success remains to be seen.

[84] For instance, the assessment of whether the Court of Justice decides on every aspect of an appeal rather than refer it back to the General Court (Art 61 of the Statute of the Court), or gives leave to appeal a General Court judgment, where the filtering rules apply (Art 58a of the Statute of the Court).