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Interim Relief in *Commission v. Poland*: the End Justifies the Means?

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1. Interim relief before the Court of Justice of the EU (the Court) constitutes possible incidental proceedings aimed at securing the full effectiveness of the action in the main case [1]. Little attention has been paid by legal scholars to the specific features that provisional measures assume in the context of actions for a declaration of failure to fulfil obligations before the Court [2]. Firstly, interim measures are

[1] See the statement in the opinion of AG Tesauro delivered on 17 May 1990, case C-213/89, *R v. Secretary of State for Transport, ex parte Factortame Ltd (No. 2)*, para. 18: «the purpose of interim protection is to achieve that fundamental objective of every legal system, the effectiveness of judicial protection. Interim protection is intended to prevent so far as possible the damage occasioned by the fact that the establishment and the existence of the right are not fully contemporaneous from prejudicing the effectiveness and the very purpose of establishing the right […]».

[2] See, *ex multis*, M. SLUSNY, *Les mesures provisoires dans la jurisprudence de la Cour de justice des Communautés européennes*, in *Rev. Belge Droit Int.*, 1967, p. 127 ss.; A. TIZZANO, *I procedimenti urgenti nel processo comunitario*, in *I processi speciali, Studi offerti a Virgilio Andrioli dai suoi allievi*, Napoli, 1979, p. 360 ss.; G. BORCHARDT, *The Award of Interim Measures by the European Court of Justice*, in *Comm. Market Law Rev.*, 1985, p. 203 ss.; B. PASTOR, E. VAN GINDERACHTER, *La procedure en référé*, in *Rev. Trim. droit eur.*, 1989, p. 561 ss.; P. OLIVER, *Interim Measures: Some Recent Developments*, in *Comm. Market Law Rev.*, 1992, p. 7 ss.; F.J. JACOBS, *Interim Measures in the*

not often ordered in this context, considering that the Court has awarded provisional measures only in few cases, the first order dating back (only) to 1977. Secondly, the action for a declaration of failure to fulfil obligations is a peculiar procedure before the Court since, if a Member State is found to be in breach of EU law, the final judgment will be simply declaratory in nature. Therefore, this final judgment has not the power of re-establishing the *status quo ante*, but simply that of ascertaining the violation of EU law by a Member State. The Court, therefore, cannot impose a certain conduct to the Member States, which are left free to decide the means to comply with the judgment under Art. 260, para. 1, TFEU, but only has the power to declare that a specific action or omission is contrary to EU law. As it is well known, only an exception to this rule exists: under Art. 260, para. 3, TFEU the Court can directly impose a lump sum or a penalty payment if a Member State has failed to fulfil its obligation to notify measures transposing a directive adopted under a legislative procedure [3].

Law and Practice of the Court of Justice of the European Communities, in R. BERNHARDT (ed.), *Interim Measures Indicated by International Courts*, Berlin, 1994, p. 37 ss.; J.L. DA CRUZ VILAÇA, *La procedure en référé comme instrument de protection jurisdictionnelle des particuliers en droit communautaire*, in *Scritti in onore di Giuseppe Federico Mancini*, Milano, 1998; C. MORVIDUCCI, *Fumus boni iuris e misure cautelari nel processo comunitario*, in *Riv. it. dir. pubb. com.*, 1999, p. 705 ss.; L. QUERZOLA, *Appunti sulle condizioni per la concessione della tutela cautelare nell'ordinamento comunitario*, in *Riv. trim. dir. processuale civile*, 2001, p. 172 ss.; C. MORVIDUCCI, *Le misure cautelari nel processo comunitario*, Padova, 2004; D. SINANIOTIS, *The Interim Protection of Individuals Before the European and National Courts*, The Netherlands, 2006.

[3] As will be explained *infra*, in section III, since 2005 the Court has recognized its competence to cumulate the two financial penalties under Art. 260, para. 2, TFEU.

The limited powers conferred to the Court have consequences on the interim relief, since by the provisional measures the Court can actually order Member States to do what the main action cannot do [4].

In this context, the consequences of a Member State's failure to comply with the order awarded have never been seriously inquired, since usually States conform themselves with provisional measures.

However, some days ago the Court, in its Grand Chamber composition, has declared, in the order awarded in *Commission v. Poland*, that it is allowed to impose penalty payments, since «une mesure accessoire consistant à prévoir l'imposition d'une astreinte en cas de non-respect par l'État membre concerné des mesures provisoires ordonnées relève du champ d'application de l'article 279 TFUE» (point 108).

This conclusion has been reached thanks to a teleological interpretation of Art. 279 TFEU and is expected to have a big echo, since it is an innovative decision with relevant effects over the EU integration process.

This contribution will dedicate a first section to a quick overview of interim relief before the Court and the rules disciplining it (section II), and will then analyse the recent order of 20 November awarded in the *Commission v. Poland* case and the legal issues that it raises (section III). Finally, some conclusions on the impact of this recent order on the EU integration process will be drawn (section IV).

[4] «Although in principle interim relief is possible in respect of the grant o fan order that the Member State concerned should do what the Commission is requesting, most often by suspending the allegedly infringing National measure, it is nonetheless awkward because the Commission is asking for a direct order at the interlocutory stage to do what the main action cannot do because it is merely declaratory»; see K. LENAERTS, I. MASELIS, K. GUTMAN, *EU Procedural Law*, Oxford, 2014, p. 571.

2. Interim measures are only partially regulated by the TFEU. Art. 278 TFEU prescribes that the Court may order the suspension of the application of a contested act. This measure constitutes an exception to the general rule, under which actions brought before the Court shall not have suspensive effect[5]. In the context of actions for a declaration of failure to fulfil obligations, the adoption of interim measures under Art. 279 TFEU is the only available option [6], since Art. 278 TFEU concerns the suspension of the execution of acts of the EU. Indeed, Art. 279 TFEU provides that the Court may, in any case before it, prescribe any necessary interim measures. Therefore, «the range of possible measures is not predetermined» [7] and it is at the discretion of the Court to indicate the most suitable measures in order to preserve the effectiveness of its future judgment [8]. Usually, in the context at issue, provisional measures consist in the order of suspension of the operation of a contested national measure [9].

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[5] As it has been noted, «[t]he fact that actions before the Court have no suspensory effect can be explained by the character of a public measure as the expression of public interest which is presumed legal until the opposite has been proven», G. BORCHARDT, *op. cit*., p. 206.

[6] V. M. F. ORZAN, *Article 39 of the Statute of the Court of Justice of the European Union*, in C. AMALFITANO, M. CODINANZI, P. IANNUCCELLI (a cura di), *Le regole del processo dinanzi al giudice dell'Unione europea*, Napoli, 2017, p. 191.

[7] K. LENAERTS, I. MASELIS, K. GUTMAN, *op. cit*., p. 566.

[8] As noted by A. Tizzano, «l'ampiezza e l'eterogeneità della [tutela cautelare attribuita alla Corte] avrebbero reso estremamente ardua, se non impossibile, una eventuale […] esemplificazione», and threfore «la genericità dei testi si giustifica col fatto che i provvedimenti d'urgenza, […] proprio per la funzione cui adempiono sono dei provvedimenti innominati, la cui determinazione, al pari della loro adozione, rientra nella sfera dell'apprezzamento discrezionale della [Corte], che si concretizza e si precisa volta a volta in relazione alle singole fattispecie»; see A. TIZZANO, *I procedimenti urgenti nel processo comunitario*, cit., p. 378.

[9] V. C. IANNONE, *Article 279*, in A. TIZZANO (a cura di), *Trattati dell'Unione europea*, Milano, 2014, p. 2205. As an example, see CJEU 10 December 2009, case C-572/08 R, *Commission v. Italy*, in which the Court ordered Italy to suspend the application of Art. 4 of the law of 30 July 2008, n. 24 adopted by the Lombardy region.

According to Art. 39 of the Statute of the Court, it is up to the president, or to the vice-president "under the conditions laid down in the Rules of Procedure", to adjudicate upon applications to suspend execution, as provided for in Art. 278 TFEU, or to prescribe interim measures pursuant to Art. 279 TFEU, «by way of summary procedure, which may, in so far as necessary, differ from some of the rules contained in this Statute and which shall be laid down in the Rules of Procedure» [10].

Interim measures granted by the Court are, by their very nature, temporary and provisional: in other terms, they are valid only for a limited period and shall not prejudice the judgment in the main proceeding. As for the first characteristic, Art. 162, para. 3, of the Rules of Procedure of the Court (RP), specifies that the measures shall lapse when the judgment which closes the proceedings is delivered, unless the order fixes a time-lapse date. As for the second one, Art. 162, para. 4, expressly provides that «[t]he order shall have only an interim effect, and shall be without prejudice to the decision of the Court on the substance of the case».

As stated in the opinion delivered on 25 March 1980, by AG Capotorti on the interim relief in *Commission v. France*, at least three elements justify the need for interim measures not to jeopardize the judgment in the main proceeding: «first of all the relationship between the interim measure and the judgment, characterized [...] by the ancillary nature of the first, would be reversed if the judgment were influenced or anticipated by the interim measure; secondly the summary nature of the proceedings in an application for interim measures would not make it possible to reach a decision capable of

[10] On the vice-president's competence to award interim measures, see Arts 10, 13 and 161 of the Rules of procedure.

affecting the substance of the case without seriously affecting the rights of the parties; thirdly, resumption of the normal course of the proceedings in the main action after their interruption by the interim measure would lose all purpose if the main problem for decision had already been decided by way of the order for interim measures» (point 3).

Arts 160–164 RP lie down the procedural aspects for the application and the suspension, variation, cancellation or further application of interim measures which, however, will not be taken into account in this contribution, exception made for Art. 163 RP, which will be analysed *infra*, in section III [11].

To the contrary, the substantive requirements for ordering provisional measures should be taken into account. As mostly required both in national and international systems, interim relief shall met two main requirements: i) the application must establish a *prima facie* case (*fumus boni iuris*); and ii) the application must be urgent, which means that the duration of the main proceeding threatens to cause the part seeking the relief a serious and irreparable damage (*periculum in mora*).

The first element requires not only that there must be a main procedure in which a measure is challenged before the Court, but also that the case is well-founded or, at least, that the substantive action is not manifestly without foundation.

The second element presupposes an evaluation in order to verify whether the absence of the judgment in the main proceedings threat-

[11] See the comment to the indicated Arts of the RP in C. AMALFITANO, M. CODINANZI, P. IANNUCCELLI (a cura di), *op. cit.*, p. 816 ss.

ens to cause the party seeking the interim relief serious and irreparable damage (Art. 160, para. 3, RP) [12].

Moreover, in its case-law the Court added a third requirement that must be fulfilled for an application for provisional measures to be granted: "the balance of interests", under which the Court is called to evaluate if the interest of the applicant for interim measures outweighs the interest of the defendant or of third parties in case the interim measures are allowed [13]. In 1985, an author noted that «[this requirement] seems to be used as an extra ground for reaching the decision taken on the basis of the other criteria. In this sense it seems to have more of a supportive than an independent character» [14]. However, it is still not clear whether the balance of interest, which for some other authors has the aim to guarantee that even in the interim relief the proportionality principle is satisfied [15], is an autonomous condition for granting provisional measures or not [16].

3. The order of 20 November 2017 in *Commission v. Poland* contains one the most recent provisional measures awarded in the context of an action for a declaration of failure to fulfil obligations, and it has

[12] On these two requirements, and on the balance of interests, see in more detail K. LENAERTS, I. MASELIS, K. GUTMAN, *op. cit.*, pp. 591-615.
[13] One of the first cases in which the Court made expressly use of the balance of interest is in CJEU 13 March 1963, case 15-63 R, *Claude Lassalle v. European Parliament*.
[14] G. BORCHARDT, *op.cit.*, p. 221.
[15] J.G. HUGLO, *Le référé*, in *Jurisclasseur Europe*, 390/ 1992, p. 12; J.L. DA CRUZ VILAÇA, *op. cit.*, p. 280 ss.
[16] See recently M.F. ORZAN, *Arts 160-161 of the Rules of Procedure of the Court of Justice*, in C. AMALFITANO, M. CODINANZI, P. IANNUCCELLI (a cura di), *op. cit.*, p. 822, which suggests that in light of CJEU 24 July 2003, case C-233/03 P(R), *Linea GIG v. Commission*, the balance of interests seems to have been conceived as an autonomous condition.

been the object of very much attention by the newspapers, because the case deals with a large-scale logging in the Białowieza forest, one of Europe's last ancient forests and a UNESCO world heritage site [17].

As acutely foreseen back when no one would have imagined it, the case has become part of a larger confrontation between the EU and Poland over the respect of the rule of law [18].

The tensions between the EU and Poland over the matter started in March 2016, when the Polish government decided to triple the logging operations in the forest, including in areas so far excluded from interventions, justifying them with the need of combating a bark-beetle infestation. In April 2017, the European Commission issued a reasoned opinion under Art. 258 TFEU accusing Poland of failure to comply with the Birds and Habitats directives [19].

On 20th July 2017 the Commission filed an action for a declaration of failure to fulfil obligations before the Court and, since Poland was continuing the activity in the forest, it requested interim measures against the State in order to stop the logging operations in the Białowieża forest [20]. On 27th July 2017, the (vice-president of the)

[17] D. KEATING, *Can the EU Save Poland's Bialowieza Forest?*, in *DW Made for minds*, 11 September 2017, www.dw.com; ANONYMOUS, *Poland Vows to Continue Logging in Białowieza Forest Despite Court Ban*, in *The Guardian*, 31 July 2017, www.theguardian.com; J. BEREDT, *Defying E.U. Court, Poland Is Cutting Trees in an Ancient Forest*, in *The New York Times*, 31 July 2017, www.nytimes.com. G. BACZYNSKA, A. BARTECZKO, *EU Court Orders Poland to Stop Logging Primeval Forest Now*, in *Reuters*, 28 July 2017, www.reuters.com.

[18] See EDITORIAL, *About Brexit Negotiations and Enforcement Action Against Poland: The EU's Own Song of Ice and Fire*, in *Comm. Market Law Rev.*, 2017, p. 1309 ss., esp. p. 1317.

[19] European Commission, Press Release *April infringements package: key decisions*, Brussels, 27 April 2017, www.europa.eu.

[20] European Commission, Press Release *Commission calls for immediate suspension of logging in Poland's Białowieża Forest*, 13 July 2017, www.europa.eu.

Court, *inaudita altera parte* under Art. 160, para. 7, RP, accepted the Commission's request retaining that, otherwise, the damage to the forest would have been irreparable, «puisqu'il ne serait pas possible de rétablir l'état initial des zones touchées par de telles opérations» (point 20). Therefore, Poland was ordered to halt the woodcuts, exceptions made in case of threats to public security.

However, the Polish government has continued, and actually improved, the logging, invoking public safety justifications.

For that reason, on 13th September 2017, the Commission asked the Court to order Poland to pay a penalty payment for its failure to comply with the injunction previously awarded. Under Art. 161, para. 1, RP, the vice-president decided to submit the case to the Grand Chamber, due to the relevance of the case.

In fact, as already stressed, this is the very first case in which a EU Member State defies an order of the Court, and thus the very first case in which the Court, in its Grand Chamber composition, has been called to take a position on the consequences of a Member State's failure to comply with its provisional measures.

In its order of 20 November 2017, the Court has decided to play hardball, not only confirming the provisional measures ordered by the vice-president in July, but also recognizing its (future) competence to order penalty payments in case Poland does not comply with its order (point 100) [21].

[21] Therefore, Poland shall communicate the measures adopted to fully implement the order within 15 days from its notification; should the Commission find that Poland still does not fully respect the EU law, it would file a motion to impose a financial penalty and, if its request is found to be well-founded, the Court will therefore order Poland the penalty payment.

It has invoked Art. 279 TFEU as a legal basis since, as already stated, it allows the Court to take "any necessary measure" considered appropriate to secure the full effectiveness of the final judgment. Although one could argue – like Poland did – that, in so doing, the Court would impose something that it does not even can on the merits (since, as already seen, its judgment under Art. 260, para. 1, TFEU is merely declaratory in nature) [22], it must be recalled that interim measures «would not [...] prejudge the decision on the substance of the case, since an interim measure lapses when final judgment is delivered» (CJEU 29 January 1997, case C-393/96 P(R), *Antonissen v. Council and Commission*, point 39). Therefore, the temporary character of provisional measures stands out as both a strength and a weakness: on the one hand, provisional measures cease to produce effects with the judgment on the merit; on the other hand, they can have even more penetrant effects than that of the final judgment, because of the fundamental role that they play in securing the full effectiveness of the main action that, otherwise, would be compromised.

Therefore, the order to pay a penalty would not be an *ultra vires* act by the Court, since the judge of the interim relief «doit être en mesure d'assurer l'efficacité d'une injonction adressée à une partie au titre de l'article 279 TFUE, en adoptant toute mesure visant à faire respecter par cette partie l'ordonnance de référé» (CJEU 20 November 2017, *Commission v. Poland*, point 100).

Moreover, the Court has easily slipped away from another exception, related to the sanctioning nature that the penalty payment order

[22] See the exception raised by Poland cited at point 91 in CJEU 20 November 2017 in *Commission v. Poland*, cit. It must be recalled that in this case Art. 260, para. 3, TFEU, does not apply. In fact, even if the case deals with Poland's failure to comply with the Birds and Habitats directives, the non-fulfilment was not due to a lack of communication of the transposing measures by Poland.

would have in that case (point 101). Indeed, it has rejected the exception raised by Poland under which «une astreinte ne peut pas, dans les circonstances de la présente espèce, être considérée comme étant une sanction», stating that «le fait de faire respecter par un État membre les mesures provisoires adoptées par le juge des référés, en prévoyant l'imposition d'une astreinte en cas de non-respect de celles-ci, vise à garantir l'application effective du droit de l'Union» (point 102). Therefore, the Court has made recourse to its most-preferred teleological interpretation method in order to support its conclusion that it is competent to order penalties on interim relief's grounds, arguing that they are needed in order to guarantee the full compliance with EU law and, thus, would not be sanctioning measures.

For the Court, the end (that of preserving the effectiveness of the final judgment) justifies the means (the imposition of a penalty to a defiant Member State which does not comply with its provisional measures).

However, the Court's declaration about the non-sanctioning nature of the measure which will be awarded if Poland does not comply with its order of 20 November 2017, seems not sufficient to solve all the doubts about it. In that regard, probably a measure adopted under Art. 163 RP, which provides that «the order may at any time be varied or cancelled on account of a change in circumstances» would seem more appropriate. If Poland does not comply with the order of 20 November 2017, the worsening situation in the Białowieza forest caused by the improved logging activity conducted by Poland after the order of 27 July 2017 could indeed be invoked by the Commission as a change in circumstances in order to ask the Court to vary the order of 20 November and impose a penalty. A variation of the

order under Art. 163 RP would, therefore, seem more suitable to deny the sanctioning nature of the penalty payment. It should be said, however, that is not clear what is to be meant to be a "change of circumstances", since there is only a precedent adopted in the case *Commission v. Italy*, in which the Court considered that an amendment of the national legislation could not be considered to be a change in circumstances such as to justify a variation or cancellation of the interim measure (point 7). However, from this precedent one could deduce that a "change in circumstances" does not take place in case of a mere normative change, but when a factual change occurs. Therefore, the continuation and even the improving of the logging activity (so the defiance with the Court's order) could be considered a factual change justifying a variation of the order of 20 November 2017 under a change in circumstances.

Apart from that, a phrase of the order reinforces the Court's conclusion and unveils the real motivation which led the Court to adopt such innovative conclusion: that what was really at stake in this case was the endurance of EU values under Art. 2 TEU[23]. In other terms, if the power of the Court to guarantee the full compliance with its provisional measures was denied, the rule of law, which is one of the founding values of the European Union enshrined in Art. 2 TEU, would have been seriously compromised [24]. This is even more im-

[23] See the assertion under which «le fait de faire respecter par un État membre les mesures provisoires adoptées par le juge des référés, en prévoyant l'imposition d'une astreinte en cas de non-respect de celles-ci, vise à garantir l'application effective du droit de l'Union, laquelle est inhérente à la valeur de l'État de droit consacrée à l'article 2 TUE et sur laquelle l'Union est fondée», at point 102 of CJEU 20 November 2017, *Commission v. Poland*, cit.

[24] See A. VON BOGDANDY, *Constitutional Principles*, in A. VON BOGDANDY, J. BAST (eds), *Principles of European Constitutional Law*, Oxford/Portland, 2006, p. 3 ss.

portant in the case at hand, which has to be inscribed into a systemic threat to the rule of law that Poland is carrying on [25].

[25] On the latest step put forward by the Commission in that regard, see European Commission, Press release of 12 September 2017, *Independence of the judiciary: European Commission takes second step in infringement procedure against Poland*, www.europa.eu. See also the Commission Recommendation 2017 C(2017) 5320 final of 26 July 2017 on the rule of law situation in Poland complementary to Commission Recommendations (EU) 2016/1374 and (EU) 2017/146. On this issue, see the numerous contributions in *European Papers*: E. CIMIOTTA, *La prima volta per la procedura di controllo sul rispetto dei valori dell'Unione prevista dall'art. 7 TUE? Alcune implicazioni per l'integrazione europea*, *European Papers*, 2016, www.europeanpapers.eu, p. 1253 ss.; EDITORIAL, *Enforcing the Rule of Law in the EU. In the Name of Whom?*, in *European Papers*, 2016, p. 771 ss., www.europeanpapers.eu; S. LABAYLE, *Respect des valeurs de l'Union européenne en Pologne: première application du nouveau cadre pour renforcer l'État de droit*, in *European Papers*, 2016, www.europeanpapers.eu, p. 1283 ss. See also, in other Reviews: N. LAZZERINI, *Less is more? Qualche rilievo sulla legittimità e il merito delle recenti iniziative delle istituzioni europee in materia di salvaguardia dei valori fondanti dell'Unione*, in *Riv. dir. int.*, 2016, p. 514 ss.; P. MORI, *Il rispetto dello Stato di diritto: "affari interni" o questione europea? I nuovi meccanismi di controllo dell'Unione alla prova della Polonia*, in *Federalismi.it*, 28 dicembre 2016, www.federalismi.it; A. MROZEK, A. ŚLEDZIŃSKA-SIMON, *Constitutional Review as an Indispensable Element of the Rule of Law? Poland as the Divided State Between Political and Legal Constitutionalism*, in *Verfassungsblog*, 12 January 2017, www.verfassungsblog.de: F. CASOLARI, *Il Rispetto Della Rule of Law Nell'Ordinamento Giuridico Dell'Unione Europea: Un Dramma in Due Atti (The Respect of the Rule of Law within the Legal Order of the European Union: A Drama in Two Acts)*, in *Dir. pubb.comp. eur. online*, No. 4/2016, p. 135 ss., www.dpceonline.it, R. MASTROIANNI, *Stato di diritto o ragion di stato? La difficile rotta verso un controllo europeo del rispetto dei valori dell'Unione negli Stati membri (dialogo con Ugo Villani)*, in *Eurojus.it*, 13 February 2017, www.rivista.eurojus.it; L. PECH, K. LANE SCHEPPELE, *Poland and the European Commission, Part I: A Dialogue of the Deaf?*, in *Verfassungsblog*, 3 January 2017, www.verfassungsblog.de; L. PECH, K. LANE SCHEPPELE, *Poland and the European Commission, Part II: Hearing the Siren Song of the Rule of Law*, in *Verfassungsblog*, 6 January 2017, www.verfassungsblog.de; L. PECH, K. LANE SCHEPPELE, *Poland and the European Commission, Part III: Requiem for the Rule of Law*, in *Verfassungsblog*, 3 March 2017, www.verfassungsblog.de; L.F.M. BESSELINK, *The Bite, the Bark, and the Howl: Article 7 TEU and the Rule of Law Initiatives*, in A. JAKAB, D. KOCHENOV (eds), *The Enforcement of EU Law* and Values: Ensuring Member States' Compliance, Oxford, 2017, p, 128 ss.; D. KOCHENOV, *Busting the Myths Nuclear: A commentary on Article 7 TEU*, in *EUI Working Papers*, LAW 2017/10, www.cadmus.eui.eu.

Therefore the real issue at stake, for the Court, was not merely a Member State's non-compliance with its orders, but the solidity of the rule of law system and, more generally, the adherence of a Member State to the EU legal system as a whole.

To reinforce this conclusion, a precedent can be recalled, not regarding interim relief but, anyway, a serious breach of EU obligations: the 2005 judgment in *Commission v. France*, in which the Court [GC] went beyond the textual interpretation of Art. 228, par. 2, EC (now Art. 260 TFEU), stating that the use of the conjunction 'or' in the text had not an alternative, but rather a cumulative sense, and therefore decided to impose both a penalty payment and a lump sum. Here, too, the Court's activism was justified by the fact that «[t]he procedure laid down in Article 228(2) EC has the objective of inducing a defaulting Member State to comply with a judgment establishing a breach of obligations and thereby of *ensuring that Community law is in fact applied*» (point 80) [26] and that, therefore, «it is for the Court to determine […] the financial penalties appropriate for making sure that the judgment […] is complied with as rapidly as possible and preventing similar infringements of Community law from recurring» (point 97).

4. Political relations between the EU and Poland were already strained, with Brussels and Warsaw at loggerheads over several key

[26] (Emphasis added). The Court declared also that «[t] he obligation on the Member States to make sure that penalties which are effective, proportionate and a deterrent are imposed for infringements of Community rules is of fundamental importance in the field of fisheries. If the competent authorities of a Member State were systematically to refrain from taking action against the persons responsible for such infringements, both the conservation and management of fishery resources and the uniform application of the common fisheries policy would be jeopardised», point 69.

issues: therefore, the case at hand seems to be only a piece of a troubled puzzle. In this context, the Court has decided to give a strong warning to Poland, which is of course valid for all Member States. When the going gets tough, the tough get going.

This is extremely significant if one considers the peculiarities of actions for a declaration of failure to fulfil obligations: here the Treaties, and so the Member States, have conferred limited powers to the Court, being its judgment only declaratory, and the Court having the possibility to impose a lump sum "and" a penalty payment only if the conditions under Art. 260, para. 2, TFEU are met.

Despite everything, even if the Court's activism in *Commission v. Poland* could sound alarming to many Member States, which in this historical period seem to be often recalcitrant to what is perceived as an over-control by the EU institutions, it should be actually welcomed for the sake of the EU integration process. In fact, the EU cannot remain frozen still when its values, and so the whole EU system, are put into risk. Moreover, it should be taken in mind that probably this would be the only bullet in the Court's chamber to play a role in the clash between EU and Poland over the attack of the latter to the rule of law, since it is the Commission that is having, and is still going to have (at least as long as the case is not brought before the European Council and the Council of the European Union) the main role under Art. 7 TEU, in particular in light of its communication establishing *A New EU Framework to Strengthen the Rule of Law*. The Court, in fact, has no possibility to make a judicial review over the (merits of the) procedure.

Two more rapid observations on the case: the first is that the Court's (political) sensitivity in deciding to avoid a snatch with Poland, simp-

ly warning it in spite of immediately imposing a penalty (as asked by the Commission) should be appreciated. The second is that it seems that the message sent by the Court has reached its addressee, having Poland already declared that it will do everything in order to avoid the fines [27].

However, the EU crusade against Poland in defence of the rule of law is not finished yet.

[27] See the notice reported on www.euractiv.com.