Jean Monnet Network on EU Law Enforcement

Working Paper Series

Conference:

'The many faces and facets of the enforcement of European Union law: adapting in the ever-evolving landscape and empowering change for successful policies'.

11–12 December 2025, Utrecht University

Eppur si muove. Virtues and Limits of Recent Developments of the Infringement Procedure

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Abstract

This article explores the evolution of centralised enforcement mechanisms, emphasizing the dual empowerment dynamic affecting the European Commission and the Court of Justice within the infringement procedure. Despite an outward appearance of continuity, Article 258 TFEU is being reshaped by recent developments in administrative practice and in the case-law. On the one hand the Commission has been further strengthened through its power to ensure compliance with final judgments through set-offs. On the other hand, the ECJ has asserted a proactive judicial role, exercising its broad discretion in imposing financial penalties, deploying atypical interim measures under Article 279 TFEU and invoking fundamental values and general principles to tackle serious breaches. The paper shows that these parallel trends ultimately converge toward the same objective, namely wielding financial pressure from the outset of the procedure. While this enhances the effectiveness of the infringement procedure, it also gives rise to potential tensions with the institutional framework laid down in the Treaties and other fundamental principles recognised in the EU legal order. The contribution identifies such shortcomings and advances potential solutions.

Keywords

Infringement procedure, enforcement, effectiveness, financial penalties, interim measures, conditionality, set-off.

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I. Introduction. The infringement procedure between lasting traditions and modernising trends.

In spite of its age, the infringement procedure represents to this day a unique and advanced example of enforcement powers conferred upon a supranational authority[2]. As is well known, Article 258 TFEU stipulates that if the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter giving the State concerned the opportunity to submit its observations. The provision empowers the Commission to bring the matter before the Court of Justice of the European Union if the State does not comply with the opinion. The infringement procedure is traditionally regarded as the main instrument at the Commission's disposal to carry out its tasks of centralised monitoring and enforcement *vis-à-vis* Member States.

The essential features of the procedure, as crystallised in the Treaty of Rome of 1957, stay unchanged. The procedure is structured around an administrative phase engaging the Commission and the concerned Member State bilaterally, and an eventual judicial stage, where the matter is adjudicated by the Court of Justice (hereinafter, the "ECJ"). The Member State is then required under Article 260(1) TFEU to take the necessary measures to comply with the judgment. Major changes were introduced on occasion of the Treaty of Maastricht, with the introduction of Article 260(2) TFEU, and the Treaty of Lisbon, which added a further ground for the imposition of financial penalties under Article 260(3) TFEU. These amendments were meant to address a longstanding deficiency in the centralised enforcement system, that is, the absence of a procedure addressing instances of persistent non-compliance with a first judgment[3].

However, the evolution of the infringement procedure is undergoing fundamental structural and functional developments - most of them taking place outside Treaty revision - thanks to an iterative interactive process involving the Commission[4] and the ECJ. The underpinning rationale of this evolutive process may be identified in the enhancement of the overall effectiveness of the procedure[5]. Despite the apparent intuitiveness of the notion, effectiveness should be considered as a multi-faceted concept as its pursuit may highlight different, even seemingly contradictory, goals and methods in the enforcement process[6]. On the one hand, effectiveness can be understood as the promotion of practices and formalised administrative procedures instituting flexible channels of dialogue with Member States and, ultimately, the swift resolution of potential violations without recourse to a formal infringement procedure. This is exemplified by the *EU Pilot* system (recently rebranded as *EU Dialogue*), which enables direct exchanges of information through IT systems between the Commission, its competent Directorates-General and the State's administration[7]. Its introduction dates back to 2008 and it has been progressively adopted on a

[2] For a brief comparison of the infringement procedure with other enforcement tools in international law, Luca Prete, *Infringement Proceedings in EU Law* (Wolter Kluwer 2016) 25.

[3] In fact, before the introduction of financial sanctions the Commission had no coercive means at its disposal and could only refer again the same matter to the Court of justice for a new declaratory judgement.

[4] An important source to understand the evolution of the infringement procedure are the Commission's Communications, whose aim is to instil transparency, foreseeability and impartiality into the enforcement process. To this day, the most important document is the Commission Communication *EU law: Better Results Through Better Application* (2017/C 18/02) OJ C18/10.

[5] See Jonas Talberg, *European Governance and Supranational Institutions. Making States Comply* (Routledge 2003) 54; Melanie Smith, *Centralised Enforcement and Good Governance* (Routledge 2009) 135.

[6] The present paper does not aim to provide an exhaustive description of effectiveness in EU law nor to decline the principle in the specific context of the infringement procedure. However, the issue of the procedure's effectiveness was already raised by other scholars who explored the "untapped potential" of the procedure, see Piotr Bogdanowicz and Matthias Schmidt, 'The Infringement Procedure in the Rule of Law Crisis: How to Make Effective Use of Article 258 TFEU' (2018) Common Market Law Review 1061 (addressing effectiveness as "*the quest for the best available choice in arriving, de iure, at the unequivocal obligation for the Member State to act, now and in full*"); Steve Peers and Marios Costa, 'The Old Dog Learns New Tricks: Reinvigorating Infringement Proceedings to Enhance the Effectiveness of EU Law' [2021] European Law Review 228; David Hadrousek, 'Speeding Up Infringement Procedures: Recent Developments Designed to Make Infringement Procedures More Effective' [2012] Journal for European Environmental and Planning Law 235.

[7] For an overview on the mechanism, European Parliament, Directorate-General for Internal Policy, Policy Department Citizens' rights and Constitutional Affairs *Tools for Ensuring Implementation and Application of EU Law and Evaluation of their Effectiveness* (2013) 62. The Commission has consistently remarked the instrument's positive impact on

larger scale since. This squarely fits within the so called cooperative or management approach, which aims to achieve compliance through cooperation and capacity building[8]. On the other side of the spectrum, effectiveness might also call for the swift lodging of an action before the Court and, ultimately, the imposition of financial penalties that are adequate, dissuasive and proportionate. This reflects a coercive approach to enforcement, based on the assumption that non-compliance is a consequence of deliberate and strategic choices[9]. As it has been submitted, the overall effectiveness of the centralised enforcement system, and thus its success, hinges on this duality[10]. This is further shored up by the fact the Commission has consistently stressed the importance to foster as much open dialogue with the Member States as making recourse to effective use of financial sanctions. Finally, an efficient system ought to provide for effective means to enforce said penalties and to ensure the coercive recovery of amounts due, whenever States do not pay willingly. However, as was argued by Smith and Drake, enforcement studies must consider that under the banner of enforcement may lie different and conflicting values and goals, such as effectiveness, efficacy and efficiency on one side, transparency, certainty, foreseeability and equal treatment on the other[11]. In fact, effectiveness-based reasoning is substantially teleological in nature[12]. This arguably might lead to a one-sided approach to enforcement issues and challenges, whereby result-oriented solutions overshadow the delicate balances upon which the European institutional framework and legal order are built. This generates constitutional tensions[13] in enforcement structures that - we contend – do not seem to have been adequately addressed in the case law.

The purpose of the present contribution is to focus specifically on sanctioning and enforcement powers in the context of the infringement procedure in the light of recent developments. The analysis therefore focuses on the enforcement approach, whereas cooperative tools and formats employed in the pre-judicial phase are left out of the scope of the present piece[14]. The contribution moves from the general framework on financial sanctions provided by Article 260 TFEU, then moves to a critical presentation of recent developments in the case-law of the ECJ and administrative practice of the Commission. The analysis aims to highlight trends underlying the evolution of the infringement procedure and related tools of centralised enforcement. It aims to present the apparently opposite but complementary trends of an increasing role of the judiciary and the development of administrative avenues at the Commission's disposal in order to ensure compliance with the EU law. The present contribution aims to highlight how through both judicial and administrative practice the enforcement system is being reshaped mostly outside Treaty revision, conferring greater powers to the Commission and the Cour of Justice. The development and deployment of new tools and methods of enforcement also raise the issue of potential tensions and inconsistencies with other fundamental principles inherent to the EU legal order. In other words, the quest for stronger and more effective enforcement powers inevitably has potential drawbacks from a constitutional standpoint. The piece will highlight such tensions, which involve in particular the principle of institutional balance, conferral, equality of treatment, predictability of institutions' action and solidarity. These shortcomings

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compliance records, see for example Report from the Commission *Monitoring the Application of European Union Law. 2023 Annual Report* COM(2024) 358 final, spec. 6, which highlights that 80% of files handled are resolved satisfactorily.

[8] Tanja A. Börzel and T. Hofmann, D. Panke, C. Sprungk, 'Obstinate and Inefficient: Why Member States Do Not Comply with European Law' [2010] Comparative Political Studies 1363.

[9] Abram Chayes and Antonia Handler Chayes, 'On compliance' International Organisation [1993] 175.

[10] Jonas Tallberg, 'Paths to Compliance: Enforcement, Management and the European Union' [2002] International Organisation 610, 615; Francis Snyder, 'The Effectiveness of European Community Law: Institutions, Processes, Techniques' [1993] Modern Law Review 19, 27.

[11] Melanie Smith and Sara Drake, 'Conclusions: assembling the jigsaw of effective enforcement – multiple strategies, multiple gaps?' in Melanie Smith and Sara Drake (eds.), *New Directions in Effective Enforcement of EU Law* (Elgar 2016) 320.

[12] Koen Lenaerts and José A. Guiterrez Fons, *Les methods d'interpretations de la Cour de Justice* (Bruylant 2020) 55, distinguishes three types of teleological interpretation: *i*. functional interpretation, aimed at ensuring the *effet utile*, as expression of a systematic interpretation; *ii*. Stricto sensu teleological interpretation, providing the solution which is coherent with the provision's aim; *iii*. consequentialist, deployed to rule out hermeneutical solutions which would run counter to the *effet utile*.

[13] Marc Ross, 'Effectiveness in the European Legal Order(s): beyond supremacy to constitutional proportionality' [2006] European Law Review 481.

[14] For an overview on the managerial approach of the Commission see in this Working Papers Serie Christian Kroll, 'The Changing Role of the Commission as Enforcer of EU Environmental Law'.

have been either overlooked or underestimated in practice, potentially nurturing objections on grounds of legitimacy. A comprehensive and critical analysis of these developments appears therefore necessary.

In particular, this piece will start by focusing on the recently recognised power by the ECJ to impose financial penalties as *interim* measures under Article 279 TFEU (*II.a*). This example will show how *interim* proceedings have been repurposed as a tool to ensure the effectiveness of the procedure from its very early phase. However, the discussion will also highlight inconsistencies with the traditional understanding of this instrument as well as established features of the infringement procedure. The paper will then move to a more general dissertation of the Commission's and ECJ's respective roles in imposing financial penalties pursuant to Article 260(2) TFEU (*II.b*). In particular, the contribution will address the discretion of the ECJ and the recent practice of invoking general and value-centered provisions to reflect the seriousness of an infringement. Finally, the paper will examine the Commission's role in ensuring that sums are collected after sanctions are imposed (III). The administrative phase of the enforcement process raises problems of its own, namely the principles governing the Commission's action and potential fallout. Furthermore, despite its practical and systematic relevance, it is still undertheorized. The study of these developments is justified by their relevance, which is twofold. First, they came to the fore as recent efforts and attempts to effectively address open defiance by some Member States, therefore highlighting struggles at the institutional level for a more functional and effective enforcement system. Secondly, these instances exemplify the adaptive and evolving nature of enforcement powers in the light of institutional practice and recent secondary law. This makes them appropriate examples to show the virtues and the potential shortcomings of the current infringement procedure in context.

II. Introduction: the role of the ECJ in imposing financial penalties

From the outset, it must be emphasised that the ECJ played a pivotal role in ensuring the overall success of the infringement procedure. Its involvement in the judicial phase delivers authoritative interpretation of EU law and contributes to the legitimacy of the procedure, fostering acceptance by the concerned Member States. Whenever a disagreement between the Commission and the Member States reaches a breaking point and the matter is referred by the Commission to the ECJ, the Court's case-law on exceptions raised by Member States ensures that the fundamental purpose of the procedure is attained[15]while safeguarding Member States' procedural rights[16]. In this way the Court fulfils its institutional mandate as a neutral *arbiter* not acting of its own motion but on the basis of a *petitum* submitted by the Commission (or another Member State pursuant to Article 259 TFEU). Moreover, the introduction of the judicial phase and the delivering of the final judgment declaring a breach does not *per se* imply any negative appraisal of the Member State, as the procedure is objective in nature and aimed at delimiting the scope and meaning of relevant legal provisions[17]. Nonetheless, the Court has been a major player in the construction and shaping of the procedure, adopting a proactive stance formally justified by reference to the principle of *effet utile*. The most salient application of this is the power to impose financial penalties following a declaration of breach. As it is well-known, this option was introduced in the Maastricht Treaty and the norm provides that the Commission may bring a second action before the Court of Justice, proposing the amount to be imposed[18]. The ECJ retains the final authority to determine whether the Member State has complied with

[15] For example, through its extensive interpretation of the notions of "State" and infringement, the Court contributed to the capacity of the infringement procedure to target a wide array of violations, irrespective of the branch of the State responsible for the infringement. For example, the Court dismissed arguments aimed to exclude from its purview breaches committed by sub-statal entities enjoying a degree of autonomy over legislative and administrative matters, see *ex plurimis* case C-403/11, *Commission v. Spain* [2012] ECLI:EU:C:2012:612, para 25.

[16] As the judicial phase is adversarial in nature, the Court ensures that the right to defence of the Member State is safeguarded, declaring the inadmissibility of the action whenever the scope of the referral is wider or different in scope than that of the reasoned opinion previously forwarded to the Member State, case C-38/10, *Commission v. Portugal* [2012] ECLI:EU:C:2012:521, paras 15 – 16.

[17] See Opinion of AG Roemer, case 7/71, *Commission v. France* [1971] recalling that for a breach to be declared the element of "culpability" is irrelevant, as the procedure is "*concerned not with guilt and morality but simply with the clarification of the legal position*".

[18] The provision (now Article 260 (2) TFEU) mirrors the literal formulation of Article 258 TFEU, as the Commission *may* bring the matter before the Court. On such ground, it is recognised that the Commission enjoys a wide margin of discretion in its decision to (or not to) start a second procedure and refer the issue to the Court. In the legal doctrine, *inter alia*, see

the previous ruling and, if not, the amount to be imposed. Following the entry into force of the Treaty of Lisbon, a third paragraph was added to Article 260 TFEU, providing for a special "fast-track" procedure, which may lead to the imposition of financial penalties after the Commission has brought an action pursuant to Article 258 TFEU 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. As will be shown in the following sections, the Court strayed from the wording of the Treaties and stepped in whenever it believed that enforcement actions by the Commission were insufficient. Moreover, the Court regards the imposition of financial penalties as an important tool, capable of pushing Member States to comply, and therefore has tried to extend their use beyond the cases which are explicitly provided for by the Treaty.

As already set out, the following sections will analyse, first, how the Court deployed *interim measures* to prevent serious and irreversible breaches in the course of a first procedure under Article 258 TFEU. Secondly, the issue of the Court's discretion under Article 260(2) TFEU will be discussed in the light of recent case law.

a. **Re-purposing old instruments? The ECJ's jurisdiction in the light *interim* measures under Article 279 TFEU**

Article 279 TFEU provides that "*The Court of Justice of the European Union may in any cases before it prescribe any necessary interim measures*". This provision is generally applicable to direct actions brought before the ECJ, as interim protection is a fundamental component of judicial protection and should be available both to applicants before European courts and in proceedings before national courts when a preliminary question is raised[19]. However, historically the Court has seldom resorted to *interim* measures *vis-à-vis* Member States in Article 258 TFEU proceedings. This was a later development, which marked a departure from the earlier, more restrictive stance of the ECJ. In *Commission v. France* (joined cases 24, 97/80 R)[20] the Court dismissed an application submitted by the Commission, requesting the Court to order French authorities to comply with a previous judgment issued pursuant to Article 171 of the Treaty. The Court maintained that such measure would have the same purpose of the prior declaratory ruling[21]. A few years later, the Court reached a different conclusion in another case concerning obstacles to the free movement of goods (*Commission v. France*, case 42/82 R). In the following years, the Court made some remarkable applications of *interim* measures, at times significantly encroaching upon Member States' autonomy[22]. This proved that interim proceedings could be a useful tool in the quest for compliance; nonetheless, the Commission has seldom requested *interim* measures, wary of their far-reaching consequences[23].

The well-known *Polish Forest* case inaugurated a new course of action of the ECJ, bringing *interim* measures to the forefront. The Court established that Article 279 TFEU confers the power to prescribe any *interim* measures that it deems necessary in order to ensure that the final decision is fully effective.

Steve Peers, 'Sanctions for Infringements of EU Law after the Treaty of Lisbon' (2012) European Public Law 33; Pal. Wennerås, 'Sanctions against Member States under Article 260 TFEU: Alive, but not kicking' [2012] Common Market Law Review 145; Chiara Amalfitano, *La procedura di "condanna" degli Stati membri* (Giuffré 2012); Camilla Burelli, *La discrezionalità della Commissione europea nelle procedure di infrazione* (Giappichelli 2024), spec.

[19] We refer to the two landmark cases C-213/89, *Factortame* [1990] ECLI:EU:C:1990:257 and joined cases C-143/88 and C-92/89, *Zuckefabrik* [1991] para 33. For a general overview of *interim* powers in judicial proceedings before the Court of Justice, Koen Lenaerts and Kathleen Gutman and Janek Tomasz Nowak, *EU Procedural Law* (Oxford 2024) 535. For an account of the recourse to *interim* measures in infringement procedures, see Prete (n. 2) 264. More recently, Louis-Marie Chauvel, 'Les mesures provisoires dans la procedure de recourse en constatation de manquement: réflexions à partir de la jurisprudence récente' [2025] Revue Trimestrielle de droit européen 25.

[20] Joined cases 24 and 97/80 R, *Commission v. France* [1980] ECLI:EU:C:1980:107.

[21] See also, Opinion of Advocate General Capotorti in the same case ECLI:EU:C:1980:95 spec. par. 4.

[22] Among the most relevant cases are case C-320/03 R *Commission v. Austria* [2004] I-3594; case C-76/08 R *Commission v. Malta* [2008] I-00064; case 45/87 R *Commission v. Ireland* [1987] I-1369. It is interesting to note that in the exercise of its power the Court issues orders imposing specific obligations on Member States, an outcome which is normally precluded under Article 260(1) TFEU.

[23] Prete (n. 2) 237.

The institution enjoys a broad discretion, which empowers it to adopt, where necessary of its own motion, any "ancillary measure" intended to guarantee the effectiveness of the main *interim* measures, including the provision for a periodic penalty to be imposed should that order not be respected by the relevant party[24]. The interpretation rests on both literal and teleological grounds. First, the broad formulation of the provision provides for the power to impose *any* measure which the Court deems necessary, provided that it does not prejudge the future decision in the main proceedings. More importantly, this reading is justified by the imperative of guaranteeing the effective application of EU law - an essential component of the rule of law, a value enshrined in Article 2 TEU and on which the European Union is founded[25].

This order set the stage for the application of this new mechanism in the ensuing cases concerning Poland. In the *Turòw mine* case, the Court slammed Poland with a penalty payment of EUR 500 000 per day from the date of notification of the order until compliance was achieved[26]. The same rule was then applied in one of the infringement procedures addressing Poland's upheaval of its national judiciary[27]. The former proceeding was ultimately discontinued by the applicant, while in the latter the Court found Poland to have only partially complied with the previous order. This novelty introduced a new tool in the ECJ's arsenal against staunch opposition by some Member States, regarded as a step forward towards a more effective use of the infringement procedure. According to some accounts, increased and immediate financial pressure would effectively jolt Member States into compliance. In fact, the seriousness of the circumstances and the virtual financial loss could lead to political backlash at home, perhaps even liability[28]. Nonetheless, the full-fledged teleological approach embraced by the Court led other commentators to advise caution.

From the outset, it must be pointed out that the broad wording of Article 279 TFEU indeed suggests that the ECJ enjoys a wide margin of discretion in selecting the most appropriate measure in the light of circumstances. A literal argument hence supports the idea that the ECJ's mandate extends also to the power to issue penalty payments, where this is necessary to ensure compliance with the principal *interim* order[29]. Nonetheless, the accessory and provisional character of *interim* measures requires that they do not prejudge the final decision and that their effect be reversible. Moreover, the *interim* measure shall not alter the nature of the main proceeding and the Court's prerogatives[30]. All aspects have raised perplexities. Indeed, the assessment carried out to fulfil the *fumus boni iuris* requirement might be tantamount to a preliminary assessment of the facts and the law, virtually mirroring the declaratory nature of the final judgment. Most importantly, the order *de facto* turns into an injunctive and punitive tool[31], such features

[24] Case C-441/17 R, *Commission c. Poland* [2017] paras 94 et seqq.

[25] Ibid, para. 102. As it was noted by Pal Wennerås, 'Saving a forest and the Rule of Law: Commission v. Poland' [2019] Common Market Law Review 541, 555 the concept of upholding the rule of law is bi-faced, playing at the substantial and institutional level. On the one hand, it implies primacy of European law over Member States' legislation and actions, on the other hand it mandates observance of judicial authority.

[26] Case C-121/21 R, *Czech Republic v. Poland* [2021], paras 39 et seqq.

[27] Case C-204/21 R, *Commission v. Poland* [2021].

[28] As suggested by Piotr Bogdanowicz and Matthias Schmidt (n. 6) 1075. Although, as a matter of fact, it some States have chosen to simply bear the financial burden and implement their policies despite the Court's rulings. For example, the Commission 2023 *Annual Report on monitoring the application of EU law* states that in 2023 alone Poland paid an astonishing amount of 257 024 280.8 Euros in financial sanctions.

[29] This view is taken by Laurent Coutron, 'La Cour de Justice au secours de la forêt de Bialowieska' [2018] Revue Trimestrielle de droit européen 321*;* Luca Prete, 'Infringement Procedures and Sanctions under Article 260 TFEU: Evolution, Limits and Future Prospects', in Stefano Montaldo and Francesco Costamagna and Alberto Miglio (eds.) *EU Law Enforcement. The Evolution of Sanctioning Powers* (Routledge 2021) adding that the requisite of effective judicial protection should not be interpreted narrowly and in a way such as to deprive the norm of its effectiveness.

[30] Recently in the case law case C-585/23 P (R), *Council v. Mazepin* [2023] ECLI:EU:C:2023:922 para 86, "*Accordingly, while the powers of the judge hearing the application for interim relief provided for in Articles 279 and 279 TFEU must be interpreted in the light of the fundamental right to effective judicial protection, that interpretation cannot have the effect of setting aside the limits of those powers which flow from the FEU Treaty*". However, Prete (n. 29), 86 argues that whenever the prima facie case appears particularly strong and the urgency of the measures sought is undeniable, the Court could "*require the State to do something that is not possible in the main action*".

[31] Though we acknowledge that the Court has reiterated that neither penalties under Article 279 TFEU nor sums imposed pursuant to Article 260 (2) and (3) should be understood as a form of punishment against the defaulting Member State, but rather compliance-inducing measures. Nonetheless, it could be argued that, despite nominal distinctions, these

falling outside the scope of proceedings under Article 258 TFEU, which is purely declaratory in nature. The nature itself of these measures appears unclear and is currently debated. Following the withdrawal of the action by the Czech Republic and the removal of the case from the register in the *Turow Mine* case, Poland claimed that, as a consequence, penalty payments imposed were retroactively extinguished. However, in ensuing litigation against the Commission's decisions to offset the penalty with funds destined to Poland (see *infra*, par. III), the General Court established that the accessory nature of the measures does not imply that sums ought to be returned in case of removal from the register. In the General Court's view, a different solution would run counter to the meaning of Article 279 TFEU, thereby undermining the effectiveness of EU law[32]. However, in the currently pending appeal Advocate General Kokott departed from the General Court's stance. She claimed instead that the principle of effectiveness could not justify that the measures be maintained as this would be tantamount to make them *autonomous* from the main proceeding[33].

Moreover, as it has been argued, sanctioning powers *vis-à-vis* Member States should be strictly interpreted and be limited to explicit conferral by the Treaties[34]. Accordingly, one might argue that faced with the option of a stronger and more prominent role of the ECJ, Member States have preferred to contain its powers: for example, during discussions leading to the drafting of the Treaty of Maastricht, proposals to introduce a power to enjoin measures and to annul national legislation were deemed as too much federalising as to their effects, and thus discarded[35]. This new stance instead suggests that the Court adopts a more relaxed approach on the matter, in the light of the undeniably serious concerns raised by the case and of the declared unwillingness by Polish authorities to abide by *interim* measures.

On another note, the Court's self-entrusted discretion on the *an* and *quantum* of the penalty appears *prima facie* to contradict with what is provided for by Article 160 of the Rules of Procedure of the Court of Justice[36], which states that it is for the applicant to submit the request for *interim* measures and to state "*the subject matter of the proceedings the circumstances giving rise to urgency and the pleas of fact and law establishing a prima facie case for the interim measure applied for*". The Court appears to have overlooked this aspect, drawing exclusively from its established case law on the application of Article 260(2) TFEU. Indeed, the Court has previously declared that it might impose financial penalties even where not suggested in the Commission's submission[37]. This development is worthy of attention since it shows how the Court's efforts do not affect the infringement procedure alone, but other means of judicial protection as well. Here, for example, as *interim* proceedings were conceived and devised as a tool to ensure effective judicial protection for applicants against acts or omission of European institutions, the rules governing their adoption reflect the traditional adversarial setting for which they were meant; however, the Court's recent stance adapts their purpose and application to the *sui generis* public enforcement mechanism under Article 258 TFEU. Having thus acknowledged that the Court retains *ex officio* prerogatives under Article 279 TFEU, the extent to which it will make use of such power is yet to be seen[38]. In particular, as the European Commission acts as the "guardian of the Treaties" and in the superior interest of the Union, the choice *not* to apply for *interim* measures should imply that the alleged infringement does not represent an immediate and serious threat to the proper application of European law. Should the Court then provide specific motivation with regard to the decision to "overrule" the Commission's (implicit) negative assessment? And how the assessment of the requisites of *fumus boni*

measures hold characteristics traditionally attributed to sanctions, e. g. the linkage between their amount and the importance of public and private interests affected, their dissuasive and deterrent function, their coercive nature.

[32] General Court, joined cases T-200/22 and T-314/22, *Poland v. Commission* [2024] OJ C 237, para 48.

[33] Opinion of Advocate General Kokott in case C-554/24 P, *Poland v. Commission* [2025] ECLI:EU:C:2025:564 para 45.

[34] Pal Wennerås (n. 25), 535. For a systematic overview on the quest for further empowerments, Stine Andersen, *The Enforcement of EU Law. The Role of the European Commission* (Oxford 2012) 124.

[35] Javier Diez-Hochleitner, 'Le Traité de Maastricht et l'inexécution des arrêts de la Cour de Justice par les Etats Membres' (1994) Revue du Marché Unique européen 133.

[36] Rules of Procedure of the Court of Justice OJ L 265/1.

[37] Case C-503/04, *Commission v. Germany* [2007] ECLI:EU:C:2007:432 par. 22.

[38] However, it must be noted that in occasion of the first case in which *interim* measures were applied the Court acted cautiously, as it did not act by its own motion, rather it advised the Commission to consider the possibility to apply for *interim* measures and ensured that Poland could submit its observations.

iuris and *periculum in mora* should be conducted in such cases? This reasoning could be taken further. One might ask which spillover effects the adoption of interim measures in infringement proceedings could entail. If the adoption of interim measures underscores the seriousness of the alleged infringement, the inaction by the Commission (or the ECJ) could be interpreted as a hint that the purported violation, after all, is at least not as serious as others. Would this have consequences, for example, on the fulfilment of State liability conditions, namely the manifest nature of the infringement? On a similar note, could a negative appraisal under Article 279 TFEU feed into the legitimate expectations of individuals relying on the contested national provision(s)?

Another aspect worth discussing is the relationship between the "new" power under Article 279 TFEU and the imposition of penalties under Article 260 (2) and (3) TFEU. The second paragraph endows the Court of Justice with the power to impose a lump sum or a penalty payment[39] in case the Member State has not complied with a first ruling. This constitutes an *ad hoc* rule introduced by the Maastricht Treaty in order to remedy the lack of bite of the procedure, which originally was deprived of any sanctioning powers[40]. The third paragraph was an added by the Treaty of Lisbon and it extends the possibility to impose a lump sum or a penalty payment when the Commission acts under Article 258 TFEU to pursue a failure by the Member State to communicate measures transposing a directive adopted under ordinary legislative procedure. It is submitted that these provisions should be understood as limiting the Court's powers twofold. First, the Commission's initiative is mandatory to start a proceeding and finally impose financial penalties[41]. Second, the introduction of Article 260(3) TFEU by the Treaty of Lisbon signals the attempt to strike a balance between the swiftness of the sanctioning phase and the intent to limit the ECJ's discretion. The provision provides that the amount imposed by the Court must not exceed the amount specified by the Commission. Thus, it might be inferred that the provision has introduced an "inverse proportionality" rule between the swiftness of the procedure leading to financial penalties and the Court's leeway in conducting its own assessment and setting the final amount. If this reading is sound, this would be at odds with the institutional balance emerging from the recent case law on the deployment of atypical *interim* measures in infringement proceedings. As explained above, the Court has endowed itself with broad discretionary powers, empowering itself to act *motu proprio*, if deemed necessary, and to depart from the Commission's proposal in its action. Furthermore, so far, the Commission has neither set out *ad hoc* criteria for calculating the amount to be imposed in a specific case nor it has made clear under what circumstances it will apply for interim measures[42].

A common thread that can be drawn from these two developments is the degree to which the purposive and teleological interpretation promoted by the ECJ entails a shift from the institutional balance drawn in the Treaty, tilting towards a stronger role for the judicial authority[43].

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[39] In its landmark judgment in case C-304/02, *Commission v. France* [2005] ECLI:EU:C:2005:444 paras 80 et seqq., the Court recognised that Article 228(2) EC must be interpreted as allowing the imposition of both a lump sum and a penalty payment. Subsequently, the Commission has embraced this interpretation and changed its policy accordingly, declaring that in its actions it would ask for both measures.

[40] The formulation adopted under Articles 169 and 171 TCE marks *prima facie* a modest enforcement tool if compared with the provision under former Article 88 ECSC, which entrusted the High Authority the power to autonomously assess and declare the existence of a breach and to adopt sanctions, following approval by the Council. Under this legal framework, the role of the Court was akin to that now played pursuant to Article 263 TFEU.

[41] It is questionable whether a Member State could start a proceeding under Article 260 (2) TFEU. The provision only states that "*This procedure shall be without prejudice to Article 259*".

[42] A brief remark on this can be found in the 2019 Communication *Strengthening the rule of law within the Union. A blueprint for action* COM(2019) 343 final, spec. 14, where the Commission undertakes to "*pursue a strategic approach to infringement proceeding related to the rule of law, requesting expedited proceedings and interim measures whenever necessary*". Furthermore, from an administrative standpoint the decision to apply for *interim* measures is the result of consultations between Commission's services and ultimately adopted by the College of Commissioners.

[43] Here we refer to the concept of institutional balance as a synonym for separation of powers. However, according to some accounts the two principles are different, the former holding a *descriptive* value, the latter a *normative* function, see Nilsa Rojas-Hutinel, *La separation du pouvoir dans l'Union européenne* (mare&martin 2017). Admittedly, the institutional framework of the European Union forbids a "static" representation of powers, each clearly assigned to an institution. As Lenaerts argued, a "functional" understanding of the separation of powers should be preferred, implying that respective competences are not defined *more geometrico* but in the light of the relevant policy area and legal basis,

In conclusion, the further development of atypical *interim* measures under Article 279 TFEU seeks to provide a new tool to effectively tackle the most serious instances of defection by some Member States. In fact, supporters of this approach stress the frustrating length of the "traditional" procedure under Article 260(2) TFEU. However, the procedure still lacks transparency and predictability as specific criteria and guidelines by the Commission are yet to be laid down. Overall, it may be argued that the latest evolution stretches the mandate of the Court, potentially colliding with the principles of institutional balance and allocation of competences set out in the Treaties. In addition, their overall effectiveness might be even hampered by the proliferation of ensuing litigation initiated by addressed Member States, asking the Court either to revise the amount imposed in light of the achieved results of compliance or to challenge subsequent actions by the Commission collecting due sums. In fact, *interim* orders recently adopted were seldom complied with and proceedings are still pending before both the General Court and the Court of Justice (*amplius*, par. III). While pursuing the objective of swift compliance, these procedures might turn out to be a source of further conflict and litigation[44].

b. **The Cour of justice's wide (and autonomous) margin of appreciation: an overstepping practice?**

In Article 260(2) TFEU proceedings the Court enjoys a wide margin of appreciation with regard to the circumstances of the case, taking into account relevant factors pertaining both to the particular nature of the infringement established and to the conduct of the Member State in the procedure[45]. Therefore, in the light of a well-established case law, the judges are not bound by the Commission's proposal[46] and in its rulings the Court seldom relies on a plain application of arithmetical factors set out in the Commission's Communications[47]. Arguably, this led to a balanced and legitimate model of enforcement, whereby the Court can scrutinize and implicitly review the Commission's approach. This has been done, for example, in relation to criteria for the calculation of sanctions under Articles 260(2) and (3) TFEU. In fact, the Court has consistently endorsed and promoted the criteria adopted by the Commission (i.e. seriousness of the infringement, duration, the capacity to pay of the Member State[48]). In other cases, the Court has used its discretion to openly depart from some choices put forward by the Commission. This was the case for the irrelevance of factors such as the States' voting rights in the Council or its population as indicators of ability to pay, and with the adoption of a unique coefficient of seriousness for any violation under Article 260 (3) TFEU[49]. As a result, the Court exercises its discretionary power also to guide and correct the Commission's enforcement policy. This process informs the sanctioning phase with transparency, predictability and accountability, as Member States expect the Court to intervene if the Commission's action is deemed to be excessively laxist or punitive. The wide margin of appreciation of the Court is therefore a main feature of the procedure.

From the outset, it should be recalled that the wide margin of discretion enjoyed by the Court was not always undisputed. The potential negative consequences of such approach were evoked by Advocate General Ruiz-Jarabo Colomer in his Opinion to the first case in which financial sanctions were applied[50]. The reading of the Opinion reveals a markedly different understanding of the procedure, the political dimension of which is strongly emphasised. The AG argued that only the Commission was in the position to assess the seriousness of the infringement and the adequacy and necessity of sanctions. The main consequence of this would have been to limit the role of the ECJ to a standard legality review to ensure

see Koen Lenaerts, 'Some reflections on the separation of powers in the European Community' [1991] Common Market Law Review 11, 13. In light of the foregoing, it might be a challenging task to lay down clear boundaries for the ECJ's jurisdiction, especially within the infringement procedure, or to assess its role in the light of an abstract standard beyond the letter of the Treaties.

[44] This is stressed by Louis-Marie Chauvel (n. 19) 40.

[45] *Inter alia*, case C-270/11, *Commission v. Sweden* [2013] ECLI:EU:C:2013:339 para 40.

[46] Case C-496/09, *Commission v. Italy* [2011] ECLI:EU:C:2011:740 para 37.

[47] Alexander Kornezov, 'Imposing the Right Amount of Sanctions under Article 260(2) TFEU: Fairness v. Predictability or How to "Bridge the Gaps' (2014) Colum. J. Eur. L. 307, noting that the Court frequently resorts to an *ex aequo et bono* assessment.

[48] Communication from the Commission *Financial Sanctions in Infringement Proceedings* (2023/C 2/01) OJ C 2/1.

[49] See case C-147/23, *Commission v. Poland* (*Lanceurs d'alert*) [2024] ECLI:EU:C:2024:346 paras 75 – 76.

[50] Opinion of AG Colomer, case C-387/97, *Commission v. Greece* [1999].

the observance of the principles of proportionality and equal treatment[51]. According to such reading, the Court could not in any case substitute its own assessment[52]. In the following judgment, the Court opted for the opposite approach, stating that while the Commission retains discretion to determine coefficients relating to seriousness, duration and the Member States' ability to pay, without their assent, it is exclusively for the Court to assess what is just, proportionate and equitable[53]. In the seminal case *Fisheries II* (case C-304/02, *Commission c. France*[54]) the stakes were even higher. The fundamental question was whether the ECJ's discretion could be brought as far as empowering it to impose a different type of sanction than the one proposed by the Commission and to comminate a lump sum and a penalty payment simultaneously. Some Member States submitted in their observations opposing this interpretation. First, it was claimed that the imposition of sanctions to Member States has a political dimension and the Court should not carry out an autonomous assessment. Second, the States claimed that this would amount to a violation of their procedural rights. However, pleas based on the right of defence, legal certainty, equality of treatment and the allegedly overstepping role of the Court were dismissed by the ECJ. The Court emphasised that the procedure for the imposition of financial sanctions is not political in nature, thus confirming the wide margin of discretion of the Court[55]. The established practice hence endows the Court with strong and autonomous prerogatives. This has suggested scholars to refer to a process of judicialization of the procedure[56].

Recently, however, this structural feature has given rise to potential drawbacks. In case C-123/22 (*Reception of application for international protection II*), the Court imposed the highest penalty on record to sanction the failure by the Hungarian authorities to correctly implement the legal framework on asylum. Despite the fact that the original action was based on secondary law alone, the Court highlighted that by failing to take appropriate measure to comply Hungary had undermined, *inter alia*, the principle of solidarity enshrined in Article 2 TEU[57]. This allowed the Court to underscore the seriousness of the infringement and hint at a more profound defiance by Hungary of the respect of the *acquis*. Still, it is noteworthy that not only the Court departed from the Commission's proposal of sanctions, but that the motivation underpinning the unprecedented sanction revolved around legal grounds which were not formally raised by the Commission. The invocation of values was a salient aspect also in the recent *Golden Passport* case. The Court sided with the Commission and found that the national legal framework granting Maltese citizenship in return for investments was incompatible with the values of solidarity and good faith enshrined in Article 2 TEU and which underpin Union citizenship. The national scheme was hence found in breach of Article 20 TFEU and the principle of sincere cooperation enshrined in Article 4(3) TFEU[58]. In this case as well, the Commission's action was not explicitly based on Article 2 TEU; nevertheless, the

[51] Ibid, para 95.
[52] Ibid, paras 87 – 98. Notably, the AG notes that a different interpretation "*would seriously upset the existing division of powers between the institutions of the Union*" (para 90).
[53] Case C-387/97, *Commission v. Greece* [2000] para 80.
[54] Case C-304/02, *Commission v. France* [2005].
[55] Ibid, parr. 80 – 86, 89 – 97. The Court followed the Opinion of AG Geelhoed, who stressed that proceedings under (then) Article 228(2) EC "*are of a sui generis character which do not have a parallel in the national legal systems and cannot be compared to civil law proceedings*" (para 26 of the Opinion). However, Pal Wennerås, 'A New Dawn for Commission Enforcement Under Articles 226 and 228 EC: General and Persistent (GAP) Infringements, Lumps Sums and Penalty Payments' [2006] Common Market Law Review 31, 53 remarked that "*the Court missed the fundamental point which rather concerns the doctrine of separation of powers*". But *contra*, Benedict Masson, "L'obscure clarté" de l'article 228 § 2 CE [2004] Revue Trimestrielle du droit européen, 639.
[56] Didier Blanc, 'Les procédures du recours en manquement, le traité, le juge et le gardien : entre unité et diversité en vue d'un renforcement de l'Union de droit', in Stéphanie Mahieu (ed.), *Contentieux de l'Union européenne* (Larcier 2014), 437 et seqq.
[57] Case C-123/22, *Commission v. Hungary* [2024] ECLI:EU:C:2024:493 paras 113 – 118. It is also worth noting that, despite its importance and echo in the political and legal debate, the judgment was delivered by a five-judges Chamber and without prior Opinion of the Advocate General; Pekka Pohankoski, 'Bolstering federal execution of EU law: Case C-123/22 *Commission v. Hungary* (*Reception of application for international protection II*)' (2025) Maastricht Journal of European and Comparative Law 89.
[58] Judgment of the Court, case C-181/23, *Commission v. Malta* [2025] ECLI:EU:C:2025:283 paras 93 – 101. The ruling prompted harsh critics of the Court's reasoning and its strong reliance on Article 2 TEU, M. van den Brink, 'Why bother with legal reasoning? The CJEU Judgment in *Commission v. Malta (Citizenship by Investment)'* (EUI Global Citizenship Observatory, 2025), accessed 2nd December 2025.

Court ultimately assessed Maltese legislation in light of Article 2 TEU. These examples show a lighter approach compared to the stringent assessment carried out by the ECJ to ensure that the scope of the infringement is not enlarged by the Commission during the administrative phase or in its *saisine* to the Court[59]. These guarantees are aimed to ensure procedural fairness, as the purpose of the strict procedural requirements preceding the judicial phase is to ensure that the concerned Member State has the opportunity to take position on the Commission's pleas and to redress the violation before an action is brought[60]. Admittedly, the Court has full jurisdiction in infringement proceedings and might therefore refer to pertinent provisions to clarify the scope and content of State's obligations[61]. This is also coherent with its role as an apex Court of the European judicial architecture, which inherently requires the interpretation of general principles. But, ultimately, invoking core values to emphasise the gravity of an infringement and adopt commensurate sanctions raises questions in terms of legitimacy and accountability[62].

In the pending case *Commission v. Hungary* (*Valeur de l'Union*), the Berlaymont framed the recent Hungarian legislation banning LGBTI content on media and educational material as a self-standing violation of Article 2 TEU. The justiciability of values via infringement proceeding remains highly controversial, given their abstract nature and subsequent doubts about their direct enforceability[63]. For the purposes of this contribution, it is sufficient to mention that the strategy was backed by some commentators, who shared the idea that this would allow for an improved effectiveness of the procedure, tackling not merely violation of specific and technical pieces of legislation, but comprehensively addressing overall deficiencies in a Member State[64]. This position was recently endorsed by Advocate General Ćapeta in her Opinion in *Valeur de l'Union*. She stressed that the invocation of Article 2 TEU bears practical consequences, as it allows the Court to highlight the underlying cause of the infringements and to impose sanctions reflecting the seriousness of the infringement[65]

As already explained, the invocation of values in the Commission's action or in the ECJ's final assessment could indeed enhance the effectiveness of the procedure. Nevertheless, some general remarks might be made. First of all, despite these "constitutional developments", the discretionary powers of the Commission remain to this day untouched[66]. It follows that not only the Commission retains full discretion whether to start a proceeding, but – crucially –also how to frame the infringement from the outset. In other words, it would be up to Commission to decide whether to bundle multiple instances of violations into an

[59] Case C-480/10, *Commission v. Sweden* [2013], ECLI:EU:C:2013:263 paras 15 – 16; case C-569/10, *Commission v. Poland* [2012] ECLI:EU:C:2013:425 paras 28 – 30.

[60] See AG Geelhoed Opinion, case C-221/03, *Commission v Belgium* [2005], paras 25 – 27 and case law cited, where the AG stresses that the inadmissibility of complaints which were not considered in the pre-litigation procedure is justified in the light of different reasons: *i.* to ensure procedural guarantee for the Member State, which must have an opportunity during the pre-litigation procedure to justify itself to the Commission; *ii*. to give the Member State the opportunity to take required measures in consultation with the Commission and so to avoid an unfavourable judgment by the Court; *iii.* To ensure that in any proceedings before the Court the subject-matter of the action can be clearly defined.

[61] Antonio Tizzano, *La Corte di giustizia delle Comunità europee* (Jovene 1967) 210. Moreover, it reflects the role of the ECJ as a "constitutional court", Koen Lenaerts, 'Some reflections on the separation of powers' (n. 43) 31.

[62] However, it should be stressed that here we are not claiming the enforcement of values should be carried out exclusively through the "political" procedure provided by Article 7 TEU. The matter was partially resolved after the *Conditionality* judgments in which the Court stated that the procedure set out in Article 7 TEU does not preclude that other avenues be set up to ensure Member States' compliance with those values. Instead, we aim to highlight potential inconsistencies with the workings of the infringement procedure.

[63] The topic goes beyond the scope of the present contribution, for a general overview, Luke Dimitrios Spieker, *EU Values Before the Court of Justice* (Oxford 2023); Matteo. Bonelli, 'Infringement Actions 2.0: How to Protect EU Values before the Court of Justice' [2022] European Constitutional Review 30; Lucia Serena Rossi, "Concretised", "Flanked", or "Standalone"? Some Reflections on the Application of Article 2 TEU' [2025] European Papers 1.

[64] Kim Lane Scheppele, 'Enforcing the Basic Principles of EU Law through Systemic Infringement Actions', in Carlos Closa and Dimitry Kochenov (eds.) *Reinforcing Rule of Law Oversight in the European Union* (Cambridge 2016), 105 et seqq.

[65] Opinion of AG Capeta, case C-769/22, *Commission v. Hungary (Valeurs de l'Union)* [2025] paras 225 – 234.

[66] Some suggestions were made that in cases of serious breach of Article 2 TEU the Commission should be obliged to initiate an infringement proceeding, see Lucia Serena Rossi, 'A Legal Scalpel Instead of an Axe' (Verfassungsblog, 2025) last visited 2nd December 2025.

"overarching legal theory"[67] that underscores the fundamental breach carried out by the Member State. There is a risk that the choice might be ultimately determined also by political – or even arbitrary - motives[68]. This undisputed margin of assessment begs the question of what role should be played by the judiciary: should the Court "substitute" its own assessment and eventually find the existence of a breach of axiological provisions? Some could argue that, after all, in face of the special place that values hold in the EU legal order[69] they are part of the its "public order" and should be raised *ex officio* – if necessary. On the other hand, the choice by the Court to invoke core values or principles in the judicial phase, irrespective of how the Commission has initially framed the action, might be perceived as a strategy to implicitly adopt a punitive stance towards some Member States. Furthermore, resorting to values might be perceived as a strategy by the Court to overtly depart from the arithmetical method of calculation of sanctions. In the light of the foregoing, questions may arise in relation to the principles of proportionality, transparency and equality of Member States[70]. The conflict between effectiveness and other constitutional principles is hence framed as an issue of legitimacy, i.e. acceptability of the decision by its final addressees.

Some of these hurdles might be mitigated by strengthening due process guarantees, in particular by ensuring an exchange on the amount that the Court intends to impose. A virtuous example, *mutatis mutandis*, might be found in the approach adopted by the Court in the landmark judgment *Commission v. France* cited above. The judges were keen to impose for the first time cumulatively a lump sum and a penalty payment and reopened the oral phase so to allow the parties to submit their observations. This introduced a strong component of procedural legitimacy. We acknowledge that this may further protract proceedings and encourage dilatory tactics, but it is also true that the decision stays in the hand of the Court itself. To ensure a fair balance between legitimacy and effectiveness, the Rules of Procedure could therefore be emended to allow the Court to reopen the oral phase under specific circumstances, for example if it intends to significantly depart from the Commission's proposal. At the current state of the art, Article 83 RoP provides that the Court may at any time order the opening or reopening of the oral part of the procedure, *inter* alia, where the case must be decided on the basis of an argument which has not been debated between the parties or the interested persons referred to in Article 23 of the Statute. This could prove extremely useful, for example, in cases where the Court deems necessary to extend the scope of the contested breach to highlight the seriousness and systemic nature of the infringement[71]. This would uphold Member States' procedural guarantees, ensuring they can submit their observations in regards to newly deduced grounds.

III. Creeping conditionality: the Commission's power to enforce penalties through set-off.

After financial sanctions are imposed, the execution is overseen by the European Commission, through supervision over the Member State's efforts to abide by the Court's judgment. This usually takes the form of renewed consultations and exchanges between the Commission and the concerned Member State. As in the administrative phase, the duty of loyal cooperation plays a significant role at this stage. In fact, the Commission can monitor the state of compliance mostly relying on information supplied by Member State. Likewise, Commission's initiatives must take into account that Court's rulings shall be complied with within a reasonable time. However, disputes may arise at this stage as well, prompting the Commission to resort to means of enforcement.

The execution of financial sanctions by coercive means had been disputed for a long time. Prominent scholars had expressed doubts about the viability of such an avenue in case of strong divergences with the

[67] Scheppele (n. 64).
[68] The concern that the discretion enjoyed by the Commission might result in arbitrary choices is a longstanding concern in the legal scholarship: *inter alia* Roberto Mastroianni, 'La procedura di infrazione ed i poteri della Commissione: chi controlla il controllore?' [1994] Rivista di diritto internazionale 1021, spec. 1025.
[69] See Case C-689/19, *Repubblika* [2021] ECLI:EU:C:2021:311 paras 62 – 64; Opinion 2/13 (*Accession of the European Union to the ECHR*) [2014] EU:C:2014:2454 para 18.
[70] See also A. RIGAUX, *Europe*, 2013, n. 8/9, 19 which complained about "*l'opacité qui entoure l'évaluation, par le juge de l'Union, della somme forfaitaire […] prévisibilité de la sanction du double manquement*".
[71] On the same line, see Opinion of AG Geelhoed in case C-304/02 (n. 54), para 35.

concerned Member State[72]. However, the Court of Justice has since taken a different position, opening to the possibility that the Commission may enforce Article 260(2) and (3) TFEU judgments through compensation with sums due to the concerned Member State under general funding regimes[73]. The General Court stated that as the Commission implements the budget, the latter is responsible for recovering the amounts due to the budget of the European Union in the light of a judgment by the Court[74].This position is now accepted in the legal doctrine[75]. The significant aspect of this development is that this subsequent phase lies entirely within the Commission's competence, in application of the general Financial Regulation[76]. Article 102 of the Regulation sets out detailed rules on "Recovery by offsetting". The Regulation is further supplemented by a Commission Decision setting out detailed rules on the recovery of amounts owed[77]. The Commission shall first adopt a letter of notice ordering payments of amounts due and, in case of non-compliance, adopt a decision of compensation. A review carried out by the Court of Justice or the General Court[78] would therefore be only eventual and *ex post*, as Commission's decisions may be challenged under Article 263 TFEU.

This further avenue of enforcement represents an *extrema ratio* to which the Commission may resort to in case a Member State refuses to comply with a (second) judgment and to pay the amounts due. Understandably, in practice the recourse to general budgetary powers appears limited, as disagreements with a State seldom reach such levels of confrontation and Member States generally pay[79]. However, in recent years the instrument has allowed the Commission to exert intense pressure on Member States openly defying the *acquis* and the ECJ's authority. For example, Hungary refused to pay fines imposed in *Reception of application for international protection II*[80], triggering offsetting measures[81]. It appears that no judicial action was taken by Hungary. Poland, on the other hand, started Article 263 TFEU proceedings against the Commission, disputing the existence and exercise of the power to collect sums[82]. The General Court upheld the Commission's decisions in all cases.

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[72] Giuseppe Tesauro, 'Les sanctions pour le non-respect d'une obligation découlant du droit Communautaire par les Etats members' in Willem Van Gerven and Mario Zuleeg (eds.) *Les sanctions comme moyens pour la mise en oeuvre du droit communautaire* (Bundesanzeiger 1996) 17. It was widely believed that Article 299 TFEU could not be applied to enforce sanctions inflicted in infringement proceedings.

[73] Judgment of the General Court, 29 March 2011, case T-33/09, *Portugal v. Commission* [2011]; 19 October 2011, case T-139/06, *France v. Commission* [2011], para 37. Recently, judgment of the General Court, case T-1033/23, *Poland v. Commission* [2025] para 52.

[74] Ibid, para 62.

[75] See Pekka Pohjankoski, 'Rule of Law with Leverage: Policing Structural Obligations in EU Law with the Infringement Procedure, Fines, and Set-off' (2021) Common Market Law Review 1341, 1353.

[76] Regulation (EU) 2024/2509 of the European Parliament and of the Council of 23 September 2024 on the financial rules applicable to the general budget of the Union repealing previous Regulation (EU) 2018/1046 of the European Parliament and of the Council OJ L 1/239.

[77] Commission Decision on the internal procedure provisions for the recovery of amounts receivable arising from direct management and the recovery of fines, lump sums and penalty payments under the Treaties C(2018) 5119 final OJ CI 514/6.

[78] In the light of the 2019 reform of its Statute, by derogation to ordinary rules the Court of Justice retains competence to hear cases on actions of annulment against compensation decisions. The amendment was introduced to avoid the risk that the General Court would impinge on the appreciation of Member States' conduct, which is reserved to the Court only. However, the General Court has recently affirmed its competence in cases of penalties imposed pursuant to Article 279 TFEU, judgment of the General Court, 5 February 2025, joined cases T-830/22, T-156/23, *Poland v. Commission*. This decision was criticised as it fragments once again the regime on jurisdiction, see Niel Kirst, 'Whose Jurisdiction? Penalty Payments for Failing to Execute Interim Measures Under Article 279 TFEU in Poland v. Commission' [2025] Review of European Litigation.

[79] According to the recent Report on *Simplification, Implementation and Enforcement* COM(2025) 871 final of 21 October 2025 Member States have paid over 302 million Euros in the first seven of 2025 alone.

[80] Case C-123/22 (n. 57).

[81] See Magnus Brunner, European Commissioner for Internal Affairs and Migration 2025 Annual Progress Report *Simplification, Implementation & Enforcement*, September 2025, 8, which reports laconically that "*In the absence of payment by Hungary, the Commission has been offsetting the amounts due*".

[82] See judgment of the General Court, case T-1033/23, *Poland v. Commission* [2025] ECLI:EU:T:2025:129; joined cases T-830/22 and T-156/23, *Poland v. Commission* [2025] ECLI:EU:T:2025:131; joined cases T–200/22 and T-314/22, *Poland v. Commission* [2024] ECLI:EU:T:2024:329 currently under appeal in case C-554/24 P (*Annulation retroactive de mesures*

This recent evolution adds a strong bite to the infringement procedure, bolstering its dissuasive effect, hence its effectiveness, and contributing to the upholding of the authority of EU law[83]. Notably, this new avenue proves to be especially effective when a Member State is the addressee of penalties for not having complied with previous *interim* measures. In fact, the interplay between the two mechanisms allows the Commission to apply economic pressure from the early stage of an infringement procedure under Article 258 TFEU, well before a ruling by the ECJ. The development is noteworthy as it mimics both past and modern features of enforcement powers, showing the great flexibility and malleability of Articles 258 et seqq. TFEU. In fact, looking at the past, the mechanism resembles sanctioning powers envisaged by Article 88 ECSC, which provided that in case of persistent non-compliance the High Authority could adopt a decision suspending payments due pursuant to the Treaty[84]. However, it is also interesting to highlight how this new tool distinguishes itself from other compliance-inducing instruments, as it does not provide for the necessary involvement of either a political institution (such as the Council and the European Council) or a jurisdictional instance. Conversely, the practice of ensuring compliance through economic leverage fits into common modern trends of enforcement structures and methods. The process is marked by the introduction of secondary law-based tools bestowing upon Commission strong and autonomous prerogatives. A prime example of this might be Regulation (EU) 2021/1060[85], which enables the Commission to interrupt deadlines for payments or suspend funding when the State is found to be non-compliant with relevant benchmarks. Notably, Article 97(1), lett. *d*), lists the issuing of a Reasoned Opinion among the possible conditions enabling the suspension of payments[86]. Article 9 of the same Regulation mandates that in the implementation of funds Member States and the Commission shall ensure respect for fundamental rights and compliance with the Charter of Fundamental Rights of the European Union. Article 15 entrusts the Commission with the power to assess compliance with enabling conditions and, eventually, deny reimbursement of expenditures related to the specific objective concerned. The well-known Conditionality Regulation is another example of this method. Despite the role of the Council[87], the Regulation introduces a swift procedure that avoids the quicksand of a political process based on consensus (such as Article 7 TEU) and the lengthiness of judicial proceedings. Finally, the recently adopted Regulation (EU, Euratom) 2024/2509 on the financial rules applicable to the general budget of the Union openly embraces the principle of conditionality: Article 6 of the Regulation refers to the provisions of the Conditionality Regulation and requires compliance with the Charter and respect for Union values enshrined in Article 2 TEU insofar as they are relevant in the implementation of the budget.

These instruments share a relatively low threshold required to be triggered and deployed. For instance, the Common Provisions Regulation allows the Commission to proceed with the suspension of payments on

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provisoires). For some first remarks, Pekka Pohjankoski, 'Contesting the Ultimate Leverage to Enforce EU Law' (Verfassungsblog, 2023), accessed 2nd December 2025.

[83] Pekka Pohjannkoski, 'Safeguarding EU Law's Authority: The General Court affirms the Commission's Decisions to recover Penalty Payments from Member States by offsetting *(T-200/22 and T-314/22, Poland v. Commission)*' (EU Law Live, 2024) accessed 2nd December 2025. *Contra*, AG Kokott in her Opinion to C-554/24 P, *cit*., par. 45, remarked that the contribution to the effective application of EU law is only a necessary consequence of the primary function of penalty payments under Article 279 TFEU of guaranteeing that effectiveness of the future final judgment; otherwise, the measure would lose its ancillary nature.

[84] *Mutatis mutandis*, on the parallelism between the recent Conditionality Regulation and Article 88 ECSC, Jacopo Alberti, 'Così antico, così moderno. Una lettura del "regolamento condizionalità" alla luce del potere di sospensione dei fondi comunitari ex art. 88 del Trattato CECA' (2022) Osservatorio delle fonti. Interestingly, however, Professor Tizzano found the qualification as "sanctions" to be incorrect, as Article 88 ECSC measure were meant to restore the equilibrium altered by a Member State's violation and to prevent unjust enrichment, Tizzano (n. 61).

[85] Regulation (EU) 2021/1060 of the European Parliament and of the Council of 24 June 2021 laying down common provisions on the European Regional Development Fund, the European Social Fund Plus, the Cohesion Fund, the Just Transition Fund and the European Maritime, Fisheries and Aquaculture Fund and financial rules for those and for the Asylum, Migration and Integration Fund, the Internal Security Fund and the Instrument for Financial Support for Border Management and Visa Policy, OJ L 231/159.

[86] According to Article 97(1) "The Commission may suspend all or part of payments, except for pre-financing, after having given the Member State the opportunity to present its observations, if any of the following conditions is met: […] *d*) there is a reasoned opinion by the Commission in respect of an infringement procedure under Article 258 TFEU on a matter that puts at risk the legality and regularity of expenditure.

[87] The original proposal submitted by the Commission foresaw a reverse majority voting rule which would have greatly empowered the Commission.

the basis of its own assessment in the light of a reasoned opinion. Financial penalties pursuant to Article 279 TFEU will be imposed under the conditions of *fumus boni iuris* and *periculum in mora* and their collection may be carried out irrespective of the outcome in the main proceeding. This translates into a standard fairly easy to fulfil. This hints at a wider resort to and normalisation of *de facto* direct sanctioning powers through conditionality in EU law[88]. Sanctions do not seem to be a matter exclusively reserved to the intergovernmental sphere anymore[89]. Likewise, the exhaustion of ordinary judicial avenues as a necessary institutional guarantee seems to have become optional, if not merely instrumental to the activation of other remedies. This entails the conferral of greater breadth and depth to the Commission's prerogatives in determining the existence an infringement of EU law. Arguably, this implies a shift of enforcement powers in favour of the executive[90]. It is unclear to what extent this is compatible with the solution envisaged by Articles 258, 259 and 260 TFEU.

However, the power to withhold sums following a Court's judgment raises some concerns. First, the Regulation lacks a clear and unequivocal "safety clause" ensuring that third parties' interests are given due consideration. It is important to stress that withheld resources are ultimately meant benefit legal and natural persons at the national level. Hence, there is a serious and concrete risk that a systematic use of the power to withhold sums might jeopardise the achievement of the European cohesion policy's goals, thus colliding with Article 3(3) TEU and the underlying principle of solidarity[91]. This omission is striking when the regime is compared to other instruments meant to address issues of non-compliance through economic leverage, such as Article 7 TEU[92] and the more recent Conditionality Regulation[93]. In fact, the former explicitly provides that when the Council adopts a decision to suspend certain of the rights deriving from the application of the Treaties to the Member State in question, it "shall take into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons"[94]; the latter also acknowledges the potential impact on third parties and states that "the Commission shall do its utmost to ensure that any amount due from government entities of Member States […] is effectively paid to final recipients or beneficiaries […]"[95]. On top of that, it is unclear whether these decisions could be subject to annulment actions by private litigants under Article 263 TFEU (i.e. members from communities ultimately, yet indirectly, affected by the suspension, NGOs, regions, municipalities etc.): arguably, the decisions are not of direct and individual concern to individuals nor could they be regarded as regulatory acts within the meaning of the fourth paragraph of Article 263 TFEU.

In conclusion, the Commission leveraged the existing legal framework so as to develop a new and further avenue to ensure that ECJ rulings are complied with. However, it might be argued that the Financial Regulation was not meant to entrust the Commission with further powers *vis-à-vis* Member States[96]. The

[88] A phenomenon otherwise referred to as "coercive" or "punitive" conditionality, Peter Becker, 'Conditionality as an instrument of European Governance – Cases, Characteristics and Types' [2025] Journal of Common Market Studies 402, 413.

[89] After all, this could be one of the main takeaways of the Conditionality judgments, as the Court stated that the procedure under Article 7 TEU does not bar the legislator from setting out other and further instruments aimed to ensure compliance with common values.

[90] As noted by the General Court in joined cases T-65/10, T-113/10 and T-138/10, *Spain v. Commission* [2013] ECLI:EU:T:2013:93 para 112, nothing prevents the Commission from ensuring the respect of EU law through reduction of Commission's financial contributions in absence of a prior finding by the Court of justice of the European Union.

[91] The issue was recently raised also by Viorica Viţâ, (Un)Constitutional Conditions. A European Perspective, in Claire Kilpatrick and Joanne Scott (eds.), *New Frontiers of EU funding: law, policy, politics* (Oxford 2024), 118.

[92] Although Article 7 TEU does not explicitly provides for the power to suspend funding, it is widely accepted that it might fall within the hypothesis of "suspension of rights".

[93] Regulation (EU) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, OJ L 433 I/1.

[94] Article 7 (3) TEU. According to a consolidated opinion, the assessment could not be scrutinised by the Court of Justice, as Article 269(1) TFEU limits its purview to procedural aspects. However, so far, the provision has not had any practical relevance.

[95] Article 5 (5) of the Regulation.

[96] It is true that Article 102 (2), second indent, of the Financial Regulation lays down procedural rules in case "*the debtor is a national authority or one of its administrative entities*", providing that the accounting officer shall also inform the Member State concerned of his or her intention to resort to recovery by offsetting at least 10 working days in advance of proceeding with it. However, it appears equally clear that said rules were designed to find application in ordinary matters

lack of an *ad hoc* legal basis and procedure allows for a great margin of manoeuvrability which could lead to abuse. For example, the Commission could employ the instrument with zeal and vigour against Member States who are traditionally most reliant on European funding, while being more lenient with others. After all, it is widely understood that the main objective pursued through economic set-offs is to undermine popular support for the national government. These concerns are compounded by the fact that, so far, the Commission has not followed its settled practice of publishing Communications setting out objective criteria guiding its enforcement action[97]. The absence of guidelines entails a lack of accountability to both Member States and European citizens. Such omission is significant if one considers that it is yet unclear whether the principles underpinning Article 258 TFEU should apply in these follow-up procedures. For example, the Commission should clarify whether it intends to exercise the same discretion it enjoys in the previous stages of the procedure. The arguments already put forward to contest the Commission's discretion under Article 260(2) TFEU should apply *a fortiori* in the administrative phase implementing a ECJ judgment[98]. Moreover, it should not be without consequence that the General Court grounded the Commission's power to offset in Article 317 TFEU and not Article 17 TFEU. This implies that powers should be exercised according to the principle of sound financial management. This entails a greater degree of political and legal scrutiny by the European Parliament and the European Court of Auditors[99].

The issues raised above are not entirely new and have been discussed in relation to other conditionality instruments. To date, the most notable example is the Commission's margin of appreciation under the Conditionality Regulation[100]. Similar doubts have been raised also in regard to the assessment of compliance with horizontal enabling conditions[101].

IV. Conclusions

The centralised enforcement system is nowadays facing daring challenges and must meet high expectations from other Member States and civil society. This led the Commission to come up with new strategies in the deployment of the infringement procedure, for example, framing actions as systemic cases of noncompliance with the Charter of Fundamental Rights, Article 19 TEU and European core values themselves. These initiatives gathered institutional backing, especially from the Court of Justice. The paper illustrated the degree of interpretative flexibility employed by the ECJ when interpreting its powers pursuant to the Treaties. Likewise, the European Commission seems to have succeeded in playing a stronger and more autonomous role in the enforcement of EU law and the sphere of sanctions. This paper showed how the enforcement structure is developing along two seemingly contradictory directions: stronger jurisdictionalization and executive empowerment. Arguably, these innovations enhance the effectiveness of the enforcement system, ensuring that strong financial pressure is applied from the outset of the judicial phase or after swift administrative procedures, presumably leading to swifter compliance. This could prove crucial in actions under Article 258 TFEU addressing serious threats to the rule of law,

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concerning the distribution of financial resources from the European to the national level. To further this argument, it is telling that the responsibility of the procedure is entrusted to an accounting officer and that seemingly no role is played by the College of Commissioners.

[97] This omission is noted also by Stefano Montaldo, 'EU Sanctioning Power and the Principle of Proportionality' in Montaldo and Costamagna and Miglio (n. 29) 147, 154.

[98] Anne Bonnie, 'European Commission Discretion under Article 171(2) EC' [1998] European Law Review 537.

[99] Interestingly the 2024 Special Report *Enforcing EU Law* published by the European Court of Auditors did not submit any observation concerning the execution of fines by the Commission.

[100] As it is well known, the European Parliament ultimately discontinued its action in case C-657/21, *Parliament v. Commission*, following the dismissal of direct actions brought by Hungary and Poland and the subsequent Commission's initiative pursuant to the Conditionality Regulation. The Court therefore did not take position on the margin of appreciation enjoyed by the Commission. The view that the Commission enjoys discretion is taken by Sébastian Platon, 'Bringing a Knife to a Gunfight. The European Parliament, the Rule of Law Conditionality, and the action for the failure to act', (Verfassungsblog, 2021) last accessed 2nd December 2025.

[101] With regard to this aspect some clarity could be provided by the Court of Justice in case C-225/24, *Parliament v. Commission*, concerning the challenge by the European Parliament against the Commission's decision to release funds to Hungary following a positive assessment of compliance with the horizontal enabling condition related to the Charter laid down in the 2021 Common Provisions Regulation. For further information, see Ilaria Gambardella, 'Freezing and Unfreezing EU funds to Ensure Fundamental Rights Compliance: The Commission's Discretion Under Review Before the Court of Justice: *Parliament v. Commission (C-225/24)'* (Eu Law Live, 2025), accessed 2nd December 2025.

primacy and the autonomy of the EU legal order. However, effectiveness comes at a cost. We highlighted some potential inconsistencies with general principles of EU law. This is neither to put into question the legitimacy *stricto sensu* of recent developments nor to suggest that the enforcement policy towards defiant Member States should be relaxed. However, European institutions should engage in a balancing exercise between the promotion of effectiveness and other potentially conflicting normative imperatives, setting out objective criteria and rules as to make their action foreseeable, impartial and justifiable. This process would contribute to a normalisation of enforcement powers beyond a logic of urgency.

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