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ARTICLE

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The Systemic Criterion in the Use of Infringement Proceedings

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Abstract
The aim of the present contribution is to assess how infringement proceedings under Articles 258 to 260 TFEU have dealt with 'systemic' breaches of EU law by the Member States' authorities. It will be argue that two, or possibly three, strands of case-law appear to specifically concern systemic breaches of EU law.

Keywords: Articles 258 to 260 TFEU; Infringement proceedings; Systemic Breaches; General and Persistent; Systemic Implications; European Commission; Environmental Protection; EU values

A. Introduction

The scope of infringement proceedings, as provided for in Articles 258–260 TFEU (Treaty on the Functioning of the European Union), is extremely broad. Although Articles 258 and 259 TFEU refer to Member States' "obligation[s] under the Treaties," it is clear that these obligations are not only those which appear in the founding Treaties or in other acts of primary law, but also those which stem from secondary legislation, and in particular from the legal acts envisaged by Article 288 TFEU: Regulations, directives and decisions. In fact, a failure to comply with any other act adopted by the Union, whatever its name and form, and whether explicitly provided for in the Treaties or not, can be the object of proceedings under Articles 258–260 TFEU, provided that the act in question produces legal effects.[1]

As a matter of principle, there is no *de minimis* rule as regards infringements that can be declared under Articles 258–260 TFEU: The mere failure to comply with an obligation imposed by an EU rule is sufficient to constitute an infringement, and the fact that such a failure has had no adverse effects in practice is irrelevant. As the Court has consistently stated, when bringing a case before it, the Commission is not required to draw distinctions based on the nature and seriousness of the infringement.[2] In fact, it is immaterial if an infringement "is of limited scope and has negligible practical consequences," under Articles 258–260 TFEU, the infringement exists and

[1]*See generally* Luca Prete, Infringement Proceedings in EU Law 54 (2017).

[2]*See* ECJ, C-209/88, *Commission v. Italy*, ECLI:EU:C:1990:423 (Nov. 27, 1990), paras. 12–14. *See also* C-45/95, *Commission v. Italy*, EU:C:1996:479 (Dec. 10, 1996), para. 31.

may thus be declared by the Court "regardless of the frequency or the scale of the circumstances complained of."[3]

However, that does not mean that the significance and magnitude of the infringements alleged are of no relevance under Articles 258–260 TFEU. The scope of this contribution is to critically assess to what extent infringement proceedings have dealt specifically with *systemic breaches* of EU law.

B. The Commission's Policy

In its 2016 Communication, *EU law: Better results through better application*, the European Commission announced that its use of infringement proceedings would be brought in line with the Juncker Commission's commitment to be "bigger and more ambitious on big things, and smaller and more modest on small things." This meant, for the Commission, "a more strategic approach to enforcement in terms of handling infringements;" in other words, a more selective and targeted use of those proceedings.[4] The prioritization of infringement proceedings was, however, not a novelty. In light of the Commission's limited resources, and the sheer amount of complaints consistently received by that institution regarding potential breaches committed by Member States' authorities, some kind of prioritization of cases has always been inevitable. In fact, already in its 1985 *White Paper on the Internal Market*, the Commission announced its decision to establish certain priorities for the processing of complaints. Non–priority cases would, unlike the others, be mainly dealt with outside the formal infringement procedure, for instance by a direct approach with the Member States' authorities.[5]

Be that as it may, with its 2016 Communication, the Juncker Commission decided to signal its intention to be even more selective—and, one may add, more transparent—with regard to this activity of prioritization and selection of the possible breaches to be investigated and, where appropriate, brought before the Court.[6] The 2016 Communication contains numerous references to systemic breaches of EU law, as a type of infringement that would be treated with priority. In the relevant parts, that Communication reads:

> The obligation to take the necessary measures to comply with a judgment of the Court of Justice has the widest effect where the action required concerns systemic weaknesses in a Member State's legal system. The Commission will therefore give high priority to infringements that reveal systemic weaknesses which undermine the functioning of the EU's institutional framework ...
>
> Beyond these cases, the Commission attaches importance to ensuring that national legislation complies with EU law since incorrect national legislation systematically undermines citizens' ability to assert their rights ... and to draw fully the benefits from EU legislation. The Commission will also pay particular attention to cases showing a persistent failure ... to apply EU law correctly.
>
> In light of the discretionary power the Commission enjoys in deciding which cases to pursue, it will examine the impact of an infringement on the attainment of important EU policy objectives, such as ... where there may be a systemic impact beyond one Member State. It will distinguish between cases according to the added value which can be achieved by an infringement procedure.

[3]*See* ECJ C-226/01, *Commission v. Denmark*, ECLI:EU:C:2003:60 (Jan. 30, 2003), para. 32.

[4]*See* Communication from the EU Commission- EU Law: Better Results Through Better Application: C/2016/8600 at 10.

[5]Commission of the European Communities, *Completing the Internal Market: White Paper from the Commission to the European Council (Milan, 28-29 June 1985)*, COM(85) 310 (June 19, 1985), 9–10.

[6]*See* Karen Banks & Gregor von Rintelen, *Infringement Procedures and the Juncker Commission*, 45 EUR. L. REV. 619–38 (2020).

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> Certain categories of cases can often be satisfactorily dealt with by other, more appropriate mechanisms at EU and national level. This applies in particular to individual cases of incorrect application not raising issues of wider principle, where there is insufficient evidence of a general practice ... or of a systematic failure to comply with EU law. In such cases, if there is effective legal protection available, the Commission will, as a general rule, direct complainants in this context to the national level.[7]

Since taking office in 2019, the Von der Leyn Commission expressed its intention to, broadly speaking, continue the policy of the previous Commission with regard to the handling of infringement proceedings.[8] In fact, in its latest Communication on this matter, *Enforcing EU Law for a Europe that Delivers*, published in October 2022, the Commission writes:

> The Commission's enforcement policy has evolved over time. Since 2017, the Commission has increasingly focused its efforts on issues where its interventions can maximize added value and make a difference in the lives and activities of as many people and businesses as possible. The Commission therefore continues to pursue the strategic approach, objectives and priorities that it set itself in the 2016 Communication ... So the Commission's strategic approach means that infringement procedures rarely focus on individual matters, but rather on systemic and structural issues affecting a large number of persons or businesses in a given Member State or across the Union ... Isolated instances of possible wrongful application of EU law, which do not raise general issues of principle (such as the incorrect transposition of a directive or impeding the procedure for preliminary rulings), lacking evidence of a general practice or of systemic shortcomings, are dealt with more effectively by redress bodies closer to those affected by the infringement.[9]

C. The Court's Case-law

In the 70-year rich case–law of the Court of Justice, two, or possibly three, strands of case-law appear to specifically concern systemic breaches of EU law. These strands of case–law will be examined in turn.

I. Administrative Practices

First, it is well-established that "an administrative practice can be the subject matter of an action for failure to fulfil obligations when it is, to some degree, of a consistent and general nature."[10] The origins of this case-law may be traced back to the Opinion of Advocate General ("AG") Roemer in a case in the early 1970's. The Commission had brought proceedings against Italy on the ground that the latter was imposing on imported goods an *ad valorem* duty which, in the Commission's view, constituted a charge having an effect equivalent to customs duties prohibited under what is now Article 30 TFEU. The Italian Government did not contest the substance of the Commission's claim. However, it asked the Court to dismiss the case on the grounds that its legislation had, in

[7] *Completing the Internal Market*, *supra* note 5, at 3.

[8] *See* Luca Prete & Bernardus Smulders, *The Age Of Maturity Of Infringement Proceedings*, COMMON. MKT. L. REV. 285–87, 296–300 (2021).

[9] *Communication From the Commission to the European Parliament, The Council, the European Economic and Social Committee and the Committee of the Regions: Enforcing EU law for a Europe that Delivers*, at 20, COM (2022) 518 final (Oct. 14, 2022).

[10] *See* ECJ, C-808/18, *Commission v. Hungary [reception of applicants for international protection]*, ECLI:EU:C:2020:1029 (Dec. 17, 2020), para. 111; https://curia.europa.eu/juris/liste.jsf?num=C-808/18&language=EN; ECJ, C-443/18, *Commission v. Italy (Xylella)*, ECLI:EU:C:2019:676 (Sept. 5, 2019), para. 74, https://curia.europa.eu/juris/liste.jsf?num=C-443/18&language=EN.

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the meantime, been brought into line with then EEC law, and it was at most implementation by the administration that was lacking. In that regard, AG Roemer responded, in essence, that an infringement need not be caused by legislative or regulatory action or inaction of the Member State in question, since it may also stem from an "administrative practice [not being] in harmony with Community law."[11] This principle was expressly endorsed by the Court, and gave rise to a relatively consistent line of case-law since the 1980's[12] and 1990's.[13]

Subsequently, that principle was, albeit cautiously, extended to *judicial* practice. In a judgment in 2007, the Court stated "If the Commission intends to prove a failure to fulfil obligations on account of a judicial practice, the criteria established by the case–law of the Court [with regard to an administrative practice] apply all the more and with particular stringency."[14] In other judgments, the Court ruled that, with regard to allegations that a judicial practice is contrary to EU law:

> [I]solated or numerically insignificant judicial decisions in the context of case–law taking a different direction, or still more a construction disowned by the national supreme court, cannot be taken into account. That is not true of a widely–held judicial construction which has not been disowned by the supreme court, but rather confirmed by it.[15]

It would seem that this strand of case-law, which remained relatively stable over the years, has given rise to very little, if any, issues before the Court. Mostly, cases turned on whether the Commission had met its burden of proof. In that regard, the Court made clear that, given the nature of the breach alleged, the type of evidence to be adduced by the applicant is:

> [D]ifferent from that usually taken into account in an action for failure to fulfil obligations concerning solely the terms of a national provision, and that in those circumstances the failure to fulfil obligations can be established only by means of sufficiently documented and detailed proof of the alleged practice of the national administration and/or courts, for which the Member State concerned is answerable.[16]

It could be safely said that, thanks to this case-law, the Court made sure that Member States' compliance with EU law need not be limited to *formal* compliance: *de facto* breaches can also be validly pursued under Articles 258–260 TFEU. Member States cannot hide behind an alleged EU law-compliant legislative and regulatory framework when the Commission is able to establish the occurrence of systemic—intended as repeated or widespread—breaches of EU law committed by its administration in the implementation, execution and, if need be, enforcement of EU law.

II. General and Persistent Breaches

The above-mentioned case-law on administrative practices contrary to EU law has been referred to, by the Court, as one of the elements that justified, in the seminal *Irish Waste* judgment of 2005, that an action under Article 258 TFEU could also be brought against a general and persistent

[11]Opinion in *Commission v. Italy*, C-8/70, ECLI:EU:C:1970:87 (Oct. 28, 1970), page 970.

[12]ECJ, C-21/84, *Commission v. France*, ECLI:EU:C:1985:184 (May 9, 1985), paras. 13–15.

[13]ECJ, C-187/96, *Commission v. Greece*, ECLI:EU:C:1998:101 (Mar. 12, 1998), para. 23; ECJ, C-185/96 *Commission v. Greece*, ECLI:EU:C:1998:516 (Oct. 29, 1998), para. 35; C-387/99, *Commission v. Germany*, ECLI:EU:C:2004:235 (Apr. 29, 2004), para. 42.

[14]ECJ, C-156/04, *Commission v. Greece*, ECLI:EU:C:2007:316 (June 7, 2007), paras. 50–52.

[15]ECJ, C-129/00, *Commission v. Italy*, ECLI:EU:C:2003:65 (Dec. 9, 2003), para. 32; ECJ, C-154/08, *Commission v. Spain*, ECLI:EU:C:2009:695 (Nov. 12, 2009), para. 126.

[16]*See Hungary*, C-808/18 at para. 113; *see also* Opinion of AG Jääskinen, in *Commission v. Germany*, C-525/12, ECLI:EU:C:2014:449 (May 22, 2014), at 27, https://curia.europa.eu/juris/liste.jsf?num=C-525/12&language=EN, ("[T]his requires that the Commission establish the horizontal nature of the failure to fulfil obligations.").

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failure by a Member State to comply with EU Law.[17] The significance and novelty[18] of the Commission's claim in that case should not be overlooked. The Commission itself stated, in its application to the Court, that by its action, it was seeking a two-fold form of order:

> [A] declaration of failure to fulfil obligations not only on account of the shortcomings noted in the specific situations covered by the individual complaints referred to in its submission but also, and more fundamentally, on account of the general and persistent nature of the deficiencies which characterize[d] the actual application of the Waste Directive in Ireland, of which the specific situations mentioned in those complaints simply constitute[d] examples.[19]

In its Opinion, AG Geelhoed emphasized the importance of the legal development sought by the Commission:

> The Commission's request is obviously important from a point of view of enforcing [EU] law and ultimately affects the way in which it is able to perform its duty under [Art. 17 TEU] to ensure that the provisions of the Treaty and the measures taken by the institutions pursuant thereto are applied ... A finding by the Court that this is the case would open the way to more effective enforcement of [EU] law obligations against Member States ....[20]

The defendant Member State contested the Commission's approach to the case. However, both AG Geelhoed[21] and the Court sided with the Commission. In particular, in its judgment, the Court came to the conclusion that:

> [I]n principle nothing prevents the Commission from seeking in parallel a finding that provisions of a directive have not been complied with by reason of the conduct of a Member State's authorities with regard to particular specifically identified situations and a finding that those provisions have not been complied with because its authorities have adopted a general practice contrary thereto, which the particular situations illustrate where appropriate.[22]

The Court's reasoning on the point is rather brief, but convincing. However, one must bear in mind that the concepts of 'administrative practice' contrary to EU law and of 'general and

[17]ECJ, C-494/01, *Commission v. Ireland*, ECLI:EU:C:2005:250 (Apr. 26, 2005), https://curia.europa.eu/juris/liste.jsf?num=C-494/01&language=EN.

[18]In looking for a possible precedent, see ECJ, C-113/86, *Commission v. Italy (statistical data)*, ECLI:EU:C:1988:59 (Feb. 4, 1988), paras. 13, 19, https://curia.europa.eu/juris/liste.jsf?num=C-113/86&language=EN:

In its application the Commission is referring not to specific acts but to a continuing failure on the part of the Italian Government to fulfil its obligation to forward the data concerned in due time' ... 'It is therefore appropriate in this case to regard the subject-matter of the dispute as being [Italy's] failure to comply with the aforementioned periods, as evidenced by the continuous delays, without there being any need to consider each case of late communication of data or to exclude events which took place after the delivery of the reasoned opinion.

But see ECJ, C-309/84, *Commission v. Italy (vines premium)*, ECLI:EU:C:1986:73 (Feb. 20, 1986), paras. 15–16:

In the present case, the Commission's allegation that [Italy] has failed to fulfil its obligations does not relate to a single act whose effects extend over a long period of time but to delays in the payment of the premiums due in each wine-growing year; those delays involve a separate breach of its obligations in each year. It was therefore necessary that [Italy] should have the opportunity in the pre-litigation procedure of submitting its defence with regard to each of the alleged breaches of its obligations. It is clear from the foregoing that [the letter of formal notice] concerned only the delays in payment in the 1980/81 and 1981/82 wine-growing years. The Italian Government has therefore had no opportunity in the pre-litigation procedure to submit its observations on the delays in payment relating to the 1982/83 and following wine-growing years. Those delays cannot therefore be considered in the present proceedings.

[19]*Commission v Ireland* C-494/01, at 23.

[20]Opinion in *Commission v Ireland*, C-494/01 at 4.

[21]Opinion in *Commission v Ireland*, C-494/01 at 22, 48 ("general and structural failures.").

[22]*Commission v Ireland*, C-494/01 at para. 27.

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persistent' breach are different. There is, in my view, only a partial overlap between them. The former concerns the *source* of the infringement—a mere practice, not a legislative or regulatory act—the latter the *type* of conduct—not isolated infringements, but a series/pattern of infringements.

At any rate, the reactions to the judgment in *Irish Waste* were largely positive, especially in academic circles. Authors generally agreed that the powers of enforcement of the Commission would be strengthened as a result of the Court's recognition of general and persistent breaches. The judgment was saluted as giving rise to "a new dawn for infringement proceedings,"[23] or as "open[ing] new scenarios for the Commission's enforcement of [EU] law obligations,"[24] insofar as it enabled that institution to monitor compliance with EU law "more effectively and comprehensively."[25] Indeed, with respect to systemic infringements, the problem for the Commission is that it had to initiate infringement proceedings for every factual situation which is contrary to EU law, even if these specific situations resulted from a general and systematic failure. This forced the Commission "to combat symptoms instead of basic underlying problems of structural non–compliance."[26] This 'piecemeal approach,' which could now be often avoided, was regarded as being very time-consuming and of limited effectiveness.[27]

These positive assessments are hardly surprising. It cannot be disputed that, when faced with systemic infringements, there are some clear benefits for the Commission to bring a claim based on a general and persistent failure.[28] First, the Commission need not discontinue its procedure even if the individual breaches identified during the pre–litigation stage are remedied before expiry of the time–limit set out in the reasoned opinion. Indeed, the subject–matter of the action is the general attitude of the Member State towards a given EU law obligation, and where this has not changed, the Commission is entitled to bring its case before the EU judges.[29] Second, during court proceedings, the Commission can provide new examples of similar infringements, since these would not constitute new pleas, inadmissible at that stage of the procedure, but merely additional evidence backing up a claim of general and persistent breach.[30] Third, a Member State found guilty of a general and persistent breach need not only redress the specific instances of infringement identified by the Commission, but arguably, change its practice in that area. If the Commission asks the Court to declare 'in parallel' two distinct, although inextricably linked, infringements,[31] then it follows, logically, that a Member State found in breach of both should: (i) remedy the individual breaches identified by the Court, and (ii) revise its "general policy and administrative practice . . . in respect of the subject governed"[32] by the EU measure breached. A failure to do the necessary changes to remedy the failure could expose that Member State to financial penalties under Article 260(2) TFEU, and to actions for liability by individuals affected the breach.[33]

[23]Pål Wennerås, *A New Dawn for Commission Enforcement under Articles 226 and 228 EC: General and Persistent (GAP) Infringements, Lump Sums and Penalty Payments*, 43 COMMON. MKT. L. REV.31–62 (2006).

[24]Luca Prete & Ben Smulders, *The Coming of Age of Infringement Proceedings*, 47 COMMON. MKT. L. REV. 9–61 (2010).

[25]Tristan Materne, *La Procédure en Manquement d'État: Guide à la Lumière de la Jurisprudence de la Cour de Justice de l'Union Européenne* (2010).

[26]Annette Schrauwen, *Fishery, Waste Management and Persistent and General Failure to Fulfil Control Obligations: The Role of Lump Sums and Penalty Payments in Enforcement Actions Under Community Law*, 18J. Env. L. 292 (2006).

[27]Wennerås, *supra* note 23.

[28]Arguably, these benefits should, mutatis mutandis, also exist when the Commission claims that the alleged breach is the result of an administrative or judicial practice.

[29]*Commission v Ireland*, C-494/01 at 32. *See also Commission v Italy*, C-443/18 at paras. 75, 76.

[30]*Commission v Ireland*, C-494/01 at paras. 37–39. *See also* ECJ, C-664/18, *Commission v. UK (NO2 values)*, ECLI:EU:C:2021:171 (Mar. 4, 2021), paras. 78-81, https://curia.europa.eu/juris/liste.jsf?num=C-664/18&language=EN.

[31]*Commission v Ireland*, C-494/01 at para. 27. *See also* ECJ, C-196/13, *Commission v. Italy*, ECLI:EU:C:2014:2407 (Dec. 2, 2014), para. 33, https://curia.europa.eu/juris/liste.jsf?num=C-196/13&language=EN.

[32]Opinion in *Commission v Ireland*, C-494/01 at 48.

[33]*See* ECJ, C-46/93 and C-48/93, *Brasserie du pêcheur and Factortame*, ECLI:EU:C:1996:79 (Mar. 5, 1996), para. 57; ECJ, C-524/04, *Test Claimants in the Thin Cap Group Litigation*, ECLI:EU:C:2007:161 (Mar. 13, 2007), para. 120.

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In the following years, the Commission made use of this new tool, bringing before the Court a number of cases on the grounds of alleged general and persistent breaches. All those cases, with very few exceptions,[34] concerned alleged failures to comply with EU environmental legislation.[35] Whereas the Commission did win most of those cases,[36] it may be interesting to note that it also lost, in entirety or only in part, a not insignificant part of them, mostly for failing to establish that the instances of non–compliance set out in its submissions were not isolated incidents but, on the contrary, were indicative of an existing pattern of non–compliance.[37]

However, given the type of cases brought by the Commission before the Court, the systemic (meant as widespread or generalized) nature of the alleged infringement being often objectively ascertainable, the concept of 'general and persistent' breach remains somewhat elusive. Indeed, the Court did not need to expand much on that concept in order to address the parties' arguments and adjudicate the disputes brought before it. The most elaborate guidance in that regard is probably to be found in the Opinion of AG Geelhoed in *Irish Waste*. He suggested examining three aspects of the alleged infringement in order to determine whether it is sufficiently 'general and persistent': scale, duration and seriousness. More specifically, AG Geelhoed took the view that such an infringement requires: (i) a general practice or a pattern of non-compliance which is also likely to keep recurring, (ii) a situation of non-compliance that exists for a certain period of time after the EU obligation in question has become effective, and (iii) some negative effect on the attainment of the objectives of the EU measure concerned.[38] In subsequent cases, other Advocates General appeared to broadly follow AG Geelhoed's suggested framework.[39]

With the judgment in *Irish Waste* soon turning 18, time appears ripe for taking stock of the use made by the Commission and the Court of this development in the case–law. Has the case–law on general and persistent breaches actually invigorated the Commission's enforcement of EU law under Articles 258–260 TFEU as expected? The overall number of cases brought before the Court,[40] and the fact that those cases were mainly limited to a single area of law—environmental law—cannot help but raise some perplexities in that regard. That is especially true if one considers the Commission's recent statements, recalled above, concerning the priority given to cases that may be revealing of systemic infringements of EU law.

[34]*See* ECJ, C-160/08, *Commission v. Germany*, ECLI:EU:C:2010:230 (Apr. 29, 2010); ECJ, C-489/06, *Commission v. Greece*, ECLI:EU:C:2009:165 (Mar. 19, 2009).

[35]*See generally* Mariolina Eliantonio, *The Systemic Criterion in the Field of the Environment*, in this special issue.

[36]*See e.g.*, ECJ, C-286/21, *Commission v. France*, ECLI :EU:C:2022:319 (Apr. 28, 2022), https://curia.europa.eu/juris/liste.jsf?num=C-286/21&language=EN; ECJ, C-730/19, *Commission v. Bulgaria*, ECLI:EU:C:2022:382 (May 12, 2022), https://curia.europa.eu/juris/liste.jsf?num=C-730/19&language=EN; ECJ, C-573/19, *Commission v. Italy*, ECLI:EU:C:2022:380 (May 12, 2022), https://curia.europa.eu/juris/liste.jsf?num=C-573/19&language=EN; *UK*, C-664/18; *Italy*, C-664/18; ECJ, C-638/18, *Commission v. Romania*, ECLI:EU:C:2020:334 (Apr. 30, 2020), https://curia.europa.eu/juris/liste.jsf?num=C-638/18&language=EN; ECJ, C-637/18, *Commission v. Hungary*, ECLI:EU:C:2021:92 (Feb. 3, 2021), https://curia.europa.eu/juris/liste.jsf?num=C-637/18&language=EN; ECJ, C-367/16, *Commission v. Poland*, EU:C:2018:94 (Jan. 23, 2018), https://curia.europa.eu/juris/liste.jsf?num=C-367/16&language=EN; ECJ, C-488/15, *Commission v. Bulgaria*, ECLI :EU:C:2017:267 (Apr. 5, 2017), https://curia.europa.eu/juris/liste.jsf?num=C-488/15&language=EN; ECJ, C-398/14, *Commission v. Portugal*, ECLI:EU:C:2016:61 (Jan. 28, 2016), https://curia.europa.eu/juris/liste.jsf?num=C-398/14&language=EN; and *Italy*, C-196/13. On this issue, *see also* Eliantonio, *supra* note 35.

[37]*See e.g.*, ECJ, C-125/20, *Commission v. Spain*, ECLI:EU:C:2022:1025 (Dec. 22, 2022); ECJ, C-441/02, *Commission v. Germany*, ECLI:EU:C:2006:253 (Apr. 27, 2006); ECJ, C-164/04, *Commission v. UK*, ECLI:EU:C:2004:742 (Nov. 18, 2004); ECJ, C-342/05, *Commission v. Finland*, ECLI:EU:C:2007:341 (June 14, 2007); ECJ, C-416/07, *Commission v. Greece*, ECLI:EU:C:2009:221 (Sept. 10, 2009); *Germany*, C-160/08; ECJ, C-34/11, *Commission v. Portugal*, ECLI:EU:C:2012:712 (Nov. 15, 2012), https://curia.europa.eu/juris/liste.jsf?num=C-34/11&language=EN; ECJ, C-68/11, *Commission v. Italy*, ECLI :EU:C:2012:815 (Dec. 19, 2012), ==https://curia.europa.eu/juris/liste.jsf?num=C-68/11&language=EN.

[38]Opinion in *Commission v Ireland*, C-494/01 at 43–48.

[39]*See also* Opinion of AG Mazák, in C-489/06, *Commission v Greece,* EU:C:2008:638, at 52 ff.

[40]The total number of cases in which the procedure has been closed by means of a judgment of the Court, on December 31, 2022, is around twenty.

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In addition, one could argue that the lack of clear guidance in terms of definition or a specific set of criteria or principles regarding what could actually be considered a general and persistent breach might give rise to some legal uncertainty. Scheppele suggested that:

> [T]he systemic infringement action needs to be more than simply a bundle of unrelated complaints, linked only by virtue of their common origin in a single Member [S]tate. The case should be tied together with an overarching legal theory which links the allegations together, making the systemic violation clear and pointing to a systemic remedy.[41]

These considerations appear, in my view, quite reasonable. Obviously, there must be one or more element(s) of commonality between the various instances of non–compliance indicated by the applicant. However, it is not entirely clear which type of elements of commonality are sufficient to build an 'overarching legal theory' which could validly support a claim of a general and persistent breach. In particular, are there some sine–qua–non condition(s) or, alternatively, some quantitative or qualitative elements which are particularly important in that regard? Is it only legal elements, for example, the breach of the same provision/same legal instrument/related legal instruments, and/or also elements of fact such as the same branch of the administration, same geographic areas that matter? Is the conjunction 'and' in the expression 'general and persistent' truly cumulative or may, in some exceptional cases, be read also as disjunctive? These basic questions do not seem to find, to date, any clear answer in the case–law.

Conversely, it may also be argued that it is difficult, if not perhaps *extremely* difficult, to provide abstract guidance in that regard. Especially, some guidance going beyond the certainly sensible, but necessarily general, criteria provided by AG Geelhoed in the above–mentioned Opinion. The view may be taken that establishing a general and persistent breach is, first and foremost, the result of a case–by–case assessment of all relevant circumstances. The rule breached, the reasons underlying the breach, and the manner in which the rule is breached may greatly vary, and that necessarily reflects on the manner in which a given general and persistent infringement is established.

Yet, one thing appears clear: So far, the Court has been normally satisfied with the applicant having established (to the required standard) the existence of a widespread or repeated breach of a specific legal obligation laid down in EU law. Whether or not the systemic failure, the widespread or repeated breach, was due to a systemic deficiency in the Member State's legal system—a flaw in the functioning of the system provided for ensuring the proper application of the relevant EU rule, which would thus make more probable, or even inevitable, the occurrence of multiple breaches of EU law—is something which remained mostly outside the courtrooms. In other words, that was not an element that the Court considered necessary to ascertain and, as a consequence, one regarding which the applicant was required to provide some explanation and evidence.

This interpretation of the concept of 'general and persistent breach' which appears confined to widespread and repeated breaches, without any inquiry as to other aspects of its structural and systemic nature, may probably explain a certain difficulty, for the interpreter, to identify precisely the Member States' obligations flowing from a first judgment of the Court under Article 258 TFEU. Article 260(1) TFEU provides that "[i]f the Court of Justice of the European Union finds that a Member State has failed to fulfil an obligation under the Treaties, the State shall be required to take the necessary measures to comply with the judgment of the Court." That provision merely attaches declaratory effect to the Court's decisions, and it is thus for the Member State in question to draw all the necessary consequences of the adverse judgment. The Court has consistently held that the objective of infringement proceedings is "to achieve the practical elimination of infringements by

[41]Kim Lane Scheppele, *Enforcing Basic Principles of EU Law Through Systemic Infringement Actions, in* Reinforcing Rule of Law Oversight in the European Union (Carlos Closa & Dimitry Kochenov eds., 2017).

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Member States and the consequences thereof,"[42] and that the Member State's action to comply with the judgment must be set in motion immediately and be completed as soon as possible.[43]

Two Opinions of AG Kokott delivered in the context of the relatively few cases brought under Article 260(2) TFEU—in which the Commission asked the Court to impose financial penalties on the Member States in question for an alleged failure to comply with Court's judgments declaring general and persistent breaches—reveal a certain uneasiness in determining how those Member States were to remedy such infringements.[44] As mentioned above, it would be reasonable to consider that a systemic breach requires a systemic remedy. However, if 'systemic' is interpreted as merely 'widespread' or 'repeated', then arguably the remedy may be limited to the need to address that multiplicity of breaches. If that is so, the Member State would not necessarily be required to tackle the origin or source of the breaches, since the elimination of most instances of non–compliance could be considered sufficient to evade any penalties with regard to the general and persistent breach. In fact, the breaches would no longer be 'general and persistent' but only constitute 'isolated cases.' However, what if the remaining cases of non–compliance are indeed few but tend to persist and/or recur? I suspect that a very narrow reading of the term 'general and persistent' would be unsatisfactory to some observers, insofar as the infringement procedures brought against that type of infringements would, once again, only cure the symptoms but not the disease.

At any rate, some questions in that regard are yet to receive an answer. For example, what if *all* past instances of non–compliance have been remedied but several new ones have emerged after the delivery of the Article 258 TFEU judgment? Would the Commission be required to bring a new case, or could it rely on the original judgment under Article 258 TFEU to start a procedure under Article 260(2) TFEU? What if there is already a judgment under Article 260(2) or (3) TFEU imposing financial penalties, could the Commission take those instances into account when determining, by means of a decision, the necessity and amount of the penalties due by that Member State? It seems to me that such a possibility for the Commission to consider *ex post facto* instances of non-compliance, without having to start fresh litigation, cannot be ruled out. In case of disagreement between the Commission and the Member State concerned as to whether the latter succeeded in remedying the general and persistent breach in full could be resolved, if necessary, in the context of an action for annulment brought, under Article 263 TFEU, by the Member State in question against the above–mentioned Commission decision. It should be borne in mind, in that regard, that Article 51(c) of the Statute of the Court of Justice of the European Union, as amended in 2019, reserves that action to the jurisdiction of the Court, thus excluding them from the first instance review of the General Court.

That said, the Court appears to take into account the systemic nature of a breach of EU law—understood as widespread and/or structural and/or likely to have serious repercussions on the functioning of the legal system—when, a breach having been established in a judgment given under Article 258 TFEU and not been fully remedied within a reasonable period of time, it decides, pursuant to Article 260(2) TFEU, to impose financial penalties on the Member State in default. According to settled case–law, in exercising its discretion in that regard, "it is for the Court to set the penalty payment at a level that is both appropriate to the circumstances and *proportionate* to the infringement established and to the ability to pay of the Member State concerned."[45] The *seriousness* of the infringement is, alongside its duration and the ability to pay of the Member State

[42]*See e.g.*, ECJ, C-364/10, *Hungary v. Slovakia*, ECLI:EU:C:2012:630 (Oct. 16, 2012), para. 68, https://curia.europa.eu/juris/liste.jsf?num=C-364/10&language=EN.

[43]*See e.g.*, ECJ, C-270/11, *Commission v. Sweden*, ECLI:EU:C:2013:339 (May 20, 2013), para. 56, https://curia.europa.eu/juris/liste.jsf?num=C-270/11&language=EN.

[44]*Italy*, C-196/13;ECJ, C-378/13, *Commission v. Italy and Greece*, ECLI:EU:C:2014:2162 (Dec. 2, 2014), https://curia.europa.eu/juris/liste.jsf?num=C-378/13&language=EN; ECJ, C-174/21, *Commission v. Bulgaria*, ECLI:EU:C:2022:903 (Mar. 16, 2023), https://curia.europa.eu/juris/liste.jsf?num=C-174/21&language=EN.

[45]*See* ECJ, C-51/20, *Commission* v.*Greece*, ECLI:EU:C:2022:36 (Jan. 20, 2022), paras. 94, 131 (emphasis added), https://curia.europa.eu/juris/liste.jsf?num=C-51/20&language=EN.

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in question, one of the three main criteria that the Court uses when determining the amount of the penalties. In applying those criteria, the Court considers that "regard must be had, in particular, *to the effects* on public and private interests of the failure to comply."[46] In addition, the fact that the Member State in question has repeatedly infringed the same provision or set of provisions of EU is considered an 'aggravating factor' which may justify a higher amount of penalty.[47] However, given the brevity of the judgments on this point, it is hard to determine the weight that the systemic element(s) of the breaches actually have when the Court decides on the specific amount of the penalties in each case.

III. Infringements with Systemic Implications (?)

A third strand of case–law may arguably concern infringements which, because of the specific features of the EU rule breached, *materialize* only when the Member State's conduct is likely to have, at national and/or EU level, systemic implications. The term 'systemic' in this context should be understood as describing the capacity of the situation of non–compliance to have far reaching and/or structural repercussions on the correct application of EU law in a specific field. The peculiarity of this kind of situation would be that, unless the problem reaches a certain threshold of gravity or magnitude, it would not lead to a breach of EU law. An example of this case–law could be the judgments given by the Court in the cases, brought by the Commission under Article 258 TFEU against Poland, regarding the independence of the judiciary.[48] The Commission's claims were based, inter alia, on Article 19(1) TEU, second subparagraph, according to which "Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law."

As the Court has held, starting from its well–known judgment in *AssociaçãoSindical dos JuízesPortugueses*,[49] the scope of Article 19(1) TEU, second subparagraph, is quite broad, both *rationemateriae*, encompassing all fields covered by EU law, irrespective of whether the Member States are implementing EU law within the meaning of Article 51(1) of the Charter in the individual case, and *rationeiudicis*, encompassing any national body that may rule, as a court or tribunal, on questions concerning the application and interpretation of EU law. However, the scope of that provision says nothing about the yardstick to be used to assess potential breaches thereof. AG Bobek, convincingly in my view, explained:

> Article 19(1) TEU is a provision concerned mainly with the structural and systemic elements of the national legal frameworks. Those elements, irrespective of whether they stem from acts of the national legislature or the executive, or from a judicial practice, may call into question the ability of a Member State to ensure effective judicial protection for individuals. In other words, what is relevant under Article 19(1) TEU is whether a Member State's judicial system complies with the principle of the rule of law, one of the Union's founding values, which is also to be found in Article 2 TEU ...

[46]*Id.* at paras. 96, 132 (emphasis added).

[47]*Id.* at para.103. *See also* ECJ, C-653/13, *Commission v. Italy*, ECLI:EU:C:2015:478 (July 16, 2015), para. 92, https://curia.europa.eu/juris/liste.jsf?num=C-653/13&language=EN; ECJ, C-184/11, *Commission v. Spain*, ECLI:EU:C:2014:316 (May 13, 2014), paras. 75–78, https://curia.europa.eu/juris/liste.jsf?num=C-184/11&language=EN.

[48]ECJ, C-791/19, *Commission v. Poland (Disciplinary regime applicable to judges)*, ECLI:EU:C:2021:596 (July 15, 2021), https://curia.europa.eu/juris/liste.jsf?num=C-791/19&language=EN; ECJ, C-691/18, *Commission v. Poland (Independence of the Supreme Court)*, ECLI:EU:C:2019:531; ECJ, C-192/18, *Commission v. Poland (Independence of ordinary courts)*, ECLI:EU:C:2019:924 (Nov. 5, 2019), https://curia.europa.eu/juris/liste.jsf?num=C-192/18&language=EN. *See also* ECJ, C-204/21, *Commission v. Poland (Independence and private life of judges)*, ECLI: EU:C:2022:991 (Oct. 27, 2021), https://curia.europa.eu/juris/liste.jsf?num=C-204/21&language=EN; M. Leloup, *The Systemic Criterion in the Field of the Right to a Fair Trial and Judicial Independence*, in this special issue.

[49]ECJ, C-64/16, *Associação Sindical dos Juízes Portugueses v. Tribunal de Contas*, EU:C:2018:117 (Feb. 27, 2018), https://curia.europa.eu/juris/liste.jsf?num=C-64/16&language=EN.

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> Article 19(1) TEU contains an extraordinary remedy for extraordinary situations. Its purpose is not to catch all possible issues arising with regard to the national judiciary, but only those of a certain gravity and/or of a systemic nature, to which the internal legal system is unlikely to offer an adequate remedy.
>
> By gravity and systemic nature, I do not mean to say that, to fall foul of that provision, a problem must necessarily arise in a significant number of cases, or affect large parts of the national judicial system. The crucial issue is rather whether the (one-off or recurring) problem brought to the attention of the Court is likely to threaten the proper functioning of the national judicial system, thereby jeopardizing the capacity of the Member State in question to provide sufficient remedies to the individuals ...
>
> [I]t is almost stating the obvious to say that not all matters possibly concerning the rules that govern the judiciary or court proceedings are an issue relating to the rule of law. The review that the Court must carry out of national measures which allegedly affect the independence of the national judiciary cannot but be limited to pathological situations.[50]

It is true that, so far, the Court has neither expressly embraced nor refuted such a proposition.[51] However, given the wording and rationale of Article 19(1) TEU, it is hard to imagine that provision being breached by any possible issue in the conception, interpretation and application of the national rules on the judiciary which could, even merely indirectly and/or potentially, affect the independence and impartiality of one or more national courts, including in very specific situations. A number of the Court's decisions seem to support such a restrictive view.[52]

The classic 'one-million-dollar' question, in this context, is whether systemic infringements of the founding values of the European Union, enshrined in Article 2 TEU, could be pursued under Articles 258–260 TFEU, in particular, by framing them as 'general and persistent' breaches, and if so, under what conditions. On the one hand, the special procedure, more of as political nature, set out in Article 7 TEU, for the enforcement and penalization of violations of the EU values could be regarded as constituting *lex specialis* in respect of ordinary infringement proceedings. However, it could also be argued that, precisely because of their very different nature, Article 7 TEU and Articles 258–260 TFEU lay down mutually independent procedures. The issue is far too complex to be treated satisfactorily in the present contribution. Suffices it to mention that observers are divided on the point[53] and, admittedly, a variety of arguments of a textual, contextual, systemic, teleological and even historical nature can be made in favor or against such a hypothesis. Needless to say, only the Court could give a definitive answer on that point.[54]

[50]Opinion in C-748/19 to C-754/19, *Prokuratura Rejonowaw Mińsku*, ECLI :EU:C:2021:403 (Nov. 16, 2021), points 144, 147, 148, 151 (footnotes omitted), https://curia.europa.eu/juris/liste.jsf?num=C-748/19&language=EN. *See also* Opinion of AG Bobek in C-132/10, *Getin Noble Bank*, ECLI:EU:C:2021:557 (Sept. 15, 2011), points 37-39, https://curia.europa.eu/juris/liste.jsf?num=C-132/10&language=EN. For a discussion on these opinions, *see* M. Leloup, *supra* note 48.

[51]Opinion in *Prokuratura Rejonowa*, C-748/19 to C-754/19 at 144.

[52]*See e.g.*, ECJ, C-272/19, *Land Hessen*, ECLI:EU:C:2020:535 (July 9, 2020), https://curia.europa.eu/juris/liste.jsf?num=C-272/19&language=EN; ECJ, C-256/19, *S.A.D. Maler und Anstreicher*, ECLI:EU:C:2020:523 (July 2, 2020), https://curia.europa.eu/juris/liste.jsf?num=C-256/19&language=EN.

[53]*See generally* Scheppele, *supra* note 41. *See also* Kim Lane Scheppele, Dimitry Kochenov & Barbara Grabowska-Moroz, *EU Values Are Law, After All: Enforcing EU Values Through Systemic Infringement Actions by the European Commission and the Member States of the European Union*, 38 YEARBOOK EUR. L. 3–121 (2020).

[54]One interesting case in that regard is currently pending before the Court: ECJ, Case C-769/22, *Commission v. Hungary*, concerning the adoption of Law LXXIX of 2021 adopting stricter measures against persons convicted of pedophilia and amending certain laws for the protection of children.

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D. Conclusions

The Commission's policy with regard to infringement proceedings, as announced in its 2016 and 2022 Communications, is to treat with priority systemic breaches of EU law. In that respect, the Commission appears to refer to the whole spectrum of what could be reasonably be regarded as systemic: Widespread/repeated/recurring breaches, structural deficiencies in the national legal systems, hence likely to give rise to frequent breaches, and breaches with systemic, serious and far reaching implications on an area of EU law. Whether the Commission is actually prioritizing systemic breaches when selecting the cases to be investigated and pursued is hard to tell. Indeed, the vast majority of cases are closed by the Commission during the administrative stage of the procedure. Verifying which and how many of those cases concerned systemic breaches would require a particularly laborious and time-consuming analysis of data which falls outside the scope of the present contribution. However, based on the snapshot given by the Commission in its Annual Reports,[55] the Commission does appear to focus especially on 'major' infringements, likely to have repercussions on a significant number of situations, and thus leave aside individual instances of non–compliance, especially when consisting in situations of mere misapplication of the EU rules.

That being said, the Commission appears to have made a relatively cautious use of the possibility it has to bring proceedings *before the Court* on the ground of general and persistent breaches of EU law. As a result, the concept of 'general and persistent' breach remains rather under-developed, and a number of interpretative issues with regard to the consequences attaching to Court's judgments declaring a general and persistent breach remain open. One may be forgiven to think that, so far, the 'new dawn' for the Commission's enforcement of EU law expected after the delivery of the judgment in *Irish Waste* has yet to materialize. The general and persistent breach tool is, probably, less revolutionary and successful than anticipated by some observers. Nevertheless, future developments in this matter cannot be excluded. In particular, on one crucial question the jury is still out: Is there any room for Articles 258–260 TFEU proceedings on grounds of systemic, or 'general and persistent', breaches of the EU values?

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[55]Annual Reports on Monitoring the Application of EU Law, COM(2022) 344 final (last one published July 15, 2022), https://commission.europa.eu/publications/annual-reports-monitoring-application-eu-law_en.

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