

inter-state proceedings interim measures and protection of the environment :Case C-121/21 R Czech Republic v Republic of Poland

Sellick, J

<http://hdl.handle.net/10026.1/19214>

Journal of Environmental Law and Management

All content in PEARL is protected by copyright law. Author manuscripts are made available in accordance with publisher policies. Please cite only the published version using the details provided on the item record or document. In the absence of an open licence (e.g. Creative Commons), permissions for further reuse of content should be sought from the publisher or author.

Case Commentary

Inter-State Proceedings, Interim Measures and Protection of the Environment

C-121/21 R *Czech Republic v Republic of Poland*, 20 September 2021,
ECLI:EU:C:2021:752

Joanne Sellick, School of Society and Culture, University of Plymouth

Introduction

The case of *Czech Republic v Republic of Poland* is a rare example of use of inter-State proceedings under EU Law, and the first example under such proceedings where interim measures have been imposed on the basis of protection of the environment and human health. It centres on the contentious extension of mining operations in Turów, Poland, and the effects such activities have caused across the border in the Czech Republic. At its heart is the weighing up of essential interests, on one hand those of protecting the environment and human health, and on the other those protecting economic and socio-economic interests such as employment, building infra-structure, energy security and investment. This year, in two Vice-President's orders imposing interim measures, we have witnessed confirmation that the former outweighs the latter, with this being justified on the basis that damage caused to the environmental and human health is, by its very nature, essentially irreparable.

Legal Context

Directive 2011/92/EU (as amended by Directive 2014/52/EU) pertains to the assessment of the effects of certain public and private projects on the environment (hereafter the Environmental Impact Assessment (EIA) Directive).¹ The 2011 Directive codified an initial 1985 Directive and three following amendments. Directive 85/337/EEC applies to public and private projects, defined in Annexes I and II – those listed in Annex I, being considered as of significant effect on the environment because of their nature and/or size, have a mandatory obligation to seek an EIA.² For those listed in Annex II, the competent authorities of the Member State have discretion in deciding if an EIA is necessary. This requires a screening procedure, which takes place either on the basis of thresholds, or on criteria set by the national transposing legislation, or on a case by case basis. When establishing thresholds and criteria and when conducting examination on a case by case basis, the competent authority must take into account criteria set out in Annex III. In 1997, it was widened in scope via increase in the number of projects covered and those requiring mandatory EIA³. In addition, new screening procedures and criteria for

¹ Directive 2011/92/EU OJ L 26, 28.1.2012, p1 and Directive 2014/52/EU OJ L 124, 25.4.2014, p1

² Directive 85/337/EEC, OJ L 175, 5.7.1985, p40

³ Council Directive 97/11/EC OJ L 73, 14.3.1997, p5 bringing the 1985 Directive in line with the Espoo Convention

Annex II projects were introduced, with minimum information requirements. In 2003, further amendment aligned provisions with the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters.⁴ Finally, in 2009, Annexes I and II were expanded to include projects related to the transport, capture and storage of carbon dioxide.⁵

By way of summary, the EIA Directive provides for the following process:

*Scoping stage*⁶ – a minimum requirement of voluntary scoping allows for the developer to request the competent authority define the key environmental impacts and issues of concern, and the nature and extent of the information required by it to make an informed decision;

*EIA Report*⁷ – an essential component, the developer is required to provide information on the environmental impact of the project. The report must include all necessary information and be of a sufficient quality for the competent authority to reach a reasoned conclusion;

*Information and consultation*⁸ – the environmental authorities and the public must be informed and consulted; and

*Decision*⁹ – the competent authority, taking consultation into consideration, reaches a decision. If it is to grant development consent it must as a minimum contain a reasoned conclusion, any environmental conditions, a description of features and/or measures to avoid, prevent or reduce, and, where possible, offset significant adverse effects on the environment, and, as appropriate, monitoring measures. The public must be informed and decisions must be capable of challenge.¹⁰

Facts

Located in southwest Poland, in the Silesia region bordering both the Czech Republic and Germany, and spanning some 28 square kilometres, is the Turów open-cast lignite coal mine, supplying an associated power plant.¹¹ Turów is owned

⁴ See Directive 2003/35/EC OJ L 156, 25.6.2003, p17; UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters 1998 – for the full text see <https://unece.org/environment-policy/public-participation/aarhus-convention/text> accessed 2.11.2021 and see generally <https://ec.europa.eu/environment/aarhus/> accessed 2.11.2021

⁵ Directive 2009/21/EC OJ L 140, 5.6.2009, p114

⁶ Article 5(2) EIA Directive, OJ L 26, 28.1.2012, p1 – for Commission Guidance on Scoping 2017 see https://ec.europa.eu/environment/eia/pdf/EIA_guidance_Scoping_final.pdf accessed 23.10.2021

⁷ Article 5(1) and 5(3) EIA Directive, OJ L 26, 28.1.2012, p1

⁸ Article 6 EIA Directive, OJ L 26, 28.1.2012, p1

⁹ Article 1(2) EIA Directive, OJ L 26, 28.1.2012, p1

¹⁰ Article 11 EIA Directive, OJ L 26, 28.1.2012, p1

¹¹ The mine has been operational since 1904. In 2019, lignite burned at the power plant produced 5.5 million tonnes of carbon dioxide: Boffey, 'Poland vows to keep coalmine open despite €500,000-a-day ECJ fine' The Guardian, 20.9.2021 <https://www.theguardian.com/world/2021/sep/20/poland-vows-to-keep-coalmine-open-despite-500000-a-day-ecj-fine> accessed 24.10.2021 Lignite (brown coal) has a lower density than other coal types, meaning larger amounts have to be burned to produce power, making it the most polluting – see generally <https://www.bbc.com/future/article/20210419-the-end-of-the-worlds-capital-of-brown-coal>

and operated by state-controlled PGE Górnictwo i Energetyka Konwencjonalna S.A. (PGE) and in 1994 the competent Polish authorities granted it a concession to operate the mine until 30 April 2020. Under Polish law, the validity of a lignite mining concession may be extended once, for a period of six years.¹² To do so does not require an environmental impact assessment where the extension is motivated by rational management of the deposit, and does not extend the scope of the concession.

On 24 October 2019, PGE submitted an application to extend the concession for six years (Poland had already amended the land use plan in May). On 21 January 2020, the Regional Director of Environmental Protection in Wrocław, adopted the EIA decision on environmental conditions for the continued exploitation of lignite at Turów until 2044 and two days later declared the EIA decision immediately enforceable. On 24 January 2020, PGE attached the EIA decision to an application for the extension of its mining concession, which the Polish Minister for Climate granted on 20 March 2020, extending the concession to 2026.

Referral to the Commission

Intensive operations at the Turów mine are cited as responsible for two significant environmental impacts within the Czech Republic – namely air pollution and water shortages as a consequence of effects on groundwater levels. In July 2020, the European Parliament’s Petition Committee discussed a petition signed by 13,000 EU nationals calling for the saving of drinking water in the region, where the Commission representative noted negotiations towards a “constructive solution” under the Water Framework Directive¹³ would be monitored over the following six months, and that whilst there was optimism of such a solution, it would not hesitate to use the infringement process if necessary.¹⁴ Despite this, the majority of Committee members called on the Commission to take quicker action. The following month, a joint statement of NGOs, national and European policy-makers along with local authorities and citizen groups called on the European Commission to take action.¹⁵

On 30 September, believing the extension of the concession by Poland to be in breach of EU Law, the Czech Republic, in accordance with Article 259 Treaty on the Functioning of the European Union (TFEU), lodged a formal inter-State complaint with the European Commission. It claimed Poland had infringed Directive 2011/92/EU, Directive 2001/42/EC (Strategic Environmental Assessment

¹² Environmental Information Act 2008 (Dz. U. No.199, item 1227) Article 72(2)

¹³ Directive 2000/60/EC OJ L 327, 22.12.2000, p1

¹⁴ The petition can be accessed via https://eko-unia.org.pl/petition/p_2 accessed 28.10.2021 accessed 29.10.2021; for a recording of the EP Petition Committee discussion see https://multimedia.europarl.europa.eu/en/peti-committee-meeting_20200714-0900-COMMITTEE-FEMM_vd accessed 28.10.2021

¹⁵ For the Joint Statement see <https://eeb.org/library/joint-statement-europe-and-poland-must-stop-turow-and-bring-water-and-climate-justice/> accessed 28.10.2021. See generally <https://eeb.org/as-czech-government-prepares-to-take-poland-to-court-for-illegal-mining-activists-urge-european-commission-to-act/> accessed 28.10.2021

Directive)¹⁶, Directive 2000/60/EC (Water Framework Directive)¹⁷, Directive 2003/4/EC¹⁸ (public access to environmental information), and Article 4(3) Treaty on European Union (TEU), otherwise known as the principle of sincere co-operation.

The Commission issued its reasoned opinion on 17 December 2020.¹⁹ In this, it noted Polish law as incorrectly transposing the EIA Directive, identifying this as subject to a pending infringement procedure under Article 258 TFEU.²⁰ In the context of the mining concession extension, the Commission determined there had been incorrect application of the provisions of the EIA Directive, and in particular infringement of Article 4(1) and (2) via the failure to carry out an EIA prior to extending the development consent for a further six years. Also breached were Directive 2003/4/EC in respect to information to the public and Member States in transboundary consultations and access to justice, and the principle of sincere co-operation under Article 4(3)/TEU. The Commission was of the opinion there had been no breach of either the Strategic Environmental Assessment or Water Framework Directives.²¹

Referral to the Court of Justice – interim measures under order 21 May 2021

On 26 February 2021, exercising its discretion under Article 259/TFEU, the Czech Republic lodged an action for failure to fulfil EU obligations with the Court of Justice of the European Union (CJEU).²² In interim proceedings, under Article 279/TFEU, it requested an order against Poland for it to immediately cease Turów mining operations pending the final judgment. Poland contested that the application for interim measures should be dismissed as manifestly inadmissible or otherwise unfounded.

Under Article 160(3) of the Rules of Procedure of the Court, an application for interim measures must specify ‘the subject-matter of the proceedings, the circumstances giving rise to urgency and the plea of fact and law establishing a prima facie case for the interim measure applied for’. The purpose of the procedure is to “guarantee the full effectiveness of the definitive future decision, in order to ensure that there is no lacuna in the legal protection provided by the Court of Justice”.²³

¹⁶ OJ L 197, 21.7.2001

¹⁷ OJ L 327, 22.12.200, p1

¹⁸ OJ L 41, 14.2.2003, p26

¹⁹ IP/20/2452, see Press Release, 17 December 2020 available at https://ec.europa.eu/commission/presscorner/detail/en/IP_20_2452 accessed 23.10.21

²⁰ Ref. No 2016/2046, see reasoned opinion C(2019) 1273 final, 7 March 2019 in which the Commission concluded 8 special acts by Poland failed to comply with the obligations under the EIA Directive, March Infringement Package: Key Decisions, MEMO/19/1472, available at https://ec.europa.eu/commission/presscorner/detail/en/MEMO_19_1472 accessed 28.10.2021

²¹ Directive 2001/42/EC OJ L 197, 21.7.2001, p30 and Directive 2000/60/EC OJ L 327, 22.12.200, p1

²² Case C-121/21 *Czech Republic v Republic of Poland* see <https://curia.europa.eu/juris/document/document.jsf?text=&docid=240041&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=9457900> accessed 23.10.2021

²³ Case 121/21 R *Czech Republic v Republic of Poland*, order 21 May 2021, ECLI:EU:C:2021:420, para 53

The Court has confirmed the existence of a set of cumulative criteria applied when hearing an application for interim relief, in that it will only order an interim measure where it is justified, *prima facie*, in law and fact and that it is urgent in order to avoid serious and irreparable harm to the applicant's interests. It must also, where appropriate, weigh up the interests involved.²⁴

On 21 May 2021, the order of the Vice-President of the Court granted the Czech Republic's request in terms of the immediate cessation of mining operations pending final judgment.²⁵ Key features of the order considered admissibility, the establishing of a *prima facie* case, the requirement of urgency, and the weighing of key interests.

Admissibility

Whilst Poland argued the application of interim measures as inapplicable on the basis that the Czech Republic had not established the existence of a direct and close link between the measure sought and the alleged infringement of EU law forming the basis of the action, the Vice-President concluded such a line of argument would "deprive of all substance the procedure for interim relief...".²⁶

Prima facie case

The Czech Republic argued that open-cast mining of a surface area of more than 25 hectares had to be subject to an EIA under Article 4(1) and Annex I of the EIA Directive. In addition, point 24 of Annex I requires any change or extension to such projects to also be subject to an EIA. Under Article 4(2), the Czech Republic argued it was the case that all open-cast mining projects should be subject to an EIA, regardless of their size.

The order identified the Polish legislation in the shape of Article 72(2) Environmental Information Act 2008 did not subject a single extension of a lignite mining concession for up to 6 years to any prior EIA (if motivated by rational management of the deposit and without extending its scope). Consequently, the Vice-President was of the opinion that it could not be ruled out, *prima facie*, that the Polish law infringed the requirements of Article 4(1) and (2) of the EIA Directive, and as such the application for interim measures appeared to be "well-founded".²⁷

Urgency

This must be established in the sense that the order is necessary to avoid serious and irreparable harm or damage. The burden of proof rests on the applicant, in that it must establish that it is sufficiently likely to occur.²⁸

²⁴ See for example C-791/19 R *Commission v Poland* order 8 April 2020, EU:C:2020:277, para 51

²⁵ Case 121/21 R *Czech Republic v Republic of Poland*, order 21 May 2021, ECLI:EU:C:2021:420, see <https://curia.europa.eu/juris/document/document.jsf?text=&docid=241541&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=9457900> accessed 23.10.21 and CJEU Press Release 89/21 21 May 2021 <https://curia.europa.eu/jcms/upload/docs/application/pdf/2021-05/cp210089en.pdf> accessed 24.10.2021

²⁶ Case 121/21 R, order 21 May 2021, ECLI:EU:C:2021:420, para 30

²⁷ As above, para 51

²⁸ C-791/19 R *Commission v Poland* order 8 April 2020, EU:C:2020:277, para 82

The Czech Republic's claim to urgency relied essentially on considerations based on protection of the environment, human health and property. First, it argued that mining activities had already had a significant effect on the groundwater level. These had accelerated subsequent to the extension of development consent until 2026, with a fall in groundwater levels of 9.45 metres in 10 months.²⁹ The subsequent effect was a serious risk to the drinking water supply of approximately 10,000 Czech residents. In addition, the Czech Republic argued that the continuation of mining could lead to 5-10 millimetres of land subsidence in areas close to the Turów mine, resulting in structural damage to property.

In relation to the point on structural damage, the order concluded that such damage was pecuniary in nature, and could not generally be regarded as irreparable unless there were exceptional circumstances. In the absence of any argument such applied, the order concluded that it had not been established that continued mining operations would lead to irreparable damage to buildings.³⁰

In direct contrast, the order concluded that damage to groundwater levels and the threat to drinking water supply would constitute serious and irreparable damage to both the environment and human health, and that continuation of mining activities would be "sufficiently likely" to have this effect.³¹

The Vice-President drew on Poland's introduction of a "major remedial measure" in the form of the construction of an anti-filtration screen, as evidence of the risk of over-exploitation of groundwater in the relevant area. Poland's argument that the introduction of this meant the effects on groundwater levels were temporary and reversible, was considered by the Vice-President as of no significance because it would not be completed until 2023 and thus could have no impact on the effects of continued mining activities pending final judgment in the case.³² Poland's contention that the damage arose from a situation prior to the adoption of decision authorising continued mining activity was dismissed on the basis that whilst this may have been the case, the fact remained that continuation of those activities pending final judgment would likely have further negative impacts on groundwater levels.³³ Equally, Poland's attempt to argue cessation of mining in the interim would not lead to preventing levels from deteriorating or of mitigating negative effects, was concluded invalid on the basis that whilst it may not make it possible to restore levels to good status, it could prevent deterioration to the point of being irreversible.

Weighing up of interests

As already identified, the Czech Republic's interest is in preventing serious and irreparable damage to the environment and human health. Poland claims

²⁹ Case 121/21 R, order 21 May 2021, ECLI:EU:C:2021:420, para 55

³⁰ Case 121/21 R, order 21 May 2021, ECLI:EU:C:2021:420, para 63-64

³¹ Case 121/21 R, order 21 May 2021, ECLI:EU:C:2021:420, para 65

³² Case 121/21 R, order 21 May 2021, ECLI:EU:C:2021:420, para 67

³³ It is reported that the Czech Geological Survey has identified a decrease in levels of 50 metres in deeper sediments between 1985 and 1999, which stagnated until 2013 when it started to decrease again, coming to a total of 60-70 metres: <https://www.france24.com/en/live-news/20210702-czech-villagers-rail-against-giant-polish-coal-mine> accessed 24.10.2021

environmental, socio-economic and energy security interests to support continuation of operations at Turów.

In relation to the environment, Poland argued that sudden cessation of mining would affect the existing balance, with a lack of drainage leading to uncontrolled flooding triggering negative physico- chemical processes, landslides and rock bursts with a risk of fires and uncontrolled gas emissions. The order noted that the interim measure sought was only temporary pending final judgment, and that it did not prevent the continuation of safety work.

In terms of negative socio-economic effects, Poland claimed closure of the mine and associated power plant would result in the loss of approximately 15,000 jobs. On this, the Vice-President drew a distinction, stating the closure of the mine would not necessarily lead to closure of the power plant since alternative Polish lignite mines could supply it. In addition, Poland could avoid or be compensated for any such effects via, for example, EU funds. In addition, such damage was pecuniary, could be compensated financially and thus was not irreparable. On balance, the precautionary principle and protecting groundwater levels thus outweighed Poland's interest in avoiding "purely economic consequences".³⁴

The remaining interest argued, was the potential threat to energy security, with Poland claiming ceasing mining activity would lead to closure of the power plant, which had a technical configuration that meant it could not be re-started. The consequence would be a loss of energy production of approximately 4.5%, threatening the energy supply to around 3.7 million Polish households. In turn, the Polish electricity system would face a significant threat of systemic failure, particularly in the south-west, which would affect not only Poland but also cross-border interconnections with Germany and the Czech Republic. Finally, it argued closure of the power plant would lead to impacts on the continuation of projects and investment in the energy sector.

The order found that the assertion that the power plant would irreversibly close as a result of the application of any interim measure to cease mining activities was not substantiated. In relation to the effect on the national electricity system, it was noted that Poland had provided written evidence that it operated a national grid system, with power plants transporting electricity to a low-voltage grid network, the operators of which gave instruction on the need for power plants to decrease or increase their production. Consequently, any unavailability of a power plant could be managed. In summary therefore, Poland "had not sufficiently established that cessation of mining would pose a real threat to its energy security, to the supply of electricity to Polish consumers or to cross-border electricity exchange".³⁵

³⁴ Case 121/21 R, order 21 May 2021, ECLI:EU:C:2021:420, para 82

³⁵ CJEU Press Release 89/21 21 May 2021

<https://curia.europa.eu/jcms/upload/docs/application/pdf/2021-05/cp210089en.pdf> accessed 24.10.2021

Finally, and significantly, echoing the conclusion on analysing the effects on employment, the order stated any threat posed to projects and investment simply could not outweigh considerations relating to the environment and human health.

Response to the 21 May order

Earlier in May, PGE had opened a new €1 billion lignite-fired unit at the Turów power plant, and in light of this, as well as significant dependency on coal for both energy and as a primary export, it was a predictably negative response from Poland to the order to cease mining operations.³⁶ It continued with its claim that the national electricity grid (PSE) would be destabilised through overloading in certain parts and that there would be a need to import more electricity. Immediately following the order, the Deputy Prime Minister claimed the order “impossible to implement” and the Prime Minister stated that whilst negotiations with the Czech Republic continued, Poland’s position on the continued operation of the mine “remains unchanged”.³⁷

On 25 May, the Polish Government announced it had reached a deal, agreeing to future co-ordination and that it finance €40-45 million in projects to mitigate impacts on groundwater levels and that the case would be dropped.³⁸ The Czech Prime Minister, however, denied any deal had been reached, and Poland subsequently clarified that the case would be dropped only once the agreement was formalised.

In June, the Czech Environment Minister announced an agreement with a long-term deal was close but during July negotiations continued.³⁹ Throughout this time, mining operations did not cease. Subsequently, the Czech Republic returned to the Court requesting an order that Poland pay a daily penalty payment of €5 million, whilst Poland on 29 June lodged an application for the dismissal of the 21 May order to immediately cease operations and that the matter be heard by the Grand Chamber of the Court.

Order 20 September 2021⁴⁰

The September order started by exploring the Polish request for the matter to be referred to the Grand Chamber. It confirmed that under Article 161(1) of the Rules of

³⁶ Hernandez-Morales, ‘Warsaw announces deal with Prague on Turów coal mine’, 25 May 2021: <https://www.politico.eu/article/warsaw-announces-deal-with-prague-on-turow-coal-mine/> accessed 24.10.2021

³⁷ Martewicz and Krasuski ‘Poland Presses Czechs to Drop Suit Threatening Power System’ 24 May 2021, Bloomberg: <https://www.bloomberg.com/news/articles/2021-05-24/poland-presses-czechs-to-drop-coal-suit-threatening-power-system> accessed 24.10.2021

³⁸ Hernandez-Morales, ‘Warsaw announces deal with Prague on Turów coal mine’, 25 May 2021: <https://www.politico.eu/article/warsaw-announces-deal-with-prague-on-turow-coal-mine/> accessed 24.10.2021

³⁹ <https://www.reuters.com/business/energy/poland-sees-possibility-reaching-agreement-with-czechs-turow-mine-2021-06-17/> accessed 24.10.2021 and <https://www.reuters.com/world/europe/czech-talks-with-poland-over-disputed-turow-coal-mine-inch-forward-2021-07-13/> accessed 24.10.2021

⁴⁰ C-121/21 R, order 20 September 2021, ECLI:EU:C:2021:752 <https://curia.europa.eu/juris/document/document.jsf?text=&docid=246301&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=9457900> accessed 24.10.2021

Procedure of the Court⁴¹, competence is conferred on the Vice-President to rule on any application for interim measures, and it is for them to determine whether any circumstances warranted referral to the Court, on a case by case basis. In the case at hand, there were no circumstances to support a need to refer to the Court, and that since sufficient information had been provided to reach a ruling, there was also no need to hold a hearing.

Argument for cancellation of the 21 May order

In support of its application, Poland made six substantive points:

- that the 21 May order had failed to consider that it was not possible for the Turów power plant to burn lignite from other mines, which would thus lead to its permanent closure because once its generating units stopped operating it could not be put back into operation;
- that suspension of mining activities would generate environmental and safety risks including surface subsidence which could damage the drainage system
- that suspension would not contribute to any improvement in the water supply in Czech territory;
- that there would be a genuine risk to the security of the Polish and European electrical energy system; and
- that any cessation of mining would interrupt heating and drinking water distribution in two Polish regions (Bogatynia and Zgorzelec).

The Vice-President noted that whilst there was no appeal to an order for interim measures, Article 163 of the Rules of Procedure could on application vary or cancel such measures where there was a change in circumstances. Such a change was identified as the occurrence of any factual or legal element capable of calling into question the assessment of the conditions under which the interim measure was granted. The first five points noted above, were concluded to be a repetition or development of arguments already put forward and thus not a change in circumstances. The final point, re effect on two Polish regions, was concluded to be insufficiently substantiated and thus also not a change in circumstances. Consequently, Poland's application for cancellation of the 21 May order was dismissed.

Argument for application of a periodic penalty payment

Poland challenged the admissibility of such an application on the basis that only the Commission could seek a periodic penalty payment. The Vice-President swiftly dismissed this claim, on the basis that Article 279/TFEU conferred on the Court the power to prescribe any interim measures it deemed necessary, and further that it had to ensure the effectiveness of such measures in that they were respected, which could extend to a periodic penalty payment if not adhered to.⁴²

⁴¹ In conjunction with Decision 2012/671/EU OJ L 300, 23.10.2012, p47

⁴² Citing in support C-441/17 R, order 20 November 2017, *Commission v Poland*, EU:C:2017:877, para 100

In support of its application, the Czech Republic noted that whilst it was possible for the injunction to be complied with in a matter of days, Poland had failed to do so. Evidence of intransigence, included that PCG had announced on 21 May that it had no intention to cease operations, which had been supported by Prime Ministerial statements, and pictures of 30 May and sound measurements on 31 May and 1 June proved mining operations continued. Using as a basis an estimated annual financial revenue of €8.2 million, the Czech Republic claimed a periodic penalty payment of €5 million per day should be imposed, a figure Poland described as manifestly disproportionate.

The Vice-President concluded evidence established lack of compliance with the 21 May order, and that it was thus “necessary to strengthen the effectiveness of the interim measures...by providing for the imposition of a periodic penalty payment”.⁴³ This in turn had to be appropriate and proportionate, which in the case at hand was concluded to be a penalty payment of €500,000 per day from 20 September until Poland complied with the 21 May order.

Publication was met with a clear statement from the Polish Government that it would not comply with either order.⁴⁴ In early October, it claimed an “irrational” rejection of a good deal,⁴⁵ and toward the end of the month, representatives from Poland’s Solidarity Union launched protests in Luxembourg.⁴⁶

Commentary

The issue at hand is naturally a highly contentious one, balancing as it does essential interests. It is clear, as expressed in the Vice-President’s order, that in terms of EU law, those interests related to protection of the environment and human health are considered significant on the basis damage to them is essentially irreparable. Underpinning this conclusion, was direct reference to Article 191(1) TFEU, in that EU policy on the environment and human health is to contribute to their preservation, protection and improvement. The order asserted that damage to the environment and human health was “generally irreversible since, more often than not, damage to such interests cannot, by reason of its nature, be eliminated retroactively”.⁴⁷ In addition, the order drew on Article 191(2) TFEU, requiring EU law on the environment to be interpreted in light of the precautionary principle, which

⁴³ C-121/21 R, order 20 September 2021, ECLI:EU:C:2021:752, para 49

⁴⁴ <https://www.gov.pl/web/premier/polski-rzad-zabezpiecza-interesy-energetyczne-milionow-polakow> accessed 24.10.2021

⁴⁵ <https://notesfrompoland.com/2021/10/01/no-deal-reached-in-coal-mine-dispute-with-irrational-czechs-says-poland/> accessed 24.10.2021

⁴⁶ <https://www.thefirstnews.com/article/polish-unionists-protest-cjeu-ruling-on-turow-mine-25540> accessed 24.10.2021 and <https://www.thetimes.co.uk/article/polish-miners-descend-on-european-court-in-luxembourg-to-save-pit-8k9ltbfg> accessed 24.10.2021

⁴⁷ Case 121/21 R, order 21 May 2021, ECLI:EU:C:2021:420, para 70, see also C-320/03 R, order 2 October 2003, *Commission v Austria* EU:C:2003:543, para 92

offers “one of the foundations of the high level of protection aimed at by EU policy on the environment”.⁴⁸

This in turn supports the conclusion that protection of the environment and human health must outweigh what the order describes as ‘purely economic consequences’ such as employment, energy security and investment as put forward by Poland. However, whether this may have been as simple a conclusion to reach had that Member State more in the way of substantiating evidence is an interesting point to consider.

As the rhetoric becomes increasingly polarised, it remains to be seen if a deal can be reached, despite both parties expressing commitment to the idea of resolving the issue diplomatically. In June, the Commission announced it had submitted a request to intervene in the case before the Court.⁴⁹ However, whether the Court will or will not be required to come to final judgment is moot since regardless, commentators have already noted we are in ground-breaking territory.⁵⁰ Article 259/TFEU provides for inter-state action to enforce EU Law, and this application by the Czech Republic is both the first under it aimed at enforcing EU environmental obligations against another Member State, and the first where in such a case the Court has granted interim measures.

Whilst the Court has a history of granting interim measures, it has done so in just three environmental cases, all being action taken by the Commission under Article 258/TFEU.⁵¹ As such, this case marks the first time the Court has used its discretion under Article 279/TFEU to impose interim measures in an action under Article 259/TFEU. Some may argue this will serve to strengthen the viability of Article 259/TFEU as a means of enforcing EU legal obligations, whatever their nature.⁵² However, only time will tell whether Member States may be more inclined to use it to seek relief, given the diplomatically contentious nature of such proceedings.

Traditionally, it is the Commission, in its role as guardian of the Treaties, that enforces EU Law, using the infringement procedures set out under Article 258/TFEU. In contrast, the direct, inter-State confrontation provided for under Article 259/TFEU

⁴⁸ Case 121/21 R, order 21 May 2021, ECLI:EU:C:2021:420, para 71, see also C-441/17 R, order 20 November 2017, *Commission v Poland*, EU:C:2017:877, para 42

⁴⁹ <https://www.euractiv.com/section/energy/news/eu-commission-joins-czechia-in-legal-case-over-polish-coal-mine/> accessed 24.10.2021

⁵⁰ See for example Slowik, A., ‘Daily penalty payment imposed on Poland for non-compliance with the interim measures on the activities at Turów coal mine’, 4 October 2021, Centre D’Etudes Juridiques Européennes, Centre d’excellence Jean Monnet; Bashenska, E., ‘Good European Neighbours: the Turów Case, Interim Measures in Inter-State Cases and the Rule of Law’, 30 May 2021 <https://verfassungsblog.de/good-european-neighbours/> accessed 24.10.2021; Shipley, T., ‘The Turów mine dispute between Poland and the Czech Republic and the future of inter-State cases before the Court of Justice’, 7 July 2021 <https://eulawlive.com/insight-the-turow-mine-dispute-between-poland-and-the-czech-republic-and-the-future-of-inter-state-cases-before-the-court-of-justice-by-trajan-shipley/> accessed 24.10.2021

⁵¹ C-503/06 R order 19 December 2006, *Commission v Italy* ECLI:EU:C:2006:800; 2; C-193/07 R order 18 April 2007, *Commission v Poland* ECLI:EU:C:2009:495; C-76/08 R order 24 April 2008, *Commission v Malta* ECLI:EU:C:2008:25

⁵² See, for example, Bashenska, E., ‘Good European Neighbours: the Turów Case, Interim Measures in Inter-State Cases and the Rule of Law’, 30 May 2021 <https://verfassungsblog.de/good-european-neighbours/> accessed 24.10.2021

has rarely gone to full judgment. The remaining question, is whether this case heralds a greater inclination by Member States to fully use Article 259/TFEU (as opposed to, for example, threatening to use it and thereby bringing the matter to the attention of the Commission in the hope it will pursue the matter). Such a development would certainly enhance the effectiveness of Article 259/TFEU, and, one could naturally argue, of EU Law more generally.⁵³

However, such a development comes with a price, given examples such as the case at hand involve trans-boundary implications and high political tensions. According to Shipley, change “would probably go hand in hand with a less self-contained, more politicised and contentious EU legal order”.⁵⁴ It remains to be seen whether, in a future where we face increasing global challenges driving national interests, we are likely to witness this. In the meantime, it is likely to remain the case that the Commission will lead as the primary instigator of enforcement proceedings.

More generally, the Turów case comes at a point where there is significant political tension between Poland and the EU. In July, the Court of Justice concluded the disciplinary chamber of Poland’s Supreme Court should be suspended, and further that Poland’s disciplinary regime did not provide guarantees of impartiality and independence.⁵⁵ Simultaneously, Poland’s Constitutional Tribunal held that such an order by the Court of Justice was incompatible with the Polish constitution, prompting a statement from the Commission, reaffirming the primacy of EU law.⁵⁶ More recently the Court has imposed a daily fine of €1 million for non-compliance.⁵⁷ Such tension may have the potential to impact on the ability of any negotiation to secure a swift solution for the Turów dispute.

⁵³ See generally Kochenov, D., ‘Biting Intergovernmentalism: The Case for Reinvention of Article 259 TFEU to Make it a Viable Rule of Law Enforcement Tool’, Jean Monnet Working Paper JMWP11/15, <https://jeanmonnetprogram.org/wp-content/uploads/JMWP-11-Kochenov.pdf> accessed 2.11.2021

⁵⁴ Shipley, T., ‘The Turów mine dispute between Poland and the Czech Republic and the future of inter-State cases before the Court of Justice’, 7 July 2021 <https://eulawlive.com/insight-the-turow-mine-dispute-between-poland-and-the-czech-republic-and-the-future-of-inter-state-cases-before-the-court-of-justice-by-trajan-shipley/> accessed 24.10.2021

⁵⁵ Case 204/21 R *Commission v Poland* ECLI:EU:C:2021:593

⁵⁶ European Commission statement, ‘European Commission reaffirms the primacy of EU law’, 7.10.2021 https://ec.europa.eu/commission/presscorner/detail/en/statement_21_5142 accessed 7.11.2021

⁵⁷ See CJEU Press release No 192/21 referring to Case C204/21 R *Commission v Poland*, available at <https://curia.europa.eu/jcms/upload/docs/application/pdf/2021-10/cp210192en.pdf> accessed 7.11.2021