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ORDER OF THE VICE-PRESIDENT OF THE COURT

20 September 2021 (*)

(Application for interim measures – Article 279 TFEU – Environment – Lignite mining activities at an open-cast mine – Turów lignite mine (Poland) – Non-execution – No change in circumstances – Periodic penalty payment)

In Case C-121/21 R,

APPLICATION for interim measures under Article 279 TFEU, lodged on 7 June 2021,

Czech Republic, represented by M. Smolek, J. Vláčil and L. Dvořáková, acting as Agents,

applicant,

supported by:

European Commission, represented by K. Herrmann, M. Van Hoof, G. Gattinara and M. Noll-Ehlers, acting as Agents, intervener,

v

Republic of Poland, represented by B. Majczyna, acting as Agent,

defendant,

THE VICE-PRESIDENT OF THE COURT,

after hearing the Advocate General, P. Pikamäe,

makes the following

Order

By its application for interim measures, the Czech Republic asks the Court to order the Republic of Poland to pay a daily penalty payment of EUR 5 000 000 to the EU budget for failure to fulfil its obligations under the order of the Vice-President of the Court of 21 May 2021, *Czech Republic v Poland* (C-121/21 R, EU:C:2021:420; 'the order of 21 May 2021').

That application has been made in an action for failure to fulfil obligations under Article 259 TFEU, brought by the Czech Republic on 26 February 2021 and seeking a declaration that the Republic of Poland has failed to fulfil its obligations under:

Article 4(1) and (2) of Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment (OJ 2012 L 26, p. 1), as amended by Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014 (OJ 2014 L 124, p. 1) ('the EIA Directive'), read in conjunction with Article 4(4) to (6), Article 5(1) and (2) and Articles 6 to 9 of that directive, by authorising the extension of lignite extraction for a period of six years, without conducting an environmental-impact assessment;

Article 6(2) to (7), Article 7(5), Articles 8 and 9 and Article 11(1) of the EIA Directive, by allowing the exclusion of the public concerned from the procedure for the grant of development consent;

Article 11(1) of the EIA Directive, by declaring the decision of the Regional Director for Environmental Protection in Wrocław (Poland) of 21 January 2020 on the environmental conditions relating to the project for the continued operation of the Turów (Poland) lignite deposit until the year 2044 ('the EIA decision') immediately enforceable;

Article 4(1)(a)(ii) and (b)(ii) of Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy (OJ 2000 L 327, p. 1), by failing to include in the EIA decision a potential procedure to be followed in the event that exemptions are not granted for the bodies of water concerned under Article 4(5) of that directive;

Article 6(2) to (7), Article 7(1), (2) and (5) and Article 8 of the EIA Directive, by failing to allow the participation of the public concerned and of the Czech Republic in the procedure which resulted in the decision of the Minister for Climate of the Republic of Poland of 20 March 2020 on the amendment to development consent No 65/94 for the extraction of lignite from the Turów deposit, by which the development consent for the extraction of lignite at that mine was extended for six years ('the development consent for the extraction of lignite until 2026');

Article 9(1) and (2) of the EIA Directive, by failing to publish the development consent for the extraction of lignite until 2026 and by failing to communicate the development consent to the Czech Republic in a comprehensible form;

Article 11(1) of the EIA Directive, by failing to enable judicial review of the development consent for the extraction of lignite until 2026;

Article 7 of Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC (OJ 2003 L 41, p. 26), by failing to publish the development consent for the extraction of lignite until 2026;

the principle of sincere cooperation referred to in Article 4(3) TEU, by failing to provide complete information in relation to the procedure for the grant of development consent for the extraction of lignite until 2026;

Article 2(1) of the EIA Directive, read in conjunction with Article 4(1) of that directive, by failing, in the development consent for the extraction of lignite until 2026, to have sufficient regard to the EIA decision; and

Article 8a(1)(b) of the EIA Directive, by failing adequately to set out all the environmental conditions in the development consent for the extraction of lignite until 2026.

By order of 21 May 2021, the Vice-President of the Court ordered the Republic of Poland to cease lignite mining activities immediately at the Turów mine (Poland) pending delivery of the judgment closing the proceedings in Case C-121/21.

Taking the view that the Republic of Poland has failed to fulfil its obligations under that order, the Czech Republic brought the present application for interim measures seeking an order requiring the Republic of Poland to pay a daily penalty payment of EUR 5 000 000 to the EU budget for failure to fulfil its obligations.

In its observations lodged on 29 June 2021, the Republic of Poland contended that that application should be dismissed. In addition, that Member State requested that that case be examined by the Grand Chamber of the Court of Justice and that oral submissions by the parties be heard at a hearing.

By separate document lodged at the Court Registry on the same day, the Republic of Poland made an application under Article 163 of the Rules of Procedure of the Court of Justice seeking cancellation of the order of 21 May 2021. Furthermore, that Member State requested that that case be examined by the Grand Chamber of the Court of Justice and that oral submissions by the parties be heard at a hearing.

The Republic of Poland's application for cancellation of the order of 21 May 2021

The Republic of Poland's request that the case be referred to the Grand Chamber of the Court of Justice and that a hearing be organised

The Republic of Poland considers that, having regard to the sensitive nature and extreme importance of the interests concerning the environment, human health and life and general safety which would be threatened if the interim measure at issue in the order of 21 May 2021 were maintained, the application for cancellation of the order must be examined by the Grand Chamber of the Court.

In addition, the Republic of Poland takes the view that the complexity of the case requires a hearing to be ordered for the purposes of ruling on that application.

In that regard, it must be borne in mind in the first place that, in accordance with Article 161(1) of the Rules of Procedure, read in conjunction with Article 1 of Decision 2012/671/EU of the Court of Justice of 23 October 2012 concerning the judicial functions of the Vice-President of the Court (OJ 2012 L 300, p. 47), the Vice-President of the Court is him or herself to rule on applications for suspension of operation or for interim measures or to refer those applications immediately to the Court.

Thus, pursuant to those provisions, competence has been conferred on the Vice-President of the Court to rule on any application for interim measures or, where he or she takes the view that the particular circumstances require the referral of the case to a formation of the Court, to refer such an application to the Court.

It follows that it is for the Vice-President of the Court alone to assess, on a case-by-case basis, whether the applications for interim measures before him or her require referral to the Court for the purpose of their assignment to a formation of the Court.

In the present case, the Republic of Poland's application for cancellation of the order of 21 May 2021 does not disclose any factor of such a kind as to require that it be assigned to a formation of the Court, so that there is no need to refer that application to the Court.

In the second place, as regards the request that the parties be heard, it must be borne in mind that the judge hearing the application for interim measures alone has jurisdiction to assess the relevance of such a request to the subject matter of the dispute and the need to obtain clarification from the parties in order to rule on the dispute (see, by analogy, order of 3 March 2020, *Commission v Poland*, C-791/19 R, not published, EU:C:2020:147, paragraph 9 and the case-law cited).

In the present case, since the file includes sufficient information to make a ruling, there is no need to organise a hearing.

Substance

Arguments

In support of its application, the Republic of Poland submits, in the first place, that the analyses carried out in order to comply with the order of 21 May 2021 established that the cessation of lignite mining activities at the Turów mine will necessarily lead to the permanent cessation of operation of the Turów power station. According to that Member State, that power station cannot, having regard to its technological design, be put back into operation after the cessation of operation of all its generating units. In addition, the Republic of Poland notes that technological and logistical obstacles and environmental requirements do not make it possible to burn in the Turów power station lignite from other opencast mines. Such circumstances were not taken into account in the order of 21 May 2021.

In the second place, the Republic of Poland submits that the suspension of lignite mining activities in the Turów mine is liable to lead to environmental and safety risks, such as surface subsidence, which might cause the destruction of the drainage system or cause damage to the latter or to the anti-filtration screen.

In the third place, the Republic of Poland notes that it is necessary to continue lignite mining activities in order to make the Turów mine safe. It is impossible to ensure the stability of the slopes and land against the adverse effects of rainwater and groundwater infiltration without continuing those activities.

In the fourth place, the Republic of Poland claims that the cessation of lignite mining activities in the Turów mine does not make it possible to prevent the reduction in the level of groundwater in Czech territory. According to that Member State, the suspension of those activities for the duration of the main proceedings is not capable of contributing to improving water supply in Czech territory.

In the fifth place, the Republic of Poland claims that the suspension of those activities may also lead to a genuine risk to the security of the Polish and European electrical energy system. A breakdown in the power plant at Rogowiec (Poland) on 17 May 2021 showed that the suspension of mining activities at the Turów mine would entail an increased risk for the safety of the Polish electricity network.

In the sixth and last place, the Republic of Poland claims, in essence, that the cessation of lignite mining activities in the Turów mine may cause an interruption in the distribution of heating and drinking water in the territories of Bogatynia (Poland) and Zgorzelec (Poland), which threatens the health of the inhabitants of those territories.

Assessment

As a preliminary point, it must be recalled that, under Article 162(1) of the Rules of Procedure no appeal lies from an order for interim measures.

On the other hand, in accordance with Article 163 of those rules, on application by a party, an order for interim measures may at any time be varied or cancelled on account of a change in circumstances. The concept of a 'change in circumstances' refers in particular to the occurrence of any factual or legal element capable of calling into question the assessments of the judge hearing the application for interim measures as to the conditions to which the grant of a suspension or of interim relief is subject.

It is therefore necessary to examine whether the factors relied on by the Republic of Poland in support of its application based on Article 163 of the Rules of Procedure constitute a 'change in circumstances' within the meaning of that article.

In that context, it must be stated, in the first place, that the arguments of the Republic of Poland set out in paragraphs 15 to 19 of the present order are, in essence, simply a repetition or a development of arguments put forward by that Member State in its written observations on the application for interim measures lodged by the Czech Republic on 26 February 2021. Such arguments cannot therefore constitute a 'change in circumstances' within the meaning of Article 163 of the Rules of Procedure and must therefore be rejected.

As regards, in the second place, the arguments of the Republic of Poland set out in paragraph 20 of the present order, it is sufficient to note that that Member State has not sufficiently substantiated that the cessation of lignite mining in the Turów mine would lead to a genuine risk of interruption in supplies of heating and drinking water in the territories of Bogatynia and Zgorzelec. Such statements cannot therefore be regarded either as a 'change in circumstances' within the meaning of Article 163 of those Rules, such as to call in question the assessments in the order of 21 May 2021.

In those circumstances, the Republic of Poland's application for cancellation of the order of 21 May 2021 must be dismissed.

The Czech Republic's claim seeking imposition of a periodic penalty payment

The Republic of Poland's request that the case be referred to the Grand Chamber of the Court of Justice and that a hearing be organised

The Republic of Poland takes the view that, having regard to the interim measures decided upon by the order of 21 May 2021, the Czech Republic's application seeking a periodic penalty payment must be examined by the Grand Chamber of the Court of Justice. Furthermore, the Republic of Poland submits that the decision to impose a periodic penalty payment on a Member State should not be taken by a single Judge.

In addition, the Republic of Poland submits that the complexity of the case requires a hearing to be ordered for the purposes of ruling on that application.

In that regard, it must be recalled that, as is apparent from paragraphs 9 to 13 of the present order, the Vice-President of the Court may refer a case to the Court in order for the latter to assign it to a formation of the Court.

In the present case, since the Czech Republic's application seeking a periodic penalty payment does not disclose any factor of such a kind as to require that it be assigned to a formation of the Court, there is no need to refer that application to the Court.

Furthermore, as is apparent from paragraph 13 of the present order, the judge hearing an application for interim measures may organise a hearing of the parties where he or she considers that it is necessary to rule on the application before him or her.

In the present case, since the file includes sufficient information to make a ruling, there is no need to organise a hearing.

Admissibility

The Republic of Poland submits, in essence, that the application for a periodic penalty payment brought by the Czech Republic is inadmissible on the ground that, in proceedings for interim relief, only the Commission, as guardian of the Treaties, may bring an application seeking imposition of a periodic penalty payment on a Member State.

It must be recalled in this respect that, in the system of legal remedies established by the Treaty, a party may not only request, in accordance with Article 278 TFEU, that application of the act contested in the main action be suspended but may also rely on Article 279 TFEU in order to seek the grant of interim measures. Under the latter provision, the Court hearing an application for interim measures may, in particular, issue, on a provisional basis, appropriate directions to the other party (order of 20 November 2017, *Commission v Poland*, C-441/17 R, EU:C:2017:877, paragraph 96).

Article 279 TFEU therefore confers on the Court the power to prescribe any interim measure that it deems necessary in order to ensure that the final decision is fully effective (order of 20 November 2017, *Commission v Poland*, C-441/17 R, EU:C:2017:877, paragraph 97).

In particular, the Court hearing an application for interim measures must be able to ensure the effectiveness of an order directed at a party pursuant to Article 279 TFEU, by adopting any measure intended to ensure that the interim order is complied with by that party. Such a measure may entail, inter alia, provision for a periodic penalty payment to be imposed should that order not be respected by the relevant party (order of 20 November 2017, *Commission v Poland*, C-441/17 R, EU:C:2017:877, paragraph 100).

It follows from the foregoing that a Member State may rely on Article 279 TFEU in order to request the granting of interim measures, such as the imposition of a periodic penalty payment, against a party in the event of the latter's failure to comply with the injunction addressed to it under that provision.

In those circumstances, the Czech Republic's application for the imposition of a periodic penalty payment on the Republic of Poland is admissible.

Substance

Arguments

The Czech Republic requests that the Republic of Poland be ordered to pay a daily periodic penalty payment of EUR 5 000 000 and that that sum be paid to the EU budget.

The Czech Republic points out that, by the order of 21 May 2021, the Vice-President of the Court ordered the Republic of Poland to cease, immediately and pending delivery of the judgment closing the proceedings on the substance, lignite mining activities at the Turów mine.

According to the Czech Republic, that obligation may, in principle, be met immediately, in a few days at the latest. It also submits that the Republic of Poland cannot rely on any legitimate reason in order to justify the failure to comply with that obligation seven days after the publication of the order of 21 May 2021. The Czech Republic observes that, as early as 21 May 2021, the company operating the Turów mine published a declaration that mining operations would not be suspended. Furthermore, the Prime Minister of the Republic of Poland made a statement to that effect. In addition, pictures dated 30 May 2021 and sound measurements carried out on 31 May and 1 June 2021 show that lignite mining at the Turów mine is still ongoing.

In that context, the Czech Republic points out, first, that the order of 21 May 2021 requires the Republic of Poland only to stop lignite mining at the Turów mine. Consequently, the Republic of Poland would remain free to carry out activities necessary for the maintenance of the mine or its facilities. Secondly, the Czech Republic points out that it has not been established that the immediate cessation of lignite mining at the Turów mine must also lead to the immediate cessation of the operation of the power station powered by the mine. In any event, it is open to the Republic of Poland to order other power stations in its territory to increase their electricity production and to make use of cross-border trade in electricity. Thirdly and lastly, according to the Czech Republic, the Republic of Poland cannot reasonably claim that an additional period is necessary to discharge its obligations under the order of 21 May 2021, when it refuses from the outset to fulfil its obligations and has not taken any measures to comply with that order.

In those circumstances, the Czech Republic takes the view that the imposition of a periodic penalty payment in an adequate amount enables it to be guaranteed that the Republic of Poland will observe its obligations under the order of 21 May 2021.

The Czech Republic claims that the Republic of Poland has, intentionally, failed to comply with any of the obligations on it under the order of 21 May 2021, even in part. The Czech Republic considers that the financial costs engendered by the cessation of mining activities at the Turów mine amount to approximately EUR 3 000 000 000. Thus, if those activities were, on the basis of the order of 21 May 2021, suspended for an entire year, the daily financial cost of that suspension would amount to approximately EUR 8 200 000. That is why the Czech Republic is of the opinion that a periodic penalty payment of EUR 5 000 000 per day should be imposed on the Republic of Poland, to be allocated to the EU budget.

The Republic of Poland observes, in the first place, that, following the delivery of the order of 21 May 2021, it took a number of measures to determine the objective conditions under which that order could be executed. It contends that it is thus apparent from the consultations and studies carried out with a view to executing that order that the sudden cessation of mining activities at the Turów mine would cause a risk to human life and health, public safety and the environment.

In the second place, the Republic of Poland submits, in essence, that the amount of the periodic penalty payment proposed by the Czech Republic, namely EUR 5 000 000 per day, is manifestly disproportionate in relation to the circumstances of the case and is not consistent with the Court's case-law on the matter. Furthermore, the Republic of Poland contends that the Czech Republic commits an abuse of rights in suggesting such an amount.

Assessment

By order of 21 May 2021, the Vice-President of the Court ordered the Republic of Poland to cease lignite mining activities immediately at the Turów mine (Poland) pending delivery of the judgment closing the proceedings in Case C-121/21.

It is unequivocally clear from the documents in the file that the Republic of Poland did not comply with that order.

In those circumstances, it therefore appears necessary to strengthen the effectiveness of the interim measures decided upon by the order of 21 May 2021 by providing for the imposition of a periodic penalty payment on the Republic of Poland in order to deter that Member State from delaying bringing its conduct into line with that order.

As regards the amount of that penalty payment, it should be noted that the proposals put forward by the Czech Republic cannot bind the judge hearing the application for interim measures, who remains free to set the periodic penalty payment imposed at an amount and in a form which he or she considers adequate to encourage the Republic of Poland to put an end to its failure to fulfil its obligations under the order of 21 May 2021, since the periodic penalty payment fixed must be both appropriate to the circumstances and proportionate to the infringement established and

the ability to pay of that Member State (see, by analogy, judgment of 12 November 2020, *Commission v Belgium (Income from foreign immovable property)*, C-842/19, not published, EU:C:2020:915, paragraphs 63 and 64 and the case-law cited).

Having regard to the circumstances of the present case, and taking the view, in particular, that the order of 21 May 2021 relates to interim measures with which compliance is necessary in order to avoid serious and irreparable harm to the environment and human health, the Republic of Poland must be ordered to pay the Commission a penalty payment of EUR 500 000 per day from the date of notification of the present order to the Republic of Poland until that Member State complies with the order of 21 May 2021.

On those grounds, the Vice-President of the Court hereby orders:

The application seeking cancellation of the order of the Vice-President of the Court of 21 May 2021, *Czech Republic v Poland (C-121/21 R, EU:C:2021:420)* is dismissed.

The Republic of Poland is ordered to pay the European Commission a penalty payment of EUR 500 000 per day, from the date of notification of the present order to the Republic of Poland until that Member State complies with the order of the Vice-President of the Court of 21 May 2021, *Czech Republic v Poland (C-121/21 R, EU:C:2021:420)*.

The costs are reserved.

[Signatures]

* Language of the case: Polish.