SYSTEMIC BREACHES OF EU ENVIRONMENTAL LAW AND THE MEANS FOR THE CJEU TO GET INVOLVED IN THE FIELD OF SCIENCE

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ABSTRACT

The environmental legislation has long been an area of concern in terms of implementation and proper enforcement. In this context, the Commission has focused on the systematic breaches of environmental legislation. Proving the existence of such breaches of environmental law and legislation has a number of specific features because of the scientifically based questions underlying environmental law. The purpose of this article is to relate the CJEU's established position on scientific uncertainty to the specific situation where the Commission claims that an infringement of EU environmental law is of a systemic nature. It will show that, while the CJEU has been sensitive to the systemic nature of the Commission's complaints through the use of some of the procedural tools at its disposal, its general reluctance to engage with the substantive issues at stake could have the potential to reduce the effectiveness of the infringement procedure as a tool for adequately pursuing systemic breaches of EU environmental law.

KEYWORDS: *Environmental legislation; Environmental law; Systemic breach; Infringement procedure; European Union; Scientific complexity*.
J.E.L Classification: K40, O38, P14

1. INTRODUCTION

Environmental legislation has long been an area of concern in terms of implementation and proper enforcement. Several reports by the European Commission (hereafter "the Commission") have highlighted shortcomings in the achievements of Member States in the context of environmental law. As stated in DG Environment's latest Strategic Plan 2020-2024, President von der Leyen said that "any legislation is only as good as its implementation".

When it comes to the correct application of environmental legislation, the Commission is aware that breaches of environmental law do not often occur as one-off cases but can be suggestive of failures of a systemic nature. Without defining this concept, the Commission's Strategic Plan 2020-2024 explicitly mentions the notion of "systemic breaches" and refers to systemic breaches of waste legislation, drinking water standards, and environmental impact assessment legislation as enforcement priorities for the coming years. The Commission's focus on enforcement in relation to systemic breaches of environmental law is a clear reflection of the general policy announced by Juncker Commission's as "bigger and more ambitious on the big things and smaller and more modest on the small things".

In the context of environmental law, "systemic breaches" should be understood as breaches which are part of a series of individual breaches which, taken together, because of their repeated or widespread nature, have a significant effect on the environment. The field of environmental policy is therefore an excellent example of a systemic breach: it occurs when a series of breaches are so repeated or widespread that they can be considered to be systemic in nature.

This idea of a systemic infringement was outlined by the CJEU in the so-called Irish Waste case, in which, for the first time, the CJEU recognised, in the context of infringement proceedings, that an infringement of EU environmental law within the meaning of Article 258 TFEU could consist not only of individual non-compliance with EU law, but also of "general and persistent" deficiencies, of which individual infringements "constitute only examples". Similarly, on the basis of long-standing case law, the CJEU has accepted that infringement proceedings may also be directed against an administrative practice if the latter is of a consistent and general nature.

The notions of general and persistent breaches of EU law, or general and persistent practices of breaches of EU law, are not specific to the field of environmental law; however, proving the existence of such breaches takes on a whole new dimension in environmental law because of the scientifically charged situations that underlie environmental law. Claims in environmental litigation often involve the discussion of questions of fact and causation that call for use of extra-legal concepts - what is the effect of a significant project on the environment; when is a mitigation measure appropriate to reduce certain harmful effects; when can a certain activity be considered to have caused environmental degradation? - and necessarily involves a degree of uncertainty in the parties' claims and in the ultimate determination by the courts. The constant presence of scientific questions, leading to a greater or lesser degree of uncertainty in the parties' allegations and in the courts' consistent determinations, distinguishes the field of environmental law from other EU policies, such as migration law. As will be explained below, these issues become all the more complex in cases of systemic infringements.

One reason for this is that issues of evidence and causality take on a different dimension when they relate neither to a single case of environmental breach nor to several cases, but to the need to establish an identifiable pattern of non-compliance.

The way scientific issues are dealt with before the European courts has recently been the subject of academic attention, particularly in the light of what has been perceived, at least in the context of actions for annulment, as a move by the CJEU towards a somewhat more "intrusive" approach to the Commission's scientific options than the traditional, process-oriented, hands-off approach that the Court has upheld in long-standing case law. However, to date, the literature has focused on a general - namely, unrelated to the systemic nature of an infringement - aspect.

The purpose of this article is to take this discussion forward and relate the established CJEU approach to scientific uncertainty to the specific situation where the applicant - generally the Commission - holds that an infringement of EU environmental law is of a systemic nature.

Systemic environmental breaches have only been brought to the Court's attention by the Commission under Articles 258 and 260 TFEU. While worth pointing out, this finding is not new: EU environmental law is overwhelmingly implemented at national level, which drastically reduces the importance of annulment proceedings under Article 263 TFEU. In addition, actions at national level - through which a preliminary question under Article 267 TFEU could be referred to the CJEU - may not be procedurally geared towards identifying systemic breaches.

2. THE CJEU AND THE SCIENTIFIC UNCERTAINTY

In the context of a survey of how international courts and judges deal with scientific claims, the doctrine has identified four main techniques of judicial engagement: (i) framework; (ii) fact-finding; (iii) factual assessment; and (iv) shaping the standard of review. These, in turn, are related to the notion that courts (i) frame the issues in such a way as to include or exclude the need to rule on scientific arguments; (ii) do or do not use available procedural techniques to involve experts in the adjudicative process; (iii) do or do not engage in inquiries into causation in their decision-making process; and (iv) manifest a more or less lenient attitude toward the decision-maker when ruling on discretionary choices made by the administration.

It is also argued that an overly cautious approach to scientific claims can end up eroding the very legitimacy of the institutions of judgement. This argument is consistent with those at EU level, where, in a context where the democratic and political accountability of EU decision-makers is contested, legal accountability could be considered an appropriate substitute, including for regulatory choices with a scientific background. Furthermore, in terms of Member State actions, which is the focus of this contribution, given the dataset identified above, legal commitment to scientific claims can be seen as the appropriate place to censure national breaches of EU law, particularly in light of the Commission's limited powers and resources to construct claims backed by sound science. From this perspective, judicial engagement with science in infringement proceedings could be seen as a way for the CJEU to 'step in' and enhance its own legitimacy trump cards vis-à-vis a European Commission necessarily limited in its function as guardian of the Treaties.

The analytical framework identified in Sulyok's paper and the four judicial techniques mentioned above, in various forms, have also been identified in CJEU case law. In particular, previous research has argued that EU courts deal with scientific uncertainty in essentially three ways: (i) allocating the burden of proof and the threshold from which a fact is deemed proven; (ii) using the investigative tools at their disposal; and (iii) engaging in more or less in-depth procedural or substantive review of the scientific choices made by the authority.

These general considerations take on a somewhat different dimension in the case of systemic breaches. Particularly in relation to issues of evidence and causality, proving that a single instance of non-compliance has occurred is a much lower burden than proving (a) a series of instances of non-compliance and (b) that this chain is part of a coherent and generalised pattern. Accordingly, what is required of the Commission by the CJEU and when the CJEU will consider that one or more instances of non-compliance and a pattern thereof are proven, as well as how much and how often the CJEU will defer to the Commission as to the plausibility or likelihood of particular causalities will inevitably influence the success of a systemic application brought by the Commission and, ultimately, the Commission's very willingness to pursue systemic breaches of EU environmental law.

3. THE CJEU'S COMMITMENT ON SCIENTIFIC CLAIMS IN SITUATIONS OF SYSTEMIC BREACHES OF EU ENVIRONMENTAL LAW

3.1. ALLOCATION OF THE BURDEN OF PROOF

The case law has established that the burden of proving that certain conduct infringes the Treaties lies with the Commission. As the Court has consistently held, in infringement proceedings, the burden is on the Commission to prove the alleged infringement and to provide the Court with the information necessary for it to verify the existence of the infringement. For this purpose, the Commission cannot rely on any "presumption or schematic causation".

However, if the CJEU finds that the Commission has presented "sufficient evidence" and that an infringement of EU law has occurred, the Member State must refute the Commission's allegations by demonstrating that it has complied with its obligations under EU law or by contesting the veracity of the information presented or the conclusions drawn by the Commission from that information. The difficult question is therefore when the evidence will be considered "sufficient". Sometimes it is the law itself that will determine the probative value of certain facts, thus allowing the CJEU to get out of the conundrum of having to assess the reliability of certain scientific evidence. For example, in Commission v. France, the Commission argued that France had consistently breached EU air quality legislation. France's defence was based, inter alia, on the claim that the samples on which the Commission relied to measure air quality could not be considered representative. Without needing to enter into the scientific question of the representativeness of these samples, the CJEU could simply observe that the samples fully complied with the requirements derived from the applicable legislation

and therefore had to be considered conclusive of France's failure to comply with its obligations under EU law.

Beyond these situations, and in the absence of a specific legislative determination on the burden and standard of proof, the fact that the Commission is satisfied that "sufficient" evidence is provided means that the CJEU is willing to accept evidence of an infringement that is not entirely conclusive and expect the Member State concerned to demonstrate compliance. Thus, this legal standard appears to be based on "a balance of probabilities test". This seems to place the Commission at a certain "competitive advantage" over the Member State, particularly when it comes to proving the existence of a systemic infringement, which will usually not relate to a problem of non-implementation or incorrect implementation, but to a problem of practical application of EU law. Indeed, while proving a lack of or incorrect implementation is something that the Commission does relatively easily through information submitted by Member States on the implementation measures adopted, when it comes to proving a lack of correct application of EU law, the Commission is in a much more sensitive position. This is because the Commission has to rely mostly on local sources of information in these cases. Thus, the "help" given by the CJEU in allocating the burden of proof and its willingness to accept even fragmentary evidence could have a decisive influence on the success of a legal action for a systemic breach of EU environmental law. In addition, it should not be forgotten that although the burden of proof is on the Commission to prove its case, Member States have a general legal obligation - arising from Article 4(3) of the Treaty on European Union - to cooperate with investigations and proceedings under Article 258 TFEU.

Despite this configuration, which would indicate a somewhat facilitated role for the Commission vis-à-vis the defendant Member State, the case law shows that the Court is not easily persuaded by the Commission when the evidence presented is not considered sufficiently convincing - in particular because of the systemic nature of the infringement.

For example, in Commission v Ireland, the Commission sought a declaration that Ireland had failed to comply systematically with its obligations under EU waste water disposal rules. The Court indicated that although the Commission had reached the required level of evidence of non-compliance by Ireland in relation to one or more cases, it had nevertheless failed to prove the existence of a consistent and widespread administrative practice because the cases of non-compliance were not sufficiently geographically widespread to prove the existence of a pattern throughout the country. This demonstrates that the CJEU will expect the Commission to provide evidence of the existence of a pattern - in this case relating to the geographical spread of non-compliance - that goes beyond proving one or more individual instances of non-compliance.

Similarly, in Commission v Finland, the Court found that the Commission's application for a declaration that Finland was in breach of the Habitats Directive by allowing derogations from the ban on wolf hunting should not be accepted. In particular, the Court held that the evidence submitted by the Commission - for example, that the Finnish authorities had, on a limited number of occasions, allowed the hunting of a fixed number of wolves in a well-defined geographical area, thereby infringing EU law - in conjunction with the evidence submitted by Finland - namely that the total number of wolves present on Finnish territory had increased - was not sufficient to establish an unlawful administrative practice. In this case, the Commission's inability to prove a pattern of non-compliance is linked to a numerical criterion of non-compliance.

The fact that the CJEU imposes a relatively high burden on the Commission when it comes to proving the systemic nature of an infringement is also very clearly exemplified by the Xylella case. In that case, the Commission sought a finding of persistent and general failure by Italy to comply with its obligations under EU law by failing to remove plants infected with a harmful bacterium and to monitor and prevent its spread. Italy tried to defend itself by arguing that the spread was not solely attributable to it, as it had been considered a natural phenomenon, which can only be controlled or slowed down. The CJEU found that the Commission had not presented any specific evidence that the spread was solely attributable to Italy, which was necessary for the CJEU to be satisfied that there

had been an infringement of EU law. Instead, the alleged infringement was essentially based on a presumption, which did not rise to the required standard of proof. In this case, therefore, the lack of a pattern was determined by the absence of a clear causal link between the Member State's actions and the environmental damage.

3.2. USE OF AVAILABLE INVESTIGATION TOOLS

There are no specific rules on the type and nature of evidence that can be presented to the Court. All types of evidence are, in principle, admissible, with the exception of improperly obtained evidence or internal documents of Member States or EU institutions disclosed without authorisation.

In addition, the European Courts have at their disposal a comprehensive set of investigative tools which, however, are very little used in general and, in fact, are never used in particular in infringement proceedings. This means that the onus is on the Commission to prove an allegation of non-compliance by presenting to the Court all the information necessary to enable it to establish that the obligation has not been fulfilled.

However, the Commission's own investigative resources are minimal and its investigative powers are limited. Except in very specific situations, the Commission has no general powers of inspection, either through EU officials or through a mandate to the competent national authorities. Consequently, the data on which the Commission bases its allegations in infringement proceedings are provided either by Member States or by individual complainants, including non-governmental organisations. For example, in Commission v. Italy, the Commission relied on "various complaints, parliamentary questions and press articles, as well as the publication ... of a report by the Corpo forestale dello Stato (National Forestry Authority)". The Commission also relied on information submitted by the Member State - namely the waste management plan for the region of Sicily - to construct the "systemic part" of the complaint against Italy.

As has been argued, the balance of power between the prosecution and the defence in terms of "gathering factual evidence lies strongly in favour of the accused Member State," and in cases involving scientific uncertainty, the question has arisen as to whether and how the Commission - and, in turn, the Court - verifies the scientific information underlying a complaint. While there is no conclusive answer to this question, it can certainly be argued that the lack of use of the available procedural tools by the CJEU is linked to its restrained approach vis-à-vis engagement with the scientific substance of the complaint and a greater focus on procedural and generally legal obligations that are not supported by scientific considerations.

3.3. THE EXTENT OF CASE-ORIENTED REVIEW

In Article 258 proceedings, the Commission has a margin of discretion at each stage of the procedure and in relation to the time limits set for respondent Member States to reply to letters of formal notice and reasoned opinions. However, according to settled case-law, the time-limits must be sufficiently long for the Member States to comply and for its rights of defence to be protected. This raises the question of whether an allegation of systemic infringement requires a longer time limit, as it could take longer for a Member State to collect and process all the evidence to refute the Commission's allegations - which will inevitably relate to more instances of non-compliance - or to remedy - again, inevitably, more instances of non-compliance. There appears to be no evidence in the case law that, in cases of systemic breaches of EU environmental law, Member States have complained about the Commission's overly short deadlines.

This demonstrates that, when it comes to breaches of environmental law, the systemic nature of the breach is not in itself related to the time taken to fix it or to collect evidence of its status on the ground.

However, Member States have complained in the past that the excessive length of the pre-litigation procedure has made it difficult for them to rebut the Commission's arguments and has therefore infringed their rights of defence. Member States have to provide evidence to this effect. In an action for failure to fulfil obligations for an alleged infringement of air quality legislation, Romania tried to argue that such an excessive length of the pre-litigation procedure would contribute to proving that the alleged infringement was not persistent and continuous. The CJEU did not accept this argument and did not make the link between the length of the pre-litigation procedure and the systemic nature of the infringement, maintaining the argument strictly related to a possible limitation of the Member State's rights of defence.

This demonstrates that, when it comes to breaches of environmental law, the systemic nature of the breach is not in itself related to the time taken to fix it or to collect evidence of its status on the ground.

Although the Commission has a margin of discretion in going through the various stages of the procedure, the stages themselves must be respected and are subject to certain procedural safeguards which the Court has traditionally strictly controlled. In particular, the Court has consistently held that the subject-matter of judicial proceedings must correspond to that defined at the administrative stage of the procedure. The Court has stressed that an application must be based on the same grounds and reasons as the reasoned opinion: if a complaint is not included in the reasoned opinion, it is inadmissible at the stage of the judicial proceedings. In addition, the reasoned opinion must set out the complaints in a coherent and precise manner so that the court can accurately assess the extent of the alleged infringement of EU law. In this respect, the extent of the Court's process-oriented scrutiny of the Commission's actions has traditionally been quite high. There has even been an increased rigour in the Court's approach in case law. For example, the Court has censured the Commission for failing to specify the years for which the relevant breach of EU obligations was alleged.

This could be seen as being in contradiction with the Commission's possibilities to successfully build a "systemic infringement complaint", as the complaint will usually be based on a succession of cases that will be identified over a long period of time. However, the CJEU was sensitive to the particularities of such claims, in Irish Waste case, and held that where the Commission seeks a finding of a general and persistent infringement by a Member State, the scope of the infringement procedure may extend to events which occurred after the reasoned opinion was issued, provided that they are of the same type as the events to which the opinion related and constitute the same conduct. The Court has thus confirmed that the Commission does not infringe the rights of the defence of the Member States if, in the course of the procedure, it merely provides new examples of the conduct complained of. In this context, recognising the special characteristics of a systemic infringement - and the need for the Commission to prove not only individual cases but also the existence of a pattern - the Court noted that such new evidence may be submitted "for the purpose of illustrating deficiencies of a general nature".

3.4. BACKGROUND REVIEW

Judicial self-assessment by European courts when adjudicating claims with a scientific or technical side are well documented in the literature, particularly in relation to the complex assessment made by the EU administration in the area of public health and risk regulation, as well as in the area of competition law. This is much less the case for infringement proceedings, particularly in the field of environmental law.

The case law analysed confirms this conclusion and shows that, in environmental infringement proceedings with a systemic side, the CJEU has demonstrated a very clear pattern of reluctance to enter into a substantive review of the Commission's claims and the Member States' responses. One of the ways in which the CJEU has been able to sidestep scientifically complex issues is to highlight inconsistencies or logical deficiencies in one party's submissions, and to shift the focus to a related legal obligation. In this way, the Court manages to stay within the confines of the scientific puzzle, but nevertheless peeks at the question at the heart of the dispute. This technique is certainly present in those cases where a systemic violation is alleged and serves the court to overcome the high evidentiary threshold required to prove an identifiable pattern of non-compliance.

For example, in the Xylella case, the Commission argued that there is a specific time of the year to carry out inspections to ensure that the presence of a harmful bacterium is identified and appropriate measures are taken to prevent its spread. Italy counter-argued that inspections could be carried out throughout the year. Instead of addressing the scientific question of the adequacy of the time period for inspections, the CJEU shifted the focus to a related obligation to prevent the spread of the bacteria:

> "*Even if ... assuming ... that the Xf bacteria can be detected throughout the year ... the fact remains that the annual survey ... should be completed at a sufficiently early point in the year, before the beginning of spring, to allow, in accordance with the requirements laid down in the [applicable legislation], the timely removal of the infected plants*".

This technique of change, not only as a means of avoiding involvement in scientific issues, but also as a way of building a claim of systemic breach of EU environmental law, has been used since the Irish Waste case. Having established that Ireland had generally and consistently failed to comply with the requirement under EU law that waste management operations be carried out under permit, the CJEU had to consider an additional allegation made by the Commission, namely the requirement that waste recovery or disposal be carried out without endangering human health and without using processes or methods that could harm the environment.

While the first charge was based on purely legal considerations - i.e. whether there was a permit system in place - the second would have required consideration of scientific arguments - i.e. when a waste disposal method is harmful to the environment. The Court managed to overlook the scientific aspect of the issue and shifted its attention to the legal obligation to operate waste disposal operations with a permit. In doing so, it upheld the Commission's second charge "because of the infringement" linked to the first charge.

Finally, another set of air quality cases provides examples of situations where the Court has managed to avoid discussing a relevant scientific issue by shifting the focus to a related legal issue. Several of these cases concern the obligation in Directive 2008/50 for national air quality plans to keep the exceedance periods for certain substances "as short as possible".

In Commission v. Poland, the Commission claimed that Poland had failed to establish "adequate" plans to reduce PM10 concentrations, to which Poland replied that the plans were adequate in view of the country's socio-economic situation. Rather than entering into a discussion of what constitutes an adequate air quality plan, the CJEU noted that the plans adopted by Poland set the timeframe for ending PM10 exceedances between 2020 and 2024, making it possible for Poland to end these exceedances only 10 or even 14 years after the date on which the exceedances were recorded. This in itself constituted a breach of the requirement for the Member State to ensure that the exceedance periods were as short as possible.

In Commission v Bulgaria, the defendant Member State sought to defend itself by arguing, inter alia, that several measures had been taken at national level to improve the situation and that an effective improvement had already taken place. Attempting to avoid the question of when a plan is capable of maintaining as short an exceedance as possible, the CJEU simply noted that the deadline

for transposition of the relevant EU legislation was 2010, while in 2014 PM10 exceedances were still widespread and national legislation was only amended in December 2015 to speed up the process of improving ambient air quality. According to the Court:

> "*Such a situation proves in itself, without it being necessary to examine in detail the content of the plans drawn up by the Republic of Bulgaria, that, in the present case, that Member State has not implemented adequate and effective measures to keep the period of exceedances of the limit values for PM10 concentrations as short as possible*. "

In Commission v UK, the CJEU instead moved from an assessment of the extent to which the relevant air quality plan ensured that NO2 exceedances would be kept as low as possible, to the strictly legal consideration that air quality plans must contain certain information required by EU law. As the Court found the plans to be too vague and insufficiently detailed, this was sufficient to allow the Court to conclude that the UK air quality plans had breached the relevant legislation.

Finally, in Commission v. Italy, the defendant Member State sought to argue that exceedances of PM10 limits cannot be attributed solely to the Member State, because of the diversity of sources of air pollution, some of which are natural and some of which are determined by EU policies. Rather than engaging in a complex discussion of causation, the CJEU confined itself to finding that EU law provides for the possibility for a Member State to obtain recognition of certain natural sources as sources of pollution contributing to the limit values claimed being exceeded, and the conditions under which, because of the specific situation of an area or agglomeration, in particular because of certain characteristics or climatic conditions, a temporary derogation from the obligation to comply with those values may be granted. Since such derogations were not granted, the Court was able to avoid an examination of the substance of the technical question.

4. CONCLUSIONS

The Court's willingness to entertain specific applications for systemic breaches of EU environmental law has been presented in the literature as a 'new departure' for infringement proceedings, and as capable of exerting significant pressure on Member States to comply with EU environmental obligations. Indeed, in order to avoid subsequent action under Article 260(2) TFEU, a Member State may need to demonstrate that it has taken steps to ensure not only that individual instances of non-compliance are remedied, but also that such instances of non-compliance are no longer systemic, i.e. that breaches are no longer repeated or of a widespread nature. In addition, a declaration of systemic infringement could have implications for the amount of the periodic penalty payments determined by the Court in an action under Article 260(2) TFEU.

It has been argued in the literature that the Commission's focus on systemic breaches in infringement proceedings is an "almost inevitable" consequence of both the expansion of the Commission's toolkit to promote compliance by Member States and the increasing complexity of EU rules. Correctly, it is noted, some systemic environmental breaches may not be remedied by NGO complaints at the national level. This is because claims at national level will inevitably be targeted at specific cases of non-compliance and are procedurally inadequate to respond to the correction of systemic and widespread breaches.

The brief analysis above shows that the infringement procedure, currently the only instrument in the EU legal system capable of addressing systemic breaches of environmental law, leaves much to be desired when it comes to such systemic failures. To be sure, the Court has taken a relatively flexible approach to the admission of new evidence in cases involving systemic breaches, and this can be particularly beneficial in scientifically complex cases where the Commission's collection of evidence may be time-consuming, and has also been very open to the Commission's admission of different types of evidence - including extra-judicial evidence such as media reports, if corroborated

by more official sources such as reports from national environmental agencies. However, this approach is intended to counterbalance a number of procedural shortcomings which could, in the long run, undermine the effectiveness of infringement proceedings as a means of pursuing systemic breaches of EU environmental law.

Firstly, while the Court is content with presenting only sufficient evidence of the alleged infringement by the defendant Member State, gathering such evidence may be a more cumbersome process when dealing with systemic infringements and scientifically complex issues, as the Xylella case demonstrates.

Secondly, and in relation to the first point, although the Court is willing to admit new and diverse evidence, it is not willing to assist the Commission in gathering evidence. Given the Commission's limited investigative powers and the fact that it relies on complaints and information submitted by Member States, this passive approach by the Court could also limit the likelihood of a possible finding of a systemic breach.

Finally, as the case law above has shown and as is the case in the context of other proceedings before the CJEU, the Court will not readily examine the merits of the application when it involves scientific considerations and will rather try to find a way to shift the focus to the legal issues it feels comfortable addressing. While the above case law shows that the Court has so far been successful in finding that Member States have infringed EU law by avoiding an assessment of the relevant scientific issues, one wonders what the Court's approach would be when there is no relevant legal obligation to which the Court could shift its attention. In turn, this could also have an influence on the types of infringement cases the Commission is willing to bring to the attention of the CJEU.

Given that the Commission is in a weaker position than the Member States in terms of gathering scientific data to support its arguments, and that the Court is unwilling to use its procedural tools to support it and, as a non-specialist, to engage in a substantive examination of scientific claims, the question arises as to whether the infringement procedure, in its current form, can be considered an appropriate tool to address systemic breaches of EU environmental law.

In the absence of a 'systemic infringement' mandate from national courts, it is surely a missed opportunity that Member States have opposed a reform of the Statute that would have the effect of moving infringement proceedings to the jurisdiction of the General Court. Indeed, one might imagine that the General Court, as a genuine court of law and fact, would have been more inclined than the Court of Justice both to use the procedural tools at its disposal and to deal more with questions of fact requiring specialist knowledge. This limited commitment to fact-finding and scientific assertions could in turn affect the very legitimacy of the Court and the authority of its judgments.

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