COURT OF JUSTICE
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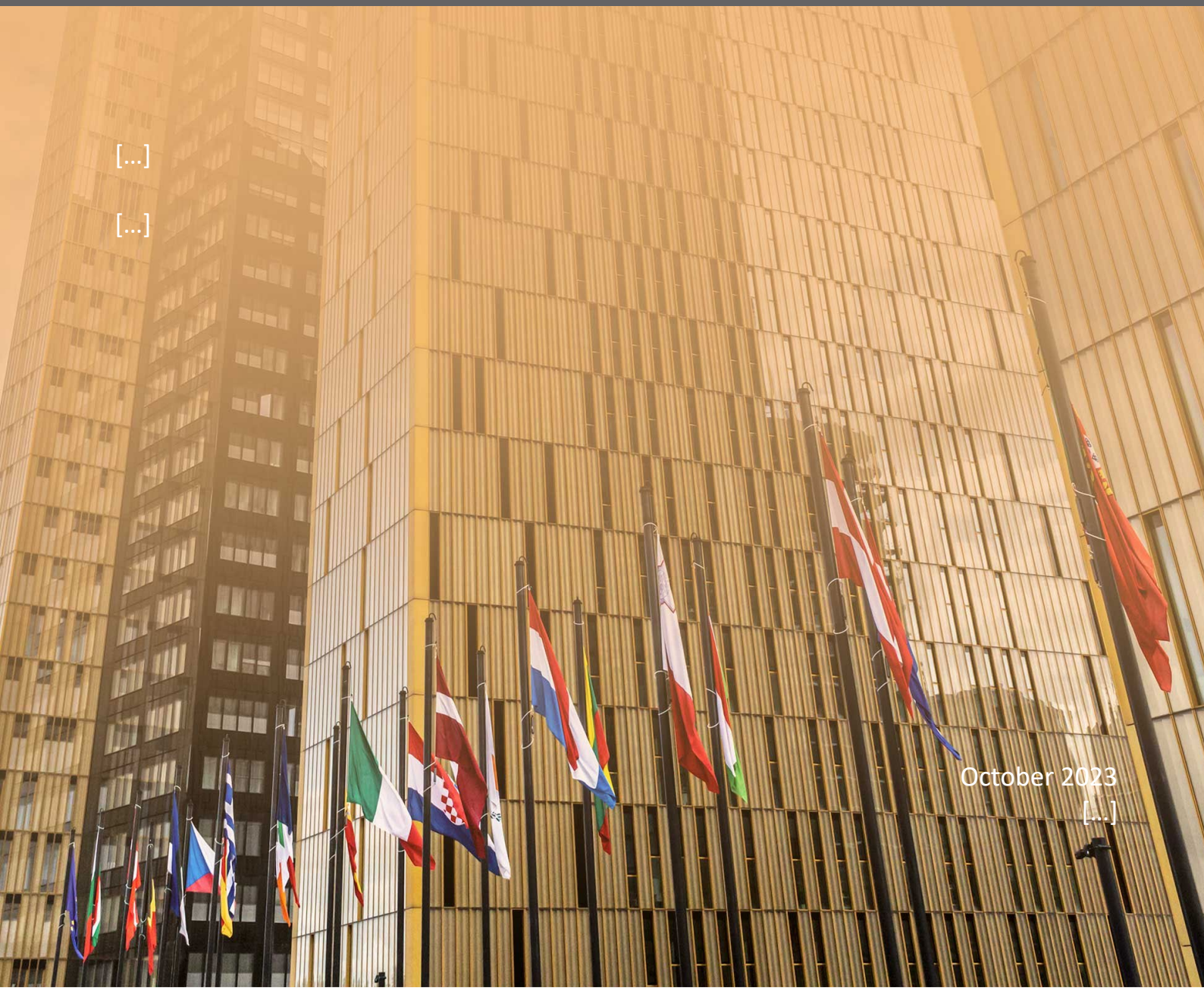
EN

RESEARCH NOTE

RESEARCH AND DOCUMENTATION DIRECTORATE

Consequences of a decision closing the main proceedings on interim measures coupled with a periodic penalty payment



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SUMMARY

'We hit them in the wallet
to break their will.'

Dean Carbonnier [1]

INTRODUCTION

1. The Research and Documentation Directorate ('DRD') received a request for a research note to examine the consequences of a decision closing the main proceedings on interim measures that are coupled with a periodic penalty payment.

2. More specifically, the aim of this note is to answer the following two questions:

   - where an interim measure coupled with a periodic penalty payment has been granted (in summary proceedings, for example) and the interim measure has not been (or has only partly been) implemented, what are the consequences of a decision closing the main proceedings (especially where the decision arises because the applicant has discontinued the proceedings) with regard to the obligation to pay a periodic penalty and/or on its amount? Is the effect of those consequences *ex nunc* or *ex tunc*?

   - further, are there cases where responsibility for setting the amount of a periodic penalty payment lies with a body other than that which imposed the periodic penalty payment?

3. The legal systems of the following thirteen Member States have been selected for the purposes of this note: **Germany**, **Bulgaria, Denmark**, **Spain**, **Estonia**, **France**, **Greece**, **Italy**, the **Netherlands**, **Poland**, **Portugal**, **Romania** and **Slovakia**. [2]

4. From the outset, it should be pointed out, given the targeted nature of the first question that we considered it appropriate to widen the scope of our research to pecuniary instruments other than periodic penalty payments, namely fines, because the purpose of both is to ensure the enforcement of the interim measures ordered. Please note, in that regard, that this study focuses solely on periodic penalty payments or fines coupled with interim measures, despite the fact that the legal systems studied offer a wide variety of pecuniary instruments specific to the enforcement of obligations.

5. The information forming the basis of our response has been drawn mainly from the civil procedure of the Members States studied, with the addition, where appropriate, of elements drawn from administrative procedure in contentious proceedings ('administrative procedure'), [3] where they prove to be relevant.

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1 Carbonnier, J., *Droit civil, Les biens, Les obligations*, Vol. II, 1st edit., Guadriage, 2004, p. 1918. Jean Carbonnier was a French lawyer, professor of private law and a civil law specialist.

2 […]

3 For the purposes of this note, administrative procedure will refer to administrative procedure in contentious proceedings and not administrative procedure in non-contentious matters.

[…]

6. Accordingly, this note, first, identifies the effects of terminating the main proceedings on interim measures coupled with a periodic penalty payment or fine (**I**.) and second, looks at cases in the legal systems examined where responsibility for setting the amount of the periodic penalty payment or fine payable lies with a body other than the one which imposed them (**II**.).

7. Two tables condensing answers drawn from the legal systems of the thirteen Member States selected for this study are appended to this summary.

I. CONSEQUENCES OF THE TERMINATION OF THE MAIN PROCEEDINGS ON INTERIM MEASURES COUPLED WITH A PERIODIC PENALTY PAYMENT OR FINE

8. Before looking in detail at the effects of the termination the main proceedings on interim measures coupled with a periodic penalty payment or fine (C.), we will, first, provide a brief outline of the nature of these instruments (A.) and, second, examine their relationship to the interim measures (B.).

9. It should be noted from the outset that, in **Romania**, periodic penalty payments have been expressly prohibited since the end of 2006 [4] and the reform of the Code of Civil Procedure. [5] Furthermore, no pecuniary instrument is provided for to ensure the enforcement of the obligations contained in interim measures. Although Romanian civil procedure provides for 'late performance penalties or interest' to enforce the performance of personal obligations to do or to refrain from doing something, [6] that instrument can only be used after the resolution of the dispute, at the time of enforcement of the final judgment. The same is true for late performance penalties and fines in administrative proceedings. [7]

10. In **Bulgaria** (civil procedure), no pecuniary instrument is expressly provided for by the legislature, either in relation to interim measures or coupled with such measures to ensure the enforcement of the obligations they contain. However, the list of interim measures provided for by law is not exhaustive and, therefore, provision

[4] Legea nr. 459/2006 pentru modificarea și completarea Codului de procedură civilă (Law No 459 amending and supplementing the Code of Civil Procedure) of 6 December 2006 (*Monitorul Oficial al României*, part I, No 994 of 13 December 2006). That law, that came into force, in accordance with Article III thereof, 30 days after it was published in the Romanian Official Journal, introduced a paragraph 5, prohibiting grants of periodic penalty payments, into Article 5803 of the previous Romanian Code of Civil Procedure, promulgated by the Decree of 9 September 1865 (republished in the *Monitorul Oficial al României*, part I, No 45 of 24 February 1948).

[5] Legea nr. 134/2010 privind codul de procedură civilă (Law No 134/2010 on the Code of Civil Procedure) of 1 July 2010 (republished in the *Monitorul Oficial al României*, part I, No 247 of 10 April 2015) ('the New Romanian Code of Civil Procedure'). The New Romanian Code of Civil Procedure came into force on 15 February 2013.

[6] Article 906 of the New Romanian Code of Civil Procedure.

[7] Articles 18(5) and 24(3) of the Legea contenciosului administrativ nr. 554/2004 (Law No 554/2004 on administrative procedure) of 2 December 2004 (*Monitorul Oficial al României*, part I, No 1154 of 7 December 2004) ('Law No 554 on Romanian administrative litigation').

has been made for the granting of 'other appropriate interim measures decided by the court'. [8] Therefore, in theory, a fine could be imposed as an interim measure. However, given the punitive nature of fines, no case-law supporting the possibility of imposing fines as interim measures has come to light. The same is true of fines that may be imposed together with interim measures.

11. Furthermore, according to Bulgarian civil and administrative procedure, fines may be imposed as part of the enforcement procedure, but only once the substance of the main dispute has been decided, and not in the context of granting interim measures, to compel the enforcement of certain types of obligation contained in the judgment. [9]

12. Therefore, we have chosen not to include the instruments provided for by the **Romanian** and **Bulgarian** legal systems in our observations in the context of the first question, which will focus only on the eleven other legal systems.

A. TYPE OF PERIODIC PENALTY PAYMENTS OR FINES COUPLED WITH INTERIM MEASURES.

13. As a preliminary observation, it should be recalled that according to EU law, Article 279 TFEU confers on the Court the power to prescribe any interim measure it deems necessary to ensure the full effectiveness of the final decision. A measure may include imposing a periodic penalty payment in case of non-compliance with an injunction directed at a party pursuant to Article 279 TFEU. Accordingly, periodic penalty payments are a coercive financial means of ensuring the effective application of Union law, which is intrinsic to the value of the rule of law enshrined in Article 2 TEU, and on which the Union is based. [10]

14. However, national legal systems do not necessarily have the same legal conception of periodic penalty payments. In fact, in the legal systems studied, the pecuniary instruments (periodic penalty payments or fines) couple with interim measures may be coercive (1), punitive (2) or even dual function (3).

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[8] Article 397 of the Grazhdanski protsesualen kodeks (Code of Civil Procedure, Bulgaria) (DV No 59, of 20 July 2007, in force since 1 March 2008) ('the Bulgarian Code of Civil Procedure').

[9] Article 527(1) and (3), and Article 528(1) of the Bulgarian Code of Civil Procedure. In administrative proceedings, fines (for natural persons) and pecuniary sanctions (for legal persons) may be imposed to enforce personal obligations under Article 287 of the Administrativen protsesualen kodeks (Code of Administrative Procedure, Bulgaria) (DV No 30, of 11 April 2006, in force since 12 July 2006) ('the Bulgarian Code of Administrative Procedure').

[10] Order of 20 November 2017, *Commission* v *Poland* (C-441/17 R, EU:C:2017:877, paragraphs 97 to 102).

[…]

1. COERCIVE INSTRUMENTS

15. In the vast majority of the legal systems studied, periodic penalty payments (**Germany**, [11] **Spain**, [12] **Estonia**, [13] **France**, [14] **Italy**, [15] the **Netherlands** [16] and **Portugal** [17]) or fines (**Poland** [18] and **Slovakia** [19]), have a coercive or incentivising function, exerting pressure on the debtor, compelling it to fulfil the obligation contained in the interim measure by paying a sum of money in compliance with defined terms.

16. However, note that, in **Germany** (administrative procedure), the question of whether a periodic penalty payment imposed on an administrative authority is merely coercive or is also a sanction similar to a punishment, is still open to discussion. [20]

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[11] Lugani, K., *Prütting/Gehrlein, ZPO*, 11th edit., 2019, ZPO §888, paragraphs 1 and 36; Gruber, P., *Münchner Kommentar zur Zivilprozessordnung*, 6th edit., 2020, ZPO §888, paragraph 25; Bundesarbeitsgericht (Federal Labour Court, Germany), judgment of 12 December 1989, 5 AZR 53/89; Bundesgerichtshof (Federal Court of Justice, Germany), order of 6 September 2017, XII ZB 42/17, paragraph 9, and Lemke, H.-D., *Fehling/Kastner/Störmer, Verwaltungsrecht*, 5th edit., 2021, VwVG §11, paragraph 1.

[12] Tribunal Constitucional (Constitutional Court, Spain), judgment du 14 December 1988, No 239/1988, ECLI:ES:TC:1988:239.

[13] Article 26[1] of the täitemenetluse seadustik (Code of Enforcement Procedures, Estonia), of 20 April 2005 (RT I 2005, 27, 198; 06.01.2023, 17) ('the Estonian Code of Enforcement Procedures'). See täitemenetluse seadustiku ja teiste seaduste muutmise seaduse eelnõu seletuskiri (explanatory statement about the government bill amending the Code of Enforcement Procedures and other laws) 763 SE, of 17 May 2010, p. 4. 'It is important to the enforcement procedure to induce the party to cooperate with bailiffs and to respond positively to their legitimate requests. This objective is better served by a coercive measure which, when implemented, will not be considered a sanction imposed on that party. On the other hand, a fine is a punitive instrument and its use is, therefore, not suitable for compelling a party to fulfil an obligation.'

[14] Court of Cassation (France), 1st Civ. Div., judgment of 20 October 1959, No 57-10.110; Council of State (France), judgment of 24 May 2017, No 403569 (ECLI:FR:CECHR:2017:403569.20170524).

[15] Corte suprema di cassazione (Supreme Court of Cassation, Italy), judgment No 7613 of 15 April 2015, and Consiglio di Stato (Council of State, Italy), judgment No 15 of 25 June 2014.

[16] Beekhoven van den Boezem, M. B., Doel en effect van dwangsom en lijfsdwang. *Bw-Krant Jaarboek,* 19, 2003, p. 164.

[17] Despite being called a 'coercive pecuniary sanction' ('sanção pecuniária compulsória'), its coercive nature is expressly asserted in the preamble to Decreto-Lei No 262/83 (Decree-Law No 262/83, Portugal) of 16 June 1983 (*Diário da República,* No 136/1983) which incorporated it into the Código Civil (Civil Code, Portugal) of 25 November 1966 (Decreto-Lei No 47344) (*Diário do Governo*, No 274/1966) ('the Portuguese Civil Code'), inserting a new Article 829-A, simultaneously specifying its aims to strengthen the sovereignty of the courts, compliance with their decisions and the prestige of justice system.

[18] These elements can be deduced from the third sentence of Article 1052 of the ustawa z dnia 17 listopada 1964 r. Kodeks postępowania cywilnego (Code of Civil Procedure, Poland) (Dz. U. 1964, No 43, position 296) ('the Polish Code of Civil Procedure').

[19] These elements can be inferred from Articles 43a to 43d of zákon č. 233/1995 Z. z. o súdnych exekútoroch a exekučnej činnosti (Exekučný poriadok) (Law No 233/1995 Rec., on bailiffs and enforcement procedures, Enforcements Code, Slovakia), of 14 September 1995 (čiastka 80/1995) ('the Slovakian Enforcements Code').

[20] Pietzner, R., Möller, J. A., *Schoch/Schneider, Verwaltungsrecht VwGO*, 44th edit. supplement to March 2023, VwGO §172, paragraph 19.

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2. PUNITIVE INSTRUMENTS

17. In **Demark** (civil and administrative procedures), a deliberate breach of the obligations contained in interim measures may incur a sanction in the form of a fine or term of imprisonment. [21] Therefore, these are punitive measures.

3. DUAL-FUNCTION INSTRUMENTS

18. Note that **Germany, Estonia** and **Poland** provide for both periodic penalty payments and fines in their legal systems. This is the reason why those three Member States appear both in the subsection on coercive instrument and in this subsection.

19. In **Germany** (civil procedure), fines ('Ordnungsgeld') have a dual function: aside from their preventive function as a coercive measure intended to avoid future breaches, they also have a punitive function, similar to a penalty. [22]

20. In **Estonia** (administrative procedure), the fines imposed also have a dual function: coercive and punitive. [23]

21. In **Poland** (civil procedure), periodic penalty payments ('sumy przymusowe') are *sui generis* dual-function instruments: they exert pressure on the debtor to comply but also provide the creditor with financial relief, compensating it for having to suffer the situation caused by the non-execution of the interim measure within the prescribed period. [24]

22. As for **Greece**, the pecuniary instruments imposed (periodic penalty payments or fines) are generally referred to as a 'means of coercion' or an 'indirect means of enforcement' but they also have a punitive function. [25]

B. PERIODIC PENALTY PAYMENTS OR FINES COUPLED WITH INTERIM MEASURES

23. From the outset, it should be noted that none of the legal systems of the Member States examined allows periodic penalty payments or fines to be imposed as interim

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21 Article 430(1) of the Retsplejeloven (Law on the administration of justice, Denmark), LBK nr. 1655 of 25 December 2022 (Codification Order No 1655 of 25 December 2022) ('the Danish Law on the administration of justice'). We should point out that in Denmark, the Law on the administration of justice governs both civil procedure and administrative procedure.

22 Bundesverfassungsgericht (Federal Constitutional Court, Germany), order of 4 December 2007, 1 BvR 1200/04, paragraph 11 and Bundesgerichtshof (Federal Court of Justice, Germany), order of 23 October 2003, I ZB 45/02, paragraphs 15 and 16.

23 Court of Cassation (France) 27 October 2020, 3-19-1656, EE:RK:2020:3.19.1656.18919 (paragraphs 18, 20 and 21).

24 Those elements can be deduced from Articles 756, 1050[1] and 1051[1] of the Polish Code of Civil Procedure.

25 Κράνης Δ., Προσωρινή Διαταγή, Ανάκληση και Μετενέργεια των Ασφαλιστικών Μέτρων, Εκδόσεις Σάκκουλα, 2013, σ. 34 (available on sakkoulas-online); Aerios Pagos (Court of Cassation, Greece), decision 1291/2019 of 24 October 2019; Monomeles Protodikeio Athinon (Court of First Instance (single judge), Athens, Greece) decision 11936/1998, available on Nomos.

[…]

measures. In fact, in the legal systems studied, the provisions on periodic penalty payments and fines are generally part of the rules relating to enforcement, [26] which are, themselves, separate to the rules on interim measures. Accordingly, as regards granting interim measures, pecuniary instruments only constitute a means of enforcing the obligations contained in those measures.

24. Although in some national legal systems, periodic penalty payments may be imposed together with interim measures to ensure that they are implemented (1), other legal systems use fines for that purpose (2). Lastly, there may be provision for both periodic penalty payments and fines in that context (3).

1. Member States providing for periodic penalty payments coupled with interim measures

25. In **Spain** (administrative procedure), [27] in **France** (civil and administrative procedure), [28] in **Italy** (administrative procedure) [29] and in the **Netherlands** (administrative procedure), [30] the possibility to couple periodic penalty payments with interim measures is available for any type of obligation contained in an interim measure, whether pecuniary or otherwise, to do or refrain from doing something, and whether or not it is personal.

26. In **Italy** (civil procedure) [31] and in the **Netherlands** (civil procedure), [32] it is only possible to couple periodic penalty payments with interim measures containing non-pecuniary obligations, namely obligations to do or refrain from doing something in order to ensure that they are enforced.

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26 In some of the Member States studied, there is a specific code of enforcement procedures (Estonia, France and Slovakia).

27 That is made clear by a combined reading of Articles 134 et 112(b) of Ley 29/1998 reguladora de la Jurisdicción Contencioso-administrativa (Code of Administrative Court Procedure) of 13 July 1998 (BOE No 167 of 14 July 1998, p. 23516) ('the Spanish Code of Administrative Procedure'). It is, however, worth noting that, in administrative procedure, the ability to attach periodic penalty payments to interim measures is purely theoretical. There is no case-law on the subject.

28 Articles 484 and 491 of the French Code of Civil Procedure; Article L. 521-2 of the French Code of Administrative Justice.

29 Article 114 of decreto legislativo n. 104 – Attuazione dell'articolo 44 della legge 18 giugno 2009, n. 69, recante delega al governo per il riordino del processo amministrativo (Legislative Decree No 104 on the implementation of Article 44 of Law No 69 of 18 June 2009 delegating powers to the government to reorganise administrative procedure) of 2 July 2010 (GURI No 156 of 7 July 2010) ('the Italian Code of Administrative Procedure').

30 Article 8:84(5) and Article 8:72(6) of the Algemene wet bestuursrecht (General law on administrative law, the Netherlands) of 4 June 1992 (Stb. 1992, No 315) ('the Dutch Code of Administrative Procedure').

31 Article 614-bis of regio decreto n. 1443 – Codice di procedura civile (Royal Decree No 1443 – Code of Civil Procedure, Italy) of 28 October 1940 (GURI No 253 of 28 October 1940) ('the Italian Code of Civil Procedure').

32 Articles 223, 254 and 611a of the Wetboek van Burgerlijke Rechtsvordering (Code of Civil Procedure, the Netherlands) ('the Dutch Code of Civil Procedure'). Article 8:84(5) and Article 8:72(6) of the Dutch Code of Civil Procedure.

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27. In **Spain** (civil procedure), [33] the ability to impose periodic penalty payments to ensure the enforcement of interim measures is limited to personal obligations to do something or to refrain from doing something.

28. In **Portugal** (civil and administrative procedures), [34] periodic penalty payments may be imposed to enforce interim measures consisting exclusively of personal obligations to do something.

2. MEMBER STATES PROVIDING FOR PERIODIC PENALTY PAYMENTS COUPLED WITH INTERIM MEASURES

29. In **Slovakia** (civil procedure), [35] it is possible to impose a fine to ensure performance of any type of obligation contained in an interim measure.

30. However, in **Denmark** (civil and administrative procedure), [36] only interim measures containing non-pecuniary measures, namely obligations to do something or to refrain from doing something, may be coupled with fines.

3. MEMBER STATES PROVIDING FOR BOTH PERIODIC PENALTY PAYMENTS AND FINES TO ENFORCE INTERIM MEASURES

31. Note that **Germany**, **Estonia**, **Greece** and **Poland** provide, in their legal systems, for both periodic penalty payments and fines to enforce interim measures.

32. Accordingly, in **Germany** (civil procedure), interim measures can be coupled with both a periodic penalty payment and a fine. On the one hand, periodic penalty payments may be imposed only to enforce interim measures containing personal

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[33] It is clear from a combined reading of Articles 709, 710 and 738 of Ley 1/2000 de Enjuiciamiento Civil (Law 1/2000 relating to the Code of Civil Procedure) of 7 January 2000 (BOE No 7, 8 January 2000, p. 575) ('the Spanish Code of Civil Procedure') and the order of the Audiencia Provincial de Barcelona (Provincial Court, Barcelona, Spain) of 26 January 2006, No 697/2005, (ECLI:ES:APB:2006:8610A). See also, Pérez Urueña, A.A., 'Las multas coercitivas en la ejecución de obligaciones de hacer y no hacer', *Diario La Ley, Práctica de Tribunales*, No 120, May-June 2016.

[34] Article 365(2) of the Código de Processo Civil (Code of Civil Procedure, Portugal) of 26 June 2013 (Law No 41/2013, *Diário da República,* No 121/2013) ('the Portuguese Code of Civil Procedure') and 829(A)(1) of the Portuguese Civil Code; Articles 168 and 169 of the Código de Processo nos Tribunais Administrativos (Code of Administrative Court Procedure, Portugal) of 22 February 2002 (Law No 15/2002, *Diário da República,* No 45/2002) ('the Code of Procedure before the Portuguese Administrative Courts').

[35] Article 43a(1)(a) of Zákon č. 160/2015 Z. z., Civilný sporový poriadok (Law No 160/2015 Rec., Code of Civil Procedure) of 21 May 2015 (čiastka 51/2015). Additionally, it should be specified that Slovak administrative procedure does not provide for interim measures.

[36] Article 430(1) of the Danish Law on the administration of justice.

[…]

obligations to do something. [37] On the other hand, fines are a means of enforcing compliance solely with obligations not to do something. [38]

33. In **Germany** (administrative procedure), there is also the possibility to use periodic penalty payments coupled with interim measures in favour of public authorities is allowed for any type of non-pecuniary obligation, namely obligations to do something or not to do something. [39] Also, periodic penalty payments may be imposed on an administrative authority for non-compliance with judgments ordering the adoption of a specific administrative act or elimination of the consequences of executing a contested administrative act or even interim measures relating to such obligations. [40] This type of periodic penalty payment applies, by analogy, to other forms of obligation and instruments authorising enforcement. [41]

34. In **Estonia** (civil procedure), periodic penalty payments may be coupled with interim measures containing a personal obligation where the debtor is in breach of that obligation by failing to supply information necessary to an enforcement procedure or where a third party responsible for the debtor refuses, without justification, to enforce a seizure order, or in a case of improper enforcement. [42] In administrative proceedings, an administrative court may impose a fine for non-compliance with non-pecuniary obligations contained in the interim measure. [43]

35. In **Greece** (civil and administrative procedures), [44] note that the Code of Civil Procedure provides for 'pecuniary sanctions' which, according to the type of breach

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37 Paragraph 888 de la Zivilprozessordnung (Code of Civil Procedure, Germany) of 1 August 1895 (RGBl. No 113/1895) ('the German Code of Civil Procedure'). See also, Bundesgerichtshof (Federal Court of Justice, Germany), order of 8 November 2001, IX ZB 44/01.

38 Paragraph 890 of the German Code of Civil Procedure. See also, Sturhahn, M., *Schuschke/Walker, Vollstreckung und vorläufiger Rechtsschutz*, 6th edit., 2016, §890 ZPO, paragraph 1; Lugani, K., *Prütting/Gehrlein, ZPO*, 11th edit., 2019, ZPO §890, paragraph 3.

39 Paragraph 169 of the Verwaltungsgerichtsordnung (Code of Contentious Administrative Procedure, Germany) of 19 March 1991 (BGBl. 1991 I, p. 686) ('the German Code of Administrative Procedure'). See also, Heckmann, D., *Sodan/Ziekow, Verwaltungsgerichtsordnung*, 5th edit., 2018, VwGO §172, paragraphs 29 to 52; Pietzner, R./Möller, J. A., *Schoch/Schneider, Verwaltungsrecht VwGO*, 44th edit., supplement to March 2023, VwGO §172, paragraphs 14 to 24.

40 Paragraph 172 of the German Code of Administrative Procedure, read in conjunction with Paragraphs 113 and 123 thereof.

41 In particular, the instruments authorising enforcement provided for in Paragraph 168 of the German Code of Administrative Procedure; for further details see Heckmann, D., *Sodan/Ziekow, Verwaltungsgerichtsordnung*, 5th edit., 2018, VwGO §172, paragraphs 29 to 52; Pietzner, R./Möller, J. A., *Schoch/Schneider, Verwaltungsrecht VwGO*, 44th edit., supplement to March 2023, VwGO §172, paragraphs 14 to 24.

42 Articles 26, 26[1] and 183 of the Estonian Code of Enforcement Procedures.

43 Articles 248 and 254(1) of the halduskohtumenetluse seadustik (Estonian code of administrative procedure in contentious proceedings, Estonia) of 27 January 2011 (RT I, 23.02.2011, 3; 11.03.2023, 22) ('the Estonian Code of Administrative Procedure').

44 It is worth noting that, although Nomos 2717/1999 Kodikas Dioikitikis Dikonomias (Law 2717/1999, Code of Administrative Procedure, Greece) (FEK A' 97/17.5.1999) does not allow for the imposition of periodic penalty payments, the Proedriko Diatagma 503/1985 Kodikas Politikis Dikonomias (Presidential Decree 503/1985, Code of Civil Procedure, Greece) (FEK A΄ 182/24.10.1985) ('the Hellenic Code of Civil Procedure') applies, by analogy, to the enforcement of judgments.

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of obligation, may be either periodic penalty payments [45] or fixed-rate fines. [46] These pecuniary instruments may be coupled with interim measures containing personal obligations to do something and obligations not to do something. [47]

36. Finally, in **Poland** (civil procedure [48]), periodic penalty payments may be coupled with interim measures containing all types of obligations. [49] Fines may be imposed to guarantee the execution of interim measures containing personal obligations or obligations not to do something. [50]

C. Effects of Terminating the Main Proceedings

37. To ascertain the effects of closing the main proceedings on interim measures coupled with periodic penalty payments or fines, we need, first, to identify the causes and effects of closing the main proceedings (1.), second, to address the consequences of termination on interim measures (2.) and on the periodic penalty payments and fines coupled with them (3.).

1. Causes of termination of the main proceedings

38. Apart from conventional cases where the termination of the main proceedings is the result of a first instance or higher court judgment, the main causes for terminating an action are its discontinuance, its lapse due to a failure to proceed or the expiry of the summons. Ancillary to the action, termination may occur by reason of a settlement, abandonment of a right of action, admission of an opponent's case or, in actions not assignable on succession, the death of a party.

39. Given the scope of the request, this research note focuses mainly on the discontinuance of proceedings (both a withdrawal from proceedings and waiver of the right of action). Additionally, as proceedings are often discontinued as the result of an amicable agreement between the parties or a settlement putting an end to the dispute, it is also helpful to look at the elements of response relevant to that aspect.

40. It is clear from our research that the effects of terminating the main proceedings are similar in all the Member States examined. Accordingly, in the legal systems studied, the effect of discontinuing an action is to end the dispute in the main proceedings, meaning that it will be possible to bring fresh proceedings at a later

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45 Aerios Pagos (Court of Cassation, Greece), decision 1291/2019 of 24 October 2019.

46 Efeteio Peiraios (Court of Appeal, Piraeus, Greece), decision 92/2021 (available on NOMOS).

47 Articles 700(1), 946 and 947 of the Hellenic Code of Civil Procedure. See also, Efeteio Peiraios (Court of Appeal, Piraeus, Greece), decision 92/2021; Monomeles Protodikeio Athinon (Court of First Instance (single judge), Athens, Greece), decision 9998/2015 of 9 December 2015; Monomeles Protodikeio Chiou (Court of First Instance (single judge), Chios, Greece), decision 110/2015 of 7 August 2015 (available on NOMOS); Γεωργίου Κ., Η αρχή της μη ικανοποιήσεως της ασφαλιστέας αξιώσεως στο πεδίο του Ιδιωτικού Δικαίου, Εκδόσεις Σάκκουλα, 2019, σ. 143 (available on sakkoulas-online).

48 We should note that Polish administrative procedure makes no provision for pecuniary instruments as a means of enforcing interim measures.

49 Articles 756, 1050 and 1051 of the Polish Code of Civil Procedure.

50 Articles 1050(1) and 1051(1) of the Polish Code of Civil Procedure.

[…]

date if the action itself has not otherwise been terminated. However, where an action has been discontinued, this withdrawal of the action is final and binding and is *res judicata* in the same way as a final judgment. The parties can also put an end their dispute amicably, by agreement (court settlement). In that case, they may either apply for their agreement to be approved by the competent court, which will issue a decision which has the force of res judicata, or discontinue the proceedings, resulting in the case in the main proceedings being struck out.

41. It is worth noting, more specifically, that in the **Netherlands** [51] and in **Portugal**, [52] the procedural effects of terminating the proceedings following an agreement concluded between the parties may be decided by the parties themselves. However, in the other legal systems studied, the agreement between the parties will have similar procedural effects to a withdrawal from the action, if the agreement is approved by the court (court settlement), or to discontinuance of the proceedings because there is no longer a matter in dispute to sustain the proceedings.

2. Effects of terminating the main proceedings on interim measures

42. In the vast majority of the legal systems studied, the end of the main proceedings implies the interim measures cease to exist *ex tunc*. The only Member States departing from this general principle are **Greece** and **Slovakia**.

[51] Mulder, R.A., Vreede, S.A., *Sdu Commentaar Burgerlijk Procesrecht*, art. 246 Rv, aant. 1 (online, last updated on 20 January 2022).

[52] Articles 283 and 284 of the Portuguese Code of Civil Procedure. The procedural effects of an amicable agreement reached by the parties are determined by the agreement. Accordingly, the proceedings may be terminated by discontinuance, where the parties have reached full agreement or continue for a part of the dispute on which the parties have not reached agreement.

[…]

43. In **Germany**, [53] **Denmark**, [54] **Spain**, [55] **Estonia**, [56] **France**, [57] **Italy**, [58] the **Netherlands**, [59] **Poland** [60] and **Portugal**, [61] the end of the main proceedings following a discontinuance or court settlement will cause the interim measures to lapse with retroactive effect. That is explained, inter alia, by the ancillary and provisional nature of the interim measures compared to the main proceedings.

44. However, in **Greece**, according to legal commentators and the case-law, setting aside interim measures has nothing to do with the lawfulness of those measures, but rather concerns the validity of them being maintained for the future. [62] Accordingly, where interim measures are set aside by reason of a contrary decision in the main proceedings, it is generally accepted that their withdrawal will only be effective *ex nunc*, [63] except in specific cases. [64] That outcome is justified for reasons

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53 An interim measure will only be annulled pursuant to an application (Paragraphs 927(1) and 936 of the German Code of Civil Procedure).

54 Article 426 of the Danish Law on the administration of justice.

55 Articles 731 and 745 of the Spanish Code of Civil Procedure. In agreement, see Ortells Ramos, M. (dir.) e.a., *Derecho procesal civil*, Aranzadi, 18th edit., 2019, p. 743 and 744; Montero Arcoa. J., Gómez Colomer, J.L., Barona Vilar, P.S., Calderón Cuadrado, M.P, *Derecho jurisdiccional II, Proceso civil*, Tirant lo Blanch, 27th edit., 2019, p. 740.

56 Article 386(4) of the tsiviilkohtumenetluse seadustik (Code of Civil Procedure) of 20 April 2005 (RT I 2005, 26, 197; 11.03.2023, 34) ('the Estonian Code of Civil Procedure') (see also the unofficial translation into English). See also, Riigikohus (Supreme Court, Estonia), judgment of 30 April 2014, 3-2-1-28-14, EE:RK:2014:3.2.1.28.14.268, paragraph 16.

57 Article 488 of the French Code of Civil Procedure; Articles L.521-1 and L. 521-2 of the French Code of Administrative Justice.

58 Tribunale ordinario di Milano (District Court, Milan, Italy), judgment of 9 February 2021.

59 Hoge Raad (Supreme Court, the Netherlands), judgment of 16 November 1984, ECLI:NL:HR:1984:AG4901 (Ciba Geigy/Voorbraak), paragraph 3.4, *RvdW* 1984, 190. In agreement, see De Bruin, P., Groene Serie Burgerlijke Rechtsvordering, art. 257 Rv, aant. 4 (online, last updated on 24 August 2023); and Beekhoven van den Boezem, M.B., *De dwangsom in het burgerlijk recht (Burgerlijk Proces & Praktijk nr. V) (diss. Groningen)*, Deventer: Kluwer 2007, p. 215.

60 Article 744 of the Polish Code of Civil Procedure.

61 Article 373(1)(c) of the Portuguese Code of Civil Procedure and Article 123 of the Code of Procedure before the Portuguese Administrative Courts; Supremo Tribunal de Justiça (Supreme Court, Portugal), judgment of 21 February 2019, in case 47/14.0T8MNC-D.G1.S1. In agreement, see Tribunal da Relação de Lisboa (Court of Appeal, Lisbon, Portugal), judgment of 5 November 2009, No 661/08.2YYLSB-B.L1-2; Tribunal da Relação do Porto (Court of Appeal, Porto, Portugal), judgment of 13 July 2016, No 2727/13.8YYPRT; Tribunal da Relação de Guimarães (Court of Appeal, Coimbra, Portugal), judgment of 22 September 2021, No 5315/17.6T8VNF-A.G1.

62 For civil procedure, see Κατσιρούμπας Π., 'Η προσωρινότητα της δικαστικής κρίσης στην πολιτική δίκη', σε: Πολιτική, Ποινική Και Διοικητική Δίκη: Αποκλίσεις Και Συγκλίσεις, Αθήνα, Νομική Βιβλιοθήκη, 2021, σελ. 49. As an example, see Efeteio Athinon (Court of Appeal, Athens, Greece), decision 4309/1992, available on Nomos. For administrative procedure, see Αρχοντάκη Α., Αίτηση ανάκλησης αποφάσεων στην προσωρινή δικαστική προστασία, Αθήνα, Νομική Βιβλιοθήκη, 2018, σελ. 197-198.

63 Δεληκωστόπουλος Ι., Η προσωρινή διαταγή κατά τον ΚΠολΔ, 2019, paragraph 3, σελ. 60-61 (available on sakkoulas-online). As an example, see Efeteio Athinon (Court of Appeal, Athens, Greece), decision 4309/1992.

64 Article 730(2) of the Hellenic Code of Civil Procedure, for example, provides for retroactive effects. In connection with a provisional award of monies, where a final decision in the main proceedings rejects the action on the merits, the judge in the main proceedings or the judge who made the provisional award of monies will order those monies to be reimbursed.

[…]

of legal certainty given that enforcement of the decision granting the interim measures has already produced effects in law.

45. That is also the case in **Slovakia**. Where interim measures are withdrawn when main proceedings end, the effects of these measures will cease non-retroactively (*ex nunc* [65]).

46. Although, in the legal systems studied, the effects of the termination of the main proceedings on interim measures are often governed by legislative provisions and case-law, that is not necessarily true in the case of periodic penalty payments and fines coupled with those interim measures.

3. EFFECTS *EX NUNC* OR *EX TUNC* OF TERMINATING THE MAIN PROCEEDINGS ON PERIODIC PENALTY PAYMENTS OR FINES COUPLED WITH INTERIM MEASURES

47. To determine the effects of terminating the main proceedings on periodic penalty payments or fines coupled with interim measures, we will analyse all the relevant information taken from the civil and administrative procedure of Member States in the light of the type of pecuniary instrument provided for. We will, in turn, look at the information regarding coercive pecuniary instruments (a.), punitive pecuniary instruments (b.) and pecuniary instruments with a dual function (c.).

a) COERCIVE PECUNIARY INSTRUMENTS

48. Among the national legal systems providing for coercive periodic penalty payments or fines to enforce interim measures, five legal systems (**Spain**, **France**, **Italy**, the **Netherlands** and **Portugal**) have shown themselves more in favour of non-retroactive effects of the termination of main proceedings on these instruments (i.). Conversely, four legal systems (**Germany**, **Estonia**, **Poland** and **Slovakia**) seem to have adopted a position more favourable towards retroactive effects (ii.).

i) POSITION MORE FAVOURABLE TO EFFECTS *EX NUNC*

49. In **Spain** (civil and administrative procedures), we have not identified, in case-law, any instances where the effect of a periodic penalty payment ceased retroactively without the decision that imposed it being withdrawn or revoked by another court decision. It could therefore be deduced, *a contrario*, that a periodic penalty payment only disappears with effects *ex tunc*, where the decision has been annulled. [66]

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[65] Števček, M., Ficová, S., Baricová, J., Mesiarkinová, S., Bajánková, J. Tomašovič, M., *a kol. Civilný sporový poriadok. Komentár*. Praha: C. H. Beck, 2016, p. 1136.

[66] With regard to civil procedure, see Audiencia Provincial de Madrid (Provincial Court, Madrid, Spain), order of 20 November 2008, No 137/2008, ECLI:ES:APM:2008:16337A and, with regard to administrative procedure, Tribunal Superior de Justicia de Cantabria (High Court of Justice, Cantabria, Spain), judgment of 29 March 2016, No 101/2015, ECLI:ES:TSJCANT:2016:215.

[…]

50. Furthermore, it appears relevant to mention the ongoing debate between legal commentators about the effects of revoking provisionally enforced judgments coupled with periodic penalty payments on appeal, that is, before they become final and binding. In that regard, most commentators take the view that, in so far as periodic penalty payments are based on the contumacy of the debtor, they cannot be affected by the revocation of a judgment on appeal. Therefore, the unrecovered portion of a periodic penalty payment remains payable by the debtor. [67]

51. As for Spanish administrative procedure, in particular, it is a matter of settled case-law that periodic penalty payments are not sanctions and are not therefore subject to the rules and guarantees governing the procedure for imposing administrative sanctions. [68] Accordingly, the rule that the provisions concerning sanctions have a retroactive effect where they favour the party committing the offence [69] does not apply to periodic penalty payments.

52. Note also that periodic penalty payments imposed according to both civil procedure and administrative procedure are paid, not to the debtor, but to the State Treasury. [70]

53. In **France** (civil procedure), the Court of Cassation has ruled on several occasions on what happens when a decision coupled with a periodic penalty payment is varied or set aside. That entails, ipso jure, due to a loss of the legal basis, the annulment of decisions taken for setting the amount of periodic penalty payments, even where they have become res judicata, and therefore, if applicable, gives rise to the right to restitution, where necessary, of the sums paid to comply with the decision setting the amount of the periodic penalty payment (effect *ex tunc*). [71]

54. Conversely, in a case where the main proceedings end because they are discontinued by the applicant, equivalent to the dispute becoming devoid of purpose (as the result of a settlement, for example), it would seem that the situation might not necessarily affect the obligation to pay the periodic penalty for the period during which the obligation has not been performed. In fact, the periodic penalty runs from the date fixed by the court that granted it until the obligation is fulfilled, unless the court decides otherwise in its unfettered discretion. As the decision imposing the periodic penalty payment is not *res judicata*, the court is entitled to reconsider the rate and duration of that periodic penalty payment. It may even decide to set it aside for the future (with effect *ex nunc*) without needing to identify

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67 Achón Bruñén, M.J., 'El arduo problema de la revocación de las sentencias ejecutadas provisionalmente', *Actualidad Civil,* No 6, March 2008, p. 523.

68 Tribunal Supremo (Supreme Court, Spain), judgment of 5 June 2018, No 1502/2017, ECLI:ES:TS:2018:2179 and Tribunal Constitucional (Constitutional Court, Spain), judgment of 14 December 1988, No 239/1988, ECLI:ES:TC:1988:239.

69 Article 26(2) of Ley 40/2015 de Régimen Jurídico del Sector Público (Law 40/2015 on the public sector legal regime) of 1 October 2015 (BOE No 236 of 2 October 2015, p. 89411).

70 Article 711(2) of the Spanish Code of Civil Procedure.

71 Court of Cassation (France), Com. Div., judgment of 3 May 2006, No 04-15.262. In agreement, see Court of Cassation (France), 2nd Civ. Div., judgment of 28 September 2000, No 98-16.175, or Court of Cassation (France), 2nd Civ. Div., judgment of 24 September 2015, No 14-14.977 and No 14-14.978 (ECLI:FR:CCASS:2015:C201356).

[…]

a cause unrelated to the debtor, taking into account, inter alia, its behaviour towards performance of its obligation. [72]

55. In proceedings involving administrative law, the Council of State (France) has ruled, in a number of judgments, on the impact on a judgment in the main proceedings of interim measures coupled with a periodic penalty payment granted by a judge. Taking a very academic approach, it must be recalled, first of all, that the purpose of a periodic penalty payment is to compel a party refusing to do so to fulfil the obligations imposed on it by decision of the court. The purpose of fixing the amount of the penalty is to set out the consequences of refusing to fulfil those obligations or to delay in so doing. A waiver of the right to receive payment of any sums resulting, where applicable, from the decision setting the amount of the periodic penalty payment does not prevent the administrative judge from setting the final amount of the payment that was imposed, once the conditions for it are met. It further stated that 'where the judge hearing applications for interim measures has, based on Article L. 521-1 of the Code of Administrative Justice, imposed an interim measure coupled with a periodic penalty payment, the delivery of a judgment in the main proceedings, putting an end to the obligation to implement that interim measure, deprives the periodic penalty payment of any legal basis for the future. However, the delivery of the judgment does not render devoid of purpose a request to set the amount of the periodic penalty payment for the period between the time-limit for meeting the interim measure (imposed in summary proceedings) and the notice to the party (subject to the periodic penalty) of the judgment issued in the main proceedings, where the measure has not been implemented during this period, or has been executed late'. [73]

56. It is important to point out a special feature of administrative periodic penalty payments compared to civil periodic penalty payments. The court can rule that part of a periodic penalty payment will be paid to the State budget rather than to the creditor. [74] That power, vested in the judge is designed to avoid undue enrichment of the creditor. [75]

57. In **Italy** (civil procedure), the Code of Civil Procedure provides that terminating proceedings causes acts done over the course of the proceedings, but not rulings on

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72 Court of Cassation (France), 2nd Civ. Div., judgment of 21 February 2019, No 17-27.900 (ECLI:FR:CCASS:2019:C200283).

73 Council of State (France), judgment of 24 May 2017, No 403569 (ECLI:FR:CECHR:2017:403569.20170524). Lastly, see Council of State (France), judgment of 6 July 2021, No 441440 (ECLI:FR:CECHS:2021:441440.20210706).

74 Article L. 911-8 of the French Code of Administrative Justice.

75 That rule has been held compliant with Article 16 of the Declaration of the Rights of Man and of the Citizen 1789, to be more specific with the 'right of individuals to an effective judicial remedy, including the right to have court decision enforced, by the Constitutional Council [(France)]' (Constitutional Council, decision of 6 March 2015, 2014-455 QPC, ECLI:FR:CC:2015:2014.455.QPC). The Constitutional Council also recalled that 'settled case-law of the Council of State [(France)] has determined that the second paragraph of Article L. 911-8 does not apply where the State is the debtor of a periodic penalty payment decided by a court' (same decision). That exclusion was restated and substantiated by the Council of State (France) in its decision of 10 July 2020, No 428409.

[…]

the merits made during those proceedings, to lose their effect. [76]The Corte suprema di cassazione (Supreme Court of Cassation) held that an order by the enforcements court determining the consequences of not complying with an obligation [77] has the substantive force of a judgment, because its content is decisive in terms of the right of a creditor to enforce the obligation. [78] Accordingly, it would seem that the effects of that order will not cease to exist retroactively once the proceedings are discontinued.

58. As for administrative procedure, our research has not provided a definitive answer to the question of what the effects are of terminating the main proceedings on periodic penalty payments coupled with interim measures. It would appear, however, that the elements drawn from civil procedure can be applied *mutatis mutandis*.

59. In the **Netherlands** (civil procedure), although there seems to be no definitive answer to the question as to when a decision granting interim measures ceases to have effect where the judgment delivered in the main proceedings is to the contrary, the Hoge Raad (Supreme Court) and legal commentators appear to support an interpretation whereby the decision granting the interim measures will cease to have effect from the date of delivery of the judgment in main proceedings. [79] If, where an interim measure coupled with a periodic penalty payment has been granted, the court dealing with the substance of a case concludes that the creditor's application should not have been granted, the judgment issued in the main proceedings will, as a rule, be effective *ex nunc*, as regards the decision granting the interim measures. [80]

60. In terms of whether a periodic penalty coupled with interim measures is payable where the court dealing with the substance of a case concludes that the creditor's summary application should not have been granted, the debtor of the periodic penalty will not be required to pay that part of the penalty incurred after the delivery of the judgment in the main proceedings. [81] As for that part of the periodic penalty incurred prior to delivery of the judgment in the main proceedings, which

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76 Article 310 of the Italian Code of Civil Procedure.

77 Article 612 of the Italian Code of Civil Procedure.

78 Corte suprema di cassazione (Supreme Court of Cassation, Italy), judgment No 3722 of 9 March 2012.

79 De Bruin, P., Groene Serie Burgerlijke Rechtsvordering, art. 257 Rv, aant. 4 (online, last updated on 24 August 2023); Van Schaick, A.C., *Mr. C. Assers Handleiding tot de beoefening van het Nederlands Burgerlijk Recht. Procesrecht. 2. Groningen)*, Deventer: Wolters Kluwer 2016, paragraph 13.9, paragraph 236 (online, last updated on 6 April 2016); Boonekamp, R.J.B., *Mr. C. Assers Handleiding tot de beoefening van het Nederlands Burgerlijk Recht. Procesrecht. 6. Het kort geding*, Deventer: Wolters Kluwer 2020, paragraph 2.2, paragraph 34 (online, last updated on 1 December 2019). See also, for example, Hoge Raad (Supreme Court, the Netherlands), judgment of 29 June 2001, ECLI:NL:HR:2001:AB2549.

80 De Bruin, P., Groene Serie Burgerlijke Rechtsvordering, art. 257 Rv, aant. 4 (online, last updated on 24 August 2023).

81 See footnote 79.

[…]

contradicts the decision granting the interim measures, it is settled case-law of the Hoge Raad (Supreme Court) that the penalty, once incurred, will remain payable. [82]

61. In administrative procedure, neither case-law nor legal commentators seem to have had occasion to form a view on whether, as in summary proceedings, that part of the periodic penalty incurred prior to delivery of the decision in the main proceedings (which contradicts the decision granting the interim measures) is still payable, or on the effects of the creditor's discontinuance of the proceedings on the periodic penalty payment, in such a case.

62. In **Portugal** (civil and administrative procedures), failing a clear position in the case-law, [83] the Supremo Tribunal de Justiça (Supreme Court) nevertheless held that, where there is no valid legal basis for the action on the merits, there can be no valid legal basis for recognising an interim right in the summary proceedings. [84] Concurring with that ruling, the Supremo Tribunal de Justiça (Supreme Court) held that interim measures were created to serve the purpose of the main proceedings, which determine the expiry of these measures, in particular, where the main proceedings are held to lack merit, causing the retroactive expiry of the decision granting the interim measures, rendering that decision ineffective.

63. Nevertheless, legal commentators emphasise that the payment of periodic penalties is linked solely to non-performance of the obligation. The only circumstance creating the obligation to pay the periodic penalty is non-compliance with the interim measure. The success of the creditor in the main proceedings does not detract from the contumacy of the debtor in not fulfilling its obligation. [85]

64. Lastly, note that half of the periodic penalty payment will be paid to the creditor and the other half to the State, represented by the State Counsel's Office. [86]

ii) POSITION MORE FAVOURABLE TO EFFECTS *EX NUNC*

65. In **Germany** (civil and administrative procedures), [87] in connection with an enforcement order which has been annulled, in particular, where it has been annulled as the result of a court settlement or a waiver of rights by a creditor, and

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82 Hoge Raad (Supreme Court, the Netherlands), judgment of 16 November 1984, Ciba Geigy v Voorbraak ECLI:NL:HR:1984:AG4901, point 3.4, *RvdW* 1984, 190 and judgment of 22 December 1989, Kempkes v Samson ECLI:NL:HR:1984:AG4901, point 3.2, *RvdW* 1990, 18.

83 Considering payment of the non-discretionary pecuniary sanction enforceable up to the moment when the decision in the main proceedings becomes final and binding. See Tribunal da Relação do Porto (Court of Appeal, Porto), judgment of 13 July 2016, in case 2727/13.8YYPRT.

84 Supremo Tribunal de Justiça (Supreme Court, Portugal), judgment of 21 February 2019, in case 47/14.0T8MNC-D.G1.S1.

85 Albuquerque P., O direito ao – De facto execution – Duty to abide by the maxim nemo ad factum cogi potest – Order in summary proceedings, periodic penalty payment and surety, p. 9022 of the RIBD, Ano 2 (2103).

86 Article 829(A)(3) of the Portuguese Civil Code and Article 24 of the Portuguese Code of Civil Procedure.

87 The provisions of the German Civil Code on enforcement apply *mutatis mutandis* in German administrative proceedings (first sentence of Paragraph 167(1) of the German Code of Administrative Procedure).

[…]

the periodic penalty payment has already been recovered, the amounts already received from the debtor must be reimbursed by the State. [88] Because a periodic penalty payment is not punitive, the creditor must be able to waive its rights under a decision that is not yet final and binding, and not to enforce the obligation in question. [89]

66. However, repayment of a periodic penalty payment is no longer possible where the instrument granting authority to enforce was not annulled, and the debtor only fulfilled its obligation once the then final and binding, quantified periodic penalty had been paid. [90] Otherwise, if the debtor could be certain of reimbursement at a later date, the periodic penalty would be much less powerful as an inducement to execute the obligation. [91]

67. In **Estonia** (civil procedure), enforcement proceedings are clearly differentiated from proceedings on the merits. That is why only the validity of an enforcement order and not its lawfulness is important in the enforcement proceedings. Thus, an enforcement order can no longer be enforced if it loses its validity, which presupposes the cancellation of its enforceability. Furthermore, although the fact that an enforcement order is no longer valid does prevent enforcement of periodic penalty payments which have already been imposed, the validity of those penalty payments is not directly affected, so the enforcement order and the periodic penalty payments must be annulled separately.

68. Therefore a periodic penalty payment coupled with an interim measure is not automatically invalidated by the termination of the main proceedings. However, no periodic penalty payment can be enforced where the enforcement order has been invalidated. [92] Accordingly, invalidating the enforcement order prevents the enforcement of periodic penalty payment which has already been imposed.

69. However, civil procedure does require the courts to make express provision in that regard in the order closing the proceedings. Non-compliance with that obligation is a material procedural defect [93] that provides a basis for annulling the order and issuing a new decision. [94]

70. In **Poland** (civil procedure), the question of what effect termination of the main proceedings has on coercive fines coupled with interim measures is not covered by

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88 Lugani, K., *Prütting/Gehrlein, ZPO*, 11th edit., 2019, ZPO §888, paragraph 49; Gruber, P., *Münchner Kommentar zur Zivilprozessordnung*, 6th edit., 2020, ZPO §888, paragraph 32.

89 Bundesarbeitsgericht (Federal Labour Court, Germany), judgment of 12 December 1989, 5 AZR 53/89; Kießling, E., *Saenger, Zivilprozessordnung*, 10th edit., 2023, ZPO §888, paragraph 22.

90 Gruber, P., *Münchner Kommentar zur Zivilprozessordnung*, 6th edit., 2020, ZPO §888, paragraph 32.

91 Bundesgerichtshof (Federal Court of Justice, Germany), order of 6 September 2017, I ZB 42/17, paragraphs 13 and 14.

92 Article 26[1](10) of the Estonian Code of Enforcement Procedures.

93 Riigikohus (Supreme Court, Estonia), judgment of 30 April 2014, 3-2-1-28-14, EE:RK:2014:3.2.1.28.14.268, paragraph 16.

94 Article 656(2) and (3) and Article 692(1) of the Estonian Code of Civil Procedure.

[…]

any legislative provision in the Code of Civil Procedure, nor has it been decided by case-law or discussed by legal commentators.

71. Admittedly, some provisions of the Code of Civil Procedure, not within the framework of interim measures, do provide that 'if the debtor fulfils the obligation or where there is a decision to dismiss, fines not been paid by that date will be annulled'. [95] However, it should be noted that the 'decision to dismiss' referred to in the Code of Civil Procedure is the decision putting an end to the enforcement proceedings and not the decision terminating the main proceedings. Accordingly, once the decision to dismiss becomes final, the decision imposing a fine will become lose its validity [96] Conversely, it would appear that fines paid before enforcement of the action or the decision to dismiss will not be refundable.

72. Note that those fines are also paid to the State.

73. In **Slovakia** (civil procedure), we can infer the effects of terminating the main proceedings on fines coupled with interim measures from the provisions of the Code of Civil Procedure and the Enforcements Code. Thus, if the debtor complies with the obligation contained in the interim measure or if the enforcement proceedings have been brought to a close, the enforcement of fines imposed during the proceedings must be immediately suspended, even if the amounts due have not been fully recovered. The unrecovered portion of the fines will then be irrecoverable. [97] Note that the enforcement procedure is closed, in particular, if the enforcement order has been annulled. To be clear, the enforcement order, an order granting interim measures, will be annulled if the reasons for adopting the interim measures no longer exist or if there is no further purpose in ruling on the merits of the case, especially where the applicant has withdrawn its application. Withdrawal must be full and not merely partial.

74. We need again to emphasise that, where an obligation contained in an interim measure has been fulfilled, the fine has achieved its purpose and it is no longer necessary to demand that the amounts payable be recovered. [98]

b) PUNITIVE INSTRUMENTS

75. In **Denmark** (civil and administrative procedures), there appears to be no case-law on the effects of ending the main proceedings on fines imposed to enforce interim measures. The courts are generally reticent about imposing sanctions for a breach

[95] Third sentence of Article 1052 of the Polish Code of Civil Procedure and Sąd Okręgowy w Toruniu (Regional Court, Torun, Poland), order of 8 February 2017, VI Gz 22/17.

[96] Wiśniewski, T. (red.), *Kodeks postępowania cywilnego. Komentarz*. Tom IV. Artykuły 730–1088, WKP 2021.

[97] Article 43d(3) of the Slovak Enforcements Code.

[98] Articles 43a to 43d were added to the Enforcements Code by Law No 48/2023, which came into force on 1 April 2023. As that is a recent addition, there is not yet any case-law or commentary from legal writers on these provisions.

[…]

of obligations contained in interim measures and generally wait for a decision on the merits in the main proceedings. [99]

76. Note also that fines are paid to the National Exchequer. [100]

c) DUAL FUNCTION PECUNIARY INSTRUMENTS

77. As previously stated, in three legal systems, interim measures can be coupled with a pecuniary instrument (periodic penalty payment or fine) with a dual function. The fines provided for in **Germany, Estonia** and **Greece** are dual-function: coercive and punitive. The same is true of periodic penalty payments in **Greece**. Periodic penalty payments in **Poland** are also dual-function: coercive and compensatory.

i) POSITION MORE FAVOURABLE TO EFFECTS *EX NUNC*

78. In **Estonia** (administrative procedure), the Riigikohus (Supreme Court) had occasion to rule on the legality of a fine imposed for failure to fulfil an obligation contained in an interim measure where the decision on the merits was in contradiction with that measure. In that case, the proceedings involved an Ethiopian national whose application for international protection had been denied by the Politsei – ja Piirivalveamet (Office of the Police and Border Guards) ('the Office'). The foreign citizen challenged the rejection of his application and the courts issued an interim order prohibiting his expulsion. Nevertheless, the Office deported him to his country of origin, on the basis of which the Office subsequently received a fine [101] Ultimately, the refusal was upheld by the courts, then challenged on appeal by the Office before the Riigikohus (Supreme Court), which rejected the appeal. The Riigikohus (Supreme Court) nevertheless upheld the lawfulness of the fine imposed on the Office, ruling that: '[…] the function of the fine is both an inducement and a punishment. Although the fine imposed did not exert sufficient pressure on the Office to comply with the order granting the interim measures, it will help avoid a similar situation arising in the future'. [102]

79. The dual function of that fine, recognised by the Riigikohus (Supreme Court, Estonia) makes it an exception in the Estonian legal system. That is explained by the fact that, in administrative proceedings, the fine is directed first against a public authority in its relationship to a private person. That differs from the general rule of enforcements law in which an enforcement measure is only possible if the underlying enforcement order remains valid.

80. In **Greece** (civil procedure), the Aerios Pagos (Court of Cassation) held that the right of a creditor to demand payment of a periodic penalty coupled with interim

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[99] Petersen, C.S et al., *Judicielle forbud/påbud og immaterialretsproces*, 1st ed., 2015, Karnov Group, p. 130 et seq.

[100] Møller, J. et al, *Kommenteret Retsplejelov*, Bind I, 10th ed., 2018, DJØF Forlag, p. 1293.

[101] In accordance with Article 248 and Article 254(1) of the Estonian Code of Administrative Procedure.

[102] Riigikohus (Supreme Court, Estonia), order of 27 October 2020, 3-19-1656, ECLI:EE:RK:2020:3.19.1656.18919, paragraphs 18, 20 and 21.

[…]

measures does not expire after the revocation of the decision granting those measures, which enjoys the status of *res judicata* until revocation, because the obligation contained in that interim measure exists during the period prior to its revocation. [103] The interim judicial protection requested by the creditor and the periodic penalty payment imposed will continue to be valid. The creditor may therefore request payment of a periodic penalty payment for the period up to the revocation of the decision granting the interim measures. [104] In an identical ruling, the Efeteio Peiraios (Court of Appeal, Piraeus) revoked a decision granting interim measures but still maintained the effects *ex nunc* of the periodic penalty payment against the debtor for failing to fulfil the obligation contained in those measures. [105]

81. Our research shows that, in administrative proceedings, the Symvoulio tis Epikrateias (Council of State, Greece) has not yet had occasion to rule on the consequences of terminating the main proceedings on interim measures coupled with a periodic penalty payment. In that regard, it should be remembered that the revocation of interim measures is, as a rule, effective *ex nunc* for reasons of legal certainty and due to limited *res judicata*.

82. In **Poland** (civil procedure), there are no provisions in the Code of Civil Procedure, no relevant case-law and no debate among legal writers about the effects of terminating the main proceedings on periodic penalty payments coupled with interim measures.

83. It should be remembered that periodic penalty payments are *sui generis* instruments with a dual function (coercive and compensatory) and that they are paid in favour of the creditor. Despite the debtor performing the obligation, the creditor may, within one month of its performance, [106] enforce payment of the periodic penalty payment it was granted. [107] The amount granted and paid is never refundable. [108]

ii) POSITION MORE FAVOURABLE TO EFFECTS *EX NUNC*

84. In **Germany** (civil procedure), where the enforcement order containing an obligation coupled with a fine expires retroactively (effect *ex tunc*), the decision imposing the fine must, as a rule, be annulled. [109] In those circumstances, the fine no longer fulfils its coercive or punitive function. [110] The enforcement order will

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[103] Aerios Pagos (Court of Cassation, Greece), decision 1291/2019 of 24 October 2019.

[104] Under Articles 696 to 698 of the Estonian Code of Civil Procedure.

[105] Efeteio Peiraios (Court of Appeal, Piraeus, Greece), decision 92/2021 (available on NOMOS).

[106] Article 1050^{1}(3) of the Polish Code of Civil Procedure.

[107] Egzekucja prowadzona na podstawie art. 1050-1051(1) k.p.c. po nowelizacji dokonanej ustawą z 16 września 2011 r., Polski Proces Cywilny 2012, No 1, p. 45 to 63.

[108] Krakowiak, M., 'Suma przymusowa według francuskiego modelu astreinte w polskim kodeksie postępowania cywilnego', *Ius est a iustitia appellatum: księga jubileuszowa dedykowana profesorowi Tadeuszowi Wiśniewskiemu*, 2017, p. 660 to 681 and p. 678.

[109] Paragraph 776 and point 1 of Paragraph 775 of the German Code of Civil Procedure; Bundesgerichtshof (Federal Court of Justice, Germany), order of 23 October 2003, I ZB 45/02, paragraphs 12 and 13.

[110] Lugani, K., *Prütting/Gehrlein, ZPO*, 11th edit., 2019, ZPO §890, paragraph 26.

[…]

expire, with effect *ex tunc,* if annulled on appeal or if withdrawn in an application to set aside. [111] Also, where the main proceedings are discontinued [112] or where the parties issue a unanimous declaration to stop the case proceeding to judgment, [113] an enforcement order, not yet final and binding, will, as a rule, expire when the main proceedings terminate. [114]

85. In addition, no fine may be imposed where the conditions for an immediate annulment of the enforcement order had already been fulfilled at the time of the failure to fulfil the obligation, even if the order had not yet been annulled at that time, but only later on. [115]

86. Accordingly, in all the above mentioned cases, where the enforcement order expires with retroactive effect, the fine cannot be maintained, even where the obligation has not been fulfilled, because the enforcement order is the basis on which the public authority is authorised to seize the debtor's assets. [116] Therefore, where the fine has been recovered, the amounts already collected from the debtor must be automatically returned, provided the decision imposing the fine has been annulled. [117] That may happen, in particular, where the application for a fine to be imposed has been withdrawn by the creditor before the decision became final and binding. [118]

87. By contrast, withdrawal of the application for the imposition of a fine or the waiver by the creditor of its rights, once the decision has become final and binding, cannot result in the annulment of the decision and repayment of the fine, because it has already been lawfully enforced and the creditor's power to act already extinguished. [119]

88. However, there are specific cases in which the fine may be maintained despite the revocation of the enforcement order. First, where the creditor issues a unilateral

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[111] Oberlandesgericht Frankfurt am Main (Higher Regional Court, Frankfurt am Main, Germany), order of 28 March 2011, 11 W 27/10 ; Kammergericht (Higher Regional Court, Berlin, Germany), order of 4 August 2003, 2 W 18/02 Kart.

[112] Lackmann, R., *Musielak/Voit, Zivilprozessordnung*, 20th edit., 2023, ZPO §890, paragraph 16.

[113] Unanimous declarations to stop the case proceeding to judgment ('beidseitige Erledigungserklärung'), lodged by both parties, will end the main proceedings without the court seised ruling on the merits [Bundesgerichtshof (Federal Court of Justice, Germany), order of 23 October 2003, I ZB 45/02, p. 13].

[114] Bundesgerichtshof (Federal Court of Justice, Germany), order of 23 October 2003, I ZB 45/02, paragraphs 12 and 13.

[115] Kammergericht (Higher Regional Court, Berlin, Germany), order of 4 August 2003, 2 W 18/02 Kart.

[116] Gruber, P., *Münchner Kommentar zur Zivilprozessordnung*, 6th edit., 2020, ZPO §890, paragraph 20.

[117] Gruber, P., *Münchner Kommentar zur Zivilprozessordnung*, 6th edit., 2020, ZPO §890, paragraph 20; Lackmann, R., *Musielak/Voit, Zivilprozessordnung*, 20th edit., 2023, ZPO §890, paragraph 16; Bundesgerichtshof (Federal Court of Justice, Germany), judgment of 22 September 1988, IX ZR 168/87.

[118] Sturhahn, M., *Schuschke/Walker, Vollstreckung und vorläufiger Rechtsschutz*, 6th edit., 2016, §890 ZPO, paragraph 56.

[119] Gruber, P., *Münchner Kommentar zur Zivilprozessordnung*, 6th edit., 2020, ZPO §890, paragraph 20; Oberlandesgericht Nürnberg (Higher Regional Court, Nuremburg, Germany), order of 7 March 2006, 3 W 2443/05.

[…]

declaration to stop the case proceeding to judgment, [120] with its effects limited to the period postdating the non-suit, the enforcement order will still be valid for the past, meaning that a fine imposed for failure to fulfil an obligation will remain in full force and effect. [121] This will also apply to interim measures granted in summary proceedings. Otherwise, the debtor could easily avoid paying the fine by forcing the issue of declarations to stop the case proceeding to judgment. [122] Second, the enforcement order will expire with effect *ex nunc* where the parties issue unanimous declarations to stop the case proceeding to judgment or agree a court settlement to this effect, or if the creditor only waives its rights arising from this obligation, starting from that moment. [123] In those specific cases, setting the amount of a fine based on the failure to fulfil an obligation predating its cancellation remains possible but repayment of a fine already paid is not possible.

89. However, where there is doubt about the effect *ex tunc* or *ex nunc* of withdrawing an enforcement order, that is, where it is not clear from the decision or declaration at what moment the outstanding obligation ceased to exist, we need, for reasons of legal certainty, to consider the withdrawal effective *ex tunc*. [124]

[120] In the case of a unilateral declaration to stop the case proceeding to judgment ('einseitige Erledigungserklärung') by one party, the court seised will issue a decision on the merits confirming termination of the main proceedings [Bundesgerichtshof (Federal Court of Justice, Germany), order of 23 February 2012, I ZB 28/11, paragraphs 4 and 5].

[121] Bundesgerichtshof (Federal Court of Justice, Germany), order of 23 October 2003, I ZB 45/02, paragraphs 13 and 14; Bundesgerichtshof (Court of Justice, Germany), order of 23 February 2012, I ZB 28/11, paragraphs 4 and 5.

[122] Bundesgerichtshof (Federal Court of Justice, Germany), order of 23 October 2003, I ZB 45/02, paragraphs 14 and 15.

[123] Gruber, P., *Muncher Kommentar zur Zivilprozessordnung*, 6th edit., 2020, ZOO §890, paragraph 19.

[124] Kammergericht (Higher Regional Court, Berlin, Germany), order of 4 August 2008, 2 W 18/02 Kart ; Oberlandesgericht Frankfurt am Main (Higher Regional Court, Frankfurt am Main, Germany), order of 28 March 2011, 11 W 27/10.

[…]

II. BODY RESPONSIBLE FOR SETTING THE AMOUNT OF A PERIODIC PENALTY PAYMENT OR FINE

90. As a preliminary point, the concept of 'setting' [the amount of the periodic penalty payment or fine] must be defined in the context of this note. That is the final process whereby the competent court (or responsible body) calculates the final amount of money that the debtor has to pay to the creditor. It occurs where the fulfilment of the obligation has been delayed or where it remains wholly or partially unfulfilled.

91. Although, in the majority of the legal systems studied, the body responsible for setting the amount of a periodic penalty payment or fine is the same one that imposed them (A.), we recognise that some national legal systems do provide for two separate bodies to be involved, one for imposing and one for setting the amount of a periodic penalty payment or fine (B.).

92. As regards **Romania** and **Bulgaria**, it should be pointed out that, since the second question in this note is independent of the first, and formulated in general terms, we have chosen to include the pecuniary instruments provided for under Romanian law and Bulgarian law in our observations below, although those instruments cannot be coupled with interim measures.

A. MEMBER STATES ALLOWING THE SAME BODY TO IMPOSE AND SET THE AMOUNT OF A PERIODIC PENALTY PAYMENT OR FINE

93. In the vast majority of the legal systems examined, it is conventional for the same body to impose and set the amount of a periodic penalty payment or fine. In the majority of national systems, that body is the competent court or judge (1.). However, it is also possible for a periodic penalty payment or fine to be imposed and its amount to be set by a bailiff (2.).

1. THE JUDGE OR THE COMPETENT COURT

94. In most cases, the body imposing and setting the amount of a periodic penalty payment or fine is the judge or the competent court. That is the case in

[…]

Germany, [125] **Denmark**, [126] **Spain**, [127] **Italy**, [128] **Greece**, [129] the **Netherlands**, [130] **Poland** [131] and **Romania**. [132]

95. It is important to note the special case of **France**. In administrative proceedings the rule is clear: the amount is fixed by the court that imposed the periodic penalty payment. [133] Jurisdiction is also recognised for judges hearing applications for interim measures in terms of their own decisions. [134]

96. However, in civil procedure, there is one rule (different bodies) and a double exception (same body). The amount of periodic penalty payments is, as a rule, set by the enforcements judge. [135] Those judges are responsible for setting the amount of periodic penalty payments, not only those they have imposed themselves but also, and more generally, those imposed by other judges including judges hearing applications for interim measures. As an exception to that rule, an application to set the amount has to be made to the same judge who imposed the periodic penalty payment, first, where they are still seised of the matter and, second, where they expressly reserve to themselves the power to set the amount. [136]

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[125] In civil proceedings, the court of first instance ruling on the merits has exclusive jurisdiction (Paragraphs 888 and 890, read in conjunction with Paragraph 802 of the German Code of Civil Procedure). That rule of jurisdiction is absolute [Bundesgerichtshof, (Federal Court of Justice, Germany), order of 8 November 2001, IX ZB 44/01, paragraphs 8 and 9]. In administrative procedure, the administrative court of first instance has jurisdiction in enforcement matters (Second sentence of Paragraph 167(1) of the German Code of Administrative Procedure). Those rules of jurisdiction are also exclusive (Pietzner, R./Möller, J. A., *Schoch/Schneider, Verwaltungsrecht VwGO*, 44th edit., supplement to March 2023, VwGO §167, paragraph 92).

[126] Article 411(1) of the Danish Law on the administration of justice.

[127] In administrative procedure (Article 112 of the Spanish Code of Administrative Procedure).

[128] In civil procedure (Article 614(A) of the Italian Code of Civil Procedure) and in administrative procedure (Article 114(4)(e) of the Italian Code of Administrative Procedure).

[129] In civil and administrative proceedings, the proper body is the competent court (Article 946 of the Hellenic Code of Civil Procedure) and the Court of First Instance (single judge) (Article 947 of the Hellenic Code of Civil Procedure).

[130] In civil and administrative proceedings, the proper body is the competent court (Article 611(b) of the Dutch Code of Civil Procedure; Article 8:72(6) of the Dutch Code of Administrative Procedure).

[131] In civil procedure, Articles 756, 1050 and 1051 of the Polish Code of Civil Procedure.

[132] In civil procedure, the enforcements judge imposes and sets the amount for late performance penalties/interest (see Article 906(1) of the New Romanian Code of Civil Procedure). In administrative procedure, the administrative judgment formation of the competent court imposes and sets the amount for late performance penalties and fines (Article 18(5) and Article 24(3) and (4) of Law No 554 on Romanian contentious administrative proceedings).

[133] Article L. 911-7(1) of the French Code of Administrative Justice. All administrative courts have jurisdiction to impose periodic penalty payments (administrative courts, administrative courts of appeal and the Council of State), including judges hearing applications for interim measures.

[134] Council of State (France), judgment of 21 May 2003, No 252872.

[135] Unless a special provision provides otherwise, for example, in family or planning matters.

[136] Article L. 131-3 of the French Code of Civil Execution Procedures.

[…]

2. BAILIFFS

97. In **Bulgaria** (civil procedure), in enforcement proceedings, fines are imposed and their amount is set by bailiffs. [137] Their amount is set by a competent judge on appeal. [138]

98. In administrative procedure, in the context of an enforcement procedure, fines and pecuniary sanctions are imposed and their amount is set by the enforcement body. [139] For enforcements against citizens and organisations, the enforcement body is the administrative authority that issued or should have issued the administrative act, unless another authority is specified by law or decree. [140] On appeal, [141] fines and pecuniary sanctions are imposed and the amount set by the competent court. Moreover, where the issue is the enforcement of a fine or pecuniary sanction against an administrative authority, the enforcement body recovering the fine or pecuniary sanction is a bailiff working in the geographical jurisdiction in which the place of enforcement of the obligation is located, [142] but the fine or pecuniary sanction is imposed and its amount set by the competent court.

99. In **Estonia** (civil procedure), enforcement procedures are, as a general rule, conducted by bailiffs who themselves have the right to impose a periodic penalty payment to ensure compliance with certain obligations. [143] The periodic penalty payment is therefore imposed and a bailiff sets its amount. [144]

100. In **Slovakia** (civil procedure), fines are, as a rule, imposed by a bailiff [145] who is also responsible for setting the amount. [146]

B. MEMBER STATES PROVIDING FOR A SEPARATE BODY FOR IMPOSITION AND SETTING THE AMOUNT

101. In five national legal systems (**Spain**, **Estonia**, **France**, **Portugal** and **Slovakia**), setting the amount of a periodic penalty payment or fine is the responsibility of a body other than the one which imposed it.

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137 Article 93(1) of the Bulgarian Code of Civil Procedure.

138 Article 93(2) and (3) and Article 435(1) of the Bulgarian Code of Civil Procedure.

139 Article 271(1) and Article 287(5) of the Bulgarian Code of Administrative Procedure. The enforcement body may differ according to the type of procedure (Article 271 of the Bulgarian Code of Administrative Procedure).

140 Article 271(1)(1) of the Bulgarian Code of Administrative Procedure.

141 Chapter VI of the Bulgarian Code of Administrative Procedure, Articles 294 to 298.

142 Article 271(1)(2) of the Bulgarian Code of Administrative Procedure.

143 Articles 26, 26^1 and 183 of the Estonian Code of Enforcement Procedures.

144 Article 2(1)(16) of the Estonian Code of Enforcement Procedures.

145 Article 43a(4) of the Slovakian Enforcements Code.

146 Article 43c(2) of the Slovakian Enforcements Code.

[…]

102. In **Spain** (civil procedure), both the competent court [147] and a bailiff [148] can impose periodic penalty payments. The same is true for setting the amount of a periodic penalty payment, which both a competent court and a bailiff are competent to do. [149] It would therefore seem that periodic penalty payments may be imposed by a competent court and their amount set by a bailiff.

103. In **Estonia** (administrative procedure), fines are imposed by a competent court and their amount set by a bailiff. [150]

104. In **France** (civil procedure), as stated above, the amount of a periodic penalty payment imposed by any judge, including a judge hearing applications for interim measures is, as a rule, set by the enforcements judge. [151]

105. In **Portugal** (civil and administrative procedures), periodic penalty payments are imposed by a competent court and their amount is set by a bailiff. [152]

106. In **Slovakia** (civil procedure), as specified above, fines are, as a rule, imposed by a bailiff who is also responsible for setting the amount. However, where necessary, [153] the bailiff may apply to a competent court to impose a higher fine. In that case, it will also be responsible for setting the amount of the fine.

III. CONCLUSION

107. The comparative analysis of legislative provisions, case-law and the legal commentary in the legal systems of the Member States studied does not provide a clear-cut answer to the question of the effects of terminating the main proceedings on interim measures coupled with a periodic penalty payment or a fine. However, a substantial amount of information to be used for further reflection has been identified in that regard.

108. It is clear that the type of pecuniary instrument (periodic penalty payment or fine) coupled with the interim measures has a bearing on whether or not those effects are retroactive. We can therefore trace a correlation between the coercive nature of the pecuniary instruments provided for and the *ex nunc* effects identified in the five legal systems studied: **Spain**, **France**, **Italy**, the **Netherlands** and **Portugal**. Additionally, the identified effects seem to be *ex nunc* in three other legal systems studied that provide for dual function pecuniary instruments: coercive and punitive

147 Article 699 and Article 709(1) of the Spanish Code of Civil Procedure.

148 Articles 709(3) and 710 of the Spanish Code of Civil Procedure.

149 Senés Motilla, C., *Ejecución forzosa de las obligaciones de no hacer*, Universidad de Almería Práctica de Tribunales, No 84, Sección Estudios, July-August 2011, edit., Wolters Kluwer.

150 Article 248 and Article 254(1) of the Estonian Code of Administrative Procedure and Article 2(1)(2) of the Estonian Code of Enforcement Procedures.

151 Article L. 131-3 of the French Code of Civil Execution Procedures. An enforcements judge sets the amount of periodic penalty payments unless a special provision provides otherwise, for example, in family or planning matters.

152 Article 719 of the Portuguese Code of Civil Procedure.

153 In a case where a fine imposed by a bailiff was not effective or where it is obvious that the fine that a bailiff could have imposed would be insufficient given the importance of the outstanding obligation.

[…]

in **Estonia** (administrative procedure fines) and in **Greece** (civil and administrative procedure periodic penalty payments and fines), along with coercive and compensatory in **Poland** (civil procedure fines).

109. By contrast, two legal systems providing for periodic penalty payments, namely **Germany** (civil and administrative procedures) and **Estonia** (civil procedure), and two legal systems providing for coercive fines, namely **Poland** (civil procedure) and **Slovakia** (civil procedure), have adopted a position more favourable to effects *ex tunc*. The same is true for the dual function coercive and punitive fines provided for in **Germany** (civil procedure).

110. Lastly, the lack of case-law and commentary by legal writers in **Denmark** has prevented us from reaching any final conclusions on the effects of terminating the main proceedings on interim measures coupled with fines.

111. The elements of our response are set out in Summary Table No 1.

112. As regards whether there are cases where the body responsible for setting the amount of periodic penalty payments or fines differs from the body imposing them, it is clear from this study that only a minority of the legal systems studied provide for such a distinction (**Spain**, [154] **Estonia**, [155] **France**, [156] **Portugal** and **Slovakia** [157]). In the majority of the legal systems, the body responsible for imposing and for setting the amount of periodic penalty payments or fines is one and the same, namely a judge or a competent court.

113. The answers to that question are set out in Summary Table No 2.

[…]

[154] In civil procedural law.

[155] For administrative procedure fines.

[156] In civil procedure, as a rule, the enforcements judge sets the amount of the fines imposed by all other courts. There is, however, a double exception in which the same judge imposes and sets the amount of periodic penalty payments.

[157] Specific case in which the bailiff applies to the competent court to impose a fine where necessary. The rule remains that bailiffs impose and set the amount of the fine themselves.

[…]

SUMMARY TABLE NO 1

Consequences of terminating the main proceedings on the interim measures coupled with a periodic penalty payment or fine				
National legal systems		**Pecuniary instruments imposed to back interim measures**	**Type of instrument**	**Effects**
Germany	Civil procedure	Periodic penalty payments, for personal obligations to do something	Coercive	Position more favourable to effects *ex tunc*
		Fines, for obligations not to do something	Dual function (coercive and punitive)	Position more favourable to effects *ex tunc*
	Administrative procedure	Periodic penalty payments in favour of public authorities, for non-pecuniary obligations and against an administrative authority, and for obligations that consist of adopting an administrative act or eliminating the consequences of an administrative act.	Coercive (controversial nature of a periodic penalty payment against a public authority)	Position more favourable to effects *ex tunc*
Bulgaria	Civil procedure	No pecuniary instrument may be imposed to back interim measures		
	Administrative procedure	No pecuniary instrument may be imposed to back interim measures		
Denmark	Civil procedure	Fines, for non-pecuniary obligations	Punitive	No final conclusions
	Administrative procedure	Civil and administrative proceedings are governed by the same law		
Spain	Civil procedure	Periodic penalty payments, for personal obligations to do something and obligations not to do something	Coercive	Position more favourable to effects *ex nunc*
	Administrative procedure	Periodic penalty payments, for any type of obligation	Coercive	Position more favourable to effects *ex nunc*
Estonia	Civil procedure	Periodic penalty payments imposed to enforce a personal obligation where the debtor has not honoured an obligation to supply information needed for an enforcement procedure, and in the case of an unjustified refusal by a third party responsible for the debtor to execute a seizure order or improper execution.	Coercive	Position more favourable to effects *ex tunc*
	Administrative procedure	Fines, for non-pecuniary obligations	Dual function (coercive and punitive)	Position more favourable to effects *ex nunc*

[…]

France	Civil procedure	Periodic penalty payments, for any type of obligation	Coercive	Position more favourable to effects *ex nunc*
	Administrative procedure	Periodic penalty payments, for any type of obligation	Coercive	Position more favourable to effects *ex nunc*
Greece	Civil procedure	Periodic penalty payments or fines, for personal obligations to do something and obligations not to do something	Dual function (coercive and punitive)	Position more favourable to effects *ex nunc*
	Administrative procedure	The enforcement procedure defined in the Code of Civil Procedure applies *mutatis mutandis* to administrative procedure.		
Italy	Civil procedure	Periodic penalty payments, for non-pecuniary obligations	Coercive	Position more favourable to effects *ex nunc*
	Administrative procedure	Periodic penalty payments, for any type of obligation	Coercive	Position more favourable to effects *ex nunc*
Netherlands	Civil procedure	Periodic penalty payments, for non-pecuniary obligations	Coercive	Position more favourable to effects *ex nunc*
	Administrative procedure	Periodic penalty payments, for any type of obligation	Coercive	Position more favourable to effects *ex nunc*
Poland	Civil procedure	Periodic penalty payments, for any type of obligation	Dual function (coercive and compensatory)	Position more favourable to effects *ex nunc*
		Fines, for personal obligations and obligations not to do something	Coercive	Position more favourable to effects *ex tunc*
	Administrative procedure	The Code of Administrative Procedure does not allow for the use of interim measures		
Portugal	Civil procedure	Periodic penalty payments, for personal obligations to do something	Coercive	Position more favourable to effects *ex nunc*
	Administrative procedure	Periodic penalty payments, for personal obligations to do something	Coercive	Position more favourable to effects *ex nunc*
Romania	Civil procedure	No pecuniary instrument may be imposed to back interim measures		
	Administrative procedure	No pecuniary instrument may be imposed to back interim measures		
Slovakia	Civil procedure	Fines, for any type of obligation	Coercive	Position more favourable to effects *ex tunc*
	Administrative procedure	The Code of Administrative Procedure does not allow for the use of interim measures		

[…]

SUMMARY TABLE NO 2

Body responsible for setting the amount of a periodic penalty payment or fine				
National legal systems		**Body responsible for imposition**	**Body responsible for setting amount**	**Separate bodies?**
Germany	Civil procedure	Court of first instance ruling on the merits	Court of first instance ruling on the merits	No
	Administrative procedure	Administrative courts of first instance	Administrative courts of first instance	No
Bulgaria	Civil procedure	Bailiff	Bailiff (except on appeal: competent court)	No (except on appeal)
	Administrative procedure	Enforcement body or competent court	Enforcement body or competent court	No (except on appeal)
Denmark	Civil procedure	Competent court	Competent court	No
	Administrative procedure	Competent court	Competent court	No
Spain	Civil procedure	Competent court or bailiff	Competent court or bailiff	Yes
	Administrative procedure	Competent court	Competent court	No
Estonia	Civil procedure	Bailiff	Bailiff	No
	Administrative procedure	Competent court (fine)	Bailiff	Yes
France	Civil procedure	Competent court	Rule: enforcements judge Exception: competent court	Yes (unless there are exceptions)
	Administrative procedure	Competent court	Competent court	Yes

[…]

Greece	Civil procedure	Competent court/Court of First Instance (single judge)	Competent court/Court of First Instance (single judge)	No
	Administrative procedure	Competent court/Court of First Instance (single judge)	Competent court/Court of First Instance (single judge)	No
Italy	Civil procedure	Competent court	Competent court	No
	Administrative procedure	Competent court	Competent court	No
Netherlands	Civil procedure	Competent court	Competent court	No
	Administrative procedure	Competent court	Competent court	No
Poland	Civil procedure	Competent court	Competent court	No
	Administrative procedure	Competent court	Competent court	No
Portugal	Civil procedure	Competent court	Bailiff	Yes
	Administrative procedure	Competent court	Bailiff	Yes
Romania	Civil procedure	Competent enforcements judge	Competent enforcements judge	No
	Administrative procedure	Administrative judgment formation of the competent court	Administrative judgment formation of the competent court	No
Slovakia	Civil procedure	Bailiff or competent court	Bailiff	Yes
	Administrative procedure	The Code of Civil Procedure applies *mutatis mutandis* to administrative proceedings		