Reports of Cases

JUDGMENT OF THE COURT (Sixth Chamber)

6 March 2025 *

(Failure of a Member State to fulfil obligations – Article 258 TFEU – Protection of persons who report breaches of Union law – Directive (EU) 2019/1937 – Article 26(1) and (3) – Failure to transpose and communicate transposition measures – Article 260(3) TFEU – Application for the imposition of a lump sum – Criteria for establishing the amount of the penalty – Automatic application of a coefficient for seriousness)

In Case C-149/23,

ACTION for failure to fulfil obligations under Article 258 and Article 260(3) TFEU, brought on 14 March 2023,

European Commission, represented by J. Baquero Cruz and L. Mantl, acting as Agents,

applicant,

v

Federal Republic of Germany, represented by J. Möller, J. Heitz and M. Hellmann, acting as Agents,

defendant,

THE COURT (Sixth Chamber),

composed of T. von Danwitz, Vice-President of the Court, acting as President of the Sixth Chamber, A. Kumin and I. Ziemele (Rapporteur), Judges,

Advocate General: N. Emiliou,

Registrar: A. Calot Escobar,

having regard to the written procedure,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

* Language of the case: German.

Judgment

1 By its action, the European Commission claims that the Court should:

– declare that the Federal Republic of Germany has failed to adopt the laws, regulations and administrative provisions necessary to transpose Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law (OJ 2019 L 305, p. 17), or, in any event, has failed to communicate them to the Commission, and that it has thus failed to fulfil its obligations under Article 26(1) and (3) of that directive;

– order the Federal Republic of Germany to pay the Commission a lump sum corresponding to the higher of the following two amounts:

  – a daily flat-rate amount of EUR 61 600 multiplied by the number of days between the day after the expiry of the deadline for transposition of Directive 2019/1937 fixed therein and the day on which the infringement is regularised or, failing regularisation, the day on which the judgment in the present case is delivered;

  – a minimum flat-rate amount of EUR 17 248 000;

– in the event that the failure to fulfil obligations established in the first indent persists until the date of delivery of the judgment in the present case, order the Federal Republic of Germany to pay to the Commission a penalty payment of EUR 240 240 per day of delay from the date of delivery of that judgment until the date on which the Federal Republic of Germany fulfils its obligations under Directive 2019/1937; and

– order the Federal Republic of Germany to pay the costs.

Legal context

Directive 2019/1937

2 Recitals 1 and 33 of Directive 2019/1937 state:

‘(1) … potential whistleblowers are often discouraged from reporting their concerns or suspicions for fear of retaliation. In this context, the importance of providing balanced and effective whistleblower protection is increasingly acknowledged at both [European] Union and international level.

…

(33) Reporting persons normally feel more at ease reporting internally, unless they have reasons to report externally. Empirical studies show that the majority of whistleblowers tend to report internally, within the organisation in which they work. Internal reporting is also the best way to get information to the persons who can contribute to the early and effective resolution of risks to the public interest. At the same time, the reporting person should be able to choose the most appropriate reporting channel depending on the individual circumstances of the case. …’

3 Under Article 1 of that directive:

‘The purpose of this Directive is to enhance the enforcement of Union law and policies in specific areas by laying down common minimum standards providing for a high level of protection of persons reporting breaches of Union law.’

4 Article 8 of that directive is thus worded:

‘1. Member States shall ensure that legal entities in the private and public sector establish channels and procedures for internal reporting and for follow-up, following consultation and in agreement with the social partners where provided for by national law.

2. The channels and procedures referred to in paragraph 1 of this Article shall enable the entity’s workers to report information on breaches. They may enable other persons, referred to in points (b), (c) and (d) of Article 4(1) and Article 4(2), who are in contact with the entity in the context of their work-related activities to also report information on breaches.

3. Paragraph 1 shall apply to legal entities in the private sector with 50 or more workers.

…

9. Paragraph 1 shall apply to all legal entities in the public sector, including any entity owned or controlled by such entities.

…’

5 Article 23(1) of that directive provides:

‘Member States shall provide for effective, proportionate and dissuasive penalties applicable to natural or legal persons that:

…

(c) bring vexatious proceedings against persons referred to in Article 4;

…’

6 Article 26 of Directive 2019/1937 provides:

‘1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 17 December 2021.

2. By way of derogation from paragraph 1, as regards legal entities in the private sector with 50 to 249 workers, Member States shall by 17 December 2023 bring into force the laws, regulations and administrative provisions necessary to comply with the obligation to establish internal reporting channels under Article 8(3).

3. When Member States adopt the provisions referred to in paragraphs 1 and 2, those provisions shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made. They shall forthwith communicate to the Commission the text of those provisions.’

The 2023 Communication

7 Communication 2023/C 2/01 from the Commission, entitled 'Financial sanctions in infringement proceedings' (OJ 2023 C 2, p. 1; 'the 2023 Communication'), devotes points 3 and 4 thereof to the 'penalty payment' and the 'lump sum payment', respectively.

8 Point 3.2 of that communication, which concerns the application of the coefficient for seriousness when calculating the daily penalty payment, provides:

'An infringement concerning a … failure to notify measures transposing a directive adopted under a legislative procedure is always considered serious. To adapt the amount of the penalty to the specific circumstances of the case, the Commission determines the coefficient for seriousness on the basis of two parameters: the importance of the Union rules breached or not transposed and the effects of the infringement on general and particular interests.

…'

9 Point 3.2.2 of that communication states:

'For actions brought under Article 260(3) TFEU, the Commission systematically applies a coefficient for seriousness of 10 in case of a complete failure to notify transposition measures. In a Union based on the respect of the rule of law, all legislative directives are to be considered of equal importance and require complete transposition by the Member States within the deadlines that they set.

In the case of a partial failure to notify transposition measures, the importance of the transposition gap is to be considered when setting the coefficient for seriousness which is lower than 10. In addition, the effects of the infringement on general and particular interests may be taken into account …'

10 Under point 3.3 of that communication, entitled 'Application of the coefficient for duration':

'…

The coefficient for duration is expressed as a multiplier of between 1 and 3. It is calculated at a rate of [0.10] per month from the date of the first judgment or from the day following the expiry of the deadline for transposition of the directive in question.

…'

11 Point 3.4 of the 2023 Communication, entitled 'Member State's capacity to pay', provides:

'…

The level of sanction required to serve as a deterrent will vary according to Member States' capacity to pay. This deterrent effect is reflected in the n factor. It is defined as a weighted geometric average of the gross domestic product (GDP) of the Member State concerned compared to the average of the Member States' GDPs, with a weight of two, and of the

population of the Member State concerned, compared to the average of Member States' populations, with a weight of one. This represents the capacity to pay of the Member State concerned in relation to the other Member States' capacity to pay:

$$\text{n factor} = \left(\frac{\text{GDP}_\text{n}}{\text{GDP}_\text{avg}}\right)^{2/3} \times \left(\frac{\text{Pop}_\text{n}}{\text{Pop}_\text{avg}}\right)^{1/3}$$

…

The Commission has decided to revise its method for calculating the n factor, which now predominantly relies on Member States' GDP and secondarily on their population as a demographic criterion allowing a reasonable deviation between the various Member States to be maintained. Taking into account Member States' population for one third of the calculation of the n factor reduces to a reasonable degree the variation of Member States' n factors, as compared to a calculation based solely on Member States' GDP. It also adds an element of stability in the calculation of the n factor, since population is unlikely to vary significantly on an annual basis. In contrast, a Member State's GDP might experience higher annual fluctuations, in particular in periods of economic crisis. At the same time, since the Member State's GDP still accounts for two thirds of the calculation, it remains the predominant factor for the purposes of assessing its capacity to pay.

…'

12 Point 4.2 of that communication sets out the calculation method for the lump sum as follows:

'The lump sum is calculated in a manner broadly similar to the method for calculating the penalty payment, that is:

– multiplying a flat-rate amount by a coefficient for seriousness,

– multiplying the result by the n factor,

– multiplying the result by the number of days the infringement persists …

…'

13 Point 4.2.1 of that communication provides:

'To calculate the lump sum, the daily amount is to be multiplied by the number of days the infringement persists. The latter is defined as follows:

…

– for actions brought under Article 260(3) TFEU, this is the number of days between the day after the expiry of the deadline for transposition set out in the directive at issue and the date the infringement comes to an end, or, failing compliance, the date of the delivery of the judgment under Article 260 TFEU.

…'

14 According to point 4.2.2 of that communication:

‘For the calculation of the lump sum, the Commission applies the same coefficient for seriousness and the same fixed n factor as for the calculation of the penalty payment …

The flat-rate amount for the lump sum is lower than for penalty payments. …

The flat-rate amount applicable for the lump sum is set out in point 2 of … Annex I.

…’

15 Annex I to the 2023 Communication, entitled ‘Data used for determining financial sanctions proposed to the Court’, provides, in point 2 thereof, that the flat-rate amount for the lump sum payment mentioned in point 4.2.2 of that communication is fixed at EUR 1 000 per day, that is one third of the flat-rate for penalty payments, and, in point 3 thereof, that the ‘n’ factor for the Federal Republic of Germany is set at 6.16. In point 5 of that Annex I, it is stated that the minimum lump sum fixed for that Member State amounts to EUR 17 248 000.

The pre-litigation procedure and the procedure before the Court

16 On 27 January 2022, the Commission sent a letter of formal notice to the Federal Republic of Germany, criticising it for having failed to communicate to it the laws, regulations or administrative provisions necessary to comply with Directive 2019/1937, the transposition deadline of which had expired on 17 December 2021. In its replies of 28 March and 3 May 2022, the Federal Republic of Germany informed the Commission that those provisions were under preparation.

17 With no subsequent communication relating to the transposition of that directive having been sent, the Commission, on 15 July 2022, addressed a reasoned opinion to the Federal Republic of Germany, calling on it to comply with its obligations under that directive within a period of two months of receipt of that opinion.

18 The Federal Republic of Germany, having secured an extension of the period for replying to that opinion until 15 December 2022, indicated, by letters of 7 December 2022 and 6 January 2023, that the law transposing Directive 2019/1937 would be adopted definitively on 10 February 2023.

19 Taking the view that that Member State had still not complied with its obligations, the Commission decided, on 14 March 2023, to bring the present action before the Court.

20 On 2 June 2023, the Federal Republic of Germany notified to the Commission the Gesetz für einen besseren Schutz hinweisgebender Personen sowie zur Umsetzung der Richtlinie zum Schutz von Personen, die Verstöße gegen das Unionsrecht melden (Federal Law on improving the protection of whistleblowers and transposing the Directive on the protection of persons who report breaches of Union law) of 31 May 2023 (BGBl. 2023 I, No 140; ‘the HinSchG’), whose provisions entered into force on 2 July 2023.

21 In addition, the Federal Republic of Germany notified to the Commission, by letters of 17 July 2023 and 10 August 2023, the regional laws concerning the *Länder* of Hesse and Bavaria respectively, which entered into force on 2 July and 1 August 2023 respectively, aimed at

transposing Directive 2019/1937 at regional level. The Federal Republic of Germany also indicated that the adoption of regional laws for the *Länder* of Berlin and Hamburg was not necessary due to their special status.

22 By document of 24 October 2023, the Commission amended its conclusions to the effect that, following the entry into force of the HinSchG, Directive 2019/1937 could be regarded as having been transposed at federal level, but that, in 12 *Länder*, the measures transposing Article 8(1) and (9) of that directive, relating to internal reporting channels, had still not been adopted.

23 Consequently, the Commission amended the amount of the penalties sought, recommending the application of a coefficient for seriousness of 1 from 2 July 2023. The result of this was that, for the period from 18 December 2021 to 1 July 2023, the coefficient for seriousness of 10 remained unchanged and the amount of the lump sum proposed was EUR 34 557 600. From 2 July 2023, the proposed daily flat-rate amount was EUR 6 160. In addition, applying the new coefficient for seriousness, the amount of the penalty payment sought was reduced to EUR 24 024 per day of delay.

24 Between 17 July 2023 and 19 July 2024, the Federal Republic of Germany notified to the Commission a number of regional laws transposing Directive 2019/1937.

25 By decision of the President of the Court of 19 December 2023, the proceedings were stayed pending delivery of the judgment in Case C-147/23. Following the delivery of the judgment of 25 April 2024, *Commission* v *Poland (Whistleblowers directive)* (C-147/23, EU:C:2024:346), the proceedings in the present case were resumed by decision of the President of the Court of the same day.

26 By document of 18 September 2024, the Commission informed the Court that the transposition of Directive 2019/1937 by the Federal Republic of Germany could be deemed to have been completed on 19 July 2024. Accordingly, that institution, first, partially abandoned its action, withdrawing its application for the imposition of a penalty payment, and, second, modified its head of claim seeking an order that that Member State pay a lump sum, claiming, on that basis, an amount of EUR 34 557 600 for the period from 18 December 2021 to 1 July 2023 and an amount of EUR 2 353 120 for the period from 2 July 2023 to 18 July 2024.

The action

Failure to fulfil obligations under Article 258 TFEU

Arguments of the parties

27 The Commission points out that, in accordance with the third paragraph of Article 288 TFEU, Member States are required to adopt the provisions necessary to transpose directives into their national legal system, within the periods laid down in those directives, and to communicate those provisions to it immediately.

28 That institution explains that the question whether a Member State has failed to fulfil those obligations must be determined by reference to the situation prevailing in that Member State at the end of the period laid down in the reasoned opinion which the Commission addressed to that Member State.

29 In the case at hand, the Federal Republic of Germany had not adopted the laws, regulations and administrative provisions necessary to transpose Directive 2019/1937 or inform the Commission of their adoption before the expiry of the period laid down in the reasoned opinion, as extended until 15 December 2022.

30 While acknowledging the failure to fulfil obligations at issue, the Federal Republic of Germany sets out three reasons which it argues justify the delay in transposing Directive 2019/1937 into its domestic legal system. First of all, it submits that there was no uniform system of protection for whistleblowers under German law. It was therefore necessary to establish a coherent regime applicable beyond the scope of that directive.

31 Next, the transposition of that directive could have considerable economic repercussions for operators forced to introduce reporting channels. Therefore, in order to achieve a responsible and considered transposition, a long process proved necessary.

32 Lastly, the Federal Republic of Germany cites the difficulties encountered during the legislative process of transposing Directive 2019/1937. Thus, as a result of the elections to the Bundestag (lower house of the Federal Parliament) which took place in 2021, legislative activity was interrupted from June 2021. Consequently, the first reading of the draft law transposing Directive 2019/1937 by the lower house of the Federal Parliament took place on 29 September 2022. Subsequently, the text of that law was adopted on 16 December 2022. The Bundesrat (Federal Council) having rejected it, however, the matter had to be referred to the conciliation committee in order to reach a compromise. Approval by the Federal Council therefore did not come until 12 May 2023. In any event, Directive 2019/1937 has now been transposed at federal level by the HinSchG.

33 Moreover, the Federal Republic of Germany emphasises that the establishment of internal reporting channels for municipalities, associations of municipalities and employers controlled by such entities provided for by Directive 2019/1937 falls within the remit of the regional legislatures. That being so, whistleblowers employed in such municipal entities could in practice, irrespective of the existence of internal reporting channels, use external reporting channels, so that they would be guaranteed effective protection.

34 In its reply, the Commission recalls, first, that, in accordance with settled case-law, a Member State may not plead circumstances prevailing in its domestic legal order or practical difficulties to justify failure to transpose provisions within the prescribed time limits.

35 Second, the Commission observes that, despite the transposition measures notified by the Federal Republic of Germany in the course of the procedure, the full transposition of Directive 2019/1937, within the meaning of Article 26(1) thereof, had not been completed by the date on which the reply was lodged, namely 5 July 2023.

36 Thus, first, the rules specifying the organisation and procedure governing external reporting channels within the Bundesamt für Justiz (Federal Office of Justice, Germany) were not communicated to the Commission.

37 Second, the lack of regional rules governing internal reporting channels within municipal entities cannot be offset by the existence of external reporting channels made available to the employees of those entities. After all, that mere possibility does not satisfy the requirement of legal certainty which is necessary for the transposition of the provisions of a directive.

38 Third, the Commission points out that the German legislation that was notified to it does not provide for penalties in the event of vexatious legal proceedings brought against whistleblowers, even though such penalties are prescribed by Article 23(1)(c) of Directive 2019/1937.

39 That institution concludes that the provisions notified by the Federal Republic of Germany up to that point permitted only a partial transposition of the aforementioned directive at both federal and regional level.

40 In its rejoinder, the Federal Republic of Germany emphasises, first, that, at federal level, external reporting channels have been operational since the entry into force of the regulation on the organisation of such channels on 11 August 2023.

41 Second, the HinSchG provides that retaliation against reporting persons constitutes an offence punishable by a fine. The concept of 'retaliation' in that regard encompasses vexatious legal proceedings.

42 Third, the scope of the HinSchG extends, in principle, to the employees of municipal entities, which guarantees their protection in the event of reporting, irrespective of the transposition of Directive 2019/1937 by the regional entities.

43 Following the lodging of the Commission's additional claims of 18 September 2024, by which that institution indicated that it considered that the transposition of Directive 2019/1937 by the Federal Republic of Germany could be deemed to have been completed on 19 July 2024, that Member State lodged, on 1 October 2024, observations by which it maintains that that directive was fully transposed from the entry into force of the transposing law, namely on 2 July 2023.

Findings of the Court

44 Under Article 26(1) of Directive 2019/1937, Member States were to bring into force, by 17 December 2021, the laws, regulations and administrative provisions necessary to comply with that directive. In addition, Article 26(3) of that directive stipulates that, when Member States adopt those measures, they are to contain a reference to that directive or be accompanied by such a reference at the time of their official publication. Moreover, pursuant to that Article 26(3), it fell to the Member States to communicate to the Commission the text of the said national provisions.

45 In accordance with settled case-law, the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in that Member State at the end of the period laid down in the reasoned opinion, the Court being unable to take account of any subsequent changes (judgment of 25 April 2024, *Commission* v *Poland (Whistleblowers directive)*, C-147/23, EU:C:2024:346, paragraph 28 and the case-law cited).

46 In the case at hand, after having found that the Federal Republic of Germany had not communicated to it the provisions necessary to transpose Directive 2019/1937, the Commission sent that Member State, on 15 July 2022, a reasoned opinion, calling on it to comply with the obligations referred to therein within a period of two months of receipt of the opinion, with that period being extended until 15 December 2022.

47 However, as is apparent from the defence and the rejoinder lodged by the Federal Republic of Germany in the present proceedings, on the expiry of that period, the Federal Republic of Germany had not adopted the laws, regulations and administrative provisions necessary to comply with Directive 2019/1937 and, therefore, nor had that Member State communicated those provisions to the Commission.

48 To justify the delay in adopting the provisions necessary to transpose Directive 2019/1937, the said Member State invokes, first, lengthy technical and political discussions which had to be held in order to determine the extent to which it was appropriate to extend the material scope of the transposing provisions beyond that provided for by that directive, so as to offer a high level of protection to whistleblowers. In addition, the same Member State cites difficulties linked to the economic repercussions of that directive, as well as to the legislative process necessary for adopting those provisions.

49 In that regard, it should be recalled that, according to the Court's settled case-law, a Member State cannot plead provisions, practices or situations prevailing in its domestic legal order to justify failure to observe obligations arising under EU law such as failure to transpose a directive within the period prescribed (judgment of 25 April 2024, *Commission* v Poland *(Whistleblowers directive)*, C-147/23, EU:C:2024:346, paragraph 33 and the case-law cited).

50 In addition, under Article 26(1) of Directive 2019/1937, the EU legislature took the view that a two-year transposition deadline was sufficient to enable the Member States to comply with their obligations, meaning that the Federal Republic of Germany cannot invoke difficulties linked to the scope and economic repercussions of the transposition of that directive.

51 Second, in terms of the transposition of the provisions of the said directive, relating to internal reporting channels within municipal entities, the Federal Republic of Germany emphasises that, in the absence of such channels, there is nothing to prevent the employees of such entities from using the external reporting channels established at federal level.

52 That being so, as follows from recital 33 of Directive 2019/1937, the EU legislature considered that internal reporting was of particular importance in preventing breaches of EU law.

53 That is why Article 8(1) of that directive lays down an obligation to establish internal reporting channels within, inter alia, legal entities in the public sector.

54 Moreover, in so far as the Federal Republic of Germany claims that, in practice, the employees of municipal entities could use external reporting channels, it should be noted that a practice without adequate publicity is by its nature alterable at will by the authorities, such that it cannot be regarded as constituting an adequate transposition of the provisions of a directive (judgment of 3 December 2020, *Commission* v *Belgium (Markets in electricity and natural gas)*, C-767/19, EU:C:2020:984, paragraph 57 and the case-law cited).

55 Accordingly, the Federal Republic of Germany cannot effectively invoke those circumstances to justify the failure to transpose Directive 2019/1937 within the period prescribed.

56 It must therefore be held that, by having failed, on the expiry of the period prescribed in the reasoned opinion of 15 July 2022, extended until 15 December 2022, to adopt the laws, regulations and administrative provisions necessary to comply with Directive 2019/1937 and, therefore, by having failed to communicate them to the Commission, the Federal Republic of Germany has failed to fulfil its obligations under Article 26(1) and (3) of that directive.

The application submitted under Article 260(3) TFEU

Arguments of the parties

57 With a view to fixing the amount of the lump sum, the Commission relies on the general principles referred to in point 2 of the 2023 Communication and on the method of calculation set out in points 3 and 4 of that communication. In particular, that institution states that the amount of the lump sum must be determined on the basis of the following fundamental criteria: the seriousness of the infringement, its duration and the need to ensure that the penalty has a deterrent effect in order to prevent repeat infringements.

58 With regard, in the first place, to the seriousness of the infringement, the Commission points out that the applicable coefficient under the 2023 Communication is between a minimum of 1 and a maximum of 20. That institution explains that, in accordance with point 3.2.2 of that communication, it systematically applies a coefficient for seriousness of 10 in the case of a complete failure to notify the provisions enabling a directive to be transposed, as any failure to transpose a directive or to notify those provisions is of the same degree of seriousness, regardless of the nature of the provisions of the directive concerned.

59 In the second place, as regards the duration of the infringement, the Commission explains that that equates, as regards the calculation of the lump sum, to the number of days that the infringement persists. That duration is calculated in accordance with point 4.2.1 of the 2023 Communication and corresponds to the number of days between the day following the expiry of the deadline for transposition of the directive in question and the day on which the infringement ceased.

60 As for, in the third place, the criterion relating to the need to ensure that the penalty has a deterrent effect taking into consideration the capacity of the Member State concerned to pay, the Commission states that that criterion is expressed by the ‘n’ factor set for each Member State in point 3 of Annex I to the 2023 Communication. It is calculated on the basis of the ratio between the GDP of the State concerned and the national average GDP of the European Union multiplied by the ratio between the population of that State and the national average population of the European Union. The first ratio is assigned a two-thirds weighting, whereas the second is assigned a one-third weighting. Pursuant to that point 3, the ‘n’ factor of the Federal Republic of Germany is 6.16.

61 Accordingly, the Commission proposes, pursuant to point 4.2 of the 2023 Communication, using a coefficient for seriousness of 10 and applying the ‘n’ factor of 6.16. The product of those two elements should be multiplied by the flat-rate amount of the lump sum fixed in point 2 of Annex I to that communication, that is to say, EUR 1 000, which amounts to a sum of

EUR 61 600, to be multiplied by the number of days that the infringement persisted, in accordance with point 4.2.1 of the said communication. The Commission states that the payment of that lump sum must be imposed provided that it is greater than EUR 17 248 000, the amount of the minimum lump sum fixed for the Federal Republic of Germany in point 5 of Annex I to the 2023 Communication.

62 In its defence, the Federal Republic of Germany contends that the 2023 Communication is not applicable to the present infringement proceedings. It is of the view that point 7 of that communication, by virtue of which the provisions of that communication are applicable to decisions to refer matters to the Court adopted after 4 January 2023, is contrary to the judgment of 24 May 2011, *Commission* v *Germany* (C-54/08, EU:C:2011:339), paragraph 126 of which states that the situation of the Member State concerned must be assessed at the end of the period prescribed in the reasoned opinion. In the case at hand, the end of that period having been fixed at 15 December 2022, the amount of the financial penalties should be calculated in accordance with the modalities established by Commission Communication 2022/C 74/02, entitled 'Updating of data used to calculate lump sum and penalty payments to be proposed by the Commission to the Court of Justice of the European Union in infringement proceedings', of 15 February 2022 (OJ 2022 C 74, p. 2).

63 In any event, the automatic application of a coefficient for seriousness of 10 does not allow account to be taken of the particularities of the situation at issue. First, the legislative procedure for the adoption of the provisions necessary to transpose Directive 2019/1937 had been completed before the end of the written procedure before the Court. Second, on the date on which the defence was lodged, the transposition deadline laid down in Article 26(2) of that directive, concerning the obligation, provided for in Article 8(3) of the latter, to establish internal reporting channels had not expired. Those circumstances, in so far as they constitute mitigating circumstances, justify the application of a coefficient of 3 at most.

64 In its reply, the Commission observes, first, that it is only at the stage of the proceedings before the Court that the imposition of a lump sum may be sought. In the case at hand, the Court having become seised of the action on 14 March 2023, the 2023 Communication is applicable by virtue of point 7 thereof. That rule ensures equal treatment between the Member States, in particular where they request an extension of the period laid down in the reasoned opinion, as was requested by the Federal Republic of Germany in the present case.

65 Second, the Commission states that the systematic application of a coefficient for seriousness of 10 on the scale of 1 to 20 ensures predictability and equal treatment between the Member States. Such a coefficient would be moderate in view of the consequences of the failure to transpose Directive 2019/1937, which guarantees the protection of persons who report breaches of EU law.

66 By its additional claims of 24 October 2023, the Commission proposes, following the notification by the Federal Republic of Germany of the HinSchG, to determine two periods of infringement and, accordingly, to apply two coefficients for seriousness, one of 10 for the period from 18 December 2021 to 1 July 2023 and the other of 1 for the period between 2 July 2023 and the day on which the infringement is regularised or, failing regularisation, the day on which the judgment in the present case is delivered. It follows that, for the first period, the proposed daily amount is EUR 61 600 (10 × 6.16 × 1 000), which is to be multiplied by the number of days that the infringement persisted, namely 561 days. The amount of the lump sum sought is therefore EUR 34 557 600. For the second period, the proposed daily flat-rate amount of EUR 6 160 (1 × 6.16 × 1 000) is to be multiplied by the number of days that the infringement persisted.

67 In its observations of 4 December 2023 on those additional claims, the Federal Republic of Germany maintains the position which it sets out in its defence and reiterates in its rejoinder.

68 By its additional claims of 18 September 2024, the Commission states that it considers that the transposition of Directive 2019/1937 into German law may be deemed to have been completed on 19 July 2024. Consequently, it considers itself to be in a position to propose the amount of the lump sum relating to the second period, running from 2 July 2023 to 18 July 2024, that is to say, 382 days of persistence of the infringement according to the Commission. The amount of the lump sum sought for that period is EUR 2 353 120 (6 160 × 382).

69 On 1 October 2024, the Federal Republic of Germany submitted observations by which it maintains that that directive was fully transposed from the entry into force of the transposing law, namely on 2 July 2023. Moreover, that Member State disputes the method of calculating the amount of the lump sum sought, relying on the judgment of 25 April 2024, *Commission* v *Poland (Whistleblowers directive)* (C-147/23, EU:C:2024:346).

Findings of the Court

70 As a preliminary point, the Federal Republic of Germany submits that the 2023 Communication is not applicable *ratione temporis* to the present application for the imposition of a lump sum, on the ground that the infringement proceedings were instituted on 28 January 2022, following the letter of formal notice of 27 January 2022, and that the applicable provisions are those which were in force on the expiry of the period laid down in the reasoned opinion of 15 July 2022. It should however be noted that, under point 7 of that communication, the rules and criteria set out therein are applicable to all decisions of the Commission to refer matters before the Court under Article 260 TFEU taken after the publication of that communication, namely after 4 January 2023.

71 The Commission having decided to bring the present action for failure to fulfil obligations before the Court on 14 March 2023, the same communication constitutes the legal basis for fixing the amount of the lump sum sought in the present case.

72 The case-law of the Court relied on by the Federal Republic of Germany according to which the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in that Member State at the end of the period laid down in the reasoned opinion, the Court being unable to take account of any subsequent changes, is irrelevant in that regard.

73 First, the Commission may propose that financial penalties be adopted only when it brings a matter before the Court under Article 258 TFEU, such that the amount of those penalties must be determined in accordance with the rules in force on the date that that matter is brought.

74 Second, the guidelines adopted by the Commission, such as those contained in its communications, are intended to clarify the rules according to which it fixes the amounts of the financial penalties that it proposes that the Court impose, provided that the Court finds that the Member State concerned has failed to fulfil its obligations.

75 A distinction must, however, be drawn between the modalities relating to the finding of a failure to fulfil obligations and those relating to the imposition of financial penalties.

76 As follows from the case-law cited in paragraph 45 above, the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in that Member State at the end of the period laid down in the Commission's reasoned opinion. However, in order to fix the amount of a lump sum, it is necessary to determine the duration of the alleged infringement. To that end, first, the relevant date for determining the starting point of the infringement at issue is not the date of expiry of the period laid down in the Commission's reasoned opinion, but the date of expiry of the transposition deadline laid down in the directive in question (judgment of 25 April 2024, *Commission* v *Poland (Whistleblowers directive)*, C-147/23, EU:C:2024:346, paragraph 80 and the case-law cited). Second, the date on which the Commission is best able to assess the seriousness of the infringement, its duration and the deterrent effect of the proposed penalty is the date on which it decides to refer an action for failure to fulfil obligations to the Court, the Commission being able, moreover, to adapt the amount of the lump sum sought according to how the infringement situation in the Member State concerned evolves.

77 Consequently, the case-law cited by the Federal Republic of Germany, referred to in paragraph 62 above, does not preclude the Commission from applying, in the case at hand, the rules laid down in the 2023 Communication in order to determine the amount of the financial penalty which it proposes that the Court impose.

78 In the present case, it must be borne in mind that the first subparagraph of Article 260(3) TFEU provides that when the Commission brings a case before the Court pursuant to Article 258 TFEU on the ground that the Member State concerned has failed to fulfil its obligation to notify provisions transposing a directive adopted under a legislative procedure, it may, when it deems appropriate, specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances. In accordance with the second subparagraph of Article 260(3) TFEU, if the Court finds that there is an infringement it may impose a lump sum or penalty payment on the Member State concerned not exceeding the amount specified by the Commission. The payment obligation is to take effect on the date set by the Court in its judgment.

79 Since, as is apparent from paragraph 56 above, it is established that, on the expiry of the period laid down in the reasoned opinion of 15 July 2022, as extended until 15 December 2022, the Federal Republic of Germany had neither adopted nor, therefore, communicated to the Commission the laws, regulations and administrative provisions necessary to transpose the provisions of Directive 2019/1937 into its domestic law, the failure thus established falls within the scope of Article 260(3) TFEU.

80 Furthermore, it should be recalled that the objective pursued by the system set out in Article 260(3) TFEU is not only to induce Member States to put an end as soon as possible to a breach of obligations which, in the absence of such a measure, would tend to persist, but also to simplify and speed up the procedure for imposing financial penalties for failures to comply with the obligation to notify national provisions transposing a directive adopted through a legislative procedure (judgment of 25 April 2024, *Commission* v *Poland (Whistleblowers directive)*, C-147/23, EU:C:2024:346, paragraph 57 and the case-law cited).

81 In order to achieve that objective, Article 260(3) TFEU provides for the imposition, inter alia, of a lump sum as a financial penalty.

82 The imposition of a lump sum is based on assessment of the effects on public and private interests of the failure of the Member State concerned to comply with its obligations, in particular where the breach has persisted for a long period (see, to that effect, judgment of 25 April 2024, *Commission* v *Poland (Whistleblowers directive)*, C-147/23, EU:C:2024:346, paragraph 59 and the case-law cited).

83 In that regard, the Commission states reasons for the nature and amount of the financial penalty sought, taking into account the guidelines which it has adopted, such as those in its communications which, although not binding on the Court, contribute to ensuring that the action brought by the Commission is transparent, foreseeable and consistent with legal certainty (judgment of 25 April 2024, *Commission* v *Poland (Whistleblowers directive)*, C-147/23, EU:C:2024:346, paragraph 60 and the case-law cited).

84 As regards whether it is appropriate for a lump sum to be imposed, in each case, it is for the Court to determine, in the light of the circumstances of the case before it and according to the degree of persuasion and deterrence which appears to it to be required, the financial penalties that are appropriate, in particular, for preventing the recurrence of similar infringements of EU law (judgment of 25 April 2024, *Commission* v *Poland (Whistleblowers directive)*, C-147/23, EU:C:2024:346, paragraph 62 and the case-law cited).

85 In the case at hand, it must be found that, notwithstanding the fact that the Federal Republic of Germany cooperated with the Commission services throughout the pre-litigation procedure, all the legal and factual elements surrounding the breach of obligations established are an indication that if the future repetition of similar infringements of EU law is to be effectively prevented, a dissuasive measure must be adopted, such as the imposition of a lump sum. In that regard, it should be noted that both on the expiry of the period laid down in Article 26(1) of Directive 2019/1937 and on the expiry of the period laid down in the reasoned opinion of 15 July 2022, extended until 15 December 2022, no law, regulation or administrative provision enabling an effective transposition of that directive had been communicated to the Commission.

86 As regards the calculation of the amount of the lump sum, it should be recalled that, under Article 260(3) TFEU, the Court alone has the power to impose a financial penalty on a Member State. However, in the context of proceedings brought on the basis of that provision, the Court has only a limited power to assess, since, where it finds that there is a failure to fulfil obligations, the Commission's proposals are binding on it as to the nature of the financial penalty which the Court may impose and the maximum amount of the penalty which it may set (judgment of 25 April 2024, *Commission* v *Poland (Whistleblowers directive)*, C-147/23, EU:C:2024:346, paragraph 67 and the case-law cited).

87 In exercising its discretion in the matter, as delimited by the Commission's proposals, it is for the Court, as has been recalled in paragraph 84 above, to fix the amount of the lump sum which a Member State may be ordered to pay pursuant to Article 260(3) TFEU, in an amount appropriate to the circumstances and proportionate to the failure to fulfil obligations. Relevant considerations in that respect include factors such as the seriousness of the failure to fulfil obligations, the length of time for which the failure has persisted and the relevant Member State's ability to pay (judgment of 25 April 2024, *Commission* v *Poland (Whistleblowers directive)*, C-147/23, EU:C:2024:346, paragraphs 68 and 87 and the case-law cited).

88 It should likewise be remembered that, in the context of that discretion, guidelines such as communications from the Commission are not binding on the Court but rather contribute to ensuring that the Commission's own actions are transparent, foreseeable and consistent with legal certainty when that institution makes proposals to the Court (judgment of 25 April 2024, *Commission* v *Poland (Whistleblowers directive)*, C-147/23, EU:C:2024:346, paragraph 69 and the case-law cited).

89 In the present case, the Commission relied on the 2023 Communication to justify its application seeking that the Federal Republic of Germany be ordered to pay a lump sum, as well as to fix the amount thereof.

90 In the first place, as regards the seriousness of the failure to fulfil obligations established, it follows from point 3.2 of the 2023 Communication that, according to the Commission, the failure to notify the provisions enabling the transposition of a directive adopted under a legislative procedure is always considered to be serious. Accordingly, that failure justifies the automatic application of a coefficient for seriousness of 10 for the period from 18 December 2021 to 1 July 2023. Following the legislative amendments notified to the Commission, that institution considers it appropriate to apply a coefficient for seriousness of 1 for the period from 2 July 2023 to 18 July 2024.

91 The Federal Republic of Germany contests the level of that coefficient and the automatic nature of its application in the circumstances of the failure established.

92 In that regard, it should be borne in mind that the obligation to adopt provisions for the purpose of ensuring that a directive is transposed in full and the obligation to notify them to the Commission are fundamental obligations incumbent on the Member States in order to ensure optimal effectiveness of EU law and that failure to fulfil those obligations must, therefore, be regarded as definitely serious (judgment of 25 April 2024, *Commission* v *Poland (Whistleblowers directive)*, C-147/23, EU:C:2024:346, paragraph 72 and the case-law cited).

93 In the present case, it must be observed that Directive 2019/1937 is a crucial instrument of EU law in that it lays down, pursuant to Article 1 thereof, read in conjunction with recital 1 thereof, common minimum standards providing for a high level of balanced and effective protection of persons reporting breaches of EU law in areas in which such breaches are likely to be particularly harmful to the general interest. By establishing a system for the protection of persons reporting breaches of EU law in a work-related context, that directive contributes to preventing harm to the public interest, in particularly sensitive areas, such as public procurement, the prevention of money laundering and terrorist financing, and the protection of the environment or of the financial interests of the European Union. Thus, the provisions of the directive provide for the obligation, for entities in both the public and private sectors, to establish internal reporting channels and procedures for receiving reports and their follow-up, whilst safeguarding the rights of the persons reporting breaches of EU law and the conditions under which those persons can qualify for the protection laid down therein (judgment of 25 April 2024, *Commission* v *Poland (Whistleblowers directive)*, C-147/23, EU:C:2024:346, paragraph 73).

94 The non-transposition of the provisions of Directive 2019/1937 within the period prescribed necessarily undermines EU law and its uniform and effective application, since breaches of EU law are unlikely to be reported if the persons with knowledge of such breaches are not protected against any retaliation (judgment of 25 April 2024, *Commission* v *Poland (Whistleblowers directive)*, C-147/23, EU:C:2024:346, paragraph 74).

95 That said, the amount of the financial penalties imposed on a Member State pursuant to Article 260(3) TFEU must be appropriate to the circumstances and proportionate to the failure to fulfil obligations (judgment of 25 April 2024, *Commission* v *Poland (Whistleblowers directive)*, C-147/23, EU:C:2024:346, paragraph 75), as has been recalled in paragraph 87 above.

96 It is for that reason that the Court has held that the automatic application of the same coefficient for seriousness in all cases in which a directive is not fully transposed and, therefore, the measures transposing that directive are not communicated necessarily precludes the amount of the financial penalties from being tailored to the circumstances characterising the failure to fulfil obligations and proportionate penalties from being imposed (judgment of 25 April 2024, *Commission* v *Poland (Whistleblowers directive)*, C-147/23, EU:C:2024:346, paragraph 76).

97 In that regard, the Court has specified that, by presuming that a failure to comply with the obligation to notify the transposition measures for a directive must be regarded as being of the same degree of seriousness regardless of the directive concerned, the Commission is unable to tailor the financial penalties according to the consequences of the failure to comply with that obligation on private and public interests, as is provided for in point 3.2.2 of the 2023 Communication (judgment of 25 April 2024, *Commission* v *Poland (Whistleblowers directive)*, C-147/23, EU:C:2024:346, paragraph 77).

98 In the present case, the Commission proposed, in its additional claims of 24 October 2023, to apply a coefficient for seriousness of 1 from 2 July 2023, following the entry into force of the HinSchG fully transposing, in its view, Directive 2019/1937 at federal level. As has been explained in paragraph 68 above, it therefore determined two periods of infringement and accordingly requests the Court to apply two coefficients for seriousness, one of 10 for the period from 18 December 2021 to 1 July 2023 and the other of 1 for the period from 2 July 2023 to 18 July 2024. However, that institution did not specifically assess, in accordance with paragraph 79 of the judgment of 25 April 2024, *Commission* v *Poland (Whistleblowers directive)* (C-147/23, EU:C:2024:346), the consequences of the failure established on private and public interests, which would justify applying a coefficient for seriousness of 10 in respect of the first period. That being so, the Court has held that the failure to comply with the obligation to adopt the laws, regulations and administrative provisions necessary to transpose Directive 2019/1937 in full and with the obligation to communicate those provisions to the Commission must be regarded as particularly serious (judgment of 25 April 2024, *Commission* v *Poland (Whistleblowers directive)*, C-147/23, EU:C:2024:346, paragraph 89).

99 Moreover, it must be recalled that the duty of sincere cooperation with the Commission, as laid down in Article 4(3) TEU, means that every Member State is under a duty to facilitate the Commission's accomplishment of its task consisting, in accordance with Article 17 TEU, in ensuring, as guardian of the Treaties, the application of EU law under the control of the Court of Justice. Accordingly, only cooperation with the Commission characterised by steps showing an intention to comply within the shortest time possible with the obligations arising from a directive may be taken into account as a mitigating circumstance in the context of assessing the seriousness of the infringement (judgment of 25 April 2024, *Commission* v *Poland (Whistleblowers directive)*, C-147/23, EU:C:2024:346, paragraph 98 and the case-law cited).

100 The argument of the Federal Republic of Germany, set out in paragraph 63 above, however, according to which the legislative procedure relating to the transposition of Directive 2019/1937 was completed before the closure of the written procedure before the Court, cannot establish the existence of such a circumstance. In addition, the argument relied on by that Member State and

referred to in that paragraph 63 above, according to which, pursuant to Article 26(2) of that directive, certain requirements of the said directive had to be transposed not by 17 December 2021 at the latest, but by 17 December 2023 at the latest, must be rejected as ineffective, in so far as the present action does not concern that provision.

101 In the second place, when assessing the duration of the infringement, it must be recalled that, as regards the beginning of the period which must be taken into account in order to fix the amount of the lump sum, the relevant date for evaluating the duration of the infringement at issue is not the date of expiry of the period laid down in the Commission's reasoned opinion, but the date of expiry of the transposition deadline laid down in the directive in question (judgment of 25 April 2024, *Commission* v *Poland (Whistleblowers directive)*, C-147/23, EU:C:2024:346, paragraph 80 and the case-law cited).

102 It is established, however, that the Federal Republic of Germany had not, on the expiry of the transposition deadline laid down in Article 26(1) of Directive 2019/1937, that is to say, on 17 December 2021, adopted the laws, regulations and administrative provisions necessary to ensure the transposition of that directive and, therefore, had likewise failed to communicate them to the Commission, contrary to what Article 26(3) of that directive provides. Furthermore, as is apparent from paragraphs 51 to 54 above, the same directive was not fully transposed with the entry into force of the HinSchG, in the absence of the adoption of transposition measures in certain *Länder*. It follows that the failure to fulfil obligations at issue, which ended only on 18 July 2024, continued for more than two and a half years.

103 In the third place, as regards the ability to pay of the Member State at issue, it is clear from the case-law of the Court that, without prejudice to the possibility for the Commission to propose financial penalties which are based on multiple criteria, with a view, in particular, to allowing a reasonable gap between the various Member States to be maintained, it is necessary to rely on the GDP of that State as the predominant factor for the purpose of assessing its ability to pay and for the fixing of penalties that are sufficiently dissuasive and proportionate in order effectively to prevent a repeat of similar infringements of EU law in the future (judgment of 25 April 2024, *Commission* v *Poland (Whistleblowers directive)*, C-147/23, EU:C:2024:346, paragraph 81 and the case-law cited).

104 In that regard, the Court has repeatedly held that it was necessary to take account of recent trends in the Member States' GDP at the time of the Court's examination of the facts (judgment of 25 April 2024, *Commission* v *Poland (Whistleblowers directive)*, C-147/23, EU:C:2024:346, paragraph 82 and the case-law cited).

105 Here, the 'n' factor, which represents the capacity to pay of the Member State concerned as compared with the capacity to pay of the other Member States and is applied by the Commission in accordance with points 3.4 and 4.2 of the 2023 Communication, is defined as a weighted geometric average of the GDP of the Member State concerned, compared to the average of the Member States' GDPs, accounting for two thirds of the calculation of the 'n' factor, and of the population of the Member State concerned, compared to the average of Member States' populations, accounting for one third of the calculation of the 'n' factor, as is apparent from the equation set out in paragraph 11 above. The Commission justifies that method of calculating the 'n' factor both by reference to the objective of maintaining a reasonable gap between the 'n' factors of the Member States, as compared to a calculation based solely on Member States' GDPs, and the

objective of ensuring a degree of stability in the calculation of the 'n' factor, since population is unlikely to vary significantly on an annual basis (judgment of 25 April 2024, *Commission* v *Poland (Whistleblowers directive)*, C-147/23, EU:C:2024:346, paragraph 83 and the case-law cited).

106 However, the Court has held that, when determining the capacity to pay of the Member State concerned, a demographic criterion cannot be taken into account in accordance with the detailed rules laid down in points 3.4 and 4.2 of the 2023 Communication as part of the method of calculating the 'n' factor (see, to that effect, judgment of 25 April 2024, *Commission* v *Poland (Whistleblowers directive)*, C-147/23, EU:C:2024:346, paragraphs 84 to 86).

107 Accordingly, in accordance with the case-law recalled in paragraph 103 above and in the absence of a relevant criterion put forward by the Commission to ensure stability of calculation and to maintain a reasonable gap between the 'n' factors of the Member States, it is by taking into account the average GDP of the Federal Republic of Germany over the last three years that the amount of the lump sum should be fixed.

108 In the light of those considerations and having regard to the discretion conferred on the Court by Article 260(3) TFEU, which provides that the Court cannot, in respect of the lump sum, fix an amount exceeding that specified by the Commission, the view must be taken that, in order effectively to prevent a repeat of infringements similar to that resulting from the infringement of Article 26(1) and (3) of Directive 2019/1937 and undermining the optimal effectiveness of EU law in the future, a lump sum must be imposed, the amount of which must be fixed at EUR 34 000 000.

Costs

109 Under Article 138(1) of the Rules of Procedure of the Court of Justice, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the Federal Republic of Germany has been unsuccessful, the latter must be ordered to bear its own costs and to pay those incurred by the Commission.

On those grounds, the Court (Sixth Chamber) hereby:

1. **Declares that, by having failed, on the expiry of the period laid down in the reasoned opinion of the European Commission of 15 July 2022, as extended until 15 December 2022, to adopt the laws, regulations and administrative provisions necessary to comply with Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law and, therefore, by having failed to communicate them to the Commission, the Federal Republic of Germany has failed to fulfil its obligations under Article 26(1) and (3) of that directive;**

2. **Orders the Federal Republic of Germany to pay to the European Commission a lump sum in the amount of EUR 34 000 000;**

3. **Orders the Federal Republic of Germany to bear its own costs and to pay those incurred by the European Commission.**

[Signatures]