Reports of Cases

JUDGMENT OF THE COURT (Ninth Chamber)

14 March 2024*

(Failure of a Member State to fulfil obligations – Article 258 TFEU – Directive (EU) 2018/1972 – European Electronic Communications Code – Failure to transpose and to notify transposition measures – Article 260(3) TFEU – Application for the imposition of a lump sum and a periodic penalty payment – Criteria for determining the amount of the penalty)

In Case C-452/22,

ACTION for failure to fulfil obligations under Article 258 and Article 260(3) TFEU, brought on 8 July 2022,

European Commission, represented by U. Małecka, L. Malferrari and E. Manhaeve, acting as Agents,

applicant,

v

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

defendant,

THE COURT (Ninth Chamber),

composed of J.-C. Bonichot, acting as President of the Chamber, S. Rodin and L.S. Rossi (Rapporteur), Judges,

Advocate General: T. Ćapeta,

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: Polish.

Judgment

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

– declare that, by failing to adopt the laws, regulations and administrative provisions necessary to comply with Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (OJ 2018 L 321, p. 36), or, in any event, by failing to notify those measures to the Commission, the Republic of Poland has failed to fulfil its obligations under that directive;

– order the Republic of Poland to pay to the Commission a lump sum based on an amount of EUR 13 180.5 per day, the minimum lump sum being EUR 3 270 000;

– if the failure to fulfil obligations described in the first indent persists until the date on which judgment is delivered in the present case, order the Republic of Poland to pay to the Commission a penalty payment of EUR 59 290.5 for each day from that date until it has complied with its obligations under Directive 2018/1972; and

– order the Republic of Poland to pay the costs.

Legal context

2 Recitals 2 and 3 of Directive 2018/1972 state:

‘(2) The functioning of the five Directives which are part of the existing regulatory framework for electronic communications networks and services … is subject to periodic review by the Commission, with a view, in particular, to determining the need for modification in light of technological and market developments.

(3) In its communication of 6 May 2015 setting out a Digital Single Market Strategy for Europe, the Commission stated that its review of the telecommunications framework would focus on measures that aim to provide incentives for investment in high-speed broadband networks, bring a more consistent internal market approach to radio spectrum policy and management, deliver conditions for a true internal market by tackling regulatory fragmentation, ensure effective protection of consumers, a level playing field for all market players and consistent application of the rules, as well as provide a more effective regulatory institutional framework.’

3 Article 1 of that directive, entitled ‘Subject matter, scope and aims’, provides:

‘1. This Directive establishes a harmonised framework for the regulation of electronic communications networks, electronic communications services, associated facilities and associated services, and certain aspects of terminal equipment. It lays down tasks of national regulatory authorities and, where applicable, of other competent authorities, and establishes a set of procedures to ensure the harmonised application of the regulatory framework throughout the [European] Union.

2. The aims of this Directive are to:

(a) implement an internal market in electronic communications networks and services that results in the deployment and take-up of very high capacity networks, sustainable competition, interoperability of electronic communications services, accessibility, security of networks and services and end-user benefits; and

(b) ensure the provision throughout the [European] Union of good quality, affordable, publicly available services through effective competition and choice, to deal with circumstances in which the needs of end-users, including those with disabilities in order to access the services on an equal basis with others, are not satisfactorily met by the market and to lay down the necessary end-user rights.

…'

4 Article 124 of that directive, entitled 'Transposition', provides, in paragraph 1 thereof:

'Member States shall adopt and publish, by 21 December 2020, the laws, regulations and administrative provisions necessary to comply with this Directive. They shall immediately communicate the text of those measures to the Commission.

Member States shall apply those measures from 21 December 2020.

When Member States adopt those measures, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. They shall also include a statement that references in existing laws, regulations and administrative provisions to the Directives repealed by this Directive shall be construed as references to this Directive. Member States shall determine how such reference is to be made and how that statement is to be formulated.'

Pre-litigation procedure and proceedings before the Court

5 Since the Republic of Poland did not send the Commission any information relating to the adoption of the provisions necessary to transpose Directive 2018/1972 into Polish law, in accordance with Article 124 thereof, the Commission sent a letter of formal notice to that Member State on 3 February 2021.

6 On 6 April 2021, the Polish authorities replied to that letter, stating, in particular, that Directive 2018/1972 was to be transposed by two laws that were to be published and communicated by the beginning of August 2021 at the latest.

7 In the absence of any further information on the transposition of Directive 2018/1972, the Commission sent a reasoned opinion to the Republic of Poland on 23 September 2021 requesting that it comply with that directive before 23 November 2021.

8 On 17 November 2021, the Polish authorities replied to the reasoned opinion by providing the Commission with details of the state of the legislative work relating to that transposition. In particular, they stated that the publication of the transposing laws was planned for March 2022.

9 Taking the view that the Republic of Poland had not adopted the provisions necessary to comply with Directive 2018/1972, the Commission decided, on 6 April 2022, to bring the present action before the Court.

10 On 27 April 2022, the Polish authorities informed the Commission that the Council of Ministers had forwarded a draft law intended to transpose Directive 2018/1972 to the Legal Committee of the Government Legislation Centre.

11 On 8 July 2022, the Commission initiated the present proceedings.

12 The Republic of Poland asks the Court to dismiss the action in its entirety, in the alternative, to refrain from imposing the lump sum and the penalty payment sought by the Commission, in the further alternative, to reduce substantially the amount of that lump sum and of that penalty payment, and to order the Commission to pay the costs.

13 On 19 December 2022, the written procedure in the present case was closed.

The action

Failure to fulfil obligations under Article 258 TFEU

Arguments of the parties

14 In its application, the Commission recalls that, under the third paragraph of Article 288 TFEU, Member States are required to adopt the provisions necessary to ensure the transposition of directives into their national legal systems within the time limits laid down in those directives and to notify those provisions to the Commission immediately.

15 The Commission explains that the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in the Member State concerned at the end of the period laid down in the reasoned opinion.

16 In the present case, on the expiry of that period, or even on the date on which the present action was brought, the Republic of Poland had not yet adopted the provisions necessary to transpose Directive 2018/1972 into national law and, in any event, had not notified them to the Commission.

17 According to the Commission, the Republic of Poland does not actually dispute the allegation that it failed to fulfil its obligations, confining itself to relying on practical and internal circumstances to justify that failure. However, failure to transpose a directive within the period prescribed in that directive cannot be justified by such circumstances.

18 In its defence, the Republic of Poland denies that it has failed to fulfil its obligations. That Member State submits that, in the light of the horizontal nature of Directive 2018/1972 and the freedom granted to Member States to choose the measures implementing that directive, it decided to apply a solution similar to that adopted by the EU legislature, that is to say, to adopt a new legal act regulating the telecommunications market as a whole, namely the ustawa Prawo komunikacji

elektronicznej (Electronic Communications Law), together with the ustawa – Przepisy wprowadzające ustawę – Prawo komunikacji elektronicznej (Law implementing the Electronic Communications Law).

19 According to the Republic of Poland, first of all, the adoption of the drafts of those two laws, on account of their broad scope, had to be preceded by the production of a number of substantive and legislative analyses and by extensive consultation of both the public administration and consumers and professionals.

20 Next, the complex and imprecise nature of the provisions of Directive 2018/1972 gave rise to a number of doubts as to their interpretation, which led to differences of opinion between the actors involved in the legislative work. In particular, those doubts related to the determination of the scope *ratione personae* of that directive and to the category of electronic communications services under which certain RCS (Rich Communication Services) services were to fall. In the latter regard, the Commission itself did not provide a useful response to a request from the Republic of Poland.

21 Lastly, the legislative work was delayed because of the COVID-19 pandemic, which made it more difficult to organise consultation meetings and led to numerous absences of persons involved in that work. Furthermore, that pandemic required parallel treatment of a number of important issues, including public health, State security, and public safety and order.

22 In its reply, the Commission contends that none of the circumstances relied on by the Republic of Poland can justify the fact that, at the date on which that reply was lodged, that Member State had not fulfilled its obligations concerning the transposition of Directive 2018/1972.

Findings of the Court

23 According to 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 February 2021, *Commission* v *Spain (Personal Data Directive – Criminal law)*, C-658/19, EU:C:2021:138, paragraph 15 and the case-law cited).

24 In addition, the Court has repeatedly held that if a directive expressly requires Member States to ensure that the necessary measures transposing the directive include a reference to it or that such reference is made when those measures are officially published, it is, in any event, necessary for Member States to adopt a specific measure transposing the directive in question (judgment of 25 February 2021, *Commission* v *Spain (Personal Data Directive – Criminal law)*, C-658/19, EU:C:2021:138, paragraph 16 and the case-law cited).

25 In the present case, the time limit for replying to the reasoned opinion expired on 23 November 2021. It is therefore necessary to assess whether or not the alleged failure to fulfil obligations exists in the light of the state of the domestic legislation in force on that date (see, to that effect, judgment of 25 February 2021, *Commission* v *Spain (Personal Data Directive – Criminal law)*, C-658/19, EU:C:2021:138, paragraph 17 and the case-law cited).

26 In that respect, it is common ground that, on that date, the Republic of Poland had not adopted the measures necessary to ensure the transposition of Directive 2018/1972, nor, consequently, had it notified those measures to the Commission.

27 In order to justify its failure to fulfil obligations, the Republic of Poland raises several arguments based, first, on its choice to adopt new legal acts regulating the telecommunications market as a whole, the adoption process for which was particularly complex, secondly, on the imprecise nature of the provisions of Directive 2018/1972 and, thirdly, on the consequences of the COVID-19 pandemic.

28 Such arguments cannot justify the failure to fulfil obligations complained of by the Commission.

29 First, the allegedly complex nature of the internal legislative process transposing Directive 2018/1972 cannot be relevant, since, according to settled case-law, a Member State cannot rely on practices or situations prevailing in its internal legal order to justify its failure to comply with the obligations and time limits laid down by EU directives, nor therefore the late or incomplete implementation of directives (judgment of 13 January 2021, *Commission* v *Slovenia (MiFID II)*, C-628/18, EU:C:2021:1, paragraph 79 and the case-law cited).

30 Secondly, the alleged imprecise nature and complexity of the provisions of Directive 2018/1972 are not such as to rule out the failure to fulfil obligations in question. As the Commission rightly submits, when the EU legislature fixed the period for transposition of that directive, it was aware of the degree of complexity and precision of that directive and, in any event, it was for the EU legislature alone to extend that period and not for the Member States to derogate from it or for the Commission to tolerate such derogations. The Republic of Poland does not claim to have taken the necessary initiatives in an attempt to obtain such an extension.

31 Thirdly, as regards the effects of the COVID-19 pandemic, which broke out at the beginning of 2020, suffice it to note that it would have been for the EU legislature to extend the time limit for transposition of Directive 2018/1972 if it had considered that the effects of that pandemic, which affected the entire territory of the European Union, were such as to prevent the Member States from complying with their obligations under that directive.

32 Accordingly, it must be held that, by failing to adopt, by the expiry of the period prescribed in the reasoned opinion, the laws, regulations and administrative provisions necessary to comply with Directive 2018/1972 and, consequently, by failing to notify those provisions to the Commission, the Republic of Poland has failed to fulfil its obligations under Article 124(1) of that directive.

The applications pursuant to Article 260(3) TFEU

Arguments of the parties

33 In its application, the Commission states, first, that Directive 2018/1972 was adopted in accordance with the ordinary legislative procedure and therefore falls within the scope of Article 260(3) TFEU and, secondly, that the failure by the Republic of Poland to fulfil its obligations under Article 124 of that directive, as a result of that Member State not notifying it of the provisions transposing the directive, clearly constitutes a failure to notify measures transposing that directive, within the meaning of Article 260(3) TFEU.

34 The Commission recalls that, in point 23 of its Communication 2011/C 12/01, entitled ‘Implementation of Article 260(3) [TFEU]’ (OJ 2011 C 12, p. 1) (‘the 2011 Communication’), it stated that the penalties that it will propose pursuant to Article 260(3) TFEU will be calculated by

means of the same method used for referrals to the Court in line with Article 260(2) TFEU, as set out in points 14 to 18 of its Communication SEC(2005) 1658, entitled 'Application of Article [260 TFEU]' (OJ 2007 C 126, p. 15) ('the 2005 Communication').

35 Consequently, the determination of the penalty should be based, in the first place, on the seriousness of the infringement, in the second place, on the duration of the infringement and, in the third place, on the need to ensure that the penalty itself has a deterrent effect in order to avoid further infringements.

36 In the first place, as regards the seriousness of the infringement, in accordance with point 16 of the 2005 Communication and with the 2011 Communication, the Commission fixes the coefficient for seriousness by taking account of two parameters, namely, first, the importance of the EU rules that are the subject of the infringement and, secondly, their consequences for the general and particular interests at issue.

37 Thus, the Commission notes that Directive 2018/1972 is the main legislative act in the field of electronic communications. To begin with, the European Electronic Communications Code ('the EECC') modernises the EU regulatory framework on electronic communications by strengthening consumer choice and rights, ensuring higher standards of communication services, encouraging investment in very high capacity networks and promoting wireless access to very high capacity connectivity across the European Union. Next, the EECC puts in place rules for the organisation of the electronic communications sector, including its institutional set-up and governance. The provisions of the EECC strengthen the role of the national regulatory authorities by defining a minimum set of powers for those authorities and by strengthening their independence through the establishment of criteria for appointments and reporting obligations. Furthermore, the EECC also ensures efficient and effective management of radio spectrum ('spectrum'). Those provisions increase the consistency of the practices of Member States with regard to essential aspects of spectrum authorisation. Those provisions promote infrastructure competition and the deployment of very high capacity networks across the European Union. Finally, the EECC regulates different aspects of the provision of electronic communications services, including universal service obligations, numbering resources and end users' rights. The strengthening of those rules is intended to increase safety and consumer protection, in particular as regards access to those services at an affordable cost.

38 In addition, failure to transpose Directive 2018/1972 into Polish law, first, undermines regulatory practices throughout the European Union as regards the management of the electronic communications system, spectrum authorisations and market access rules. Consequently, undertakings do not benefit from more coherent and predictable procedures for the grant or renewal of existing spectrum rights of use or from the predictability of the regulation resulting from the 20-year minimum duration of spectrum licences. Such failures have a direct influence on the availability and deployment of very high capacity networks within the European Union. Secondly, consumers are not able to benefit from a series of tangible advantages conferred on them by that directive, such as solutions relating to access to the provision of affordable communications services, the requirement to provide them with clear information on contracts, the obligation to charge transparent tariffs, the simplification of switching network providers in order to promote more affordable retail prices and the obligation for operators to offer disabled end users equivalent access to communications services.

39 Since it has not identified any aggravating or mitigating factors, the Commission proposes a coefficient for seriousness of 10 in the present case.

40 In the second place, as regards the duration of the failure to fulfil obligations, the Commission submits that it relates to the period from the date following the expiry of the transposition deadline laid down by Directive 2018/1972, namely 22 December 2020, to the date of adoption of the decision to bring the present action before the Court, namely 6 April 2022. It follows that the relevant period is 15 months. Applying the coefficient of 0.10 per month provided for in point 17 of the 2005 Communication, read in conjunction with the 2011 Communication, the duration coefficient is therefore 1.5.

41 In the third place, as regards the Republic of Poland's ability to pay, the Commission applied the 'n' factor provided for in its Communication 2019/C 70/01, entitled 'Modification of the calculation method for lump sum payments and daily penalty payments proposed by the Commission in infringements proceedings before the Court of Justice of the European Union' (OJ 2019 C 70, p. 1). That factor takes account of two elements, namely the gross domestic product (GDP) and the institutional weight of the Member State concerned, represented by the number of seats allocated to that Member State in the European Parliament.

42 Even though the Court, in its judgment of 20 January 2022, *Commission* v *Greece (Recovery of State aid – Ferronickel)* (C-51/20, EU:C:2022:36), already called into question the relevance of both that second element and the adjustment coefficient of 4.5 provided for in that communication, the Commission nevertheless decided to apply, in the present case, the criteria laid down in that communication, pending the adoption of a new communication that would take account of that recent case-law of the Court.

43 Thus, in accordance with 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' (OJ 2022 C 74, p. 2) ('the 2022 Communication'), the 'n' factor for the Republic of Poland is 1.45.

44 In accordance with its Communication 2017/C 18/02, entitled 'EU law: Better results through better application' (OJ 2017 C 18, p. 10), the Commission asks the Court to impose on the Republic of Poland, first, a penalty payment in respect of the period from the date of delivery of the judgment in the present case to the date on which it is fully complied with and, secondly, a lump sum payment in respect of the period between the date following the date of expiry of the transposition deadline provided for in Directive 2018/1972 and the date on which that Member State fully complies with its obligations under that directive or the date of delivery of that judgment.

45 As regards the penalty payment, the Commission recalls that, in accordance with point 18 of the 2005 Communication, the amount of such a penalty payment should ensure that the sanction is both proportionate and dissuasive. To those ends, the amount of the daily penalty payment is calculated by multiplying the standard flat-rate amount by a coefficient for seriousness and a coefficient for duration, then by the 'n' factor applicable to the Member State concerned. The standard flat-rate amount for calculating the penalty payment is, in accordance with the 2022 Communication, EUR 2 726 per day. As pointed out in paragraphs 39 and 40 above, the coefficients for seriousness and for duration proposed by the Commission are 10 and 1.5, respectively. The 'n' factor for the Republic of Poland is 1.45. Thus, the amount of the daily penalty payment proposed by the Commission is EUR 59 290.5, from the date of delivery of the judgment in the present case.

46 As regards the lump sum, it is apparent from point 20 of the 2005 Communication that it should have at least a fixed minimum base, reflecting the principle that any case of persistent non-compliance with EU law, irrespective of any aggravating circumstances, in itself represents an attack on the principle of legality in a Community governed by the rule of law, which calls for a real sanction. According to the 2022 Communication, the minimum lump sum for the Republic of Poland is EUR 3 270 000.

47 Under the method established by the 2005 Communication and the 2011 Communication, if the result of the calculation of the lump sum exceeded that minimum lump sum, the Commission would propose that the Court determine the lump sum by multiplying a daily amount by the number of days during which the infringement concerned has persisted between the date following the expiry of the transposition deadline laid down by the directive in question and the date on which that infringement ceases or, failing that, the date of delivery of the judgment under Article 260(3) TFEU. Thus, the daily amount of the lump sum should be calculated by multiplying the standard flat-rate amount applicable to the calculation of the daily amount of the lump sum by the coefficient for seriousness and by the 'n' factor. That standard flat-rate amount is, in accordance with the 2022 Communication, EUR 909. In the present case, since the coefficient for seriousness and the 'n' factor are 10 and 1.45, respectively, it follows that the daily amount of the lump sum is EUR 13 180.5. The amount of that sum corresponds to the multiplication of that daily amount by the number of days that elapsed between the date following that on which the transposition deadline laid down by Directive 2018/1972 expired, namely 22 December 2020, and the date on which the Republic of Poland complies with its obligations under that directive or the date of delivery of the judgment in the present case, since that sum may not be less than the minimum lump sum of EUR 3 270 000, set by the 2022 Communication concerning that Member State.

48 In its defence, the Republic of Poland submits that the amounts of the lump sum and periodic penalty payment proposed by the Commission are excessive and disproportionate to the seriousness of the alleged failure to fulfil obligations.

49 As regards, first, the setting of the coefficient for seriousness, the Republic of Poland complains that the Commission failed to carry out a detailed analysis, as required by the 2005 Communication and by the case-law of the Court. The Commission confined itself to general formulations that do not make it possible to determine the significance of the provisions of EU law infringed or the impact of the failure to transpose Directive 2018/1972 on the general interest and on particular interests.

50 The Commission incorrectly assessed the real importance of the rules of EU law affected by the alleged failure to fulfil obligations. Directive 2018/1972 largely reproduces the provisions of directives previously in force, which were fully transposed into Polish law, without introducing any changes of a systemic nature. Some of those changes have only editing value or are of minor importance.

51 As regards the changes considered essential by the Commission, the Republic of Poland argues that Polish law already contains provisions that, in essence, are similar to those laid down in Directive 2018/1972 and which ensure the attainment of the objectives pursued by that directive. Those provisions entered into force on 21 December 2020, that is to say, on the date of expiry of the transposition deadline of that directive.

52 Even if, owing to the failure to notify those provisions to the Commission, they were not taken into account in the assessment of the existence of the failure to fulfil obligations in question, the Republic of Poland submits that they should be taken into account in calculating the coefficient for seriousness of that failure and, in particular, in assessing the effects of the failure to transpose Directive 2018/1972 in a timely manner on the general interest and on particular interests.

53 As regards, secondly, consideration of the deterrent effect, and in particular the application of the 'n' factor, the Republic of Poland maintains that, as in the case that gave rise to the judgment of 20 January 2022, *Commission* v *Greece (Recovery of State aid – Ferronickel)* (C-51/20, EU:C:2022:36), there is no need to take account of the institutional weight of the defendant Member State within the European Union, and that it is sufficient to rely on its GDP. In that case, the 'n' factor should be reduced to 1.03.

54 In conclusion, the Republic of Poland seeks a reduction of the coefficient for seriousness and of the 'n' factor and, consequently, a reduction of the amount of the penalties requested by the Commission.

55 In its reply, the Commission asserts, in the first place, that the Republic of Poland's argument is inconsistent, since it states, first, that the detailed text of Directive 2018/1972 required multiple substantive analyses and public consultations, including with consumers and undertakings, which led to a delay in its transposition, and, secondly, that that directive largely reproduces the provisions of earlier directives, to the extent that the failure to fulfil obligations at issue cannot have a concrete and substantial effect on the market or on the situation of end users.

56 In the second place, the Commission states that, on the date on which that reply was lodged, the national provisions mentioned by the Republic of Poland, which the latter claimed complied with the requirements of Directive 2018/1972, had not been notified to it as measures transposing that directive. It is therefore not possible for the Commission to take those provisions into account for the purposes of determining the coefficient for seriousness.

57 First, the Commission did not have the opportunity to examine whether those national provisions actually transposed the provisions of Directive 2018/1972 in full.

58 Secondly, in any event, that directive imposes an obligation to notify the text of such national provisions to the Commission in an appropriate form, so that the Commission can determine the date and scope of that notification. The Republic of Poland's position amounts to asserting that the formal communication to the Commission may be replaced by a reference, before the Court, to the measures intended to transpose the directive in question, which constitutes a de facto communication and is in direct contradiction with the wording of the obligation to notify laid down by that directive and renders that obligation meaningless, to the detriment of the effectiveness of EU law. The same applies where the transposition of a directive can be ensured by national rules already in force. In such a case, the Member States are not exempt from the obligation to notify the Commission of the existence of those rules.

59 Thirdly, the information that Member States are obliged to supply to the Commission must be clear and precise and must indicate unequivocally the laws, regulations and administrative provisions by means of which the Member State concerned considers that it has fulfilled the various obligations that the directive concerned imposes on it. In the absence of such information, the Commission is not in a position to determine whether the Member State concerned has genuinely and fully transposed the directive.

60 Fourthly, the Commission states that the arguments put forward by the Republic of Poland are of a general nature and that it cannot be inferred therefrom that the rules of law cited effectively and fully transpose the provisions of Directive 2018/1972 into Polish law.

61 In the third place, as regards the 'n' factor, the Commission maintains its position.

62 In its rejoinder, the Republic of Poland states that, as regards, in the first place, the coefficient for seriousness, it does not dispute that the obligation to adopt national measures to ensure full transposition of a directive and the obligation to notify those measures to the Commission constitute essential obligations of the Member States and that the failure to fulfil those obligations must be regarded as undoubtedly serious. Moreover, it does not believe that the formal communication to the Commission can be replaced by a de facto communication.

63 However, first, that does not mean that, when the Commission assesses, for the purposes of determining the amount of the penalties, the effects of the failure to transpose Directive 2018/1972 in a timely manner on the internal market and on consumers, it may completely ignore national legislation solely on the ground that it was not notified to it. To accept the contrary would mean that, when setting the coefficient for seriousness, it would be the potential effects of the conduct of the Member States that would be assessed and not the actual effects of that conduct. In accordance with point 16 of the 2005 Communication, among the parameters influencing the coefficient for seriousness of an infringement, the importance of the provisions of EU law in respect of which that infringement was committed and the effects of that infringement on general or particular interests are mentioned separately. The Republic of Poland submits that, in the context of the first of those parameters, the scope of the EU act concerned is assessed theoretically, including in particular the potential effects of the failure to implement it in the Member States. By contrast, the effects of the alleged infringement on general or particular interests should be analysed in the specific context, taking into account not only the provisions of Directive 2018/1972 but also the factual circumstances, which also include the national provisions in force, even if they have not been notified. In that regard, that Member State refers to paragraph 53 of the judgment of 25 June 2013, *Commission* v *Czech Republic* (C-241/11, EU:C:2013:423).

64 Moreover, the Republic of Poland states that, on 25 November 2022, it notified a series of acts to the Commission and that the two draft transposing laws were sent to the Sejm (Lower Chamber of the Polish Parliament, Poland) on 9 December 2022, which, in accordance with point 16.3 of the 2005 Communication, should be regarded as a mitigating factor, since it indicates the progress of the legislative work.

65 Secondly, that Member State maintains that its argument is not inconsistent. The fact that Directive 2018/1972 largely reproduces repealed directives does not preclude the existence of ambiguity in the new provisions that it introduces. The issues raised by the defence related precisely to those new provisions.

66 In the second place, as regards the 'n' factor, the Republic of Poland submits that the judgment in *Commission* v *Greece (Recovery of State aid – Ferronickel)* (C-51/20, EU:C:2022:36) was delivered on 20 January 2022 and that the Commission cannot rely on unfinished analyses to justify its failure to comply with it. That judgment is of considerable importance for ongoing proceedings relating to the failure to transpose directives and to the failure to comply with judgments of the Court, in which the Commission, first, criticises the Member States for not having fulfilled their obligations in good time and, secondly, itself delays compliance with that judgment.

Findings of the Court

67 Since, as is apparent from paragraph 32 above, it is established that, by the expiry of the period prescribed in the reasoned opinion, the Republic of Poland had not notified to the Commission any measure transposing Directive 2018/1972, within the meaning of Article 260(3) TFEU, the failure to fulfil obligations thus declared falls within the scope of that provision.

68 The Commission seeks the imposition of a penalty payment and a lump sum payment.

69 It is apparent from the Court's case-law that the application of each of those measures depends on their respective ability to meet the objective pursued according to the circumstances of the case. While the imposition of a penalty payment seems particularly suited to inducing a Member State 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, the imposition of a lump sum is based more 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 (judgment of 25 February 2021, *Commission* v *Spain (Personal Data Directive – Criminal law)*, C-658/19, EU:C:2021:138, paragraph 54 and the case-law cited).

– *The application for the imposition of a penalty payment*

70 As regards the appropriateness of imposing a penalty payment in the present case, it should be recalled that, according to the Court's case-law, the imposition of such a penalty payment is, in principle, justified only if the failure continues up to the time of the Court's examination of the facts, that is to say, the date of conclusion of the proceedings (judgment of 25 February 2021, *Commission* v *Spain (Personal Data Directive – Criminal law)*, C-658/19, EU:C:2021:138, paragraphs 55 and 57 and the case-law cited).

71 It follows that, in order to determine whether, in the present case, the imposition of a penalty payment may be envisaged, it is necessary to examine whether the failure to fulfil obligations established in paragraph 32 above persisted until the date of the conclusion of the proceedings, which took place on 19 December 2022.

72 In that regard, it is apparent from the file submitted to the Court that, on that date, the Republic of Poland had neither adopted nor, consequently, notified the measures necessary to ensure the transposition of the provisions of Directive 2018/1972 into Polish law.

73 In those circumstances, it must be held that, by failing to adopt those measures by the date of the Court's examination of the facts and, consequently, to communicate them to the Commission, the Republic of Poland has persisted in its failure to fulfil obligations.

74 Therefore, the Court considers that the imposition of a penalty payment on the Republic of Poland, sought by the Commission, is appropriate for the purposes of ensuring that that Member State puts a prompt end to the established failure and complies with its obligations under Directive 2018/1972. Conversely, since it cannot be ruled out that, on the date of delivery of the judgment in the present case, the directive is transposed in full, that penalty payment should be imposed only in so far as the failure to fulfil obligations established in paragraph 32 above persists at that date.

75 It should be recalled that, in exercising its discretion in the matter, it is for the Court to set the penalty payment so that it is, first, appropriate to the circumstances and proportionate to the infringement established and the ability to pay of the Member State concerned and, secondly, does not exceed, in accordance with the second subparagraph of Article 260(3) TFEU, the amount indicated by the Commission (judgment of 25 February 2021, *Commission* v *Spain (Personal Data Directive – Criminal law)*, C-658/19, EU:C:2021:138, paragraph 62 and the case-law cited).

76 In the assessment which it is for the Court to carry out for the purposes of determining the amount of a penalty payment, the criteria which must be taken into consideration in order to ensure its coercive effect so that EU law is applied uniformly and effectively are, in principle, the duration and seriousness of the infringement and the ability to pay of the Member State in question. In applying those criteria, the Court must have regard, in particular, to the effects of the failure to fulfil its obligations on the public and private interests in question and to how urgent it is for the Member State concerned to be induced to fulfil its obligations (judgment of 25 February 2021, *Commission* v *Spain (Personal Data Directive – Criminal law)*, C-658/19, EU:C:2021:138, paragraph 63 and the case-law cited).

77 As regards, in the first place, the seriousness of the infringement, it must be borne in mind that the obligation to adopt national measures for the purposes of ensuring that a directive is transposed in full and the obligation to notify those measures 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 February 2021, *Commission* v *Spain (Personal Data Directive – Criminal law)*, C-658/19, EU:C:2021:138, paragraph 64 and the case-law cited).

78 In the present case, it must be held that, as is apparent from paragraph 32 above, by the expiry of the period prescribed in the reasoned opinion, namely 23 November 2021, the Republic of Poland had failed to fulfil its transposition obligations under Directive 2018/1972, with the result that the full effectiveness of EU law was not ensured. The seriousness of that failure is reinforced by the fact that, at that date, the Republic of Poland had still not notified any measure transposing that directive.

79 Moreover, as the Commission argues, Directive 2018/1972 is the main legislative act in the field of electronic communications.

80 In particular, first of all, under Article 1(1) of Directive 2018/1972, that directive ‘establishes a harmonised framework for the regulation of electronic communications networks, electronic communications services, associated facilities and associated services, and certain aspects of terminal equipment. It lays down tasks of national regulatory authorities and, where applicable, of other competent authorities, and establishes a set of procedures to ensure the harmonised application of the regulatory framework throughout the Union’.

81 Next, according to Article 1(2) of that directive, its aim is, first, to implement an internal market in electronic communications networks and services that results in the deployment and take-up of very high capacity networks, sustainable competition, interoperability of electronic communications services, accessibility, security of networks and services and end-user benefits; and, secondly, to ensure the provision throughout the European Union of good quality, affordable, publicly available services through effective competition and choice, to deal with

circumstances in which the needs of end users, including those with disabilities in order to access the services on an equal basis with others, are not satisfactorily met by the market and to lay down the necessary end-user rights.

82 Lastly, as is apparent from recitals 2 and 3 thereof, that directive modifies the existing regulatory framework before its adoption in order to take account of technological and market developments.

83 It is true, as the Republic of Poland submits, that the area in question is already regulated by other acts of EU law, which that directive amends or replaces.

84 However, that directive does not merely codify those acts. As the Commission emphasises, without being contradicted by the Republic of Poland, the EECC strengthens, in particular, the choices and rights of consumers, by guaranteeing higher standards of communication services, and the role of the national regulatory authorities, by defining a minimum set of powers for those authorities and by strengthening their independence through the establishment of criteria for appointments and reporting obligations. In addition, the EECC regulates different aspects of the provision of electronic communications services, including universal service obligations, numbering resources and end users' rights. Strengthening the rules on the organisation of the electronic communications sector laid down by the EECC aims to increase consumer security and protection, in particular as regards access to those services at an affordable cost.

85 As the Commission rightly states, the Republic of Poland's failure to transpose Directive 2018/1972, first, undermines regulatory practices throughout the European Union as regards the management of the electronic communications system, spectrum authorisation and market access rules. Consequently, undertakings do not benefit from more coherent and predictable procedures for the grant or renewal of existing spectrum rights of use or from the predictability of the regulation resulting from the 20-year minimum duration of spectrum licences. Such failures have a direct influence on the availability and deployment of very high capacity networks within the European Union. Secondly, consumers are unable to benefit from a series of tangible advantages conferred on them by that directive, such as solutions relating to access to the provision of affordable communications services, the requirement to provide them with clear information on contracts, the obligation to charge transparent tariffs, the simplification of switching network providers in order to promote more affordable retail prices and the obligation for operators to offer disabled end users equivalent access to communications services.

86 In the second place, as regards the duration of the infringement, it must be recalled that that duration must, in principle, be assessed by reference to the date on which the Court assesses the facts and that that assessment of the facts must be considered as being made at the date of conclusion of the proceedings (see, to that effect, judgment of 25 February 2021, *Commission* v *Spain (Personal Data Directive – Criminal law)*, C-658/19, EU:C:2021:138, paragraphs 66 and 79 and the case-law cited).

87 With regard to, first, the beginning of the period which must be taken into account in order to set the amount of the lump sum payment to be imposed pursuant to Article 260(3) TFEU, the Court has held that the relevant date for evaluating the duration of the infringement at issue is the date of expiry of the period prescribed in the reasoned opinion (see, to that effect, judgments of 16 July 2020, *Commission* v *Romania (Anti-money laundering)*, C-549/18, EU:C:2020:563, paragraph 79, and of 16 July 2020, *Commission* v *Ireland (Anti-money laundering)*, C-550/18, EU:C:2020:564, paragraph 90).

88 In the present case, it is not validly disputed that, on the expiry of the period prescribed in the reasoned opinion, that is to say 23 November 2021, the Republic of Poland had neither adopted the laws, regulations and administrative provisions necessary to ensure that Directive 2018/1972 was transposed nor, consequently, notified those measures to the Commission.

89 Secondly, as is apparent from paragraphs 72 and 73 above, the failure to fulfil obligations established in paragraph 32 above had not yet come to an end on the date on which the proceedings before the Court were concluded, namely 19 December 2022.

90 An infringement of a duration of almost 13 months is significant having regard to the fact that, under Article 124 of Directive 2018/1972, Member States were bound to transpose the provisions of the directive by 21 December 2020 at the latest.

91 That said, the view must be taken that that length of time may have resulted in part from the exceptional circumstances linked to the COVID-19 pandemic. The Republic of Poland contends, without being challenged, that those circumstances, which were unforeseeable and beyond its control, delayed the legislative process necessary to transpose Directive 2018/1972 and, consequently, extended the period during which the failure to fulfil obligations established in paragraph 32 above persisted.

92 As regards, in the third place, the ability to pay of the Member State concerned, it is apparent from the case-law of the Court that it is necessary to take account of the GDP of that Member State at the time of the Court's examination of the facts (see, to that effect, judgments of 16 July 2020, *Commission* v *Romania (Anti-money laundering)*, C-549/18, EU:C:2020:563, paragraph 85, and of 16 July 2020, *Commission* v *Ireland (Anti-money laundering)*, C-550/18, EU:C:2020:564, paragraph 97).

93 The Commission proposes to take into account, in addition to the GDP of the Republic of Poland, the latter's institutional weight in the European Union expressed by the number of seats that that Member State has within the Parliament. The Commission also submits that an adjustment coefficient of 4.5 should be used to ensure that the penalties that it is asking the Court to impose on that Member State are proportionate and dissuasive.

94 However, as the Republic of Poland rightly submits, the Court has recently made it very clear, first, that taking into account the institutional weight of the Member State concerned is not essential to ensure sufficient deterrence and to induce that Member State to change its current or future conduct and, secondly, that the Commission has failed to establish the objective criteria on the basis of which it fixed the value of the adjustment coefficient of 4.5 (see, to that effect, judgment of 20 January 2022, *Commission* v *Greece (Recovery of State aid – Ferronickel)*, C-51/20, EU:C:2022:36, paragraphs 115 and 117).

95 In the light of the foregoing, and having regard to the Court's discretion under Article 260(3) TFEU, which provides that the Court may not, as regards the penalty payment which it imposes, exceed the amount indicated by the Commission, it is appropriate, should the failure to fulfil obligations established in paragraph 32 above persist at the date of delivery of this judgment, to order the Republic of Poland to pay the Commission, as from that date and until that Member State has put an end to that failure, a daily penalty payment of EUR 50 000.

– *The application for the imposition of a lump sum payment*

96 As regards whether or not the payment of a lump sum should be imposed in the present case, it must be borne in mind that, 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 February 2021, *Commission* v *Spain (Personal Data Directive – Criminal law)*, C-658/19, EU:C:2021:138, paragraph 69 and the case-law cited).

97 In the present case, it must be found that, notwithstanding the fact that the Republic of Poland cooperated with the Commission services throughout the pre-litigation procedure and kept them informed of the reasons which prevented it from ensuring the transposition of Directive 2018/1972 into Polish law, all the legal and factual circumstances culminating in the breach of obligations established – namely, the fact that no measure necessary for that transposition had been notified at the expiry of the period laid down in the reasoned opinion or even at the date on which the present action was brought or on which the Court assessed the facts – indicate that if the future repetition of similar infringements of EU law is to be effectively prevented, a dissuasive measure must be adopted, such as a lump sum payment (see, by analogy, judgment of 25 February 2021, *Commission* v *Spain (Personal Data Directive – Criminal law)*, C-658/19, EU:C:2021:138, paragraph 70 and the case-law cited).

98 It follows that it is appropriate to impose a lump sum payment on the Republic of Poland.

99 As regards the calculation of the amount of that lump sum, it must be borne in mind that, in exercising its discretion in the matter, as delimited by the Commission's proposals, it is for the Court to fix the amount of the lump sum which may be imposed on a Member State 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 February 2021, *Commission* v *Spain (Personal Data Directive – Criminal law)*, C-658/19, EU:C:2021:138, paragraph 73 and the case-law cited).

100 As noted in paragraph 86 above, the duration of the infringement must, in principle, be assessed by reference to the date on which the Court assesses the facts and that assessment of the facts must be regarded as being made on the date of closure of the proceedings.

101 First, as regards the beginning of the period which must be taken into account in order to fix the amount of the lump sum to be imposed pursuant to Article 260(3) TFEU, the Court held that, unlike the daily penalty payment, the relevant date for evaluating the duration of the infringement at issue is not the date of expiry of the period prescribed in the reasoned opinion, but the date of expiry of the transposition deadline laid down in the directive in question (judgments of 16 July 2020, *Commission* v *Romania (Anti-money laundering)*, C-549/18, EU:C:2020:563, paragraph 79, and of 16 July 2020, *Commission* v *Ireland (Anti-money laundering)*, C-550/18, EU:C:2020:564, paragraph 90).

102 In the present case, it is not validly disputed that, at the date of expiry of the transposition deadline laid down in Article 124 of Directive 2018/1972, namely 21 December 2020, the Republic of Poland had not adopted the laws, regulations and administrative provisions necessary to ensure the transposition of that directive nor, consequently, notified those measures to the Commission.

103 Secondly, as has already been pointed out in paragraph 89 above, on the date on which the proceedings were closed, namely 19 December 2022, the failure to fulfil obligations established in paragraph 32 above had not yet come to an end, with the result that, on that date, that failure to fulfil obligations had lasted 728 days.

104 However, it must be borne in mind that the duration of that failure to fulfil obligations may in part have resulted from the exceptional circumstances referred to in paragraph 91 above.

105 It follows that, having regard also to the considerations relating both to the seriousness of the infringement, set out in paragraphs 77 to 85 above, and to the Republic of Poland's ability to pay, set out in paragraphs 92 to 94 above, and in the light of the Court's discretion under Article 260(3) TFEU, which provides that the Court cannot, as regards the payment of the lump sum imposed by it, exceed the amount specified by the Commission, it must be held that the effective prevention of future repetition of infringements similar to that resulting from the infringement of Article 124 of Directive 2018/1972 affecting the full effectiveness of EU law requires the imposition of a lump sum payment in the amount of EUR 4 million.

106 The Republic of Poland must, therefore, be ordered to pay the Commission a lump sum of EUR 4 million.

Costs

107 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 to be awarded against the Republic of Poland and the Republic of Poland has been unsuccessful, the latter must, in addition to bearing its own costs, be ordered to pay those incurred by the Commission.

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

1. **Declares that, by failing to adopt, by the expiry of the period prescribed in the reasoned opinion, the laws, regulations and administrative provisions necessary to comply with Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code, and, consequently, by failing to notify those measures to the European Commission, the Republic of Poland has failed to fulfil its obligations under Article 124(1) of that directive;**

2. **Declares that, by failing to adopt, by the date the Court examined the facts, the provisions necessary to transpose into its national law the provisions of Directive 2018/1972 and, consequently, by failing to notify those measures to the Commission, the Republic of Poland persisted in its failure to fulfil its obligations;**

3. Should the failure to fulfil obligations established in point 1 persist at the date of delivery of this judgment, orders the Republic of Poland to pay the European Commission, as from that date and until that Member State has put an end to that failure to fulfil obligations, a daily penalty payment of EUR 50 000;

4. Orders the Republic of Poland to pay the Commission a lump sum in the amount of EUR 4 million;

5. Orders the Republic of Poland, in addition to bearing its own costs, to pay those incurred by the Commission.

[Signatures]