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 notify the 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-439/22,

ACTION for failure to fulfil obligations under Article 258 and Article 260(3) TFEU, brought on 5 July 2022,

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

applicant,

v

Ireland, represented by M. Browne, A. Joyce, M. Lane and D. O'Reilly, acting as Agents, and by S. Brittain, Barrister-at-Law,

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: English.

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 provisions to the Commission, Ireland has failed to fulfil its obligations under Article 124(1) of that directive;

– order Ireland to pay to the Commission a lump sum based on an amount of EUR 5 544.90 per day for an amount of at least EUR 1 376 000;

– if the failure to fulfil obligations described in the first indent continues until the date of delivery of the judgment in the present case, order Ireland to pay to the Commission a periodic penalty of EUR 24 942.90 per day, from that date until the date on which that Member State fulfils its obligations under Directive 2018/1972; and

– order Ireland 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 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:

'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 Not having received any notification from Ireland of the necessary laws, regulations and administrative provisions adopted by that Member State to comply with Directive 2018/1972 in accordance with Article 124 of that directive, the Commission sent that Member State a letter of formal notice on 3 February 2021 and invited it to submit its observations.

6 On 7 April 2021, the Irish authorities replied to that letter, explaining that the procedure for transposing Directive 2018/1972 into Irish law had been initiated and that transposition measures were being drawn up.

7 In the absence of any information from the Irish authorities on a timetable or a date for transposing that directive, the Commission sent a reasoned opinion to Ireland on 23 September 2021, requesting that it comply with that opinion before 23 November 2021.

8 By letter of 22 November 2021, supplemented by a letter of 26 November 2021, the Irish authorities requested an extension of the time limit fixed in the reasoned opinion. The Commission fixed that time limit at 23 February 2022.

9 On 22 February 2022, the Irish authorities replied to the reasoned opinion, relying on the unforeseeable nature of the Irish legislative timetable to justify the fact that it was impossible to predict with certainty a date for transposing Directive 2018/1972. They nevertheless stated that they intended to send to the Oireachtas (Irish Parliament) some of the transposition measures in April 2022.

10 Taking the view that Ireland had not adopted the provisions necessary to comply with that directive, the Commission decided, on 6 April 2022, to bring the present action before the Court.

11 On 5 July 2022, the Commission initiated the present proceedings.

12 In its defence pleading of 16 September 2022, Ireland asked the Court to make the order for payment of a lump sum subject to the condition that Ireland failed to transpose Directive 2018/1972 within three months of the date of delivery of the judgment in the present case.

13 In its rejoinder of 2 December 2022, Ireland corrected the form of order sought by asking that the Court, in the event that it were to find that, at the date of the hearing in the present case, that Member State had fully transposed Directive 2018/1972:

– declare that there is no longer any need to adjudicate on the claim that Ireland should be ordered to make a periodic penalty payment; and

– declare that there is also no need to rule on the claim that Ireland should be ordered to pay a lump sum, on the ground that it would have been legally impossible for Ireland to transpose that directive in accordance with its Constitution before the judgment of the Supreme Court (Ireland) of 6 April 2021 in *Zalewski* v *Adjudication Officer* ('the judgment in *Zalewski*') or, in the alternative, that the difficulties encountered in transposing that directive were not attributable to Ireland and that the Court should take that into account when calculating the amount of any lump sum that may be imposed.

14 On 2 December 2022, the written procedure in the present case was closed.

15 By document of 5 July 2023, Ireland informed the Court that, on 16 June 2023, it had notified the Commission of the measures by which it considered that it had transposed the whole of Directive 2018/1972, with the exception of Article 110 thereof, which, according to that Member State, was due to be transposed as soon as possible.

16 On 3 October 2023, the Commission submitted its observations in that regard and modified the form of order sought.

17 The Commission is of the view that the measures in question do not yet fully transpose Directive 2018/1972, inasmuch as they do not transpose Article 110 of that directive and that, in order for that transposition to be regarded as being complete, the measures transposing Article 110 should be notified to it.

18 However, in view of the progress made by Ireland in the transposition of that directive, the Commission has also modified the form of order it is seeking relating to financial penalties.

19 As regards the lump sum, the Commission reduced the coefficient for seriousness and asks the Court to apply a lump sum of EUR 4 944 500 for the period from the date following the date of expiry of the period for transposing that directive, namely 22 December 2020, to 8 June 2023 and a lump sum on the basis of an amount of EUR 1 100 per day in respect of the period from the date of entry into force of the measures referred to in paragraph 15 above, namely 9 June 2023, to the date of the end of the infringement or, failing that, to the date of delivery of the judgment in the present case.

20 As regards the periodic penalty payment, the Commission now proposes that the Court impose a daily penalty payment of EUR 4 950 until the date on which Ireland fully complies with its obligations under Article 124(1) of Directive 2018/1972.

21 On 27 October 2023, Ireland submitted its observations on the modification of the form of order sought by the Commission. In those observations, it confined itself, in essence, to reiterating its arguments in defence and, in particular, the argument that it was impossible to transpose Directive 2018/1972 before the date of delivery of the judgment in *Zalewski*.

22 On 29 November 2023, Ireland informed the Court that, on the same day, it had adopted measures transposing Article 110 of Directive 2018/1972 and that it therefore considered that it had fully transposed that directive into national law. It states that, in those circumstances, the imposition of a periodic penalty payment is no longer justified.

23 By letter of 14 December 2023, the Commission reserved its right to inform the Court of the outcome of its assessment of those measures and of any consequences for the form of order it is seeking concerning the imposition of penalties on that Member State.

24 By document of 2 February 2024, the Commission informed the Court that the transposition of Directive 2018/1972 by Ireland could be regarded as having been completed on 1 December 2023 and discontinued its action in part, by withdrawing its claim that that Member State be ordered to make a periodic penalty payment, while modifying its claim that that Member State should be ordered to pay a lump sum and proposing that that sum be fixed in the amount of EUR 5 137 000.

25 On 12 February 2024, Ireland submitted its observations on the Commission's discontinuance in part and on the modification of the form of order sought by that institution.

The action

Failure to fulfil obligations under Article 258 TFEU

Arguments of the parties

26 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 order within the time limits laid down in those directives and to notify those provisions to the Commission immediately.

27 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.

28 In the present case, on the expiry of that period, or even on the date on which the present action was brought, Ireland 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.

29 According to the Commission, Ireland 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.

30 Ireland acknowledges that it did not adopt the provisions necessary to comply with Directive 2018/1972 before the date of transposition laid down in that directive.

31 It states, however, that, first, the Irish Government approved the Communications Regulations Bill ('the Bill'), which would be before the Irish Parliament in the autumn of 2022 and which would implement that directive in part, and, second, it also produced a statutory instrument, SI No 444 of 2022, which was signed and published and which would apply once the Bill became law. Ireland stated that the final version of the Bill and the statutory instrument would be published on or prior to 30 September 2022 and that they envisaged that the Bill would be enacted into law by year end 2022.

32 In order to justify the delay, Ireland explains that by the judgment in *Zalewski*, the Supreme Court held that the Workplace Relations Commission (Ireland), a body charged with the resolution of employment law disputes in Ireland, was involved in the administration of justice under Article 37 of the Irish Constitution. In so doing, the Supreme Court departed from its previous case-law.

33 Thus, the need to adapt the Bill in such a way as to comply with the new constitutional requirements applicable to the bodies responsible for administering justice, resulting from that judgment, was the main reason for the delay in drafting the Bill. That judgment considerably expanded the range of functions which will be considered to involve the administration of justice under Irish constitutional law, so that bodies which had previously been understood as having purely administrative or regulatory functions may be held to be administering justice in the context of exercising certain of their statutory decision-making functions, particularly those which involve adjudicating on the rights of persons in disputed cases.

34 In those circumstances, the delay which took place in Ireland's implementation of Directive 2018/1972 is predominantly attributable to the extensive attempts which were made to ensure that Ireland implemented that directive in a manner which was consistent with novel constitutional requirements, brought about after the date for the transposition of that directive had passed. Moreover, compliance with that time limit would not have made it possible to take account of the judgment in *Zalewski*, which could have led to the finding that the way in which Ireland had implemented that directive was unlawful.

Findings of the Court

35 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 the Member State concerned at the end of the period laid down in the reasoned opinion, and the Court cannot 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).

36 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).

37 In the present case, the time limit for replying to the reasoned opinion, as extended by the Commission, expired on 23 February 2022. 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).

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

39 In order to justify its failure to fulfil obligations, Ireland relies on the need to take account of the novel constitutional requirements for bodies charged with the administration of justice resulting from the judgment in *Zalewski*, which made the legislative process very complex.

40 Such an argument cannot justify the failure to fulfil obligations complained of by the Commission.

41 The allegedly complex nature of the internal legislative process for 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).

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

The applications submitted under Article 260(3) TFEU

The application for an order to make a periodic penalty payment

43 As has been pointed out in paragraph 24 above, by document of 2 February 2024, the Commission acknowledged that the transposition of Directive 2018/1972 by Ireland could be regarded as having been completed on 1 December 2023, and therefore it withdrew its application for the imposition of a periodic penalty payment.

44 Accordingly, there is no longer any need to rule on that claim.

The application for an order to pay a lump sum

– *Arguments of the parties*

45 In its application, the Commission notes, 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, second, that the failure by Ireland to fulfil its obligations under Article 124 of that directive, as a result of that Member State not notifying to the Commission the provisions transposing the directive, clearly constitutes a failure to notify measures transposing that directive, within the meaning of Article 260(3) TFEU.

46 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 which it will propose under Article 260(3) TFEU will be calculated using the same method as that used for referrals to the Court under Article 260(2) TFEU, as set out in points 14 to 18 of Communication SEC(2005) 1658, entitled 'Application of Article [260 TFEU]' ('the 2005 Communication').

47 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 that 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.

48 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 sets the coefficient for seriousness taking into account two parameters, namely, first, the importance of the EU rules which are the subject of the infringement and, second, their consequences for the general and particular interests at issue.

49 Thus, the Commission states 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, promoting 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 institutional set-up and governance of that sector. Its provisions 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 enhance the consistency in Member States' practice with respect to key 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 consumer security and protection, in particular as regards access to those services at an affordable cost.

50 In addition, the failure to transpose Directive 2018/1972 into Irish 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. Second, 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.

51 Since it has not identified aggravating or mitigating factors, the Commission proposes a coefficient for seriousness of 10 in the present case. Such a coefficient should, according to the Commission, be reduced to 2 for the period after 9 June 2023, the date of entry into force of the measures for the transposition in part of Directive 2018/1972 notified by Ireland.

52 In the second place, as regards the duration of the failure to fulfil obligations, the Commission submits that that corresponds to the period from the date following the date of expiry of the period for transposing 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. By applying the coefficient of 0.10 per month provided for in paragraph 17 of the 2005 Communication, read in conjunction with the 2011 Communication, the coefficient for duration is therefore 1.5.

53 In the third place, as regards Ireland'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.

54 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), has 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 which is expected to take account of that recent case-law of the Court.

55 Thus in accordance with Communication from the Commission 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 Ireland is 0.61. However, in its observations of 3 October 2023, the Commission applied the 'n' factor of 0.55 now laid down for that Member State in Annex I to the Communication from the Commission 2023/C 2/01, entitled 'Financial sanctions in infringement proceedings' (OJ 2023 C 2, p. 1; 'the 2023 Communication').

56 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 is asking the Court to impose on Ireland a lump sum in respect of the period between the date following the date of expiry of the transposition period provided for in Directive 2018/1972 and the date on which that Member State complied fully with its obligations under that directive, namely 1 December 2023.

57 It is apparent from point 20 of the 2005 Communication that the lump sum payment 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. In accordance with the 2022 Communication, the minimum lump sum for Ireland is EUR 1 376 000.

58 Under the method established by the 2005 and 2011 Communications, 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 the infringement concerned persisted between the date following the date of expiry of the transposition period 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 point 2 of Annex I to the 2023 Communication, EUR 1 000 per day. In the present case, the coefficient for seriousness is 10 for the first 899 days of the infringement, that is to say, between 22 December 2020 and 8 June 2023, and 2 for the period beginning on 9 June 2023. The 'n' factor is 0.55. It follows that the amount of the lump sum is EUR 4 944 500 for the period from 22 December 2020 to 8 June 2023 and EUR 1 100 per day for the period from 9 June 2023 until the day before the date on which Ireland fully complied with its obligations under Directive 2018/1972, that is to say, 30 November 2023. Accordingly, the Commission asks the Court to order Ireland to pay a lump sum of EUR 5 137 000.

59 In its defence pleading, Ireland merely asks that, in view of the reasons which it put forward during the pre-litigation procedure to justify its delay in transposing Directive 2018/1972, the Court impose a lump sum, payable three months after delivery of the judgment in the present case, in the event that it fails to transpose that directive before then.

60 In its reply, the Commission infers from this that Ireland implicitly requests that the order to pay a lump sum should be conditional and deferred.

61 The Commission submits that that request should be refused. Ireland merely explains the reasons for its delay in transposing Directive 2018/1972 by relying, in essence, on constitutional difficulties connected with that transposition. However, such reasons are not sufficient to justify such a failure to fulfil obligations, all the more so since that failure persisted and that Member State did not cooperate.

62 In its rejoinder, Ireland states that, contrary to what the Commission claims, it engaged with that institution throughout the procedure. In addition, it is not appropriate to impose a lump sum payment. First, the initial delay, that is to say, the delay corresponding to the period between the date fixed for the transposition of that directive, namely 21 December 2020, and the date on which the judgment in *Zalewski* was delivered, namely 6 April 2021, is to be seen in the context of the COVID-19 pandemic and the disruptions it caused. Second, a reversal judgment such as the judgment in *Zalewski* is an extremely unusual event.

63 Thus, Ireland's delay in transposing Directive 2018/1972 since 6 April 2021 was attributable to circumstances that were entirely beyond its control.

64 In those circumstances, the imposition of a lump sum payment would have no dissuasive effect on Ireland and, therefore, should not be imposed, provided that Directive 2018/1972 has been transposed by the time the present matter is heard before the court.

65 In the alternative, Ireland should be ordered to pay a very modest lump sum. The reasons why Ireland did not transpose Directive 2018/1972 show that that Member State experienced insurmountable difficulties for which it was in no way responsible.

– *Findings of the Court*

66 Since, as is apparent from paragraph 42 above, it is established that, by the expiry of the period prescribed in the reasoned opinion, as extended by the Commission, Ireland had not notified the Commission of any measure transposing Directive 2018/1972 within the meaning of Article 260(3) TFEU, that failure to fulfil obligations thus declared falls within the scope of that provision.

67 The Commission seeks the imposition of a lump sum.

68 It is apparent from the case-law of the Court that the purpose of imposing a lump sum under that provision is based, inter alia, on the 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 February 2021, *Commission* v *Spain (Personal Data Directive – Criminal law)*, C-658/19, EU:C:2021:138, paragraph 54 and the case-law cited).

69 As regards whether or not 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).

70 In the present case, it must be found that, notwithstanding the fact that Ireland 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 Irish 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 – 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).

71 That assessment is not called into question by Ireland's argument set out in paragraph 62 above.

72 First, the alleged difficulties associated with the delivery of the judgment in *Zalewski* cannot be relevant, since, as has been recalled in paragraph 41 above, 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 such directives.

73 Second, as regards the effects of the COVID-19 pandemic, which occurred at the beginning of 2020, suffice it to note that it would have been for the EU legislature to extend the time limit for transposing 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 Member States from complying with their obligations under that directive.

74 In the light of the foregoing, it is appropriate to impose a lump sum payment on Ireland.

75 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).

76 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 undoubtedly 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).

77 In the present case, it must be held that, as is apparent from paragraph 42 above, by the expiry of the period prescribed in the reasoned opinion, as extended by the Commission, namely 23 February 2022, Ireland 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, Ireland had still not notified any measure transposing that directive.

78 Moreover, as the Commission points out, Directive 2018/1972 is the main legislative act in the field of electronic communications.

79 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'.

80 Next, according to Article 1(2) of that directive, its purpose 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, second, 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.

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

82 It should be noted that, as the Commission rightly states, Ireland'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. Second, 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.

83 That being so, in assessing the seriousness of the infringement for the purposes of setting the amount of the lump sum payment, it is necessary to take into consideration the fact that, in the course of the procedure, Ireland notified to the Commission the measures transposing all the provisions of Directive 2018/1972.

84 In the second place, as regards the duration of the infringement, it should be borne in mind that that duration must, in principle, be assessed taking into account the date on which the Court assesses the facts and that that assessment of the facts must be regarded as having taken place on

the date on which the proceedings were closed (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).

85 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 has 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 (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).

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

87 Second, in its observations of 12 February 2024 on the modification of the form of order sought by the Commission, Ireland does not dispute the fact that the transposition of Directive 2018/1972 into Irish law may be regarded as having been completed on 1 December 2023.

88 It follows that the failure to fulfil obligations established in paragraph 42 above persisted from 22 December 2020 to 30 November 2023, that is to say, a period of 1 073 days, which is a considerable length of time.

89 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. Ireland 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 that failure to fulfil its obligations persisted.

90 In the third place, as regards the ability to pay of the Member State in question, it is apparent from the Court's case-law that it is necessary to take into account 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).

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

92 However, the Court has recently explained very clearly, first, that taking into account the institutional weight of the Member State concerned is not essential to ensuring sufficient deterrence and inducing that Member State to change its current or future conduct and, second, 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).

93 Having regard to all the circumstances of the present case 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 in the amount of EUR 4 500 000.

94 Ireland must, therefore, be ordered to pay to the Commission a lump sum of EUR 4 500 000.

Costs

95 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. In accordance with Article 141(1) of those rules, a party who discontinues or withdraws from proceedings is to be ordered to pay the costs if they have been applied for in the other party's observations on the discontinuance. Article 141(2), however, provides that, at the request of the party who discontinues or withdraws from proceedings, the costs are to be borne by the other party if this appears justified as a result of the conduct of that party. Finally, under Article 141(4), if costs are not claimed, the parties are to bear their own costs.

96 In the present case, although the Commission has claimed that Ireland should be ordered to pay the costs and although the failure to fulfil obligations has been established, that institution discontinued part of its action without requesting that that Member State pay the costs relating to the present action. Furthermore, in its observations on the Commission's discontinuance, that Member State did not request that the Commission be ordered to pay the costs.

97 That being so, it should be noted that the Commission's discontinuance was the result of Ireland's conduct, since that Member State did not adopt and notify the measures for the complete transposition of Directive 2018/1972 to the Commission until after the present action had been brought, and that it is because of that conduct that the Commission's claim that that Member State should be ordered to pay a periodic penalty became devoid of purpose and was withdrawn by the Commission.

98 In those circumstances, and since it is not possible to draw a relevant distinction between the costs relating to the failure to fulfil obligations established in paragraph 42 above and those relating to the Commission's discontinuance in part, it is appropriate to order Ireland to bear its own costs and 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, as extended by the European Commission, 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 provisions to the Commission, Ireland has failed to fulfil its obligations under Article 124(1) of that directive;

2. **Orders Ireland to pay to the Commission a lump sum in the amount of EUR 4 500 000;**

3. **Orders Ireland to bear its own costs and to pay those incurred by the Commission.**

Bonichot Rodin Rossi

Delivered in open court in Luxembourg on 14 March 2024.

A. Calot Escobar
Registrar

J.-C. Bonichot
Acting President of the Chamber