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 – Discontinuance in part)

In Case C-449/22,

ACTION for failure to fulfil obligations under Article 258 and Article 260(3) TFEU, brought on 7 July 2022,

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

applicant,

v

Portuguese Republic, represented by P. Barros da Costa and A. Pimenta, acting as Agents,

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: Portuguese.

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), no later than 21 December 2020 or, in any event, by failing to communicate those provisions to the Commission, the Portuguese Republic has failed to fulfil its obligations under Article 124(1) of that directive;

– order the Portuguese Republic to pay a lump sum of EUR 5 181.30 per day from 22 December 2020 until it has fulfilled its obligation to notify or the date of delivery of the judgment in the present case for an amount of at least EUR 1 286 000;

– order the Portuguese Republic to make a daily penalty payment of EUR 23 307.30 from the date of delivery of that judgment until the date that Member State complies with that obligation, and

– order the Portuguese Republic 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 Taking the view that the Portuguese Republic had not adopted the laws, regulations and administrative provisions necessary 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 12 April 2021, the Portuguese authorities replied to that letter, explaining the various stages of the procedure which had been initiated in order to transpose Directive 2018/1972 into Portuguese law. They stated, in particular, that a draft law had been approved by the Council of Ministers for referral to Parliament on 1 April 2021 and that the draft law would be adopted in the second quarter of 2021.

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

8 On 25 November 2021, the Portuguese authorities replied to that reasoned opinion by providing the Commission with information on the state of transposition of Directive 2018/1972, which had been delayed because of changes in Portugal, but without providing any indication of possible dates for transposition of that directive.

9 Taking the view that the Portuguese Republic 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.

10 On 22 April 2022, the Portuguese authorities sent a letter to the Commission informing it that the Council of Ministers had adopted a draft law intended to transpose Directive 2018/1972 and undertook to inform the Commission of the ongoing legislative process.

11 On 31 May 2022, the Portuguese authorities sent to the Commission a further letter informing it that the entire draft law had been submitted to the Parliament for examination.

12 By letters of 29 and 30 June 2022, the Portuguese authorities kept the Commission informed of the various stages of the process and of the legislative timetable concerning the transposition of Directive 2018/1972.

13 On 7 July 2022, the Commission initiated the present proceedings.

14 The Portuguese Republic contends, primarily, that the Court should dismiss that action and order the Commission to pay the costs, in the alternative, that it should not impose any penalty and, in the further alternative, that it should not apply any periodic penalty payment and reduce the amount of the lump sum proposed by the Commission.

15 On 25 July 2022, the Portuguese Republic sent to the Commission information on compliance with the timetable which that Member State had sent to it and on the approval of the draft law referred to in paragraph 10 above, and the parliamentary vote of 21 July 2022. That communication was accompanied, inter alia, by the text of that draft law as approved.

16 On 16 August 2022, the Portuguese Republic informed the Commission of the publication in the *Diário da República* of Law No 16 of 16 August 2022 ('Law No 16/2022'), which, according to that Member State, fully transposed Directive 2018/1972 into the Portuguese legal order.

17 On 8 September 2022, the Portuguese Republic sent to the Commission a correlation table between the provisions of Directive 2018/1972 and those of Law No 16/2022 ('the correlation table').

18 On 18 and 24 October 2022, that Member State notified to the Commission six additional national measures transposing Directive 2018/1972.

19 On 25 October 2022, that Member State notified to the Commission an updated version of the correlation table.

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

21 By document of 22 March 2023, the Commission informed the Court that the transposition of Directive 2018/1972 by the Portuguese Republic could be regarded as having been completed on 25 October 2022 and discontinued its action in part, while clarifying its claim that that Member State should be ordered to pay a lump sum in the amount of EUR 3 481 833.60.

22 On 17 April 2023, the Portuguese Republic submitted its observations on the Commission's discontinuance in part.

The action

Failure to fulfil obligations under Article 258 TFEU

Arguments of the parties

23 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.

24 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.

25 In the present case, on the expiry of that period, or even on the date on which the present action was brought, the Portuguese Republic 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.

26 According to the Commission, the Portuguese Republic 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.

27 The Portuguese Republic contends, first of all, that, by Law No 16/2022, notified to the Commission on the very day of its publication in the *Diário da República*, it fully complied with its obligations under Directive 2018/1972.

28 Next, that Member State submits that any failure to fulfil obligations must be assessed in the light of the complexity of that directive, which is confirmed by the significant number of infringement proceedings brought against other Member States, and the process of internal transposition.

29 In any event, the timetable for transposing Directive 2018/1972 into the Portuguese legal order did not affect the functioning of the internal market for electronic communications, since that directive merely recasts the rules of an already regulated market. As it is, those rules had already been transposed into that legal order.

30 Finally, the Portuguese Republic has always acted in a spirit of collaboration and sincere cooperation with the Commission, unlike the Commission, which brought the present action only one month before the publication of Law No 16/2022 in the *Diário da República*. Thus, the Commission ignored the information which that Member State had sent to it on the progress of the legislative process transposing Directive 2018/1972, in particular on compliance with the legislative timetable and the efforts which the Portuguese authorities devoted to that complex process.

31 In its reply, the Commission submits that the arguments put forward by the Portuguese Republic are not sufficient to rule out the failure to fulfil obligations.

32 To begin with, the fact that Law No 16/2022 was notified to the Commission on the very day of its publication cannot remedy the failure to fulfil obligations complained of. First, the correlation table was not notified to the Commission until 8 September 2022, so that that date was the first date on which the Portuguese Republic might possibly be regarded as no longer failing to fulfil its obligations, and, second, in October 2022 that Member State notified other transposition measures. In any event, the relevant date for assessing whether there has been a failure to fulfil obligations is the date on which the period laid down in the reasoned opinion expired, namely, in the present case, 23 November 2021.

33 Next, the alleged complexity of Directive 2018/1972 is not such as to rule out the failure to fulfil obligations in question.

34 Furthermore, the Portuguese Republic's arguments concerning the alleged lack of impact of the failure complained of on the internal market are irrelevant and, in any event, are unfounded, since the failure to transpose Directive 2018/1972 resulted, in the present case, in a lack of harmonisation of telecommunications legislation at European level, with negative effects on the market and its operators, and on the management of the electronic communications system, spectrum authorisation and market access rules, to the detriment of both undertakings and consumers.

35 Finally, the fact that the Portuguese Republic cooperated with the Commission is irrelevant for the purpose of assessing whether there has been an infringement of EU law.

36 In its rejoinder, the Portuguese Republic adds, first of all, that the measures notified after the date of publication of Law No 16/2022, namely 16 August 2022, were all adopted before that date and notified at the Commission's request. Next, the obligation to notify concerns the measures transposing Directive 2018/1972 and not the correlation table. Finally, the purpose of the action brought under Article 260(3) TFEU is not to verify the correct transposition of the directive concerned, since cases of non-notification and failure to transpose must be distinguished from cases of incorrect transposition, with the result that a financial penalty can be imposed in the latter cases only following an action for failure to fulfil obligations brought on the basis of Article 260(2) TFEU.

Findings of the Court

37 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).

38 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).

39 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).

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

41 In order to justify the alleged failure to fulfil obligations, the Portuguese Republic puts forward a number of arguments concerning, first, the adoption of Law No 16/2022, notified to the Commission on the actual day of its publication in the *Diário da República*, second, the complexity of Directive 2018/1972, third, the lack of impact of the delay in transposing that directive into Portuguese law on the functioning of the internal market for electronic communications and, fourth, the spirit of collaboration and sincere cooperation with the Commission which that Member State has always demonstrated.

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

43 First, as is apparent from paragraphs 37 and 39 above, the relevant date for assessing the existence of the failure to fulfil obligations complained of by the Commission is 23 November 2021. Law No 16/2022 was adopted after that date.

44 Second, the alleged complexity of Directive 2018/1972 is not such as to rule out the failure to fulfil obligations in question. When the EU legislature fixed the period for transposition of that directive, it was aware of the degree of complexity 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 Portuguese Republic does not claim to have taken the necessary initiatives in an attempt to obtain such an extension.

45 Third, the alleged lack of impact of the Portuguese Republic's failure complained of on the internal market is not relevant for the purpose of establishing the existence of that failure, which is objective in nature.

46 Fourth, the fact that the Portuguese Republic cooperated with the Commission is also irrelevant for the purposes of assessing whether that failure to fulfil obligations is genuine, since the Member States and the EU institutions have, in accordance with Article 4(3) TEU, a duty to cooperate with each other and that duty also includes the correct and full transposition of directives within the periods prescribed therein.

47 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 Portuguese Republic 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

48 As has been pointed out in paragraph 21 above, by document of 22 March 2023, the Commission acknowledged that the transposition of Directive 2018/1972 could be regarded as having been completed on 25 October 2022, and therefore it withdrew its application for the imposition of a periodic penalty payment.

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

Application for an order to pay a lump sum

– *Arguments of the parties*

50 The Commission submits, 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 the Portuguese Republic to fulfil its obligations under Article 124 of that directive, as a result of that Member State not notifying the Commission of the provisions transposing the directive, clearly constitutes a failure to notify measures transposing that directive, within the meaning of Article 260(3) TFEU.

51 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').

52 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.

53 In the first place, as regards the seriousness of the infringement, in accordance with point 16 of the 2005 Communication and 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.

54 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 the institutional set-up and governance of that sector. It strengthens 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'). It enhances the consistency in Member States' practice with respect to the key aspects of spectrum authorisation. The amendments introduced by the EECC 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.

55 In addition, the failure to transpose Directive 2018/1972 into Portuguese 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.

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

57 In the second place, as regards the duration of the failure to fulfil obligations, the Commission submits that this coincides with the period from the date following the date of expiry of the transposition period of Directive 2018/1972, namely 22 December 2020, to the date on which the failure concerned came to an end, namely the date preceding the date of compliance by the Portuguese Republic, which took place on 25 October 2022, that is to say, the date on which that Member State notified to the Commission the updated version of the correlation table, as indicated in paragraph 19 above. It follows that the failure to fulfil obligations lasted 672 days.

58 In the third place, as regards the Portuguese Republic'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.

59 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.

60 Thus in accordance with 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 Portugal is 0.57.

61 As regards the setting of the amount of the lump sum payment, 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. In accordance with the 2022 Communication, the minimum lump sum for the Portuguese Republic is EUR 1 286 000.

62 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 corresponding to the duration of the infringement, in the present case 672 days.

63 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, the coefficient for seriousness is 10. The 'n' factor for Portugal is 0.57. It follows that the amount of the lump sum payment is EUR 5 181.30 per day.

64 The lump sum should therefore be set at EUR 3 481 833.60.

65 The Portuguese Republic contends, in the first place, that the Commission's request for a lump sum to be imposed must take account of the objective pursued by the nature of that penalty, as is apparent from Article 260(3) TFEU. In that regard, the method followed in the Commission's communications is debatable, and it is for the Court alone to adopt the decision imposing the penalty provided for in that provision, by freely assessing the circumstances of the case.

66 In that context, the Portuguese Republic recalls, first of all, that Directive 2018/1972 was transposed at the time of the early dissolution of the Assembleia da República (Assembly of the Republic), next, that in that Member State the GDP per capita, expressed in purchasing power equivalents, was the seventh lowest in the European Union in 2021, that is to say, a GDP per capita that is 26% below the EU average, according to data from the Statistical Office of the European Union (Eurostat), and, finally, that the very complexity of that directive led to its late transposition in most Member States. On top of that were the effects of the COVID-19 pandemic, aggravated by the effects of the Russian-Ukrainian conflict on inflation and GDP.

67 Moreover, given that Directive 2018/1972 has already been transposed into Portuguese law, the purpose of a penalty in the present case is meaningless, and its application is manifestly disproportionate and belated.

68 In the second place, the Portuguese Republic disputes the method of calculation followed by the Commission.

69 First of all, as regards the seriousness of the alleged failure to fulfil obligations, the Portuguese Republic, while acknowledging the importance of the system introduced by Directive 2018/1972 for updating the electronic communications sector, is of the view that the interests of consumers

have not been adversely affected since there was already in existence legislation that allowed the internal market for electronic communications to function, so that the delay in transposing that directive did not paralyse the functioning of that market. In view of the general delay in the transposition of that directive into the legal orders of the Member States, the EECC could not have become applicable, essentially, until after 28 July 2022, the date on which the last national measures transposing that directive were notified to the Commission. Consequently, and in view of the fact that Law No 16/2022 transposed Directive 2018/1972 only 21 days after notification of the last of those measures, the use of the coefficient for 'seriousness' must be weighed against the actual consequences of the alleged failure to fulfil obligations on the factual situation. In actual fact, having regard to the general situation of the single market, that market was not objectively affected by the delay in transposing that directive into Portuguese law.

70 In that context, the Commission was wrong not to recognise the existence of mitigating circumstances. Such circumstances stem from the following. First, the factual circumstances prevailing in Portugal at the time, that is to say, the dissolution of the Assembly of the Republic and the Government's fall, made it impossible to approve and publish Law No 16/2022, even though it was already at an advanced stage of the legislative procedure during the previous legislature. However, that law was one of the first laws to be approved and published after the entry into service of the new government. Second, the complexity of Directive 2018/1972 itself led to delays in its transposition by most Member States, which clearly illustrates the objective difficulty of that transposition. Third, the COVID-19 pandemic had unexpected consequences on the legislative procedure for transposing that directive. The declaration of several states of emergency gave rise to a mandatory lockdown, which limited and restricted the work and the functioning of a number of Portuguese government departments over long periods. Fourth, this is the first action against the Portuguese Republic for failure to transpose a directive, which rules out any type of repeated infringement. Fifth, the Portuguese authorities' interventions, based on continuous and transparent dialogue with the Commission, reflect that Member State's commitment to the resolution of the situation and demonstrate its sincere cooperation with the Commission.

71 Next, as regards the duration of the failure to fulfil its obligations, the Portuguese Republic contends that the notification of correlation tables between the provisions of a directive and the provisions of the national measures transposing that directive is merely complementary to those measures and that therefore the end date of the failure to fulfil its obligations cannot be the date on which those tables were notified to the Commission. Consequently, in the present case, the end date of the failure to fulfil its obligations is 16 August 2022, when Law No 16/2022, which fully transposed Directive 2018/1972, was published in the *Diário da República*, and was notified to the Commission, whereas all notifications made after that date concerned only information of an administrative nature, sometimes requested by the Commission itself.

72 In any event, if the Court were to consider that the correlation table is relevant for the purposes of determining the end date of the alleged failure to fulfil obligations, the date to be taken into account would be 8 September 2022, that is to say, the date on which the Portuguese Government notified that table to the Commission, together with more detailed information.

73 Finally, as regards Portugal's ability to pay, the Portuguese Republic submits that the method followed by the Commission in its Communication 2019/C 70/01, referred to in paragraph 58 above, must be reviewed, and the Court should use its broad discretion in that regard. In

particular, inflation and the consequences of the Russian-Ukrainian conflict should be taken into account. Moreover, the Court has already recognised the importance of inflation and the GDP of Member States in assessing their ability to pay.

74 In the third place, the Portuguese Republic disputes the Commission's calculations. It states that any order to pay a lump sum and, where appropriate, the fixing of the amount of that sum must depend on all the relevant factors pertaining both to the particular nature of the failure established and to the conduct of the Member State concerned. In that regard, the application of a lump sum should, above all, have a deterrent effect which must take into account that conduct and the principle of proportionality.

75 According to the Portuguese Republic, first of all, given that the situation submitted by the Commission to the Court for assessment is due to a set of objective circumstances and that no action for failure to fulfil obligations under Article 260(3) TFEU has ever been brought against that Member State, there is no objective need to correct any conduct on the part of the Portuguese authorities. In actual fact, the delay in transposing Directive 2018/1972 is due to reasons of *force majeure*. It would have been objectively impossible for that Member State to transpose that directive within the period prescribed therein.

76 Next, as regards the impact of that delay on the internal market, there is no compensation objective that would justify an order to pay a lump sum. The transposition of Directive 2018/1972 was subject to a generalised delay in the Member States, with the result that the Portuguese situation does not disturb the harmonious and coherent functioning of the European framework for electronic communications.

77 Finally, even if the Court were to consider that a penalty should be imposed, it would be necessary to examine all the reasons set out with a view to reducing the amount of the lump sum proposed by the Commission.

– *Findings of the Court*

78 Since, as is apparent from paragraph 47 above, it is established that, by the expiry of the period prescribed in the reasoned opinion, the Portuguese Republic had not notified to the Commission 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.

79 It is settled case-law that the purpose of an order for payment of a lump sum under that provision is based on an assessment of the consequences of the failure of the Member State concerned to fulfil its obligations for private and public interests, in particular where the failure to fulfil its obligations has persisted over a long period of time (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).

80 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).

81 In the present case, it must be found that, notwithstanding the fact that the Portuguese Republic 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 Portuguese 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).

82 That assessment is not called into question by the Portuguese Republic's argument set out in paragraphs 66 and 67 above.

83 First, the fact that Directive 2018/1972 was transposed at the time of the early dissolution of the Assembly of the Republic cannot be relied on to justify failure to observe obligations arising under EU law (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 72 and 78 and the case-law cited).

84 Second, although the GDP per capita of the Member State concerned is a factor that may be taken into consideration for the purposes of calculating the amount of a financial penalty, it cannot be relevant in assessing whether it is appropriate to apply such a penalty.

85 Third, the same is true of the complexity of Directive 2018/1972 and the fact that other Member States have belatedly transposed that directive. Furthermore, the Portuguese Republic did not ask the EU legislature to extend the period for transposing that directive and the legislature considered that the directive did not present any difficulties preventing Member States from transposing it within the period laid down in Article 124 thereof. The position of the other Member States in that respect is irrelevant to the assessment of the existence of the alleged failure to fulfil obligations.

86 Fourth, as regards the effects of the COVID-19 pandemic, which broke out at the beginning of 2020, it has not been established, or even claimed, that that explains the entirety of the Portuguese Republic's delay in transposing Directive 2018/1972.

87 Fifth, as regards the Russian-Ukrainian conflict, which began in February 2022, and its effects on inflation and on GDP, suffice it to state that those circumstances, even if they were capable of affecting the ability of a Member State to comply with its obligations under EU law, did not take place until after the expiry of the transposition period of Directive 2018/1972, which Article 124 of that directive fixed as 21 December 2020.

88 Sixth, although the transposition of Directive 2018/1972 into the Portuguese legal order after the expiry of that period may justify, as the Commission itself pointed out in its document of 22 March 2023, by which it discontinued its action in part, the waiver of the imposition of a periodic penalty payment, it does not run counter to the purpose of the imposition of a lump sum, referred to in paragraph 79 above. It is the delay in transposing Directive 2018/1972 that is liable to have consequences for private and public interests, in particular if such an infringement persisted for a long period.

89 In the light of the foregoing, it is appropriate to impose a lump sum payment on the Portuguese Republic.

90 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).

91 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 74 and the case-law cited).

92 In the present case, it must be held that, as is apparent from paragraph 47 above, by the expiry of the period prescribed in the reasoned opinion, namely 23 November 2021, the Portuguese Republic 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 Portuguese Republic had still not notified any measure transposing that directive.

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

94 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'.

95 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.

96 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.

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

98 However, that directive does not merely codify those acts. As the Commission points out, without being contradicted by the Portuguese Republic, 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. The strengthening of the rules on the organisation of the electronic communications sector laid down by the EECC is intended to increase consumer security and protection, in particular as regards access to those services at an affordable cost.

99 As the Commission rightly states, the Portuguese Republic'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 would 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 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.

100 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, paragraph 79 and the case-law cited).

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 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).

102 In the present case, it is not validly disputed that, by the expiry of the transposition deadline laid down in Article 124 of Directive 2018/1972, namely 21 December 2020, the Portuguese Republic 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.

103 Second, it is common ground that the failure to fulfil obligations established in paragraph 47 above has come to an end.

104 However, the parties disagree as to the date on which that occurred. According to the Commission, that failure came to an end on the date of the Portuguese Republic's notification of the updated version of the correlation table, namely 25 October 2022. By contrast, according to the Portuguese Republic, that failure to fulfil obligations came to an end on the date on which it notified Law No 16/2022 to the Commission, namely 16 August 2022.

105 It should be recalled, in that respect, that the purpose of Article 260(3) TFEU is not only to induce Member States to put an end as soon as possible to a breach of obligations which, in the absence of such a measure, would tend to persist, but also to simplify and speed up the procedure for imposing financial penalties for failures to comply with the obligation to notify a national measure transposing a directive adopted through a legislative procedure, in order to ensure that Member States comply with their obligations under EU law and that they adopt all the laws, regulations and administrative provisions necessary to transpose that directive into their respective legal orders (see, to that effect, judgment of 8 July 2019, *Commission* v *Belgium (Article 260(3) TFEU – High-speed networks)*, C-543/17, EU:C:2019:573, paragraph 52 and the case-law cited).

106 The notification required of the Member States, in accordance with Article 260(3) TFEU, read in the light of the principle of sincere cooperation laid down in Article 4(3) TEU, is intended to facilitate the achievement of the Commission's tasks, which consist, inter alia, under Article 17 TEU, in ensuring the application of the Treaties and of measures adopted by the institutions pursuant to them. That notification must contain sufficiently clear and precise information on the substance of the national rules which transpose a directive. Thus, that notification, to which may be added a correlation table between the provisions of that directive and the provisions of those standards, must indicate unequivocally the laws, regulations and administrative provisions by means of which the Member State concerned considers that it has satisfied the various requirements imposed on it by that directive. In the absence of such information, the Commission is not in a position to ascertain whether the Member State concerned has genuinely implemented the directive in question in full. The failure of a Member State to fulfil that obligation to notify, whether by providing no information at all, partial information or by providing insufficiently clear and precise information, may of itself justify recourse to the procedure provided for in Article 260(3) TFEU in order to establish the failure to fulfil the obligation (see, by analogy with Article 258 TFEU, judgment of 8 July 2019, *Commission* v *Belgium (Article 260(3) TFEU – High-speed networks)*, C-543/17, EU:C:2019:573, paragraph 51 and the case-law cited).

107 It follows that, while it is true that the notification referred to in that provision may be accompanied by such a correlation table, the purpose of that notification is limited to information indicating the laws, regulations and administrative provisions by means of which the Member State concerned considers that it has satisfied the various requirements imposed on it by the directive in question.

108 In the present case, on 16 August 2022, the Portuguese Republic notified to the Commission Law No 16/2022, taking the view that that law transposed Directive 2018/1972 in its entirety into its national legal order.

109 It was therefore by that notification that the Portuguese Republic brought to an end the failure to fulfil obligations established in paragraph 47 above.

110 The Court has already held that the expression 'obligation to notify measures transposing a directive' in Article 260(3) TFEU refers to the obligation of the Member States to provide sufficiently clear and precise information on the measures transposing a directive. In order to satisfy the obligation of legal certainty and to ensure the transposition of the provisions of that directive in full throughout their territory, the Member States are required to state, for each provision of the directive, the national provision or provisions ensuring its transposition. Once notified, and having also received a correlation table where relevant, it is for the Commission to establish, for the purposes of seeking a financial penalty to be imposed on the Member State in question provided for in that provision, whether certain transposition measures are clearly lacking or do not cover all the territory of that Member State, bearing in mind that it is not for the Court, in judicial proceedings brought under that provision, to examine whether the national measures notified to the Commission ensure a correct transposition of the provisions of the directive in question (judgment of 8 July 2019, *Commission* v *Belgium (Article 260(3) TFEU – High-speed networks)*, C-543/17, EU:C:2019:573, paragraph 59).

111 In the present case, the Commission has not claimed that, notwithstanding the adoption of Law No 16/2022, certain measures transposing Directive 2018/1972 were still manifestly lacking or did not cover all of the Portuguese territory.

112 It follows that the failure to fulfil obligations established in paragraph 47 above persisted from 22 December 2020 to 15 August 2022, that is to say, a period of 601 days, which is a very considerable length of time.

113 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 Portuguese Republic 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 its obligations persisted.

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

115 The Commission proposes to take into account, in addition to the GDP of the Portuguese Republic, 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.

116 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).

117 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 2 800 000.

118 The Portuguese Republic must, therefore, be ordered to pay the Commission a lump sum of EUR 2 800 000.

Costs

119 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 by the conduct of that party. Finally, under Article 141(4), if costs are not claimed, the parties are to bear their own costs.

120 In the present case, although the Commission has claimed that the Portuguese Republic 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, whereas, in its observations on the Commission's discontinuance, that Member State requested that the Commission be ordered to pay the costs.

121 That being so, it should be noted that the Commission's discontinuance was the result of the conduct of the Portuguese Republic, since that Member State did not adopt and notify Law No 16/2022 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.

122 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 47 above and those relating to the Commission's discontinuance in part, it is appropriate to order the Portuguese Republic 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, 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 European Commission, the Portuguese Republic has failed to fulfil its obligations under Article 124(1) of that directive;

2. **Orders the Portuguese Republic to pay to the Commission a lump sum in the amount of EUR 2 800 000;**

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

[Signatures]