Reports of Cases

JUDGMENT OF THE COURT (Ninth Chamber)

14 March 2024*

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

In Case C-457/22,

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

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

applicant,

v

Republic of Slovenia, represented by T. Mihelič Žitko, acting as Agent,

defendant,

THE COURT (Ninth Chamber),

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

Advocate General: T. Ćapeta,

Registrar: A. Calot Escobar,

having regard to the written procedure,

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

gives the following

* Language of the case: Slovenian.

Judgment

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

– declare that, by failing to adopt all of 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 communicate those provisions to the Commission, the Republic of Slovenia has failed to fulfil its obligations under Article 124(1) of that directive;

– order the Republic of Slovenia, under Article 260(3) TFEU, to pay a daily penalty payment of EUR 6 256.17, as from the date of delivery of the judgment in the present case, on the ground that that Member State has failed to fulfil its obligation to notify the measures transposing that directive;

– order the Republic of Slovenia, in accordance with Article 260(3) TFEU, to pay a lump sum of EUR 1 390.77 per day, multiplied by the number of days for which the failure to fulfil obligations described in the first indent continues, with a minimum of EUR 383 000; and

– order the Republic of Slovenia to pay the costs.

Legal context

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

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

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

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

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

2. The aims of this Directive are to:

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

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

…'

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

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

Member States shall apply those measures from 21 December 2020.

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

Pre-litigation procedure and proceedings before the Court

5 Since the Republic of Slovenia did not send any information relating to the adoption of the provisions necessary to transpose Directive 2018/1972 into Slovenian law, in accordance with Article 124 thereof, the Commission sent a letter of formal notice to that Member State on 4 February 2021.

6 After requesting and obtaining an extension of the deadline for replying to that letter of formal notice, the Slovenian authorities replied on 4 June 2021, stating, inter alia, that Directive 2018/1972 was to be transposed by a law that was to be published and communicated to the Commission by December 2021 at the latest ('the transposing law').

7 On 23 September 2021, the Commission sent the Republic of Slovenia a reasoned opinion. On 5 November 2021, the Slovenian authorities requested an extension of the deadline for replying to that reasoned opinion and informed the Commission that an incident during the internal legislative procedure had delayed the adoption of that law, which was now to be published and communicated in March 2022.

8 The Commission granted that request and extended that deadline until 23 February 2022.

9 In their letter of 18 February 2022 replying to the reasoned opinion, the Slovenian authorities argued that unforeseen circumstances had caused a further delay in the transposition of Directive 2018/1972. In particular, they stated that the draft transposing law was now to be adopted in April 2022 and that that law would then be published and communicated to the Commission. Furthermore, on 18 March 2022, those authorities sent a correlation table between the provisions of that draft law and those of certain provisions of that directive. On 25 March 2022, the Commission submitted its observations on that draft law.

10 Maintaining that the Republic of Slovenia 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 12 April 2022, the Slovenian authorities informed the Commission that the vote on the draft transposing law had been suspended due to a request by a group of Members of Parliament that an advisory referendum on that draft be organised.

12 On 14 June 2022, the Slovenian authorities informed the Commission of the progress made in transposing Directive 2018/1972. In particular, they stated that, as a result of the new parliamentary term, all legislative procedures initiated during the previous parliamentary term, including that relating to the draft transposing law, had been brought to an end, that a new draft transposing law had been presented to the Slovenian Parliament and that no referendum on it had been or would be organised. No timetable for the adoption of that new draft law was communicated by those authorities.

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

14 The Republic of Slovenia asks the Court, primarily, to reduce the amount of the financial penalties sought by the Commission and, in the alternative, to dismiss the latter's claims in their entirety.

15 In its rejoinder of 19 December 2022, the Republic of Slovenia informed the Court that, on 28 September 2022, the transposing law had been adopted, that it had informed the Commission of this on the same day and that that law had entered into force on 10 November 2022.

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

17 By document of 20 June 2023, the Commission informed the Court that the transposition of Directive 2018/1972 by the Republic of Slovenia could be regarded as having been completed on 10 November 2022 and discontinued its action in part, by withdrawing its claim for a periodic penalty payment, while modifying its claim that that Member State should be ordered to pay a lump sum in the amount of EUR 958 240.53.

18 On 31 July 2023, the Republic of Slovenia 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

19 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.

20 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.

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

22 According to the Commission, the Republic of Slovenia does not actually deny that it has failed to fulfil its obligations, merely relying on practical and internal circumstances to justify that failure. Failure to transpose a directive within the period prescribed therein cannot be justified by such circumstances.

23 In fact, the Republic of Slovenia does not actually deny that it has failed to fulfil its obligations and merely describes the progress of the work that ultimately led to the adoption of the transposing law, which entered into force on 10 November 2022. However, it states that throughout the procedure, it always cooperated in good faith with the Commission and kept that institution informed of developments in that procedure, the delay of which was due to unforeseen circumstances that that Member State explained to the Commission in its reply to the reasoned opinion.

Findings of the Court

24 According to settled case-law, the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in that Member State at the end of the period laid down in the reasoned opinion, the Court being unable to take account of any subsequent changes (judgment of 25 February 2021, *Commission* v *Spain (Personal Data Directive – Criminal law)*, C-658/19, EU:C:2021:138, paragraph 15 and the case-law cited).

25 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).

26 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).

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

28 In order to justify its failure to fulfil obligations, the Republic of Slovenia, first, relies on an incident that occurred during the legislative procedure, a new parliamentary term and a request for an advisory referendum to be organised and, secondly, emphasises the spirit of collaboration and sincere cooperation that it has always shown towards the Commission.

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

30 First, the circumstances of an internal constitutional nature relied on by the Republic of Slovenia 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).

31 Secondly, the fact that the Republic of Slovenia cooperated with the Commission is also irrelevant for the purposes of assessing whether that Member State has actually failed to fulfil obligations, 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 complete transposition of directives within the periods prescribed therein.

32 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, the Republic of Slovenia has failed to fulfil its obligations under Article 124(1) of that directive.

The applications pursuant to Article 260(3) TFEU

The application for an order to make a periodic penalty payment

33 As has been pointed out in paragraph 17 above, by document of 20 June 2023, the Commission acknowledged that the transposition of Directive 2018/1972 by the Republic of Slovenia could be regarded as having been completed on 10 November 2022, and as a consequence it withdrew its application for the imposition of a periodic penalty payment.

34 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*

35 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, secondly, that the failure by the Republic of Slovenia to fulfil its obligations under Article 124(1) of that directive clearly constitutes a failure to notify measures transposing that directive, within the meaning of Article 260(3) TFEU.

36 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 sanctions that it will propose pursuant to Article 260(3) TFEU will be calculated by means of the same method used for referrals to the Court in line with Article 260(2) TFEU, as set out in points 14 to 18 of its Communication SEC(2005) 1658, entitled 'Application of Article [260 TFEU]' ('the 2005 Communication').

37 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.

38 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 fixes the coefficient for seriousness by taking account of two parameters, namely, first, the importance of the EU rules that are the subject of the infringement and, secondly, their consequences for the general and particular interests at issue.

39 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, encouraging investment in very high capacity networks and promoting wireless access to very high capacity connectivity across the European Union. Next, the EECC puts in place rules for the organisation of the electronic communications sector, including its institutional set-up and governance. 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 safety and consumer protection, in particular as regards access to those services at an affordable cost.

40 In addition, failure to transpose Directive 2018/1972 into Slovenian law, first, undermines regulatory practices throughout the European Union as regards the management of the electronic communications system, spectrum authorisations and market access rules.

Consequently, undertakings do not benefit from more coherent and predictable procedures for the grant or renewal of existing spectrum rights of use or from the predictability of the regulation resulting from the 20-year minimum duration of spectrum licences. Such failures have a direct influence on the availability and deployment of very high capacity networks within the European Union. Secondly, consumers are not able to benefit from a series of tangible advantages conferred on them by that directive, such as solutions relating to access to the provision of affordable communications services, the requirement to provide them with clear information on contracts, the obligation to charge transparent tariffs, the simplification of switching network providers in order to promote more affordable retail prices and the obligation for operators to offer disabled end users equivalent access to communications services.

41 Since the Republic of Slovenia has notified the Commission of the measures transposing a very small number of articles of Directive 2018/1972, the Commission proposes a coefficient for seriousness of 9.

42 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 deadline of Directive 2018/1972, namely 22 December 2020, to the date on which the failure established in paragraph 32 above came to an end, namely the date preceding the date of compliance by the Republic of Slovenia, which took place on 10 November 2022, that is to say, the date on which the transposing law entered into force, as indicated in paragraph 15 above. It follows that the failure to fulfil obligations lasted 688 days.

43 In the third place, as regards the Republic of Slovenia'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.

44 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 that would take account of that recent case-law of the Court.

45 Thus, in accordance with Commission Communication 2022/C 74/02, entitled 'Updating of data used to calculate lump sum and penalty payments to be proposed by the Commission to the Court of Justice of the European Union in infringement proceedings' (OJ 2022 C 74, p. 2) ('the 2022 Communication'), the 'n' factor for the Republic of Slovenia is 0.17.

46 As regards the setting of the amount of the lump sum, it is apparent from point 20 of the 2005 Communication that it should have at least a fixed minimum base, reflecting the principle that any case of persistent non-compliance with EU law, irrespective of any aggravating circumstances, in itself represents an attack on the principle of legality in a Community governed by the rule of law, which calls for a real sanction. According to the 2022 Communication, the minimum lump sum for the Republic of Slovenia is EUR 383 000.

47 Under the method established by the 2005 Communication and the 2011 Communication, if the result of the calculation of the lump sum exceeded that minimum lump sum, the Commission would propose that the Court determine the lump sum by multiplying a daily amount by the number of days corresponding to the duration of the infringement, in the present case 688 days.

48 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 9. The 'n' factor is 0.17. It follows that the amount of the lump sum is EUR 1 390.77 per day.

49 The lump sum should therefore be set at EUR 958 240.53.

50 The Republic of Slovenia maintains that such an amount is excessive.

51 First of all, as regards the coefficient for seriousness, the effect of the failure to transpose Directive 2018/1972 into Slovenian law on public and private interests is not as great as the Commission maintains.

52 The Republic of Slovenia states that it communicated to the Commission, on 18 March 2022, a correlation table in which it listed the provisions of Slovenian law that transposed that directive in part. As a result of that implementation of those provisions, the effect of the failure to transpose that directive is less than that estimated by the Commission.

53 Furthermore, the Republic of Slovenia's continued efforts to achieve the objectives of Directive 2018/1972 as soon as possible are also reflected in the steady progress made by that Member State in its ranking in the Digital Economy and Society Index (DESI) drawn up by the Commission, which follows the general state of digitisation in the European Union and progress in terms of digital competitiveness achieved by each Member State.

54 Next, as regards the coefficient for duration of the infringement, the Republic of Slovenia submits that, contrary to the method used by the Commission, the period to be taken into account in order to determine that duration is not the period commencing on the day following the expiry of the transposition deadline laid down by the directive in question, but, in accordance with the case-law, the period that runs from the date of expiry of the period laid down in the reasoned opinion.

55 Lastly, as regards the 'n' factor, the Republic of Slovenia relies, in particular, on paragraphs 111 to 117 of the judgment of 20 January 2022, *Commission* v *Greece (Recovery of State aid – Ferronickel)* (C-51/20, EU:C:2022:36), in order to argue that the Commission was wrong to take account of the institutional weight of that Member State in the European Union and to apply the adjustment coefficient of 4.5 provided for in Communication 2019/C 70/01, referred to in paragraph 43 above.

56 The Commission argues, first, that, as regards the seriousness of the infringement, it proposed, in the light of the partial transposition notified by the Republic of Slovenia, that a coefficient of 9 be used. The transposition of 6 articles of Directive 2018/1972, which comprises 127 articles, does not justify the adoption of a lower coefficient for seriousness, particularly since the articles to

which the Republic of Slovenia refers in its defence cannot all be regarded as ensuring complete transposition. Furthermore, the Republic of Slovenia's progression in the ranking of the DESI is not relevant for determining the seriousness of that infringement.

57 Secondly, as regards the duration of the infringement, the Commission submits that, in accordance with point 17 of the 2005 Communication and points 27 and 31 of the 2011 Communication, the period to be taken into account for determining that duration and calculating the coefficient is the period from the date following the expiry of the transposition deadline set by the directive in question until the date on which the Commission decided to bring the matter before the Court.

58 That would not prevent the Court from taking into consideration a different period and, in fact, it determines the duration of a failure to fulfil obligations by considering, as the end date of that failure, the date on which it assesses the facts and not the date on which the case is brought before it by the Commission. Since the latter cannot rely on that first date, it should use other start and end dates to determine that duration and to calculate the coefficient.

59 The Commission maintains that the calculation of that coefficient must take into account the entire period that has elapsed since the expiry of the deadline for transposition of the directive in question. In the context of infringement proceedings, the purpose of taking into account the date of expiry of the period laid down in the reasoned opinion is to determine, for the purposes of establishing a failure to fulfil obligations, within the meaning of Article 260(1) TFEU, the existence of that failure on that precise date. By definition, the duration of a failure to fulfil obligations is not limited to that date, but relates to the entire infringement period, which did not begin simply on the date of expiry of the period laid down in the reasoned opinion, but from the date on which the period for transposing the directive concerned expired. Consequently, it cannot be held that a failure to fulfil obligations begins only from the date of expiry of the period laid down in the reasoned opinion.

60 Such an approach is contrary to the principle of equal treatment. If the starting date of a failure to fulfil obligations, to be taken into account for the purposes of calculating the coefficient for duration of that infringement and imposing a penalty, were the date of expiry of the period laid down in the reasoned opinion, the duration of that failure would depend on the duration of the pre-litigation procedure. That could result in unequal treatment between Member States subject to the same transposition deadline.

61 The Commission also submits that the relevant date for determining the duration of an infringement depends on the object of that infringement. In the context of the procedure laid down in Article 260(2) TFEU, the issue is the failure to comply with a judgment of the Court, so that the relevant chronological point of reference is the date of delivery of that judgment. By contrast, in the case of the procedure referred to in Article 260(3) TFEU, the infringement lies in the failure of a Member State to notify measures transposing a directive, so that the relevant chronological point of reference is the date from which that Member State has failed to fulfil its obligation to notify those transposing measures.

62 In its rejoinder, the Republic of Slovenia states that the imposition of a financial penalty is no longer justified, since Directive 2018/1972 was fully transposed into Slovenian law on 10 November 2022.

– *Findings of the Court*

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

64 It is settled case-law that the purpose of imposing a lump sum under that provision is based 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).

65 As regards whether or not the payment of a lump sum should be imposed in the present case, it must be borne in mind that, in each case, it is for the Court to determine, in the light of the circumstances of the case before it and according to the degree of persuasion and deterrence which appears to it to be required, the financial penalties that are appropriate, in particular, for preventing the recurrence of similar infringements of EU law (judgment of 25 February 2021, *Commission* v *Spain (Personal Data Directive – Criminal law)*, C-658/19, EU:C:2021:138, paragraph 69 and the case-law cited).

66 In the present case, it must be found that, notwithstanding the fact that the Republic of Slovenia 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 Slovenian law, all the legal and factual circumstances culminating in the breach of obligations established – namely, the fact that no measure necessary for the complete transposition of that directive 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).

67 It is therefore appropriate to impose a lump sum on the Republic of Slovenia.

68 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).

69 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).

70 In the present case, it must be held that, as is apparent from paragraph 32 above, by the expiry of the period prescribed in the reasoned opinion, as extended by the Commission, namely 23 February 2022, the Republic of Slovenia had failed to fulfil its transposition obligations under Directive 2018/1972, with the result that the full effectiveness of EU law was not ensured. The seriousness of that failure is reinforced by the fact that, at that date, the Republic of Slovenia had still not notified any measure transposing that directive.

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

72 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'.

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

74 Lastly, as is apparent from recitals 2 and 3 of Directive 2018/1972, that directive amends the regulatory framework in force before its adoption in order to take account of technological and market developments.

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

76 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).

77 First, as regards the beginning of the period that 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).

78 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 Republic of Slovenia had not adopted the laws, regulations and administrative provisions necessary to ensure the complete transposition of that directive nor, consequently, had it notified those measures to the Commission.

79 Secondly, in its observations on the modification of the form of order sought by the Commission, the Republic of Slovenia does not dispute the fact that the transposition of Directive 2018/1972 into Slovenian law may be regarded as having been completed on 10 November 2022.

80 It follows that the failure to fulfil obligations established in paragraph 32 above persisted from 22 December 2020 to 11 November 2022, that is to say, a period of 688 days, which is a considerable length of time.

81 That said, the view must be taken that that length of time may have resulted in part from the exceptional circumstances linked to the COVID-19 pandemic. The Republic of Slovenia 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.

82 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).

83 The Commission proposes to take into account, in addition to the GDP of the Republic of Slovenia, the latter's institutional weight in the European Union expressed by the number of seats that that Member State has within 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.

84 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 ensure sufficient deterrence and to induce that Member State to change its current or future conduct and, secondly, that the Commission has failed to establish the objective criteria on the basis of which it fixed the value of the adjustment coefficient of 4.5 (see, to that effect, judgment of 20 January 2022, *Commission* v *Greece (Recovery of State aid – Ferronickel)*, C-51/20, EU:C:2022:36, paragraphs 115 and 117).

85 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 800 000.

86 The Republic of Slovenia must, therefore, be ordered to pay the Commission a lump sum of EUR 800 000.

Costs

87 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.

88 In the present case, although the Commission has claimed that the Republic of Slovenia 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.

89 That being so, it should be noted that the Commission's discontinuance was the result of the Republic of Slovenia'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.

90 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 32 above and those relating to the Commission's discontinuance in part, it is appropriate to order the Republic of Slovenia, in addition to bearing its own costs, 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, the Republic of Slovenia has failed to fulfil its obligations under Article 124(1) of that directive;**

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

3. **Orders the Republic of Slovenia, in addition to bearing its own costs, to pay those incurred by the Commission.**

[Signatures]