Reports of Cases

JUDGMENT OF THE COURT (Third Chamber)

13 January 2021*

(Failure of a Member State to fulfil obligations – Article 258 TFEU – Market for financial instruments – Delegated Directive (EU) 2017/593 – Failure to transpose and/or to notify transposition measures)

In Case C-631/18,

ACTION for failure to fulfil obligations under Article 258 TFEU, brought on 8 October 2018,

European Commission, represented by T. Scharf and B. Rous Demiri, acting as Agents,

applicant,

v

Republic of Slovenia, represented by V. Klemenc, acting as Agent,

defendant,

THE COURT (Third Chamber),

composed of A. Prechal, President of the Chamber, K. Lenaerts, President of the Court, acting as a Judge of the Third Chamber, A. Kumin, N. Wahl and F. Biltgen (Rapporteur), Judges,

Advocate General: P. Pikamäe,

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

Judgment

1 By its application, the European Commission asks the Court to declare that, by failing to adopt all the laws, regulations and administrative provisions necessary to ensure compliance with the Commission Delegated Directive (EU) 2017/593 of 7 April 2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council with regard to safeguarding of financial instruments and funds belonging to clients, product governance obligations and the rules applicable to the provision or

* Language of the case: Slovenian.

reception of fees, commissions or any monetary or non-monetary benefits (OJ 2017 L 87, p. 500; 'the MiFID II Directive'), and by failing to notify the Commission of those measures, the Republic of Slovenia has failed to fulfil its obligations under Article 14 of Delegated Directive 2017/593.

Legal context

2 According to recitals 1 to 3 of the MiFID II Directive:

'(1) Directive 2014/65/EU [of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU [(OJ 2014 L 173, p. 349), as amended by Directive (EU) 2016/1034 of the European Parliament and of the Council of 23 June 2016 (OJ 2016 L 175, p. 8) ('the MiFID II Directive')] sets out comprehensive regime aiming to ensure investor protection.

(2) The protection of client financial instruments and funds is an important part of that regime, investment firms being subject to an obligation to make adequate arrangements to safeguard investor's ownership and rights in respect of securities and funds entrusted to an investment firm. Investment firms should have in place proper and specific arrangements to ensure the safeguarding of client financial instruments and funds.

(3) In order to further specify the regulatory framework for the protection of investors and increased clarity to clients, and in line with the overall strategy to foster jobs and growth in the Union through an integrated legal and economic framework that is efficient and treats all actors fairly, the Commission has been empowered to adopt detailed rules to address specific risks to investor protection or to market integrity.'

3 Article 1 of that directive, entitled 'Scope and definitions', provides, in paragraph 1:

'This Directive shall apply to investment firms, to management companies in accordance with Article 6(4) of Directive 2009/65/EC of the European Parliament and of the Council [of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (OJ 2009 L 302, p. 32)] and to alternative investment fund managers in accordance with Article 6(6) of Directive 2011/61/EU of the European Parliament and of the Council [of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010 (OJ 2011 L 174, p. 1)].'

4 Article 14 of the delegated directive, entitled 'Entry into force and application', provides:

'1. Member States shall adopt and publish, by 3 July 2017, the laws, regulations and administrative provisions necessary to comply with this Directive. They shall forthwith communicate to the Commission the text of those measures.

They shall apply those provisions from 3 January 2018.

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. The manner in which such references are to be made shall be laid down by the Member States.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.'

Pre-litigation procedure and proceedings before the Court

5 Since the Commission had not received from the Republic of Slovenia any information concerning the adoption and publication of the laws, regulations and administrative provisions necessary to comply with the MiFID II Directive, by the expiry of the transposition period prescribed in Article 14 of that directive, namely 3 July 2017, the Commission sent a letter of formal notice to that Member State on 26 September 2017.

6 In the reply of the Republic of Slovenia, dated 23 November 2017, it became clear that, at that date, the transposition measures were under preparation and were due to be adopted in April 2018. On 26 January 2018, the Commission therefore sent a reasoned opinion to that Member State, inviting it to adopt the measures necessary to comply with the requirements of the MiFID II Directive within 2 months of receipt of that opinion.

7 Since its requests to extend the deadline for responding to the reasoned opinion of 26 January 2018 were refused, the Republic of Slovenia responded to that opinion by letter of 21 March 2018, informing the Commission that the draft legislation containing the measures for the transposition of the MiFID II Directive would be adopted in April 2018. The draft law was annexed to that reply.

8 On 1 August 2018, the Republic of Slovenia informed the Commission of the holding of early elections and of the establishment of the new National Assembly and requested the Commission to adopt an understanding attitude as regards the adoption of measures transposing the MiFID II Directive. In the same letter, that Member State also stated that it would implement all procedures relating to the adoption of the new law on the markets in financial instruments, which would transpose the delegated directive, by the end of September 2018.

9 Taking the view that the Republic of Slovenia had not notified the national measures transposing the MiFID II Directive, the Commission brought the present action.

10 On 3 December 2018, that is to say, before the lodging of the defence, on 19 December 2018, the Republic of Slovenia informed the Commission of the national measures, namely the Zakon o trgu finančnih instrumentov (Law on the market in financial instruments, Uradni list RS, No 67/2007; 'the ZTFI'), the Sklep o pogojih za opravljanje investigajskih storitev za borznoposredniške družbe (Order on the Conditions for the Provision of Investment and Other Services for Stock Brokerage Companies' Uradni list RS, No 85/2016, 'the ATVP Order') and the Sklep o spremembah in dopolnitvah Sklepa o pogojih za opravljanje investicijskih in drugih storitev za borznoposredniške družbe (Order amending the Order on the conditions for the provision of investment and other services for stock exchange brokerage companies, Uradni list RS, No 62/2017, the 'Order amending the ATVP Order'), which it considered to be partial transposition measures of the MiFID II Directive. Those measures were adopted in the context of the transposition of Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments, amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC (OJ 2004 L 145, p. 1, 'the MiFID I Directive').

11 On 6 December 2018, the Republic of Slovenia notified the Commission of the Zakon o trgu finančnih instrumentov (Law on the market in financial instruments), Uradni list RS, No 77/2018 ('the ZTFI-1'), by which it considered that it had fully transposed the MiFID II Directive into Slovenian law.

The action

Arguments of the parties

12 According to the Commission, by having failed to adopt, by 3 July 2017 at the latest, all the laws, regulations and administrative provisions necessary to comply with Delegated Directive MiFID II or, in any event, by having failed to notify those provisions to the Commission, the Republic of Slovenia has failed to fulfil its obligations under Article 14 thereof.

13 The Commission submits that, in the present case, it is common ground that the Republic of Slovenia did not transpose the MiFID II Directive on the expiry of the period laid down in Article 14 thereof, that is 3 July 2017, or the period laid down in the reasoned opinion, 26 March 2018. The Commission states that while the Republic of Slovenia claims that, on that date, the delegated directive was partially transposed into Slovenian law, the Commission was not informed of that alleged partial transposition until the beginning of December 2018. According to settled case-law, it is necessary to examine the question of a failure by a Member State to fulfil its obligations by reference to the situation in force at the end of the period laid down in the reasoned opinion and no subsequent change can be taken into account by the Court. In any event, the measures communicated by the Republic of Slovenia on 3 December 2018, which were in force on 26 March 2018, did not transpose Articles 7 to 10 and 12 to 14 of the MiFID II Directive. Furthermore, Articles 1 to 6 and Article 11 of the Delegated Directive were only partially transposed by those measures.

14 As regards the national measures adopted at the end of November 2018 and notified to the Commission on 6 December 2018, the Commission states that they still do not ensure the transposition in full of the MiFID II Directive. It submits, first of all, that there is a possible error in the ZTFI-1 which has the effect of invalidating all the infra-legislative provisions adopted on the basis of the ZTFI.

15 Next, it is apparent from Article 261 of the ZTFI-1, which is supposed to ensure the transposition of Articles 1 and 7 to 13 of that delegated directive, read in conjunction with Article 556 of the ZTFI-1, that that provision merely entrusts the Office for the Stock Market with the adoption, within six months of the entry into force of the ZTFI-1, of more detailed rules on the provision of investment services and on the exercise of investment activities, in certain cases, following the Ministry of Finance's preliminary opinion. Without the adoption of more detailed rules, those articles of the MiFID II Directive cannot be regarded as having been transposed.

16 Finally, it would appear from the correlation table submitted by the Republic of Slovenia on 10 December 2018 that Articles 2 to 6 of the MiFID II Directive should also be transposed by Article 261 of the ZTFI-1. Therefore, in the absence of adoption of infra-legislative rules by the Securities Market Office, it cannot be concluded that the Republic of Slovenia has fully transposed the delegated directive into national law.

17 Furthermore, according to the Commission, the transposition of the MiFID II Directive is essential for the full implementation of investors' rights guaranteed by the MiFID II Directive. Failure to transpose the delegated directive would have negative consequences for those investors, who would then not be covered by the protection scheme established by the MiFID II Directive, which is more comprehensive than that resulting from the MiFID I Directive. Likewise, the failure to transpose that delegated directive in one Member State affects the European financial market, investors and all citizens, as participants in the financial market. Consequently, the arguments of the Republic of Slovenia seeking to establish that, in the present case, the failure to transpose that directive in full into Slovenian law did not have adverse effects on the financial market must be dismissed.

18 The Republic of Slovenia, while acknowledging the importance of the purpose, objectives and the general scheme of the MiFID II Directive, submits that, at the end of the period laid down in the reasoned opinion, on 26 March 2018, the MiFID I Directive had been fully transposed into and implemented in Slovenian law, as well as part of the MiFID II Directive.

19 The Republic of Slovenia relies in that regard on the correlation table of 27 November 2018 and the declarations relating to the transposition of that delegated directive into the Slovenian law. It cites in that regard, as measures ensuring the transposition in whole or in part of Articles 2 to 6 and 11 of that delegated directive, the ZTFI, the ATVP Order and the Order amending the ATVP Order. Those measures were notified to the Commission on 3 December 2018, and were registered the following day.

20 The Republic of Slovenia takes the view that, by adopting, on 20 November 2018, a legislative package, including the ZTFI-1, intended to transpose effectively and fully the EU legislative framework relating to financial markets and financial instruments, namely the MiFID II Directive and the MiFID II Directive, and by notifying those measures to the Commission, it has discharged in full its obligation, laid down in Article 14 thereof, to transpose and communicate those measures.

21 In any event, that Member State adds that the failure to transpose the MiFID II Directive in full into Slovenian law within the prescribed period did not, contrary to the Commission claims, have any adverse consequences for the various investors, citizens and participants in the financial market.

22 In its rejoinder, the Republic of Slovenia acknowledges that Article 557(5) of the ZTFI-1 does indeed contain a typographical error and that the reference to paragraph 1 thereof must be interpreted as referring to Article 556(1) of the ZTFI-1. It points out that this error was corrected by a corrigendum to the ZTFI-1 published on 22 March 2019 (Uradni list RS No 17/2019).

23 In the light of the foregoing, the Republic of Slovenia asks the Court to dismiss the present action.

Findings of the Court

24 According to the settled case-law of the Court, 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 (judgments of 8 July 2019, *Commission* v *Belgium* (Article 260(3) TFEU – High-speed networks), C-543/17, EU:C:2019:573, paragraph 23; of 16 July 2020, *Commission* v *Romania (Anti-money laundering)*, C-549/18, EU:C:2020:563, paragraph 19; and of 16 July 2020, *Commission* v *Ireland (Anti-money laundering)*, C-550/18, EU:C:2020:564, paragraph 30).

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 (see, to that effect, judgments of 27 November 1997, *Commission* v *Germany*, C-137/96, EU:C:1997:566, paragraph 8; of 16 July 2020, *Commission* v *Romania (Anti-money laundering)*, C-549/18, EU:C:2020:563, paragraph 20; and of 16 July 2020, *Commission* v *Ireland (Anti-money laundering)*, C-550/18, EU:C:2020:564, paragraph 31).

26 In the present case, since the Commission sent the reasoned opinion to the Republic of Slovenia on 26 January 2018, the two-month period within which it was required to comply with its obligations expired on 26 March 2018. 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

(judgments of 16 July 2020, *Commission* v *Romania (Anti-money laundering)*, C-549/18, EU:C:2020:563, paragraph 21, and of 16 July 2020, *Commission* v *Ireland (Anti-money laundering)*, C-550/18, EU:C:2020:564, paragraph 32).

27 In that regard, first, it is not in dispute that the national measures, which the Republic of Slovenia claims ensure the partial transposition of the MiFID II Directive, were notified as measures transposing that directive on 3 December 2018, that is after the period prescribed in the reasoned opinion had expired.

28 Second, and in any event, it is apparent from the documents submitted by the Republic of Slovenia in the present proceedings that the measures which partially transposed the MiFID II Directive on the expiry of the period laid down in the reasoned opinion, namely the ZTFI, the ATVP Order, and the Order amending the ATVP Order, do not contain any reference to it, contrary to the provisions of Article 14 of that delegated directive.

29 It follows that the measures in question cannot be considered to be specific measures of transposition within the meaning of the case-law mentioned in paragraph 25 above.

30 It must, therefore, be concluded that, on the expiry of the period prescribed in the reasoned opinion of 26 March 2018, the Republic of Slovenia had not adopted the measures necessary to ensure that the MiFID II Directive was transposed and, therefore, did not notify those measures to the Commission.

31 Finally, it is not necessary to rule on the Commission's arguments, summarised in paragraphs 14 to 17 of this judgment, concerning certain national measures adopted at the end of November 2018 and communicated to the Commission on 6 December 2018. As those national measures were adopted after 26 March 2018, it is sufficient to state that they do not fall within the scope of the present proceedings for failure to fulfil obligations.

32 Accordingly, it must be held that, by having failed to adopt, on the expiry of the period prescribed, the laws, regulations and administrative provisions necessary to comply with the MiFID II Directive and, therefore, by failing to notify those provisions to the Commission, the Republic of Slovenia has failed to fulfil its obligations under Article 14 thereof.

Costs

33 Under Article 138(1) of the Rules of Procedure of the Court, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the Republic of Slovenia has been unsuccessful, the latter must be ordered to pay the costs.

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

1. **By failing to adopt all the laws, regulations and administrative provisions necessary to ensure compliance with Commission Delegated Directive (EU) 2017/593 of 7 April 2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council with regard to safeguarding of financial instruments and funds belonging to clients, product governance obligations and the rules applicable to the provision or reception of fees, commissions or any monetary or non-monetary benefits, or by failing to notify those measures to the European Commission, the Republic of Slovenia has failed to fulfil its obligations under Article 14 of Delegated Directive 2017/593;**

2. **Orders the Republic of Slovenia to pay the costs.**

[Signatures]