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 transposition measures – Article 260(3) TFEU – Application for the imposition of a lump sum and a penalty payment – Criteria for determining the amount of the penalty)

In Case C-454/22,

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

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

applicant,

v

Republic of Latvia, represented by J. Davidoviča and K. Pommere, 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: Latvian.

Judgment

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

– declare that, by failing to adopt all the laws, regulations and administrative provisions necessary to comply with Article 124(1) of 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 Latvia has failed to fulfil its obligations under that directive;

– order the Republic of Latvia to pay a lump sum of EUR 1 145.34 per day, with a minimum lump sum of EUR 316 000;

– if the failure to fulfil obligations described in the first indent continues until the date of delivery of the judgment in the present case, order the Republic of Latvia to pay to the Commission a penalty payment of EUR 1 145.34 for each day of delay from that date until the date on which that Member State fulfils its obligations under Directive 2018/1972, and

– order the Republic of Latvia 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 On 29 September 2020, the Republic of Latvia notified to the Commission interim implementing provisions with a view to the partial transposition of Directive 2018/1972. In addition, by letter of 11 November 2020, receipt of which was acknowledged by the Commission on 13 November 2020, that Member State stated that a draft law on electronic media ('the draft transposition law'), intended to transpose that directive into Latvian law, had been adopted at the meeting of the State Secretaries on 10 September 2020.

6 Taking the view that those provisions did not transpose Directive 2018/1972, since they related to the previous legal framework, and that, consequently, the Republic of Latvia had not adopted the laws, regulations and administrative provisions necessary to comply with that directive, in accordance with Article 124 thereof, the Commission, on 3 February 2021, sent that Member State a letter of formal notice and invited it to submit its observations.

7 On 26 March 2021, the Latvian authorities replied to that letter, setting out the progress of the process of transposing Directive 2018/1972 into Latvian law. Those authorities stated, in particular, that that transposition was due to be completed by 30 November 2021 at the latest.

8 In the absence of any further information on the full transposition of Directive 2018/1972, the Commission sent a reasoned opinion to the Republic of Latvia on 23 September 2021 requesting that it comply with that directive by 23 November 2021 at the latest.

9 On 5 November 2021, the Republic of Latvia notified new transposition measures, which the Commission, however, also regarded as relating to the previous legal framework.

10 On 17 November 2021, the Latvian authorities replied to the reasoned opinion, stating that the transposition of Directive 2018/1972 had been further delayed due to the COVID-19 pandemic. Those authorities stated, in particular, that the new dates laid down for the adoption of the draft transposition law and the other ministerial regulations necessary for the completion of the transposition of that directive were 1 April and 1 June 2022 respectively.

11 Taking the view that the Republic of Latvia had not adopted the provisions necessary to comply with that directive, the Commission decided to bring the present action before the Court.

12 On 8 April 2022, the Latvian authorities notified the Commission of new measures transposing that directive. On 12 April 2022, they replied to the Commission's request for clarification concerning those measures. In particular, those authorities informed the Commission that implementing regulations were due to enter into force on the date of adoption of the draft transposition law, the last parliamentary reading of which was scheduled for 14 April 2022.

13 On 12, 28 and 29 April 2022, those authorities notified new measures transposing Directive 2018/1972 and provided additional information on the progress of that transposition. In particular, they stated that the legislative timetable had been amended because the Latvijas Republikas Saeima (Parliament of the Republic of Latvia) had to deal at the same time with urgent issues linked to the COVID-19 pandemic, the considerable rise in energy costs and the invasion of Ukraine by the Russian Federation. In that context, they added that the adoption of the draft transposition law was scheduled for 1 June 2022 and that those implementing regulations were in the process of being drafted.

14 On 2 June 2022, the Law transposing Directive 2018/1972 ('the Transposition Law') was adopted, but was not enacted by the President of the Republic of Latvia and was referred back to the legislature for review, pursuant to the Latvian Constitution.

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

16 The Republic of Latvia claims that the Court should:

– primarily (i) declare that the delay in transposing Directive 2018/1972 is insignificant in relation to the damage which could have been caused to society if the government had not dealt with the urgent issues referred to in paragraph 13 of the present judgment as a matter of priority, (ii) accept that that delay is justified by circumstances of *force majeure*, (iii) not impose a penalty on it and order the Commission to pay the costs; and

– in the alternative, should the Court decide to impose a penalty on it, (i) apply the lowest possible amount, taking into account those circumstances and the forecasts concerning gross domestic product (GDP), and the fact that the provisions of Directive 2018/1972 were, in essence, implemented in the Latvian legal order before it was transposed in full, (ii) reduce the amount of the lump sum and/or penalty payment in proportion to the provisions in force that

already complied with that directive before the start of its transposition, that is to say, by up to 25% of the amount claimed by the Commission.

17 In its defence of 15 September 2022, the Republic of Latvia notified, inter alia, the entry into force, on 29 July 2022, of the Transposition Law, the adoption of governmental and administrative implementing measures between 4 and 23 August 2022, and a list of implementing measures in the process of being adopted. In its reply of 26 October 2022, the Commission confirmed that it had received notification.

18 In its rejoinder of 7 December 2022, the Republic of Latvia stated that it had notified, on 17 November 2022, the measures which had fully transposed Directive 2018/1972.

19 On 7 December 2022, the written procedure in the present case was closed.

20 By document of 30 June 2023, the Commission informed the Court that the Republic of Latvia had notified it of certain measures and that that Member State considered that it had completed the transposition of Directive 2018/1972 ('the document of 30 June 2023'). However, the Commission takes the view that those measures did not yet fully transpose that directive.

21 In the light of the progress made by the Republic of Latvia in the transposition of that directive, the Commission also, by that document, adjusted the form of order sought with regard to its request for financial penalties to be imposed on that Member State.

22 As regards the lump sum, in view of the dates on which the Republic of Latvia had notified measures transposing Directive 2018/1972, namely 29 July and 17 November 2022, the Commission reduced the coefficient for seriousness and asked the Court to apply, first, for the period from the date following the expiry of the period for transposing that directive, namely 22 December 2020, to 28 July 2022, a lump sum of EUR 349 650, second, for the period from 29 July 2022 to 16 November 2022, a lump sum of EUR 39 480 and, third, as regards the period from 17 November 2022 to the end of the infringement or, failing that, the date of delivery of the judgment in the present case, a lump sum based on an amount of EUR 210 per day.

23 As regards the penalty payment, the Commission now proposes that the Court impose a daily penalty payment of EUR 945 until the date on which the Republic of Latvia complies fully with its obligations under Article 124(1) of the directive.

24 On 14 August 2023, the Republic of Latvia submitted its observations on the document of 30 June 2023. In those observations, it maintains that, contrary to the Commission's position, the measures notified on 17 November 2022 completed the full transposition of Directive 2018/1972 into Latvian law. Consequently, it claims that no lump sum should be imposed on it as from that date.

25 On 31 December 2023, the Court informed the parties of the date of delivery of the present judgment.

26 On 1 February 2024, the Commission, first, informed the Court that the Republic of Latvia had, on 15 August 2023, notified it of certain additional measures and, second, argued that, contrary to the Republic of Latvia's position, the latter had still not correctly transposed Article 112(1) of Directive 2018/1972 into Latvian law. In addition, the Commission explained that, given the very advanced stage of the procedure it could not reassess its conclusions relating to the amount of the

penalties sought, as such a reassessment would not only have to be carried out on a technical level by the Commission services, but would also have to give rise to a decision by the College of Commissioners, which the Commission could not do without delaying the delivery of the Court's judgment. The Commission therefore left it to the Court to adjust the level of financial penalties, in the light of the assessment of those additional measures notified by the Republic of Latvia.

The action

Failure to fulfil obligations under Article 258 TFEU

Arguments of the parties

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

28 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.

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

30 According to the Commission, the Republic of Latvia 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.

31 The Republic of Latvia does not actually dispute the failure to fulfil obligations. On the contrary, it contends, first of all, that its conduct has been fair throughout the procedure. Next, it justifies the delay in transposing Directive 2018/1972 in the light of the complexity of that directive, the transposition period for which was too short, and the procedure for adopting the Transposition Law. In addition, it relies on *force majeure*, linked, first, to the COVID-19 pandemic and its consequences for the organisation of work and, second, to the invasion of Ukraine by the Russian Federation. In that regard, it states that, since Latvia is one of the countries bordering Russia and Belarus, that invasion, including from the territory of the latter country, constituted a greater threat to national security and defence than for many other Member States, so that the reassessment of priorities had a significant impact on the work of the Latvian Government. The state of emergency declared in 2021 and 2022 as regards irregular refugees from Belarus had a direct impact on the agenda of the competent institutions and on the problems to be dealt with as a matter of priority. Lastly, it considers that the Latvian law in force already ensured sufficient and comprehensive regulation of the electronic communications sector and protection of the interests and rights of end users.

Findings of the Court

32 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).

33 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).

34 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).

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

36 In order to justify the alleged failure to fulfil obligations, the Republic of Latvia puts forward a number of arguments based, first, on its fair conduct throughout the procedure, second, on the complexity of Directive 2018/1972, the transition period for which was too short, and on the procedure for the adoption of the Transposition Law, third, on *force majeure*, linked, on the one hand, to the consequences of the COVID-19 pandemic and, on the other hand, to the invasion of Ukraine by the Russian Federation and, fourth, on the fact that Latvian law already ensured sufficient and comprehensive regulation of the electronic communications sector.

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

38 In the first place, the fair conduct of the Member States towards the EU institutions, which also includes the correct and complete transposition of directives within the periods prescribed therein, constitutes an obligation flowing directly from Article 4(3) TEU and cannot therefore be relevant in order to justify a failure to comply with another provision of EU law.

39 In the second place, first, the alleged complexity of the provisions of Directive 2018/1972 is not such as to preclude the failure to fulfil obligations in question. As the Commission rightly points out, 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. However, the Republic of Latvia does not claim to have taken the necessary initiatives in an attempt to obtain such an extension.

40 Second, the same is true of the allegedly complex nature of the procedure for the adoption of the Transposition Law. 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).

41 In the third place, as regards the effects, first, of the COVID-19 pandemic, which occurred at the beginning of 2020, and, second, of the Russian Federation's war of aggression against Ukraine as of February 2022, it is not established, or even alleged, that they explain the entirety of the delay with which the Republic of Latvia transposed Directive 2018/1972.

42 In the fourth place, in the light of the case-law referred to in paragraph 33 of the present judgment, the fact that the law of a Member State in force before the entry into force of Directive 2018/1972 already complied with that directive is not sufficient to exclude the obligation on that Member State to transpose that directive into its legal order and, therefore, to justify such a failure to fulfil obligations.

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

The applications submitted under Article 260(3) TFEU

Arguments of the parties

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

45 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').

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

47 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.

48 Accordingly, 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 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 across the European Union 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.

49 Furthermore, the failure to transpose Directive 2018/1972 into Latvian 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.

50 Since the Republic of Latvia notified to the Commission secondary legislation which, according to the Latvian authorities, is necessary for the transposition of Directive 2018/1972, the Commission considers that such notification constitutes a mitigating circumstance.

51 Consequently, the appropriate and proportionate coefficient for seriousness in the present case is 9. That coefficient should, according to the Commission, be gradually reduced to 4, for the period between 29 July and 16 November 2022, and to 3, for the period after 17 November 2022, having regard to the measures notified by the Republic of Latvia, referred to in paragraph 20 of the present judgment.

52 In the second place, as regards the duration of the failure to fulfil obligations, the Commission submits that that corresponds to the period from the date following the date of expiry of the period for transposing Directive 2018/1972, namely 22 December 2020, to the date on which the failure to fulfil obligations in question came to an end. Since the Republic of Latvia partially notified measures transposing that directive, the duration of that infringement was 555 days for the part of that failure between 22 December 2020 and 28 July 2022, 141 days for the part of that failure from 29 July to 16 November 2022 and continues for the part of that failure to fulfil obligations concerning the measures which the Commission considers should still be notified to it.

53 In the third place, as regards the Republic of Latvia'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 GDP and the institutional weight of the Member State concerned, represented by the number of seats allocated to that Member State in the European Parliament.

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

55 Thus in accordance with the Communication from the Commission 2022/C 74/02 entitled 'Updating of data used to calculate lump sum and penalty payments to be proposed by the Commission to the Court of Justice of the European Union in infringement proceedings' (OJ 2022 C 74, p. 2) ('the 2022 Communication'), the 'n' factor for the Republic of Latvia is 0.14. However, in its document of 30 June 2023, the Commission applied the 'n' factor of 0.07 now laid down for that Member State in Annex I to the Communication from the Commission 2023/C 2/01, entitled 'Financial sanctions in infringement proceedings' (OJ 2023 C 2, p. 1; 'the 2023 Communication').

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

57 As regards the penalty payment, the Commission recalls that, in accordance with point 18 of the 2005 Communication, the amount of the penalty payment must have the effect that the penalty is both proportionate and dissuasive. For those purposes, the amount of the daily penalty payment is calculated by multiplying the standard flat-rate amount by a coefficient for seriousness and a coefficient for duration, then by the 'n' factor applicable to the Member State concerned. In that regard, although, in its application, the Commission referred to its 2022 Communication, in its document of 30 June 2023, it now refers to the 2023 Communication. The 'flat-rate amount for the penalty payment' is, in accordance with point 1 of Annex I to that communication,

EUR 3 000 per day. The coefficients for seriousness and for duration proposed by the Commission are 3 and 1.5 respectively. As noted in paragraph 55 of the present judgment, the 'n' factor applied by the Commission to the Republic of Latvia is 0.07. Thus, the amount of the daily penalty payment proposed by the Commission is EUR 945 from the date of delivery of the judgment in the present case until the date of full compliance with the obligations laid down in Article 124(1) of Directive 2018/1972.

58 As regards 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 Republic of Latvia is EUR 316 000.

59 Under the method established by the 2005 and 2011 Communications, if the result of the calculation of the lump sum exceeded that minimum lump sum, the Commission would propose that the Court determine the lump sum by multiplying a daily amount by the number of days the infringement concerned persisted between the date following the date of expiry of the transposition period laid down by the directive in question and the date on which that infringement ceases or, failing that, the date of delivery of the judgment under Article 260(3) TFEU. Thus, the daily amount of the lump sum should be calculated by multiplying the standard flat-rate amount applicable to the calculation of the daily amount of the lump sum by the coefficient for seriousness and by the 'n' factor. That standard flat-rate amount is, in accordance with point 2 of Annex I to the 2023 Communication, EUR 1 000 per day. In the present case, the coefficient for seriousness is 9 for the first 555 days of the infringement, that is to say between 22 December 2020 and 28 July 2022, 4 for the following 141 days, that is to say between 29 July and 16 November 2022, and, lastly, 3 for the period beginning on 17 November 2022. The 'n' factor is 0.07. It follows that the amount of the lump sum is EUR 349 650 for the period from 22 December 2020 to 28 July 2022, EUR 39 480 for the period from 29 July to 16 November 2022 and EUR 210 per day for the period from 17 November 2022 until the date on which the Republic of Latvia fully complies with its obligations under Directive 2018/1972 or the date of delivery of the judgment in the present case.

60 The Republic of Latvia maintains, as regards, first of all, the seriousness of the infringement, that the pre-existing legislative framework was already sufficient and comprehensive. The delay in transposing Directive 2018/1972 did not directly cause loss or damage to the electronic communications sector.

61 In particular, the Republic of Latvia draws attention to the fact that it did not attempt to avoid transposing Directive 2018/1972 and regularly informed the Commission of the progress of the legislative work to transpose it. Moreover, that directive essentially improves the existing legal framework without substantially amending it.

62 Next, as regards the duration of the infringement, the Republic of Latvia considers that it cannot be regarded as relevant, since the delay, by that Member State, in transposing Directive 2018/1972 did not have any negative consequences.

63 Lastly, the imposition of a penalty on the Republic of Latvia would not have a dissuasive effect, but, on the contrary, would draw the public's attention to the fact that the priority is to address formal issues for which the State may be sanctioned, rather than addressing issues of national and societal

importance such as combating the spread of the COVID-19 pandemic, the influx of refugees from Belarus prior to the invasion of Ukraine by the Russian Federation, the rising cost of energy resources and the resolution of the urgent problems resulting from that invasion. The Republic of Latvia adds that, as a result of the latter, GDP growth forecasts for 2022 and 2023 were significantly reduced to 1.8% and 3.2% respectively.

64 In its reply, the Commission contends that the failure to fulfil obligations in question, which is disputed by the Republic of Latvia, is likely to hinder the proper functioning of the internal market and therefore has a certain degree of seriousness, even if it does not produce negative effects. In any event, according to the Commission, while it is true that Directive 2018/1972 incorporates numerous pre-existing provisions, it also modernises the legislative framework, in particular by introducing new rules concerning the deployment of 5G networks, the deployment of new fixed high capacity networks and new solutions to better protect consumers.

65 The Commission recalls that the main objective of the penalties referred to in Article 260(3) TFEU is to ensure the transposition of EU legislation within the periods laid down therein and to prevent that type of infringement from recurring. The transposition of a directive within the periods prescribed therein is not a mere formal question but a fundamental obligation imposed on the Member States in order to ensure the full effectiveness of EU law.

66 In its rejoinder, the Republic of Latvia maintains its position and adds that, since the adoption of the measures which it notified to the Commission on 17 November 2022, Directive 2018/1972 has been fully transposed into Latvian law.

67 In its document of 30 June 2023, however, the Commission considers that those measures do not transpose certain provisions of Directive 2018/1972 and that they do not fully transpose other provisions of that directive.

68 In its observations on that document, the Republic of Latvia restates its position that those measures fully transpose Directive 2018/1972 into Latvian law.

Findings of the Court

69 Since, as is apparent from paragraph 43 of the present judgment, it is established that, by the expiry of the period prescribed in the reasoned opinion, the Republic of Latvia had not notified to the Commission measures ensuring full transposition of Directive 2018/1972 within the meaning of Article 260(3) TFEU, that failure to fulfil obligations falls within the scope of that provision.

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

71 As it is, it is apparent from the Court's case-law that the application of each of those measures depends on their respective ability to meet the objective pursued according to the circumstances of the case. While the imposition of a penalty payment seems particularly suited to inducing a Member State to put an end as soon as possible to a breach of obligations which, in the absence of such a measure, would tend to persist, the imposition of a lump sum is based more on assessment of the effects on public and private interests of the failure of the Member State concerned to comply with its obligations, in particular where the breach has persisted for a long period (judgment of 25 February 2021, *Commission* v *Spain (Personal Data Directive – Criminal law)*, C-658/19, EU:C:2021:138, paragraph 54 and the case-law cited).

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

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

73 It follows that, in order to determine whether, in the present case, the imposition of a penalty payment may be envisaged, it is necessary to examine whether the failure stated in paragraph 43 above persisted until the date of the conclusion of the proceedings, which took place on 7 December 2022.

74 In that context, 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, in accordance with the principle of sincere cooperation laid down in Article 4(3) TEU, to state, for each provision of the directive, the national provision or provisions by means of which they consider that they have fulfilled the various obligations imposed on them by that directive. Once notified, where relevant in addition to a correlation table, it is for the Commission to establish, for the purposes of seeking the financial penalty to be imposed on the Member State in question laid down in Article 260(3) TFEU, whether certain transposing measures are clearly lacking or do not cover all of the territory of the Member State in question, 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 (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, paragraphs 51 and 59 and the case-law cited).

75 In that regard, it is apparent from the file submitted to the Court that, on 17 November 2022, the Republic of Latvia notified the Commission of certain measures. In its rejoinder, that Member State expressly stated that, in its view, those measures fully transposed Directive 2018/1972 into Latvian law.

76 By contrast, in its document of 30 June 2023, the Commission merely asserted that, as of that date, the Republic of Latvia had not yet notified measures transposing Article 1(4), Article 35(7) and (9), Article 48(2), Article 49(3), Article 69(4), Article 96(4) and Articles 100 and 112 of Directive 2018/1972. Moreover, according to the Commission, Article 43(2), Article 61(4), Article 62(2), Article 76(2), the second sentence of Article 80(3) and Article 102(2) of that directive have not been fully transposed into Latvian law.

77 Thus, the Commission has not provided any evidence to suggest that the measures notified to it on 17 November 2022 by the Republic of Latvia manifestly failed to transpose Directive 2018/1972 into Latvian law or did not cover the entire territory of that Member State.

78 Furthermore, in its observations on the document of 30 June 2023, not only did the Republic of Latvia reaffirm that, in its view, since the adoption of those measures, Directive 2018/1972 had been fully transposed, but it also stated the reasons why the provisions of that directive referred to in paragraph 76 of the present judgment had to be regarded as having been fully transposed into Latvian law.

79 Similarly, in its letter of 1 February 2024, referred to in paragraph 26 of the present judgment, the Commission merely informs the Court of the outcome of its analysis of the measures it had received as early as 15 August 2023, and reports a disagreement between it and the Republic of Latvia concerning the transposition of Article 112(1) of Directive 2018/1972.

80 In the light of the case-law referred to in paragraph 74 of the present judgment, it is not for the Court, in proceedings brought under Article 260(3) TFEU, to rule on whether such measures ensure the correct transposition of the provisions of that directive.

81 Where the Commission considers that measures transposing a directive notified by a Member State do not ensure the correct transposition of that directive, a financial penalty may be imposed on that Member State only following an action for failure to fulfil obligations under Article 260(2) TFEU (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, paragraphs 55 to 57).

82 In those circumstances, it must be held that, by notifying the Commission, on 17 November 2022, of the measures by which it considered that it had complied in full with its obligations under Directive 2018/1972, the Republic of Latvia put an end to the failure to fulfil obligations established in paragraph 43 of the present judgment.

83 Accordingly, the Commission's claim that the Republic of Latvia should be ordered to pay a penalty payment must be rejected.

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

84 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).

85 In the present case, it must be found that, notwithstanding the fact that the Republic of Latvia 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 Latvian law, all the legal and factual circumstances culminating in the breach of obligations established – namely, the fact that, no measure necessary for the full 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).

86 That assessment is not called into question by the Republic of Latvia's line of argument set out in paragraphs 60 to 63 above.

87 First, as regards the alleged fact that the pre-existing legislative framework was already sufficient, it follows from the case-law referred to in paragraph 33 above 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.

88 Second, although the fact that the failure to fulfil obligations established in paragraph 43 of the present judgment did not have negative consequences, even if it were established, could be relevant for assessing the seriousness of that infringement for the purposes of calculating the amount of the lump sum, it cannot, on the other hand, be relevant for the purpose of assessing whether it is appropriate to impose such a penalty.

89 Third, as the Commission rightly points out, notification of measures transposing a directive is not a formal question. 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 (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).

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

91 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).

92 As regards, in the first place, the seriousness of the infringement, it must be borne in mind that, according to the case-law referred to in paragraph 89 above, 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.

93 In the present case, it must be held that, as is apparent from paragraph 43 above, by the expiry of the period prescribed in the reasoned opinion, namely 23 November 2021, the Republic of Latvia had failed to fulfil its transposition obligations under Directive 2018/1972, with the result that the full effectiveness of EU law was not ensured.

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

95 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'.

96 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.

97 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.

98 Admittedly, as the Republic of Latvia points out, the field in question is already regulated by other acts of EU law which that directive amends or replaces.

99 However, that directive is not limited to codifying those acts. As the Commission emphasises, without being contradicted by the Republic of Latvia, 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 establishing a minimum set of powers for those authorities and by strengthening their independence, through the establishment of criteria for appointments and reporting obligations. Moreover, the EECC regulates different aspects of the provision of electronic communications services, including universal service obligations, numbering resources and end users' rights. Strengthening those rules on the organisation of the electronic communications sector laid down by the EECC aims to increase safety and consumer protection, in particular as regards access to those services at an affordable cost.

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

101 That being so, in assessing the seriousness of the infringement for the purposes of setting the amount of the lump sum payment, it is necessary to take into consideration the fact that, in the course of the procedure, the Republic of Latvia notified to the Commission measures transposing a significant number of provisions of Directive 2018/1972 and that, on 17 November 2022, that Member State notified it of the measures by means of which it considered that it had complied in full with its obligations under that directive.

102 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).

103 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).

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

105 Second, as is apparent from paragraph 82 of the present judgment, on 17 November 2022, the Republic of Latvia put an end to the infringement established in paragraph 43 of the present judgment.

106 It follows that the failure to fulfil obligations persisted from 22 December 2020 to 16 November 2022, that is to say, a period of 694 days, which is a considerable length of time.

107 That said, it must be taken into account that that length of time may have resulted in part from the exceptional circumstances linked to the COVID-19 pandemic and, then, to the Russian Federation's war of aggression against Ukraine. The Republic of Latvia 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.

108 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).

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

110 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).

111 Having regard to all the foregoing 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 300 000.

112 The Republic of Latvia must, therefore, be ordered to pay to the Commission a lump sum of EUR 300 000.

Costs

113 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.

114 In the present case, the rejection of the Commission's claim that the Republic of Latvia should be ordered to pay a penalty payment is connected with the conduct of that Member State, the latter having taken, and notified the Commission of, the measures by which it considered that it had complied in full with its obligations under Directive 2018/1972 only after the present action had been brought.

115 In those circumstances, and as it is unable to draw a relevant distinction between the costs relating to the failure to fulfil obligations established in paragraph 43 of the present judgment and those relating to the rejection of that claim, the Republic of Latvia must bear its own costs and pay those incurred by the Commission, in accordance with the form of order sought 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 Republic of Latvia has failed to fulfil its obligations under Article 124(1) of that directive;**

2. Orders the Republic of Latvia to pay to the Commission a lump sum in the amount of EUR 300 000;

3. Dismisses the action as to the remainder;

4. Orders the Republic of Latvia to bear its own costs and to pay those incurred by the Commission.

[Signatures]