



# Reports of Cases

OPINION OF ADVOCATE GENERAL  
SZPUNAR  
delivered on 11 April 2019<sup>1</sup>

**Case C-543/17**

**European Commission**

**v**

**Kingdom of Belgium**

(Failure of a Member State to fulfil obligations — Article 258 TFEU — Directive 2014/61/EU — Cost of deploying high-speed electronic communications networks — Article 260(3) TFEU — Obligation to notify measures transposing a directive — Financial penalties — Claim for payment of a daily penalty payment)

## I. Introduction

1. In the present case, the European Commission requests that the Court ‘declare that, by failing, by 1 January 2016 at the latest, to adopt all the laws, regulations and administrative provisions necessary to comply with Directive 2014/61/EU of the European Parliament and of the Council of 15 May 2014 on measures to reduce the cost of deploying high-speed electronic communications networks, [2] or, in any event, by failing to communicate those provisions to the Commission, the Kingdom of Belgium has failed to fulfil its obligations under Article 13 of that directive’.<sup>3</sup>

2. Moreover, the Commission asks the Court to ‘order the Kingdom of Belgium to pay, in accordance with Article 260(3) TFEU, a fine in the sum of EUR 54 639.36 *per diem* from the date of delivery of the judgment in this action for failure to fulfil the obligation of communicating the measures transposing Directive 2014/61’.<sup>4</sup>

3. The present action for failure to fulfil an obligation therefore has two aspects: the first aspect is the issue of a conventional failure to fulfil an obligation, that failure consisting in the (partial) non-transposition of a directive; the second aspect is the issue of a financial penalty<sup>5</sup> under Article 260(3) TFEU. The first aspect of the action is not legally problematic and, moreover, is not in dispute between the parties to the proceedings.<sup>6</sup> On the other hand, the point of law raised in the context of the second aspect is the subject of debate between the Commission, on the one hand, and the Kingdom of Belgium and the intervening Member States, on the other hand.<sup>7</sup>

1 Original language: French.

2 OJ 2014 L 155, p. 1.

3 See paragraph 85 of the Commission’s application of 15 September 2017.

4 See paragraph 85 of the Commission’s application.

5 The term ‘financial penalty’ is the generic term for the terms ‘lump sum’ and ‘penalty payment’.

6 None of the other intervening Member States challenges the Commission’s application in that regard.

7 As in the legal literature, as I shall indicate below.

4. Article 260(3) TFEU was introduced by the Lisbon Treaty. It provides a mechanism for the Court to impose a financial penalty on a Member State as from the first declaration that the Member State concerned has failed to fulfil its obligation to notify the measures transposing a directive adopted under a legislative procedure.

5. To date, the Court has never ruled on the interpretation of Article 260(3) TFEU. It is true that the Court has already been seised of numerous cases in which the Commission requested the application of Article 260(3) TFEU. However, all of them have, to date, been resolved between the Member State concerned and the Commission before judgment was delivered, which led the Commission to discontinue the proceedings in each of those cases, sometimes at the very last moment.<sup>8</sup>

6. The present case may therefore allow the Court to interpret that provision.<sup>9</sup>

7. The interpretation of Article 260(3) TFEU raises fundamental questions concerning the legal order of the European Union. My main objective, not to say my main concern, in this case is to indicate to the Court that any interpretation of that provision should go beyond the truism that the expeditious, full and correct transposition of directives is essential for the uniform application of EU law.

## II. Legal context

8. Article 13 of Directive 2014/61, entitled ‘Transposition’, provides:<sup>10</sup>

‘Member States shall adopt and publish the laws, regulations and administrative provisions necessary to comply with this Directive by 1 January 2016. They shall inform the Commission thereof.

They shall apply those measures from 1 July 2016.

When Member States adopt those measures, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.’

## III. Background to the dispute

### A. Pre-litigation procedure

9. Under Article 13 of Directive 2014/61, Member States were to adopt and publish the laws, regulations and administrative provisions necessary to comply with that directive by 1 January 2016 and were to inform the Commission thereof.

10. As no national measure transposing that directive was notified to the Commission by that date, the Commission sent the Kingdom of Belgium a letter of formal notice on 23 March 2016.

<sup>8</sup> However, two Advocates General have already given their views on the interpretation of Article 260(3) TFEU. See Opinion of Advocate General Wathelet in *Commission v Poland* (C-320/13, EU:C:2014:2441), and Opinion of Advocate General Tanchev in *Commission v Spain (Article 260(3) TFEU — Residential property loans)* (C-569/17, EU:C:2019:271, point 71). The Commission discontinued the proceedings in the first case while the second is still pending before the Court.

<sup>9</sup> I would note, in that regard, that although Advocate General Wathelet rightly observed that the Member States showed a lack of interest in the interpretation of Article 260(3) TFEU (see his Opinion in *Commission v Poland*, C-320/13, EU:C:2014:2441, footnote 3), such an observation cannot be made in the present case, since 10 Member States intervened in support of the Kingdom of Belgium.

<sup>10</sup> In view of the fact that there is no disagreement between the parties as regards transposition of the content of Directive 2014/61, it is not necessary to cite the substantive provisions thereof.

11. Since the Kingdom of Belgium's reply showed that, as at 11 July 2016, transposition measures were in preparation, the Commission sent a reasoned opinion to that Member State on 30 September 2016, calling on the Member State to take the measures necessary to comply with the reasoned opinion within two months of receiving it.

12. Following an extension of the deadline for reply, the Kingdom of Belgium replied to the reasoned opinion by letters of 21 February and 28 March 2017, informing the Commission that the transposition of Directive 2014/61 was in progress. Those letters were accompanied by draft transposition measures and the consolidated version of the ordonnance du 3 juillet 2008 relative aux chantiers de voirie de la Région de Bruxelles Capitale (Ordinance of 3 July 2008 concerning roadworks in the Brussels Capital Region) (Belgium).

13. Taking the view that there had been a failure both to transpose in full Directive 2014/61 and to notify the national measures fully transposing that directive and that the Kingdom of Belgium had therefore failed to fulfil its obligations pursuant to Article 13 of that directive, the Commission decided, on 13 July 2017, to bring the present action.

### ***B. Procedure before the Court***

14. By its application, lodged on 15 September 2017, the Commission claimed that the Kingdom of Belgium, on the one hand, had failed to adopt all the measures necessary to comply with Directive 2014/61 and, on the other hand, in any event, had not notified them to the Commission.

15. In its defence, the Kingdom of Belgium described the progress made in transposing the provisions of Directive 2014/61, stating that most of the provisions were transposed into Belgian law, in accordance with the division of powers between the Federal State, the regions and the communities, and that the necessary measures have been taken or are in progress for those which have not yet been transposed.

16. In its reply, the Commission stated that, in spite of the significant progress made in transposing Directive 2014/61 by the Kingdom of Belgium since the lodging of the application, the adoption of additional measures remained necessary in order to transpose the directive in full. That need is also recognised by the Belgian authorities themselves. Consequently, and although the Commission reduced the amount of the daily penalty payment which it is seeking to have the Kingdom of Belgium ordered to pay, that institution maintained its claims.

17. On 5 February 2018, the Federal Republic of Germany, the Republic of Estonia, Ireland, the Kingdom of Spain, the French Republic, the Italian Republic, the Republic of Lithuania, Hungary and the Republic of Austria were granted leave to intervene in support of the form of order sought by the Kingdom of Belgium. On 21 November 2018, Romania was granted leave to intervene in support of the form of order sought by the Kingdom of Belgium.

18. The Belgian Government and the Commission presented oral argument at the hearing on 22 January 2019, as did the German, Estonian, Spanish, French, Italian, Hungarian, Austrian and Romanian Governments.

### **IV. Analysis**

19. I shall first examine the issue of the alleged failures of the Kingdom of Belgium to fulfil its obligations under Article 258 TFEU (section A) before addressing the more difficult issue of the financial penalties under Article 260(3) TFEU (section B).

### ***A. Failures to fulfil obligations under Article 258 TFEU***

20. The Commission complains that the Kingdom of Belgium failed to transpose the provisions of Directive 2014/61 into national law by 1 January 2016, the date laid down in Article 13(1) of that directive for the adoption and publication of the laws, regulations and administrative provisions necessary to comply with that directive, and failed to notify the transposition provisions.

21. The Kingdom of Belgium does not dispute this complaint.

22. Accordingly, in this case there is an ‘undisputed failure’: the Kingdom of Belgium has not transposed Directive 2014/61 within the prescribed period and nor has it, as required by Article 13(1) of that directive, informed the Commission of any transposition measures.

23. In order to establish a failure to fulfil obligations under a directive, its existence must, in accordance with the Court’s settled case-law, be assessed by reference to the situation in the Member State as it stood at the end of the period laid down in the reasoned opinion.<sup>11</sup>

24. I therefore propose that the Court declare that, by failing to adopt within the prescribed period all the laws, regulations and administrative provisions necessary to comply with Directive 2014/61 or, in any event, by failing to notify those provisions to the Commission, the Kingdom of Belgium has failed to fulfil its obligations under Article 13 of that directive.

### ***B. The financial penalty under Article 260(3) TFEU***

25. The key question in the present case undoubtedly concerns the interpretation of Article 260(3) TFEU, that is to say the way in which that provision is to be applied in the present case.

#### *1. The directive*

26. According to the third paragraph of Article 288 TFEU ‘a directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods’. That measure inherent to the European Union’s legal system is the instrument for harmonising national provisions.

27. The directive is an excellent and emblematic example of the way in which the national legal systems are interconnected with the European Union’s legal order. Correct transposition is therefore of paramount importance both for the effectiveness of the directive and for its uniform application throughout the European Union.

<sup>11</sup> See, by way of example, judgments of 21 March 2019, *Commission v Italy* (C-498/17, EU:C:2019:243, paragraphs 29 and 30); of 18 October 2018, *Commission v Romania* (C-301/17, not published, EU:C:2018:846, paragraphs 42 and 43); and of 23 November 2016, *Commission v France* (C-314/15, not published, EU:C:2016:887, paragraphs 28 and 29). The legal literature echoes that finding, see, for example, Schermers, H.G., Waelbroeck, D., *Judicial Protection in the European Union*, 6th edition, Kluwer Law International, The Hague/London/New York, 2001, § 1256; Pechstein, M., in M. Pechstein, C. Nowak, U. Häde (ed.), *Frankfurter Kommentar zu EUV, GRC und AEUV, Band IV*, Mohr Siebeck, Tübingen, 2017, Artikel 258 AEUV, paragraph 42, and Streinz, R., in R. Streinz (ed.), *EUV/AEUV (Kommentar)*, 3rd Edition, C.H. Beck, Munich, 2018, Artikel 258 AEUV, paragraph 34. It should be noted, however, that in *the operative parts* of the judgments, the Court tends to refer loosely to the concept ‘within the prescribed period’, without specifying whether this is a reference to the period prescribed by the EU legislature in the directive or to the period prescribed by the Commission in the reasoned opinion.

28. The two-stage legislative procedure for directives requires a significant monitoring effort. Since directives must be transposed by the Member States, they are a source not only of divergences, but also of errors.<sup>12</sup> Experience to date has thus shown that the second stage cannot be taken for granted and that transposition by Member States is often better ensured through systematic monitoring by the Commission. As a result, transposition practices are subject to continuous monitoring and statistical evaluation by the Commission.

29. As regards the transposition of directives into national law, a distinction has traditionally been made between three main types of infringements. The first concerns a failure to notify transposition measures (a Member State has not notified the measures transposing a directive to the Commission within the prescribed period); the second concerns non-compliance (the transposition measures taken by a Member State do not comply with the requirements of EU directives); and, lastly, the third concerns misapplication or incorrect application (the directive, even if formally transposed, is not applied correctly or is not applied at all by national authorities).

30. It should be pointed out that that classification is used by the Commission itself.<sup>13</sup>

31. In order properly to fulfil its role as guardian of the Treaties and to verify whether a Member State has correctly transposed the provisions of a directive into national law, the Commission must therefore be informed of the transposition measures taken by the Member States.<sup>14</sup>

32. Member States often fail to comply with the requirements for transposing directives and the incorrect transposition of directives is one of the most frequent and most serious cases of misapplication of EU law in the Member States.<sup>15</sup>

33. Directives now impose the obligation to make a reference to the directive in the national transposition measure. As a result of that independent obligation to refer to the directive, transposition measures become necessary even if national legislation already fulfils, in substance, the requirements of the directive. In order to facilitate the monitoring of transposition, directives often required Member States to notify the transposition measures taken, even prior to the entry into force of the Lisbon Treaty.<sup>16</sup> Moreover, in order to facilitate the monitoring of transposition, the Commission regularly requires Member States to provide it with a correlation table showing how each provision of a given directive is transposed into national law.<sup>17</sup>

34. The Treaty of Lisbon added the procedure provided for in Article 260(3) TFEU to the measures at the disposal of the Commission for the purposes of that monitoring.

## 2. *The purpose of Article 260(3) TFEU*

35. In order to understand the logic of Article 260(3) TFEU, it seems to me appropriate to take a step back and place that provision in its historical and schematic context.

<sup>12</sup> See Haltern, U., *Europarecht, Dogmatik im Kontext, Band I*, 3rd Edition, Mohr Siebeck, Tübingen, 2017, paragraph 872.

<sup>13</sup> See, in particular, Report from the Commission: Monitoring the application of European Union law, 2016 Annual Report, 6 July 2017 (COM(2017) 370 final), point III, p. 18.

<sup>14</sup> That, in my view, is why Article 260(3) TFEU puts particular emphasis on the failure to notify transposition measures. I shall return to that point below, in my analysis relating to Article 260(3) TFEU.

<sup>15</sup> See, also, Ruffert, M., in Chr. Calliess, M. Ruffert, (ed.), *EUV/AEUV*, 5th Edition, C.H. Beck, Munich, 2016, Artikel 288 AEUV, paragraph 46.

<sup>16</sup> In any event, it has always been possible to infer from Article 4(3) TEU the obligation of Member States to notify transposition measures upon request.

<sup>17</sup> See, in particular, the Annex to the Commission Recommendation of 12 July 2004 on the transposition into national law of Directives affecting the internal market (OJ 2005 L 98, p. 47), paragraph 3.3, and Annex to the Commission Recommendation of 29 June 2009 on measures to improve the functioning of the single market (OJ 2009 L 176, p. 17), paragraph 3(f). Such a table also accompanies any draft national implementing measure when it is forwarded to the parliament or the government of the Member State to facilitate discussions and is attached to the notification of that measure to the Commission.

36. To that end, I would like to examine, briefly, the much-debated aim of that provision.

37. In that regard, two arguments are put forward. First, it is argued that the mechanism established by that provision is intended directly to penalise a failure to notify transposition measures. That is the argument which is advanced, in particular, by the Commission,<sup>18</sup> by some legal academics<sup>19</sup> and, implicitly, by Advocates General Wathelet<sup>20</sup> and Tanchev.<sup>21</sup> According to that approach, a failure to notify transposition measures within the period prescribed by a directive may, as such, give rise to the imposition of financial penalties. The payment obligation may take effect either immediately, that is to say from the date of delivery of the judgment, or at a later date determined by the Court in its judgment.

38. Secondly, the opposing argument is that the mechanism established in Article 260(3) TFEU is intended to penalise a failure to comply with a judgment of the Court declaring that a Member State has failed to fulfil its obligation to notify transposition measures.<sup>22</sup> According to that approach, a financial penalty imposed by the Court in the judgment establishing the infringement<sup>23</sup> does not take effect until a later date, because the specific rationale for the financial penalty is the failure to comply with that judgment. That approach maintains that the *ratio legis* of Article 260(3) TFEU is that penalties may be imposed on a Member State immediately, that is to say on the date of the judgment relating to the infringement, if the infringement is manifest, which means that establishing its existence does not pose a problem. Only in such a situation is there justification for speeding up the procedure under Article 260(2) TFEU and for not having to refer the matter to the Court once again.

39. I accept that the first approach may seem, at first sight, more enticing than the second. It is in any event an intuitive approach for anyone versed in — not to say frustrated by — the Member States' record in transposing directives. Nevertheless, for the reasons I shall set out below, I am convinced that the second approach is the right one.

(a) *Wording*

40. The wording of Article 260(3) TFEU provides preliminary guidance.

41. I would recall that under the second subparagraph of Article 260(3) TFEU, 'if the Court finds that there is an infringement it may impose a lump sum or penalty payment on the Member State concerned not exceeding the amount specified by the Commission. The payment obligation shall take effect on the date set by the Court in its judgment'. Such wording implies, in my view quite logically, that the payment obligation necessarily arises on a date subsequent to the date of delivery of the judgment. On the other hand, it is not possible to exclude an interpretation of the wording of Article 260(3) TFEU as meaning that the payment obligation may coincide with the delivery of the

18 See Communication from the Commission on the implementation of Article 260(3) TFEU (OJ 2011 C 12, p. 1), points 6 and 7.

19 See Wennerås, P., 'Making effective use of Article 260 TFEU', in J. András, D. Kochenov, *The enforcement of EU law and values*, OUP, Oxford, 2017, pp. 79 to 98, in particular p. 79; Kilbey, I., 'The Interpretation of Article 260 TFEU (ex 228 EC)', *European Law Review*, 2010, pp. 370 to 386, in particular pp. 383 and 384; Pechstein, M., in M. Pechstein, C. Nowak, U. Häde (ed.), *Frankfurter Kommentar zu EUV, GRC und AEUV, Band IV*, Mohr Siebeck, Tübingen, 2017, Artikel 260 AEUV, paragraph 18, and Wunderlich, N., in H. von der Groeben, J. Schwarze, A. Hatje (ed.), *Europäisches Unionsrecht (Kommentar)*, 7th edition, Nomos, Baden-Baden, 2015, Artikel 260 AEUV, paragraph 31.

20 See Opinion of Advocate General Wathelet in *Commission v Poland* (C-320/13, EU:C:2014:2441, point 114 et seq.).

21 See Opinion of Advocate General Tanchev in *Commission v Spain (Article 260(3) TFEU — Residential property loans)* (C-569/17, EU:C:2019:271, point 67 et seq.).

22 See, *in extenso*, Wahl, N., Prete, L., 'Between certainty, severity and proportionality: some reflections on the nature and functioning of Article 260(3) TFEU', *European Law Reporter*, 2014, pp. 170 to 189, in particular pp. 175 to 177. See, also, Van Rijn, Th., 'Les Sanctions Pécuniaires de l'Article 260 TFEU: 5 ans après le Traité de Lisbonne', *Cahiers de droit européen*, 2016, pp. 557 to 589, in particular p. 588, and Klamert, M., 'Die Durchsetzung finanzieller Sanktionen gegenüber den Mitgliedstaaten', *Europarecht*, 2018, pp. 159 to 174, in particular p. 162.

23 The infringement relating, *inter alia*, to the failure to notify transposition measures.

judgment. Even though I consider that second interpretation more improbable than the first, it is clear that the wording of Article 260(3) TFEU is not unambiguous and it is not possible to assert that the answer to the question raised in this case follows, without the slightest doubt, from the wording of that provision.

(b) *General scheme*

42. From a schematic point of view, it cannot be a coincidence that the provision in question is contained in the article relating to compliance and non-compliance with the judgments of the Court, that is to say Article 260 TFEU, and not in the article relating to the usual procedure for a declaration of failure to fulfil an obligation, that is to say Article 258 TFEU.

43. The procedure for an action for failure to fulfil an obligation is the traditional ‘centralised’ remedy for ensuring implementation by the Member States of EU law.<sup>24</sup> To that end, Article 258 TFEU allows the Commission to refer a matter to the Court of Justice of the European Union after an unsuccessful pre-litigation procedure,<sup>25</sup> while Article 259 TFEU — which is seldom applied — provides for a similar procedure<sup>26</sup> for any (other) Member State.<sup>27</sup>

44. Article 260 TFEU establishes the effects of and the rules governing compliance with the judgments delivered on the basis of Articles 258 and 259 TFEU.<sup>28</sup>

45. To that end, Article 260(1) TFEU provides that if the Court finds that a Member State has failed to fulfil one of its obligations, the State is to be required to take the necessary measures to comply with the judgment of the Court.

46. Moreover, the provisions of Articles 258 and 259 TFEU and Article 260(1) TFEU are identical to those contained in the 1957 Treaty of Rome.<sup>29</sup>

47. Article 260(2) TFEU, introduced by the Maastricht Treaty, deals with the procedure for the imposition of financial penalties where the Member State concerned has not taken measures to comply with a judgment declaring a failure to fulfil an obligation.<sup>30</sup> That ‘double infringement’ procedure is therefore a second stage in the sense that it takes place only after a first judgment declaring a failure to fulfil an obligation has been delivered.

24 By contrast, ‘decentralised’ implementation before the national courts as ordinary courts applying EU law occurs on a day-to-day basis, by means of interaction between principles derived from the case-law of the Court: the direct effect of the provisions of directives, the obligation to interpret national law in accordance with directives and actions seeking to establish State liability.

25 It follows from the wording of Article 258 TFEU that that pre-litigation procedure consists, at the very least, in the issuing of two documents by the Commission: a letter of formal notice (‘after giving the State concerned the opportunity to submit its observations’) and a reasoned opinion.

26 Of course, the purpose of Article 259 TFEU differs from that of Article 258 TFEU in so far as, unlike the Commission, another Member State is not the guardian of the Treaties.

27 Nevertheless, the pre-litigation procedure differs somewhat from that of Article 259 TFEU. With regard to the differences between those two procedures, see Wunderlich, N., in H. von der Groeben, J. Schwarze, A. Hatje (ed.), *Europäisches Unionsrecht (Kommentar)*, 7th Edition, Nomos, Baden-Baden, 2015, Artikel 259 AEUV, paragraphs 8 to 12.

28 See Ehrlicke, U., in R. Streinz (ed.), *EUV/AEUV*, 3rd Edition, C.H. Beck, Munich, 2017, Artikel 260 AEUV, paragraph 1.

29 Apart from the replacement, in those three articles, of the term ‘this Treaty’ by ‘the Treaties’ and the addition of the term ‘of the European Union’ after ‘Court of Justice’.

30 Under Article 260(2) TFEU, if it considers that the Member State concerned has not taken the necessary measures to comply with the judgment of the Court, the Commission may therefore bring the case before the Court after giving that State the opportunity to submit its observations. It is to specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances. If the Court finds that the Member State concerned has not complied with its judgment it may impose a lump sum or penalty payment on it.

48. Article 260(3) TFEU, which was introduced by the Lisbon Treaty and has not, to date, been the subject of a judgment of the Court,<sup>31</sup> provides that when the Commission brings a case before the Court pursuant to Article 258 TFEU on the grounds that the Member State concerned has failed to fulfil its obligation to notify the measures transposing a directive adopted under a legislative procedure, it may, when it deems appropriate, specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances. If the Court finds that there is an infringement it may impose a lump sum or penalty payment on the Member State concerned not exceeding the amount specified by the Commission. The payment obligation is to take effect on the date set by the Court in its judgment.

49. It would go against all the logic of the system to introduce a provision in Article 260 TFEU which governs not compliance with a judgment but an obligation which may form the subject matter of proceedings under Article 258 TFEU. Article 260(3) TFEU can therefore be concerned only with a failure to comply with a judgment delivered by the Court.

(c) *Travaux préparatoires*

50. The origin of Article 260(3) TFEU supports the approach I am proposing.<sup>32</sup> Indeed, the discussion circle established in the context of the European Convention<sup>33</sup> gave rise to the provision as it is expressed in Article 260(3) TFEU. Its final report contains proposals<sup>34</sup> ‘to grant the Commission the possibility of initiating before the Court *both* (in the same procedure) proceedings for failure to fulfil an obligation pursuant to Article [258 TFEU] and an application to impose a sanction. If, at the Commission’s request, the Court imposes the sanction in the same judgment, the sanction would apply after a certain period had elapsed from the date the judgment was delivered,<sup>35</sup> if the defending State did not comply with the Court’s ruling. ... This would enable the procedure in particular for sanctions in cases of “non-communication” of a national transposition measure to be simplified and speeded up<sup>36, 37</sup>. Those proposals were echoed almost word for word by the Praesidium of the European Convention<sup>38</sup> concerning the draft of the new provision:<sup>39</sup> ‘Paragraph 3 (new) is the result of a suggestion submitted to the discussion circle by the Commission. It grants the Commission the possibility of initiating before the Court both (in the same procedure) proceedings for failure to fulfil an obligation pursuant to Article [258 TFEU] and an application to impose a sanction. If, at the Commission’s request, the Court imposes the sanction in the same judgment, the sanction would

31 See point 5 of this Opinion.

32 See, also, Opinion of Advocate General Tanchev in *Commission v Spain (Article 260(3) TFEU — Residential property loans)* (C-569/17, EU:C:2019:271, point 59), in which, for other reasons, he reached a conclusion different from that which I propose in the present case.

33 European Convention on the Future of Europe, established by the Laeken declaration (adopted on 15 December 2001).

34 Those proposals are cited here and include footnotes 35 and 36. The only change is in their numbering.

35 Some felt that the amount of the sanction (penalty payment) should in this case be calculated in such a way that the penalty payment took effect retroactively, from the date of the judgment.

36 A distinction is made in practice between cases of ‘non-communication’ — i.e. the Member State has not taken any transposition measure, and cases of incorrect transposition — i.e. the transposition measures taken by the Member State do not, in the Commission’s view, comply with the directive. The proposed arrangements would not apply in the second case.

37 See Final report of the discussion circle on the Court of Justice, published by the Secretariat of the European Convention in Brussels, on 25 March 2003, CONV 636/03, paragraph 28, available at the following address: [http://www.europarl.europa.eu/meetdocs\\_all/committees/conv/20030403/03c\\_en.pdf](http://www.europarl.europa.eu/meetdocs_all/committees/conv/20030403/03c_en.pdf)

38 See Praesidium of the European Convention, Articles on the Court of Justice and the High Court, published by the Secretariat of the European Convention in Brussels on 12 May 2003, CONV 734/03, p. 16, available at the following address: [http://www.europarl.europa.eu/meetdocs\\_all/committees/conv/20030520/734000en.pdf](http://www.europarl.europa.eu/meetdocs_all/committees/conv/20030520/734000en.pdf)

39 The text of that new provision of Article 228(3), which became Article III-367 of the Convention’s draft constitutional treaty, which became Article III-362 of the IGC Constitutional Treaty, which became Article 260 TFEU in Lisbon, read as follows: ‘When the Commission brings a case before the Court of Justice pursuant to Article 226 on the grounds that the State concerned has failed to fulfil its obligations to notify measures transposing a framework law, it may, when it deems appropriate, request that, in the course of the same proceedings, the Court of Justice impose the payment of a lump sum or penalty if the Court finds that there has been such a failure. If the Court of Justice complies with the Commission’s request, the payment in question shall take effect within the time limit laid down by the Court of Justice in its judgment.’



apply after a certain period had elapsed from the date the judgment was delivered, if the defending State did not comply with the Court's ruling. ... This would enable the procedure for sanctions in cases of "non-communication" of a national transposition measure to be considerably simplified and speeded up. ...'

51. Those citations clearly indicate, in my view, that the authors of Article 260(3) TFEU intended to create a procedure for failure to comply with a judgment.

52. In that regard, I shall give more weight to the intention of the draftsmen of the TFEU, the clarity of which leaves no doubt in my mind, than to the interpretation put forward by the Commission in its Communication on the implementation of Article 260(3) TFEU. I find it difficult in this instance to attribute greater significance to a measure constituting 'soft law', adopted by a party to the present proceedings, rather than to the travaux préparatoires, drawn up, it should not be forgotten, in the course of an unprecedented convention on the future of Europe.<sup>40</sup>

*(d) The nature of the financial penalties*

53. I have a more fundamental comment to make concerning the purpose of Article 260(3) TFEU. Financial penalties in the context of infringement proceedings have never, to my knowledge, been interpreted as being of a punitive nature, penalising a failure to comply with the substantive law of the European Union.

54. In that regard, the infringement in Article 260(2) proceedings 'is no longer merely the original infringement of the Treaty found by the Court in accordance with the procedure under Article [258 TFEU] (hereinafter the underlying infringement), but is treated as a compound infringement encompassing the original infringement within breach of the specific obligation under Article [260(1) TFEU] to comply with the Court's judgment'.<sup>41</sup>

55. From a wider perspective, the logic underlying that concept of double infringement is the fact that the European Union is a union based on the rule of law,<sup>42</sup> in which the need to take account of judgments and to comply with them is of paramount importance.

56. If it were accepted that failure to transpose the provisions of a directive and failure to notify the transposition measures constituted, in themselves, the rationale for the financial penalties, this would run counter to that logic of double infringement. There would be a certain inconsistency in such a situation, since a failure to fulfil the obligation to notify transposition measures is often more benign in nature than many other infringements of EU law.

*(e) Finding*

57. Article 260(3) TFEU thus provides for the possibility of financial penalties in the context of an accelerated procedure for situations in which it is clear that a Member State has failed to fulfil its obligations. The purpose of that provision is essentially to avoid unnecessary litigation before the Court before penalties may be imposed. The objective of that procedure is to avoid a second set of proceedings for simple cases of failure to notify transposition measures, for reasons of procedural

<sup>40</sup> In that connection, another point of view is put forward by Gáspár-Szilágyi, S., 'What constitutes "Failure to Notify" National Measures?', *European Public Law*, 2013, pp. 281 to 294, in particular p. 285, according to which the travaux préparatoires merely add to the confusion surrounding Article 260(3) TFEU and are contrary to the Commission's practices.

<sup>41</sup> See Opinion of Advocate General Fennelly in *Commission v Greece* (C-197/98, EU:C:1999:597, point 19). See, also, Opinion of Advocate General Wahl in *Commission v Germany* (C-95/12, EU:C:2013:333, footnote 50).

<sup>42</sup> See judgment of 27 February 2018, *Associação Sindical dos Juizes Portugueses* (C-64/16, EU:C:2018:117, paragraph 31).

economy and optimal allocation of resources. That objective is specifically achieved under Article 260(3) TFEU by allowing the Court to impose penalties from the first stage of the procedure and to order that such penalties automatically take effect at a later date if the judgment delivered on the basis of Article 258 TFEU is not complied with.<sup>43</sup>

### 3. *The conditions set out in Article 260(3) TFEU*

#### (a) *The obligation to notify measures transposing a directive*

58. Since the purpose of Article 260(3) TFEU has been established, I shall now examine the conditions set out in that provision.

59. The expression ‘obligation to notify measures transposing a directive’ must therefore be interpreted. What is the exact meaning of that phrase, which at first sight appears to be unambiguous?

60. Three points of view may be distinguished.

61. The first point of view, put forward in particular by the Belgian Government and supported in that regard by the governments intervening in support of the Kingdom of Belgium, is that that phrase is intended to cover only the situation in which a Member State has remained totally inactive as regards transposing a directive into national law and has therefore failed, within the prescribed period, to take measures to transpose the directive and to notify them to the Commission.

62. The Commission, on the other hand, supports a second point of view, that is to say that Article 260(3) TFEU applies both in the case of a complete failure to transpose and to notify transposition measures and in the case of *partial* transposition and notification of those measures.

63. A third point of view, put forward by Advocates General Wathelet<sup>44</sup> and Tanchev,<sup>45</sup> is that Article 260(3) TFEU applies in three situations, that is to say where there is a total failure to notify any transposition measures, where there is a notification of measures constituting incomplete transposition of the directive or where there is a notification of measures constituting incorrect transposition of the directive.

64. In that regard, the views expressed in the legal literature also differ.<sup>46</sup>

65. I admit that I am not convinced by any of the arguments put forward.

66. First of all, I have serious doubts concerning the second and third arguments. They are based on a broad interpretation of Article 260(3) TFEU and, in my view, do not adequately take into account that provision’s wording, schematic context in the Treaty, origin and purpose.

<sup>43</sup> In that regard I concur with the approach of Prete, L., *Infringement Proceedings in EU Law*, Wolters Kluwer, Alphen aan den Rijn, 2017, pp. 266 to 270, in particular p. 270.

<sup>44</sup> Opinion of Advocate General Wathelet in *Commission v Poland* (C-320/13, EU:C:2014:2441, point 145).

<sup>45</sup> Opinion of Advocate General Tanchev in *Commission v Spain (Article 260(3) TFEU — Residential property loans)* (C-569/17, EU:C:2019:271, point 71).

<sup>46</sup> See, in particular, Everling, U., ‘Rechtsschutz in der Europäischen Union nach dem Vertrag von Lissabon’, *Europarecht*, 2009, Beiheft 1, pp. 71 to 86; Wahl, N., Prete, L., op. cit.; Blanc, D., ‘Les procédures du recours en manquement, le traité, le juge et le gardien: entre unité et diversité en vue d’un renforcement de l’Union de droit’, in St. Mahieu (ed.), *Contentieux de l’Union européenne: questions choisies*, Larcier, 2014, pp. 429 to 461; Wennerås, P., ‘Making Effective Use of Article 260 TFEU’, in J. András, D. Kochenov, *The Enforcement of EU Law and Values*, OUP, Oxford, 2017, pp. 79 to 98; Radivojević, Z., Raičević, N., ‘Financial sanctions against Member States for infringement of EU law’, *Procedural aspects of EU law*, Osijek 2017, pp. 171 to 191.

67. Those approaches, are in my opinion, hardly practicable, since they require a detailed examination of whether or not a directive has been transposed by the Member State concerned, which runs counter to the objectives of the effectiveness and expeditiousness of the procedure.

68. I understand Article 260(3) TFEU not as laying down the substantive condition that a directive has not been *transposed* but as laying down the procedural<sup>47</sup> condition that transposition measures have not been *notified*.

69. The event giving rise to the payment of a penalty payment or lump sum is the infringement by the Member State concerned of the obligation to notify. The obligation referred to in Article 260(3) TFEU is not the obligation to adopt transposition measures but the obligation to notify them.<sup>48</sup> It is not a question of denying that the obligations to notify and transpose are related obligations in the sense that the obligation to notify puts into operation the obligation to transpose.<sup>49</sup> Nevertheless, this is no way alters the clear wording of Article 260(3) TFEU, which refers not to transposition measures as such but to the notification of them.

70. Accordingly, the wording of the first subparagraph of Article 260(3) TFEU must be understood as meaning that that provision places a clear limit on the scope of the Commission's power to request the payment of a financial penalty.

71. The situations in which a Member State, on the ground that it has failed to adopt any transposition measures, fails to notify to the Commission any transposition measures within the prescribed period are similar to the situations referred to in Article 260(2) TFEU. In both sets of circumstances,<sup>50</sup> the legal situation is in principle clear. There is no legal uncertainty and, therefore, no need to obtain a (first) clarificatory judgment from the Court. On the other hand, the issue of partial, imperfect or incorrect transposition is not an issue which is easily resolved, but quite the contrary.<sup>51</sup>

72. In that context, I concur with the view that the 'distinction between (in)complete and (in)correct transposition is not appropriate'.<sup>52</sup>

73. Attempting to draw a line between incomplete transposition and incorrect transposition not only complicates matters but is also misleading.<sup>53</sup> This is because incomplete transposition is also, by definition, incorrect transposition.<sup>54</sup> Moreover, incorrect transposition often relates to an absence of national measures which implement or reflect certain parts of a directive. In most cases of incorrect transposition, more or less significant parts of the provisions of a directive may be identified as being absent from the relevant national legislation.

74. A key argument of those who support the idea that Article 260(3) TFEU includes not only a complete failure to notify, but also a partial failure to notify, or even the incorrect transposition of a directive, is the argument as to effectiveness: only the broadest possible interpretation of Article 260(3) TFEU is capable of ensuring that that provision constitutes a genuinely effective means of securing the Member States' timely transposition of directives.

47 Or formal.

48 See, also, to that effect, Simon, D., 'Sanctions pécuniaires', *Revue Europe*, March 2011, p. 15.

49 That connection is emphasised, in particular, by Advocate General Tanchev in his Opinion in *Commission v Spain (Article 260(3) TFEU — Residential property loans)* (C-569/17, EU:C:2019:271, point 48).

50 That is to say Article 260(2) and (3) TFEU.

51 See also, to that effect, Thiele, A., 'Das Rechtsschutzsystem nach dem Vertrag von Lissabon — (K)ein Schritt nach vorn?', *Europarecht*, 2010, pp. 30 to 51, in particular p. 35.

52 See Opinion of Advocate General Wathelet in *Commission v Poland* (C-320/13, EU:C:2014:2441, points 125 to 139). See, also, Opinion of Advocate General Tanchev in *Commission v Spain (Article 260(3) TFEU — Residential property loans)* (C-569/17, EU:C:2019:271, point 70).

53 The legal literature has also pointed out the difficulty in drawing a line between incorrect transposition and incomplete transposition: see Wennerås, P., 'Sanctions against Member States under Article 260 TFEU: alive, but not kicking?', *Common Market Law Review*, vol. 49, 2012, pp. 145 to 176, in particular p. 167.

54 See also Prete, L., *op. cit.*, p. 273.

75. Such an argument is convincing, if at all, only if it is based on the premiss that Article 260(3) TFEU is intended to penalise not a failure to comply with a judgment of the Court, but a failure to notify transposition measures. Accordingly, I am of the opinion that considerations relating to effectiveness cannot be accepted.

76. The Commission takes the view, moreover, that ‘where the Member State has provided all necessary explanations on how it *believes* it has transposed the entire directive, the Commission may consider that the Member State has not failed to meet its obligations to notify transposing measures, and therefore Article 260(3) [TFEU] does not apply’.<sup>55</sup>

77. Although I do not wish to call into question the Commission’s discretion in the procedure for a declaration of failure to fulfil an obligation, I nonetheless note that the Commission seems to allow itself to be guided by the subjective considerations put forward by Member States. Nevertheless, the procedure under Article 258 TFEU<sup>56</sup> and the procedure under Article 260 TFEU<sup>57</sup> are based on the *objective* finding that a Member State has failed to fulfil its obligations.

78. Consequently, I do not see how that assertion by the Commission, which actually introduces a subjective criterion seeking to bring morality into the procedure under Article 260 TFEU, could be accepted.<sup>58</sup> Moreover, following the Commission’s reasoning would require a detailed analysis of the substantive issue of whether or not a directive has been transposed.

79. There remains the argument that Article 260(3) TFEU covers only situations in which a Member State remains totally inactive.

80. Such an argument, if it does not include situations in which a Member State notifies to the Commission, as ‘transposition measures’, measures unrelated to the directive to be transposed,<sup>59</sup> is not convincing. Such ‘simulated notification’ actually constitutes a failure to notify. Where it appears, *prima facie* and without a substantive examination, that measures are unrelated to the directive, it is not reasonable to speak of *transposition* measures under Article 260(3) TFEU.<sup>60</sup> If it appears, at first sight, that the measures notified in no way constitute transposition, there is a failure to notify.

81. Accordingly, a situation may be characterised as one involving a ‘failure to notify’, for the purposes of Article 260(3) TFEU, where ‘it is quite obvious’ that the information concerning the transposition measures notified to the Commission is unrelated to the provisions of the directive.<sup>61</sup>

### (b) *Application to the present case*

82. The question which now arises is whether the conditions set out in Article 260(3) TFEU are fulfilled in this instance, that is to say whether that provision applies *ratione materiae* in the present case.

55 See the Communication from the Commission on the implementation of Article 260(3) of the Treaty (OJ 2011 C 12, p. 1), paragraph 19. Emphasis added.

56 See judgment of 1 February 2001, *Commission v France* (C-333/99, EU:C:2001:73, paragraph 33).

57 See judgment of 12 July 2005, *Commission v France* (C-304/02, EU:C:2005:444, paragraph 44).

58 In that connection, I would recall the wise words of Advocate General Roemer, who stated forcefully in his Opinion in *Commission v France* (7/71, EU:C:1971:107, p. 1035) that actions for failure to fulfil obligations ‘are concerned not with guilt and morality but simply with the clarification of the legal position’.

59 That is the specific point addressed in the criticism relating to a restrictive interpretation of Article 260(3) TFEU. See, for example, Materne, T., *La procédure en manquement d’État*, Larcier, Bruxelles 2012, p. 43, and Van der Jeught, St., ‘L’action en manquement “renforcée”: sanctions pécuniaires en cas de non-transposition des directives européennes’, *Journal de droit européen*, 2011, pp. 68 to 70, in particular p. 69.

60 See also, to that effect, Mańnicki, J., ‘Postępowanie z tytułu braku notyfikacji środków implementujących dyrektywę w świetle opinii rzecznika generalnego w sprawie C-320/13’, *Europejski Przegląd Sądowy*, vol. 4, 2015, pp. 16 to 23, in particular p. 20.

61 That finding should make it possible to prevent a Member State from complying with the obligation to notify by communicating national measures unrelated to the provisions of a directive. See also, to that effect, Van Rijn, Th., *op. cit.*, p. 585.

83. I think not.

84. The Commission asks the Court to ‘order the Kingdom of Belgium to pay, in accordance with Article 260(3) TFEU, a fine in the sum of EUR 54 639.36 *per diem* from the date of delivery of the judgment in this action for failure to fulfil the obligation of communicating the measures transposing Directive 2014/61’.<sup>62</sup>

85. That amount was gradually reduced during the proceedings before the Court, as the Kingdom of Belgium progressively transposed the directive.

86. The reference date for determining the imposition of a penalty payment is the date of the Court’s examination of the facts. This is true in the context of Article 260(2) TFEU,<sup>63</sup> according to the settled case-law of the Court, which is, in my view, fully applicable to Article 260(3) TFEU.<sup>64</sup>

87. At the hearing, the Commission informed the Court that it takes the view that gaps in transposition remain only in relation to the Brussels Capital Region and relate only to certain provisions, namely the definitions set out in Article 2(7),<sup>65</sup> (8),<sup>66</sup> (9)<sup>67</sup> and (11),<sup>68</sup> in Article 4(5)<sup>69</sup> and in Article 8<sup>70</sup> of Directive 2014/61. In view of that progress, the Commission decided to reduce the gravity factor to ‘1’ and asks the Court to impose a daily penalty payment of EUR 6 071.04 on the Kingdom of Belgium.

88. The Kingdom of Belgium does not dispute the existence of the gaps in transposition complained of.

89. Moreover, the Kingdom of Belgium has notified the Commission of the transposition measures already adopted. However, the Commission maintains that that government ‘failed to fulfil its obligation to notify measures transposing’ Directive 2014/61.

90. On the basis of the criteria which I have just set out and in so far as that Member State progressively notified to the Commission the transposition measures, the Kingdom of Belgium cannot be regarded as having failed to fulfil its obligation to notify.

91. Accordingly, the Commission’s claim relating to Article 260(3) TFEU cannot be upheld.

#### 4. *Financial penalties*

92. The Commission asks the Court to impose a daily penalty payment of EUR 6 071.04 on the Kingdom of Belgium.

<sup>62</sup> See paragraph 85 of the Commission’s application.

<sup>63</sup> See judgments of 12 July 2005, *Commission v France* (C-304/02, EU:C:2005:444, paragraph 31); of 18 July 2006, *Commission v Italy* (C-119/04, EU:C:2006:489, paragraph 33); and of 17 October 2013, *Commission v Belgium* (C-533/11, EU:C:2013:659, paragraphs 64 and 74).

<sup>64</sup> See also, to that effect, Opinion of Advocate General Wathelet in *Commission v Poland* (C-320/13, EU:C:2014:2441, point 63).

<sup>65</sup> ‘In-building physical infrastructure’.

<sup>66</sup> ‘High-speed-ready in-building physical infrastructure’.

<sup>67</sup> ‘Major renovation works’.

<sup>68</sup> ‘Access point’.

<sup>69</sup> Which provides that Member States are to require network operators to meet reasonable requests for on-site surveys of specific elements of their physical infrastructure.

<sup>70</sup> Which provides that Member States are to ensure that all newly constructed buildings and those undergoing major renovation works are equipped with a high-speed-ready in-building physical infrastructure as well as an access point.

93. Although I see no need to take a view on the exact calculation of a daily penalty payment in the present case, since I am of the opinion that Article 260(3) TFEU is not applicable in circumstances such as those of this case, I would nevertheless like to make two brief comments of a general nature concerning financial penalties, in the event that the Court reaches the conclusion that Article 260(3) TFEU is applicable in the present case.

94. The purpose of financial penalties is to ensure that a Member State complies with EU law and to prevent further infringements.<sup>71</sup> The aim of those penalties is not moral but practical.

95. It should be noted at the outset that, *in general*,<sup>72</sup> the principles developed in the context of Article 260(2) TFEU apply also to Article 260(3) TFEU.<sup>73</sup> In that regard, my two comments are set out below.

96. In the first place, since Article 260(3) TFEU, like Article 260(2) TFEU, has the purpose of penalising a failure to comply with a judgment of the Court, the Commission may use the same method to calculate the financial penalties under those two paragraphs.<sup>74</sup> In any event, the Court is not bound by the Commission's suggestions either as regards the imposition of a penalty<sup>75</sup> or as regards its method of calculation.<sup>76</sup>

97. In the second place, the question arises as to whether the Court's case-law on Article 260(2) TFEU concerning whether the Court may impose a financial penalty which has not been requested by the Commission can be applied to Article 260(3) TFEU.<sup>77</sup>

98. I think not.

99. Unlike Article 260(2) TFEU, Article 260(3) TFEU has an important addition: the latter provision states that the Court may impose a penalty payment on the Member State '*not exceeding* the amount specified by the Commission'.<sup>78</sup> Although Article 260(3) TFEU mentions not the choice of the financial penalty to be imposed but only the amount,<sup>79</sup> that wording has an impact on the choice of the financial penalty. To illustrate my point: the Commission is requesting the imposition of a daily penalty payment of EUR 6 071.04. If the Court decided to impose a lump sum in addition to the daily penalty payment, how could the Court ensure that the penalty imposed remained one '*not exceeding* the amount specified by the Commission'? By lowering the penalty payment? Since this case concerns a *daily* penalty payment, the final amount of which to be paid by the Member State depends on the duration (continuation) of the infringement as from (after) the date set by the Court in its judgment, what is the limit of that amount? The amount is impossible to determine.

71 See, also, Sikora, A., *Sankcje finansowe w razie niewykonania wyroków Trybunału Sprawiedliwości Unii Europejskiej*, Wolters Kluwer, Warsaw, 2011, p. 91.

72 As I shall show below, one of the exceptions may apply in the present case.

73 See also, to that effect Peers, S., 'Sanctions for Infringement of EU Law after the Treaty of Lisbon', *European Law Review*, vol. 18, 2012, pp. 33 to 64, in particular p. 45.

74 See also, to that effect, Opinion of Advocate General Wathelet in *Commission v Poland* (C-320/13, EU:C:2014:2441, point 146 et seq.), and Opinion of Advocate General Tanchev in *Commission v Spain (Article 260(3) TFEU — Residential property loans)* (C-569/17, EU:C:2019:271, point 73).

75 It is for the Court to assess in each case, in the light of the circumstances of the case, the financial penalties to be imposed: see judgment of 11 December 2012, *Commission v Spain* (C-610/10, EU:C:2012:781, paragraph 115).

76 The Commission's suggestions cannot bind the Court and merely constitute a useful point of reference. Similarly, guidelines such as those contained in the communications of the Commission are not binding on the Court but contribute to ensuring that the action brought by the Commission is transparent, foreseeable and consistent with legal certainty; see judgment of 30 May 2013, *Commission v Sweden* (C-270/11, EU:C:2013:339, paragraph 41).

77 It is well known that the Court held that the appropriateness of imposing a financial penalty and the choice of the penalty most suited to the circumstances of the case could be appraised only in the light of the findings made by the Court in the judgment to be delivered under Article 260(2) TFEU and therefore fell outside the political sphere; see judgment of 12 July 2005, *Commission v France* (C-304/02, EU:C:2005:444, paragraphs 90 and 91).

78 Emphasis added.

79 See Opinion of Advocate General Tanchev in *Commission v Spain (Article 260(3) TFEU — Residential property loans)* (C-569/17, EU:C:2019:271, point 77).

100. I therefore understand the expression ‘not exceeding the amount specified by the Commission’ as meaning that Article 260(3) TFEU confers on the Court jurisdiction to impose financial penalties, with a general prohibition on imposing a heavier penalty.<sup>80</sup>

## V. Costs

101. Under Article 138(3) of the Rules of Procedure of the Court, where each party succeeds on some and fails on other heads, the parties are to bear their own costs. Since the Commission and the Kingdom of Belgium have each failed on one head, they must be ordered to bear their own costs.

102. Under Article 140(1) of the Rules of Procedure of the Court, the German, Estonian, Irish, Spanish, French, Italian, Lithuanian, Hungarian, Austrian and Romanian Governments must bear their own costs.

## VI. Conclusion

103. In the light of the foregoing considerations, I propose that the Court should:

- (1) Declare that, by failing to adopt, within the prescribed period, all the laws, regulations and administrative provisions necessary to comply with Directive 2014/61/EU of the European Parliament and of the Council of 15 May 2014 on measures to reduce the cost of deploying high-speed electronic communications networks or, in any event, by failing to notify those provisions to the European Commission, the Kingdom of Belgium has failed to fulfil its obligations under Article 13 of that directive;
- (2) Dismiss the action as to the remainder;
- (3) Order the Commission and the Kingdom of Belgium each to bear their own costs;
- (4) Order the German, Estonian, Irish, Spanish, French, Italian, Lithuanian, Hungarian, Austrian and Romanian Governments to bear their own costs.

<sup>80</sup> See also, to that effect, Prete, L., op. cit., p. 282, and Póltorak, N., in D. Kornobis-Romanowska, J. Łacny, W. Andrzej (ed.), *Traktat o funkcjonowaniu Unii Europejskiej. Komentarz. Tom III*, Wolters Kluwer, Warsaw, 2012, Art. 223-358, paragraph 260.7.