Reports of Cases

OPINION OF ADVOCATE GENERAL
PITRUZZELLA
delivered on 1 July 2021 [1]

Case C-51/20

European Commission
v

Hellenic Republic

(Failure to fulfil obligations – Action under Article 260 TFEU – Financial penalties – Method of calculation – 'N' factor – Consideration of the institutional weight of the Member State)

I. Introduction

1. In accordance with Article 260(2) TFEU, if the European Commission considers that a Member State has not taken the necessary measures to comply with a judgment establishing a failure to fulfil an obligation given in accordance with paragraph 1 of that article, the Commission may bring the case before the Court of Justice, requesting that the Member State concerned be subject to financial sanctions in the form of a lump sum or penalty payment. The former is intended to penalise the continuation of the infringement after the judgment establishing the failure to fulfil the obligations in question has been given, and the latter is designed to ensure that the Member State does not repeat the same offence. [2] In the action by which it refers a Member State to the Court under Article 260(2) TFEU, the Commission will specify the amount of the penalties which it considers appropriate in the circumstances. To determine that amount, the Commission uses a method of calculation described, most recently, in a communication of 12 December 2005 [3] ('the 2005 communication'). Along with other factors such as the seriousness and duration of the infringement, that calculation method takes into account the ability to pay of the Member State concerned, expressed as the *'n' factor*. As will be seen below, the calculation of the 'n' factor was initially based on two components: the gross domestic product (GDP) of the Member State concerned, on the one hand, and the number of votes the Member State had in the Council for qualified-majority voting, on the other hand.

[1] Original language: Italian.

[2] According to settled case-law, the imposition of a penalty payment is, in principle, justified only in so far as the failure to comply with an earlier judgment of the Court continues up to the time of the Court's examination of the facts (see, inter alia, judgment of 31 May 2018, *Commission* v *Italy* (C-251/17, not published, EU:C:2018:358, paragraph 64)). On the possibility of combining both types of sanctions – penalty and lump sum payment – in a single judgment, given the different, complementary aims they are intended to achieve, see judgment of 12 July 2005, *Commission* v *France* (C-304/02, EU:C:2005:444, paragraphs 80 to 86).

[3] Communication from the Commission – Application of Article 228 of the EC Treaty (SEC(2005) 1658) (OJ 2007 C 126, p. 15). That communication was extended by the Commission after the entry into force of the Treaty of Lisbon to include procedures governed by Article 260(2) TFEU (see, to that effect, Communication from the Commission – Implementation of Article 260(3) of the Treaty, 15 January 2011 (OJ 2011 C 12, p. 1), paragraph 4).

After the entry into force, on 1 April 2017, of the new system for calculating the qualified majority within the Council provided for in Article 16(4) TEU, the Court held, in the judgment of 14 November 2018, *Commission* v *Greece*[4] ('the judgment of 14 November 2018'), that the double majority rule, on which that system is based, is not directly transposable to the mechanism for calculating penalties to be imposed on Member States in infringement proceedings and therefore cannot effectively substitute the old system of weighted votes used up to that point to calculate the 'n' factor. The Commission therefore issued a new communication in 2019[5] ('the 2019 communication'), which revised the component of the 'n' factor not tied to GDP, essentially replacing the criterion of the number of votes in the Council with the different criterion of the number of seats for representatives in the European Parliament allocated to each Member State.

2. The amounts of the penalties that the Commission is proposing that the Court impose on the Hellenic Republic in this action, lodged under Article 260(2) TFEU, have been determined using that new method of calculation of the 'n' factor.

3. By that action, the Commission is asking the Court to establish that the Hellenic Republic has failed to comply with its obligations under Article 260(1) TFEU in that it has failed to take all necessary measures to comply with the judgment of 9 November 2017, *Commission* v *Greece*[6] ('the judgment establishing a failure to fulfil obligations'). The Commission is also asking the Court to order the Hellenic Republic to pay a daily penalty payment in the sum of EUR 26 697.89 from the day on which the judgment is delivered in the present case until the judgment establishing a failure to fulfil obligations has been complied with in full, on the one hand, and a lump sum amount determined by multiplying a daily sum of EUR 3 709.23 by the number of days elapsed between the day when this judgment is delivered and the day when the infringement ends, on the other hand, or, if there has not been compliance, between that date and the day when judgment is delivered in the present case. Lastly, the Commission is asking the Court to order the Hellenic Republic to pay the costs.

4. In its application, the Commission asserts that, in accordance with the method of calculation described in the 2005 communication, the penalty it is proposing that the Court impose on the Hellenic Republic per day of delay in complying with the judgment establishing a failure to fulfil obligations is calculated by multiplying a standard flat-rate amount, set as EUR 3 116,[7] by a coefficient for seriousness of 7 – determined on the basis of the importance of the EU provisions infringed, the impact of that infringement on public and private interests, a comparison with comparable situations of non-compliance and other mitigating or aggravating factors – and by a coefficient for duration of 2.4, corresponding to the 24 months elapsed between 9 November 2017, the date when the judgment establishing a failure to fulfil obligations was delivered, and 27 November 2019, the date when the Commission brought the case before the Court. The amount thus obtained was multiplied by the 'n' factor calculated using the method described in the 2019 communication and set for the Hellenic Republic as 0.51.[8]

4 C-93/17, EU:C:2018:903, paragraphs 136 to 142.

5 Communication from the Commission – 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).

6 C-481/16, not published, EU:C:2017:845.

7 Communication from the Commission – 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, 13 September 2019 (OJ 2019 C 309, p. 1).

8 In accordance with the communication from the Commission cited in footnote 7 to this Opinion.

5. In terms of the lump sum, the Commission states that, in accordance with the calculation method described in the 2005 communication, this amount has been determined on the basis of a daily amount, corresponding to a standard flat-rate amount, set as EUR 1 039,[9] multiplied by a coefficient for seriousness of 7 and by an 'n' factor of 0.51. On the basis of the Commission's proposal, the total lump sum amount to be imposed on the Hellenic Republic should not be less than a minimum sum set for that Member State as EUR 135 820 824.35.[10]

6. In its action, the Commission emphasises the need to set the financial penalties to be imposed pursuant to Article 260(2) TFEU taking account not only of the ability of the defaulting Member State to pay and, therefore, its GDP, but also the institutional weight of that Member State within the European Union. According to the Commission, the criterion invalidated by the Court in the judgment of 14 November 2018, based on the number of votes of each Member State within the Council, should be substituted by a new criterion that acts to correct the application of a calculation method based solely on GDP, with the aim of maintaining a balance between the ability to pay of the defaulting Member State and its institutional weight and of avoiding situations where excessive discrepancies between the coefficient assigned to each Member State create unjustified differences in treatment.

7. In its defence, the Hellenic Republic asks the Court to dismiss the action and order the Commission to pay the costs. In relation to the financial penalties proposed by the Commission, the Hellenic Republic believes that these are neither justified nor proportionate. However, if the Court were to consider it necessary to sanction the failure to fulfil the obligations, the Hellenic Republic agrees with the Commission that the 'n' factor, and in general the amount of the sanctions, should reflect not only the ability to pay of the Member State in question but also its institutional weight. According to the Hellenic Republic, the criterion adopted by the Commission in the 2019 communication, based on the number of seats in Parliament, makes it possible to take this latter element appropriately into account.

8. The Commission and the Hellenic Republic were invited by the Court, by way of measures of organisation of procedure, to respond in writing to a series of questions, relating, inter alia, to the method used to determine the 'n' factor as described in the 2019 communication.

9. This Opinion relates exclusively to the question of the relevance, for the purposes of imposing penalties that are dissuasive and proportionate, of the element represented by the institutional weight of the Member State concerned within the European Union, as expressed in particular by the number of seats in the European Parliament allocated to that Member State.

[9] In accordance with the communication from the Commission cited in footnote 7 to this Opinion.

[10] In accordance with the communication from the Commission cited in footnote 7 to this Opinion.

II. Legal assessment

A. The 'n' factor before the judgment of 14 November 2018

1. The 2005 communication

10. The 'n' factor first made its appearance in the communication from the Commission of 28 February 1997 on calculating penalty payments [11] ('the 1997 communication'). The 2005 communication extended the scope of that text to cover calculation of the lump sum. [12] Defined as 'a special factor', [13] the 'n' factor was governed in the 2005 communication, and previously in the 1997 communication, in a separate section entitled 'Taking into account the Member State's ability to pay'. [14] Its purpose was seen in terms of the requirement to guarantee the deterrent effect of the penalty. In the Commission's view, this makes it possible to set the penalty and the lump sum at a level that is sufficiently high to exert pressure on the Member State to bring the infringement to an end [15] and not to repeat the same offence. [16]

11. In the 2005 communication, as in the 1997 communication, the 'n' factor was described as the 'geometric mean based, in part, on the [GDP] of the Member State in question and, in part, on the weighting of voting rights in the Council'. This was calculated by taking the square root of the product of two factors, the first representing the ratio of the GDP of the Member State concerned to the GDP of Luxembourg and the second the ratio of the number of votes of each Member State in the Council according to the weighting established by Article 148 of the EC Treaty to the number of votes allocated to Luxembourg. [17] According to the Commission, application of this formula produced reasonable divergence between the coefficients assigned to each Member State, ranging from 0.36 to 25.40. [18]

12. The Commission reserved the right to revise the 'n' factor in the event of any significant divergence from the real situation or if the weighting of votes in the Council changed, and to adapt it periodically, in particular taking account of the proportionately higher growth in GDP expected for the new Member States. [19] The rules used to update the data based on the change in GDP and inflation in each Member State are indicated in a communication from 2010. [20] According to that communication, updates were to be applied every year from 2011. [21]

[11] Information from the Commission – Method of calculating the penalty payments provided for pursuant to Article 171 of the EC Treaty (OJ 1997 C 63, p. 2). That communication represented a clarification of and a supplement to the Information from the Commission – Method of calculating the penalty payments provided for pursuant to Article 171 of the EC Treaty of 5 June 1996, the first in chronological order (OJ 1996 C 242, p. 6), which merely set certain guidelines for calculating penalties.

[12] See the 2005 communication, paragraph 20.

[13] See the 1997 communication, Section 1.

[14] This is Section 4 in the 1997 communication and Section D in the 2005 communication.

[15] The penalty must therefore be higher than the benefit that the Member State gains from the infringement, see the 1997 communication, Section 4, and the 2005 communication, paragraph 18.

[16] 2005 communication, paragraph 18.

[17] The formula is: $\sqrt{\frac{GDP\ n.}{GDP\ Lux} \times \frac{Votes\ n.}{Votes\ Lux.}}$, see paragraph 18 and footnote 18 in the 2005 communication. In the 1997 communication, the GDP and the number of votes in the Council of each Member State were taken in relation to the lowest GDP and the minimum number of votes respectively of the 15 Member States.

[18] See the 2005 communication, paragraph 18.1.

[19] See the 2005 communication, paragraph 18.2.

[20] See the communication of 20 July 2010 (SEC(2010) 923/3).

[21] The most recent revision of the data before the 2019 communication was adopted took place in 2017 (OJ 2017 C 431, p. 3). In its communication of 2011 (OJ 2011 C 12, p. 1, paragraph 24), the Commission stated that it would follow the same calculation method as set out in the 2005 communication with regard to the penalties proposed under Article 260(3) TFEU.

2. The case-law

13. The Commission's initiative to establish guidelines for determining the methods used to calculate the financial penalties to be imposed in the case of failure to fulfil obligations was received positively from the outset by the Court, which emphasised that such 'guidelines' help to ensure that the Commission acts in a manner which is transparent, foreseeable and consistent with legal certainty.[22] The Court also approved the substance of the principles on which those guidelines are based, identifying, in line with the subsequent Commission communications, the duration of the infringement, its degree of seriousness and the ability of the Member State concerned to pay as the basic criteria which must be taken into account in order to ensure that penalty payments have coercive force, are appropriate for the circumstances and are proportionate to the failure to fulfil obligations, so as to guarantee that EU law is applied uniformly and effectively.[23]

14. In terms of the 'n' factor in particular, the Court of Justice approved both its purpose and the criteria used to determine it from the first time it was formulated in the 1997 communication, stating that 'the Commission's suggestion that account should be taken both of the [GDP] of the Member State concerned and of the number of its votes in the Council appears appropriate in that it enables that Member State's ability to pay to be reflected while keeping the variation between Member States within a reasonable range'.[24] In some cases, which have been somewhat sporadic and do not extend beyond 2009, when recalculating the amount of the penalty to be imposed on the defaulting Member State in the light of its findings in terms of the duration and seriousness of the infringement, the Court has itself applied the multiplying coefficient corresponding to the 'n' factor allocated by the Commission to that Member State,[25] adapting it, where necessary, to take into account more up-to-date data, relating specifically to changes in the GDP of that Member State.[26] More generally, in the face of criticism from defaulting Member States about the Commission's assessment of their ability to pay, or even if no such criticisms have been made, the Court has consistently held that consideration should be given to recent trends in inflation

[22] See judgment of 4 July 2000, *Commission* v *Greece* (C-387/97, EU:C:2000:356, paragraph 87).

[23] See, in relation to penalties, judgment of 4 July 2000 (C-387/97, EU:C:2000:356, paragraph 92) and, most recently, judgment of 25 February 2021, *Commission* v *Spain (Personal Data Directive – Criminal law)* (C-658/19, EU:C:2021:138, paragraph 63); in relation to the lump sum, see, inter alia, judgment of 16 July 2020, *Commission* v *Ireland* (*Anti-money laundering*) (C-550/18, EU:C:2020:564, paragraph 81), and, most recently, judgment of 25 February 2021, *Commission* v *Spain (Personal Data Directive – Criminal law)* (C-658/19, EU:C:2021:138, paragraph 73).

[24] See, inter alia, judgments of 4 July 2000, *Commission* v *Greece* (C-387/97, EU:C:2000:356, paragraph 88); of 25 November 2003, *Commission* v *Spain* (C-278/01, EU:C:2003:635, paragraph 59); of 12 July 2005, *Commission* v *France* (C-304/02, EU:C:2005:444, paragraph 109); and of 17 November 2011, *Commission* v *Italy* (C-496/09, EU:C:2011:740, paragraph 65). In the judgment of 10 January 2008, *Commission* v *Portugal* (C-70/06, EU:C:2008:3, paragraph 48), the Court qualified its assessment of the appropriateness of the method used to determine the 'n' factor', stating that that method was an appropriate way, 'in principle', of reflecting the ability to pay of the Member State concerned.

[25] See judgments of 25 November 2003, *Commission* v *Spain* (C-278/01, EU:C:2003:635, paragraphs 59 and 60); of 12 July 2005, *Commission* v *France* (C-304/02, EU:C:2005:444, paragraph 110); of 14 March 2006, *Commission* v *France* (C-177/04, EU:C:2006:173, paragraph 76); and of 4 June 2009, *Commission* v *Greece* (C-109/08, EU:C:2009:346, paragraph 43).

[26] See, for example, judgment of 10 January 2008, *Commission* v *Portugal* (C-70/06, EU:C:2008:3, paragraph 49), in which the coefficient corresponding to the 'n' factor assigned to the Portuguese Republic was increased by the Court.

and the GDP of the Member State concerned 'at the time of the Court's examination of the facts'.[27] The Court has also taken into account the reduced ability to pay relied on by the Member State concerned in a situation of economic crisis.[28]

B. The judgment of 14 November 2018

15. As mentioned above, in its judgment of 14 November 2018, the Court examined the impact of the modification to the qualified-majority voting system within the Council on the determination of the 'n' factor on the basis of the rules laid down in the 2005 communication. The Hellenic Republic, brought before the Court by the Commission in the case in which the above judgment was delivered, asserted, inter alia, that that modification which, as stated above, introduced a double majority system to calculate the qualified majority instead of the previous system of weighted votes,[29] had resulted in a situation where Member States with a comparable GDP and population had sustained a serious loss of influence within the Council. For its part, the Commission asserted that the weighting of votes within the Council, as provided for before the reform, was still a reasonable benchmark, although 'historical', especially to the extent that it made it possible to maintain an acceptable differentiation among the Member States.

16. In line with the Opinion of Advocate General Wathelet,[30] the Court held that the new double majority system does not provide satisfactory criteria for determining the ability of Member States to pay and that GDP is to be the 'predominant factor' for that purpose.[31] The Court of Justice has also indicated that only the GDP of the Member State in question has been considered in its case-law after 1 April 2017, thereby further emphasising its intention to give precedence to that parameter following the reform of the system for calculating the qualified majority within the Council.[32]

[27] See, inter alia, judgments of 11 December 2012, *Commission* v *Spain* (C-610/10, EU:C:2012:781, paragraph 131); of 19 December 2012, *Commission* v *Ireland* (C-279/11, not published, EU:C:2012:834, paragraphs 78 and 79); of 2 December 2014, *Commission* v *Italy* (C-196/13, EU:C:2014:2407, paragraph 104); of 22 June 2016, *Commission* v *Portugal* (C-557/14, EU:C:2016:471, paragraph 78); of 7 September 2016, *Commission* v *Greece* (C-584/14, EU:C:2016:636, paragraph 81); of 22 February 2018, *Commission* v *Greece* (C-328/16, EU:C:2018:98, paragraph 101); of 12 March 2020, *Commission* v *Italy (Unlawful aid granted to the hotel industry in Sardinia)* (C-576/18, not published, EU:C:2020:202, paragraphs 158 and 159); and, most recently, 25 February 2021, *Commission* v *Spain (Personal Data Directive – Criminal law)* (C-658/19, EU:C:2021:138, paragraph 83).

[28] See, inter alia, judgment of 19 December 2012, *Commission* v *Ireland* (C-374/11, not published, EU:C:2012:827, paragraph 44).

[29] Article 16(4) TEU provides that, from 1 November 2014, 'a qualified majority shall be defined as at least 55% of the members of the Council, comprising at least fifteen of them and representing Member States comprising at least 65% of the population of the Union'. On the basis of Article 3(2) of Protocol No 36 on transitional provisions, the reform finally entered into force on 1 April 2017.

[30] *Commission* v *Greece* (C-93/17, EU:C:2018:315, points 137 to 140).

[31] See judgment of 14 November 2018, paragraphs 139 and 142.

[32] The Court cites the judgments of 22 February 2018, *Commission* v *Greece* (C-328/16, EU:C:2018:98), and of 31 May 2018, *Commission* v *Italy* (C-251/17, not published, EU:C:2018:358), although in neither of the cases was the question of the impact of the reform of the system used to calculate the qualified majority of votes within the Council raised, explicitly, by the parties. In particular, in the first of the two judgments, the Court, as on other occasions, merely stated that it is necessary to take account of recent trends in the GDP of the Member State concerned, produced by the latter (see judgment of 22 February 2018, *Commission* v *Greece* (C-328/16, EU:C:2018:98, paragraph 101)). In the second of those judgments and in other judgments delivered prior to the judgment of 14 November 2018, the statement that the ability to pay of the Member State concerned should take account of the recent change in the GDP of that State takes on a more general character, without a clear indication being given of the exclusive nature of that criterion. See, in addition to the judgment of 31 May 2018, *Commission* v *Italy* (C-251/17, not published, EU:C:2018:358, paragraph 81), the judgment of 25 July 2018, *Commission* v *Spain* (C-205/17, not published, EU:C:2018:606, paragraph 63).

C. The 'n' factor after the judgment of 14 November 2018

1. The 2019 communication

17. Following the invitation from Advocate General Wathelet in his Opinion in the case that gave rise to the judgment of 14 November 2018 [33] and to comply with that judgment, the Commission issued the 2019 communication. In that communication, the Commission explains that only a combination of the ability to pay and the 'institutional weight' of the Member State concerned, namely its 'intrinsic value in the institutional set-up of the European Union', [34] makes it possible to guarantee a balance between the deterrent effect and the proportionality of the penalties it proposes in infringement proceedings under Article 260(2) and (3) TFEU. According to the Commission, use of GDP as the single calculation factor would upset that equilibrium, as it would exclusively reflect the economic dimension of Member States. Specifically, the use of GDP alone would mean that the difference between the highest and the lowest 'n' factor would increase from 55 to 312, which would mean a substantial increase in the amounts of the proposed sanctions for more than a third of Member States. [35] The primary objective sought by the Commission in the 2019 communication is therefore to keep the amounts of the proposed penalties within values as close as possible to those obtained using the previous calculation method.

18. On the basis of those considerations, the Commission sets out the new method for calculating the 'n' factor, which takes account of two elements: GDP and the number of seats assigned to each Member State for its representatives in Parliament. [36] The new calculation method abandons the use of the Luxembourg 'n' factor as reference value [37] and replaces it with an average of the two parameters used (GDP and number of European Parliament representatives). The 'n' factor therefore corresponds to the geometric mean calculated by taking the square root of the product of two factors, the first representing the ratio between the GDP of the Member State concerned and the average GDP for the European Union [38] and the second the ratio between the number of seats held by that Member State in the Parliament and the number of seats held by all Member States. [39]

19. However, the Commission states that using the new parameters without adjustment leads to a reference value for the 'n' factor that is considerably lower than the value used up to this point. To ensure that the amounts it proposes to the Court remain proportionate and sufficiently dissuasive,

[33] C-93/17, EU:C:2018:315, footnote 65.

[34] See the 2019 communication, paragraph 2, p. 2.

[35] See the 2019 communication, p. 2.

[36] For the current parliamentary term, the Commission refers to Article 3 of European Council Decision (EU) 2018/937 of 28 June 2018. See the 2019 communication, footnote 11.

[37] That choice was made in the period when Luxembourg was the country with the lowest total GDP among the Member States.

[38] The formula used is

$$\sqrt{\frac{GDPn}{GDPavg} \times \frac{Seatn}{Seatavg}}$$

[39] In the 2019 communication, the Commission has considered the European Union of 28 Member States.

the Commission therefore believes it necessary to apply an adjustment factor of 4.5 to the standard flat-rate amounts used to calculate the daily penalties and lump-sum amounts, respectively, and the minimum lump sum amounts per Member State. [40]

20. The calculation method described above has been applied by the Commission since the date of publication of the 2019 communication. [41]

2. The case-law

21. Since the judgment of 14 November 2018, the Court has delivered nine judgments in which financial penalties have been imposed under Article 260(2) or (3) TFEU. In the first of these judgments, the Court merely mentioned the ability to pay of the Member State concerned among the criteria that must be taken into consideration in order to ensure the coercive effect of the penalty payment, without indicating how that ability to pay has been assessed. [42] In the other cases, as in numerous previous judgments, the Court mentions that, as regards assessing the ability to pay of the Member State concerned, it is necessary to take account of recent trends in that Member State's GDP at the time of the Court's examination of the facts. [43]

22. It is important to note that it is only in the cases resulting in the final two judgments delivered by the Court, given in appeals lodged after the date of publication of the 2019 communication, [44] that the 'n' factor for the penalties proposed by the Commission was calculated using the method described in that communication. Specifically, in the case resulting in the judgment of 25 February 2021, *Commission* v *Spain ((Personal Data Directive – Criminal law)*, [45] relating to an appeal under Article 260(3) TFEU, the Kingdom of Spain expressly raised the question of the validity of the calculation method used in the 2019 communication, stating that the coefficient

[40] The standard flat-rate amount for daily penalty payments is therefore increased to EUR 690 × 4.5 = EUR 3 105, the standard flat-rate amount for lump sum payments to EUR 230 × 4.5 = EUR 1 035 and the reference minimum lump sum amount to EUR 571 000 × 4.5 = EUR 2 569 500.

[41] See the 2019 communication, paragraph 3, p. 3. The Commission reserves the right to review the new calculation method five years after its adoption. The most recent update to the macroeconomic data used to calculate the 'n' factor was in the communication of 13 April 2021 (OJ 2021 C 129, p. 1), adopted following the withdrawal of the United Kingdom.

[42] See judgment of 8 July 2019, *Commission* v *Belgium (Article 260(3) TFEU – High-speed networks)* (C-543/17, EU:C:2019:573, paragraphs 83 and 84).

[43] See judgments of 12 November 2019, *Commission* v *Ireland (Derrybrien Wind Farm)* (C-261/18, EU:C:2019:955, paragraph 124); of 16 July 2020, *Commission* v *Romania (Anti-money laundering)* (C-549/18, EU:C:2020:563, paragraph 85; in the case resulting in this judgment, which was filed before the date of publication of the 2019 communication, Romania referred to that communication, but only to contest the amount of the base lump sum proposed by the Commission on the basis of the calculation method set in the 2005 communication, see paragraph 62); of 16 July 2020, *Commission* v *Ireland (Anti-money laundering)* (C-550/18, EU:C:2020:564, paragraph 97); of 13 January 2021, *Commission* v *Slovenia (MiFID II)* (C-628/18, EU:C:2021:1, paragraph 85; in the case resulting in this judgment, which was also filed before the date of publication of the 2019 communication, Slovenia cited the judgment of 14 November 2018 to contest the 'n' factor as calculated in the 2005 communication, asking the Court to apply the coefficient indicated in the 2019 communication, paragraph 62); of 27 February 2020, *Commission* v *Greece (Pollution caused by nitrates)* (C-298/19, not published, EU:C:2020:133, paragraph 53); of 12 March 2020, *Commission* v *Italy (Unlawful aid granted to the hotel industry in Sardinia)* (C-576/18, not published, EU:C:2020:202, paragraph 158); of 12 November 2020, *Commission* v *Belgium (Income from foreign immovable property)* (C-842/19, not published, EU:C:2020:915, paragraph 58); and of 25 February 2021, *Commission* v *Spain (Personal Data Directive – Criminal law)* (C-658/19, EU:C:2021:138, paragraph 83).

[44] This relates to the judgments of 12 November 2020, *Commission* v *Belgium (Income from foreign immovable property)* (C-842/19, not published, EU:C:2020:915, in which the Commission's appeal was lodged on 19 November 2019), and of 25 February 2021, *Commission* v *Spain (Personal Data Directive – Criminal law)* (C-658/19, EU:C:2021:138, in which the Commission's appeal was lodged on 4 September 2019).

[45] C-658/19, EU:C:2021:138.

assigned to it in that communication placed it in fourth place among the Member States in terms of ability to pay, whereas if that factor were calculated on the basis of GDP only, Spain would be ranked 14th. [46] As noted, the Court has not explicitly addressed this question.

D. On the Court of Justice's margin of discretion in determining the financial penalties to be imposed in the case of failure to fulfil obligations

23. It is worth remembering at this stage that the Court has substantial discretion in deciding whether to impose financial penalties on a defaulting Member State and in determining the amount and form of those penalties. Article 260 TFEU does not lay down any express constraint on the exercise of that discretion – except for the obligation not to exceed the amount specified by the Commission in infringement proceedings under paragraph 3 of that article [47] – merely stating the type of penalty that may be imposed.

24. Since its first rulings on the interpretation of the third subparagraph of Article 171(2) of the EC Treaty (which became Article 228(2) EC and then Article 260(2) TFEU), the Court has, on the one hand, stressed the non-binding nature of the proposals made by the Commission, which constitute only a 'useful point of reference', [48] claiming the power to decide whether to impose penalties if no express proposal to that effect is made by the Commission [49] or not to impose penalties if a proposal is made, [50] and to amend, downward but also upward, [51] the amount of that proposal or even to adapt the method of payment to the circumstances of each individual case, in particular in terms of the frequency of the penalty, the fixed or decreasing nature of the amount [52] or the due date for payment. [53]

25. On the other hand, the Court has stated that it is not bound by the guidelines laid down in the Commission's communications, [54] although, as we have seen, it does emphasise the importance of those guidelines in terms of ensuring that the action brought by that institution is transparent, foreseeable and consistent with legal certainty. As regards the method used to calculate the penalty, the Court has repeatedly stated that it is for the Court itself, in the exercise of its discretion, to set that penalty 'so that it is appropriate to the circumstances and proportionate both to the breach that has been established and to the ability to pay of the Member State concerned'. [55] In terms of the lump sum, the Court has held that both the imposition of such a

[46] See judgment of 25 February 2021, *Commission* v *Spain (Personal Data Directive – Criminal law)* (C-658/19, EU:C:2021:138, paragraph 49).

[47] See the second subparagraph of Article 260(3) TFEU.

[48] See, inter alia, judgments of 4 July 2000, *Commission* v *Greece* (C-387/97, EU:C:2000:356, paragraph 41); of 12 July 2005, *Commission* v *France* (C-304/02, EU:C:2005:444, paragraph 103); of 10 January 2008, *Commission* v *Portugal* (C-70/06, EU:C:2008:3, paragraph 34); of 9 December 2008, *Commission* v *France* (C-121/07, EU:C:2008:695, paragraph 61); and, more recently, judgment of 12 November 2020, *Commission* v *Belgium (Income from foreign immovable property)* (C-842/19, not published, EU:C:2020:915, paragraph 64).

[49] See, inter alia, judgments of 12 July 2005, *Commission* v *France* (C-304/02, EU:C:2005:444, paragraph 90), and of 18 July 2007, *Commission* v *Germany* (C-503/04, EU:C:2007:432, paragraph 22).

[50] See judgment of 9 December 2008, *Commission* v *France* (C-121/07, EU:C:2008:695).

[51] For a recent example, see judgment of 12 November 2019, *Commission* v *Ireland (Derrybrien Wind Farm)* (C-261/18, EU:C:2019:955, paragraphs 99 and 134).

[52] See, inter alia, judgments of 25 November 2003, *Commission* v *Spain* (C-278/01, EU:C:2003:635, paragraphs 44 and 45), and of 12 July 2005, *Commission* v *France* (C-304/02, EU:C:2005:444, paragraph 111).

[53] See judgment of 7 July 2009, *Commission* v *Greece* (C-369/07, EU:C:2009:428, paragraph 125).

[54] See, inter alia, judgments of 13 May 2014, *Commission* v *Spain* (C-184/11, EU:C:2014:316, paragraph 61 and the case-law cited), and, more recently, of 12 November 2020, *Commission* v *Belgium (Income from foreign immovable property)* (C-842/19, not published, EU:C:2020:915, paragraph 64).

[55] In particular, judgments of 12 July 2005, *Commission* v *France* (C-304/02, EU:C:2005:444, paragraph 103); of 14 March 2006, *Commission* v *France* (C-177/04, EU:C:2006:173, paragraph 61); and of 10 January 2008, *Commission* v *Portugal* (C-70/06, EU:C:2008:3, paragraph 38).

penalty and the determination of its amount 'must depend in each individual case on all the relevant factors relating both to the characteristics of the infringement established and to the conduct of the Member State involved' in the infringement proceedings.[56] According to this information, the elements used by the Court of Justice as the basis for determining specifically the amount of the penalty and of the lump sum are, as noted above, the seriousness of the infringement, its duration and the ability to pay of the Member State, in the light of all the relevant circumstances of each case.[57] More generally, the Court has held that 'an order imposing a penalty payment and/or a lump sum is not intended to compensate for damage which may have been caused by the Member State concerned, but to place it under economic pressure which induces it to put an end to the infringement that has been established. The financial penalties imposed must therefore be decided on according to the degree of persuasion needed for the Member State in question to alter its conduct'.[58]

26. The various factors involved in calculating the amount of the penalties, including the ability to pay of the Member State concerned, which guarantees that those penalties are set at a level that is sufficiently dissuasive, may therefore be freely determined by the Court of Justice.[59]

27. In such circumstances, the Court is not required, although it has done so in the past,[60] to apply the coefficients proposed by the Commission as the 'n' factor, or to use the calculation method developed by the Commission in its communications. Neither is the Court required to take a position as to the lawfulness of that method or whether it is correctly applied by the Commission. It therefore follows that, in this case, as has already been done in the judgment of 25 February 2021, *Commission* v *Spain (Data Protection Directive – Criminal sector)*,[61] the Court may decide not to rule on the relevance of the element represented by the 'institutional weight' of the Member State concerned in determining the 'n' factor, or on the ability of the criterion adopted in the 2019 communication to reflect such an element, despite being expressly requested to do so by the Commission.

28. The following considerations are provided in the event that the Court decides to rule.

E. The number of seats allocated to each Member State in the European Parliament as a criterion for reflecting the 'institutional weight' of the Member State

29. Unlike the other factors used in calculating the penalties proposed by the Commission under Article 260 TFEU, the 'n' factor is subjective and is separate from the characteristics of the failure to fulfil the obligations in question. Since its 1997 communication, the Commission, as we have seen, has believed it necessary to calculate this factor in a way that takes into account the economic and political dimension of the Member State concerned, reflected by the two component elements of GDP and the number of votes of that Member State according to the weighted voting system. For the purposes of calculating the qualified majority within the Council, that system involved allocating to each Member State a conventional package of votes determined directly by the Treaties and essentially commensurate with its demographic weight,

56 See, inter alia, judgment of 13 May 2014, *Commission* v *Spain* (C-184/11, EU:C:2014:316, paragraph 60 and the case-law cited).

57 See footnote 23 to this Opinion.

58 See judgments of 12 July 2005, C-304/02, *Commission* v *France*, cited above, paragraph 91; of 14 March 2006, *Commission* v *France* (C-177/04, EU:C:2006:173, paragraph 60); and of 10 January 2008, *Commission* v *Portugal* (C-70/06, EU:C:2008:3, paragraph 35).

59 See, inter alia, in relation to the coefficient for duration, judgment of 14 March 2006, *Commission* v *France* (C-177/04, EU:C:2006:173, paragraph 71).

60 See point 14 of this Opinion.

61 C-658/19, EU:C:2021:138.

according to the criterion defined 'by the square root', which assigned each Member State a number of votes less than proportionate to its population, with a ratio between votes allocated and population more favourable in principle for smaller Member States.

30. In the press release accompanying the adoption of the 1997 communication,[62] the Commission stated that account had been taken of the number of votes each Member State had in the Council, thereby reflecting the say it had in establishing the Community law which had been infringed. To that effect, the 'institutional weight' of the defaulting Member State for the purposes of determining the 'n' factor was to a certain extent, although only approximately and imperfectly, seen in the context of its influence in decision-making processes.[63]

31. That ratio, which in itself is not free from criticism,[64] is lacking in the new calculation method proposed by the Commission. Although the Commission asserts in the 2019 communication that the new criterion based on the number of seats of each Member State in the European Parliament makes it possible to achieve the 'most appropriate reflection of institutional weight of Member States available today in the EU Treaties', such a criterion is manifestly inadequate to account for the influence that each Member State is likely to wield in decision-making processes within the European Union.

32. In effect, as has been correctly pointed out in the legal literature, in addition to being representatives not of the Member States but, rather, of the Union citizens, in accordance with Article 14(2) TEU, the MEPs elected in each Member State are elected on the basis of political affiliations, and therefore their votes in Parliament, grouped on the basis of those affiliations, do not really reflect in their entirety the position advocated by the 'electing' Member State in legislative negotiations within the European Union.[65]

62 IP/97/5, 8 January 1997.

63 According to a kind of equation whereby a greater ability to influence these processes corresponds to greater responsibility in the event of infringement (provided that the formula applied by the Commission actually resulted, for the Member States with the largest number of votes, in a coefficient higher than they would have had if GDP alone had been considered).

64 See, for a critical view, the Opinion of Advocate General Ruiz-Jarabo Colomer in *Commission* v *Greece* (C-387/97, EU:C:1999:455, footnote 40), and the Opinion of Advocate General Fennelly in *Commission* v *Greece* (C-197/98, EU:C:1999:597, points 38 to 41). Advocate General Fennelly highlighted, on the one hand, the appropriateness of a criterion based on the weighting of votes, largely the result of a political agreement, to account for the ability to pay of the defaulting Member State, and, on the other hand, the inadequacy of that criterion in cases where the provisions infringed were not adopted on the basis of a qualified majority. In the same vein, the doctrine has demonstrated that not all failures to fulfil obligations necessarily and exclusively concern rules of secondary legislation (see, to that effect, Adam, R., '"Peso istituzionale" degli Stati membri e calcolo delle sanzioni per inadempimenti ad obblighi europei', *Il diritto dell'Unione europea*, *Osservatorio europeo*, June 2019, p. 9). On this point, see also Kornezov, A., 'Imposing the Right Amount of Sanctions under Article 260(2) TFEU: Fairness v. Predictability, or How to "Bridge the Gaps"', *Columbia Journal of European Law*, Vol. 20, No 3, 2014, p. 329, Condinanzi, M., and Amalfitano, C., 'La procedura d'infrazione dieci anni dopo Lisbona', *Federalismi.it*, 19/2020, pp. 238 and 239. The legal literature has also advanced criticisms about the unnecessarily complicated nature of the calculation proposed by the Commission for the 'n' factor, and about the inability of the results to reflect the actual ability to pay of Member States, which creates a risk that the ability to pay of the poorest States could be overestimated and that of the richest underestimated. See, in particular, Kilbey, I, 'The Interpretation of Article 260(2) TFEU', *European Law Review*, 2010, p. 370, and Borzsak, L., 'Punishing Member States or Influencing their Behaviour or Iudex (Non) Calculate?', *Journal of Economic Literature*, 2001, 13, p. 235. Lastly, it should be noted that the Court has held that political considerations are irrelevant in a judicial procedure intended to determine whether a Member State has complied with a judgment finding a failure to fulfil obligations (see judgment of 12 July 2005, *Commission* v *France* (C-304/02, EU:C:2005:444, paragraph 90)). That position, which also applies to the decision to impose a financial penalty following such a determination, is difficult to reconcile, as has been correctly pointed out in the legal literature, with the use of criteria that could make the level of that penalty depend, at least in part, on considerations of that nature. See Jack, B., 'Enforcing Member State Compliance with EU Environmental Law: A Critical Evaluation of the Use of Financial Penalties', *Journal of Environmental Law*, 2011, p. 90 et seq.

65 Adam, R., op. cit., p. 8.

F. The importance of the 'institutional weight' of the Member States in determining the 'n' factor

33. More generally, we need to ask whether, as the Commission maintains, the assessment of the ability to pay of the defaulting Member State required to ensure that the penalties to be imposed act as a deterrent should necessarily take into account its 'institutional weight'.

34. The method used to calculate the 'n' factor by considering, inter alia, the number of votes of the defaulting Member State for qualified-majority voting within the Council has, as we have seen, been considered by the Court ice to be 'appropriate' in ensuring that the penalties proposed by the Commission are both dissuasive and proportionate. However, that does not mean, as the Commission appears to assert, that the Court has deemed it absolutely necessary to determine the ability to pay of the defaulting Member State based on its 'institutional weight' or that the Court a priori considered a calculation method based solely on GDP to be inadequate. On the contrary, even during the period when the method applied to calculate the 'n' factor was based on the weighted votes system, the Court has consistently stated that there is a fundamental need to assess that ability to pay on the basis of updated GDP values. Furthermore, in declaring that the new calculation system based on qualified-majority voting is inadequate, the Court, far from stating that a replacement criterion needed to be identified to reflect the 'institutional weight' of the Member State concerned, merely stated that GDP should be considered the predominant factor.[66]

35. For my part, I believe that the objective of setting penalties that are sufficiently dissuasive in the context of proceedings under Article 260 TFEU does not necessarily require consideration of parameters other than GDP (simple, per capita or comparative), which is of itself able to provide an adequate indication of the ability to pay of the Member State concerned. Specifically, I do not consider that the achievement of this objective makes it necessary to consider the 'institutional weight' of that Member State within the European Union, understood as the influence that Member State could wield in decision-making processes or, in more general and abstract terms, in the sense of its 'intrinsic value' in the institutional set-up of the European Union.[67] Indeed, such a criterion is, in any case, irrelevant for the purposes of setting the amount of the financial penalties to be imposed on a defaulting Member State at a level ensuring that sufficient pressure is applied to force that State to change its (current and future) behaviour.

36. On closer examination, however, we can see from the 2019 communication (see point 17 of this Opinion) and from the clarifications provided to the Court in response to its written questions, that the Commission continues to consider it necessary to combine GDP with a criterion that is able to reflect the 'institutional weight' of the Member States within the European Union essentially, if not exclusively, to keep the variation between the coefficient applied to each Member State 'within a reasonable range'.[68] That concern, generically linked to the need to ensure equal treatment among Member States,[69] has also led the Commission to

[66] It should be noted that the Italian translation of paragraph 142 of the judgment of 14 November 2018 ('occorre basarsi definitivamente sul PIL di tale Stato membro') deviates from both the authentic Greek text (the language of the case: 'ως κυριότερο στοιχείο, πρέπει να ληφθεί ως βάση το ΑΕΠ του εν λόγω κράτους μέλους'), and from the French (the language in which the original document was drafted: 'il convient de s'appuyer sur le PIB dudit État membre en tant que facteur prédominant'), both of which are less imperative.

[67] To that effect, see the 2019 communication, p. 2.

[68] That concern is also the main reason why, from the 1997 communication to the judgment of 14 November 2018, the Commission included the number of votes in the Council in the calculation of the 'n' factor, and the reason why the Court approved the calculation method.

[69] Although we could ask whether it constitutes unequal treatment for a significantly different financial penalty to be imposed to sanction an identical or similar infringement, where that penalty is effectively commensurate, inter alia, with the ability to pay of the defaulting State.

introduce a multiplier of 4.5 in the new calculation method. This adjustment can only be explained by the need to align the amounts obtained by applying the current 'n' factors, which were not deemed sufficiently dissuasive, with those proposed previously, keeping the variation between them the same.

37. On this point I will simply say that the objective of maintaining a given ratio between the coefficients applied to the various Member States can be achieved using different methods from those applied thus far, such as using per capita GDP, rather than a 'comparative' GDP,[70] namely one that is based on a demographic criterion making it possible to interpret the results from the consideration of simple or comparative GDP in relative terms.[71]

III. Conclusion

38. On the basis of all the considerations above, I suggest that, where it deems it appropriate to rule on the criterion used to determine the 'n' factor represented by the number of seats allocated to each Member State in the European Parliament, the Court declare that this criterion is not appropriate to ascertain the ability to pay of the defaulting Member State in terms of setting penalties that are both dissuasive and proportionate, and confirm the relevance, for this purpose, of a criterion based on the gross domestic product of the defaulting Member State.

[70] Set in the past as the GDP of the 'poorest' State, currently as the mean value for the European Union.

[71] For examples of alternative calculation methods see Kilbey, I., op. cit., pp. 378 and 379, Borzsak, L., op. cit., pp. 258 and 259, and Kornezov, A., op. cit., p. 327.