Reports of Cases

OPINION OF ADVOCATE GENERAL
EMILIOU
delivered on 14 March 2024[1]

Case C-147/23

European Commission
v

Republic of Poland

(Failure of a Member State to fulfil obligations – Article 258 TFEU – Protection of persons who report breaches of Union law – Directive (EU) 2019/1937 – Failure to transpose that directive – Article 260(3) TFEU – Financial sanctions – Periodic penalty payment – Lump sum – Method of calculation applied by the Commission when proposing financial sanctions to the Court – Coefficient for seriousness – Complete failure to notify measures transposing a directive – Systematic application of a coefficient of 10 – Capacity to pay of the Member State – 'N' factor – Taking into account the Member State's population size)

I. Introduction

1. When the driver of a car gets a speeding ticket, he or she probably assumes that the amount of that fine will reflect the gravity of the violation and, thus, be proportionate to the number of kilometres per hour by which he or she exceeded the speed limit. In a different scenario, a company that is issued a fine for a breach of the European Union competition or personal data protection rules likely expects (as EU law requires)[2] the amount of such a fine to take account of, inter alia, the gravity and duration of the breach, as well as its capacity to pay the fine based on its total turnover. However, neither the driver nor the company, in those two examples, would imagine that the amount of their fine would increase because the number of people in their household or the number of persons that they employ at the time of the violation is comparatively higher than that of the average driver or of another company.

2. Should a different logic apply when financial sanctions are imposed on a Member State for failing to notify the European Commission of the measures necessary to transpose a directive? Can the amount of those sanctions depend on the Member State's population size?

3. That is, in essence, one of the core issues in the present case.

[1] Original language: English.

[2] See, in that regard, Article 23 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101 and 102] TFEU (OJ 2003 L 1, p. 1), and Article 83 of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (OJ 2016 L 119, p. 1) ('the GDPR').

4. Specifically, that issue arises in the context of infringement proceedings brought by the Commission under Article 258 TFEU against the Republic of Poland, on the ground that it has failed to adopt and notify the Commission of the measures necessary to transpose Directive (EU) 2019/1937 on the protection of persons who report breaches of Union law [3] ('the Whistleblowers Directive'). The Republic of Poland does not deny that failure. However, it takes issue with the amount of the financial sanctions that the Commission proposes that the Court impose. In that regard, it questions two elements of the methods of calculation applied by the Commission. In its view, one of those elements systematically results in higher financial sanctions for Member States that, like Poland, have a larger population size than others.

5. Within that context, the Court is required to interpret Article 260(3) TFEU, whose first sentence entitles the Commission to specify the amount of the financial sanctions that it deems appropriate when it initiates proceedings against a Member State in application of Article 258 TFEU for failing to notify the measures necessary to transpose a directive adopted under a legislative procedure.

II. Legal background

1. The Whistleblowers Directive

6. Article 26 of the Whistleblowers Directive provides:

'1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 17 December 2021.

2. By way of derogation from paragraph 1, as regards legal entities in the private sector with 50 to 249 workers, Member States shall by 17 December 2023 bring into force the laws, regulations and administrative provisions necessary to comply with the obligation to establish internal reporting channels under Article 8(3).

3. When Member States adopt the provisions referred to in paragraphs 1 and 2, those provisions shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made. They shall forthwith communicate to the Commission the text of those provisions.'

2. The 2023 Communication [4]

7. The 2023 Communication contains the methods of calculation which the Commission applies when it proposes that the Court impose financial sanctions in the context of infringement proceedings. Those financial sanctions may consist of a penalty payment or a lump sum or both.

8. In the section of that communication entitled 'General principles', the Commission states that it 'considers that the financial sanctions imposed should be based on three fundamental criteria …:

– the seriousness of the infringement,

[3] Directive of the European Parliament and of the Council of 23 October 2019 (OJ 2019 L 305, p. 17).

[4] Communication from the Commission – Financial sanctions in infringement proceedings (OJ 2023 C 2, p. 1).

– its duration,

– the need to ensure that the financial sanction itself is a deterrent to further infringements'.

9. Point 3.2.2 of the 2023 Communication is entitled 'Failure to notify transposition measures (Article 260(3) TFEU)'. Its first paragraph provides:

'For actions brought under Article 260(3) TFEU, the Commission systematically applies a coefficient for seriousness of 10 in case of a complete failure of the obligation to notify transposition measures. In a Union based on the respect of the rule of law, all legislative directives are to be considered of equal importance and require complete transposition by the Member States within the deadlines that they set.'

10. Point 3.4 of the 2023 Communication, which concerns penalty payments, is entitled 'Member State's capacity to pay'. It states:

'The amount of the penalty payment should ensure that the sanction is both proportionate and dissuasive. The deterrent effect of the penalty payment has two aspects. The sanction must be sufficiently high to ensure that:

– the Member State brings the infringement to an end (it must therefore be higher than the benefit that the Member State gains from the infringement),

– the Member State does not repeat the infringement.

The level of sanction required to serve as a deterrent will vary according to Member States' capacity to pay. This deterrent effect is reflected in the n factor. It is defined as a weighted geometric average of the gross domestic product (GDP) … of the Member State concerned compared to the average of the Member States' GDPs, with a weight of two, and of the population of the Member State concerned, compared to the average of Member States' populations, with a weight of one. This represents the capacity to pay of the Member State concerned in relation to the other Member States' capacity to pay:

$$n\ factor = \left(\frac{GDP_n}{GDP_{avg}}\right)^{2/3} \times \left(\frac{Pop_n}{Pop_{avg}}\right)^{1/3}$$

…

[The] method for calculating the n factor … now predominantly relies on Member States' GDP and secondarily on their population as a demographic criterion allowing a reasonable deviation between the various Member States to be maintained. Taking into account Member States' population for one third of the calculation of the n factor reduces to a reasonable degree the variation of Member States' n factors, as compared to a calculation based solely on Member States' GDP. It also adds an element of stability in the calculation of the n factor, since population is

unlikely to vary significantly on an annual basis. In contrast, a Member State's GDP might experience higher annual fluctuations, in particular in periods of economic crisis. At the same time, since the Member State's GDP still accounts for two thirds of the calculation, it remains the predominant factor for the purposes of assessing its capacity to pay.'

11. Point 4.2.2. of the 2023 Communication, which concerns lump sums, is entitled 'Other elements of the calculation method for the lump sum'. It states that 'for the calculation of the lump sum, the Commission applies the same coefficient for seriousness and the same fixed n factor as for the calculation of the penalty payment'.

12. The n factors for each Member State are laid down in point 3 of Annex I to the 2023 Communication.

III. The pre-litigation procedure

13. On 27 January 2022, the Commission sent a letter of formal notice to the Republic of Poland, alleging that it had failed to notify it of the measures adopted to transpose the Whistleblowers Directive. In its response to the letter of formal notice, dated 23 March 2022, the Republic of Poland merely pointed out that such measures were in the process of being adopted at the national level.

14. On 15 July 2022, the Commission addressed a reasoned opinion to the Republic of Poland, in which it invited it to comply with its obligations under the Whistleblowers Directive within a period of two months, starting on the day of the formal notification of the reasoned opinion.

15. In its response of 15 September 2022, the Republic of Poland indicated that, given the need for in-depth inter-ministerial consultation on the issues covered by that directive, it anticipated ongoing Parliamentary works at the national level to close at the end of 2022. Thereafter, it communicated to the Commission that it planned to publish the measures designed to transpose the Whistleblowers Directive in August 2023.

16. On 15 February 2023, the Commission decided to initiate infringement proceedings against the Republic of Poland before the Court, in application of the second paragraph of Article 258 TFEU.

IV. Procedure before the Court and forms of order sought

17. In its application, lodged on 10 March 2023, the Commission claims that the Court should:

– declare that the Republic of Poland has failed to fulfil its obligations under the Whistleblowers Directive, by failing to adopt the laws, regulations and administrative provisions necessary to transpose that directive and by failing to notify the Commission of them;

– order the Republic of Poland to pay the Commission:

(a) a lump sum of one of the following two amounts, whichever is the highest:

– EUR 13 700 per day from the date on which the deadline for transposition of the Whistleblowers Directive expired until the date on which the alleged infringement is brought to an end or, should the infringement continue, until the date of delivery of the judgment in the present case,

– a minimum amount of EUR 3 836 000;

(b) in the event that the alleged infringement continues until the date of delivery of the judgment in the present case, a penalty payment of EUR 53 430 per day of delay in complying with the obligations under the Whistleblowers Directive, from the date of the delivery of that judgment and until the date on which those obligations are fulfilled;

– order the Republic of Poland to pay the costs.

18. The Republic of Poland, having been duly served the application initiating the proceedings, lodged a defence on 31 May 2023. It claims that the Court should:

– dismiss the action in its entirety;

– in the alternative, refrain from imposing a lump sum and a penalty payment;

– in the further alternative, substantially reduce the amounts proposed by the Commission for those financial sanctions;

– order the Commission to pay the costs.

19. The parties to the present case were invited by the Court to submit a second round of written observations. The reply and the rejoinder were lodged on 3 July 2023 and 9 August 2023, respectively.

20. No hearing was held.

V. Analysis

21. The EU legislature adopted the Whistleblowers Directive in 2019 after a series of revelations throughout the European Union (including, most notably, those related to the 'Lux Leaks scandal')[5] attracted significant public and media attention, demonstrating the need for EU legislation in that field. That directive aims to provide 'balanced and effective' protection to persons who report breaches of EU law on which they acquire information in a work-related context and that are 'harmful to the public interest'.[6] As Article 1 thereof states, its purpose is to

[5] The 'Lux Leaks scandal' refers to the revelations, in 2014, of more than 300 'tax rulings' (tax schemes) agreed by the Luxembourg tax administration with businesses and companies and the subsequent judicial proceedings initiated against some of the persons that were involved in those revelations.

[6] See recital 1 and Article 4, entitled 'Personal scope', of the Whistleblowers Directive.

'enhance the enforcement of Union law and policies' in certain specific areas of importance to the public interest, by laying down common minimum standards providing for a 'high level of protection' to such persons.[7]

22. Member States were required, under Article 26(1) of the Whistleblowers Directive, to adopt the 'laws, regulations and administrative provisions' necessary to comply with that directive by 17 December 2021.[8] They were also required, under paragraph 3 of that article, to include a reference to the Whistleblowers Directive in those transposition measures. Furthermore, they had to notify the Commission of those measures (as they must generally do, for all directives).

23. The present case is part of a series of six cases[9] concerning the alleged failure of several Member States to comply with those obligations.

24. As I have already noted in the Introduction above, the present proceedings concern, in essence, a '*manquement non contesté*' (undisputed failure). Indeed, the Republic of Poland does not dispute that it has failed to transpose the Whistleblowers Directive into Polish law. Nor does it dispute that it has, a fortiori, failed to notify the Commission of any transposition measure. However, it puts forward several justifications for that failure to do so. In addition, it challenges the amount of the financial sanctions which the Commission proposes that the Court impose.

25. I will first explain why the justifications invoked by the Republic of Poland can, in my view, readily be dismissed by the Court (A). I will then address the criticism that that Member State directs towards the amount of the financial sanctions proposed by the Commission in the present case and, more specifically, the methods applied by the Commission to calculate that amount, as detailed in the 2023 Communication (B). That issue is of importance to all six cases referred to in point 23 above, as well as, more generally, to all cases in which the Commission specifies the amount of the financial sanctions which it proposes that the Court impose in the context of infringement proceedings.

A. The Republic of Poland's justifications for failing to transpose the Whistleblowers Directive

1. Arguments of the parties

26. The Republic of Poland provides, in essence, three justifications for its failure to transpose and, as a consequence, to notify the measures necessary to transpose the Whistleblowers Directive into Polish law within the period prescribed by Article 26(1) of that directive.

27. First, it explains that, because of the broad scope of the Whistleblowers Directive and its significant impact on a wide range of sectors, a longer consultation procedure at the national level has been required. Many stakeholders have been encouraged or have requested to submit

[7] The rules contained in the Whistleblowers Directive cover a broad range of areas and extend to both public and private sectors. They include a strict prohibition on all forms of retaliation against whistleblowers. For a general commentary on that directive, see Abazi, V., 'The European Union Whistleblower Directive: A "game changer" for whistleblowing protection?', *Industrial Law Journal*, Vol. 49, Issue 4, 2020, pp. 640 to 656.

[8] Except for the measures necessary to comply with the obligation to establish internal reporting channels under Article 8(3) of the Whistleblowers Directive, as regards legal entities in the private sector with 50 to 249 workers, for which Member States benefited from an extra two years (until 17 December 2023) (see Article 26(2) of that directive).

[9] See cases C-149/23, *Commission* v *Germany*; C-150/23, *Commission* v *Luxembourg*; C-152/23, *Commission* v *Czech Republic*; C-154/23, *Commission* v *Estonia*, and C-155/23, *Commission* v *Hungary*. All those cases are currently pending before the Court.

observations over the course of that consultation procedure. Some of the doubts formulated by those stakeholders in their observations have called for an additional in-depth analysis, thus delaying the adoption of measures transposing that directive.

28. The second and third justifications put forward by the Republic of Poland relate to the COVID-19 pandemic and the ongoing military conflict in Ukraine. On the one hand, the Republic of Poland explains that the COVID-19 pandemic made the organisation of in-person meetings and the conduct of the consultation procedure more difficult. It also states that priority has had to be given to other, more pressing, legislation connected to the management and containment of the COVID-19 pandemic.

29. On the other hand, the Republic of Poland notes that the Ministry of Family and Social Policy (which was responsible for transposing the Whistleblowers Directive into Polish law) had to play a key role in the adoption of national provisions on the integration of Ukrainian refugees into the Polish social security system and the conditions under which they were welcomed into Poland, following the outbreak of the war in Ukraine. The need to take rapid action and mobilise resources on those issues further delayed the transposition of the Whistleblowers Directive into Polish law.

30. In the light of those elements, the Republic of Poland claims that its failure to transpose the Whistleblowers Directive is not the result of a flaw in its legislative process but of the necessity to give priority to other urgent questions of public health, security and policy.

31. The Commission does not accept the justifications put forward by the Republic of Poland.

32. First, it considers that the Republic of Poland cannot invoke the complexity of the Whistleblowers Directive to justify its delay in transposing that directive into national law. The complexity of a piece of EU legislation is not an 'abnormal or unforeseeable' obstacle to the fulfilment of the Member States' obligations with regard to the transposition of directives. Nor can difficulties encountered during the consultation procedure at national level be relied upon by Member States to justify their failure to transpose a directive.

33. Second, the Commission considers that the Republic of Poland cannot claim that its failure to transpose the Whistleblowers Directive within the period prescribed under Article 26(1) thereof was due to the COVID-19 pandemic. The pandemic can serve as a justification in only two situations: first, where the relevant EU act allows for derogations or exceptions because of the difficulties linked to the pandemic or, second, where the requirements for a defence of *force majeure* (insurmountable difficulties) are fulfilled. According to the Commission, neither of those situations applies here.

34. Finally, the Commission notes that the ongoing military conflict in Ukraine started on 24 February 2022, that is to say, after the period for transposition of the Whistleblowers Directive expired. Accordingly, it claims that the Republic of Poland cannot rely on the consequences of that conflict to justify its failure to transpose that directive within the period prescribed by Article 26(1) thereof. In any event, those consequences would be too indirect or remote for the defence of *force majeure* to apply.

2. Assessment

35. The three justifications put forward by the Republic of Poland in the present proceedings are, by no means, novel or uncommon. They can, in my view, be dismissed without much difficulty.

36. As the Commission indicates, the Court has already ruled, on a number of occasions, that a Member State cannot plead provisions, practices or situations prevailing in its domestic legal system (that is to say, internal difficulties) in order to justify its failure to comply with the obligations and deadlines laid down in a directive.[10] In particular, it is irrelevant that the failure of such a Member State is the result of political debates[11] or is attributable to the need to engage in consultation procedures at the national level.[12]

37. In addition, the Court has consistently rejected justifications based on the alleged complexity of the legislation in question.[13] In that regard, it has emphasised that, if the period allowed for the implementation of a directive proves to be too short, the only means of action that is compatible with EU law and is available to the Member State concerned is to obtain an extension of the period from the competent EU institution.[14]

38. In the light of that case-law, it is abundantly clear to me that the Republic of Poland cannot invoke difficulties arising from the broad scope of the Whistleblowers Directive, its complexity or the doubts raised by certain stakeholders and their impact on the length of the consultation procedure at the national level in order to justify its failure to transpose that instrument (the first justification).

39. As for the second justification put forward by the Republic of Poland, which submits, in essence, that the unfavourable situation linked to the COVID-19 pandemic prevented it from transposing the Whistleblowers Directive within the period prescribed, I note that that directive was adopted by the EU legislature just a few months before the first cases of COVID-19 occurred.

40. I can readily accept, as the Court has in other instances,[15] that a health crisis on a scale such as that of the COVID-19 pandemic is beyond the control of the Member States and is both abnormal and unforeseeable. However, in my view, that does not mean that the Republic of Poland can rely on the occurrence of the COVID-19 pandemic to plead a defence of *force majeure* in the present case, relieving it of its obligations under Article 26 of the Whistleblowers Directive.

41. It is true that the Court has, in principle, accepted *force majeure* as a defence, including in cases concerning the failure to transpose a directive.[16] Nevertheless, such a defence may only be successful if there are 'extraneous circumstances' that make it 'impossible' for the relevant transposition measures to be adopted. Even though that definition does not presuppose 'absolute impossibility', it nevertheless requires 'abnormal difficulties' which appear 'inevitable even if all due care is taken'.[17] That is a high threshold which clearly limits the instances in which Member

[10] See, inter alia, to that effect, judgment of 20 September 2001, *Commission* v *France* (C-468/00, EU:C:2001:482, paragraph 10).

[11] See, to that effect, judgment of 30 May 2013, *Commission* v *Sweden* (C-270/11, EU:C:2013:339, paragraph 54).

[12] See, to that effect, judgments of 20 September 2001, *Commission* v *France* (C-468/00, EU:C:2001:482, paragraphs 8 to 10), and of 26 February 2008, *Commission* v *Luxembourg* (C-273/07, EU:C:2008:122, paragraphs 8 to 10).

[13] See judgment of 17 July 1997, *Commission* v *Spain* (C-52/96, EU:C:1997:382, paragraphs 8 to 11).

[14] See judgment of 16 July 2020, *Commission* v *Ireland* (Anti-money laundering) (C-550/18, EU:C:2020:564, paragraph 46).

[15] See judgment of 8 June 2023, *Commission* v *Slovakia (Right of termination without fees)* (C-540/21, EU:C:2023:450, paragraph 83).

[16] See judgment of 6 July 2000, *Commission* v *Belgium* (C-236/99, EU:C:2000:374, paragraphs 21 to 24).

[17] See, in that regard, judgments of 17 September 1987, *Commission* v *Greece* (70/86, EU:C:1987:374, paragraph 8), and of 8 July 2010, *Commission* v *Italy* (C-334/08, EU:C:2010:414, paragraphs 46 and 47).

States can successfully invoke a defence of *force majeure*. Furthermore, such a defence is no longer available to a Member State if the period of its inaction extends beyond the point at which the effects of those extraneous circumstances ceased to exist. [18]

42. In that regard, it seems to me that the fact that priority had to be given to legislative proposals concerning the management and containment of the COVID-19 pandemic and that the organisation of in-person meetings for the transposition of the Whistleblowers Directive was simply made more difficult during that time did not subject the adoption of measures necessary to transpose that directive to 'abnormal difficulties' which could not have been avoided even if all due care had been taken, at least, certainly not for the entire relevant period.

43. I recall that Article 26(1) of the Whistleblowers Directive required Member States to adopt the 'laws, regulations and administrative provisions' necessary to comply with that directive by 17 December 2021, that is to say, approximately one year and nine months after the start of the COVID-19 pandemic. The Republic of Poland benefited from another nine months (corresponding to the time between the expiry of that period and the end of the two-month period set out in the Commission's reasoned opinion) to comply with that obligation, but still failed to do so. On the date on which the present proceedings were initiated by the Commission, the Republic of Poland still had not adopted the measures necessary to transpose that instrument.

44. It does not take an expert in the inner workings of a government to observe that changes in the priorities of the legislative agenda or of Ministries' agendas are not uncommon. That observation applies even when the events leading to those changes (such as the outbreak of a virus) are, for their part, unpredictable. Following the reasoning of the judgment in *Commission* v *Italy*, [19] in which the Court recalled that the defence of '*force majeure*' requires the non-performance of the act in question to be attributable to abnormal and unforeseeable circumstances (and is, therefore, not available if a diligent and prudent person could have taken the necessary steps to avoid the consequences flowing from those circumstances), I am of the view that, even before the expiry of the period prescribed by Article 26(1) of the Whistleblowers Directive, the Republic of Poland could have mitigated the disruptions caused by the COVID-19 pandemic and taken the necessary precautions to ensure that the question of the transposition of that directive was still being addressed. Furthermore, it could have found alternatives to in-person meetings.

45. In those conditions, the circumstances invoked by the Republic of Poland appear to me to be the result of 'internal difficulties', rather than a situation of *force majeure*. [20] The opposite conclusion, which seems to me to be hard to defend, would mean that Member States would, essentially, be relieved of the obligation to adopt transposition measures for any directive whose transposition period somehow overlapped with the period of the COVID-19 pandemic.

46. The third justification provided by the Republic of Poland, which concerns the impact of the war in Ukraine, also fails to convince me. As the Commission indicates, the war in Ukraine started in February 2022, whereas the period set out in Article 26(1) of the Whistleblowers Directive

[18] See, to that effect, judgments of 11 July 1985, *Commission* v *Italy* (101/84, EU:C:1985:330, paragraph 16), and of 8 June 2023, *Commission* v *Slovakia (Right of termination without fees)* (C-540/21, EU:C:2023:450, paragraph 81 and the case-law cited). See, also, Opinion of Advocate General Wahl in *Commission* v *Germany* (C-527/12, EU:C:2014:90, points 47 to 53).

[19] Judgment of 4 March 2010 (C-297/08, EU:C:2010:115, paragraphs 80 to 86).

[20] See, by analogy, judgment of 6 July 2000, *Commission* v *Belgium* (C-236/99, EU:C:2000:374, paragraphs 21 to 24).

ended on 17 December 2021 (before the start of that war). It follows, in my view, that the Republic of Poland cannot justify its failure to transpose the Whistleblowers Directive within the period prescribed by that provision by relying on the impact of that conflict.

47. Of course, it cannot be ruled out that the war in Ukraine may subsequently have had an impact on the Republic of Poland's ability to comply with its obligation to transpose the Whistleblowers Directive and to notify the Commission of the relevant transposition measures. However, even as regards that period, which post-dates the start of that conflict, I am reluctant to accept the third justification put forward by the Republic of Poland.

48. Indeed, the Republic of Poland's arguments in that regard are rather flimsy, to say the least. In fact, that Member State makes no claim other than that the adoption of transposition measures was further delayed, during that subsequent period, because the Ministry of Family and Social Policy had to give priority to proposals concerning the integration of Ukrainian refugees into the Polish social security system and the conditions under which they were welcomed into Poland. That argument must, in my view, be rejected for the same reasons as those outlined in points 44 and 45 above. In that regard, I note that the Republic of Poland does not explain, for example, why a different ministry could not ensure the transposition of that directive, where the Ministry of Family and Social Policy could not do so.

49. In those conditions, I am not convinced by any of the three justifications provided by the Republic of Poland.

B. The amount of the financial sanctions and the methods of calculation applied by the Commission

50. The key issue in the present case concerns the interpretation of Article 260(3) TFEU and the methods of calculation applied by the Commission to determine the amount of the financial sanctions which it proposes that the Court impose in application of that provision.

51. Article 260(3) TFEU has been described by the Commission as an 'innovative instrument' introduced by the FEU Treaty 'with a view to providing an effective solution to the widespread problem of late transposition of directives'.[21] Pursuant to its first sentence, '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 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'.[22]

52. The second sentence of Article 260(3) TFEU indicates that, if the Court concludes that such an infringement exists, it may impose a lump sum and/or penalty payment on the Member State concerned.

53. As the Court has held, that provision essentially has a dual function. On the one hand, it aims to confer specific prerogatives on the Commission for the purposes of ensuring the effective application of EU law. On the other hand, it seeks to put the Court in a position to exercise its

[21] See point 11 of the Communication from the Commission – Implementation of Article 260(3) of the Treaty (OJ 2011 C 12, p. 1).

[22] As Article 260(3) TFEU specifies, the directive in question must have been 'adopted under a legislative procedure'. It does not apply to non-legislative directives.

judicial function of determining, in a single set of proceedings, whether the Member State concerned has fulfilled its obligations to notify the measures transposing the directive in question and, where relevant, impose the financial sanctions which it considers to be the most suitable. [23]

54. Two features of Article 260(3) TFEU deserve further attention, in my view.

55. First, the Court has made clear that Article 260(3) TFEU cannot be applied in isolation, but must be linked to the commencement of infringement proceedings by the Commission under Article 258 TFEU. [24] Put simply, the 'added value' of Article 260(3) TFEU is that, contrary to infringements falling solely within the scope of Article 258 TFEU, infringements to which both provisions apply do not require a second, separate procedure for the imposition of financial sanctions. [25] Indeed, Article 260(3) TFEU enables the Court to impose a lump sum and/or penalty payment in the same judgment in which it concludes to the existence of an infringement of the obligation to notify transposition measures. That is why the Court has described the objective of the system introduced by Article 260(3) TFEU as being not only to induce Member States to put an end to their failure to comply with that obligation as soon as possible, but also to simplify and speed up the procedure for imposing financial sanctions. [26]

56. Second, the Commission has stated that the methods of calculation which it applies within that context are, essentially, the same as under Article 260(2) TFEU. The latter provision empowers the Commission to propose, and the Court to order, financial sanctions in a distinct situation, namely where a Member State fails to take the necessary measures to comply with the judgment of the Court. [27] However, because the same types of sanctions can, essentially, be ordered under both provisions and the assessment in that regard must be guided by the same principles, the Court has endorsed the Commission's approach and held that the case-law relating to Article 260(2) TFEU applies by analogy to Article 260(3) TFEU. [28]

57. That statement is, nevertheless, subject to a *caveat*: the Court's power of assessment under that last provision is subject to a limitation which has no equivalent under Article 260(2) TFEU. Indeed, while, under both provisions, the Court can depart from the proposals of the

[23] See, to that effect, judgment of 16 July 2020, *Commission* v *Ireland (Anti-money laundering)* (C-550/18, EU:C:2020:564, paragraph 55 and the case-law cited).

[24] That is because the application for financial sanctions under Article 260(3) TFEU is only an ancillary mechanism of the infringement proceedings the effectiveness of which it must ensure (see judgment of 16 July 2020, *Commission* v *Romania (Anti-money laundering)* (C-549/18, EU:C:2020:563, paragraph 49 and the case-law cited)).

[25] For the sake of completeness, I note that, although Article 260(3) TFEU is silent on whether the obligation for the Member State concerned to comply with the sanctions 'kicks in' as of the date on which the judgment is delivered (without any subsequent grace period), the Court has already ordered, on a number of occasions, that sanctions take effect immediately (see, for example, the judgment of 8 July 2019, *Commission* v *Belgium (Article 260(3) TFEU – High-speed networks)*, C-543/17, EU:C:2019:573). For the doctrinal debate on that issue, see Materne, T., *La Procédure en Manquement d'État – Guide Pratique*, 2nd ed., Bruylant, p. 483.

[26] See, to that effect, judgment of 16 July 2020, *Commission* v *Ireland (Anti-money laundering)* (C-550/18, EU:C:2020:564, paragraph 74 and the case-law cited).

[27] In that regard, I add that whereas Article 260(2) TFEU targets what is, essentially, a 'compound infringement' or 'double infringement' (the original failure of the Member State plus its failure to comply with the Article 258 TFEU judgment), Article 260(3) TFEU applies in the context of a single infringement (namely, the non-transposition of a directive) (see Wahl, N. and Prete, L., 'Between certainty, severity and proportionality: Some reflections on the nature and functioning of Article 260(3) TFEU', *European Law Reporter*, Issue 6, 2014, pp. 170 to 189, at p. 173).

[28] See judgment of 25 February 2021, *Commission* v *Spain (Personal Data Directive – Criminal law)* (C-658/19, EU:C:2021:138, paragraph 56 and the case-law cited).

Commission, Article 260(3) TFEU provides (unlike Article 260(2) TFEU) that the amount of the financial sanctions ultimately decided upon by the Court cannot exceed that which is specified by the Commission. [29]

58. With those clarifications made, I recall that the Commission outlines two distinct methods of calculation in the 2023 Communication: one for lump sums and one for penalty payments. Lump sums are imposed to sanction the continuation of the Member State's infringement until the delivery of the Court's judgment or until full compliance, if reached earlier. Penalty payments are aimed, for their part, at prompting the Member State to end the infringement as soon as possible after the delivery of the Court's judgment and are, in principle, justified only if the failure has continued up to the time of the Court's examination of the facts. [30]

59. Both methods are based on the multiplication of a flat-rate amount by three elements. The first two elements represent the seriousness of the infringement (reflected by a coefficient for seriousness) and its duration (reflected by a coefficient for duration or the number of days during which the infringement has persisted or persists). The third is described by the Commission as the 'n factor reflecting the capacity to pay of the Member State concerned'.

60. As I have indicated in point 17 above, in the present case the Commission has calculated the amount of the lump sum to be one of the following two amounts: EUR 13 700 per day from the date on which the deadline for transposition of the Whistleblowers Directive expired until the date on which the alleged infringement is brought to an end or, should the infringement continue, until the date of delivery of the judgment in the present case or a minimum amount of EUR 3 836 000, whichever is the highest. That institution also requests that the Court order the Republic of Poland to make a penalty payment of EUR 53 430 per day of delay in complying with the obligations under the Whistleblowers Directive from the date of the delivery of that judgment until the date on which those obligations are fulfilled.

61. The Republic of Poland claims that those sanctions are excessive and disproportionate. Specifically, it takes issue with two elements of the methods of calculation applied by the Commission which are described in the 2023 Communication: first, the coefficient for seriousness, which, pursuant to the guidelines set out in that communication, is the same in all situations of complete failure of the Member State concerned to notify measures necessary to transpose a directive (1); and, second, the 'n' factor, which is based, in part, on the Member State's population size (2). The issues raised by the Republic of Poland with regard to those two elements are not limited to the present case, but call into question the appropriateness of the methods of calculation set out by the Commission in the 2023 Communication as a whole. I will address those more general issues first, before commenting on the excessive or disproportionate character of the amount of the financial sanctions specified by the Commission in the present proceedings (3).

[29] That limitation affects not only the amount itself, but also the choice of the Court as to the type of sanctions (lump sum or penalty payment or both) which it deems appropriate (see judgment of 16 July 2020, *Commission* v *Romania (Anti-money laundering)* (C-549/18, EU:C:2020:563, paragraph 52)). Having said that, I note that, as indicated in the 2023 Communication, the Commission 'systematically proposes to the Court to impose both a lump sum and a penalty payment'.

[30] See, in that regard, judgment of 25 February 2021, *Commission* v *Spain (Personal Data Directive – Criminal law)* (C-658/19, EU:C:2021:138, paragraph 55 and the case-law cited).

1. General issue (i): The coefficient for seriousness applied by the Commission

(a) Arguments of the parties

62. The Commission recalls that the coefficient for seriousness, which reflects the seriousness of the infringement, is set at a value between 1 and 20. It adds that, as indicated in the 2023 Communication, it 'systematically' applies a coefficient of 10 in cases concerning a complete failure to fulfil the obligation to notify transposition measures. The present case concerns such a complete failure. Hence, the Commission has applied a coefficient for seriousness of 10.

63. The Commission explains that, pursuant to the Court's case-law, [31] the obligation to transpose directives and to notify the Commission of transposition measures is a 'fundamental obligation', which contributes to ensuring the effectiveness of EU law. Instances of a complete failure to fulfil that obligation must be regarded as 'undoubtedly serious'. That justifies, in the Commission's view, the systematic application of a coefficient for seriousness of 10 in all such cases.

64. The Commission further states that all directives adopted under a legislative procedure must be considered to be of equal importance and require complete transposition by the Member States within the periods specified therein. In its view, the nature of the directive in question should not have any impact on the determination of the coefficient for seriousness.

65. The Commission further argues that the systematic application of a coefficient for seriousness of 10 in all cases that concern a complete failure to fulfil the obligation to notify transposition measures enhances legal certainty. Such a systematic application also makes the financial sanctions proposed by the Commission more predictable and ensures equal treatment between the Member States.

66. Moreover, the Commission is of the view that the application of that coefficient is, in any event, justified in the present case. In that regard, it claims, first, that the Whistleblowers Directive plays a key role in facilitating the effective application of EU law in a number of important fields and that the failure to transpose that directive can, therefore, have consequences for other acts of EU law (those adopted in the areas that come within the material scope of that directive). Second, it argues that the lack of effective protection of whistleblowers in a Member State could affect the protection of their fundamental rights, which reinforces the seriousness of the infringement. Third, the Commission is not aware of any provisions of Polish law that pursue the same objectives as, or mirror the content of, the Whistleblowers Directive. Fourth, the fact that the Republic of Poland has cooperated with the Commission during the pre-litigation procedure does not mitigate its failure.

67. The Republic of Poland claims that the systematic application of a coefficient for seriousness of 10 in all cases concerning a complete failure to fulfil the obligation to notify transposition measures enables the Commission to circumvent its obligation to conduct, in every case, an in-depth assessment of the seriousness of the alleged infringement.

68. In particular, the Republic of Poland argues that, in the present case, the Commission has failed to take account of the fact that Polish law already affords some form of protection to whistleblowers and that its failure to transpose the directive concerning the protection of those persons, therefore, has a limited impact on the interests which that instrument seeks to protect.

[31] See judgment of 13 January 2021, *Commission* v *Slovenia (MiFID II)* (C-628/18, EU:C:2021:1, paragraph 75).

In its view, that fact should be regarded as a mitigating factor in the determination of the coefficient for seriousness; otherwise, the coefficient applied by the Commission would be based on the potential effects of the infringement only (as opposed to its real consequences).

69. The Republic of Poland also notes that the fact that a Member State cooperates sincerely (as it did) with the Commission during the pre-litigation procedure is also a mitigating factor. [32]

(b) Assessment

70. The Court has made it clear that financial sanctions imposed on Member States for non-compliance with their obligations under EU law must be both 'appropriate to the circumstances' and 'proportionate' to [the infringement] and the capacity to pay of the Member State concerned'. [33] The Commission indicates that it has taken due account of those requirements in the 2023 Communication. [34]

71. In the light of those elements, I understand that the coefficient for seriousness applied by the Commission aims, specifically, at ensuring that the amount of the lump sums and/or penalty payments specified by the Commission under Article 260(3) TFEU are proportionate to the seriousness of the infringement, assessed in the light of the relevant circumstances. In fact, that is the only element of the methods of calculation set out in the 2023 Communication that can reflect the gravity of the infringement. [35]

72. It is in that context that the question whether the Commission can systematically apply a coefficient for seriousness of 10 whenever the alleged infringement, on the basis of which it proposes that the Court impose financial sanctions in application of Article 260(3) TFEU, consists of a complete failure to fulfil the obligation to notify transposition measures must be addressed. That question has never been examined by the Court. Indeed, prior to the 2023 Communication, the Commission did not systematically apply the same coefficient in such situations. [36]

73. For the sake of clarity, I recall that Article 260(3) TFEU applies when the 'Member State concerned has failed to fulfil its obligation to notify measures transposing a directive adopted under a legislative procedure'. The scope of that provision is thus not limited to instances of complete failure to fulfil the obligation to 'notify' but extends to situations where a Member State partially or incorrectly notifies transposition measures. However, whilst the Commission does not state, in the 2023 Communication, which coefficient for seriousness must be applied in that second scenario, [37] it does indicate that it systematically applies a coefficient of 10 in the first.

[32] In that regard, it relies on the judgments of 25 June 2013, *Commission* v *Czech Republic* (C-241/11, EU:C:2013:423), and of 17 October 2013, *Commission* v *Belgium* (C-533/11, EU:C:2013:659).

[33] See, in relation to penalty payments, judgments of 4 July 2000, *Commission* v *Greece* (C-387/97, EU:C:2000:356, paragraph 90), and of 25 February 2021, *Commission* v *Spain (Personal Data Directive – Criminal law)* (C-658/19, EU:C:2021:138, paragraph 62); in relation to lump sum payments, judgments of 16 July 2020, *Commission* v *Ireland (Anti-money laundering)* (C-550/18, EU:C:2020:564, paragraph 81), and of 25 February 2021, *Commission* v *Spain (Personal Data Directive – Criminal law)* (C-658/19, EU:C:2021:138, paragraph 73).

[34] See point 2 of the 2023 Communication.

[35] Indeed, the other elements of the methods of calculation applied by the Commission (namely, the flat-rate amount, the coefficient for duration or the number of days during which the infringement has persisted or still persists and the 'n' factor) are not based on the seriousness of the infringement.

[36] See point 25 of the Communication from the Commission – Implementation of Article 260(3) of the Treaty (OJ 2011 C 12, p. 1).

[37] See, for more details, point 85 below.

74. As I will explain below, I consider that such an approach is appropriate (and compatible with the principle of proportionality) if and only if the infringements concerned by it can all be deemed to be of the same degree of seriousness in comparison, first, to other types of infringement and, second, to each other. However, in my view, that is not the case here.

(1) First reason: instances of complete failure to fulfil the obligation to adopt and, thus, to notify, transposition measures are not necessarily more serious than other types of infringement

75. Hypothetically, the Commission's approach (which is to systematically apply a coefficient for seriousness of 10) could cover two types of situation: first, where the Member State concerned has adopted the necessary transposition measures (in whole or in part) but has simply completely failed to notify them; and second, where that Member State has failed to transpose the directive in question altogether.

76. In that regard, I recall that, as Advocate General Szpunar has explained, the obligation referred to in Article 260(3) TFEU is not the obligation to adopt transposition measures, but the obligation to notify them.[38] It follows that the failure of a Member State to 'notify' transposition measures (as opposed to its complete failure to adopt such measures) is sufficient to trigger the application of Article 260(3) TFEU.

77. That said, I can readily accept (as the Commission also seems to) that the first scenario is, in practice, unlikely. Indeed, in most situations (if not all), the reason why a Member State fails to notify transposition measures is that it has also failed to adopt such measures. Indeed, it is hard to imagine why a Member State which has 'done the job correctly' and adopted the measures necessary to transpose a directive would fail to notify the Commission of them. Thus, it is clear to me that, when that institution speaks of instances of complete failure to 'notify', it has in mind the complete failure to fulfil the obligation to transpose (and not, purely and simply, the complete failure to fulfil the obligation to notify), in line with its perception of Article 260(3) TFEU as a provision introducing a mechanism designed to provide 'an effective solution to the widespread problem of late transposition of directives'.[39]

78. In such cases, the Member State concerned is effectively responsible for a twofold infringement. Not only has it failed to notify transposition measures, it has also failed to adopt such measures (the first failure being a consequence of the second).

79. At first sight, the existence of such a twofold infringement may, indeed, appear, as the Commission argues, to be rather serious. Yet, that is where the weakness of the Commission's 'one-size-fits-all' solution becomes apparent: it is plainly over-simplistic. Under that approach, the Commission 'singles out' one type of breach (the complete failure to fulfil the obligation to adopt and, thus, to notify transposition measures) as being inherently more serious than other types of infringement, in particular many of those covered by Article 260(2) TFEU. By doing that, it overlooks the fact that such is not necessarily the case.[40]

[38] See, in that regard, Opinion of Advocate General Szpunar in *Commission* v *Belgium (Article 260(3) TFEU – High-speed networks)* (C-543/17, EU:C:2019:322, point 69).

[39] See point 51 above.

[40] See, in that regard, Opinion of Advocate General Szpunar in *Commission* v *Belgium (Article 260(3) TFEU – High-speed networks)* (C-543/17, EU:C:2019:322, point 56). See, also, Wahl, N. and Prete, L., 'Between certainty, severity and proportionality: Some reflections on the nature and functioning of Article 260(3) TFEU', *European Law Reporter*, Issue 6, 2014, pp. 170 to 189, at p. 173.

80. To illustrate that point, one can refer to the failure of the Czech Republic to transpose certain provisions of Directive 2003/41/EC on the activities and supervision of institutions for occupational retirement provision,[41] which the Court examined in its judgment in *Commission* v *Czech Republic*.[42] Leaving aside the fact that that failure was partial, not complete, it was also benign. Indeed, the activity which those provisions regulated (*in casu*, occupational retirement provision) did not exist in the Czech Republic. Conversely, the infringement established by the Court in its judgment in *Commission* v *France*[43], which concerned the French Republic's failure to comply with certain control obligations for fishing activities by French vessels (an infringement which comes within the scope of what is now Article 260(2) TFEU), was much more severe in terms of the consequences that it had for the public and private interests affected.[44]

(2) Second reason: instances of complete failure to adopt and, thus, to notify, transposition measures have different degrees of seriousness

81. The second reason why I consider the Commission's approach to be inappropriate is that not all instances of complete failure to fulfil the obligation to adopt and, thus, to notify, transposition measures covered by Article 260(3) TFEU can themselves be said to be of the same level of seriousness.

82. Soon after the FEU Treaty introduced that new provision, the Commission explained that its purpose was to encourage the prompt transposition of directives by Member States, which it said to be of 'crucial importance', not only as a matter of 'safeguarding the general interests' pursued by EU legislation, but also, and above all, as a matter of protecting EU citizens who enjoy individual rights under such legislation.[45]

83. Thereafter, the Court expressly recognised that, in the context of the application of Article 260(3) TFEU, the imposition of a lump sum must be based (as is also the case under Article 260(2) TFEU) on an assessment of the 'effects on public and private interests' of the failure of the Member State concerned to comply with its obligations.[46] The same considerations (as well as how urgent it is for the Member State concerned to be induced to fulfil its obligations) are relevant for the purposes of determining the amount of a penalty payment.[47]

84. In my view, the Commission's decision, in the 2023 Communication, to systematically apply the same coefficient for seriousness of 10 in all cases where a Member State completely fails to adopt and, thus, to 'notify', transposition measures to the Commission stands at odds with that previous approach and with that case-law. I shall explain that observation.

41 Directive of the European Parliament and of the Council of 3 June 2003 (OJ 2003 L 235, p. 10).

42 See judgment of 25 June 2013 (C-241/11, EU:C:2013:423, paragraph 53).

43 Judgment of 12 July 2005 (C-304/02, EU:C:2005:444).

44 See, in that regard, Wahl, N. and Prete, L., 'Between certainty, severity and proportionality: Some reflections on the nature and functioning of Article 260(3) TFEU', *European Law Reporter*, Issue 6, 2014, pp. 170 to 189, at p. 173.

45 See point 7 of the Communication from the Commission – Implementation of Article 260(3) of the Treaty (OJ 2011 C 12, p. 1).

46 See judgment of 25 February 2021, *Commission* v *Spain (Personal Data Directive – Criminal law)* (C-658/19, EU:C:2021:138, paragraph 54 and the case-law cited).

47 See, by analogy, judgment of 20 January 2022, *Commission* v *Greece (Recovery of State aid – Ferronickel)* (C-51/20, EU:C:2022:36, paragraph 96).

85. In that document, the Commission justifies its new approach by stating that 'all legislative directives are to be considered of equal importance and require complete transposition by the Member States within the deadlines that they set'.[48] It adds that the 'importance of ensuring the transposition of legislative directives by the Member States within the deadlines set by those directives applies to all legislative directives equally'.[49] By contrast, it explains that, for a partial (rather than complete) failure to fulfil the obligation to notify transposition measures, the coefficient for seriousness is set at a level lower than 10 and due consideration is taken of the effects of the infringement on 'general and particular interests'.

86. I gather from those statements that the Commission considers that, within the context of the application of Article 260(3) TFEU, the question of which specific interests and rights are affected by the infringement is relevant only in cases other than those that concern a complete failure to fulfil the obligation to notify transposition measure.

87. That leaves me with an unresolved question: if, as the Commission argues, the ultimate objective of the financial sanctions which it can propose that the Court impose in application of Article 260(3) TFEU is to 'protect the general interests' pursued by EU legislation and the 'individual rights of EU citizens', how is it possible that the amount of those sanctions *not* be adapted depending on the extent to which those interests and rights are affected or could potentially be affected by the infringement in all the cases that are covered by that provision?

88. In that regard, I have already noted in point 21 above that it is generally accepted (as the material scope of the Whistleblowers Directive itself illustrates, for example) that certain areas of EU law are of greater importance to the public interest than others. A complete failure of a Member State to transpose a directive in one of those areas is, in principle, and especially if it aims to confer individual rights on EU citizens, more serious than a failure of the same Member State to transpose a directive in a different area.[50]

89. In my view, one cannot argue, therefore, that all directives adopted under a legislative procedure are of equal importance. I agree that the obligation of the Member States to adopt transposition measures in a timely manner applies 'equally' to all such directives. However, it is another thing to claim, as the Commission does, that those instruments must all be placed on an equal footing because they are all of equal importance.[51] The fact that an infringement is inherently serious does not mean that its seriousness cannot vary from one situation to another.

90. I wish to make two further remarks.

91. First, that conclusion is not affected by the fact that the Court has stated that 'the obligation to adopt national measures for the purposes of ensuring that a directive is transposed in full and the obligation to notify those measures to the Commission are fundamental obligations'.[52] In that regard, I refer to the considerations which I have just outlined above.

[48] See point 3.2.2 of the 2023 Communication.

[49] See point 2.2 of that communication.

[50] With that said, I agree that, even in a field which is regarded as being generally important for the public interest, it is possible that the EU legislature adopts a directive on a point of relatively little importance (for example, a very technical point), and vice versa. The seriousness of the infringement is thus to be assessed in each individual case.

[51] Arguably, it was on the basis of considerations of a similar kind that the Commission stated, in its very first communication on Article 260(3) TFEU, that the rules and general criteria which it had formulated in relation to that provision had to be applied on a 'case-by-case' basis and that each financial sanction always had to be tailored to the circumstances of the case (see point 10 of the Communication from the Commission – Implementation of Article 260(3) of the Treaty (OJ 2011 C 12, p. 1)).

[52] See judgment of 13 January 2021, *Commission* v *Slovenia* (MiFID II) (C-628/18, EU:C:2021:1, paragraph 75).

92. I add that the justification provided by the Commission in the present case, namely that the systematic application of a coefficient for seriousness of 10 ensures equal treatment between Member States, seems to me to be particularly unconvincing. I fail to understand how adapting the coefficient of seriousness to take account of factors such as the importance of the directive in question could jeopardise equal treatment between Member States.

93. Second, in the 2023 Communication, the Commission notes that, in relation to Article 260(2) TFEU, the importance of the infringement at stake must be determined by taking into consideration 'the nature and extent of the [legal] provisions concerned'. It adds that 'infringements affecting fundamental rights or the four fundamental freedoms … should generally be considered as particularly serious and should result in an appropriate penalty'.[53] Furthermore, it explains that the effects on general and particular interests should be measured on a case-by-case basis, taking into account, inter alia, the loss of EU resources, serious damage to EU financial interests, the impact of the infringement on the way the EU functions, serious or irreparable damage to human health or the environment, any possible financial advantage that the Member State gains from not complying and the size of the population affected by the infringement.

94. I do not see any reason why the same guiding principles and factors could not also have a role to play in the setting of the coefficient for seriousness where the infringement consists of a complete failure to fulfil the obligation to adopt and, thus, to notify, transposition measures within the meaning of Article 260(3) TFEU.

95. In that regard, I further add that, in its very first communication on Article 260(3) TFEU, the Commission had indicated that the coefficient for seriousness had to be established in line with the rules and criteria applicable to infringements covered by Article 260(2) TFEU, from which it followed that that coefficient was simply required to be between 1 and 20.[54] The reasons for departing from that approach (other than that of the equal importance of all directives adopted under a legislative procedure) are not outlined in the 2023 Communication.

96. I note that, in the present case, the Republic of Poland argues that account should be taken of two mitigating factors: first, the fact that whistleblowers are already protected by Polish law and, second, the Republic of Poland has cooperated sincerely with the Commission during the pre-litigation procedure.

97. I will save my assessment of the present case for later (see Section 3. below). For now, I would simply like to make clear that I consider that the Commission should reserve, in all cases, the possibility for the coefficient for seriousness to be adapted in the light of relevant mitigating and/or aggravating factors.

[53] See point 3.2.1.1 of the 2023 Communication.

[54] See point 25 of the Communication from the Commission – Implementation of Article 260(3) of the Treaty (OJ 2011 C 12, p. 1), which refers to point 16.6 of the Communication from the Commission – Application of Article 228 of the EC Treaty (SEC/2005/1658).

(3) Conclusion

98. It follows from the above considerations that, in my view, the Court should declare that the systematic application of a coefficient for seriousness of 10 in all cases involving a complete failure to fulfil the obligation to notify the measures necessary to transpose a directive coming within the scope of Article 260(3) TFEU is inappropriate in terms of setting financial sanctions that are sufficiently dissuasive and proportionate to the relevant infringement.

2. General issue (ii): the method of calculation of the 'n' factor

(a) Arguments of the parties

99. In the Commission's view, the 'n' factor aims to take account of the Member States' capacity to pay and thereby ensures that financial sanctions imposed in application of Article 260(3) TFEU have a deterrent effect. Two thirds of that factor represents the gross domestic product (GDP) of the Member States (compared with the average GDP across all Member States) and one third represents its population (compared with the average population of all the Member States).

100. The Commission indicates that, pursuant to point 3 of Annex I to the 2023 Communication, it has applied an 'n' factor of 1.37 in the present case.

101. The Commission adds that, in determining the method of calculation of the 'n' factor in that communication, it has taken due consideration of the Court's judgment in *Commission* v *Greece (Recovery of State aid – Ferronickel)*.[55] It understands from paragraph 116 of that judgment that, although the GDP of the Member States must be the predominant factor for the purposes of assessing their capacity to pay, that is without prejudice to the possibility for the Commission to propose financial penalties which are based on multiple criteria, especially if such other criteria seek to maintain a reasonable gap between the Member States.

102. The Commission considers that integrating an element based on the population size of the Member States into the method of calculation of the 'n' factor serves, precisely, that objective. It argues that the demographic criterion also ensures the stability of the 'n' factor over time, since the population size of a Member State is less likely than its GDP to vary significantly on an annual basis.

103. Moreover, the Commission claims that the method of calculation of the 'n' factor adopted in the 2023 Communication follows the indications provided by Advocate General Pitruzzella in his Opinion in *Commission* v *Greece (Recovery of State aid – Ferronickel)*,[56] in which he stated that 'the objective of maintaining a given ratio between the coefficients applied to the various Member States' could be achieved by using a 'demographic criterion making it possible to interpret the results from the consideration of simple or comparative GDP in relative terms'.

104. The Republic of Poland disagrees with the Commission. It considers that the demographic criterion used in the calculation of the 'n' factor is incompatible with the overall objective of that factor, which is to take account of the Member States' capacity to pay while also ensuring that the financial sanctions imposed on them are sufficiently deterrent.

[55] See judgment of 20 January 2022 (C-51/20, EU:C:2022:36).

[56] C-51/20, EU:C:2021:534, point 37.

105. The Republic of Poland further claims that the Commission's method of calculation of the 'n' factor leads to inconsistent results, since the capacity of the Member States to pay may be over-valued or under-valued, depending on their respective population size, which would not be the case if the 'n' factor were based on their GDP only.

106. The Republic of Poland also states that variations in the 'n' factor of the Member States must be expected, since not all Member States have the same capacity to pay. Overall, it argues that the Commission's approach causes disproportionate financial sanctions to be imposed on Member States with a lower GDP but a larger population.

107. Finally, the Republic of Poland indicates that, in his Opinion in *Commission* v *Greece*,[57] Advocate General Wathelet stated that 'it cannot be excluded that some Member States with a given population may have a lower capacity to pay than other Member States with a smaller population' and that that criterion is, therefore, 'also irrelevant for calculating the penalty payment'.

108. In that regard, the Republic of Poland notes that, since 2017 (following the Opinion of Advocate General Wathelet in *Commission* v *Greece*), the Court has never taken elements other than the GDP into consideration when determining a Member State's capacity to pay. Furthermore, the reference to a 'demographic criterion' in the Opinion of Advocate General Pitruzzella in *Commission* v *Greece (Recovery of State aid – Ferronickel)* should merely be understood as an indication that it may be appropriate to divide the GDP of the Member States by their population size to get a more accurate picture of their capacity to pay.

109. In the light of the above considerations, the Republic of Poland argues that the 'n' factor applied by the Commission should be based on the capacity to pay of the Member States, reflected by their GDP only.

(b) Assessment

110. The method applied by the Commission to calculate the 'n' factor is the same for infringements that come within the scope of Article 260(2) TFEU as for those covered by Article 260(3) TFEU.

111. Initially, that method was based on two elements: the GDP of the Member State concerned, on the one hand, and the number of votes that that Member State had in the Council for qualified majority voting, on the other hand.[58] However, the rules for qualified majority voting in the Council changed after the entry into force, on 1 April 2017, of the new 'double majority rule', introduced by Article 16(4) TEU. The Court examined the consequences of that development in its judgment of 14 November 2018, *Commission* v *Greece*,[59] in which it held that that new system did not provide satisfactory criteria for determining the capacity to pay of the Member States and,

[57] C-93/17, EU:C:2018:315, point 139.

[58] See Section D, entitled 'Taking into account the Member State's ability to pay' of the Communication from the Commission – Application of Article 228 of the EC Treaty (SEC/2005/1658). For the sake of completeness, I add that the 'n' factor first made an appearance in the document entitled Information from the Commission – Method of calculating the penalty payments provided for pursuant to Article 171 of the EC Treaty, of 28 February 1997 (OJ 1997 C 63, p. 2), but it was only in 2005 that it began to apply for the calculation of lump sums as well.

[59] C-93/17, EU:C:2018:903 (paragraphs 139 to 141).

therefore, could not effectively substitute the old system of weighted voting. It also noted that, at any rate, since 1 April 2017, the Court had only taken into account the GDP of the Member State concerned for the purposes of evaluating its capacity to pay.

112. The Commission issued a new communication in 2019 ('the 2019 Communication'),[60] in which it included a revised method of calculation of the 'n' factor. That new method continued to include a component which was not tied to the GDP of the Member State concerned. However, that component was no longer based on the number of votes in the Council, but on the number of seats of representatives in the European Parliament.

113. In its judgment of 20 January 2022, *Commission* v *Greece (Recovery of State aid – Ferronickel)*,[61] the Court stated again that it was necessary to rely on the GDP of the Member State concerned as the predominant factor for the purposes of assessing that Member State's capacity to pay and that the objective of setting financial sanctions that are sufficiently dissuasive did not necessarily require that account be taken of the institutional weight in the European Union of the Member State concerned, since that element was not related to the characteristics of the infringement at issue.

114. The 2023 Communication was adopted after that judgment.

115. In that communication, the 'n' factor is described by the Commission as a weighted geometric average which relies 'predominantly' on the Member States' GDP and 'secondarily' on their population 'as a demographic criterion allowing a reasonable deviation between the Member States to be maintained'.

116. I agree with the Republic of Poland that that 'demographic criterion' is not appropriate for determining the Member States' relative capacity to pay. Three principal reasons lead me to that conclusion.

117. First, one could argue that the elements outlined in point 113 above do not exclude the possibility for the Commission to take account of other factors or parameters in setting the method of calculation of the 'n' factor. In fact, as the Commission notes in the 2023 Communication, the Court did recognise, in its judgment of 20 January 2022, *Commission* v *Greece (Recovery of State aid – Ferronickel)*[62] (the judgment which led the Commission to revise its method of calculation of that factor and to adopt that communication), that the fact that the GDP of the Member State concerned was the predominant factor for the purposes of assessing its ability to pay was 'without prejudice' to the possibility for the Commission to propose financial sanctions 'based on multiple criteria, with a view, in particular, to allowing a reasonable gap between the various Member States to be maintained'.

[60] Communication from the Commission – Modification of the calculation method for lump sum payments and daily penalty payments proposed by the Commission in infringement proceedings before the Court of Justice of the European Union (OJ 2019 C 70, p. 1).

[61] C-51/20, EU:C:2022:36 (paragraphs 113 to 115).

[62] C-51/20, EU:C:2022:36 (paragraph 116).

118. However, what those elements do show, in my view, is that the Court does require a correlation between the GDP of the Member States and the 'n' factors respectively attributed to them.[63] Indeed, if a Member State with a comparatively lower GDP than another Member State were attributed a higher 'n' factor than such other Member State, and vice versa, that factor could, quite simply, no longer be said to be representative of the Member States' respective capacity to pay.

119. That is precisely where the flaw in the method of calculation of the 'n' factor chosen by the Commission in the 2023 Communication becomes apparent. Annex I to the 2023 Communication indicates that the 'n' factors listed therein have been calculated on the basis of the GDP of the Member States in 2020. If one considers the GDP of the Member States during that year[64] and the 'n' factors which the Commission has attributed to each of them, one sees that:

– the GDP of Luxembourg is higher than that of Bulgaria, Croatia Lithuania and Slovenia, but the 'n' factor which the Commission applies to Luxembourg is lower than that which it applies to those other Member States;

– the GDP of the Netherlands is significantly higher than that of Poland, but their 'n' factors are practically identical (1.39 versus 1.37);

– by contrast, the GDP of Poland is only slightly higher than that of Sweden, but their 'n' factors vary significantly (1.37 versus 0.83).

120. Furthermore, if one decides to analyse the 'n' factors set out in the 2023 Communication in the light of the Member States' GDP per capita as it was in 2020,[65] instead of their GDP (since, arguably, the GDP per capita enables a better comparison of the Member States' respective capacity to pay), one observes even more inconsistent results:

– Denmark's GDP per capita is higher than that of Germany, but Germany's 'n' factor is almost 12 times that of Denmark (6.16 versus 0.52);

– by contrast, Ireland and Denmark have been attributed similar 'n' factors (0.55 versus 0.52), although Ireland's GDP per capita is almost 1.5 times greater than that of Denmark;

– likewise, the Netherlands and Poland have similar 'n' factors (1.39 and 1.37), but there is a significant gap between their GDPs per capita (the Netherlands' GDP per capita being almost four times that of Poland);

– Italy and Cyprus have similar GDPs per capita, but Italy's 'n' factor is 3.41 whereas Cyprus's 'n' factor is 0.05 (Italy's 'n' factor is, therefore, approximately 68 times greater than that of Cyprus);

[63] In that regard, I add that the Court has emphasised, in a number of judgments, that, as regards the capacity to pay of the Member State concerned, it is necessary to take account of recent trends in that Member State's gross domestic product (GDP) at the time of the Court's examination of the facts (see, inter alia, judgments of 16 July 2020, *Commission* v *Romania (Anti-money laundering)* (C-549/18, EU:C:2020:563, paragraph 85), and of 16 July 2020, *Commission* v *Ireland (Anti-money laundering)* (C-550/18, EU:C:2020:564, paragraph 97)). Moreover, the Court has taken the view that the amount of financial sanctions must be reduced in situations where the Member State concerned is in a situation of economic crisis (and its GDP has significantly decreased) (see judgment of 19 December 2012, *Commission* v *Ireland* (C-374/11, EU:C:2012:827, paragraph 44)).

[64] Based on the values provided by Eurostat here: https://ec.europa.eu/eurostat/databrowser/view/NAMA_10_GDP__custom_1799513/bookmark/bar?lang=en&bookmarkId=d8b13929-28c2-478f-8c40-492f2c166c77.

[65] Based on the values provided by Eurostat here: https://ec.europa.eu/eurostat/databrowser/view/sdg_08_10/default/table?lang=en.

– Luxembourg has one of the lowest 'n' factors, but the highest GDP per capita of all Member States.

121. In the light of those elements, it is clear to me that the 'n' factors listed in the 2023 Communication are not representative of the Member States' respective capacities to pay (regardless of whether that capacity is determined in the light of their GDP or GDP per capita). In my view, the argument that was made by some authors [66] and Member States [67] during the time when the method of calculation of the 'n' factor was still based on voting rights in the Council or the number of representatives in the European Parliament that that factor did not necessarily provide an accurate picture of the Member States' capacity to pay, since it over- or undervalued the ability of certain Member States to pay, certainly still has force. [68]

122. That brings me to the second reason why I consider that the method of calculation of the 'n' factor set out in the 2023 Communication is inappropriate. It seems clear to me that, when setting out that method, the Commission intended not only to give effect to the judgment of the Court of 20 January 2022, *Commission* v *Greece (Recovery of State aid – Ferronickel)*, [69] in which the previous method of calculation (namely, that set out in the 2019 Communication) was criticised by the Court, but also to ensure that the amounts of the financial sanctions which it would propose to the Court would stay as close as possible to the values obtained under that previous method.

123. In fact, even at the stage of adopting the 2019 Communication, the Commission had pointed out that the use of the GDP of the Member States as a sole criterion would cause a difference between the highest and the lowest 'n' factors which, in its view, was unacceptable. [70] I can easily imagine that the Commission may have had similar concerns when it suggested including a demographic criterion in its new method of calculation in the 2023 Communication, rather than relying solely on the GDP or GDP per capita. Indeed, if one compares the 'n' factors listed in Annex I to that communication with those listed in Annex I to the 2019 Communication, one sees that there are no major discrepancies between the two.

124. In that regard, I agree, of course, with the Commission that ensuring that the 'n' factor stays within a similar range of values from one method of calculation to the other and has some degree of stability over time is not an entirely misguided objective. Yet, it seems to me that stability could easily be achieved by other, more appropriate, means. To begin with, the Commission could take account of the Member States' GDP or GDP per capita over several years and base itself on their average value across a period of, for example, five years. In addition, in order to ensure that the gaps between the 'n' factors of the different Member States are not too great and that they stay somewhat within the same range of values as they currently are (that is to say, between 0.03 and 6.16), the Commission could scale back the values obtained on the basis of an average of the GDP or GDP per capita to fit, precisely, within that range.

66 See, in that regard, Kornezov, A. 'Imposing the right amount of sanctions under Article 260(2) TFEU: Fairness v. predictability, or how to "bridge the gaps"', Vol. 20, No 3, *Columbia Journal of European Law*, 2014, pp. 307 to 331, at p. 329.

67 See, in that regard, judgment of 25 February 2021, *Commission* v *Spain (Personal Data Directive – Criminal law)* (C-658/19, EU:C:2021:138, paragraph 49), in which the Kingdom of Spain argued that the 'n' factor assigned to it in the 2019 Communication placed it in fourth position 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 fourteenth.

68 See, also, Opinion of Advocate General Fennelly in *Commission* v *Greece* (C-197/98, EU:C:1999:597, points 39 to 43).

69 C-51/20, EU:C:2022:36.

70 See the 2019 Communication, point 2.

125. Allow me to illustrate. Under the approach I suggest, the Member State with the highest GDP or GDP per capita would be attributed an 'n' factor of 6.16. All the other Member States would be given an 'n' factor that reflects their comparative GDP or GDP per capita but which remains below that value. For example, if Luxembourg has the highest GDP per capita, its 'n' factor could be 6.16. The 'n' factor for the Netherlands, whose GDP per capita was (in 2020) approximately half that of Luxembourg, would be close to 3.

126. In my view, and contrary to what the Commission argues, Advocate General Pitruzzella had similar considerations in mind when he stated, in his Opinion in *Commission* v *Greece (Recovery of State aid – Ferronickel)*,[71] that 'the objective of maintaining a given ratio between the coefficients applied to the various Member States' could be achieved by using different methods, such as by using a 'demographic criterion making it possible to interpret the results from the consideration of simple or comparative GDP in relative terms'. Indeed, I do not see how that passage could be read in the way in which the Commission proposes, given that, in point 35 of the same Opinion, Advocate General Pitruzzella indicated that, in his view, 'the GDP (simple, per capita or comparative)…is, in itself, able to provide an adequate indication of the ability to pay of the Member State concerned'.

127. The third reason why I believe that the Commission's method of calculation of the 'n' factor is inappropriate is linked to some broader reflections on the relevance of the population size of the Member State concerned at the stage of determining its capacity to pay financial sanctions.

128. As I have stated above, I am of the view (much like Advocate General Pitruzzella) that it may be useful, if not better, in order to get an accurate picture of that Member State's capacity to pay, to rely on its GDP per capita (which, to state the obvious, requires taking account of its population size). However, that is not what the Commission does in the 2023 Communication. Indeed, as I have explained above, in that communication, it does not divide the GDP of the Member State concerned by its population size, as one would do to calculate that Member State's GDP per capita. Rather, it takes the view that the relative wealth of the Member State concerned (its GDP, assessed against the average GDP of all Member States) must be multiplied by the population size of that Member State (again, assessed against the average population size of all Member States).

129. As the Republic of Poland rightly argues, the result of that approach is that a Member State with a comparatively larger population size is systematically considered to have a higher capacity to pay than a Member State with the same overall wealth (GDP) and a comparatively smaller population. I fail to see how that can be reconciled with the principle of equal treatment between Member States.

130. Furthermore, it seems to me that the Commission's approach ultimately leads to a very unfortunate result, where the population size of the Member State concerned is actually treated either as an aggravating or as a mitigating factor (depending on whether the population size is large or small) at the stage of determining the 'n' factor. In my view, such a consideration does not have a place in an assessment of the relative *capacity to pay* of the Member States. Indeed, as Advocate General Wathelet has argued, 'it cannot be excluded that some Member States with a given population may [actually] have a lower capacity to pay than other Member States with a smaller population'.[72]

[71] C-51/20, EU:C:2021:534, point 37.

[72] See Opinion of Advocate General Wathelet in *Commission* v *Greece* (C-93/17, EU:C:2018:315, point 139).

131. That brings me to my final remark. I can readily accept that the obligations of the Member States under EU law, particularly those linked to the transposition of directives, are somehow 'owed' by those Member States to their citizens. When a Member State fails to transpose a directive, I can see how it may be relevant to take account of the number of EU citizens living on its territory which are affected by that failure. That is, in my view, the main difference between the failure of a Member State to comply with its EU law obligations and the driver of a car or the company, which I used as examples in the Introduction above. As I see it, the driver or the company would not imagine for one second that the amount of their fine could vary depending on the number of people living in their household or the number of persons they employ at the time of the breach for the simple reason that the rules of which they are in breach (whether they pertain to traffic regulation, EU competition or the protection of personal data) do not entail obligations which are owed to those individuals.

132. By contrast, the fact that a Member State sustains a higher sanction because it has a larger population than another Member State may not, in my view, be totally unjustified in the context of infringement proceedings brought under Article 258 TFEU. However, I consider that that element relates to the seriousness of the infringement, not the capacity of the Member States to pay. That is why I am of the view that the population size of the Member State concerned cannot be used as an aggravating or mitigating factor at the stage of the determination of the 'n' factor. Instead, it may, where relevant, be included amongst the mitigating or aggravating factors which are relevant to determine the coefficient for seriousness in each given case. In that regard, I note that, as I have already indicated in point 93 above, the Commission already makes that possible for infringements that come within the scope of Article 260(2) TFEU.

3. The present case

133. In the previous sections, I have explained why I am of the view that it is inappropriate, first, to apply the same coefficient for seriousness of 10 'systematically', in all instances of complete failure to notify transposition measures and, second, for the purposes of determining the capacity of the Member State concerned to pay, to rely on a demographic criterion which systematically penalises Member States which, like Poland, have a larger population size.

134. I would now like to address the remaining issue of the financial sanctions which the Court should, in my view, adopt in the present case.

135. In that regard, I recall, on the one hand, that the overall amount of the financial sanctions imposed by the Court in application of Article 260(3) TFEU cannot, as I have already stated in point 57 above, exceed that which is specified by the Commission.

136. On the other hand, the Court has repeatedly held that, in the context of infringement proceedings, it is not, generally, bound by the guidelines laid down in the Commission's communications, the purpose of which is to contribute to ensuring that that institution's own actions are transparent, foreseeable and consistent with legal certainty when that institution makes proposals to the Court. Moreover, the Court has stated that the mathematical variables used by the Commission to calculate the amount of financial sanctions constitute a 'useful point of reference'. In other words, they are indicative rules which merely set out the approach which the Commission proposes to follow.[73]

[73] See judgment of 20 January 2022, *Commission* v *Greece (Recovery of State aid – Ferronickel)* (C-51/20, EU:C:2022:36, paragraphs 95, 109 and 110).

137. In the present case, it follows that, although the proposals made by the Commission were adopted pursuant to the guidelines set out in the 2023 Communication and are, thus, affected by the two flaws which I have identified in point 133 above, those flaws do not prevent the Court from ordering financial sanctions of an amount lower than that specified by the Commission, in disregard of the methods of calculation set out in that communication.

138. At the same time, given that those proposals place a 'ceiling' on the amount that the Court can impose in application of that provision, it cannot be excluded that they could, in a situation where the Court deems it appropriate to opt for financial sanctions of a higher amount than that specified by the Commission (an issue which, fortunately, in my view, does not arise in the present case), deprive the Court of that possibility. That is why I propose that the Court expressly point out the flaws in the Commission's methods of calculation in its judgment in the present case (as it has previously done in its judgments of 14 November 2018, *Commission* v *Greece*,[74] and of 20 January 2022, *Commission* v *Greece (Recovery of State aid – Ferronickel)*.[75]

139. Having made those clarifications, I note that, to this date, the Republic of Poland still has failed to notify the Commission of the measures necessary to transpose the Whistleblowers Directive.

140. In those circumstances, I consider that it is appropriate to impose both a lump sum and a penalty payment on the Republic of Poland, to encourage it to take the measures necessary to put an end to the infringement established.

141. However, to ensure that the amount of that lump sum and of that penalty payment is itself both 'appropriate to the circumstances' and 'proportionate to [the infringement] and the capacity to pay' of the Republic of Poland,[76] the Court must consider, in my view, that the Republic of Poland has a lower capacity to pay than that which is reflected in the 'n' factor relied upon by the Commission.[77]

142. Furthermore, in its assessment of the seriousness of the infringement at issue, it seems to me that the Court must take account of all the relevant mitigating or aggravating factors (such as those which I have listed in point 93 above). Such factors include the fact that the non-transposition of the Whistleblowers Directive by the Republic of Poland could impact the rights of a rather large number of EU citizens, given the relatively large population size of that Member State and the fact that that directive precisely seeks to confer individual rights on persons who report breaches of EU law.

143. In terms of the effects which the Republic of Poland's failure has on public and private interests, I recall that, as I have noted in point 21 above, the Whistleblowers Directive aims to grant 'balanced and effective' protection to persons who report breaches of EU law on which they acquire information in a work-related context and to 'enhance the enforcement of Union law and policies' in certain specific areas of importance to the public interest. The failure to transpose that

74 C-93/17, EU:C:2018:903.

75 C-51/20, EU:C:2022:36.

76 See the case-law which I have recalled in point 70 of the present Opinion.

77 Using the method which I described in point 125 above, the Republic of Poland's 'n' factor could, for example, be 0.97, since its GDP per capita, between 2018 and 2022, was EUR 13 354 on average (compared with EUR 84 280 for Luxembourg) (based on the values provided by Eurostat here: https://ec.europa.eu/eurostat/databrowser/view/sdg_08_10/default/table?lang=en).

instrument must, thus, be deemed particularly serious because it generates important consequences for such 'areas of importance to the public interest', as well as for the protection of the individual rights of whistleblowers.

144. However, it seems to me that those important consequences are somehow mitigated by the fact that whistleblowers are already protected by Polish law (and thus that the exercise of their rights is not as adversely affected by the Republic of Poland's failure to transpose the Whistleblowers Directive than one might initially think). In that regard, I recall that the Court has already found that the seriousness of the infringement may depend on its practical effects, in particular, the fact that those effects remain relatively limited.[78] Thus, in principle, I share the Republic of Poland's view that the level of protection afforded to whistleblowers under Polish law can be regarded as a mitigating factor.

145. Moreover, I agree with the Republic of Poland that the fact that it cooperated sincerely with the Commission during the procedure leading up to the infringement proceedings before the Court could also be regarded as a mitigating factor.[79]

146. Overall, it seems to me, in the light of the relevant factual and legal circumstances which I have just outlined (and, in particular, the Republic of Poland's lower capacity to pay), that it would be appropriate for the Court to impose financial sanctions of a lower amount than that which is specified by the Commission, namely a lump sum of EUR 8 700 per day from the date on which the deadline for transposition of the Whistleblowers Directive expired until the date of delivery of the judgment in the present case, and a penalty payment of EUR 34 000 per day of delay in complying with the obligations under the Whistleblowers Directive from the date of the delivery of that judgment until the date on which those obligations are fulfilled.

VI. Conclusion

147. In the light of the foregoing, I suggest that the Court of Justice:

– declare that the Republic of Poland has failed to fulfil its obligations under Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law ('the Whistleblowers Directive'), by failing to adopt the laws, regulations and administrative provisions necessary to transpose that directive or, in any event, by failing to notify the Commission of them;

– declare that the systematic application of a coefficient for seriousness of 10 in all cases involving a complete failure to fulfil the obligation to notify the measures necessary to transpose a directive is inappropriate in terms of setting financial sanctions that are sufficiently dissuasive and proportionate to the relevant infringement;

– declare that, for the purpose of setting such financial sanctions, the method of calculation used by the European Commission in its Communication entitled 'Financial sanctions in infringement proceedings' to determine the 'n' factor is inappropriate to ascertain the capacity to pay of that Member State;

[78] See judgment of 13 January 2021, *Commission* v *Slovenia* (MiFID II) (C-628/18, EU:C:2021:1, paragraph 80).

[79] See, in that regard, judgments of 25 June 2013, *Commission* v *Czech Republic* (C-241/11, EU:C:2013:423, paragraph 51), and of 17 October 2013, *Commission* v *Belgium* (C-533/11, EU:C:2013:659, paragraph 40). Conversely, I agree with the Commission that a lack of cooperation constitutes an aggravating factor. Indeed, Member States are under a duty to cooperate sincerely with the Commission under Article 4(3) TEU.

– order the Republic of Poland to pay a lump sum of EUR 8 700 per day from the date on which the deadline for transposition of the Whistleblowers Directive expired until the date of delivery of the judgment in the present case, and a penalty payment of EUR 34 000 per day of delay in complying with the obligations under the Whistleblowers Directive from the date of the delivery of that judgment until the date on which those obligations are fulfilled.

– order the Republic of Poland to pay the costs.