



Reports of Cases

JUDGMENT OF THE COURT (Third Chamber)

13 January 2021 *

(Failure of a Member State to fulfil obligations – Article 258 TFEU – Market in financial instruments – Directives 2014/65/EU and (EU) 2016/1034 – Failure to transpose and/or to notify transposition measures – Article 260(3) TFEU – Application for an order to pay a lump sum)

In Case C-628/18,

ACTION for failure to fulfil obligations under Article 258 and Article 260(3) TFEU, brought on 5 October 2018,

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

applicant,

v

Republic of Slovenia, represented by T. Mihelič Žitko, A. Dežman Mušič and N. Pintar Gosenca, acting as Agents,

defendant,

supported by:

Federal Republic of Germany, represented by S. Eisenberg, acting as Agent,

Republic of Estonia, represented by N. Grünberg, acting as Agent,

Republic of Austria, represented by G. Hesse, acting as Agent,

Republic of Poland, represented by B. Majczyna, acting as Agent,

interveners,

THE COURT (Third Chamber),

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

* Language of the case: Slovenian.

Advocate General: P. Pikamäe,

Registrar: M. Longar, Administrator,

having regard to the written procedure and further to the hearing on 9 September 2020,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

- 1 By its action, the European Commission claims that the Court should:
 - declare that, by failing to adopt, by 3 July 2017, the laws, regulations and administrative provisions necessary to comply with Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (OJ 2014 L 173, p. 349), and with Directive (EU) 2016/1034 of the European Parliament and of the Council of 23 June 2016 amending Directive 2014/65/EU on markets in financial instruments (OJ 2016 L 175, p. 8), or, in any event, by failing to notify those measures to the Commission, the Republic of Slovenia has failed to fulfil its obligations under Article 93 of Directive 2014/65, as amended by Article 1 of Directive 2016/1034;
 - impose on the Republic of Slovenia, pursuant to Article 260(3) TFEU, the payment of a lump sum of EUR 1 028 560, to be paid into an account to be indicated to it by the Commission, with effect from the date of delivery of the judgment in the present case; and
 - order the Republic of Slovenia to pay the costs.

Legal context

- 2 Under Article 1 of Directive 2014/65:
 - ‘1. This Directive shall apply to investment firms, market operators, data reporting services providers, and third-country firms providing investment services or performing investment activities through the establishment of a branch in the Union.
 2. This Directive establishes requirements in relation to the following:
 - (a) authorisation and operating conditions for investment firms;
 - (b) provision of investment services or activities by third-country firms through the establishment of a branch;
 - (c) authorisation and operation of regulated markets;
 - (d) authorisation and operation of data reporting services providers; and

(e) supervision, cooperation and enforcement by competent authorities.

3. The following provisions shall also apply to credit institutions authorised under Directive 2013/36/EU, when providing one or more investment services and/or performing investment activities:

(a) Article 2(2), Article 9(3) and Articles 14 and 16 to 20,

(b) Chapter II of Title II excluding second subparagraph of Article 29(2),

(c) Chapter III of Title II excluding Article 34(2) and (3) and Article 35(2) to (6) and (9),

(d) Articles 67 to 75 and Articles 80, 85 and 86.

4. The following provisions shall also apply to investment firms and to credit institutions authorised under Directive 2013/36/EU when selling or advising clients in relation to structured deposits:

(a) Article 9(3), Article 14, and Article 16(2), (3) and (6);

(b) Articles 23 to 26, Article 28 and Article 29, excluding the second subparagraph of paragraph 2 thereof, and Article 30; and

(c) Articles 67 to 75.

5. Article 17(1) to (6) shall also apply to members or participants of regulated markets and MTFs [(Multilateral Trading Facilities)] who are not required to be authorised under this Directive pursuant to points (a), (e), (i) and (j) of Article 2(1).

6. Articles 57 and 58 shall also apply to persons exempt under Article 2.

7. All multilateral systems in financial instruments shall operate either in accordance with the provisions of Title II concerning MTFs or OTFs [(Organised Trading Facilities)] or the provisions of Title III concerning regulated markets.

Any investment firms which, on an organised, frequent, systematic and substantial basis, deal on own account when executing client orders outside a regulated market, an MTF or an OTF shall operate in accordance with Title III of Regulation (EU) No 600/2014 [of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012 (OJ 2014 L 173, p. 84)].

Without prejudice to Articles 23 and 28 of Regulation (EU) No 600/2014, all transactions in financial instruments as referred to in the first and the second subparagraphs which are not concluded on multilateral systems or systematic internalisers shall comply with the relevant provisions of Title III of Regulation (EU) No 600/2014.'

3 Article 93 of Directive 2014/65 headed ‘Transposition’, provided:

‘1. Member States shall adopt and publish, by 3 July 2016, the laws, regulations and administrative provisions necessary to comply with this Directive. They shall forthwith communicate to the Commission the text of those measures.

Members States shall apply those measures from 3 January 2017 except for the provisions transposing Article 65(2) which shall apply from 3 September 2018.

When Member States adopt those measures, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made. They shall also include a statement that references in existing laws, regulations and administrative provisions to the directives repealed by this Directive shall be construed as references to this Directive. Member States shall determine how such reference is to be made and how that statement is to be formulated.

...

3. Member States shall communicate to the Commission and to ESMA the text of the main provisions of national law which they adopt in the field covered by this Directive.’

4 Article 1 of Directive 2016/1034 provides:

‘Directive 2014/65/EU is amended as follows:

...

(7) in Article 93(1), the date “3 July 2016” is replaced by “3 July 2017”, the date “3 January 2017” is replaced by “3 January 2018” and the date “3 September 2018” is replaced by “3 September 2019”.

Pre-litigation procedure and proceedings before the Court

5 Since the Commission had not received from the Republic of Slovenia any information concerning the adoption and publication of the laws, regulations and administrative provisions necessary to comply with Directive 2014/65, as amended by Directive 2016/1034 (‘the MiFID II Directive’), by the expiry of the transposition period prescribed in Article 93 of that directive, namely 3 July 2017, the Commission sent a letter of formal notice to the Republic of Slovenia on 26 September 2017.

6 The reply from the Republic of Slovenia, dated 23 November 2017, revealed that, as at that date, transposition measures were being prepared and were due to be adopted in April 2018. Accordingly, on 26 January 2018, the Commission sent to the Republic of Slovenia a reasoned opinion, calling on it to adopt the measures necessary to comply with the requirements of the MiFID II Directive within two months of receipt of that opinion.

- 7 Since its request to extend the deadline for responding to the reasoned opinion was refused by the Commission, the Republic of Slovenia replied to that opinion by letter of 21 March 2018, informing the Commission that draft legislation containing measures for transposing the MiFID II Directive was being prepared and would be adopted in April 2018. The draft legislation was annexed to that reply.
- 8 On 1 August 2018, the Republic of Slovenia informed the Commission that early elections were being held and the new National Assembly was being appointed, and requested that the Commission be understanding as regards the adoption of the transposition measures. In the same letter, the Republic of Slovenia also stated that it would complete all procedures relating to the adoption of the new law on markets in financial instruments, which would transpose the MiFID II Directive, by the end of September 2018.
- 9 On 5 October 2018, taking the view that the Republic of Slovenia had failed to communicate the national measures transposing the MiFID II Directive, the Commission brought the present action, seeking from the Court a declaration of failure to fulfil obligations in the manner alleged and an order that the Republic of Slovenia should pay not only a lump sum but also a daily penalty payment.
- 10 In its statement in reply, the Commission informed the Court that it was withdrawing part of its action and that it was no longer seeking the imposition of a daily penalty payment, since that head of claim had become devoid of purpose as a result of Directives 2014/65 and 2016/1034 having been transposed in full into Slovenian law with effect from 6 December 2018. It also stated that payment of the lump sum which it sought in the present case amounted to EUR 1 028 560 and covered the period from 4 July 2017 to 6 December 2018, being 520 days on the basis of EUR 1 978 per day.
- 11 By decisions of the President of the Court of 9 January, 4 February, 7 February and 14 May 2019, the Republic of Poland, the Federal Republic of Germany, the Republic of Estonia and the Republic of Austria, respectively, were granted leave to intervene in support of the Republic of Slovenia.

The action

Failure to fulfil obligations under Article 258 TFEU

Arguments of the parties

- 12 According to the Commission, by failing to adopt, by 3 July 2017, all the laws, regulations and administrative provisions necessary to comply with the MiFID II Directive or, in any event, by failing to notify those measures to the Commission, the Republic of Slovenia has failed to fulfil its obligations under Article 93 of that directive.
- 13 In the present case, the Commission takes the view that the MiFID II Directive was transposed in full only when the Zakon o trgu finančnih instrumentov (Law on the market in financial instruments, Uradni list RS, No 77/18) was adopted, which was communicated to the Commission on 6 December 2018. The national measures communicated on 3 December 2018,

namely three pieces of legislation, two decisions and provisions amending and supplementing the Code on the Ljubljana Stock Exchange (Uradni list RS, No 76/17), constitute, at best, only partial transposition of Directive 2014/65.

- 14 The Commission states in that regard that the Republic of Slovenia itself has acknowledged that those measures only partially transposed the MiFID II Directive since some provisions were not transposed and others were transposed only in part. That is the case, *inter alia*, with the provisions applicable to both multilateral trading facilities (MTF) and organised trading facilities (OTF).
- 15 In addition, the Commission submits that the MiFID II Directive introduced new provisions as compared with those set out in Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC (OJ 2004 L 145, p. 1), which was transposed by the measures communicated on 3 December 2018, in order to regulate new trading venues and trading activities which had developed and which did not come within the scope of Directive 2004/39 and were not, therefore, regulated. By the MiFID II Directive and Regulation No 600/2014, the EU legislature established a new, more reliable regulatory framework for dealing with the growing complexity of the market, characterised by an increasing range of financial instruments and new trading methods.
- 16 The main contributions of the MiFID II Directive to the establishment of a safer, sounder, more transparent and more responsible financial system which serves the economy and society are to be found, *inter alia*, as is apparent from Article 27(3) of that directive, in the creation of a framework for a market structure that remedies deficiencies and ensures that transactions take place, where appropriate, on regulated trading venues. Articles 20 and 27 of that directive lay down rules guaranteeing a level playing field for regulated markets and MTFs. The provisions of Title II, Chapter II, Section 3 of that directive relate to the strengthening of stock market transparency and the introduction of the principle of transparency for non-equity financial instruments. Harmonised rules are laid down concerning position limits and position management controls in commodity derivatives. Articles 64 and 66 of the MiFID II Directive strengthen the effectiveness of the consolidation and publication of trade data. Articles 57 and 58 of that directive also strengthen supervisory powers and establish a harmonised regime for position limits in commodity derivatives in order to improve transparency, encourage orderly pricing and prevent market abuse. Conditions for competition in the trading and clearing of financial instruments are improved. Article 25 of the MiFID II Directive strengthens investor protection, and Article 70 of that directive amends the existing system of penalties in order to determine effective and harmonised administrative sanctions. Title V of that directive introduces a new type of service subject to approval and supervision, namely ‘data reporting services’. In addition, Articles 39 to 43 of that directive establish a harmonised authorisation regime for access to EU markets by third-country firms where they provide certain services in the European Union or perform certain activities in the European Union on behalf of eligible professional clients and counterparties.
- 17 Lastly, the Commission states that, in accordance with the Court’s case-law, where, as in Article 93 of the MiFID II Directive, a directive expressly requires that the measures transposing it include a reference to it or that such reference is made when they are officially published, it is in any event necessary to adopt specific measures transposing the directive in question containing

such a reference (judgment of 11 June 2015, *Commission v Poland*, C-29/14, EU:C:2015:379, paragraph 49 and the case-law cited). In the present case, none of the measures notified by the Republic of Slovenia on 3 December 2018 make reference to the MiFID II Directive.

- 18 In the light of the foregoing, the Commission takes the view that the Republic of Slovenia failed to adopt and, in any event, failed to communicate, in the period prescribed, the measures necessary to transpose that directive.
- 19 The Republic of Slovenia, while not disputing that it omitted to inform the Commission in good time of the partial transposition of the MiFID II Directive, submits that, on expiry of the period prescribed for complying with the reasoned opinion, the majority of the provisions of that directive had been transposed into the Slovenian legal system by the national measures communicated on 3 December 2018, listed in paragraph 13 above. Those measures transposed Directive 2004/39 into the Slovenian legal system, with the result that they also partially transposed the MiFID II Directive, which had been drawn up on the basis of Directive 2004/39. The Republic of Slovenia states that it did not communicate those measures as measures transposing the MiFID II Directive to the Commission before 3 December 2018 because the draft legislation that it had informed the Commission was in the process of being adopted and which was intended to reform the legal framework for the market in financial instruments was due to be adopted by the National Assembly by April 2018. However, owing to a change in government and early elections, that draft legislation was adopted more than eight months after it was lodged, which took place in February and March 2018.
- 20 The Republic of Slovenia also states that, on 19 July 2018, the Commission decided to bring an action not only against the Republic of Slovenia but also against the Kingdom of Spain. It states that, having been informed by the Kingdom of Spain of the partial transposition of the MiFID II Directive and of the completion of the full transposition phase before the end of November 2018, the Commission decided provisionally to stay the proceedings against that Member State. The Republic of Slovenia states that it was aware that it had not informed the Commission of the partial transposition before the Commission brought the action in question, but that it would have succeeded in transposing the MiFID II Directive in November 2018, thus fulfilling its obligations under Article 93 of that directive, within the period laid down by the Commission for the Kingdom of Spain. The Republic of Slovenia states that, according to paragraph 7 of the Communication from the President of the Commission of 9 December 2005, headed 'Re-cast Communication on the application of Article 228 EC' (SEC (2005) 1658), the sanctions proposed to the Court by the Commission for failure to fulfil obligations must be fixed using a method that respects the principle of proportionality and the principle of equal treatment among the Member States. In those circumstances, the Republic of Slovenia submits that the Commission should withdraw the action for failure to fulfil obligations that has been brought against it.

Findings of the Court

- 21 According to the Court's settled case-law, the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in that Member State at the end of the period laid down in the reasoned opinion, and the Court cannot take account of any subsequent changes (judgments of 8 July 2019, *Commission v Belgium (Article 260(3) TFEU – High-speed Networks)*, C-543/17, EU:C:2019:573, paragraph 23; of 16 July 2020, *Commission v Romania (Anti-money laundering)*, C-549/18, EU:C:2020:563, paragraph 19; and of 16 July 2020, *Commission v Ireland (Anti-money laundering)*, C-550/18, EU:C:2020:564, paragraph 30).

- 22 In addition, the Court has repeatedly held that if a directive expressly requires Member States to ensure that the necessary measures transposing the directive include a reference to it or that such reference is made when those measures are officially published, it is, in any event, necessary for Member States to adopt a specific measure transposing the directive in question containing such a reference (see, to that effect, judgments of 27 November 1997, *Commission v Germany*, C-137/96, EU:C:1997:566, paragraph 8; of 16 July 2020, *Commission v Romania (Anti-money laundering)*, C-549/18, EU:C:2020:563, paragraph 20; and of 16 July 2020, *Commission v Ireland (Anti-money laundering)*, C-550/18, EU:C:2020:564, paragraph 31).
- 23 In the present case, since the Commission sent the reasoned opinion to the Republic of Slovenia on 26 January 2018, the two-month period within which it was to comply with its obligations expired on 26 March 2018. The assessment as to whether or not there has been a failure to fulfil obligations as claimed must, therefore, relate to the state of the national legislation in force on that date (judgments of 16 July 2020, *Commission v Romania (Anti-money laundering)*, C-549/18, EU:C:2020:563, paragraph 21, and of 16 July 2020, *Commission v Ireland (Anti-money laundering)*, C-550/18, EU:C:2020:564, paragraph 32).
- 24 In that regard, first, it is not in dispute that the national measures, which the Republic of Slovenia claims partially transpose the MiFID II Directive, were communicated as measures transposing that directive on 3 December 2018, after the period prescribed in the reasoned opinion had expired.
- 25 Secondly, in any event, as is clear from the Republic of Slovenia's reply to a question put to it by the Court at the hearing, it is not disputed that, contrary to the requirements of Article 93 of the MiFID II Directive, those measures contain no reference to that directive.
- 26 It follows that the measures in question do not fulfil the necessary conditions to be specific measures transposing the directive within the meaning of the case-law mentioned in paragraph 22 above.
- 27 It must, therefore, be concluded that, on the expiry of the period prescribed in the reasoned opinion, the Republic of Slovenia had neither adopted the measures necessary to transpose the MiFID II Directive nor, therefore, notified those measures to the Commission.
- 28 Accordingly, it must be held that, by failing to adopt, by the expiry of the period prescribed in the reasoned opinion, all the laws, regulations and administrative provisions necessary to comply with the MiFID II Directive and, therefore, by failing to notify those measures to the Commission, the Republic of Slovenia has failed to fulfil its obligations under Article 93 of that directive.

Failure to fulfil obligations under Article 260(3) TFEU

Applicability of Article 260(3) TFEU

– Arguments of the parties

- 29 According to the Commission, Article 260(3) TFEU was introduced by the Treaty of Lisbon with the aim of strengthening the penalty mechanism previously established by the Treaty of Maastricht. Taking account of the novelty of that provision and the need to maintain

transparency and legal certainty, the Commission adopted the Communication entitled 'Implementation of Article 260(3) of the Treaty', published on 15 January 2011 (OJ 2011 C 12, p. 1).

- 30 The purpose of Article 260(3) TFEU is to give a stronger incentive to Member States to transpose directives within the deadlines laid down by the EU legislature and to ensure the application of EU legislation.
- 31 The Commission submits that Article 260(3) TFEU applies both in cases of total failure to notify measures transposing a directive and of partial notification of such measures.
- 32 The Commission further submits that while Article 260(3) TFEU refers to the failure of a Member State to fulfil its obligation to notify measures transposing a directive, that provision applies not only in the event of a failure to notify the national measures transposing a directive, but also in the event of failure to adopt such measures. A very literal interpretation of that provision, according to which it aims merely to ensure effective notification of national measures, would not guarantee relevant transposition of all the provisions of the directive in question and would negate the effectiveness of the obligation to transpose directives into national law.
- 33 The present case specifically concerns the imposition of penalties not only for the Republic of Slovenia's failure to notify the Commission, but also its failure to adopt and publish all the legal provisions necessary to transpose the MiFID II Directive into national law.
- 34 In reply to the Republic of Slovenia's argument disputing that Article 260(3) TFEU is applicable in the present case, the Commission states that what differentiates the present case is that, until 3 December 2018, the Republic of Slovenia had failed to notify it of any measures transposing the MiFID II Directive. The Commission acknowledges that, between 3 and 6 December 2018, the transposition status of that directive was that it had been partially transposed following notification of the national measures transposing the directive. However, the fact remains that, on expiry of the period laid down in the reasoned opinion, no transposition measures had been communicated. Proposing that payment of a lump sum be imposed, the Commission seeks to penalise the period during which there was a total failure to notify transposition measures, between the day following the expiry of the transposition period, namely 4 July 2017, and 3 December 2018. Furthermore, it is indisputable that, on the date on which the action was brought, the Republic of Slovenia had not fulfilled its obligation to notify the transposition measures. Accordingly, there is no need to address the question whether Article 260(3) TFEU applies in the event of partial transposition. Moreover, the Republic of Slovenia's argument that Article 260(3) TFEU is no longer applicable where a Member State has notified partial transposition measures, even if that notification took place on a date when judicial proceedings were already under way, would deprive Article 260(3) TFEU of any practical effect.
- 35 As regards the Republic of Slovenia's argument that the Commission should have treated it in the same way as it treated the Kingdom of Spain, that is to say, by provisionally staying the infringement proceedings brought against it, the Commission states that the Kingdom of Spain notified it of the transposition measures within the period it had indicated. Despite its undertakings, the Republic of Slovenia failed to notify any transposition measures to the Commission before the end of September 2018. The Commission therefore had no reason further to delay bringing the present action.
- 36 The Republic of Slovenia disputes that Article 260(3) TFEU is applicable in the present case.

- 37 In support of its position, it submits, first, that that provision does not apply where a directive has been partially transposed. In the present case, the MiFID II Directive was partially transposed into Slovenian law before the expiry of the period laid down in the reasoned opinion. The failure of a Member State to inform the Commission of the measures which it has adopted transposing a directive does not amount to a failure to transpose it, even if the transposition of that directive is incorrect or incomplete. It is clear from the wording of Article 260(3) TFEU that that provision can apply only where a Member State does not adopt any measure transposing a directive into its national legal system and therefore does not send the Commission any notification in that regard.
- 38 Next, the Republic of Slovenia maintains that any interpretation other than that which it advocates undermines the foreseeability of the infringement procedure, since the Court's case-law and the Commission's practice do not make it possible to distinguish clearly between partial transposition and incorrect transposition. Such a situation would undermine the principle of legal certainty and the principle of equality between Member States before the Treaties. Furthermore, the interpretation advocated by the Commission is contrary to a restrictive interpretation of Article 260(3) TFEU, which constitutes an exception, and is not supported by a teleological interpretation of that provision.
- 39 Finally, even if the interpretation advocated by the Commission gives that provision definite practical effect, the concept of 'practical effect' cannot be used as a means of increasing the effectiveness and relevance of EU law to the point of interpreting Article 260(3) TFEU in a manner that is contrary to the way the authors of the Treaty clearly intended it to be interpreted. Moreover, the interpretation proposed by the Commission also runs contrary to the principle of proportionality in that it provides for a system of penalties which is disproportionate to the adverse effects of a minor infringement, namely a failure to notify transposition measures to the Commission.
- 40 The Republic of Slovenia takes the view that, having regard to the partial transposition of the MiFID II Directive, the minimal effects for the Slovenian financial markets and the European Union of the failure to transpose and the absence of any prior decision finding that there had been a failure to fulfil obligations, the proposed lump sum is unfounded and is too high. In that regard, it states that it fully transposed the MiFID II Directive one year and four months after the expiry of the period laid down in Article 93 of that directive. It also states that the Court held, in paragraph 81 of the judgment of 12 July 2005, *Commission v France* (C-304/02, EU:C:2005:444), that the imposition of a lump sum is based more on assessment of the effects on public and private interests of the failure of the Member State concerned to comply with its obligations, in particular where the breach has persisted for a long period since the judgment which initially established it. Finally, it submits that the Court has thus far ordered the Member States to pay a lump sum only in respect of infringements which lasted longer than that at issue in the present case, and, moreover, only after a prior decision establishing the breach. Consequently, it takes the view that the imposition of a lump sum payment is disproportionate and inconsistent with the principle of equal treatment between the Member States and with the objective of lump sum payments, as established by the Court.
- 41 The Republic of Estonia and the Republic of Poland submit, in essence, that Article 260(3) TFEU applies only where a Member State has failed, within the prescribed period, to adopt any transposition measure and to notify it to the Commission. The scope of that provision does not cover a situation in which a Member State has notified transposition measures to the Commission which the Commission subsequently considers to be an incorrect or incomplete transposition of the directive in question.

- 42 Those Member States add that Article 260(3) TFEU can apply only where the Commission has provided a detailed statement of reasons for its decision to seek the imposition of financial penalties. Specific reasons for such a decision must be provided in relation to the particular circumstances of each case, since a lump sum may not, in accordance with the Court's case-law, be imposed automatically. Moreover, it is only on an analysis of the particular circumstances of each case that the Commission can determine the nature of the financial penalty to be imposed on the Member State concerned in order to bring the infringement in question to an end and can establish the amount of that penalty, in accordance with the Court's case-law. In the present case, first, the Commission did not give reasons for its decision to seek the imposition of a lump sum payment. Secondly, and in any event, it is disproportionate to impose the payment of a lump sum when the Republic of Slovenia transposed the MiFID II Directive.

Findings of the Court

- 43 It should be borne in mind that the first subparagraph of Article 260(3) TFEU provides that when the Commission brings a case before the Court pursuant to Article 258 TFEU on the ground that the Member State concerned has failed to fulfil its obligation to notify measures transposing a directive adopted under a legislative procedure, the Commission 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. In accordance with the second subparagraph of Article 260(3) TFEU, if the Court finds that there is an infringement, it may impose a lump sum or penalty payment on the Member State concerned not exceeding the amount specified by the Commission, the payment obligation taking effect on the date set by the Court in its judgment.
- 44 As regards the scope of Article 260(3) TFEU, the Court has held that that provision is to be interpreted in a manner which, on the one hand, allows prerogatives held by the Commission for the purposes of ensuring the effective application of EU law and protecting the rights of the defence and the procedural position enjoyed by the Member States under Article 258 TFEU, read in conjunction with Article 260(2) TFEU, to be guaranteed, and, on the other, puts the Court in a position of being able to exercise its judicial function of determining, in a single set of proceedings, whether the Member State in question has fulfilled its obligations to notify the measures transposing the directive in question and, where relevant, assess the seriousness of the declared failure and impose the financial penalty which it considers to be the most suited to the circumstances of the case (judgments of 8 July 2019, *Commission v Belgium (Article 260(3) TFEU – High-speed networks)*, C-543/17, EU:C:2019:573, paragraph 58; of 16 July 2020, *Commission v Romania (Anti-money laundering)*, C-549/18, EU:C:2020:563, paragraph 45; and of 16 July 2020, *Commission v Ireland (Anti-money laundering)*, C-550/18, EU:C:2020:564, paragraph 55).
- 45 In that context, the Court has interpreted the expression 'obligation to notify measures transposing a directive' in Article 260(3) TFEU as referring to the obligation of the Member States to provide sufficiently clear and precise information on measures transposing a directive. In order to satisfy the obligation of legal certainty and to ensure the transposition of the provisions of that directive in full throughout their territory, the Member States are required to state, for each provision of the directive, the national provision or provisions ensuring its transposition. Once notified, and having also received a correlation table where relevant, it is for the Commission to establish, for the purposes of seeking a financial penalty to be imposed on the Member State in question provided for in Article 260(3) TFEU, whether certain transposition measures are clearly lacking or do not cover all the territory of the Member State in question,

bearing in mind that it is not for the Court, in judicial proceedings brought under Article 260(3) TFEU, to examine whether the national measures notified to the Commission ensure a correct transposition of the provisions of the directive in question (judgments of 8 July 2019, *Commission v Belgium (Article 260(3) TFEU – High-speed networks)*, C-543/17, EU:C:2019:573, paragraph 59; of 16 July 2020, *Commission v Romania (Anti-money laundering)*, C-549/18, EU:C:2020:563, paragraph 46; and of 16 July 2020, *Commission v Ireland (Anti-money laundering)*, C-550/18, EU:C:2020:564, paragraph 56).

- 46 Since, as is apparent from paragraphs 27 and 28 above, it is established that, on the expiry of the period prescribed in the reasoned opinion, the Republic of Slovenia had not notified to the Commission any measure transposing the MiFID II Directive within the meaning of Article 260(3) TFEU, the failure to fulfil obligations thus declared falls within the scope of that provision.
- 47 As regards whether, as the Republic of Estonia and the Republic of Poland submit, the Commission must state reasons, on a case-by-case basis, for its decision to seek a financial penalty under Article 260(3) TFEU or whether it may take such a decision without stating reasons, in all cases falling within the scope of that provision, it must be borne in mind that, as guardian of the Treaties pursuant to the second sentence of Article 17(1) TEU, the Commission enjoys a discretion to take such a decision.
- 48 Article 260(3) TFEU cannot be applied in isolation, but must be linked to the commencement of infringement proceedings under Article 258 TFEU. Since the application for a financial penalty under Article 260(3) TFEU is only an ancillary mechanism of the infringement proceedings the effectiveness of which it must ensure and the Commission enjoys a discretion as to whether or not to commence such proceedings, which is not for review by the Court (judgments of 16 July 2020, *Commission v Romania (Anti-money laundering)*, C-549/18, EU:C:2020:563, paragraph 49, and of 16 July 2020, *Commission v Ireland (Anti-money laundering)*, C-550/18, EU:C:2020:564, paragraph 59), the conditions for applying Article 260(3) TFEU cannot be more restrictive than those governing the implementation of Article 258 TFEU.
- 49 In addition, it must be pointed out that under Article 260(3) TFEU the Court alone has the power to impose a financial penalty on a Member State. Where the Court takes such a decision at the end of *inter partes* proceedings, it must state reasons. Consequently, the Commission's failure to state reasons for its decision to request the Court to apply Article 260(3) TFEU does not affect the procedural guarantees of the Member State in question (judgments of 16 July 2020, *Commission v Romania (Anti-money laundering)*, C-549/18, EU:C:2020:563, paragraph 50, and of 16 July 2020, *Commission v Ireland (Anti-money laundering)*, C-550/18, EU:C:2020:564, paragraph 60).
- 50 Furthermore, the fact that the Commission is not required to state reasons on a case-by-case basis for its decision to seek the imposition of a financial penalty under Article 260(3) TFEU does not relieve it of the obligation to state reasons for the nature and amount of the financial penalty sought, taking into account in that regard the guidelines which it has adopted, such as those in the Commission's communications which, although not binding on the Court, contribute to ensuring that the action brought by the Commission is transparent, foreseeable and consistent with legal certainty (judgments of 16 July 2020, *Commission v Romania (Anti-money laundering)*, C-549/18, EU:C:2020:563, paragraph 51, and of 16 July 2020, *Commission v Ireland (Anti-money laundering)*, C-550/18, EU:C:2020:564, paragraph 61).

- 51 That requirement to state reasons for the nature and amount of the financial penalty sought is all the more important since, unlike the provisions of Article 260(2) TFEU, Article 260(3) TFEU provides that, in the context of proceedings brought under that provision, the Court has only a limited power to assess, since, where it finds that there is an infringement, the Commission's proposals are binding on it as to the nature of the financial penalty which the Court may impose and the maximum amount of the penalty which it may set (judgments of 16 July 2020, *Commission v Romania (Anti-money laundering)*, C-549/18, EU:C:2020:563, paragraph 52, and of 16 July 2020, *Commission v Ireland (Anti-money laundering)*, C-550/18, EU:C:2020:564, paragraph 62).
- 52 Indeed, it is clear from Article 260(3) TFEU that it is for the Commission to specify 'the amount of the lump sum or penalty payment to be paid' by the Member State in question, but that the Court may only impose a financial penalty payment 'not exceeding the amount specified' by the Commission. The authors of the FEU Treaty thus established a direct correlation between the penalty sought by the Commission and the penalty that may be imposed by the Court under that provision (judgments of 16 July 2020, *Commission v Romania (Anti-money laundering)*, C-549/18, EU:C:2020:563, paragraph 53, and of 16 July 2020, *Commission v Ireland (Anti-money laundering)*, C-550/18, EU:C:2020:564, paragraph 63).
- 53 As regards the Republic of Slovenia's arguments based on the difference in treatment as compared with the Kingdom of Spain in relation to the transposition of the MiFID II Directive or the duration of the pre-litigation procedure in the present case, it must be found, first, that those arguments relate not to the applicability of Article 260(3) TFEU to a failure to fulfil obligations such as that at issue, but to the merits of the application for the payment of a lump sum in the present case, which will be assessed at a later stage of this judgment. Secondly, and in any event, the Commission has a discretion whether to initiate infringement proceedings against a Member State, with the result that the fact that no action was brought against the Kingdom of Spain does not call in question the possibility open to the Commission to seek, pursuant to Article 260(3), the imposition of a financial penalty on the Republic of Slovenia.
- 54 Accordingly, it must be held that Article 260(3) TFEU applies in a situation such as that at issue in the present case.

The imposition of a lump sum in the present case

– Arguments of the parties

- 55 As regards the amount of the financial penalties to be imposed, the Commission submits, in accordance with the position reflected in point 23 of the communication published on 15 January 2011, that, since a failure to fulfil the obligation to notify measures transposing a directive is no less serious than a failure to fulfil obligations that may be the subject of the penalties mentioned in Article 260(2) TFEU, the method of calculating the financial penalties referred to in Article 260(3) TFEU must be the same as that applied in the context of the procedure set out in Article 260(2) TFEU.
- 56 In the present case, the Commission seeks the imposition of a lump sum calculated according to the guidelines in the Communication of the President of the Commission of 9 December 2005, as updated by the Communication of 13 December 2017, entitled 'Updating of data used to calculate lump sum and penalty payments to be proposed by the Commission to the Court of Justice in infringement proceedings' (C(2017) 8720), the minimum lump sum for the Republic of Slovenia

being EUR 496 000. That minimum lump sum is not, however, to be applied in the present case, since it is lower than the amount which results from calculating the lump sum in accordance with those communications. In order to determine the daily amount forming the basis of that calculation, the standard flat-rate amount of EUR 230 must be multiplied by the coefficient for seriousness, which in the present case is 10 on a scale of 1 to 20, and by the ‘n’ factor of 0.86 for the Republic of Slovenia. The daily amount is, therefore, EUR 1 978 per day and should be multiplied by the number of days which have elapsed between 4 July 2017, that is the day following that on which the transposition period prescribed by the MiFID II Directive expired, and 5 December 2018, the day preceding that on which the Republic of Slovenia notified the measures transposing that directive in full, namely 520 days. Accordingly, the lump sum to be imposed amounts to EUR 1 028 560.

- 57 As regards the fact that the Court held, in its judgment of 14 November 2018, *Commission v Greece* (C-93/17, EU:C:2018:903), that it is no longer necessary to take account of the criterion relating to the number of votes which a Member State has within the Council of the European Union in order to calculate the amount of the financial penalties to be imposed, so that the ‘n’ factor used by the Commission is no longer appropriate, the Commission states that its services have developed a new calculation method taking into account the gross domestic product (GDP) and the political weight of each Member State, but that new method, published after the present action was brought, cannot be applied in the present case. In any event, the Commission submits that its proposal remains a useful point of reference for the penalties which the Court may impose.
- 58 As regards the Republic of Slovenia’s argument relating to the incorrect assessment of the seriousness of the infringement and the disproportionate nature of the amount of the penalties sought when it had notified partial transposition measures on 3 December 2018, the Commission states that Article 260(3) TFEU provides that failure to notify transposition measures is itself punishable by penalties. That provision therefore penalises not only the fact that a directive has not been transposed, but also failure to comply with the formal obligation to notify measures transposing the directive.
- 59 As regards the arguments relating to the situation of the Slovenian financial market, which seek to substantiate the Republic of Slovenia’s claim that the coefficient for the seriousness of the infringement should be reduced on the ground that the effects of the failure to transpose the MiFID II Directive in that Member State are less significant than the Commission considered, the Commission states that it is settled case-law that the mandatory nature of directives entails the obligation for all Member States to comply with the time limits laid down by those directives in order that the implementation shall be achieved uniformly within the whole Union (judgment of 22 September 1976, *Commission v Italy*, 10/76, EU:C:1976:125, paragraph 12). Furthermore, the Commission states that the Court held, in paragraphs 39 and 42 respectively of the judgment of 14 January 2010, *Commission v Czech Republic* (C-343/08, EU:C:2010:14), that the fact that a certain activity referred to in a directive does not exist in a particular Member State cannot release that Member State from its obligation to adopt laws or regulations in order to ensure that all the provisions of the directive are properly transposed and that it is only where the transposition of a directive is pointless for reasons of geography that it is not mandatory.
- 60 The Commission denies, moreover, that the imposition of a lump sum is an exception and applies only in exceptional circumstances. The late transposition of directives undermines not only the safeguarding of the general interests pursued by EU legislation, where delays are unacceptable, but also and above all the protection of EU citizens who enjoy individual rights under that legislation.

- 61 The Commission submits, finally, that it is not required to calculate the ‘real risk’ of the infringement in a situation such as that at issue in the present case, which is characterised by the fact that, until the date on which the action was brought, the Republic of Slovenia had not notified any measures for transposition into national law. The Commission states that it verifies whether directives have been fully transposed into national law solely on the basis of the measures notified by the Member State concerned, and is not able to take into account in that regard whether there might be other pre-existing information with regard to the national legal system which has not been notified to it and might possibly fill gaps resulting from the transposition measures notified. Accordingly, a Member State cannot complain that the Commission confined itself to determining the amount of the penalty proposed only on the basis of the transposition measures notified to it and not on all the other measures that might exist in national legislation.
- 62 The Republic of Slovenia disputes the amount of the lump sum proposed by the Commission, claiming that it is unfounded and that it is too high. As regards, more specifically, the calculation of the amount of the lump sum, the Republic of Slovenia states that, in proceedings under Article 260(3) TFEU, the Commission cannot apply the same method of calculation as in cases brought under Article 260(2). Moreover, it is no longer appropriate to refer to the ‘n’ factor used by the Commission, since the Court has abandoned the criterion based on the number of votes available to a Member State in the Council and relies solely on the GDP of the Member State in question as the decisive factor (judgment of 14 November 2018, *Commission v Greece*, C-93/17, EU:C:2018:903, paragraph 141). At the very most, the Court could have reference to the ‘n’ factor, as determined by the Commission in its communication headed ‘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’, published on 25 February 2019 (OJ 2019 C 70, p. 1), in which it fixed the ‘n’ factor on the basis of GDP and the number of seats of the Member State at the European Parliament, if the Court considered that to be a more appropriate method for determining the lump sum than referring solely to the GDP.
- 63 Furthermore, according to the Republic of Slovenia, the Commission cannot, when asking the Court to impose financial penalties on the basis of Article 260(3) TFEU, apply the same scale of gravity from 1 to 20 as that applicable to cases under Article 260(2) TFEU. That scale should, in a situation such as that at issue in the present case, be smaller in view of the purpose of Article 260(3) TFEU. In addition, the Commission referred generally to the importance of the EU rules infringed and to the seriousness of the effects of the failure to transpose the MiFID II Directive on public and private interests, assuming a total failure to transpose that directive. By proceeding in that way, the Commission failed to take account of a number of mitigating circumstances specific to the present case. The partial transposition of that directive into the Slovenian legal system had no adverse effects on transactions on trading venues, the functioning of the market in financial instruments in Slovenia or the functioning of the internal market, the cross-border provision of services for the various investment services and activities, legal certainty or the European financial market, or undertakings and other market operators. In those circumstances, the coefficient for the seriousness of the infringement should be less than 10, so that the amount of the lump sum is appropriate to the circumstances and proportionate to the infringement.
- 64 The Republic of Slovenia adds, in that regard, that two months after the present action was brought, on 6 December 2018, it fulfilled its obligations in their entirety as regards the transposition of the MiFID II Directive and informed the Commission that it had done so, nevertheless the Commission did not reduce the amount of the lump sum sought. If the payment

of a lump sum was genuinely intended to encourage the Member States to fulfil their obligations, a Member State which, as of the first stage of the judicial infringement proceedings, has adopted transposition measures and notified them to the Commission, should not be required to pay the full amount sought by way of a lump sum.

- 65 The Republic of Estonia and the Republic of Poland submit, inter alia, that the case-law on Article 260(2) TFEU cannot be automatically applied to Article 260(3), since the purpose of Article 260(3) is to penalise an infringement that is less serious than that referred to in Article 260(2), consisting of failing to comply with a first judgment of the Court establishing an infringement. Moreover, the Republic of Slovenia cooperated in good faith with the Commission and cannot be held responsible for the delay in transposing the MiFID II Directive. Accordingly, the coefficient for the seriousness of the infringement proposed by the Commission is disproportionate and should be reduced.

– Findings of the Court

- 66 As regards, in the first place, the argument that it would be disproportionate to impose a lump sum since, in the course of the proceedings, the Republic of Slovenia put an end to the infringement at issue, it should be borne in mind, first, that the failure of a Member State to fulfil its obligation to notify measures transposing a directive, whether by providing no information at all, partial information or by providing insufficiently clear and precise information, may of itself justify recourse to the procedure under Article 258 TFEU in order to establish the failure to fulfil the obligation (judgments of 8 July 2019, *Commission v Belgium (Article 260(3) TFEU – High-speed networks)*, C-543/17, EU:C:2019:573, paragraph 51; of 16 July 2020, *Commission v Romania (Anti-money laundering)*, C-549/18, EU:C:2020:563, paragraph 64; and of 16 July 2020, *Commission v Ireland (Anti-money laundering)*, C-550/18, EU:C:2020:564, paragraph 74).
- 67 Secondly, the objective pursued by the introduction of the system set out in Article 260(3) TFEU is not only to induce Member States to put an end as soon as possible to a breach of obligations which, in the absence of such a measure, would tend to persist, but also to simplify and speed up the procedure for imposing financial penalties for failures to comply with the obligation to notify a national measure transposing a directive adopted through a legislative procedure, it being specified that, prior to the introduction of such a system, it might be years before a financial penalty was imposed on Member States which had failed to comply in a timely manner with an earlier judgment of the Court and failed to respect their obligations to transpose a directive (judgments of 8 July 2019, *Commission v Belgium (Article 260(3) TFEU – High-speed networks)*, C-543/17, EU:C:2019:573, paragraph 52; of 16 July 2020, *Commission v Romania (Anti-money laundering)*, C-549/18, EU:C:2020:563, paragraph 64; and of 16 July 2020, *Commission v Ireland (Anti-money laundering)*, C-550/18, EU:C:2020:564, paragraph 74).
- 68 It should be noted that, in order to attain the objective pursued by Article 260(3) TFEU, provision is made for two types of financial penalty, namely a lump sum and a penalty payment.
- 69 In that regard, it is apparent from the Court's case-law that application of each of those measures depends on their respective ability to meet the objective pursued according to the circumstances of the case. While the imposition of a penalty payment seems particularly suited to inducing a Member State to put an end as soon as possible to a breach of obligations which, in the absence of such a measure, would tend to persist, the imposition of a lump sum is based more on assessment of the effects on public and private interests of the failure of the Member State concerned to comply with its obligations, in particular where the breach has persisted for a long

period (judgments of 16 July 2020, *Commission v Romania (Anti-money laundering)*, C-549/18, EU:C:2020:563, paragraph 66, and of 16 July 2020, *Commission v Ireland (Anti-money laundering)*, C-550/18, EU:C:2020:564, paragraph 76).

- 70 In those circumstances, an application by which the Commission seeks, as in the present case, the imposition of a lump sum cannot be dismissed as disproportionate solely because it concerns a failure to fulfil obligations which, having persisted over time, came to an end by the time of the Court's examination of the facts at issue.
- 71 As regards, in the second place, whether it is appropriate for a financial penalty to be imposed in the present case, it should be borne in mind that, in each case, it is for the Court to determine, in the light of the circumstances of the case before it and according to the degree of persuasion and deterrence which appears to it to be required, the financial penalties that are appropriate, in particular, for preventing the recurrence of similar infringements of EU law (judgments of 8 July 2019, *Commission v Belgium (Article 260(3) TFEU – High-speed networks)*, C-543/17, EU:C:2019:573, paragraph 78; of 16 July 2020, *Commission v Romania (Anti-money laundering)*, C-549/18, EU:C:2020:563, paragraph 68; and of 16 July 2020, *Commission v Ireland (Anti-money laundering)*, C-550/18, EU:C:2020:564, paragraph 78).
- 72 In the present case, it must be found that, notwithstanding the fact that the Republic of Slovenia cooperated with the Commission services throughout the pre-litigation procedure, kept those services informed of the progress of the procedure for the adoption of measures transposing the MiFID II Directive, and made efforts which enabled it, in the course of the proceedings, to put an end to the infringement complained of, all the legal and factual circumstances culminating in the breach of the obligations established – namely, the total failure, by the expiry of the period prescribed in the reasoned opinion and even at the date on which the present action was brought, to notify the measures necessary to transpose that directive – indicate that if the future repetition of similar infringements of EU law is to be effectively prevented, a dissuasive measure must be adopted, such as a lump sum payment (judgments of 16 July 2020, *Commission v Romania (Anti-money laundering)*, C-549/18, EU:C:2020:563, paragraph 69, and of 16 July 2020, *Commission v Ireland (Anti-money laundering)*, C-550/18, EU:C:2020:564, paragraph 79).
- 73 That assessment is not called in question by the line of argument set out in paragraph 53 above. First of all, as has been pointed out in that paragraph, it is for the Commission, in particular, to assess whether it is appropriate to take action against a Member State and to choose when to initiate infringement proceedings against that Member State. Next, it is not disputed in the present case, that, unlike the Republic of Slovenia, the Kingdom of Spain notified the Commission of measures transposing the MiFID II Directive within the period prescribed for that purpose. Lastly, it is not claimed that the deadlines for replying which, in the present case, were set out in the letter of formal notice and the reasoned opinion were particularly short or unreasonable and were such as to call in question the objectives of the pre-litigation procedure, namely to give the Member State concerned an opportunity to comply with its obligations under EU law and to avail itself of its right to defend itself against the objections formulated by the Commission (judgment of 19 September 2017, *Commission v Ireland (Registration Tax)*, C-552/15, EU:C:2017:698, paragraph 28 and the case-law cited). Moreover, as is apparent from the facts set out in paragraphs 5 and 6 above, the Republic of Slovenia was fully aware of the fact that it had failed to fulfil its obligations under Article 93 of the MiFID II Directive, at least from 4 July 2017.

- 74 As regards, in the third place, the calculation of the lump sum which it is appropriate to impose in the present case, it should be borne in mind that, in exercising its discretion in the matter, as delimited by the Commission's proposals (see paragraph 51 above), it is for the Court to fix the amount of the lump sum which may be imposed on a Member State pursuant to Article 260(3) TFEU, in an amount appropriate to the circumstances and proportionate to the failure to fulfil obligations. Relevant considerations in that respect include factors such as the seriousness of the failure to fulfil obligations, the length of time for which the failure has persisted and the relevant Member State's ability to pay (judgments of 16 July 2020, *Commission v Romania (Anti-money laundering)*, C-549/18, EU:C:2020:563, paragraph 72, and of 16 July 2020, *Commission v Ireland (Anti-money laundering)*, C-550/18, EU:C:2020:564, paragraph 81).
- 75 As regards, first, the seriousness of the infringement, it should be borne in mind 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 incumbent on the Member States in order to ensure optimal effectiveness of EU law and that failure to fulfil those obligations must, therefore, be regarded as undoubtedly serious (judgments of 8 July 2019, *Commission v Belgium (Article 260(3) TFEU – High-speed networks)*, C-543/17, EU:C:2019:573, paragraph 85; of 16 July 2020, *Commission v Romania (Anti-money laundering)*, C-549/18, EU:C:2020:563, paragraph 73; and of 16 July 2020, *Commission v Ireland (Anti-money laundering)*, C-550/18, EU:C:2020:564, paragraph 82).
- 76 In addition, the MiFID II Directive is an important instrument of EU legislation applicable to financial markets in so far as it seeks to improve the competitiveness of the EU financial markets by creating a single market for investment services and activities, while ensuring a high and harmonised level of protection for investors in the financial instruments sector. The absence or inadequacy, at the national level, of rules guaranteeing the proper functioning of the financial markets and the protection of investors must be considered particularly serious in the light of their effects on public and private interests within the European Union.
- 77 Although the Republic of Slovenia did, in the course of the proceedings, put an end to the failure to notify complained of, the fact remains that that failure to fulfil obligations existed on the expiry of the period prescribed in the reasoned opinion, namely 26 March 2018, with the result that the effectiveness of EU law was not ensured at all times.
- 78 The seriousness of that failure is also augmented by the fact that, as at that date, the Republic of Slovenia still had not notified any measures transposing the MiFID II Directive.
- 79 The arguments put forward by the Republic of Slovenia for the purpose of explaining the delay in transposing the MiFID II Directive, namely the interruption of the legislative process previously commenced due to the organisation of early parliamentary elections, is not such as to affect the seriousness of the infringement at issue since, according to settled case-law, a Member State cannot rely on practices or situations prevailing in its internal legal order to justify its failure to comply with the obligations and time limits laid down by EU directives, nor therefore the late or incomplete implementation of directives (judgment of 13 July 2017, *Commission v Spain*, C-388/16, not published, EU:C:2017:548, paragraph 41).
- 80 By contrast, it is necessary to take into account, in the assessment in this case of the seriousness of the infringement, the fact that, as the Republic of Slovenia argued without being contradicted by the Commission, the practical effects of the late transposition of the MiFID II Directive into

Slovenian law on the Slovenian financial market and the other EU financial markets and on the protection of investors have remained, in view of the size of the Slovenian financial market, relatively limited.

- 81 As regards, secondly, the duration of the infringement, it should be recalled that that duration must, as a rule, be assessed by reference to the date on which the Court assesses the facts, not the date on which proceedings are brought before it by the Commission. That assessment of the facts must be considered as being made at the date of conclusion of the proceedings (judgments of 16 July 2020, *Commission v Romania (Anti-money laundering)*, C-549/18, EU:C:2020:563, paragraph 77, and of 16 July 2020, *Commission v Ireland (Anti-money laundering)*, C-550/18, EU:C:2020:564, paragraph 86).
- 82 In the present case, it is not disputed that the infringement at issue came to an end on 6 December 2018, that is before the conclusion of those proceedings.
- 83 As regards the beginning of the period which must be taken into account in order to set the amount of the lump sum to be imposed pursuant to Article 260(3) TFEU, the Court has held that, unlike the daily penalty payment, the relevant date for evaluating the duration of the infringement at issue is not the date of expiry of the period prescribed in the reasoned opinion, but the date of expiry of the transposition period laid down in the directive in question (judgments of 16 July 2020, *Commission v Romania (Anti-money laundering)*, C-549/18, EU:C:2020:563, paragraph 79, and of 16 July 2020, *Commission v Ireland (Anti-money laundering)*, C-550/18, EU:C:2020:564, paragraph 90).
- 84 In the present case, it is not in dispute that, on the expiry of the transposition period laid down in Article 93 of the MiFID II Directive, namely 3 July 2017, the Republic of Slovenia had not adopted all of the laws, regulations and administrative provisions necessary to ensure that that directive was transposed and nor had it, therefore, notified to the Commission the measures transposing that directive. It follows that the failure to fulfil obligations at issue, which did not come to an end until 6 December 2018, persisted for approximately 17 months.
- 85 Thirdly, as regards the ability to pay of the Member State concerned, it is apparent from the Court's case-law that it is necessary to take account of recent trends in that Member State's GDP at the time of the Court's examination of the facts (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).
- 86 Having regard to all the circumstances of the present case and in the light of the Court's discretion under Article 260(3) TFEU, which provides that the Court cannot, as regards the payment of the lump sum imposed by it, exceed the amount specified by the Commission, it must be held that the effective prevention of future repetition of similar infringements to that of Article 93 of the MiFID II Directive undermining the full effectiveness of EU law requires the imposition of a lump sum in the amount of EUR 750 000.
- 87 The Republic of Slovenia must, therefore, be ordered to pay the Commission a lump sum of EUR 750 000.

Costs

- 88 Under Article 138(1) of the Rules of Procedure of the Court, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs to be awarded against the Republic of Slovenia and the Republic of Slovenia has been unsuccessful, the latter must be ordered to bear its own costs and pay those incurred by the Commission.
- 89 In accordance with Article 140(1) of those rules, under which Member States which have intervened in the proceedings are to bear their own costs, the Federal Republic of Germany, the Republic of Estonia, the Republic of Austria and the Republic of Poland must be ordered to bear their own costs.

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

- 1. Declares that, by failing to adopt or, in any event, by failing to notify to the European Commission, by the expiry of the period prescribed in the reasoned opinion, the laws, regulations and administrative provisions necessary to comply with Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU, as amended by Directive (EU) 2016/1034 of the European Parliament and of the Council of 23 June 2016, the Republic of Slovenia has failed to fulfil its obligations under Article 93 of Directive 2014/65, as amended by Directive 2016/1034;**
- 2. Orders the Republic of Slovenia to pay the European Commission a lump sum in the amount of EUR 750 000;**
- 3. Orders the Republic of Slovenia to bear its own costs and to pay those incurred by the European Commission;**
- 4. Orders the Federal Republic of Germany, the Republic of Estonia, the Republic of Austria and the Republic of Poland to bear their own costs.**

[Signatures]