Reports of Cases

OPINION OF ADVOCATE GENERAL
COLLINS
delivered on 8 December 2022 [1]

Case C-692/20

European Commission
v

United Kingdom of Great Britain and Northern Ireland

(Failure of a Member State to fulfil obligations – Directive 95/60/EC – Fiscal marking of gas oils – Failure to comply with a judgment – Article 260(1) TFEU – Imposition of a lump sum payment – Article 260(2) TFEU – Gravity of the infringement – Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community – Protocol on Ireland/Northern Ireland – Persistence of the infringement after the end of the transition period in respect of Northern Ireland – Consequences for the calculation of the lump sum payment)

I. Introduction

1. In its judgment of 17 October 2018 in *Commission* v *United Kingdom* (C-503/17, not published, EU:C:2018:831; 'the judgment in Case C-503/17'), the Court held [2] that, by allowing the use of marked fuel [3] for the purpose of propelling private pleasure craft, even where that fuel is not subject to any exemption from or reduction in excise duty, the United Kingdom of Great Britain and Northern Ireland had failed to fulfil its obligations under Council Directive 95/60/EC of 27 November 1995 on fiscal marking of gas oils and kerosene. [4]

2. On 21 December 2020, the European Commission brought the present action under Article 260 TFEU against the United Kingdom, seeking a declaration that it had failed to comply with the judgment in Case C-503/17 and requesting that the Court impose a financial penalty.

3. The present action has at least three novel features. First, it is the only one of its kind taken against the United Kingdom during its membership of the European Union. Second, it commenced during the transition period laid down in the Agreement on the withdrawal of the

1 Original language: English.

2 Paragraph 46 of that judgment.

3 'Marked fuel' is fuel to which a fiscal marker in the form of a dye has been added under fiscal supervision before the product is released for consumption.

4 OJ 1995 L 291, p. 46. Directive 95/60 promotes the completion and functioning of the internal market by facilitating the identification of gas oil not subject to taxation at the full rate. A fiscal marker must be applied to gas oils and kerosene (other than jet fuel) which are exempt from excise duty or are subject to excise duty at a rate other than the standard rate applicable to mineral oils used as motor fuel. That marked fuel is sometimes referred to as 'red diesel' in the United Kingdom and Ireland.

United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community ('the Withdrawal Agreement').[5] Third, at the expiry of that transition period, the United Kingdom was obliged to comply with the judgment in Case C-503/17 in respect of Northern Ireland only.[6] In ruling upon this action, the Court is thus required to determine whether the last of these three features (a) mitigates the seriousness of the infringement and/or (b) has the consequence that the gross domestic product (GDP) of Northern Ireland, as distinct from that of the United Kingdom, is to be used to calculate the lump sum payment.

II. Pre-litigation procedure

4. By letter of 22 October 2018, the Commission asked the United Kingdom to outline, within a period of two months, the measures that it planned to take to comply with the judgment in Case C-503/17, delivered on 17 October 2018. The United Kingdom replied by letter of 19 December 2018. It explained the practical difficulties that it faced to achieve such compliance.[7] It indicated its intention to prohibit the use of marked fuel to propel private pleasure craft by enacting primary legislation in 2019 and by laying the requisite secondary legislation before Parliament in 2020.

5. Having received no further information, the Commission issued a letter of formal notice to the United Kingdom on 15 May 2020, to the effect that the latter had not yet taken the measures necessary to comply with the judgment in Case C-503/17. That letter requested observations within four months of its receipt, after which the Commission could refer the matter to the Court under Article 260(2) TFEU.

6. In the course of a telephone conference held on 12 August 2020, the United Kingdom explained to the Commission's services that, whilst a further consultation with interested parties on the use of marked fuel was ongoing, the relevant primary legislation had been enacted and that it would proceed to adopt the requisite secondary legislation.

7. The United Kingdom replied to the letter of formal notice on 11 September 2020. It explained that, as a consequence of the general election held in December 2019, no finance bill had been enacted in that year. Responses to the aforementioned consultation also disclosed a number of challenges of a practical nature to implementation of measures to bring about compliance with the judgment in Case C-503/17. The United Kingdom indicated that a further public consultation would close on 1 October 2020, after which it would decide when to remove the entitlement to use marked fuel to propel private pleasure craft.

5 OJ 2020 L 29, p. 7.

6 See the Protocol on Ireland/Northern Ireland, and points 56 to 57 of the present Opinion.

7 See point 13 of the present Opinion.

III. Procedure before the Court

8. Having received no further communication from the United Kingdom, the Commission brought the present action on 21 December 2020.[8] It requests the Court to:

– declare that, by failing to take the necessary measures to comply with the judgment in Case C-503/17, the United Kingdom failed to fulfil its obligations under Article 260(1) TFEU, read in conjunction with Articles 127 and 131 of the Withdrawal Agreement;

– order the United Kingdom, pursuant to Article 260(2) TFEU, read in conjunction with Articles 127 and 131 of the Withdrawal Agreement, to pay to the Commission a lump sum of EUR 35 873.20 multiplied by the number of days between the date on which the judgment in Case C-503/17 was pronounced and either the date on which the United Kingdom complies with that judgment or the date of the judgment in the present proceedings, whichever is earlier, with a minimum lump sum of EUR 8 901 000;

– order the United Kingdom to pay the costs of the present proceedings.

9. The United Kingdom subsequently informed the Commission that secondary legislation made on 28 June 2021 gave effect to the provisions of the Finance Act 2020[9] and prohibited the use of marked fuel to propel private pleasure craft in Northern Ireland with effect from 1 October 2021.[10] By letter of 11 February 2022 to the Court, the Commission indicated that, for that reason, it withdrew the head of claim in the application to impose a daily penalty. It nevertheless maintained the head of claim to impose a lump sum payment for non-compliance between 17 October 2018, the date of the judgment in Case C-503/17, and 30 September 2021, the date upon which the United Kingdom had complied therewith.

10. On 28 September 2022, a hearing took place at which the Commission and the United Kingdom presented oral argument and responded to the Court's questions.

IV. Analysis

A. Did the Commission give the United Kingdom sufficient time to comply with the judgment in Case C-503/17?

1. The parties' arguments

11. The Commission's letter of formal notice of 14 May 2020 sought observations from the United Kingdom within four months of its receipt, namely 15 September 2020 ('the assessment date'). The Commission's view is that the present action is justified because, by not complying with the judgment in Case C-503/17 by the assessment date, the United Kingdom failed to fulfil

[8] See Articles 86 and 89 of the Withdrawal Agreement regarding the Court's jurisdiction in pending cases and the binding force and enforceability of its judgments and orders on and in the United Kingdom.

[9] See section 89 of and schedule 11 to the Finance Act 2020.

[10] The Finance Act 2020, schedule 11 (Appointed Day) (Northern Ireland) Regulations 2021. See also United Kingdom guidance entitled *Fuel used in private pleasure craft and for private pleasure flying*, Excise Notice 554, section 2.

its obligations under Article 260(1) TFEU. According to the Commission, a Member State may not rely on practical difficulties to justify non-compliance with a Court judgment. In any event, the difficulties the United Kingdom describes do not justify its delay in achieving compliance.

12. The United Kingdom submits that both the Commission's letter of formal notice and the commencement of the Article 260 TFEU procedure were premature. It is a corollary of the requirement in the case-law that a Member State achieve compliance with a Court judgment as soon as possible that, when assessing if a Member State has had sufficient time to comply therewith, the Commission takes due account of any practical obstacles to the achievement of that result.

13. The United Kingdom contends that the Commission confused legal or political difficulties with certain tangible practical difficulties that confronted it. Among these, it identified the length of the United Kingdom's coastline; the large number of ports and harbours of varying size; the viability of smaller ports supplying unmarked fuel to private pleasure craft and marked fuel to commercial vessels; and the difficulty of obtaining planning permission to install second tanks in sensitive marine environments. Issues arose as to the deterioration of fuel when stored for long periods of time as a consequence of it being sold in small quantities. The unavailability of unmarked fuel might cause private pleasure craft operators to store such fuel on board their vessels or to purchase marked fuel without paying the correct amount of duty.[11] Boats without two tanks to facilitate the separate storage of fuel for propulsion and fuel for cooking and heating would encounter difficulties, as would vessels that are put to commercial use for part of the year and recreational use for another part.

14. At the very least, the Commission ought to have explained why it considered that those practical difficulties did not justify giving the United Kingdom additional time to comply with the judgment in Case C-503/17.

15. The United Kingdom also observes that, in the seven months immediately prior to the assessment date, the COVID-19 pandemic, which affected the United Kingdom more than most other countries in Europe, created additional challenges to effecting compliance.

16. The rejoinder submits that, if a failure to adopt appropriate measures by the assessment date contained in the letter of formal notice automatically gives rise to a violation of Article 260 TFEU, that confers excessive power on the Commission to determine the date by which such compliance must be achieved. Moreover, the Commission has on occasion afforded different Member States different periods of time for that purpose. It refers to a number of cases where the deadline afforded for compliance in the letter of formal notice was longer than in the present case and where a further considerable period of time was permitted to elapse between the issue of the letter of formal notice and the commencement of Article 260 TFEU proceedings. Such differences in approach are, in the United Kingdom's submission, impermissible breaches of the principle of equal treatment.

2. Assessment

17. Article 260 TFEU does not specify any period of time within which a Court judgment declaring a Member State to have failed to fulfil its obligations must be complied with. Settled case-law is to the effect that the importance of immediate and uniform application of EU law

[11] Point 38 of the present Opinion describes the measures the United Kingdom adopted in 2008.

requires the process of compliance to be initiated at once and to be completed as soon as possible.[12] It seems uncontroversial that Member States must be afforded a reasonable period of time within which to take the measures necessary to achieve compliance.[13] The parties agree that 15 September 2020 is the date upon which the existence of an infringement is to be assessed for the purposes of Article 260 TFEU.[14] It follows that the Commission afforded the United Kingdom four months to respond to the letter of formal notice and 23 months within which to comply with the judgment in Case C-503/17. The present action commenced on 21 December 2020, three months after the assessment date.

18. It is settled case-law that infringement proceedings are based on an objective finding that a Member State has failed to fulfil its obligations under EU law. A Member State may thus not rely on provisions, practices or situations prevailing in its domestic legal order to justify a failure to observe those obligations.[15] Moreover, the Court's case-law provides no support for the distinction that the United Kingdom seeks to draw between legal and political difficulties, which it recognises cannot justify undue delay in complying with a Court judgment, and practical problems or obstacles, which it considers may do so.

19. The Court rejected a Member State's argument that a situation of *force majeure* and funding difficulties in relation to a construction project hindered its ability to comply with a Court judgment concerning the treatment of urban waste water.[16] The Court also rejected arguments that non-compliance could be justified by the complications and cost attendant upon the development and implementation of a programme to close down illegal landfills.[17] In the context of State aid, neither the difficulty in identifying the recipients of unlawful aid,[18] nor problems in quantifying the sums to be recovered,[19] were accepted as legitimate justifications for non-compliance with a Court judgment. The Court also did not accept a submission that violent demonstrations could justify a delay in implementing a Court judgment to the effect that a Member State had failed to implement an EU directive.[20]

20. In line with that case-law, the difficulties the United Kingdom describes are to be equated with a situation prevailing in that State's domestic legal order that do not justify a failure to observe obligations arising under EU law.

21. There is no doubt that the United Kingdom intended to achieve compliance by way of enacting legislation, which is not in itself complicated or challenging. In fact, the practical difficulties to which the United Kingdom refers, and upon which it also relied in Case C-503/17, relate predominantly to costs that fuel suppliers in ports and harbours were likely to incur in

12 See, for example, judgment of 22 February 2018, *Commission* v *Greece* (C-328/16, EU:C:2018:98, paragraph 100 and the case-law cited).

13 Opinion of Advocate General Mischo in *Commission* v *Spain* (C-278/01, EU:C:2003:342, points 31 and 32), and judgment of 25 November 2003, *Commission* v *Spain* (C-278/01, EU:C:2003:635, paragraphs 30 and 31).

14 See, for example, judgments of 25 June 2013, *Commission* v *Czech Republic*, (C-241/11, EU:C:2013:423, paragraph 23 and the case-law cited), and of 12 November 2019, *Commission* v *Ireland (Derrybrien Wind Farm)* (C-261/18, EU:C:2019:955, paragraph 84 and the case-law cited).

15 See, for example, judgment of 15 October 2015, *Commission* v *Greece* (C-167/14, not published, EU:C:2015:684, paragraph 35 and the case-law cited).

16 Judgment of 22 June 2016, *Commission* v *Portugal* (C-557/14, EU:C:2016:471, paragraphs 33 and 41 and the case-law cited).

17 Judgment of 2 December 2014, *Commission* v *Greece* (C-378/13, EU:C:2014:2405, paragraphs 24 and 29 and the case-law cited).

18 Judgment of 17 November 2011, *Commission* v *Italy* (C-496/09, EU:C:2011:740, paragraph 87 and the case-law cited).

19 Judgment of 7 July 2009, *Commission* v *Greece* (C-369/07, EU:C:2009:428, paragraph 45 and the case-law cited).

20 Judgment of 9 December 2008, *Commission* v *France* (C-121/07, EU:C:2008:695, paragraph 72 and the case-law cited).

complying with legislation that correctly transposed Directive 95/60. In that context, the United Kingdom does not explain how the delay in compliance with the judgment in Case C-503/17 alleviated those costs, rather than merely deferring them.

22. The COVID-19 pandemic is the other practical difficulty that the United Kingdom relies upon in this context. Contemporaneous correspondence between the United Kingdom and the Commission does not mention the COVID-19 pandemic. Absent details as to how the COVID-19 pandemic delayed compliance with the judgment in Case C-503/17, it is difficult to accept it as a legitimate justification for that delay.

23. In the present context, it is also of some relevance that the matter of the United Kingdom's non-compliance with Directive 95/60 has, in one way or another, been the subject of discussions with the Commission since the expiry of the derogation from Directive 95/60 in 2006.[21] Moreover, as the Commission points out, Ireland complied with the judgment in *Commission* v *Ireland*,[22] which involved a similar case of non-compliance with Directive 95/60, by enacting legislation that entered into force on 1 January 2020.

24. I am therefore of the opinion that the circumstances the United Kingdom relies on do not, in law or in fact, support its contention that it was unable to comply with the judgment in Case C-503/17 by the assessment date.

25. The United Kingdom's argument that the Commission failed to explain in the pre-contentious phase of these proceedings why it considered that the circumstances the United Kingdom relied on were not legitimate grounds for non-compliance with the judgment in Case C-503/17 seems somewhat disingenuous. First, the United Kingdom's letter of 19 December 2018 described various obstacles to complying with the judgment and stated its intention to introduce legislative amendments in 2019 or 2020. The United Kingdom's proposed timetable therefore acknowledged the existence of these practical difficulties and took account of them. In the absence of further communication, the Commission sent the United Kingdom a letter of formal notice in May 2020, with a four-month deadline to reply thereto. The United Kingdom's reply does not refer to any doubts that it might have had about the impact of practical difficulties on its proposed timeframe for compliance. Second, as the Commission points out, the United Kingdom had raised the same practical difficulties to explain its non-compliance with Directive 95/60 in the proceedings that led to the judgment in Case C-503/17.[23] Finally, in proceedings pursuant to Article 260(2) TFEU, the Commission proposes the penalties and/or lump sum payments that it considers appropriate, leaving it to the Court to impose them. Both parties are afforded ample opportunity to put all relevant matters before the Court. The United Kingdom's submission that the Commission infringed any duty that it may have had is thus unfounded.

26. Neither am I persuaded that there is any merit in the argument, raised in the rejoinder, that the Commission acted unlawfully because there are instances where it granted Member States a longer period of time in which to comply with a Court judgment. Infringement actions do not easily lend themselves to uniform timelines. Each case is specific to its facts, and account may need to be taken of a wide range of circumstances before it is possible to determine the timing

[21] European Commission, Directorate-General for Taxation and Customs Union, *Evaluation study on the application of the provisions of the Council Directive 95/60/EC of 27 November 1995 on fiscal marking of gas oil and kerosene: final report, volume I – Main text*, Publications Office, 2018 (https://data.europa.eu/doi/10.2778/25969) ('the 2018 Evaluation Study'), p. 61.

[22] Judgment of 17 October 2018 (C-504/17, not published, EU:C:2018:832).

[23] See paragraph 39 of the judgement in Case C-503/17.

and the form of appropriate enforcement action. It is thus for the Commission to determine whether and when it is expedient to take action against a Member State for a failure to fulfil obligations.[24] The exercise of that power is subject to judicial review in the context of an Article 260 TFEU action. An argument that consists in pointing to a number of instances where other Member States, in different circumstances, were given more time to comply with Court judgments cannot, however, succeed.

27. The United Kingdom does not contest that, after the assessment date had passed, private pleasure craft operators in the United Kingdom could use marked fuel to propel their vessels. It had therefore not complied with the judgment in Case C-503/17 by that date, thereby failing to fulfil its obligations under Article 260(1) TFEU.

28. In the light of the foregoing, I advise the Court that the pre-contentious phase of these proceedings was not unlawful by reference to any of the matters the United Kingdom has raised in its written and oral pleadings.

B. The lump sum payment

1. Introduction

29. The Commission proposes that the Court impose on the United Kingdom a lump sum payment of EUR 35 873.20 per day, to be multiplied by the number of days between the date on which judgment was delivered in Case C-503/17 (17 October 2018) and the date on which the United Kingdom complied therewith (30 September 2021), yielding a total of EUR 38 743 056.

30. To determine the daily lump sum, the Commission followed the method laid down in its 2005 Communication,[25] as updated in 2019 and 2020.[26] That calculation is intended to result in a lump sum payment that has an adequate deterrent effect while respecting the principles of proportionality and equal treatment.[27] The daily lump sum the Commission proposes is based on the standard flat-rate amount of EUR 1 052,[28] multiplied by a coefficient for seriousness of 10 out of 20.[29] That result is, in turn, multiplied by an amount intended to reflect the Member State's ability to pay, referred to as the special 'n' factor, which in the United Kingdom's case is 3.41.[30]

[24] See, to that effect, judgment of 8 March 2022, *Commission* v *United Kingdom (Action to counter undervaluation fraud)* (C-213/19, EU:C:2022:167, paragraph 203 and the case-law cited).

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

[26] 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) ('the 2019 Communication') and Communication from the Commission - Updating of data used to calculate lump sum and penalty payments to be proposed by the Commission to the Court of Justice of the European Union in infringement proceedings (C(2020) 6043) (OJ 2020 C 301, p. 1) ('the 2020 Communication').

[27] Based on this methodology, the maximum lump sum payment for the United Kingdom in respect of the infringement in question is EUR 77.5 million ((1 052 × 20 × 3.41) × 1 080).

[28] 2020 Communication, section III, first paragraph, point (2).

[29] 2005 Communication, point 16.6.

[30] 2020 Communication, section III, first paragraph, point (3).

31. The United Kingdom does not contest that, according to settled case-law, a lump sum payment may be imposed in the present circumstances. [31] It nevertheless submits that, in the light of the practical difficulties that it was confronted with in seeking to comply with the judgment in Case C-503/17, the very limited impact of non-compliance and the withdrawal of the United Kingdom from the European Union, the lump sum payment should be no higher than EUR 250 000.

32. Article 260(2) TFEU confers a wide discretion on the Court in the imposition of lump sum payments. According to settled case-law, the imposition of a lump sum payment must in each individual case depend upon all of the relevant factors relating both to the characteristics of the failure to fulfil obligations and to the conduct of the Member State. It requires an assessment of both the seriousness of the infringement, including its effects on public and private interests, and its duration from the date of delivery of the judgment in question to the date upon which it is complied with. [32]

2. Seriousness of the infringement

(a) The parties' arguments

33. The Commission relies on three factors to justify its proposed seriousness coefficient of 10 on the scale of 1 to 20 established by the 2005 Communication. First, it emphasises the clarity of the obligation, also highlighted in the judgment in Case C-503/17. [33] There can have been no doubt as to the nature of the implementing measures the United Kingdom was required to take in order to comply with that judgment.

34. Second, the Commission observes that Directive 95/60 complements Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity, [34] in order to promote the completion and functioning of the internal market by allowing the easy and quick identification of gas oil not subject to taxation at the full rate. The first recital of Directive 95/60 also states that its objectives cannot be achieved by Member States individually. It therefore considers that the infringement is, in principle, serious.

35. The Commission points out that in 2011, the Excise Duty Committee considered that failure by Member States to impose the use of unmarked gas oil as propellant undermined the entire system of common fiscal marking. The Commission submits that the United Kingdom made it difficult for other Member States' authorities inspecting vessels to determine whether a particular craft carried fuel lawfully taxed at the full rate of excise duty in the United Kingdom. A considerable number of private pleasure craft operators are likely to have been affected by the United Kingdom's failure to eliminate the entitlement to use marked fuel as a propellant, although precise numbers are unknown. The Commission also refers to instances where Member State authorities fined private pleasure craft operators travelling from the United Kingdom for the use of marked fuel as a propellant.

[31] Judgment of 12 July 2005, *Commission* v *France* (C-304/02, EU:C:2005:444, paragraph 83).

[32] See, to that effect, judgment of 2 December 2014, *Commission* v *Greece* (C-378/13, EU:C:2014:2405, paragraphs 72, 73 and 76).

[33] Paragraph 44 of the judgment in Case C-503/17.

[34] OJ 2003 L 283, p. 51.

36. Third, the Commission took account of the fact that this is the first time it has taken action against the United Kingdom for failure to comply with a Court judgment.

37. The United Kingdom points out that the aim of Directive 95/60 is ancillary to the ultimate objective pursued by Directive 2003/96, which is to ensure that Member States levy minimum levels of tax on energy products. Considered in that light, the effect of any infringement was limited by legislative measures that it adopted in 2008 and 2012.

38. In 2008, it implemented a scheme whereby rebated fuel marked with red dye was made available for use in private pleasure craft subject to the following conditions. Private pleasure craft operators were required to pay the standard duty rate on fuel purchased to propel their vessels and to declare that it was being used for that purpose. A receipt was issued on the purchase of such fuel and the registered fuel supplier remitted the duty to the tax authorities. Purchasers of marked fuel for the propulsion of private pleasure craft were thereby charged the full amount of excise duty in compliance with the ultimate objective of the aforementioned directives. The tax authorities were able to verify that the correct level of duty had been paid by requiring private pleasure craft operators to produce receipts and, if necessary, by seeking confirmation of sale from the registered fuel supplier.[35] In 2012, it introduced a further requirement that purchasers of marked fuel must acknowledge that other Member States may take action should they discover that marked fuel was being used to propel private pleasure craft.[36]

39. The United Kingdom further observes that, following the end of the transition period on 31 December 2020, Directive 95/60 applies in Northern Ireland only. There are approximately 1 500 private pleasure craft in Northern Ireland, which use but a small percentage of the marked fuel consumed in the United Kingdom. From that date, therefore, the already limited impact of non-compliance was further reduced.

40. The United Kingdom concludes that a coefficient of 3 out of 20 would be appropriate to meet the seriousness of the infringement.

(b) Assessment

(1) Cooperation and previous conduct

41. In assessing the seriousness of an infringement, a Member State's cooperation with the Commission, particularly during the pre-litigation procedure, is a relevant consideration to take into account.[37]

42. On 19 December 2018, the United Kingdom responded to the Commission's first communication after the delivery of the judgment in Case C-503/17, setting out its plans to ensure compliance therewith. Thereafter it did not, however, follow its own plans. In its response to the Commission's letter of formal notice, the United Kingdom explained that its delay in that regard was due to the general election held in December 2019 and the continuance of a wider consultation as to the use of marked fuel across various sectors. Once that consultation concluded, it would decide when to remove the entitlement for private pleasure craft operators

[35] Sections 14E and 14F of the Hydrocarbon Oil Duties Act 1979 and the Hydrocarbon Oil and Bioblend (Private Pleasure-flying and Private Pleasure Craft) (Payment of Rebate etc.) Regulations 2008, SI 2008/2599.

[36] Section 14E(7A) of the Hydrocarbon Oil Duties Act 1979.

[37] See, for example, judgment of 25 June 2013, *Commission* v *Czech Republic* (C-241/11, EU:C:2013:423, paragraph 51).

to use marked fuel for propulsion, with further steps to be taken later that year. The United Kingdom enacted the required enabling legislation in July 2020, but did not achieve full compliance until October 2021, a largely unexplained deviation from the plans it had initially communicated to the Commission.

43. In particular, the United Kingdom did not explain to the Commission why two consultations, including one on wider issues, were necessary in order to effect compliance with the judgment in Case C-503/17. This is particularly so when such compliance was not at any point a matter of discretion, as the United Kingdom's response to the letter of formal notice implicitly recognised where it stated that it would comply with the judgment once the consultation had been concluded.[38] If the aim of those consultations was to provide interested parties with advance notice of the measures required to achieve compliance with national legislation, that could have been done far sooner and more effectively. Moreover, as point 21 of the present Opinion explains, I am unpersuaded that the practical difficulties the United Kingdom continued to raise over a prolonged period of time reflected any real inability to achieve compliance on its part.

44. For cooperation to constitute a mitigating factor in the assessment of the seriousness of the infringement, something more than normal interaction with the Commission is required. I would expect to see a genuine spirit of cooperation[39] evidenced by a proactive, honest and constructive dialogue with the Commission and an earnest intention to achieve compliance as soon as possible. For the reasons set out in the preceding point of the present Opinion, I do not consider that the United Kingdom's conduct reached that threshold.

45. Whilst it has been said that virtue is its own reward, in this instance the EU legal order offers at least some tangible recompense. That the United Kingdom has not previously been the defendant in an Article 260 TFEU action is an established mitigating circumstance that ought to be taken into account, as the application recognises.[40]

(2) The objective pursued

46. The establishment of the internal market under Article 3(3) TEU is one of the European Union's essential missions.[41] Directive 2003/96 aims to facilitate the proper functioning of the internal market by laying down minimum levels of taxation for most energy products. By establishing common rules for the fiscal marking of gas oil and kerosene that have not borne duty at the full rate applicable – where such fuels are used as a propellant – Directive 95/60 complements Directive 2003/96. Directive 95/60 thus promotes the completion and functioning of the internal market,[42] by allowing easy and quick identification of gas oil not subject to taxation at the full rate.[43]

[38] At least one earlier consultation on compliance with Directive 2003/96 had concluded in August 2007, after the derogation from which the United Kingdom benefited had expired (see paragraph 7.4 of the Explanatory Memorandum to the Hydrocarbon Oil and Bioblend (Private Pleasure-flying and Private Pleasure Craft) (Payment of Rebate etc.) Regulations 2008).

[39] See, by analogy, judgment of 24 June 2015, *Fresh Del Monte Produce* v *Commission and Commission* v *Fresh Del Monte Produce* (C-293/13 P and C-294/13 P, EU:C:2015:416, paragraph 184 and the case-law cited).

[40] Judgment of 30 May 2013, *Commission* v *Sweden* (C-270/11, EU:C:2013:339, paragraph 55).

[41] Judgment of 14 November 2018, *Commission* v *Greece* (C-93/17, EU:C:2018:903, paragraph 122).

[42] See paragraph 46 of the judgment in Case C-503/17.

[43] Further details of the legal context are set out in paragraphs 2 to 14 of the judgment in Case C-503/17.

47. There is no doubt that the fairness, legitimacy and efficacy of the European Union's internal market depends on all Member States acting in solidarity by a full and correct transposition of all relevant directives. A Member State's breach of its obligations relating to the proper functioning of the internal market is, in principle, a serious matter. That is all the more so when, as is the case here, those obligations are clearly laid down in the applicable legislation.

48. Points 33 to 34 of the present Opinion set out the Commission's arguments under this heading. It may, nevertheless, be observed that the 2018 Evaluation Study on the application of Directive 95/60 that it prepared concludes that, from an internal market perspective, fiscal marking is of limited relevance to the removal of obstacles to intra-EU trade. The 2018 Evaluation Study represents that the bulk of intra-EU trade concerns unmarked fuel in duty suspension which, of its nature, eliminates barriers linked to the fiscal status of products. About 80% of marked fuel is used in activities that are of an intrinsically local character, such as heating, farming, electricity generation and construction, which do not raise any issue of legal use within the European Union. [44] At the hearing, the Commission agreed that the proceedings concern only a part of the 20% of marked fuel used in cross-border activities. It nevertheless emphasised that Directive 95/60 seeks to implement an effective system of control within the European Union, which the United Kingdom failed to implement.

49. The 2018 Evaluation Study gives a useful and authoritative perspective on the relevance of fiscal marking in the removal of obstacles to intra-EU trade. The Court can accordingly take account of it in its assessment of the seriousness of the infringement.

(3) Effect on public and private interests

50. The United Kingdom contends that the measures described in point 38 of the present Opinion mitigated the effect of non-compliance since they ensured that, so far as practicable, the correct level of tax was levied and returned. The Commission submits that that consideration is irrelevant to the assessment of the seriousness of the infringement because Directive 95/60 requires the United Kingdom to ensure that marked fuel is not used to propel private pleasure craft.

51. I am not persuaded that it is appropriate to follow the narrow approach for which the Commission contends. As stated in point 46 of the present Opinion, the objective of Directive 95/60 complements that of Directive 2003/96. The Excise Duty Committee thus observed in 2011 that all Member States should impose the use of unmarked gas oil and apply the full rate applicable to gas oil used as propellant.

52. Although the measures described in point 38 of the present Opinion did not ensure compliance with Directive 95/60, it does not follow that they were incapable of mitigating the seriousness of the infringement when account is taken of the wider objectives pursued by the measures with which the United Kingdom had not complied. [45] Correctly implemented and properly enforced, those measures could have ensured that the appropriate level of duty was in fact levied and returned in the United Kingdom.

[44] Page 6 of the 2018 Evaluation Study.

[45] See also points 46 to 48 of the present Opinion.

53. The United Kingdom did not, however, provide information about the efficacy of the measures it implemented. Such measures may have been open to abuse since it is likely to have been unattractive for private pleasure craft operators to purchase marked fuel at the higher price of unmarked fuel.[46] It is clear that, contrary to what Directive 95/60 envisages, the authorities could not rely on spot checks to ensure that the correct rate of duty had been paid on fuel used to propel private pleasure craft. Instead, they had to check fuel receipts and logbooks, if available, to ascertain whether the fuel in the tank was the fuel to which a given receipt pertained. In theory, the United Kingdom authorities were able to verify purchases with the registered fuel supplier that issued the receipt, but the Court was not informed that any system was in place to facilitate other Member States' authorities in verifying such purchases.

54. In terms of the impact on private interests, it is relevant that, as the United Kingdom accepts, private pleasure craft operators from the United Kingdom faced a threat of enforcement action in other Member States notwithstanding that they had complied with United Kingdom law.[47] The Commission provided evidence that some were prosecuted; others may simply have decided not to leave United Kingdom waters. Moreover, those who wished to avoid difficulties with the authorities of other Member States as a result of using marked fuel to propel their private pleasure craft were less easily able to obtain unmarked fuel. This is because fuel suppliers in ports and harbours in the United Kingdom had less incentive to provide unmarked fuel, as compared to the situation that would have pertained had the United Kingdom transposed Directive 95/60 and complied with the judgment in Case C-503/17. That circumstance would have also affected private pleasure craft operators from other Member States that wished to refuel in the United Kingdom.

55. The 2008 measures may have gone some way towards mitigating the effect on public interests within the United Kingdom; to what extent depends on the degree of compliance by private pleasure craft operators and fuel suppliers with those measures. Moreover, the measures did not materially assist verification by other Member States' authorities that the correct duty had been paid on fuel used to propel private pleasure craft travelling from the United Kingdom. There was thus little or no mitigation of the infringement's impact on private interests engaged in the cross-border movement of private pleasure craft. The mitigating effect of the 2008 and 2012 measures thus appears to be of minor significance in the assessment of the seriousness of the infringement.

(4) Northern Ireland

56. The Withdrawal Agreement was adopted on 17 October 2019 and entered into force on 1 February 2020. Article 126 thereof provides that the transition period commences on the date of its entry into force and ends on 31 December 2020. According to Article 127(1) and Article 131 thereof, EU law shall be applicable to and in the United Kingdom during the transition period.

57. The Commission and the United Kingdom agree that, after the end of the transition period, in accordance with the Protocol on Ireland/Northern Ireland, in particular Article 8, regarding the collection of VAT and excise duties, and Annex 3 to the Protocol, read in conjunction with

[46] The United Kingdom mentions this in the context of the obstacles it faced in achieving compliance (see the summary in point 13 of the present Opinion).

[47] This appears to have been the motivation for the 2012 measures. I am therefore unpersuaded that those measures had a material mitigating effect on public and private interests.

Article 185 of the Withdrawal Agreement, the United Kingdom was obliged to comply with Directive 95/60, and therefore with the judgment in Case C-503/17, in respect of Northern Ireland only. [48]

58. The United Kingdom's argument that this merits a lower lump sum payment suffers from a core deficiency that it could be interpreted to mean that an infringement by a 'small' Member State is inherently less serious than an infringement by a 'large' Member State. [49] The Court's case-law does not support that proposition.

59. It is nevertheless indisputable that the effect of non-compliance, considered in points 50 to 55 of the present Opinion, was reduced in the period from 31 December 2020 to the date of compliance, as compared to the preceding period, since its impact was limited to private pleasure craft operators in Northern Ireland only. [50] The geographic scope of the effect of non-compliance was thus more limited in the second period as compared to the first.

60. Taking account of this element is consonant with both the 2005 Communication [51] and the Court's case-law. By way of example, in *Commission* v *Slovenia*, the Court held, in the context of applying Article 260(3) TFEU, that the practical effects of the tardy transposition of 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 [52] into the law of Slovenia on the Slovenian financial market, the other EU financial markets and the protection of investors was limited given the size of that Member State's financial market. [53]

61. Nor do I consider that that approach conflicts with the *Commission* v *Spain* judgment, [54] which involved a failure to recover unlawful State aid. The Court observed that, taking into account the amount of the aid at issue, the number of recipients and the multi-sectoral nature of the aid scheme, the seriousness of that Member State's failure to recover the aid was not attenuated by the fact that it affected a single autonomous region and not the entirety of its territory. [55] That conclusion follows from the fact that illegal State aid has, by definition, an effect on inter-State trade regardless of the location of the aid beneficiaries. For those reasons, a valid analogy cannot be drawn between the circumstances in which that judgment was decided and those of the present case as outlined in point 59 of the present Opinion.

62. For the sake of completeness, it may be added that the United Kingdom does not contend that the power to direct compliance with the judgment in Case C-503/17 fell within the scope of the matters devolved to Northern Ireland. Even if it had, it should be borne in mind that the Court

[48] The Commission's heads of claim do not refer to Article 185 of the Withdrawal Agreement (see point 8 of the present Opinion). The United Kingdom nevertheless defended the claim on the understanding that it included a period of non-compliance with the judgment in Case C-503/17 after the end of the transition period. It, moreover, took no objection based on vires or on any discrepancy between the heads of claim and its substance.

[49] Applying those adjectives to the population of the Member States, five have a population approximately the same as, or smaller than, Northern Ireland: Estonia, Cyprus, Latvia, Luxembourg and Malta.

[50] On 1 January 2020, Ireland complied with the judgment of 17 October 2018, *Commission* v *Ireland* (C-504/17, not published, EU:C:2018:832).

[51] See the 2005 Communication, paragraph 16.4: 'the degree of seriousness could be considered less if the infringement does not concern the whole of the Member State in question'.

[52] OJ 2014 L 173, p. 349.

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

[54] Judgment of 13 May 2014, *Commission* v *Spain* (C-184/11, EU:C:2014:316).

[55] Judgment of 13 May 2014, *Commission* v *Spain* (C-184/11, EU:C:2014:316, paragraph 81 and 82).

has held that the internal allocation of central and regional powers has no bearing on the application of Article 260 TFEU, since the Member State concerned is always answerable to the European Union for compliance with its EU law obligations. [56]

63. Overall, I am of the view that the circumstance that, following the end of the transition period on 31 December 2020, the United Kingdom was required to comply with Directive 95/60 and the judgment in Case C-503/17 in respect of Northern Ireland only, merits a reduction of the seriousness coefficient for the period between 1 January 2021 and 30 September 2021.

(c) Overall assessment of seriousness of the infringement

64. In the light of the mitigating factors that I have identified, namely: (i) this is the first occasion upon which the United Kingdom is being made to answer for non-compliance with a Court judgment; (ii) the reduced scope of the injury to attaining the objectives of Directive 95/60 as disclosed by the 2018 Evaluation Study's conclusions; and (iii) the effect of the measures the United Kingdom introduced in 2008, I propose that the Court arrive at a seriousness coefficient of 8 out of 20. [57]

65. To reflect the circumstance that, between 1 January 2021 and 30 September 2021, the United Kingdom's obligation to comply with Directive 95/60 and the judgment in Case C-503/17 was limited to the territory of Northern Ireland, I advise that the seriousness coefficient be further reduced to 4 out of 20 with respect to that period.

3. The special 'n' factor: ability to pay

(a) The parties' arguments

66. The Commission considers that the special 'n' factor, calculated on the basis of Member States' GDP [58] and their institutional weighting as reflected in the number of seats allocated to their national delegation in the European Parliament, [59] is an appropriate multiplier because it ensures that the lump sum payment has a sufficient deterrent effect, is proportionate to Member States' ability to pay and respects the principle of equal treatment.

67. The United Kingdom contends that the special 'n' factor of 3.41 that the Commission proposes to apply is too high. Furthermore, since it faced significant economic challenges in 2020, the most recent GDP figures should be used instead of the 2018 GDP data tendered in the application. It also points out that, since 1 February 2020, it has no seats in the European Parliament so the special 'n' factor should not take account of it.

68. The Commission contends that it is irrelevant that the United Kingdom no longer has any seats in the European Parliament. It observes that, in the special 'n' factor formula used to calculate financial sanctions that may be imposed on the United Kingdom following its withdrawal from the European Union, the element of the calculation relating to the number of

[56] Judgment of 13 May 2014, *Commission* v *Spain* (C-184/11, EU:C:2014:316, paragraph 43 and the case-law cited).

[57] See (i) point 45, (ii) points 48 to 49 and (iii) points 52 to 55 of the present Opinion.

[58] 2020 Communication, section I, fourth paragraph.

[59] The formula for the calculation of the special 'n' factor, based on the number of seats in the European Parliament, appears in footnote 12 of the 2019 Communication.

seats in the European Parliament was replaced by a fixed numerical factor of 2.8. That factor corresponds to the United Kingdom's share of seats in the European Parliament in 2018 in relation to the EU average, yielding a special 'n' factor of 3.7.[60] These facts undermine the United Kingdom's assertion that the Commission has proposed too high a special 'n' factor in the present case.

69. The United Kingdom reiterates that, from the end of the transition period, its obligation to comply with the judgment in Case C-503/17 was limited to Northern Ireland. According to recently published figures, Northern Ireland represented 2.25% of the United Kingdom's GDP in 2020, a fact that the special 'n' factor ought to reflect.

70. At the hearing, the United Kingdom emphasised that the extent of its obligations under EU law is much reduced following its withdrawal from the European Union. As a result, the United Kingdom is in a different position as compared to the Member States, notably as regards deterrence, such as would justify a difference in treatment in that regard. Since deterrence is less important, it can be achieved equally by the imposition of a lower lump sum payment. The Commission disagrees with that submission.

(b) Assessment

71. It is settled case-law that, in determining the lump sum payment, account must be taken of recent GDP data.[61] At the hearing, the representative of the United Kingdom stated that the United Kingdom's nominal GDP for 2020, as published by the Office for National Statistics in the Blue Book 2021, was 2 156 073 million. It is my understanding that that figure is in pound sterling (GBP). Based on an average GBP to EUR exchange rate in 2020 of 1.1248, United Kingdom GDP for 2020 is EUR 2 425 151 million.

72. The parties agree that the United Kingdom has assumed obligations under the Withdrawal Agreement of which the Protocol on Ireland/Northern Ireland is a part. Compliance with Directive 95/60 and the judgment in Case C-503/17 features among those obligations. The objective of imposing a lump sum payment is to punish past failure to comply and to deter future non-compliance. The United Kingdom did not comply with the judgment by the assessment date, and it is the United Kingdom – not Northern Ireland – that is, in principle, responsible for ensuring that that will not recur.[62] It would therefore be inappropriate to take into account the GDP of Northern Ireland, instead of that of the entirety of the United Kingdom, with respect to any non-compliance after the expiry of the transition period.

73. The United Kingdom's contention that the lump sum payment should be reduced to reflect the reduced scope of the United Kingdom's EU law obligations following its withdrawal from the European Union is illogical. It would be persuasive only if the United Kingdom no longer had any obligations with respect to the European Union, which is not the case. After its withdrawal from the European Union, the United Kingdom's incentive to contribute to the maintenance of the latter's integrity and legitimacy and to act in solidarity with its Member States by complying with

[60] Section IV of Communication from the Commission - Adjustment of the calculation for lump sum and penalty payments proposed by the Commission in infringement proceedings before the Court of Justice of the European Union, following the withdrawal of the United Kingdom (OJ 2021 C 129, p. 1).

[61] See, inter alia, judgments of 7 September 2016, *Commission* v *Greece* (C-584/14, EU:C:2016:636, paragraph 81); of 22 February 2018, *Commission* v *Greece* (C-328/16, EU:C:2018:98, paragraph 101); and of 25 February 2021, *Commission* v *Spain (Personal Data Directive – Criminal law)* (C-658/19, EU:C:2021:138, paragraph 83).

[62] Protocol on Ireland/Northern Ireland, Article 12(1).

all of its obligations at EU law is not the same as when it was a Member State. These considerations lead one to the conclusion that, if anything, the lump sum payment ought to be increased, rather than decreased, in order to achieve a sufficient deterrent effect. Thus, although the United Kingdom is not in the same position as the Member States following its withdrawal from the European Union, that fact does not, in my view, reduce the importance of the deterrence element in the calculation of a lump sum payment. If anything, it is an element in favour of the Court applying a more stringent approach towards the calculation of a lump sum payment in an appropriate case.

74. In points 56 to 63 of the present Opinion, I propose that it would be appropriate to reflect the fact that, from 1 January 2021, the United Kingdom's obligation to comply with Directive 95/60 and the judgment in Case C-503/17 was limited to the territory of Northern Ireland as a mitigating factor in assessing the seriousness of the infringement. [63] Taking the GDP of Northern Ireland, rather than that of the United Kingdom, into account over the same period would have the unwarranted consequence of duplicating the impact of that element in mitigation.

75. This Court has also recently reconfirmed that GDP is the predominant factor for assessing ability to pay, and that, from the point of view of setting sufficiently dissuasive and proportionate sanctions, there is no need to take account of institutional weight as expressed by the number of votes Member States' representatives have in the European Parliament. [64] I see no reason why that approach ought not to apply here.

4. Duration

76. The parties' arguments on duration related principally to the imposition of a daily (or periodic) penalty for any period of delay after the delivery date of the judgment in the present action. Since the United Kingdom complied with the judgment in Case C-503/17 in respect of Northern Ireland on 1 October 2021, and it was no longer under an obligation to comply with respect to Great Britain after the end of the transition period, the Commission does not maintain that head of claim. I will thus not address those arguments.

77. Suffice it to say that, according to the Commission's communications, the duration of an infringement is an objective parameter in the calculation of the lump sum payment. The daily lump sum is multiplied by the number of days from 17 October 2018, the date of the judgment in Case C-503/17, to 30 September 2021, the last day of non-compliance. That approach ought to be applied here, bearing in mind that, if the Court adopts my proposals in points 64 and 65 of the present Opinion, the daily lump sum for the period from 17 October 2018 (the date of the judgment in Case C-503/17) to 31 December 2020 (the end of the transition period) will be higher than the daily lump sum for the period from 1 January 2021 (the first day following the end of the transition period) to 30 September 2021 (the last day of non-compliance with the judgment in Case C-503/17).

[63] See points 59 to 63 of the present Opinion.

[64] Judgment of 20 January 2022, *Commission* v *Greece (Recovery of State aid – Ferronickel)* (C-51/20, EU:C:2022:36, paragraphs 114 to 117), and the detailed examination of the special 'n' factor in the Opinion of Advocate General Pitruzzella in *Commission* v *Greece (Recovery of State aid – Ferronickel)* (C-51/20, EU:C:2021:534). See also judgment of 14 November 2018, *Commission* v *Greece* (C-93/17, EU:C:2018:903, paragraphs 139 and 142).

5. Assessment and calculation of the lump sum payment

78. In its judgments, the Court, in the exercise of its full discretion to impose a lump sum payment, does not give many details about the calculation or the weighting of the various factors it takes into account. In my view, the interests of transparency would be well served by including in the present Opinion the calculation that results from the assessment that I propose the Court adopt, namely:

– for the period from 17 October 2018 up to and including 31 December 2020, where: (i) the seriousness coefficient is eight; and (ii) the special 'n' factor is the square root of the GDP ratio [65] (the nominal GDP of the United Kingdom for 2020 divided by the average GDP of the 27 Member States in 2020 [66]):

  ((1 052 × 8) × 2.2) × 807 days = EUR 14 941 766;

– for the period from 1 January 2021 up to and including 30 September 2021, where: (i) the seriousness coefficient is four; and (ii) the special 'n' factor is the same as stated above:

  ((1 052 × 4) × 2.2) × 273 days = EUR 2 527 324.

79. That yields a total of EUR 17 469 090, which the Court could round down to EUR 17 million.

V. Costs

80. Under Article 138(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

81. The Commission has applied for costs. In the light of the United Kingdom's failure to comply with its obligations under Article 260(1) TFEU, it should be ordered to pay the costs, even though the Commission has been unsuccessful in its pleadings to the extent that its application envisaged the imposition of a higher lump sum payment.

VI. Conclusion

82. I propose that the Court:

– declare that the United Kingdom of Great Britain and Northern Ireland failed to fulfil its obligations under Article 260(1) TFEU, read in conjunction with Articles 127, 131 and 185 of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, by not complying with the judgment of 17 October 2018, *Commission* v *United Kingdom* (C-503/17, not published, EU:C:2018:831);

[65] It is not entirely clear from the Court's judgments whether the GDP element that must be taken into account as the predominant factor is simply the GDP ratio or the square root of the GDP ratio. The latter approach is in keeping with the Commission's communications and has the effect of smoothing the differences between lump sum payments that may be imposed on Member States. The simple GDP ratio for the United Kingdom is 4.9; using this instead of the square root of the GDP ratio (2.2) gives a total lump sum payment of EUR 39 million.

[66] The 2020 GDP of the 27 Member States published by Eurostat was EUR 13 450 460 million.

– order the United Kingdom, pursuant to Article 260(2) TFEU, read in conjunction with Articles 127, 131 and 185 of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, to pay to the European Commission a lump sum of EUR 17 million;

– order the United Kingdom to pay the costs of the present proceedings.