



Reports of Cases

JUDGMENT OF THE COURT (Grand Chamber)

15 January 2014 *

(Appeal — Compliance with a judgment of the Court of Justice establishing a failure to fulfil obligations — Periodic penalty payment — Claim for payment — Repeal of the national legislation which gave rise to the failure to fulfil obligations — Assessment by the Commission of the measures adopted by the Member State to comply with the judgment of the Court of Justice — Limits — Division of jurisdiction between the Court of Justice and the General Court)

In Case C-292/11 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 8 June 2011,

European Commission, represented by P. Hetsch, P. Costa de Oliveira and M. Heller, acting as Agents, with an address for service in Luxembourg,

appellant,

the other parties to the proceedings being:

Portuguese Republic, represented by L. Inez Fernandes and J. Arsénio de Oliveira, acting as Agents,

defendant at first instance,

supported by:

Czech Republic, represented by M. Smolek and D. Hadroušek, acting as Agents,

Federal Republic of Germany, represented by T. Henze and J. Möller, acting as Agents,

Hellenic Republic, represented by A. Samoni-Bantou and I. Pouli, acting as Agents, with an address for service in Luxembourg,

Kingdom of Spain, represented by N. Díaz Abad, acting as Agent,

French Republic, represented by G. de Bergues, A. Adam, J. Rossi and N. Rouam, acting as Agents,

Kingdom of the Netherlands, represented by C. Wissels and M. Noort, acting as Agents,

Republic of Poland, represented by M. Szpunar and B. Majczyna, acting as Agents,

* Language of the case: Portuguese.

Kingdom of Sweden, represented by A. Falk, acting as Agent,

interveners in the appeal,

THE COURT (Grand Chamber),

composed of V. Skouris, President, K. Lenaerts, Vice-President, A. Tizzano (Rapporteur), R. Silva de Lapuerta, M. Ilešič, E. Juhász, A. Borg Barthet, C.G. Fernlund and J.L. da Cruz Vilaça, Presidents of Chambers, A. Rosas, G. Arestis, A. Arabadjiev, C. Toader, E. Jarašiūnas and C. Vajda, Judges,

Advocate General: N. Jääskinen,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 5 March 2013,

after hearing the Opinion of the Advocate General at the sitting on 16 May 2013,

gives the following

Judgment

- 1 By its appeal, the European Commission seeks to have set aside the judgment of the General Court of the European Union of 29 March 2011 in Case T-33/09 *Portugal v Commission* [2011] ECR II-1429 ('the judgment under appeal'), by which the General Court annulled Commission Decision C(2008) 7419 final of 25 November 2008 ('the contested decision') requiring payment of penalty payments due pursuant to the judgment of the Court of Justice of 10 January 2008 in Case C-70/06 *Commission v Portugal* [2008] ECR I-1 ('the 2008 judgment').

Background to the dispute

- 2 By judgment of 14 October 2004 in Case C-275/03 *Commission v Portugal* ('the 2004 judgment'), the Court of Justice declared that, '[b]y failing to repeal Decree-Law No 48 051 of 21 November 1967 ("Decree-Law No 48 051"), making the award of damages to persons injured by a breach of Community law relating to public contracts, or of the national rules implementing it, conditional on proof of fault or fraud, the Portuguese Republic has failed to fulfil its obligations under ... Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33)'.
- 3 As it took the view that the Portuguese Republic had failed to comply with that judgment, the Commission decided to bring an action under Article 228(2) EC for failure to comply with the obligations imposed by the 2004 judgment.
- 4 In the 2008 judgment, the Court held, in paragraphs 16 and 17 of that judgment, that, given the wording of the operative part of the 2004 judgment, it was necessary, in order to determine whether the Portuguese Republic had adopted the measures required to ensure compliance with that judgment, to ascertain whether Decree-Law No 48 051 had been repealed. In that regard, the Court noted, in paragraph 19 of the 2008 judgment, that, on the date on which the period laid down in the reasoned opinion of 13 July 2005 had expired, the Portuguese Republic had not yet repealed that

decree-law. The Court also pointed out, in paragraph 36 of the 2008 judgment, that, as the agent of the Portuguese Republic had confirmed at the oral hearing of 5 July 2007, that decree-law was still in force on that date.

- 5 In the 2008 judgment, the Court accordingly declared, in paragraph 1 of the operative part of that judgment, that ‘by failing to repeal [Decree-Law No 48 051], the Portuguese Republic has failed to adopt the measures necessary to comply with the [2004 judgment] and has thereby failed to fulfil its obligations under Article 228(1) EC’.
- 6 In paragraph 2 of the operative part of the 2008 judgment, the Court also ordered ‘the Portuguese Republic to pay to the Commission of the European Communities, into the “European Community own resources” account, a penalty payment of EUR 19 392 for every day of delay in implementing the measures necessary to comply with the [2004 judgment], from the day on which the Court of Justice delivers judgment in the present case until the day on which the [2004 judgment] is complied with’.
- 7 On 31 December 2007, that is to say, a few days before the 2008 judgment was delivered, the Portuguese Republic adopted Law No 67/2007 laying down a system for the non-contractual civil liability of the State and other public bodies (*Diário da República*, Series 1, No 251, of 31 December 2007, p. 9117; ‘Law No 67/2007’), which deals with, inter alia, damage caused by acts of legislative, judicial or administrative bodies. That law, Article 5 of which repeals Decree-Law No 48 051, came into force on 30 January 2008.
- 8 On 28 January 2008, during a meeting between the Commission’s agents and the representatives of the Portuguese Republic, the latter claimed that, as a result of the adoption of Law No 67/2007 repealing Decree-Law No 48 051, the Portuguese Republic had taken all the measures necessary to ensure compliance with the 2004 judgment and that, therefore, the only amounts payable by the Portuguese Republic were those due for the period between the date of the delivery of the 2008 judgment, namely 10 January 2008, and the date on which Law No 67/2007 entered into force, namely 30 January 2008. The Commission, by contrast, took the view, essentially, that that law did not constitute an adequate and complete measure to ensure compliance with the 2004 judgment.
- 9 On 15 July 2008, the Commission, taking the view that the Portuguese Republic had not yet taken all the measures necessary to ensure compliance with the 2004 judgment, sent a letter to that Member State requesting payment of EUR 2 753 664 in respect of penalty payments due pursuant to the 2008 judgment for the period from 10 January 2008 to 31 May 2008.
- 10 On 4 August 2008, the Portuguese Republic replied to that letter of the Commission. It restated its position that Law No 67/2007 was in conformity with the 2004 judgment and declared that it had, nevertheless, decided to adopt Law No 31/2008 of 17 July 2008 amending Law No 67/2007 (‘Law No 31/2008’), in order to avoid prolonging the dispute as to the appropriate interpretation of Law No 67/2007.
- 11 By the contested decision, the Commission, in essence, took the view, first, that Law No 67/2007 did not constitute adequate compliance with the 2004 judgment and, second, that, as from 18 July 2008, the date on which Law No 31/2008 had come into force, the Portuguese Republic had finally complied with that judgment. The Commission therefore confirmed the request for payment of the penalty payment made in its letter of 15 July 2008 and also claimed an additional amount of EUR 911 424 corresponding to the period between 1 June 2008 and 17 July 2008.

The judgment under appeal

- 12 The Portuguese Republic brought an action before the General Court seeking annulment of the contested decision.

- 13 In the judgment under appeal, the General Court examined, as a preliminary matter, whether it had jurisdiction to deal with such an action.
- 14 To that end, it first pointed out, in paragraph 62 of the judgment under appeal, that the Commission is responsible for recovering the amounts due to the European Union budget in compliance with a judgment of the Court of Justice, delivered pursuant to Article 228(2) EC, ordering a Member State to make payment.
- 15 The General Court then went on to state, in paragraphs 63 to 65 of the judgment under appeal, that, in so far as the EC Treaty does not make any specific provision regarding the settlement of disputes arising between a Member State and the Commission in the event of such a judgment finding against a Member State, the remedies established by the EC Treaty apply. As a result, according to the General Court, the decision by which the Commission determines the amount due from the Member State in terms of the penalty payment which it has been ordered to make by the Court of Justice can be the subject of an action for annulment within the meaning of Article 230 EC. The General Court accordingly declared that it had jurisdiction to hear and determine such an action on the basis of the first subparagraph of Article 225(1) EC.
- 16 Finally, the General Court explained, in paragraphs 66 and 67 of the judgment under appeal, that, in exercising such jurisdiction, the General Court cannot, however, impinge on the exclusive jurisdiction reserved to the Court of Justice under Articles 226 EC and 228 EC and accordingly could not rule on a question relating to the infringement by the Member State of its obligations under the EC Treaty that had not previously been decided on by the Court of Justice.
- 17 On the basis of those preliminary considerations, the General Court first held, in paragraphs 68 and 69 of the judgment under appeal, basing itself on the wording of the operative part of the 2004 judgment, read in the light of the grounds adopted by the Court of Justice in paragraphs 16 to 19 of the 2008 judgment, that it was sufficient for the Portuguese Republic to repeal Decree-Law No 48 051 in order to comply with the 2004 judgment and that the penalty payment would be due until that repeal.
- 18 From this it concluded, in paragraphs 71 and 72 of the judgment under appeal, that the Commission had failed to take into account the operative part of the 2008 judgment by considering, first, that the adoption of Law No 67/2007 did not constitute adequate compliance with the 2004 judgment and, second, that the Portuguese Republic had complied with that judgment only as from 18 July 2008, the date on which Law No 31/2008 came into force. On that ground, the General Court held that the contested decision had to be annulled.
- 19 Second, the General Court examined, in paragraph 80 et seq. of the judgment under appeal, the Commission's argument that, by the 2004 and 2008 judgments, the Court of Justice had required the Portuguese Republic, in order to bring an end to the infringement established in the first of those two judgments, not simply to repeal Decree-Law No 48 051 but, more generally, to bring national legislation into line with the requirements of Directive 89/665. Consequently, according to the Commission, the failure to fulfil the obligations complained of persisted as long as Portuguese law continued to make the award of damages to persons harmed by a breach of European Union law conditional on proof of fault or fraud.
- 20 In that regard, the General Court held, in paragraphs 81 and 82 of the judgment under appeal, that the exercise by the Commission of its power to appraise the measures taken by a Member State to comply with a judgment of the Court of Justice imposing a periodic penalty must not prejudice either the procedural rights of the Member States which result from the procedure provided for in Article 226 EC or the exclusive jurisdiction of the Court of Justice to rule on the compatibility of national legislation with European Union law.

- 21 In particular, the General Court took the view, in paragraph 88 of the judgment under appeal, that the rights and duties of Member States may be determined and their conduct appraised only by a judgment of the Court of Justice ruling under Articles 226 EC to 228 EC.
- 22 Consequently, the General Court held, in paragraph 89 of the judgment under appeal, that the Commission was not entitled to decide, when verifying whether there had been compliance with the 2008 judgment, that Law No 67/2007 did not comply with European Union law and then draw conclusions from this for the calculation of the penalty payment determined by the Court of Justice. In the same paragraph, the General Court added that, in so far as it considered that the system of rules introduced by the new law did not constitute a correct transposition of Directive 89/665, the Commission should have initiated the procedure provided for in Article 226 EC.
- 23 Third, the General Court considered, in paragraph 90 of the judgment under appeal, that granting the Commission a greater discretion in relation to assessing the measures for enforcement of a judgment delivered by the Court of Justice under Article 228(2) EC would have the consequence that, when a Member State has challenged an assessment by the Commission that goes beyond the actual terms of the operative part of the judgment of the Court of Justice, the General Court would, inevitably, be required to make a ruling on the compliance of national legislation with European Union law. Such an appraisal, however, falls within the exclusive jurisdiction of the Court of Justice and not that of the General Court.
- 24 In the light of those considerations, the General Court upheld the action brought by the Portuguese Republic and annulled the contested decision.

Procedure before the Court of Justice and the forms of order sought

- 25 The Commission contends that the Court of Justice should:
- set aside the judgment under appeal;
 - give a final ruling on the questions forming the subject-matter of the present appeal and dismiss the action seeking annulment of the contested decision; and
 - order the Portuguese Republic to pay the costs of both sets of proceedings.
- 26 The Portuguese Republic contends that the appeal should be dismissed and that the Commission should be ordered to pay the costs of the proceedings at first instance and on appeal.
- 27 By order of the President of the Court of 27 October 2011, the Czech Republic, the Federal Republic of Germany, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Kingdom of the Netherlands, the Republic of Poland and the Kingdom of Sweden were granted leave to intervene in support of the form of order sought by the Portuguese Republic.

The appeal

The first part of the first ground of appeal, concerning the respective powers of the Commission and of the General Court

Arguments of the parties

- 28 The Commission contests, in essence, the interpretation by the General Court in paragraphs 82 to 89 of the judgment under appeal that the assessment of the content of new legislation adopted by a Member State to comply with a judgment of the Court of Justice delivered pursuant to Article 260(2) TFEU comes in all cases within the exclusive jurisdiction of the Court of Justice and must, in the case where there is a disagreement between the Commission and that Member State, be the subject of a fresh procedure under Article 258 TFEU.
- 29 Accordingly, by adopting such an interpretation, the General Court wrongly restricted both the powers of the Commission in the recovery of penalty payments imposed pursuant to Article 260(2) TFEU and its own powers to review acts of the Commission.
- 30 In the first place, by excluding, in paragraphs 87 to 89 of the judgment under appeal, the possibility for the Commission to assess the content of Law No 67/2007 in order to determine whether the Portuguese Republic had properly complied with the 2004 judgment and had brought the infringement to an end, the General Court impermissibly limited the Commission's powers, pursuant to which the latter implements the European Union budget and ensures that infringement proceedings are effective, to a simple 'formal review' the purpose of which is to determine whether or not Decree-Law No 48 051 had been repealed. Under that approach, when the Commission assesses whether the measures adopted by the Member State concerned make it possible for that Member State to comply with a judgment of the Court of Justice, the Commission would have to confine itself to determining whether that Member State has adopted new measures while refraining from checking whether those measures are, in the specific case, suitable for the purpose of ensuring compliance with that judgment.
- 31 In addition, in the event of disagreement between the Commission and a Member State as to whether legislation adopted by that Member State enables it to comply with a judgment delivered pursuant to Article 260(2) TFEU, if the Commission were prevented from examining that legislation in order to satisfy itself that it meets the requirements laid down by the Court of Justice and were, as a result, obliged, as held by the General Court, to bring a fresh action before the Court of Justice under Article 258 TFEU for the purpose of submitting those new provisions to the Court of Justice for review, the effectiveness of proceedings for failure to fulfil obligations, in particular the effectiveness of penalty payments, would be compromised.
- 32 In the second place, the Commission contends that the General Court's power to monitor the Commission, when reviewing the lawfulness of the contested decision, was improperly restricted.
- 33 In particular, the General Court ought to have examined the Commission's assessment of the new legislation adopted by the Portuguese Republic in order specifically to determine whether, by the contested decision, the Commission had indeed remained within the boundaries of the subject-matter of the infringement and had not erred in its evaluation of the persistence of the failure to fulfil obligations.
- 34 The General Court, by contrast, confined itself to carrying out a 'purely formal' review, by merely finding, in paragraph 84 of the judgment under appeal, that the legal situation of the Member State concerned, held by the Court of Justice not to be in conformity with Directive 89/665, had changed as a result simply of the adoption of a new law, namely Law No 67/2007, featuring 'substantial

modifications' vis-à-vis the previous system resulting from Decree-Law No 48 051, irrespective of whether that measure was capable of effectively bringing to an end the infringement established by the Court of Justice.

- 35 To allow the General Court to limit in this way its power of review would be tantamount to accepting that, for each new measure adopted by a Member State following a judgment of the Court of Justice delivered pursuant to Article 260(2) TFEU, a fresh procedure under Article 258 TFEU would in all cases have to be instituted as a matter of course. Apart from being liable to undermine the effectiveness of those provisions, such an outcome would, in the Commission's view, be in any event at variance with the very logic of proceedings for failure to fulfil obligations.
- 36 The Portuguese Republic contests these arguments of the Commission.

Findings of the Court

- 37 Under Article 260(1) TFEU, if the Court of Justice finds that a Member State has failed to fulfil an obligation under the Treaties, that State is required to take the necessary measures to comply with the judgment of the Court of Justice.
- 38 Under Article 260(2) TFEU, if the Commission considers that the Member State concerned has not taken the necessary measures to comply with such a judgment, it may bring a case before the Court of Justice requesting it to order that Member State to pay a lump sum and/or a penalty payment.
- 39 Unlike the procedure established under Article 258 TFEU, which is designed to obtain a declaration that the conduct of a Member State is in breach of European Union law and to terminate that conduct (see Joined Cases 15/76 and 16/76 *France v Commission* [1979] ECR 321, paragraph 27, and Case C-456/05 *Commission v Germany* [2007] ECR I-10517, paragraph 25), the procedure provided for under Article 260 TFEU has a much narrower ambit, since it is designed only to induce a defaulting Member State to comply with a judgment establishing a breach of obligations (Case C-304/02 *Commission v France* [2005] ECR I-6263, paragraph 80, and Joined Cases C-514/07 P, C-528/07 P and C-532/07 P *Sweden v API and Commission* [2010] ECR I-8533, paragraph 119).
- 40 Consequently, that latter procedure must be regarded as a special judicial procedure for the enforcement of judgments and, in other words, as a method of enforcement (Case C-304/02 *Commission v France*, paragraph 92). Therefore, only a failure of a Member State to fulfil its obligations under the FEU Treaty which the Court has held, on the basis of Article 258 TFEU, to be well founded may be dealt with under that procedure (Case C-457/07 *Commission v Portugal* [2009] ECR I-8091, paragraph 47).
- 41 *A fortiori*, where the Court of Justice orders the Member State concerned to pay a penalty payment, the Commission's review of the measures adopted by the Member State for the purpose of complying with such a judgment and the recovery of sums owed pursuant to the penalties imposed must be carried out having regard to the scope of the failure to fulfil obligations, as defined by the Court of Justice in its judgments delivered pursuant to Articles 258 TFEU and 260 TFEU.
- 42 In the present case, it is clear both from the operative part of the 2004 judgment and from that of the 2008 judgment that the failure to fulfil obligations established by the Court of Justice relates to the failure to repeal Decree-Law No 48 051, which made the award of financial compensation to persons injured by a breach of European Union law in the area of public contracts conditional on proof of fault or fraud.

- 43 For the purpose of complying with the 2004 judgment, the Portuguese Republic adopted Law No 67/2007. That law, which came into force a few days after the delivery of the 2008 judgment, repealed Decree-Law No 48 051.
- 44 After examining that law, however, the Commission formed the view that it did not conform to European Union law and therefore did not ensure proper compliance with the 2004 judgment.
- 45 This gave rise to a difference between the Commission and the Portuguese Republic as to the legal scope and the interpretation of Law No 67/2007, resulting in the adoption of the contested decision, in which the Commission, relying specifically on its own interpretation of the effects of that law, calculated the amount of the penalty payment imposed by the Court of Justice.
- 46 In so doing, the Commission took a view on the issue of the conformity of Law No 67/2007 with Directive 89/665, even though, as the General Court correctly held in paragraphs 83 to 85 of the judgment under appeal, that law introduced a system of liability, which the Court of Justice could not have examined beforehand, and which was distinct from that established by Decree-Law No 48 051.
- 47 It is true that, as the General Court essentially held in paragraph 81 of the judgment under appeal, when enforcing a judgment of the Court of Justice imposing a penalty payment on a Member State, the Commission must be able to assess whether the measures adopted by that Member State enable it to comply with the judgment establishing an infringement.
- 48 However, as the General Court correctly held in paragraph 82 of the judgment under appeal, that power of appraisal cannot be exercised in a manner which is prejudicial to the exclusive jurisdiction of the Court of Justice to rule on the compliance of national legislation with European Union law.
- 49 According to the system established by Articles 258 TFEU to 260 TFEU, the rights and duties of Member States may be determined and their conduct appraised only by a judgment of the Court of Justice (Case C-191/95 *Commission v Germany* [1998] ECR I-5449, paragraph 45 and the case-law cited).
- 50 The Court of Justice thus enjoys, in this regard, exclusive jurisdiction which is directly and expressly conferred on it by the Treaty and on which the Commission cannot encroach when checking whether there has been compliance with a judgment delivered by the Court of Justice pursuant to Article 260(2) TFEU.
- 51 Likewise, as it correctly pointed out in paragraph 90 of the judgment under appeal, the General Court also cannot itself give a ruling on the Commission's assessment as to whether compliance with a judgment establishing a failure to fulfil obligations can be achieved through a national practice or national legislation which has not previously been examined by the Court of Justice. Were it to do so, the General Court would, inevitably, be required to make a ruling as to whether that practice or national legislation complied with European Union law, thereby encroaching on the exclusive jurisdiction of the Court of Justice in that regard.
- 52 It follows that, in the case where, in the context of verification of compliance with a judgment delivered by the Court of Justice pursuant to Article 260 TFEU, a difference arises between the Commission and the Member State concerned as to whether national legislation or a national practice which the Court of Justice has not examined beforehand is appropriate for ensuring compliance with that judgment, the Commission cannot, by adopting a decision, resolve such a difference itself and draw from this the necessary inferences for the calculation of the penalty payment.
- 53 It is true that an action for annulment may be brought, as is the case here, against such a decision before the General Court, the judgment of which may be the subject of an appeal to the Court of Justice.

- 54 However, the analysis that the General Court would carry out, in such proceedings, of the Commission's assessment as to whether compliance with a judgment establishing a failure to fulfil obligations can be achieved through national legislation or a national practice which has not yet been examined by the Court of Justice would not only infringe, for the reasons set out in paragraphs 50 and 51 of the present judgment, the exclusive jurisdiction which the Treaty confers on the Court of Justice in the context of proceedings for failure to fulfil obligations, but would also place unwarranted restrictions on the possibility for the Court of Justice to reconsider findings of fact on which the General Court based its analysis, since the Court of Justice is not entitled to review such findings of fact in appeal proceedings.
- 55 In addition, allowing the Commission a greater margin of discretion as regards the assessment of measures designed to ensure compliance with a judgment delivered pursuant to Article 260(2) TFEU would lead to a breach of the procedural rights of defence available to the Member States in infringement proceedings.
- 56 In accordance with Articles 258 TFEU to 260 TFEU, Member States which, in the view of the Commission, have not fulfilled their obligations under European Union law are entitled, inter alia, to set out their position at a pre-litigation stage. The purpose of that stage of the procedure is to give the Member State concerned the opportunity to comply with its obligations or to present its case properly against the complaints set out by the Commission as regards its continued failure to fulfil its obligations (see, to that effect, inter alia, Case C-457/07 *Commission v Portugal*, paragraph 67 and the case-law cited).
- 57 It follows from the foregoing that, in the judgment under appeal, the General Court did not unduly limit the powers of the Commission in the verification of compliance by the Portuguese Republic with the 2008 judgment or, consequently, its own jurisdiction in relation to the review of the Commission's assessment in that regard.
- 58 That being so, the first part of the first ground of appeal must be rejected as unfounded.

The second part of the first ground of appeal, concerning the definition of the failure to fulfil obligations established by the Court of Justice in its 2004 and 2008 judgments

Arguments of the parties

- 59 By the second part of its first ground of appeal, the Commission claims that the General Court erred in law by reason of its incomplete and formalistic reading of the operative part of the 2008 judgment, thereby improperly restricting the subject-matter of the failure to fulfil obligations established by the Court of Justice in both the 2004 and 2008 judgments. The General Court wrongly held, in paragraph 69 of the judgment under appeal, that, in accordance with the operative part of the 2008 judgment, it was sufficient for the Portuguese Republic to repeal Decree-Law No 48 051 in order to comply with the 2004 judgment and that the penalty payment was therefore due only until that repeal.
- 60 The Commission contends that, on the contrary, the operative part of the 2004 judgment clearly requires the Portuguese Republic to implement the measures necessary to comply with that judgment, something which the General Court ought to have verified specifically without confining itself to determining simply that the decree-law had been repealed, which, moreover, created a legal void in Portuguese national law.

- 61 The Commission was therefore entitled, in order to ascertain whether the Portuguese Republic had complied with the 2004 judgment, confirmed by the 2008 judgment, to analyse the compatibility of Law No 67/2007 with Directive 89/665 and, having established that, in the Portuguese legislation, the award of damages continued to be conditional on proof of fault or fraud, to conclude that the failure to fulfil obligations persisted.
- 62 The Portuguese Republic contests these arguments of the Commission.

Findings of the Court

- 63 The second part of the first ground of appeal is based on the mistaken premiss that, in order to ascertain whether the Portuguese Republic had complied with the 2004 judgment, confirmed by the 2008 judgment, the Commission acted correctly in law in taking a view on the compatibility of Law No 67/2007 with Directive 89/665.
- 64 Consequently, when reviewing the assessment carried out by the Commission in the contested decision, the General Court itself ought to have specifically checked whether that law was in compliance with European Union law.
- 65 It is, however, apparent from the examination of the first part of the first ground of appeal that the Commission and the General Court cannot, in circumstances such as those in the present case, encroach on the exclusive jurisdiction reserved to the Court of Justice under Articles 258 TFEU to 260 TFEU in respect of the finding that a Member State has failed to fulfil its obligations under European Union law.
- 66 Consequently, the General Court cannot be criticised on the ground that it erred in law by failing to examine the precise legal scope of Law No 67/2007.
- 67 In those circumstances, the second part of the first ground of appeal put forward by the Commission in support of its appeal must be rejected and, therefore, that ground of appeal must be rejected as being unfounded in its entirety.

The second ground of appeal, alleging that the reasoning of the judgment under appeal is inadequate and contradictory

Arguments of the parties

- 68 The Commission claims that the General Court annulled the contested decision on the basis of inadequate and contradictory reasons in the judgment under appeal.
- 69 So far as the inadequacy of the reasoning is concerned, the Commission criticises the General Court on the ground that, for the purpose of annulling the contested decision, it relied exclusively on the fact, established in paragraph 85 of the judgment under appeal, that the Commission itself recognised, in that decision, that Law No 67/2007 makes it potentially less difficult for tenderers, who have been harmed by an unlawful act of the contracting authority, to obtain damages and, in its written pleadings, that the Portuguese legislature did not simply repeal Decree-Law No 48 051, but replaced it with a new system of rules by means of Law No 67/2007.
- 70 So far as the contradictory nature of the reasoning is concerned, the Commission contends that the General Court, while maintaining, in paragraph 81 of the judgment under appeal, that the Commission must be able to assess the measures adopted by the Member State to comply with a judgment of the Court of Justice in order to prevent that Member State from simply taking measures

that have the same content as those which were the subject of that judgment, restricted, in paragraph 87 of that judgment, the Commission's power to a purely formal review designed merely to establish whether or not Decree-Law No 48 051 had been repealed.

71 The Portuguese Republic contests these arguments of the Commission.

Findings of the Court

72 According to the Court's settled case-law, the statement of the reasons on which a judgment is based must clearly and unequivocally disclose the General Court's thinking, so that the persons concerned can be apprised of the justification for the decision taken and the Court of Justice can exercise its power of review (see, *inter alia*, Case C-202/07 P *France Télécom v Commission* [2009] ECR I-2369, paragraph 29 and the case-law cited).

73 In the present case, the General Court, in its reasoning in paragraphs 68 to 91 of the judgment under appeal, set out in detail the grounds for annulment of the contested decision, thereby satisfying the conditions mentioned in paragraph 72 above.

74 Such reasoning is indeed based on a logical, coherent and full examination of the circumstances of the present case, which starts, in paragraph 68 of the judgment under appeal, with an analysis of the scope of the 2008 judgment, read in the light of its grounds and its operative part, continues, in paragraphs 73 to 90 thereof, with an explanation of the reasons which led the General Court to reject the Commission's interpretation that the latter was entitled to determine whether Law No 67/2007 was in compliance with Directive 89/665, and concludes, in paragraph 91, with the annulment of the contested decision.

75 It must therefore be held that the Commission errs in its claim that the only ground on which the General Court justified its annulment of the contested decision is that set out in paragraph 85 of the judgment under appeal.

76 Likewise, the Commission's argument that the judgment under appeal is based on contradictory reasoning also cannot be accepted.

77 In that regard, it should be noted that, in paragraph 81 of the judgment under appeal, the General Court recognised, in general terms, the Commission's power to assess the measures taken by a Member State to comply with a judgment of the Court of Justice delivered pursuant to Article 260 TFEU.

78 However, the General Court clearly took the view, in paragraph 82 of the judgment under appeal, that that power can be used only within certain precise limits in the light, in particular, of the exclusive jurisdiction of the Court of Justice to rule on the conformity of national legislation with European Union law.

79 It is precisely on the basis of that premiss that the General Court held, in paragraphs 83 to 88 of the judgment under appeal, that, in the present case, in light of the fact that the Court of Justice had not, in the 2004 and 2008 judgments, ruled on the question whether Law No 67/2007 was in conformity with European Union law, the Commission was not entitled itself to make such an assessment or to draw inferences from this for the purposes of calculating the penalty payment.

80 In the light of the foregoing, it must be concluded that the General Court's reasoning is not vitiated by insufficient or contradictory grounds and, therefore, the second ground of appeal put forward by the Commission in support of its appeal must be rejected.

- 81 It follows from the foregoing that neither of the two grounds of appeal put forward by the Commission in support of its appeal can be upheld and that the appeal must therefore be dismissed in its entirety.

Costs

- 82 In accordance with Article 184(2) of the Rules of Procedure, where the appeal is unfounded, the Court is to make a decision as to costs. Under Article 138(1) of those Rules, which applies to the procedure on appeal by virtue of Article 184(1) of those Rules, 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 Portuguese Republic has applied for costs to be awarded against the Commission, and as the latter has been unsuccessful, the Commission must be ordered to pay the costs of the present proceedings. Under Article 140(1) of the Rules of Procedure, which also applies to appeal proceedings, the Member States which have intervened in proceedings must be ordered to bear their own respective costs.

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

- 1. Dismisses the appeal;**
- 2. Orders the European Commission to bear its own costs and to pay those of the Portuguese Republic in the present proceedings;**
- 3. Orders the Czech Republic, the Federal Republic of Germany, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Kingdom of the Netherlands, the Republic of Poland and the Kingdom of Sweden to bear their own respective costs.**

[Signatures]