Reports of Cases

JUDGMENT OF THE COURT (Grand Chamber)

22 October 2013 *

(Failure of a Member State to fulfil obligations — Judgment of the Court establishing a failure to fulfil obligations — National legislation providing for a blocking minority of 20% in respect of the adoption of certain decisions by the shareholders of Volkswagen AG)

In Case C-95/12,

ACTION under Article 260(2) TFEU for failure to fulfil obligations, brought on 21 February 2012,

European Commission, represented by E. Montaguti and G. Braun, acting as Agents, with an address for service in Luxembourg,

applicant,

v

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

defendant,

THE COURT (Grand Chamber),

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

Advocate General: N. Wahl,

Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 12 March 2013,

after hearing the Opinion of the Advocate General at the sitting on 29 May 2013,

gives the following

* Language of the case: German.

Judgment

1 In its application, the European Commission claims that the Court should:

— declare that, by failing to adopt all the measures necessary to ensure compliance with the judgment of the Court of 23 October 2007 in Case C-112/05 *Commission* v *Germany* [2007] ECR I-8995, concerning the incompatibility of certain provisions of the Law on the privatisation of equity in the Volkswagenwerk limited company (Gesetz über die Überführung der Anteilsrechte an der Volkswagenwerk Gesellschaft mit beschränkter Haftung in private Hand) of 21 July 1960 (BGBl. 1960 I No 39, p. 585, and BGBl. 1960 III, p. 641-1-1; 'the VW Law') with European Union law, the Federal Republic of Germany has failed to fulfil its obligations under Article 260(1) TFEU;

— order the Federal Republic of Germany to pay to the Commission, from the date on which judgment is delivered in the present case until the judgment in *Commission* v *Germany* has been complied with, a daily penalty payment in the amount of EUR 282 725.10 for the delay in complying with the judgment in *Commission* v *Germany*;

— order the Federal Republic of Germany to pay to the Commission, from the date of the judgment in *Commission* v *Germany* until the date on which judgment is delivered in the present case or the date on which that Member State puts an end to the infringement, a lump sum in an amount calculated by multiplying a daily amount of EUR 31 114.72 by the number of days over which the infringement has continued; and

— order the Federal Republic of Germany to pay the costs.

Background to the dispute and the judgment in *Commission* v *Germany*

2 When the VW Law was adopted, in 1960, the German Federal State and the *Land* of Lower Saxony were the two main shareholders in Volkswagenwerk GmbH ('Volkswagen'), with each holding 20% of its capital. Pursuant to that law, Volkswagen, a limited liability company, became a public limited company.

3 The German Federal State subsequently divested itself of its shareholding in that company, while the *Land* of Lower Saxony still retains, for its part, a shareholding of approximately 20%.

4 Paragraph 2(1) of the VW Law, in its version prior to the delivery of the judgment in *Commission* v *Germany*, laid down that the voting rights of a shareholder whose par value shares represented more than one fifth of the share capital were to be limited to the number of votes granted by the par value of shares equivalent to one fifth of the share capital.

5 Paragraph 4 of the VW Law, headed 'The company's articles of association', in its version prior to the delivery of the judgment in *Commission* v *Germany*, was worded as follows:

'1. The Federal Republic of Germany and the *Land* of Lower Saxony may each appoint two members to the supervisory board on condition that they hold shares in the company.

…

3. Resolutions of the general meeting which, under the Law on public limited companies, require the favourable vote of at least three quarters of the share capital represented at the time of their adoption, shall require the favourable vote of more than four fifths of the share capital represented at the time of that adoption.'

6 In its judgment in *Commission* v *Germany*, the Court, in paragraph 1 of the operative part, declared that:

'… [B]y maintaining in force Paragraph 4(1), as well as Paragraph 2(1) in conjunction with Paragraph 4(3), of the [VW Law], the Federal Republic of Germany has failed to fulfil its obligations under Article 56(1) EC.'

7 Following that judgment, the Federal Republic of Germany adopted the Law amending the Law on the privatisation of equity in the Volkswagenwerk limited company (Gesetz zur Änderung des Gesetzes über die Überführung der Anteilsrechte an der Volkswagenwerk Gesellschaft mit beschränkter Haftung in private Hand) of 8 December 2008 ('the Law amending the VW Law'), which was promulgated in the *Bundesgesetzblatt* on 10 December 2008 (BGBl. 2008 I No 56, p. 2369) and entered into force on 11 December 2008.

8 That law repealed, inter alia, Paragraphs 2 and 4(1) of the VW Law. By contrast, it did not introduce any amendments to Paragraph 4(3) of the VW Law.

Pre-litigation procedure

9 By letter of 24 December 2007, the Commission requested the Federal Republic of Germany to inform it of the measures that the Federal Republic of Germany had adopted or intended to adopt with a view to complying with the judgment in *Commission* v *Germany*.

10 By letter of 6 March 2008, that Member State replied that the Federal Ministry of Justice had prepared a draft Law for the purposes of complying with that judgment and that that draft was the subject-matter of consultation between the departments concerned.

11 On 5 June 2008, the Commission sent to the Federal Republic of Germany a letter of formal notice, calling on it to submit its observations within two months.

12 On the same day, the Federal Republic of Germany sent to the Commission the draft Law approved by the Council of Ministers and designed to ensure compliance with the judgment in *Commission* v *Germany*, stating that the legislative procedure would begin without delay.

13 On 1 December 2008, the Commission sent to the Federal Republic of Germany a reasoned opinion in which it called upon it to adopt the measures necessary to comply with that judgment within two months of receipt of that opinion.

14 The Commission also stated that, while it was true that the repeal of Paragraphs 2(1) and 4(1) of the VW Law was provided for in the draft Law designed to ensure compliance with the judgment in *Commission* v *Germany*, the draft, by contrast, maintained in force Paragraph 4(3) of that law. The Commission added that it had not been provided with any information concerning the amendment of the passages in the Articles of Association which reflected the contested provisions of the VW Law.

15 On 10 December 2008, the Law amending the VW Law was promulgated, its content remaining essentially identical to that in the draft.

16 By letter of 17 December 2008, the Federal Republic of Germany sent to the Commission a proposal that they jointly submit to the Court an application for interpretation of the judgment in *Commission* v *Germany*, pursuant to Article 43 of the Statute of the Court of Justice of the European Union and Article 102 of its Rules of Procedure.

17 The Commission did not take up that proposal and the Federal Republic of Germany, by letter of 29 January 2009, replied to the reasoned opinion, stating that, following the entry into force of the Law amending the VW Law, it considered that it had complied in full with the judgment in *Commission* v *Germany*.

18 On 21 February 2012, taking the view that the Federal Republic of Germany had only partially complied with that judgment, the Commission brought the present action.

The action

The complaint relating to Volkswagen's Articles of Association

Arguments of the parties

19 The Commission submits that full compliance with the judgment in *Commission* v *Germany* must include an amendment not only to the VW Law but also to Volkswagen's Articles of Association. The current version of those articles, it argues, still contains, in Article 25(2), a clause relating to the lower blocking minority, which is essentially analogous to that provided for in Paragraph 4(3) of the VW Law. In addition, the clause relating to the cap on voting rights was not removed from those articles until September 2009, that is to say, nine months after the corresponding provision in the VW Law had been repealed. According to the Commission, however, the Court held, in paragraph 26 of its judgment, that the abovementioned clauses of the articles are to be considered to be a national measure for the purposes of the free movement of capital.

20 The Commission observes in that context that, if the Court finds that a Member State has failed to fulfil one of the obligations imposed on it under the Treaties, that State is required, in accordance with Article 260(1) TFEU, to 'take the necessary measures to comply with the judgment of the Court'. Therefore, since the State is, through the intermediary of the *Land* of Lower Saxony, a shareholder in Volkswagen, it was, in that capacity, not only entitled but also obliged to propose the required amendments to the Articles of Association of that company.

21 The Federal Republic of Germany contends that the complaint relating to the failure to amend Volkswagen's Articles of Association is inadmissible inasmuch as those articles were not the subject-matter of the judgment in *Commission* v *Germany*. In that judgment, it argues, the Court examined only certain provisions of the VW Law.

22 In any event, since Volkswagen is a private company, the Federal Republic of Germany contends that it cannot be held responsible for the actions and omissions of that company because, pursuant to Paragraph 119(1)(5) of the Law of 6 September 1965 on public limited companies (Aktiengesetz) (BGBl. 1965 I, p. 1089), as amended by the Law on the monitoring and transparency of companies (Gesetz zur Kontrolle und Transparenz im Unternehmensbereich) of 27 April 1998 (BGBl. 1998 I, p. 786), only the shareholders of such a company may amend the Articles of Association of the company at a General Meeting.

Findings of the Court

23 The procedure laid down in Article 260(2) TFEU must be regarded as a special judicial procedure for the enforcement of judgments of the Court, in other words as a method of enforcement (Case C-304/02 *Commission* v *France* [2005] ECR I-6263, paragraph 92). Consequently, only a failure of a

Member State to fulfil its obligations under the 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).

24 In the judgment in *Commission* v *Germany*, however, the Court did not in any way examine the question as to whether Volkswagen's Articles of Association were the cause of a failure by the Federal Republic of Germany to fulfil its obligations under the FEU Treaty. The subject-matter of the proceedings which gave rise to that judgment related exclusively to the compatibility of certain provisions of the VW Law with that Treaty.

25 Contrary to what the Commission claims, the Court held, in paragraph 26 of that judgment, not that Volkswagen's Articles of Association were to be considered, in themselves, a national measure, but that '[e]ven if … the VW Law does no more than reproduce an agreement which should be classified as a private law contract, it must be stated that the fact that this agreement has become the subject of a Law suffices for it to be considered as a national measure for the purposes of the free movement of capital'.

26 Consequently, the complaint alleging a failure to amend Volkswagen's Articles of Association must be rejected as inadmissible.

The complaint relating to the VW Law

Arguments of the parties

27 According to the Commission, it follows from the judgment in *Commission* v *Germany* that the reduction of the minority blocking threshold, resulting from Paragraph 4(3) of the VW Law, constitutes an independent infringement of Article 63(1) TFEU. Several aspects of that judgment, the Commission submits, confirm that conclusion, including, in particular:

— the fact that the Commission had put forward three separate complaints, of which one related to the reduction of the minority blocking threshold laid down in Paragraph 4(3) of the VW Law, and that none of its complaints was rejected by the Court, as paragraph 81 of that judgment shows;

— the order that the Federal Republic of Germany pay all the costs demonstrates that the Commission was successful in respect of all the complaints alleging infringement of Article 63(1) TFEU, the finding, in paragraph 83 of the judgment, that that Member State had 'in essence, been unsuccessful', which is the reason why it was ordered to pay the costs, being attributable rather to the dismissal of the action in so far as it was also based on an infringement of the freedom of establishment enshrined in Article 49 TFEU;

— paragraphs 48 and 50 of the judgment in *Commission* v *Germany*, from which it is apparent that the reduction of the minority blocking threshold, on its own, confers on the Federal and State authorities which are shareholders in Volkswagen the possibility of exercising considerable influence over that company without making the investments required by general company law;

— paragraph 51 of that judgment, in which, in stating that the capping of voting rights 'supplements' the legal framework established by the reduction of the minority blocking threshold, the Court held that that framework, in itself, enables the Federal and State authorities to exercise considerable influence over the decisions of the company on the basis of such a reduced investment;

— the use, in paragraph 54 of that judgment, of the term ‘restrictions’ in the plural and of the conjunction ‘and’ instead of ‘in conjunction with’ in order to link Paragraphs 2(1) and 4(3) of the VW Law, from which the Commission infers that those two provisions constitute two restrictions each independent of the other.

28 In addition, the Commission submits, it is apparent from paragraphs 40, 41, 51, 52 and 72 to 81 of the judgment in *Commission* v *Germany*, read together, that the cap on voting rights provided for in Paragraph 2(1) of the VW Law constitutes also, on its own, an unjustified restriction on the free movement of capital. Consequently, it argues, nothing in that judgment supports the conclusion that the Federal Republic of Germany was free to choose which of the two provisions it was appropriate to repeal in order to comply with the judgment.

29 As regards the operative part of the judgment in *Commission* v *Germany*, the Commission submits that this must be construed in the light of the grounds of that judgment, and in particular, of the considerations set out above.

30 The Federal Republic of Germany contends that it is clear from paragraph 1 of the operative part of that judgment that the infringement of Article 63(1) TFEU, established by the Court, resulted from Paragraph 2(1) of the VW Law ‘in conjunction with’ Paragraph 4(3) of that law. Consequently, the failure to fulfil obligations established in that judgment results solely from the interaction between the provision relating to the cap on voting rights, namely Paragraph 2(1) of the VW Law, and that relating to the lower blocking minority, namely Paragraph 4(3) of the VW Law.

31 That conclusion, it is argued, is borne out by, inter alia, paragraphs 30, 43, 51, 54, 56 and 78 of the judgment in *Commission* v *Germany*.

32 The fact that the Federal Republic of Germany was ordered to pay the costs is, it contends, irrelevant since, as is apparent from paragraph 83 of that judgment, that order was based on the finding that that Member State had ‘in essence’ been unsuccessful.

Findings of the Court

33 Under Article 260(1) TFEU, if the Court finds that a Member State has failed to fulfil an obligation under the Treaties, that Member State is required to take the necessary measures to comply with the judgment of the Court.

34 Following the delivery of the judgment in *Commission* v *Germany*, and within the period prescribed for so doing in the reasoned opinion issued by the Commission in connection with the present proceedings, the Federal Republic of Germany repealed Paragraphs 2(1) and 4(1) of the VW Law. By contrast, it maintained in force Paragraph 4(3) of that law.

35 In those circumstances, it is necessary to determine whether that Member State was also required, under Article 260(1) TFEU, to repeal or amend Paragraph 4(3) of the VW Law in order to comply in full with the judgment in *Commission* v *Germany*.

36 That would be the case if, in that judgment, the Court had established a failure to fulfil obligations deriving independently from Paragraph 4(3) of the VW Law.

37 In that regard, the operative part of the judgment, which describes the failure to fulfil obligations established by the Court, is of particular importance. In paragraph 1 of the operative part, the Court, departing in this respect from the Commission’s application, declared that ‘by maintaining in force Paragraph 4(1), as well as Paragraph 2(1) in conjunction with Paragraph 4(3), of the [VW Law], the Federal Republic of Germany has failed to fulfil its obligations under Article [63(1) TFEU]’.

38 By employing the conjunction 'as well as' and the expression 'in conjunction with', the Court distinguished the failure to fulfil obligations resulting from Paragraph 4(1) of the VW Law from that resulting from the combined application of Paragraph 2(1) and Paragraph 4(3) of that law.

39 Accordingly, unlike the failure to fulfil obligations resulting from Paragraph 4(1) of the VW Law, the Court did not establish a failure to fulfil obligations resulting from Paragraph 4(3) of that law, considered in isolation, but did so only as regards the combination of that provision with Paragraph 2(1) of the VW Law.

40 This conclusion is confirmed by the grounds of the judgment in *Commission* v *Germany*, in the light of which the operative part of that judgment must be construed (see Case 135/77 *Bosch* [1978] ECR 855, paragraph 4, and Case C-526/08 *Commission* v *Luxembourg* [2010] ECR I-6151, paragraph 29).

41 In this connection, first, it is apparent from paragraph 30 of the judgment in *Commission* v *Germany* that the Court decided to examine together the complaints relating to the incompatibility of Paragraphs 2(1) and 4(3) of the VW Law with Article 63(1) TFEU, by reason not only of the parties' arguments but also of the 'cumulative effects of [those] two provisions'.

42 Secondly, in paragraph 43 of that judgment, the Court made clear that it was appropriate to examine the effects of the cap on voting rights laid down in Paragraph 2(1) of the VW Law 'alongside the requirement contained in Paragraph 4(3) of [that law]'.

43 Thirdly, after finding, in paragraph 50 of that judgment, that Paragraph 4(3) of the VW Law creates an instrument enabling the Federal and State authorities to procure for themselves, with a lower level of investment than would be required under general company law, a blocking minority allowing them to oppose important resolutions, the Court observed, in paragraph 51 of that judgment, that, by capping voting rights at the same level of 20%, Paragraph 2(1) of the VW Law 'supplements a legal framework which enables the Federal and State authorities to exercise considerable influence on the basis of such a reduced investment'.

44 Fourthly, the Court held, in paragraph 56 of that judgment, that 'the combination of Paragraphs 2(1) and 4(3) of the VW Law constitutes a restriction on the movement of capital within the meaning of Article [63(1) TFEU]'. That finding contrasts with that set out in paragraph 68 of that judgment, according to which 'Paragraph 4(1) of the VW Law constitutes a restriction on the movement of capital within the meaning of Article [63(1) TFEU]'.

45 The grounds of the judgment in *Commission* v *Germany* thus confirm the conclusion drawn in paragraph 1 of the operative part of that judgment, according to which the failure to fulfil obligations established by the Court did not result from Paragraph 4(3) of that law, considered in isolation, but solely from the combination of that provision with Paragraph 2(1) of the VW Law.

46 None of the considerations put forward by the Commission is such as to call that conclusion into question.

47 First, the interpretation given by the Commission to paragraphs 48 and 50 of the judgment in *Commission* v *Germany* is based on a partial reading of that judgment which does not take account of the inherent links between the various passages of the judgment, nor of the grounds of the judgment as a whole and their coherence. Thus, in observing, in paragraph 50 of that judgment, that Paragraph 4(3) of the VW Law 'creates an instrument enabling the Federal and State authorities to procure for themselves a blocking minority allowing them to oppose important resolutions, on the basis of a lower level of investment than would be required under general company law', the Court – contrary to what the Commission appears to suggest – did not in any way rule on the question as to whether or not that provision, on its own, infringes Article 63(1) TFEU. Moreover, that paragraph forms part of the line of reasoning framed by the preceding paragraphs of that judgment, in which the Court

specified, in paragraphs 30 and 43, that it was appropriate to examine Paragraph 2(1) of the VW Law 'alongside' Paragraph 4(3) of that law by reason of, inter alia, their 'cumulative effects'. As for paragraph 48 of that judgment, to which the Commission also refers, suffice it to note that that paragraph contains only a finding purely of fact, namely that 'when the VW Law was adopted in 1960, the Federal State and the *Land* of Lower Saxony were the two main shareholders in Volkswagen, a recently privatised company, and each held 20% of its capital'.

48 Secondly, paragraph 51 of the judgment in *Commission* v *Germany* must also be construed in the light of the remainder of the judgment. Accordingly, in observing that the cap on voting rights 'supplements' a legal framework which enables the Federal and State authorities to exercise, on the basis of a reduced investment, considerable influence over the decisions adopted by Volkswagen, the Court stressed the complementary nature of Paragraphs 2(1) and 4(3) of the VW Law, and not, contrary to what the Commission claims, the independent effects of that latter provision.

49 Thirdly, the Commission cannot infer from the mere use, in paragraph 54 of that judgment, of the term 'restrictions' in the plural or of the conjunction 'and' that Paragraphs 2(1) and 4(3) of the VW Law constitute two restrictions on the free movement of capital which are independent of each other. In the same paragraph, the Court pointed out that those two provisions create 'an instrument' liable to limit the ability of direct investors to participate in the company with a view to establishing or maintaining lasting and direct economic links with it which would make possible effective participation in the management of that company or in its control. In addition, in paragraph 56 of that judgment, the Court concluded that 'the combination of Paragraphs 2(1) and 4(3) of the VW Law constitutes a restriction on the free movement of capital within the meaning of Article 56(1) EC'.

50 Fourthly, whilst it is true that, in paragraph 81 of the judgment in *Commission* v *Germany*, the Court upheld the complaints relied on by the Commission and alleging infringement of Article 63(1) TFEU, that fact cannot, in the absence of an express contrary indication, be treated as amounting to a finding by the Court that Paragraph 4(3) of the VW Law constitutes, on its own, a restriction on the free movement of capital.

51 Fifthly, the fact that the Court ordered the Federal Republic of Germany to pay all the costs is likewise not such as to substantiate the argument put forward by the Commission. That order was justified, as is apparent from paragraph 83 of that judgment, by the finding that that Member State had 'in essence, been unsuccessful'.

52 Consequently, by repealing both Paragraph 4(1) of the VW Law and Paragraph 2(1) of the VW Law, thereby putting an end to the combination between that latter provision and Paragraph 4(3) of that law, the Federal Republic of Germany did, within the period prescribed, fulfil its obligations under Article 260(1) TFEU.

53 Accordingly, that complaint must be rejected and, in consequence, the action dismissed in its entirety.

Costs

54 Under Article 138(1) of the Rules of Procedure of the Court of Justice, 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 Federal Republic of Germany has applied for costs and the Commission has been unsuccessful, the latter must be ordered to pay the costs.

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

1. Dismisses the action;

2. Orders the European Commission to pay the costs.

[Signatures]