



Press and Information

Court of Justice of the European Union
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Judgment in Case C-292/11 P
Commission v Portugal

In the context of recovery of a penalty payment set by the Court of Justice, the Commission cannot rule on the conformity with EU law of national legislation which the Court of Justice has not examined beforehand

Such a discretion would encroach on the exclusive jurisdiction reserved to the Court of Justice

By judgment of 14 October 2004¹, the Court of Justice held that Portugal had failed to fulfil its obligations by not repealing its national legislation which made the award of damages to persons injured by a breach of EU law, in the field of public procurement, conditional on proof of fault or fraud². Taking the view that Portugal had failed to comply with that judgment, the Commission brought a fresh action seeking imposition of a penalty payment. By its judgment of 10 January 2008³, the Court of Justice held that Portugal had not complied with its first judgment of 2004, as the Portuguese legislation had not been repealed by the end of the period prescribed by the Commission. The Court accordingly ordered Portugal to pay to the Commission a penalty payment of €19 392 for each day of delay in implementing the measures necessary to ensure compliance with the first judgment of 2004, with effect from the date of delivery of the second judgment, 10 January 2008.

On 31 December 2007, that is to say, a few days before the 2008 judgment was delivered, Portugal adopted Law No 67/2007, which repealed the national legislation in question and put in place a new system of compensation for damage caused by the State. That law came into force on 30 January 2008. The Commission, however, took the view that that law did not constitute an adequate and complete measure to ensure compliance with the 2004 judgment. In order to avoid prolonging the dispute, Portugal subsequently adopted Law No 31/2008 amending Law No 67/2007, while maintaining that Law No 67/2007 contained all the measures necessary to ensure compliance with the 2004 judgment. Law No 31/2008 came into force on 18 July 2008.

In the context of the proceedings for recovery of the penalty payment set by the Court of Justice, the Commission took the view that Law No 67/2007 did not constitute adequate compliance with the 2004 judgment. In its view, Portugal had complied with that judgment only when it adopted Law No 31/2008. Accordingly, in its decision of 25 November 2008, the Commission determined that the daily penalty payment was payable up to 17 July 2008, the day before Law No 31/2008 came into force.

Portugal then brought an action before the General Court against that decision of the Commission. By judgment of 29 March 2011⁴, the General Court annulled the decision. It held that the assessment of the content of new legislation adopted by a Member State with a view to complying 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, if there is a disagreement between the Commission and that Member State, be the subject of a fresh procedure.

¹ Judgment in Case [C-275/03](#) *Commission v Portugal*.

² Obligation stemming from 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 Judgment in Case [C-70/06](#) *Commission v Portugal*.

⁴ Judgment in Case [T-33/09](#) *Portugal v Commission*; see also Press Release [No 27/11](#).

The Commission has brought an appeal by which it seeks to have that judgment of the General Court set aside⁵.

By its judgment delivered today, the Court of Justice dismisses the appeal.

The Court first points out that the procedure intended to induce a defaulting Member State to comply with a judgment establishing a failure to fulfil obligations⁶ must be regarded as a special judicial procedure for the enforcement of the Court's judgments and, in other words, as a method of enforcement. Therefore, the Commission's review of the measures adopted by that Member State for the purpose of complying with such a judgment and the recovery of any sums owed must be carried out having regard to the scope of the failure to fulfil obligations, as defined by the Court of Justice.

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 relates to the failure to repeal national legislation. The Commission, however, took the view that Law No 67/2007, repealing the national legislation at issue, did not ensure proper compliance with the 2004 judgment. The Court considers that, in doing so, the Commission formed a view on the issue of the conformity of the new Portuguese law with EU law, even though that Portuguese law introduced a system of liability which was distinct from that of the repealed legislation and which the Court of Justice could not have examined beforehand. However, **the Commission's power of appraisal, in the context of compliance with a judgment of the Court of Justice, cannot be exercised in a manner which is prejudicial to the Court's exclusive jurisdiction to rule on the conformity of national legislation with EU law.**

Likewise, as was pointed out in 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 was in conformity with EU law, thereby encroaching on the exclusive jurisdiction of the Court of Justice in that regard.

It follows that, in the case where there is a difference between the Commission and the Member State concerned as to whether a national practice or national legislation which the Court of Justice has not examined beforehand is appropriate for ensuring compliance with such a 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.

An action for annulment may, admittedly, be brought against such a decision before the General Court, the judgment of which may be the subject of an appeal to the Court of Justice. However, the analysis that the General Court would carry out in such proceedings would 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.

In addition, **allowing the Commission a greater margin of discretion would lead to a breach of the procedural rights of defence available to the Member States in infringement proceedings.** Such an interpretation would eliminate the pre-litigation stage, in which the Member State concerned has the opportunity to comply with its obligations or to present its case properly against the complaints set out by the Commission.

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 Portugal**

⁵ Germany, Spain, France, Greece, the Netherlands, Poland, the Czech Republic and Sweden have intervened in support of Portugal.

⁶ Article 260 of the Treaty on the Functioning of the European Union, for example, the procedure concluded by the judgment of 10 January 2008.

with the 2008 judgment or, consequently, its own jurisdiction in relation to the review of the Commission's assessment in that regard.

NOTE: An appeal, on a point or points of law only, may be brought before the Court of Justice against a judgment or order of the General Court. In principle, the appeal does not have suspensive effect. If the appeal is admissible and well founded, the Court of Justice sets aside the judgment of the General Court. Where the state of the proceedings so permits, the Court of Justice may itself give final judgment in the case. Otherwise, it refers the case back to the General Court, which is bound by the decision given by the Court of Justice on the appeal.

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The [full text](#) of the judgment is published on the CURIA website on the day of delivery.

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