Reports of Cases

OPINION OF ADVOCATE GENERAL
JÄÄSKINEN
delivered on 16 May 2013 [1]

Case C-292/11 P

European Commission
v

Portuguese Republic

(Appeal — Article 258 TFEU — Compliance with a judgment of the Court of Justice — Failure of the Portuguese Republic to take the measures necessary to comply with a judgment establishing a failure to fulfil obligations — Article 260 TFEU — Judgment of the Court of Justice ordering the Portuguese Republic to pay a periodic penalty — Assessment by the Commission of the measures adopted by the Member State to comply with the judgment of the Court of Justice — Powers of the Commission in the context of compliance with judgments under Article 260 TFEU)

1. In this case, the Court has been called upon for the first time to consider the issue of measures to comply with judgments delivered under Article 260 TFEU. The main difficulty in the case at hand lies in the fact that the FEU Treaty contains no specific provision regulating the procedure to be followed in the event of a dispute between a Member State and the European Commission concerning the recovery of amounts owed in compliance with such a judgment.

2. The dispute at the heart of this case related to the incorrect transposition by the Portuguese Republic of 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, [2] which had led the Commission to bring an action under Article 226 EC (now Article 258 TFEU) against that Member State. In its judgment of 14 October 2004 in *Commission* v *Portugal* ('the 2004 judgment establishing a failure to fulfil obligations'), [3] the Court held that, by failing to repeal Decree-Law No 48 051 of 21 November 1967 making the award of damages to persons harmed by a breach of Community law relating to public contracts, or of the national rules implementing it, conditional on proof of fault or fraud ('Decree-Law No 48 051'), the Portuguese Republic had failed to fulfil its obligations under that directive. As it took the view that the Portuguese Republic had failed to comply with that judgment, the Commission subsequently brought an action under Article 228(2) EC (now Article 260(2) TFEU). In its judgment of 10 January 2008 in *Commission* v *Portugal* [4] ('the 2008 judgment on compliance'), the Court established that the Portuguese Republic had failed to comply with the 2004 judgment establishing a failure to fulfil obligations and imposed a periodic penalty on it, payable until the date of full compliance with that latter judgment.

1 — Original language: French.
2 — OJ 1989 L 395, p. 33.
3 — Case C-275/03.
4 — Case C-70/06 *Commission* v *Portugal* [2008] ECR I-1.

3. In the course of the process of supervising compliance with that judgment, and pursuant to its budgetary powers under Article 274 EC (now Article 317 TFEU), the Commission, on 25 November 2008, adopted Decision C(2008) 7419 final requiring payment of the periodic penalties due in compliance with the Court's judgment in Case C-70/06 *Commission* v *Portugal* [2008] ECR I-1 ('the contested decision').[5] Because of a disagreement between the Portuguese Republic and the Commission on the scope of the measures taken in order to comply with the 2004 judgment establishing a failure to fulfil obligations, the Portuguese Republic brought an action before the Court of First Instance of the European Communities (now the General Court of the European Union) for annulment of the contested decision.

4. In its appeal, the Commission asks the Court of Justice to set aside the judgment of the General Court of 29 March 2011 in *Portugal* v *Commission*[6] ('the judgment under appeal'), by which the General Court upheld the Portuguese Republic's action and set aside the contested decision. In the present appeal, the Commission puts forward two grounds. In the first limb of the first ground of appeal, the Commission claims that the General Court erred in law by wrongly restricting the powers of the Commission and its own powers in the context of compliance with judgments of the Court of Justice under Article 260(2) TFEU. In the second limb of its first ground of appeal, the Commission contends that the General Court further erred in law by reason of its incomplete and narrow reading of the operative part of the 2008 judgment on compliance. Finally, by its second ground of appeal, the Commission argues that the reasoning set out in the judgment under appeal is inadequate and contradictory.

5. The present case thus concerns the novel issue of the scope of the Commission's powers of appraisal as to the adequacy of measures adopted by national authorities in order to bring an end to an infringement and, consequently, to treat, as appropriate, the obligation to pay a periodic penalty to be extinguished. The Court is thus called upon to resolve the question of the nature and scope of the compliance obligations resting on a Member State pursuant to the operative part of a judgment delivered pursuant to Article 258 TFEU.

I – The 2004 judgment establishing a failure to fulfil obligations, the 2008 judgment on compliance, and the subsequent proceedings

6. In the 2004 judgment establishing a failure to fulfil obligations, the Court ruled as follows:

'[B]y failing to repeal Decree-Law No 48 051 … the Portuguese Republic has failed to fulfil its obligations under … Directive 89/665/EEC.'

7. In the 2008 judgment on compliance, the Court held (in paragraphs 16 and 17) that, given the wording of the operative part of the 2004 judgment establishing a failure to fulfil obligations, in order to establish whether the Portuguese Republic had adopted the measures necessary to comply with that judgment, it was necessary to determine whether Decree-Law No 48 051 had been repealed. Thus, the Court found (in paragraph 19 of that judgment) that, on the date of expiry of the period laid down in the reasoned opinion of 13 July 2005, the Portuguese Republic had not yet repealed that decree-law. The Court also pointed out in paragraph 36 of that judgment that, as the agent of the Portuguese Republic had confirmed at the hearing held on 5 July 2007, Decree-Law No 48 051 was still in force on that date.

5 — This decision has not been published in the *Official Journal of the European Union*.

6 — Case T-33/09 *Portugal* v *Commission* [2011] ECR II-1429.

8. The Court accordingly ruled as follows:

‘1. … 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 establishing a failure to fulfil obligations] and has thereby failed to fulfil its obligations under Article 228(1) EC;

2. [The Court] orders the Portuguese Republic to pay to the Commission … a penalty payment of EUR 19 392 for every day of delay in implementing the measures necessary to comply with the [2004 judgment establishing a failure to fulfil obligations], 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;

…’

9. During a meeting with the Commission’s agents on 28 January 2008, the Portuguese authorities argued that, with the approval of Law 67/2007 (adopted on 31 December 2007) repealing Decree-Law No 48 051, the Portuguese Republic had taken all the measures necessary to ensure compliance with the 2004 judgment establishing a failure to fulfil obligations. Accordingly, the Portuguese Republic contended that it had, at most, to pay the penalty amounts only for the period between the date of delivery of the 2008 judgment on compliance, namely 10 January 2008, and the date on which Law 67/2007 entered into force, namely 30 January 2008. The Commission, for its part, essentially took the view that Law 67/2007 did not constitute an adequate and complete measure to ensure compliance with the 2004 judgment establishing a failure to fulfil obligations.

10. On 15 July 2008, the Commission sent a letter to the Portuguese authorities [7] requesting payment of EUR 2 753 664 corresponding to the penalty payments due for the period from 10 January 2008 to 31 May 2008, in satisfaction of the 2008 judgment on compliance, on the ground that those authorities had not yet taken all the measures necessary to ensure compliance with the 2004 judgment establishing a failure to fulfil obligations. [8]

11. By letter of 4 August 2008, the Portuguese authorities replied to the Commission’s letter requesting payment. They restated their position that, with the publication and entry into force of Law 67/2007, they had adopted all the measures necessary to ensure compliance with the 2004 judgment establishing a failure to fulfil obligations. The Portuguese authorities stated that they had, however, agreed to amend Law 67/2007 and to adopt Law 31/2008 of 17 July 2008, amending Law 67/2007 for the first time, in order to avoid prolonging the dispute and to resolve their differences with the Commission concerning the interpretation of Law 67/2007. They also stated that Article 2 of Law 31/2008 provided for the retroactive application of that law as from 30 January 2008. Consequently, they argued, the Portuguese legal system had been in conformity with the 2004 judgment establishing a failure to fulfil obligations since 30 January 2008. For that reason, the Portuguese authorities essentially sought a reassessment of the amount of the periodic penalty payment, taking 30 January 2008 as the reference date.

12. By the contested decision — which was notified to the Portuguese Republic by letter of 26 November 2008 from the General Secretariat — the Commission stated, essentially, that, in its view, Law 67/2007 did not constitute adequate compliance with the 2004 judgment establishing a failure to fulfil obligations. However, by means of Law 31/2008, the Portuguese authorities had, it found, complied with the 2004 judgment and, as that law had entered into force on 18 July 2008, the

7 — Letter bearing the reference MARKT/C 2/PMS/bmgF/(2008) 13692 of 15 July 2008.

8 — The Portuguese Republic’s action against the Commission’s letter of 15 July 2008 — which was lodged at the Registry of the General Court on 15 September 2008 under reference T-378/08 — was removed from the register by order of 5 March 2009 of the President of the Third Chamber of the General Court.

date on which the infringement had ceased was determined as being 18 July 2008. The Commission therefore confirmed the request for payment of the penalty made in the letter of 15 July 2008 from the Internal Market and Services Directorate General. Furthermore, it claimed an additional amount of EUR 911 424 corresponding to the period from 1 June 2008 to 17 July 2008.

II – The judgment of the General Court and the procedure before the Court of Justice in the present case

13. By application lodged on 26 January 2009, the Portuguese Republic brought an action for annulment of the contested decision before the General Court.

14. In the judgment under appeal, the General Court first stated that it had jurisdiction to hear that action, pursuant to the first subparagraph of Article 225(1) EC (now the first subparagraph of Article 256(1) TFEU). However, it pointed out in paragraphs 66 and 67 of the judgment under appeal that, in exercising such jurisdiction, it could not impinge on the exclusive jurisdiction reserved to the Court of Justice under Articles 226 EC and 228 EC and, therefore, could not rule on a question relating to the infringement by the Member State of its obligations under the EC Treaty which had not been previously decided by the Court of Justice.

15. On the substance, the General Court first held (in paragraphs 68 to 70 of the judgment under appeal) — relying on the wording of the operative part of the 2008 judgment on compliance, read by reference to the grounds upheld by the Court of Justice in paragraphs 16 to 19 thereof — that it was sufficient for the Portuguese Republic to repeal Decree-Law No 48 051 in order to comply with the 2004 judgment establishing a failure to fulfil obligations and that the penalty payment would be due until that repeal. In paragraphs 71 and 72 of the judgment under appeal, the General Court concluded that the Commission had failed to take account of the operative part of the 2008 judgment on compliance, as the Commission had considered, first, that the adoption of Law 67/2007 repealing the decree-law did not constitute adequate compliance with the 2004 judgment establishing a failure to fulfil obligations, and, second, that the Portuguese Republic had been in compliance with that judgment only from 18 July 2008 onwards, this being the date on which Law 31/2008 came into force. The General Court therefore held that the contested decision had to be annulled.

16. Secondly, in paragraph 80 et seq. of the judgment under appeal, the General Court rejected the Commission's argument that the Court of Justice, in its 2004 judgment establishing a failure to fulfil obligations and its 2008 judgment on compliance, required the Portuguese Republic not only to repeal Decree-Law No 48 051 but also to bring its national laws into line with Directive 89/665, with a view to bringing an end to the failure at issue.

17. Thirdly, in paragraph 90 of the judgment under appeal, the General Court pointed out that the conferral of wider discretion on the Commission in relation to the evaluation of measures taken to comply with a judgment handed down under Article 228(2) EC would have the consequence that, when a Member State has challenged before the General Court 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 EU law. Such an appraisal, however, falls within the exclusive jurisdiction of the Court of Justice and not that of the General Court.

18. In view of all of those considerations, the General Court upheld the Portuguese Republic's action and annulled the contested decision.

19. On 9 June 2011, the Commission lodged the present appeal in support of which it relies on the two grounds described in point 4 of the present Opinion. 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 Portuguese Republic.

20. During the hearing held on 5 March 2013, the Czech, Greek, Spanish, French and Swedish Governments, as well as the Portuguese Republic and the Commission, set out their respective oral arguments.

III – The second limb of the first ground of appeal, alleging an error of law in the narrow interpretation of the operative part of the judgment of the Court of Justice

21. In light of the sensitivity of the issues raised by the Commission in the second limb of the first ground of appeal, I shall examine the first ground of appeal invoked by the Commission by starting with that second limb. Indeed, I take the view that the reply to the second limb will have a significant impact on the reply to be given to the first limb of the first ground of appeal.

A – *Arguments of the parties*

22. In the second limb 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 on compliance, thereby improperly restricting the subject-matter of the failure to fulfil obligations as established by the Court of Justice in its 2004 judgment establishing a failure to fulfil obligations and in its 2008 judgment on compliance. The General Court was, the Commission submits, wrong to hold (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 establishing a failure to fulfil obligations and that the penalty payment was due until that repeal.

23. The Commission takes a different view, arguing that the operative part of the 2004 judgment establishing a failure to fulfil obligations clearly requires the Portuguese Republic to take the measures necessary to comply with that judgment. That, it contends, is what the General Court ought to have checked, without confining itself to determining whether the decree-law had simply been repealed, something which, moreover, would have created a legal void in Portuguese law.

24. According to the Commission, the General Court was fully entitled to examine the compatibility of Law 67/2007 with Directive 89/665 in order to ascertain whether the Portuguese Republic had complied with the 2004 judgment establishing a failure to fulfil obligations, confirmed by the 2008 judgment on compliance, and, having established that Portuguese law continued to make the award of damages conditional on proof of fault or fraud, to conclude that the failure to fulfil obligations continued.[9]

25. The Portuguese Republic, for its part, submits that the General Court correctly interpreted the scope of those judgments delivered by the Court of Justice. By imposing obligations on the Portuguese Republic which the latter should not have had to bear, and by ruling on the novel issue of the compatibility of Law 67/2007 with EU law, the Commission overstepped the bounds of its own powers in the context of the compliance procedure in question.

9 — In this regard, the Commission relies on the Opinion of Advocate General Mazák in Case C-70/06 *Commission* v *Portugal*, in particular point 54 thereof.

B – *Assessment*

26. As a preliminary point, it strikes me as important to explain the background against which the Commission was required to exercise its powers of supervision after the Court of Justice had delivered the judgments under Articles 258 TFEU and 260 TFEU.

27. In the words of Advocate General Roemer, actions for failure to fulfil obligations 'are concerned not with guilt and morality but simply with the clarification of the legal position'. [10] It is, however, quite clear that, over time, proceedings for failure to fulfil obligations have undergone significant changes and have moved away from their original function as a normative and objective supervisory mechanism. [11] Those proceedings have increasingly become a method of challenging not only legislative deficiencies, but also the conduct and practices of national authorities. Two striking examples of this evolution are infringements involving an administrative practice [12] and the concept of structural and generalised infringements. [13] It is thus clear that the operative part of a judgment delivered pursuant to Article 258 TFEU is capable of encompassing a wide range of legal or factual phenomena amounting to infringements of EU law, beyond merely confirming an incompatibility between EU law and a provision of national law. Consequently, there are various ways by which the Court of Justice can establish a failure to fulfil obligations.

28. In my view, the fundamental principle which must guide the Commission in the exercise of its powers of supervision after the Court of Justice has given judgment under Article 260 TFEU is that of compliance, namely the effective implementation of the wording of the operative part of the first judgment handed down on the basis of Article 258 TFEU. Consequently, the Commission cannot exceed the limits of the failure as established by the Court of Justice in its first judgment.

29. This means that the extent of the Commission's powers necessarily follows from the wording of the operative part of the judgments delivered under Article 258 TFEU and subsequently under Article 260 TFEU. This does not preclude the wording of the operative part from being interpreted, where appropriate, in the light of the reasoning of the judgment. However, such an interpretation cannot extend the scope of the operative part in question, as the objective scope of the principle of *res judicata* as it applies to the Court of Justice's judgments cannot go beyond that operative part. [14] The operative part of a judgment establishing a failure to fulfil obligations must in particular be interpreted by reference to the legal action of the Commission and how it was disposed of by the Court of Justice.

30. By contrast, contrary to the arguments submitted at the hearing, in particular by the French and Swedish Governments, there is no need, in my view, to have recourse to additional criteria such as that of manifest non-compliance or the narrow interpretation of the operative part of the Court of Justice's judgment. Quite simply, this is an issue of reading the obligation as to conduct of a Member State at regulatory or factual level, as defined by the Court of Justice in a judgment delivered under Article 258 TFEU establishing a failure to fulfil obligations.

10 — Opinion of Advocate General Roemer in Case 7/71 *Commission* v *France* [1971] ECR 1003, at p. 1035.

11 — Puissochet, J.-P., 'L'action en manquement peut-elle encore se parer de ses justes vertus?' *Une communauté de droit: Festschrift für Gil Carlos Rodríguez Iglesias*, 2003, pp. 569 to 580.

12 — See, inter alia, Case 21/84 *Commission v France* [1985] ECR 1355; Case C-212/99 *Commission* v *Italy* [2001] ECR I-4923; Case C-441/02 *Commission* v *Germany* [2006] ECR I-3449; Case C-342/05 *Commission* v *Finland* [2007] ECR I-4713; and judgment of 22 January 2009 in Case C-150/07 *Commission* v *Portugal*.

13 — In this regard see, inter alia, the Opinion delivered in Case C-304/02 *Commission* v *France* [2005] ECR I-6263. See also Wenneras, P., 'A New Dawn for Commission Enforcement under Articles 226 and 228 EC', *CMLRev*. 2006, vol. 43.

14 — As Advocate General Kokott noted in point 38 of her Opinion in Case C-526/08 *Commission* v *Luxembourg* [2010] ECR I-6151, '[t]he force of *res judicata* of a judgment therefore precludes a fresh action being brought if there is a risk that the new decision by the Court will contradict the findings of fact and law made in the earlier judgment. Not only is the operative part relevant, but also the *ratio decidendi* of that judgment which is inseparable from it'.

31. Thus, in the case of 'legislative' failures to fulfil obligations, a distinction should, in my view, be drawn between two different types of situation. The Court might find that the infringement of EU law consists in the maintenance of a provision in force within the national legal system which conflicts with EU law. It will then hold that, by failing to repeal that provision, the Member State has failed to fulfil its obligations under EU law.

32. Alternatively, the infringement might involve a defective transposition of an EU measure, either because there is no national implementing provision or because the transposition is incomplete or inadequate. In that case, the Court will identify, where necessary, the relevant provisions of national law in that regard. In order to remedy the infringement thus established, the Member State must take steps both to repeal the provision at issue and to adopt new measures that are compatible with EU law.

33. It is not uncommon for these two types of infringement to overlap, for instance when a Member State maintains national rules in force which conflict with a directive and, at the same time, fails to adopt the necessary provisions to transpose that directive.

34. More generally, the obligation as defined in the operative part of the Court of Justice's judgment might give rise to an obligation as to results at a legislative level, involving the repeal and/or adoption of laws, regulations or administrative provisions,[15] as well as at a factual level.[16] Accordingly, the Commission is entitled to check whether the newly adopted national measures are those required for full transposition of the EU legal rule in question. It also follows that the Commission may examine factual information, which is often the case in the environmental field.

35. Compliance with the obligation to act as established in a judgment of the Court of Justice in no way undermines the Commission's powers in this respect, as the General Court correctly pointed out in paragraph 81 of the judgment under appeal. Indeed, it is for the Commission to satisfy itself that the Member State concerned has not simply taken measures that, in reality, have the same content as those that were the subject of the judgment of the Court of Justice. Thus, a 'cosmetic' amendment by that Member State clearly cannot fall outside the Commission's sphere of supervision.

36. Along the same lines, I consider that proper compliance with a judgment establishing a failure to fulfil obligations, defined as a failure to repeal specific national provisions, may not be sufficient to ensure proper transposition of the relevant directive. In other words, the full and correct transposition of a provision of EU law which has been the subject of proceedings under Article 258 TFEU may require measures to be taken which go further than repealing the national provisions at issue. None the less, this last consideration cannot broaden the objective scope of the judgment establishing a failure to fulfil obligations, as the extent of the obligation to comply necessarily depends on the way in which the Court of Justice has defined the infringement complained of.

37. This approach seems to me to be the only way to safeguard legal certainty and the authority of the Court's judgments. The need for legal certainty is particularly compelling in circumstances such as those of the present case, involving as it does the imposition of pecuniary obligations on Member States.

38. Here, the Court of Justice — in its 2004 judgment establishing a failure to fulfil obligations — found clearly that the act of maintaining Decree-Law No 48 051 in force in Portuguese law was incompatible with EU law. Contrary to the provisions of Directive 89/665, that decree-law made the award of damages to persons harmed by a breach of Community law relating to public contracts, or of the national rules implementing it, conditional on proof of fault or fraud.

15 — See, inter alia, judgment of 25 October 2012 in Case C-387/11 *Commission* v *Belgium* and judgment of 6 November 2012 in Case C-286/12 *Commission* v *Hungary*.

16 — See Case C-92/96 *Commission* v *Spain* [1998] ECR I-505, concerning the quality of bathing water, and Case C-278/01 *Commission* v *Spain* [2003] ECR I-14141. Even more recently, see the judgment of 7 February 2013 in Case C-517/11 *Commission* v *Greece*.

39. It is true that the form of order sought by the Commission in its application was expressed in a broader manner, in that it asked the Court of Justice to find that 'by failing to transpose Directive 89/665 correctly and in full …, the Portuguese Republic has failed to fulfil its obligations under Community law'.

40. Nevertheless, it follows clearly from paragraph 18 of the 2004 judgment establishing a failure to fulfil obligations that the scope of the dispute had been clearly defined at the pre-litigation stage. Indeed, upon expiry of the period laid down in the reasoned opinion, the Commission submitted that 'the infringement is confined to the failure to repeal Decree-Law No 48 051'. Furthermore, in paragraph 20 of that judgment, the Court pointed out that '[the Commission] submits that the Portuguese Republic ought to have repealed' the text of the decree-law in order to comply with Directive 89/665.

41. In its 2004 judgment establishing a failure to fulfil obligations, the Court of Justice held that 'by failing to repeal Decree-Law No 48 051 … the Portuguese Republic had failed to fulfil its obligations under Article 1(1) and Article 2(1)(c) of Directive 89/665/EEC'.

42. That was therefore the starting point for the Commission when it brought its application under Article 228 EC against the Portuguese Republic. The Commission took the view that 'since it has not repealed Decree-Law No 48 051, the Portuguese Republic has not taken the measures necessary to ensure compliance' [17] with the 2004 judgment establishing a failure to fulfil obligations. Furthermore, it seems to me that a discussion on the status of the transposition of Directive 89/665 had already been initiated by the Commission in its application under Article 260 TFEU. [18]

43. However, in paragraph 17 of its 2008 judgment on compliance, the Court of Justice held that, '[i]n the context of the present proceedings for failure to comply with obligations, in order to check whether the Portuguese Republic has adopted the measures necessary to comply with the [2004 judgment establishing a failure to fulfil obligations]', it was necessary to determine whether Decree-Law No 48 051 had been repealed. The Court also rejected the Portuguese authorities' argument that other domestic legal provisions had already ensured transposition. In paragraph 23 of its 2008 judgment on compliance, the Court expressed the view that the infringement complained of related to the fact that the Portuguese Republic had maintained Decree-Law No 48 051 in force in its national legal system.

44. Consequently, it is clear that, in the judgment under appeal, the General Court correctly discharged its supervisory obligation.

45. In paragraph 67 of the judgment under appeal, the General Court correctly held that — in the context of an action for annulment — it could not rule on a question relating to the infringement by the Member State of its obligations under the EC Treaty that had not been previously decided by the Court of Justice. There is no need whatsoever to show that resolution of the question of the compatibility of Law 67/2007 with EU law would involve an encroachment by the General Court upon the Court of Justice's exclusive jurisdiction under Article 258 TFEU.

46. The General Court also correctly pointed out in paragraph 81 of the judgment under appeal that 'in the context of enforcing a judgment of the Court of Justice imposing a penalty payment on a Member State, the Commission must be able to assess the measures adopted by the Member State to comply with the judgment of the Court of Justice in order, inter alia, to prevent the Member State which has failed to fulfil its obligations from simply taking measures that, in reality, have the same content as those that were the subject of the judgment of the Court of Justice'. However, it added in

17 — See the 2008 judgment on compliance, paragraph 12.

18 — Idem.

paragraph 82, without committing any error of law, that 'the exercise of that power of appraisal can prejudice neither the rights — and in particular the procedural rights — of the Member States, as they result from the procedure set out in Article 226 EC, nor the exclusive jurisdiction of the Court of Justice to rule on the compliance of national legislation with Community law'.

47. In light of all of the foregoing, I accordingly propose that the second limb of the Commission's first ground of appeal should be rejected as being unfounded.

IV – The first limb of the first ground of appeal, alleging excessive restriction of the respective powers of the Commission and the General Court

A – *Arguments of the parties*

48. In the first limb of its first ground of appeal, the Commission essentially takes issue with the General Court's interpretation of the extent of its powers to supervise compliance by a Member State with a judgment delivered by the Court of Justice under Article 260 TFEU. The Commission criticises the General Court on the ground that it took the view that the appraisal of the content of new legislation adopted by a Member State in order to comply with a judgment delivered under that article fell within the exclusive jurisdiction of the Court of Justice and should, in the event of a disagreement between the Commission and the Member State in question, be the subject of fresh proceedings under Article 258 TFEU.

49. Firstly, in the Commission's view, by depriving it (in paragraphs 87 to 89 of the judgment under appeal) of the opportunity to evaluate the content of Law 67/2007 in order to establish whether the Portuguese Republic had complied with the 2004 judgment establishing a failure to fulfil obligations and thus brought an end to the infringement, the General Court wrongly reduced the Commission's powers to a mere 'formal review' designed to establish whether or not Decree-Law No 48 051 had been repealed.

50. Furthermore, the effectiveness of infringement procedures, in particular periodic penalty payments, would, the Commission argues, be compromised if, in the event of a disagreement between the Commission and a Member State as to whether legislation adopted by the latter enables it to comply with a judgment delivered under Article 260(2) TFEU, the Commission was obliged — as the General Court found — to bring a fresh action before the Court of Justice under Article 258 TFEU for the purpose of submitting the new provisions to it for review.

51. Secondly, the Commission claims that the General Court improperly restricted its own powers in connection with the judicial review of the contested decision. In particular, it argues, the General Court ought to have examined the Commission's assessment of the new legislation adopted by the Portuguese Republic in order to determine specifically whether, by the contested decision, the Commission had in fact remained within the boundaries of the subject-matter of the infringement and had not erred in its evaluation of the duration of the infringement.

52. The Portuguese Republic takes issue with the Commission's line of argument and submits that, by adopting the contested decision and by ruling on the compatibility of Law 67/2007 with EU law, the Commission broadened the subject-matter of the dispute and overstepped its powers in supervising compliance with the 2008 judgment on compliance. By choosing to adopt a decision rather than bring a direct action as provided for by the FEU Treaty, the Commission also infringed the Portuguese Republic's rights of defence as the latter was deprived of the opportunity to defend itself during the

pre-litigation stage provided for in Article 258 TFEU. In addition, as regards the alleged unjustified restriction of the General Court's powers, the Portuguese Republic points out that a possible appraisal at first instance as to whether Law 67/2007 was in compliance with EU law would not be consistent with the enforceable nature of the procedure provided for in Article 260(2) TFEU.

B – *Assessment*

1. Introductory remarks

53. In view of the novel nature of the issues raised in these proceedings, and despite the procedural limitations to which this appeal is subject, I take the view that the Court of Justice cannot avoid addressing the preliminary issue concerning the nature of the powers allocated to the Commission in the context of compliance with judgments delivered pursuant to Article 260(2) TFEU. Even though the Commission's competence to require compliance with such judgments pursuant to its budgetary powers provided for in Article 317 TFEU[19] has not been disputed, in principle, by any of the parties, the impact of that approach on the division of powers between the General Court and the Court of Justice merits an in-depth consideration. That question is closely linked to the issue at the core of this dispute: the extent of the Commission's powers.

54. It is common ground that the lack of competence of the author of a measure which adversely affects a party constitutes an absolute bar that the Court of Justice can raise on its own initiative.[20] Indeed, '[s]ince that is a finding which touches on the competence of the Commission, [the lack of competence] must be raised by the Court of its own motion even though none of the parties has asked it to do so'.[21]

55. Finally, it follows clearly from both the written observations and the submissions presented during the hearing that, given the Treaties' silence on the matter, Member States are concerned by the outcome of the Court's reply in this case, from the standpoint of observance of their rights of defence, the financial interests at stake and the weakness of their procedural position in the wake of a Court judgment under Article 260 TFEU imposing a penalty payment.

56. I think it is necessary, in this connection, to lay down some specific parameters in order to provide a framework for the supervision of compliance with judgments of the Court of Justice delivered under Articles 258 TFEU and 260 TFEU and to establish the boundaries of the Commission's powers in that regard.

57. Furthermore, it should always be borne in mind that, if the Court of Justice were to find that the Commission did not have the power to adopt decisions adversely affecting Member States in the context of compliance with judgments under Article 260 TFEU, the Commission's appeal would have to be dismissed in its entirety as inoperative. Indeed, before the General Court can be accused of having interpreted the Commission's power in an overly restrictive manner, it is first necessary that that power should have existed.

19 — See, in this regard, the criticism of the Commission's powers in Case T-139/06 *France* v *Commission* [2011] ECR II-7315. However, no appeal has been lodged against the General Court's judgment.

20 — See Case 14/59 *Société des fonderies de Pont-à-Mousson* v *High Authority* [1959] ECR 215, at p. 229, and Case 108/81 *Amylum* v *Council* [1982] ECR 3107, paragraph 28. Also see Case T-182/94 *Marx Esser and Del Amo Martinez* v *Parliament* [1996] ECR-SC I-A-411 and II-1197, paragraph 44, and Case T-315/01 *Kadi* v *Council and Commission* [2005] ECR II-3649, paragraph 61 et seq.

21 — Case C-210/98 P *Salzgitter* v *Commission* [2000] ECR I-5843, paragraph 56.

2. The extent of the powers of the Commission and the General Court

a) The approach taken by the General Court in the judgment under appeal

58. Upon reading the judgment under appeal, I note from the outset that, far from ruling in a general sense on the extent of the Commission's powers in connection with compliance with judgments under Article 260(2) TFEU, the General Court confined itself to conducting a meticulous examination of the case at hand. Consequently, I support the argument advanced, notably, by the Portuguese, Czech, Spanish and Swedish Governments, according to which the Commission's appeal appears to be based on a misreading of the judgment under appeal in that it complains that the General Court restricted the powers of the Commission across the board.

59. The General Court was careful not to set out a general theory as to the extent of the Commission's powers in this respect. By contrast, in keeping with the principle of the allocation of powers, it correctly examined the scope of the Portuguese Republic's obligations in light of the operative part of the 2004 judgment establishing a failure to fulfil obligations under Article 258 TFEU, as confirmed by the 2008 judgment on compliance under Article 260 TFEU.

60. Consequently, the General Court did not therefore reduce the Commission's powers to a mere 'formal review', as the latter claims, but instead held that, in the present case, its powers had to be confined to checking whether the national legislation in question had been repealed, without reviewing domestic law in the light of Directive 89/665.

b) The two aspects relating to the Commission's powers in the context of compliance with judgments under Article 260 TFEU and the consequences for the allocation of powers between the General Court and the Court of Justice

61. In its appeal, the Commission concentrates on the issue of the extent of its powers in the context of compliance with a Court of Justice judgment establishing a failure to fulfil obligations and ordering payment of a pecuniary penalty.

62. A distinction should be drawn, in this connection, between two aspects which are nevertheless interlinked: (a) the existence of a power held by the Commission for the purpose of recovering sums due to the EU budget in compliance with a judgment delivered under Article 260 TFEU; and (b) the existence of a power held by the Commission for the purpose of taking decisions which adversely affect Member States and are aimed at assessing measures adopted by them in compliance with the operative part of judgments of the Court of Justice delivered under Articles 258 TFEU and 260 TFEU.

63. In its response to the appeal, the Portuguese Republic suggests that the dispute between it and the Commission before the General Court did not concern compliance with the Court of Justice's judgment but instead related to a new issue concerning the conformity of national law with EU law. Consequently, the Portuguese Republic considers that the Commission adopted an incorrect approach in that respect and that it ought to have followed the legal path provided for in Article 258 TFEU.

64. It thus seems to me that the issue at the heart of these proceedings is to ascertain what is covered by the concept of compliance with a Court of Justice judgment establishing that a Member State has failed to fulfil its obligations. This entails, first, an analysis of the mechanisms available to Member States for that purpose and the obligations incumbent on them following the delivery of a judgment under Article 258 TFEU. Second, compliance should be defined from the perspective of the procedure to be followed after the delivery of a Court of Justice judgment under Article 260 TFEU and the competent authority should be identified in that connection.

65. As a preliminary point, it is important to note that, pursuant to Articles 280 TFEU and 299 TFEU, judgments of the Court of Justice are enforceable. However, those provisions apply only to persons 'other than States'. Thus, in the event of default in the payment of a pecuniary penalty or a dispute concerning compliance with a Court of Justice judgment delivered under Articles 258 TFEU or 260 TFEU, enforcement against a Member State is precluded both in view of the wording of Article 299 TFEU and by reason of the sovereignty and jurisdictional immunity of States.

66. It should also be recalled that the procedure provided for in Article 260(2) TFEU is a special judicial procedure for the enforcement of judgments of the Court of Justice.[22] Unlike declaratory judgments delivered under Article 258 TFEU, which are designed to confirm and bring to an end the unlawful conduct of the Member State concerned, the procedure provided for in Article 260 TFEU is designed only to induce the defaulting Member State to comply with the first judgment establishing a failure to fulfil obligations by imposing, where appropriate, pecuniary penalties.[23]

67. As regards the first aspect, namely the recovery of sums due, the Commission's powers do not pose any problems. They logically form part of the tasks entrusted to the Commission under Article 317 TFEU, pursuant to which the Commission implements the budget of the EU.[24] Just like any party in whose favour the Court of Justice has ruled, the European Union — represented by the institution tasked with implementing the budget — must be able to seek payment of sums due to it, including periodic penalty payments.

68. The Commission is therefore entitled to issue an 'invoice' to the Member State in accordance with the operative part of the Court of Justice judgment delivered under Article 260(2) TFEU. It is irrelevant, in this regard, that the preparation of that invoice may entail calculations or other similar operations. Proper compliance with a judgment often calls for such operations to be carried out, for example in relation to the calculation of interest or the specific scope of the payment obligation, when the judgment to be complied with has defined that obligation in more abstract terms.

69. In the present case, the Court of Justice — in its 2008 judgment on compliance — ordered the Portuguese Republic to make a penalty payment to the Commission, into the account 'European Community own resources'. The Court itself identified the Commission as being the institution with competence to receive the penalty payment. Consequently, the Commission is entitled not only to declare the existence of the obligation to pay a specific amount in respect of the pecuniary penalty due by reason of non-compliance with the 2008 judgment on compliance, but also to demand payment of that penalty by the Member State concerned.

70. In my view, acceptance that the Commission has such a power addresses the Member States' need for judicial protection, as the decision of the Commission will obviously be subject to review by the General Court.

71. By contrast, as regards the second aspect, namely the power of the Commission to analyse the measures taken for the purpose of complying with a Court of Justice judgment, as I have already pointed out, that analysis must correspond to the scope of the failure as it is apparent from the operative part of the Court's judgment delivered under Article 258 TFEU, as interpreted, where appropriate, in light of the grounds of that judgment.

22 — Case C-304/02 *Commission* v *France*, cited above, paragraph 92.

23 — See, in this regard, Joined Cases C-514/07 P, C-528/07 P and C-532/07 P *Sweden and Others* v *API and Commission* [2010] ECR I-8533, paragraph 119.

24 — See, in this regard, Case T-139/06 *France* v *Commission*.

72. In respect of the extent of the General Court's powers in this context, I would note simply that the General Court is capable of being entrusted with a power of interpretation [25] in relation to judgments delivered by the Court of Justice under Articles 258 TFEU and 260 TFEU. Accordingly, the General Court is recognised as having absolute discretion as regards the factual findings underpinning the finding that an infringement exists, as previously established by the Court of Justice. Since a significant proportion of failures to fulfil obligations are of a factual nature, the Court of Justice must bear in mind that questions of fact might fall outside its jurisdiction in the context of an appeal against a General Court judgment concerning the lawfulness of a Commission decision on the status of compliance with a Court of Justice judgment and on the need to take action to secure payment of a penalty.

c) Legal remedies in the event of a dispute at the stage of compliance with a Court of Justice judgment delivered under Article 260 TFEU — introduction of a new action pursuant to Article 258 TFEU

73. The Court of Justice could, it is true, take the view that, in the event of a disagreement concerning compliance with a judgment delivered by it under Article 260(2) TFEU and imposing a periodic penalty, it falls to the Commission to bring a fresh action for failure to fulfil obligations in accordance with Article 258 TFEU. In my view, however, although such an approach may be rigorous and legally justified, it is the most protracted of all options and rather unappealing. It also risks undermining the impact of pecuniary penalties as well as the authority of Court of Justice rulings and is questionable from the standpoint of *res judicata*.

74. However, the situation would be different if the Commission were to be obliged to bring a fresh action for failure to fulfil obligations when the dispute with the Member State at the stage of compliance with a judgment delivered under Article 260 TFEU were to concern measures that, although linked to the infringement established by the Court of Justice, exceed its objective boundaries, as can be seen from the operative part of the first judgment establishing a failure to fulfil obligations.

75. That, moreover, appears to me to be the case here.

76. In the context of the present proceedings, the German Government contemplated a possible new action for failure to fulfil obligations under Article 258 TFEU for the purpose of examining the compatibility, with Directive 89/665, of the new Portuguese rules on liability pursuant to Law 31/2008. The Portuguese Government has also suggested that approach.

77. It seems to me to be common ground that the new legal rules on liability introduced into Portuguese law were not examined by the Court of Justice in order to determine whether they were in conformity with EU law. In my view, the Commission is required to bring a fresh action for failure to fulfil obligations on the basis of Article 258 TFEU as the dispute between the Commission and the Member State goes beyond the boundaries established in the operative part of the Court of Justice judgment under Article 258 TFEU.

78. To my mind, the foregoing is necessary in order to safeguard the rights of defence of Member States. As the German Government correctly noted in relation to actions for failure to fulfil obligations under Article 258 TFEU, new proceedings should be brought when new complaints are made against measures adopted in the course of the proceedings, with a view to resolving the objections raised by the Commission. [26]

25 — However, I recall that, according to settled case-law, the question of proper compliance with a judgment of the Court of Justice does not concern the interpretation of that judgment within the meaning of Article 43 of the Statute of the Court of Justice of the European Union. See, to that effect, Case C-503/04 *Commission* v *Germany* [2007] ECR I-6153, paragraph 15, and the Opinion of Advocate General Geelhoed in Case C-177/04 *Commission* v *France* [2006] ECR I-2461, point 43.

26 — Case C-221/03 *Commission* v *Belgium* [2005] ECR I-8307, paragraph 41.

79. Furthermore, the observations of the Czech Government provide a clear picture of the problem relating to the extent of the Commission's powers in this regard. According to the Czech Government, the Portuguese rules which continued in force after the 2008 judgment on compliance made the award of damages conditional on proof of fault or fraud. The problem identified by the Court of Justice in its 2004 judgment establishing a failure to fulfil obligations concerned the burden of proof, not the requirement of fault. The adoption of Law 67/2007 introduced into the Portuguese legal system a set of legal rules on liability based on a presumption of fault. Consequently, the Commission's complaints on the compatibility of the requirement of fault with EU law necessarily exceed the boundaries of the infringement identified by the Court of Justice in its first judgment establishing a failure to fulfil obligations. In any event, that conclusion cannot be invalidated by the later case-law of the Court of Justice, which has confirmed that the requirement of fault is incompatible with EU law. [27] There is no doubt in my mind that the General Court should not rule on such issues in the course of reviewing the Commission's exercise of the budgetary powers which it is recognised as having.

80. Accordingly, in view of the change in the subject-matter of the proceedings, the General Court was right to refrain from ruling on the new national legislation. Had it acted otherwise, the General Court would have encroached upon the Court of Justice's exclusive jurisdiction in the context of Article 258 TFEU.

d) Legal remedies in the event of a dispute at the stage of compliance with a Court of Justice judgment delivered under Article 260 TFEU — introduction of a new action pursuant to Article 260(2) TFEU

81. According to the Greek Government, in the event of a disagreement between the Commission and the Member State at fault concerning compliance with a judgment, fresh proceedings should be brought in accordance with Article 260(2) TFEU, under the expedited procedure. In its view, responsibility for ruling on a matter of that nature is vested directly in the Court of Justice. [28] During the hearing, the agent acting for the Swedish Government also argued in favour of the possibility of bringing an action under Article 260 TFEU in such a situation.

82. I recall that the 'double infringement' procedure applies when 'the Member State concerned has not taken the necessary measures to comply with the judgment of the Court', although this does not restrict the scope of the procedure to judgments delivered under Article 258 TFEU. On the contrary, Article 260(1) TFEU covers all judgments pursuant to which the Court of Justice has found that a Member State 'has failed to fulfil an obligation under the Treaties'. As a result, there is scope for that article to apply to other provisions, such as Articles 108(2) TFEU and 348 TFEU. Accordingly, the procedure provided for in Article 260 TFEU cannot, in my view, be ruled out per se as a method of securing compliance with a judgment delivered under the same article. The following two points should, however, be addressed.

83. Firstly, I note that the Court of Justice has already described penalty payments and lump sums under Article 260 TFEU as penalties to which the principle of *non bis in idem* generally applies. [29] Notwithstanding the Court's position, in her Opinion in *Commission* v *Luxembourg*, Advocate General Kokott was in favour of a repeated application of those coercive measures. [30] Since the procedure provided for in Article 260(2) TFEU is a method of enforcement, the penalties provided for could, in theory, be imposed on more than one occasion.

27 — Case C-314/09 *Strabag and Others* [2010] ECR I-8769.

28 — In this regard, the Greek Government refers to Case T-139/06 *France* v *Commission*, in which the French Republic challenged Commission Decision C(2006) 659 final requiring the payment of penalties due in compliance with a Court of Justice judgment under Article 260 TFEU.

29 — See Case C-304/02 *Commission* v *France*, cited above, paragraph 84.

30 — Case C-526/08 *Commission* v *Luxembourg*.

84. In my view, the Court of Justice cannot, in a second judgment delivered under Article 260(2) TFEU, increase the amount of the lump sum or penalty payment accruing between the date of delivery of the first judgment under that provision and the date of delivery of the second judgment without thereby infringing the principle of *non bis in idem*. However, I share Advocate General Kokott's view that '[p]enalties to enforce a judgment are different in nature from repressive penalties. Whilst enforcement cannot be effected twice, coercive measures may be repeated if this is necessary to enforce the title in question.' [31]

85. It follows that at a point in time (date Y) after the date of delivery of the first judgment under Article 260(2) TFEU (date X), the amount of the penalty payment may be decreased or increased as from date Y, in keeping with the principles of *res judicata* and *non bis in idem*. I think it is quite common, as regards coercive measures, to provide for the possibility of modifying the penalty payment with immediate effect depending on the status of compliance with the obligation referred to in the judicial or administrative decision.

86. Secondly, it is important to recall the scope of the principle of *res judicata*, the applicability of which has been confirmed by the Court of Justice in actions brought under Article 258 TFEU, [32] and to determine whether that principle might stand in the way of the Commission's bringing a second action in accordance with Article 260 TFEU by reason of the earlier judgment delivered under the same article.

87. I consider that, where the operative part of the judgment under Article 260 TFEU does not give rise to any reasonable doubt, it is for the Commission to send, first of all, a decision to the Member State setting out the amount of the penalty payment due in respect of the first period arising from the Court of Justice's judgment under Article 260 TFEU. It could then be argued that, if the infringement complained of should continue, the Commission could bring a fresh action under Article 260 TFEU and request that a higher penalty payment be set for the second time. This approach would have the advantage of being shorter and more effective, as the entry into force of the Treaty of Lisbon has limited the pre-litigation procedure under Article 260 TFEU to the sending of a letter putting a Member State on notice to submit observations.

88. However, applying the same line of reasoning, *mutatis mutandis*, as that underpinning the judgment in *Commission* v *Luxembourg*, leads me to conclude that a second action brought in accordance with Article 260(2) TFEU should be regarded as inadmissible, since it would cover the same facts and law as the previous judgment delivered under Article 260 TFEU. Put another way, the second action under Article 260 TFEU would involve a mere repetition of the finding of non-compliance with the judgment establishing a failure to fulfil obligations under Article 258 TFEU. Since an earlier judgment delivered under Article 260(2) TFEU constitutes a method of enforcement, such a judgment cannot, by itself, preclude a further judgment from being handed down under the same article, subject to the limits described above.

89. Thus, a second set of proceedings under Article 260(2) TFEU cannot be ruled out if the boundaries of the dispute have clearly changed, where the Member State has taken measures which have been shown to be largely inadequate for the purpose of complying with a judgment delivered under Article 260(2) TFEU. This is also true if compliance with a judgment establishing a factual infringement of a complex nature has reached a point where a future reduction in the penalty payment is justified, without it being necessary to rescind that measure. Pursuant to the principle of sincere cooperation — which also applies to institutions, according to the case-law — it seems to be preferable for the Court of Justice to take a decision in that regard rather than the Commission proceeding on a bold interpretation of its budgetary powers.

31 — Point 33 of the Opinion of Advocate General Kokott in *Commission* v *Luxembourg*.

32 — *Commission* v *Luxembourg*.

90. In view of all these considerations and of the present status of EU law, I consider that the General Court was fully entitled to set aside the contested decision. In that decision, the Commission examined the compatibility, with EU law, of national measures that were not covered by the operative part of the 2004 judgment establishing a failure to fulfil obligations, whereas the Commission ought to have brought a fresh action under Article 258 TFEU in respect of that matter.

91. In addition, I recall that, in accordance with the *Meroni* v *High Authority* line of case-law,[33] the principle governing the institutional architecture of the European Union is the principle of allocation of powers. The General Court therefore acted correctly in restricting its jurisdiction by holding that it could not rule on issues that had not yet been examined by the Court of Justice, the latter being the only institution having the authority to rule on the action for a failure to fulfil obligations concerning the relationship between national measures and EU law.

92. In light of all of the arguments set out above, I propose that the first limb of the Commission's first ground of appeal should be rejected as being unfounded.

V – The second ground of appeal, alleging that the grounds of the judgment under appeal are inadequate and contradictory

A – *Arguments of the parties*

93. By its second ground of appeal, the Commission argues that the judgment under appeal is vitiated by errors of law in that the General Court set aside the contested decision on the basis of inadequate and contradictory grounds.

94. So far as the inadequacy of the grounds is concerned, the Commission takes the view that, in order to set aside the contested decision, the General Court based itself solely on the fact, pointed out in paragraph 85 of the judgment under appeal, that Law 67/2007 makes it potentially less difficult for tenderers who have been harmed by an unlawful act of the contracting authority to obtain damages. According to the Commission, paragraph 86 et seq. of the judgment under appeal do not contain any grounds in the strict sense, as that is where the General Court sets out its narrow interpretation of the Commission's powers.

95. As to the claim that those grounds are contradictory, the Commission contends that the General Court, whilst asserting, 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 Court of Justice judgment in order to prevent that Member State from simply taking measures that have the same content as those that were the subject of the judgment, went on, in paragraph 87, to restrict the Commission's powers to a formal review designed purely to determine whether or not Decree-Law No 48 051 had been repealed.

96. The Portuguese Republic counters by submitting that, as regards the alleged inadequacy of the grounds, the General Court provided ample justification, in paragraphs 68 to 91 of the judgment under appeal, for setting aside the contested decision. As to the claim that the grounds are contradictory, the Portuguese Republic states that, admittedly, in paragraph 81 of the judgment under appeal, the General

33 — The principle of institutional balance was established by the Court in a series of judgments delivered in the context of the ECSC Treaty (Joined Cases 7/56 and 3/57 to 7/57 *Algera and Others* v *Common Assembly* [1957] ECR 39 and Case 9/56 *Meroni* v *High Authority* [1958] ECR 133). That principle is considered to have been 'created by the Treaties' (Case C-70/88 *Parliament* v *Council* [1990] ECR I-2041, paragraph 21).

Court acknowledged the Commission's powers to appraise the measures adopted by a Member State to comply with a Court of Justice judgment. Nevertheless, in paragraph 82 the General Court pointed out the limits on those powers, namely that such appraisal could not prejudice the procedural rights of the parties or the jurisdiction of the Court of Justice.

B – *Assessment*

97. I note, at the outset, that, in view of the clear and substantiated grounds underpinning the judgment under appeal, the Commission's second ground of appeal cannot succeed. To my mind, since the Commission wrongly construed the scope of the judgment under appeal as being overly broad, the claim that the grounds of the judgment were inadequate and contradictory is a result of such a misreading.

98. It should be recalled that, in the context of an appeal, the purpose of review by the Court of Justice is, primarily, to examine to what extent the General Court took into consideration, in a legally correct manner, all of the arguments put forward by the applicant. [34] The reasoning of the General Court may therefore be implicit on condition that it enables the persons concerned to ascertain why the General Court has not upheld their arguments and provides the Court of Justice with sufficient material for it to exercise its power of review. [35]

99. In this regard, I take the view that, in paragraphs 57 to 91 of the judgment under appeal, the General Court addressed the arguments relied on at first instance. The responses provided by the General Court are clear and unequivocal and disclose the matters on which it based its assessment. The fact that the General Court, on the merits, arrived at a quite different conclusion from that of the Commission cannot in itself vitiate the judgment under appeal for failure to state reasons. [36]

100. As regards the argument advanced by the Commission, according to which the General Court contradicted itself in paragraphs 81, 84 and 87 of the judgment under appeal by affirming the powers of Commission only to then restrict their scope, it must be noted that such a claim is based on a patently erroneous reading of the judgment under appeal. Indeed, without contradicting itself on this point, at paragraph 80 of the judgment under appeal the General Court rejected the Commission's argument as to its potential powers to examine Law 67/2007. In order to substantiate its analysis, at a later stage in the judgment under appeal the General Court defined the limits of the Commission's powers, having regard to the scope of the 2004 judgment establishing a failure to fulfil obligations and the 2008 judgment on compliance, in which the Court of Justice had not ruled on the conformity of Law 67/2007 with Directive 89/665. Since the determination of the rights and obligations of the Member States and the appraisal of their conduct can be carried out only in the context of a judgment delivered by the Court of Justice under Articles 258 TFEU to 260 TFEU, the General Court acted correctly in law in holding that the Commission was required to bring a fresh action in accordance with Article 258 TFEU.

101. It therefore follows that the Commission's second ground of appeal is manifestly unfounded in its entirety.

34 — See the order of 31 March 2011 in Case C-367/10 P *EMC Development* v *Commission*, paragraph 46 and the case-law cited.

35 — See the order of 15 June 2012 in Case C-493/11 P *United Technologies* v *Commission*, paragraph 48, and that of 13 December 2012 in Case C-593/11 P *Alliance One International* v *Commission*.

36 — See, by analogy, Case C-362/05 P *Wunenburger* v *Commission* [2007] ECR I-4333, paragraph 80.

VI – Conclusion

102. In conclusion, I propose that the Court should:

— dismiss the appeal and order the European Commission to pay the costs; and

— order the intervening Member States to bear their own respective costs.