

JUDGMENT OF THE GENERAL COURT OF THE EUROPEAN UNION CLARIFIES THE BOUNDARIES OF THE COMMISSION'S COMPETENCES CONCERNING INFRINGEMENT PROCEDURES

On March 29, 2011 the General Court has annulled a decision of the European Commission (“Commission”) by refusing to accept the broad interpretation adopted by the same institution of its competences in the context of infringement procedures under articles 226 and 228 EC (currently articles 258 and 260 of the Treaty on the Functioning of the European Union – “TFEU”) (case T-33/09, *Portuguese Republic v. Commission*).

The case had its origin in the judgment of the Court of Justice of October 14, 2004 which declares 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 the national laws implementing it, conditional on proof of fault or fraud, the Portuguese Republic has failed to fulfil its obligations under Article 1(1) and Article 2(1) (c) 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* [OJ 1989 L 395, p. 33] (underlined added) (case C-275/03, *Commission v. Portugal*) (“2004 judgment”). Consequently, the Portuguese Republic is “required to take the necessary measures to comply with the judgment” under article 260 (1) of the TFEU.

The Commission is competent to initiate the administrative phase of the procedure (already of “double infringement”) and, having considered that the infringement declared by the Court in the first judgment continues to exist, the Commission brings the case again before the Court of Justice, which happened on February 7, 2006. The Court has delivered a new judgment on this case on January 10, 2008, according to which the Portuguese Republic has failed to fulfil its obligations arising from the 2004 judgment (declaration of “double infringement”) and has imposed the Member State a penalty payment of 19.392 euros for each day of delay in adopting the necessary measures to fulfil the obligations arising from the judgment (case C 70/06, *Commission v. Portugal*) (“2008 judgment”).

In the meetings which have followed, the Commission representatives and the Portuguese authorities have discussed what are the measures adequate to comply with the 2004 judgment and the latter defended that Law No. 67/2007, published in December 31, 2007¹ complied with the 2004 judgment. This Law adopts the system for the non-contractual civil liability of the State and other public bodies (*Lei No. 67/2007, que aprova o regime da responsabilidade*

¹ See the Official Gazette, 1st series, nr. 251, of December 31, 2007.



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civil extracontratual do Estado e demais entidades públicas) and in Article 5 provides that Decree-Law No. 48051 is repealed, its entry into force having been established for January 30 2008. On April 25 the Portuguese authorities have communicated to the Commission a proposal of law amending Law No. 67/2007 in order to overcome the Commission's doubts of interpretation concerning the same Law – and irrespective of their disagreement with them - and thus the infringement cease. This same draft law was approved as Law No. 31/2008, of July 17, its entry into force starting the day after. This Law also provided for its retroactive application as from January 30, 2008. However, the Commission has considered in Decision C(2008) 7419 final, which was adopted on November 25 2008, that only Law No. 31/2008 complied with the 2004 judgment. Consequently, the timeframe for calculating the penalty payment imposed by the Court started from the date of the judgment until the entry into force of this Law – July 18 2008.

Subsequently, Portugal brought an action before the General Court seeking the annulment of the same decision. In summary, the Portuguese Republic alleges that the Court of Justice has clearly held that the infringement resulted from the failure to repeal Decree-Law No. 48051 and as such, the 2004 judgment was complied with by Law No. 67/2007, which article 5 repealed the same Decree-Law. Moreover, the Court of Justice did not analyse the compliance of the new Law with the legal framework on the non-contractual civil liability of the State and other public bodies which stems from the European Union law. Therefore, the Commission was bound to initiate a new infringement procedure², given that only the Court of Justice has competence to determine conclusively on the compatibility of a given line of conduct with the Treaty.

Within the context of preliminary considerations, the General Court clarifies the scope of its jurisdiction to hear and determine the legality of the Commission's decision³, responsible for recovering the amounts that would be due to the budget of the European Union pursuant to the judgment that imposed the referred sanction. In this way, the General Court refers that the 2008 judgment constitutes the conclusion of a method of enforcement, given that it is delivered in the context of a special judicial procedure for the enforcement of a judgment (the 2004 one). Consequently, and taking into consideration that there are no specific provisions regarding the settlement of disputes that would arise between a Member State and the Commission on the recovery of the amounts arising from the sanction, the jurisdiction to hear and determine the legality of the Commission's decision is of the General Court in line with the rules concerning annulment actions. But the same Court subsequently clarifies the boundaries of its jurisdiction by considering that it may not rule on questions relating to the infringement by a Member State of its obligations under the Treaty – in the context of an action for annulment of a Commission decision concerning the enforcement of a Court of Justice judgment whereby the same declared an infringement by a Member State – if the same have not been previously decided by the Court of Justice.

The competence of the Commission when verifying compliance by a Member State with a judgment of the Court of Justice and also recovering of the due amounts imposed by the same Court as penalty payments is limited to the assessment of compliance of the national measures with the operative part of the judgment

In the case in question, given that the assessment of the compatibility of Law No. 67/2007 with the European Union law was not undertaken by the Court of Justice in the 2008

² Pursuant to article 260 TFEU.

³ Pursuant to articles 256 and 263 TFEU.

Once the Member State repeals the legal framework considered by the Court of Justice as the only ground for declaring the infringement, should the Member State adopt a new legal framework replacing it and the Commission raises doubts as to its compatibility with the European Union law, the Commission should initiate a new infringement procedure

judgment, the General Court could not undertake it, as it would impinge on the Court of Justice's exclusive jurisdiction.

In this way, so long as it follows expressly from the operative part of the 2008 judgment that it was sufficient for Portugal to repeal Decree-Law No. 48 051 in order to comply with the 2004 judgment and also that the penalty payment would be due until that same repeal, the jurisdiction of the General Court is strictly limited to a formal review to determine whether or not the same Decree had been repealed. Thus, the General Court concludes that the decision must be annulled given that the same has failed to take into account the operative part of the 2008 judgment. In this context, the General Court takes the opportunity to refute the Commission's allegation that it holds a power of appraisal as concerns the enforcement of a judgment delivered by the Court of Justice under a "double infringement" procedure. According to the Court, in case this allegation would be accepted, when a Member State challenges 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 rule on the compliance of national legislation with European Union law. According to the General Court, such an appraisal would prejudice both the procedural rights of the Member States and the exclusive jurisdiction of the Court of Justice, which is not admitted by the Treaty. The General Court thus concludes that under articles 258 and 260 TFEU the determination of the rights and duties of Member States and the appraisal of their conduct may only be undertaken by a judgment of the Court of Justice.

Final notes/Conclusions

This judgment of the General Court constitutes an important step for the clarification of the boundaries of the Commission's competence in the context of infringement procedures against Member States and in monitoring the adoption of measures by the same to comply with the Court of Justice's judgments which moreover impose penalty payments until compliance is achieved. In reality, the General Court:

- Confirms that the measure adequate to comply with a Court of Justice's judgment which declares the failure by a Member State to comply with the obligations arising from the Treaty by not repealing a given legal framework is limited to repealing that same legal framework;
- Confirms that the competence of the Commission when verifying compliance by a Member State with a judgment of the Court of Justice and also recovering of the due amounts imposed by the same Court as penalty payments is limited to the assessment of compliance of the national measures with the operative part of the judgment (and the correspondent calculation of the amount due is undertaken in the context of the adoption of those measures);
- Confirms that, once the Member State repeals the legal framework considered by the Court of Justice as the only ground for declaring the infringement, should the Member State adopt a new legal framework replacing it and the Commission raises doubts as to its compatibility with the European Union law, the Commission should initiate a new infringement procedure;

Only the Court of Justice has the power to determine conclusively on the compatibility of a national legislation with the European Union law

BRIEFING

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This judgment is of particular importance given the amendments introduced by the Treaty of Lisbon to articles 258 and 260 TFEU

Given the strengthening of the competences of the Commission in the context of infringement procedures, the clarification that has been undertaken by the General Court of those competences and also of the jurisdiction of the two courts when scrutinizing the former's competences is particularly timely

- Confirms that only the Court of Justice has the power to determine conclusively on the compatibility of a national legislation with the European Union law;
- Confirms that the competence of the General Court in the context of an appeal by a Member State of a Commission decision ordering the recovery of the amounts due as penalty payment is limited to a formal review of that decision in light of the Court of Justice's judgment.

This judgment is of particular importance given the amendments introduced by the Treaty of Lisbon to articles 258 and 260 TFEU. In reality, on the one hand it should be highlighted that the administrative phase preceding the second infringement action is speedier, given that the issuance of reasoned opinion by the Commission has been eliminated⁴. That results, in practice, in an increase of "pressure" on Member States in the discussion of the compatibility of the measures to comply with the judgment of the Court of Justice that declares the infringement exists already at the initial stage of the letter of formal notice, given that if the Commission concludes that the Member State's reply is not satisfactory and thus the infringement has not ceased, it may then initiate a new infringement procedure with the Court of Justice ("double infringement"). In the same way, the Commission enjoys a new competence according to which it may propose to the Court a penalty payment already in the context of the first action for infringement in cases where allegedly the Member State has not communicated the measures for implementing a directive. Given the strengthening of the competences of the Commission in the context of infringement procedures, the clarification that has been undertaken by the General Court of those competences and also of the jurisdiction of the two courts when scrutinizing the former's competences is particularly timely.

⁴ Formerly, the Commission established a time-limit in the reasoned opinion for the Member State to comply with the judgment which declared the infringement which, in practice, gave more time to the State to evaluate and decide upon the measures to be adopted.

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