OPINION OF ADVOCATE GENERAL
WAHL
delivered on 29 May 2013 (1)

Case C-95/12

European Commission
v
Federal Republic of Germany

(Action under Article 260(2) TFEU – Judgment of the Court establishing a failure to fulfil obligations – Meaning and scope of the judgment – Financial penalties – Penalty payment – Lump sum payment – Alleged ambiguity of the judgment – Time elapsed between the end of the pre-litigation procedure and the commencement of proceedings before the Court – Application for interpretation)

1. This action has been brought by the European Commission against the Federal Republic of Germany under Article 260(2) TFEU, following an alleged failure to comply with the judgment delivered by the Court on 23 October 2007 in Case C-112/05 *Commission* v *Germany* (2) ('the 2007 Judgment').

2. In that judgment, the Court held that by maintaining in force Paragraph 4(1), as well as Paragraph 2(1) in conjunction with Paragraph 4(3), of the Law of 21 July 1960 on the privatisation of equity in Volkswagenwerk GmbH (3) ('the VW Law') the Federal Republic of Germany had failed to fulfil its obligations under Article 56(1) EC. Given that the Federal Republic of Germany has in fact enacted new legislation repealing Paragraphs 2(1) and 4(1) of the VW Law, the present proceedings concern compliance only in relation to Paragraph 4(3) thereof.

3. As the parties hold contrasting views concerning the 2007 Judgment on this point, the present case raises a preliminary issue as to whether the Court established an infringement in relation to Paragraph 4(3) of the VW Law – which affords any shareholder holding 20% of the share capital a blocking minority – taken individually, or whether, instead, that provision was held to constitute a breach of the movement of capital within the meaning of Article 56(1) EC only when read in conjunction with Paragraph 2(1) of the VW Law. According to the latter provision, the voting rights of any individual shareholder were capped at 20% of Volkswagenwerk GmbH ('Volkswagen') share capital.

4. If the Court upholds the Commission's application as regards the failure to comply with the 2007 Judgment, this case also will raise complex issues concerning the correct method of calculating the amount of any financial penalties. The gist of that matter is, on the one hand, the extent to which importance should be ascribed to the alleged ambiguity of the 2007 Judgment with regard to the imposition of financial penalties and, on the other hand, whether – and if so, how – account should be taken, in the calculation of financial penalties, of the unusual length of time to have elapsed between the Federal Republic of Germany's reply to the reasoned opinion and the referral of the case to the Court.

I – Pre-litigation procedure

5. By letter of 24 December 2007 the Commission requested the German Government to notify to it the measures taken in light of the 2007 Judgment.

6. The German authorities replied by letter of 6 March 2008, stating that provision had been made for the necessary changes in the existing law in order to comply with the 2007 Judgment.

7. As the letter did not, however, contain any indication as to the legislative timetable or the content of the draft text mentioned therein, the Commission sent a letter of formal notice dated 5 June 2008 to the Federal Republic of Germany, calling on it to submit its observations within two months.

8. The German Government replied the same day, informing the Commission of the progress of the proposed legislation. It stated that the draft legislative text amending the VW Law had been approved by the Federal Government and that the legislative procedure would begin shortly.

9. On 1 August 2008 the German Government specified the timetable for adoption of the legislative text and informed the Commission of the content of its draft legislation.

10. As it was still not satisfied with the replies provided by the German Government, the Commission delivered a reasoned opinion on 1 December 2008 in which it asked the Federal Republic of Germany to adopt the necessary measures to comply with the obligations set out in the 2007 Judgment within two months. With regard to the draft legislative text, it stated that the text at issue did not amend the minority blocking right provided for in Paragraph 4(3) of the VW Law. The Commission also noted that it had not been provided with information concerning the intentions of the German Government with regard to the amendment of the Articles of Association of Volkswagen, which gave effect to the unlawful provisions of the VW Law; and finally, that it had yet to be notified of the amendment of the VW Law itself.

11. On 10 December 2008, the Law of 8 December 2008 amending the VW Law (4) ('Law amending the VW Law'), which had remained in essence identical to the draft legislative text, was enacted. That law, which entered into force on 11 December 2008, repealed Paragraphs 4(1) and 2(1) of the VW Law as well as Paragraph 101(5) of the Law on public limited companies. (5) However, it did not introduce any amendments to Paragraph 4(3) of the VW Law.

12. Given that the parties continued to hold different views with regard to the 2007 Judgment, the German Government proposed by letter of 17 December 2008 that the parties should jointly submit an application for interpretation of the contested judgment to the Court in accordance with Article 43 of the Statute of the Court of Justice of the European Union and Article 102 of its Rules of Procedure. (6) The Commission replied by letter of 15 January 2009 in which it stated that since it had no doubts as to the meaning or scope of the 2007 Judgment, it did not intend to submit an application for interpretation to the Court.

13. The German Government replied to the reasoned opinion by letter of 29 January 2009 in which it concluded that, by adopting the Law amending the VW Law, it had thoroughly complied with the 2007 Judgment.

14. On 21 February 2012, taking the view that the Federal Republic of Germany had only partially complied with the 2007 Judgment, the Commission brought the present action.

II – Procedure before the Court and forms of order sought

15. By its application, the Commission claims that the Court should:

– declare that by failing to adopt all the measures necessary to comply with the 2007 Judgment regarding the incompatibility with European Union ('EU') law of provisions of the VW Law, the Federal Republic of Germany has failed to meet its obligations under Article 260(2) TFEU;

– order the Federal Republic of Germany to make a daily penalty payment in the amount of EUR 282 725.10 and a lump sum daily payment of EUR 31 114.72, payable to the own resources account of the European Union;

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

16. The Federal Republic of Germany contends that the Court should:

– dismiss the action or, in the alternative, reduce, at the discretion of the Court, the penalty payment and lump sum sought by the Commission and set a date in the judgment in the present case, from which the possible payment obligation should take effect;

– order the Commission to pay the costs.

17. The German Government and the Commission presented oral argument at the hearing on 12 March 2013. The parties also provided their replies to the questions sent to them on my behalf in preparation for the hearing. (7)

III – Analysis

A – *Has the Federal Republic of Germany failed to fulfil its obligations?*

1. The enforcement mechanism under Article 260 TFEU

18. The procedure laid down in Article 260(2) TFEU may be described as the ultimate means for the Commission in its role as the 'guardian of the Treaties' to ensure enforcement of EU law. It operates as a special judicial procedure for the enforcement of judgments or, in other words, as a coercive method to ensure compliance therewith. (8)

19. In this action, the Commission has put forward complaints not only in relation to Paragraph 4(3) of the VW Law but also concerning Volkswagen's Articles of Association. In response to those complaints, the German Government observes that those articles were not called into question by the Court in the 2007 Judgment. Consequently, those complaints should, in its submission, be rejected as inadmissible.

20. In that regard, suffice it to note that – given the special characteristics of the enforcement procedure under Article 260(2) TFEU – the Court has held that only an infringement which the Court has declared, on the basis of Article 258 TFEU, to be well founded may be dealt with under that procedure. (9) As the Articles of Association were not scrutinised by the Court in the 2007 Judgment, I consider the abovementioned complaints inadmissible. (10)

21. Against that background, the purpose of the present proceedings is not to determine whether Paragraph 4(3) of the VW Law, which requires a majority of over 80% of the shares represented for resolutions of the general assembly of Volkswagen, infringes EU law. Instead, this action is concerned with the question whether or not the Federal Republic of Germany has failed to comply with the 2007 Judgment.

22. After a declaratory judgment under Article 258 TFEU, the Member State concerned is required to take all the necessary measures to comply with the ruling of the Court, as stated in Article 260(1) TFEU. When post-litigation non-compliance arises, the Commission plays a pivotal role in determining, prior to a case being brought before the Court under Article 260(2) TFEU, to what extent a Member State has undertaken all the necessary measures in order to comply with the initial judgment of the Court in which an infringement was found.

23. In the present case, before deciding whether the necessary measures have been taken, the Court must, however, first establish whether any infringement was found at all in relation to Paragraph 4(3) of the VW Law, from which an obligation to take measures ensuring compliance could consequently follow.

24. That the parties draw contrasting conclusions from the 2007 Judgment is regrettable. Although disagreement about the meaning and scope of judgments is an inevitable aspect of law, it seems to me that in the context of infringement proceedings under Article 258 TFEU the Court may help to avoid such uncertainty by ensuring that its reasoning is transparent and by carefully formulating the operative part of its judgments. Indeed, while it is for the Commission to assess at the post-litigation stage whether compliance by the Member State can be considered sufficient, the carrying out of this assessment effectively presupposes a clear statement from the Court with regard to the existence of a failure to fulfil obligations.

25. That said, the 2007 Judgment is not to my mind particularly ambiguous. Nonetheless, as the present case illustrates, the language employed in that judgment seems to leave room for argument in relation to Paragraph 4(3) of the VW Law.

26. At this juncture, it must be emphasised that I will not attempt to ascertain what the 'subjective meaning' of the 2007 Judgment is or what the Court might or might not have intended. Instead, the present interpretative exercise seeks to determine the meaning of the operative part of that judgment in light of the grounds thereof. Since the defaulting Member State must be able to determine what constitutes unlawful behaviour on the basis of the judgment at issue, only information that may be discerned from that judgment is of relevance in the present context. In other words, given the financial penalties involved, a broad interpretation of the 2007 Judgment cannot be accepted.

27. For reasons illustrated in the following, I consider that the reading of the 2007 Judgment proposed by the Federal Republic of Germany is to be preferred over that supported by the Commission.

2. Reconstructing the meaning and scope of the 2007 Judgment

28. In the operative part of the 2007 Judgment the Court found that, by maintaining in force Paragraph 4(1), as well as Paragraph 2(1) 'in conjunction with' (11) Paragraph 4(3), of the VW Law, the Federal Republic of Germany had failed to fulfil its obligations under Article 56(1) EC.

29. Accordingly, a finding that the Federal Republic of Germany has failed to fulfil its obligations under Article 260(1) TFUE will turn on whether the 2007 Judgment is interpreted either (i) as declaring the unlawfulness of the three provisions considered individually or (ii) as finding instead two distinct infringements: the first in relation to Paragraph 4(1) of the VW Law and the second in relation to Paragraph 2(1) of the VW Law when read in conjunction with Paragraph 4(3) of that law. This latter reading (ii) is based on the very interaction between the provisions at issue. The unlawfulness would thus follow from the combined effects of those provisions.

30. The Commission contends that the fact that the relevant part of the operative part of the 2007 Judgment contains the words 'in conjunction with' does not exclude the unlawfulness of each of the contested provisions taken on its own. In fact, the unlawfulness of those provisions is confirmed, according to the Commission, by the grounds of that judgment.

31. The German Government argues the contrary. It maintains that the operative part of the 2007 Judgment cannot be read as referring to three unlawful provisions taken separately. It asserts that the Court found two infringements of Article 56(1) EC: the first in relation to Paragraph 4(1) of the VW Law and the second in relation to Paragraphs 2(1) and 4(3) of the VW Law read together. Accordingly, the German Government contends that, by repealing Paragraphs 4(1) and 2(1) of the VW Law, it has fulfilled its obligations under Article 260(1) TFEU.

32. In my view, the use of the words 'in conjunction with' in the operative part of the judgment excludes, on its own, the reading proposed by the Commission. (12) However, given the importance placed on the grounds of a judgment when its meaning is construed, (13) it appears appropriate to analyse the operative part of the 2007 Judgment in light of the reasons given by the Court to justify its decision.

a) One single restriction in relation to Paragraphs 2(1) and 4(3) of the VW Law

33. At the outset, it must be emphasised that the grounds of the 2007 Judgment – in particular paragraphs 31 to 56 – do not in my view support the view taken by the Commission.

34. Firstly, in view of the arguments of the parties in relation to the individual complaints made by the Commission with regard to Paragraphs 2(1) and 4(3) of the VW Law, and the cumulative effects of those provisions, the Court considered it appropriate to analyse the complaints together. (14) In that regard, emphasis should in my view be placed on the fact that the Court explicitly referred to the cumulative effects of the provisions at issue. (15)

35. Secondly, the Commission relies on a number of paragraphs of the 2007 Judgment, (16) which – read on their own – could be construed as supporting its view. I must, however, emphasise the importance of adopting a comprehensive approach to the findings of the Court with regard to the provisions at issue.

36. In my reading of the 2007 Judgment, the combined effect of the relevant provisions underlies the decision of the Court to deal with the complaints relating to Paragraphs 2(1) and 4(3) of the VW Law together. Indeed, this is borne out by the fact that the Court chose to consider the effects of the cap on voting rights alongside the minority blocking right contained in Paragraph 4(3) of the VW Law. (17)

37. In paragraph 50 of the 2007 Judgment, the Court held that Paragraph 4(3) of the VW Law was tantamount to an instrument enabling the public authorities to secure a blocking minority for themselves since the Land of Lower Saxony retained an interest in the capital of VW of approximately 20%. This allowed them to oppose important resolutions on the basis of a lower level of investment than would be required under the German Law on public limited companies.

38. The Commission interprets that paragraph of the 2007 Judgment as confirming the existence of a restriction in relation to Paragraph 4(3) of the VW Law, taken individually. However, I would advise caution against over-reliance on that paragraph by itself.

39. In my view, paragraph 50 of that judgment must be read in conjunction with paragraph 51 in which the Court observes 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 public authorities to exercise considerable influence on the basis of such a reduced investment. It is precisely this legal framework – resulting from the interaction between the contested provisions – that lies at the heart of the analysis undertaken by the Court regarding the existence of a restriction on the free movement of capital and more particularly, direct investments.

40. At this juncture, it must be recalled that movements of capital within the meaning of Article 56(1) EC include direct investments, that is, investments undertaken which serve to establish or maintain lasting and direct links between the persons providing the capital and the undertakings to which that capital is made available in order to carry out an economic activity. (18) The objective of establishing or maintaining lasting economic links presupposes that the shares held by an investor enable him to participate effectively in the management of that undertaking or in its control. (19)

41. With regard to direct investments, national measures must be regarded as restrictions within the meaning of Article 56(1) EC if they are liable to prevent or limit the acquisition of shares in the undertakings concerned or to deter investors of other Member States from investing in their capital. (20)

42. In addition, the Commission relies on the first sentence of paragraph 54 of the 2007 Judgment. More particularly, it submits that the use of ‘restrictions’ in the plural form in that context attests to the finding of two individual infringements in relation to Paragraphs 2(1) and 4(3) of the VW Law.

43. I must emphasise that in that paragraph the Court stated, on the one hand, that the ‘restrictions on the free movement of capital which form the subject-matter of these proceedings relate to direct

investments in the capital of Volkswagen, rather than portfolio investments … which are not relevant to the present action'. (21) On the other hand, the Court concluded as regards direct investments – which in accordance with the first sentence were held to form the subject-matter of the proceedings – that, 'by creating an instrument liable to limit the ability of [direct] investors to participate in a 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, Paragraphs 2(1) and 4(3) of the VW Law diminish the interest in acquiring a stake in the capital of Volkswagen'. (22)

44. In my opinion, both the use of 'restrictions' in the plural form, and the absence of the words 'in conjunction with' in that paragraph are inconclusive. In that regard, the first sentence simply restricts the assessment of the alleged restrictions to direct investments and excludes the analysis of portfolio investments on the ground that they are irrelevant. The second sentence applies the Court's case-law relating to direct investments to the case before it. According to the Court, Paragraphs 2(1) and 4(3) of the VW Law together diminish investors' interest in acquiring stakes in Volkswagen, because they create a framework – or instrument – which may limit the ability of direct investors to participate in the company with a view to establishing or maintaining lasting links with it. (23) In other words, the interaction of those paragraphs lies at the very heart of this restriction.

45. Indeed, any other interpretation would to my mind fail to take into account paragraph 56 of the 2007 Judgment in which the Court found *the combination of* Paragraphs 2(1) and 4(3) of the VW Law to constitute a restriction on the movement of capital within the meaning of Article 56(1) EC.

46. Accordingly, once Paragraph 2(1) of the VW Law is repealed, it would seem that the relevant legal framework ceases to exist, thereby putting an end to the undesired effect of the interaction between Paragraphs 2(1) and 4(3) of the VW Law, that is, restricting direct investment in Volkswagen, which – as is plain from the 2007 Judgment – formed the crux of the Commission's complaints. Although I am not convinced that the same result could have been achieved by repealing Paragraph 4(3) of the VW Law instead of Paragraph 2(1) thereof, the grounds of the 2007 Judgment as well as its operative part would seem equally to permit such a solution.

47. Moreover, I do not consider that the remainder of the Court's assessment of the contested provisions of the VW Law can be interpreted as refuting such an analysis.

b) Further considerations regarding the 2007 Judgment

48. After establishing the existence of a restriction, the Court moved on to consider whether the contested provisions were justified by overriding reasons in the public interest. Finding that the interests invoked by the Federal Republic of Germany, namely the protection of workers and of minority shareholders, could not justify the restrictions in question, the Court held that the 'complaints relied on by the Commission alleging breach of Article 56(1) EC must be upheld'. (24)

49. Again, considered individually, that paragraph could be interpreted as confirming the Commission's reading of the 2007 Judgment. Taking into account the Court's interim conclusion, at paragraph 56 of the 2007 Judgment, concerning the existence of a restriction, paragraph 81 seems unhappily worded. (25) However, the contradiction between the two paragraphs is alleviated when, at paragraph 82, the Court concludes its analysis re-affirming 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 56(1) EC'.

50. As regards the fact that the Court ordered the Federal Republic of Germany to pay the costs in accordance with the form of order sought by the Commission because Germany had, 'in essence, been unsuccessful', (26) it does not contradict my reading of the 2007 Judgment. Indeed, it is irrelevant in that respect whether or not the Federal Republic of Germany was unsuccessful in relation to *all* of the complaints made by the Commission against the VW Law within the context of Article 56(1) EC, or only to two thirds of those complaints. (27)

51. Finally, I do not find persuasive the arguments put forward by the Commission concerning the relevance of the 'golden shares case-law' (28) in interpreting the 2007 Judgment. It is true that that case-law forms the basis for the analysis concerning the existence of a restriction on the free movement of capital and its possible justification, as is clear from the reasoning of the Court. (29) It cannot, however, be relied on to interpret the 2007 Judgment broadly.

52. In this respect, particular significance should be placed on context. As I have observed, the 2007 Judgment was given within the framework provided for by Article 258 TFEU (ex Article 226 EC). Although the Commission has considerable discretion in assessing to what extent the measures taken by a Member State comply with a judgment, I would advise against recognising that the Commission has the power unilaterally to extend the scope of a declaratory judgment of the Court *ex post* on the basis of other similar, yet not identical, cases. (30)

53. Equal caution should, in my view, be exercised in relation to the Commission's argument that the 2007 Judgment is to be read in light of the Opinion delivered by Advocate General Ruiz-Jarabo Colomer in the case giving rise to that judgment. (31) It must be recalled that the Advocate General, after rejecting the arguments of the German Government, proposed that the Court declare the three contested provisions unlawful. Although the Opinion of the Advocate General certainly offers an in-depth analysis of the legal and political issues underlying the judgment of the Court, appropriate regard must be had to the varying formulae used in the operative part of the judgment and the Opinion with regard to the existence of unlawful restrictions.

54. That being so and because the purpose of the present proceedings is not to determine whether Paragraph 4(3) of the VW Law, considered on its own, constitutes an infringement of EU law, there is no need to enquire any further into whether the minority blocking right provided for in Paragraph 4(3) of the VW Law constitutes an infringement of EU law. This issue should, in my view, be decided in proceedings under Article 258 TFEU. (32)

55. Therefore, I am of the opinion that the Commission's action should be dismissed and that it should be ordered to pay the costs.

56. In the event, however, that the Court does not concur with my reading of the 2007 Judgment, I will address the issue of financial penalties.

B – *Financial penalties*

1. Preliminary issues

57. If the Court were to find that the Federal Republic of Germany has not complied with the 2007 Judgment, it may impose a penalty payment and/or a lump sum in accordance with Article 260(2)(2) TFEU. (33) It is settled law that, although the suggestions formulated by the Commission on financial penalties constitute a useful point of reference, they do not bind the Court. Accordingly, it is for the Court to assess in each case, in light of the circumstances specific to the case, the amount of the financial penalties to be imposed. (34)

58. Relying on the method of calculating financial penalties set out in its 'Communication on the application of Article 228 of the EC Treaty', (35) the Commission suggests that the Court impose on the Federal Republic of Germany a penalty payment of EUR 282 725.10 per day of delay in complying with the 2007 Judgment. It bases this suggestion on a combination of a basic flat-rate amount of EUR 630 multiplied by a coefficient for seriousness of 7, a coefficient for duration of 3 and a special 'n' factor of 21.37. (36)

59. With regard to the lump sum payment, the Commission proposes, having regard to all the legal and factual circumstances pertaining to the infringement at issue, that a daily amount of EUR 31 114.72 (which is the product of a basic flat-rate amount of EUR 208, a coefficient for seriousness of 7 and a special 'n' factor of 21.37) should be multiplied by the number of days between delivery of the

2007 Judgment and the date on which the Federal Republic of Germany complies with its obligations or, failing that, the date of judgment in the present case.

60. Employing the guidelines drafted by the Commission as a point of departure, the Court systematically considers three basic criteria; that is, the degree of seriousness of the infringement, its duration and the ability of the Member State to pay. (37) More particularly, the Court assesses the effects which the failure to comply will have on private and public interests, and the urgency of persuading the Member State concerned to fulfil its obligations. (38) In this regard, the Court has consistently held that the financial penalties imposed must be set at a level that is both appropriate to the circumstances and proportionate to the infringement established, as well as to the ability to pay of the Member State concerned. (39)

61. At this juncture, I would point out that the economic data on which the Commission bases its suggestions has been updated since the referral of the case to the Court. In this respect, it seems appropriate to take into consideration changes in that data that may have occurred. In particular, this relates to the need to assess the Member State's ability to pay in light of recent trends in inflation and GDP of the Member State concerned at the time when the Court examines the facts. (40)

62. In my opinion, having recourse to updated economic data duly reflects the principles of appropriateness and proportionality applicable in the field of financial penalties. (41) Accordingly, I intend to use the most recent data available, namely that provided by the Commission in its Communication of 2012. (42) In that Communication, the standard flat-rate amount for calculating the penalty payment is fixed at EUR 640 per day, the standard flat-rate amount for the lump sum payment at EUR 210, and the special 'n' factor for the Federal Republic of Germany at 21.12. (43)

2. Special circumstances of the present case

63. The present case raises several issues of principle. Specifically, the issue is whether – and, if so, how – the alleged ambiguity of the 2007 Judgment, the period of three years that elapsed between the end of the pre-litigation procedure and the commencement of proceedings before the Court and, finally, the proposal of the Federal Republic of Germany to submit a joint application for interpretation to the Court should be taken into account in calculating the amount of the financial penalties to be imposed.

64. Those factors will be examined before the calculation of financial penalties is addressed in detail.

a) Should the alleged ambiguity of the 2007 Judgment have an impact on the imposition of financial penalties?

65. The German Government has argued throughout its submissions that, given the absence of a clear and unambiguous legal basis for the obligations deriving from the 2007 Judgment, the Court should refrain from imposing any financial penalties.

66. I cannot accept this argument. Doing otherwise would, in my opinion, fail to reflect the purpose of Article 260 TFEU, that is, the need to safeguard the effective enforcement of EU law.

67. It must be recalled that the particular system set up by the complementary Articles 258 and 260 TFEU, which is intended to ensure compliance with EU law, was designed by the Member States themselves. As a *sui generis* procedure peculiar to EU law, affording the primary mechanism for imposing sanctions against defaulting Member States, the enforcement procedure governed by Article 260 TFEU must be distinguished from a civil procedure. (44)

68. Accordingly, the rights which are accorded to the defaulting Member State in relation to financial penalties envisaged have consistently been construed narrowly in the case-law of the Court. More particularly, they must be understood in light of the objective pursued by Article 260 TFEU, namely guaranteeing that the relevant legislation is complied with. (45) In this context, it is for the Member State concerned to draw the conclusions to which the judgment establishing an infringement in its view gives

rise, and to justify, when necessary, the validity of those conclusions before the Court in proceedings under Article 260 TFEU. (46)

69. To satisfy the minimum requirements as regards those rights, it is sufficient that the Member State has been given an opportunity to express its view on all the matters of law and of fact necessary for establishing that the alleged breach has persisted and for deciding on the seriousness of the breach and the measures which may be adopted in order to bring it to an end. (47) Provided that such an opportunity has been given, the Court may impose the financial penalties it considers appropriate for ensuring that the initial judgment is complied with as rapidly as possible and for preventing similar infringements of EU law from recurring. (48)

70. Put differently, if an argument concerning the alleged ambiguity of a judgment of the Court could be raised successfully against the need to impose financial penalties, the enforcement mechanism governed by Article 260 TFEU would lose its bite. Moreover, such a solution would require the Court systematically to assess its declaratory judgments under Article 258 TFEU for any ambiguity capable of exempting the Member States from financial penalties. This would be in obvious contradiction to the objective of Article 260 TFEU, namely that of putting an end to non-compliance with EU law as rapidly as possible. In this respect, the risk of financial penalties provides a powerful incentive to Member States to remedy the breach without delay.

71. Nonetheless, it could be argued that the alleged ambiguity of the 2007 Judgment is to be considered as a mitigating factor in determining the seriousness of the infringement. This would be justified because the content of a Member State's obligations is determined definitively only in the very judgment which imposes the penalty payment. (49)

72. Even though the Court has full jurisdiction to take account of all the circumstances it considers pertinent, I would not advocate such an approach. In infringement proceedings under Article 258 TFEU, the Court is required to find only that a provision of EU law has been infringed. (50) It does not, however, take a stance on the measures that need to be taken by the Member State in question to put an end to the breach. In this respect, it is not unusual for a judgment finding an infringement to leave room for argument as regards the necessary measures to be taken.

73. Furthermore, the failure to fulfil obligations which gives rise to the initial judgment under Article 258 TFEU stems from non-compliance with Member-State obligations under the Treaties. In fact, the relevant legal provisions from which those obligations arise are not as such affected by the way in which the judgment confirming the breach in question is worded. Therefore, it seems to me that the clarity of the relevant EU legislation may in some circumstances constitute a more appropriate yardstick for the analysis of seriousness than the clarity of judgments finding an infringement. (51)

74. For the above reasons, I take the view that the Federal Republic of Germany cannot successfully plead ambiguity of the 2007 Judgment in its defence concerning the imposition of financial penalties.

b) Who should act when disagreement as regards compliance persists?

75. At the hearing, the parties were invited to give their views on the question whether, in the circumstances of the present case, one of the parties was under an obligation to act within a specific period and, if so, how an omission to act should be taken into consideration in the calculation of financial penalties. In essence, the issue boils down to establishing who should bear the risk of not acting, once it has become clear that the parties hold irreconcilable views with regard to compliance with the initial judgment.

76. At the outset, it must be recalled that under Article 258 TFEU the Commission enjoys wide discretion in taking the decision to initiate proceedings and in determining the appropriate time frame for bringing an action for failure to fulfil obligations before the Court. (52) However, in the context of Article 260 TFEU the precise scope of that discretion remains to be determined by the Court.

77. Parallels may be drawn between these two provisions. Similarly to Article 258(2) TFEU, Article 260(2) TFEU does not prescribe any time-limit for bringing an action before the Court. Indeed, these provisions appear to afford wide discretion to the Commission in this respect. (53) In my opinion, the absence of mandatory language, which is common to both provisions, seems to warrant the analogous application of the Court's case-law in the context of Article 258 TFEU regarding, in particular, the discretion afforded to the Commission as to the appropriate time to refer a case to the Court. (54)

78. In that regard, the Commission's discretion to bring an action for failure to fulfil obligations is limited only in so far as its behaviour infringes the rights of defence of the Member State concerned.(55) If the unusual length of proceedings hampers the Member State in its defence, this may result in the inadmissibility of the action brought under Article 258 TFEU. (56)

79. In the present case, there is no evidence that suggests that the Commission's behaviour and the length of time that elapsed after the close of the pre-litigation procedure had any effect on the way in which the Federal Republic of Germany conducted its defence.

80. In fact, it seems to me that under Article 260 TFEU the constraining effect of the rights of the defence comes into play only in very exceptional circumstances and that the Commission is not, as a matter of principle, under an obligation to refer the case to the Court within a specific period. (57) However, this begs the following question: even if the delay in bringing an action before the Court does not affect the admissibility of the action, should it have a bearing on the imposition of financial penalties?

81. At first glance, taking the Commission's behaviour into account in one way or another would seem reasonable, since the longer the delay in bringing an action before the Court, the longer the non-compliance persists. In fact, delay in referring a case to the Court after the close of the pre-litigation procedure could in some cases prove detrimental to securing compliance 'as soon as possible' (58) and, in the final analysis, to ensuring the effective enforcement of EU law.

82. This anomaly cannot, however, be considered sufficient to construe Article 260 TFEU as containing a specific period within which a case must be brought before the Court.

83. Requiring the Commission to refer the case to the Court within a specific period – and penalising it for not acting within that period either by exempting the Member State from financial penalties or by reducing the amount thereof – would in my view run counter to the objective underlying the enforcement mechanism. (59) This is because such a requirement would deprive the Commission of its means of persuading the Member State concerned to take compliance measures as soon as possible, including the economic pressure of financial penalties.

84. That said, the fact that in this case a period of three years elapsed between the end of the pre-litigation procedure and the referral of the case to the Court does not seem fully consistent with the objective of a speedy and efficient solution to the issue of non-compliance. (60) In this respect, the course of action taken by the Commission cannot escape criticism.

85. Notwithstanding the Commission's behaviour, the fact remains that the Member State concerned is required to take all the necessary measures in order to comply with EU law. While Article 260 TFEU does not specify the period within which the initial judgment declaring a breach of obligations must be complied with, the Court has consistently held that the imperative of immediate and uniform application of EU law means that 'the process of compliance must be initiated at once and completed as soon as possible'. (61)

86. Indeed, remedying the breach remains the sole responsibility of the Member State concerned. As Article 260 TFEU provides for a coercive method of enforcement and as the possibility of imposing financial penalties is intended to dissuade Member States from prolonging non-compliance, I do not consider it appropriate to exempt the Federal Republic of Germany from financial penalties or, indeed, to reduce the amount thereof because of the course of action taken by the Commission in this case. In general terms, such an approach would in practice weaken the coercive force of Article 260 TFEU and

make compliance a less attractive alternative. (62)

87. Finally, given the requirement expressly stated in Article 260(1) TFEU to take the necessary measures to comply with a judgment, I see no reason why the Federal Republic of Germany could not have submitted an application for interpretation to the Court on its own motion in order to mitigate the financial risk involved. (63) However, since submission of such an application is not required under the enforcement procedure, the fact that it chose not to pursue that option ought not to have any effect on the assessment of appropriate financial penalties. (64)

88. I now turn to consider the calculation of financial penalties, beginning with the penalty payment.

3. The penalty payment

89. The penalty payment is intended to induce the defaulting Member State to remedy a persisting breach of obligations. (65) To determine whether a penalty payment should be imposed, the decisive factor is whether an infringement still persists when the case is examined by the Court.

90. In the event that the Court should uphold the Commission's action regarding the existence of a breach, there seems to be agreement between the parties that it is simply because Paragraph 4(3) of the VW Law remains in force that the Federal Republic of Germany has not put an end to that breach.

91. In those circumstances, and in the event the Court should not concur with my reading of the 2007 Judgment, I take the view that a penalty payment should be imposed on the Federal Republic of Germany.

a) Seriousness of the alleged infringement

92. As regards the seriousness of the infringement, it must be observed that Article 56 EC lays down a fundamental principle which constitutes one of the cornerstones of the internal market. To ensure the functioning thereof, it is imperative that all restrictions on the movement of capital between Member States, and between Member States and third countries, be abolished. (66)

93. In the Commission's analysis, the alleged infringement results in a situation in which authorities retain the possibility of exercising influence in an undertaking which exceeds their level of investment. Specifically, action taken by public authorities in a private undertaking by means provided for in legislation (that is, by imposing the minority blocking right laid down in Paragraph 4(3) of the VW Law) would be capable of limiting the ability of other investors to participate in that company with a view to establishing or maintaining lasting and direct economic links with it.

94. Although the infringement of fundamental principles of the Treaty must be held to be particularly serious, (67) it must be noted that the Federal Republic of Germany has ensured partial compliance with the 2007 Judgment by repealing Paragraphs 2(1) and 4(1) of the VW Law. This factor should, in my opinion, alleviate the seriousness of the infringement at issue.

95. Furthermore, I would be inclined to argue that without the framework provided by the cap on voting rights in Paragraph 2(1) of the VW Law, the minority blocking right contained in Paragraph 4(3) of the VW Law has only very limited impact on the movement of capital. Certainly, it is undisputed that the minority blocking right diverges from the general threshold of 25% provided for in the Law on public limited companies and that it involves a specific obligation that is imposed on shareholders by way of legislation. Nonetheless, for assessing the seriousness of the alleged infringement, it is significant that that blocking right benefits all shareholders, large and small, without distinction. Therefore, I am not convinced that such a blocking right – even if considered in light of the existing interest of approximately 20% retained by public authorities (namely the Land of Lower Saxony) in the capital of Volkswagen – is capable of significantly restricting the movement of capital.

96. Having regard to the above considerations, I am of the opinion that a coefficient of 2 would

appropriately reflect the seriousness of the infringement.

b) Duration and the Member State's ability to pay

97. The duration of the infringement under Article 260(1) TFEU, which must be calculated from the date on which the Court delivered the 2007 Judgment, is at present five years and seven months. While the provision does not indicate the period within which a judgment must be implemented, it is settled law that the process of compliance must be initiated at once and completed as soon as possible. (68)

98. If the Court should find the Federal Republic of Germany to continue to be in breach of the 2007 Judgment, that failure to fulfil obligations is particularly open to criticism because the measures necessary to comply with the 2007 Judgment can be described as being straightforward. Indeed, as the adoption of the Law amending the VW Law illustrates, full compliance with the 2007 Judgment ought not to have encountered any major difficulties.

99. In those circumstances, a coefficient of 3 appears appropriate to take account of the duration of the infringement.

100. With regard to the ability to pay of the Member State concerned, the Court has held that multiplying the basic amount by a coefficient specific to that Member State is an appropriate means of reflecting that State's ability to pay while keeping the variation between the Member States within a reasonable range. (69) It follows that, in this case, it is appropriate to use an 'n' factor of 21.12 for the Federal Republic of Germany. (70)

101. Finally, I disagree with the German Government's claim that it should be granted an additional period enabling it to meet its obligations. It justifies this claim by the absence of a clear and unambiguous legal basis from which its obligations follow. (71)

102. As I have tried to illustrate above, the alleged ambiguity of a judgment should not be considered a relevant factor for the assessment of seriousness. Given that the 2007 Judgment has not in any way altered the content of Member States' obligations arising from Article 56 EC, there is no need to grant the Federal Republic of Germany an additional period of grace.

103. For the above reasons, I am of the opinion that a daily penalty payment of EUR 81 100.8 (= 640x2x3x21.12) should be imposed on the Federal Republic of Germany from the date of delivery of the judgment in the present case until the 2007 Judgment has been fully complied with.

4. The lump sum payment

104. To place the defaulting Member State under sufficient financial pressure to induce it to remedy the breach established in the initial judgment under Article 258 TFEU, the Court may decide to impose a lump sum in addition to a penalty payment. (72)

105. A penalty payment functions as an inducement to the defaulting Member State to remedy a breach as soon as possible after judgment has been given in proceedings under Article 260 TFEU. By contrast, imposing a lump sum payment represents a deterrent which aims to ensure that Member States will not consider it preferable to await such proceedings before taking the appropriate measures to remedy a breach established by the Court in infringement proceedings under Article 258 TFEU. (73)

106. It is settled law that Article 260 TFEU confers a wide discretion on the Court to decide whether or not to impose a lump sum payment, having regard to all the relevant factors pertaining to both the particular nature of the infringement established and the conduct of the Member State involved. (74) More particularly, these considerations include the length of time for which the breach of obligations has persisted since the judgment establishing it was delivered as well as the seriousness of the infringement. (75)

107. In the present proceedings, it is the duration of the infringement which in my view supports the imposition of a lump sum payment. In particular, a considerable period of time has elapsed, inasmuch as more than five years have passed since delivery of the 2007 Judgment. The breach in question exists regardless of the partial compliance which was achieved by adopting the Law amending the VW Law.

108. As regards the lump sum payment in particular, the Court rarely elucidates the criteria employed to calculate the amount which it considers appropriate in the circumstances of the case in question. To achieve more transparency and, hence, to enhance the deterrent effect of the lump sum payment in this respect, I consider it particularly important that the applicable criteria be clearly elucidated. (76)

109. In the present case, I see no reason why the Commission guidelines (77) could not be employed as a yardstick. Taking account of the above analysis of seriousness and the Member State's ability to pay, it appears appropriate to apply a daily lump sum payment of EUR 8 870.40 – which is the product of a basic flat-rate amount of EUR 210, a coefficient for seriousness of 2 and a special 'n' factor of 21.12 – for each day of non-compliance.

110. At the date of delivery of this Opinion the breach has persisted for 2 045 days. Multiplying the daily amount of EUR 8 870.40 by 2 045 days amounts to a total of EUR 18 139 968. As this amount exceeds the minimum set by the Commission for the Federal Republic of Germany (EUR 11 192 000), (78) the proposed lump sum payment in my view also correctly reflects the dissuasive and punitive character of this financial penalty.

111. Therefore I am of the opinion that a daily lump sum payment of EUR 8 870.40 multiplied by the number of days between delivery of the 2007 Judgment and the date of the judgment in the present case should be imposed on the Federal Republic of Germany.

IV – Conclusion

112. In light of the foregoing considerations, I propose that the Court:

– dismiss the Commission's action;

– order it to pay the costs.

In the alternative, if the Court finds that the Federal Republic of Germany has failed to fulfil its obligations under Article 260(1) TFEU, the Court should:

– order the Federal Republic of Germany to make a daily penalty payment in the amount of EUR 81 100.80 from the date on which judgment is delivered in the present case until the 2007 judgment has been complied with and a daily lump sum payment of EUR 8 870.40 multiplied by the number of days between delivery of the 2007 Judgment and the date of the judgment in the present case;

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

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1 – Original language: English.

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2 – Case C-112/05 *Commission* v *Germany* [2007] ECR I-8995.

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3 – Gesetz über die Überführung der Anteilsrechte an der Volkswagenwerk Gesellschaft mit beschränkter Haftung in private Hand (Law of 21 July 1960 on the privatisation of equity in the Volkswagenwerk limited company), BGBl. 1960 I No 39, p. 585, and BGBl. 1960 III, p. 641-1-1.

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4 – Gesetz zur Änderung des Gesetzes über die Überführung der Anteilsrechte an der Volkswagenwerk Gesellschaft mit beschränkter Haftung in private Hand (Law amending the law on the privatisation of equity

in the Volkswagenwerk limited company), BGBl. 2008 I No 56, p. 2369.

5 – Aktiengesetz (Law on public limited companies), BGBl. 1965 I No 48, p. 1089.

6 – After the amendment of the Rules of Procedure, this provision now figures in Article 158 thereof.

7 – See point 75 et seq. below.

8 – See, to that effect, Case C-304/02 *Commission* v *France* [2005] ECR I-6263, paragraph 92.

9 – Case C-457/07 *Commission* v *Portugal* [2009] ECR I-8091, paragraph 47. See also, on the imperative of coherence and precision concerning the Commission's application initiating infringement proceedings, Case C-68/11 *Commission* v *Italy* [2012] ECR I-0000, paragraphs 50 and 51 and case-law cited.

10 – At the hearing, the Commission was asked to clarify its position on that point. Given the vagueness of its answer, I must assume that the Commission did not intend to limit its complaints solely to Paragraph 4(3) of the VW Law. In other words, it appears that its arguments concerning the Articles of Association were not simply raised to clarify the context of the debate.

11 – The authentic German version of the 2007 Judgment employs the expression 'in Verbindung mit' in this context.

12 – Indeed, as the Federal Republic of Germany correctly observed in its oral submissions, the Court could have specified, as it did inter alia in Joined Cases C-463/04 and C-464/04 *Federconsumatori and Others* [2007] ECR I-10419, paragraph 43, that the contested provisions form unlawful restrictions both on their own and in conjunction with the other relevant provision.

13 – Case C-526/08 *Commission* v *Luxembourg* [2010] ECR I-6151, paragraph 29; see also Case 135/77 *Bosch* [1978] ECR 855, paragraph 4.

14 – Paragraph 30 of the 2007 Judgment.

15 – Contrary to what the Commission asserts, the content of the initiating application in Case C-112/05 should in my opinion remain irrelevant for the purposes of interpreting the 2007 Judgment in so far as details of that content are not discernible from that judgment itself.

16 – See, in particular, paragraphs 40, 50 and 81 of the 2007 Judgment.

17 – Paragraph 43 of the 2007 Judgment.

18 – Case C-194/06 *Orange European Smallcap Fund* [2008] ECR I-3747, paragraph 100 and case-law cited.

19 – Ibid., paragraph 101. See also paragraph 18 of the 2007 Judgment and case-law cited.

20 – Case C-543/08 *Commission* v *Portugal* [2010] ECR I-11241, paragraph 47 and case-law cited.

21 – First sentence of paragraph 54 of the 2007 Judgment.

22 – Second sentence of paragraph 54 of the 2007 Judgment.

23 – See, in particular, paragraphs 52 and 54 *in fine* of the 2007 Judgment.

24 – Paragraph 81 of the 2007 judgment.

25 – See point 45 above.

26 – Paragraph 83 of the 2007 Judgment.

27 – This remains true notwithstanding the fact that the Court dismissed the Commission's action in so far as it was based on a breach of Article 43 EC, since two out of three contested provisions were deemed unlawful as a result of those proceedings.

28 – See the Opinion of Advocate General Ruiz-Jarabo Colomer in Case C-112/05, at point 40 et seq.

29 – See, in particular, paragraphs 18 and 72 and 73 of the 2007 Judgment.

30 – On differences between the circumstances that gave rise to the 2007 Judgment and those underlying the golden shares case-law of the Court, see the Opinion of Advocate General Ruiz-Jarabo Colomer in Case C-112/05.

31 – See, in particular, points 103 and 107 of the Opinion.

32 – In this context account should be taken of the principle of *res judicata*, which is also applicable to infringement proceedings. However, the principle only extends its reach to matters of fact and law actually or necessarily settled by a declaratory judgment given pursuant to Article 258 TFEU. Therefore, Member States cannot validly plead *res judicata* in light of an earlier judgment unless the relevant cases are essentially identical in fact and in law with regard to the content of the complaints put forward by the Commission. See Case C-526/08 *Commission* v *Luxembourg*, paragraphs 27 and 34 and case-law cited.

33 – See Case C-304/02 *Commission* v *France,* paragraph 86.

34 – Case C-70/06 *Commission* v *Portugal* [2008] ECR I-1, paragraphs 34 and 38 and case-law cited.

35 – SEC(2005) 1658.

36 – In the application the Commission relies on data based on the Commission Communication 'Updating of data used to calculate lump sum and penalty payments in infringement proceedings', SEC(2011)1024.

37 – Case C-610/10 *Commission* v *Spain* [2012] ECR I-0000, paragraph 119 and case-law cited. See also Case C-387/97 *Commission* v *Greece* [2000] ECR I-5047, paragraph 92, and Case C-278/01 *Commission* v *Spain* [2003] ECR I-14141, paragraph 52.

38 – Case C-304/02 *Commission* v *France*, paragraph 104. See also Case C-387/97 *Commission* v *Greece*, paragraph 92.

39 – In relation to the penalty payment, see Case C-610/10 *Commission* v *Spain*, paragraph 118 and case-law cited. The same principle applies in the context of the lump sum payment. See, in this respect, Case C-568/07 *Commission* v *Greece* [2009] ECR I-4505, paragraph 47 and case-law cited.

40 – Case C-407/09 *Commission* v *Greece* [2011] ECR I-2467, paragraph 42; Case C-610/10 *Commission* v *Spain*, paragraph 131; and Case C-279/11 *Commission* v *Ireland* [2012] ECR I-0000, paragraphs 78 and

79.

41 – See similarly the Opinion of Advocate General Jääskinen in Case C-241/11 *Commission* v *Czech Republic* [2013] ECR I-0000, point 86.

42 – The Commission Communication 'Updating of data used to calculate lump sum and penalty payments to be proposed by the Commission to the Court of Justice in infringement proceedings', C(2012) 6106 final.

43 – Ibid., pp. 3 and 4.

44 – See, in particular, Case C-304/02 *Commission* v *France*, paragraph 91.

45 – As regards the principle of legal certainty and the rights of defence, see Case C-304/02 *Commission* v *France*, paragraphs 85 to 97.

46 – Case C-503/04 *Commission* v *Germany*, paragraph 16.

47 – Case C-304/02 *Commission* v *France*, paragraph 97.

48 – Ibid.

49 – See similarly the Opinion of Advocate General Geelhoed in Case C-177/04 *Commission* v *France* [2006] ECR I-2461, point 70. In that case, however, the Court did not follow the Advocate General's proposal. See paragraph 78 of the judgment.

50 – Case C-503/04 *Commission* v *Germany* [2007] ECR I-6153, paragraph 15. In fact, once Article 260 TFEU comes into play, an infringement is no longer confined to the underlying breach of Treaty obligations under Article 258 TFEU, but forms a 'compound infringement' covering not only the original infringement but also the breach of obligations that follows from Article 260(1) TFEU. See the Opinion of Advocate General Fenelly in Case C-197/98 *Commission* v *Greece* [2000] ECR I-8609, point 19.

51 – Indeed, in its assessment, the Court has taken into consideration the extent to which the Member State's obligations were clearly defined in the relevant provisions. See, in this respect, Case C-177/04 *Commission* v *France*, paragraph 72.

52 – See, inter alia, Case C-546/07 *Commission* v *Germany* [2010] ECR I-439, paragraphs 21 and 22 and case-law cited. Under the procedure governed by Article 258 TFEU the Commission is not obliged to act within a specific period, save where the excessive duration of the pre-litigation procedure is capable of making it more difficult for the Member State concerned to refute the Commission's arguments and of thus infringing the rights of the defence.

53 – According to Article 260(2) TFEU, first sentence: 'If the Commission considers that the Member State concerned has not taken the necessary measures to comply with the judgment of the Court, it may bring the case before the Court after giving that State the opportunity to submit its observations.' See also the Opinion of Advocate General Fenelly in Case C-197/98 *Commission* v *Greece*, point 19.

54 – This also appears to reflect the prevailing position in legal scholarship: see inter alia Bonnie, A., 'Commission discretion under Art. 171(2) EC', *European Law Review*, 1998, 23(6), p. 544, and Masson, B., 'L'obscure clarté de l'article 228, par. 2, CE', *Revue trimestrielle du droit européen*, 2004, 4(4), pp. 639 to 668.

55 – See point 76 above.

56 – Case C-523/04 *Commission* v *Netherlands* [2007] ECR I-3267, paragraph 27. See also Case C-96/89 *Commission* v *Netherlands* [1991] ECR I-2461, paragraph 16.

57 – For criteria applicable to the assessment concerning the rights of the defence, see Case C-304/02 *Commission* v *France*, paragraph 97.

58 – See, in this respect, Case C-374/11 *Commission* v *Ireland* [2012] ECR I-0000, paragraph 21 and case-law cited.

59 – Such a requirement would also entail a complex and detailed assessment of what constitutes a reasonable time frame in each individual case.

60 – This objective is of particular significance in light of the amendment made to Article 260 TFEU by the Treaty of Lisbon which allows the Commission to bring the Member State concerned before the Court without issuing a reasoned opinion. Although in the present case the pre-litigation procedure came to an end before the entry into force of the Lisbon Treaty, so that it here also included the issuing of a reasoned opinion, the amendment again highlights that the objective of the procedure is to ensure that a breach is remedied rapidly and efficiently. See also: Secretariat of the European Convention, 'Final report of the discussion circle on the Court of Justice', document CONV 636/03, paragraph 28.

61 – See, in this respect, Case C-374/11 *Commission* v *Ireland*, paragraph 21 and case-law cited.

62 – This is so, in particular, because Member States may be able to delay the referral of the case to the Court by prolonging negotiations with the Commission. In such cases, the delay in bringing an action would unjustifiably favour the defaulting Member State.

63 – See similarly the Opinion of Advocate General Jääskinen C-241/11 *Commission* v *Czech Republic*, point 70.

64 – By contrast, the conclusion would necessarily be different if the Federal Republic of Germany had submitted an application to that effect and the Court had concluded that the 2007 Judgment did in fact find an infringement in relation to Paragraph 4(3) of the VW Law. Under this hypothesis, the course of action taken by the Member State would clearly illustrate its intention to put an end to the infringement as soon as possible.

65 – See Case C-304/02 *Commission* v *France*, paragraph 103.

66 – Article 56(1) EC.

67 – See to that effect, Case C-109/08 *Commission* v *Greece* [2009] ECR I-4657, paragraph 33, and Case C-304/02 *Commission* v *France*, paragraphs 105 and 107.

68 – Case C-287/01 *Commission* v *Spain*, paragraph 27 and case-law cited.

69 – Case C-496/09 *Commission* v *Italy* [2011] ECR I-0000, paragraph 65 and case-law cited.

70 – Commission Communication C(2012) 6106 final, p. 5.

71 – See *mutatis mutandis* Case C-473/93 *Commission* v *Luxembourg* [1996] ECR I-3207, paragraphs 51 and 52.

72 – The Opinion of Advocate General Poiares Maduro in Case C-119/04 *Commission* v *Italy* [2006] ECR I-6885,

paragraph 46. For the role of the lump sum payment, see also Case C-369/07 *Commission* v *Greece* [2009] ECR I-5703, paragraph 140 and case-law cited.

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73 – Case C-121/07 *Commission* v *France* [2008] ECR I-9159, paragraph 58, and the Opinion of Advocate General Poiares Maduro in Case C-119/04 *Commission* v *Italy*, point 46. See also the Opinion of Advocate General Jääskinen in Case C-241/11 *Commission* v *Czech Republic*, points 34 and 35 on the punitive nature of the lump sum payment.

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74 – See, inter alia, Case C-279/11 *Commission* v *Ireland*, paragraph 67 and case-law cited.

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75 – Case C-610/10 *Commission* v *Spain*, paragraph 144 and case-law cited.

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76 – In fact, a lack of transparency may in my view enhance deterrence only where the amount of a fine is over-estimated by those concerned. That does not appear to be the case under Article 260 TFEU, since it is not uncommon for the Court to reduce at its discretion the amount proposed by the Commission without necessarily providing clear criteria for doing so.

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77 – Commission Communication C(2012) 6106.

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78 – Commission Communication C(2012) 6106 final, p. 5.