

JUDGMENT OF THE COURT (Third Chamber)

14 January 2010\*

In Case C-343/08,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 23 July 2008,

**European Commission**, represented by M. Šimerdová and N. Yerrell, acting as Agents,  
with an address for service in Luxembourg,

applicant,

v

**Czech Republic**, represented by M. Smolek, acting as Agent,

defendant,

\* Language of the case: Czech.

COMMISSION v CZECH REPUBLIC  
THE COURT (Third Chamber),

composed of J.N. Cunha Rodrigues, President of the Second Chamber, acting for the President of the Third Chamber, P. Lindh, A. Rosas, U. Lõhmus and A. Ó Caoimh (Rapporteur), Judges,

Advocate General: Y. Bot,  
Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 10 September 2009,

after hearing the Opinion of the Advocate General at the sitting on 6 October 2009,

gives the following

### **Judgment**

- <sup>1</sup> By its application, the Commission of the European Communities asked the Court to declare that, by failing to transpose fully into its domestic legal system Directive 2003/41/EC of the European Parliament and of the Council of 3 June 2003 on the activities and supervision of institutions for occupational retirement provision (OJ 2003 L 235, p. 10), and, in particular, in failing to transpose Articles 8, 9, 13, 15 to 18 and 20(2) to (4) of that directive, the Czech Republic has failed to fulfil its obligations under the directive, and in particular Article 22(1) thereof.

## Legal context

### *Community legislation*

<sup>2</sup> Recitals 1, 6, 8, 9, 20, 36 and 37 in the preamble to Directive 2003/41, adopted on the basis of Articles 47(2) EC, 55 EC and 95(1) EC, provide:

‘(1) A genuine internal market for financial services is crucial for economic growth and job creation in the Community.

...

(6) This Directive thus represents a first step on the way to an internal market for occupational retirement provision organised on a European scale. By setting the “prudent person” rule as the underlying principle for capital investment and making it possible for institutions to operate across borders, the redirection of savings into the sector of occupational retirement provision is encouraged, thus contributing to economic and social progress.

...

(8) Institutions which are completely separated from any sponsoring undertaking and which operate on a funded basis for the sole purpose of providing retirement

benefits should have freedom to provide services and freedom of investment, subject only to coordinated prudential requirements, regardless of whether these institutions are considered as legal entities.

...

- (9) In accordance with the principle of subsidiarity, Member States should retain full responsibility for the organisation of their pension systems as well as for the decision on the role of each of the three “pillars” of the retirement system in individual Member States. In the context of the second pillar, they should also retain full responsibility for the role and functions of the various institutions providing occupational retirement benefits, such as industry-wide pension funds, company pension funds and life-assurance companies. This Directive is not intended to call this prerogative into question.

...

- (20) Institutions for occupational retirement provision are financial service providers which bear a heavy responsibility for the provision of occupational retirement benefits and therefore should meet certain minimum prudential standards with respect to their activities and conditions of operation.

...

- (36) Without prejudice to national social and labour legislation on the organisation of pension systems, including compulsory membership and the outcomes of collective bargaining agreements, institutions should have the possibility of providing their services in other Member States. ...

(37) The exercise of the right of an institution in one Member State to manage an occupational retirement scheme contracted in another Member State should fully respect the provisions of the social and labour law in force in the host Member State in so far as it is relevant to occupational pensions, for example the definition and payment of retirement benefits and the conditions for transferability of pension rights.’

3 According to Article 1 thereof, the objective of Directive 2003/41 is to lay down rules for the taking-up and pursuit of activities carried out by institutions for occupational retirement provision.

4 Article 2 of that directive provides:

‘1. This Directive shall apply to institutions for occupational retirement provision. ...

2. This Directive shall not apply to:

(a) institutions managing social-security schemes which are covered by [Council] Regulation (EEC) No 1408/71 [of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community (OJ, English Special Edition 1971 (II), p. 416)] and Regulation (EEC) No 574/72 [of the Council of 21 March 1972 fixing the procedure for implementing Regulation (EEC) No 1408/71 (OJ, English Special Edition 1972 (I), p. 159)];

(b) institutions which are covered by [First Council] Directive 73/239/EEC [of 24 July 1973 on the coordination of laws, regulations and administrative provisions relating to the taking-up and pursuit of the business of direct insurance other than

life assurance (OJ 1973 L 228, p. 3)], [Council] Directive 85/611/EEC [of 20 December 1985 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (OJ 1985 L 375, p. 3)], [Council] Directive 93/22/EEC [of 10 May 1993 on investment services in the securities field (OJ 1993 L 141, p. 27), Directive 2000/12/EC [of the European Parliament and of the Council of 20 March 2000 relating to the taking-up and pursuit of the business of credit institutions (OJ 2000 L 126, p. 1)] and Directive 2002/83/EC [of the European Parliament and of the Council of 5 November 2002 concerning life assurance (OJ 2002 L 345, p. 1);

(c) institutions which operate on a pay-as-you-go basis;

(d) institutions where employees of the sponsoring undertakings have no legal rights to benefits and where the sponsoring undertaking can redeem the assets at any time and not necessarily meet its obligations for payment of retirement benefits;

(e) companies using book-reserve schemes with a view to paying out retirement benefits to their employees.'

<sup>5</sup> Under Article 4 of Directive 2003/41, the Member States may choose to apply certain provisions thereof to the occupational-retirement-provision business of insurance undertakings covered by Directive 2002/83.

<sup>6</sup> Pursuant to Article 5 of Directive 2003/41, Member States may also choose not to apply that directive, in whole or in part, to any institution located in their territories which operates pension schemes which together have less than 100 members in total or, as the

case may be, to institutions where occupational retirement provision is made under statute, pursuant to legislation, and is guaranteed by a public authority.

7 Under Article 6 of that directive, the following definitions are given:

‘ ...

(a) “institution for occupational retirement provision”, or “institution”, means an institution, irrespective of its legal form, operating on a funded basis, established separately from any sponsoring undertaking or trade for the purpose of providing retirement benefits in the context of an occupational activity on the basis of an agreement or a contract agreed:

- individually or collectively between the employer(s) and the employee(s) or their respective representatives, or
  
- with self-employed persons, in compliance with the legislation of the home and host Member States,

and which carries out activities directly arising therefrom;

(b) “pension scheme” means a contract, an agreement, a trust deed or rules stipulating which retirement benefits are granted and under which conditions;

(c) “sponsoring undertaking” means any undertaking or other body, regardless of whether it includes or consists of one or more legal or natural persons, which acts as an employer or in a self-employed capacity or any combination thereof and which pays contributions into an institution for occupational retirement provision;

...

(i) “home Member State” means the Member State in which the institution has its registered office and its main administration or, if it does not have a registered office, its main administration;

(j) “host Member State” means the Member State whose social and labour law relevant to the field of occupational retirement schemes is applicable to the relationship between the sponsoring undertaking and members.’

8 Article 8 of the Directive provides that each Member State is to ensure that there is a legal separation between a sponsoring undertaking and an institution for occupational retirement provision in order that the assets of the institution are safeguarded in the interests of members and beneficiaries in the event of bankruptcy of the sponsoring undertaking.

9 Article 9(1) of the Directive provides that the Member States are to ensure that every institution for occupational retirement provision located in their territory complies with certain conditions of operation and, in particular, that they are authorised or



registered in a national register by the competent supervisory authority, that they are run by persons of good repute who have appropriate professional qualifications and experience or who employ advisers with those qualifications and experience and that they are subject to appropriate rules. Article 9(5) thereof provides that, in the case of cross-border activity, the conditions of operation of the institutions for occupational retirement provision are to be subject to a prior authorisation by the competent authorities of the home Member State.

- 10 Under Article 10 of Directive 2003/41, each Member State is to require that every institution located in its territory draw up annual accounts and annual reports taking into account each pension scheme operated by the institution.
- 11 Under Article 12 of that directive, each Member State is to ensure that every institution located in its territory prepares a written statement of investment-policy principles.
- 12 Under Article 13 of the Directive, each Member State is to ensure that the competent authorities have the necessary powers and means to supervise the activities carried out by institutions for occupational retirement provision located in its territory.
- 13 Articles 15 to 18 of the Directive provide, respectively, that the home Member States are required to ensure that the institutions for occupational retirement provision establish technical provisions for the different retirement schemes, have sufficient assets to cover those provisions and additional assets to serve as a buffer and invest in accordance with the 'prudent person' rule.

14 Under Article 20(1) to (4) of Directive 2003/41:

‘1. Without prejudice to national social and labour legislation on the organisation of pension systems, including compulsory membership and the outcomes of collective bargaining agreements, Member States shall allow undertakings located within their territories to sponsor institutions for occupational retirement provision authorised in other Member States. They shall also allow institutions for occupational retirement provision authorised in their territories to accept sponsorship by undertakings located within the territories of other Member States.

2. An institution wishing to accept sponsorship from a sponsoring undertaking located within the territory of another Member State shall be subject to a prior authorisation by the competent authorities of its home Member State, as referred to in Article 9(5). It shall notify its intention to accept sponsorship from a sponsoring undertaking located within the territory of another Member State to the competent authorities of the home Member State where it is authorised.

3. Member States shall require institutions located within their territories and proposing to be sponsored by an undertaking located in the territory of another Member State to provide the following information when effecting a notification under paragraph 2:

(a) the host Member State(s);

(b) the name of the sponsoring undertaking;

- (c) the main characteristics of the pension scheme to be operated for the sponsoring undertaking.

4. Where a competent authority of the home Member State is notified under paragraph 2, and unless it has reason to doubt that the administrative structure or the financial situation of the institution or the good repute and professional qualifications or experience of the persons running the institution are compatible with the operations proposed in the host Member State, it shall within three months of receiving all the information referred to in paragraph 3 communicate that information to the competent authorities of the host Member State and inform the institution accordingly.'

- <sup>15</sup> The first subparagraph of Article 22(1) of that directive provides:

'Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive before 23 September 2005. They shall forthwith inform the Commission thereof.'

- <sup>16</sup> Under Article 22(3) and (4), Member States may, under certain conditions, postpone until 23 September 2010 the application of certain of the provisions provided for in Articles 17 and 18 of the Directive to institutions for occupational retirement provisions located in their territory.

*National legislation*

- 17 Directive 2003/41 was transposed into Czech law by Law No 340/2006 of 24 May 2006 on activities carried out by institutions for occupational retirement provision of the Member States of the European Union and amending Law No 48/1997 on public health insurance amending and supplementing a number of related laws.

**Pre-litigation procedure**

- 18 On 11 July 2006, the Czech Republic informed the Commission that it had transposed Directive 2003/41 into its domestic legal system by means of Law No 340/2006.
- 19 On 18 October 2006, the Commission, pursuant to Article 226 EC, sent to the Czech Republic a letter of formal notice in which it stated that Articles 1 to 5, 8, 9, 13 and 15 to 21 of the Directive had not been transposed or had been transposed only in part.
- 20 In its reply of 18 December 2006, the Czech Republic explained, essentially, that, as there were no institutions for occupational retirement provision falling within the scope of Directive 2003/41 located within its territory, Law No 340/2006 merely transposed the provisions of the Directive intended to enable institutions for occupational retirement provision located in other Member States to carry out cross-border activities by means of the provision of services destined for Czech territory and, in that way, to enable undertakings located in Czech territory to contribute to the schemes offered by those institutions. The Czech Republic pointed out in that regard

that the Member States have, pursuant to the first indent of Article 137(4) EC, freedom of choice concerning the organisation of their national social security systems.

- 21 Not satisfied by that reply, on 23 March 2007, the Commission sent a reasoned opinion to the Czech Republic, requesting that it take the measures necessary, within two months of receipt of that opinion, to transpose in full Directive 2003/41 into its domestic law and, in particular, Articles 8, 9, 13, 15 to 18 and 20(2) and (4) thereof, in accordance with Article 22(1) of that directive.
- 22 By letter of 24 July 2007, that Member State replied to the reasoned opinion by reasserting that the obligation to transpose the directive cannot affect the rights of the Member States to define the fundamental principles of their national social security systems.
- 23 As it was not satisfied with that reply, the Commission decided to institute these proceedings.

## **The action**

### *Admissibility*

- 24 By this action, the Commission seeks, according to the form of order sought in its application, a declaration that the Czech Republic has failed to fulfil its obligations under Directive 2003/41, 'in particular' by failing to transpose Articles 8, 9, 13, 15 to 18 and 20(2) to (4) thereof.

- 25 In that regard, it should be borne in mind that the Court may of its own motion examine whether the conditions laid down in Article 226 EC for bringing an action for failure to fulfil obligations are satisfied (Case C-362/90 *Commission v Italy* [1992] ECR I-2353, paragraph 8; Case C-439/99 *Commission v Italy* [2002] ECR I-305, paragraph 8; and Case C-98/04 *Commission v United Kingdom* [2006] ECR I-4003, paragraph 16).
- 26 It is clear from Article 38(1)(c) of the Rules of Procedure of the Court of Justice and from the case-law relating to that provision that an application must state the subject-matter of the proceedings and a summary of the pleas in law on which the application is based, and that that statement must be sufficiently clear and precise to enable the defendant to prepare its defence and the Court to rule on the application. It is therefore necessary for the essential points of law and of fact on which a case is based to be indicated coherently and intelligibly in the application itself and for the heads of claim to be set out unambiguously so that the Court does not rule *ultra petita* or indeed fail to rule on an objection (Case C-195/04 *Commission v Finland* [2007] ECR I-3351, paragraph 22 and the case-law cited, and Case C-412/04 *Commission v Italy* [2008] ECR I-619, paragraph 103).
- 27 In the present case, it should be pointed out that, in so far as the Commission seeks, by using the term 'in particular' in the form of order sought in its application, to include in its action provisions of Directive 2003/41 other than those which are expressly referred to therein, the application does not comply with those requirements, since neither the identity of those other provisions nor the reasons why the Czech Republic failed to transpose them within the prescribed period are specified in the action.
- 28 Consequently, this action is admissible solely in so far as it relates to the alleged failure by the Czech Republic to transpose Articles 8, 9, 13, 15 to 18 and 20(2) to (4) of Directive 2003/41.

*Substance*

- 29 It is not contested that Articles 8, 9, 13, 15 to 18 and 20(2) to (4) of Directive 2003/41 were not transposed by the Czech Republic within the period prescribed by that directive or by the expiry of the period set in the reasoned opinion. That Member State, which does not rely on the possibility of partial postponement for which Article 22(3) and (4) of the Directive provides in respect of certain provisions of Articles 17 and 18 thereof, recognises that the provisions referred to expressly by this action have not been implemented in its domestic legal system within the time-limits. No provision of Directive 2003/41 makes provision for Member States or certain of them to dispense with such transposition.
- 30 The Czech Republic contends, however, that it is not required to transpose the provisions of Directive 2003/41 to which the action expressly refers because, in doing so, it would be obliged to change the fundamental principles of its national social security system, the organisation of which, pursuant to the first indent of Article 137(4) EC, falls within the competence of the Member States, by introducing into its retirement pension system an occupational retirement scheme, although no such scheme exists under national law.
- 31 The Czech Republic explains in that regard that its retirement pension system comprises only two parts, made up of the first and third pillars of retirement pension systems. The first pillar, governed by Law No 155/1995 on pension insurance, comprises the legal, general and mandatory pension for all insured persons and falls within the national social security scheme. The third pillar, governed by Law No 42/1994 on supplementary pension insurance benefiting from a State contribution, comprises individual contracts of pension insurance entered into by insured persons on a voluntary basis with the pension funds established pursuant to the Law. Membership of those funds is not linked to employment, to an employer or to the exercise of a self-employed activity. The Czech retirement pension system does not, however, include a second pillar made up of supplementary pensions provided in connection with professional, employed or self-employed activity.

32 Thus, the Czech Republic states that, under the national legislation currently in force, an institution for occupational retirement provision cannot establish itself in the territory of the Czech Republic in order to carry out that activity there, since it would be in breach of the legal provisions governing the pursuit of a professional activity on the financial market and could be subject to proceedings for the imposition of criminal penalties or administrative fines. In addition, there is neither the political will nor sufficient economic potential to introduce an occupational retirement scheme in that Member State.

33 According to the Czech Republic, since the first indent of Article 137(4) EC leaves the power to determine the fundamental structure of their national social security schemes to Member States, a transposition of Directive 2003/41 which would affect the effective exercise of the right guaranteed by primary law cannot be required. As the provisions of that directive expressly referred to in the present action impose precise obligations on Member States in the territory of which institutions for occupational retirement provision are located, their transposition would lead inevitably to the creation of the legal framework necessary for the operation of undertakings established in the territory of the Czech Republic in the field of occupational retirement provision and, accordingly, to the establishment, in fact and in law, to a second pillar in that Member State, which would seriously affect the overall financial equilibrium of the national system of retirement pensions.

34 By way of example, the Czech Republic refers in that regard to Article 9(1) of Directive 2003/41, which obliges Member States to register institutions for occupational retirement provision located in their territory on a national register or to authorise them. The creation of the appropriate register or the establishment of an appropriate system of authorisation would necessarily require the adoption of corresponding legislation. Adopting such legislation in isolation, without the introduction of occupational retirement provision as a complex system, that is, without defining, for example, the rights and the obligations of the contracting parties, would not be possible.

35 The Czech Republic states that it is aware of the fact that, generally, institutions for occupational retirement provision should not be confused with the second pillar of retirement pension systems. Nevertheless, those institutions are an essential element of



that pillar and the creation of a framework for their establishment would necessarily lead to changes to the retirement pension systems themselves.

<sup>36</sup> The Czech Republic contends, moreover, that the transposition carried out by Law No 340/2006 attains the objective pursued by Directive 2003/41. That law transposes all the provisions concerning the cross-border provision of occupational pension services by institutions established in other Member States, thus allowing undertakings established in its territory to contribute to retirement pension schemes offered by those institutions and, at the same time, allowing them to offer appropriate services in the Czech Republic.

<sup>37</sup> It follows from the foregoing that, by this reasoning, the Czech Republic seeks, essentially, to justify its failure to transpose the provisions of Directive 2003/41 concerned, first, by the fact that no occupational retirement institution is located in its territory as a result of the prohibition which national law imposes on their establishment and, second, by the circumstance that transposition of those provisions would oblige it to change its national retirement pensions system by introducing a second pillar, even though the first indent of Article 137(4) EC, recognises that Member States have competence to organise their national systems in this field.

<sup>38</sup> It is thus necessary to examine whether those considerations, drawn, respectively, from national law and Community law, are capable of justifying the failure to transpose the provisions of Directive 2003/41 to which the action expressly refers.

<sup>39</sup> In that connection, with regard to the assertion that there is no institution for occupational retirement provision located in the Czech Republic, it must be pointed out that, according to the settled case-law of the Court, the fact that an activity referred to in a directive does not yet exist in a Member State cannot release that State from its obligation to adopt laws or regulations in order to ensure that all the provisions of the

directive are properly transposed (Case C-214/98 *Commission v Greece* [2000] ECR I-9601, paragraph 22; Case C-372/00 *Commission v Ireland* [2001] ECR I-10303, paragraph 11; and Case C-441/00 *Commission v United Kingdom* [2002] ECR I-4699, paragraph 15; and judgment of 8 June 2006 in Case C-71/05 *Commission v Luxembourg*, paragraph 12).

- 40 Both the principle of legal certainty and the need to secure the full implementation of directives in law and not only in fact require that all Member States reproduce the rules of the directive concerned within a clear, precise and transparent framework providing for mandatory legal provisions (see, to that effect, Case C-339/87 *Commission v Netherlands* [1990] ECR I-851, paragraphs 22 and 25, and *Commission v Greece*, paragraph 23).
- 41 Such an obligation applies to Member States in order to anticipate any change in the situation existing in them at a given point in time and in order to ensure that all legal persons in the Community, including those in Member States in which a particular activity referred to in a directive does not exist, may know with clarity and precision, what are, in all circumstances, their rights and obligations (see, to that effect, *Commission v Greece*, paragraph 27; *Commission v Ireland*, paragraph 12; Case C-441/00 *Commission v United Kingdom*, paragraph 16; and *Commission v Luxembourg*, paragraph 13).
- 42 According to case-law, it is only where transposition of a directive is pointless for reasons of geography that it is not mandatory (see *Commission v Italy*, paragraph 13 and Case C-441/00 *Commission v United Kingdom*, paragraph 17).
- 43 In the present case, it should be pointed out that, as follows, in particular, from recitals 1, 6 and 8 of Directive 2003/41, that directive, which was adopted on the basis of Articles 47(2) EC, 55 EC and 95 EC, seeks to introduce an internal market for

occupational retirement provision schemes in which institutions for occupational retirement provision must have freedom to provide services and freedom of investment.

44 With that objective in mind, Article 20(1) of Directive 2003/41 provides that the Member States are, first, to allow undertakings located within their territories to sponsor institutions for occupational retirement provision authorised in other Member States and, second, to allow institutions for occupational retirement provision authorised in their territories to accept sponsorship by undertakings located in other Member States.

45 For the purposes of carrying out such cross-border activities, Directive 2003/41 requires Member States, as follows from recitals 7 and 20, to apply to the institutions for occupational retirement provision located within their territory various minimum prudential rules with respect to their activities and conditions of operation in order to ensure a high degree of security for future pensioners who are to enjoy their benefits.

46 Those rules consist, in particular, under Articles 8, 9, 13 and 15 to 18 of Directive 2003/41, respectively, of the legal separation between the institutions for occupational retirement provision and sponsoring undertakings, in order that, in the event of bankruptcy of those undertakings, the assets of the institutions are safeguarded, of conditions of operation designed to guarantee the reliability of institutions for occupational retirement provision, such as authorisation or registration in a national register by the competent supervisory authority, management by persons of good repute, the adoption of appropriate rules of operation, the establishment of technical provisions certified by an actuary and the provision of information to members of a list of information to be provided to the competent authorities and of the presentation and management of sufficient funds to cover their commitments.

47 In addition, Article 20(2) to (4) of Directive 2003/41 lays down the procedure which an authorised institution for occupational retirement provision in a Member State is to follow where it wishes to provide services in another Member State and the role, in such a case, of the competent authorities. In particular, Article 20(2), like Article 9(5) of the Directive, provides that the institutions for occupational retirement provision wishing

to carry out such cross-border activities are to be subject to a prior authorisation by the competent authorities of the home Member State, that is, the Member State in the territory of which the institution has its registered office and/or main administration.

48 It follows that, as the Czech Republic has pointed out, the provisions of Directive 2003/41 referred to expressly in the present action, that is, Articles 8, 9, 13, 15 to 18 and 20(2) to (4), impose, essentially, obligations on Member States in the territory of which institutions for occupational retirement provision are located.

49 According to the Czech Republic, no institution for occupational retirement provision may legally establish itself in its territory.

50 However, in accordance with the case-law cited in paragraphs 39 to 41 above, and in the absence of a geographical reason rendering the transposition of the provisions concerned redundant, it is important that, in the event that the Czech Republic might decide to supplement its national retirement pension system with an occupational retirement provision scheme falling under the second pillar, all persons in that Member State, like everyone else in the Community, should know what their rights and duties are.

51 Such development of the national retirement pension system can in no way be regarded as impossible or purely hypothetical, as the Czech Republic claims, on the ground that it would entail a change to the applicable legal framework and not solely the removal of an obstacle of a factual nature. All legislation can be amended. In the present case, it follows, moreover, from that Member State's own pleadings that draft legislation intended to introduce a second pillar into the national retirement pension system was drawn up in the Czech Republic before Directive 2003/41 was adopted in 1993, when the Minister for Employment and Social Affairs presented a legislative proposal to that effect to the Czech Government, which ultimately chose another option, namely the adoption of a law on supplementary pension insurance benefiting from a State contribution, and in 2001, when the Government presented to the Chamber of

Deputies of the Czech Parliament a legislative proposal on occupational pension insurance. Moreover, at the hearing, the Czech Republic conceded that a second pillar could be introduced in the future if the political will to do so were to emerge.

52 It follows that, even if, according to the applicable national legislation, no institution for occupational retirement provision may legally establish itself in the territory of the Czech Republic in the absence of a second pillar in the national retirement pension system, that Member State is obliged to transpose fully the provisions of Articles 8, 9, 13, 15 to 18 and 20(2) to (4) of Directive 2003/41, by adopting and bringing into force in its domestic law, pursuant to the first subparagraph of Article 22(1) thereof, the legislative, regulatory and administrative rules necessary to that end.

53 Contrary to the Czech Republic's submission, that obligation to transpose does not affect its competence as regards the organisation of the national retirement pension system and maintenance of the financial equilibrium thereof by requiring it to put in place, in the context of that transposition, such a second pillar, in disregard of the prerogatives which the first indent of Article 137(4) EC recognises it as enjoying.

54 First, transposition into its domestic law of the provisions of Directive 2003/41 concerned in no way obliges the Czech Republic to alter its national retirement pension system.

55 In that regard, the Czech Republic is wrong when it claims that such transposition would result *ipso facto* in the introduction of a second pillar in its national retirement pension system.

- 56 According to the actual explanation provided by that Member State in response to the written questions of the Court on that point, the creation of such a second pillar, which forms part of a complex system, would require the adoption by the national legislature of comprehensive domestic legislation in order to determine, in particular, the necessary conditions for establishing institutions for occupational retirement provision in its territory and the legal relationship both between the second pillar and the other pillars of the national retirement pension system and, within that second pillar itself, between its various elements, namely, employers, employees, supervision and monitoring bodies and, where appropriate, other State bodies.
- 57 However, it should be pointed out that none of the provisions of Directive 2003/41 to which the action expressly refers, nor any other of its provisions, requires Member States to implement such legislation.
- 58 Thus, contrary to what the Czech Republic claims, although the transposition of Article 9(1) of Directive 2003/41 into domestic law does indeed require, *inter alia*, that all Member States provide in their national legislation for registration or authorisation of the institutions for occupational retirement provision located in their territory, that provision does not include any rule requiring Member States to allow such institutions to establish themselves in their territory.
- 59 As follows from paragraphs 43 to 47 above, Directive 2003/41 represents merely a first step on the way to an internal market for occupational retirement provision, by putting in place, on a European scale, minimum ‘prudent person’ rules. It is not, however, intended to harmonise, even partially, national retirement pension systems by requiring Member States to amend or abolish the rules of their national law which determine the actual organisation of those systems.
- 60 In recital 9, that directive thus states expressly that, in accordance with the principle of subsidiarity, Member States retain full responsibility for the organisation of their national retirement pension systems as well as for the decision on the role of each of the

pillars of those systems, including that of the second pillar, and it cannot therefore under any circumstance affect such prerogatives.

- 61 In the same vein, Article 20(1) of Directive 2003/41 provides, moreover, in accordance with recitals 36 and 37 in the preamble thereto, that cross-border activities of institutions for occupational retirement provision are to be pursued without prejudice to the social and labour legislation of host Member States on the organisation of national retirement pension systems.
- 62 Consequently, and contrary to what the Commission also contended in its pleadings, Directive 2003/41, as such, can in no way be interpreted as requiring a Member State which, like the Czech Republic, prohibits, by reason of the lack of a second pillar in its national retirement pension system, the establishment in its territory of institutions for occupational retirement provision, to lift that prohibition so as to allow institutions for occupational retirement provision to establish themselves in its territory with a view to providing services which, as is not contested, are covered by the second pillar of national retirement pension systems.
- 63 Admittedly, such a prohibition in national law must comply with the rules on free movement laid down in the EC Treaty, in particular, the provisions on freedom of establishment which include the prohibition, in principle, of restrictions on the exercise of that freedom (see, to that effect, inter alia, Case C-372/04 *Watts* [2006] ECR I-4325, paragraph 92 and the case-law cited, and Case C-228/07 *Petersen* [2008] ECR I-6989, paragraph 42), unless they can be justified on the grounds set out in the Treaty or by overriding reasons in the public interest, which include, in particular, the risk of seriously undermining the financial equilibrium of the social security system (see, to that effect, inter alia, Case C-158/96 *Kohll* [1998] ECR I-1931, paragraph 41, and Case C-350/07 *Kattner Stahlbau* [2009] ECR I-1513, paragraph 85).

- 64 However, for the purpose of assessing whether this action is well founded, since it solely concerns infringement of the provisions of Directive 2003/41 rather than the possible infringement of Treaty provisions, which have at no point been relied on by the Commission in support of its reasoning, it is not necessary to examine whether the prohibition imposed by Czech law on the establishment of institutions for occupational retirement provision in the territory of the Czech Republic is contrary to rules concerning free circulation or, accordingly, to examine to what extent that Member State might be required, in order to comply with those rules, to introduce, if necessary, a second pillar into its national retirement pension system.
- 65 Second, contrary to what the Czech Republic claims, the obligation to transpose fully Directive 2003/41 by implementing in domestic law the provisions laid down in Articles 8, 9, 13, 15 to 18 and 20(2) to (4) thereof, in no way disregards the provisions of the first indent of Article 137(4) EC.
- 66 In that regard, under the first indent of Article 137(4) EC, the provisions adopted pursuant to that article 'shall not affect the right of Member States to define the fundamental principles of their social security systems and must not significantly affect the financial equilibrium thereof'.
- 67 It is clear, first, that Directive 2003/41, which is the subject of this action, was not adopted on the basis of Article 137 EC, which constitutes the legal basis in the Treaty for the approximation of national legislation in the field of social policy. As already indicated in paragraph 43 above, that directive has as its legal bases Articles 47(2) EC, 55 EC and 95 EC, which seek to establish the internal market by means of freedom to provide services and freedom of establishment.
- 68 Second, Directive 2003/41, in accordance with Article 2(2)(a) thereof, does not apply to institutions which manage social security schemes, so that such institutions cannot be affected by the provisions laid down by that directive.



69 Consequently, it must be held that, by failing to adopt, within the period prescribed, the laws, regulations and administrative provisions necessary to comply with Articles 8, 9, 13, 15 to 18 and 20(2) to (4) of Directive 2003/41, the Czech Republic has failed to fulfil its obligations under Article 22(1) of that directive. The action is dismissed as to the remainder.

### Costs

70 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has asked for costs and the Czech Republic has failed in its submissions, the Czech Republic must be ordered to pay the costs.

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

- 1. Declares that, by failing to adopt, within the period prescribed, the laws, regulations and administrative provisions necessary to comply with Articles 8, 9, 13, 15 to 18 and 20(2) to (4) of Directive 2003/41/EC of the European Parliament and of the Council of 3 June 2003 on the activities and supervision of institutions for occupational retirement provision, the Czech Republic has failed to fulfil its obligations under Article 22(1) of that directive;**

- 2. Dismisses the action as to the remainder;**
  
- 3. Orders the Czech Republic to pay the costs.**

[Signatures]