OPINION OF ADVOCATE GENERAL JÄÄSKINEN
delivered on 14 April 2011 [1]

I — Introduction

1. By the present action, the European Commission seeks a declaration from the Court that, by maintaining in force Articles 143, 136(3) and 136a(2) of the Law of 28 August 1997 on the organisation and operation of pension funds, [2] as amended ('the Law on pension funds'), which restrict foreign investments by pension funds forming part of a national mechanism based on compulsory affiliation and a capitalisation system (known as 'open pension funds'), the Republic of Poland has failed to fulfil its obligations under Article 56 EC, now Article 63 TFEU. [3]

2. The legislation challenged by the Commission limits foreign investments by Polish open pension funds to 5% of their assets. [4]

3. Primarily, the Republic of Poland contests the applicability of Article 56 EC. It takes the view, inter alia, that the pension funds concerned are public entities to be treated in the same way as the Polish State, with the result that any legal rule limiting their investments falls outside the scope of the free movement of capital.

4. In the alternative, the Republic of Poland expresses the view that, were the legislation in question to give rise to a restriction on the free movement of capital, that restriction would be justified.

1 — Original language: French.

2 — Ustawa o organizacji i funkcjonowaniu funduszy emerytalnych (Dz. U. 2004, No 159, heading 1667).

3 — In view of the fact that the reasoned opinion was sent by the Commission to the Republic of Poland on 23 September 2008, reference will be made to the provisions of the EC Treaty in accordance with the numbering system applicable prior to the entry into force of the Treaty of Lisbon.

4 — According to the information provided by the Republic of Poland, on 31 December 2008 the open pension funds invested between 0% and 4.5% of their assets abroad; five of them did not have any foreign investments. The total fund capital is estimated at PLN 147 000 million, which is equivalent to approximately EUR 35 000 million (information provided by the Commission on the basis of figures published on the website of the Polish Financial Supervision Authority (http://www.knf.gov.pl, as at 29 May 2009)). In my view, these figures show that investments made by open pension funds have a logical importance for the liquidity of the capital market and for the financing of undertakings and bodies governed by public law in Poland.

5. In order to resolve this dispute, it is first necessary to examine whether Article 56 EC is applicable to the legislation in question. If so, it will then be necessary to examine whether the legislation at issue constitutes a restriction on the free movement of capital, and then whether that restriction may be justified by the provisions of the Treaty or by overriding reasons in the public interest as recognised by the Court's case-law.

II — National legislative framework

A — *The pension scheme*

6. The pension scheme in force in Poland, which is based on three pillars, can be summarised in table form. [5]

Pillars	First pillar Compulsory scheme; based on the redistribution principle	Second pillar Compulsory scheme; based on the capitalisation principle	Third pillar Optional scheme
Legislation	Law of 13 October 1998 on the social security scheme [6]	Law on pension funds	Law of 20 April 2004 on individual retirement accounts [7]
Institutions	Social Security Institution (Zakład Ubezpieczeń Społecznych (ZUS))	14 management companies (Powszechne Towarzystwa Emerytalne (PTE))	Consists of voluntary supplementary savings mechanisms
Funds	Social Insurance Fund (Fundusz Ubezpieczeń Społecznych (FUS))	14 open pension funds (Otwarte Fundusze Emerytalne (OFE))	

5 — The scheme in force upon the expiry of the period set in the Commission's reasoned opinion of 23 September 2008. I note that in January 2011 a public consultation was launched by the Polish Government with a view to modifying the scheme (see the document *Analizy* No 2(46) of 2 February 2011, produced by the Polish Parliament's Bureau of Research, available at http://www.bas.sejm.gov.pl).

6 — Ustawa o systemie ubezpieczeń społecznych (Dz. U. de 2007, n° 11, position 74).

7 — Ustawa o indywidualnych kontach emerytalnych (Dz. U. n° 116, position 1205).

B — *The Law on pension funds*

7. Under Article 3(1)(2) of the Law of 13 October 1998 on the social security scheme, open pension funds are defined in accordance with the provisions of the Law on pension funds.

8. Under Article 2 of the Law on pension funds, the purpose of an open pension fund is to accumulate and invest financial resources with a view to repaying them to its members after they have attained retirement age.

9. Article 3 of that Law states that an open pension fund is a legal person formed as a foundation, the assets of which are separate from those of the company which created it, which manages it and which represents it exclusively in its relations with third parties ('the management company'). That management company carries on its activity exclusively in the form of a joint-stock company (Article 27 of the Law) and for a fee (Article 29 of the Law). A management company may manage only one open pension fund.

10. As contributors have the option to choose their open pension fund, the ZUS then pays into the fund up to one third of the pension contributions pertaining to the contributor in question.

11. Pursuant to Article 180 of the Law on pension funds, the Polish Treasury guarantees to cover deficits in open pension funds under certain conditions.

12. Articles 134 to 137 of the Law on pension funds define the method of financing of the activities of the open pension funds. Under those provisions, such funds may derive remuneration by deducting a percentage of the contributions paid, before their conversion into accounting units and up to a limit of 3.5 % thereof. They may also charge fees for the management of the fund by the management company, in which connection the amount of those fees is to be based on the value of the assets and cannot exceed the limits laid down in Article 136(2a) of that Law.

13. For the purposes of determining the value of the assets on the basis of which the amount of those fees is defined, Article 136(3) of the Law on pension funds provides:

'In determining the value of the net assets managed by the fund, referred to in paragraphs 2 and 2a, account shall not be taken of the value of the investments referred to in Article 141(1)(8) or of investments in shares issued by joint investment bodies domiciled abroad, referred to in Article 143(1).'

14. Article 136a of the Law on pension funds also provides:

'1. The costs related to the safeguarding of assets and the implementation and execution of transactions for the acquisition or sales of fund assets, which are equivalent to the fees due to the clearing houses whose intermediation the fund is obliged to use in accordance with specific provisions and which form part of the remuneration of the depositary, shall be deducted from the fund assets according to the table of commissions and fees currently in force for the clearing house concerned.

2. The costs referred to in paragraph 1, being equivalent to the fees due to foreign clearing houses, shall be deducted from the fund assets up to the corresponding amounts due to the national clearing houses referred to in paragraph 1.'

15. Articles 139 to 156 of the Law on pension funds concern the investment activities of open pension funds.

16. Article 139 of that Law provides that the funds must invest their assets in accordance with the provisions of that Law, by seeking to maximise both security and return on investments.

17. Article 141(1) of the Law on pension funds is worded as follows:

'1. Subject to Article 146, the fund assets may be invested only in the following categories of instruments:

(1) bonds, bills and other securities issued by the Treasury or the National Bank of Poland, and loans and credits extended to those entities;

(2) bonds and other debt securities based on cash payments which are guaranteed or backed by the Treasury or the National Bank of Poland, and deposits, credits and loans guaranteed or backed by those bodies;

(3) bank deposits and bank securities in Polish currency;

(3a) bank deposits and bank securities, in the currency of a Member State of the [Organisation for Economic Cooperation and Development (OECD)] or of another State with which the Republic of Poland has concluded a reciprocal investment promotion and protection agreement, in so far as those currencies may be acquired solely for settlement of the current liabilities of the fund;

(4) shares in companies listed on a regulated stock market, as well as pre-emptive subscription rights, stock options and bonds convertible into shares in companies listed on a regulated stock market;

(5) shares in companies listed on a regulated OTC [over-the-counter] market or dematerialised in accordance with the Law of 29 July 2005 on trading in financial instruments, shares in companies which are not tradable on a regulated market, as well as pre-emptive subscription rights, stock options and bonds convertible into shares in companies which are listed on the regulated OTC market or dematerialised, but not listed on the regulated market;

(6) National Investment Fund shares;

(7) investment certificates issued by closed investment funds;

(8) shares sold by open investment funds or specialised open investment funds;

(9) bonds and other debt securities issued by local authorities, groups of local authorities or the City of Warsaw, dematerialised in accordance with the Law referred to in point 5;

(10) instruments, other than bonds and other dematerialised debt securities, issued by local authorities, groups of local authorities or the City of Warsaw;

(10a) income bonds referred to in the Law of 29 June 1995 on bonds (Dz. U. 2001, No 120, heading 1300; Dz. U. 2002, No 216, heading 1824; and Dz. U. 2003, No 217, heading 2124);

(11) bonds dematerialised in accordance with the Law referred to in point 5 and issued by entities other than local authorities, groups of local authorities or the City of Warsaw, which have been guaranteed in the amount corresponding to their full face value and any interest;

(12) instruments other than dematerialised bonds and other debt securities issued by entities other than local authorities, groups of local authorities or the City of Warsaw, which have been guaranteed in the amount corresponding to their full face value and any interest;

(13) bonds and other debt securities issued by publicly-owned companies, other than the securities referred to in points 11 and 12;

(13a) bonds and other debt securities dematerialised in accordance with the Law referred to in point 5, other than those referred to in points 9 and 11;

(13b) mortgage bonds;

(13c) certificates of deposit within the meaning of the Law of 29 July 2005 on trading in financial instruments, tradable on a regulated market in Poland.

…'

18. Article 143 of the Law on pension funds then defines the categories of foreign instruments in which open pension funds may invest their assets. It reads as follows:

'1. On the basis of a general permit issued by order of the Minister responsible for financial institutions, and on the conditions laid down therein, the assets of an open pension fund may be invested abroad in securities issued by companies listed on the main stock markets of the OECD Member States or of other States as may be specified in the permit, as well as in treasury bonds or securities issued by the central banks of those States and in shares issued by joint investment bodies domiciled in those States, if those bodies offer those shares to the general public and take them back at the investor's request.

2. The total value of investments made

(1) by an open pension fund in instruments falling under the categories referred to in paragraph 1 may not exceed 5 % of the value of the fund assets.

…'

C — *The Ministerial Decree of 23 December 2003*

19. The Law on pension funds has been supplemented by Article 1 of the Decree of the Minister for Finance of 23 December 2003 introducing general authorisation for investments of pension funds outside national borders, [8] as amended ('the Ministerial

8 — Rozporządzenie Ministra Finansów w sprawie ogólnego zezwolenia na lokowanie aktywów funduszy emerytalnych poza granicami kraju (Dz. U. No 229, heading 2286).

Decree of 23 December 2003'). That decree provides, inter alia in Article 1(3), that investments in foreign assets must be accompanied by an evaluation of the quality of the investment conducted by a specialist rating agency recognised on an international capital market, which will assess the investment risk in relation to the relevant securities and the ability of the issuer of those securities to honour the commitments made upon maturity.

III — Pre-litigation procedure

20. On 23 October 2007, the Commission sent to the Republic of Poland a letter of formal notice concerning a failure to fulfil obligations under Article 56 EC. In that letter, the Commission argued that the provisions of Article 143, in conjunction with Article 141, Article 136(3) and Article 136a(2) of the Law on pension funds restricted foreign investments by open pension funds and for that reason breached the fundamental freedom of movement of capital under Article 56 EC.

21. By a letter of 20 December 2007, the Polish Government responded to the complaints raised by the Commission, claiming that Article 56 EC is not applicable to open pension funds.

22. On 23 September 2008, the Commission sent to the Republic of Poland a reasoned opinion, in which it rejected the arguments put forward by the Polish authorities concerning the non-applicability of Article 56 EC to the investment activity of open pension funds and maintained the complaint concerning failure to fulfil obligations under Article 56 EC by reason of the restriction on investments imposed by Article 143, in conjunction with Article 141, Article 136(3) and Article 136a(2) of the Law on pension funds.

23. On 24 November 2008, in its response to the Commission's reasoned opinion, the Polish Government invoked, in addition to the non-applicability of Article 56 EC to the investment activity of open pension funds, the need to protect the public interest by safeguarding the financial stability of the social security system, as justification for the restrictions imposed on investments by those funds.

24. In the light of the position taken by the Republic of Poland, the Commission decided to bring the present action on 16 July 2009.

25. At the hearing, which was held on 16 December 2010, the Commission and the Republic of Poland presented oral argument.

IV — Analysis

A — *Admissibility*

26. In its rejoinder, the Republic of Poland contests the admissibility of the action on two grounds.

27. First of all, it submits, the Court should rule the action inadmissible because of the differences between the Republic of Poland and the Commission with regard to the assessment of the factual aspects of the case and of the elements which purportedly constitute an infringement of European Union law.

28. According to the Republic of Poland, by failing to determine correctly and fully the principles, the nature and the legal regime applicable to open pension funds, the Commission failed to define precisely the subject-matter of the dispute in the course of the pre-litigation procedure and also infringed Article 38(1)(c) of the Court's Rules of Procedure. In this regard, the Republic of Poland points out that the differences relate to the connection of open pension funds with the different pillars of the social security scheme, the public nature of the capital held by open pension funds, and the separation between the open pension funds and the management companies. More specifically as regards the first of these elements, the Polish Government claims that the Commission's misunderstanding of the principles on which the Polish social security scheme operates, leading it to separate the first pillar from the second pillar, in terms of their governing principles, and to treat the second and third pillars as equivalent, forms the basis for the erroneous conclusion that open pension funds must be regarded as entities which are engaged in economic activity.

29. I would point out that it is settled case-law that the proper conduct of the pre-litigation procedure constitutes an essential guarantee required by the EC Treaty not only in order to protect the rights of the Member State concerned, but also so as to ensure that any judicial proceedings will have a clearly defined dispute as their subject-matter. It follows from that objective that the purpose of the letter of formal notice is, first, to delimit the subject-matter of the dispute and to indicate to the Member State, which is invited to submit its observations, the factors enabling it to prepare its defence and, secondly, to enable the Member State to comply before proceedings are brought before the Court. [9] The Member State is therefore able to clarify and correct the facts presented by the Commission throughout the pre-litigation procedure.

30. However, the purpose of that procedure is not that the Commission and the Member State should agree in every respect on the facts or on their assessment. The Commission may

9 — See, to that effect, Case C-442/06 *Commission* v *Italy* [2008] ECR I-2413, paragraph 22.

legitimately bring an action if it considers it appropriate and provided that the procedural rules are fully respected. Consequently, the fact that the Member State does not share in full the view taken by the Commission does not preclude the Commission from bringing an action for failure to fulfil obligations. Nevertheless, the burden of proof always rests with the Commission.

31. In the present case, the claims made by the Commission during the pre-litigation procedure were sufficiently clear to enable the Republic of Poland to deploy its defence, as is shown by the course which that phase of the procedure took.

32. This plea of inadmissibility must therefore be rejected as unfounded.

33. Secondly, in its rejoinder, the Republic of Poland raises a separate plea of inadmissibility concerning the Commission's reliance, in its reply, on the Ministerial Decree of 23 December 2003. According to the Republic of Poland, since it was not raised during the pre-litigation procedure, this element constitutes a new complaint which is unconnected with those initially raised and cannot constitute a development of those complaints either.

34. I note that the Commission did not rely on the Ministerial Decree of 23 December 2003 in the pre-litigation procedure and that it did so only at the stage of its reply before the Court. However, it invoked it solely in response to comments made in that regard by the Republic of Poland in its defence. In discussing that decree in its reply, the Commission did not modify the complaints which it had raised against the Member State concerned in its application. [10]

35. In those circumstances, this plea of inadmissibility must also be rejected as unfounded.

B — *Substance*

36. The Commission argues that the limitations in relation to the amount and the nature of possible foreign investments under Article 143(1) and (2) of the Law on pension funds, in conjunction with Article 141, Article 136(3) and Article 136a(2) of that Law, relating to the operating costs for open pension funds, which may deter those funds from investing their assets outside Poland, constitute obstacles to the free movement of capital within the meaning of Article 56 EC.

10 — See Case C-287/00 *Commission* v *Germany* [2002] ECR I-5811, paragraph 24.

37. The Republic of Poland takes the view that Article 56 EC is not applicable to the investment activity of open pension funds. It claims, in essence, that the legal status of open pension funds and the fact that their activity comes under the compulsory retirement pension regime exclude the provisions of Articles 143, 136(3) and 136a of the Law on pension funds from the scope of the fundamental freedom guaranteed by the Treaty in the form of free movement of capital.

38. It is for that reason necessary to ascertain, first of all, whether Article 56 EC is applicable in the present case.

1. The scope of Article 56 EC

39. A preliminary point to note is that, according to consistent case-law, Article 56(1) EC generally prohibits restrictions on movements of capital between Member States. [11]

40. In the absence of a Treaty definition of 'movements of capital' for the purposes of Article 56(1) EC, the Court has recognised the nomenclature of movements of capital in Annex I to Directive 88/361/EEC as having indicative value. [12]

41. The Court has ruled that movements of capital for the purposes of Article 56(1) EC include 'portfolio' investments, namely investments in the form of the acquisition of shares on the capital market solely with the intention of making a financial investment without any intention to influence the management and control of the undertaking. [13]

42. The Court has stated that national measures must be regarded as 'restrictions' within the meaning of Article 56(1) EC if they are likely to prevent or limit the acquisition of shares in the undertakings concerned or to deter investors from other Member States from investing in their capital. [14]

11 — See, inter alia, Joined Cases C-282/04 and C-283/04 *Commission* v *Netherlands* [2006] ECR I-9141, paragraph 18 and the case-law cited, and Case C-112/05 *Commission* v *Germany* [2007] ECR I-8995, paragraph 17.

12 — Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty [article repealed by the Treaty of Amsterdam] (OJ 1988 L 178, p. 5).

13 — See Joined Cases C-282/04 and C-283/04 *Commission* v *Netherlands*, paragraph 19 and the case-law cited.

14 — Case C-367/98 *Commission* v *Portugal* [2002] ECR I-4731, paragraphs 45 and 46; Case C-483/99 *Commission* v *France* [2002] ECR I-4781, paragraph 40; Case C-463/00 *Commission* v *Spain* [2003] ECR I-4581, paragraphs 61 and 62; Case C-98/01 *Commission* v *United Kingdom* [2003] ECR I-4641, paragraphs 47 and 49; Case C-174/04 *Commission* v *Italy* [2005] ECR I-4933, paragraphs 30 and 31; and Joined Cases C-282/04 and C-283/04 *Commission* v *Netherlands*, paragraph 20.

43. In my view, investments made by open pension funds fully satisfy the definition of portfolio investments. However, the Republic of Poland claims that the state character of the pension funds excludes them from the scope of Article 56 EC.

44. Before examining whether or not the funds in question have such a character, it is necessary to ascertain whether the state character of the pension funds might play a determinant role in the free movement of capital, since, if that were not the case, it would be pointless to consider whether the funds in question are 'private' or 'state' in nature. [15]

45. The liberalisation of the movement of capital provided for by the Treaty establishing the European Economic Community, as envisaged in the initial version of Article 67 of the EEC Treaty, related only to an objective to be attained by subsequent measures. [16]

46. As regards the scope of the liberalisation, the original text, by making reference to 'persons resident in Member States', may have created some uncertainty as to the scope of that provision. However, it seems clear to me that the provision was directed at the Member States from the outset, [17] and this was made clear by the amendment introduced by the Treaty of Maastricht, which removed all references to persons, precisely by deleting the words 'persons resident in Member States'. [18]

47. Article 56 EC does therefore indeed apply to open pension funds, even if their activities are in the nature of 'state' activities. Consequently, measures such as those here in question must comply with the provisions of the Treaty concerning the free movement of capital, irrespective of whether the assets of the open pension funds in question have a state or a private origin. In those circumstances, it is not even necessary to ascertain whether the funds in question do indeed have

15 — I note, however, that the 'public' or 'private' character of those funds may have a bearing on the question whether or not the restrictions are objectively justified, which will be considered below.

16 — Article 67(1) of the EEC Treaty, under which 'during the transitional period and to the extent necessary to ensure the proper functioning of the common market, Member States shall progressively abolish between themselves all restrictions on the movement of capital belonging to persons resident in Member States and any discrimination based on the nationality or on the place of residence of the parties or on the place where such capital is invested'.

17 — See, in this regard, Article 68(3) of the EEC Treaty (repealed by the Treaty of Maastricht on 1 January 1994), according to which 'loans for the direct or indirect financing of a Member State or its regional or local authorities shall not be issued or placed in other Member States unless the States concerned have reached agreement thereon. This provision shall not preclude the application of Article 22 of the Protocol on the Statute of the European Investment Bank.' In my view, this provision would have been superfluous if the Member States' operations on the capital markets had not been the subject of the provisions of the EEC Treaty relating to the free movement of capital.

18 — See Article 73b(1) of the EC Treaty (which became Article 56(1) EC), according to which 'within the framework of the provisions set out in this Chapter, all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited'.

a 'state' origin, as is claimed by the Republic of Poland. Furthermore, the question of who should be regarded as the 'owner' of the assets held by the open pension funds is also not relevant. [19]

That provision therefore constitutes a quantitative restriction on movements of capital. It amounts to an obligation to invest 95% of the assets of the open pension fund in Polish shareholdings, debt securities or deposits and therefore creates a system of national preference for investments made by those funds.

2. The existence of a restriction of free movement of capital

50. In addition, the list of foreign investments in Article 143(1) of the Law on pension funds does not contain all the categories of investments set out in Article 141 of that Law, which concerns possible investments within national territory. Article 143(1) of the Law provides only for the following investment possibilities for assets from open pension funds outside Poland:

(a) Article 143 of the Law on pension funds

48. The first limitation of the free movement of capital claimed by the Commission is that Article 143(2) of the Law on pension funds limits the value of the investments outside Poland which may be made by an open pension fund.

— securities issued by companies listed on the main stock markets of an OECD Member State or of a State specified in the ministerial permit;

— treasury bonds or securities issued by the central bank of an OECD Member State or of a State specified in the ministerial permit, and

49. I find that, under that provision, foreign investments may not exceed 5% of the value of the assets of the fund concerned.

— shares issued by joint investment bodies domiciled outside Poland, if those shares are available to the general public and taken back at the investor's request.

19 — It should be stated that, for the free movement of capital, the Treaty does not make provision for an exception relating to 'public authority' as is the case for the free movement of persons under Article 39(4) EC, for the right of establishment under the first paragraph of Article 45 EC, and for services under Article 55 EC.

51. In contrast to the categories of investments which may be made within Poland, as set out in Article 141(1) of the Law on pension funds, open pension funds may not therefore invest outside Poland in, inter alia, the following instruments:

— loans and credits extended to the government of another Member State or to its central bank (cf. Article 141(1)(1));

— bonds and other securities, in particular deposits and loans from other entities guaranteed by the government of another Member State or its central bank (cf. Article 141(1)(2));

— bonds and other debt securities issued by a local authority of another Member State (cf. Article 141(1)(9) to (12));

— shares in companies listed on a stock market other than the primary market (cf. Article 141(1)(5)) and convertible bonds (cf. Article 141(1)(4)), and

— pre-emptive subscription rights, stock options and bonds convertible into shares in companies which are listed on the regulated OTC market or dematerialised, but not listed on the regulated market (cf. Article 141(1)(5)).

52. The Republic of Poland has itself acknowledged that Article 143 of the Law on pension funds imposes a limit on investments by open pension funds.

53. In my view, a list of possible foreign investments which is less extensive than that for possible investments in national territory constitutes not only a restriction on the movement of capital within the meaning of Article 56(1) EC, but also discrimination against investments in foreign securities as compared with national securities.

(b) Article 136(3) of the Law on pension funds

54. The second limitation of the free movement of capital claimed by the Commission is that, under Article 136(3) of the Law on pension funds, the value of the investments made by an open pension fund in shares issued by joint investment bodies (investment funds) domiciled outside Poland and referred to in Article 143(1) of the Law on pension funds is not taken into account in determining the net assets of the fund concerned. However,

the amount due to the management company in respect of management costs for the open pension fund is calculated on the basis of the value of the net fund assets in accordance with Article 136(2a) of the Law on pension funds. Consequently, the management company cannot collect fees for the management of assets of the open pension fund invested in investment funds which are domiciled outside Poland, whatever the category.

55. In my view, that provision constitutes a restriction on the movement of capital within the meaning of Article 56 EC in so far as it deters open pension funds from investing their assets in foreign investment funds. It amounts to a direct restriction.

56. In addition, it indirectly restricts the movement of capital by limiting the investments that open pension funds may make in national investment funds which, in turn, invest their capital outside Poland. [20]

57. That provision thus penalises investments in foreign investment funds in comparison with those made by open pension funds in national investment funds not listed in Article 141(1)(8) of the Law on pension funds (closed investment funds, for example), from which the management company will be able to deduct management fees.

(c) Article 136a(2) of the Law on pension funds

58. The third limitation of the free movement of capital claimed by the Commission is that Article 136a(2) of the Law on pension funds provides that the transaction costs due to foreign clearing houses may be covered by the assets of an open pension fund only up to the amount of the corresponding costs due to national clearing houses.

59. I consider that that provision may also deter open pension funds from investing outside Poland in so far as they will not be able fully to cover the costs of those transactions with their assets, which they are able to do in the case of investments in national territory. Article 136a(2) of the Law thus not only restricts movements of capital, but also penalises foreign investments by open pension funds.

20 — Article 136(3) of that Law, which refers to Article 141(1)(8) of the same Law, treats only investments in national open investment funds and specialised open investment funds in this way.

3. The existence of a justification for the restrictions on the free movement of capital

60. In the light of the foregoing, it must be held that the legislation in question gives rise to restrictions on the movement of capital within the meaning of Article 56 EC. According to well-established case-law, national measures which restrict the free movement of capital may be justified on the grounds set out in Article 58 EC or by overriding reasons in the public interest, provided that they are appropriate to secure the attainment of the objective which they pursue and do not go beyond what is necessary to achieve it. [21] It is clear that certain other derogating Treaty provisions may also be relied on, as the Republic of Poland has done. In my view, it is necessary, against this background, to examine Articles 58 EC, 86(2) EC, 137(4) EC and 295 EC, which are relied on by the Republic of Poland, in order to determine whether their wording can justify the restrictions identified.

61. For its part, without calling into question the need to guarantee the security of the financial resources accumulated in the retirement accounts of the open pension funds, the Commission expresses the view that such restrictions cannot be justified either under Article 58(1)(b) EC or any other provision cited, or by overriding reasons in the public interest in the form of the financial equilibrium of the open pension funds and the protection of their members, by reason of their discriminatory character, and that they are in any event disproportionate.

62. While the Republic of Poland does not contest the restrictive nature of the measures under challenge, it claims that they are justified. The justifications put forward must therefore be examined.

(a) The justification based on Article 58 EC

63. The Republic of Poland puts forward two types of reason based on Article 58 EC to justify the stricter treatment of foreign investments by open pension funds as compared with those that they make in Poland. It refers, first of all, to the risk of exchange rate fluctuations and, secondly, to the alleged difficulties it has experienced in obtaining information on foreign capital markets and their instruments, which has created an 'asymmetry of information'.

21 — See Case C-543/08 *Commission* v *Portugal* [2010] ECR I-11241, paragraph 83 and the case-law cited.

64. Under Article 58(1)(b) EC, Article 56 EC is without prejudice to the right of Member States to take all requisite measures to prevent infringements of national law and regulations, in particular in the field of taxation and the prudential supervision of financial institutions, or to lay down procedures for the declaration of capital movements for purposes of administrative or statistical information, or to take measures which are justified on grounds of public policy or public security. [22]

65. The Polish open pension funds cannot, in my view, be regarded as financial institutions, even though the legislation in question could be regarded as coming under the prudential supervision of those funds. In fact, all the arguments put forward by the Republic of Poland seek to show that the pension funds are emanations of the Polish State, which appears to me specifically to rule out the possibility of regarding them as financial institutions. In addition, the Republic of Poland has not invoked an exception justified on grounds of public policy or public security and, in my view, cannot do so either. The other derogations laid down in that provision do not appear to be relevant.

22 — Furthermore, under Article 58(3) EC, the measures and procedures referred to in paragraphs 1 and 2 must not constitute a means of arbitrary discrimination or a disguised restriction on the free movement of capital and payments as defined in Article 56 EC.

66. Consequently, the present restrictions on the free movement of capital cannot be justified on the basis of Article 58(1)(b) EC.

(b) The justification based on Article 86(2) EC

67. The Republic of Poland submits that the applicability of Article 56 EC should also be rejected on the basis of Article 86(2) EC in so far as the open pension funds are undertakings entrusted with the operation of services of general economic interest.

68. I note that the applicability of Article 86(2) EC requires the presence of an undertaking which operates on the market by offering, inter alia, goods or services. It is possible for certain state prerogatives to be delegated to an undertaking for that purpose. [23]

23 — It is worth bearing in mind, in this context, the comments made by Advocate General Jacobs on the functional approach in his Opinion in Joined Cases C-264/01, C-306/01, C-354/01 and C-355/01 *AOK Bundesverband and Others* [2004] ECR I-2493, at point 25, namely that 'as to the status of the sickness funds, the Court's general approach to whether a given entity is an undertaking within the meaning of the Community competition rules can be described as functional, in that it focuses on the type of activity performed rather than on the characteristics of the actors which perform it, the social objectives associated with it, or the regulatory or funding arrangements to which it is subject in a particular Member State … Provided that an activity is of an economic character, those engaged in it will be subject to Community competition law'.

69. In the present case, the Republic of Poland has defined the funds in question as emanations of the State pursuing objectives of a social nature. In my view, this rules out the possibility of regarding them as undertakings engaged in economic activities, which is a condition for the applicability of Article 86(2) EC.

70. It is, nevertheless, possible, in principle, to consider the companies which manage those funds, taken individually, and the entities formed by the management companies and their funds, to be undertakings even in the case of a statutory pension scheme, provided that those undertakings operate on the market.

71. However, a management company does not provide its services to an open group of customers, since the Polish legislation requires that a management company should administer only one single open pension fund. In my view, this would appear to rule out the possibility of regarding their activities as services for the purposes of competition law, even though the legislature appears to have conferred profit-making status on them in order to increase competition in the field of statutory pensions.

72. As regards open pension funds, the beneficiaries of which are the contributors, their activity could be regarded as a service of general interest in so far as it consists in managing capital in order to be able transmit liquid funds to the ZUS, so that the ZUS can then pay to the beneficiaries pensions corresponding to the capitalised contributions. By contrast, the other part of the open pension funds' activity, consisting in investing assets, cannot be distinguished from the activities of other institutional investors which are subject to strict prudential supervision, such as life assurance companies.

73. In conclusion, even if it were assumed that the management companies, taken individually, or together with the funds managed by them, are undertakings within the accepted terms of competition law, the Republic of Poland would not have shown why the restrictions at issue are necessary to guarantee the attainment of the objectives pursued by those funds. It has not shown that a national preference with regard to investments is necessary for the purpose of securing the objective of the funds, which is to be able to provide capital management services for the statutory pension scheme.

74. On these grounds, this justification must also be rejected.

(c) The justification based on Article 137(4) EC

75. The Republic of Poland argues that, in accordance with Article 137(4) EC, it alone is competent to define the principles governing the operation of the compulsory social

security system, which for that reason does not in any way come under Article 56 EC.

76. That argument cannot be accepted.

77. While it is true that, according to consistent case-law, in the absence of Community harmonisation, it is for the legislation of each Member State to determine, in particular, the conditions concerning the requirement to be insured with a social security scheme and, consequently, the method of financing that scheme, the Member States must, nevertheless, comply with Community law, including the free movement of capital, when exercising those powers. [24]

78. In addition, Article 137(4) EC frames the provisions which must be adopted by the European Union legislature pursuant to that article. It does not seek to derogate from the fundamental freedoms laid down in the Treaty.

79. That justification must therefore be rejected.

(d) The justification based on Article 295 EC

80. As regards Article 295 EC, which states that 'the Treaty shall in no way prejudice the rules in Member States governing the system of property ownership', suffice it to note that, in accordance with settled case-law, that article does not have the effect of exempting the Member States' systems of property ownership from the fundamental rules of the Treaty and cannot therefore be relied on by way of justification for obstacles to the freedoms for which the Treaty provides. [25] The Court has already applied that principle in the context of schemes relating to 'golden shares' which some Member States retain in privatised undertakings.

81. Nevertheless, the restrictions imposed by the legislature in relation to the object of portfolio investments made by open pension funds do not appear to me to be capable of being regarded as forming part of the system of property ownership in the Member State concerned.

82. On these grounds, this justification must be rejected.

24 — See, to that effect, Case C-350/07 *Kattner Stahlbau* [2009] ECR I-1513, paragraph 74.

25 — See, to that effect, Case C-171/08 *Commission* v *Portugal* [2010] ECR I-6817, paragraph 64 and the case-law cited.

e) The justification based on overriding reasons in the public interest

83. The Republic of Poland has invoked as a principal argument the public nature and origin of the open pension funds. I do not rule out the possibility that the restrictions relating to investments made by those funds may be justified by overriding reasons in the public interest which are connected with the tasks and objectives of those funds in the social security system. [26] It is clear that, for those reasons, investments made by an open pension fund must satisfy requirements relating to liquidity and security so that the pension system is able to provide pensioners with the benefits due to them.

84. I would observe, first of all, that any reasonable institutional investor defines its investment policy in terms of acceptable risks and volatility and with reference to the desired returns on investment. A necessary element of the definition of that policy is to distribute the investments among different categories of investments and to diversify them into different geographical markets.

85. In the case of public investors, such as States, central banks, other bodies governed by public law, and institutions or bodies forming part of the social security system, it seems to me to be normal for the general framework of the investment policy to be amenable to definition by law, regulation or administrative provision, which is the case with regard to institutions that are subject to prudential supervision. [27]

86. In addition, so far as bodies governed by public law are concerned, it also seems justified to me that the legislation governing their investment policies may go further than the prudential principles applied by private investors to their own investment policies, if that is necessary to allow them to perform their specific tasks, connected with financial, monetary or social policy, for example. Restrictions of this kind may impose requirements in terms of liquidity or security of investments, or limitations with regard to certain risks.

87. In the present case, however, I do not consider the limitations imposed on open pension funds by the legislature to be either coherent or proportionate. For example, I note that the legislation accepts risks connected with certain types of investment in relation to Polish investments, but not in

26 — See, to that effect, Case C-171/08 *Commission* v *Portugal*, paragraph 69. See also point 59 et seq. of the Opinion of Advocate General Trstenjak delivered on 8 March 2011 in Case C-10/10 *Commission* v *Austria*, in which judgment was delivered on 16 June 2011.

27 — The Commission mentions, by way of example, Article 18(5)(b) 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 (OJ 2003 L 235, p. 10), which lays down a prudential rule of this kind, setting at 30% the maximum level of investment in assets denominated in currencies other than those in which the financial institution's liabilities are expressed.

relation to comparable investments in other Member States.[28]

88. From the point of view of risk management, these restrictions impose on the open pension funds the duty to concentrate almost all their investments on the Polish capital market. Whilst European Union law does not require the Member States' public investors to diversify their investments, national legislation which patently increases, rather than reduces, the level of risk for investments cannot be viewed as a justification connected with the prudential supervision of those funds.

89. On these grounds, I conclude that the restrictions in question also cannot be justified by overriding reasons in the public interest connected with the special tasks and objectives of open pension funds.

V — Conclusion

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

— declare that, by maintaining in force Articles 143, 136(3) and 136a(2) of the Law of 28 August 1997 on the organisation and operation of pension funds (Ustawa o organizacji i funkcjonowaniu funduszy emerytalnych), which restrict foreign investments by Polish open pension funds, the Republic of Poland has failed to fulfil its obligations under Article 56 EC, and

— order the Republic of Poland to pay the costs.

28 — From the point of view of proportionality, the obligation to invest at least 95% of assets in the domestic market cannot be regarded as an appropriate means of protecting investments against the risk of exchange-rate fluctuations.