Reports of Cases

JUDGMENT OF THE COURT (Grand Chamber)

25 June 2013*

(Failure of a Member State to fulfil obligations — Directive 2003/41/EC — Activity and supervision of institutions for occupational retirement provision — Partial failure to transpose within the prescribed period — Judgment of the Court establishing that a Member State has failed to fulfil its obligations — Failure to comply with the judgment — Article 260(2) TFEU — Financial penalties — Lump sum)

In Case C-241/11,

ACTION under Article 260(2) TFEU for failure to fulfil obligations, brought on 19 May 2011,

European Commission, represented by Z. Malůšková, N. Yerrell and K.-P. Wojcik, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Czech Republic, represented by M. Smolek and J. Očková, acting as Agents,

defendant,

THE COURT (Grand Chamber),

composed of V. Skouris, President, K. Lenaerts, Vice-President, R. Silva de Lapuerta, M. Ilešič, L. Bay Larsen, A. Rosas, G. Arestis, J. Malenovský and E. Jarašiūnas, Presidents of Chambers, E. Juhász, A. Borg Barthet, A. Ó Caoimh (Rapporteur), C.G. Fernlund, J.L. da Cruz Vilaça and C. Vajda, Judges,

Advocate General: N. Jääskinen,

Registrar: M. Aleksejev, Administrator,

having regard to the written procedure and further to the hearing on 11 December 2012,

after hearing the Opinion of the Advocate General at the sitting on 21 March 2013,

gives the following

* Language of the case: Czech.

Judgment

1 In its application, the European Commission claims that the Court should:

— declare that, by failing to adopt 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 (OJ 2003 L 235, p. 10) and by thus failing to fulfil its obligations under Article 22(1) of that directive, the Czech Republic has failed to take the measures necessary to comply with the judgment of 14 January 2010 in Case C-343/08 *Commission* v *Czech Republic* [2010] ECR I-275 ('the judgment in *Commission* v *Czech Republic*') and has thus failed to fulfil its obligations under Article 260 TFEU;

— order the Czech Republic to pay the Commission, into the 'European Union own resources' account, a penalty payment in the amount of EUR 22 364.16 for each day of delay in adopting the measures necessary to comply with the judgment in *Commission* v *Czech Republic*, from the date of delivery of the judgment in the present case until the date of adoption of the measures necessary to comply with the judgment in *Commission* v *Czech Republic*;

— order the Czech Republic to pay it, into the same account, a lump sum in the amount of EUR 5 644.80 for each day of delay in adopting the measures necessary to comply with the judgment in *Commission* v *Czech Republic*, from the date of delivery of that judgment, 14 January 2010, until the date of delivery of the judgment in the present case or until the date of adoption of the measures necessary for the Czech Republic to comply with that judgment if that date precedes the delivery of the judgment in the present case; and

— order the Czech Republic to pay the costs.

Legal context

2 Recitals 1, 6, 8 and 9 in the preamble to Directive 2003/41, which was adopted on the basis of Article 47(2) EC, Article 55 EC and Article 95(1) EC, state:

'(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.'

3 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.

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

5 Under Article 13 of Directive 2003/41, 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.

6 Articles 15 to 18 of that directive provide, respectively, that the home Member States are required to ensure that institutions for occupational retirement provision establish technical provisions for the various pension schemes, have sufficient assets to cover those provisions and additional assets intended to serve as a buffer, and invest in accordance with the 'prudent person' rule.

7 Article 20(2) to (4) of that directive sets out the rules concerning the supervision of cross-border activities of institutions for occupational retirement provision with which the home Member States must comply.

8 The first subparagraph of Article 22(1) of Directive 2003/41 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.'

The judgment in Commission v Czech Republic

9 On 23 July 2008, the Commission brought, pursuant to Article 226 EC, an action against the Czech Republic for failure to fulfil obligations, seeking a declaration that, by failing to transpose Directive 2003/41 fully into its domestic legal system, in particular because of the failure to transpose Articles 8, 9, 13, 15 to 18 and 20(2) to (4) of that directive, it had failed to fulfil its obligations under the directive, and in particular under Article 22(1) thereof.

10 The Court upheld the Commission's action, by holding in paragraph 1 of the operative part of the judgment in *Commission* v *Czech Republic* that, by failing to adopt, within the prescribed period, the laws, regulations and administrative provisions necessary to comply with the abovementioned articles of Directive 2003/41, the Czech Republic had failed to fulfil its obligations under Article 22(1) of that directive.

Pre-litigation procedure

11 By letter dated 19 February 2010, the Commission requested the Czech Republic to notify it of the measures and the precise timetable that that Member State intended to adopt in order to comply with the judgment in *Commission* v *Czech Republic*.

12 By letter dated 3 February 2010, registered on 24 February 2010, the Czech Republic informed the Commission that, in the light of its internal political situation, in particular the holding of parliamentary elections on 28 and 29 May 2010, the most realistic period for carrying out the changes necessary for the purpose of a complete transposition of Directive 2003/41 was two years from the date of that letter.

13 By letter of 23 March 2010, the Czech Republic sent the Commission an indicative timetable showing the stages for adoption of the measures to implement the judgment in *Commission* v *Czech Republic*, from which it appeared that those measures would be adopted at the latest during June 2012.

14 By letter dated 17 June 2010, the Czech Republic notified the Commission that it had drawn up a working document on the transposition of Directive 2003/41, which should have been examined by the government on 31 May 2010. However, in view of the holding of the parliamentary elections, the decision on the method of transposition of that directive was, according to that Member State, to be entrusted to the new government emerging from those elections, probably in the autumn of 2010.

15 By letter dated 27 September 2010, the Czech Republic stated that a precise timetable setting the procedure for transposing that directive would be sent to the Commission in the very near future.

16 By letter dated 1 October 2010, the Czech Republic notified the Commission that a working document drawn up by the Ministry of Finance, relating to the transposition of Directive 2003/41 and similar to the document which should have been examined on 31 May 2010, would be submitted to the new government in the coming weeks.

17 On 29 October 2010, the Commission sent the Czech Republic a letter of formal notice notifying it that it still had not fulfilled the obligations imposed on it by the judgment in *Commission* v *Czech Republic*. At the request of that Member State, the period for replying to the letter of formal notice was extended to 28 January 2011.

18 By letter dated 25 January 2011, the Czech Republic notified the Commission that the draft law prepared for the purpose of complying with the abovementioned judgment would be submitted to the government, after consultation with the competent central authorities, during the first quarter of 2011. It envisaged that that draft would be submitted to the national parliament in April 2011 and that the law would enter into force during the third quarter of that year.

19 Since it was not notified of the adoption of provisions necessary for that Member State to comply with the judgment in *Commission* v *Czech Republic*, the Commission decided to bring the present action.

The developments that have taken place during the present proceedings

20 On 2 September 2011, the Czech Republic notified the Commission of the publication and entry into force, on 31 August 2011, of Law No 260/2011, which, according to that Member State, ensured full compliance with the judgment in *Commission* v *Czech Republic*, by the supplementing of Law No 340/2006 of 24 May 2006 relating to activities carried out by institutions for occupational retirement provision of the Member States of the European Union and of the other States party to the Agreement on the European Economic Area in the territory of the Czech Republic and amending Law No 48/1997 on public health insurance amending and supplementing a number of related laws, which had partially transposed Directive 2003/41 into the Czech legal system prior to delivery of that judgment.

21 After having examined Law No 260/2011, the Commission stated, in its reply, that the Czech Republic had brought its legislation into line with that judgment.

22 Consequently, the Commission is no longer seeking the imposition of a penalty payment. Nevertheless, it retains its claim for an order requiring the Czech Republic to pay a lump sum.

The failure to fulfil obligations

23 As the FEU Treaty abolished the reasoned opinion stage in infringement proceedings under Article 260(2) TFEU, the reference date for assessing whether there has been an infringement for the purpose of Article 260 TFEU is the date of expiry of the period prescribed in the letter of formal notice issued in accordance with the first subparagraph of Article 260(2) (see Case C-610/10 *Commission* v *Spain* [2012] ECR, paragraph 67, and the judgment of 19 December 2012 in Case C-279/11 *Commission* v *Ireland*, paragraph 19).

24 In the present case, as the Czech Republic has acknowledged, the legislative measures necessary to ensure compliance with the judgment in *Commission* v *Czech Republic* were not laid down until the adoption of Law No 260/2011, which was published and entered into force on 31 August 2011, that is to say, after the period prescribed in that regard in the letter of formal notice of 29 October 2010, a period which expired on 28 January 2011.

25 In those circumstances, it must be held that, by failing to take, by the date of expiry of the period prescribed in the letter of formal notice sent to the Czech Republic by the Commission pursuant to Article 260(2) TFEU, all the measures necessary to comply with the judgment in *Commission* v *Czech Republic*, the Czech Republic has failed to fulfil its obligations under Article 260(1) TFEU.

The lump sum

Arguments of the parties

26 The Commission explains that the amount of the lump sum requested, namely EUR 5 644.80 for each day of the infringement, was established in accordance with the criteria laid down in the communication of 13 December 2005 on the application of Article 228 EC (SEC(2005) 1658), as updated by the Commission communication on the application of Article 260 TFEU and the 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 (SEC(2010) 923) ('the 2005 communication') and made applicable to procedures governed by Article 260(2) TFEU by virtue of the Commission communication on the implementation of Article 260(3) TFEU (OJ 2011 C 12, p. 1). That amount is arrived at by multiplying a basic flat-rate amount of EUR 210 per day by the coefficient for seriousness of the infringement set at 8 (on a scale of 1 to 20) and by an 'n' factor, representing the

Czech Republic's ability to pay, of 3.36. Since the total amount arrived at, namely, according to the Commission, EUR 3 364 891.20 for 594 days of infringement, is greater than the minimum lump sum set for the Czech Republic by the 2005 communication, it is that lump sum calculated on the basis of the daily rate which should be paid by that Member State.

27 The Commission considers that the adopted coefficient for seriousness is suitable, since the provisions at issue are essential for the purpose of the supply of cross-border services by institutions for occupational retirement provision and, in the absence of their complete transposition in the domestic legal system, the conditions for the functioning of the internal market for occupational retirement provision, of which Directive 2003/41 is the first stage, are not created.

28 The Commission disputes the fact that failure to transpose the provisions at issue would have had almost no consequences because of the absence of a second pillar in the retirement system of the Czech Republic. Admittedly, Directive 2003/41 does not contain any rule requiring Member States to allow institutions for occupational retirement provision to establish themselves in their territory. However, by failing to transpose the provisions at issue of that directive, the Czech Republic did not ensure that it was prepared for a possible change of situation as a result of any decision to supplement its national system by an occupational pension regime.

29 The Commission considers moreover that the definition of the technical conditions necessary for the operation of institutions for occupational retirement provision is fundamentally irrelevant to the issue of the establishment of a second pillar.

30 Furthermore, according to the Commission, the fact that Directive 2003/41 was partially transposed is not relevant. It was not possible to identify from that partial transposition either the conditions of operation of institutions for occupational retirement provision subject to supervision by the Czech authorities or the prudential rules applicable to those institutions.

31 Finally, the Commission notes that the transposition of Directive 2003/41 is an obligation compliance with which is not left to the discretion of the Member States. Furthermore, the relevant provisions of that directive are clearly set out and give the Member States no interpretative discretion. Likewise, the judgment in *Commission* v *Czech Republic* is clearly expressed and raises no difficulties with regard to the methods for complying with it.

32 The Czech Republic considers, for its part, that it should not be ordered to pay a lump sum, or that the latter should be reduced. The seriousness of the infringement established in the judgment in *Commission* v *Czech Republic* is negligible, if not inexistent.

33 In the first place, that Member State claims that the Commission's assessment of the seriousness of the infringement is based on an incorrect premiss, since it confuses that question with the question of the infringement of European Union law. That error affects the assessment in that the Commission fails to appreciate that Directive 2003/41 was adopted without account being taken of the fact that, in certain States which were going to accede to the European Union, a second pillar had not been introduced into the pension system, so that that directive could conflict with the powers guaranteed to the Member States in the area of social security by Article 153(4) TFEU. That error also affects the assessment of the seriousness of the infringement in that the Commission takes account neither of the fact that the Czech Republic did not commit a systematic and long-lasting infringement of European Union law nor of the fact that the partial transposition of Directive 2003/41 allowed the cross-border provision of the services at issue.

34 In the second place, the Czech Republic points out that, in order to assess the seriousness of an infringement, it is necessary to take into consideration the effects of the infringement established on private and public interests, the degree of urgency in having the Member State comply with its obligations, the importance of the legal rule held to have been infringed and the conduct of that Member State.

35 First, concerning the effects, for private and public interests, of the failure to comply with the judgment in *Commission* v *Czech Republic*, the Czech Republic points out that in that judgment the Court expressly held that the Czech Republic was free to decide how to organise its own social security system, including whether to introduce a second pillar of the pension system. In those circumstances, the failure to comply with that judgment damages neither the internal market nor private and public interests.

36 Secondly, concerning the degree of urgency for the adoption of the measures necessary to comply with the judgment in *Commission* v *Czech Republic*, the Czech Republic submits that, since the sole aim of the transposition of Directive 2003/41 was to inform persons who are potentially concerned in the event that a second pillar is introduced, the degree of urgency should be seen in context.

37 Third, concerning the importance of Directive 2003/41 in the light of the alleged infringement, that Member State recalls that the directive does not aim to create institutions for occupational retirement provision. By transposing Directive 2003/41, a Member State should only put in place a legal framework for the purpose of any future organisation.

38 Fourth, concerning the conduct adopted by the Czech Republic for the purposes of rectifying the infringement complained of, that Member State points out that it notified the Commission of all the steps taken. The completion of the transposition of Directive 2003/41 was, however, dependent on the result of a complex reform of retirement pensions.

39 Finally, the Czech Republic considers that the period in which the process of transposition was completed, on 31 August 2011, is not excessive in the light of the usual period of time for the adoption of legislative acts.

Findings of the Court

40 An order to pay a lump sum is based essentially on the assessment of the effects on public and private interests of the failure of the Member State concerned to comply with its obligations, in particular where the breach has persisted for a long period after the judgment initially establishing it was delivered (see, inter alia, Case C-121/07 *Commission* v *France* [2008] ECR I-9159, paragraph 58; Case C-407/09 *Commission* v *Greece* [2011] ECR I-2467, paragraph 28; and *Commission* v *Ireland*, paragraph 65).

41 Moreover, the question of whether such an order should be made and the fixing, if necessary, of the amount of the lump sum must, in each individual case, depend on all the relevant factors pertaining to both the particular nature of the infringement established and the individual conduct of the Member State involved in the procedure instigated pursuant to Article 260 TFEU (see, inter alia, *Commission* v *France*, paragraph 62; *Commission* v *Greece*, paragraph 30; and *Commission* v *Ireland*, paragraph 67).

42 That provision confers in that regard a wide discretion upon the Court in deciding whether or not to impose such a penalty and determining, if necessary, its amount (*Commission* v *Spain*, paragraph 141). In particular, an order requiring a Member State to pay a lump sum cannot be made automatically (see, to that effect, *Commission* v *France*, paragraph 63).

43 For that purpose, the Commission's suggestions cannot bind the Court and are merely guidance. Likewise, guidelines concerning orders for payment of lump sums, such as those appearing in the 2005 communication, which the Commission relied on in the present case, do not bind the Court, but may contribute to ensuring that the Commission's actions are transparent, foreseeable and consistent with legal certainty (see, to that effect, *Commission* v *France*, paragraph 61, and *Commission* v *Spain*, paragraph 116 and the case-law cited).

44 Here, for the purposes of ruling on the claim for an order requiring the Czech Republic to pay a lump sum, it should be recalled that, although Article 260 TFEU does not specify the period within which a judgment must be complied with, the action required to give effect to a judgment must be set in motion immediately and be completed as soon as possible (see, in particular, *Commission* v *Greece*, paragraph 34).

45 That is all the more the case since the entry into force of the FEU Treaty, because, as was pointed out in paragraph 23 of the present judgment, that treaty abolished the reasoned opinion stage in infringement proceedings under Article 260(2) TFEU.

46 In the present case, it should be noted that 19 months elapsed between the date of delivery, on 14 January 2010, of the judgment in *Commission* v *Czech Republic* and that of the publication and entry into force, on 31 August 2011, of Law No 260/2011, which brought the national legislation into conformity with the operative part of that judgment.

47 It is apparent from the documents submitted to the Court that, although, from the month following the delivery of the judgment in *Commission* v *Czech Republic* and until September 2010, the Czech authorities notified the Commission of the approximate timetable for the adoption of the measures necessary to comply with that judgment, it is only in October of that year that a working document relating to those measures was communicated to the government as the Czech authorities decided to postpone such communication until a new government had been established after the holding of parliamentary elections at the end of May 2010.

48 It should, however, be pointed out that a Member State cannot plead provisions, practices or situations prevailing in its domestic legal order to justify failure to observe obligations arising under European Union law (see, inter alia, Case C-568/07 *Commission* v *Greece* [2009] ECR I-4505, paragraph 50, and *Commission* v *Greece*, cited above, paragraph 36).

49 Consequently, the Court considers that it is justified, in the present case, in ordering the Czech Republic to pay a lump sum.

50 Concerning the amount of that sum, it is necessary to take into account the following circumstances relating to the conduct of the Member State concerned and to the duration and seriousness of the infringement.

51 In the first place, with regard to the conduct of the Member State concerned, the Czech Republic, as is apparent from paragraphs 11 to 18 of the present judgment, cooperated in good faith with the Commission, since it regularly notified the latter of the measures proposed to comply with the judgment in *Commission* v *Czech Republic*.

52 In the second place, concerning the duration of the infringement, it should be noted that 19 months elapsed between the date of delivery of the judgment in *Commission* v *Czech Republic* and the date when the Czech Republic fully transposed Directive 2003/41 into domestic law and, consequently, brought its national legislation into conformity with that judgment.

53 Concerning, in the third place, the seriousness of the infringement, it is necessary to take into account that, in the absence, in the Czech Republic, of a second pillar in the national retirement pension system, and in the light of the fact that institutions for occupational retirement provision are prohibited from establishing themselves in its territory, late compliance, by that Member State, with the judgment in *Commission* v *Czech Republic* had a limited effect on the internal market for occupational retirement provision, which Directive 2003/41, according to recitals 1, 6 and 8 in the preamble thereto, seeks to establish, and, therefore, on private and public interests.

54 In particular, the complete transposition of Directive 2003/41 is intended principally to inform interested persons in the event that, as the Court observed in paragraph 51 of the judgment in *Commission* v *Czech Republic*, the national retirement pension system develops in that regard.

55 Having regard to all of those considerations, it is a just reflection of the circumstances of the present case to set the amount of the lump sum to be paid by the Czech Republic to the Commission, into the 'European Union own resources' account, at EUR 250 000.

Costs

56 Under Article 138(1) 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 applied for costs and the Czech Republic has been unsuccessful, the latter must be ordered to pay the costs.

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

1. **Declares that, by failing to take, by the date of expiry of the period prescribed in the letter of formal notice sent to the Czech Republic by the European Commission pursuant to Article 260(2) TFEU, all the measures necessary to comply with the judgment of 14 January 2010 in Case C-343/08 *Commission* v *Czech Republic*, the Czech Republic has failed to fulfil its obligations under Article 260(1) TFEU;**

2. **Orders the Czech Republic to pay to the European Commission, into the 'European Union own resources' account, a lump sum of EUR 250 000;**

3. **Orders the Czech Republic to pay the costs.**

[Signatures]