OPINION OF ADVOCATE GENERAL

BOT

delivered on 6 October 2009 [1]

1. These infringement proceedings concern the Czech Republic's transposition of Directive 2003/41/EC of the European Parliament and of the Council. [2]

2. Directive 2003/41 seeks to facilitate the pursuit by institutions for occupational retirement provision of their activities in Member States other than those in which they are located. To that effect, it lays down strict prudential rules to protect the beneficiaries of retirement benefits payable by those institutions. However, Directive 2003/41 does not call into question the competence of the Member States to organise freely their retirement systems.

3. In order to comply with the requirements of that directive, the Czech Republic adopted provisions authorising institutions for occupational retirement provision located in other Member States to provide their services within its territory and permitting undertakings located in the Czech Republic to use such services. However, it did not transpose the provisions of the directive which impose obligations on the home Member State of those institutions because there are no institutions for occupational retirement provision in its territory and such a transposition would call the organisation of its retirement system into question.

4. The Commission of the European Communities is of the view that the Czech Republic's reasoning is unfounded and seeks a declaration by the Court that that Member State, by not transposing various provisions of Directive 2003/41, has thereby failed to fulfil its obligations.

5. I am of the view that the Commission's action is well founded. In this Opinion, I shall show that the provisions of Directive 2003/41 which impose obligations on the Member States as home Member States of institutions for occupational retirement provision do not govern the role and functions of such institutions in the system of those States. I shall conclude from this that full transposition of that directive does not affect the organisation by the Czech Republic of its retirement system. I shall then point out that, according to the case-law, the fact that an activity

1 — Original language: French.

2 — Directive of 3 June 2003 on the activities and supervision of institutions for occupational retirement provision (OJ 2003 L 235, p. 10).

referred to by a directive does not exist in a Member State does not release that State from the obligation to transpose it and I shall maintain that that case-law is applicable in the present case.

I — Directive 2003/41

6. The institutions for occupational retirement provision are part of what is called 'the second pillar' in the method of organising retirement systems by the Member States. [3]

7. Directive 2003/41 seeks to allow those institutions to provide their services in other Member States. [4] According to recital 6 in its preamble, that directive represents a first step towards the creation of an internal market for occupational retirement provision. To that end, it lays down strict prudential rules with respect to the activities and conditions of operation of institutions for occupational retirement provision in order to guarantee a high degree of security for future pensioners entitled to benefit from retirement benefits paid by the institutions. [5]

3 — The first pillar comprises mandatory pay-as-you-go schemes. The third pillar comprises individual contracts of a life assurance nature.

4 — Recitals 6, 8 and 36.

5 — Recitals 7 and 20.

8. However, it is stated in recital 9 in the preamble to Directive 2003/41 that that directive does not call into question the organisation by the Member States of their pension systems and, with regard in particular to the second pillar, the definition, by each State, of the role and functions of the institutions providing occupational retirement benefits. [6]

9. The provisions of Directive 2003/41 relevant to this case concern the scope of that directive, the conditions under which institutions for occupational retirement provision pursue their activities and the special rules governing their cross-border activities.

1. The scope of Directive 2003/41

10. Articles 2, 3 and 6 of Directive 2003/41 define in mandatory terms the institutions which fall within the scope of that directive and those which fall outside it.

6 — Recital 9 is worded as follows:
'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.'

11. It thus follows from those provisions that they apply to institutions for retirement provision which, irrespective of their legal form and name, operate on a funded basis, [7] are not first pillar social security schemes and aim to provide retirement benefits in the context of an occupational activity on the basis of a contract or collective agreement.

12. In particular, the following are excluded: institutions managing social-security schemes covered by the Community coordination rules; financial institutions which are already covered by a Community measure (insurance, undertakings for collective investment in transferable securities, investment services undertakings); and institutions for occupational retirement provision which operate on a pay-as-you-go basis.

13. Directive 2003/41 also lays down optional provisions.

14. Accordingly, under Article 4 of that directive, home Member States [8] may choose to apply the provisions of the directive to the occupational-retirement-provision business of insurance undertakings. Likewise, pursuant to Article 5 of Directive 2003/41, Member States may choose not to apply the directive in whole or in part to institutions located in their territories which operate pension schemes which together have less than 100 members in total, and to institutions where occupational retirement provision is made under statute, pursuant to legislation, and is guaranteed by a public authority.

2. The conditions under which institutions for occupational retirement provision pursue their activities

15. Directive 2003/41 lays down that the Member States are to impose various obligations on institutions for occupational retirement provision located in their territory.

16. Each Member State is thus to require them to limit their activities to the provision of retirement benefits (Article 7) and to be legally separate from sponsoring undertakings [9] (Article 8). It must also ensure, pursuant to Article 9, that any institution located in its territory is registered in a national register, is

7 — Funded schemes are characterised by the fact that pensions are prefinanced and their payment is guaranteed by reserves. They differ from pay-as-you-go schemes, in which contributions are used directly in order to pay benefits due.

8 — 'Home Member State' is defined in Article 6(i) of Directive 2003/41 as 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.

9 — 'Sponsoring undertaking' is defined in Article 6(c) of Directive 2003/41 as any undertaking or other body consisting of one or more legal or natural persons which pays contributions into an institution for occupational retirement provision.

effectively run by persons of good repute and is subject to appropriate rules.

17. Each Member State is also to ensure that every institution located in its territory provides annual accounts (Article 10) and communicates the information listed in Article 11 of Directive 2003/41 to members and beneficiaries. It must also create a competent authority with sufficient powers to supervise effectively the activities of such institutions (Article 13).

18. Lastly, each Member State is required to ensure that every institution located in its territory states at regular intervals the principles guiding its investment policy (Article 12), has sufficient reserves to cover its liabilities (Articles 15 to 17) and invests its assets in accordance with the 'prudent person' rule (Article 18).

3. The special regime for cross-border activities

19. Under Article 20(1) of Directive 2003/41, the Member States are to allow undertakings located within their territories to sponsor institutions for occupational retirement provision authorised in other Member States. They are also to allow institutions for occupational retirement provision authorised in their territories to accept sponsorship by undertakings located within the territories of other Member States.

20. An institution which wishes to provide cross-border services must obtain a prior authorisation from the home Member State (Article 9(5)).

21. For that purpose, according to Article 20(3) of Directive 2003/41, it must indicate to the competent authority of that State the Member State or Member States in which it has decided to provide services, the name of the sponsoring undertaking and the main characteristics of the pension scheme to be operated. In accordance with Article 20(4) of Directive 2003/41, except where it is of the view that the institution in question is not in a position to provide the service envisaged, the competent authority of the home Member State is to inform the competent authority of the host Member State within a period of three months.

22. Article 20(5) to (10) of Directive 2003/41 lays down the detailed rules for the exchanges between the competent authorities of the

Member States concerned as well as their respective powers in order to ensure, in particular, that the provision of services is carried out in compliance with the social and labour law of the host Member State.

23. Under Article 22(1) of Directive 2003/41, the Member States were to implement the provisions necessary in order to comply with that directive before 23 September 2005 and inform the Commission thereof. According to Article 22(3) and (4), Member States could postpone until 23 September 2010 the application of Article 17(1) and (2) and Article 18(1)(f) under the conditions set out in those subparagraphs.

II — Pre-litigation procedure

24. On 11 July 2006, the Czech Republic informed the Commission that it had transposed Directive 2003/41 into its domestic law by means of Law No 340/2006 on the activities of the institutions for occupational retirement provision of the Member States of the European Union in the territory of the Czech Republic.

25. By letter of 18 October 2006, the Commission sent that Member State a letter of formal notice in which it stated that Articles 1 to 5, 8, 9, 13 and 15 to 21 had not been transposed or had been transposed only in part.

26. The Czech Republic replied by letter of 18 December 2006, in which it indicated, essentially, that, as its social security system has no second pillar and there are no institutions for occupational retirement provision within its territory, it was not required to transpose the articles of Directive 2003/41 which presuppose the presence of such institutions.

27. By letter of 23 March 2007, the Commission sent a reasoned opinion to the Czech Republic in which it complained that that Member State had failed to transpose in full Directive 2003/41, and in particular Articles 8, 9, 13, 15 to 18 and 20(2) and (4).

28. The Czech Republic replied by letter of 24 July 2007, in which it maintained its position and denied the failure to transpose complained of.

III — Forms of order sought and arguments of the parties

29. By application of 18 July 2007, the Commission brought the present infringement action, in which it claims that the Court should:

'(1) declare that, by failing to transpose fully into its domestic legal system [Directive 2003/41], and, in particular, in failing to transpose Article 8, Article 9 in its entirety and Articles 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;

(2) order the Czech Republic to pay the costs.'

30. The Czech Republic contends that the Court should dismiss the action and order the Commission to pay the costs.

31. The Commission claims that the limited nature of Community powers in the field of pensions in no way authorises the Czech Republic not to transpose certain provisions of Directive 2003/41. The fact that an activity referred to in a directive does not exist in a Member State cannot release that State from its obligation to adopt laws or regulations to ensure that all the provisions of that directive are properly transposed. Non-transposition of a directive is only permissible where the transposition proves pointless for geographical reasons. [10]

32. The Commission is of the view that the partial failure to transpose Directive 2003/41 seriously prejudices the effectiveness of that directive. The Czech Republic is thereby hindering the establishment of institutions for occupational retirement provision in its territory. It would to a considerable extent compromise the objective of creating an internal market for occupational retirement provision if every Member State could decide not to comply with the requirement to create the conditions necessary for the activities of institutions for occupational retirement provision in its territory.

33. The Commission states, in that regard, that Directive 2003/41 does not require Member States to alter the organisation of

10 — The Commission cites Case C-214/98 *Commission* v *Greece* [2000] ECR I-9601, paragraph 22, and Case C-441/00 *Commission* v *United Kingdom* [2002] ECR I-4699, paragraphs 15 and 17.

their retirement systems. It merely requires them, in fixing the rules relating to the taking-up and pursuit of activities carried out by institutions for occupational retirement provision, to create the legal framework necessary for those activities.

34. In addition, the Commission states that institutions for occupational retirement provision, which are defined in Article 6(a) of Directive 2003/41, are not to be confused with the second pillar of the pension scheme. The possibility cannot be excluded that some institutions pursuing activities on Czech territory and having their registered office or main administration in that territory satisfy the definition set out in Article 6(a).

35. Moreover, the Commission points out that, according to the information available to it, Czech law does not preclude the creation of institutions for occupational retirement provision.

36. Lastly, the Commission is of the view that in any event, in the light of the case-law, the fact that, currently there is no retirement provision institution which falls within the scope of Directive 2003/41 in the Czech Republic does not release that Member State from the obligation to transpose the directive in full. It is of little account, in that regard, that primary law confers on Member States the right to define the fundamental principles of the retirement system at issue. The obligation on the Member States to transpose a directive does not depend on the legal basis upon which it was adopted or on the field to which it relates, as that obligation arises from Article 10 EC and the third paragraph of Article 249 EC, as well as the terms of the directive.

37. The Czech Republic considers that it is not required to transpose into its domestic law the provisions of Directive 2003/41 which are the subject of this action, since, in doing so, it would be obliged to introduce an occupational pension scheme falling under the second pillar and thus to alter the fundamental principles of its social security system, the organisation of which falls fully within the competence of the Member States.

38. The Czech Republic explains, in that regard, that its pension system has no second pillar. It is solely based, first, on a mandatory legal scheme laid down, for all insured persons, by the Law on pension insurance, falling under the first pillar, and, second, on supplementary pension insurance, falling under the third pillar. Under the current national legislation, an institution for occupational retirement provision cannot establish itself on Czech territory in order to pursue that activity, as it would be in contravention of the legislation governing the occupational activities that may be pursued on the financial market and could thus be the

object of administrative or criminal law proceedings. In addition, there is insufficient political will or economic potential to introduce an occupational pension insurance scheme.

39. According to the Czech Republic, since the first indent of Article 137(4) EC, which constitutes one of the implied legal bases of Directive 2003/41, leaves competence to determine the basic structure of their social security system to the Member States, no transposition of that directive which would affect the effective exercise of the right guaranteed by primary law can be required. As the provisions referred to in the present action impose obligations on Member States in whose territory institutions for occupational retirement provision are located, their transposition would lead inevitably to the creation of a legal framework necessary for the operation of such undertakings in the territory of the Czech Republic and, thus, to the establishment of a second pillar in that Member State, which would seriously affect the overall financial equilibrium of its national retirement system.

40. By way of example, the Czech Republic refers to Article 9(1)(a) of Directive 2003/41, which lays down the obligation to register institutions in 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 occupation retirement provision as a complex system, that is to say, without defining, for example, the rights and the obligations of the contracting parties, would not be possible.

41. 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 system. Nevertheless, those institutions are an essential element of retirement schemes and the creation of a framework for their establishment would necessarily lead to changes to the national retirement system itself.

42. 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 companies established in other Member States, thus allowing undertakings located in its territory to contribute to retirement schemes offered by those companies and, at the same time, allowing those companies to offer appropriate services in the Czech Republic.

43. In answer to the Court's question requesting it to specify how that authorisation to use the services of institutions for occupational retirement provision located in other Member States could be reconciled with the absence of a second pillar, the Czech Republic

replied that such provision of services was not tantamount to the creation of a second pillar, inasmuch as those institutions carried out their activities under the responsibility of their home Member State, and that the Czech Republic did not have to take it into account in its assessment of whether the needs of its nationals were satisfied.

44. Lastly, according to the Czech Republic, as its domestic law does not provide for a second pillar, the situation in dispute in the present case is not analogous to that referred to in the case-law referred to by the Commission concerning the inexistence of an activity in a Member State. Thus, in the present case, the implementation of the Community legislation is not precluded by an obstacle *de facto* arising from circumstances capable of changing at any moment but *de iure*, being linked to the competence of Member States to organise the basic structure of their social security system.

IV — Assessment

45. At the outset, I note that the Commission, in its application, alleges that the Czech Republic failed to transpose in full Directive 2003/41 and, in particular, the articles which it lists.

46. I consider that the present action is only admissible and should be examined in so far as it concerns the provisions of Directive 2003/41 which are referred to expressly in the application. It follows from Article 38(1)(c) of the Rules of Procedure of the Court of Justice and from the case-law [11] that the forms of order sought in the application initiating proceedings must be formulated clearly and precisely so that the Court does not rule *ultra petita* and fail to rule on an objection.

47. The Czech Republic expressly admits that it has not transposed Articles 8, 9, 13, 15 to 18 and 20(2) to (4) of Directive 2003/41. However, the measures imposed by those provisions are expressed in mandatory terms, such as '[e]ach Member State shall ensure that …', [12] '[t]he home Member State shall ensure that …', [13] or '[t]he competent authorities/[t]he host Member State/[t]he home Member State shall require that…'. [14]

48. Moreover, Directive 2003/41 does not provide for any derogation from the obligation to transpose the articles concerned, apart

11 — See, in particular, Case C-412/04 *Commission* v *Italy* [2008] ECR I-619, paragraphs 103 to 105.
12 — Articles 8, 9 and 13.
13 — Articles 15 and 17.
14 — Articles 14, 16 and 18.

from those, very limited and temporary, which are set out in Article 22(3) and (4) thereof. [15]

49. The Commission's complaint against the Czech Republic that it has failed to transpose in full Articles 8, 9, 13, 15 to 18 and 20(2) to(4) of Directive 2003/41 is thus well founded.

50. The question at the centre of the present dispute is whether the Czech Republic could legitimately refrain from carrying out such a transposition. The special feature of the present case rests in the fact that, according to that Member State, the transposition of the relevant provisions of Directive 2003/41, which impose obligations on Member States in their capacity as home Member State, would oblige it to alter its retirement system and affect its competence in that field.

51. According to the Czech Republic, the transposition of the provisions concerned would lead inevitably to the creation of the legal framework necessary for the operation of such institutions in its territory and, thus, to the establishment of a second pillar, which would seriously affect the overall financial equilibrium of its national retirement system.

52. Like the Commission, I am of the view that that reasoning cannot be supported for the following reasons.

53. It is of course common ground that Member States have retained competence to organise freely their national retirement systems. The Community, which, according to Article 5 EC enjoys only conferred powers, has not been invested with the power to legislate in or harmonise that field. Article 137 EC, which defines Community competences in matters of social policy, precludes any power to harmonise in the social security field, of which old age pensions form a part. Moreover, under Article 137(4) EC, the provisions adopted by the Community on the basis of that article must not affect the right of Member States to define the fundamental principles of their social security systems or affect the financial equilibrium thereof.

54. It follows that the Member States may freely determine the role of each of the three pillars in their retirement system and, with regard to the second pillar, the role and functions of institutions for occupational retirement provision, as stated expressly in

15 — According to Article 22(3) of Directive 2003/41, 'Member States may postpone until 23 September 2010 the application of Article 17(1) and (2) to institutions located in their territory which at the date specified in paragraph 1 of this Article do not have the minimum level of regulatory own funds required pursuant to Article 17(1) and (2)'. Under Article 22(4), 'Member States may postpone until 23 September 2010 the application of Article 18(1)(f) to institutions located in their territory'.

recital 9 in the preamble to Directive 2003/41. Those States may thus provide for the extent to and the conditions under which undertakings located in their territory may sponsor an institution for occupational retirement provision in order to guarantee such provision for their employees.

55. In exercising that reserved competence, the States must, of course, respect the commitments which they have given in the context of the EC Treaty, which implies that, if the retirement system of a Member State restricts freedom of movement, that State must be in a position to show that the restriction is justified on legitimate grounds and is proportionate to the objective pursued.

56. In that regard, it is should be borne in mind that the necessity, for a Member State to preserve the financial equilibrium of its retirement system constitutes a legitimate ground for restricting freedom of movement, as is made expressly clear in Article 137(4) EC and the case-law. [16] Moreover, the Court has accepted that the Member States have a wide discretion in the organisation of their retirement systems where that organisation involves complex evaluations of financial data. [17]

57. It thus appears conceivable, in my view, for a Member State, without undermining Community law, to base its retirement system exclusively on the first and third pillars and thus to decide that institutions for occupational retirement provision should not play any role in that system. I note that the Commission is not challenging the compliance of the Czech retirement system with Community law as regards the fact that the Czech Republic decided to base that system exclusively on the first and third pillars.

58. However, that reserved competence of the Member States cannot justify the Czech Republic's position, because the provisions of Directive 2003/41 concerned do not determine the role and functions of institutions for occupational retirement provision under national retirement systems. They are not intended to harmonise the extent to and the conditions under which undertakings located in the territory of the Member States may sponsor such institutions.

59. Those provisions seek to enable institutions located in the territory of a Member State to provide their services in the other Member States. Accordingly, they require all Member States to make institutions for occupational retirement provision located in their territory subject to various strict prudential rules designed to guarantee a high degree of security for the future pensioners who are to benefit from their services.

16 — See, in particular, Case C-303/02 *Haackert* [2004] ECR I-2195, paragraph 30 and the case-law cited.

17 — Case C-67/96 *Albany* [1999] ECR I-5751, paragraph 119.

60. Those rules consist, as we have seen, in the legal separation between institutions for occupational retirement provision and sponsoring undertakings in order that, in the event of the bankruptcy of those undertakings, the assets of the institution are safeguarded (Article 8); in conditions of operation designed to guarantee the reliability of institutions for occupational retirement provision (registration in a national register or authorisation, management by persons of good repute, appropriate rules, technical provisions certified by a specialist, information to members) (Article 9); in a list of information to be provided to the competent authorities (Article 13); and in the presentation and management of sufficient funds to cover their commitments (Articles 15 to 18).

61. Article 20(2) to (4) of Directive 2003/41 lays down, lastly, the procedure that an institution for occupational retirement provision is to follow where it wishes to provide services in another Member State, and the role of the competent authorities of the Member State within the territory of which it is located.

62. I am of the view that such rules are not capable of calling into question the role and functions of institutions for occupational retirement provision in the retirement system of each Member State.

63. I would also cite as evidence the fact that all those rules are expressed in mandatory terms although other provisions of Directive 2003/41, such as Articles 4 and 5 thereof, are expressly optional in nature and that Article 22 of that directive made no provision for derogation from the obligation to transpose the rules, apart from the very limited and temporary exceptions set out in Article 22(3) and (4) thereof.

64. Moreover, we have already seen that the Community legislature took care to mention, in recital 9 in the preamble to Directive 2003/41, that that directive was not to interfere with the reserved competence of the Member States to organise their pension systems and, in particular, to define the place of the second pillar. The wording, in mandatory terms of the articles concerned, in the light of that statement, confirms that the legislature, that is to say, inter alia, the Member States themselves, took the view that transposition of those articles would not call that competence into question.

65. The transposition, by the Czech Republic, of the provisions of Directive 2003/41 concerned should therefore not require it to alter the role and functions of institutions for occupational retirement provision in its retirement system and to create a second pillar, contrary to what the Member State maintains. That transposition might, however, force it to change the rules by

which it has sought to limit that role and those functions.

66. The Czech Republic has contended, in effect, that, pursuant to its legislation, an institution for occupational retirement provision would not be able to establish itself within Czech territory and pursue its activities there on pain of administrative or criminal proceedings. On the other hand, according to that Member State, undertakings located within its territory are entitled to become members of institutions for occupational retirement provision established in other Member States. Accordingly, that Member State sought to limit the role of institutions for occupational retirement provision by prohibiting their establishment within its territory rather than by regulating the right of national undertakings to become members of such institutions.

67. The transposition of the legal framework provided for by Directive 2003/41 should thus lead the Czech Republic to change its legislation, in so far as it prohibits the establishment of such institutions within its territory. However, that adaptation, which is necessary for the implementation of that directive, does not, in my view, affect the reserved competence of the Czech Republic since that competence, as I have indicated, comprises of determining the role and functions of those institutions in its retirement system. Expressed differently, the reserved competence of the Czech Republic to define the role and functions of institutions for occupational retirement provision in its national system must be exercised in accordance with Community law and, in particular, with the requirements of Directive 2003/41.

68. Accordingly, in my view, that Member State must introduce the legal framework for which the provisions of Directive 2003/41 concerned provide, if need be by lifting the prohibition against institutions for occupational retirement provision establishing themselves within its territory, without however having to alter the role and the functions which it wishes to see those institutions perform in its national retirement system or calling into question the fact that that system rests on the first and third pillars. The Czech Republic would thus be able to lay down the extent to which and under what conditions national undertakings could become members of such institutions.

69. In that regard, I would, however, point out that, in its reply to the Court's questions, the Czech Republic claimed that the possibility for undertakings established in its territory of becoming members of the institutions for occupational retirement provision established in other Member States does not affect the financial equilibrium of its pension scheme. I do not understand, from the explanations provided by the Czech Republic, why the situation would be different if such institutions were located within its territory.

70. At this stage of the analysis, the question which remains to be dealt with is only whether

a Member State is required to transpose the provisions in question of Directive 2003/41 even though, as its retirement system is at present organised, institutions for occupational retirement provision would not play any role or play only a very limited role in that system. In other words, the question is whether a Member State is bound to establish such a legal framework, although it is possible that it will remain an empty shell to the extent that, being unable to pursue their activities effectively or in adequate conditions in that State, institutions for occupational retirement provision will not in fact seek to establish themselves there.

71. The answer to that question can, in my view, be deduced easily from the case-law.

72. It is settled case-law that the fact that an activity referred to by a directive does not exist in a Member State does not release that Member State from the obligation to transpose it.

73. Thus, in the judgment in Case 339/87 *Commission* v *Netherlands*, [18] the Court held that the fact that practices incompatible with or prohibited by a directive do not exist in a Member State (the case concerned means of hunting under Council Directive 79/409/EEC) [19] cannot release that Member State from its obligation to ensure the transposition of that directive. Likewise, in accordance with the judgment in *Commission* v *Greece*, above, [20] the fact that no abattoir had been authorised in Greece for the slaughter of solipeds did not free that Member State from mentioning those animals in its legislation for the purposes of the application of the fee charged under Council Directive 93/118/EC. [21]

74. Lastly, in the judgments in *Commission* v *Ireland*, [22] and *Commission* v *United Kingdom*, above, it was held that the fact that there were no high speed trains in Ireland and Northern Ireland did not release Ireland and the United Kingdom of Great Britain and Northern Ireland from the obligation to transpose Council Directive 96/48/EC. [23]

75. The fact that the situation covered by those directives did not exist was held not to be relevant because, according to the Court, it is important not only to anticipate a change to

18 — Case C-339/87 [1990] ECR I-851, paragraphs 22, 25 and 32.

19 — Directive of 2 April 1979 on the conservation of wild birds (OJ 1979 L 103, p. 1).

20 — Paragraph 26.

21 — Directive of 22 December 1993 amending Directive 85/73/EEC on the financing of health inspections and controls of fresh meat and poultrymeat (OJ 1993 L 340, p. 15).

22 — C-372/00, [2001] ECR I-10303.

23 — Directive of 23 July 1996 on the interoperability of the trans-European high-speed rail system (OJ 1996 L 235, p. 6).

that factual state, but above all to guarantee in all circumstances their effective application. [24] In other words, the Court considered that the Member States were obliged to adopt the legal framework permitting them to ensure the effective application of the directive concerned within the period prescribed therein, even if, on the facts, that legal framework did not fall to be applied immediately.

76. It is only in a case where such a factual situation will not evolve for geographical reasons that transposition is not mandatory. [25]

77. It follows that, once the factual situation that renders the directive inoperative may evolve and, accordingly, the directive may effectively be applied, it must be transposed so that its effectiveness and effective application are not delayed when the circumstances which render it inoperative have disappeared.

78. That case-law is, in my view, applicable *a fortiori* to a situation such as that in the present case, in which the fact that a directive is inoperative does not arise from a purely factual situation which does not necessarily depend on the Member State concerned, but from a legal context falling entirely within that Member State's power of decision.

79. First, in the latter situation, that legal context may itself evolve. It is therefore also important that the directive concerned should be capable of producing all its effects immediately if the Member State decides to alter that context.

80. Second, in so far as alteration of the legal context which renders the directive concerned inoperative falls within the competence of that Member State, it is necessary to preclude a situation in which that Member State could be tempted to maintain that context as it stands with the sole aim of avoiding the obligations imposed by that directive.

81. In view of all the foregoing considerations, I am of the view that the Court should declare the Commission's action well founded in so far as it concerns Articles 8, 9, 13, 15 to 18 and 20(2) to (4) of Directive 2003/41 and order the Czech Republic to pay the costs.

24 — *Commission* v *Netherlands* (paragraphs 22 and 25), and *Commission* v *Greece*, paragraphs 23 and 27.

25 — *Commission* v *United Kingdom*, cited above, paragraph 17.

V — Conclusion

82. In the light of the foregoing considerations, I propose that the Court declare the present infringement proceedings admissible and well founded in so far as they refer to 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, and order the Czech Republic to pay the costs.