JUDGMENT OF THE COURT (Third Chamber)

21 December 2011 *

In Case C-271/09,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 16 July 2009,

European Commission, represented by E. Montaguti and K. Herrmann, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Republic of Poland, represented by M. Dowgielewicz, M. Szpunar, M. Jarosz and P. Kucharski, acting as Agents,

defendant,

* Language of the case: Polish.

THE COURT (Third Chamber),

composed of K. Lenaerts, President of the Chamber, R. Silva de Lapuerta, E. Juhász, T. von Danwitz and D. Šváby (Rapporteur), Judges,

Advocate General: N. Jääskinen,
Registrar: K. Malaček, Administrator,

having regard to the written procedure and further to the hearing on 16 December 2010,

after hearing the Opinion of the Advocate General at the sitting on 14 April 2011,

gives the following

Judgment

1 By its action the Commission of the European Communities seeks a declaration by 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 (Ustawa o organizacji i funkcjonowaniu funduszy emerytalnych), as amended (Dz. U. 2004, No 159, heading 1667) ('the Law on pension funds'), which limit foreign investments by Polish

open pension funds ('OPFs'), the Republic of Poland has failed to fulfil its obligations under Article 56 EC.

Legal context

European Union ('EU') legislation

Directive 88/361/EEC

2 The introductory section of Annex I to Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty [article repealed by the Treaty of Amsterdam] (OJ 1988 L 178, p. 5), which is entitled 'Nomenclature of the capital movements referred to in Article 1 of the Directive', states:

'…

The capital movements listed in this Nomenclature are taken to cover:

…

— operations carried out by any natural or legal person [as defined by national legislation], including operations in respect of the assets or liabilities of Member States or of other public administrations and agencies, subject to the provisions of Article 68(3) of the Treaty,

…'

Directive 2003/41/EC

3 Article 18(5) and (6) 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) provides:

'5. In accordance with the provisions of paragraphs 1 to 4, Member States may, for the institutions located in their territories, lay down more detailed rules, including quantitative rules, provided they are prudentially justified, to reflect the total range of pension schemes operated by these institutions.

In particular, Member States may apply investment provisions similar to those of Directive 2002/83/EC.

However, Member States shall not prevent institutions from:

…

(b) investing up to 30 % of the assets covering technical provisions in assets denominated in currencies other than those in which the liabilities are expressed;

…

6. Paragraph 5 shall not preclude the right for Member States to require the application to institutions located in their territory of more stringent investment rules also on an individual basis provided they are prudentially justified, in particular in the light of the liabilities entered into by the institution.'

National legislation

4 Subject to the adjustments linked to the transitional schemes applicable to persons born before 1 January 1949 and to persons born between 1 January 1949 and 31 December 1968, the retirement pension scheme which entered into force in Poland on 1 January 1999 pursuant to the Law of 13 October 1998 on the social security scheme (Ustawa o systemie ubezpieczeń społecznych), as amended (Dz. U. 2007, No 11, heading 74) is based on three pillars:

— The first pillar, a compulsory scheme, is based on the redistribution principle. The pensions are managed and paid by the Zakład Ubezpieczeń Społecznych (Social Security Institution) ('the ZUS'), a public body with the financial resources of the Fundusz Ubezpieczeń Społecznych (Social Insurance Fund).

— The second pillar, also a compulsory scheme, is based on the capitalisation principle. It consists of the OPFs, of which there are currently fourteen.

— The third pillar, an optional scheme, consists of voluntary supplementary savings mechanisms. It is governed by the Law of 20 April 2004 on individual retirement accounts (Ustawa o indywidualnych kontach emerytalnych) (Dz. U. No 116, heading 1205).

5 In accordance with Article 3(1)(2) of the Law of 13 October 1998 on the social security scheme, as amended, the OPFs are defined in accordance with the provisions of the Law on pension funds.

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

7 Article 3 of that Law states that an OPF 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, that is to say, the Powszechne Towarzystwo Emerytalne ('the PTE'). In accordance with Article 27 of that Law, that management company operates exclusively in the form of a joint-stock company and, under Article 29 of that Law, for a fee. A PTE may manage only one single OPF.

8 Contributors are free to choose their OPFs, which are supplied by the ZUS by means of a transfer of a third of the retirement contributions pertaining to those contributors paid under the first pillar of the retirement pension scheme.

9 Pursuant to Article 180 of the Law on pension funds, the Treasury guarantees to cover deficits in OPFs in a situation where, in accordance with Article 175(1) of that Law, over a period of 36 months, the return on the investment is lower than the minimum return required, that is to say, a return that is 50 % lower than the average weighted return on all of the OPFs for the same period, or 4 percentage points of that average, based on the lowest value, if neither the OPF in question nor the guarantee fund, to which the OPFs contribute pursuant to Chapter 19 of that Law, has the resources necessary to do so.

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

11 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).'

12 Article 136a of the Law on pension funds states:

'1. The costs related to the safeguarding of assets and the implementation and execution of transactions for the acquisition or sale 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.'

13 Articles 139 to 156 of the Law on pension funds concern the investment activities of the OPFs.

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

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

'1. …, 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 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 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.

…'

16 Article 143 of the Law on pension funds defines the categories of foreign instruments in which the OPFs may invest their assets. That article 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 [OPF] my 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 [OPF] in instruments falling under the categories referred to in paragraph 1 may not exceed 5 % of the value of the fund assets.

…'

17 This last provision is 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 (Rozporządzenie Ministra Finansów w sprawie ogólnego zezwolenia na lokowanie aktywów funduszy emerytalnych poza granicami kraju), as amended (Dz. U. No 229, heading 2286) ('the Decree of the Minister for Finance'), which provides, inter alia, in its paragraph 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.

Pre-litigation procedure

18 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 of the Law on pension funds, read in conjunction with Article 141, as well as Article 136(3) and Article 136a(2) of that Law, restricted foreign investments by the OPFs and, consequently, amounted to a breach of the fundamental freedom of movement of capital under Article 56 EC.

19 By letter of 20 December 2007, the Republic of Poland responded to the formal complaints raised by the Commission, claiming that Article 56 EC was not applicable to the OPFs.

20 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 the OPFs and maintained the complaint alleging failure to fulfil obligations under Article 56 EC by reason of the restriction imposed on investments by Article 143 of the Law on pension funds, read in conjunction with Article 141 thereof, as well as by Article 136(3) and Article 136a(2) of that Law.

21 On 24 November 2008, in its response to the Commission's reasoned opinion, the Republic of Poland invoked, in addition to the non-applicability of Article 56 EC to the investment activity of the OPFs, 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.

22 In the light of that response received from the Republic of Poland, the Commission decided to bring the present action.

The action

Admissibility

23 In its rejoinder, the Republic of Poland asks the Court to rule of its own motion on the admissibility of the present action.

24 The Republic of Poland points out, first of all, that it disagrees with the Commission as regards the assessment of the factual aspects of the case and of the elements which purportedly constitute an infringement of the principle of the free movement of capital. By failing to establish correctly and fully the principles and the legal regime applicable to the OPFs, as well as their nature, the Commission, it argues, failed to define precisely the subject-matter of the dispute in the course of the pre-litigation procedure and infringed Article 38(1)(c) of the Court's Rules of Procedure. Second, the Republic of Poland claims that the Commission, in its reply, invoked the provisions of Article 1(3) of the Decree of the Polish Minister for Finance, which amounts to relying, at this advanced stage of the proceedings concerning a failure on the part of the Republic of Poland to fulfil its obligations, on a new ground of complaint, which must be declared inadmissible.

25 In that regard, it should be borne in mind that the Court may, of its own motion, examine whether the conditions laid down in Article 226 EC for bringing an action for failure to fulfil obligations are satisfied (Case C-439/99 *Commission* v *Italy* [2002] ECR I-305, paragraph 8; Case C-98/04 *Commission* v *United Kingdom* [2006] ECR I-4003, paragraph 16; and Case C-343/08 *Commission* v *Czech Republic* [2010] ECR I-275, paragraph 25).

26 In this context, it must be held, first of all, that the disagreement between the Commission and the Republic of Poland with regard to the assessment of the factual and legal aspects of the alleged infringement cannot lead to the conclusion that there has been a failure to define the subject-matter of the present action. On the contrary, such a disagreement lasting beyond the time-limit laid down by the Commission in its reasoned opinion constitutes the very justification for bringing an action before the Court under Article 226 EC.

27 Furthermore, it must be stated that, as required by Article 21 of the Statute of the Court of Justice of the European Union and by Article 38(1)(c) of the Court's Rules of Procedure, the Commission, in the form of order sought in the application initiating the proceedings, stated clearly that the complaint directed at the Republic of Poland concerned the non-conformity with Article 56 EC of Articles 143, 136(3) and 136a(2)

of the Law on pension funds, and thus defined in sufficient detail the subject-matter of the action.

28 So far as concerns, second, the reliance on Article 1(3) of the Decree of the Polish Minister for Finance, it is apparent from the file submitted to the Court that that decree is a measure for the application of Article 143 of the Law on pension funds, which is the subject of the present action. Consequently, the fact that the Commission detailed, in its reply, a complaint which it had already set out, in more general terms, in the application did not alter the subject-matter of the alleged infringement, and has thus had no effect on the scope of the proceedings (see, to that effect, Case C-543/08 *Commission* v *Portugal* [2010] ECR I-11241, paragraphs 20, 21 and 23, and the case-law cited).

29 In the light of the foregoing, it must be held that the present action is admissible.

The alleged failure to fulfil obligations

Preliminary observations

30 At the hearing, the Commission, on being asked by the Court to specify the scope of the alleged failure to fulfil obligations, stated that it was limiting that failure exclusively to the restriction of the movement of capital between Member States.

Applicability of Article 56 EC

— Arguments of the parties

31 The Commission submits that Article 56 EC applies to the investment activities of the OPFs in the light of the Court's case-law concerning the nomenclature annexed to Directive 88/361.

32 The Commission also points out that, in the restructuring of their social security systems, Member States must comply with EU law, which means, in the present case, that, as regards the choice in respect of the investment of their assets, the OPFs must be able to benefit from the free movement of capital. In that regard, Article 137(4) EC cannot validly be relied on in so far as it concerns only the new provisions adopted pursuant to that article and by no means precludes the obligation on Member States to comply with the fundamental freedoms guaranteed by the EC Treaty.

33 According to the Commission, the activity at issue cannot be excluded from the scope of Article 56 EC on the ground that the OPFs should be treated as entities governed by public law substituting themselves for the State and, therefore, not engaging in economic activity. In view of their characteristics, the OPFs should, it argues, be considered to be operating according to the principle of capitalisation and on the basis of principles unrelated to the redistribution scheme as it prevails under the first pillar managed by the ZUS. Consequently, the OPFs should be classified as undertakings that engage in economic activity.

34 In addition, the Commission rejects the view that Article 295 EC is such as to exclude the Polish legislation at issue from the scope of Article 56 EC on the ground that

the real owner of the resources derived from the contributions is the State. Those contributions, the Commission argues, originate entirely from the payments made by employees and entitle the latter, if they fulfil the requirements laid down by the legislation, to payment of the accumulated capital.

35 Basing itself on Article 137(4) EC, the non-economic nature of the activity at issue and Article 295 EC, the Republic of Poland maintains that the legislation concerning the OPFs does not come within the scope of application of EU law and that, consequently, Article 56 EC does not apply to the activity here at issue.

36 So far as concerns, first of all, Article 137(4) EC, the Republic of Poland argues that it alone is competent to define the principles governing the operation of the Polish compulsory social security scheme, including the foreign investment policy of the OPFs and the fees relating to those investments, which have the objective of safeguarding the financial equilibrium of its retirement pension scheme.

37 Second, with regard to the non-economic nature of the activity of the OPFs, the Republic of Poland argues that the freedoms set out in the Treaty, in particular in Article 56 EC, do not apply to fields which, like that of social security at issue in the present case, concern, by their very nature, State prerogatives and do not directly have a commercial dimension. The status of the OPFs as entities governed by public law which do not operate on a profit-making basis and their participation in the compulsory retirement pension scheme ought, it contends, to lead to the conclusion that the OPFs fulfil an exclusively social function.

38 Lastly, as regards Article 295 EC, the Republic of Poland maintains that, under that article, Member States may choose freely how to exercise the prerogatives vested in them by virtue of their ownership of public resources in order to comply with the

duties incumbent on them. According to the Republic of Poland, the sums at issue constitute public resources, an assertion which has been confirmed by the Polish courts.

— Findings of the Court

39 Since it is common ground that the investment transactions open to the OPFs constitute 'movements of capital' within the meaning of Article 56 EC, it is necessary to examine the arguments put forward by the Republic of Poland with a view to demonstrating that those transactions do not, however, come within the scope of that provision.

40 With regard, first of all, to the argument that Article 56 EC is not intended to apply to activities involving the investment of OPF assets on the ground that those activities are not economic in nature, it must be borne in mind that the Court has already held that occupational pension funds operating in accordance with the principle of capitalisation engage, notwithstanding their social objective and the compulsory affiliation to the second pillar for the retirement scheme to which they belong, in economic activity (see Case C-67/96 *Albany* [1999] ECR I-5751, paragraphs 81 to 87). In accordance with Articles 2, 3, 27 and 29 of the Law on pension funds, the scheme in question is based on the capitalisation principle and the assets of the OPFs are managed and invested by PTEs, which operate for a fee, in the form of a joint-stock company. The evidence, relied on by the Republic of Poland, concerning the prudential supervision of the OPFs and PTEs by the public authorities and the guarantee made by the State to cover any deficits in the OPFs is not such as to call into question the economic nature of the activities in question.

41 So far as concerns the public or private nature of the resources allocated to the OPFs and managed by the PTEs, even if the public nature of those resources were to be accepted, as maintained by the Republic of Poland, notwithstanding the fact that they originate from the pension contributions collected from the employers of the workers concerned, such a fact would in itself be insufficient, in any event, to exclude from the scope of Article 56 EC transactions concerning those resources, as is apparent from Annex I to Directive 88/361, which provides that the concept of 'capital movements' covers, inter alia, 'operations in respect of the assets or liabilities of Member States or of other public administrations and agencies'.

42 Neither the allegedly non-economic nature of the investment activities of the OPFs nor the allegedly public nature of the funds that supply them can therefore preclude application of Article 56 EC.

43 As regards, second, the argument of the Republic of Poland that application of Article 56 EC is, in the present case, excluded on the basis of Article 137(4) EC, which prohibits infringement of the right of Member States to define the fundamental principles of their social security systems and states that the financial equilibrium thereof must not be significantly affected, it must be noted that those prohibitions thus laid down apply in respect of 'provisions adopted pursuant to [that] article' (see, to that effect, Case C-343/08 *Commission* v *Czech Republic*, paragraphs 66 and 67). However, that is not the case with regard to Article 56 EC.

44 Third, with regard to the claims based on Article 295 EC, which states that '[the] Treaty shall in no way prejudice the rules in Member States governing the system of property ownership', it must be noted 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 (see Case C-171/08 *Commission* v *Portugal* [2010] ECR I-6817, paragraph 64 and the case-law cited). Consequently, if the sums held by the OPFs and invested by the PTEs must be considered to be public

resources, Article 295 EC cannot relieve the Republic of Poland of its duty to comply with the rules relating to the free movement of capital (see, by analogy, Case C-367/98 *Commission* v *Portugal* [2002] ECR I-4731, paragraph 48), any more than it can justify a restriction on those rules (see, to that effect, Case C-171/08 *Commission* v *Portugal*, paragraph 64 and case-law cited).

45 It must therefore be concluded that the provisions of the Law on pension funds which are here in issue come within the scope of Article 56 EC.

The restrictions on the free movement of capital and their justification

— Arguments of the parties

46 The Commission maintains that the provisions at issue in the present action constitute restrictions on movements of capital between Members States within the meaning of Article 56 EC, in so far as they are liable to deter, and do deter, investments of the OPFs from being made outside the Republic of Poland in other Member States, a fact which the Republic of Poland does not dispute and which is evidenced by the low levels of foreign investments made by the OPFs (1.1 %).

47 Without calling into question the need to guarantee the security of the funds accumulated in the retirement accounts of the OPFs, the Commission takes the view that such restrictions cannot be justified either under Article 58(1)(b) EC or by overriding reasons in the public interest constituted by the maintenance of the financial equilibrium of the OPFs and the protection of the interests of their members, on account of their discriminatory character, and that they are, in any event, disproportionate.

48 The Commission also rejects the argument that Article 86(2) EC permits derogation, in the present case, from the principle of the free movement of capital. In that regard, while recognising that that article may constitute justification for a restriction on the free movement of capital, and that the OPFs may be classified as services of general economic interest, the Commission notes, first, that Article 86(2) EC requires that the operation of those services be entrusted to entities which have the status of undertakings, a status that the Republic of Poland excludes with regard to the OPFs. The Commission considers, second, that the OPFs are not required by the State to provide such services. Third, and in any event, the Commission notes that the application of the rules relating to the free movement of capital do not preclude the fulfilment of the tasks delegated to the OPFs and that the restrictions in dispute cannot be regarded as being necessary and proportionate to ensure that those tasks are carried out. The Commission takes the view, fourthly, that those restrictions affect the development of trade in a manner which runs counter to the interests of the European Union by significantly limiting competition and by discouraging and deterring the OPFs from operating more effectively.

49 The Republic of Poland submits that the restrictions at issue are justified, first, pursuant to Article 58(1)(b) EC and, second, by an overriding reason in the public interest relating, essentially, to the need to safeguard the stability and security of the resources transferred to the OPFs. In the third place, the Republic of Poland maintains that the restrictions at issue are justified pursuant to Article 86(2) EC.

— Findings of the Court

50 It is necessary to examine, first of all, whether the national provisions at issue result in a restriction on the free movement of capital between Member States which is, in principle, prohibited by Article 56(1) EC.

51 It is common ground that Article 143 of the Law on pension funds, first, limits foreign investments by the OPFs to 5% of the value of the assets of the OPF concerned, and, second, sets out a list of possible foreign investments which is less extensive than that for possible investments within Poland pursuant to Article 141(1) of that Law. In doing so, Article 143 of the Law on pension funds imposes both quantitative and qualitative restrictions on OPFs with regard to investments made outside national territory, and in particular in other Member States.

52 Such a provision also has a restrictive effect in relation to companies established in other Member States in that it constitutes an obstacle to the raising, by such companies, of capital in Poland since the acquisition of, inter alia, shares in joint investment bodies is restricted (see, by analogy, Case C-242/03 *Weidert and Paulus* [2004] ECR I-7379, paragraph 14).

53 Likewise, it is apparent from Article 136(3) of the Law on pension funds that the value of the investments made by an OPF in shares issued by joint investment bodies domiciled outside Poland and referred to in Article 143(1) of that Law must not be taken into account in determining the value of the net assets managed by the fund concerned, the value of which forms the basis for determining the management costs levied by the PTEs as payment. Consequently, a provision such as Article 136(3) of that Law has the effect of deterring OPFs from investing their assets in shares issued by joint investment bodies domiciled in other Member States, by not allowing them

to deduct management fees in respect of those assets. Furthermore, in conjunction with Article 143 of the Law on pension funds, Article 136(3) thereof reinforces the obstacle to the raising of capital in Poland by those bodies.

54 Lastly, Article 136a(2) of the Law on pension funds states that costs equivalent to the fees due to foreign clearing houses may be covered only to the extent of the corresponding amounts due to national clearing houses. That factor is also liable to deter OPFs from investing their assets in other Member States since, if costs such as those at issue that are incurred outside Poland prove to be greater than those incurred within Poland, they cannot be fully covered, in contrast to the position in respect of similar costs generated by national clearing houses.

55 Next, as regards justification for the restrictions on free movement of the capital in question, the Court has repeatedly held that the free movement of capital may be limited by national legislation only if this is justified by one of the reasons mentioned in Article 58 EC or by overriding reasons in the public interest within the meaning of the Court's case-law (see, to that effect, judgment of 14 February 2008 in Case C-274/06 *Commission* v *Spain*, paragraph 35 and the case-law cited). Moreover, pursuant to Article 86(2) EC, 'undertakings entrusted with the operation of services of general economic interest … shall be subject to the rules contained in this Treaty, … in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them [and on condition that the] development of trade [is] not … affected to such an extent as would be contrary to the interests of the [European Union]'.

56 With regard, first of all, to the argument that the restrictions in question are justified under Article 58(1)(b) EC, which provides that 'Article 56 shall be 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 … the prudential

supervision of financial institutions', suffice it to state that, while the national provisions at issue undoubtedly lay down the substantive content of the prudential rules applicable to the OPFs, they are not, by contrast, in any way whatsoever designed to prevent infringement of the laws and regulations in the field of the prudential supervision of financial institutions. Those provisions cannot, therefore, come within the exception laid down in that article.

57 So far as concerns, second, the alleged justification in terms of overriding reasons in the public interest, it is necessary to point out that the need to guarantee the stability and security of the assets administered by a pension fund, in particular by the adoption of prudential rules, constitutes an imperative reason of public interest which is capable of justifying restrictions on the free movement of capital.

58 Such restrictions must, however, be appropriate to the objective pursued and must not go beyond what is necessary to attain that objective (Case C-451/05 *ELISA* [2007] ECR I-8251, paragraph 82 and the case-law cited).

59 With regard, first of all, to the restrictions resulting from Article 143 of the Law on pension funds, the Commission maintains that the requirements laid down by the national legislation in question are disproportionate in view of the objective pursued, since diversification of investments both geographically and by type of investment guarantees their security. In addition, the Commission notes that the Polish legislation in question allows foreign investments to be made only in EU and OECD Member States or in States with which the Republic of Poland has concluded reciprocal investment promotion and protection agreements, and that the risk linked to short-term foreign-exchange-rate fluctuations does not justify such restrictive measures. Lastly, in the view of the Commission, if the defendant Member State were to adopt strict measures, those measures would have to be identical for both foreign and national investments in financial instruments.

60 The Republic of Poland rejects the argument that geographic diversification of investments still constitutes an essential risk-reducing tool, by reason of the globalisation of financial markets. The Republic of Poland stresses the exchange risks linked to sharp fluctuations in the Polish złoty exchange rate and stresses the need to adopt a particularly prudent approach during the initial period of operation of the new Polish social security system. The Republic of Poland also notes that it is easier, for the Financial Market Authority, to implement quantitative restrictions than to monitor an investment policy based on the 'prudent-investor rule'.

61 In that regard, it is necessary to examine whether the Republic of Poland has been able to show that the quantitative and qualitative restrictions imposed by Article 143 of the Law on pension funds are appropriate for the purpose of guaranteeing the stability and security of the assets administered by a pension fund and that they do not go beyond what is necessary to attain that objective.

62 As regards the exchange risk, it is true that sharp fluctuations in the exchange rate of foreign currencies may have a significant impact on the return on investments made in foreign currency. However, it follows from Article 18(5)(b) of Directive 2003/41 that Member States must not prevent institutions for occupational retirement provision from investing up to 30 % of their assets in assets denominated in foreign currencies and that, pursuant to Article 18(6) thereof, it is only on an individual basis that Member States may require the application to institutions located in their territory of investment rules that are more stringent than those laid down in Article 18(5) of that directive.

63 Even if those provisions do not apply *ratione materiae* to the investments of the OPFs, the fact nonetheless remains that the 30 % rule was laid down by the EU legislature to cover similar situations.

64 In those circumstances, the Republic of Poland ought to have put forward, in order to justify the quantitative limit of 5 %, which is significantly lower than the limit of 30 % considered appropriate by the EU legislature, specific evidence explaining the reasons for imposing the quantitative limit that was adopted.

65 In so far as the Republic of Poland relies, in this respect, on the difficulties of the OPFs in evaluating the risks linked to foreign investments, it must be noted that this factor cannot justify quantitative restrictions on investments in securities issued in Member States. As the Commission has submitted, the laws of the Member States concerning disclosure of information on financial products and protection of investors and consumers have, to a large extent, been the subject of harmonisation at EU level, thereby facilitating the creation of a common market in European capital.

66 Likewise, such quantitative measures cannot be justified on the ground that it is easier for national monitoring authorities to implement them, even in the context of an emerging social security scheme.

67 For the same reasons as those referred to in paragraph 65 of this judgment, qualitative restrictions cannot be justified in respect of investments in securities issued in Member States.

68 So far as concerns, next, the restrictions resulting from Articles 136(3) and 136a(2) of the Law on pension funds, it must be held that the Republic of Poland has not put forward any evidence capable of demonstrating to the requisite legal standard that the objective pursued by those provisions cannot be attained either without such restrictions or by means of less restrictive measures with regard to the freedom of the OPFs to invest in other Member States.

69 Neither the failure to take into account the value of investments made in shares issued by joint investment bodies domiciled outside Poland for the purposes of determining the net assets of the fund concerned, the value of which is the basis for determining the management costs levied by the PTEs, nor the limit placed on the allocation of transaction costs linked to national clearing houses can be justified by the need, pleaded by the Republic of Poland, to protect the OPFs from the risk of bearing additional or excessive costs, since such costs must, in any event, be taken into account by the investor when choosing his investments, irrespective of where they are made.

70 Third, with regard to the arguments based on Article 86(2) EC, it must be borne in mind that, in accordance with settled case-law, it is incumbent upon a Member State which invokes that article to show that all the conditions for application of that provision are fulfilled (Case C-160/08 *Commission* v *Germany* [2010] ECR I-3713, paragraph 126 and the case-law cited).

71 While it is, admittedly, true that the OPFs are liable to be considered to be performing a task of general economic interest (see, by analogy, *Albany*, paragraphs 105 to 111), it must nevertheless be pointed out that the Republic of Poland has failed to demonstrate to the requisite legal standard that the conditions for the application of that article are met. In particular, the Republic of Poland has not demonstrated to what extent the application of the Treaty rules, in this case those relating to the free movement of capital between Member States, would obstruct the attainment, in law or in fact, of the objectives pursued by the OPFs.

72 It follows that the Republic of Poland's arguments based on Article 86(2) EC must be rejected.

73 It must, accordingly, be held that, by maintaining in force Articles 143, 136(3) and 136a(2) of the Law on pension funds, in that they limit investments by Polish OPFs in the other Member States, the Republic of Poland has failed to fulfil its obligations under Article 56 EC.

Costs

74 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has asked for costs to be awarded against the Republic of Poland, and since the latter has been unsuccessful, the Republic of Poland must be ordered to pay the costs.

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

1. **Declares 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), as amended, in that they limit investments by Polish open pension funds in the other Member States, the Republic of Poland has failed to fulfil its obligations under Article 56 EC;**

2. **Orders the Republic of Poland to pay the costs.**

[Signatures]