2007/03/20 - PL. ÚS 4/06: SLOVAK PENSIONS

HEADNOTES

The purpose of § 17 para. 1 Code of Administrative Justice (C.A.J.) is solely to prevent any possible inconsistency in the Supreme Administrative Court's decisional practice, not to serve as some sort of special instrument by which the principle that the Court is bound by Constitutional Court judgments (Art. 89 para. 2 of the Constitution) might be applied in the situation (and only then!) where the panel deciding the matter must (in view of this binding nature) decide on the basis of a proposition of law that differs from that which was until then applied in the jurisprudence of the Supreme Administrative Court.

It is not tenable for the Supreme Administrative Court to presume (considering the reference made to the 9 December 2004 Resolution of the Constitutional Court, No. II. US 21/04) that the decision of the Extended Panel can bring about within the Constitutional Court a decision of its Plenum with consequences similar to those which are foreseen in § 23 of the Act on the Constitutional Court (cf. the 2 April 1998 Judgment, No. III. US 425/97).

As the arbitrary dealing with the composition of a court also falls under the Constitutional Court's protection, namely in the context of the right to one's lawful judge under Art. 38 para.1 of the Charter of Fundamental Rights and Basic Freedoms, the first grounds of constitutional critique which cannot be overlooked has been established at this juncture.

If in the preceding quashing decision in this matter, of 25 January 2005, No. III. US 252/04, the Constitutional Court also criticized the Supreme Administrative Court for ignoring the propositions of law it had declared in its 3 June 2003 judgment, No. II. US 405/02, and thereby „violating . . . the maxim flowing from Art. 89 para. 2 of the Constitution, according to which enforceable decisions of the Constitutional Court are binding on all authorities and persons", then when subsequently deciding, the Supreme Administrative Court was subject to an even more stringent requirement; namely, to project (and respect) this binding force, not as some sort of „general", rather as a „concrete" binding force, founded directly on the adjudicated matter, which is the analogue of the binding force as between court instances deciding in the same matter.

Since the Constitutional Court is itself subject to the analogous requirement, arising from Art. 89 para. 2 of Constitution (Judgment No. III. US 425/97), the issues adjudicated in the preceding cassational judgment in the given matter (sp. zn. III. US 252/04) cannot be reopened in the matter, rather in principle all that can be done is a comparison of the subsequent Supreme Administrative Court decision with the requirements that this judgment is binding.

CZECH REPUBLIC
CONSTITUTIONAL COURT
JUDGMENT

IN THE NAME OF THE CZECH REPUBLIC

The Constitutional Court, composed of judges Stanislav Balík, František Duchoň, Vlasta Formánková, Vojen Güttler, Pavel Holländer, Ivana Janů, Vladimír Kůrka, Dagmar Lastovecká, Jiří Mucha, Jan Musil, Jiří Nykodým, Pavel Rychetský, Miloslav Výborný, Eliška Wagnerová and Michaela Židlická, in the matter of the constitutional complaint of the complainant, A. W., represented by JUDr. P. Z., advocate, against the 26 October 2005 Judgment of the Supreme Administrative Court, No. 3 Ads 2/2003-112, decided as follows:

The 26 October 2005 Judgment of the Supreme Administrative Court, No. 3 Ads 2/2003-112, is hereby quashed.

REASONING

I.

1. The complainant contested the judgment designated in the heading with the argument (in the first series) that Arts. 1 and 89 para. 2 of the Constitution of the Czech Republic (hereinafter „the Constitution“) have been violated, and she asserts that the ordinary court, even though it is bound in this matter by the annulling Constitutional Court Judgment, No. III. US 252/04, has once again decided against her. It rejected the cassational complaint on the merits and itself deduced impermissibly – in conflict with Art. 3 para. 1 of the Charter of Fundamental Rights and Basic Freedoms (hereinafter „the Charter“) – its conclusion on the „non-discriminatory“ nature of Art. 20 of the Treaty between the Czech Republic and the Slovak Republic on Social Security, promulgated as No. 228/1993 Coll. (hereinafter „the Treaty“), alternatively that its application did not result in a violation of the principle of equality in rights. Art. 89 para. 2 of the Constituton was then disregarded in consequence of the fact that the Supreme Administrative Court departed from the legal conclusions formulated in Constitutional Court Judgment No. III. US 275/05.

II.

2. The decisive factual circumstances are not in doubt: the complainant was born on 29 July 1943; she had an apprenticeship at the National Enterprise, Slovenka, the Žilina works, in the period from 1 September 1958 until 26 August 1960, after which, from 1 September 1960 until 28 July 1996, she was employed in the enterprise, Tatrasvit a.s., Svit; up to the day she submitted her application for an old-age pension at the Social Insurance Company (9 August 1996) she was a permanent resident of the Slovak Republic (in Poprad) and was a Slovak citizen. By its 19 August 1996 decision, the Social Insurance Co. of the Slovak Insurance

Company granted the complainant, with effect from 29 July 1996, an old-age pension in the amount of 3229 Sk [Slovak Crowns], as she was credited with 37 completed years of employment, and her claim was assessed exclusively in accordance with domestic (Slovak) enactments, without the Treaty being applied. After she was granted the pension, the complainant relocated to the Czech Republic to be with her husband (who is a citizen of the Czech Republic, just as is their common child), and on 10 June 1998 she was granted Czech citizenship.

III.

3. After the complainant had repeatedly and unsuccessfully requested that she be provided an „equalization adjustment" to the pension she draws from the Slovak Republic, on that the law's hardship be eliminated, or that she be provided an the old-age pension from the Czech insurance system, by her 29 February 2000 submission addressed to the Czech Social Security Administration in Prague (hereinafter „ČSSZ"), she once again requested to be granted an „equalization adjustment", the amount of which she derived from the difference between the pension granted and paid by the Slovak insurance carrier and the pension to which she would be entitled (or would be granted) in the Czech Republic if she satisfied the conditions for a claim to old-age pension according to the laws on pension insurance in effect in the Czech Republic, without taking into account the Treaty. By its „letter" of 10 April 2000, the ČSSZ rejected this claim. The remedial action against this decision was subsequently heard within the framework of judicial review, in accordance with Part Five of the Civil Procedure Code in effect at that time, and the Regional Court in Ostrava, by its 3 April 2001 judgment, No. 38 Ca 97/2000-24, affirmed the ČSSZ „decision". This judgment was in turn affirmed by the High Court in Olomouc, in its 21 November 2001 judgment, No. 2 Cao 140/2001-38, which the complainant then contested by an extraordinary appeal. Since the Supreme Court had not decided on the matter by 31 December 2002, it was taken over – as a cassational complaint – by the Supreme Administrative Court for its decision (§ 132, § 129 para. 4 of Act No.. 150/2002 Coll., the Code of Administrative Justice, hereinafter „C.A.J.")

4. In its 19 February 2004 Judgment, No. 3 Ads 2/2003-60, the Supreme Administrative Court rejected the cassational compliant on the merits. It appears from the reasoning that the court did not concur with the complainant's argument on the violation of the principle (characteristic of international „social" treaties), according to which the fact that the State has concluded with another State an agreement on social insurance, cannot be prejudicial to citizens in pension matters, and therefore their statutory claims pursuant to Czech law cannot be abridged. It considered as decisive the fact that the complainant had earned „her period of security in its entirety in the Slovak Republic" and that her claim to an old-age pension, which the Slovak Republic's pension security carrier also granted her, arose there. In terms of the current legal regime, periods of security earned within the territory of the common State must be deemed as periods earned in the territory either of the Czech Republic or of the Slovak Republic (Art. 11 and Art. 20 of the Treaty); the equalization adjustment, which is claimed by the complainant, cannot be granted, as there is no support, either in the law or in an international

agreement, for providing it.

IV.

5. In its 25 January 2005 Judgment, No. III. US 252/04, the Constitutional Court quashed this judgment. The Constitutional Court upbraided the Supreme Administrative Court for not having sufficiently grappled with the constitutional aspects of the entire matter and with the line of argument contained in the cassational complaint, and above all that in the matter under adjudication it failed to take into account the proposition of law contained in the Constitutional Court's 3 June 2003 Judgment, No. II. US 405/02, as well as the implications thereof for the application of Art. 11 paras. 1, 2 in conjunction with Art. 20 of the Treaty (which will be set out in greater detail below).

V.

6. By its 21 July 2005 ruling, the Supreme Administrative Court's Third Panel, which had received this matter in accordance with that Court's schedule and whose opinion had held that the conditions therefor, in the sense of § 17 para. 1 of the C.A.J., were satisfied, referred it for decision to the Supreme Administrative Court's Extended Panel.

7. In its 26 October 2005 Judgment, No. 3 Ads 2/2003-112, the Extended Panel of the Supreme Administrative Court (once again) rejected the complainant's cassational complaint on the merits as unfounded. It persisted in its assessment of the insurance periods earned up until 31 December 1992, just as it had treated them in its preceding panel decision, and once again declared that „the periods of security (insurance) earned by the insured while the common State was still in existence, can be, after its dissolution, credited towards a claim to a pension either in the Czech system of security (insurance) or in the Slovak system of security, either in accordance with Art. 20 of the Treaty or with the domestic laws; however, apart from those cases stated in Art. 11 para. 3 of the Treaty, they cannot be doubly credited (in both systems)". The complainant earned all of her social security periods through engaging in employment in the Slovak Republic, where her employer's headquarters was located as well, which means that they are exclusively „Slovak" periods and, in contrast thereto, the conditions for gaining credit in the Czech insurance system, which the complainant seeks, have not been satisfied, either in accordance with Art. 20 of the Treaty or § 13 of Act No. 155/1995 Coll. The proposition of law contained in the Judgment of the High Court in Prague, in matter 3 Cao 12/96, and Judgment of the Supreme Court No. 30 Cdo 120/98 evidently do not apply to the matter under adjudication, as the complainant did not earn any periods of insurance under Czech domestic enactments. The Supreme Administrative Court stated that, „considering the binding proposition of law of the Constitutional Court, it placed especial weight on the issue of whether, by its interpretation of the positive legal enactments (particularly in relation to Art. 20 of the Treaty), it has, in the given case, violated the principle of equality in rights" and „the principle of the prohibition of discrimination". It came to the conclusion that „in the field of old-age security

governed by Art. 30 para. 1 of the Charter . . . the personal scope (ratio personae) derives, in principle, from gainful activity on the territory of the State and the legislature cannot establish preferential treatment on the grounds of citizenship, that is, grant a preferential status to citizens of the Czech Republic as against other natural persons who, under analogous circumstances (are engaged in gainful activity on the territory, pay insurance premiums), were also participants in that system. Such a differentiation in treatment would lack logic, would not be founded on reasonable and objective bases and, moreover, would be in conflict with the Czech Republic's obligations arising from international law . . . otherwise preferential treatment is not contained in Czech laws . . . neither is it a component of the incriminated Art. 20 of the Treaty . . . " Therefore, in the Supreme Administrative Court's view, „the criterion of the employer's headquarters, contained in Art. 20 of the Treaty, which determines the respective competencies of the Czech Republic and the Slovak Republic to assess the periods of security (insurance) from the period prior to the dissolution of the ČSFR, is not by its nature discriminatory in the sense of Art. 3 of the Charter, nor does it constitute a violation of the principle of equality in rights under Art. 1 of the Charter. This norm is founded on objective and reasonable grounds, and the means employed are proportional to the objective, moreover, there is no unequivocal criterion by which to define a sub-group which would be disadvantaged by the aforementioned Treaty provisions. Those participants in the pension security system of the former ČSFR who, before 31 December 1992, were employed on the territory of the Slovak Republic and whose employer's headquarters were there as well, cannot be considered as such a sub-group, since the results of the assessment of the periods of security in accordance with the general rules contained in Act No. 155/1995 Coll., on Pension Insurance, and Art. 20 of the Treaty would be the same in their case as well." The same applies for „participants in the former ČSFR's pension security system who were employed on the territory of the Czech Republic in various periods up until 31 December 1992 and whose employer had, on the given date, their headquarters in Slovakia, as even in these cases . . . the outcome of the assessment of the pension claim, and the amount thereof, turned upon a number of factors – the overall proportion of periods of security earned in both successor States, the salary level, excluded periods, etc." As far as concerns the propositions of law pronounced in Constitutional Court Judgment No. II. US 405/02 and its possible implications for the adjudication of the complainant's matter, the Supreme Administrative Court is of the view that „the case there under consideration markedly differs, both factually and legally, from the complainant's case" since, in contrast to the situation adjudicated in that case, here „the issue in dispute is the very coming into being of the claim to a benefit in accordance with Czech laws, while leaving the Treaty out of consideration"; moreover, the complainant does not have „any unassessed periods of security (insurance) which it would be possible to credit in the Czech system of pension insurance, whether it relates to the claim or the amount of the old-age pension" and „that her case is not a matter in which one can speak of a retroactive denial of a claim to a benefit acquired while the federation was in existence". Thus, in the Supreme Administrative Court's view, the complainant is claiming double credit for those periods of security in the pension systems of both successor States of the former federation, which it considers impermissible.

8. The Supreme Administrative Court summarized the reasons why it did not find the complainant's claim persuasive, not even after taking into account the Constitutional Court's instructions contained in its preceding cassational decision: a) the view, according to which the periods earned by participants in the former ČSFR's pension security system up until 31 December 1992 qualify as Czech periods if the participant (the insured) has Czech citizenship, has no basis in Czech positive law, nor can it be deduced either from constitutional law principles or from canons enshrined in the Constitution and Charter; on the contrary, precisely such a divergent assessment of social security (insurance) periods on the basis of citizenship would be a manifest violation of Art. 1 and Art. 3 of the Charter; b) the assertion that all Czechoslovak periods of social security also qualify as Czech periods, without consideration of the actual place where gainful activity was performed or of the employer's headquarters, in its consequences denies the principle of the allocation of public law obligations in the area of pension security between the two successor States to the former ČSFR and makes the Czech Republic the sole and general successor, which is obliged to assume obligations in relation to all participants in the former ČSFR's pension security system, if they earned at least 25 years of security (insurance) and reached the pension age while the ČSFR was still in existence; c) the demand to credit a period, already once assessed in the Slovak system of pension security, in favor of a claim to a pension in the Czech system of pension insurance outside of the framework laid down by Art. 11 para. 3 of the Treaty and without consideration of the actual place where gainful employment occurred or where the employer's headquarters was, is construed as „some sort of right of the insured to the election of the system of pension security in which he will have preferential assessment of the periods of security earned up until 31 December 1992 according to the system which will grant a higher pension". In the Supreme Administrative Court's view, however, such an individual right „is not buttressed by the provisions of any legal enactment, whether of ordinary or constitutional law; moreover, it contains within itself a conspicuously discriminatory component".

VI.

9. In the constitutional complaint, which the complainant submitted against the Supreme Administrative Court's judgment, she makes repeated reference to the unequal status of pensioners permanently resident in the Czech Republic, who have been granted and are paid a pension by the Slovak insurance carrier, on the grounds that, at the decisive time, they worked on Czechoslovak territory (or their employer had its headquarters on Slovak territory), since the determinative criterion for the assessment of earned periods of insurance in the common State until 1 January 1993 (although in a „single federal system of pension insurance") should be the principles found into Arts. 11 and 20 of the Treaty. She states that she did not request to be granted a pension from the Czech pension insurance; her claim is that, when applying the Treaty, the principle, holding that „social treaties should not injure citizens in comparison with the situation that would prevail in the absence of such treaty", should also be respected. If the Treaty suffers from this defect, and if it does not contain an institute which would act as a corrective to that defect, then, when applying it, the administrative organ must proceed so as not to bring about a violation of the prohibition of discrimination and the principle

of equal treatment. This principle did not cease to be valid as a result of the Czech Republic's accession to the European Union, as it is an internationally recognized canon, contained in „documents which take precedence over Regulation No. 1408/71", which the Supreme Administrative Court otherwise itself invokes, without however taking into account, in this connection, its Art. 3 or Art. 7, for example. The complainant referred as well to other Supreme Administrative Court judgments in analogous matters (No. 2 Ads 15/2003 and No. 6 Ads 53/2003), where the mentioned canon was respected, and also to Art. 5 of the European Interim Agreement (No. 112/2000 Collection of International Agreements), according to which "[t]he provisions of this Agreement shall not limit the provisions of any national laws . . . [or] international conventions . . . which are more favourable for the beneficiary." Since the „Regulation" does not resolve the issue of claims „derived from periods of employment in one State, which is subsequently divided" and it is not possible in this case to apply its Art. 94, regulating the possibility of „the recalculation of a pension", the complainant does not think it conceivable that a legal arrangement was adopted which would result in the reduction (or loss) of claims derived from periods of employment in „one's own" State. The complainant thus concludes that „the Regulation cannot apply either to claims arising prior to, or following, the Czech Republic's and Slovak Republic's accession to the EU, as far as concerns the assessment of periods of employment in Czechoslovakia". She then adds that – while respecting Art. 20 of the Treaty – „she is not inventing some sort of right of an insured to an election of the system of pension security" and is reconciled to the fact that she will receive her pension from the Slovak Republic. She is merely asking for the elimination of inequality in the right to pension security, which is also obvious when one compares the level of pensions of „former Czechoslovak citizens" permanently residing in the Czech Republic, certain of which – although they worked (either primarily or solely) on the territory of the Slovak Republic – receive their pension from the Czech system of pension insurance (and that, merely due to the fact that they had, already before 1 January 1993, permanent residence in the Czech Republic or they timely received information on the „impact" of the Treaty and „timely" entered into „a further" employment relation with a Czech employer). The complainant states that, were it not for the Treaty, her „pension claim would be higher", or, it would correspond to the length of the period of employment in Czechoslovakia. In order to safeguard justifiedly expected claims (to be provided benefits from pension insurance), where the domestic law conditions for them to be granted are satisfied, the recognition of an equalization adjustment functions in international law (see, for instance, Art. 32 of the 2001 Treaty between the Czech Republic and Austria) where what it is decisive is the level of claim warranted by domestic laws, and not where the relevant „pension" work was performed.

10. In the complainant's view, the „equalization adjustment" which she is requesting be granted in relation to her „Slovak pension" is a benefit that compensates for the disadvantages of treaties based on the principle of partial pensions, where „disadvantages arise exactly in comparing treaties on the territorial principle"; if the Treaty lacks such a provision on an equalization adjustment, it should be applied in such a way that the intended objective is attained, that is, so as not to cause detriment to citizens in consequence of the treaty scheme.

11. Further, the complainant then took issue with the Supreme Administrative Court's interpretation regarding the conditions for health insurance, and the pension insurance derived therefrom, to come into being, which that Court reached by means of an interpretation of Act No. 54/1956 Coll., on Health Insurance, in conjunction with Constitutional Act No. 4/1993 Coll. She once again stated: „[I]t was not a condition for health insurance to come into being that the activity had been performed on Czechoslovak territory (even periods of activity performed by Czechoslovak citizens abroad qualified as periods of Czechoslovak pension security as well). On the contrary, everybody who worked in employment relations in Czechoslovakia (thus also foreigners) were subject to health insurance"; . . . „(thus) the decisive factor was never where employment activities were performed, nor whether they were insured, rather whether they could be assessed according to Czechoslovak legal enactments". Thus, citizens' faith in law may not be disappointed by the fact that „a court in the future provides that an earned and paid period of health insurance is not a period of pension security in the case of a certain group of inhabitants" (in this case, those who, by the day the common State was split, „did not manage by 31 December 1992 to relocate or change employers").

VII.

12. In its statement of views, submitted in relation to the constitutional complaint, the Supreme Administrative Court rejected the objection that it had failed to respect the binding proposition of law contained in Judgment No. III. US 252/04. While it is true that the Constitutional Court criticized it for failing, in its decision, to take into account the constitutional law aspects of the matter, especially the proposition contained in its 3 June 2002 Judgment, No. II. US 405/02, nonetheless, also in that judgment it stated the conditions under which a court should „observe the proposition there stated", that is, „unless in a later case the deciding court finds sufficiently relevant reasons grounded on rational and persuasive arguments which in their totality more nearly conform to the legal order as a meaningful whole and thus speak for a change in the case-law". At the same time, the Constitutional Court stated that „in no way [did] it anticipate the conclusion as to whether the complainant has satisfied the conditions to have a claim to a pension from the Czech insurance system". The Supreme Administrative Court asserted that it had satisfied this condition, as it had, in the reasoning of its judgment contested in the complaint, dealt with the considerations put forward by the Constitutional Court.

13. On the issue of the complainant's pension claim in connection with the application of Act No. 155/1995 Coll., on Pension Insurance, as subsequently amended, (hereinafter „Act No. 155/1995 Coll.") and Art. 20 of the Treaty, the Supreme Administrative Court stated that the complainant's requested „equalization adjustment" is not regulated – as an independent benefit – by these legal enactments, so that it is not within the competence of any court (cf. Art. 2 para. 3 of the Constitution and Art. 2 para. 2 of the Charter) to order an administrative body to „grant a non-existent benefit", thus, „ to compel it to violate legal enactment in the both substantive and procedural fields". The complainant's request was thus looked upon as a request to be granted an old-age

pension in the Czech insurance system, and it was assessed whether the conditions for such a claim were satisfied in accordance with „Czech enactments“ – in particular the necessary insurance period – with the proviso that „one and the same period of insurance can be evaluated for a claim to a benefit (with the exception of cases according to Art. 11 para. 3 of the Treaty) only in one of the systems of pension insurance for persons of the successor states to the defunct federation“. Although the complainant formally acknowledged this principle, in fact, „for one period she was claiming credit in both systems of insurance“, specifically by demanding that both citizenship (as an „unregulated“ criterion) be taken into consideration, as well as a „fact that is irrelevant for this case – namely, permanent residence“, which, however, bears no connection (nor do any changes thereto) with the (required) assessment of a period of insurance for the claim to an old-age pension to come into being in accordance with the laws currently in effect. In response to the complainant's arguments regarding the observance of the principle, according to which the application of international (social) agreements cannot work to the citizen's detriment as regards claims arising from domestic laws, the Supreme Administrative Court added that „in view of the cirumstances of the case (in view of her lifelong gainful employment in the Slovak Republic and her permanent residence there at the time when she satisfied the age condition) Act No. 100/1988 Coll. was the domestic act for assessing the complainant's claim to the benefit“, in other words, a domestic enactment of the Slovak Republic. When calculating the complainant's old-age pension, and also for claims even to higher benefits, the Slovak insurance carrier took into account all of (her) earned periods of insurance (moreover exclusively in accordance with „Slovak domestic enactments, without reference to the Treaty“). Thus, in the Supreme Administrative Court's view, the complainant could not have suffered detriment in this case, as regards the level of her pension claims, in consequence of the application of the Treaty.

14. The Extended Panel (here of the Supreme Administrative Court) then affirmed the view of the panel which had proceeded in accordance with § 17 para. 1 of the C.A.J., insofar as it held that, following the entry into effect of Constitutional Act No. 395/2001 Coll., which amends Constitutional Act of the Czech National Council No. 1/1993 Coll., the Constitution of the Czech Republic, as subsequently amended, (i.e., as of 1 June 2002), all possibilities to „circumvent“ the Treaty have been excluded and that there is no longer any doubt that all of the complainant's periods of insurance, up until 31 December 1992, qualify as periods obtained in the Slovak pension insurance system.

VIII.

15. The secondary party, the Czech Social Security Administration (also ČSSZ) spots the complainant's „basis error“ regarding the nature and function of the equalization adjustment, in that her view conflicts with the principles of Community law in the social security field, which guarantees merely a minimal level of pension in accordance with the domestic enactments of the State where the pensioner holds permanent residence, if that level is higher than the aggregate of partial pensions (the decisions of the European Court of Justice in case C-22/81, Browning, and in case C-132/96, Stinco and Panfilo). However, to compare the

level of pensions in accordance with the Treaty and the domestic enactments was only possible until 1 June 2002; at the same time, the complainant's pension claims earned on the basis of periods of insurance during the existence of the common State are not being denied her, rather her entire period of insurance has been assessed, and is reflected in the level of her old-age pension. According to the ČSSZ, to permit the comparison of the levels of differing benefits („with the possibility to elect the higher one") results in the discrimination of citizens of the Czech Republic to whom the criterion of Art. 20 of the Treaty does not apply; on the contrary, the application of this rule would entail the consequence that „all citizens of the Slovak Republic – former citizens of the Federation, who automatically satisfy the indicated criterion and have the period of insurance (employment) from the time when the federal State was in existence, could claim from the Czech State . . . that it bring their Slovak pension up to the appropriate level". Act No. 155/1995 Coll. does not include circumstances such as citizenship of the Czech Republic or permanent residence in the Czech Republic among the conditions of a claim to a pension; to require as such would be in conflict with the principle of equality, and it would be necessary to extend such legal protection not only to Czech citizens living abroad, but also even to citizens of other States; moreover, to countenance these conditions would be in conflict with „European legislation".

IX.

16. In its statement of views, which the Constitutional Court requested of it, the Ministry of Work and Social Affairs (MWSA), made a detailed analysis of the historical and legal contexts of the consequences of the division of the previous common State, especially the reasons for the considerations which were given priority in this connection. Following the division of the ČSFR, it was imperative to divide what had up until then been a „unitary" time period (see Art. 20 of the Treaty), so that „there would be either Czech or Slovak time periods", and so that these time periods were not assessed twice, which must be considered as a „sufficiently objective and rational grounds" for the criteria employed. In contrast thereto, the circumstance that the Constitutional Court ties the claim to the complainant's Czech citizenship (Judgment No. III. US 252/04) is, according to the MWSA, in conflict with the Act on Pension Insurance, since it introduces an „entirely inapplicable" element to pension insurance. In relation to the „possible consequences of the Constitutional Court judgment", the MWSA observed that, if the „period from the ČSFR were always to be evaluated as a period of the Czech Republic, then a large number of citizens of the Slovak Republic . . . would also earn a pension from the Czech Republic, if they had by 31 December 1992 earned at least 25 years and reached the pension age . . . ". The Constitutional Court's thesis, that „the carrier of Czech pension insurance will thus bear in mind the amount of pension drawn in conformity with the Treaty from the other party to the Treaty such that it does not result in duplicitous drawing of two pensions of the same type granted for the same reasons from two different insurance carriers", lacks any basis in law, and to invoke citizenship is not compatible with the principles of the EU or with Community law, which the MWSA has analyzed in detail also in other contexts.

X.

17. In the rejoinder to these statements, the complainant continues to adhere to the arguments submitted in her constitutional complaint.

XI.

The Oral Hearing
18. In view of the fact that the parties to the proceeding, as well as the secondary parties, agreed to dispense with an oral hearing and that the Constitutional Court is of the view that no further clarification of the matter could be expected from a hearing, the conditions were met for the Constitutional Court to decide in the given matter without holding an oral hearing (§ 44 para. 2 of the Act on the Constitutional Court).

XII.

19. Since in the given matter, the Supreme Administrative Court decided, not in the composition of a penal, rather of the „Extended Panel“ in the sense of § 17 para. 1 C.A.J., the Constitutional Court Plenum heard the constitutional complaint pursuant to § 11 para. 2 lit. k) of the Act on the Constitutional Court, having regard to the Plenum's resolution of 18 December 2003 (see the Constitutional Court Notice published as No. 14/2004 Coll.). The Constitutional Court could not, however, leave aside consideration of the propriety of the manner of proceeding adopted by the Supreme Administrative Court, since the „differing view“ of the otherwise competent panel was not in any sense relevant for the adjudication of the given matter; as will be substantiated in greater detail below, the way in which it intended „to depart“ from its own existing decisional practice, could not be applied to the legal adjudication of the matter, either upon any procedural or substantive grounds.

20. The purpose of § 17 para. 1 C.A.J. is solely to prevent any possible inconsistency in the Supreme Administrative Court's decisional practice, not to serve as some sort of special instrument by which the principle that that Court is bound by Constitutional Court judgments (Art. 89 para. 2 of the Constitution) might be applied in the situation (and only then!) where the panel deciding the matter must (in view of this binding nature) decide on the basis of a proposition of law that differs from that which was until then applied in the jurisprudence of the Supreme Administrative Court. The opposite view (which is inserted into the penultimate paragraph of the reasoning of the ruling referring the matter to the Extended Panel) would lead to the absurd conclusion that every time following the quashing of one of its judgments, the Supreme Administrative Court would have to decide in its Extended Panel, and merely in order for it to apply the Constitutional Court's binding proposition of law, as without doubt even that Panel could not disencumber itself from the binding nature of that proposition.

21. Similarly, it is not tenable for the Supreme Administrative Court to presume (considering the reference made to the 9 December 2004 Resolution of the Constitutional Court, No. II. US 21/04) that the decision of the Extended Panel can bring about within the Constitutional Court a decision of its Plenum with consequences similar to those which are foreseen in § 23 of the Act on the Constitutional Court. In this regard, it suffices to recall that in its 2 April 1998 judgment, No. III. US 425/97, the Constitutional Court declared that „the requirements arising from § 23 of Act No. 182/1993 Coll. do not relate to a matter in which the Constitutional Court has already once issued a decision."

22. As the arbitrary dealing with the composition of a court also falls under the Constitutional Court's protection, namely in the context of the right to one's lawful judge under Art. 38 para.1 of the Charter of Fundamental Rights and Basic Freedoms, the first grounds of constitutional critique which cannot be overlooked has already been established at this juncture.

XIII.

23. In the preceding quashing decision in this matter, of 25 January 2005, No. III. US 252/04, the Constitutional Court also criticized the Supreme Administrative Court for ignoring the propositions of law it had declared in its 3 June 2003 judgment, No. II. US 405/02, and thereby „violating . . . the maxim flowing from Art. 89 para. 2 of the Constitution, according to which enforceable decisions of the Constitutional Court are binding on all authorities and persons". When subsequently deciding, the Supreme Administrative Court was subject to an even more stringent requirement; namely, to project (and respect) this binding force, not as some sort of „general", rather as a „concrete" binding force, founded directly on the adjudicated matter, or as „the binding force of a judgment which relates to a specific matter (merits) adjudicated (decided) by the Constitutional Court" (cf. once again the Judgment of 2 April 1998, No. III. US 425/97), which is the analogue of the binding force as between court instances deciding in the same matter (see, for example, § 226 para. 1 and § 243d para. 1 of the Code of Civil Procedure, § 264 para. 1 and § 265s para. 1 of the Criminal Procedure Code and, concerning the binding force as between the Constitutional Court and ordinary courts within the context of criminal proceedings, see §314h para. 1 of the Criminal Procedure Code).

24. The Constitutional Court itself is subject to the analogous requirement; in the above-recalled Judgment No. III. US 425/97, it also stated that „enforceable judgments of the Constitutional Court are binding on all authorities and persons (Article 89 para. 2 of Constitutional Act No. 1/1993 Sb.), and thus - which is otherwise understood of its own force - such decisions are binding even on the Constitutional Court itself, in consequence of which, in any further proceedings before it in which the same matter must be decided upon once again (even if in a divergent manner), that decision represents an unavoidable procedural obstacle in the sense of res judicata (§ 35 para. 1 of Act No. 182/1993 Coll., on the Constitutional Court), which naturally bars any further review of that matter on the merits whatsoever."

25. It follows therefrom that the issues adjudicated in the preceding cassational judgment in the given matter (sp. zn. III. US 252/04) cannot be reopened in further proceedings in the matter, rather in principle all that can be done is a comparison of the subsequent Supreme Administrative Court decision with the requirements that this judgment is binding, as were just laid out.

26. Although it is evident that the Supreme Administrative Court proceeded – incorrectly – on the basis of some other conception of the province of its decision-making, the Constitutional Court nonetheless considers it appropriate in the given matter to substantiate in particulars its conclusion that the decision of the Supreme Administrative Court contested in the constitutional complaint failed to respect the principle, under Art. 89 para. 2, that Constitutional Court judgments are binding.

XIV.

27. In its Judgment No. III. US 252/04, the Constitutional Court (from the perspective of applied sub-constitutional law) dealt with the issue of whether the Supreme Administrative Court had intruded upon the complainant's rights, as protected by the constitutional order, due to the fact that it concurred with the application of Art. 11 paras. 1, 2 in conjunction with Art. 20 of the Treaty, as the administrative body had originally decided. The particular provisions alleged to have been infringed being Art. 1 para. 1 and Art. 89 para. 2 of the Constitution, Art. 1 (equality in rights), Art. 3 para. 1 (the prohibition of discrimination), Art. 30 para. 1 (the right to adequate material security in old age), as well as Art. 36 para. 1 (the right to fair process) of the Charter, and the Court came to the conclusion, that it did in fact intrude upon them.

28. The Constitutional Court constructed its cassational judgment, No. III. US 252/04, on the following principles, often calling to mind the legal conclusions already uttered in its 3 June 2003 judgement, No II. US 405/02:
a/ the ratification of international agreements does not affect the more favorable rights, protections, and conditions that are provided for under, and guaranteed by, domestic legislation (Judgment No. Pl. US 31/94);
b/ the former common State had a unitary system of old-age pensions and, according to the law then in effect, it was entirely irrelevant in which part of the Czechoslovak State the citizen was employed, or where the employer had its headquarters. In Constitutional Act of the Czech National Council, No. 4/1993 Coll., on Measures connected with the Dissolution of the Czech and Slovak Federal Republic (Art. 1), the Czech Republic accepted, on the constitutional plane, the principle of the continuity of the legal order, for which reason the period of employment for an employer with its headquarters in the Slovak part of the Czechoslovak state cannot be deemed „employment abroad";
c/ in consequence thereof, a distinction between citizens of the Czech Republic which is based on the fiction, according to which employment in the Slovak Republic of the then common Czechoslovak State (or fan an employer having its headquarters there) is, nonetheless, „employment abroad", must be considered discriminatory, since it does not rest on „objective" and „reasonable" grounds
d/ the bilateral social security convention concluded with the Slovak Republic

intrudes upon legal relations which arose and continued in being during the existence of the previous common State, at a time when Czechoslovak law, which was subsequently received into Czech law, was still in effect, and therefore the Czech Republic's international obligations, the effects of which extend back into the past and into the legal relations of its citizens, which arose and developed within Czechoslovakia and the Czechoslovak legal order, must respect certain constitutional limits;
e/ in the case that a citizen satisfied, while the common Czechoslovak State was still in existence, the condition of a minimal number of years of insurance coverage required by § 31 para. 1 of Act No. 155/1995 Coll., "the application of an international treaty on the basis of § 61 of the same statute cannot lead to the situation where the satisfaction of these conditions is retroactively negated. That would conflict with the principle of legal certainty and of the foreseeability of law, which form the very foundations of the concept of the law-based state." The concept of the law-based state must be construed in close connection with the requirement of respect for the rights and freedoms of man and citizens (Art. 1 para. 1 of the Constitution), and this must be observed even when applying an international agreement;
f/ the focal point of the cited Judgment, No. II. US 405/02, which is declared to be central in the presently adjudicated case (and „applies to it to the full extent“) consists in the proclaimed respect for the constitutional principle of equality (the exclusion of unjustified inequality), „particularly between citizens of the Czech Republic“. In a case in which the interpretive principle, lex specialis derogat legi generali, applies to the relation between an international agreement and domestic law, the principle that specific rules (the international agreement) take precedence over general ones (domestic law) must yield to the constitutional principle, that such rule be interpreted and applied in a constitutionally conforming manner; the constitutional principle at issue is that respecting the fundamental right flowing from the constitutional principle of the equality of citizens and the exclusion of any unjustified legal distinctions between them;
g/ the argument put forward concerning Council Regulation (EEC) No 1408/71 „can only be designated as inapposite and inappropriate“, since pursuant to its Art. 7 para. 2, lit. c), as subsequently amended, "this Regulation does not affect the obligations resulting from the provisions of the social security conventions listed in Annex II“; it follows therefrom, that European law has no relevant application to the adjudication of claims of Czech citizens flowing from social security, where their employers had, prior to 31 December 1992, their headquarters within the Slovak Republic, which was a component of the Czech and Slovak Federal Republic, (the same follows also from Art. 2 of the Regulation, which defines the group of persons whom it covers);
h/ to the extent that a citizen fulfills the statutory conditions for a pension claim to come into being, even without the existence of the Treaty, and that claim would be to a higher pension than the claim pursuant to the Treaty, it is up to the carrier of Czech pension insurance to ensure that a pensioner draws a „pension benefit“ in an amount corresponding to the higher claim pursuant to domestic law or, in the alternative, to decide that the amount of pension drawn from the other party to the Treaty be brought up to the Czech level, taking into account the amount of pension drawn in conformity with the Treaty from the other party to the Treaty such that it does not result in duplicitous drawing of two pensions of the same type granted for the same reasons from two different insurance carriers;

ch/ the existence of the 6 November 2003 Judgment of the Supreme Administrative Court, No. Ads 15/2003-39, was not overlooked, bearing in mind, however, that the Supreme Administrative Court „failed to respect the basic elements“ of the ratio decidendi of the key judgment No. II. US 405/02;
i/ in assessing applications for the conferral of Czech citizenship, it is the duty of the competent state body - the Ministry of the Interior - to ascertain any possible economic grounds motivating that application, and the conferral of citizenship at the request of a citizen of a foreign state is „an expression of unrestrained state sovereignty, and occurs in a sphere of absolute discretion". In relation to Act No. 155/1995 Coll., can be considered „as untenable inequality solely in relation to a distinction between citizens of the Czech Republic in their social security claims not, however, in connection with further classes of natural persons“;
j/ the starting points established in Judgment No. II. US 405/02, and applicable in instant matter as well, contains the proposition that the Treaty on Social Security between the Czech Republic and the Slovak Republic does not form a part of the constitutional order and is not a treaty under Art. 10 of the Constitution, „in the wording prior to the Euro-Amendment“; an application of its provisions cannot be deemed constitutionally conforming, if it would result in a situation which is not in conformity with the Constitution or the Charter, as parts of the constitutional order.

XV.

29. It was in light of these principles that the Constitutional Court assessed the conclusions which the Supreme Administrative Court reached in its subsequent decision, which is contested in the constitutional complaint.

30. Assessed exclusively on the basis of sub-constitutional law, there are no grounds to oppose the Supreme Administrative Court; moreover, the Constitutional Court has already made clear, in its Judgment No. II. US 405/02, that an approach giving priority to an international agreement (in this instance, in accordance with § 61 of Act No. 155/1995 Sb) was prima facie legal. The Supreme Administrative Court’s understanding of the conditions giving rise to a claim to an old-age pension within the Czech system of insurance can be viewed as conformable to law, and, if the constitutional law context is discounted, one could apply it even to the conclusion that, from the perspective of Act No. 155/1995 Coll., citizenship is not a relevant circumstance, as well as to the interpretation of the (different) regime for the regulation of the periods of insurance which, when the common State, the Czech and Slovak Federal Republic, ceased to exist on 31 December 1992, was enshrined in the Treaty, which, in contrast to the principle of „being active“ within the territory of a state (cf. § 13 of Act No. 155/1995 Coll., Art. 1 para. 2 of Act No. 4/1993 Coll., § 2 para. 1, lit. a) of Act No. 54/1956 Coll.), introduced the criterion of the employer’s headquarters (Art. 20 para. 1 of the Treaty) without regard to where (that is, on the territory of which of the treaty parties) the periods of insurance were actually earned. The elucidation of the selection of this „fiction“, or its pragmatic cause, is also comprehensible. With regard to the principle that an international agreement cannot work to the detriment of a citizen’s rights acquired under domestic legislation, the Supreme Administrative Court also acknowledged that the precedence of the Treaty can be affected in cases where

the period of insurance, which under the Treaty is as if „Slovak“, would be a Czech period under Act No. 155/1995 Coll. (since „the work was done“ on the territory of the Czech Republic). In such cases the Supreme Administrative Court also recognized that, although the corresponding claim does not enjoy direct support in Act No. 155/1995 Coll., it is possible for a court to oblige the insurance carrier to compute a level of pension under Czech law and „to bring it up to the level of pension from the second treaty party“.

31. A controversy erupted between the Supreme Administrative Court and the Constitutional Court only at the point where the Supreme Administrative Court persisted in its view that, when applying the Treaty, the just mentioned situation is precisely that boundary line which cannot be overstepped. It adduces (as the „formal culmination of the existing practice“) that proposition of law which it expressed in its 6 November 2003 Judgment, No. 2 Ads 15/2003-39, which provides: „[I]n setting the level of the pension insurance benefit the claim to which arose prior to 1 June 2002, it is necessary to examine whether it would be more advantageous for the insured if the calculation were to be made in accordance with the Treaty between the Czech Republic and the Slovak Republic on Social Security or with the domestic (Czech) law. The given rule applies, however, only under the condition that a claim to a benefit would arise in favor of the insured if solely the periods of insurance earned within the territory of the Czech Republic were taken into account.“ In the Supreme Administrative Court’s view, this is the case due to the fact that, „in view of the simultanous exclusion of the Treaty, and thereby also Art. 11 para. 3 thereof, one cannot take into consideration the periods of insurance earned on the territory of the second treaty State“; apart from cases envisaged by that Article of the Treaty, a period of insurance cannot by „doubly“ credited („in both systems“).

32. As is explained in detail in the preceding (narrational) part, the Supreme Administrative Court then applied what has been stated to the complainant’s circumstances and reached the conclusion that she earned her entire period of insurance „by engaging in employment on the territory of the Slovak Republic, where in addition her employer‘s headquarters was located“ so that that period was a period „earned exclusively within the Slovak system of pension security“, and not in the Czech system. Hence, no grounds are adduced for that period to be credited „within the Czech system“, either in accordance with Art. 20 of the Treaty or with § 13 of Act No. 155/1995 Coll., so that a claim to an old-age pension („in whatever form it would be provided“) did not arise in the complainant‘s favor from Czech pension insurance.

33. The Supreme Administrative Court (just as, in its cassational judgment, „the Constitutional Court obliged“ it to do) supplemented these conclusion, identical with those which it had already pronounced in its preceding (panel) decision of 19 February 2004, No. 3 Ads 2/2003-60, with an assessment of the complainant’s objections „from the constitutional law perspective“. It inferred that the relevant proposition of law, contained in the Judgment of the Supreme Court, No. 30 Cdo 120/98 (that the application of an international agreement cannot work to a citizen’s detriment as regards rights acquired under domestic laws), is not applicable in her matter, as the complainant „did not earn any periods of insurance„ under Czech law, thus, a „Czech“ claim from the pension insurance did

not arise. As has already previously been noted, then in its further reasoning, it went through an elaborate assessment of whether, by its interpretation of positive law, it had violated the principle of equality under Art. 1 of the Charter and the prohibition of discrimination under its Art. 3 para. 1, above all in relation to Art. 20 of the Treaty. Applying the standard interpretive criteria of the given constitutional principles, it came to the conclusion that this Article of theTreaty passes the „test of constitutionality“, even if it employs an approach to the assessment of insurance periods differing from the principles which otherwise predominate in Act No. 155/1995 Coll., or in the area of positive law in question. It is also characteristic of that area that the citizenship of the insured is not decisive, so that, in its view, neither in this regard can a conflict with the given constitutional principles be deduced.

34. In the Supreme Administrative Court's view, neither are the propositions of law contained in the 3 June 2003 Judgment of the Constitutional Court, No. II. US 405/2002, capable of shaking these conclusions, as it found relevant circumstances to „distinguish“ that case from the „complainant's case“. They consist in the fact that, whereas in this instance „the very coming into being of the claim to a benefit under Czech law, through excluding the treaty, [is] controversial“, in that case it was not controversial, and that the complainant in that case was even granted a (partial) old-age pension (prior to reaching the pension age) by the Czech insurance carrier (even if only for the „Czech“ period of insurance that followed the dissolution of the common State). In view of the fact that Slovak law does not allow for an early old-age pension to be granted, thus „in neither of the systems was the entire period of security earned during the existence of the federation assessed“. If the Constitutional Court deduced in this situation that it is necessary to take into account „the entire period“ of insurance, it thereby made clear, in the Supreme Administrative Court's view, that „the division of the State cannot be to the detriment of the insured as regards the level of his pension claims in the sense that his period of security (insurance) earned up until 31 December 1992 will not be assessed in the pension security system of either of the successor States to the former federation“. The Supreme Administrative Court considers that it is in „this context“ that one must understand the (Constitutional Court's) proposition of law, to the effect that the period of employment „in Slovakia“ cannot be considered as employment abroad. The complainant's case is different, however, as she does not have any such unassessed period of security (insurance), since the Slovak insurance carrier granted her an old-age pension for the „federal“ period as well.

35. Finally, the Supreme Administrative Court, or its Extended Panel, affirming the proposition of law advanced by the panel which referred the matter to it, inferred that even the conclusions concerning the possibilities to assess pension claims also apart from the Treaty, as expressed in the 16 November 2003 Judgment, No. 2 Ads 15/2003-39, „ceased to be valid“ as of 1 June 2002, that is, the day of the entry into effect of Constitutional Act No. 395/2001 Coll. (the „Euro-Amendment“), which granted to international agreements (including the Treaty decisive in this case) „a legal force higher than statutes“, at the very latest then as a result of the Czech Republic's accession to the European Union (1 May 2004), and that in view of Council Regulation (EEC) No 1408/71. In the Supreme Administrative Court's view, the application of the Treaty became, at that moment, „the sole permissible

solution“.

XVI.

36. The considerations and conclusions set out by the Supreme Administrative Court cannot be accepted.

37. While it is true that, in its preceding cassational decision, the Constitutional Court made clear that even propositions of law other than those adopted by it can be applied, however, that is the case only if certain preconditions are present, namely that the principles of legal certainty and the protection of justified expectations in rights are not affected thereby (Nos. IV. US 200/96, III. US 470/97, and others). However, the Supreme Administrative Court – as will be explained below – failed to substantiate the satisfaction of these preconditions, in the form of „sufficiently relevant reasons grounded on rational and persuasive arguments“ in the sense of substantiated greater conformity „to the legal order as a meaningful whole“, alternatively it overlooked the bounds of their assertion represented by the binding nature of propositions of law explicated in cassational judgments – in the same matter.

38. Notwithstanding that the Constitutional Court had already previously reproached it for its entire lack of respect for the supporting grounds of Judgment No. II. US 405/02 (including the similar manner in which it treated that Judgment in its 6 November 2003 Judgment, No. 2 Ads 15/2003-39) and indicated that the method of „distinguishing“ which it had used was untenable, the Supreme Administrative Court once again declined to deduce or accept the actual ratio decidendi of that Judgment. The crux of that Judgment did not, as the Supreme Administrative Court thinks, consist in the fact that the complainant in that case was already a participant in the Czech system of health insurance (from periods „worked“ within the territory of the Czech Republic after the dissolution of the common State), nor in the fact that Slovak law does not recognize the institute of „early“ old-age pension, in consequence of which „in neither of the systems was the entire period of security earned during the existence of the federation assessed“, rather, it consisted in the affirmation that periods earned in the common State be credited, as formulated in the conclusion that, in reference to the constitutional principles of equality of citizens of the Czech Republic and of the law-based state (founded on respect for the rights and freedoms of man and citizens), citizens of the Czech Republic who satisfied the condition, under Act No. 155/1995 Coll., of attaining the minimum number of years while the common State was still in existence, then the satisfaction of this condition cannot be denied. It would certainly not be appropriate to presume that that the Constitutional Court disregarded the decisive factual circumstances of that matter, nonetheless it is worth noting that the claimant, a Czech citizen, did not earn the requested periods of employment (until 31 December 1992) within the territory of the Czech Republic, rather of the Slovak Republic (also for an employer having its headquarters there).

39. From this alone it is evident that it is untenable for the Supreme Administrative Court repeatedly to insist (with the reference to Judgment No. 2 Ads 15/2003-39)

on the condition that the complainant can gain a claim to the benefit „taking into consideration only periods of insurance earned on the territory of the Czech Republic“; from the perspective of the arguments explained in Judgment No. II. US 405/02, that condition was in no sense significant. Even less could the Constitutional Court consider it relevant in a matter that has already been adjudicated, in its cassational Judgment No. III. US 252/04, if here, in opposition to the Supreme Administrative Court, it already based its findings on the complainant's specific factual circumstances.

40. The Supreme Administrative Court continues to ignore the proposition expressed by the Constitutional Court, the it is not in conformity with the Constitution to look upon the period during which a citizen of the Czech Republic was employed in the Slovak Republic (during the period the common State existed) as a period of „employment abroad“; if the Supreme Administrative Court regards the periods the complainant worked as not qualifying for recognition in the Czech system of pension insurance, then it considered it precisely in this way.

41. In opposition to the conclusions of a constitutional law nature which the Constitutional Court (deduced in both judgments), the Supreme Administrative Court continues to put forward ones deriving from positive law and deals with them, as if they were decisive, such that the circumstance of the employment engaged in by the complainant in the Slovak Republic and for the Slovak employer leads to the outcome that her periods of employment cannot be credited as periods of insurance in the Czech system of insurance, either pursuant to Art. 20 of the Treaty or pursuant to § 13 of Act No. 155/1995 Coll. The Supreme Administrative Court had already asserted that argument in its preceding judgment (of 19 February 2004, No. 3 Ads 2/2003-60), and if the Constitutional Court annulled that judgment, it should be apparent that it was not determinative of the final result in the proceeding (not to mention the fact that it did not suffice merely to reiterate it, even if in more fully elaborated form). As concerns the „constitutional law“ proposition expressed in Supreme Court Judgment No. 30 Cdo 120/98, if the Supreme Administrative Court states, in relation to it, that it is inapplicable since the complainant has not earned „any“ periods of insurance under Czech laws, it is fitting to observe that the same applied for the complainant in matter No. II. US 405/02 – in relation to periods with which this case is concerned (that is, until 31 December 1992), and in subsequent proceedings of the then competent High Court in Olomouc „the complainant was granted old-age pension in an amount corresponding to credit of all periods of insurance“ (thus, even „Slovak“ periods), without the Supreme Administrative Court protesting against this.

42. The Supreme Administrative Court has repeatedly ignored the actual (state law) ground of the constitutional interpretive principle earlier deduced by the Constitutional Court, which rests on specific facts, consisting in the division of the originally common State (with a unitary system of pension insurance) and the consequences thereof.

43. The Constitutional Court has already explained, in its cassational Judgment No. III. US 252/04, which consequences for the adjudication of the given matter flow from the „Euro-Amendment“ and the Czech Republic's accession to the European Union, rather that no consequences flow therefrom. It is astonishing that the

Supreme Administrative Court has - in the same matter no less – put forward its own (moreover the opposite) interpretive version, in opposition to the legal conclusions of that Judgment. In view of what has been stated in Point XIII, the Constitutional Court has nothing to add thereto, or perhaps only that the applicational priority (and not "higher legal force") of international agreements (here the Treaty) was applied even before 1 June 2002 (by means of the interpretive principle lex specialis derogat legi generali) and, in any case, the Constitutional Court's already declared principle applies – that even international agreements under Art. 10 of the Constitution, as amended on that date, must be interpreted and applied in a constitutionally conforming manner.

44. From a consideration of the summary of principles set out above, upon which the Constitutional Court's preceding cassational decision was based, as well as from a comparison of them with grounds of decision of the Supreme Administrative Court's contested judgment, it is evident that, while the Supreme Administrative Court admittedly obliged the Constitutional Court „subjectively" by the fact that it supplemented its originally expressed conclusions (in its preceding judgment of 19 February 2004, No. 3 Ads 2/2003-60) with some constitutional law arguments (for the insufficiency of which it was also reproved), in actuality it mainly took issue with the propositions of law which should be understood as binding. Stated otherwise, the supporting grounds of its (new) decision were once again based on circumstances situated beyond that constitutional framework which the Constitutional Court had already designated as decisive.

45. The constitutional law result which, just as in matter No. II. US 405/02, the Constitutional Court regarded as crucial, and which the Supreme Administrative Court should have perceived, is the conclusion flowing from the principle of equality of citizens of the Czech Republic, namely that if citizens of the Czech Republic „satisfied the condition, laid down in Act No. 155/1995 Coll., of the minimal number of years of insurance while the common State was still in existance", then the „satisfaction of these conditions cannot be denied", not even by application of the Treaty.
46. Insofar as the Supreme Administrative Court takes issue with it, then that Court does so either impermissibly, because in conflict with its actual binding nature, or incorrectly, because its argument is entirely beside the point.
47. The same evidently applies as well to that part of the reasoning of its decision in which it „dealt with" with the grounds for referring the matter to the Extended Panel; it also thereby demonstrated that actual grounds for this procedural step did not exist in this case (see Point XII, above). Otherwise the Supreme Administrative Court itself stated that it did so only "in order to discharge its obligation to make a complete analysis of the questions at issue," however, that was not the issue in the matter under adjudication.

48. A further circumstance of significance is then the fact that the complainant is a citizen of the Czech Republic, and in its cassational judgment the Constitutional Court made perfectly clear that it is irrelevent when she became one, as is any possible speculation that can be connected to the motives leading her to attain this status.

49. As follows from what has been stated, and should have followed for the Supreme Administrative Court already after cassational Judgment No. III. US 252/04 was handed down, is that the complainant's asserted (special) pension claim must be derived (in the regime of the already inferred „equalization", in relation to the pension drawn from the Slovak insurance carrier) from the level of old-age pension, as calculated in accordance with Czech enactments, corresponding to the taking into account of periods of security (insurance) earned while the common State was in existence (without in any way taking into account subsequent, already „Slovak", periods), and this with the self-evident prerequisite that the other conditions for the claim to old-age pension to come into being have already been satisfied (alternatively, from the moment when they were satisfied, which applies especially for the attainment of the required age).

XVII.

50. If the the Supreme Administrative Court did not reach this conclusion even on the second try, no option remains but to find now that its judgment (contested in the constitutional complaint) suffers from the same constitutional defect as its earlier judgment annulled by the Constitutional Court, that is, (substantively) in the form of a violation of Art. 1 para. 1 of the Constitution and Art. 1 and Art. 3 para. 1, in conjunction with Art. 30 para. 1, of the Charter, as well as for a („procedural") violation of Art. 89 para. 2 of the Constituton and Art. 36 para. 1 of the Charter, and that on the same grounds which were explicated in the 25 January 2005 cassational Judgment No. III. US 252/04, to which it suffices to merely refer.

51. The violation of Art. 89 para. 2 of the Constitution is here emphasized more urgently (and separately) for the reasons that the Supreme Administrative Court has departed from the binding effect established by the Constitutional Court judgment which had already been handed down in the same matter, as was already noted above in Point XIII of the reasoning with reference to Judgment No. III. US 425/97.

52. The Constitutional Court has therefore quashed also the Supreme Administrative Court's 26 October 2005 Judgment, No. Ads 2/2003-112 (§ 82 para. 1, para. 2, lit. a/, and para. 3, lit. a/ of Act No. 182/1993 Coll., as subsequently amended).

Notice: Judgments of the Constitutional Court may not be appealed.

Brno, 20 March 2007

Dissenting opinion
of Justice Stanislav Balík

This separate opinion is directed solely against the reasoning of the judgment; I agree with the judgment itself and voted to quash the contested Supreme Administrative Court judgment.

My version of the reasoning would end with Part XII, para. 22; said otherwise, it would not contain paras. 23-51. I would stress, as the sole grounds for quashing the judgment, the aspect of the arbitrary dealing with the composition of the court in the context of the right to one's statutory judge under Art. 38 para. 1 of Charter of Fundamental Rights and Basic Freedoms.

Is it appropriate to convince that body which will not again be deciding in this matter, that is, the Extended Panel of the Supreme Administrative Court, that, if it had had jurisdiction, it should have adhered to the binding proposition of law pronounced by the Constitutional Court?

In using the eraser on paragraphs 23 – 51, the matter would come again before the Third Panel without, in my view, any inordinate grief over the way in which that body which should not even have considered the matter had improperly proceeded.

Is it not perchance, at this moment, on the agenda of the designated Panel for it to deal with the matter on the plane of constitutionality and legality independently, without the above-mentioned conditional moods?

Stated figuratively, with reference to Rhodes, Panel III of the Supreme Administrative Court should face no obstacle preventing it from being able, without any outside influence, saltare. [translator's note – this Italian/Latin for "to jump"]

Brno, 20 March 2007

Dissenting Opinion
of Justice František Duchoň, Dissenting from the Reasoning of Judgment
Pl. US 4/06

I agree with the judgment in this case. I also agree with that portion of the reasoning which concerns the assessment of the Supreme Administrative Court Extended Panel's decision in terms of its failure to respect Art. 89 para. 2 of the Constitution of the Czech Republic. I consider as superfluous those passages of the reasoning which reopen the merits of the matter. This is a matter about which the Constitutional Court has already once decided and in which it expressed its binding legal views, therefore to return to the merits of the matter appears to me to be in conflict with the principle of the impediment of a decided matter. The heart of the matter is the fact that the Supreme Administrative Court proceeded in conflict with Article 89 para. 2 of the Constitution of the Czech Republic and failed to respect the binding legal conclusions expressed in the judgment of 25 January 2005, No. III US 252/04.
Brno, 20 March 2007

Dissenting Opinion
of Justice Vlasta Formánková, Dissenting from the Reasoning of Judgment
No. Pl. US 4/06

I agree with that portion of the majority opinion of the judgment up through Part XIII.

I do not agree, however, with the content of the subsequent portion of the majority opinion, in which the majority launches into an argument with the reasoning of the annulled decision. In connection with judgment No. III US 425/97, I am of the view that, when deciding anew in the same matter, it is permissible to depart from the Constitutional Court's views only in the case that factual findings have been revised in further proceedings. In the case under review, however, there is nothing indicating such a change, and therefore I do not consider as appropriate the line of argument relating to the substantive side of the problem.

Dissenting Opinion
of Dagmar Lastovecká, Dissenting from the Reasoning of the Judgment

I adopt this separate opinion not in relation to the judgment itself, but only to its reasoning, which in my view should have ended with the penultimate paragraph of Part XIII.

In Part XII, the Constitutional Court found that, in the context of the right to one's lawful judge, for the Supreme Administrative Court to decide the instant matter in its Extended Panel, it had proceeded in a manner in conflict with Art. 38 para. 1 of the Charter of Fundamental Rights and Basic Freedoms. This conclusion alone gives sufficient grounds for quashing the decision contested in the constitutional complaint and leaves no room for review of the contested decision on the merits.
In view thereof, I consider as unnecessary and, in relation to the "lawful judge", which has not yet decided in this matter, premature that part of the reasoning finding that, in relation to the body which decided in the matter (the Extended Panel of the Supreme Administrative Court), the Supreme Administrative Court decision contested in this constitutional complaint failed to respect the principle under Art. 89 para. 2 of the Constitution, that Constitutional Court judgments are binding.

Dissenting Opinion
of Justice Jiří Nykodým, Dissenting from the judgment of the Plenum,
No. Pl. US 4/06

I.

I do not concur in the majority opinion of the Plenum according to which the contested decision of the Supreme Administrative Court was quashed, in part on the grounds of its arbitrary application of § 17 para. 1 of the Code of Administrative Justice, which thereby resulted in an "arbitrary treatment" with the Court's composition (cf. point no. 22 of the Judgment), and in part on the grounds of the failure to respect the principle enshrined in Art. 89 para. 2 of the Constitution, that Constitutional Court judgments are binding.

1. The question is whether and to what extent the Constitutional Court can, in accordance with Act No. 182/1993 Coll., on the Constitutional Court, as subsequently amended, assess in proceedings before it the manner in which the Supreme Administrative Court (hereinafter "SAC"), which, following the Constitutional Court decision (No. III. US 252/04 of 25 January 2005), made use of a procedural step pursuant to the Code of Administrative Justice and the SAC Rules of Procedure and decided the matter in the Court's Extended Panel. The composition of the court, where instead of a three-member panel a seven-member panel would decide, should not be perceived as some sort of detriment to the party's rights, much less as arbitrary dealing with the Court's composition. There is no basis for the conclusion that this was an opportunistic step, the sole reason for which was that, in the eventuality of a constitutional complaint, the matter would be adjudicated by the Constitutional Court's Plenum. Nothing of the kind can be inferred from the ruling of the SAC penal by which the matter was referred to the Extended Panel, as its line of argument, even if its might appear debatable, is plausible, and it cannot be said that it is strictly opportunistic.

2. It is another question whether and how to apply to the matter under adjudication the principle that the SAC is bound by the propositions of law expressed in Judgment No. III US 252/04, in which the complainant's matter was already once resolved. That judgment made reference to Judgment No. Pl. US 31/94, and above all to Judgment No. II US 405/02. The Constitutional Court's Panel III stated that the SAC, if it „failed to reflect" the interpretation expressed in Judgment No. III US 252/04, thereby violated the maxim from Art. 89 para. 2 of the Constitution. Apart from that, however, Panel III also explained under what conditions, in its view, a divergence may occur in the way that independent courts approaches a matter and what are the requirements that must be satisfied by a thought process which leads to a modification of the interpretation and no doubt also the transparency of the reasoning, acceptable rational and objective grounds which "naturally must also be responsive to the legal conclusion in the previous decisional practice regarding the asserted legal issue in question". Then in that judgment in relation to the SAC judgment under review before it, Panel III criticized the SAC that its judgment lacked "any sort of constitutional argumentation, much less one that could at least persuasively compete with the generally applicable thesis explicated in Judgment No. II. US 405/02." In my view, the SAC justifiedly interpreted these passages of Judgment III. US 252/04 such that the Constitutional Court conceded that the SAC may supplement its constitutional

arguments in a manner at least competing with the line of arguments put forward in Judgment No. II. US 405/02. One cannot overlook the fact that Judgment No. III. US 252/04 did not expand the line of argument in Judgment II. US 405/02 in any substantial way, although the former judgment dates from 3 June 2003 and the latter from 15 January 2005. Factually these were very distinct cases (whether it be the circumstance of citizenship, of residence within the Czech Republic, or finally of the moment of the Czech Republic's accession to the EU). In this context, one must take into consideration the fact that the Supreme Administrative Court has been at the summit of the administrative judiciary from 1 January 2003, whereas Judgment II. US 405/02 was directed at a decision of the the Superior Court in Olomouc, which was the only decision quashed by that Judgment, and that the Supreme Administrative Court did not subsequently decide in that dispute. If then the Constitutional Court in the mentioned judgment directed its arguments at the grounds put forward by the Superior Court in Olomouc and one of the decisive grounds of the quashing judgment was the fact that employment in the period the ČSSR or ČSFR [translator's note: these two abbreviations refer respectively to the Czechoslovak Socialist Republic and the Czech and Slovak Federal Republic] were in existence was not "employment abroad", as that superior court stated and upon which it based its reasoning, then it is necessary to pose a further question, namely, whether and to what extent is it correct to assert that a new court should be bound by a judgment quashing the decision of another court, which in relation to the decisive issues put forward arguments that were different from those of the SAC.

3. In its cited judgment, the Constitutional Court itself interpreted the conditions under which it could depart from the propositions of law previously declared by it. If there are grounds for proceeding in this manner, and if a panel finds them to be present, then it must proceed in accordance with § 23 of the Act on the Constitutional Court. If the matter is before the Plenum, however, then such a manner of proceeding naturally does not come into question, and in my view there is nothing to prevent the Plenum from proceeding to such a review. Everything depends (in the words of the cited judges on this point) on whether "in a later case the deciding court finds sufficiently relevant reasons grounded on rational and persuasive arguments which in their totality more nearly conform to the legal order as a meaningful whole and thus speak for a change in the case-law". I am persuaded, for the reasons which I will explain below, that this case presents just such a situation.

4. If, however, the Constitutional Court Plenum by a majority of votes found (cf. point no. 21 of the Judgment) that "it is not tenable for the Supreme Administrative Court to presume that the decision of the Extended Panel can bring about within the Constitutional Court a decision of its Plenum with consequences similar to those which are foreseen in § 23 of the Act on the Constitutional Court", then in my view it is entirely illogical for the Constitutional Court in Part XV of its Judgment to infer any sort of constitutional conclusions, and if it does so, then they are conclusions that they do not have the consequences anticipated in § 23 of the Act on the Constitutional Court, as it stated itself, and they are also views uttered obiter dictum, which the judgment should not even have contained, as this raises doubt as to the nature of these conclusions for further interpretive practice

of the ordinary courts.

5. Until now in its decisional practice, the Constitutional Court has, when adjudicating similar problems (of pensions granted to citizens of the Czech Republic by the Slovak insurance carrier), has proceeded on the basis of the conclusion that, "as follows from the principle of equality of citizens of the Czech Republic, if citizens of the Czech Republic satisfied the conditions, in Act No. 155/1995 Coll., of the minimum number of years of insurance while the common State was still in existence, the satisfaction of these conditions cannot be denied them by application of the Treaty". I cannot concur with this conclusion.

6. The Constitutional Court has already several times now dealt with the complaints of persons requesting that pensions from pension insurance which is provided them, under Slovak law, by the Slovak insurance carrier, to be "brought up to" the level of a pension to which they would "otherwise" be entitled under the law of the Czech Republic. The factual circumstances of the adjudicated matters were not entirely identical. That which all these suits had in common was that they involved complainants who, at the time they submitted their complaints (or their applications in relation to executive bodies), they were citizens of the Czech Republic and they were living in the Czech Republic. The special feature distinguishing the adjudicated matters is that they concern the consequences, in the area of old-age security, of the dissolution of the ČSFR. Whereas even this judgment persists in the view of a constitutionally conforming interpretation of the Treaty between the Czech Republic and the Slovak Republic on Social Security, promulgated as No. 228/1993 Coll. (hereinafter "the Treaty"), and Act No. 155/1995 Coll., on Pension Insurance. However, the judgment fails to deal in any way with a basic question as to the legal nature of that "bringing up" of the Slovak pension to the level of the pension under Czech law. At the same time, this is a fundamental need without which a constitutionally conforming interpretation cannot be made. It is clear that there are only two possibilities, either it is an institute, the existence of which can be inferred from a constitutionally conforming interpretation of the Treaty (which takes precedence over statutes), or the Treaty cannot be applied at all (evidently due to its conflict with the Constitution, which the Constitutional Court is, however, not empowered to adjudicate), and then no alternative remains but, by means of a constitutionally conforming interpretation of Act No. 155/1995 Coll., on Pension Insurance, to deduce a claim to a "Czech" pension as a whole (the law does not provide for any "equalization adjustment"). The weakness of the approach employed in the Judgment, but also in the preceding judgments, consists in the fact that the question whether the Constitutional Court may adjudicate the Treaty's conformity with the Constitution was not sufficiently dealt with. The conclusion, to the effect that a period earned before the end of 1992 anywhere within the territory of the former ČSFR qualifies as a period which , in the case of a citizen of the Czech Republic, the Czech Republic is always obliged to assess, is in direct conflict with Art. 20 of the Treaty, which divided "federal" periods between the two successor states in essence according to the criterion of the employer's headquarters. Thus, this Constitutional Court decision is an unambiguous order for the ordinary courts and the executive to not apply the Treaty. The Constitutional Court may only do so if it finds the provisions to be in conflict with the acts forming part of the constitutional order. Nonetheless, one must face the basic question as to whether,

in the case of this Treaty, the Constitutional Court even has such competence. After all, it is not possible to simultaneously assert that the Treaty forms a constitutionally conforming part of the of the Czech Republic's legal order, and that the criterion selected in it suffers from no constitutional defects (and in its Judgment the Constitutional Court did not in any sense call it into doubt, nor can it any longer call it into doubt), and at the same time assert that it injures somebody. In this one sees the cardinal and fundamental logical conflict in the reasoning of this judgment and of all preceding judgments.
7. Further, the Judgment does not deal in detail with the circumstances of the dissolution of the ČSFR in terms of the succession to obligations of a public law nature. In its Judgment, No. II. US 214/98, (which factually concerned the non-payment of the service income of a secret agent of the former ČSSR who had defected, which was allegedly deposited for him within the country during the period of time ending in his defection) did not call into doubt the Czech Republic's status as a State which is not a successor to the ČSFR and did not assume all "property obligations" of the ČSFR, rather only those which a Czechoslovak constitutional act, a treaty with the Slovak Republic or international law obliged it to assume. This judgment's reasoning was persuasive on the issue of why, in the case of public law obligations, in principle only a treaty can imposes certain obligations to assume, since international law does not oblige the Czech Republic to assume "obligations", nor was it done by Czechoslovak constitutional acts; it was done solely and exclusively by the Treaty, which was included in the final property settlement between the Czech Republic and the Slovak Republic (No. 63/2000 Coll.m.s.).

A Constitutional Court decision which calls into doubt, on constitutional grounds, the extent of the obligations assumed by the Czech Republic on the strength of the Treaty, entails an obligation on the part of the Constitutional Court to review the constitutionality of the Treaty in relation to Art. 4 of Constitutional Act No. 4/1993 Coll., on Measures Connected with the Dissoluion of the ČSFR ("Property and other rights and obligations of the ČSFR pass, upon its dissolution, to the Czech Republic to the extent provided for in constitutional acts of the Federal Assembly or treaties between the Czech Republic and the Slovak Republic"). If, on the one hand, the Constitutional Court in its Judgment No. II. US 214/98 found it to be constitutionally conforming for the Czech Republic not to assume all obligations in the area of individual public-law rights and only to assume obligations in relation to persons who, on the day the State ceased to exist, had permanent residence on the territory of the Czech Republic, and rejected the argument that a violation of a principle of the constitutional order had occurred in the case of "those who were not effectively connected with the territory of a successor state at the moment the ČSFR ceased to exist" (and this concerned already existing rights and claims from service relations of a member of the federal police corps), then, in a situation where such rights existed only "implicitly" (periods of insurance cannot be considered as some sort of acquired rights; the claim to a pension arises only by virtue of satisfying the final temporal condition of the two, hence the period of insurance and the reaching of a certain age), and which is de jure still "worse" the claims arising from services relations with the ČSFR, grounds cannot be found for the Constitutional Court's diametrically distinct approach in relation to a question that is substantively analogous by type. From the perspective of the judgment referred to, No. II. US 214/98, the complainant in the instant matter was not, at

the time the ČSFR ceased to exist, totally much less effectively connected with the territory of the Czech Republic (she was born on the territory of the Slovak Republic and until 1996 lived in Slovakia, where she also worked, and she was a citizen of the Slovak Republic, all of which continued to hold true up until the day the common State ceased to exist). The Constitutional Court judgments heretofore handed down have in no sense to come to terms in detail with the temporal effects, in relation to the system of pension insurance, of acquiring citizenship of the Czech Republic.

II.

8. In my view, the basic premises underlying Judgments Nos. II. US 405/02 and III.US 252/04 cannot withstand scrutiny, namely, those which are summarized in in its Chapter XIV of Judgment No. Pl. US 4/06, and by which the Plenum on formal grounds, that is, in consequence of their binding nature arising from Art. 89 para. 2 of the Constitution and in view of the previous plenary judgments, feels itself to be bound. Accordingly, it would have been appropriate for the Plenum to revise the prevailing case law of the Constitutional Court panels.

9. The usual principle of treaty practice, according to which more advantageous rights guaranteed by domestic legislation cannot be affected by a treaty, cannot be applied in this case; Art. 20 of the Treaty does not qualify as an ordinary coordinating rule for designating the decisive law, by which legal relations arising from labor on the territory of a particular state will be administered, rather it is a special determiner for the competence of the Czech and Slovak republics to assume "obligations" from the past of the common State, moreover for those periods of security earned prior to the dissolution of the common State (in the case of most bilateral treaties concerning social security and in the area of EC law, legal relations in pension insurance is governed by the law of the State where the work was performed).

10. The continuity of the legal order following the dissolution of the Czech and Slovak Federal Republic (ČSFR) does not settle the issue of the claim to pension benefits in old age. In relation to the vast majority of assessed periods, the enactments concerning pension security (insurance) were bound to periods of employment (through participation in health insurance) within the territory of the ČSFR, following 31 December 1992, within the territory of the Czech Republic. Thus, it was not possible to deduce, from the continuity of the legal order, any sort of relevance of employment in Slovakia and the coming into being of the claim to a pension for persons who, prior to the ČSFR's dissolution, worked in Slovakia in accordance with "domestic enactments".

11. The formulations about „employment abroad", so far as it concerned employment in Slovakia during the existence of the common State, certainly do not hold water, but they are not decisive for the matter. They are inappropriate formulations of the Superior Court in Olomouc, whose decision was reviewed in the matter No. II US 405/02. If the Constitutional Court Plenum is of the view (in point 40) that the SAC in no way „protested" in matter No. II US 405/02, then it must be an error as to time and place, as the Superior Court in Olomouc in the case which

the Constitutional Court adjudicated under No. II US 405/02, did not grant a early old-age pension; on the contrary, it affirmed all decisions in which such requests had been rejected on the merits. Its decision was quashed by the Constitutional Court, and the Supreme Administrative Court, coming into being on 1 January 2003, did not and could not have had any procedural status in this matter, much less could it in any way protest or not protest.

12. The Treaty on the Assumption of Obligations of the Czech and Slovak Republics in the area of Pension Security at the Time the ČSFR Ceased to Exist (Art. 20) must respect certain constitutional limits; even I have no doubts in this respect. These were limits laid down in Constitutional Act No. 4/1993 Coll., which became a component of our constitutional order. It was one of the treaties adopted still before the common State ceased to exist. Neither the reasoning of the judgment, nor that of the judgments to which it refers, provided much of a response to the question as to why it chose citizenship of the Czech Republic as the decisive criterion of equality in rights in the area of pension security. In view of the Czech Republic's international obligations, it is not in dispute that the right to security in old age is a human right, not a civil right, and it can be claimed only within the confines of statutes. It is certain that inequality in the level of benefit cannot be understood on the constitutional plan, as nobody has been guaranteed that they will have the same pension as other citizens. It is incontestible that the principle of certainly and the foreseeability of law are characteristic features of the law-based state, however, the interpretation of how to apply them in the case of a state ceasing to exist is lacking in the judgment (as well as the preceding judgments). In general these principles were respected by the continuity of law, however, they cannot be conceived such that if someone somewhere enters into employment and, in accordance with some enactments in effect at that time, this period is assessed as a period of insurance, that this will be the case for good, especially 50 years from now, when such a person will apply for a benefit in old age. The judgment gave no reasons as to why the pension rights of citizens of the Czech Republic cannot be distinguished based on the place where they worked. In terms of the constitutional principles, the existence of Czechoslovakia as a common State and its dissolution do not justify the necessity, that each citizen of the Czech Republic obtained a „Czech pension" for the period earned up until 1992. I cannot but observe that neither the preceding judgment nor this judgment contains the customary test which a certain rule must pass in the case of the objection of inequality (discrimination) – the reasoning remains chiefly on the level of the conclusion that, if citizens of the Czech Republic worked for a certain period and, prior to the dissolution of the ČSFR, earned a certain period of employment (apparently 25 years), then they must have a Czech pension.

13. Judgments Nos. II. US 405/02 and III.US 252/04, which constitute the ideational foundations for this Judgment, denied that EC law in any way applied to the subject matter being adjudicated. One cannot at present agree with this view. The Czech Republic acceded to the European Union on 1 May 2004, and although the Union does not set as its objective to harmonize the pension systems and, thus, entirely respects that the level of benefits varies in the different Member States, it coordinates the national system so that it is possible, among other things, to ensure one of the four fundamental freedoms – the free movement of persons; it does so by means of Council Regulation (EEC) No 1408/71 and

574/72. The purpose of this legislative scheme is to ensure that persons who have been employed in more than one country do not lose their claim to social benefits on the grounds of having a different citizenship or residence, or due to the fact that they do not satisfy the necessary period of insurance laid down in the laws of one or another country. There are four basic coordinating principles: all discrimination on the grounds of citizenship is prohibited (Art. 7); the legal system of only one State applies – the legal system of the State where the employed person works, without regard to the place of residence (Art. 13); the aggregation of all periods of insurance in all Member State (Art. 45 for pensions); and the claim to a benefit can be asserted without regard to the place of residence, as the benefit is to be paid abroad. According to Art. 6 of the cited Regulation No 1408/71, that Regulation replaces the provisions of any social security convention between two Member States, Art. 7 then partially limits the rule in Art. 6 such that, Art. 6 notwithstanding, the provisions of the social security conventions listed in Annex III continue to apply [Art. 7 para. 2, lit. c)]. In connection with the accession of the Czech and Slovak republics into the European Union, the content of Art. 20 of the Treaty was incorporated into Annex III of Regulation No 1408/71 (Treaty of Accession to the EU), and thus became EC law, so that it is a provision which is binding on all Member States. In its hitherto jurisprudence on Art. 7, the European Court of Justice has, as of yet, in no way diverged from its respect for the Member States‘ intentions to maintain in force certain special treaty provisions (as laid down in the very Annex III to Regulation No 1408/71) which originate from the period prior to their accessions to the EU. The decision of the European Court of Justice (hereinafter „ECJ“) C-305/92, Hoorn of 28 April 1994, is inspirational for the adjudication of this case. According to a treaty concluded in 1956 between the Federal Republic of Germany and the Netherlands on the settlement of rights which were earned by Dutch workers in the years 1940-45 under the German program of social insurance, it is in conformity with the laws of the Community, that Dutch workers did not earn a claim under German law (the place where the work is performed) for forced labor performed in Germany during the Second World War, but were included instead in the Dutch program (agreement in a bilateral treaty), as if the work had been performed in the Netherlands, even despite the fact that the claim under German law would have been more favorable. The ECJ reasoned its decision, among other things, in consideration of the fact that there was an undoubted intention of the treaty parties, expressed in Annex III to the Regulation, to regulate the matter in this way, and thus the ECJ did not consider as relevant the objection that the Dutch pension was lower than the German. In this case the ECJ very clearly expressed the position that, for one thing, it will not interfere with the rules which are embodied in Annex III to the Regulation, and which constitute a rule have precedence over the text of the Regulation, (in the case, the complainant had sought the application of the Regulation, thus the rule of the place where the work was performed – Germany, as it was the rule which was more favorable to him in terms of the level of his pension), all the while accepting that these relation were governed by a certain fiction (although the Dutch citizen was forcibly engaged in Germany during the Second World War, the treaty between the two states declared him, fictitiously, as coming under Dutch insurance). For another, it stated that the amount of pensions in these circumstances is not subject to EU jurisdiction at all and that it is up to the Member States to decide the level of benefit which it considers as commensurate with its economic and social conditions. Applied to the matter under adjudication, these conclusions

brings on the conviction that the content of Article 20 of the Treaty, embodied into Annex III of the Regulation and also containing a certain fiction towards the period of insurance prior to the dissolution of the ČSFR (the headquarters of the employer need not necessarily coincide with the place where the work is performed) takes precedence over the rule in the Regulation concerning the law applicable to legal relations concerning insurance, whereas the issue of the level of pension are not decisive for the EU (there is a certain exception as regards the minimal amount of pension). Of course, not even the application of the Regulation to the factual circumstances of the case which is the subject of this Judgment would, in contrast to the situation of Mr. Hoorn from the Netherlands, result in a more favorable outcome, as the place where the complainant performed the work always was solely and exclusively the Slovak Republic and there is nothing in terms of EU law indicating that the law of the Czech Republic should apply. In this case then, it would be necessary rather to review whether the preference given to citizens of the Czech Republic is not rather in direct conflict with the basic principles upon which is constructed the coordination of the systems of social security within the framework of the European Union.

The question which must be posed in connection with the propositions proclaimed so far, that is, that citizenship of the Czech Republic is that decisive element which must "put the finishing touches to" the Treaty or Act No. 155/1995 Coll., on Pension Insurance, is the following: is the condition of citizenship of the Czech Republic an expansive condition for claims in the field of pension insurance or a restrictive one? Thus, is it, in the Constitutional Court's view, solely and exclusively citizens of the Czech Republic who are entitled to pension insurance benefits, are is anybody entitled whom ordinary law designates as an insured and lays down for him conditions for a claim to a benefit, whereas it is still obligatory to grant citizens of the Czech Republic a pension, even despite the fact that they do not satisfy the conditions laid down by this legislation (or Treaty)? And what is the significance of the fact that the insured did not have citizenship of the Czech Republic at the moment the ČSFR ceased to exist? And if they did not even have it during the period of insurance?

14. Thus, as of 1 May 2004, Art. 20 of the Treaty forms a part of EU law and as such is applied by the executive and will be applied even to uncompleted matters which were begun prior to the accession and have not as yet been completed (Art. 118 of Regulation 574/72). In its judgments, Pl. US 50/04 a Pl. US 36/05, the Constitutional Court explained that Community law cannot be a referential criterion for the adjudication of the constitutionality of domestic enactments, nonetheless the Constitutional Court has not failed to take account of how the ECJ interprets principles corresponding to the fundamental rights and basic freedoms. From this perspective, it is unacceptable for this Judgment to insist upon the principle that citizens of the Czech Republic have an extraordinary status, in the absence in particular of perspectives from the broader contexts (flowing from the prohibition under EC law against preferring one's own citizens or the necessity of granting those advantages to which citizens are entitled also to all other citizens of the EU who satisfy the same conditions), without in any way taking into account possible consequences for the rights of persons defraying the expenses of the system of pension insurance in the Czech Republic, particularly due to the too restrictive perspective from which the Constitutional Court has as of yet

viewed the matter. After all, if the Czech Republic grants some sort of "multi-claims" from pension insurance solely to its own citizens, then in consequence of the precedence of Community law, this rule must be applied to all citizens of EU Member States who earned periods of insurance (security) within the territory of the Czech Republic, thus citizens of the Slovak Republic as well. The allocation of obligations following the dissolution of the ČSFR would thereby be de facto repudiated, and it would naturally apply even to citizens of the newly acceding countries, to the extent that their citizens "had" a certain period of security within the territory of the ČSFR. On the margins, since the complaint's factual background in this matter points to such an outcome, perhaps it would even be possible to assess matters such that each citizen of a Member State who immigrates to the Czech Republic (and obtains citizenship), would have a claim to a Czech pension, to the extent that his pension was lower than the Czech. Of course, in view of the prohibition of favoring one's own citizens, they quite possibly would not even need to obtain citizenship. After all, one must realize as a general matter that the mere fact of relocating within the bounds of the EU does not establish any sort of claim in relation to the exported pension, as far as the country of residence is concerned. The Judgment mixes possible temporal effects of EU law and in no ways clarifies whether the previous Constitutional Court judgments denying that EU law has any sort of influence on the subject matter under consideration did so on temporal grounds or from the fallacious conception that Art. 20 of the Treaty does not form a part of EC law.

15. The judgment leaves to one side the question of the level and calculation of the "bringing up to" claim. If it is meant to involve a claim, then these chiefly technical matters should follow from written enactments; however, if that is not the case, then the judge in the role of lawmaker is obliged to compose the legal scheme as a whole. Those unclear points which prevail in this matter must be addressed. In the case that the complainant was employed only in the Slovak Republic, whether prior to or following the dissolution of the ČSFR, and had income solely from employment in that state, then it is not evident what legal certainty or expectation was disappointed in the matter under adjudication. In the period that the common State was in existence (until the end of 1992), nobody could have satisfied the period of insurance in accordance with Act No. 155/1995 Coll., which took effect as of 1 January 1996. It was Act No. 100/1988 Coll., on Social Security, which was valid and in effect at that time, and it regulated the claim differently (for example, a mere 10 year period of security was sufficient in order for a claim to arise). If the judgment will be interpreted in practice such that, after relocating from Slovakia to the Czech Republic, the holder of a Slovak pension will obtain a "supplementary payment" up to the amount of the Czech pension under Act No. 155/1995 Coll., whereas this Slovak pension was granted under Act No. 100/1988 Coll., which remained in effect in Slovakia until 31 December 2003, then this would constitute a distinct inequality in relation to insured persons who were, within the territory of the Czech Republic, granted a pension in accordance with Act No. 100/1988 Coll. After all, these persons' pensions were never recalculated in accordance with Act No. 155/1995 Coll. (according to available statistics, they are approximately 1.5 million persons).

16. In my view, the Treaty from 1992 established equal conditions for all interested persons. It did not favor or disfavor anybody. The de facto inequality, which has

subsequently come about in the area of social security, was the consequence of differing development of the successor states, not the consequence of the criteria which were laid down for the assumption of the obligations of the dissolved federation. The divergences are due to the dissimilar economic progress and the different legislation of the two independent states. There is not basis in the constitutional order for the effort to eliminate, by means of court decisions, the inequality in the level of pension security that has come about in this way; nor is there a basis for it in sub-constitutional law, which does not even contain a mechanism allowing the court decision in this specific matter to be effectuated. The interpretation of the current legal framework, in the effort to comply with judicial decisions issued in the spirit of the Constitutional Court's majority opinion, expressed in the current Judgment, No. Pl. US 4/06, will result in the establishment of actual inequality, namely, inequality before the law between two groups of pensioners who retired in the same period before the last legislative amendments to the pension system, one of them obtained a pension calculated according to the legislative framework in effect until 31 December 1995, and the other according to the framework in effect after that date. This is only one of the possible consequences. A further one, then, consists in the inequality between citizens of the Czech Republic and other persons receiving pension under the law of the Slovak Republic and a number of foreigners (primarily citizens of the Slovak Republic), but citizens of the European Union. As far as concerns the conditions of citizenship of a Member State as a condition of the applicability of Regulation No 1408/71, the ECJ has found, for ex. (Case 2/89 Belhouab), that periods earned prior to the time the Regulation entered into force (that is, before the State's accession to the EU) are taken into consideration if the employed person was a citizen of a Member State during the period of insurance). In this regard, the legal rule contained in Annex III to Regulation No 1408/71 and, until the time of the Czech Republic's accession to the EU, contained in Art. 20 of the Treaty, became utterly crucial for the fate of pension claims of the former ČSFR citizens; it is necessary to see that it was the Czech and Slovak republics, and not the state which ceased to exist in 1992, which acceded to the European Union. If this rule is should be overlookd, then that could also result in the situation where benefits from Czech pension insurance could be provided solely and exclusively for periods which were earned by employment (which is always the decisive period) within the territory of the Czech Republic, whereas other periods, in particular, periods earned within the territory of the Slovak Republic, could not be taken into account merely due to the fact that, although in the period up to 1992 citizenship of the Czech Republic and the Slovak Republic did exist, they were not citizenships which could be considered as citizenships of the states which acceded to the European Union. It is, however, perfectly clear that it is solely and exclusively the European Court of Justice which has jurisdiction to decide on a number of these questions.

17. The consequences of the Constitutional Court's decision must be viewed not only through the prism of the complainant's fate, which in a subjective sense she certainly bears very hard, rather also in relation to the social situation of thousand of other persons, including those who finance the system. A decision, the consequences of which are not entirely thought through, is capable of undermining the social system and seriously burdening the Czech economy. In the final consequences, the Constitutional Court is reopening an already concluded chapter

of the history of the division of ČSFR property.

Brno, 27 March 2007

Dissenting Opinion
of Justice Eliška Wagnerová, Dissenting from the Reasoning of Judgment No. Pl. US 4/06

With certain reservations, which I will state below, I agree with the majority opinion to the extent which is reasoned up through Part XIII.

In no case, however, can I concur with the fact that the majority opinion deals substantively with the objections put forward by the Extended Panel of the Supreme Administrative Court in relation to the preceding Constitutional Court decision in the same matter. By proceeding in this fashion, after all, the Constitutional Court itself diminishes the normative nature of constitutional provisions, and in particular the normative nature of Art. 89 para. 2 of the Constitution. Until now, at least since 1998, it has been the case that the applicational reach of the cited constitutional provision extends at least to decision-making on specific matters. In other words there is no doubt that this provision represents, in the minimal conception, the principle that a court is bound by the proposition of law expressed in a cassational decision of a higher court which, without more, applies in all judicial proceedings without regard to the substantive content resolved in them. Thus, if the judgments reasoning enters into a debate with the reasoning of the contested decision, it calls into doubt even the minimal applicational reach of the constitutional provision at issue, which I consider unacceptable.

I am of the view that this Judgment should have been reasoned in the same manner and with the same scope as Judgment No. III US 425/97 was reasoned. In common with that judgment's reasoning, I am of the view that, once the decision in a specific matter is quashed by the Constitutional Court, the Constitutional Court's proposition of law can be diverged from in further proceedings only in the case that the factual findings are revised, which naturally did not happen in the given case.

To the extent that the Supreme Administrative Court submitted with reference to the Constitutional Court's ruling No. II US 21/04, which diverges from the preceding annulling judgment adopted in this matter, No III US 252/04, this matter to the Supreme Administrative Court's Extended Panel, then there is no doubt that this constituted an abuse of the procedural provisions contained in the Code of Administrative Justice. Sec. 17 para. 1 C.A.J. is meant to resolve, the Supreme Administrative Court, inconsistencies in its case law. However, the aim that the Supreme Administrative Court panel had in submitting the matter to the Extended Panel was to resolve an alleged inconsistency in the Constitutional Court's case law, which, in and of itself, is entirely unacceptable. Moreover, the given case does not in the least concern inconsistency of the Constitutional Court case law, since the above-mentioned Constitutional Court ruling, just as all Constitutional Court rulings, does not come within the ambit of Art. 89 para. 2 of the Constitution, as the Act on the Constitutional Court in no way touches upon their

enforceability (which is dealt with analogously by the application of the Civil Procedure Code); further, this ruling is not published in the manner foreseen in Art. 89 para. 1 of the Constitution, according to para. 2 of that constitutional provision, one of the prerequisites for the binding nature of Constitutional Court decisions. It is a shortcoming of the ordinary courts, including the supreme courts, that they do not adequately make the distinction between actually binding Constitutional Court case law, which is contained solely in its judgment, and rulings, of which the binding nature of their content is exhausted in their inter partes effects.

Brno, 27 March 2007