2012/01/31 - PL. ÚS 5/12: SLOVAK PENSIONS

Pl. ÚS 5/12 of 31 January 2012

Slovak Pensions XVII – application of the Agreement between the CR and the SR on Social Security, obligations in international and EU law

CZECH REPUBLIC
CONSTITUTIONAL COURT
JUDGMENT

IN THE NAME OF THE REPUBLIC

The Plenum of the Constitutional Court, composed of Vlasta Formánková, Vojen Güttler, Pavel Holländer, Ivana Janů, Vladimír Kůrka, Jiří Mucha, Jan Musil, Jiří Nykodým, Pavel Rychetský, Miloslav Výborný, Eliška Wagnerová and Michaela Židlická, ruled on the constitutional complaint of K. H., represented by JUDr. Barbora Frydrychová, attorney, with her office at 110 00 Prague 1, Senovážné nám. 23, against the decision of the Supreme Administrative Court of 31 August 2011, ref. no. 6 Ads 52/2009-88, and the decision of the Regional Court in Hradec Králové, Pardubice branch, of 29 January 2009, ref. no. 52 Cad 35/2008-40, setting his old age pension, with the participation of the Czech Social Security Administration, with its office at 225 08 Prague 5, Křížová 25, as a secondary party to the proceeding, as follows:

The judgment of the Supreme Administrative Court of 31 August 2011, ref. no. 6 Ads 52/2009-88, and the judgment of the Regional Court in Hradec Králové, Pardubice branch, of 29 January 2009, ref. no. 52 Cad 35/2008-40, and the decision of the Czech Social Security Administration of 8 February 2008, ref. no. 450 811 075/428, are annulled.

REASONING

I.
Outline of the case according to the constitutional complaint

In the petition submitted for delivery to the Constitutional Court on 25 November 2011, i.e., by the deadline specified in § 72 par. 3 of Act no. 182/1993 Coll., on the Constitutional Court, as amended by later regulations, the complainant seeks the annulment of the judgment of the Supreme Administrative Court of 31 August 2011, file no. 3 Ads 52/2009, and the judgment of the Regional Court in Hradec Králové, Pardubice branch, of 29 January 2009, ref. no. 52 Cad 35/2008-40, setting his old age pension. He believes that these decisions of the ordinary courts infringe his fundamental right to adequate material security in old age under Art. 30 of the Charter of Fundamental Rights and Freedoms (the "Charter"), his fundamental right arising from the principles of equality and the prohibition of discrimination under Art. 1 and Art. 3 par. 1 of the Charter and his fundamental right to judicial and other legal protection under Art. 36 of the Charter.

II.
Overview of the case in proceedings before the ordinary courts

The complainant, a citizen of the Czech Republic with permanent residence in its territory, was an employee of the Czechoslovak National Railways (the "CNR") from 20 July 1964; his employment

relationship was agreed in an employment agreement with the CNR – Northwest Rail Administration in Prague , which was a branch of the CNR. On the basis of that agreement he worked as an engineer in the locomotive depot in Nymburk. From 4 November 1969 he was transferred to CNR – Eastern Rail Administration, which was renamed CNR – Bratislava region, as of 1989, and which was also a branch of the CNR. He worked in the Bratislava locomotive depot from that date, also as an engineer, until 31 May 1993, when his employment relationship was dissolved by agreement. On 1 June 1993, on the basis of an employment agreement, he became an employee of the Czech Railways, again as an engineer.

In its decision of 8 February 2008, ref. no. 450 811 075/428, the Czech Social Security Administration, pursuant to § 29 let. a) of Act no. 155/1995 Coll., on Pension Insurance, and Art. 46 par. 2 of Regulation (EEC) No. 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community (the "Regulation") granted the complainant, as of 11 July 2007, an old age pension of CZK 3,409 per month, with the provision that, under government decree no. 256/2007 Coll., as of January 2008 he was entitled to an old age pension of CZK 3,537 per month. In the reasoning of the decision, it stated that an insurance period of 5,062 days completed in the Czech pension insurance system, and an insurance period of 11,961 days completed in the Slovak pension insurance system were included when setting the amount of the pension. According to the secondary party in the proceeding before the Constitutional Court, the complainant's entitlement to an old age pension arose only taking into account the period of insurance acquired in the Slovak pension insurance system, and under Art. 46 par. 2 of the Regulation the basic and percent components of a pension are set at an amount corresponding to the proportion of the length of insurance periods completed under Czech legal regulations to the total period of insurance in all member states.

The Regional Court in Hradec Králové, Pardubice branch, in its decision of 29 January 2009. ref. no. 52 Cad 35/2008-40, denied the complainant's complaint regarding the cited decision by the secondary party. It reasoned primarily on the basis that the fact that, during the relevant period of the applicable legal framework, the company branches acted in the name of the company and lacked legal capacity, does not, as a consequence, mean that their registered office cannot be considered the registered office of an employer under Art. 20 par. 1 of the Agreement between the Czech Republic and the Slovak Republic on Social Security, published as no. 228/1993 Coll. (the "Agreement"), and Art. 15 of the Administrative Agreement on implementing the Agreement, published as no. 117/2002 Coll. of International Treaties (the "Administrative Agreement"). Under the cited provision of the Administrative Agreement, the registered office of the employer means the address that is registered in the Commercial Register, and if the employer has registered a separate workplace or other branch in the Commercial Register, the registered office means the address of that separate workplace or branch. Regarding the Constitutional Court's case law (in particular, judgments file no. II. ÚS 405/02, Pl. ÚS 4/06), to which the complainant referred in the administrative complaint, the court stated that it applies to legally and factually different cases, where a pension was granted before the Czech Republic joined the European Union, so its subject matter was not to review the relationship of national regulations to secondary European law. However, according to the Regional Court, in the present matter, the complainant was granted a pension only after the Czech Republic joined the European Union, wherefore it is necessary, when evaluating the grant, to begin with Annex III to the Regulation, which, according to the Court, contains Art. 20 of the Agreement. This provision is part of the directly applicable norms of European Union law, and therefore, according to the Regional Court in Hradec Králové, this procedure cannot be seen to violate the Constitution or the Charter; on the contrary, in its opinion, a different procedure would be inconsistent with Art. 2 par. 2 of the Charter.

The Supreme Administrative Court denied the complainant's cassation complaint concerning the judgment of the Regional Court, by decision of 31 August 2011, file no. 6 Ads 52/2009. In the reasoning, it first recapitulated the relevant case law of the Constitutional Court concerning analogous cases (in particular, judgments file no. III. ÚS 252/04, Pl. ÚS 4/06, IV. ÚS 301/05, I. ÚS 1375/07. It also pointed to the decision of 23 September 2009, ref. no. 3 Ads 130/2008-107, where, in a factually

analogous case, it referred questions concerning its subordination under the framework of European law to the Court of Justice of the European Union (the "ECJ") for a preliminary ruling.

In the case which it referred to the ECJ for a preliminary ruling, the Supreme Administrative Court then ruled, by judgment of 25 August 2011, ref. no. 3 Ads 130/2008-204, in which it concluded that, in order to review entitlements for benefit payments arising after 30 April 2004, taking into account Constitutional Court judgment file no. II. ÚS 1009/08, and in consequence of the ECJ decision of 22 June 2011, C-399/09, there is no national legislation that could be considered binding and on the basis of which the insurer would have an obligation to include periods of employment completed by persons in the pension insurance system of the former CSFR until 31 December 1992 in pension calculations in the Czech pension insurance system in a greater scope than is determined by Art. 20 of the Agreement, on the basis of the pension applicant's citizenship and permanent residence. In other words, the Supreme Administrative Court, in that decision, concluded that at the given moment the national rule constituted by the Constitutional Court will not be applied, a rule which permits, when reviewing the entitlement to an old age benefit and setting the amount thereof above the framework of Art. 20 par. 1 of the Agreement, fully including a period of employment in the pension insurance system of the former CSFR until 31 December 1992, on the basis of Czech citizenship and permanent residence in the Czech Republic. This decision also referred to Constitutional Court judgments file no. Pl. ÚS 50/04 and Pl. ÚS 19/08, in which the Constitutional Court agreed with the doctrine supported by the German Constitutional Court (Solange), and on the basis thereof concluded that it can intervene in a matter that was addressed as part of the exercise of powers transferred to the European Union. In the Constitutional Court's opinion, delegation of the powers of national bodies cannot continue in a case where they exercise them beyond the scope of the powers of the European Union. In these cases, community acts would be inapplicable in the Czech Republic, and the Czech national bodies would again take over the relevant powers. Therefore, in the opinion of the Supreme Administrative Court, the Constitutional Court's authority, in a proceeding on a constitutional complaint, to review again a disputed legal issue, which was the subject matter of a ruling on preliminary issues, and to insist on applying its rule, is not affected in any way. That, according to the Supreme Administrative Court, is its undoubted authority, not questioned by anyone at the national level, arising from its role as the guardian of the constitutionality and the sovereignty of the Czech Republic. Such a judgment would be directly binding as a precedent both for the Czech pension insurer, and for all ordinary courts.

In the present case of complainant K. H., the Supreme Administrative Court concludes from the foregoing that a conclusion that the ECJ judgment of 22 June 2011, C-399/09, according to the cited judgments file no. Pl. ÚS 50/04 and file no. Pl. ÚS 19/08, is inapplicable, can be made only by the Constitutional Court. Therefore, as in the case file no. 3 Ads 130/2008, in the present case the Supreme Administrative Court must take this EU act as a starting point; even an expanded panel could not deviate from it, if the legal issue in dispute were passed on to it for a decision under § 17 of the Administrative Procedure Code. In the given situation, when evaluating the entitlement to an old age benefit and setting the amount thereof above the framework of Art. 20 par. 1 of the Agreement it was possible to fully include the period of employment completed until the dissolution of the Czechoslovak federation only if the rule were applied not only to Czech citizens with permanent residence in the Czech Republic, but also to Czech citizens with permanent residence outside the Czech Republic, and especially to citizens of other member states of the European Union. This rule too would correspond to the conclusions stated in the Court of Justice of the European Union decision of 22 June 2011, C-399/09. However, such a procedure would go even further beyond the framework of Art. 20 par. 1 of the Agreement than the national rule constituted by the Constitutional Court, and therefore, in the adjudicated matter, the Supreme Administrative Court did not find any arguments for applying it. On the contrary, in the given situation it agreed with the conclusion of the judgment of 25 August 2011, ref. no. 3 Ads 130/2008-204, under which the rule created by the Constitutional Court is not applied at the given moment. According to the Supreme Administrative Court, for the foregoing reasons, when reviewing the complainant's entitlement to an old age pension and the amount thereof from the Czech social security system, periods of employment until 31 December 1992 could not be considered Czech periods of employment solely on the basis of the complainant's Czech citizenship and his permanent residence in the Czech Republic.

III.
Overview of objections and the proposed verdict of the constitutional complaint

The complainant first objects that in the decisions contested by the constitutional complaint the Supreme Administrative Court, as well as the Regional Court in Hradec Králové, reached the incorrect conclusion, based on Art. 15 par. 1 of the Administrative Agreement, that his employer in the period in question had its registered office in the Slovak Republic. In his opinion, the cited provision was no longer valid, under Annex III to the Regulation; he considers the interpretation that it is applicable, with the exception of expressly designated articles, to be inconsistent with the text of the Regulation and with its intentions. In this regard he refers to judgment file no. III. ÚS 939/10 of 3 August 2010 (N 153/58 SbNU 295), in which the Constitutional Court considered in detail the interpretation of Art. 15 of the Administrative Agreement in relation to Art. 20 of the Agreement and to § 61 of Act no. 155/1995 Coll., and concluded, in agreement with the opinion of the public Defender of Rights, that the organizational unit Czechoslovak National Railways, Transportation Revenue Administration, with its registered office in Bratislava, lacked legal capacity, and thus was also not an entity authorized to enter into employment agreements. In this regard he argues with the opinion of the Supreme Administrative Court, that it is not possible to conclude, solely on the basis of Art. 20 of the Agreement, that the registered office of the complainant's employer was not located, as of the day when the federation was dissolved at "the address of the CNR central office in Prague," because he did not perform his work at the CNR central office in Prague, nor did he ever claim to do so – as a locomotive engineer he performed his work ordinarily and regularly in the Czech Republic, where he conducted trains, in particular on the routes Komárno – Bratislava – Brno – Praha – Ústí nad Labem and back, or the route Košice – Praha and back. He is of the opinion that the argument based on his de facto performing his work activity in the entire territory of the then Czechoslovakia permits breaking through the rule that arises from Art. 20 par. 1 of the Agreement and Art. 15 par. 1 of the Administrative Agreement.

The complainant also refers to the Constitutional Court's settled case law (in particular, judgments file no. IV. ÚS 228/06, II. ÚS 405/02, III. ÚS 252/04 and Pl. ÚS 4/06) in analogous cases. In connection with the different review of the entitlements of citizens of the Czech Republic to social security benefits, in view of recognition of insurance periods based on employment relationships until 31 December 1992 with an employer that had its registered office in what is now the Slovak Republic, exercised before and after the Czech Republic's entry into the European Union, the complainant refers to Constitutional Court judgment file no. I. ÚS 1375/07 – he believes that the legal conclusions following from it also apply to entitlements exercised after the Czech Republic's entry into the European Union.

As regards the ECJ opinion stated in its judgment of 22 June 2011, C-399/09, the complainant states that he meets the conditions that ensue from it for a supplementary payment to an old age pension.

Due to the foregoing, i.e. for violation of his fundamental right to adequate material security in old age under Art. 30 of the Charter, his fundamental right arising from the principle of equality and the prohibition of discrimination under Art. 1 and Art. 3 par. 1 of the Charter, and his fundamental right to judicial and other protection under Art. 36 of the Charter, the complainant seeks annulment of the judgment of the Supreme Administrative Court of 31 August 2011, file no. 6 Ads 52/2009, and the judgment of the Regional Court in Hradec Králové, Pardubice branch, of 29 January 2009, ref. no. 52 Cad 35/2008-40.

IV.
Overview of the essential parts of the statements from the parties and the secondary party

In response to the Constitutional Court's request, under § 42 par. 4 and § 76 par. l of Act no. 182/1993 Coll., as amended by later regulations, the party to the proceedings submitted a statement on the constitutional complaint. The statement was delivered to the Constitutional Court on 20 December

2011. It states that in the present case the Supreme Administrative Court concluded that the employment periods completed by the complainant until 31 December 1992 cannot be considered as Czech periods of pension insurance. In this regard, the panel ruling in the matter, 6 Ads, took as its starting point the decision of the Supreme Administrative Court of 25 August 2011, ref. no. 3 Ads 130/2008-204, which was issued in the case in which questions were submitted to the ECJ for a preliminary ruling. In its process, it also took into account the fact that even an expanded panel of the Supreme Administrative Court could not deviate from the decision by the ECJ if the disputed issue were passed on to it for a ruling. In this situation, the statement expresses the opinion that the complainant's fundamental rights provided in Art. 30 and 36 of the Charter were not violated in the proceedings before the courts.

The party to the proceeding agrees with the complainant that, according to the ECJ judgment "where discrimination contrary to EU law has been established, as long as measures reinstating equal treatment have not been adopted, observance of the principle of equality can be ensured only by granting to persons within the disadvantaged category the same advantages as those enjoyed by persons within the favored category, the latter arrangements, for want of the correct application of EU law, being the only valid point of reference remaining." However, according to statement, in the decision contested by the constitutional complaint, the Supreme Administrative Court took as its starting point the position that, for purposes of reviewing an entitlement to benefits arising after 30 April 2004, as a consequence of the ECJ judgment there is no national rule that could be considered binding, and on the basis of which the insurer would have an obligation to include period of employment completed by participants in the social security system of the former CSFR until 31 December 1992 in the Czech pension insurance system in a scope greater than that determined by Art. 20 of the Agreement, on the basis of the pension applicant's citizenship and permanent residence. As a result of the non-application of the rule to entitlements recognized as of 1 May 2004, there is also no administrative practice that could have aroused a legitimate expectation among pension applicants that their applications to have period of employment served in the pension insurance system of the former CSFR until 31 December 1992 included beyond the scope of Art. 20 par. 1 of the Agreement would be guaranteed and that supplementary benefits would be granted. According to the party to the proceeding, the specific case of former CNR employees does not represent settled administrative practice, in terms of the definition provided in the decision by the expanded panel of the Supreme Administrative Court, ref. no. 6 Ads 88/2006-132, of 21 July 2009, because the employment periods were included for them in a negligible number of cases, and the practice has been in place for a relatively short time since the issuance of Constitutional Court judgment file no. III. ÚS 939/10. In view of the conclusions in the ECJ judgment, which the ruling panel applied in accordance with the Supreme Administrative Court's decision in the case file no. 3 Ads 130/2008, the statement expresses the belief that the issued decisions likewise did not violate the fundamental rights arising from the principle of equality and the prohibition of discrimination under Art. 1 a Art. 3 par. 1 of the Charter.

In a situation where, in the Supreme Administrative Court's opinion, the ECJ judgment described the rule arising from the Constitutional Court's judgments to be discriminatory (point 50 of the judgment), it was not possible to grant the complainant's claim to provide a supplementary benefit. Although it would be possible to object, for example, that the ECJ did not have at its disposal all the decisive circumstances (point 47 of the judgment states that the ECJ was not presented with any facts that could justify discriminatory treatment), the party to the proceeding believes that the ECJ's conclusions are clear that, in the framework of the relevant provisions of the Regulation, the criterion of citizenship and the criterion of residence are indirectly discriminatory.

Based on the grounds thus laid out, the Supreme Administrative Court proposes that the Constitutional Court dismiss the present constitutional complaint.

In response to the Constitutional Court's request under § 42 par. 4 and § 76 par. 2 of Act no. 182/1993 Coll., as amended by later regulations, the secondary party, the Czech Social Security Administration, in its statement, delivered to the Constitutional Court on 25 January 2012, after repeating the conduct of the case, in particular its facts, refers to the relevance of Art. 20 of the Agreement and Art. 15 par. 1

of the Administrative Agreement for evaluation of the case. It states that "the purpose of Art. 20 of the Agreement was to create a criterion for evaluating period of pension insurance completed during the existence of the Czechoslovak federation so that expenses for payment of pensions would be divided between the successor states." According to the secondary party, Art. 15 par. 1 of the Administrative Agreement is a reaction to the existence of companies active nationwide, and to the need, in these cases, to set the company's registered office as a factor for distributing the expenses. From this viewpoint, it objects to the consequences which it believes arise from the legal opinion contained in judgment file no. III. ÚS 939/10, as a result of which, in such cases the full expenses for payment of pensions would be borne by the successor state where the registered office of a company active nationwide was located. It fully agrees with the conclusions reached on this issue by the party to the proceeding (in particular in decisions ref. no. 6 Ads 14/2009-41, 3 Ads 37/2009-62, 4 Ads 80/2009-198, 6 Ads 25/2010-146, and 3 Ads 130/2008-204).

Regarding the complainant's objection that he should be granted a supplementary benefit to his old age pension, the secondary party states that no conditions for an entitlement to the requested supplementary benefit to the old age pension are provided in any legislation, and at present granting a supplementary benefit, or granting analogous benefits, is on the contrary disqualified by § 106a of Act no. 155/1995 Coll., as amended by Act no. 428/2011 Coll., which provides that a pension from Czech pension insurance cannot be granted or increased for periods of pension insurance completed under Czechoslovak legislation before the date of dissolution of the CSFR, i.e. before 1 January 1993, which, under Art. 20 of the Agreement are considered to be periods of pension insurance of the Slovak Republic, nor can balancing, settlements, supplemental payments or similar amounts related to a pension or part thereof, or provided instead of a pension or part thereof, be granted on the basis of these periods. Further, in the opinion of the Czech Social Security Administration, the Constitutional Court's existing case law does not apply to cases in which a pension was granted after the Czech Republic entered the European Union, because "it does not comprehensively consider the relationship of national legislation and coordinating Regulations, especially a conflict between the fundamental constitutional values in the form of unilateral protection of citizens of the Czech Republic with the principle of equal treatment also enshrined in the primary law of the European Communities."

In conclusion, the statement expresses the belief that the secondary party, in reviewing the complainant's pension entitlements, acted with respect for the "unquestioned purpose of Art. 15 par. 1 of the Administrative Agreement" and acted in accordance with Czech legal regulations.

V.
Assumption of the matter by the Plenum of the Constitutional Court

Under Art. 1 par. 1 let. j) of the decision of the Plenum of the Constitutional Court of 9 August 2011, ref. no. Org. 40/11, on assuming competence, the Plenum of the Constitutional Court, pursuant to § 11 par. 2 let. k) of Act no. 182/1993 Coll., on the Constitutional Court, as amended by later regulations, shall decide to assume a matter upon the petition of any judge on the panel assigned to review and rule in the matter, based on its exceptional gravity, with the consent of all judges of the relevant panel and of the parties to the proceeding.

In response to the request of the Constitutional Court, both the complainant, in a filing delivered to the Constitutional Court on 11 January 2012, and the party to the proceeding, in a filing delivered to the Constitutional Court on the same day, gave consent to the assumption. In response to a petition from all the judges of panel III, assigned to review and rule on the matter file no. III. ÚS 3536/11 in the work schedule for 2012 (Org. 1/12), the Plenum of the Constitutional Court decided to assume the matter, by resolution of 24 January 2012 ref. no. Pl. ÚS 5/12-1.

VI.
Waiver of a hearing

Under § 44 par. 2 of Act no. 182/1993 Coll., on the Constitutional Court, the Constitutional Court can, with the consent of the parties, waive a hearing, if it cannot be expected to clarify a matter in greater detail. In view of the fact that the parties, i.e. the complainant impliedly to the express request of the Constitutional Court, and the Supreme Administrative Court, in a filing delivered to the Constitutional Court on 18 January 2012, stated their consent to waive a hearing, and in view of the fact that the Constitutional Court believes that a hearing cannot be expected to clarify the matter in greater detail, a hearing in this matter was waived.

VII.
Review of the case under European law

In the decision contested by the constitutional complaint, the Supreme Administrative Court took as its starting point the legal conclusions stated in case file no. 3 Ads 130/2008. Primarily, it referred to its decision of 23 September 2009, ref. no. 3 Ads 130/2008-107, in which, in a factually analogous case, it submitted the following questions to the Court of Justice of the European Union for a preliminary ruling:

1. Must point 6 of Annex III(A) to Council Regulation (EC) No 1408/71 … read in conjunction with Article 7(2)(c) [thereof], according to which the criterion for determining the successor state competent to determine the value of periods of insurance completed by employed persons before 31 December 1992 under the social security scheme of the Czech and Slovak Federal Republic is to remain applicable, be interpreted as precluding the application of a rule of national law which provides that the Czech social security institution is to take into account, with regard to entitlement to a benefit and setting the amount thereof, the entire period of insurance completed in the territory of the Czech and Slovak Federal Republic before 31 December 1992, even though, according to the abovementioned criterion, it is the social security institution of the Slovak Republic which is competent to determine the value of that period of insurance?

2. If the first question is answered in the negative, must Article 12 EC in conjunction with Articles 3(1), 10 and 46 of Regulation (EC) No 1408/71 … be interpreted as meaning that the period of insurance completed under the social security scheme of the Czech and Slovak Federal Republic before 31 December 1992, which has already been taken into account once to the same extent for benefit purposes under the social security scheme of the Slovak Republic, cannot, pursuant to the abovementioned national rule, be taken into account in its entirety only in respect of nationals of the Czech Republic resident in the territory of the Czech Republic for the purposes of entitlement to old age benefit and setting the amount thereof ?

In its judgment of 22 June 2011, C-399/09, the ECJ stated that by the first question, the referring court sought in essence to ascertain whether the provisions of point 6 of Annex III(A) to Regulation No 1408/71, read in conjunction with Article 7(2)(c) thereof, preclude a national rule, such as that at issue in the main proceedings, which provides for the payment of a supplement to old age benefit where the amount of such benefit, awarded under Article 20 of the Agreement, is lower than that which would have been received if the retirement pension had been calculated in accordance with the legal rules of the Czech Republic. It noted that the effect of the abovementioned provisions of Regulation No 1408/71 is to preserve Article 20 of the Agreement, which establishes that the criterion for the identification of the applicable scheme and the authority with competence to grant social security benefits is the country in which the employer was resident at the time of the dissolution of the Czech and Slovak Federal Republic. According to the ECJ, it is clear from the case–law of the Constitutional Court in analogous matters that the rule on the allocation of competence, as between the Czech and Slovak social security institutions for the purpose of taking into account periods of insurance completed before the date of the dissolution of the Czech and Slovak Federal Republic, a rule introduced by Article 20 of the Agreement, is neither called into question nor affected, since the

objective of the case-law of the Constitutional Court is simply to increase the amount of the Czech old age benefit awarded under the Agreement in order to bring it to the level which would have been awarded under national law alone. Accordingly, what is at issue is not the award of a parallel Czech old age benefit, nor one and the same period of insurance being taken into account twice, but merely the elimination of an objectively established difference between benefits from different sources. The ECJ stated that such an approach avoids 'the overlapping of national legislations applicable', in accordance with the objective set out in the eighth recital of the preamble to Regulation No 1408/71, and does not run counter to the criterion for the allocation of competence established in Article 20 of the Agreement, which is maintained under Article 7(2)(c) of Regulation No 1408/71, read in conjunction with point 6 of Annex III(A) to that regulation. In the light of the foregoing, its answer to the first question referred was that the provisions of point 6 of Annex III(A) to Regulation No 1408/71, read in conjunction with Article 7(2)(c) thereof, do not preclude a national rule, such as that at issue in the main proceedings, which provides for payment of a supplement to old age benefit where the amount of such benefit, awarded under Article 20 of the Agreement, is lower than that which would have been received if the retirement pension had been calculated in accordance with the legal rules of the Czech Republic.

According to the ECJ, by the second question the referring court sought, in essence, to ascertain whether the Constitutional Court judgment, which allows payment of a supplement to old age benefit solely to individuals of Czech nationality residing in the territory of the Czech Republic, constitutes discrimination which is prohibited under Article 12 EC and the combined provisions of Articles 3(1) and 10 of Regulation No 1408/71. In this regard the ECJ notes that the purpose of Article 3(1) of Regulation No 1408/71 is to ensure, in accordance with Article 39 EC, equality of treatment in matters of social security, without distinction based on nationality, for the persons to whom that regulation applies by abolishing all discrimination in that regard deriving from the national legislation of the member states (Case C-332/05 *Celozzi* [2007] ECR I-563, paragraph 22). According to the ECJ, the documents before the Court show undoubtedly that the Constitutional Court judgment discriminates, on the ground of nationality, between Czech nationals and the nationals of other member states. As regards the requirement of residence in the territory of the Czech Republic, it also notes that the principle of equality of treatment, as referred to in Article 3(1) of Regulation No 1408/71, prohibits not only overt discrimination based on the nationality of the beneficiaries of social security schemes but also all covert forms of discrimination which, through the application of other distinguishing criteria, lead in fact to the same result (*Celozzi*, paragraph 23). Therefore, it considers that conditions imposed by national law must be regarded as indirectly discriminatory where, although applicable irrespective of nationality, they affect essentially migrant workers or the great majority of those affected are migrant workers, where they are applicable without distinction but can more easily be satisfied by national workers than by migrant workers, or where there is a risk that they may operate to the particular detriment of the latter (see *Celozzi*, paragraph 24). That applies to a condition of residence, such as that at issue in the main proceedings, which essentially affects migrant workers who reside in the territory of member states other than their state of origin. Moreover, the ECJ notes that Article 10(1) of Regulation No 1408/71 establishes the principle that residence clauses are to be waived by protecting the persons concerned from any negative effect which might be caused by the transfer of their residence from one member state to another. From the foregoing, the ECJ concludes that [49] the Ústavní soud judgment involves a direct discrimination based on nationality and indirect discrimination based on nationality, as a result of the residence test, against those who have made use of their freedom of movement. As regards the consequences of failure to observe the principle of equal treatment in a situation such as that in the main proceeding, the ECJ states that where discrimination contrary to EU law has been established, as long as measures reinstating equal treatment have not been adopted, observance of the principle of equality can be ensured only by granting to persons within the disadvantaged category the same advantages as those enjoyed by persons within the favoured category, the latter arrangements, for want of the correct application of EU law, being the only valid point of reference remaining (Case of 26 January 1999, Terhoeve, C-18/95, [1999] ECR I-345, paragraph 57, and the case law cited).

As regards the possible retroactive effects of its decision, the ECJ states that, as regards the implications, for persons, such as Ms Landtová, belonging to the category of those who have benefited from the rule deriving from the Constitutional Court judgment, of the finding that that judgment is discriminatory, while, as Czech law currently stands, the competent authority for the purpose of granting the pension cannot lawfully refuse to extend entitlement to the supplement to those who are placed at a disadvantage, nothing precludes that authority from maintaining that right for the category of persons who already benefit from it under the national rule. EU law does not, provided that the general principles of EU law are respected, preclude measures to re-establish equal treatment by reducing the advantages of the persons previously favoured (see Case C-200/91 *Coloroll Pension Trustees* [1994] ECR I-4389, paragraph 33). However, before such measures are adopted, there is no provision of EU law which requires that a category of persons who already benefit from supplementary social protection, such as that at issue in the main proceedings, should be deprived of it. In the light of the foregoing, the ECJ's answer to the second question referred was that the combined provisions of Articles 3(1) and 10 of Regulation No 1408/71 preclude a national rule, such as that at issue in the main proceedings, which allows payment of a supplement to old age benefit solely to Czech nationals residing in the territory of the Czech Republic, but it does not necessarily follow, under EU law, that an individual who satisfies those two requirements should be deprived of such a payment.

On the basis of these considerations, the European Court of Justice, in its judgment of 22 June 2011, C-399/09 answered the referred questions as follows:

1. The provisions of point 6 of Annex III(A) to Council Regulation (EC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996 and as amended by Regulation (EC) No 629/2006 of the European Parliament and of the Council of 5 April 2006, read in conjunction with Article 7(2)(c) thereof, do not preclude a national rule, such as that at issue in the main proceedings, which provides for payment of a supplement to old age benefit where the amount of that benefit, granted pursuant to Article 20 of the bilateral agreement between the Czech Republic and the Slovak Republic signed on 29 October 1992 as a measure to regulate matters after the dissolution of the Czech and Slovak Federal Republic, is lower than that which would have been received if the retirement pension had been calculated in accordance with the legal rules of the Czech Republic.

2. The combined provisions of Article 3(1) and Article 10 of Regulation No 1408/71, as amended by Regulation No 629/2006, preclude a national rule, such as that at issue in the main proceedings, which allows payment of a supplement to old age benefit solely to Czech nationals residing in the territory of the Czech Republic, but it does not necessarily follow, under European Union law, that an individual who satisfies those two requirements should be deprived of such a payment.

In a number of its decisions the Constitutional Court defined the constitutional context for evaluating the relationship between the Czech Republic and the European Union, particularly by interpreting Art. 10 and 10a, as well as Art. 1 par. 1 and 2 and Art. 9 par. 2 of the Constitution. The key judgments in this regard are file no. Pl. ÚS 50/04, Pl. ÚS 66/04, Pl. ÚS 19/08, and Pl. ÚS 29/09.

The Constitutional Court determined the following principles for evaluating the relationship between the laws of the Czech Republic and European law:

The Constitutional Court stated the principle of Euro-conformity in judgment file no. Pl. ÚS 66/04 regarding the constitutionality of the legal institution of a European arrest warrant: "A constitutional principle can be derived from Article 1 par. 2 of the Constitution, in conjunction with the principle of cooperation laid down in Art. 10 of the EC Treaty, according to which domestic legal enactments, including the constitution, should be interpreted in conformity with the principles of European integration and the cooperation between Community and Member State organs. If the Constitution, of which the Charter of Fundamental Rights and Basic Freedoms forms a part, can be interpreted in

several manners, only certain of which lead to the attainment of an obligation which the Czech Republic undertook in connection with its membership in the EU, then an interpretation must be selected with supports the carrying out of that obligation, and not an interpretation which precludes its.“

In judgment file no. Pl. ÚS 50/04 the Constitutional Court formulated the principle of double binding subordination of transferred European law, i.e. it must be consistent both with European law and with the constitutional order. Thus, although the frame of reference for review by the Constitutional Court are still the norms of the constitutional order, the Constitutional Court cannot completely overlook the effect of Community law on the creation, application, and interpretation of national law, in an area of legal regulation whose creation, functioning, and object are directly connected to Community law.

A certain parallel to the decisions by the German Constitutional Court, “Solange I,” “Solange II,” and “Maastricht-Urteil” can be found in judgment file no. Pl. ÚS 50/04, defining the fundamental viewpoints for evaluation of the relationship between the Constitution of the Czech Republic and European law: “There is no doubt that, as a result of the Czech Republic’s accession to the EC, or EU, a fundamental change occurred within the Czech legal order, as at that moment the Czech Republic took over into its national law the entire mass of European law. Without doubt, then, just such a shift occurred in the legal environment formed by sub-constitutional legal norms, which necessarily must influence the examination of the entire existing legal order, constitutional principles and maxims included, naturally on the condition that the factors which influence the national legal environment are not, in and of themselves, in conflict with the principle of the democratic law-based state or that the interpretation of these factors may not lead to a threat to the democratic law-based state. Such a shift would come into conflict with Art. 9 par. 2, or Art. 9 par. 3 of the Constitution of the Czech Republic… “The current standard within the Community for the protection of fundamental rights cannot give rise to the assumption that this standard for the protection of fundamental rights through the assertion of principles arising therefrom, such as otherwise follows from the above-cited case-law of the ECJ, is of a lower quality than the protection accorded in the Czech Republic, or that the standard of protection markedly diverges from the standard up till now provided in the domestic setting by the Constitutional Court.“ The principle of protection in Art. 1 par. 1 and Art. 9 par. 2 of the Constitution is also contained in judgment file no. Pl. ÚS 66/04: The constitutional principle that national law shall be interpreted in conformity with the Czech Republic’s obligations resulting from its membership in the European Union is limited by the possible significance of the constitutional text. Article 1 par. 2 of the Constitution is thus not a provision capable of arbitrarily modifying the significance of any other express constitutional provision whatsoever. If the national methodology for the interpretation of constitutional law does not enable a relevant norm to be interpreted in harmony with European Law, it is solely within the Constituent Assembly’s prerogative to amend the Constitution. Naturally, the Constituent Assembly may exercise this authority only under the condition that it preserves the essential attributes of a democratic law-based state (Art. 9 par. 2 of the Constitution), which are not within its power to change, and not even a treaty pursuant to Art. 10a of the Constitution can assign the authority to modify these attributes.“ The Constitutional Court also accentuated this principle in judgment file no. Pl. ÚS 19/08 and subsequently in judgment file no. Pl. ÚS 29/09: “The Constitutional Court remains the supreme protector of Czech constitutionality, including against possible excesses by Union bodies or European law, which also clearly answers the contested issue of the sovereignty of the Czech Republic; if the Constitutional Court is the supreme interpreter of the constitutional regulations of the Czech Republic, which have the highest legal force on Czech territory, it is obvious that Art. 1 par. 1 of the Constitution can not be violated. if European bodies interpreted or developed EU law in a

manner that would jeopardize the foundations of materially understood constitutionality and the essential requirements of a democratic, law-based state that are, under the Constitution of the Czech Republic, seen as inviolable (Art. 9 par. 2 of the Constitution), such legal acts could not be binding in the Czech Republic. In accordance with this, the Czech Constitutional Court also intends to review, as ultima ratio, whether the legal acts of European bodies remain within the bounds of the powers that were provided to them. In this regard the Constitutional Court basically agreed with certain conclusions of the German Federal Constitutional Court, stated in its Maastricht decision (see above), under which the majority principle, per the imperative of mutual regard, arising from loyalty to the Community, has its limits in the constitutional principles and elementary interests of the member states; the exercise of sovereign power by an association of states, the European Union, is based on authorization from the states, which remain sovereign, and which, through their governments, regularly act in the inter-state area, and thus guide the integration process. In judgment file no. Pl. ÚS 19/08 it emphasized, from a procedural viewpoint, the thesis that its intervention is conceivable, particularly with the application of European law in particular cases, which may come to the Constitutional Court through individual constitutional complaints tied to possible (exceptional) interference by EU bodies and EU law into the fundamental rights and freedoms. It defined the context for its review of the exercise of transferred competences by European Union bodies by three areas: the non-functioning of its institutions, the protection of the material core of the Constitution, not only in relation to European law but also to the particular application thereof, and, finally, the functioning as ultima ratio, i.e. the authority to review whether an act by European Union bodies exceeded the powers that the Czech Republic transferred to the European Union under Art. 10a of the Constitution; these could be, in particular, abandoning a value identity and exceeding the scope of the entrusted competences.

In the present case, it is the task of the Constitutional Court to evaluate, in terms of the safeguards thus outlined, the effects of ECJ judgment of 22 June 2011, C-399/09 on the present case.

The core of the arguments in the matter is application of Council Regulation (EEC) 1408/71 of 14 June 1971, on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, to the legal relationships governed by the Agreement, the object of which is regulating the exercise of entitlements arising from the social security system until the dissolution of the Czech and Slovak Federal Republic between the successor states, the Czech Republic and the Slovak Republic.

According to the consolidated version of the Regulation, its purpose, stated in the preamble, is to coordinate the effects of the social security schemes of European Union member states, in view of the principle of free movement of workers who are nationals of member states. Under Art. 2 par. 1, the Regulation applies to persons (in particular, employed persons or self-employed persons and students) who are or have been subject to the legislation of one or more member states and who are nationals of one of the member states. According to Annex III point A/9, Art. 12, 20 and 33 of the Agreement remain applicable, notwithstanding Art. 6 and Art. 7 par. 2 let. c) of the Regulation. This provision of Annex III was introduced into the Regulation by European Parliament and Council Regulation (EC) No 629/2006 of 5 April 2006. Under Art. 6 of the Regulation, with the exception of Articles 7, 8 and Art. 46 par. 4, the Regulation replaces, as regards personal and material jurisdiction which it covers the provisions of any social security convention binding either a) two or more member states exclusively, or b) at least two member states and one or more other states, where settlement of the cases concerned does not involve any institution of one of the latter states. Under Art. 7 par. 2 let. c) of the Regulation, Art. 6 notwithstanding, certain provisions in social security conventions concluded by member states before the date of applicability of the Regulation remain applicable, if they are more advantageous for the benefit recipients or if they arose on the basis of special historical circumstances, their effect is for a limited period of time, and they are listed in Annex III. It must be noted here that the decisions of the administrative courts contested by the constitutional complaint are based precisely on Art. 20 of the Agreement, which, under Annex III of the Regulation, is applicable, notwithstanding Art. 6 and Art. 7 par. 2 let. c) of the Regulation. Its applicability is defined – notwithstanding the

Regulation – by the relevant case law of the Constitutional Court. In terms of European Union law, the provisions of Annex III are of a declaratory, not constitutive nature: the key factor for applying the Regulation is its object and the nature of the reviewed legal relationships, which must contain a "foreign" element.

Under Art. 12 of the Agreement, survivor pensions are granted and paid by the insurer of the state party to which the pensions from which the survivor pensions are calculated are considered to belong, or would be considered to belong. Art. 20 par. 1 of the Agreement provides that insurance periods served before the date of dissolution of the Czech and Slovak Federal Republic are considered to be insurance periods of the state party in whose territory the citizen's employer had its registered office as of the date of dissolution of the Czech and Slovak Federal Republic, or on the last date before that date. Paragraph 2 provides that if a citizen did not, as of the date of dissolution of the Czech and Slovak Federal Republic, or on the last date before that date, have an employer with its registered office in the Czech and Slovak Federal Republic, insurance periods served before that date are considered to be insurance periods of the state party in which the citizen had permanent residence as of the date of dissolution of the Czech and Slovak Federal Republic, or on the last date before that date. Finally, under Art. 33 of the Agreement, pensions granted as of a date that falls into the period before the dissolution of the Czech and Slovak Federal Republic by the insurers of the Czech Republic or the Slovak Republic will continue to be considered pensions of that state party whose insurer was, or would be, responsible for payment of those pensions as of the date of dissolution o the Czech and Slovak Federal Republic.

Art. 30 par. 1 of the Charter, i.e. the right to adequate material security in old age, is a fundamental right tied to citizenship of the Czech Republic; that is, only citizens of the Czech Republic, and not other persons, can be a differential group when testing for potential differing treatment under Art. 3 par. 1 of the Charter. The tenor of the Constitutional Court's case law applicable in this regard to Art. 30 par. 1 of the Charter (see file no. II. ÚS 405/02, III. ÚS 252/04, IV. ÚS 158/04, IV. ÚS 301/05, IV. ÚS 298/06, I. ÚS 365/05, II. ÚS 156/06, IV. ÚS 228/06, I. ÚS 366/05, I. ÚS 257/06, I. ÚS 1375/07, III. ÚS 939/10 and Pl. ÚS 4/06) is respecting the constitutional principle of equality, i.e. ruling out unjustified inequality, in this case between citizens of the Czech Republic. The Constitutional Court expressly addressed the purpose of the Agreement in judgment file no. I. ÚS 1375/07. It stated that "the object of concluding an international treaty cannot be to reduce the pension entitlements of one's own citizens, whose entitlement to a higher pension arises independently of such a treaty, under national legislation." It described as constitutionally impermissible discrimination of one versus other groups of citizens of the Czech Republic an inequality established "only as a result of a particular circumstance that originates in the dissolution of the then-existing Czechoslovak federation."

In the Constitutional Court's opinion, a period of employment with an employer with its registered office in the present-day Slovak Republic during the existence of the Czechoslovak state cannot be retroactively considered to be a period of employment abroad. All citizens of the Czech Republic have a right to equal treatment in the area of social security with regard to years worked until 31 December 1992 (i.e. to the date of dissolution of the Czech and Slovak Federal Republic) regardless of the place where the work was performed and the employer's registered office being in the then-Czechoslovakia. Therefore, neither the place where work was performed, nor the employer's registered office in the subsequent Slovak Republic can be considered as being in the territory of a foreign state. Moreover, during the entire time of existence of the Czechoslovak federation, social security fell within federal jurisdiction, and Constitutional Act no. 4/1993 Coll., on Measures related to the Dissolution of the Czech and Slovak Federal Republic, enshrined the continuity of the Czech and Czechoslovak legal order. The territory of the present-day Slovak Republic until 31 December 1992, as either a place where work was performed or the location of an employer's registered office cannot, for purposes of social security for Czech citizens, be considered as the territory of a foreign state. It follows from this maxim that the relationships of social security and entitlements arising from them in this context do not contain a foreign element, which is a condition for applying the Regulation.

For the cited reasons, citizens of the Czech Republic who were employed by an employer with its registered office in the territory of the present-day Slovak Republic in the period until 31 December 1992, are entitled to a supplementary payment to the aggregate of their (partial) old age pension granted by the Czech insurer and their (partial) old age pension granted by the Slovak insurer, up to the amount of the expected (theoretical) pension that would have been granted if all the insurance periods from the time of the joint state were considered to be Czech periods. This solution is the result of the international agreement between the Czech Republic and the Slovak Republic, governing the allocation of expenses for social security between the successor states in relation to entitlements established by employment periods until 31 December 1992.

This entire issue is not comparable to evaluating entitlements for social security in view of the inclusion of periods served in various countries; it is an issue of the consequences of the dissolution of Czechoslovakia and evaluating the entitlements of citizens of the Czech Republic with regard to the allocation of expenses for social security between the successor countries (as the secondary party also says in its statement). Insofar as, as previously stated, Art. 2 par. 1 of the Regulation states that it shall apply to persons (in particular employed persons or self-employed persons and students) who are or were subject to the legislation of one or more member states and who are nationals of one of the member states, then within the indicated case law of the Constitutional Court, in the case of citizens of the Czech Republic all the effects arising from their social security until 31 December 1992 must be considered to be subject to the legal regulation of the state of which they are citizens. Failure to distinguish the legal relationships arising from the dissolution of a state with a uniform social security system from the legal relationships arising for social security from the free movement of persons in the European Communities, or the European Union, is a failure to respect European history, it is comparing things that are not comparable.

Due to the foregoing, European law, i.e. Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons, self-employed persons, and members of their families moving with the Community, cannot be applied to entitlements of citizens of the Czech Republic arising from social security until 31 December 1992; and, based on the principles explicitly stated by the Constitutional Court in judgment file no. Pl. ÚS 18/09, we cannot do otherwise than state, in connection with the effects of ECJ judgment of 22 June 2011, C-399/09 on analogous cases, that in that case there were excesses on the part of a European Union body, that a situation occurred in which an act by a European body exceeded the powers that the Czech Republic transferred to the European Union under Art. 10a of the Constitution; this exceeded the scope of the transferred powers, and was ultra vires.

Moreover, the Constitutional Court also points to deficiencies concerning the safeguards of a fair trial in the proceeding before the ECJ in case C-399/09. Although the Constitutional Court, as the judicial body for protection of the constitutionality of the Czech Republic, was not a party to the proceeding on the preliminary question before the ECJ, and although it was not even asked by the ECJ to submit a statement, it did provide supplementary information and arguments for the proceeding in case C-399/09 on the preliminary questions referred by the Supreme Administrative Court in the case Marie Landtová versus the Czech Social Security Administration. It submitted its statement of 8 March 2011 file no. Př. 31/11 with the knowledge that the Czech government, as a party to the proceeding on the preliminary question, unprecedentedly stated in its statement that the case law of the Constitutional Court violates European Union law (See also the position of Advocate General Pedro Cruz-Villalón of 3 March 2011, the "Advocate General's statement," point 3). It pointed out that this position of the Czech government is inconsistent with Art. 89 par. 2 of the Constitution of the Czech Republic, under which the enforceable decisions of the Constitutional Court are binding for all bodies and persons, i.e. including the government of the Czech Republic and its agent. It pointed out that, under § 4 par. 1 let. b) of Act no. 582/1991 Coll., on the Organization and Implementation of Social Security, as amended by later regulations, the government, or the member thereof at the head of the Ministry of Labor and Social Affairs, directly governs the Czech Social Security Administration, which was a party to the proceedings before the administrative courts of the Czech Republic and which, on that basis, was also a (unsuccessful) secondary party to the proceeding before the Constitutional Court. If

the Czech government had no hesitation to appear at all as a party to the proceeding on a preliminary question before the ECJ against its own Constitutional Court, the Constitutional Court in its statement expressed the expectation that, at least in order to preserve the appearance of objectivity, the ECJ would familiarize itself with the arguments that respected the case law of the Constitutional Court and the constitutional identity of the Czech Republic, which it draws from the common constitutional tradition with the Slovak Republic, that is from the over seventy years of the common state and its peaceful dissolution, i.e. from a completely idiosyncratic and historically created situation that has no parallel in Europe. The absence of explanatory arguments, which made it more difficult for the ECJ to orient itself in the merits of the matter, was also reflected in the statement of the "Advocate General," who noted this fact several times (points 45, 47, 51, 52). In addition to the foregoing, the statement also declares that the government's position contains data that are inconsistent with reality. In the Constitutional Court's case law, provision of a supplementary benefit was tied only to the applicant's being a Czech citizen, not to the condition of permanent residence in the Czech Republic as well, as reference order of the Supreme Administrative Court confusingly and incorrectly states in point 8 i. f. and in point 18, and as the Czech government also claims (the foregoing is adopted in the Advocate General's statement – see points 18, 39, 43, 48-52). In the judgment cited there, file no. III. ÚS 252/04 the Constitutional Court merely stated that "[i]nsofar as Act no. 155/1995 Coll., as amended by later regulations, permits exercising claims arising from it regardless of nationality, i.e. in connection to permanent residence, in terms of constitutional protection the Constitutional Court considers inequality to be unjustified only in connection with distinguishing citizens of the Czech Republic in their entitlements arising from social security, but not in relation to other categories of persons."

In the submission of 25 March 2011 the head of the judicial office of the ECJ, based on an instruction from the chairperson of the fourth chamber of the ECJ returned the statement in question to the Constitutional Court with the justification that "pursuant to established customs, members of the ECJ do not correspond with third persons regarding cases that have been submitted to the ECJ."

In this regard, the Constitutional Court notes that the ECJ regularly makes use of the institution of amici curiae in proceedings on preliminary questions, especially in relation to the European Commission. In a situation where the ECJ was aware that the Czech Republic, as a party to the proceeding, in whose name the government acted, expressed in its statement a negative position on the legal opinion of the Constitutional Court, which was the subject matter for evaluation, the ECJ' statement that the Constitutional Court was a "third party" in the case at hand cannot be seen otherwise than as abandoning the principle audiatur et altera pars.

VIII.
Review of the constitutionality of the interpretation and application of the ordinary law relevant in the case

Reviewing the constitutionality of interference by a public authority into the fundamental rights and freedoms involves several components (file no. III. ÚS 102/94, III. ÚS 114/94, III. ÚS 84/94, III. ÚS 142/98, III. ÚS 224/98 and others). The first is evaluating the constitutionality of the applied legislative provision (which follows from § 78 par. 2 of Act no. 182/1993 Coll., as amended by later regulations). Further components are reviewing the observance of constitutional procedural rights, and finally reviewing the constitutional conformity of the interpretation and application of substantive law.

In terms of the ordinary law relevant in constitutional law review, the legislation applicable to the present matter is § 61 of Act no. 155/1995 Coll., Art. 20 of the Agreement, and Art. 15 par. 1 of the Administrative Agreement.

In the present matter, the Constitutional Court found no grounds for proceeding according to § 78 par. 2 of Act no. 182/1993 Coll., as amended by later regulations, with § 61 of Act no. 155/1995 Coll.; it is not endowed with the authority to evaluate the constitutionality of directly applicable provisions of international treaties.

The Constitutional Court has spoken regarding the issue of the constitutionality of the relationship of § 61 of Act no. 155/1995 Coll. to Art. 20 of the Agreement in a number of its decisions (see judgments file no. II. ÚS 405/02, III. ÚS 252/04, IV. ÚS 158/04, IV. ÚS 301/05, IV. ÚS 298/06, I. ÚS 365/05, II. ÚS 156/06, IV. ÚS 228/06, I. ÚS 366/05, I. ÚS 257/06, I. ÚS 1375/07, Pl. ÚS 4/06, III. ÚS 939/10 and III. ÚS 1012/10).

The Constitutional Court only points out and repeats that the tenor of these decisions is respecting the constitutional principle of equality, i.e. ruling out unjustified inequality, in this case between citizens of the Czech Republic. As early as judgment file no. Pl. ÚS 31/94 the Constitutional Court declared the acceptance of the internationally recognized principle that ratification of international treaties does not affect more advantageous rights, protection, and conditions provided and guaranteed by national legislation. In a case where a special incorporative norm, contained in § 61 of Act no. 155/1995 Coll., establishes the priority of an international treaty over national law, where application of the law is controlled by the rule of interpretation lex specialis derogat legi generali, as the Constitutional Court is not endowed with the authority to review the constitutionality of ratified international treaties, this principle of interpretation, that specific legislation takes priority over general legislation, must give way to the constitutional principle applicable to the application and interpretation or relevant ordinary law, the principle of constitutionally conforming interpretation and application. In the present case, this constitutional principle is the fundamental right arising from the constitutional principle of the equality of citizens and the ruling out of unjustified differentiation in their rights. As already stated, the Constitutional Court explicitly addressed the purpose of the Agreement in judgment file no. I. ÚS 1375/07. It stated that “the object of concluding an international treaty cannot be to reduce the pension entitlements of one’s own citizens, whose entitlement to a higher pension arises independently of such a treaty, under national legislation.” It described as constitutionally impermissible discrimination of one versus other groups of citizens of the Czech Republic an inequality established “only as a result of a particular circumstance that originates in the dissolution of the then-existing Czechoslovak federation.” Under judgment file no. IV. ÚS 228/06, the fact that the Czech Republic concluded a treaty with the Slovak Republic on implementation of social security (the Agreement between the Czech Republic and the Slovak Republic on Social Security, published as no. 228/1993 Coll.) cannot operate to the detriment of a Czech citizen as regards the amount of his pension entitlements, even if he was employed in Slovakia as of the date of dissolution of the CSFR. In judgment file no. I. ÚS 1375/07 the Constitutional Court summarized its previous deliberations thus: “The Constitutional Court has already considered the issue of application of the Agreement in its decisions file no. II. ÚS 405/02 and III. ÚS 252/04. It spoke in detail on these conclusions, and especially interpretation thereof, in the judgment of the Plenum of 20 March 2007, file no. Pl. ÚS 4/06. In these decisions it stated that ‘the Czech Republic and the Slovak Republic were created as of 1 January 1993 by the dissolution of the joint Czechoslovak state. The joint state had a unified pension insurance system. In terms of the laws in effect at the time, it was legally irrelevant which part of the Czechoslovak state a citizen was employed in, or where his employer had its registered office.’”

From this point of view, the Constitutional Court’s deliberations on the interpretation of Art. 15 par. 1 of the Administrative Agreement, contained in judgment file no. III. ÚS 939/10, apply to sub-constitutional law, and in terms of the arguments concerning the relationship between the law of the Czech Republic and European law, and interpretation of Art. 30 par. 1 of the Charter in terms of the constitutional principle of equality they appear to have only a supporting role.

On the periphery of the secondary party’s arguments, according to which, in the case of the complainant and other analogous cases, the full costs of paying pensions would be borne by the successor state on whose territory the registered office of a company operating nationwide was located, the Constitutional Court emphatically points out and reiterates the legal opinion that it stated in judgment file no. III. ÚS 939/10: “The Constitutional Court also emphasizes that allocating a pension in this matter under the Agreement and § 4 par. 3 of Act no. 582/1991 Coll., on the Organization and Implementation of Social Security, as amended by later regulations, can be accepted, in accordance with constitutionally conforming interpretation of Art. 20 of the Agreement, Art. 15 par.

1 of the Administrative Agreement and § 61 of Act no. 155/1995 Coll., only in the sense of an entitlement to an arranged payment of a benefit provided by the Social Insurance Company in Bratislava, adjusted up to the amount of pension to which the entitled person would be entitled if the Czech Social Security Administration were competent to assess all the periods of insurance (employment), including replacement periods, which the person completed, i.e., including periods before the dissolution of the joint state. In these circumstances the legislation in question only regulates the allocation of the shares of both successor states in payment of a pension, but it does not affect the protected position of a citizen of the Czech Republic, which follows from the Constitutional Court's case law (see judgments file no. II. ÚS 405/02, III. ÚS 252/04, IV. ÚS 158/04, IV. ÚS 301/05, IV. ÚS 298/06, I. ÚS 365/05, II. ÚS 156/06, IV. ÚS 228/06, I. ÚS 366/05, I. ÚS 257/06, I. ÚS 1375/07 and Pl. ÚS 4/06)."

Due to the foregoing, i.e. violation of Art. 30 par. 1 in conjunction with Art. 4 par. 4 a Art. 3 par. 1 of the Charter, the Constitutional Court annulled the judgment of the Supreme Administrative Court of 31 August 2011, file no. 3 Ads 52/2009, the judgment of the Regional Court in Hradec Králové, Pardubice branch, of 29 January 2009, ref. no. 52 Cad 35/2008-40, and the decision of the Czech Social Security Administration of 8 February 2008, ref. no. 450 811 075/428 [see § 82 par. 1 and par. 3 let. a) of Act no. 182/1993 Coll., on the Constitutional Court]. The Constitutional Court also applied the grounds for cassation to the decision by the secondary party, for reasons of procedural efficiency, as well as the fact that the unconstitutional interference in the complainant's fundamental rights and freedoms was already established by its decision.

IX.
Obiter dictum

Article XII, point 18 of Act no. 428/2011 Coll. of 6 November 2011, which Amends Certain Acts in Connection with the Adoption of the Act on Pension Savings and of the Act on Supplementary Pension savings, amends and supplements Act no. 155/1995 Coll., on Pension Insurance, as amended by later regulations, by inserting after § 106 a new § 106a, which reads (including the heading):

"§ 106a
Evaluation of certain periods during the period before 1993

Pensions from Czech pension insurance (security) cannot be granted or increased for periods of pension insurance completed before 1 January 1993 under Czechoslovak legislation, which, under the Agreement between the Czech Republic and the Slovak Republic on Social Security of 29 October 1992 are considered to be periods of pension security or insurance of the Slovak Republic, nor can adjustments, balancing, supplements or analogous payments for a pension or part thereof, or amounts provided instead of a pension or part thereof, be provided by taking these periods into account; these periods can be taken into account, in accordance with Art. 4 of Constitutional Act no. 4/1993 Coll., on Measures Related to the Dissolution of the Czech and Slovak Federal Republic, only under the conditions and in the scope provided by that treaty or that Act (§ 61)."

Under the transitional provision Art. XIII of that Act: "Applications for the provision of adjustments, settlements, supplements, and analogous payments set forth in § 106a of Act no. 155/1995 Coll., in the wording in effect from the day this Act goes into effect, shall be set aside, and proceedings shall not be conducted on them; if these applications were filed before the day this Act went into effect, proceedings on them shall be stopped. Measures taken before the day this Act went into effect on the basis of these applications shall remain unaffected, with the provision that the relevant payment, after accounting for advance payments during 2011, shall remain in the resulting amount without change, if, under the legislation of the Czech Republic and the Slovak Republic, there is a continuing entitlement to a pension that was the grounds for granting the payment; upon termination of an entitlement for a pension under the legislation of one of these states the entitlement to the relevant payment also terminates permanently."

Under Art. XXVI of Act no. 428/2011 Coll., the provisions of Art. XII point 18 and Art. XIII go into effect on the day it is promulgated, that day being 28 December 2011, when part 149/2011 of the Collection of Laws, in which Act no. 428/2011 Coll. was published, was distributed.

The background report to the government bill adopted as Act no. 428/2011 Coll. does not contain any justification for Art. XII and XIII. That is because these provisions were proposed in the second reading of the Chamber of Deputies discussion of the government bill (publication 414) on 30 August 2011 by Deputy Gabriela Pecková, as a reaction to the ECJ judgment in the Landtová case: "Provision of a supplementary benefit is based on the previous case law of the Constitutional Court of the Czech Republic. The Court of Justice of the European Union decided that adjusting Slovak pensions through a supplementary benefit cannot be limited by the condition of Czech citizenship and residence in the Czech Republic, because such a limitation is discrimination contrary to European Union law. In connection with this judgment, I propose adopting legislation that would generally rule out supplements to Slovak pensions."
(See http://www.psp.cz/eknih/2010ps/stenprot/022schuz/s022029.htm.)

As the secondary party correctly states in its statement, the conditions for entitlement to the requested supplementary benefit to the old age benefit are not governed by any legislation. Thus, § 106a of Act no. 155/1995 Coll., as amended by Act no. 428/2011 Coll., enshrines a prohibition on payment of social benefits that is not governed by law. This is undoubtedly contradictio in adiecto, it is certainly a statutory provision which makes no sense in and of itself. It is necessary to answer the question of whether a supplementary benefit, that is tied to application of the Agreement, really is not established on any other legally relevant grounds and whether the interference by the legislature regarding it is relevant.

The transcript of the Chamber of Deputies discussion of the bill of the Act in question indicates that the proponent of the amending proposal, and thus the entire Chamber, were aware that "provision of a supplementary benefit is based on the previous case law of the Constitutional Court of the Czech Republic."

If the purpose of adopting § 106a of Act no. 155/1995 Coll., as amended by Act no. 428/2011 Coll., and Art. XIII of Act no. 428/2011 Coll., was a reaction to the consequences of the ECJ judgment of 22 June 2011, C-399/09 with "derogative" consequences for the case law of the Constitutional Court, then we cannot do otherwise than conclude that the essential grounds for this Constitutional Court judgment, which declares that the ECJ's actions in the case at hand were ultra vires, makes the cited statutory provisions obsolete (§ 106a of Act no. 155/1995 Coll., as amended by Act no. 428/2011 Coll., and Art. XIII of Act no. 428/2011 Coll.), based on the legal principle cessante ratione legis cessat lex ipsa (if the reason for the law ceases to exist, the law itself ceases to exist).

The Constitutional Court did not open a proceeding on review of norms concerning § 106a of Act no. 155/1995 Coll., as amended by Act no. 428/2011 Coll., and Art. XIII of Act no. 428/2011 Coll., because the present case did not meet the requirements for proceeding under § 78 par. 2 of Act no. 182/1993 Coll., on the Constitutional Court, i.e. the legislative provisions in question were not applied in proceedings from which the decisions contested by the constitutional complaint arose.

Instruction: This judgment cannot be appealed.

Brno, 31 January 2012

Dissenting opinion of Judge Jiří Nykodým to judgment of the Plenum file no. Pl. ÚS 5/12

I disagree with the majority opinion of the Plenum, annulling the decision of the Supreme Administrative Court due to violation of the constitutional principle of the equality of citizens and ruling out unjustified differences in their rights when providing adequate material security under Art. 30 par. 1 of the Charter of Fundamental Rights and Freedoms. The reasons for my disagreement relate to the arguments applied in the dissenting opinion filed to Constitutional Court judgment file no. Pl. ÚS 4/06, the relevant points of which I summarize and to which I refer in full.

First. I do not consider correct the conclusion that European law, i.e. Regulation (EEC) of the Council 1408/71 of 14 June 1971, on application of social security schemes to employed persons and their families moving within the Community cannot be applied to entitlements of citizens of the Czech Republic arising from social security until 31 December 1993, and that therefore the ECJ judgment of 22 June 2011, C-399/09, affecting cases analogous to the complainant's is an overreaching by an EU body.

The CR joined the European Union on 1 May 2004. The EU coordinates national social security schemes through the abovementioned regulation so that it will be possible to ensure, among other things, one of the four fundamental freedoms – the free movement of persons. The purpose of the legislation is to ensure that a person employed in several countries will not lose his entitlement to social benefits on the grounds of different citizenship or residence, or because he has not completed in any country the necessary insurance period set forth by the legislation of that country. Coordination has four fundamental principles: it prohibits all discrimination based on nationality (Art. 7), the legal order of one state is applied – that of the state where the employed person works, regardless of place of residence (Art. 13), insurance periods in all member states are aggregated (Art. 45 for pensions), entitlements to benefits can be exercised regardless of place of residence, and benefits are paid abroad. Under Art. 6, Regulation 1408/71 replaces the provisions of any agreement on social security between two member states; Art. 7 partially limits Art. 6, to the effect that, notwithstanding Art. 6, agreements on social security listed in Annex III remain applicable [Art. 7 par. 2 let. c)]. The content of Art. 20 of the Agreement on transfer of obligations by the Czech and Slovak Republics in the field of pension security for the period until the dissolution of the CSFR was, in connection with the Czech and Slovak Republics' accession to the European Union, included in Annex III to Regulation 1408/71 (by the Agreement on Accession to the EU); thus, it became EU law, and is a provision that is binding for all member states. In its current case law regarding Art. 7, the ECJ has so far not deviated from its respect for the will of mMember states to preserve by treaty certain individual features existing since the time before accession to the EU, set forth in Annex III to Regulation 1408/71. In my dissenting opinion to judgment file no. Pl. 4/06 I already pointed to the exemplary decision in this regard, ECJ decision 305/92, Hoorn, of 28 April 1994. Thus, as of 1 May 2004, Art. 20 of the Agreement is a component of EU law, and as such it is applied by the executive branch and will be applied, including to incomplete cases that were begun before the entry to the EU and have not yet been completed (Art. 118 of Regulation 574/72).

This involves a rule for settling obligations from pension security between two member states; therefore, the ECJ had the authority to address the issue and interpret the rule. In its judgment, in view of the text of the Regulation, it did not rule out the possibility that the Czech Republic could introduce a rule on the basis of which a supplementary benefit would be paid, provided of course, that it would not discriminate against nationals of other member states.

Second. I also do not agree that the annulled decisions by the administrative courts failed to respect the constitutional principle of equality, or did not, in relation to the complainant, arrange to rule out unjustified inequality between citizens of the Czech Republic. The right to security in old age is a fundamental human right, but it can be exercised only within the bounds of the law. Inequality in the amount of benefit cannot be understood at a constitutional level, because no one is guaranteed to have the same pension as another citizen. The essence of the constitutional complaint from which the present judgment arose is dissatisfaction with the amount of the granted pension. The difference in the amount of benefit calculated according to the Act on Pension Insurance and the Czech regulation compared to the amount to which one is entitled in accordance with Art. 20 of the Agreement on assumption of obligations by the Czech and Slovak Republics in pension insurance for the period until the dissolution of the CSFR, is a consequence of the dissolution of the CSFR, allocation of its obligations between the successor states, and the subsequent different legal and economic history of these states. In this regard I must note that the amounts of pensions are approaching each other, and it is not impossible that in future the Slovak pension will be more advantageous, for example, for certain groups of insured persons; does that mean that persons who are now affected by the rule will then, in contrast, receive a constitutionally unacceptable advantage? The Agreement on assumption of obligations by the Czech and Slovak Republics in pension insurance for the period until the dissolution of the CSFR had to observe certain constitutional limits provided by Constitutional Act no. 4/1993 Coll. I consider it reasonable to try to allocate the burden of obligations so that the obligated subject is not primarily only the Czech Republic, where most employers active in the entire territory of the then Czechoslovakia had their registered offices. Perhaps it would have been more suitable to choose as a criterion the place where work was performed, but at this point this is merely an academic question. In individual cases – and the complainant's case is obviously one of them – this provision, or the system of allocation of the obligations of the dissolved state could have harsh effects. However, that is not sufficient to conclude that it is unconstitutional. The principles of certainty and predictability of the law are unquestionable elements of a law-based state. These principles were generally observed by acceptance of legal continuity, specifically in the field of pension insurance, by preserving the entitlement as such, and aggregating completed insurance periods. This is important from the viewpoint of constitutional guarantees. I do not agree that citizens of the CR could not have different pension rights based on where they worked. The existence of Czechoslovakia as a joint state and its dissolution do not, from the viewpoint of constitutional principles, justify a need for every citizen of the Czech Republic to receive a so-called "Czech pension" for periods completed through 1992.

The judgment argues that citizens of the Czech Republic employed until 31 December 1992 by an employer with its registered office in the territory of the present-day Slovak Republic are entitled to a supplementary benefit to the aggregate of partial pensions granted by the Czech and Slovak insurer. However, the Act on Pension Insurance does not contain any a supplementary benefit. It does not regulate the manner of calculating such a supplementary benefit. Moreover, the Act on Pension Insurance, as amended by the "small pension reform" expressly prohibits supplementary adjustment. Thus, a body ruling on pension matters receives contradictory instructions, which is it bound to observe.

Third. I disagree with the overall concept of the Constitutional Court's approach to the issue of so-called "Slovak pensions." It is evident from the previous decisions concerning this issue that it involves a wide and diverse range of factual situations: from the case of the

complainant, where some sort of general sense of justice leads to a belief that a "Czech pension" would be adequate, to cases where the insured person completed the substantial part of his employment in the Slovak part of the joint republic, lived in Slovakia during the entire time, and had Slovak citizenship at the time of dissolution of the joint state. In other words, cases that would not even require a special regime under an international agreement, and could be resolved according to the basic principle that the Czech Republic, in the area of public subjective rights, assumed only obligations vis-à-vis those persons who had permanent residence in its territory as of the date of dissolution of the joint state. By adopting a general interpretation in a matter with a completely specific factual context, the Constitutional Court is attempting to replace the legislature, or the governments of the Czech Republic and the Slovak Republic, who would be competent to make any amendments to the regime agreed upon at the time of dissolution of the joint state in the cited Agreement. Only future complaints and constitutional complaints will reveal the risks that these actions bring.

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