OPINION OF ADVOCATE GENERAL CRUZ VILLALÓN delivered on 3 March 2011 [1]

I — Introduction

1. As a result of the dissolution and subsequent division of the Czech and Slovak Federal Republic, the two new States which emerged on its territory, the Czech Republic and the Slovak Republic, concluded an international agreement aimed at coordinating a number of matters relating to social security benefits for individuals with links to both States. The criterion chosen for determining the applicable scheme and the authority with competence to grant such benefits is that of the State of residence of the employer at the time of dissolution, that is, 31 December 1992.

2. The application of that rule meant that Czech nationals who, before the division, worked for employers established in the territory of what is now the Slovak Republic were subject to the legislation and competence of the social security authorities of that State. That situation gave rise to a number of disputes which resulted in the now settled case-law of the Czech Constitutional Court to the effect that, put simply, Czech citizens who are subject to the Slovak scheme, based on the fundamental right of access to social security benefits, are entitled to receive a supplement from the Czech authorities which covers any difference between the Slovak benefit and the benefit which would have been due to them in the event that they had been subject to the Czech scheme.

3. In its written observations in relation to the present reference for a preliminary ruling, the Czech Government submits that that case-law of the Constitutional Court infringes European Union law ('EU law'). First, the Czech Government considers that the effect of that case-law is that the same contribution period is taken into account twice, which is contrary to Regulation No 1408/71. [2] Secondly, the Czech Government takes the view that the supplement to which Czech recipients of a pension are entitled is granted selectively, by reference to a cumulative criterion based on nationality and residence, thereby infringing

1 — Original language: Spanish.

2 — Council Regulation (EEC) 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 (OJ, English Special Edition 1971 (II), p. 416), replaced by Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ 2004 L 166, p. 1; corrigendum at OJ 2004 L 200, p. 1).

Articles 3 and 10 of Regulation No 1408/71, interpreted in the light of Article 39 EC (now Article 45 TFEU).

4. The Nejvyšší správní soud (Czech Supreme Administrative Court), which shares the doubts raised by the Czech Government, has referred for a preliminary ruling the two questions which form the basis of the present proceedings.

5. This is, in essence, the issue which the Court is required to resolve in the present case. The 'national rule' called into question by the referring court is in fact that which follows from the case-law of the Constitutional Court, a case-law which moreover extends the rights of Czech citizens resident in the Czech Republic against the background of an historical event whereby one State was divided and two new States created. Furthermore, this case has the particularity that it does not concern an individual asking to be treated in the same way as a favoured group but, on the contrary, the social security administration wishing to deprive an individual who belongs to that group of the favourable treatment concerned. Therefore, the case referred to the Court is one of discrimination in reverse, so to speak, and it has arisen in an institutional context which is as controversial as it is delicate.

6. Accordingly, this case provides the Court with an opportunity to examine the perennially thorny issue of redress for the effects of discriminatory situations and, more specifically, in the light of the specific circumstances of the case, to consider the latitude available to a national court in such circumstances.

II — European Union law

7. Article 12 EC (now Article 18 TFEU) provides: 'Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.'

8. The prohibition of discrimination is specifically laid down for workers in Article 39 EC, which provides as follows:

'1. Freedom of movement for workers shall be secured within the Union.

2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.

…'

9. Article 42 EC (now Article 48 TFEU) provides that the European Parliament and the Council are to adopt such measures in the field of social security as are necessary to provide freedom of movement for workers; to this end, they shall make arrangements to secure for employed and self-employed migrant workers and their dependants:

'(a) aggregation, for the purpose of acquiring and retaining the right to benefit and of calculating the amount of benefit, of all periods taken into account under the laws of the several countries;

(b) payment of benefits to persons resident in the territories of Member States.'

10. The measures referred to in Article 42 EC are reflected in Regulation No 1408/71, Article 3 of which contains a non-discrimination clause which is worded as follows:

'1. Subject to the special provisions of this Regulation, persons to whom this Regulation applies shall be subject to the same obligations and enjoy the same benefits under the legislation of any Member State as the nationals of the State.

...

3. Save as provided in Annex III, the provisions of social security conventions which remain in force pursuant to Article 7(2)(c) shall apply to all persons to whom this Regulation applies.'

11. After Article 4(1) of Regulation No 1408/71 states that its provisions apply to invalidity and old-age benefits, Article 6 thereof provides that it replaces the provisions of any social security convention binding two or more Member States exclusively. The sole exception to that rule is set out in Article 7(2), which guarantees the application of 'certain provisions of social security conventions entered into by the Member States before the date of application of this Regulation provided that they are more favourable to the beneficiaries or if they arise from specific historical circumstances and their effect is limited in time if these provisions are listed in Annex III.'

12. Annex III(A), which is headed 'Provisions of social security conventions remaining applicable notwithstanding Article 6 of the Regulation', provides as follows in point 9:

'9. Czech Republic - Slovakia

Articles 12, 20 and 33 of the Agreement on Social Security of 29 October 1992.'

III — The national legal framework

13. Article 30 of the Charter of fundamental rights and freedoms of the Czech Republic provides that 'Citizens have the right to adequate material security in old age and during periods of work incapacity, as well as in the case of the loss of the household provider'.

14. Article 28 of Law 155/1995 on retirement schemes provides that 'the insured person has a right to a retirement pension where he has completed the necessary insurance period and reached the prescribed age and, where appropriate, fulfils other conditions laid down in this Law'.

15. Article 20 of the international Agreement on Social Security between the Czech Republic and the Slovak Republic signed in Prague on 29 October 1992, provides that 'the insurance period completed before the day of the division of the Czech and Slovak Federal Republic... shall be considered to be the insurance period of that State party in the territory of which the employer of the national had its seat on the day of the division of the Czech and Slovak Federal Republic or most recently before that day'.

16. Accordingly, pursuant to that agreement, Czech and Slovak workers who were resident in Czech territory but worked for an employer established in Slovak territory were subject to the scheme and competence of the authorities of the Slovak Republic. However, Czech and Slovak workers who were resident in Czech territory and worked for an employer established in Czech territory were subject to the scheme and competence of the authorities of the Czech Republic.

17. By judgment of 25 January 2005 [3] the Czech Constitutional Court confirmed a line of case-law which had been laid down before the accession of the Czech Republic to the European Union, [4] in accordance with which Czech nationals who were subject to the scheme and competence of the authorities of the Slovak Republic were entitled, pursuant to Article 30 of the Charter of fundamental rights and freedoms of the Czech Republic, [5] to claim a supplement to the retirement benefit for which they were eligible under the agreement of 29 October 1992. According to the Constitutional Court, 'where a national of the Czech Republic fulfils the statutory conditions for entitlement to a benefit and that entitlement would, according to national (Czech) law, be higher than the entitlement under the [Czech-Slovak] Treaty, it is for [a Czech social security institution] to ensure the drawing of pension payments in an amount corresponding to the higher claim under the national laws, that is, to decide to make up the amount of pension drawn from

3 — Judgment No III. ÚS 252/04 (vol. 36, No 16, p. 173).

4 — See the judgment of 3 June 2003, No II. ÚS 405/02 (vol. 30, No 80, p. 245).

5 — The Charter of fundamental rights and freedoms of the Czech Republic is an autonomous text, which was adopted in 1991 and ratified by decision of the Czech National Council (No 2/1993 Coll) and on which Article 112 of the Czech Constitution confers constitutional status.

the other party, bearing in mind the amount of pension drawn in conformity with the [Czech-Slovak] Treaty from the other party to the Treaty such that it does not result in the duplicated drawing of two pensions of the same type granted for the same reasons from two different [social security institutions].'

18. That judgment also stated that only individuals who, cumulatively, held Czech nationality *and* were resident in the territory of the Czech Republic were entitled to receive the payment due from the Czech social security institution.

IV — The facts and the proceedings before the national court

19. Marie Landtovà, of Czech nationality, worked in the territory of the former Czech and Slovak Federal Republic from 1964 to 31 December 1992. After the latter date, the time of the dissolution and subsequent division of Czechoslovakia, Marie Landtovà was employed until 31 August 1993 in the territory of the Slovak Republic. She then moved to work in the Czech Republic until the date of her retirement.

20. In 2002 the Slovak social security institution granted Marie Landtovà a partial invalidity pension, which, in accordance with the Czech-Slovak agreement of 29 October 1992, covered the contribution period between 1964 and 31 August 1993.

21. In 2006 the Czech Social Security Authorities ('CSSA') granted the applicant a retirement pension covering the insurance period beginning on 31 August 1993, the date on which Marie Landtovà moved to live in Czech territory. The CSSA expressly refused to grant the supplement which the case-law of the Czech Constitutional Court guarantees to Czech nationals and residents. Consequently, the administrative decision was restricted to the strict application of the calculation criterion laid down in Article 20 of the Czech-Slovak agreement of 29 October 1992.

22. That decision of the CSSA having been appealed to the Prague City Court, that court annulled the contested decision and ordered the authorities to comply with the case-law of the Constitutional Court. According to the first instance court, the CSSA was required to guarantee to every Czech national and resident an additional payment to cover the difference between the amount of the Slovak benefit to which they are entitled and the amount of the benefit to which they would have been entitled had the Czech social security scheme been applicable to them. That

was the situation of Marie Landtovà. Accordingly, the Prague City Court concluded that the old age benefit which the CSSA had granted to the applicant must be made up to the amount to which the applicant would have been entitled if she had completed the entire insurance period up to 31 December 1992 in the social security system of the Czech Republic.

23. The CSSA lodged an appeal on a point of law against the judgment at first instance with the Nejvyšší správní soud, relying in support on Regulation No 1408/71 and the principle of non-discrimination in the general terms laid down in the founding Treaties. The Nejvyšší správní soud upheld the appeal, approved the arguments put forward by the CSSA and referred the case back to the lower court.

24. However, when the Prague City Court ruled on the case for a second time, it reiterated the terms of its original decision and rejected the interpretation given by the Nejvyšší správní soud. The CSSA lodged a further appeal on a point of law with the latter court, based on the arguments already put forward in the first appeal. In the course of that second appeal on a point of law, the Nejvyšší správní soud decided to seek a preliminary ruling from the Court of Justice.

V — The reference for a preliminary ruling and the procedure before the Court of Justice

25. On 16 October 2009 the reference for a preliminary ruling from the Nejvyšší správní soud was received at the Registry of the Court; the two questions referred are worded as follows:

'(1) Must point 6 of Annex III(A) to Council Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community read together 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 former Czech and Slovak Federal Republic is to remain applicable, be interpreted as precluding the application of a rule of national law according to which a 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 former Czech and Slovak Federal Republic before 31 December 1992, even though, according to the above mentioned 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 (EEC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community be interpreted as meaning that the period of insurance completed under the social security scheme of the former 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 above mentioned national rule, be taken into account in its entirety only in respect of nationals of the former Czech Republic resident in the territory of the Czech Republic for the purposes of entitlement to old age benefit and fixing the amount thereof?'

26. Written observations were lodged by the representative of Marie Landtovà, the Czech Republic, the Slovak Republic and the Commission.

27. At the hearing, which was held on 25 November 2010, oral argument was presented by the agents for the Czech Republic and the Commission.

VI — Admissibility

28. The Slovak Republic submits that the reference for a preliminary ruling is inadmissible because the questions referred are hypothetical. In so far as the present case concerns the compatibility of the Czech legal system with the principle of EU law that discrimination on grounds of nationality is prohibited, the Slovak Republic is of the opinion that Ms Landtovà is not the victim of the alleged discrimination but rather the beneficiary. The case-law of the Constitutional Court guarantees the supplement to the retirement benefit for Czech nationals like Ms Landtovà,. Accordingly, in the view of the Slovak Government, the issue raised in the instant case would be useful only in proceedings brought by an individual who is *not* entitled to receive the supplement to which individuals in the same situation as Marie Landtovà are currently entitled.

29. The Court has held on many occasions that, in exceptional circumstances, it can examine the conditions in which the case was referred to it by the national court, in order to confirm its own jurisdiction. The Court can refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of Community law that is sought bears no relation to the actual facts of the main

action or its purpose or where the problem is hypothetical. [6]

30. However, that is not so in the instant case. Although Ms Landtovà is a beneficiary of the rules at issue, rather than being excluded, it must be recalled that both the CSSA and the Nejvyšší správní soud have raised serious doubts about the rule on which her claim is based. The present dispute does not involve an appellant who has brought proceedings in the abstract or a court which has raised points of law that are unconnected to the facts of the particular case. On the contrary, the proceedings which have given rise to the reference for a preliminary ruling are a second appeal on a point of law resulting from a disagreement between two Czech courts, which is reflected in three diverging decisions, against the background of settled but, as we have seen, by no means uncontroversial case-law of the Constitutional Court. It is clear that the Nejvyšší správní soud seeks a preliminary ruling in order to dispel a legal uncertainty which has given rise to lengthy proceedings between Ms Landtovà and the Czech authorities, which, moreover, it may reasonably be presumed are not the only proceedings concerned with this issue.

31. That should be sufficient to reject the argument that the instant case is hypothetical in nature, regardless of the conclusions which it is appropriate to draw from the particular way in which the present reference for a preliminary ruling has come before the Court.

6 — In that connection see, inter alia, Case 244/80 *Foglia* [1981] ECR 3045, paragraph 21; Case C-379/98 *PreussenElektra* [2001] ECR I-2099, paragraph 39, and Case C-544/07 *Rüffler* [2009] ECR I-3389, paragraph 37.

VII — The first question

32. The first question which the Nejvyšší správní soud has referred to the Court concerns the compatibility of the case-law of the Czech Constitutional Court with Regulation No 1408/71. In particular, the referring court is uncertain whether the granting of a supplement to the recipient of a social security benefit is the result of taking the same contribution period into account twice, in a way which is prohibited by Article 46(2) of Regulation No 1408/71.

33. That article lays down a method of calculation which apportions the total amount of the benefit between the different social security schemes to which the recipient was subject over the years when contributions were made. In order to prevent the overvaluation or undervaluation of the total benefit, the article apportions each contribution period in each Member State in such a way that it is not possible to take into account the same period under two or more national systems at the same time. Clearly, the fact that more than one scheme may cover the same contribution period makes an objective apportionment possible.

34. The Czech Republic submits that, by guaranteeing Czech nationals and residents a supplement to make up the difference between the Slovak benefit and the Czech benefit, the Czech Constitutional Court requires the CSSA to take the same period into account twice, which is incompatible with Article 46(2) of Regulation No 1408/71. Further, in the opinion of the Czech Republic, that supplement modifies the rule laid down in Article 20 of the Czech-Slovak agreement of 29 October 1992, which determines the applicable, competent scheme for the purposes of social security benefits. That agreement is guaranteed in Annex III (A) to Regulation No 1408/71, pursuant to Article 7 thereof. Thus, the Czech Republic contends, the Constitutional Court altered the financial amount to which recipients are entitled under the Czech-Slovak agreement (since it granted an entitlement to a supplement which increases the final amount) and the criterion for competence (since, in a case such as the instant one, where competence to grant the benefit rests with the Slovak authorities, only the Czech authorities may award the supplement).

35. Although the terms used by the Constitutional Court may invite the conclusion that the disputed supplement modifies the method of calculation provided for in Article 46(2) of Regulation No 1408/71, the fact is that, for the reasons I will now set out, this case does not involve such an outcome.

36. First of all, from a procedural perspective, it should be noted that, rather than being calculated at the same time as the basic benefit, the supplement to which Czech nationals and residents are entitled is calculated afterwards. In other words, the recipient of a benefit who is subject to Regulation No 1408/71 and to the Czech-Slovak agreement must, in the first instance, approach the authorities stipulated in that legislation and calculate the applicable amount in accordance with its provisions. Once that calculation has been made, the question arises of entitlement to the supplement in accordance with the case-law of the Czech Constitutional Court. It is, therefore, a supplement in the strict sense, an upward *revision*, so to speak, of the amount of the benefit, which is not intended to modify the method of calculation but rather the legal status of the recipient. Further, the supplement is not granted automatically but rather at the request of the person concerned, since it is an ancillary right which accompanies the basic benefit.

37. Viewed in those terms, the disputed case-law does not infringe the rules of the Czech-Slovak agreement because those rules are fully applied. The effect of the supplement does not cast doubt on either the applicable scheme or the competence of the authorities designated in the Czech-Slovak agreement and instead it allows an ancillary benefit which is added to the basic benefit to be claimed from another social security administration following the application of the agreement. Further, a contrary solution would entail a reduction of the benefit as a result of the application of EU law, something which would be difficult to reconcile with the

case-law of the Court.[7] Accordingly, I believe that the case-law of the Czech Constitutional Court is not incompatible with the rules governing calculation of the benefit laid down in Article 45 of Regulation No 1408/71, or with the rules of the Czech-Slovak agreement. On the contrary, the supplement to which Czech nationals and residents may be entitled is an extra monetary payment which does not affect the application of the abovementioned provisions.

38. Consequently, for the reasons explained above, I believe that Regulation No 1408/1971 must be interpreted as meaning that it is not incompatible with national case-law in accordance with which a social security institution is required to grant to nationals and residents who claim it a supplement the amount of which is the difference between the benefit to which they are entitled in another Member State and that to which they would have been entitled in their Member State of nationality.

VIII — The second question

39. By its second question, the referring court asks, in short, whether the case-law of the Czech Constitutional Court referred to above is compatible with the principle of EU law of the prohibition of discrimination on grounds of nationality and residence. Although the disputed supplement does not entail taking the same contribution period into account twice, it is the case, as this Opinion has made clear, that the case-law of the Constitutional Court on which it is based restricts its personal scope to Czech nationals and residents. It is, therefore, a supplement which is payable only to individuals who hold Czech nationality and who are also resident in Czech territory, to the exclusion of all other European Union nationals.

40. First of all, I will deal in turn with the aspects in which the treatment is discriminatory, and I will state at the outset that I will conclude that the prohibited discrimination does exist. Next, for the purposes of providing the referring court with a helpful reply, I will deal with the underlying, yet unavoidable, issue relating to the measure of discretion available

7 — See, inter alia, Case 92/63 *Nonnenmacher* [1964] ECR 557; Case 807/79 *Gravina* [1980] ECR 2205, paragraph 7; Case 254/84 *De Jong* [1986] ECR 671, paragraph 15; Case 21/87 *Borowitz* [1988] ECR 3715, paragraph 24; Case 168/88 *Dammer* [1989] ECR 4553, paragraph 21; Case C-227/89 *Rönfeldt* [1991] ECR I-323, paragraph 26; Case C-370/90 *Singh* [1992] ECR I-4265, paragraph 23; Case C-305/92 *Hoorn* [1994] ECR I-1525, paragraph 16; and Case C-277/99 *Kaske* [2002] ECR I-1261, paragraph 37.

to the referring court when it comes to drawing the proper inferences from the reply to be given by the Court.

41. As I will now explain, the fact that the supplement is restricted to a group of nationals raises doubts as to its compatibility with Article 3 of Regulation No 1408/71, interpreted in the light of Article 39 EC. If the discrimination is confirmed, the supplement must be held to be incompatible with EU law. Owing to the context in which the present case has arisen some additional clarification is required. The supplement stems from case-law of the Czech Constitutional Court which, for its part, interpreted a fundamental right in a way which extends the scope of protection of that right. The reply which the Court gives cannot be blind to that fact and, therefore, I shall propose a reply which is tailored to the context of the present case, having particular regard to the regressive effects which a reply from this Court of the kind put forward above would have on the legal status of Ms Landtovà.

A — *The alleged discrimination*

42. The Czech Government, the Slovak Government and the Commission all take the view that a supplement of the kind at issue, which is restricted exclusively to Czech nationals and residents, is contrary to the principle of EU law of non-discrimination. They base their position more directly on Articles 3 and 10 of Regulation No 1408/71, which lay down the principle of equality of treatment in relation to social security, interpreted in the light of Article 39 EC, which prohibits all discriminatory impediments to the freedom of movement for workers.

43. The discrimination complained of is twofold: the case-law of the Czech Constitutional Court lays down, as a cumulative condition for drawing the supplement, the requirements of Czech nationality and residence. As I will now explain, while they are subject to different rules, both requirements are equally contrary to EU law.

1. Discrimination based on nationality

44. In accordance with Article 3 of Regulation No 1408/71, persons who are subject to its provisions are entitled to rely on the legislation of any Member State under the same conditions as nationals of that State. In short, it is a requirement not to discriminate on grounds of nationality which sets out, in the field of social security, a principle already expressed in Article 39 EC. As the Commission has rightly stated, that rule means that Member States may not adopt measures which differentiate without justification between European Union nationals. Accordingly, it does not prohibit all discrimination

based on nationality but rather discrimination for which there are no specifically justified reasons. [8]

45. First of all, it should be pointed out that the disputed supplement is a benefit which is granted only to Czech nationals. Accordingly, it is a measure which is clearly discriminatory. Next, it is necessary to determine whether the difference in treatment is justified by objective and reasonable grounds. In that connection, notwithstanding the fact that, by its very nature, discrimination based on nationality may be justified only in very specific circumstances, none of the parties to the main proceedings, or the Slovak Government or the Commission, have submitted relevant arguments in support of one view or the other. Only the Commission has taken the trouble to analyse the discriminatory character of the nationality condition imposed on recipients of the supplement and its arguments are confined to the assertion that the measure is unjustified.

46. The case-law of the Czech Constitutional Court appears to base the nationality condition on the wording of Article 30 of the Charter of fundamental rights and freedoms of the Czech Republic, which refers simply to 'citizens'. Such a term would restrict the fundamental right to social assistance to Czech nationals, thereby justifying the restriction of the disputed supplement, the legal basis for which is Article 30, to that group. The immediate legal effect of the case-law is to introduce discrimination based on nationality, which EU law allows only in specifically justified cases. The literal interpretation given by the Constitutional Court, based on the wording of the Czech charter, does not seem of sufficient weight to support a difference in treatment of the kind at issue, at least from the point of view of EU law.

47. Accordingly, in the absence of other arguments put forward in the proceedings, I believe that the personal scope attributed to the supplement at issue amounts to discrimination for which there is no objective and reasonable justification.

2. Discrimination based on residence

48. As previously stated, recipients of the supplement at issue must satisfy an additional condition: permanent residence in the territory of the Czech Republic. The referring court also asks the Court whether this second

8 — See, inter alia, Case C-1/78 *Kenny* [1978] ECR 1489; Case C-302/02 *Laurin Effing* [2005] ECR I-553; and Case C-332/05 *Celozzi* [2007] ECR I-563.

condition is compatible with the principle of EU law of non-discrimination.

49. Under EU law, residence conditions and nationality clauses are not subject to the same rules. Clearly, Article 10 of Regulation No 1408/71 prohibits Member States from linking the granting of social assistance to the requirement that the recipient must reside in their territory. However, both secondary law and the case-law of the Court have applied a more flexible approach to residence conditions than to nationality conditions. Further, the approach varies depending on the type of benefit. [9] Article 10 of Regulation No 1408/71 begins by stating that, save as otherwise provided, the prohibition of residence clauses applies to invalidity, old-age or survivors' cash benefits, pensions for accidents at work or occupational diseases and death grants. When the Court has been required to rule on residence clauses applicable to benefits other than the ones listed in Article 10, such as non contributory benefits, the legal frame of reference and the stringency of the review have varied.

9 — See, inter alia, Case C-326/90 *Commission* v *Belgium* [1992] ECR I-5517; Case C-43/99 *Leclere and Deaconescu* [2001] ECR I-4265; Case C-212/00 *Stallone* [2001] ECR I-7625; and Case C-28/00 *Kauer* [2002] ECR I-1343.

50. In the instant case, the disputed supplement is a benefit within the meaning of Regulation No 1408/71, because, first, it is granted to recipients on the basis of a statutorily defined status, regardless of any individual, discretionary assessment of their personal needs, and, second, it relates to one of the risks expressly referred to in Article 4(1) of the regulation: old age. That is also one of the risks referred to in Article 10, which prohibits residence clauses in connection with the benefits set out therein.

51. In the light of the foregoing arguments, it is appropriate to state that the residence condition laid down in the case-law of the Czech Constitutional Court is a discriminatory measure which may be accepted as lawful only if it is justified on objective and reasonable grounds. However, as I stated in points 45 and 46 of this Opinion, no arguments have been put forward to justify the measure in these proceedings. Indeed, in the case of the residence condition, the arguments before the Court are even weaker. Furthermore, the case-file does not explain the reasoning which led the Czech Constitutional Court to qualify its case-law in this regard.

52. Accordingly, in the absence of arguments submitted in the proceedings and in the light of the circumstances surrounding the imposition of the residence requirement, I

believe that the supplement at issue is a discriminatory measure for which there is no objective and reasonable justification.

B — *The effects of a finding of infringement of the European Union principle of non-discrimination on the judgment to be given by the referring court*

53. The reply which I have so far proposed to the Court in relation to the second question would be incomplete if it were not followed by some observations relating to the highly specific context in which these proceedings arose.

54. I should point out in particular, by way of an introduction, that, as I indicated above, the case has at its origin case-law of the Czech Constitutional Court concerning the interpretation of the fundamental right to social security benefits. The aim of that case-law was to remedy the practical effects of the 1992 Czech-Slovak agreement, the provisions of which made Czech nationals who had worked for a Slovak employer on the date of partition subject to the scheme and competence of the social security authorities of the Slovak Republic. It appears that the financial harm which those individuals suffered as compared with other Czech citizens who were subject to the scheme and competence of the Czech authorities was well-known, which perhaps explains an interpretation of the scope of Article 30 of the Charter of fundamental rights and freedoms of the Czech Republic which would alleviate that situation. The solution which the Czech Constitutional Court reached was also determined by the existence of an international treaty, the Czech-Slovak Agreement. The supplement which was eventually granted was, therefore, the result of an interpretation which is a compromise between guaranteeing the fundamental right and fulfilling the international obligations of the Czech Republic.

55. However, the difficulty which I must now address is directly linked to the classic dilemma raised by provisions which are found to be discriminatory. The restoration of a body of rules which is consistent with the principle of equality, or with the prohibition of discrimination, within the framework of a single legal system must fall directly to the court with responsibility for reviewing those rules. [10] This can be achieved, and here is the dilemma, either by levelling 'upwards', in other words, extending the more favourable situation to everyone, or by levelling 'downwards', in other words, eliminating the more favourable situation for everyone. As a matter of principle, it is also the case that, in a national context, this may also be achieved through action by the legislature in the form of the adoption of a 'new' rule, that is, one which differs from the previous two alternatives and which complies with the prohibition of discrimination.

10 — In that connection, see González Beilfuss, M., *Tribunal Constitucional y reparación de la discriminación normativa*, Centro de Estudios Políticos y Constitucionales, Madrid, 2000.

56. However, the question referred for a preliminary ruling under Article 267 TFEU concerns the interpretation or validity of EU law, which means that the effective restoration of the overriding importance of the principle of equality in the legal system of the Member State, with the scope established by the Court of Justice, falls, as the case may be, to the courts or legislative bodies of that State. In any event, it is always the result of a specific dispute which gives rise to a reference for a preliminary ruling and in relation to which the reply of the Court must provide some assistance. As a matter of principle, therefore, the reply to the question should have the effect of determining the judgment to be given at the appropriate time.

57. The difficulty with the instant case has already been signalled by the argument of the Slovak Republic to the effect that it is hypothetical; I have, however, proposed that that argument should be rejected.

58. Naturally, a reply of the kind I propose, which identifies as discriminatory the rule at issue, will, in any event, have a number of effects on the legal system of the Member State concerned that are general in scope. A body of rules which is found to be discriminatory must be eliminated within the context of that legal system by the methods deemed to be appropriate. In this case, whether action is taken by the courts alone, by the legislature or by the Constitutional Court is not a matter which forms part of the reply to be given to the referring court.

59. Also important are the immediate effects which the Court's reply has on the outcome of the proceedings in which the reference for a preliminary ruling has been made, which will determine whether a citizen of the Union is entitled to receive a particular old-age benefit which, if regard is had to the reasoning of the Czech Constitutional Court on which the case-law creating the rule at issue is based, may have a bearing on a decent minimum standard of living. EU law is founded on a number of values which guide and inform it and exercise a powerful influence capable of affecting the decisions of its institutions and, in particular, the decisions of its courts. [11]

60. Accordingly, as I have stated, the reply which I propose to the second question referred will have a general and immediate effect on the legal system of the Member State concerned. I believe, however, that this reply cannot have the direct effect of a judgment upholding the claim of the Czech social security body. I would like to make clear that I certainly do not propose that the referring court should apply to the case a rule which I have also suggested is discriminatory. What I do propose is that, in the particular circumstances of the present reference for a preliminary ruling, the national court may not regard the reply to its question as having

11 — See, for example, Case C-403/05 *Parliament* v *Commission* [2007] ECR I-9045, paragraph 56; Case C-91/05 *Commission* v *Council* [2008] ECR I-3651; Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation* v *Council and Commission* [2008] ECR I-6351, paragraph 303; and Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08 *Salahadin Abdulla and others* [2010] ECR I-1493.

sufficient weight to support the a decision to uphold the claim of the CSSA in the main proceedings.

61. As I have pointed out, EU law is founded on a number of principles the status of which is sufficiently prominent to exclude an outcome of the kind I have just described. Naturally, it cannot be denied that the Court has for a long time relied on these principles for the purposes of restoring the overriding importance of the principle of equality.

62. Indeed, the case-law of the Court provides solid guidance in that regard.

63. Sexual equality policies have provided the Court with the opportunity to examine the consequences flowing from the redress of discrimination. In *Federatie Nederlandse Vakbeweging* [12], a case concerning the directives on gender equality, specifically in the field of social security, the Court held that women who suffer discriminatory treatment are entitled 'to be treated in the same manner, *and to have the same rules applied to them, as men who are in the same situation*, since, where [a] directive has not been implemented, those rules remain the only valid point of reference.' [13] That decision, given in a case where a Member State had not adopted measures transposing a directive, required the national court to redress the discrimination in a particular way: by treating the woman concerned in the same way as the favoured group. Subsequently, the Court extended that case-law to cases in which indirect discrimination, also based on sex, was challenged. Thus, in *Ruzius-Wilbrink*, [14] the Court pointed out, by analogy to the procedure in a case of direct discrimination, that 'in a case of indirect discrimination... the members of the group placed at a disadvantage, be they men or women, are entitled *to have the same rules applied to them as are applied to the other recipients of the allowance*.' [15]

64. It should be pointed out that, in 1991, that case-law moved forward considerably when the Court held that it was based not only on the equal treatment directives but also on the Treaty, in addition to developing the criteria which the national court seised of the main proceedings must apply. In *Nimz*, the Court held that victims of discrimination must be afforded the same status as the favoured group in a case which concerned Article 141 EC (now Article 157 TFEU), and went on to state that a national court which is called upon to apply EU law 'is under a duty to give full effect to those provisions, if necessary by refusing of its own motion to apply any conflicting provision of national legislation, and

12 — Case 71/85 *Federatie Nederlandse Vakbeweging* [1986] ECR 3855.

13 — Ibid, paragraph 23 (emphasis added).

14 — Case C-102/88 *Ruzius-Wilbrink* [1989] ECR 4311.

15 — Ibid, paragraph 20 (emphasis added).

it is not necessary for the court to request or await the prior setting aside of such provision by legislative or other constitutional means.' [16]

65. That statement of the law is now settled case-law. [17] It may be summarised briefly as follows: when a court holds that a national measure infringes the principle of EU law that discrimination on grounds of sex is prohibited, it is required to apply the legal status of the favoured group to those who have suffered the unequal treatment. There is nothing to prevent the State concerned from altering that solution and abolishing the favourable treatment for everyone equally; that is, by redressing the discrimination 'downwards'. However, until such time as the authorities adopt such a decision, the courts must apply the more favourable treatment to everyone pursuant to EU law. [18]

66. It can hardly be disguised that the case-law cited above concerns a specific area other than that covered by the instant case, namely, policies on equal treatment for men and women in the sphere of employment. However, the basis for that case-law is not restricted exclusively to the field of gender policies. The *Nimz* judgment is founded on grounds which apply equally to other areas of EU law, including, as I will go on to explain, social security and the freedom of movement for workers.

67. The legislative basis for the *Nimz* judgment is Article 141 EC, which calls on Member States to ensure the application of the principle of equal pay for men and women. That article expresses the wish of the Union to combat discrimination based on sex, a particularly abhorrent kind of discrimination, in a field where social protection considerations such as employment converge. In that connection, Article 3 of Regulation No 1408/71 also lays down a prohibition of all discrimination based on a ground to which the Union attaches particular gravity: nationality. As evidence of how this type of discrimination is to be judged, it is expressly proscribed by Article 12 EC and by all the freedoms of movement, in which connection the principle of non-discrimination proscribes in particular any State measure based, directly or indirectly, on nationality criteria. Furthermore, the Charter of Fundamental Rights of the European Union confirms the priority of the fight against the two forms of discrimination, by prohibiting them expressly and individually in Articles 21(2) and 23, respectively.

16 — Case C-184/89 *Nimz* [1991] ECR I-297, paragraph 19.

17 — See, *inter alia*, Case C-408/92 *Avdel Systems* [1994] ECR I-4435, paragraphs 16 and 17; Case C-442/00 *Rodríguez Caballero* [2002] ECR I-11915, paragraphs 42 and 43; Case C-81/05 *Cordero Alonso* [2006] ECR I-7569, paragraphs 45 and 46; and also the order under Article 104(3) of the Rules of Procedure in Joined Cases C-128/07 to C-131/07 *Molinari* [2008] ECR I-4, paragraph 23.

18 — On the *Nimz* case-law, see Adinolfi, A., *Common Market Law Review*, vol. 29, 1992; Burragato, G., 'La discriminazione indiretta secondo la Corte di giustizia: oneri probatori e sanzioni', *Rivista italiana di diritto pubblico comunitario*, 1993; Deakin, S., 'Levelling Down Employee Benefits', *The Cambridge Law Journal*, vol. 54, 1995; and More, G., 'Seniority Pay for Part-time Workers', *European Law Review*, 1991.

68. In addition, Article 141 EC, and with it the *Nimz* case-law, responds to an objective set out in Article 2 EC, which provides that the Community 'shall have as its task... to promote... equality between men and women', albeit in the context of 'a high level of employment and of social protection'. By calling for a specified level of social protection, the final phrase finds common ground with the objectives inherent in the European Union legislation on social security. Thus, where discrimination based on nationality arises in the context of social security, as in the instant case, the prohibition of that discrimination is founded on a number of social protection values for workers which the Union enshrines and which are the same as the ones referred to in relation to the prohibition of discrimination based on sex in the sphere of employment. [19]

69. Notwithstanding the foregoing, it is also true that social policy requires in all cases a global view of each legal situation and, in particular, special attention to the economic and financial aspects which define the social security benefit and social assistance systems of the Member States. Where EU law is concerned, that need for special attention becomes even greater – if that is possible – because European Union social policies merely coordinate, rather than unify or harmonise, the national social security systems. It is therefore necessary to find solutions which balance the social values reflected in a principle like the principle of non-discrimination against the need to protect the financial autonomy and integrity required by national social security systems. That is the balancing exercise which the Court carried out in *Nimz*, because, as I indicated in point 64 of this Opinion, the Court merely requires national courts to remedy discrimination on a case-by-case basis, while leaving the general remedial solution, whatever it may be, to the legislature or constitutional institution of the State in question. In that way, the *Nimz* judgment guarantees a particular level of protection for individuals who are parties to proceedings and who call for a response from the courts while conferring on each Member State responsibility for the general, definitive remedial solution. Following that same line of reasoning, a case-by-case remedy is also acceptable in relation to discrimination based on nationality in the sphere of social security, where it is necessary to have regard to the overall context of each national welfare system, and it will be for Member States, using the legislative or constitutional procedures laid down in their legal systems, to decide on a general formula for redress.

19 — I refer in this regard to Case C-341/05 *Laval un Partneri* [2007] ECR I-11767, paragraphs 104 and 105, and Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union* ('Viking Line') [2007] ECR I-10779, paragraph 79, in which the Court, after pointing out the social objectives of the Community, held that the Community has 'not only an economic but also a social purpose, [and therefore] the rights under the provisions of the Treaty on the free movement of goods, persons, services and capital must be balanced against the objectives pursued by social policy, which include, as is clear from the first paragraph of Article 136 EC, inter alia, improved living and working conditions, so as to make possible their harmonisation while improvement is being maintained, proper social protection and dialogue between management and labour.'

70. In conclusion, I believe that the reply to this question must be founded on the *Nimz*

case-law, subject to the points I make below, where I question the discriminatory character of a social security supplement. Since the two cases share the same legal basis, objectives, principles and balancing of interests, I see no reason why an approach of the kind referred to should not be applied in the instant case.

71. Having said that, it only remains for me to consider again the particular circumstances of the present case, since it is necessary to determine whether the fact that they have arisen 'in reverse' has any bearing on the solution proposed. As I indicated in points 28 to 30 of this Opinion, it is not the victim of discrimination who has brought legal proceedings seeking an end to unequal treatment. On the contrary, it is a beneficiary of a discriminatory measure, Marie Landtovà, who was forced to institute legal proceedings as a result of the refusal of the social security authorities to grant her a supplement, who instigated these proceedings.

72. The proceedings in *Nimz*, like the vast majority of cases concerning discrimination, were instituted by an individual who had suffered discriminatory treatment prohibited by EU law, and, in that connection, the Court called on the referring court to apply to the applicant the same rules as the ones applicable to the favoured group. In a case like that of Marie Landtovà, in which the applicant is a beneficiary of the discriminatory measure, the referring court cannot extend the supplement to victims of the discrimination even if that is only for the simple reason that they are not parties to the proceedings.

73. What is required in the instant case is both more modest and more unusual: the finding that the national rule is discriminatory must be prevented from having the immediate effect of constituting the basis for eliminating, in this particular case, the more favourable position of someone who by law falls within the personal scope of that rule. Naturally, the foregoing will be necessary until such time as the Czech Republic takes general action to address the matter in accordance with the legislative or constitutional procedures laid down in its legal system.

IX — Conclusion

74. In the light of the foregoing considerations, I propose that the Court reply to the Nejvyšší správní soud as follows:

'(1) Regulation No 1408/1971 must be interpreted as meaning that it is not, in principle, incompatible with national case-law in accordance with which a social security institution is required to grant to certain individuals who claim it a supplement the amount of which is the difference between the benefit to which they are entitled in another Member State and that to which they would have been entitled in their Member State of nationality.

(2) Articles 3 and 10 of Regulation No 1408/71, interpreted in the light of Article 39 EC, are incompatible with a social security supplement which is granted only to Czech nationals who reside in the territory of the Czech Republic, with the characteristics described above. However, in the particular circumstances of this case, that reply does not have sufficient weight to support a decision to uphold the claim of the CSSA in the main proceedings.'