



Reports of Cases

OPINION OF ADVOCATE GENERAL
JÄÄSKINEN
delivered on 23 October 2012¹

Case C-401/11

Blanka Soukupová
v
Ministerstvo zemědělství

(Reference for a preliminary ruling from the Nejvyšší správní soud (Czech Republic))

(Agriculture — EAGGF — Regulation (EC) No 1257/1999 — Equal treatment — Concept ‘normal retirement age’ — Different retirement ages for men and women — Early retirement support for farmers — Directive 79/7/EEC)

I – Introduction

1. The present dispute concerns whether, and if so how, the principle of equal treatment between men and women has been breached by the Czech Republic in an administrative decision refusing payment of early retirement support under Council Regulation (EC) No 1257/1999 of 17 May 1999 on support for rural development from the European Agricultural Guidance and Guarantee Fund (EAGGF) and amending and repealing certain Regulations (‘Regulation No 1257/1999’).²
2. Mrs Blanka Soukupová, a Czech farmer, argues that it has been. She was denied early retirement support because she had already reached the retirement age applicable to women under Czech law, which is lower than that applicable to men. As a consequence of her challenge to this decision, Nejvyšší správní soud (the Supreme Administrative Court of the Czech Republic) has referred a series of questions to the Court concerning the interpretation of Regulation No 1257/1999. In essence the national referring court asks whether European Union (‘EU’) law equal treatment principles preclude denial of early retirement support in circumstances in which it would have been paid to a man.
3. The purpose of the EU early retirement support scheme is to encourage farmers to transfer their farm holdings to younger farmers before they reach their normal retirement age. In this case the problem is created by the fact that in the Czech Republic, retirement age for women is lower than it is for men, and by reference to the number of children a woman has raised. In turn this means that eligibility for early retirement support differs along the same parameters. The interesting issue

¹ — Original language: English.

² — OJ 1999 L 160, p. 80. All of the provisions of Regulation 1257/1999 that are relevant to the present dispute were repealed with effect from 1 January 2007 by Article 93 of Council Regulation (EC) No 1698/2005 of 20 September 2005 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD) (OJ 2005 L 277, p. 1). However, given that Mrs Soukupová was denied early retirement support on 20 December 2006, Regulation No 1257/1999 is applicable *ratione temporis*.

therefore arises of whether early retirement support falls within the “other benefits” which can be paid to men and women under unequal conditions, as provided in Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security (‘Directive 79/7’).³

II – Legal framework

A – EU law

4. Article 3(1) of Directive 79/7 provides;

‘This Directive shall apply to:

(a) statutory schemes which provide protection against the following risks:

...

— old age,

...

(b) social assistance, in so far as it is intended to supplement or replace the schemes referred to in (a).’

5. Article 7 of Directive 79/7 provides;

‘1. This Directive shall be without prejudice to the right of Member States to exclude from its scope:

(a) the determination of pensionable age for the purposes of granting old-age and retirement pensions and the possible consequences thereof for other benefits;

(b) advantages in respect of old-age pension schemes granted to persons who have brought up children; the acquisition of benefit entitlements following periods of interruption of employment due to the bringing-up of children;

...

2. Member States shall periodically examine matters excluded under paragraph 1 in order to ascertain, in the light of social developments in the matter concerned, whether there is justification for maintaining the exclusions concerned.’

6. Recital 23 to Regulation No 1257/1999 states as follows;

‘... early retirement from farming should be encouraged in order to improve the viability of agricultural holdings, taking into account the experience acquired in the implementation of Regulation (EEC) No 2079/92’.

7. Recital 40 to Regulation No 1257/1999 states, inter alia, as follows;

³ — OJ 1979 L 6, p. 24.

‘... measures to remove inequalities and to promote equal opportunities for men and women should be supported’.

8. The 11th indent of Article 2 of Regulation No 1257/1999 provides;

‘Support for rural development, related to farming activities and their conversion, may concern:

...

— the removal of inequalities and the promotion of equal opportunities for men and women, in particular by supporting projects initiated and implemented by women.’

9. Article 10 of Regulation No 1257/1999 provides;

‘1. Support for early retirement from farming shall contribute to the following objectives:

- to provide an income for elderly farmers who decide to stop farming,
- to encourage the replacement of such elderly farmers by farmers able to improve, where necessary, the economic viability of the remaining agricultural holdings,
- to reassign agricultural land to non-agricultural uses where it cannot be farmed under satisfactory conditions of economic viability.

2. Early retirement support may include measures to provide an income for farm workers.’

10. Article 11(1) of Regulation No 1257/1999 provides;

‘A transferor of a farm shall:

- stop all commercial farming activity definitively; he may, however, continue non-commercial farming and retain the use of the buildings,
- be not less than 55 years old but not yet of normal retirement age at the time of transfer, and
- have practised farming for the 10 years preceding transfer.’

11. Article 12(2) of Regulation No 1257/1999 provides;

‘The duration of early retirement support shall not exceed a total period of 15 years for the transferor and 10 years for the farm worker. It shall not go beyond the 75th birthday of a transferor and not go beyond the normal retirement age of a worker.

Where in the case of a transferor a normal retirement pension is paid by the Member State, early retirement support shall be granted as a supplement taking into account the amount of the national retirement pension.’

12. Article 2 of Council Regulation (EC) No 1260/1999 of 21 June 1999 laying down general provisions on the Structural Funds⁴ provides;

‘1. For the purposes of this Regulation, “Structural Funds” shall mean the European Regional Development Fund (ERDF), the European Social Fund (ESF), the European Agricultural Guidance and Guarantee Fund (EAGGF), Guidance Section, and the Financial Instrument for Fisheries Guidance (FIFG), hereinafter referred to as “the Funds”.

...

5. ... The Commission and the Member States shall ensure that the operations of the Funds are consistent with other Community policies and operations, in particular in the areas of employment, equality between men and women, social policy and vocational training, the common agricultural policy, the common fisheries policy, transport, energy and the trans-European networks and the incorporation of the requirements of environmental protection into the definition and implementation of the operations of the Funds.’

13. Article 12 of Regulation No 1260/1999 provides;

‘Operations financed by the Funds or receiving assistance from the EIB or from another financial instrument shall be in conformity with the provisions of the Treaty, with instruments adopted under it and with Community policies and actions, including the rules on competition, on the award of public contracts, on environmental protection and improvement and on the elimination of inequalities and the promotion of equality between men and women.’

B – *National law*

14. Pursuant to Regulation No 1257/1999, on 26 January 2005 the Czech Republic adopted Government Decree No 69/2005 fixing the conditions for the grant of the subsidy in connection with the early cessation of an agricultural activity by an agricultural entrepreneur. Pursuant to Article 1, the governmental decree has the objective of granting subsidies in the context of the programme for supporting the early cessation of agricultural activities by an agricultural entrepreneur.

15. Under Paragraph 3(1) of Government Decree No 69/2005, a natural person may submit an application for registration under the scheme if, inter alia, on the day on which the application for registration is submitted he has already reached the age of at least 55 and on the day on which the application for registration is submitted he has not reached the age required for entitlement to a retirement pension.

16. Under the provisions of Paragraph 29 of Law No 155/1995 on pension insurance, in the version in force until 31 December 2009, to which Government Decree 69/2005 refers, the insured person is entitled to a retirement pension if he has completed a period of insurance of no less than (a) 25 years and reached at least the age required for entitlement to a retirement pension or (b) 15 years and reached at least 65 years of age, where he has not satisfied the condition in (a).

4 — OJ 1999 L 161, p. 1. Regulation No 1260/1999 was repealed with effect from 1 January 2007, by virtue of Article 107 of Council Regulation (EC) No 1083/2006 of 11 July 2006 laying down general provisions on the European Regional Development Fund, the European Social Fund, and the Cohesion Fund and repealing Regulation (EC) No 1260/1999 (OJ 2006 L 210, p. 25). However, given that Mrs Soukupová was refused early retirement benefit on 20 December 2006, Regulation No 1260/1999 governs the matter to hand *ratione temporis*. I would further note, however, that Regulation No 1083/2006 protects equal treatment between men and women in even clearer terms in Article 16 thereof.

17. Under Paragraph 32(1) of Law No 155/1995 on pension insurance, to which Government Decree 69/2005 also refers, pensionable age was 60 for men and between 53 years of age and 57 years of age for women (according to the number of children). These rules applied to insured persons who had reached that age by 31 December 1995. Paragraph 32(2) of Law No 155/1995 further provides for the phased increase in pensionable age for insured persons who reach these age limits during the period 1 January 1996 to 31 December 2012 and Paragraph 32(3) of Law No 155/1995 establishes pensionable age after 31 December 2012 at 63 for men and 59 to 63 for women (according to the number of children).

III – Facts and the questions referred

18. The applicant, Mrs Blanka Soukupová, who was born on 24 January 1947, applied for registration under the farmers' early retirement from farming scheme ('the scheme') on 3 October 2006.

19. On 20 December 2006 Mrs Soukupová's application for early retirement support was refused by the Státní zemědělský intervenční fond (State Agricultural Intervention Fund) because, on the date of her application, she had already reached the age entitling her to a retirement pension. Pursuant to Paragraph 32(1) and (2) of Law No 155/1995 on pension insurance she, as a woman having raised two children, became so entitled on 24 May 2004. However, if Mrs Soukupová had had only one or no children, she would not have been eligible for a pension until after 24 May 2004.

20. At the same time, a man born on the same date as Mrs Soukupová and who applied for registration under the scheme would not have been eligible for a retirement pension as at 3 October 2006. He therefore would have been awarded early retirement support. His entitlement to a pension would not have arisen until 2009. Moreover, no provision of Czech law altered the pensionable age of a man by reference to the number of children he has raised.

21. The Commission explains in its written observations that Mrs Soukupová has a substantial financial interest in participating in the scheme because, in 2005, the average old-age pension for women was CZK 7 030 (EUR 287.02) and in 2007 it was CZK 8 747 (EUR 357.09), while participants in the early retirement scheme could secure maximum income support of almost (net) CZK 13 500 (EUR 551.15) for either 15 years, or until the age of 75, whichever occurred the earliest.

22. That being so, Mrs Soukupová contested this refusal before the Ministry of Agriculture, but her claim was rejected by a decision dated 12 April 2007. She then brought an action before the Městský soud v Praze (Prague City Court). Mrs Soukupová claimed that the Czech legislation results in women who have brought up more children having an objectively shorter period in which to submit an application for early retirement support than either women who have brought up fewer children, or than men.

23. By judgment of 30 April 2009 the Městský soud v Praze set aside the Ministry of Agriculture's decision, rejecting an interpretation that would lead to unjustified differences between male farmers and female farmers. The Městský soud v Praze noted, inter alia, that one of the pre-conditions under Czech law for entitlement to an old-age pension is achievement of retiring age. For social and historical reasons, the retirement age of men and women is different, with the latter being determined by the number of children a woman has raised. The Městský soud v Praze found no legitimate basis for any difference in treatment concerning early retirement support on the basis of age, sex, or the number of children born, and referred Mrs Soukupová's case back to the Ministry for Agriculture for further consideration.

24. The Ministry of Agriculture lodged an appeal on a point of law against the judgment of the Městský soud v Praze before the Nejvyšší správní soud. It claimed, inter alia, that Regulation No 1257/1999 makes precise provision for only the lower age limit for an applicant seeking early retirement support (and not the upper limit) that the normal retirement age was laid down separately in the individual Member States, and that the term ‘normal retirement age’ in Article 11(1) of Regulation No 1257/1999 and ‘pensionable age’ in Law No 155/1995 on pension insurance were analogous in meaning.

25. The Nejvyšší správní soud decided to refer the following questions for a preliminary ruling:

- ‘(1) May the concept of “normal retirement age” at the time of transfer of a farm under Article 11 of Council Regulation (EC) No 1257/1999 of 17 May 1999 on support for rural development from the European Agricultural Guidance and Guarantee Fund (EAGGF) and amending and repealing certain Regulations be interpreted as “the age required for entitlement to a retirement pension” by a particular applicant under national legislation?
- (2) If the answer to the first question is in the affirmative, is it in accordance with EU law and the general principles of EU law for ‘normal retirement age’ at the time of transfer of a farm to be determined differently for individual applicants depending on their sex and the number of children they have brought up?
- (3) If the answer to the first question is in the negative, what criteria should the national court take into account when interpreting the concept of “normal retirement age” at the time of transfer of a farm under Article 11 of Council Regulation (EC) No 1257/1999 of 17 May 1999 on support for rural development from the European Agricultural Guidance and Guarantee Fund (EAGGF) and amending and repealing certain Regulations?’

26. Mrs Soukupová, the Czech Government, the Polish Government, and the European Commission have submitted written observations. The Czech Government and the Commission participated at the oral hearing held on 28 June 2012.

IV – Analysis

A – Introductory remarks

27. The present dispute raises the question of whether a Member State, which has exercised its entitlement under EU law to provide different retirement ages for men and women with respect to the availability of the old-age pension can rely on the same, discriminatory, national rules to determine ‘normal retirement age’ under Article 11(1) of Regulation No 1257/1999. The case to hand therefore contains a hidden complexity, due to the latitude afforded to the Member States by Article 7(1) of Directive 79/7 for compliance with the principle of equal treatment in the determination of pensionable age for the purposes of granting old-age and retirement pensions, and the possible consequences thereof for other benefits.

28. However, Question 1 is expressed in more straightforward terms which do not reflect this complexity. It simply asks whether ‘normal retirement age’ under EU law can be interpreted as ‘the age required for entitlement to a retirement pension’ under national law. In my opinion this is the context in which Regulation No 1257/1999 should be understood, and Question 1 thereby answered.

29. However, the matter does not end there. The EU legislature, as much as the Member States when they are applying or implementing EU law, are bound by the principle of equal treatment between men and women. Any piece of EU legislation that cannot be interpreted in conformity with this principle is invalid.⁵ Or, under a general principle of interpretation, a Community measure must be interpreted, as far as possible, in such a way as not to affect its validity and in conformity with primary law as a whole, including the principle of equal treatment.⁶

30. Therefore, account needs to be taken of the position of Member States like the Czech Republic who have exercised their entitlement under EU law to provide different retirement ages for men and women in the context of the old-age pension. This means that a general approach is needed, and one which takes due account of general principles of EU equality law.

B – Question 1

31. In principle the concept of ‘normal retirement age’ at the time of transfer of a farm under Article 11(1) of Regulation No 1257/1999 should be interpreted as meaning ‘the age required for entitlement to a retirement pension’. This conclusion results from the aims pursued by Regulation No 1257/1999 and the text of its provisions.

32. Early retirement support is not directed at supplying a supplement to the retirement pension for social reasons. Nor does it directly aim at providing additional income for elderly farmers. These consequences are inherent in Regulation No 1257/1999 as a means of achieving the primary aim of the early retirement support scheme which is to create an economic incentive to older farmers to cease their activities early, and in circumstances in which they would not ordinarily do so.

33. Hence, the target of the early retirement support scheme is to facilitate structural transformation of the agricultural sector to better ensure the viability of agricultural exploitation. As the Commission points out in its written observations, there is a presumption underpinning Regulation No 1257/1999 that older farmers will be less inclined to engage with modern technology that will enhance the productivity of farms than younger farmers. As indicated in recital 23 of Regulation No 1257/1999, early retirement of farmers is encouraged with the aim of improving the viability of agricultural holdings.

34. However, it can be assumed that, in normal circumstances, a farmer will not cease his or her activities *before* they have become entitled to an alternative source of income in some form of a pension. It would seem, therefore, to be in conformity with this logic to impose, as a condition for the payment of *early* retirement support, a requirement that the application for it be made prior to the occurrence of eligibility for the normal old-age pension.

35. As the Commission points out in its written observations, the second paragraph of Article 12 of Regulation No 1257/1999 makes it clear that, when a normal retirement pension is paid by the Member State, early retirement support shall be granted as a complement to retirement pension, thereby avoiding excessive compensation in the form of a benefit that was concurrent with the old-age pension. The fact that early retirement support continues to be payable after normal retirement shows that it aims at providing a sufficient incentive to farmers whose national old-age pensions are modest and who would otherwise have continued their agricultural activity after having reached the retirement age.

5 — See e.g. Case C-236/09 *Association belge des Consommateurs Test-Achats and Others* [2011] ECR I-0000.

6 — Case C-149/10 *Chatzi* [2010] ECR I-8489, paragraph 43.

36. I would note further that, under Article 12(2) of Regulation No 1257/1999, the maximum duration of early retirement support is 15 years in the case of transferors of farms, and it may be paid up to their 75th birthday. On the other hand, as Article 11(1) of Regulation No 1257/1999 precludes Member States from including in the scheme farmers who have already reached ‘normal retirement age’, the combined effects of these provisions prevents Member States from including farmers in the scheme who have reached normal retirement age, but nonetheless enables the Member States to continue to pay the support after they have reached that age.

37. The concept of ‘normal retirement age’ in Article 11(1) and, indeed, Article 12(2) of Regulation No 1257/1999 in my opinion has to be interpreted in a uniform manner throughout the European Union. However, and not unlike many other notions used in directly applicable EU Regulations, this EU law concept implicitly refers to national law provisions that are not harmonised. Hence, even if the concept of ‘normal retirement age’ in the regulation must be interpreted as referring to the age required for entitlement to a retirement pension and not, for example to an age limit concerning particular national early retirement schemes, that age is, in concrete terms, defined by the applicable national legislation.⁷

38. Nevertheless, the application of the notion of normal retirement age is subject to the imperatives of equal treatment. While, in principle, these provisions allow Member States to tie ‘normal retirement age’ under Regulation No 1257/1999 to ‘the age required for entitlement to a retirement pension’ under national legislation, the entitlement to do so is subject to compliance with the principle of equal treatment between men and women. I will address what this requires in my answer to Question 2.

39. I therefore propose the following answer to the first question;

‘The concept of “normal retirement age” at the time of transfer of a farm under Article 11 of Regulation No 1257/1999 may be interpreted as “the age required for entitlement to a retirement pension” by a particular applicant under national legislation.’

C – Question 2

1. Introductory comments

40. By Question 2, the Nejvyšší správní soud wishes to find out whether it is in accordance with EU law and the general principles of EU law for ‘normal retirement age’ at the time of transfer of a farm to be determined differently for individual applicants depending on their sex and the number of children they have brought up?

41. Here it is necessary to recall that under Czech law, ‘the age required for entitlement to a retirement pension’ is different for men and women. Moreover, it is influenced by the number of children a woman has raised, but not by the number of children a man has raised. Can this justify a difference in the circumstances in which early retirement support is paid under Regulation No 1257/1999?

42. In this context it necessary first to ponder the question as to whether the different treatment of male farmers and female farmers under Czech law, in the context of early retirement support, can be ‘saved’ by Articles 3 and 7 of Directive 79/7. It is thus necessary to probe the following issues;

⁷ — See for an analogous situation relating to a notion in a directive, Case C-467/08 *Padawan* [2010] ECR I-10055, paragraph 37.

- (i) Is there a particular legal regime under EU law that covers the payment of early retirement support, or should the matter be determined by reference to general principles of EU law on the prohibition on unequal treatment?
- (ii) Is Mrs Soukupová being treated differently from a man in a comparative position?
- (iii) If so, is there an objective justification for this difference in treatment?⁸
- (iv) If so, is the difference in treatment proportionate to the objective pursued?⁹

2. Directive 79/7 is not pertinent to resolution of the dispute

43. As a preliminary issue, I acknowledge that Article 7(1)(a) and (b) of Directive 79/7 indeed preserves the entitlement of Member States to determine pensionable age for the purposes of granting old-age and retirement pensions, and the possible consequences thereof for other benefits (and including advantages for people who have brought up children).¹⁰ As is reflected in the written observations of the Polish Government, there would therefore appear to be scope for arguing that early retirement support is a consequential benefit flowing from a (lawful) difference between the pensionable age for men and women under Czech law.

44. However, as the Commission pointed out in its written observations, early retirement support does not fall within the statutory schemes that are listed in Article 3(1)(a) and (b) of Directive 79/7.¹¹ This therefore leaves the question as to whether early retirement support can amount to ‘other benefits’ under Article 7 of Directive 79/7 with respect to which the Member States are effectively excused from adherence to the principle of equal treatment between men and women.

45. As was pointed out by the Commission at the hearing, Article 7 of Directive 79/7 has consistently been interpreted restrictively. The Court has held that ‘where ... a Member State prescribes different retirement ages for men and women for the purposes of granting old-age and retirement pensions, the scope of the permitted derogation is limited to forms of discrimination which are necessarily and objectively linked to the difference in retirement age’.¹²

46. In my opinion, in the light of the established case-law, eligibility for early retirement support cannot be linked under Article 7(1) of Directive 79/7 to the difference in treatment between men and women with respect to the age at which they become entitled to an old-age pension. This is so because the ‘other benefits’ covered by Article 7(1)(a), and which can lawfully feature a difference in treatment between men and women on the basis of age, can entail only discrimination that ‘is objectively necessary in order to avoid disturbing the financial equilibrium of the social security system or to ensure coherence between the retirement pension scheme and other benefit schemes’.¹³

8 — See e.g. Case C-21/10 *Nagy* [2011] ECR I-6769, paragraph 47.

9 — See the Opinion of Advocate General Kokott in Case C-540/03 *Parliament v Council* [2006] ECR I-5769, point 107, citing inter alia Case T-8/93 *Huet v Court of Auditors* [1994] ECR II-103, paragraph 45, Case T-14/03 *Di Marzio v Commission* [2004] ECR-SC I-A-43 and II-167, paragraph 83. For an example of the operation of the principle of proportionality in the context of a Member State’s application of Regulation No 1257/1999 see Case C-241/07 *JK Otsa Talu* [2009] ECR I-4323.

10 — Case C-366/99 *Griesmar* [2001] ECR I-9383.

11 — The statutory schemes appearing Article 3(1)(a) and (b) of Directive 79/7 protect against sickness, invalidity, old age, accidents at work and occupational diseases, and unemployment. The directive is also applicable to social assistance, in so far as it is intended to supplement or replace these schemes.

12 — Joined Cases C-377/96 to C-384/96 *De Vriendt and Others* [1998] ECR I-2105, paragraph 25.

13 — Case C-137/94 *Richardson* [1995] ECR I-3407, paragraph 19.

47. As I have already mentioned, early retirement support is not a social security benefit, but a benefit which is aimed at improving the productivity of farming, in other words, an instrument of the Common Agricultural Policy. There is nothing in the case file, and nor was there any evidence presented at the hearing, to suggest the existence of the requisite fiscal links between the payment of early retirement support and both the Czech Republic's old-age pension scheme, and its broader social security system, or to show that the difference in treatment is justified by the need to maintain such coherence. Rather, aside from the payment of early retirement support as a supplement to the old-age pension as provided in Article 12(2) of Regulation No 1257/1999, the two payments are characterised by their independence from one another. That being so, I am unable to agree with the arguments made by the Polish Government to the effect that Article 7(1)(a) of Directive 79/7 can excuse any difference in treatment between Mrs Soukupová and a male farmer of the same age.

48. Indeed, as was observed in the written observations of Mrs Soukupová, even though the Czech Constitutional Court has held that unequal treatment between men and women is justified within the heart of the national pension system, it does not follow that this unequal treatment should apply in other areas of the lives of Czech citizens, such as the determination for eligibility of early retirement support.¹⁴

49. Further, no legislative justification for the difference in treatment between Mrs Soukupová and a man in a comparable position to her can be drawn from Article 7(1)(b) of Directive 79/7 which allows the Member States to exclude from its scope '(b) advantages in respect of old-age pension schemes granted to persons who have brought up children'. This is so for the simple reason that Mrs Soukupová is being disadvantaged with respect to her eligibility for early retirement support, for having brought up children. She has a substantial financial interest in participating in the scheme. The Czech Government is therefore wrong in so far as it asserts that Mrs Soukupová would suffer no particularly negative consequence by retiring and taking a full national pension. On the contrary, according to the information provided by the Commission, and to which I have already referred, she will suffer significant financial loss through exclusion from early retirement support.

50. Moreover, just as early retirement support falls outside of the exclusion provided by Article 7(1)(a), I would equally hold that it is not 'in respect of old-age pension schemes' for the purposes of Article 7(1)(b). Rather, it is a payment arising from the EAGGF.

51. Therefore, while I acknowledge that the determination of 'normal retirement age' under Article 11(1) of Regulation No 1257/1999 is connected with national pensions legislation, I am not able to reach a conclusion that would entitle the Member States, in their application of Regulation No 1257/1999, to breach fundamental principles of EU law, including the prohibition on discrimination based on sex.¹⁵ Indeed, the Court has held that 'a provision of a Community act could, in itself, not respect fundamental rights if it required, or expressly or impliedly authorised, the Member States to adopt or retain national legislation not respecting those rights'.¹⁶ Or as Advocate General Kokott has observed, 'the EU legislature may not authorise Member States to take measures which would infringe the fundamental rights of the European Union'.¹⁷

14 — Thus, no reliance can be placed by the Czech Government on the ruling of the Court of Human Rights of 20 June 2011 in *Andrle v. the Czech Republic*, no. 6268/08, which concerned the discrete issue of the compatibility of age discriminatory old-age pension laws, by reference to the number of children raised by mothers, with Article 14, and Article 1, Protocol No 1, of the ECHR. The ruling in *Andrle* does not apply *ratione materie* to the case at hand because in *Andrle* the Court of Human rights was primarily concerned with determining whether affording women an *advantage* amounted to a legitimate aim that could justify Article 14 ECHR unequal treatment.

15 — See Case 149/77 *Defrenne v Sabena (No 3)* [1978] ECR 1365, paragraphs 26 to 27. See further Articles 2 and 3(3) TEU, Articles 8 and 10 TFEU, and Article 21 and 23 of the European Union Charter of Fundamental Rights. See also, in the specific context of rural development, recital 40 of Regulation No 1257/1999, and Article 2, 11th indent, of the same regulation, and Articles 2(5) and 12 of Regulation No 1260/1990.

16 — *Parliament v Council*, paragraph 23.

17 — See the Opinion of Advocate General Kokott in *Association Belge des Consommateurs Test-Achats*, paragraph 30.

52. Thus, different treatment of male farmers and female farmers in the context of early retirement support cannot be ‘saved’ by Articles 3 and 7 of Directive 79/7. As I have already noted, it is therefore necessary to probe the four issues I have raised in paragraph 42 above.

3. The appropriate legal regime

53. As pointed out by the Nejvyšší správní soud, it is far from clear that any discrimination that may have been suffered by Mrs Soukupová with respect to access to early retirement support falls within the ambit of any of the legislative measures that have been passed by the European Union in order to combat discrimination on the basis of sex.¹⁸ I also agree with the argument appearing in the written observations of the Commission to the effect that early retirement support cannot be considered to be ‘pay’ under Article 157 TFEU because it is not a pension provided to a worker by reason of a relationship of employment with a previous employer, as is required under the case-law of the Court.¹⁹

54. However, as I have already mentioned, the Czech Republic, in refusing Mrs Soukupová early retirement support, was acting in the application of Regulation No 1257/1999. The principle of equal treatment between men and women is expressly referred to in recital 40, the 11th indent of Article 2 of Regulation No 1257/1999, and in Article 2(5) and 12 of Regulation No 1260/1999. It is beyond question that Member States are bound by the principle of equal treatment in the application and implementation of EU agricultural law.²⁰

55. This means, therefore, that determining whether Mrs Soukupová has suffered unlawful discrimination in breach of EU law must be done by reference to the general principle of equality.

4. Is Mrs Soukupová being treated differently from a man in a comparative position?

56. In my opinion, Mrs Soukupová could be considered as being discriminated against because of her sex in that her retirement age is affected by the number of children she has had, whereas this issue does not affect the retirement age of men (which in any case is higher than the retirement age of women). In fact, under Czech law, Mrs Soukupová is being treated differently from a man of the same age, and with the same number of children, in that she has a shorter period of time to apply for early retirement support. This in turn has resulted in significant and adverse financial consequences. As pointed out in the written observations of the Commission, the advantage afforded to her in gaining early access to a pension, through recognition of her sex and the fact that she has borne two children, has transformed into a disadvantage in the context of early retirement support. As I have already noted, this is reflected in the differences in the average sums paid to women under the old-age pension system, in the years 2005 and 2007, and the maximum sums paid out under early retirement support.

18 — The only legislative measure guaranteeing equal treatment which applies to the specific situation of self-employed female farmers, and is applicable *ratione temporis*, is Council Directive 86/613/EEC of 11 December 1986 on the application of the principle of equal treatment between men and women engaged in an activity, including agriculture, in a self-employed capacity, and on the protection of self-employed women during pregnancy and motherhood (OJ 1986 L 359, p. 56). However, none of its provisions could be interpreted as covering discrimination in the context of early retirement support. Directive 86/613 was repealed with effect from 5 August 2012 under Article 17 of Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC (OJ 2010 L 180, p. 1).

19 — Judgment of 13 November 2008 in Case C-46/07 *Commission v Italy*, paragraph 35.

20 — The case to hand is thus the inverse of the situation that arose in Case C-309/96 *Annibaldi* [1997] ECR I-7493, whether the national legislation in issue, which was challenged on the basis of, inter alia, the principle of equal treatment, was held to fall outside the ‘scope of Community law’ (see paragraph 24) for several reasons, one of which was the fact there was ‘nothing in the present case to suggest that the Regional law was intended to implement a provision of Community law either in the sphere of agriculture or in that of the environment or culture’ (see paragraph 21).

57. The Czech Government has argued that Mrs Soukupová is not in the same position as a man who has reached the same age as her. This is so because, in the case of a man, Regulation No 1257/1999 is capable of attaining its objective of encouraging early retirement, while, in the case of Mrs Soukupová, these same measures are inoperable because she has already reached retirement age. Or, as was argued by the Polish Government, given that the aim of Regulation No 1257/1999 is to encourage early retirement with the aim of improving the viability of agricultural holdings, the objective pursued by Regulation No 1257/1999 loses its *raison d'être* once Mrs Soukupová has attained the legal retirement age that is lower than the age applicable to a man.

58. I cannot accept these submissions. First I consider that the scheme does not aim at early retirement as such but at transfer of agricultural activities to younger farmers. Unless there is a national rule forbidding a farmer who has reached normal retirement age from continuing his or her agricultural activities, and forcing the farmer concerned to transfer these activities, the arguments of the Czech Government and the Polish Government are unsound. In other words, the fact that a female farmer has reached the retirement age applicable to her does not necessarily result in transfer of her activities to a younger farmer. Hence, applying a lower retirement age to female farmers actually diminishes the number of cases where a transfer is an economically viable alternative to the continuation of the activity by the older farmer, and for as long as possible. Indeed, the Czech legislation excludes female farmers with many children from the scope of the scheme and thereby prevents the achievement of the *effet utile* of the EU early retirement scheme.

59. Moreover, as the Commission pointed out in its written observations, the disadvantage suffered by Mrs Soukupová by reason of the national provisions in issue has an effect in manifest contradiction to the principle of equal treatment. It was uncontested in either the written submissions or at the hearing that a man with the same number of children as Mrs Soukupová would have been awarded early retirement support. This is plainly sufficient to show a difference in treatment.

5. Is there an objective justification for this difference in treatment?

60. The Czech Government argues that any difference in treatment is objectively justified, notably by the goal pursued by Regulation No 1257/1999, which is to encourage older farmers to cease their agricultural activities prematurely by taking early retirement.²¹ The Polish Government adds that the refusal to accord Mrs Soukupová early retirement support was justified because she already had the benefit of the old-age pension, so that she was not denied a means of subsistence once she finished farming.

61. I am not able to accept these arguments. The structural policy aims of the provisions of Regulation No 1257/1999 are plainly achievable without resort by the Member States to discriminatory treatment. Further, the availability in the hands of Mrs Soukupová of diminished funds, in the form of a pension with no early retirement support supplement, provides no logical connection with the objective justification required by EU law before discriminatory treatment can be rendered lawful. This difference in treatment suffered by Mrs Soukupová is not appropriate to achieve the goal of securing greater productivity of farm holdings in the European Union (through early retirement).²²

21 — I would note that, on the basis of the ruling of the Court in Case C-356/09 *Kleist* [2010 ECR I-11939, paragraphs 30 and 31, the discrimination suffered by Mrs Soukupová appears to be direct. This means that, if the matter was governed by the treaties or the equal treatment directives, with the exception of positive action, the grounds of justification would be limited to those contained in the treaties and the relevant secondary legislation. However, the discrimination here in issue is being suffered in the context of application and implementation by a Member State of a general piece of EU legislation. In this context, the prohibition on discrimination between men and women is a specific manifestation of the general principle of equal treatment, which is always subject to the broad category of 'objective justification'. See for example *Association belge des Consommateurs Test-Achats*, paragraph 28.

22 — Case C-123/10 *Brachner* [2011] ECR I-10003, paragraphs 70 and 71 and case-law cited. I would also observe that at paragraph 69 the Court noted that it was being asked whether a disadvantage could be justified by the fact that the women in that case began to receive the pension earlier. The Court held at paragraphs 76 to 79 that it could not.

62. Given that I have concluded that there is no objective justification for this difference in treatment, it is not necessary for me to consider compliance with the principle of proportionality. However, should the Court disagree with my conclusions and reach this stage, in my opinion it suffices to balance the scale of the financial loss suffered by Mrs Soukupová against any benefits arising from her early entitlement to the old-age pension. Given that early retirement support is payable for a maximum period of 15 years, Mrs Soukupová will be a long way indeed from the financial position of a man who shares her circumstances. This gap is excessive in relation to the goals pursued by Regulation No 1257/1999.

63. I therefore propose the following answer to question 2;

‘It is not in accordance with EU law for “normal retirement age” at the time of transfer of a farm for the purposes of EU early retirement support to be determined differently for individual applicants depending on their sex.’

D – *The answer to Question 3*

64. In my opinion the third question requires a small measure of reformulation, in that the Court is asked to answer it only in the event of a negative answer to the first question. As I have already explained, the case to hand is one in which it is impossible to provide a simple ‘yes’ or ‘no’ answer. That being so, I would strike out the words ‘if the answer to the first question is in the negative’ and simply provide the national court with all the guidance it needs with regard to the criteria in applying ‘normal retirement age’ under Article 11 of Regulation No 1257/1999.

65. As was pointed out in the written observations of the Commission, the appropriate reference criteria for determining Mrs Soukupová’s entitlement to early retirement support is the ‘normal retirement age’ in the sense of Article 11(1) of Regulation No 1257/1999 of a man of her age.

66. Under the consistent case-law of the Court, when measures re-establishing equal treatment have not been adopted, respect for equal treatment can only be guaranteed by the grant to the persons in the disadvantaged category of the same advantages as enjoyed by those in the favoured category.²³ The person in the less favourable position must be placed in the same position as the person enjoying the benefit of the advantage. This means that, while a range of alternative criteria have been suggested by the Nejvyšší správní soud, in the case at hand Mrs Soukupová must simply be considered as if she were a man of her age when the Czech national authorities consider her eligibility for early retirement support.

67. I therefore propose the following answer to question 3;

‘In applying the concept of “normal retirement age” at the time of transfer of a farm under Article 11 of Regulation No 1257/1999 the condition of a higher retirement age applicable to male farmers must also be applied to female farmers.’

V – **Conclusion**

68. For the reasons presented above, I propose that the Court should answer the questions referred by the Nejvyšší správní soud as follows;

23 — See for example Case C-399/09 *Landtová* [2011] ECR I-5573, paragraph 51 and case-law cited. See also Joined Cases C-231/06 to C-233/06 *Jonkman and Others* [2007] ECR I-5149, paragraphs 36 to 40, on the obligations incumbent of Member States, including their courts, when discrimination infringing EU law has been found.

- (1) The concept of ‘normal retirement age’ at the time of transfer of a farm under Article 11 of Council Regulation (EC) No 1257/1999 of 17 May 1999 on support for rural development from the European Agricultural Guidance and Guarantee Fund (EAGGF) and amending and repealing certain Regulations may be interpreted as ‘the age required for entitlement to a retirement pension’ by a particular applicant under national legislation.
- (2) It is not in accordance with European Union law for ‘normal retirement age’ at the time of transfer of a farm for the purposes of European Union early retirement support to be determined differently for individual applicants depending on their sex.
- (3) In applying the concept of ‘normal retirement age’ at the time of transfer of a farm under Article 11 of Regulation No 1257/1999 the condition of a higher retirement age applicable to male farmers must also be applied to female farmers.