JUDGMENT OF THE COURT (Grand Chamber)

18 December 2007 *

In Joined Cases C-396/05, C-419/05 and C-450/05,

REFERENCES to the Court under Article 234 EC, from the Sozialgericht Berlin (Germany) (C-396/05 and C-419/05) and the Landessozialgericht Berlin-Brandenburg (Germany) (C-450/05), by decisions of 27 September and 11 November 2005, which arrived at the Court on 14 and 28 November and 19 December 2005 respectively, in the proceedings

Doris Habelt (C-396/05),

Martha Möser (C-419/05),

Peter Wachter (C-450/05)

v

Deutsche Rentenversicherung Bund,

* Language of the case: German.

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, C.W.A. Timmermans, A. Rosas, K. Lenaerts and L. Bay Larsen, Presidents of Chambers, J.N. Cunha Rodrigues (Rapporteur), K. Schiemann, J. Makarczyk, P. Kūris, E. Juhász, A. Ó Caoimh and P. Lindh, Judges,

Advocate General: V. Trstenjak,
Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 6 March 2007,

after considering the observations submitted on behalf of:

— Ms Möser, by R.-G. Müller, Rechtsanwalt,

— Deutsche Rentenversicherung Bund, by R. Meyer and A. Pflüger, acting as Agents,

— the German Government, by M. Lumma, C. Schulze-Bahr and C. Blaschke, acting as Agents,

— the Italian Government, by I.M. Braguglia, acting as Agent, and W. Ferrante, avvocato dello Stato,

— the Commission of the European Communities, by V. Kreuschitz and I. Kaufmann-Bühler, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 28 June 2007,

gives the following

Judgment

1 These references for a preliminary ruling concern the validity of Annexes III and VI to Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, in the version amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996 (OJ 1997 L 28, p. 1, 'Regulation No 1408/71').

2 The references were made in the course of actions brought by the claimants in the main proceedings against the Deutsche Rentenversicherung Bund (Federal pension insurance body, 'Rentenversicherung') over the latter's refusal to take account, for the purposes of the payment of old-age benefits, of periods of contribution completed, in the case of Mrs Habelt (Case C-396/05) in the Sudetenland from

January 1939 to April 1945, and in the case of Mrs Möser (Case C-419/05) in Pomerania from 1 April 1937 to 1 February 1945, at a time when those territories, which are not part of the present-day Federal Republic of Germany, were part of territories where the social security legislation of the German Reich was applicable, and, in the case of Mr Wachter (Case C-450/05) in Romania, from September 1953 to October 1970, on the ground that the claimants in the main proceedings have established their residence in a Member State other than the Federal Republic of Germany.

Legal context

The Community legislation

3 Under Article 2(1) of Regulation No 1408/71:

'This Regulation shall apply to employed or self-employed persons who are or have been subject to the legislation of one or more Member States and who are nationals of one of the Member States or who are stateless persons or refugees residing within the territory of one of the Member States, as well as to the members of their families and their survivors.'

4 Article 4 of Regulation No 1408/71 provides:

'1. This Regulation shall apply to all legislation concerning the following branches of social security:

...

(c) old-age benefits;

(d) survivors' benefits;

...

2. This Regulation shall apply to all general and special social security schemes, whether contributory or non-contributory, and to schemes concerning the liability of an employer or shipowner in respect of the benefits referred to in paragraph 1.

2a. This Regulation shall also apply to special non-contributory benefits which are provided under a legislation or schemes other than those referred to in paragraph 1 or excluded by virtue of paragraph 4, where such benefits are intended:

(a) either to provide supplementary, substitute or ancillary cover against the risks covered by the branches of social security referred to in paragraph 1(a) to (h), or

(b) solely as specific protection for the disabled.

...

4. This Regulation shall not apply to social and medical assistance, to benefit schemes for victims of war or its consequences, or to special schemes for civil servants and persons treated as such.'

5 Article 5 of the Regulation provides:

'The Member States shall specify the legislation and schemes referred to in Article 4(1) and (2), the special non-contributory benefits referred to in Article 4(2a), the minimum benefits referred to in Article 50 and the benefits referred to in Articles 77 and 78 in declarations to be notified and published in accordance with Article 97.'

6 Under Article 6 of Regulation No 1408/71:

'Subject to the provisions of Articles 7, 8 and 46(4) this Regulation shall, as regards persons and matters which it covers, replace the provisions of any social security convention binding either;

(a) two or more Member States exclusively, or

(b) at least two Member States and one or more other States, where settlement of the cases concerned does not involve any institution of one of the latter States.'

7 Article 7 of the Regulation, which is headed 'International provisions not affected by this Regulation', provides in paragraph 2:

'The provisions of Article 6 notwithstanding, the following shall continue to apply:

...

(c) the provisions of the social security conventions listed in Annex III.'

8 Annex III, Part A, to Regulation No 1408/71, which is headed 'Provisions of social security conventions remaining applicable notwithstanding Article 6 of the Regulation. (Article 7(2)(c) of the Regulation)', provides in point 35, headed 'Germany-Austria' under (e):

'Article 4(1) of the Convention [on social security concluded between the Federal Republic of Germany and the Republic of Austria of 22 December 1966, 'the 1966 German Austrian Convention'] as regards the German legislation, under which accidents (and occupational diseases) occurring outside the territory of the Federal Republic of Germany, and periods completed outside that territory, do not give rise to payment of benefits or only give rise to payment of benefits, under certain conditions, when those entitled to them reside outside the territory of the Federal Republic of Germany, in cases in which:

(i) the benefit has already been paid or is payable on 1 January 1994;

(ii) the beneficiary has established his habitual residence in Austria before 1 January 1994 and the payment of pensions due under the pension and accident insurance begins prior to 31 December 1994;

this shall also apply to periods during which another pension, including a survivor's pension was collected, replacing the initial one, where the periods of collection follow each other without interruption.'

9 Point 35, headed 'Germany-Austria', under (e), of Annex III, Part B, to Regulation No 1408/71, which is entitled 'Provisions of Conventions which do not apply to all persons to whom the Regulation applies (Article 3(3) of the Regulation)' has the same wording as Point 35(e) of Annex III, Part A, above.

10 Under the first subparagraph of Article 10(1) of Regulation No 1408/71:

'Save as otherwise provided in this Regulation invalidity, old-age or survivors' cash benefits ... acquired under the legislation of one or more Member States shall not be subject to any reduction, modification, suspension, withdrawal or confiscation by reason of the fact that the recipient resides in the territory of a Member State other than that in which the institution responsible for payment is situated.'

11 Article 10a of Regulation No 1408/71 provides :

'Notwithstanding the provisions of Article 10 and Title III, persons to whom this Regulation applies shall be granted the special non-contributory cash benefits

referred to in Article 4(2a) exclusively in the territory of the Member State in which they reside, in accordance with the legislation of that State, provided that such benefits are listed in Annex IIa. Such benefits shall be granted by and at the expense of the institution of the place of residence.'

12 Article 89 of the Regulation provides:

'Special procedures for implementing the legislations of certain Member States are set out in Annex VI.'

13 Annex VI, Part C, to Regulation No 1408/71, which is headed 'Germany' provides in point 1:

'The provisions of Article 10 of the Regulation are without prejudice to the provisions under which accidents (and occupational diseases) occurring outside the territory of the Federal Republic of Germany, and periods completed outside that territory, do not give grounds for benefits, or do so only subject to certain conditions, when the persons concerned are resident outside the territory of the Federal Republic of Germany.'

14 Article 94 of the Regulation, which is headed 'Transitional provisions for employed persons', provides:

'1. No right shall be acquired under this Regulation in respect of a period prior to 1 October 1972 or to the date of its application in the territory of the Member State concerned or in a part of the territory of that State.

2. All periods of insurance and, where appropriate, all periods of employment or residence completed under the legislation of a Member State before 1 October 1972 or before the date of its application in the territory of that Member State or in a part of the territory of that State shall be taken into consideration for the determination of rights acquired under the provisions of this Regulation.

3. Subject to the provisions of paragraph 1, a right shall be acquired under this Regulation even though it relates to a contingency which materialised prior to 1 October 1972 or to the date of its application in the territory of the Member State concerned or in a part of the territory of that State.

...'

The 1966 German-Austrian Convention

15 The first sentence of Article 48(1) of the 1966 German-Austrian Convention provides:

'Unless provided otherwise in this Convention, the legislation of one Contracting State under which the arising of entitlement to benefits or the provision of benefits or the payment of cash benefits depends on residence within the country does not apply to the persons specified in Article 3 who reside in the territory of the other Contracting State.'

The Social Security Convention of 4 October 1995 between the Federal Republic of Germany and the Republic of Austria

16 Under Article 14(2)(b) of the social security convention concluded between the Federal Republic of Germany and the Republic of Austria on 4 October 1995 (BGBl. 1998 II, p. 313), which entered into force on 1 October 1998 (BGBl. 1998 II, p. 2544, 'the 1995 German-Austrian Convention'):

'2. The following provisions shall apply:

...

(b) Article 4(1) of the [1966 German-Austrian Convention], in relation to the German legislation pursuant to which accidents (occupational illnesses) arising outside the territory of the Federal Republic of Germany and periods completed outside that territory do not give rise to entitlement to benefits or give rise to such entitlement only subject to certain conditions, if the persons entitled reside outside the territory of the Federal Republic of Germany, in cases where:

(i) the benefits are already being or could be paid on the date when the Regulation takes effect in the relationship between the Contracting States;

(ii) the person concerned takes up habitual residence in Austria before the Regulation takes effect in the relationship between the Contracting States and the benefit under the pension and accident insurance scheme begins within 12 months of the date when the Regulation takes effect in the

relationship between the Contracting States; this shall also apply to periods during which another pension, including a survivor's pension, was received, if such periods follow each other without interruption.'

The German Social Security Code

17 Paragraph 110(2) and (3) of Book VI of the Social Security Code — Statutory Pension Insurance (Sozialgesetzbuch VI — Gesetzliche Rentenversicherung, 'SGB VI') provides:

'(2) Beneficiaries who have their normal place of residence abroad shall receive such benefits unless the following provisions governing the payment of benefits to beneficiaries abroad provide otherwise.

(3) The provisions of this section shall apply only if nothing to the contrary is provided under supranational or international law.'

18 Under paragraph 113 of SGB VI :

'(1) Beneficiaries' personal credit units shall be determined from:

1. credit units for contribution periods completed on Federal German territory,

...

contribution periods completed on Federal German territory are contribution periods for which contributions have been paid under Federal German law after 8 May 1945 and contribution periods equated therewith under the Fifth Chapter.

(2) The supplement to personal credit units in the case of beneficiaries' orphan pensions shall be determined from contribution periods completed on Federal German territory only.

(3) The personal credit units of beneficiaries who are not nationals of a State in which Regulation No 1408/71 is applicable shall be taken into account as to 70 per cent.'

19 Under paragraph 114 of SGB VI:

'(1) The personal credit units of beneficiaries who are nationals of a State in which Regulation No 1408/71 is applicable shall be determined from

1. credit units relating to periods in which contributions were not paid,

2. the supplement to credit units for periods in which reduced contributions were paid and

3. the deduction of credit units deriving from the standardisation of pensions in so far as it falls outside the periods in which contributions were not paid or no supplement to personal credit units was paid for periods in which reduced contributions were paid.

In that way, the credit units determined pursuant to the first sentence are taken into account in the ratio in which credit units relating to periods of contribution completed on Federal Territory and those determined pursuant to Paragraph 272(1)(1) and 272(3), first sentence, stand to the total credit units relating to periods of contribution, including periods of employment under the law on pension rights acquired by contribution abroad (Fremdrentengesetz, 'FRG').

(2) The supplement to personal credit units relating to orphan's pensions of beneficiaries who have the nationality of a State in which Regulation (EEC) No 1408/71 is applicable is determined from

1. the periods in which contributions were not paid in the amount resulting from the second sentence of subparagraph 1 and

2. the periods to be taken into account completed on national territory'.

20 Under Paragraph 247(3), first sentence, of Chapter V of SGB VI:

'Periods in which compulsory or voluntary contributions were paid under the Reich insurance legislation are also considered to be periods of contribution.'

21 Paragraph 271 of Chapter V of SGB VI provides:

'Contribution periods completed on Federal German territory shall also include periods for which the following payments were made under the Reich insurance legislation applicable prior to 9 May 1945:

1. compulsory contributions for employment or self-employed activity on national territory, or

2. voluntary contributions for a period of normal residence on national territory or outside the scope of application of the Reich insurance legislation.

Periods spent bringing up children (Kindererziehungszeiten) constitute contribution periods completed on Federal German territory if the children are brought up within the territory of the Federal Republic of Germany.'

22 Paragraph 272 of SGB VI provides:

'(1) The personal credit units of beneficiaries who hold the nationality of a State in which Regulation No 1408/71 applies, who were born before 19 May 1950 and who acquired their normal place of residence abroad prior to 19 May 1990 shall also be determined from

1. credit units for contribution periods under the FRG up to the maximum number of credit units for contribution periods completed on Federal German territory;

2. the benefit supplement for contribution periods under the FRG, up to the maximum benefit supplement for contribution periods completed on Federal German territory,

3. the reduction in credit units resulting from a competed pension equalisation or pension split relating to contribution periods under the FRG, in the ratio in which the credit units limited in accordance with point 1 for contribution periods under the FRG stand to the total credit units for those periods; and

4. the supplement to personal credit units in the case of orphan pensions from contribution periods under the FRG in the ratio laid down under point 3.

(2) Credit units for contribution periods under the FRG which are to be taken into account additionally pursuant to subparagraph 1 on the basis of credit units (East) shall be deemed to be credit units (East).

(3) The credit units of beneficiaries under subparagraph 1, which are to be taken into account up to the maximum number of credit units for contribution periods completed on Federal German territory, shall also include contribution periods completed in the territory of the former German Reich. Contribution periods completed in the territory of the Reich shall be taken into account as contribution periods under the FRG in determining credit units arising from a benefit supplement, from a reduction resulting from a competed pension equalisation or pension split and from the supplement in the case of an orphan pension.'

23 Under Paragraph 14 of the FRG:

'Unless otherwise provided by the following provisions, the rights and obligations of beneficiaries under this section shall be governed by the general rules in force in the Federal Republic of Germany.'

The dispute in the main proceedings and the questions referred

Case C-396/05

24 According to the order for reference, Ms Habelt, a German national, was born on 30 January 1923 in Eulau (Jilové) in the Sudetenland, which, at the time, was part of Czechoslovakia, and is now in the Czech Republic.

25 She worked in Eulau from January 1939 to May 1946. From 1 January 1939 to 30 April 1945 she paid compulsory contributions under the legislation of the German Reich on old-age pension insurance, that is to say, the law on the social insurance scheme for employees (Angestelltenversicherungsgesetz) to the Reichsversicherungsanstalt für Angestellte (Reich Insurance Institution for Employees, 'the RfA'). The RfA, which was in Berlin, was the competent social insurance institution after the annexation of the Sudetenland by the German Reich. From 5 May 1945 to 13 May 1946 Ms Habelt was subject to compulsory insurance in Czechoslovakia. Following her expulsion from the Sudetenland, she lived in the territory of the Federal Republic of Germany.

26 Since 1 February 1988 Ms Habelt has received an old-age pension from the Bundesversicherungsanstalt für Angestellte (Federal Insurance Institution for Employees, 'the Bundesversicherungsanstalt'), which became, as of October 2005, the Rentenversicherung. In addition to periods during which she had brought up children and paid voluntary contributions, the pension was based initially on compulsory contributions paid on the basis of her work in the Sudetenland between January 1939 and 30 April 1945, and also on periods taken into account under the FRG for her work from 5 May 1945 to 13 May 1946 in a job in the then Czechoslovakia which was subject to compulsory insurance.

27 After Ms Habelt moved to Belgium on 1 August 2001 the Bundesversicherungsanstalt decided to reassess her pension and, with effect from 1 December 2001, granted her a monthly pension of DEM 204.50 (EUR 104.56) before tax, which was DEM 438.05 (EUR 223.96) less than the monthly pension she had received previously.

28 The claim brought by Ms Habelt against the decision reassessing her pension was dismissed by the Bundesversicherungsanstalt. According to that body, in the case of payment of a statutory old-age pension to a beneficiary habitually resident abroad,

account must be taken of the specific provisions relating to payment laid down by Paragraph 113(1)(1) of SGB VI. According to that paragraph, the personal credit units of persons entitled to a pension are determined according to the credit units for contribution periods on national territory, that is to say, the contribution periods for which contributions were paid under the German law applicable after 1945 and the contribution periods deemed equivalent to such periods in Chapter V of SGB VI.

29 The Bundesversicherungsanstalt took the view, therefore, that, as the contribution periods of the person concerned between January 1939 and April 1945 in respect of employment in the Sudetenland were not completed under the German law applicable after 1945, reference had to be made to Paragraph 271 of the SGB VI which determined which contributions paid before 9 May 1945 had to be deemed to be contribution periods completed on the territory of the Federal Republic of Germany within the meaning of Paragraph 113(1)(1) of the SGB VI.

30 The Bundesversicherungsanstalt observes, in that regard, that under Paragraph 271 of the SGB VI, contribution periods completed on German territory are also periods in respect of which, under the legislation of the Reich on pension insurance applicable before 9 May 1945, compulsory contributions were paid for employment or self-employment in Germany. 'Germany' does not refer to the area of application of the legislation of the Reich on insurance, but only to the territory of the present Federal Republic of Germany. Hence, it argues, compulsory contributions that were paid under the Reich pension insurance legislation for employment or self-employment in the territory where that legislation was applicable, but outside the territory of the present Federal Republic of Germany, are not contributions paid on German territory. That is true of the contributions paid by Ms Habelt between January 1939 and April 1945 under the Reich legislation, as the Sudetenland does not lie within the territory of the present Federal Republic of Germany.

31 Moreover, the Bundesversicherungsanstalt takes the view that Ms Habelt cannot rely on Article 272 of the SGB VI, in that her habitual residence abroad began after May 1990.

32 Following the dismissal of her claim, Ms Habelt instituted proceedings before the Sozialgericht Berlin. In reply to a question from that court concerning the effect on Ms Habelt's position of the fact that the Sudetenland has been part of the European Union since 1 May 2004, the Bundesversicherungsanstalt stated that the accession of the Czech Republic to the Union does not alter the position. Under Annex VI, Part C, point 1, to Regulation No 1408/71, no benefit may be paid in a Member State on the basis of pension credit units for contribution periods completed on territory where the social security legislation of the German Reich was applicable or periods completed under the FRG.

33 The referring court takes the view that the situation at issue falls within the personal, material and temporal scope of Regulation No 1408/71.

34 As the Sozialgericht Berlin saw no justification for the limitation of the principle, guaranteed by the EC Treaty, of the exportability of pension benefits, it decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Is the provision in Annex VI, Part D, (formerly C), headed 'Germany' ... to Regulation (EEC) No 1408/71 ... compatible with higher-ranking European law, particularly the principle of freedom of movement — in this case, the principle of the exportability of benefits under Article 42 [EC] — inasmuch as it rules out also pension benefits in respect of contribution periods completed in the territory of the former German Reich?'

Case C-419/05

35 Ms Möser, a German national, was born on 2 January 1923 in Pniewo in Pomerania. She fled from the former Russian occupation zone in 1946 and settled in the territory of the present Federal Republic of Germany, where, since 1 February 1988, she has received an old-age pension from the Bundesversicherungsanstalt. Initially, that pension was calculated on the basis of, among other things, compulsory contribution periods completed by the person concerned for the period from 1 April 1937 to 1 February 1945 for work in Pomerania in a part of the territory where the social security legislation of the German Reich was applicable and which is now in the Republic of Poland.

36 After Ms Möser moved to Spain on 1 July 2001, the pension was reassessed with effect from 1 September 2001. The reason given for the reduction of EUR 143.15 in the monthly pension was that contribution periods completed outside the territory of the Federal Republic of Germany could not be taken into account because the person concerned resided abroad. Since 1 June 2004, Ms Möser has lived in the United Kingdom.

37 After several attempts to obtain a decision on her claim, on 17 May 2002, Ms Möser instituted proceedings for failure to act before the court now seeking a preliminary ruling. Her claim was dismissed by the Bundesversicherungsanstalt by decision of 14 July 2003.

38 On 9 August 2003 Ms Möser lodged an application with the referring court to set aside that decision. On the basis of the reasoning set out in Case C 396/05 and after finding that the claimant was not entitled to an old-age pension under the Polish pension insurance scheme either, that court decided to stay the proceedings and to refer a question in the same terms as that in Case C-396/05 to the Court of Justice for a preliminary ruling.

Case C-450/05

39 Mr Wachter was born in Romania in 1936. He possesses Austrian nationality and is recognised as a displaced person (expellee) within the meaning of the German law on displaced persons and refugees (Bundesvertriebenengesetz, 'BVG').

40 In 1970 he left Romania to live and work in Austria, where he has lived since. In November 1995 the Bundesversicherungsanstalt recognised the contribution and employment periods completed by Mr Wachter in Romania between September 1953 and October 1970 as compulsory contribution periods under the German pension insurance scheme, given that the person concerned was recognised as a displaced person under the BVG.

41 In June 1999 Mr Wachter applied for an old-age pension to be paid from 1 August 1999, his 63rd birthday. The application was refused on the ground that no contribution periods completed with a foreign organisation conferring entitlement to a pension under the FRG could give rise to the payment of a pension abroad. The Community regulations which replaced the 1966 German-Austrian Convention lay down the same rule.

42 The action brought by Mr Wachter against that decision in the Sozialgericht Berlin was dismissed by judgment of 9 July 2001.

43 In support of his appeal before the Landessozialgericht Berlin-Brandenburg, Mr Wachter argued that, under the 1966 German-Austrian Convention, until 31 December 1993, as an Austrian living in Austria he had the same status as a

German living in Germany. As the convention had been replaced by Regulation No 1408/71 with effect from 1 January 1994, the principle of equal treatment in the two countries for which it provided now applied subject to certain conditions, which he did not fulfil (point 35, Germany-Austria (e), of Parts A and B of Annex III, and point 1, Germany, of Part C of Annex VI to that regulation).

44 Mr Wachter argues that the application of Regulation No 1408/71 has had the effect that he is placed in a worse position than he was in previously. The principle of freedom of movement for persons precludes such an effect.

45 The referring court observes that, under the applicable German law, pensions based on FRG contribution periods may not be paid abroad, but that the first sentence of Article 4(1) of the 1966 German-Austrian Convention provided for the payment abroad of pensions based on contribution periods under the FRG. The principle of equiparation of territories is thus applicable without restriction, in so far as that convention prevented the application of the provisions of German legislation which precluded the transfer abroad of pensions in such a case (Paragraphs 110(2), 113(1) and 272 of SGB VI).

46 It raises the question whether the application by the Republic of Austria, as of 1 January 1994, of Regulation No 1408/71, which automatically repeals all bilateral conventions is compatible with the freedom of movement guaranteed by the Treaty.

47 The national court adds that, whilst Regulation No 1408/71 provides in Article 10 for equiparation of territories, this was disapplied by the provisions of Annex VI, Part C, point 1, with regard to contribution periods completed in the parts of the

territory where the social security legislation of the Reich was applicable and those completed under the FRG.

48 However, there is an exception to this restriction of the principle of the exportability of social security benefits, precisely with respect to the first sentence of Article 4(1) the 1966 German-Austrian Convention. In Annex III, Parts A and B specify provisions of social security conventions which remain applicable notwithstanding Article 6 of the Regulation and continuing provisions of such conventions which do not apply to all persons to whom the Regulation applies. However, Mr Wachter does not fulfil the conditions laid down for those wishing to rely on the 1966 German-Austrian Convention.

49 In the view of the referring court, it is possible that the provisions of Annex III, Parts A and B, point 35(e) and of Annex VI, Part C, point 1, to Regulation No 1408/71 are, at least in a situation such as that at issue in the main proceedings, contrary to the principle of freedom of movement for persons and, in particular, to the principle of the exportability of social security benefits in Article 42 EC, as their effect would be to preclude the payment to the person concerned of an old-age pension in another Member State where it is exclusively based on contribution periods completed under the FRG.

50 In those circumstances, the Landessozialgericht Berlin-Brandenburg decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:

'Are point 35, headed 'Germany-Austria' (e) of Parts A and B of Annex III to Regulation No 1408/71 and Part C, headed, 'Germany', point 1, of Annex VI to Regulation No 1408/71 compatible with higher-ranking European law, in particular

the requirement of freedom of movement under Article 39 EC in conjunction with Article 42 EC?'

51 By letter received on 2 February 2006, the national court gave the following clarification with regard to the question referred:

'1. Point 35, headed 'Germany–Austria' under (e), of Parts A and B of Annex III to Regulation No 1408/71 — which became point 83 according to the consecutive renumbering of the annexes to Regulation No 1408/71 as a consequence of the accession of certain east European countries to the EU with effect on 1 May 2004 — is meant in the version applicable until Regulation (EC) No 647/2005 came into force on 5 May 2005. The provision in the Annex corresponds to Article 14(2)(b) of the 1995 German-Austrian Convention to which the national court's question also refers by analogy in view of the legal position applying in 1999 (pension entitlement arising on reaching age 63).

2. Part C, headed 'Germany', point 1, of Annex VI to Regulation No 1408/71 corresponds to Part D headed 'Germany', point 1, of Annex VI to Regulation No 1408/71 after the consecutive renumbering as a consequence of the accession of certain east European countries to the EU with effect on 1 May 2004.'

The questions referred

The question referred in Cases C-396/05 and C-419/05

52 Under Annex VI, Part C, point 1, to Regulation No 1408/71, Article 10 of the Regulation, which sets out the principle of the waiver of residence clauses, is without

prejudice to the provisions under which periods completed outside the territory of the Federal Republic of Germany do not give grounds for benefits, or do so only subject to certain conditions, when the persons concerned are resident outside that territory.

53 By its question, the referring court seeks to know, essentially, whether the provisions of Annex VI, Part C, point 1, to Regulation No 1408/71 are compatible with freedom of movement for persons, and in particular, with Article 42 EC, in that, in circumstances such as those in the main proceedings, they make it possible to make the inclusion, for the purposes of the payment of old-age benefits, of contribution periods completed between 1937 and 1945 on the parts of the territory where the social security legislation of the German Reich was applicable, but which are outside the territory of the Federal Republic of Germany, subject to the condition that the recipient reside in that Member State.

54 It must first be considered whether a situation such as that of the claimants in the main proceedings falls within the scope of Regulation No 1408/71.

55 To begin with, it must be observed that, under Article 94(2) of Regulation No 1408/71, people in the position of Ms Habelt and Ms Möser may rely on the inclusion, for the determination of rights pursuant to the regulation, in this case from 1 February 1988, of all periods of insurance, employment or residence completed under German legislation of a Member State before the date of application of that regulation (see, to that effect, inter alia, Case C-28/00 *Kauer* [2002] ECR I-1343, paragraphs 22 and 46).

56 Moreover, it is not disputed that Ms Habelt and Ms Möser, who are retired workers covered by the German social security scheme, fall within the personal scope of

regulation No 1408/71, as defined by Article 2(1) thereof, according to which the regulation applies, inter alia, 'to employed or self-employed persons who are or have been subject to the legislation of one or more Member States and who are nationals of one of the Member States'.

57 According to the case-law of the Court, even if they are not in gainful occupation, pensioners entitled to draw pensions under the legislation of one or more Member States come within the provisions of the Regulation concerning 'workers' by virtue of their insurance under a social security scheme (see, inter alia, Case C-194/96 *Kulzer* [1998] ECR I-895, paragraph 24).

58 However, the Rentenversicherung and the German Government dispute that the benefits at issue fall within the material scope of Regulation No 1408/71. They argue that the benefits in question fall within 'benefit schemes for victims of war or its consequences' which are excluded from the scope of the regulation under Article 4(4) thereof. They refer, in that regard, to the judgments of the Court in Case 79/76 *Fossi* [1977] ECR 667 and Case 144/78 *Tinelli* [1979] ECR 757, which, they claim, confirmed the validity of the exclusion of benefits such as those at issue in the main proceedings from the scope of Regulation No 1408/71.

59 According to the Rentenversicherung and the German Government, in those judgments, which concerned pensions for accidents at work and invalidity benefits relating to contribution periods completed before 1945 in the parts of the territory where the social security legislation of the German Reich was applicable but which was outside the territory of the Federal Republic of Germany, the Court ruled that such pensions and benefits should not be considered to fall within the field of social security. In so ruling, it took account of the fact that the competent insurance institutions to which the persons covered by the provision at issue had been affiliated no longer existed or were situated outside the territory of the Federal

Republic of Germany, of the fact that the German legislation concerned was intended to alleviate certain situations arising from events linked to the National Socialist regime and the Second World War and, finally, of the fact that the payment of the benefits at issue was discretionary as regards nationals living abroad.

60 Again according to the Rentenversicherung and the German Government, those considerations are still valid today; the social insurance bodies of the time, including the RfA, were dissolved following territorial changes and movements of populations during and after the Second World War and the rights relating to those periods cannot be claimed from those bodies. The relevant provisions of the SGB VI, in particular Paragraphs 271 and 272, constitute specific rules relating to the consequences of the war. The retirement benefits deriving from those periods are benefits which the Federal Republic of Germany pays for reasons of historical liability; in so doing that Member State has always ensured that the persons concerned were habitually resident in Germany and continued to reside there during their retirement.

61 That argument cannot be upheld.

62 Pursuant to Article 4(1)(c) and (d) of Regulation No 1408/71, the latter applies to legislation concerning the branches of social security relating to old-age and survivors' benefits as social security benefits.

63 A benefit may be regarded as a social security benefit in so far as it is granted to the recipients, without any individual and discretionary assessment of personal needs, on the basis of a legally defined position and relates to one of the risks expressly listed in Article 4(1) of Regulation No 1408/71 (see, inter alia, Case C-286/03 *Hosse* [2006] ECR I-1771, paragraph 37).

64 As the Court has consistently held, the aim of Articles 39 EC and 40 EC and Article 50 of the EC Treaty would not be attained if, as a consequence of the exercise of their right to freedom of movement, workers were to lose the social security advantages guaranteed them by the legislation of one Member State, especially where those advantages represent the counterpart of contributions which they have paid (see, inter alia, Case C-215/99 *Jauch* [2001] ECR I-1901, paragraph 20).

65 It is of course permissible for the Community legislature to adopt, in the course of the implementation of Article 42 EC, provisions excluding certain specific benefits from the scope of those implementing measures. Such provisions, like those laid down by Article 4(4) of Regulation No 1408/71 must, however, be interpreted strictly (see, inter alia, the judgment in *Hosse*, paragraph 37). That implies that they can be applied only to benefits fulfilling the conditions they lay down. Article 4(4) of the regulation excludes from the scope of the regulation benefit schemes for victims of war or its consequences.

66 According to the orders for reference, it is clear from the first sentence of Paragraph 247(3) of the SGB VI that the contribution periods completed by the claimants in the main proceedings in the parts of the territory where the social security legislation of the German Reich was applicable during the periods at issue in the main proceedings are recognised as such not because of the war but because contributions were paid under German legislation on old-age insurance. The benefits at issue in the main proceedings are financed, like pensions based on periods completed on the territory of the present Federal Republic of Germany, by contributions from insured persons who are currently working (Paragraph 153 of SGB VI).

67 Moreover, the payment of such benefits to recipients living outside the territory of the Federal Republic of Germany is not discretionary, if only to the extent that

Paragraph 272(1) and (3) of SGB VI provides that pensions based on contribution periods completed in the parts of the territory where the social security legislation of the German Reich was applicable are, generally, paid abroad when those entitled were born before 1950 and took up habitual residence abroad before 19 May 1990.

68 Having regard to their purpose and the conditions for granting them, benefits such as those at issue in the main proceedings may not therefore be considered to be benefits for victims of war or its consequences within the meaning of Article 4(4) of Regulation No 1408/71.

69 Consequently, such benefits must, in view of the characteristics listed in paragraphs 66 and 67 of this judgment, be regarded as old-age and survivors' benefits within the meaning of Article 4(1)(c) and (d) of Regulation No 1408/71.

70 Contrary to the argument put forward by the Rentenversicherung and the German Government, the fact that the RfA ceased to exist after the war does not alter that conclusion, regardless of what became of the capital of the RfA and its assets, since it is common ground that contributions were paid under the German legislation on old-age insurance within the meaning of Paragraph 247(3)(1) of SGB VI.

71 In addition, persons who, during the periods at issue, were, like the claimants in the main proceedings, insured with the RfA but, unlike them, resided in the territory of the present Federal Republic of Germany, are not covered by the disputed residence clause, whereas, in both cases, social security contributions were paid to the RfA which has since ceased to exist.

72 The conclusion reached in paragraph 69 of this judgment is confirmed by the statement of the Federal Republic of Germany pursuant to Article 5 of Regulation No 1408/71(OJ 2003 C 210, p. 1) which, in paragraph 1, concerning legislation and schemes as referred to in Article 4(1) and (2) of the Regulation, mentions, under 3(a) on statutory pension insurance, the 'Sozialgesetzbuch (Social Code), Book VI, of 18 December 1989' in which Paragraph 247 of SGB VI appears.

73 In so far as the situation of the claimants in the main proceedings falls within the scope of Regulation No 1408/71, it must be observed that, under Article 10 of the regulation, the waiver of residence clauses is guaranteed 'save as otherwise provided in this Regulation'.

74 As found above, Annex VI, Part C, point 1 to Regulation No 1408/71 provides precisely that the provisions of Article 10 of the regulation are without prejudice to the provisions under which periods completed outside the territory of the Federal Republic of Germany, do not give rise to benefits, or do so only subject to certain conditions, when the persons concerned are resident outside that territory.

75 It is therefore necessary to consider, secondly, whether, as the referring court claims, Article 42 EC precludes that provision of Annex VI, in so far as it makes it possible, in circumstances such as those in the main proceedings, to make the inclusion, for the purposes of the payment of old-age benefits, of contribution periods completed in the parts of the territory where the social security legislation of the German Reich was applicable subject to the condition that the recipient reside in the territory of the Federal Republic of Germany.

76 It is not disputed, in the cases in the main proceedings, that the transfer of residence of the persons concerned to a Member State other than the Federal Republic of Germany resulted in a substantial decrease in the amount of their old-age pension.

77 The Rentenversicherung and the German Government argue that the obstacle to freedom of movement for persons which results is justified in that it is intended to ensure the integration into society in the Federal Republic of Germany of refugees from the former territories in the East and it allows that Member State to protect itself from the financial consequences which are difficult to deal with following the disappearance of the RfA because of the large number of potential beneficiaries which it is almost impossible to manage because of the Second World War, when large parts of Eastern Europe were under German domination. That group of persons could not reasonably be delimited by any objective criterion other than residence.

78 It must be observed that the provisions of Regulation No 1408/71 on the waiver of residence clauses constitute measures to give effect to Article 42 EC taken in order to establish, in the field of social security, the freedom of movement for workers guaranteed by Article 39 EC (see inter alia *Jauch*, paragraph 20, and Case C-287/05 *Hendrix* [2007] ECR I-6909, paragraph 52). The Court has also held that the provisions of Regulation No 1408/71 which are designed to ensure that social security benefits are payable by the competent State, even where the insured, who has worked exclusively in his State of origin, resides in or transfers his residence to another Member State, undoubtedly help to ensure freedom of movement not only for workers, under Article 39 EC, but also for citizens of the Union, within the European Community, under Article 18 EC (see, to that effect, inter alia, Case C-135/99 *Elsen* [2000] ECR I-10409, paragraph 35).

79 As the Commission of the European Communities rightly observed, the refusal of the German authorities to take account, for the purposes of calculating old-age benefits, of the contributions made by the claimants in the main proceedings during the periods at issue makes manifestly more difficult or even prevents the exercise by those concerned of their right to freedom of movement within the Union and therefore constitutes an obstacle to that freedom.

80 It must be considered whether that refusal can be objectively justified.

81 As regards the special non-contributory benefits mentioned in Annex IIa to Regulation No 1408/71, the Court has held that it is permissible for the Community legislature to adopt, in the course of implementation of Article 42 EC, provisions derogating from the principle of the exportability of social security benefits. In particular, as the Court has in the past accepted, the grant of benefits closely linked with the social environment may be made subject to a condition of residence in the State of the competent institution (see, inter alia, Case 313/86 *Lenoir* [1988] ECR 5391, paragraph 16, Case C-20/96 *Snares* [1997] ECR I-6057, paragraph 42, and Case C-154/05 *Hershberger-Lap and Dams-Schipper* [2006] ECR I-6249, paragraph 33).

82 That is clearly not the case with social security benefits which, as in the main proceedings, fall within Article 4(1) of Regulation No 1408/71, which do not appear to be linked to the characteristic social environment of the Member State which introduced them and thus liable to be made subject to a condition of residence. In those circumstances, to allow the competent Member State to rely on grounds of integration into the social environment of that State in order to impose a residence clause would run directly counter to the fundamental objective of the Union which is to encourage the movement of persons within the Union and their integration into the society of other States.

83 Moreover, although the Court has accepted that the risk of seriously undermining the financial balance of the social security system may justify a barrier of that kind (see, inter alia, Case C-158/96 *Kohl* [1998] ECR I-1931, paragraph 41), it must be found that the German Government has failed to demonstrate how transfers of residence from Germany such as those which took place in the cases in the main proceedings, are liable to impose a heavier financial burden on the German social security scheme.

84 Therefore, the fact that the grant of an old-age benefit such as that at issue in the main proceedings may be made subject to a condition of residence on the territory of the competent State under Annex VI, Part C, point 1, constitutes a breach of Article 42 EC.

85 Having regard to the foregoing considerations, the answer to the question referred must be that the provisions of Annex VI, Part C, point 1, to Regulation No 1408/71 are incompatible with freedom of movement for persons, and, in particular, with Article 42 EC, in that they make it possible, in circumstances such as those in the main proceedings, to make the inclusion, for the purposes of the payment of old-age benefits, of contribution periods completed between 1937 and 1945 on the parts of the territory where the social security legislation of the German Reich was applicable, but which are outside the territory of the Federal Republic of Germany, subject to the condition that the recipient reside in the territory of that Member State.

The question referred in Case C-450/05

86 By its question, the referring court seeks to know, essentially, first, whether the provisions of Annex III, Parts A and B, point 35(e) to Regulation No 1408/71 are compatible with Article 39 EC and Article 42 EC and, second, whether the provisions of Annex VI, Part C, point 1, to that regulation are compatible with freedom of movement for persons, and Article 42 EC in particular, in that those provisions make it possible, in circumstances such as those in the main proceedings, to make the inclusion, for the purposes of the payment of old-age benefits, of contribution periods completed under the FRG between 1953 and 1970 in Romania subject to the condition that the recipients reside in the territory of the Federal Republic of Germany.

On the validity of the provisions of Annex III, Parts A and B, point 35(e), to Regulation No 1408/71

87 Under Article 7(2)(c) of Regulation No 1408/71, the provisions of the social security conventions mentioned in Annex III to that regulation continue to apply notwithstanding the provisions of Article 6 of the regulation, according to which the regulation is to replace generally the provisions of any social security convention binding two or more Member States as regards persons and matters which it covers.

88 Under Annex III, Parts A and B, point 35(e) to Regulation No 1408/71, Article 4(1) of the 1966 German-Austrian Convention remains applicable in cases where the benefit has already been paid or is payable on 1 January 1994 or the beneficiary has established his habitual residence in Austria before 1 January 1994 and the payment of pensions due under the pension and accident insurance begins prior to 31 December 1994. The applicability of Article 4(1), Article 6 of Regulation No 1408/71 notwithstanding, concerns the German legislation, which, according to the referring court, provides that periods of insurance completed outside the territory of the Federal Republic of Germany do not give rise to payment of benefits or only give rise to payment of benefits under certain conditions, where the recipients of such benefits do not reside in that territory.

89 Those provisions of Annex III correspond to those of Article 14(2)(b) of the 1995 German-Austrian Convention, which came into force on 1 October 1998, under which Article 4(1) of the 1966 German-Austrian Convention remains applicable in the cases listed in that annex.

90 As the referring court observes, the situation of Mr Wachter, which does not fall within any of the relevant provisions of the SGB VI allowing him to receive payment of the benefits at issue in the main proceedings abroad, does not fall within any of the abovementioned cases either, as his right to an old-age pension only arose on 1 August 1999.

91 Before the referring court, Mr Wachter made the point that, although, until 1 January 1994, the date of the entry into force of Regulation No 1408/71 as regards the Republic of Austria (see paragraph 94 of this judgment), he could rely on the first sentence of Article 4(1) of the1966 German-Austrian Convention in order to enjoy the waiver of the residence clause laid down in it, the result of the application of Regulation No 1408/71 was, pursuant to Article 6 thereof, that the regulation replaced the convention.

92 It is true that, Article 6 of Regulation No 1408/71 notwithstanding, Article 7(2)(c) of the regulation provides that the provisions of the social security conventions listed in Annex III remain applicable. However, as observed above, Mr Wachter does not fulfil the conditions set out in Parts A and B, point 35(e), of that annex so as to benefit from the first sentence of Article 4(1) of the 1966 German-Austrian Convention and, therefore receive old-age benefits under the FRG when he is not resident in the territory of the Federal Republic of Germany.

93 In order to give a reply to the referring court, it is necessary to ascertain whether, contrary to the argument of the Rentenversicherung and the German Government, a situation such as that of the claimant in the main proceedings falls within the scope of Regulation No 1408/71.

94 In that regard, it must be observed, first of all, that Regulation No 1408/71 became applicable to the Republic of Austria on 1 January 1994 by virtue of the Agreement on the European Economic Area of 2 May 1992 (OJ 1994 L 1, p. 3), and that that regulation applied to that Member State as a member of the Union as of 1 January 1995.

95 Pursuant to Article 94(2) of Regulation No 1408/71, a person in Mr Wachter's position may rely on the inclusion, for the determination of rights acquired under the provisions of the regulation, in this case as of 1 August 1999, of all periods of insurance, employment or residence completed under the legislation of a Member State before the date of application of that regulation.

96 Then, as is apparent from paragraphs 56 and 57 of this judgment, a person in the position of Mr Wachter, who is a retired Austrian worker receiving old-age benefits under the German legislation, falls within the personal scope of Regulation No 1408/71, as defined by Article 2(1) thereof, according to which the regulation applies, inter alia, 'to employed or self-employed persons who are or have been subject to the legislation of one or more Member States and who are nationals of one of the Member States'.

97 The fact that, after leaving Romania, Mr Wachter settled in Austria and did not subsequently work or reside in another Member State does not alter that conclusion, particularly as the person concerned claims an old-age pension under the legislation of a Member State other than the one in which he resides (see, to that effect, inter alia, Case C-389/99 *Rundgren* [2001] ECR I-3731, paragraph 35).

98 The Rentenversicherung and the German Government dispute that the provisions at issue in the main proceedings, based on the FRG, fall within the material scope of Regulation No 1408/71, on the ground that they relate to 'benefit schemes for victims of war or its consequences' which are excluded from the scope of that regulation pursuant to Article 4(4).

99 The German Government observes, in that regard, that periods of contribution completed with a foreign old-age insurance body may be calculated as German insurance periods inter alia if the insured person falls within the category of displaced and repatriated persons recognised by the BVG, that is to say, in particular, persons who, as German nationals or persons of German origin, had their home in the German territories of the East or abroad and who lost that home because of events connected with the Second World War, following their displacement as a result of expulsion or emigration.

100 Those rules must be viewed against the background of the situation of the German minorities living in Eastern Europe and central Asia who suffered a particularly difficult fate during and after the Second World War. As a result, the Federal Republic of Germany acknowledges its particular responsibility for that fate. It fulfils that responsibility, first, by allowing the persons concerned to decide whether to embrace a future in their home country of the time or to return to Germany under the statutory provisions on integration, and, second, by providing support for the social integration of persons so repatriated.

101 The FRG is one of those measures of integration and the persons concerned are in principle placed in the same position as if they had spent all their working life in Germany. The periods of contribution which the persons concerned completed with a foreign old-age insurance body are integrated into German pension law and confer entitlement to pensions at the same level as German pensions.

102 Such integration is necessary, either because the competent foreign insurance bodies do not export their pensions, or because the exported foreign pensions are not sufficient to guarantee the persons concerned in Germany sufficient revenue to meet their needs. The benefits derived form periods falling under the FRG are intended to provide an additional, compensatory or complementary guarantee against the risks of old-age connected with the economic and social environment in Germany.

103 Moreover, the grant of benefits derived from periods falling under the FRG in Germany does not depend on the fact that the persons concerned paid contributions to the German old-age insurance scheme. The Federal State repays the expenditure arising from those benefits to the old-age insurance bodies, pursuant to Paragraph 291b of the SGB VI, out of public funds. Those benefits constitute material compensation for the disadvantages arising from the National Socialist regime and the war, while taking the legal form of social security to facilitate the integration of the population concerned, both psychologically and economically.

104 Those statutory provisions were historically limited and should be seen in the context of the alleviation of the consequences of the war. Moreover, the benefits in question were based on the principle of integration and national recognition of displacement, and on the alleviation of the negative consequences connected with it. However, they are not equivalent to a contribution paid to a body situated on the current territory of the Federal Republic of Germany. That notion of integration is still valid today, more than sixty years after the end of the Second World War.

105 Therefore, the criteria established in the judgments in *Fossi* and *Tinelli* are still useful. The pensions at issue, which derive from the rules on displaced persons and which still pursue the aim, despite the time which has now passed, of integrating

into German society persons affected by the consequences of war, must be classified, according to those criteria, as 'benefit schemes for victims of war'.

106 That line of argument cannot be accepted.

107 As pointed out in paragraph 63 of this judgment, a benefit may be regarded as a social security benefit in so far as it is granted to the recipients, without any individual and discretionary assessment of personal needs, on the basis of a legally defined position and relates to one of the risks expressly listed in Article 4(1) of Regulation No 1408/71.

108 It is also apparent from the case-law of the Court cited in paragraph 65 of this judgment that provisions such as those in Article 4(4) of Regulation No 1408/71 must be interpreted strictly.

109 Although it is true that, in the case of benefits based on periods of contribution under the FRG, unlike the benefits at issue in Cases C-396/05 and C-419/05, contributions have not been paid pursuant to German legislation on old-age insurance, that does not mean that benefits based on periods under the FRG are excluded from the benefits covered by Article 4(1) of Regulation No 1408/71.

110 It is common ground that the purpose of the FRG is to integrate insured persons who have completed periods of contribution under that law in the German statutory pension insurance scheme, such insured persons being deemed to have completed those periods of insurance in Germany.

111 Moreover, although there are situations in which the benefits paid under the FRG may be regarded as being intended to alleviate difficult situations arising from events connected with the National Socialist regime and the Second World War, that is not the case in a situation such as that of Mr Wachter.

112 In addition, the payment of the benefits at issue to recipients who do not reside on the territory of the Federal Republic of Germany is not discretionary if only in so far as Paragraph 272(1) and (2) of SGB VI provides that pensions deriving from periods of contribution under the FRG are, as a general rule, paid abroad where the beneficiaries were born before 19 May 1950 and acquired their normal place of residence abroad prior to 19 May 1990.

113 Leaving aside the fact that contributions were paid to insurance bodies of a third State, the benefits at issue cannot be considered to be benefits in favour of victims of war or its consequences within the meaning of Article 4(4) of Regulation No 1408/71.

114 Accordingly, the benefits at issue in the main proceedings must, in the light of the characteristics described in paragraphs 110 to112 of this judgment, be regarded, like those at issue in Cases C-396/05 and C-419/05, as old-age and survivors' benefits within the meaning of Article 4(1)(c) and (d) of Regulation No 1408/71, so that the regulation is generally applicable, and in particular Article 10 thereof, according to which the waiver of residence clauses is guaranteed 'save as otherwise provided in this regulation'.

115 As observed above, Annex VI, Part C, point 1 to Regulation No 1408/71 provides precisely that the provisions of Article 10 of the regulation are without prejudice to the provisions under which periods completed outside the territory of the Federal

Republic of Germany, do not give grounds for benefits, or do so only subject to certain conditions, when the persons concerned are resident outside that territory.

116 Accordingly, a person in the position of Mr Wachter is not entitled to payment of the benefits at issue when he resides outside the territory of the Federal Republic of Germany. First, Annex VI, Part C, point 1, to Regulation No 1408/71 allows the inclusion of periods completed outside the territory of that Member State to be made subject to residence in that Member State. Second, the person concerned cannot claim the waiver of the residence clause pursuant to Article 4(1) of the 1966 German-Austrian Convention, as Annex III, Parts A and B, point 35(e) to Regulation No 1408/71 does not cover a situation like that of Mr Wachter. Thirdly, the 1995 German-Austrian Convention merely reproduces, in Article 14, the above provisions of Annex III.

117 The referring court raises the question whether such a situation entails the incompatibility of the provisions of Annex III with Article 39 EC and Article 42 EC, in so far as the loss of the right to old-age benefits of a recipient under the FRG such as Mr Wachter is a result of the fact that the first sentence of Article 4(1) of the 1966 German-Austrian Convention is not applicable, following the entry into force of Regulation No 1408/71 in Austria and of the 1995 German-Austrian Convention, applicable since 1 October 1998.

118 In paragraphs 22, 23 and 29 of its judgment in Case C-227/89 *Rönfeldt* [1991] ECR I-323, the Court held that although it was clear from Articles 6 and 7 of Regulation No 1408/71 that the replacement by the regulation of the provisions of social security conventions between Member States was mandatory in nature and did not allow of exceptions, save for the cases expressly set out in the regulation, nevertheless, consideration had to be given to whether, when such replacement has the effect of placing workers in a less favourable position as regards some of their

rights than was accorded to them under the previous system, it is compatible with the principle of freedom of movement for workers under Articles 39 EC and 42 EC. Those Articles must be interpreted as precluding the loss of social security advantages for the workers concerned which would result from the inapplicability, following the entry into force of Regulation No 1408/71, of conventions operating between two or more Member States and incorporated in their national law.

119 Subsequently, the Court made clear that that principle could not, however, apply to workers who did not exercise their right to freedom of movement until after the entry into force of that regulation (see, inter alia, Case C-475/93 *Thévenon* [1995] ECR I-3813, paragraph 28).

120 In the case in the main proceedings, it is not disputed that the person concerned had settled in Austria in order to live and work there before the entry into force in that Member State of Regulation No 1408/71, whose provisions, save as otherwise provided, replace those of the 1966 German-Austrian Convention. It cannot be accepted that such replacement can, in some circumstances, deprive a person in the position of Mr Wachter of the rights and advantages accruing to him under that convention.

121 The fact that such a person did not move between two Member States but lived and worked in Romania before settling and working in Austria without ever having lived or worked in another Member State does not preclude the application of Articles 39 EC and 42 EC.

122 As the Court held in paragraph 15 of its judgment in Case C-214/94 *Boukhalfa* [1996] ECR I-2253, provisions of Community law may apply to professional activities pursued outside Community territory as long as the employment relationship retains a sufficiently close link with the Community (see, in particular, Case 237/83 *Prodest* v *Caisse Primaire d'Assurance Maladie de Paris* [1984] ECR

3153, paragraph 6, Case 9/88 *Lopes da Veiga* v *Staatssecretaris van Justitie* [1989] ECR 2989, paragraph 15, and Case C-60/93 *Aldewereld* v *Staatssecretaris van Financiën* [1994] ECR I-2991, paragraph 14). That principle must be deemed to extend also to cases in which there is a sufficiently close link between the employment relationship, on the one hand, and the law of a Member State and thus the relevant rules of Community law, on the other.

123 That is the case in a situation such as that in the main proceedings. First, the periods of contribution completed by the person concerned in Romania until 1970 were deemed equivalent to periods of contribution within the meaning of the German legislation in his capacity as a displaced person within the meaning of the BVG. Second, where a person in the position of Mr Wachter settled in Austria in 1970 in order to live and work there while being entitled, under the 1966 German-Austrian Convention, to German old-age benefits under FRG periods at retirement age in 1999, the rules on freedom of movement for persons apply in such a situation.

124 In those circumstances, it must be concluded that the loss, pursuant to Annex III, Parts A and B, point 35(e) to Regulation No 1408/71 and the 1966 German-Austrian Convention, where the person concerned settled in Austria before the entry into force of Regulation No 1408/71 in that Member State, breaches Articles 39 EC and 42 EC.

125 The answer to the first part of the question referred must therefore be that the provisions of Annex III, Parts A and B, point 35(e) to Regulation No 1408/71 are incompatible with Article 39 EC and Article 42 EC in that they make it possible, in circumstances such as those in the main proceedings where the recipient resides in Austria, to make the inclusion, for the purposes of the payment of old-age benefits, of contribution periods completed under the FRG between 1953 and 1970 in Romania subject to the condition that the recipient reside in the territory of the Federal Republic of Germany.

The validity of Annex VI, Part C, point 1, to Regulation No 1408/71

126 It is common ground that the consequence of the transfer of the residence and the place of work of Mr Wachter to a Member State other than the Federal Republic of Germany was a refusal to include, for the purposes of his old-age pension, the periods of contribution completed by the person concerned between September 1953 and October 1970 in Romania. Such a consequence, authorised by the provisions of Annex VI, Part C, point 1, to Regulation No 1408/71 hinders or prevents the exercise by the person concerned of his right to freedom of movement within the Union and therefore constitutes an obstacle to that freedom.

127 In order to justify that refusal, the Rentenversicherung and the German Government essentially put forward the same grounds as those relied on in Cases C-396/05 and C-419/05, relating to the periods of contribution completed in the parts of the territory where the social security legislation of the German Reich was applicable (see paragraph 77 of this judgment).

128 On the grounds set out in paragraphs 81 and 82 of this judgment, and to the extent that the German Government has failed to demonstrate that the inclusion of the contributions at issue for the purposes of calculating the old-age benefits at issue in the main proceedings would have a significant effect on the financing of the German system of social security, that argument must be rejected.

129 The answer to the second part of the question referred must therefore be that the provisions of Annex VI, Part C, point 1, to Regulation No 1408/71 are incompatible with freedom of movement for persons and Article 42 EC in particular in that they make it possible, in circumstances such as those in the main proceedings, to make the inclusion, for the purposes of the payment of old-age benefits, of contribution periods completed under the FRG between 1953 and 1970 in Romania subject to the condition that the recipient reside in the territory of the Federal Republic of Germany

Costs

130 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

1. **The provisions of Annex VI, Part C, headed 'Germany', point 1, to Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, in the version amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996, are incompatible with freedom of movement for persons, and, in particular, with Article 42 EC, in that they make it possible, in circumstances such as those in the main proceedings, to make the inclusion, for the purposes of the payment of old-age benefits, of contribution periods completed between 1937 and 1945 on the parts of the territory where the social security legislation of the German Reich was applicable, but which are outside the territory of the Federal Republic of Germany, subject to the condition that the recipient reside in the territory of that Member State.**

2. **The provisions of Annex III, Parts A and B, point 35, headed 'Germany-Austria', under (e), to Regulation No 1408/71, as amended, are incompatible with Article 39 EC and Article 42 EC in that they make it possible,**

in circumstances such as those in the main proceedings, where the recipient resides in Austria, to make the inclusion, for the purposes of the payment of old-age benefits, of contribution periods completed under the law on pension rights acquired by contribution abroad (Fremdrentengesetz) between 1953 and 1970 in Romania subject to the condition that the recipient reside in the territory of the Federal Republic of Germany.

3. **The provisions of Annex VI, Part C, headed 'Germany', point 1, to Regulation No 1408/71, as amended, are incompatible with freedom of movement for person,s and, in particular, with Article 42 EC, in that they make it possible, in circumstances such as those in the main proceedings, to make the inclusion, for the purposes of the payment of old-age benefits, of contribution periods completed under the law on pension rights acquired by contribution abroad between 1953 and 1970 in Romania subject to the condition that the recipient reside in the territory of the Federal Republic of Germany.**

[Signatures]