# OPINION OF ADVOCATE GENERAL TRSTENJAK delivered on 28 June 2007 [1]

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1 — Original language: German.

## I — Introduction

1. These joined cases arise from references from the Sozialgericht Berlin (Social Court, Berlin) (Cases C-396/05 and C-419/05) and the Landessozialgericht Berlin-Brandenburg (Higher Social Court, Berlin-Brandenburg) (Case C-450/05) seeking a preliminary ruling from the Court of Justice of the European Communities, pursuant to the first paragraph of Article 234 EC, on the interpretation and assessment of the compatibility with higher-ranking Community law of certain provisions 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 and their families moving within the Community [2] ('Regulation No 1408/71' or 'the Regulation').

2. The contested provisions in Annexes III and VI to Regulation No 1408/71 are intended respectively to allow the Federal Republic of Germany to conclude international treaties with the Republic of Austria and to leave in force domestic legislation in the field of old-age pensions for ethnic German expellees and *Spätaussiedler* ['late settlers': persons of German origin who emigrated from countries east of the Oder-Neisse border relatively late after 1945], which is to remain unaffected by the provisions of Regulation No 1408/71 and, above all, Article 10 concerning the exportability of benefits. Leaving aside differences of detail in their legal formulation, those provisions basically provide that claimants must accept reductions in or even the loss of benefits if they move their residence from the territory of the Federal Republic of Germany.

2 — 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, as amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996 (OJ 1997 L 28, p. 1).

3. The applicants in the main proceedings, who are all recognised as ethnic German expellees under the relevant German legislation, are personally affected by those provisions as a result of their decision to settle in other Member States of the European Union. They consider that the exceptional provisions in Annexes III and VI to Regulation No 1408/71 are inconsistent with the freedom of movement under Articles 18 EC, 39 EC and 42 EC and, in particular, with the exportability of benefits under Article 42 EC and, as they are incompatible with higher-ranking Community law, are void.

## II — Legal context

### A — *Community law*

1. Regulation No 1408/71

4. Article 4 of Regulation No 1408/71 provides as follows:

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

...

(c) old-age 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.

...

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 6 of Regulation No 1408/71 provides as follows:

'Subject to the provisions of Articles 7, 8 and 46(4) this Regulation shall, as regards per-

sons and matters which it covers, replace the provisions of any social security convention binding either:

(a) two or more Member States exclusively,

(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.'

6. Article 7 of the Regulation, concerning international provisions not affected by the Regulation, refers in paragraph (2)(c) to:

'the social security conventions listed in Annex III'.

7. Parts A and B of Annex III to Regulation No 1408/71 list the provisions of treaties which remain in force or are applicable, and read as follows in point 35, Germany-Austria, (e):

'Article 4(1) of the ... Convention [of 22 December 1966 on social security] 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.'

8. The first subparagraph of Article 10(1) of Regulation No 1408/71 provides as follows:

'Save as otherwise provided in this Regulation invalidity, old-age or survivors' cash benefits, pension for accidents at work or occupational diseases and death grants 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.'

9. Article 89 of the Regulation provides as follows:

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

10. Annex VI, Part C, Germany, point 1, of Regulation No 1408/71 provides as follows:

'Article 10 of the Regulation is without prejudice to provisions under which accidents (occupational diseases) and 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 the territory of the Federal Republic of Germany.'

2. The Social Security Convention of 22 December 1966 between the Federal Republic of Germany and the Republic of Austria

11. The first sentence of Article 4(1) of the Social Security Convention of 22 December 1966 between the Federal Republic of Germany and the Republic of Austria provides as follows:

'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.'

B — *The German provisions*

12. Paragraph 110 of Sozialgesetzbuch VI — Gesetzliche Rentenversicherung (Book VI of the Social Security Code — Statutory Pension Insurance; 'SGB VI') provides as follows:

'(1) Beneficiaries who reside abroad only temporarily shall receive benefits for that period in the same way as beneficiaries who have their normal place of residence on national territory.

(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.'

13. Paragraph 113 of SGB VI reads as follows:

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

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

...

...

contribution periods completed in 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 in 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%.'

14. Paragraph 271 of SGB VI provides as follows:

'Contribution periods completed in 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 in Federal German territory if the children are brought up within the territory of the Federal Republic of Germany.'

15. Paragraph 272 of SGB VI reads as follows:

'(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 Fremdrentengesetz [Law on foreign pensions] up to the maximum number of credit units for Bundesgebiet contribution periods,

2. the benefit supplement for contribution periods under the Fremdrentengesetz, up to the maximum benefit supplement for Bundesgebiet contribution periods,

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

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

(2) Credit units for contribution periods under the Fremdrentengesetz 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 in Federal German territory, shall also include contribution periods completed in the territory of the former German Reich. The latter shall be taken into account as contribution periods under the Fremdrentengesetz in determining credit units arising from a benefit supplement, from a reduction resulting from a completed pension equalisation or pension split and for the supplement in the case of an orphan pension.'

16. Paragraph 14 of the Fremdrentengesetz ('FRG') provides as follows:

'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.'

## III — The main proceedings and the questions referred

### 1. *Case C-396/05*

17. The claimant in the main proceedings, Ms Habelt, a German national born on 30 January 1923 in Eulau (Jilové) in the Sudetenland (formerly Czechoslovakia, now the Czech Republic), worked in Eulau from January 1939 to May 1946. From 1 January 1939 to 30 April 1945 she paid compulsory contributions under the German pension scheme to the Reichsversicherungsanstalt für Angestellte (Reich Insurance Institution for Employees), which was the competent social insurance institution after the annexation of the Sudetenland by the German Reich. From 5 May 1945 to 13 May 1946 she was subject to compulsory insurance in the then Czechoslovakia. Following her expulsion, she lived in the territory of the p
resent Federal Republic of Germany.

18. Since 1 February 1988 she has received an old-age pension from the defendant in the main proceedings. In addition to periods during which she had brought up children and paid voluntary contributions, the pension was based on compulsory contributions paid on the basis of her work in the territory of the present Czech Republic between January 1939 and 30 April 1945, and also on Fremdrenten 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.

19. After the claimant moved to Belgium on 1 August 2001, the defendant in the main proceedings reassessed her pension and, with effect from 1 December 2001, granted her a monthly pension of DEM 204.50 (EUR 104.56) before tax. This reduced her existing pension by DEM 438.05 (EUR 223.96) per month.

20. According to the social insurance institution, when a pension is paid under the statutory pension scheme to recipients of the pension who have their normal place of residence abroad, the special payment provisions — in this case, Paragraph 113 of SGB VI — have to be taken into account. According to that provision, the personal credit units of persons entitled to a pension are determined according to the credit units for contribution periods completed in Federal German territory. These are contribution periods for which contributions were paid under federal legislation after 1945 and contribution periods treated as such in the Fifth Chapter of SGB VI. Therefore, under the Federal German law applicable after 1945, no payments were made for contribution periods completed by the claimant for employment in the Sudetenland in the period from January 1939 to April 1945.

21. According to the defendant, Paragraph 271 of SGB VI stipulates which contributions paid before 9 May 1945 are to be deemed to have been made during contribution periods completed in Federal German territory within the meaning of Paragraph 113(1)(1) of SGB VI. That provision states that contribution periods completed in Federal German territory include periods during which compulsory contributions were paid under the Reich insurance legislation applicable prior to 9 May 1945 for employment or self-employment on national territory. The term 'on national territory' does not refer to the area of application of the Reich insurance legislation, but only to the territory of the present Federal Republic of Germany. Hence compulsory contributions that were paid under the Reich insurance legislation for employment or self-employment in the territory of the former German Reich, but outside the territory of the present Federal Republic of Germany, are not contributions in Federal German territory. The contributions paid by the claimant from January 1939 to April 1945 under the Reich legislation were not contributions paid during contribution periods completed in Federal German territory pursuant to Paragraph 271 of SGB VI because the Sudetenland does not lie within the territory of the present Federal Republic of Germany.

22. The position has not changed since the accession of the Czech Republic to the

European Union. Under point 1, Germany, of Part D (formerly C) of Annex VI to Regulation No 1408/71, credit units for contribution periods completed in the territory of the former German Reich and periods under the FRG cannot give rise to the payment of benefit in a Member State.

2. *Case C-419/05*

23. On 23 March 2002 Ms Habelt instituted proceedings before the court now seeking a preliminary ruling, which takes the view that the issues arising in the main proceedings fall within the personal, material and temporal scope of Regulation No 1408/71. As the national court saw no justification for the disputed limitation, by point 1 of Part D of Annex VI to the abovementioned Regulation, of the principle 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), Germany, point 1, to Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community 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 of the Treaty establishing the European Community — inasmuch as it rules out also pension benefits in respect of contribution periods completed in the territory of the former German Reich?'

24. The claimant in the main proceedings, Ms Möser, a German national born on 2 January 1923 in Pniewo (Poland), fled from the former Russian occupation zone in 1946 and settled in the territory of the present Federal Republic of Germany. Since 1 February 1988 she has received from the defendant in the main proceedings an old-age pension calculated on the basis of, among other things, compulsory contribution periods for the period from 1 April 1937 to 1 February 1945 for work in Pomerania in the territory of the German Reich within the 1937 borders (now Poland).

25. After the claimant 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 present Federal German territory could not be taken into account because the claimant resided abroad. Since 1 June 2004 she has lived in Great Britain.

26. After several attempts to obtain a decision on her claims, on 17 May 2002 the claimant instituted proceedings for failure to act before the court now seeking a preliminary ruling. Her objection was dismissed by the defendant in the main proceedings by decision of 14 July 2003.

27. On 9 August 2003 the claimant lodged an application with the abovementioned court to set aside the decision of 14 July 2003. 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, the court decided to stay the proceedings and to refer to the Court of Justice the same question as that in Case C-396/05.

3. *Case C-450/05*

28. Mr Wachter, the claimant in the main proceedings, was born in Romania in 1936. He possesses Austrian nationality and is recognised as an expellee within the meaning of the Bundesvertriebenengesetz (Federal Law on expellees; 'BVFG'). In 1970 he emigrated from Romania to Austria, where he has lived since then. In November 1995 the defendant in the main proceedings recognised the contribution and employment periods completed by the claimant in Romania between September 1953 and October 1970 as compulsory contribution periods under the FRG.

29. In June 1999 the claimant 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 pension from Fremdrenten periods [periods taken into account under the FRG] could be paid abroad. The same conclusion follows from the Community regulations which replaced the Social Security Convention between Austria and Germany.

30. After the claimant's action against the abovementioned decision in the Sozialgericht Berlin was dismissed, he lodged an appeal on the ground that, until 31 December 1993, under the bilateral Social Security Convention of 1966 between Germany and Austria, as an Austrian living in Austria he had been treated in the same way 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, which the Convention contained, was now subject to limitations (point 35, Germany-Austria, (e), of Parts A and B of Annex III and point 1, Germany, of

Part C of Annex VI to Regulation No 1408/71), which meant that he was placed in a worse position, resulting in a breach of the principle of freedom of movement.

31. The national court observes that the first sentence of Article 4(1) of the bilateral Social Security Convention of 1966 between Germany and Austria provided for a right to the payment abroad of pensions based on FRG contribution periods. According to the national court, this was an unlimited equiparation of territories because the Convention excluded the application of the provisions of German law which preclude such export of pensions (Paragraphs 110(2), 113(1) and 272 of SGB VI). The national court doubts whether the replacement in principle of all bilateral conventions, as a result of Regulation No 1408/71 becoming applicable in relation to Austria from 1 January 1994, is compatible with the freedom of movement under Articles 39 EC and 42 EC.

32. The national court adds that, whilst Regulation No 1408/71 contains in Article 10 an equiparation of territories, this was disapplied by the provisions of Annex VI, Part C (now D), Germany, point 1, with regard to contribution periods completed in the territory of the former German Reich and FRG periods. However, there is an exception to this — precisely with respect to the first sentence of Article 4(1) the 1966 Convention between Germany and Austria. In Annex III, Parts A and B, provisions of social security conventions are specified which would remain applicable notwithstanding Article 6 of the Regulation (Part A) and continuing provisions of conventions which do not apply to all persons to whom the Regulation applies (Part B). However, the applicant does not fulfil the conditions required to be able to rely on the Convention.

33. Consequently those provisions, at least in a situation such as that to which the main proceedings relate, could be contrary to the freedom of movement (Articles 18 EC, 39 EC and 42 EC) and, in particular, to the principle of the exportability of benefits under Article 42 EC since, in the claimant's case, they had the effect that his old-age pension is not payable in other Member States because it is based solely on FRG periods.

34. In those circumstances the national court decided to stay the proceedings and to refer the following question to the Court:

'Are point 35, Germany-Austria, (e), of Parts A and B of Annex III to Regulation No 1408/71 and Part C, 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?'

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

1. Point 35, Germany-Austria, (e), of Parts A and B of Annex III to Regulation No 1408/71 — 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 German-Austrian Convention of 4 October 1995 (BGBl. 1998 II, p. 313) — which entered into force on 1 October 1998 (announcement BGBl. 1998 II, p. 2544) — 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. Point 1, Germany, of Part C of Annex VI to Regulation No 1408/71 corresponds to point 1, Germany, of Part D 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.

## IV — Procedure before the Court of Justice

36. On 6 December 2005 the President of the Court of Justice joined Cases C-396/05 and C-419/05, and on 27 January 2006 joined those cases with Case C-450/05.

37. Written observations were submitted pursuant to Article 23 of the Statute of the Court of Justice by the claimant in the main proceedings in Case C-419/05, the defendant in the main proceedings, the German and Italian Governments and the Commission.

38. At the hearing on 6 March 2007 oral argument was presented by the lawyers representing the claimant in the main proceedings in Case C-419/05 and those representing the defendant in the main proceedings, the German Government and the Commission.

## V — Legal assessment

### A — *Cases C-396/05 and C-419/05*

#### 1. Introductory remarks

39. The Sozialgericht Berlin has submitted the same question to the Court in two orders for reference asking whether the provision under point 1, Germany, of Part D of Annex VI to Regulation No 1408/71 is compatible with higher-ranking Community law.

40. As I pointed out at the beginning, that secondary provision of Community law is intended to allow the Federal Republic of Germany to retain domestic measures in SGB VI which enable ethnic German residents of the eastern territories of the former German Reich which do not form part of the territory of the present Federal Republic of Germany who are recognised as expellees within the meaning of Paragraph 1 of the BVFG to derive claims to the payment of an old-age pension. The parties to the main proceedings all agree that the abovementioned secondary-law provision extends to cover those provisions of SGB VI which prevent the payment in other countries of pension claims arising in accordance with that law. Consequently point 1, Germany, of Part D of Annex VI to Regulation No 1408/71 is to be understood as a provision which removes a carefully defined regulated matter from the material scope of that regulation and leaves it to the legislative competence of the Federal Republic of Germany.

41. This means that the waiver of residence clauses laid down in Article 10(1) of Regulation No 1408/71,[3] which prohibits the Member States from reducing or withdrawing old-age cash benefits acquired under the legislation of a Member State by reason of the fact that the recipient resides in the territory of a Member State other than that

3 — R. Schuler, *Europäisches Sozialrecht* (edited by Maximilian Fuchs), 4th edition, Article 10, n. 13, points out that Annex VI to Regulation No 1408/71 contains exceptions to the principle of the exportability of benefits.

in which the institution responsible for payment is situated, ceases to apply. [4]

42. However, the export of social security benefits is by no means a principle which is situated at the secondary-law level. On the contrary, Article 10(1) performs the task of coordination provided for by Article 42(b) EC, which requires arrangement to be made to secure the payment of benefits to which a right has arisen on the basis of a social security system of one or more Member States to recipients residing in the territory of another Member State. Therefore the principle of the export of social security cash benefits, which follows from the primary-law basis of Article 42(b), has the object of eliminating, by prohibiting the application of conflicting legislation of Member States, the potential legal disadvantage of the loss of rights to cash benefits as a result of moving to another Member State and thereby enabling workers to exercise the freedom of movement conferred by Community law. [5]

43. In view of the importance of Article 42(b) EC for giving effect to the freedom of movement for workers, I must agree with the Commission that the question referred by

4 — Article 10(1) of Regulation No 1408/71 excludes any reduction of rights on the ground of residence in another Member State. It specifies practically all the possible ways of limiting rights by national measures laying down a residence requirement in the respective Member State. See Case C-356/89 *Newton* [1991] ECR I-3017, paragraph 23; Joined Cases 379/85 to 381/85 and 93/86 *Giletti and Others* [1987] ECR 955, paragraph 17; and Case 92/81 *Camera* [1982] ECR 2213, paragraph 16. This waiver of residence clauses in the law of the Member States in effect places the territories of the Member States on an equal footing with regard to the entitlement to benefits. In positive terms, it means that this provision obliges the Member States to transfer all the benefits specified in Article 10(1) to other Member States within the material ambit of Regulation No 1408/71. Certain commentators see this as a farewell to the traditional principle of territoriality in social security law. See R. Schuler, op. cit. (footnote 3) Article 10, n. 3; K. Louven and C. Louven, 'Das Territorialitätsprinzip im Internationalen Sozialrecht', *Neue Zeitschrift für Arbeitsrecht*, 1991, Part 13, p. 497; and E. Eichenhofer, 'Export von Sozialleistungen nach Gemeinschaftsrecht', *Die Sozialgerichtsbarkeit*, 1999, p. 57.

5 — Without the aggregation of insurance periods and the export of cash benefits a worker who exercises his freedom of movement would forfeit social security rights if and to the extent that they are founded on the law of the State of his previous employment. That is why the Court stated in Case 51/73 *Smieja* [1973] ECR 1213, paragraphs 14 to 17, that Article 10(1) 'ensures for the recipient full entitlement to various cash benefits, pensions, and other grants acquired under the legislation of one or more Member States, even while he resides in the territory of a Member State other than that in which the institution responsible for payment is situated. The aim of this provision is to guarantee the party concerned his right to have the benefit of such payments even after taking up residence in a different Member State, e.g. his country of origin'. According to a finding of the Court in Case 92/81 *Caracciolo* [1982] ECR 2213, paragraphs 14 and 16, the aim of the unlimited export of cash benefits is 'not only that the person concerned retains the right to receive pensions and benefits acquired under the legislation of one or more Member State even after taking up residence in another Member States, but also that he may not be prevented from acquiring such a right merely because he does not reside in the territory of the State in which the institution responsible for payment is situated. ... Article 10(1) ... is to be interpreted as meaning that the insurance institution of the State of origin is not permitted to apply to invalidity benefits the principle of territoriality to which the national court refers'. According to Borchardt, *Handbuch des EU-Wirtschaftsrechts* (edited by M.A. Dauses), Munich, 2004, Volume I, D. II, n. 64, the rules of social security for workers therefore constitute a necessary adjunct to the law on freedom of movement. F. Ruland, 'Rentenversicherung', in B. Schulze and H. Zacher (eds), *Wechselwirkungen zwischen dem Europäischen Sozialrecht und dem Sozialrecht der Bundesrepublik Deutschland, Schriftenreihe für Internationales and Vergleichendes Sozialrecht*, Volume 12, Berlin, 1991, p. 75, therefore describes European social security law as 'flanking freedom of movement'. European social security law is said to contain 'coupling rules' which are necessary in order that the part-history of migrant workers in individual Member States can become a single complete life history.

the Sozialgericht Berlin focuses generally on the compatibility of point 1, Germany, of Part D of Annex VI with the primary-law provisions concerning freedom of movement for workers, including Articles 42 EC and 39 EC, although from my point of view the principle of the export of benefits plays a central part in the reply to the question referred.

2. Applicability of the provisions on freedom of movement for workers

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i) Personal scope

Classification as social security benefits

44. With Regulation No 1408/71 the Community legislature has narrowed down the material scope of the principle of the export of social security benefits under Article 42(b) EC so that not all benefits from social security schemes are required to be transferable or are suitable for transfer, but only the categories listed in Article 10(1) and in the central provision of Article 4(1) of Regulation No 1408/71.[6] Article 4(1)(c) provides that old-age benefits fall within the material scope of the Regulation. Article 4(2a) results in a restriction of the exportability of special non-contributory benefits. By contrast, the Regulation expressly does not apply to benefit schemes for victims of war or its consequences.

45. The applicants fall within the personal scope of the Regulation in so far as they claim pension rights in the main proceedings against the defendant before the Sozialgericht Berlin. Under Article 2(1) of Regulation No 1408/71, the persons covered include not only workers in the narrow sense, but also pensioners, that is to say, former workers, provided that they are covered by a statutory

6 — E. Eichenhofer, 'Export von Sozialleistungen nach Gemeinschaftsrecht', *Die Sozialgerichtsbarkeit*, 1999, p. 58, points out that Article 10 of Regulation No 1408/71 does not create a general duty to export all benefits, as Article 42 EC actually appears to require.

social insurance scheme.[7] This requirement is fulfilled as the applicants are former workers of pensionable age and none of the parties to the main proceedings disputes that they are covered by the German social insurance scheme. On the other hand, the specific classification of the cash benefits in question in the list of benefits in Article 4(1) raises certain questions.

(ii) Material scope

46. Article 4(1) merely lists certain categories of social security benefits, but no legal definitions are given at all. The case-law has defined the categories in detail, stressing that they should not be interpreted on the basis of the corresponding categories in national law, but should be determined according to Community law. Therefore the classification of a social security benefit must be made to depend on its direct connection with the social security scheme of a Member State, which must be assessed according to the objects and conditions for granting it.[8] In other words, the classification of a Member State's cash benefit as a social security benefit within the meaning of Article 4(1) of Regulation No 1408/71 depends on the purpose and the calculation basis of the benefit in question.[9]

47. The German Government and the defendant in the main proceedings consider that the disputed pensions should be classified as benefits for victims of war which do not fall within the scope of Regulation No 1408/71. In that connection they refer first to the *Fossi*[10] and *Tinelli*[11] judgments, in which the Court found that accident and invalidity pensions based on insurance per-

7 — In Case C-194/96 *Kulzer* [1998] ECR I-895, paragraph 24, and Case 182/78 *Pierik* [1979] ECR 1977, paragraph 4, the Court stated that the term 'worker' within the meaning of Article 2(1) of Regulation No 1408/71 was general in its scope and covered any person, whether in gainful occupation or not, who qualified as a person insured under the social security legislation of one or more Member States. It follows that, 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, unless they are subject to special provisions.

8 — As the Court has repeatedly held, the distinction between benefits excluded from the scope of Regulation No 1408/71 and those which fall within its scope is based essentially on the constituent elements of each particular benefit, in particular its purposes and the conditions on which it is granted, and not on whether a benefit is classified as a social security benefit by national legislation. In Case 171/82 *Valentini* [1983] ECR 2157, paragraph 13, the Court found that old-age benefits within the meaning of Article 4(1)(c) of Regulation No 1408/71 did not cover a benefit pursuing an objective relating to employment policy inasmuch as it helped to release posts held by workers near the age of retirement for the benefit of younger unemployed persons. See also Case 249/83 *Hoeckx* [1985] ECR 973, paragraph 11; Case 375/85 *Campana* [1987] ECR 2387; Case C-78/91 *Hughes* [1992] ECR I-4839, paragraph 14; and Joined Cases C-245/94 and C-312/94 *Hoever and Zachow* [1996] ECR I-4895, paragraph 17.

9 — M. Fuchs, op. cit. (footnote 3), Article 4, nn. 13 and 14. *Valentini*, cited in footnote 8, paragraph 13.

10 — Case 79/76 [1977] ECR 667.

11 — Case 144/78 [1979] ECR 757.

iods completed before 1945 outside the territory of the Federal Republic of Germany are not to be regarded as coming within the sphere of social security. The Court based that conclusion on the following considerations: first, the competent insurance institutions no longer existed; second, the German legislation simply alleviates cases of hardship which arose out of events connected with the National Socialist regime and the Second World War; and, third, the payment of the benefits in question is of a discretionary nature where such nationals are residing abroad.

48. In the opinion of the German Government and the defendant, the object of the national provisions in SGB VI is to provide for cases of hardship arising from the fact that social insurance institutions were liquidated as a result of territorial changes and population displacement during and after the end of the Second World War and that claims can no longer be met. The Reichsversicherungsanstalt für Angestellte was closed down after the end of the German Reich and liquidated in 1953. Consequently claims against that former German insurance institution cannot now be made.

49. On the other hand, the Commission and the Italian Government, as well as the claimant in Case C-419/05 and the national court, take the view that the contested pension payments are neither special non-contributory benefits within the meaning of Article 4(2a) nor benefits for victims of war within the meaning of Article 4(4) of Regulation No 1408/71, but benefits which must be included in the list of old-age benefits and survivors' benefits within the meaning of Article 4(1)(c) and (d) and therefore in the sphere of social security.

50. In my view, the second approach must be followed. The contested pension payments, which are based on SGB VI, are neither special non-contributory benefits within the meaning of Article 4(2a) nor benefits for victims of war within the meaning of Article 4(4) of Regulation No 1408/71.

— Differentiation from special non-contributory benefits

51. The case-law defines a special benefit within the meaning of Article 4(2a) by its purpose. It must either replace or supplement a social security benefit and be in the nature of social assistance justified on economic and social grounds and fixed by

legislation setting objective criteria. [12] The Court regards the actual financing of the benefit as the relevant criterion for deciding whether it is non-contributory. The Court must consider whether the financing comes directly or indirectly from social insurance contributions or from public resources. [13]

52. As the Commission and the national court in Cases C-396/05 and C-419/05 correctly observe, payments from contribution periods completed in the territory of the former German Reich cannot be regarded as special non-contributory benefits within the meaning of Article 4(2a) which are exempt from the requirement of exportability because the reason for the payment for contribution periods completed in the territory of the former German Reich is precisely that contributions were previously paid into a German statutory pension insurance scheme. This corresponds with the legal and factual situation in the main proceedings as it is clear from the orders for reference in Cases C-396/05 and C-419/05 that both claimants had shown prima facie that they had paid contributions to the earlier insurance institution, with the consequence that the Court is bound by that finding of the national court.

53. According to the observations of the national court in the abovementioned cases, recognition of the fact that contributions were paid in the past is precisely the reason why contribution periods completed in the territory of the former German Reich were removed from the scope of Fremdrenten pensions law by virtue of the Fremdrenten- und Auslandsrenten-Neuregelungsgesetz (Law amending the law on foreign pensions and the payment of pensions to certain categories of persons residing abroad: 'FANG') of 25 February 1960 and incorporated into general legislation, that is to say, the Reichsversicherungsordnung (Social Insurance Code; 'RVO') (RVO Paragraph 1250) and the Angestelltenversicherungsgesetz (Law on insurance for clerical staff; 'AVG') (AVG Paragraph 27) with the consequence that they are now found in general legislation, that is to say, in SGB VI.

54. The method of financing the system of social security benefits under Article 4(1) offers further support for classification in that system, at the same time precluding subsumption under the heading of special non-contributory benefits according to Article 4(2a) of Regulation No 1408/71. As pointed out by the Commission and the national court, the benefits from contribution periods completed in the territory of the

12 — Case C-20/96 *Snares* [1997] ECR I-6057, paragraphs 33, 42 and 43; Case C-297/96 *Partridge* [1998] ECR I-3467, paragraph 34; Case C-43/99 *Leclere and Deaconescu* [2001] ECR I-4265, paragraph 32; and Case C-160/02 *Skalka* [2004] ECR I-5613, paragraph 25.

13 — Case C-215/99 *Jauch* [2001] ECR I-1901, paragraphs 32 and 33; *Skalka*, cited in footnote 12, paragraph 28; and Case C-265/05 *Perez Naranjo* [2007] ECR I-347, paragraph 36, relate respectively to the payment of a care allowance (contributory) and the award of a compensatory supplement to retirement pension (non-contributory) in Austria, as well as the payment of a supplementary old-age allowance from a solidarity fund (non-contributory in principle, full judgment to be given by the national court) in France.

former German Reich are not funded in the same way as pensions that are based on periods completed within the territory of the present Federal Republic of Germany, out of the Federal Government's contribution (Paragraph 213 of SGB VI), [14] but by means of the pay-as-you-go scheme under Paragraph 153 of SGB VI. [15] This means that the persons insured who are in active employment pay out of their contributions the pensions of those who paid contributions earlier.

55. These arguments suggest that the system of benefits from contribution periods completed in the territory of the former German Reich must be regarded as a component of the German pension scheme. Therefore classification in the category of special non-contributory benefits under Article 4(2a) of Regulation No 1408/71 can be ruled out.

— Differentiation from benefits for victims of war and its consequences

56. With regard to the classification of benefits from contribution periods completed in the territory of the former German Reich as part of the system of benefits for victims of war and its consequences under Article 4(4) of Regulation No 1408/71, as proposed by the German Government and the defendant, it must be observed that that provision, like Article 4(2a), constitutes an exception which, in accordance with the Court's settled case-law, must be interpreted in the light of Article 42 EC, the objective of which is to contribute to the establishment of the greatest possible freedom of movement for migrant workers. [16] The aim of Articles 39 EC, 40 EC and 42 EC would not be attained if, as a consequence of the exercise of their right to freedom of movement, workers were to lose the social

14 — This provision regulates the Federal Government's contribution to the expenditure of the general pension insurance fund. In putting the welfare state principle into effect, the Federal Government created the pension insurance scheme which is based overwhelmingly on compulsion. Consequently the Government has an obligation to arrange matters so that the charges resulting from that scheme are bearable. The purpose of the Government's contribution is to guarantee the pension insurance benefits and to protect those paying contributions against an excessive burden. Accordingly, the Government's contribution has a security and guarantee function (U. Diel, *Sozialgesetzbuch VI* (edited by K. Hauck and W. Noftz), Volume 2, Berlin, 2006, Paragraph 213, nn. 8 and 9 , p. 44.

15 — The pay-as-you-go scheme is a method of funding social insurance schemes, particularly old-age provision, but also sickness and unemployment insurance. Individual contributions paid in are used directly to fund the benefits provided, in addition to which small reserves may be constituted by the insurance institution (for example, contingency reserve of the statutory pension insurance scheme). The person paying contributions acquires, in return, a claim to benefit in case of need (unemployment, sickness, old age). The scheme is based on the so-called 'Generationenvertrag' [agreement between generations] which describes the situation where those paying contributions support the current generation of pensioners for a certain period and, in return, can have a claim, or rather a justified expectation, to be supported later in the same way by the present generation of children (H. Finke, *Sozialgesetzbuch VI*, loc. cit. (footnote 14), Volume 2, Berlin, 2006, K, Paragraph 153, n. 20, p. 7).

16 — See Case 10/78 *Belbouab* [1978] ECR 1915, paragraph 5.

security advantages guaranteed them by the legislation of one Member State, [17] especially where those advantages represent the counterpart of contributions which they have paid. [18] In this connection the Community legislature is entitled to adopt provisions which derogate from the principle that social security benefits are exportable, but derogating provisions such as those in Article 4(4) of Regulation No 1408/71 must be interpreted strictly. [19]

57. To remain consistent, the Court has recognised Member State benefits as benefits for victims of war and its consequences only in very specific cases. In addition to *Fossi* [20] and *Tinelli*, [21] which have already been mentioned, mention must be made of the judgments in *Gillard* [22] and *Baldinger*, [23] which concerned compensation payments by Belgium and Austria to their own nationals, former prisoners of war, in recognition of services rendered and hardships suffered for their country. In both cases it was obvious that, on the basis of the close connection with events in the war, the payments were by way of compensation. On the other hand, in the main proceedings that conclusion does not automatically follow, particularly as the benefits in question are not typical war compensation, but ordinary old-age pensions.

58. I should like to point out first that, contrary to what the German Government suggests, it does not appear appropriate to apply the principles of *Fossi* and *Tinelli* to the present cases because, in those earlier cases, as the national court correctly notes, the Court of Justice had to consider Fremdrenten cases under the FRG and not cases which are covered by the present SGB VI, which means that the facts material to a judgment are different. In my view, a distinction must be made between Fremdrenten periods completed on the basis of contribution periods under a foreign, that is to say, non-German, scheme, and contribution periods completed in the territory of the former German Reich during which contributions were paid to a German institution. As the latter situation exists in the present case, I think a careful examination of the requirements of Article 4(4) of Regulation No 1408/71 is necessary.

17 — Case 24/75 *Petroni* [1975] ECR 1149, paragraph 13; Case 62/76 *Strehl* [1977] ECR 211; Case 69/79 *Jordan-Vosters* [1980] ECR 75; Case 733/79 *Laterza* [1980] ECR 1915; Case 254/84 *De Jong* [1986] ECR 671, paragraph 15; and Case C-168/88 *Dammer* [1989] ECR 4553, paragraph 21.

18 — *Jauch*, cited in footnote 13, paragraph 20, and Case 284/84 *Spruyt* [1986] ECR 685, paragraph 18 et seq.

19 — *Jauch*, cited in footnote 13, paragraph 21, and Case C-286/03 *Hosse* [2006] ECR I-1771, paragraphs 24 and 25.

20 — Cited in footnote 10.

21 — Cited in footnote 11.

22 — Case 9/78 [1978] ECR 1661.

23 — Case C-386/02 [2004] ECR I-8411.

59. I am not persuaded by the claim of the German Government and the defendant that benefits from contribution periods completed in the territory of the former German

Reich are of the nature of compensation because the recognition of contribution periods does not depend on the fact that the war took place but, as has already been established, that in the past contributions were paid to a German insurance institution. Consequently the reason for the payment of an old-age pension cannot lie in a purely discretionary decision of the Federal Republic of Germany which would be aimed at discharging its historic responsibility to the victims of National Socialist rule, but must be seen in the existence of a factual situation in German pension law, as defined in SGB VI.

60. The reasoning of the German Government and the defendant that the pension payments in question serve as compensation payments to contribution payers for the extinction of the former insurance institutions in the eastern territories of the German Reich as a result of the war cannot be accepted either. In so far as this reasoning relates to the former Reichsversicherungsanstalt as the competent insurance institution at the time, it does not alter the fact that contribution payments were indisputably made to a State insurance institution. In that respect I must concur with the submission of the Italian Government that it can make no difference whether the claimants lived in the territory of the Reich (Pomerania) or an annexed territory (Sudetenland). The only decisive factor is that contributions were paid to the Reichsversicherungsanstalt.

61. In my opinion, the loss of the insurance institution's infrastructure and installations as a result of the territorial separation of Pomerania and the Sudetenland from the German Reich is irrelevant for giving judgment in the present cases because a change in the personnel and property resources of an institution, even as a consequence of war, does not affect its legal personality. [24] I must

24 — The Reichsversicherungsanstalt für Angestellte was established as the State compulsory insurance institution for clerical staff in 1912 in Berlin. As a public-law corporation with the capacity of a public authority, it was at first under the supervision of the Reichskanzler and after 1919 it was an institution of the subordinate sector of the Reich Ministry of Employment. In 1934 it was placed under the Reich Insurance Office and, in addition to its existing functions, it took over the supervision of health insurance funds for sickness insurance of clerical staff. Public-law corporations are public-law associations of persons which administer their affairs themselves and are therefore intended to relieve the State administration. They are not linked with the general characteristic of domicile or establishment in a particular territory, but acquire their members according to specific, namely, occupational, financial, social, cultural or other aspects. Therefore, unlike regional or local corporations, they are also described as personal corporations. In the field of social security insurance they include local health insurance funds and other funds treated as such, occupational accident insurance associations, *Land* social insurance offices and the Bundesversicherungsanstalt für Angestellte (H. Maurer, *Allgemeines Verwaltungsrecht*, 12th edition, Munich, 1999, Paragraph 23, n. 30). F. Koja, *Allgemeines Verwaltungsrecht*, 3rd edition, Vienna, 1996, p. 322, points out that social security insurance institutions occupy an intermediate position between personal corporations and communities of interests, but also possess certain elements of an institution (*Anstalt*). Like institutions, they constitute an organisational combination of administrative staff and physical resources (buildings, equipment, technical appliances), forming an independent administrative unit.

also agree with the national court in Cases C-396/05 and C-419/05 that it is irrelevant what capital sum an insurance institution might once have accumulated and whether this might possibly have been lost as a result of war. From my viewpoint the decisive factor is whether the Reichsversicherungsanstalt continued to exist as an administrative unit after the end of the war.

62. The German Government and the defendant maintain in their pleadings that, while the Rentenversicherung Bund succeeded to the functions of the Reichsversicherungsanstalt, it was not the successor to its rights. Later in the course of the hearing, in reply to a question from the Court, the German Government clarified this by stating that succession to functions differs conceptually from succession to rights in so far as liabilities are not taken over by the successor. Apart from the uncertainty involved in applying such a concept, it seems to me impossible to accept this conclusion in view of the findings of the national court. It is clear from the orders for reference in Cases C-396/05 and C-419/05 that, although the Reichsversicherungsanstalt no longer exists, it had its head office in Berlin, that is to say, in the territory of the present Federal Republic of Germany and its assets (for example, land and administrative buildings) passed into the ownership of the defendant. Consequently the submissions of the German Government and the defendant concerning a partial collapse of the Reichsversicherungsanstalt in the former eastern territories cannot be accepted. If the legal opinion of the German Government regarding the alleged collapse of the Reichsversicherungsanstalt were accepted, it would have to be presumed, as the Italian Government correctly points out, that that insurance institution had entirely ceased to exist, that is to say, not only for insured persons who lived in the former eastern territories, but also for those who were insured with it and had their residence in the territory of the present Federal Republic of Germany. The latter category, however, is not affected by the national provision at issue, although contributions were paid in both cases.

63. Consequently it cannot be accepted that the payment of a pension from contribution periods completed in the territory of the former German Reich constitutes compensation of any kind. It is therefore not a benefit under a benefit scheme for victims of war or its consequences pursuant to Article 4(4) but, in accordance with its intended purpose, its funding and the conditions for granting it, a social security benefit under Article 4(1) of Regulation No 1408/71.

— Legal effect of the declaration under Article 5 of Regulation No 1408/71

64. This conclusion is supported by the declaration made by the Federal Republic of Germany in accordance with Article 5 of Regulation No 1408/71, in paragraph I.3(a) of which it names the Sozialgesetzbuch, Book VI, of 18 December 1989, as legislation and schemes within the meaning of Article 4(1) of Regulation No 1408/71. [25] As shown by the first sentence of Paragraph 247(3) of SGB VI, contribution periods completed in the territory of the former German Reich are taken into account for calculating pensions as it provides that contribution periods include periods for which compulsory or voluntary contributions were paid under Reich insurance legislation.

65. If a Member State names a statutory measure in a declaration pursuant to Article 5 of Regulation No 1408/71, it necessarily follows that the benefits referred to in that measure are social security benefits within the meaning of Article 4(1) of Regulation No 1408/71. [26] The notified benefits will then be covered by the material scope of the Regulation. [27] Notification has the legal effect of binding the Member States by their own acts, so that they must abide by their declarations. [28]

3. Restriction of workers' freedom of movement by the residence clause

66. The factual situation set out in Article 4(1) gives rise to the legal consequence of Article 10(1) of Regulation No 1408/71, which prohibits the Member States from applying national legislation which provides for a reduction in old-age cash benefits if the person entitled moves to another Member State. This so-called principle of the waiver of residence clauses is not, however, uncon-

25 — Paragraph I.3(a) of the declaration by the Federal Republic of Germany pursuant to Article 5 of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community (OJ 2003 C 210, p. 1). It follows from this that the provisions regulating the statutory pension insurance scheme in the 'Sozialgesetzbuch, Book VI, of 18 December 1989' are deemed to be part of the legislation and schemes referred to in Article 4(1) and (2) of the Regulation.

26 — Case 35/77 *Beerens* [1977] ECR 2249, paragraphs 9 and 10.

27 — W. Brechmann, *Kommentar zum EUV/EGV*, 1st edition (1999), Article 42, p. 647, n. 11, points out that making the declaration necessarily brings all legislation and schemes within the scope of the Regulation. Furthermore, in Case 104/76 *Jansen* [1977] ECR 829, paragraph 7; Case 70/80 *Vigier* [1981] ECR 229, paragraph 12 et seq.; and Case C-327/92 *Rheinhold and Mahla* [1995] ECR I-1235, paragraph 15 et seq., the Court found that the scope of Article 4(1) of Regulation No 1408/71 is described in terms which make it clear that the rules of Community law cover national social security schemes in their entirety.

28 — See *Partridge*, cited in footnote 12, paragraph 35; Case C-228/88 *Bronzino* [1990] ECR I-531, paragraph 11; and Case C-12/89 *Gatto* [1990] ECR I-557. M. Fuchs, *Europäisches Sozialrecht*, loc. cit. (footnote 3), Article 5, n. 5; N. Brall, *Der Export von Leistungen der sozialen Sicherheit in der Europäischen Union*, Baden-Baden, 2003, p. 153.

ditional, as is clear from the wording and as confirmed by the Court, [29] but is save as otherwise provided in that regulation. The exception in point 1, Germany, of Part D of Annex VI to Regulation No 1408/71 expressly provides otherwise.

67. As the two provisions of secondary legislation rank equally in law, it is not possible to examine the validity of point 1, Germany, of Part D of Annex VI directly by reference to Article 10(1). However, it must be borne in mind that, in fulfilling the mission of coordination under Article 42 EC, the function of Article 10(1) is to introduce a regulatory system for the Community which contributes, in the sphere of social security, to guaranteeing the fundamental right of freedom of movement for workers embodied in Article 39 EC. [30] Consequently the finding that Regulation No 1408/71 applies to the factual situations underlying the main proceedings opens the way for an examination of the compatibility of the German entry [in Part D of Annex VI] with higher-ranking Community law, which means Articles 39 EC and 42 EC as the relevant provisions concerning freedom of movement for workers, as well as Article 18 EC concerning Union citizenship.

68. Freedom of movement for workers within the Community is guaranteed under Article 39(1) EC. This provision not only prohibits discrimination, but also requires that there be no interference with the freedom of movement. [31] The Court has stated time and again that Article 39 EC implements a fundamental principle contained in Article 3(c) of the EC Treaty, under which the activities of the Community are to include the abolition, as between Member States, of obstacles to freedom of movement for persons. [32] For the claimants in the main proceedings, moving their residence to another Member State had the consequence that they lost approximately 60 and 25% respectively of their pension because of the reassessment of their pension rights. Such loss of lawfully acquired pension rights is likely to prevent persons entitled, such as the claimants, from exercising their freedom of movement and must therefore be seen as a restriction of that fundamental freedom. The same applies to their right, as Union citizens, to move and reside freely under Article 18(1) EC.

29 — *Snares*, cited in footnote 12, paragraph 39.

30 — N. Brall, op. cit. (footnote 28). According to B. Kahil, *Europäisches Sozialrecht und Subsidiarität*, Baden-Baden, 1996, p. 252, the Community legislature's task of adopting coordination measures follows not only from the wording of Article 42 EC, but also from a teleological interpretation of that provision and its purpose-related connection with Article 39 EC.

31 — R. Langer, *Europäisches Sozialrecht*, loc. cit. (footnote 3), 4th edition, Article 39, n. 1.

32 — See the Opinion of Advocate General Saggio in Case C-135/99 *Elsen* [2000] ECR I-10409, point 25, and the judgment in Case C-18/95 *Terhoeve* [1999] ECR I-345, paragraph 36.

4. Justification of restriction of freedom of movement for workers

69. In so far as the German legislature exercises the power to enact special legislation on behalf of the category of persons who have completed contribution periods in the territory of the former German Reich outside the Federal Republic of Germany, the deductions from the full benefit for Fremdrenten periods in the case of residence outside Germany must be set at a level such that the freedom of movement is not impaired.

70. In *Elsen*,[33] the Court, without finding it necessary to consider the validity of the provision in Part D of Annex VI, found that the Member States, in organising their social security schemes, must 'comply with Community law and, in particular, the Treaty provisions on freedom of movement for workers or again the freedom of every citizen of the Union to move and reside in the territory of the Member States'.

33 — Cited in footnote 32, paragraph 33; similarly Case C-120/95 *Decker* [1998] ECR I-1831, paragraph 23; Case C-158/96 *Kohll* [1998] ECR I-1931, paragraph 19; Case C-85/96 *Martínez Sala* [1998] ECR I-2691, paragraph 33; and Case C-28/00 *Kauer* [2002] ECR I-1343, paragraph 45.

(a) Submissions of the parties

71. To justify the limitation of the freedom of movement for workers, the German Government refers to the German legislature's endeavour to integrate expellees from the former eastern territories into the society of the Federal Republic of Germany.

72. The German Government adds that, in requiring persons receiving pensions to be resident, SGB VI draws the appropriate conclusion from the fact that the Federal German pension insurance institutions are not the successors to the rights, but the successors to the functions, of the defunct Reichsversicherungsanstalt. However, this can and should apply only in relation to the present territorial competence. Otherwise, because of the events of the Second World War, in which large parts of Eastern Europe came under German occupation, the number of potentially entitled persons could not be estimated, nor could that category of persons be logically delimited by any objective criteria other than residence.

73. Therefore, according to the submissions of the German Government, the rules on contribution periods completed in the territory of the former German Reich and on FRG periods also serve to avert financial risks which could hardly be managed. Such

risks would not only burden the German exchequer in the form of compensation payments to pension funds, but would also call into question the nature of the German pension insurance scheme as a whole because it is at present based almost entirely on funding by the contributions of insured persons.

74. On the other hand, the Commission considers that the residence requirement as a condition for the payment of a pension from contribution periods completed in the territory of the former German Reich is a disproportionate interference with the freedom of movement for workers under Articles 39 EC and 42 EC, which cannot be justified in the light of the Court's case-law on citizenship of the Union.

(b) Legal assessment

75. In view of the integrating function of the national legislation in question, the German Government is correct in its view that, as Community law stands at present, in the absence of harmonisation in the sphere of social security, the Member States remain competent to define the conditions for granting social security benefits [34] and therefore they have a broad discretion with regard to laying down the criteria for connection with the society of a State. [35] In particular, the Community legislature has deliberately not limited such discretion in relation to residence clauses for special non-contributory benefits. On the contrary, it expressly declared residence clauses permissible in Article 10a of Regulation No 1408/71. [36]

76. On the other hand, the objection that must be raised to this is that those principles apply in principle only to special non-

34 — *Snares*, cited in footnote 12, paragraph 45.

35 — In her Opinion in Case C-192/05 *Tas-Hagen and Tas* [2006] ECR I-10451, points 61 and 62, Advocate General Kokott observed that, in the same way as a Member State is generally free to lay down the conditions for granting social benefits not governed by Community law, it also has a broad margin of discretion as regards the degree of integration which the person concerned must demonstrate. The place of residence of the person concerned can, in principle, be used as the criterion for connection with the society of the Member State granting the benefit. That person's integration into the relevant society may be regarded as established by a finding that he has resided in that Member State for a certain length of time. On that point, see Case C-209/03 *Bidar* [2005] ECR I-2119, paragraph 57; also Case C-224/98 *D'Hoop* [2002] ECR I-6191, paragraph 38; Case C-138/02 *Collins* [2004] ECR I-2703, paragraph 67; and Case C-258/04 *Ioannidis* [2005] ECR I-8275, paragraph 30. Finally, see the Opinion of Advocate General Kokott in Case C-287/05 *Hendrix*, pending before the Court, point 72.

36 — Lastly, see the Opinion of Advocate General Kokott in *Hendrix*, cited in footnote 35, point 72.

contributory benefits under Article 10a.[37] However, that provision cannot be applied by analogy in the present main proceedings because the intention of the legislature to waive residence clauses in the case of cash benefits is clear from the wording of Article 10(1) of Regulation No 1408/71.

77. The German Government's argument is based mainly on the assertion, which has already been refuted, that the pension payments at issue are social security benefits for which there are no reciprocal contribution periods in relation to a national or foreign insurance institution which still exists. From the viewpoint of Community law, it is irrelevant whether the Rentenversicherung Bund was the successor to the rights or the successor to the functions of the Reichsversicherungsanstalt, particularly as there is sufficient evidence of a certain degree of continuity in the form of the Rentenversicherung Bund. It has also been established that those payments are not in recognition of the consequences of war, but social security benefits within the meaning of Article 4(1) of Regulation No 1408/71.

78. So far as the German Government refers to alleged financial risks which could hardly be met, it must be observed that it has not discharged its burden of asserting and proving facts in support. In particular, there is no proof of the exact number of persons affected or of the cost to the Federal Republic of Germany if they were paid a full old-age pension. Nevertheless, this argument cannot be accepted because, if the persons concerned are in the territory of the Federal Republic of Germany, pensions would have to be paid in full in any case. Therefore the German rule in SGB VI can only have the purpose of preventing the persons entitled from moving to other Member States.

79. A further question is whether the 'integration idea' which, according to the German Government, underlies the German

37 — See *Leclere and Deaconescu*, cited in footnote 12, paragraph 32; *Snares*, cited in footnote 12, paragraph 42; and Case 313/86 *Lenoir* [1988] ECR 5391, paragraph 16, in which the Court stressed that, with regard to special non-contributory benefits, the Community legislature may, in implementing Article 42 EC, adopt measures which derogate from the principle of exportability of social security benefits. In particular, as the Court has already recognised, 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. Article 10a of Regulation No 1408/71 enables benefits of a mixed type, as now defined in Article 4(2a), to be included in the coordination, without at the same time making them subject to the requirement of exportability. Those benefits are granted only in the State of residence in accordance with its law and at its expense. According to the Court's case-law, they are benefits similar in some respects to social assistance in that need is an essential criterion for granting them and they do not depend on the aggregation of employment periods or contribution periods, while in other respects they resemble social security benefits in so far as they are not discretionary and the beneficiary is given a right which is defined by law, and they fall simultaneously into the category of social security and that of social assistance (see R. Schuler, op. cit. (footnote 3), Article 10a, nn. 1 and 2, and S. Van Raepenbusch, *La sécurité sociale des travailleurs européens — Principes directeurs et grands arrêts de la Cour de Justice des Communautés européennes*, Brussels, 2001, p. 28 et seq.).

provision in SGB VI is compatible with the concept of Union citizenship set out in Articles 17 EC and 18 EC. Article 18 EC gives Union citizens the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaty and by the measures adopted to give it effect.

80. In the light of that provision the fundamental freedom of movement for workers has developed into a fully fledged freedom of movement for citizens. [38] Accordingly in *Martínez Sala* [39] for the first time the Court gave direct effect to Union citizenship in relation to a question of entitlement to benefits by considering the effect of Union citizenship alone. In *Elsen* [40] the Court made it clear that Article 18 EC must also be referred to as a legal basis of Regulation No 1408/71 in stating that those provisions help to ensure freedom of movement not only for workers under Article 39 EC but also for citizens of the Union under Article 18 EC.

81. One of the main concerns of European social security legislation, and also in relation to freedom of movement, is the integration of workers and, thereby, of Union citizens into the social life of a Member State. [41] Articles 18(1) EC and 39 EC are obviously infringed by national legislation which, like that at issue in the present cases, although pursuing the integration of a particular group of persons into the society of the home country, is at the same time directed against their integration into the society of other Member States.

82. The aim of integration of Union citizens will be frustrated and Article 18(1) EC thereby infringed if a Member State segregates a particular group of its own nationals for no apparent reason and puts them at a disadvantage, compared with the majority, by making it difficult for them to exercise their freedom of movement by reducing their pensions.

83. I fail to see why integration into the society of the Federal Republic of Germany should not at the same time always entail integration into the society of peoples within the European Union, particularly as the declared aim of the EC Treaty is, according to the first recital in the preamble, to lay the foundations of an ever closer union among the peoples of Europe.

38 — N. Brall, op. cit. (footnote 28), p. 30 et seq.

39 — Cited in footnote 33.

40 — Cited in footnote 32, paragraph 35.

41 — Borchardt, op. cit. (footnote 5), nn. 81 and 82.

84. Consequently the aim of the German rules in SGB VI concerning benefits from Reichsgebiet contribution periods, that is to say, the aim of the integration of ethnic German expellees into the society of the Federal Republic of Germany, cannot justify any obstacle that may result to their integration into the society of host States.

85. As the relevant entry under point 1 of Part D of Annex VI to Regulation No 1408/71 for the purposes of the preliminary ruling procedure under point b in the first paragraph of Article 234 EC merely safeguards the residence clause in national law, without modifying or qualifying it, that entry cannot be regarded as compatible with higher-ranking Community law.

B — *Case C-450/05*

86. The question which the Landessozialgericht Berlin-Brandenburg has referred to the Court for a preliminary ruling consists, in a way, of two parts. The national court asks whether the transitional arrangements of point 35, Germany-Austria, (e), of Parts A and B of Annex III (which after the extension of 1 May 2004 became point 83(e) in both of Parts A and B) and point 1, Germany, of Part C of Annex VI to Regulation No 1408/71 are compatible with higher-ranking Community law.

1. First part of the question

(a) Introductory remarks

87. The claimant in the main proceedings submits that he has lost advantages as a result of the limitation of the equiparation of territories contained in Article 4 of the former German-Austrian Social Security Convention of 22 December 1966, brought in by the German-Austrian Social Security Convention of 4 October 1995.[42] The transitional arrangements of the new Convention take account of the fact that, because of Austria's accession to the European Economic Area (EEA) and to the European Union, Regulation No 1408/71 came into

42 — Article 4(1) of the German-Austrian Social Security Convention of 22 December 1966 stated that, unless provided otherwise in that 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 depended on residence within the country did not apply to the persons specified in Article 3 who resided in the territory of the other Contracting State. Article 3(a) stated that, when applying the legislation of a Contracting State, its nationals were to be treated on an equal footing with those of the other Contracting State. Article 4(1) in conjunction with Article 3(a) of the Convention must therefore be understood to be a waiver of the residence clause in favour of the nationals of both States. In actual fact, because of that rule the territory of Germany and Austria was regarded as a single territory (equiparation) for the purpose of handling benefit claims under social security law.

force in that Member State and, in accordance with Article 6 thereof, replaced the existing bilateral Convention.

88. The transitional arrangements in Article 14(2)(b) of the German-Austrian Social Security Convention of 4 October 1995 specifically provide for the continuation of equiparation, but limited to cases where (i) the benefits could already have been provided on 1 January 1994, (ii) the person concerned took up habitual residence in Austria before 1 January 1994 and the benefits from pension and accident insurance began prior to 31 December 1994. [43] The claimant does not fulfil those conditions because, although he has resided in Austria since 1970, he became entitled to apply for an old-age pension only from 1 August 1999, on reaching the age of 63.

89. Those transitional arrangements are confirmed by an entry, with the same wording as that of the abovementioned provision, in point 35, Germany-Austria, (e), of Parts A and B of Annex III. Under point b in the first paragraph of Article 234 EC, the Court's jurisdiction in the context of references for a preliminary ruling is limited to the question of the validity of that entry as a provision in a measure of secondary Community law. By contrast, the social security conventions between Germany and Austria are not a permissible subject for examination because, according to the Court's case-law, those bilateral conventions must be classified as domestic law of the States concerned. [44] They are nevertheless important for determining the question of how far they have been replaced by the provisions of Regulation No 1408/71. Therefore the claimant is not entitled to the payment of a pension from contribution periods under the FRG as long as he does not reside in the Federal Republic of Germany if

43 — Article 14(2)(b) of the German-Austrian Social Security Convention (German BGBl. 1998 II, p. 313; Austrian BGBl. III, No 138/1998) provides as follows: '(2) The following provisions shall continue to apply: ... (b) Article 4(1) of the Convention named in paragraph 1 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 one year 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.'

44 — In Case C-227/89 *Rönfeldt* [1991] ECR I-323, paragraph 29, the Court refers to 'conventions operating between two or more Member States and incorporated in their national law'. M. Költzsch, 'Eine Entscheidung des EuGH und ihre Folgen für das internationale Sozialrecht — Zum Rönfeldt-Urteil des EuGH', *Die Sozialgerichtsbarkeit*, 1992, p. 593, concludes from that headnote that the Court classifies the social security conventions as domestic law of the respective Contracting States. He adds that this is correct according to the German concept of justice because the dualist theory concerning the relationship between international law and domestic law underlies the German Basic Law.

Regulation No 1408/71 is applicable to that benefit and if there is no exception in his favour.

(b) Applicability of Regulation No 1408/71

(i) Personal scope and cross-border element

90. As a former worker in Austria and a present pensioner under Article 2(1), the claimant falls within the personal scope of the Regulation.

91. In addition, the Community connection [45] necessary for the Regulation to be applicable exists. This presupposes that persons, situations or applications have a connection in law with another Member State. This may also exist where a person is or has been subject to the legislation of only one Member State, but not if there is no factor linking them with any of the situations governed by Community law and which are confined in all relevant respects within a single Member State. [46] It must be concluded from this that a legal relationship with an international connection exists where the legislation of a Member State other than that in which the person entitled resides is applicable to the worker. This must be the case where that legislation gives the worker a right to a pension. [47] The claimant meets those requirements. It is true that, after leaving Romania, he lived and worked only in Austria. However, as the German insurance institution recognised German contribution periods under the provisions of the FRG, a legal connection with another Member State has existed since Austria's accession.

(ii) Temporal scope

92. Regulation No 1408/71 has been applicable to Austria since 1 January 1994 on the basis of the Agreement on the European

45 — E. Eichenhoffer, *Europäisches Sozialrecht*, loc. cit. (footnote 3), Article 2, n. 6, points out that a further requirement for the application of Regulation No 1408/71 is a cross-border element. This is manifested in the wording of Article 2(2), which states that the Regulation applies to persons 'who are or have been subject to the legislation of one or more Member States'. According to the author, this is to be understood as meaning that the application of the provisions on the coordination of social security benefits can be considered only in cross-border situations.

46 — Case C-95/99 *Khalil* [2001] ECR I-7413, paragraphs 68 and 69.

47 — In Case C-389/99 *Rundgren* [2001] ECR I-3731, paragraph 35, the Court found that Regulation No 1408/71 applies to a person who resided in a Member State without having worked there, but received a pension from another Member State as a retired civil servant instead.

Economic Area of 2 May 1992 (EEA Agreement). [48] Since 1 January 1995 the Regulation has been applicable to Austria in its capacity as a Member State of the European Union. [49] However, this does not mean that it cannot apply to insurance and employment periods of the claimant prior to that date. Article 94(2) of Regulation No 1408/71 provides for periods of insurance, employment and residence prior to, and even for periods completed before, the date of entry into force of the Regulation to be taken into consideration. In addition, Article 94(3) of that regulation provides that a right to a benefit will be acquired even though relating to a contingency which materialised prior to the date of entry into force of the Regulation in the territory of the Member State concerned.

93. The fact that Regulation No 1408/71 has no retrospective effect, as provided by Article 94(1), which states that no right will be acquired under the Regulation for a period prior to the date of its entry into force in the territory of the Member State in question, is irrelevant in the present case because the claimant's right to apply for a pension arose only on 1 August 1999, his 63rd birthday, that is to say, after the Regulation entered into force in Austria.

48 — OJ 1994 L 1, p. 3.

49 — See *Kauer*, cited in footnote 33, paragraph 3.

(iii) Material scope

94. The legal position in the present case differs from that in the joined cases of *Habelt* and *Möser*. Fremdrenten periods under the FRG differ from contribution periods completed in the territory of the former German Reich under SGB VI in that, first, they aim to take into account contribution periods completed under another, that is to say, non-German, scheme. In other words, in Fremdrenten cases a State benefit does not correspond to a contribution previously paid by an entitled person. Furthermore, the category of persons entitled under the FRG encompasses more persons than the ethnic Germans who resided in settled areas outside the former German Reich.

95. Against that background, benefits under the FRG must be considered separately according to their intended purpose in order to be classified correctly in the classes of benefits in Article 4 of Regulation No 1408/71. At the same time the exceptions set out therein, which include benefit schemes for consequences of war, must be construed strictly in the interest of the

establishment of the greatest possible freedom of movement for migrant workers. [50]

97. The integration of foreign periods into the German scheme is necessary because the competent foreign insurance institutions either do not export their pensions or the foreign export pensions are not sufficient to guarantee the persons concerned the minimum income to meet the cost of living in Germany. Consequently the benefits from FRG periods are intended to provide additional, substitute or supplementary, protection against the risk in old age concerning the economic and social environment in Germany.

— Submissions of the parties

96. According to the submissions of the German Government and the defendant, the rules of the FRG must be viewed bearing in mind the fact that the German minorities living in Eastern Europe and Central Asia endured great suffering during and after the Second World War. Germany accepts particular responsibility for their suffering in that it leaves those concerned to decide whether to build their future in their present homeland or to resettle in Germany on the basis of the statutory exceptions, and also promotes by way of the social compact the integration of those who settle in Germany. The FRG forms part of these integration measures, the persons concerned being treated as if they had spent their working life in Germany. Their contribution periods with a foreign pension insurance institution were integrated into German pension law and corresponding pensions were paid at the German level.

98. The German Government submits that the grant of benefits from FRG periods in Germany does not depend on whether the persons concerned have also paid contributions to the German pension insurance scheme.

99. On the other hand, the Commission considers that the benefits in question must be classified as old-age benefits within the meaning of Article 4(1)(c) and therefore fall within the area of social security. The Commission adds that in actual fact no contributions were paid to the German scheme for FRG benefits, but that does not make them special non-contributory benefits.

50 — *Spruyt*, cited in footnote 18, paragraph 18 et seq.; *Jauch*, cited in footnote 13, paragraph 21; and *Hosse*, cited in footnote 19, paragraphs 24 and 25.

100. The Commission adds that, since the end of the cold war, it is no longer true that resettled persons have been unable to gain recognition of social insurance claims acquired in their States of origin because the competent institutions were situated outside Germany. In many of the territories named in the BVFG, Community law, including Regulation No 1408/71, now applies. Therefore the argument that it is impossible to obtain recognition of claims must fail in relation to those Member States.

— Legal assessment

Differentiation from benefits for victims of war and its consequences

101. On the one hand, it must be said that the German Government is correct in stating that the FRG, in conjunction with the BVFG, originally aimed at the integration into the society of the Federal Republic of Germany of ethnic Germans who lost their homes in other countries as a result of being driven out or expulsion in connection with the events of the Second World War. The German Government finds justification for this view of the law in *Tinelli*, which states that the purpose of the FRG is 'to facilitate the reintegration, following events connected with the National Socialist regime and the Second World War, of exiles and refugees who contribute by their work to reconstruction in the Federal Republic of Germany'. [51]

102. On the other hand, I must agree with the Commission and the national court that in the light of present circumstances this argument merits reconsideration. Particularly with regard to so-called *Spätaussiedler* who have made no contribution to reconstruction in the Federal Republic of Germany, it is unlikely that measures such as the FRG now serve that purpose, but rather aim at the integration into the German statutory pension insurance scheme of insured persons with Fremdrenten periods. [52]

51 — *Tinelli*, cited in footnote 11, paragraph 7.

52 — The German FRG (Law on foreign pensions), which replaced the Fremdrenten- und Auslandsrentengesetz (Law on foreign pensions and pensions from abroad; FAG) applies to pension and accident insurance. E. Eichenhofer, *Handbuch des Sozialversicherungsrechts* (edited by B. Schulin), Volume 3, Munich, 1999, Paragraph 76, n. 51, points out that while the purpose of the FAG was still to compensate expellees for the social insurance loss in the State from which they were expelled with German periods and expectancies, the FRG is characterised, in accordance with the intentions of the German legislature, by the endeavour to integrate the expellees. Irrespective of their individual social insurance position, which depended on the social security policy of their homeland, expellees were not primarily compensated for the adverse effects of expulsion, but placed in a position for social security purposes that they would have been in if they had spent their social security existence in Germany instead of in the territories from which they were expelled. For that reason periods completed by persons in such territories are to be integrated into the statutory pension insurance scheme as contribution periods under Paragraph 15 of the FRG. The author concludes from this that, although the FRG is still based on the idea of compensation, it is nevertheless supplemented, and dominated, by the idea of integration.

103. The German Government's argument in the present case that FRG benefits are intended as compensation for the fact that the persons concerned were unable to assert their acquired claims in their States of origin because the competent institutions were outside Germany also seems to be obsolete. As the Commission rightly observes, this reasoning, which underlies *Fossi* and *Tinelli*, has not been valid since the end of the cold war and the last two enlargements of the European Union. In many of the territories in Eastern Europe named in the BVFG, Community law, including Regulation No 1408/71, now applies. Under the Regulation each Member State grants a pro rata pension according to the insurance periods completed under its legislation and, under Article 10 of the Regulation, that pension is to be exported to other Member States. Under the transitional arrangements of Article 94 of the Regulation, this refers to insurance periods which were completed and to contingencies which materialised before a country acceded to the European Union. With Romania's accession on 1 January 2007, the claimant would have been able to obtain a Romanian pension from that date at the latest on the basis of his Romanian insurance periods. Consequently the argument that a pension cannot be obtained must fail in relation to those Member States.

104. Therefore, in the case of benefits from Fremdrenten periods under the FRG, it cannot be said that there is a benefit scheme for victims of war or its consequences within the meaning of Article 4(4) of Regulation No 1408/71.

Differentiation from special non-contributory benefits

105. On the other hand, benefits from Fremdrenten periods under the FRG may be classified as special non-contributory benefits under Article 4(2a) of Regulation No 1408/71. For that purpose, the benefit in question must be listed in Annex IIa and the substantive elements for the existence of a special non-contributory benefit under Article 4(2a) must be present. [53]

106. Such classification is suggested, first, by the method of funding since the grant of benefits from Fremdrenten periods under the FRG does not depend on whether the persons concerned paid contributions to the German pension insurance scheme. Those benefits are funded from public funds, the

53 — *Jauch*, cited in footnote 13, paragraphs 32 and 33.

Federal Government reimbursing pension insurance institutions for the cost of benefits under the FRG pursuant to Paragraph 291b of SGB VI.[54] However, this cannot be the sole criterion for the purpose of clear differentiation from social security benefits under Article 4(1), particularly as it is clear from Article 4(2) that Regulation No 1408/71 applies to contributory and non-contributory social security schemes.

107. Classification as special non-contributory benefits under Article 4(2a) of Regulation No 1408/71 also depends on whether the benefit in question is of the nature of a special benefit. For this, it must either replace or supplement a social security benefit and be in the nature of social assistance justified on economic and social grounds. In addition, a decision on it must be given in accordance with a provision laying down objective criteria.[55] Benefits from Fremdrenten periods under the FRG take the form of old-age pensions and are therefore treated as a specific social security benefit for the purpose of Article 4(1)(c) of Regulation No 1408/71. Although their purpose in the economic respect, among others, is the social integration of the persons entitled, they do not have the characteristics of social assistance, contrary to the opinion of the German Government.[56] This applies to the criterion of need as benefits from Fremdrenten periods under the FRG are granted without it being necessary to establish need on the part of the individual or a specific category of persons. Furthermore, a grant is based on the aggregation of employment periods completed by the individual in his country of origin, which precludes any similarity to social assistance.

108. Finally, another factor militating against the classification of benefits from Fremdrenten periods under the FRG as special non-contributory benefits under Article 4(2a) of Regulation No 1408/71 is the fact that they are not included in Annex IIa. However, a social security benefit of that kind can be awarded only when all the substantive requirements are satisfied and

54 — Paragraph 291b of SGB VI (Reimbursement of benefits not covered by contributions) reads as follows: 'The Federal Government shall reimburse workers' and employees' pension insurance institutions for the cost of benefits under foreign pensions law.' This provision relates to benefits to be paid by the institutions under foreign pensions law, that is to say, a specific part of the benefits not covered by contributions (or by insurance) which fall to be paid by the institutions (see, in that regard, H. Finke, *SGB VI — Gesetzliche Rentenversicherung einschließlich Übergangsrecht für das Beitrittsgebiet*, Volume 3, Part 4/06, Paragraph 291b, n. 1).

55 — *Snares*, cited in footnote 12, paragraphs 33, 42 and 43; *Partridge*, cited in footnote 12, paragraph 34; *Leclere and Deaconescu*, cited in footnote 12, paragraph 32; and *Skalka*, cited in footnote 12, paragraph 25.

56 — The Court has found that the grant of a benefit provided for in a legislative provision independently of the completion of periods of employment, insurance or contribution is characteristic of social assistance. See *Newton*, cited in footnote 4, paragraph 13.

the benefit in question is entered in Annex IIa. [57]

(c) Existence of an exception

(i) The transitional arrangements in the 1995 bilateral Convention and in Annex III to Regulation No 1408/71

109. It follows that benefits from Fremdrenten periods under the FRG must be classified as social security benefits within the meaning of Article 4(1)(c) of Regulation No 1408/71.

111. As a consequence of its entry into force in Austria, Regulation No 1408/71 replaced the 1966 bilateral Convention pursuant to Article 6(a) of the Regulation. At the inter-State level, the 1966 Convention was replaced by the Convention of 4 October 1995, which took effect on 1 October 1998. A transitional arrangement was introduced in Article 2(b) of the Convention on the ground of the protection of legitimate expectations.

110. In principle, therefore, Regulation No 1408/71 is applicable to the present case.

57 — In her Opinion in *Hosse*, cited in footnote 19, point 30, Advocate General Kokott observed, with reference to the Court's case-law, that provisions which lay down exceptions from the exportability of social security benefits must be interpreted strictly. This principle of interpretation must apply all the more where the effect of a derogating provision, such as Article 4(2b) of Regulation No 1408/71, is actually that the Regulation as a whole is inapplicable. Consequently, in addition to the mention of a benefit in Part III of Annex II to the Regulation, the following substantive requirements must be cumulatively satisfied in order for a benefit to be excluded from the scope of the Regulation under Article 4(2b): the benefit stems from legislation the validity of which is confined to part of the territory of a Member State; the benefit is granted on a non-contributory basis and has the character of a special benefit. See *Jauch*, cited in footnote 13, paragraph 21, and *Hosse*, cited in footnote 19, paragraph 25. M. Fuchs, op. cit. (footnote 9), Article 4, n. 27, points out that the special non-contributory benefits listed in Article 4(2a) are paid in cash only in the State of residence in accordance with its legislation, provided that they are listed in Annex IIa.

112. At the Community level the transitional arrangement was secured by an entry with the same wording under point 35, Germany-Austria, (e), of Parts A and B of Annex III (or point 83, (e), of Parts A and B of Annex III after the enlargement of 1 May 2004). However, only Article 7(2)(c) may be used as the legal basis for an entry in Annex III. Under that provision, the social security conventions listed in Annex III continue to apply, Article 6 notwithstanding. It follows that Article 7(2)(c) applies only to conven-

tions concluded before Regulation No 1408/71 entered into force, while the Member States retain the right under Article 8 to conclude new conventions even after the Regulation enters into force.[58] However, Article 8 does not apply to the conventions specified in Annex III. As the Social Security Convention between the Federal Republic of Germany and the Republic of Austria was signed on 4 October1995, after Regulation No 1408/71 entered into force in Austria, it could only be a new convention and therefore, as the Commission notes, in principle not one which could be entered in Annex III. This view is supported by the fact that the preamble to the Convention expressly refers to Article 8 of Regulation No 1408/71 and to the Contracting Parties' intention 'to conclude a new social security convention to replace the Convention of 22 December 1966'.

113. On the other hand, Article 14(2)(b) of the Convention and, thereby, the entry in Annex III relate only to provisions of the 1966 Convention, the terms of which remain substantially unchanged and for which only time-limits for the grant of benefits, if the persons entitled reside outside the territory of the Federal Republic of Germany, are introduced. Article 14(1) of the Convention expressly states that, on the entry into force of that convention, with the exception of the provisions listed in paragraph 2, the Social Security Convention of 22 December 1966 between the Republic of Austria and the Federal Republic of Germany will cease to apply. Consequently Article 14(2)(b) of the 1995 Convention may be regarded as the continuation in force of the old provision, subject to a time-limit. Consequently there can be no objection to the entry in Annex III.

(ii) Limitation of workers' freedom of movement

— Loss of a social security advantage

114. However, it remains to examine the question whether there is a breach of substantive Community law. In alleging that, as a result of encroachment upon the principle of equiparation of territories, he

58 — It is clear from Articles 6, 7 and 8 of Regulation No 1408/71 and from the Court's case-law that Article 8 relates only to conventions concluded by the Member States with each other after Regulation No 1408/71 enters into force. See, to that effect, Case C-305/92 *Hoorn* [1994] ECR I-1525, paragraph 19, and Case C-23/92 *Grana-Novoa* [1993] ECR I-4505, paragraph 22.

has lost certain advantages, the claimant in the main proceedings submits that his freedom of movement has been infringed.

115. Article 4(1) of the 1966 Convention provided for the equiparation of the territories of Austria and Germany, which has not existed since Regulation No 1408/71 because, notwithstanding equiparation, Article 10 of the Regulation terminates it by the entry in point 1, Germany, of Part D of Annex VI precisely for the benefits in question. As equiparation under the 1966 Convention would have led to the payment of a pension in Austria on the basis of Fremdrenten periods under the FRG, this amounts to a social security advantage which, as such, is not provided for by the Regulation.

116. Until the transitional arrangement ceased to have effect on 5 May 2005, in Annex III it provided for an exception to Annex VI to the Regulation, but not in cases where the pension was first paid after 1 January 1995. This covers the claimant's situation as he has received a pension only since 1999. Therefore he cannot plead equiparation under the 1966 Convention because, on the basis of the entry in Annex VI, the Regulation does not provide for equiparation for benefits of that kind and because, in the entry in Annex III, the Regulation did not provide for a transitional arrangement in cases such as the claimant's and, finally, because in the bilateral relationship the equiparation of territories was abolished for new cases when the new Convention came into force in October 1998 because the new Convention, like Annex III to Regulation No 1408/71, presupposes that a pension is paid for the first time in 1994 at the latest.

117. The claimant would be able to rely on the continued application of the provisions of the 1966 Social Security Convention, in spite of the entry into force of Regulation No 1408/71, if the entries in Annexes III and VI were not compatible with higher-ranking Community law, in particular the provisions concerning freedom of movement for workers.

— Encroachment upon freedom of movement for workers

118. The Court has consistently held that the Treaty provisions concerning freedom of movement preclude the loss of social security advantages for workers, who have exercised their right to freedom of movement, which would result from the inapplicability, following the entry into force of the Regula-

tion, of a bilateral convention incorporated into national law. [59] This case-law is based on the idea that the worker concerned is entitled to entertain the confidence, which merits protection, that he can profit from more favourable rules of the conventions even after exercising the freedom of movement. In *Rönfeldt*, [60] *Thévenon*, [61] *Naranjo Arjona and Others* [62] and *Grajera Rodriguez* [63] the Court set out the conditions under which old bilateral conventions continue to apply notwithstanding the replacement provision in Article 6 of Regulation No 1408/71.

119. In *Thévenon* the Court clarified the *Rönfeldt* case-law by stating that the principle of the protection of legitimate expectations cannot apply to workers who completed insurance periods in only one Member State before Regulation No 1408/71 entered into force and who exercised their freedom of movement only after it came into force. [64]

120. In *Naranjo Arjona and Others* and *Grajera Rodriguez* it was established that the persons concerned were employed in Germany before Regulation No 1408/71 came into force in Spain with that country's accession on 1 January 1986 and therefore in principle the Regulation, in accordance with Article 6, replaced the provisions of the German-Spanish Convention. In the opinion of the Court, substitution could not therefore be allowed to deprive those persons of their rights and advantages under that convention. [65]

121. It may be concluded from the case-law that the replacement of the provisions of social security conventions concluded between Member States by Community regulations is in principle mandatory [66] and, apart from the cases specified in the regulations, an exception is permitted only in a case where they would result in a worker who had previously exercised his freedom of movement losing, when the Regulation came

59 — *Rönfeldt*, cited in footnote 44, paragraph 23. That judgment is a further development of earlier case-law (in particular, *Petroni*, cited in footnote 17, paragraph 13; *De Jong*, cited in footnote 17, paragraph 15; and *Dammer*, cited in footnote 17, paragraph 21), which states that the aim of Articles 48 to 51 of the Treaty would not be attained if, as a consequence of the exercise of their right to freedom of movement, workers were to lose advantages in the field of social security guaranteed to them in any event by the legislation of a single Member State. The Court also drew the logical conclusion from the judgment in Case 807/79 *Gravina* [1980] ECR 2205, paragraph 7, in finding that application of the Community rules must not bring about a reduction in the benefits awarded by virtue of the legislation of a Member State. F. Kessler, 'Pensions d'invalidité de droit communautaire et conventions bilatérales de sécurité sociale — des précisions', *Revue de droit sanitaire social*, January-March 1996, p. 148, considers that here the Court applies a kind of 'favourability principle' in the case of a conflict between a provision of Regulation No 1408/71 and a bilateral social security convention.

60 — Cited in footnote 44.

61 — Case C-475/93 [1995] ECR I-3813, paragraph 26.

62 — Joined Cases C-31/96 to C-33/96 [1997] ECR I-5501, paragraph 27.

63 — Case C-153/97 [1998] ECR I-8645.

64 — Cited in footnote 61, paragraph 26.

65 — *Naranjo Arjona and Others*, cited in footnote 62, paragraph 29, and *Grajera Rodriguez*, cited in footnote 63, paragraph 29.

66 — Case 82/72 *Walder* [1973] ECR 599, paragraphs 6 and 7, and *Thévenon*, cited in footnote 61, paragraph 15.

into force, the social security advantages accruing to him on the basis of conventions between two or more Member States which had been incorporated into national law.

122. In that connection it is important to remember that these principles were derived from the interpretation of Articles 39 EC and 42 EC and therefore the sole intent and purpose of the case-law can be to guarantee freedom of movement for workers. [67] The logical condition for the application of those articles is the exercise of that fundamental freedom by the person concerned. Unlike the claimants in Cases C-396/05 and C-419/05, the claimant in the main proceedings in Case C-450/05 lived and worked in Romania and Austria only and did not therefore move physically between two EU Member States. However, the Community-law rules on freedom of movement are applicable even if, although the activity in question is carried on outside the European Union, the employment relationship nevertheless has a geographical connection or sufficiently close link with the law of a Member State and thus the relevant rules of Community law. For example, in *Boukhalfa*, [68] the Court found a sufficiently close link where a worker who pursued an activity in a non-member country was covered by the social insurance scheme of a Member State. In the present case the claimant was recognised as an expellee within the meaning of the relevant provisions of the BVFG, so that in principle he was entitled to an old-age pension and his contribution periods in Romania should be taken into account in accordance with the FRG.

123. For the Community rules on freedom of movement to apply, it is sufficient if the

67 — On the other hand, it cannot be the purpose of the case-law to grant workers all conceivable advantages from social security conventions and under national legal systems. S. Van Raepenbusch, 'Les rapports entre le règlement (CEE) n° 1408/71 et les conventions internationales dans le domaine de la sécurité sociale des travailleurs circulant à l'intérieur de la Communauté', *Cahiers de droit européen*, 1991, p. 446, points out, for example, that although it is recognised that Article 42 EC does not permit the Council, in carrying out its legislative function, to withdraw from workers' rights already awarded to them, the primary purpose of Article 42 EC is to replace the traditional schemes with machinery for coordinating the national social security schemes so as to guarantee freedom of movement for workers within the Community. A. Ottevaere, 'Le règlement 1408/71 et les conventions de sécurité sociale: suite et fin des incertitudes — l'arrêt Thévenon', *Revue belge de sécurité sociale*, 1996, p. 849, recognises the risk that workers will choose between the applicability of Regulation No 1408/71 and the bilateral social security conventions in order to claim the desired advantages. Consequently this author welcomes the clarification of the *Rönfeldt* case-law in the *Thévenon* judgment.

68 — Case C-214/94 [1996] ECR I-2253, paragraph 15. This case concerned a Belgian national who was employed as local staff in the passport section of the German Embassy in Algiers and who was already resident in Algeria before her employment began. She claimed equal treatment with local German staff, which was refused by the Federal Republic of Germany on the ground that Community law could not be relied upon as there was no territorial applicability. However, the Court pointed out that, according to the case-law, 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. This principle is to be understood as meaning that it also applies to cases where the employment relationship has a sufficiently close connection with the law of a Member State and thus the relevant rules of Community law. However, the Court found that in cases such as that of the claimant Community law and thus the prohibition of discrimination based on nationality contained in the above-mentioned Community provisions are applicable to all aspects of the employment relationship which are governed by the law of a Member State.

benefit itself crosses a border, and the physical exercise of the freedom of movement by persons is not necessary, as otherwise different results, for which there would be no justification, would be likely. Accordingly in *Rundgren* [69] the Court found that Regulation No 1408/71 and thus the provisions concerning workers' freedom of movement were applicable in the case of a person who lived in a Member State, without having worked there, but instead received a pension as a retired civil servant from another Member State. In the present case the benefit crosses the border between two Member States. The claimant, who had previously worked in Austria, was, until the new Convention came into force in 1998, entitled to an old-age pension under German legislation and no residence requirement was attached to the benefit.

124. In 1970 the claimant moved from Romania to Austria, relying on receiving, when he reached pensionable age in 1999, an old-age pension which would be based on the contribution periods completed in Romania and would be paid into Austria on the basis of the 1966 Convention. As a result of the adoption of the Regulation together with the provisions in Annex III, the claimant had an advantage withdrawn.

125. In the light of the *Rönfeldt* case-law, such withdrawal proves to be an infringement of the rights guaranteed in Articles 18 EC, 39 EC and 42 EC as pensioners lose advantages which they could claim under a bilateral convention if they exercise their freedom of movement before the convention lapses and before Regulation No 1408/71 enters into force. Because of the 1966 bilateral Convention, the claimant acquired a right on the basis of which his decision to live and work in Austria instead of Germany could not be to his disadvantage with regard to his payment claims from Fremdrenten periods on the occurrence of the event insured against.

126. As Articles 6 and 7 of Regulation No 1408/71 preclude the application of the more favourable provisions of the bilateral Convention, the fact that the claimant

69 — Cited in footnote 47, paragraph 35. That case concerned a retired Swedish civil servant who received a civil service pension in Sweden and settled in Finland before Regulation No 1408/71 entered into force in that State. The Court stated that his retirement and move from Sweden to Finland before the Regulation came into force did not exclude him from its temporal, personal and material scope. The decisive factor was that he received a civil service pension from another Member State. Consequently the Court found that Regulation No 1408/71 was applicable to the case.

cannot, on the basis of the transitional arrangement in point 35 (later point 83), (e) of Parts A and B of Annex III and on the basis of Article 14(2)(b) of the 1995 bilateral Convention, rely on the more favourable provision of the 1966 bilateral Convention is contrary to higher-ranking Community law, namely Articles 18 EC, 39 EC and 42 EC.

127. Consequently the transitional arrangements in point 35, Germany-Austria, (e), of Parts A and B of Annex III (or point 83, (e), of Parts A and B of Annex III after the enlargement of 1 May 2004) are contrary to the provisions of Community law on the freedom of movement for workers and citizenship of the Union in Articles 18 EC, 39 EC and 42 EC.

2. Second part of the question

128. As social security benefits within the meaning of Article 4(1)(c) of Regulation No 1408/71, the benefits from Fremdrenten periods under the FRG are subject to the duty of coordination under Article 10(1) of the Regulation. This goes along with the Member States' obligation to set aside provisions in national measures which make the grant of benefits conditional upon residence in the respective Member State.

129. In accordance with the submissions in Cases C-396/05 and C-419/05, in the present case also point 1, Germany, of Part D of Annex VI to Regulation No 1408/71 must be examined for compatibility with Article 42 EC as higher-ranking Community law, taking into account the Community aim of the greatest possible freedom of movement for workers.

130. Unlike the entry in Annex III, which enables benefits from Fremdrenten periods to be granted during a transitional phase to entitled persons resident in Austria, the entry in point 1, Germany, of Part D of Annex VI, in conjunction with the provisions of German law (Paragraphs 110(2), 113(1) and 272 of SGB VI), provides for the general exclusion of exported pensions from the Federal Republic of Germany.

131. For the claimant in the main proceedings, the effect of that exclusion is not

substantially different from that for the claimants in Cases C-396/05 and C-419/05. A reduction or the entire loss of an old-age pension as the result of merely moving residence to another country is likely, as a financial blow to provision for old age, to deter persons from exercising their freedom of movement under Articles 39 EC and 42 EC, so that the measure in question must be seen as a limitation of that fundamental freedom.

132. To justify the national provisions concerning the non-payment of pensions from Fremdrenten periods under the FRG into other countries, to which the exclusion in point 1, Germany, of Part D of Annex VI relates, the German Government adduces in essence the same arguments as in relation to benefits from contribution periods completed in the territory of the former German Reich which are governed by the provisions of SGB VI. The German Government pleads, first, the need for the integration of expellees into the society of the Federal Republic of Germany and, second, the need to avert the risk of an incalculable number of potentially entitled persons.

133. Here again it must be observed that, in organising their social security schemes, the Member States must comply with the Treaty provisions on freedom of movement for workers and the freedom of every citizen of the Union to move and reside in the territory of the Member States.[70] Accordingly the German legislature's aim of integrating ethnic German expellees must not have an adverse effect for fundamental freedoms. This applies particularly where, as nationals of the Member States, they have the special protection of citizenship of the Union under Article 18 EC. One of the main concerns of European social security legislation, as in the sphere of freedom of movement, is the integration of workers, and thus also Union citizens, into the social life of a Member State. Therefore Articles 18(1) EC and 39 EC are infringed by a national provision such as that in issue, which aims to prevent the integration of a specific group of nationals into the societies of the other Member States.

134. In so far as the German Government also refers to alleged financial risks which could hardly be managed, it must be observed that it has not discharged its burden of asserting and proving facts in support. Consequently that submission must be dismissed as insufficiently substantiated.

70 — *Elsen*, cited in footnote 32, paragraph 33; similarly, *Decker*, cited in footnote 33, paragraph 23; *Kohll*, cited in footnote 33, paragraph 19; *Martínez Sala*, cited in footnote 33, paragraph 33; and *Kauer*, cited in footnote 33, paragraph 45.

## VI — Conclusion

135. In the light of the foregoing analysis, I propose that the Court should reply as follows:

(1) to the question referred by the Sozialgericht Berlin in Cases C-396/05 and C-419/05:

A provision such as that in point 1, Germany, of Part D of Annex VI to Regulation No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996, is incompatible with Articles 18 EC, 39 EC and 42 EC in so far as it excludes the payment of a pension from contribution periods completed in the territory of the former German Reich and in so far as the exception contained therein to the waiver of residence clauses is likely to deter a person from exercising his freedom of movement;

(2) to the question referred by the Landessozialgericht Berlin-Brandenburg in Case C-450/05:

(a) The limitation of the continued validity of the Social Security Convention of 22 December 1966 between Germany and Austria to cases where

(i) the benefits are or may be paid already on 1 January 1994,

(ii) the person concerned took up habitual residence in Austria before 1 January 1994 and the benefit under the pension and accident insurance scheme begins prior to 31 December 1994,

in point 35 (later point 83), Germany-Austria, (e), of Parts A and B of Annex III to Regulation No 1408/71 is incompatible with Articles 18 EC, 39 EC and 42 EC;

(b) the same limitation in Article 14(2)(b) of the Social Security Convention of 4 October 1995 between Germany and Austria is incompatible with Articles 18 EC, 39 EC and 42 EC;

(c) point 1, Germany, of Part D of Annex VI to Regulation No 1408/71 is incompatible with Articles 18 EC, 39 EC and 42 EC in so far as it authorises the Federal Republic of Germany not to grant benefits under the Fremdrentengesetz to entitled persons residing outside the Federal Republic of Germany.