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ECLI:EU:C:2022:691

Provisional text

JUDGMENT OF THE COURT (Seventh Chamber)

15 September 2022 (\*)

(Reference for a preliminary ruling – Coordination of social security systems – Regulation (EC) No 883/2004 – Article 13 – Determination of the legislation applicable – Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons – Annex II – Article 1(2) – Person pursuing the profession of lawyer the centre of interest of whose private and professional activities is situated in Switzerland and who also pursues that profession in two other Member States – Application for the award of an early retirement pension – National legislation requiring that the person concerned waive his right to practise the profession in question in the territory of the Member State concerned and abroad)

In Case C-58/21,

REQUEST for a preliminary ruling under Article 267 TFEU from the Verwaltungsgericht Wien (Administrative Court, Vienna, Austria), made by decision of 21 January 2021, received at the Court on 1 February 2021, in the proceedings

**FK**

interested party:

**Rechtsanwaltskammer Wien,**

THE COURT (Seventh Chamber),

composed of J. Passer, President of the Chamber, F. Biltgen (Rapporteur) and M.L. Arastey Sahún, Judges,

Advocate General: J. Richard de la Tour,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- FK, by W. Polster, Rechtsanwalt,
- the Austrian Government, by A. Posch and E. Samoilova, acting as Agents,
- the European Commission, by B.-R. Killmann and D. Martin, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion, gives the following

## **Judgment**

1 This request for a preliminary ruling concerns the interpretation of Article 13(2)(b) of Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ 2004 L 166, p. 1, and corrigendum OJ 2004 L 200, p. 1).

2 The request has been made in proceedings between FK and the Rechtsanwaltskammer Wien (Vienna Bar Association, Austria) concerning the rejection of FK's application for the award of an early retirement pension.

## **Legal context**

### *European Union law*

#### *Regulation No 883/2004*

3 Article 1 of Regulation No 883/2004, entitled 'Definitions', is worded as follows:

'For the purposes of this Regulation:

...

(x) "pre-retirement benefit" means: all cash benefits, other than an unemployment benefit or an early old-age benefit, provided from a specified age to workers who have reduced, ceased or suspended their remunerative activities until the age at which they qualify for an old-age pension or an early retirement pension, the receipt of which is not conditional upon the person concerned being available to the employment services of the competent State; "early old-age benefit" means a benefit provided before the normal pension entitlement age is reached and which either continues to be provided once the said age is reached or is replaced by another old-age benefit;

...'

4 Under Article 3 of that regulation, entitled 'Matters covered':

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

...

(d) old-age benefits;

...

(i) pre-retirement benefits;

...’

5 Article 11(1) and (3)(a) of Regulation No 883/2004 states:

‘1. Persons to whom this Regulation applies shall be subject to the legislation of a single Member State only. Such legislation shall be determined in accordance with this Title.

...

3. Subject to Articles 12 to 16:

(a) a person pursuing an activity as an employed or self-employed person in a Member State shall be subject to the legislation of that Member State’.

6 Article 13(2) of that regulation provides:

‘A person who normally pursues an activity as a self-employed person in two or more Member States shall be subject to:

(a) the legislation of the Member State of residence if he/she pursues a substantial part of his/her activity in that Member State;

or

(b) the legislation of the Member State in which the centre of interest of his/her activities is situated, if he/she does not reside in one of the Member States in which he/she pursues a substantial part of his/her activity.’

7 In accordance with Article 14(1) to (3) of Regulation No 883/2004:

‘1. Articles 11 to 13 shall not apply to voluntary insurance or to optional continued insurance unless, in respect of one of the branches referred to in Article 3(1), only a voluntary scheme of insurance exists in a Member State.

2. Where, by virtue of the legislation of a Member State, the person concerned is subject to compulsory insurance in that Member State, he/she may not be subject to a voluntary insurance scheme or an optional continued insurance scheme in another Member State. In all other cases in which, for a given branch, there is a choice between several voluntary insurance schemes or optional continued insurance schemes, the person concerned shall join only the scheme of his/her choice.

3. However, in respect of invalidity, old age and survivors’ benefits, the person concerned may join the voluntary or optional continued insurance scheme of a Member State, even if he/she is compulsorily subject to the legislation of another Member State, provided that he/she has been subject, at some stage in his/her career, to the legislation of the first Member State because or as a

consequence of an activity as an employed or self-employed person and if such overlapping is explicitly or implicitly allowed under the legislation of the first Member State.’

8 Under Article 90(1) of that regulation:

‘1. 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 1971 L 149, p. 2), as amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996 (OJ 1997 L 28, p. 1)] shall be repealed from the date of application of this Regulation.

However, Regulation (EEC) No 1408/71 shall remain in force and shall continue to have legal effect for the purposes of:

...

(c) the Agreement on the European Economic Area [(EEA) of 2 May 1992 (OJ 1994 L 1, p. 3)] and the Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other part, on the free movement of persons ... and other agreements which contain a reference to Regulation (EEC) No 1408/71, for as long as those agreements have not been modified in the light of this Regulation.’

*Regulation (EC) No 987/2009*

9 Article 14 of Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation No 883/2004 (OJ 2009 L 284, p. 1), entitled ‘Details relating to Articles 12 and 13 of [Regulation No 883/2004]’, provides in paragraphs 6, 8 and 9:

‘6. For the purposes of the application of Article 13(2) of [Regulation No 883/2004], a person who “normally pursues an activity as a self-employed person in two or more Member States” shall refer, in particular, to a person who simultaneously or in alternation pursues one or more separate self-employed activities, irrespective of the nature of those activities, in two or more Member States.

...

8. For the purposes of the application of Article 13(1) and (2) of [Regulation No 883/2004], a “substantial part of employed or self-employed activity” pursued in a Member State shall mean a quantitatively substantial part of all the activities of the employed or self-employed person pursued there, without this necessarily being the major part of those activities.

To determine whether a substantial part of the activities is pursued in a Member State, the following indicative criteria shall be taken into account:

- (a) in the case of an employed activity, the working time and/or the remuneration; and
- (b) in the case of a self-employed activity, the turnover, working time, number of services rendered and/or income.

In the framework of an overall assessment, a share of less than 25% in respect of the criteria mentioned above shall be an indicator that a substantial part of the activities is not being pursued in the relevant Member State.

9. For the purposes of the application of Article 13(2)(b) of [Regulation No 883/2004], the “centre of interest” of the activities of a self-employed person shall be determined by taking account of all the aspects of that person’s occupational activities, notably the place where the person’s fixed and permanent place of business is located, the habitual nature or the duration of the activities pursued, the number of services rendered, and the intention of the person concerned as revealed by all the circumstances.’

#### *The EC-Switzerland Agreement*

10 The Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons (OJ 2002 L 114, p. 6), signed in Luxembourg on 21 June 1999 and approved on behalf of the Community by Decision 2002/309/EC, Euratom of the Council, and of the Commission as regards the Agreement on Scientific and Technological Cooperation, of 4 April 2002 on the conclusion of seven Agreements with the Swiss Confederation (OJ 2002 L 114, p. 1) (‘the EC-Switzerland Agreement’), provides in Article 8:

‘The Contracting Parties shall make provision, in accordance with Annex II, for the coordination of social security systems with the aim in particular of:

- (a) securing equality of treatment;
- (b) determining the legislation applicable;
- (c) aggregation, for the purpose of acquiring and retaining the right to benefits, and of calculating such benefits, all periods taken into consideration by the national legislation of the countries concerned;
- (d) paying benefits to persons residing in the territory of the Contracting Parties;
- (e) fostering mutual administrative assistance and cooperation between authorities and institutions.’

11 Annex II to the EC-Switzerland Agreement, concerning the coordination of social security schemes, provides in Article 1:

‘1. The contracting parties agree, with regard to the coordination of social security schemes, to apply among themselves the Community acts to which reference is made, as in force at the date of signature of the Agreement and as amended by section A of this Annex, or rules equivalent to such acts.

2. The term “Member State(s)” contained in the acts referred to in section A of this Annex shall be understood to include [the Swiss Confederation] in addition to the States covered by the relevant Community acts.’

12 Section A of Annex II to that agreement referred, inter alia, to Regulation No 1408/71, as modified and updated by Regulation No 118/97 (‘Regulation No 1408/71’), and to Regulation

(EEC) No 574/72 of the Council of 21 March 1972 fixing the procedure for implementing Regulation No 1408/71 (OJ 1972 L 74, p. 1).

13 Annex II to the EC-Switzerland Agreement was updated by Decision No 1/2012 of the Joint Committee established under the Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons of 31 March 2012 replacing Annex II to that Agreement on the coordination of social security schemes (OJ 2012 L 103, p. 51), which entered into force on 1 April 2012. That annex now refers to Regulations No 883/2004 and No 987/2009.

14 Furthermore, it is only from 1 January 2005, in accordance with Article 3 of Regulation (EC) No 647/2005 of the European Parliament and of the Council of 13 April 2005 amending Regulations No 1408/71 and No 574/72 (OJ 2005 L 117, p. 1), that the scope of Regulation No 1408/71, which was replaced by Regulation No 883/2004, also covers the ‘pension schemes of pension institutions of liberal profession associations’, which include the retirement pension paid as a consequence of the exercise of the profession of lawyer, such as that at issue in the main proceedings.

### *Austrian law*

15 The provisions governing entry in the register of an Austrian bar association and entitlement to the corresponding retirement pension are set out in Paragraphs 49 and 50 of the Rechtsanwaltsordnung (Code of Lawyers) of 15 July 1868 (RGI., 96/1868), in the version of 23 December 2020 (BGBl. I, 156/2020) (‘the RAO’).

16 Paragraph 49(2) of the RAO states:

‘As a matter of principle, all persons entered in the register of an Austrian bar association or in the list of lawyers who are citizens of a Member State of the European Union, kept by an Austrian bar association, as well as trainee lawyers entered in the register of an Austrian bar association, shall be obliged to pay contributions unless they are already subject, by virtue of their exercise of the profession of lawyer, to compulsory affiliation, under other legislation, to an old-age pension scheme of a Member State of the European Union, of another State which is a party to the [EEA Agreement] or of the Swiss Confederation. Two or more bars may also set up a joint pension institution.’

17 Paragraph 50(1) of the RAO provides, in essence, that any person pursuing the profession of lawyer has the right to a retirement pension, invalidity pension or survivors’ pension if the requisite conditions are met and the event conferring entitlement to the benefit concerned occurs.

18 Under Paragraph 50(2) of the RAO, that right must be defined in the statutes of the pension institutions according to fixed rules. Paragraph 50(2)(2)(c)(aa) of the RAO states that, in order to obtain an early retirement pension, the person concerned must waive the right to practise as a lawyer in national territory and abroad.

19 Paragraph 26 of the Verordnung der Vertreterversammlung des österreichischen Rechtsanwaltskammertages über die Versorgungseinrichtungen Teil A der österreichischen Rechtsanwaltskammern (Satzung Teil A 2018) (2018 Regulation of the Assembly of Representatives of the Austrian Bar Association on the Pension Schemes in ‘Part A’ of the Austrian Bars; ‘the 2018 Statute for Part A’), also states, in point 8 of the first paragraph, as a condition for

obtaining an early retirement pension, that the right to practise as a lawyer ‘anywhere’ is to be waived by the person concerned.

### **The dispute in the main proceedings and the questions referred for a preliminary ruling**

20 FK, born in 1954, has both Polish and German nationality. Since 8 March 1984, he has been entered in the register of the Cologne Bar Association (Germany). He pursues a professional activity not only as a Rechtsanwalt (lawyer) there, but also as a certified interpreter and translator for the Polish language. Since he started practising as a lawyer, he has contributed to the retirement scheme of the Land of North Rhine-Westphalia (Germany).

21 In 1996, FK was entered in the register of the Vienna Bar Association in Austria and practised as a lawyer there, in addition to pursuing his activity in Germany. Since his entry in that register, FK has contributed to the Austrian pension scheme.

22 The centre of interest of FK’s activities remained in Cologne until 2007, the year from which FK moved his place of residence and the centre of interest of his activities to Switzerland, where he now practises as a lawyer, entered in the list of lawyers who are nationals of a Member State of the European Union or of the European Free Trade Association (EFTA), by virtue of his entry in the register of the Cologne Bar Association.

23 Since then, the time spent by FK practising as a lawyer in Germany has gradually decreased in favour of that spent pursuing that profession in Switzerland, that is to say, recently, FK has thus spent 70% of his working time pursuing the profession of lawyer at his Swiss office, compared to 25% at his German office and 5% at his Austrian office. Moreover, the working time spent by FK at his Austrian office has never exceeded 10% of his total working time spent pursuing that profession.

24 Since 2018, FK has received an early retirement pension in Germany, whilst continuing to practise as a lawyer there.

25 FK also contributes to the general pension scheme in Switzerland.

26 On 16 October 2017, FK submitted to the Vienna Bar Association an application for the award of an early retirement pension from 1 November 2017 in which he stated that he wished to waive the right to practise as a lawyer in Austria, whilst maintaining his entry in the register of the Cologne Bar Association and in the list of lawyers who are nationals of a Member State of the European Union or of the EFTA in Switzerland.

27 By decision of the Committee of the Vienna Bar Association of 29 May 2018, that application was rejected on the basis of Paragraph 26, in conjunction with Paragraph 29, of the 2018 Statute for Part A, under which the award of a retirement pension presupposes that the person concerned has waived the right to practise as a lawyer ‘anywhere’.

28 On 3 August 2018, FK brought an action against that decision before the Verwaltungsgericht Wien (Administrative Court, Vienna, Austria) – which is the referring court – which upheld that decision.

29 FK brought an extraordinary appeal on a point of law (*Revision*) against the decision of the Verwaltungsgericht Wien (Administrative Court, Vienna) before the Verwaltungsgerichtshof (Supreme Administrative Court, Austria). The latter court set aside that decision on the ground, in

essence, that the Verwaltungsgericht Wien (Administrative Court, Vienna) had failed to establish the facts coming within the scope of EU law, even though FK had submitted that EU law precluded national legislation which makes entitlement to a retirement pension conditional on the waiver by the person concerned of the right to practise as a lawyer in national territory and abroad.

30 The referring court – before which the dispute in the main proceedings was brought – observes that, until 1 January 2005, both in Germany and Austria, the special schemes for self-employed persons, including those pursuing the profession of lawyer, were excluded from the scope of Regulation No 1408/71 pursuant to Annex II thereto. It is only from that date that that regulation has applied in respect of those persons, following an amendment of that regulation pursuant to which there was no entitlement for any earlier period, even though previously completed periods of activity were to be taken into account.

31 The referring court takes the view that Article 13(2) of Regulation No 883/2004 should be applied in order to determine the legislation applicable to a person who, like FK, pursues an activity as a self-employed person in two or three Member States.

32 The referring court is uncertain as to the interpretation to be given to that provision in the situation in which the centre of interest of the activities of the person concerned and his place of residence are not situated in a Member State, since, according to a literal interpretation of that provision, no legislation of a Member State is applicable in such a situation.

33 If Austrian legislation were to be applicable, the referring court is also uncertain as to whether the RAO complies with EU law, in particular with the principles of equal treatment and non-discrimination, the right to property and the free movement of persons or the freedom of establishment, and, if not, whether Paragraph 50(2)(2)(c)(aa) of the RAO must be disapplied in accordance with the principle of the primacy of EU law.

34 Stating that, in the dispute in the main proceedings, there is undeniably a cross-border situation coming within the scope of EU law in that FK is established in two Member States and an Austrian provision affects the legal situation of the person concerned in Germany, the referring court notes that, under Article 17 of the Charter of Fundamental Rights of the European Union, the right to property, and therefore also the proprietary interests relating to social benefits provided for by law, such as retirement pensions, is inviolable and that restrictions of such a fundamental right must be justified by objectives of general interest, be appropriate for securing the attainment of the objective pursued and be proportionate. In that regard, the referring court is uncertain whether the interests involved justify making entitlement to a retirement pension conditional on the waiver by the person concerned of the right to practise as a lawyer both in Austrian territory and abroad. In the view of the referring court, the legislation at issue in the main proceedings may constitute an impediment to the freedom of establishment, which is guaranteed by Article 15(2) of the Charter of Fundamental Rights in conjunction with Article 49 TFEU.

35 Moreover, the referring court draws attention to the fact that EU law allows, by its very nature, persons to continue to pursue an activity in Member States whilst receiving a retirement pension in another Member State, in particular since, in the context of the coordination of social security systems, the issue of the difference in retirement ages across the Member States is expressly addressed.

36 In those circumstances, the Verwaltungsgericht Wien (Administrative Court, Vienna) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:



‘(1) How is Article 13(2)(b) of Regulation No 883/2004 to be interpreted where, from a quantitative point of view, the centre of interest of the activities of a person is in a [non-member country] in which that person also resides and, furthermore, that person also pursues an activity in two Member States (Federal Republic of Germany and Austria), the activity in the two Member States being distributed in such a way that the bulk of the activity clearly takes place in one Member State (in this specific case, the Federal Republic of Germany)?

In the event that that provision is interpreted to the effect that Austria has competence, [the following question] is [asked]:

(2) [Are] the provision of Paragraph 50(2)(2)(c)(aa) of the [RAO] and the provision of point 8 of the first subparagraph of Paragraph 26 of the Satzung Teil A 2018 (2018 Statute for Part A) based thereon permissible under EU law or do they infringe EU law and the rights guaranteed under EU law by requiring, as a condition for the award of a retirement pension, that the right to practise law in Austria and abroad be waived (Paragraph 50(2)(2)(c)(aa)) or that the right to practise as a lawyer anywhere be waived (point 8 of the first subparagraph of Paragraph 26 of the 2018 Statute for Part A) by the person concerned?’

## **Consideration of the questions referred**

### ***Preliminary observations***

37 As regards the wording of the first question, it must be noted, as is apparent from paragraphs 11 to 13 above, that, in accordance with Article 1(2) of Annex II to the EC-Switzerland Agreement, the term ‘Member State(s)’ contained in the acts referred to in Section A of that annex is to be understood to include the Swiss Confederation in addition to the Member States of the European Union covered by those acts.

38 By expressly referring, in Section A of Annex II, in the different versions of that annex, to Regulations No 1408/71 and No 883/2004, the EC-Switzerland Agreement therefore extends the scope of those regulations to the Swiss Confederation, so that, contrary to what is implied by the referring court in the first question, it is necessary to consider the Swiss Confederation not as a non-Member State, but as a Member State for the purposes of the present case.

### ***The first question referred***

39 By its first question, the referring court asks, in essence, which legislation is applicable under Article 13(2)(b) of Regulation No 883/2004 where the place of residence and the centre of interest of the activities of the person concerned are situated in Switzerland and that person also pursues an activity – which is distributed unevenly – in two other Member States, within the meaning of Article 1(2) of Annex II to the EC-Switzerland Agreement, namely in Germany and Austria.

40 It should be borne in mind that, in the procedure laid down by Article 267 TFEU providing for cooperation between national courts and the Court of Justice, it is for the latter to provide the national court with an answer which will be of use to it and enable it to determine the case before it. To that end, the Court may have to reformulate the questions referred to it and, in that context, to interpret all provisions of EU law which national courts require in order to decide the actions pending before them, even if those provisions are not expressly indicated in the questions referred to the Court by those courts (see, *inter alia*, judgments of 19 October 2017, *Otero Ramos*, C-531/15, EU:C:2017:789, paragraph 39 and the case-law cited, and of 19 September 2018, *González Castro*, C-41/17, EU:C:2018:736, paragraph 54).

41 Consequently, although the referring court has formally limited its first question to a request for an interpretation of Article 13(2)(b) of Regulation No 883/2004 when in fact, on account of the clarification in paragraph 38 above, according to which the Swiss Confederation must be regarded as a ‘Member State’, the question referred for a preliminary ruling should have concerned the interpretation of Article 13(2)(a) of that regulation, it is for the Court to extract from all the information provided by that court, in particular from the grounds of the request for a preliminary ruling, the points of EU law which require interpretation in view of the subject matter of the dispute in the main proceedings (see, *inter alia*, judgments of 19 October 2017, *Otero Ramos*, C-531/15, EU:C:2017:789, paragraph 40 and the case-law cited, and of 19 September 2018, *González Castro*, C-41/17, EU:C:2018:736, paragraph 55).

42 In the present case, the information provided in the request for a preliminary ruling shows that it is necessary for the Court, in order to provide a useful answer to the referring court, to interpret other provisions of EU law.

43 It follows from the case-law that the provisions of Regulation No 883/2004 and those of Regulation No 1408/71 have established a system of coordination concerning, *inter alia*, the determination of the legislation applicable to employed and self-employed persons who make use, under various circumstances, of their right to freedom of movement (see, to that effect, judgments of 3 April 2008, *Derouin*, C-103/06, EU:C:2008:185, paragraph 20; of 26 October 2016, *Hoogstad*, C-269/15, EU:C:2016:802, paragraph 33; and of 16 July 2020, *AFMB and Others*, C-610/18, EU:C:2020:565, paragraph 40).

44 Pursuant to the rules provided for in that system of coordination, the persons concerned are subject only to the legislation of a single Member State such as to avoid the complications which may ensue from the simultaneous application of a number of national legislative systems and to eliminate the unequal treatment which, for persons moving within the European Union, would be the consequence of a partial or total overlapping of the applicable legislation (see, to that effect, judgments of 26 February 2015, *de Ruyter*, C-623/13, EU:C:2015:123, paragraphs 36 and 37; of 26 October 2016, *Hoogstad*, C-269/15, EU:C:2016:802, paragraphs 35 and 36; and of 16 July 2020, *AFMB and Others*, C-610/18, EU:C:2020:565, paragraph 40).

45 That principle of a single applicable legislation is expressed, in particular, in Article 13 of Regulation No 883/2004, which determines the legislation applicable to a person who pursues activities in two or more Member States and which provides, in paragraph 2, that a person who normally pursues an activity as a self-employed person in two or more Member States is to be subject to either the legislation of the Member State of the place of residence, if he or she pursues a substantial part of his or her activity in that Member State (Article 13(2)(a) of that regulation), or the legislation of the Member State in which the centre of interest of his or her activities is situated, if that person does not reside in one of the Member States in which he or she pursues a substantial part of his or her activities (Article 13(2)(b) of Regulation No 883/2004).

46 Article 14(8) of Regulation No 987/2009 provides that, for the purposes of the application of Article 13(1) and (2) of Regulation No 883/2004, a ‘substantial part’ of employed or self-employed activity pursued in a Member State is to mean a quantitatively substantial part of all the activities of the employed or self-employed person concerned pursued there, without this necessarily being the major part of those activities. To determine whether a substantial part of an activity is pursued in a Member State, account is to be taken, in the case of an employed activity, of working time and/or remuneration. The fact that less than 25% in respect of those criteria is met is to be an indicator that a substantial part of that activity is not being pursued in the relevant Member State (see, to that effect, judgment of 19 May 2022, *Ryanair*, C-33/21, EU:C:2022:402, paragraph 63).

47 Given that FK resided in Germany, where the centre of interest of his activities was also situated before he changed his place of residence to Switzerland, where the centre of interest of his activities is currently located, he must be regarded as being subject, in accordance with Article 13(2) of Regulation No 883/2004, either to the application of German legislation or to that of Swiss legislation.

48 In the present case, since the referring court observes that the working time spent by FK at his Austrian office never exceeded 10% of his total working time spent practising as a lawyer, the view must be taken that, according to the conflict rules introduced by Regulation No 883/2004, Austrian legislation is not applicable.

49 Nonetheless, although the complete and uniform system of conflict rules established by Regulation No 883/2004 has the effect of divesting, in principle, the legislature of each Member State of the power to determine at its discretion the ambit and the conditions for the application of its national legislation so far as the persons who are subject thereto and the territory within which the provisions of national law take effect are concerned (see, *inter alia*, judgments of 26 February 2015, *de Ruyter*, C-623/13, EU:C:2015:123, paragraphs 34 and 35, and of 19 September 2019, *van den Berg and Others*, C-95/18 and C-96/18, EU:C:2019:767, paragraph 50), the principle of a single applicable legislation cannot, however, deprive a Member State that does not have jurisdiction by virtue of the provisions of Title II of Regulation No 883/2004 of the possibility of granting, under certain conditions, family benefits or an old-age pension to a migrant worker under its own national law even though, under Article 13 of that regulation, that person is to be subject to the legislation of another Member State (see, to that effect, judgments of 23 April 2015, *Franzen and Others*, C-382/13, EU:C:2015:261, paragraphs 58 to 61, and of 19 September 2019, *van den Berg and Others*, C-95/18 et C-96/18, EU:C:2019:767, paragraph 53).

50 The sole purpose of the conflict rules laid down by Regulation No 883/2004 is to determine the legislation applicable to persons who are in one of the situations referred to in the provisions fixing those rules (see, to that effect, judgments of 26 October 2016, *Hoogstad*, C-269/15, EU:C:2016:802, paragraph 37, and of 1 February 2017, *Tolley*, C-430/15, EU:C:2017:74, paragraph 60). As such, those provisions are not intended to lay down the conditions creating the right or the obligation to become affiliated to a particular social security scheme (see, to that effect, judgments of 11 June 1998, *Kuusijärvi*, C-275/96, EU:C:1998:279, paragraph 29 and the case-law cited, and of 21 February 2013, *Dumont de Chassart*, C-619/11, EU:C:2013:92, paragraph 39).

51 Consequently, Regulation No 883/2004 allows different schemes to continue to exist, creating different claims on different institutions against which the beneficiary concerned possesses direct rights by virtue either of national law alone or of national law supplemented, where necessary, by EU law (see, to that effect, judgments of 21 February 2013, *Dumont de Chassart*, C-619/11, EU:C:2013:92, paragraph 40 and the case-law cited, and of 1 February 2017, *Tolley*, C-430/15, EU:C:2017:74, paragraph 57).

52 Thus, the conflict rules laid down by Regulation No 883/2004 are not intended to govern the issue whether a worker has a right to a benefit which he was able to acquire by virtue of contributions paid during a given period to a social security scheme of a particular Member State.

53 In the present case, first, it should be noted that the referring court states that the contributions paid by the applicant in the main proceedings to the special schemes applicable to persons pursuing the profession of lawyer in Austria had been excluded from the scope of Regulation No 1408/71, replaced by Regulation No 883/2004, and that they came within the scope of those regulations solely from 1 January 2005. Secondly, it is not apparent from the documents before the Court that

the applicant in the main proceedings is arguing for the application of rules for aggregating or taking into account periods completed in other Member States for the purpose of the award of the early retirement pension applied for, which is based exclusively on the application of Austrian law.

54 It follows that the dispute in the main proceedings does not raise the issue of the determination of the legislation applicable in accordance with the conflict rules laid down in Articles 11 to 13 of Regulation No 883/2004, but only that of the application to the person concerned of the scheme which is provided for by the legislation of the Member State concerned and to which he has contributed.

55 That conclusion is, moreover, supported by the argument relied on by FK that the special scheme applicable to persons pursuing the profession of lawyer is to be classified as a ‘voluntary insurance scheme or an optional continued insurance scheme’.

56 Subject to the verification, which it is for the referring court to carry out, as to whether that special scheme is to be classified as a ‘voluntary insurance scheme or an optional continued insurance scheme’, at least as regards the contributions paid since 1 January 2005, such an insurance scheme is, in accordance with Article 14(1), in conjunction with Article 14(3), of Regulation No 883/2004, expressly excluded from the scope of the mechanism for determining the applicable legislation established by that regulation. Thus, FK may qualify for such optional continued insurance in Austria, even though he is compulsorily subject to the legislation of another Member State, in the present case Swiss legislation, since he began to contribute to the special scheme covering persons practising as a lawyer in Austria when that scheme was not covered by the scope of Regulation No 1408/71, replaced by Regulation No 883/2004, and continued to contribute to that scheme thereafter.

57 In such a situation, the person concerned must have the option of deciding to continue or to waive his or her affiliation to a compulsory insurance scheme for certain periods, to the extent that that choice affects the extent of the future social security benefit (see, to that effect, judgment of 12 February 2015, *Bouman*, C-114/13, EU:C:2015:81, paragraph 58).

58 In the light of all the foregoing considerations, the answer to the first question is that the conflict rules laid down in Article 13(2) of Regulation No 883/2004 are not applicable to the situation of a person who resides in the Member State in which the centre of interests of his activities is also situated, whilst pursuing an activity – which is distributed unevenly – in two other Member States, where it is necessary to determine whether that person has direct rights vis-à-vis the institutions of one of those two other Member States by virtue of contributions paid during a given period.

### *The second question referred*

59 By its second question, the referring court asks, in essence, whether EU law must be interpreted as precluding national legislation which makes the award of an early retirement pension applied for conditional on the waiver by the person concerned of the right to practise as a lawyer not only in the territory of the Member State concerned but also abroad.

60 In that regard, it should be noted that the situation of a person pursuing the profession of lawyer who is a national of a Member State and who moves to another Member State in order to perform work there in the regulated profession concerned may be covered by Article 49 TFEU on freedom of establishment if he or she is ordinarily remunerated by the client, or by Article 45 TFEU on freedom of movement for workers if his or her remuneration takes the form of a salary (see, to

that effect, judgments of 30 November 1995, *Gebhard*, C-55/94, EU:C:1995:411, paragraphs 22 to 25, and of 17 December 2020, *Onofrei*, C-218/19, EU:C:2020:1034, paragraph 23).

61 As regards the question whether the Austrian legislation at issue in the main proceedings constitutes a restriction on the freedom of establishment or on the freedom of movement for workers, it must be borne in mind that Regulation No 883/2004 does not establish a common scheme of social security, but allows different national schemes to exist. Member States retain the power to organise their social security schemes and, in the absence of harmonisation at EU level, it is for each Member State to determine in its legislation, in particular, the conditions for entitlement to social benefits. In exercising those powers, Member States must nonetheless comply with the law of the European Union and, in particular, with the provisions of the FEU Treaty giving every citizen of the European Union the right to move and reside within the territory of the Member States (see, inter alia, judgments of 21 February 2013, *Salgado González*, C-282/11, EU:C:2013:86, paragraphs 35 to 37; of 5 November 2014, *Somova*, C-103/13, EU:C:2014:2334, paragraphs 33 to 35; and of 21 October 2021, *Zakład Ubezpieczeń Społecznych I Oddział w Warszawie*, C-866/19, EU:C:2021:865, paragraph 27 and the case-law cited).

62 Furthermore, all the provisions of the FEU Treaty relating to the free movement of persons and to the freedom of establishment are intended to facilitate the pursuit by EU nationals of occupational activities of all kinds throughout the European Union and preclude measures which might place such nationals at a disadvantage when they wish to pursue an economic activity in the territory of another Member State (see, to that effect, inter alia, judgments of 15 December 1995, *Bosman*, C-415/93, EU:C:1995:463, paragraph 94, and of 5 November 2014, *Somova*, C-103/13, EU:C:2014:2334, paragraph 36).

63 Consequently, those provisions preclude any national measure which, albeit applicable without discrimination on grounds of nationality, is liable to hinder or render less attractive the exercise by EU nationals of the fundamental freedoms guaranteed by the FEU Treaty (see, to that effect, judgments of 1 April 2008, *Government of the French Community and Walloon Government*, C-212/06, EU:C:2008:178, paragraph 45, and of 5 November 2014, *Somova*, C-103/13, EU:C:2014:2334, paragraph 38).

64 In the present case, it must be stated that the legislation at issue in the main proceedings may apply without distinction to all persons pursuing the profession of lawyer and therefore does not constitute discrimination on grounds of nationality.

65 However, it should be noted that a condition such as that provided for in Austrian law which requires that the person concerned waive the right to practise as a lawyer both in national territory and abroad in order to qualify for an early retirement pension is such as to deter persons entitled to such a pension from exercising their freedom of establishment or freedom of movement.

66 Furthermore, although such a waiver is likely to be accepted by a person who has pursued all his or her professional activity in Austria, it may prove more difficult to accept for a person who has exercised his or her freedom of establishment or freedom of movement and who is required, inter alia, to continue to pursue his or her professional activity in another Member State, since he or she has not reached the statutory retirement age in that Member State.

67 It follows that the legislation at issue in the main proceedings constitutes a restriction on the freedoms guaranteed by Articles 45 and 49 TFEU which is warranted only if it pursues a legitimate objective compatible with the FEU Treaty and is justified by overriding reasons in the public interest. In such a case, the application of such a measure must also be suitable for securing the

attainment of that objective and must not go beyond what is necessary in order to achieve it (see, inter alia, judgments of 16 May 2013, *Wencel*, C-589/10, EU:C:2013:303, paragraph 70 and the case-law cited; of 5 November 2014, *Somova*, C-103/13, EU:C:2014:2334, paragraph 46; and of 17 December 2020, *Onofrei*, C-218/19, EU:C:2020:1034, paragraph 32).

68 In that regard, the Austrian Government maintains that the overriding reason in the public interest justifying the measure concerned can be inferred from the purpose of the scheme at issue in the main proceedings, which consists in substituting the pension concerned for previous income to which no income from full-time employment is deemed to be added. The Austrian Government argues that the objective is not only to protect persons still pursuing the profession of lawyer from competition from those who are already retired, but also to ensure the financial sustainability of the retirement pension scheme concerned, which does not come under the general retirement scheme and which, unlike funded schemes, is financed by a pay-as-you-go system.

69 In that regard, it should be noted that the Court has acknowledged that employment policy objectives such as those seeking, inter alia, to set age limits for mandatorily ceasing activity with the aim of promoting the establishment of a more balanced age structure may be regarded as legitimate (see, to that effect, judgment of 21 July 2011, *Fuchs and Köhler*, C-159/10 and C-160/10, EU:C:2011:508, paragraph 50).

70 The legitimacy of such an aim of public interest relating to employment policy cannot reasonably be called into question, since, in accordance with the first subparagraph of Article 3(3) TEU, the promotion of a high level of employment is one of the ends pursued by the European Union (see, to that effect, judgment of 2 April 2020, *Comune di Gesturi*, C-670/18, EU:C:2020:272, paragraph 36 and the case-law cited).

71 While it cannot be disputed that a national law which regulates the labour market in order to release posts held by persons who are near the age of retirement and to ensure healthy competition among professionals is appropriate for securing the attainment of the objective pursued, it must, however, be found that, where it requires that the person concerned waive the right to practise as a lawyer both in the territory of the Member State concerned and abroad, it cannot be ruled out that it goes beyond what is necessary to attain that objective.

72 National legislation which requires that the person concerned waive the right to practise as a lawyer both in the territory of the Member State concerned and abroad in order to protect persons still pursuing that profession from competition from those who have already exercised their right to retirement appears to go beyond what is necessary to attain the objective in question, since that objective can be attained by limiting that waiver of the right to pursue any professional activity to national territory alone or possibly to a limited geographical area in another Member State. Such legislation does not, moreover, take into account the fact that the conditions for acquiring and maintaining the right to a pension are not harmonised between the Member States, but only coordinated by EU law, and that the persons concerned may be obliged to continue to work in other Member States in order to acquire their right to a pension under the national laws concerned.

73 Furthermore, the condition that the person concerned waive the right to practise as a lawyer both in national territory and abroad appears to go beyond what is necessary to ensure that income from full-time employment is not added to the early retirement pension thus paid.

74 As regards the objective relating to the financial sustainability of the special scheme concerned, although it is true that the risk of seriously undermining the financial balance of a social security system may constitute an overriding reason in the general interest (see, inter alia,

judgments of 28 April 1998, *Kohll*, C-158/96, EU:C:1998:171, paragraph 41, and of 11 January 2007, *ITC*, C-208/05, EU:C:2007:16, paragraph 43), it is not, however, clear from the explanations provided by the Austrian Government how the financing system of that special scheme, which is dependent on the contributions paid by the beneficiaries of that special scheme, would be subject to a risk of being seriously undermined by the fact that recipients of early retirement pensions under the special scheme concerned continue to work in other Member States.

75 Therefore, although it is ultimately for the referring court to determine whether, and to what extent, the national legislation in question meets the requirement of proportionality as regards the implementation of the objective relating to the financial sustainability of the special scheme concerned, it appears, in the light of the documents before the Court, that that objective can be attained by less restrictive means.

76 In the light of all the foregoing considerations, the answer to the second question is that Articles 45 and 49 TFEU must be interpreted as precluding national legislation which makes the award of an early retirement pension applied for conditional on the waiver by the person concerned of the right to practise as a lawyer, without taking into account, in particular, the Member State in which the activity concerned is pursued.

### **Costs**

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

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

- 1. The conflict rules laid down in Article 13(2) of Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems are not applicable to the situation of a person who resides in the Member State in which the centre of interests of his or her activities is also situated, whilst pursuing an activity – which is distributed unevenly – in two other Member States, where it is necessary to determine whether that person has direct rights vis-à-vis the institutions of one of those two other Member States by virtue of contributions paid during a given period.**
- 2. Articles 45 and 49 TFEU must be interpreted as precluding national legislation which makes the award of an early retirement pension applied for conditional on the waiver by the person concerned of the right to practise as a lawyer, without taking into account, in particular, the Member State in which the activity concerned is pursued.**

[Signatures]

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\* Language of the case: German.

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