OPINION OF ADVOCATE GENERAL FENNELLY

delivered on 14 December 1995 *

Introduction

1. This reference from the Dutch Centrale Raad van Beroep (Higher Social Security Court) effectively seeks clarification of the Court's decision in the *Roks* case. [1] It concerns provisions of Dutch social security law which adversely affect far greater numbers of women than of men, but which are claimed to be objectively justified by reference to the social policy objectives pursued by the law in question.

Legal and factual background

2. This reference concerns, in particular, adjustments to the Netherlands General Law on Incapacity for Work, the Nederlandse Algemene Arbeidsongeschiktheidswet [2] (hereinafter 'the AAW'), in response to the requirements of Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security [3] (hereinafter 'the Directive').

3. Article 2 of the Directive defines its personal scope as follows:

'This Directive shall apply to the working population — including self-employed persons, workers and self-employed persons whose activity is interrupted by illness, accident or involuntary unemployment and persons seeking employment — and to retired or invalided workers and self-employed persons.'

* Original language: English.

1 — Case C-343/92 *De Weerd, née Roks and Others* v *Bestuur van de Bedrijfsvereniging voor de Gezondheid, Geestelijke en Maatschappelijke Belangen and Others* [1994] ECR I-571 (hereinafter '*Roks*').

2 — Law of 11 December 1975, Staatsblad 674, as amended.

3 — OJ 1979 L 6, p. 24.

Article 4(1) of the Directive states:

'The principle of equal treatment means that there shall be no discrimination whatsoever on ground of sex either directly, or indirectly by reference in particular to marital or family status, in particular as concerns:

— the scope of the [social security schemes to which the Directive applies] and the conditions of access thereto; ... .'

The Directive applies to statutory schemes which provide protection against risks of, *inter alia*, sickness and invalidity. [4] Article 8 required the Directive to be implemented by 23 December 1984. Article 4(1) of the Directive is capable of direct effect in the absence of proper implementation after that date. [5]

4. The AAW, and its history of amendment, are, for present purposes, well summarized in the judgment of the Court in *Roks*:

'(3) The AAW, which came into force on 1 October 1976, originally conferred on men and on unmarried women, at the end of one year's incapacity for work, entitlement to benefits for incapacity for work the amount of which did not depend on either the other income or the loss of income of the beneficiary.

(4) Entitlement to benefits under the AAW was extended to married women by the Wet Invoering Gelijke Uitkeringsrechten Voor Mannen en Vrouwen (Law introducing Equal Treatment for Men and Women as regards Entitlement to Benefits) of 20 December 1979. [6] At the same time that Law made entitlement to benefits subject for all those insured, except certain categories, to the condition that during the year preceding the commencement of his incapacity for work the beneficiary received from his employment or in connection therewith a certain income which was initially set at no less than HFL 3 423.81 (hereinafter referred to as "the income requirement"). The income requirement applied to all persons whose incapacity for work had commenced after 1 January 1979.

4 — See Article 3(1)(a) of the Directive.

5 — See Case 71/85 *Netherlands* v *Federatie Nederlandse Vakbeweging* [1986] ECR 3855, paragraphs 12 to 23 of the judgment; see also, for example, Case 286/85 *McDermott and Cotter* [1987] ECR 1453, paragraph 17; Case C-31/90 *Johnson* [1991] ECR I-3723, paragraph 36; and Case C-343/92 *Roks*, paragraph 18.

6 — Referred to in this Opinion as the 1979 Law.

(5) By virtue of the transitional provisions contained in the abovementioned Law of 20 December 1979 men and unmarried women whose incapacity for work had commenced before 1 January 1979 continued to be entitled to benefits without having to satisfy the income requirement. Married women whose incapacity had commenced before 1 October 1975 were not entitled to benefits even if they satisfied the income requirement. As for those whose incapacity had begun between 1 October 1975 and 1 January 1979, they were entitled to benefits only if they satisfied the income requirement.

(6) By several judgments of 5 January 1988 the Centrale Raad van Beroep (Higher Social Security Court) held that those transitional provisions constituted discrimination on the ground of sex, contrary to Article 26 of the International Covenant on Civil and Political Rights of 19 December 1966, [7] and that married women whose incapacity for work arose before 1 January 1979 were entitled with effect from 1 January 1980, the date on which the Law of 20 December 1979 came into force, to AAW benefits on the same conditions as men, that is to say, without having to satisfy the income requirement, even if their incapacity had commenced before 1 October 1975.

7 — *United Nations Treaty Series* Vol. 999, p. 171.

(7) The transitional provisions held to discriminate against married women were repealed by a Law of 3 May 1989. [8] Article III of that Law, however, provided that persons whose incapacity for work arose before 1 January 1979 and who applied for AAW benefits after 3 May 1989 had to satisfy the income requirement, and Article IV provided that AAW benefits were to be withdrawn from persons whose incapacity for work arose before 1 January 1979 if they did not satisfy the income requirement. That withdrawal of benefits, which was originally to have been made on 1 January 1990, was postponed to 1 July 1991 by subsequent legislation.

(8) By a judgment of 23 June 1992 the Centrale Raad van Beroep ruled that the amount of income required, which in 1988 was HFL 4 403.52 a year, constituted indirect discrimination against women, contrary to Article 26 of the International Covenant referred to above, and to Article 4(1) of Directive 79/7, and that the income requirement must be regarded as being satisfied if during the year preceding the commencement of his incapacity for work the beneficiary had received "some income".' [9]

8 — Referred to in this Opinion as the 1989 Law.

9 — Case C-343/92 *Roks*, paragraphs 3 to 8 of the judgment. The questions posed by the Centrale Raad van Beroep in the instant case refer to the income requirement as interpreted by that court on 23 June 1992, viz. a requirement of some income. The term 'income requirement' will be used in this sense in the discussion which follows; see further paragraph 15 below.

5. In *Roks*, new and existing claimants adversely affected by the 1989 Law challenged decisions refusing or withdrawing benefits. The Raad van Beroep, 's-Hertogenbosch referred a number of questions to the Court for a preliminary ruling. Two of these (the second and third questions referred) are of particular relevance to the present case. [10] The second question was whether the withdrawal for the future of a right acquired by virtue of the direct effect in Community law of a provision of a directive which has not been properly implemented was contrary to the Community principle of legal certainty. The Court responded as follows:

'Community law does not preclude the introduction of national legislation which, by making continuance of entitlement to benefits for incapacity for work subject to a condition applicable henceforth to men and women alike, has the effect of withdrawing from women in future rights which they derive from the direct effect of Article 4(1) of Directive 79/7/EEC.'

6. The third question in *Roks* was whether provisions such as those in the 1989 Law, which in practice adversely affected married women either exclusively (as regards new claims) or largely (in the case of withdrawal of existing entitlements), and which, therefore, in principle, created indirect discrimination against women as defined in Article 4(1) of the Directive, could be objectively justified by budgetary considerations. The Court's answer was:

'Article 4(1) of Directive 79/7/EEC precludes the application of national legislation which makes the grant of benefits for incapacity for work subject to the condition of having received some income during the year preceding the commencement of the incapacity, a condition which, although it does not distinguish on grounds of sex, affects far more women than men, even if the adoption of that national legislation is justified on budgetary grounds.'

7. The instant reference arises from two cases brought before the Centrale Raad van Beroep: case 1 concerns Mrs Posthuma, case 2 Mr Oztürk. Mrs Posthuma's benefit was withdrawn pursuant to the amendment to the AAW in the 1989 Law, which extended the income requirement to those incapacitated before 1 January 1979; Mr Oztürk was refused benefit pursuant to the original

10 — The first question in *Roks* concerned *retroactive* withdrawal of entitlement to benefits acquired but not yet claimed in respect of the period from 23 December 1984 to 3 May 1989 by virtue of the direct effect of Article 4(1) of the Directive. The fourth question related to the standing of persons outside the scope of application of the Directive to rely upon its terms.

amendment to the AAW in the 1979 Law, introducing the income requirement in respect of incapacitation arising from 1 January 1979 onwards.

8. Mrs Posthuma, a married woman, was self-employed until affected by ill health at the end of 1974; she was recognized as incapacitated from 1 October 1976 (when, as a married woman, she was not entitled to benefit). Pursuant to the 1988 decisions of the Centrale Raad van Beroep, mentioned above, she successfully applied for benefit for incapacity for work to the relevant social security authority, the Bestuur van de Bedrijfsvereniging voor Detailhandel, Ambachten en Huisvrouwen (Trade Association for Retailers, Craftsmen and Housewives, hereinafter 'Detam'). [11] Pursuant to Article IV of the 1989 Law, as amended, her benefit was later withdrawn by Detam, [12] with effect from 1 July 1991, for failure to meet the income requirement in the year prior to the commencement of her incapacity for work. [13] Mrs Posthuma appealed to the Centrale Raad van Beroep against the dismissal by the Rotterdam Arrondissementsrechtbank (District Court) of her action challenging Detam's decision.

9. Mr Oztürk worked until 1988. He received unemployment benefits until 17 April 1990, when he took up new employment. However, he ceased employment again on 13 September 1990 owing to psychiatric problems, and it was established that he should have been certified as unfit for work as early as 1 April 1989. He is regarded as having ceased work before that date by reason of unemployment. Mr Oztürk was refused benefit for incapacity for work by another trade association, acting as a social security authority, the Bestuur van de Nieuwe Algemene Bedrijfsvereniging (hereinafter 'NAB'), for failure to comply with the income requirement during the year prior to the commencement of his incapacity for work. [14] Mr Oztürk also appealed to the Centrale Raad van Beroep against an unfavourable decision of the Rotterdam Arrondissementsrechtbank.

10. The Centrale Raad van Beroep suggests, in its order for reference of 14 October 1994, that the decision of the Court in *Roks* raises certain questions of interpretation. In particular, it wishes to know whether the Court's

11 — The application was made on 26 October 1988, and the benefit was granted by a decision of 25 July 1989.

12 — By a decision of 26 March 1991.

13 — Although Detam's decision of 26 March 1991 withdrawing Mrs Posthuma's benefits in accordance with Article IV of the 1989 Law was taken before the Centrale Raad van Beroep's decision of 23 June 1992 that the amount of income required constituted impermissible indirect discrimination against women, counsel for Detam stated at the oral hearing that Mrs Posthuma's case was reviewed afterwards, and that the withdrawal of benefits was confirmed as she had earned no income in the year preceding the commencement of her incapacity for work.

14 — The decision is variously stated to have been taken on 23 October 1992 and 23 October 1991, but this apparent error is not material.

ruling was confined to Article IV of the 1989 Law (dealing with withdrawal of benefit), and whether it was budgetary grounds only which were excluded from consideration as potential objective justifications for measures adversely affecting far more women than men, or whether it had gone so far as holding that no objective justification of any sort existed for such an effect in the case of the income requirement under the AAW. The national court also raises again the issue of legal certainty, by asking whether an income requirement which would normally be relevant only at the moment of recognition of entitlement to benefit can be imposed after that point.

11. The Centrale Raad van Beroep therefore ordered the following questions to be referred to the Court for a preliminary ruling:

'If it is established that an income requirement imposed by legislation on incapacity for work affects more women than men: [15]

1. (as regards case 1:) Is the applicable Community law to be interpreted as meaning that it prohibits termination of benefits for incapacity for work under the AAW, acquired by virtue of incapacity for work which commenced before 1 January 1979, as a result of the application of Article IV of the Law of 3 May 1989, which makes retention of entitlement to benefits after 1 July 1991 subject to the requirement that prior to the commencement of the incapacity for work income from or in connection with work has been received?

2. (as regards case 2:) Is the applicable Community law to be interpreted as meaning that it prohibits refusal to grant benefits for incapacity for work under the AAW on the basis of Article 6 of the AAW (as that provision reads following the entry into force of the Law of 20 December 1979, and taking into account the judgment of the Centrale Raad van Beroep of 23 June 1992), according to which the grant of benefits is subject to the requirement that in the year prior to the commencement of the incapacity for work, in this case 1 April 1989, income from or in connection with work was received?'

Observations

12. Observations were submitted by Detam and NAB, the Netherlands Government, and the Commission.

15 — The existence of discrimination is usually deduced from an adverse effect on far greater, or considerably greater, numbers of one sex than of the other — see Case 171/88 *Rinner-Kühn* [1989] ECR 2743; Case C-184/89 *Nimz* [1991] ECR I-297, paragraph 15 of the judgment; Case C-343/92 *Roks*, paragraph 38; Case C-317/93 *Nolte* [1995] ECR I-4625, paragraph 57 of the Opinion of Advocate General Léger, delivered on 31 May 1995, and paragraph 28 of the judgment, delivered on 14 December 1995. The Dutch income requirement was understood to have such an effect in *Roks*, so I shall presume that this also holds for the purpose of the present case.

13. Detam and NAB argue that the decision of the Court in *Roks* rejects only purely budgetary considerations as possible grounds of justification of apparent indirect discrimination. [16] They submit that the 1979 Law transformed the AAW from a general social security measure into a measure insuring against loss of income on the part of those affected by incapacity, a principle referred to by the Centrale Raad van Beroep in its order for reference. Budgetary considerations influenced this change of policy, but it was none the less a social policy choice within the margin of appreciation of the national legislator. [17] This principle of insurance against income loss was accentuated by the 1989 Law, which removed anomalous remnants of the previous system.

14. The Netherlands Government argues that the decision in *Roks* should be limited to the exclusion of attempted justifications on purely budgetary grounds. In so far as the AAW, as amended, adversely affects more women than men, it does so as a simple consequence of the continued larger numbers of men in the workforce, which is inextricably linked with the avowed social aim of insuring against loss of income. The 1992 Raad van Beroep decision (on the amount of income required) removed any unnecessary elements of discrimination. Member States' competence to determine social policy in general and, in particular, to retain a connection between social security contributions (from workers' income) and social security payments, would be undermined by a contrary decision of the Court.

15. The Commission, having argued in its written observations for a very broad interpretation of *Roks*, indicated at the oral hearing that it had misunderstood the reference to an income requirement in the decision, and thus in the order for reference in the present case, as referring to the specific amount of income (HFL 4 403.52 per annum) required before the Centrale Raad van Beroep's decision of 23 June 1992 substituting a requirement of 'some income'. [18] Its earlier proposals (for a link between prior income and level of entitlement) had been put forward as alternatives to that rule requiring a specific income. The agent for the Commission conceded at the oral hearing that the imposition of a requirement simply of 'some income' was within Member State competence. He suggested that, in any event, the Court was presented with a false problem, as persons who did not earn some income fell, in any event, outside the

16 — Detam and NAB submitted virtually identical written observations, and complementary oral observations.

17 — See Article 118 of the Treaty establishing the European Community.

18 — The hearing in the Raad van Beroep, 's-Hertogenbosch, which resulted in the reference in *Roks*, preceded by a few days the decision of the Centrale Raad van Beroep on the level of the income requirement. However, the order for reference was made only on 30 June 1992, and referred to the decision. As can be seen in the quotation above from the summary of the Dutch law in *Roks*, the Court also took account of this development.

personal scope of the Directive, and so could not rely upon its terms.

16. In its written observations, the Commission doubted the appropriateness of the reference in Mr Oztürk's case, as he is a man, and, therefore, is not disadvantaged relative to women by the income requirement. However, the agent for the Commission did not press the point at the oral hearing, because he contended that the same principles applied *mutatis mutandis* to the 1979 Law and the 1989 Law.

Substantive analysis

17. I will first deal with the argument of the Commission at the oral hearing that persons who did not satisfy the requirement of some income during the year before their incapacitation for work were outside the personal scope of the Directive, and so could not invoke its terms. This argument is reminiscent of that put forward by the defendant trade associations and by the Netherlands Government in *Roks* in an attempt to exclude certain questions. [19] That argument was rejected by the Court, which remarked that it was for the national court to determine in each case the necessity for a preliminary ruling and the relevance of the questions referred to the Court, and that one of the questions posed precisely concerned the consequences in national law for persons outside the scope of the Directive of a finding of incompatibility between the 1989 Law and the Directive. [20]

18. The Commission's argument in this case seems to be more substantive than procedural, in that it seeks to establish that discrimination between income-earners and others cannot constitute prohibited discrimination under Article 4(1) of the Directive, because the Directive cannot prohibit discrimination against those to whom it does not apply (women who are not members, including retired and invalided members, of the working population). However, it is not clear that the category of persons who earn some income from, or in connection with, work is entirely coextensive with the category of persons to whom the Directive is applicable by virtue of Article 2. Indeed, both Mrs Posthuma and Mr Oztürk may themselves fall within the personal scope of the Directive, in spite of their inability to satisfy the income requirement under the AAW. The Commission itself suggested in its written observations that Mrs Posthuma should be considered to have satisfied the requirements of Article 2, as an invalided

19 — Case C-343/92 *Roks*, paragraph 14 of the judgment.

20 — Case C-343/92 *Roks*, paragraph 16 of the judgment.

self-employed person, at the point when she applied for AAW benefit. Similarly, Mr Oztürk was unemployed before the commencement of his incapacity for work, although it is not clear from the order for reference whether he was either a person whose activity was interrupted by involuntary unemployment or a person seeking employment. While the Court interprets the Directive, the question whether persons in a particular category defined by national law (and, in particular, the appellants in the instant case) fall within the personal scope of the Directive is also a question of fact and of national law, to be decided by the national judge. [21]

19. Consequently, the first question is whether the general principle of legal certainty prohibits termination of benefits pursuant to newly-introduced national rules regulating entitlement to such benefits. Presuming, for the purposes of the present discussion, that the national rules do not otherwise offend Community law, and in particular Article 4(1) of the Directive, this question seems to me to have been answered by the Court in *Roks*.

20. The Court stated in *Roks* that the Directive leaves intact the powers reserved by Articles 117 and 118 of the Treaty to the Member States to define their social policy within the framework of close cooperation organized by the Commission, and consequently the nature and extent of measures of social protection, including those relating to social security, and the way in which they are implemented. [22] The Court also held that Community law does not prevent Member States from taking measures, in order to control their social expenditure, which have the effect of withdrawing social security benefits from certain categories of persons, provided that those measures are compatible with the principle of equal treatment between men and women as defined in Article 4(1) of the Directive. [23] The Court concluded that Community law does not preclude the introduction of national legislation which has the effect of withdrawing rights from women, by making *continuance* of entitlement to benefits for incapacity for work subject to a condition applicable henceforth to men and women alike. [24]

21. The Centrale Raad van Beroep expresses its concern in the order for reference that, the judgment in *Roks* notwithstanding, an income requirement relevant only at the moment of recognition of entitlement should be applied even after entitlement to benefits has already commenced. However, when Member States act within their own competence, they are subject only to national legal

21 — See the Opinion of Advocate General Léger in Case C-317/93 *Nolte*, cited above, paragraph 42.

22 — Paragraph 28 of the judgment; see also Joined Cases 281/85, 283/85, 284/85, 285/85 and 287/85 *Germany and Others* v *Commission* [1987] ECR 3203; Case C-229/89 *Commission* v *Belgium* [1991] ECR I-2205.

23 — Paragraph 29 of the judgment; see also Case 30/85 *Teuling* [1987] ECR 2497; Case C-229/89 *Commission* v *Belgium*, cited above; Case C-226/91 *Molenbroek* [1992] ECR I-5943.

24 — Paragraph 30 of the judgment.

and constitutional principles (including, of course, such international-law principles as may be applicable in the national legal system). So long as the requirements of the Directive in relation to equal treatment are satisfied, Member States are competent to design their social security system to suit their resources, needs and social policy objectives. Therefore, irrespective of whether it would require the maintenance of such social security entitlements if they were governed by Community law, the Community-law principle of legal certainty is of no application to the provisions of the Dutch law in question in the present proceedings. Community law does not prevent the withdrawal, for the future, while respecting the principle of equal treatment, of a social security benefit already enjoyed. This is to be distinguished from any attempt to withdraw, *with retroactive effect*, rights which have been acquired as a result of the direct effect of provisions of an unimplemented or improperly implemented directive. [25]

22. As Community law imposes no special requirements as regards the retention of benefits, as opposed to their grant or refusal for the first time, it follows that the questions raised in the cases of Mrs Posthuma and Mr Oztürk are, for practical purposes, identical. The different national measures referred to in the questions (Article IV of the 1989 Law, and Article 6 of the AAW as amended by the 1979 Law, respectively) both impose the same income requirement, in respect of different periods in which incapacity commenced (before and after 1 January 1979, respectively). The two questions can therefore be answered together, without having to address any problems to which Mr Oztürk's position might give rise.

23. Both questions effectively enquire whether the answer to the third question referred in *Roks* excluded any objective justification apart from budgetary considerations for the income requirement in the Dutch rules on social security benefits for incapacity for work. That answer states that Article 4(1) of the Directive 'precludes' the application of an income requirement such as that at issue, which affects far more women than men, 'even if the adoption of that legislation is justified on budgetary grounds'. The response of the Court could possibly be read as excluding justifications other than purely budgetary ones. In the light of both the text of the question addressed and the Court's own discussion of the issues, the uncertainty of the Centrale Raad van Beroep about the scope of the decision is therefore understandable.

25 — This was the response of the Court to the first question in *Roks*, mentioned in footnote above; see also Case C-377/89 *Cotter and McDermott* [1991] ECR I-1155, paragraph 25 of the judgment.

24. However, I believe that a close reading of the Court's judgment in *Roks* shows that it did not reach so sweeping a finding. The Court observed that Article 4(1) of the Directive precludes the application of a national measure which, although formulated in neutral terms, works to the disadvantage of far more women than men, unless that measure is based on objectively justified factors unrelated to any discrimination on grounds of sex. [26] That is the case, the Court said, where the measures chosen reflect a legitimate social policy aim of the Member State whose legislation is at issue, are appropriate to achieve that aim and are necessary in order to do so. [27] The Court remarked that although budgetary considerations may influence a Member State's choice of social policy and affect the nature or scope of the social protection measures it wishes to adopt, they cannot *themselves* constitute the aim pursued by that social policy and cannot, therefore, justify discrimination against one of the sexes. [28]

25. I am satisfied, therefore, that the Court did not exclude the possibility that the far greater adverse effect of an income requirement on women than on men could be objectively justified by considerations of social policy. Advocate General Darmon took a wider approach to the question in his Opinion in *Roks*. He also dismissed the possibility of justifying such a discriminatory effect by reference to budgetary considerations alone, and observed that such considerations could none the less influence the nature of social security schemes established by Member States. He then continued:

'That means that if the purpose of rules is to compensate for loss of income by a member of the working population when he becomes unable to work, a Member State is entitled, when the budgetary resources allocated to payment of the relevant benefits are or may become insufficient, to restrict those benefits to persons whose income from work prior to the materialization of the risk indicates that they were in proper employment.

However, such an income requirement cannot be fixed without having regard to the characteristics of the labour market, and in particular certain conditions special to women's employment, such as part-time employment.' [29]

26. I agree with the analysis of Advocate General Darmon. It appears that the requirement of merely 'some income' for entitlement to incapacity benefit accommodates the position of working women, who are often found in greater numbers in lower-paid and part-time employment. Of course, it

26 — Paragraph 33 of the judgment; see also Case C-229/89 *Commission* v *Belgium*, cited above, paragraph 13.

27 — Paragraph 34 of the judgment; see also Case C-226/91 *Molenbroek*, cited above, paragraph 13.

28 — Paragraph 35 of the judgment.

29 — Paragraphs 55 and 56 of the Opinion.

excludes the payment of benefit to incapacitated persons who did not earn any income from or in connection with work, which exclusion affects a greater proportion of women than men. However, Community law cannot dictate the nature or scope of national social protection measures, and each Member State is at liberty to organize its social security system in order to ensure that it is coherent. [30] It appears to be a legitimate social policy aim to seek to guarantee a minimum income to those affected by loss of income through their incapacity for work, and the system in the Netherlands applies, by virtue of the income requirement now in force, to a very wide category of such persons.

27. These observations are offered merely to provide guidance to the national court as to the considerations on which it should base its decision. It is for the national court ultimately to determine whether the national measures at issue do in fact reflect a legitimate social policy aim, are appropriate to achieve that aim and are necessary in order to do so.

Conclusion

28. I conclude that the questions referred by the Centrale Raad van Beroep should be answered as follows:

If it is established that an income requirement imposed by legislation on incapacity for work affects far greater numbers of women than of men, the applicable Community law is not to be interpreted as meaning that it prohibits national rules which make the retention, or the grant, of benefits for incapacity for work subject to the requirement that in the year prior to the commencement of the incapacity for work, income from or in connection with work was received, if the national rules in question reflect a legitimate social policy aim, are appropriate to achieve that aim and are necessary in order to do so.

30 — See Case C-343/92 *Roks*, paragraph 28 of the judgment; Case C-229/89 *Commission* v *Belgium*, cited above, paragraph 21; Case C-317/93 *Nolte*, cited above, paragraphs 33 and 34.