OPINION OF ADVOCATE GENERAL TESAURO
delivered on 26 April 1994 *

Mr President,
Members of the Court,

1. The present case concerns a reference to the Court by the Centrale Raad van Beroep (Higher Social Security Court) for a preliminary ruling on the compatibility with Article 51 of the EEC Treaty of Point 4 of Annex VI, section J (Netherlands), to 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 [1] (hereinafter 'the regulation'). The alleged incompatibility stems from the fact that the provision in question may lead to a situation where, in order to obtain invalidity benefit under the legislation of a Member State, a (previously) employed person is obliged, pursuant to national law, to meet an additional requirement (in the present case, a specified level of earned income received in the year preceding the commencement of the incapacity for work), which is inoperative for the purposes of the national legislation to which the employee in question is still deemed to be subject within the meaning of Article 45(4) of that regulation.

Thus, in essence, the question put by the national court calls for examination of the validity of Point 4 of Annex VI, section J (Netherlands), to Regulation No 1408/71.

2. A summary of the relevant national legislation is necessary in order to understand the terms of the question.

In the Netherlands compulsory insurance is governed by two sets of rules: the Algemene Arbeidsongeschiktheidswet [2] (General Law on incapacity for work: 'AAW') and the Wet op de Arbeidsongeschiktheidsverzekering [3] (Law on invalidity insurance: the 'WAO'). The AAW, which came into effect on 1 October 1976, is a national insurance scheme to which, in principle, all residents are affiliated. Neither the acquisition of entitlement to benefits nor the calculation thereof is subject to any condition with respect to the length of insurance periods. However, following an amendment with effect from 1 January 1980, the award of benefit under that law is subject to the requirement that, during the year preceding the commence-

* Original language: Italian.

1 — See the codified version contained in Council Regulation (EEC) No 2001/83 (OJ 1983 L 230, p. 6).

2 — Law of 11 December 1975, *Staatsblad* 674.

3 — Law of 18 February 1966, *Staatsblad* 84.

ment of the incapacity for work, the person insured received a specified amount in the form of income from (or in connection with) the pursuit of an economic or professional activity (Article 6). With respect to the latter point it should be noted that benefits in lieu of remuneration are treated as income for the purposes of the AAW; however, that does not apply to income in the form of social assistance.

The WAO, which came into effect on 1 July 1967, governs compulsory insurance for employed persons against incapacity for work. In order to qualify for the relevant benefits, the persons concerned must be subject to the legislation in question, that is to say, at the time when the risk insured against materializes they must be engaged in gainful employment. However, the acquisition of entitlement to benefit and the calculation thereof are not subject to any requirement with respect to the length of the insurance periods. Insured persons who have been unfit for work for a continuous period of 52 weeks may receive benefit under the WAO; the amount awarded is calculated on the basis of the degree of invalidity and the level of daily remuneration.

At the material time, if applications were made at the same time for benefit under both systems, the WAO benefit was paid only in so far as it exceeded the amount of the AAW benefit. Nevertheless, a person entitled to benefit under the WAO who, for whatever reason, could not obtain benefit under the AAW, was and is entitled to the full amount of the WAO benefit.

3. Let me now turn to the relevant Community law. As I observed, Article 51 of the Treaty requires the Council to adopt such measures in the field of social security as are necessary specifically to secure for migrant workers 'aggregation, for the purpose of acquiring and retaining the right to benefit and of calculating the amount of benefit, of all periods taken into account under the laws of the several countries' (Article 51(a)). On the basis of that article the Council adopted Regulation No 1408/71, the principal aim of which is to coordinate the various national social security legislations, so as to ensure that the freedom of movement for workers does not give rise to a situation in which workers who exercise that right are thereby placed at a disadvantage as compared with those who pursue their occupations in only one Member State.

With respect to invalidity benefits in particular, one of the aims of Community legislation is to facilitate the coexistence of insurance schemes based on the principle that the acquisition of entitlement to benefit follows upon materialization of the risk insured against (such as the Netherlands scheme) with schemes based instead on the principle that entitlement to benefit is cumulatively acquired and therefore related to the length of insurance periods. In that connection, Article 45(4) (Article 45(3) at the material time) of the regulation is especially impor-

tant: it provides that 'where the legislation of a Member State which makes the granting of benefits conditional upon an employed person being subject to its legislation at the time when the risk materializes has no requirements as to the length of insurance periods either for entitlement to or calculation of benefits, any employed person who is no longer subject to that legislation shall, for the purposes of this chapter, be deemed to be still so subject at the time when the risk materializes, *if at that time he is subject to the legislation of another Member State* or, failing this, *can establish a claim to benefits under the legislation of another Member State*'. [4] Article 45(6) makes identical provision with regard to self-employed persons, the only difference being that no mention is made therein of the alternative possibility alluded to in the passage I have emphasized.

Section J(4) of Annex VI to Regulation No 1408/71, the provision at issue in the present case, lays down special procedures for the application of the Netherlands legislation relating to incapacity for work. For our purposes, suffice it to say that the provision in question provides that, for the purpose of applying Article 46(2) of the regulation (the rules governing payment of benefits), the competent institution must fix the amount of cash benefits in accordance with the provisions of the WAO 'if, when incapacity for work or the resultant invalidity occurred, the person concerned was an employed person within the meaning of Article 1(a) of the regulation' (paragraph a); and in accordance with the provisions of the AAW 'if, when incapacity for work and the resultant invalidity occurred, the person concerned was not an employed person within the meaning of Article 1(a) of the regulation' (paragraph b). It is useful to note that those procedures were so amended when Regulation No 1408/71 was extended to cover self-employed persons [5] — for the specific purpose, therefore, of also bringing benefits granted under the AAW within the compass of Community law.

4. I shall now turn to the facts of the case. Mr Drake is a citizen of Czechoslovakia who was naturalized in the Netherlands under the Law of 20 May 1975. Between 24 October 1968 and 5 November 1971, he completed insurance periods under the WAO scheme totalling 3 years and 12 days. However, between 30 November 1971 and 23 October 1980, he was affiliated, by reason of his employment in Germany, to the German invalidity insurance scheme. According to the order for reference, Mr Drake ceased work after the last-mentioned date and until 1 July 1984 received no benefits in lieu

4 — My emphasis.

5 — See Council Regulation (EEC) No 1390/81 of 12 May 1981 extending to self-employed persons and members of their families Regulation (EEC) No 1408/71 (OJ 1981 L 143, p. 1).

of remuneration. By decision of 24 March 1986, his invalidity was officially recognized by the competent authorities in Germany, who granted him as from 1 July 1984 an *Erwerbsunfähigkeitsrente* (pension for incapacity for work), calculated on the basis of insurance periods completed in Germany.

Following an application for benefit filed in the Netherlands, the Nieuwe Algemene Bedrijfsvereniging (the New General Professional and Trade Association: the 'NAB'), which is the Netherlands body responsible for implementing the regulations, assessed whether Mr Drake was entitled to invalidity benefit on the basis of his insurance in the Netherlands, and concluded that as from 31 August 1984 he was to be deemed unfit for work for the purposes of both the WAO and AAW. Nevertheless, by decision of 18 November 1986, Mr Drake's application was rejected on the ground that, at the time when his incapacity for work commenced, he was not an employed person and could not therefore claim entitlement under the WAO. The NAB also ruled that Mr Drake was ineligible for benefit under the AAW because he had not been in receipt of income during the year preceding the commencement of his incapacity for work.

Mr Drake challenged that decision before the Raad van Beroep (Social Security Court), Amsterdam, which upheld his claims. The NAB appealed in turn against that judgment to the Centrale Raad van Beroep which, in order to resolve the dispute, considered it appropriate to seek a preliminary ruling from the Court of Justice. As I have already explained, the question calls for the Court to rule on the validity of section J(4) of Annex VI to the regulation.

5. That said, it must therefore be established whether a provision (section J (4) of the Annex) which, at least at first sight, limits the scope of Article 45(4) of the regulation, is lawful and, above all, whether such a provision, to the extent that it would prevent the aggregation of the rights to which the previously employed person is entitled, is incompatible with Article 51 of the Treaty and therefore invalid.

It is appropriate to begin with the observation that Article 45(4) of the regulation really does no more than to introduce a legal 'fiction', specifically in order to take into account the fact that the acquisition of benefit under the WAO is independent of the length of insurance periods but depends on the materialization of the risk insured against; that is to say, in order to prevent the negative consequences which could ensue for those workers who in the course of their working life have been subject to both types of scheme. The legal fiction resides in the fact that, as has already been explained, any worker who is no longer subject to a statutory scheme based on the materialization of risk is deemed to be still so subject at the time when the risk materializes, if at that time:

(a) he is subject to the legislation of another Member State; or

(b) he can establish a claim to benefits under the legislation of another Member State.

If that rule were applied in the case of Mr Drake, it would follow that, since he receives invalidity benefits under the legislation of another Member State, he would also be entitled to benefits under the WAO. That is incontestably what would have been the outcome before 1 July 1982, since until that date it was sufficient, in order to establish entitlement to benefits under the WAO, to satisfy one of the two conditions set out in Article 45(4) of the regulation.

However, as from 1 July 1982, the relevant legal framework was changed by the amendment to the annex in question, which was occasioned by the extension of Regulation No 1408/71 to cover self-employed persons. The relevant section of the annex now provides that only those persons who are 'actively' employed when the risk insured against materializes are entitled to benefits under the WAO. Otherwise, benefits are only available under the AAW, provided — of course — that claimants meet the income requirement, that is to say, they have received income from or in connection with work in the year preceding the commencement of the incapacity for work. Thus Mr Drake is not eligible for benefits either under the WAO, since he was not employed when the risk materialized, or under the AAW, since he does not meet the income requirement stipulated by Article 6 of the AAW.

6. Now that the terms of the question have been clarified, the first difficulty to be considered is the relationship between the relevant provisions contained in the body of the regulation and those contained in Annex VI to the regulation, particularly regarding the question whether provisions of the annex at issue may lawfully limit the scope of Article 45(4) of the regulation. In that connection, it must first be recalled that, as the Court has observed, 'the provisions of Regulation No 1408/71, and in particular those of Annex VI thereto, were adopted to implement Article 51 of the EEC Treaty and must be interpreted in the light of the objective of Article 51, which is to contribute to the establishment of the greatest possible freedom of movement for migrant workers'. [6] In my opinion, that statement implies that no hierarchical relationship exists between those provisions: what is important is that they should be interpreted, where possible, in conjunction with Article 51 of the Treaty and — above all — in such a way that they do not obstruct its aims.

Although, admittedly, the Court has consistently held that Article 51 of the Treaty envisages the coordination, rather than the harmonization, of legislations and therefore allows differences to remain between the social security schemes of the Member States, 'it is also settled that the aim of Articles 48 to 51 would not be attained if, as a consequence of the exercise of their right to freedom of movement, workers were to lose the advantages in the field of social security

6 — See Case C-293/88 *Winter-Lutzins* [1990] ECR I-1623, paragraph 13. Similarly, see Case C-282/91 *De Wit* [1993] ECR I-1221, paragraph 16.

guaranteed to them by the laws of a single Member State'. [7] Such a consequence might discourage Community workers from exercising their right to freedom of movement and would therefore constitute an obstacle to that freedom. [8] In that connection, the Court has, for example, pointed out that discrimination arises whenever the national legislature defines the conditions for the acquisition or retention of the right to benefits in such a way that they can in fact be fulfilled only by nationals of the Member State concerned or if it defines the conditions for loss or suspension of the right in such a way that they can in fact be more easily satisfied by nationals of other Member States than by those of the State of the competent institution. [9]

7. Plainly, that is not true of this case. On the contrary, a person who had pursued his occupation only in the Netherlands and who had ceased work before the risk insured against materialized would find himself in the same circumstances as Mr Drake and, more generally, in the same circumstances as those who, in exercise of their right to freedom of movement, have been subject at the same time to both a scheme based on risk and a scheme based on the cumulative acquisition of rights. In other words, the situation in which Mr Drake finds himself does not stem from the fact that he exercised his right to the freedom of movement of workers as guaranteed by the Treaty, but from the fact that he had ceased work of any kind long before the incapacity for work first commenced.

The facts of the case before us are therefore quite different from those of *Blottner* [10] — cited by the Greek Government in support of its claim that section J(4) of Annex VI to Regulation No 1408/71 is unlawful — in which the applicability of Article 45(3) of the regulation to the plaintiff in the main proceedings was indeed challenged, but on the ground that she had completed insurance periods before the regulation entered into effect and under a different scheme from that in force at that time. Quite rightly, therefore, the Court stated that, in those circumstances, the plaintiff was entitled to benefits under the WAO.

8. In the same context, the national court also queries the lawfulness of introducing a further condition (subsequent to the period in which the person concerned was subject to the legislation in question), such as that concerning the receipt of a specific level of earned income during the year preceding the

7 — See *inter alia* Case C-349/87 *Paraschi* [1991] ECR I-4501, paragraph 22.

8 — In that connection see, most recently, Joined Cases C-45/92 and C-46/92 *Lepore* and *Scamuffa* [1993] ECR I-6497, paragraph 21.

9 — See *Paraschi*, cited above, paragraph 23.

10 — See Case 109/76 *Blottner* [1977] ECR 1141, in particular paragraphs 11, 12, 15, 16 and 17. In *Blottner* another point at issue was the applicability of Article 45(4) (Article 45(3) at the time) of Regulation No 1408/71 to a person who had ceased working before the risk insured against materialized.

commencement of the incapacity for work, since a requirement of that nature is inoperative for the purposes of the national legislation to which the worker in question is deemed still to be subject within the meaning of Article 45(4) of the regulation.

In that connection, suffice it to say that, as the Court has consistently held, Article 51 of the Treaty and Regulation No 1408/71 provide only for the aggregation of insurance periods completed in different Member States and do not regulate the conditions under which those insurance periods are constituted; the conditions governing the right or obligation to become a member of a social security scheme are a matter to be determined by the legislation of each Member State, provided always that there is no discrimination in that connection between the nationals of the host State and those of other Member States. It follows that Community law does not in principle prevent the national legislature from amending the conditions for the grant of an invalidity pension, even if it makes them stricter, provided that the conditions adopted do not give rise to any overt or disguised discrimination between Community citizens. [11]

The income requirement imposed by the Netherlands legislature for the purposes of obtaining benefit under the AAW, to which the national court refers in the order for reference, is an objective condition which is applied to national workers and those from other Member States alike; it does not seem possible therefore to declare it unlawful from the point of view of Community law.

9. All things considered, there seems no reason to doubt the validity of section J(4) of Annex VI to the regulation, inasmuch as the failure to obtain benefits in this case is based on objective requirements imposed by national legislation and applied equally to those who have pursued their occupation only in the Member State in question, which means, most significantly, that the consequences which ensue for workers who have exercised their right to freedom of movement do not conflict with the aims of Articles 48 to 51 of the Treaty.

10. Lastly, there remains to be considered the marginal possibility described by the Commission in its written observations, that is to say, the possibility that in certain cases even a person who was employed when the risk insured against materialized might nevertheless be ineligible for benefits under the WAO for the simple reason that he had first been declared unfit for work in a Member State where the insurance scheme in force was based on the cumulative acquisition of rights. In those circumstances, he would no longer be an employed person when his incapacity for work was recognized in the

11 — See *Paraschi*, cited above, paragraphs 15 and 16.

Member State where the insurance scheme in force was based on risk; a further possible consequence could be that, by failing to meet the income requirement, he might also be ineligible for benefits under the AAW.

Obviously that situation is fundamentally different from this case, since in essence it concerns a person who is 'actively' employed when the risk insured against materializes. It is nevertheless clear that, if the Netherlands authorities were to exclude such circumstances when implementing the rules in question, it would be too restrictive and based on an excessively formal interpretation. In that connection I feel that on this occasion I need only point out that the provision at issue in the present case, which must in any case be read in the light of Article 45(4) of the regulation and — more generally — in the light of the purpose of Article 51, cannot in any event be interpreted in such a way as to penalize those who have exercised their right to free movement by comparison with those who have been subject to only one insurance scheme in only one Member State.

11. In view of the foregoing I propose that the Court give the following answer to the question submitted by the Centrale Raad van Beroep, Utrecht:

Consideration of the question submitted for a preliminary ruling has not revealed any factors capable of affecting the validity of section J (Netherlands)(4) of Annex VI to Regulation No 1408/71.