OPINION OF ADVOCATE GENERAL COSMAS

delivered on 2 February 1999 *

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I — Introduction

1. With this reference for a preliminary ruling under Article 177 of the EC Treaty, the Centrale Raad van Beroep (Netherlands), which is required to give a decision at second instance in proceedings brought by the appellant, Mr Nijhuis, against the Landelijk Instituut Sociale Verzekeringen (National Institute for Social Security) ('the LISV'), has referred to the Court two questions concerning the interpretation of Point 4(a) of Section J, relating to the Netherlands, of Annex VI to Council Regulation (EEC) No 1408/71 of 14 June

* Original language: Greek.

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] and of Point 2(b) of Section J, relating to the Netherlands, of Annex 2 to Council Regulation (EEC) No 574/72 of 21 March 1972 laying down the procedure for implementing Regulation No 1408/71. [2] In particular, the Court is asked to state whether an insurance period completed in the Netherlands under a special scheme for civil servants must be treated as an insurance period completed under the general scheme, so as to enable a migrant worker within the Community, who was found to be incapacitated for work in another Member State, to receive *pro rata* Netherlands benefits.

II — The legal context

A — *The national provisions*

(a) German law

2. Under the general scheme of the Angestelltenversicherungsgesetz (Law on Insurance for Clerical Staff), the amount of an invalidity benefit depends on the duration of insurance periods completed under that law. In other words, it is calculated *pro rata temporis* (type B legislation, as classified by the Court in the *Grahame and Hollanders* judgment of 13 November 1997). [3]

(b) The Netherlands legislation

3. The present case involves two different laws:

(1) The Algemene Burgerlijke Pensioenwet (General Law on Civil Pensions, 6 January 1966, 'the ABPW'), in the version in force at the time when Mr Nijhuis was working in the Netherlands. It is common ground that this was a special scheme applying only to civil servants. [4] Mr Nijhuis was insured in the Netherlands under this scheme alone, which, like all invalidity insurance schemes in the Netherlands, was a so-called risk scheme (type A), where the entitlement to the benefit arises on the occurrence of the insured risk during the insurance period.

1 — OJ, English Special Edition 1971 (II), p. 416.

2 — OJ 1972 L 74, p. 1.

3 — Case C-248/96 [1997] ECR I-6407, paragraph 14.

4 — For the definition of a special scheme for civil servants and persons treated as such, see the judgment in Case C-443/93 *Vougioukas* [1995] ECR I-4033, paragraphs 23 to 27.

(2) The Wet op de Arbeidsongeschiktheidsverzekering (Law relating to Insurance against Incapacity for Work, 18 February 1966, 'the WAO'), which introduced compulsory insurance for workers against invalidity. Under this law, the entitlement to the benefit arises if the person concerned is insured at the time when incapacity for work occurs (type A scheme) and remains incapacitated for work for 52 weeks without interruption. The amount of the benefit is calculated by reference to the degree of invalidity and the daily salary of the person concerned.

Under the WAO, which came into force on 1 July 1967, no insurance period prior to that date can be taken into account. Furthermore, civil servants and military personnel were excluded from its scope (Article 6(1)). On the other hand, as from 1 October 1976 they were covered by the Algemene Arbeidsongeschiktheidswet (General Law on Incapacity for Work, 11 December 1975, 'the AAW'), which also introduced a scheme based on risk (type A).

B — *The Community legislation*

4. Article 48 of the EEC (now the EC) Treaty enshrines the principle of freedom of movement for workers, but paragraph 4 states that 'the provisions of this Article shall not apply to employment in the public service'.

5. In addition, Article 51 of the EEC (now the EC) Treaty provides as follows:

'The Council shall, acting unanimously on a proposal from the Commission, adopt such measures in the field of social security as are necessary to provide freedom of movement for workers; to this end it shall make arrangements to secure for migrant workers and their dependants:

(a) 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;

(b) payment of benefits to persons resident in the territories of Member States.'

6. On the basis of Article 51, the Council adopted Regulations Nos 1408/71 and 574/72, the main aim of which is to coordinate the laws of the several countries in the sector in question, so that freedom of movement for workers does not have the effect of placing those who exercise that freedom in a less

favourable position than those who work in a single Member State.

7. Article 4(4) of Regulation No 1408/71 (in the version in force at the material time in the main proceedings, that is to say, the version amended and updated by Council Regulation (EEC) No 2001/83 of 2 June 1983 [5]), provides as follows:

'4. This Regulation shall not apply to ... special schemes for civil servants and persons treated as such.'

8. Article 40(1) of Regulation No 1408/71 (in the version in force at the material time in this case), relating to the conditions for the grant of invalidity benefit where a worker has been subject to the legislations of different Member States in succession, at least one of which does not cause the amount of benefits to depend on the duration of insurance periods (type A legislation, such as the Netherlands legislation in this case), refers for the calculation of benefits to Chapter 3, relating to old age and death pensions, and in particular to Article 46, concerning the calculation of benefits by each of the national insurance institutions in question. Under Article 46(2), the benefits are to be calculated in proportion to the periods of insurance completed under the legislation of each Member State to which the person concerned has been subject, including legislation where the amount of the invalidity benefit does not depend on the length of periods of insurance.

9. In addition, Article 45(4) of Regulation No 1408/71 (in the version in force at the material time in this case [6]), which aimed to safeguard the coexistence of type A and type B schemes, in principle permitted workers receiving invalidity pensions on the basis of the legislation of another Member State to receive also the Netherlands benefits payable under the WAO.

10. With regard to the Netherlands legislation relating to insurance against incapacity for work, Point 4(a) of Section J, relating to the Netherlands, of Annex VI to Regulation No 1408/71 (in the version in force at the

5 — OJ 1983 L 230, p. 6.

6 — '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 materialises 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. However, this latter condition shall be deemed to be satisfied in the case referred to in Article 48(1).'

material time in the main proceedings) provided as follows:

'For the purpose of applying Article 46(2) of the Regulation, Netherlands institutions will respect the following provisions:

(a) 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, the competent institution shall fix the amount of cash benefits in accordance with the provisions of the law of 18 February 1966 on insurance against incapacity for work (WAO), taking account of:

— insurance periods completed under the abovementioned law of 18 February 1966 (WAO),

— insurance periods completed after the age of 15 under the law of 11 December 1975 on incapacity for work (AAW), provided that they do not coincide with insurance periods completed by the person concerned under the abovementioned law of 18 February 1966 (WAO), and

— periods of paid work and equivalent periods completed in the Netherlands before 1 July 1967.'

11. Finally, in accordance with Point 2(b) of Section J of Annex 2 to Regulation No 574/72, in the version in force at the material time in the main proceedings, the competent institution under the Netherlands legislation for paying the invalidity benefit is the Nieuwe Algemene Bedrijfsvereniging (New General Professional and Trade Association, 'the NAB', which was replaced on 1 March 1997 by the LISV, the respondent in the main proceedings) where employed and self-employed workers are not entitled, without application of the regulation, to benefits under Netherlands legislation alone.

Moreover, Article 84 of Regulation No 1408/71 (in the version in force at the material time in the main proceedings) provides for the exchange of information and for the competent authorities and institutions of the Member States to lend each other their good offices and to cooperate in the implementation of the regulation.

Simultaneously, Article 86 of Regulation No 1408/71 (in the version in force at the material time in the main proceedings) requires claims, declarations or appeals submitted to an authority, institution or court of a Member State other than the competent State to be forwarded without delay to the competent authority or institution of the competent Member State. The provisions of this article ensure that the submission of claims, declarations or appeals for the first time to a non-competent authority, institution or court cannot have adverse consequences with regard to admissibility or time-limits.

III — The facts

12. The appellant in the main proceedings, Mr Nijhuis, a Netherlands national, worked in the Netherlands from 15 October 1968 to 1 October 1973 as a scientific research assistant with the Netherlands Organisation for Research in the Field of Pure Science in The Hague, and from 1 August 1973 to 1 April 1974 as a teacher in Tilburg. During these periods he was insured against the risk of invalidity under the ABPW. Outside these periods he did no work in the Netherlands, not even on a self-employed basis.

13. Subsequently he worked in Germany, where he was insured from 1 April 1974 to 1 April 1988 under the general scheme of the Angestelltenversicherungsgesetz. On 29 March 1988 he was found to be incapacitated for work. By decision of 4 September 1989 the Bundesversicherungsanstalt für Angestellte (Federal Insurance Office for Clerical Staff) awarded him an invalidity pension as from 9 November 1988. The pension was calculated on the basis of the insurance periods completed in Germany, without taking into account those completed in the Netherlands.

14. Mr Nijhuis claimed an invalidity benefit from the Algemeen Burgerlijk Pensioenfonds (General Civil Service Pension Fund, 'the ABPF'). When his claim was rejected, he did not respond.

By decision of 31 January 1990 the NAB, as the institution responsible for the award of invalidity benefits under the WAO, and which had been contacted by the competent German authority, rejected his claim on the grounds that he was not insured under the WAO or the AAW when his incapacity for work arose and that he could not rely on Regulation No 1408/71 because, when he was employed in the Netherlands, he was insured under the ABPW scheme, which was a special scheme for civil servants and was outside the ambit of that regulation.

15. The appellant in the main proceedings referred the decision of the NAB to the Raad van Beroep te Amsterdam (Appeal Court, Amsterdam), which dismissed his action. He then appealed to the Centrale Raad van Beroep te Utrecht.

IV — The questions referred

16. The Centrale Raad van Beroep took the view that the following questions should be referred to the Court under Article 177 of the Treaty:

'1. When applying Article 46(2) in conjunction with Article 45(4) of Regulation (EEC) No 1408/71, and on the basis of Articles 48 and 51 of the EC Treaty, is Point 4(a) of Section J [7] of Annex VI to Regulation No 1408/71 (in the version in force at the material time) to be interpreted as meaning that, in the case of a person who has worked exclusively in the Netherlands in the period from 15 October 1968 to 1 April 1974 and who was insured throughout that period against invalidity under a special scheme for civil servants, that period should also be taken into account in accordance with that section of the annex when determining invalidity benefits?

2. If so, is the competent institution for the determination of benefits on the basis of those periods the institution referred to in Point 2(b) of Section J of Annex 2 to Regulation (EEC) No 574/72 or is it the competent institution under national law in regard to invalidity insurance for civil servants, notwithstanding the fact that the latter institution is not referred to in the said annex?'

V — The reply to the questions

A — *The first question*

17. The facts of the main proceedings led the Centrale Raad van Beroep to refer to the Court a question on the interpretation of Point 4(a) of what was at the material time Section I (now Section J as a result of the accession of the Portuguese Republic and the Kingdom of Spain) of Annex VI to Regulation No 1408/71, in the light of Articles 48 to 51 of the Treaty. The question is probably explained by the observation, made by the respondent in the main proceedings, the Netherlands Government and the Commission,

7 — Footnote not affecting English translation of the question.

that, according to the wording of the relevant provisions of Annex VI to Regulation No 1408/71 (in the version in force at the material time), only insurance periods completed under the WAO and AAW schemes can, since the entry into force of the WAO, be taken into account for the purpose of Article 46(2) in conjunction with Article 45(4) of the regulation. Therefore the insurance periods completed by Mr Nijhuis between 15 October 1968 and 1 April 1974 under the ABPW scheme cannot be taken into account, if only because they were completed after the entry into force of the WAO and before that of the AAW. In view of this, it is clear that the national court is asking the Court of Justice to reply to the question whether the literal interpretation of the provisions in question is binding or whether the national court may, in one way or another, avoid it.

18. On this point it must be observed that, after taking account of the Commission's proposal to amend Regulation No 1408/71 [8] and the *Vougioukas* judgment, [9] the Council finally decided to amend the said regulation by Regulation (EC) No 1606/98 of 29 June 1998, which extends its scope to special schemes for civil servants. [10]

It is also worth mentioning that, as appears from a letter of 5 October 1998 to Mr Nijhuis, a copy of which has been sent to the Court, the competent institution in the main proceedings proposes, following the abovementioned amendment of Regulation No 1408/71 by Regulation No 1606/98, to grant Mr Nijhuis a right to *pro rata* benefits under the WAO as from 25 October 1998, the date when the new provisions took effect. The same institution points out that it will take account of insurance periods completed by him pursuant to the ABPW between 15 October 1968 and 1 April 1974.

This declared intention on the part of the respondent in no way affects the subject-matter of the main proceedings or, consequently, the usefulness of the reply to be given to the national court in so far as, in any case, the question arises as to whether Mr Nijhuis is entitled to Netherlands benefits for the period prior to 25 October 1998. [11]

19. To begin with, it should be observed that the reply to the question before the Court follows from the case-law principles set out in the *Vougioukas* judgment. Therefore the examination of the question must deal with the main elements of the problems in that judgment: these questions relate, first, to (a) the validity of the relevant provisions of Annex VI to Regulation No 1408/71, in the version in force at the material time, and (b) the implications of their interpretation and,

8 — OJ 1992 C 46, p. 1.

9 — Cited in footnote 4.

10 — OJ 1998 L 209, p. 1.

11 — In this connection it must be noted that Article 1, point 11 of Regulation No 1606/98 adds to Regulation No 1408/71 a new article (95c), paragraph (1) of which provides that 'no rights shall be acquired under Regulation (EC) No 1606/98 for any period prior to 25 October 1998.'

secondly, (c) the direct effect, if any, of Articles 48 and 51 of the Treaty. Finally, the discussion of these points will show (d) the need to clarify the principles of the *Vougioukas* judgment.

(a) The validity of the relevant provisions of the Annex

20. Is a literal interpretation of the relevant provisions of Annex VI to Regulation No 1408/71 consistent with Articles 48 and 51 of the Treaty in so far as such interpretation leads to insurance periods completed under the special scheme for civil servants of the ABPW being disregarded and to Mr Nijhuis being refused *pro rata* Netherlands benefits?

21. The relevant provisions of Annex VI to Regulation No 1408/71 must be interpreted in conjunction with the other provisions of the same regulation. [12] On this basis it is clear that, as the respondent institution in the main proceedings observes, if the annex makes no mention of insurance periods completed under the ABPW scheme, the reason is precisely that this scheme is a special scheme for civil servants who, pursuant to Article 4(4) of the regulation (in the version in force at the material time), are outside the scope of the regulation. Consequently the same principles as for Article 4(4) must be applied to the provisions in question of the annex.

22. In particular, in the *Vougioukas* judgment cited in footnote 4, the Court observed that, by not introducing, following the expiry of the transitional period laid down for freedom of movement for workers, any coordination measure for extending the material scope of Regulation No 1408/71 to special schemes for civil servants and persons treated as such, the Council had not fully discharged its obligation under Article 51 of the Treaty to set up a system to enable migrant workers to overcome obstacles with which they might be confronted in national social security rules. [13] Whereas, in the case of civil servants, their potential freedom of movement was enlarged by strict interpretation of the exception laid down by Article 48(4) of the Treaty, [14] the Council's prolonged hesitation in providing for the coordination of special insurance schemes for workers in that category has been

12 — See the judgment in Case C-227/94 *Olivieri-Coenen* [1995] ECR I-3301, paragraph 16.

13 — See the *Vougioukas* judgment, cited in footnote 4, paragraphs 30 to 34.

14 — Adopting a functional approach to the term 'public service', the Court found that the exception laid down in Article 48(4) applied only to posts with the characteristics of specific activities of the public service, in so far as persons in those posts have powers conferred by public law and are responsible for safeguarding the general interests of the State, whereas public service posts in the fields of, for example, health, education, art and science (research centres), etc. do not fall within the scope of Article 48(4). See, in particular, the judgments in Case 149/79 *Commission* v *Belgium* [1982] ECR 1845; Case 307/84 *Commission* v *France* [1986] ECR 1725; Case 66/85 *Lawrie-Blum* [1986] ECR 2121, and Case 225/85 *Commission* v *Italy* [1987] ECR 2625.

a considerable obstacle to exercising the freedom of movement and it may well be asked whether such hesitation was consistent with the aims of the Treaty.

23. While finding that the prolonged failure to act was unjustified, the Court took the view that the validity of Article 4(4) of Regulation No 1408/71 was not affected since, having regard to the Council's wide discretion with regard to the choice of the most appropriate measures for attaining the objective of Article 51 of the Treaty, the Council remained at liberty, for the purpose of coordinating special schemes for civil servants and persons treated as such, to depart, in some respects at least, from the mechanisms provided for in the regulation . [15]

24. As I said in my Opinion in the *Grahame and Hollanders* case, cited in footnote 3, the above interpretation is consistent with the nature of the regulation as a means of coordinating, not harmonising, the laws of the Member States relating to social security and it shows that the fact that a person is a civil servant who may exercise his freedom of movement under Article 48 of the Treaty does not automatically guarantee him the benefit of the provisions of the regulation. That is because, whereas the abovementioned article of the Treaty applies on the basis of the objective characteristics of the employment relationship with the public service, the regulation applies by reason of a person's belonging to a national social security scheme which is covered by the regulation, in other words, by virtue of belonging to a general social security scheme. However, membership of such a scheme is subject to substantive conditions laid down by the national legislature by virtue of its perfectly legitimate freedom to regulate the social security sector. [16]

25. Consequently there appears to be no question of conflict between the relevant provisions of Annex VI (in the version in force at the material time) and Articles 48 and 51 of the Treaty in so far as those provisions do not refer to the ABPW for determining the periods to be taken into account in order to calculate *pro rata* invalidity benefits. In addition, the fact that the WAO does not apply to civil servants (Article 6) and that, under the Netherlands social insurance legislation, they were covered by the special scheme (ABPW) for the period in question from 15 October 1968 to 1 April 1974 does not affect the validity of the provisions of the regulation but is a result, as I have already said, of

15 — See the *Vougioukas* judgment, cited in footnote 4, paragraph 35.

16 — See paragraph 48 of my opinion in the *Grahame and Hollanders* case, cited in footnote 3.
In accordance with the foregoing, the fact that Mr Nijhuis was employed in the public service could not lead, as he himself states, to limiting his freedom of movement within the Community. However, the Court, modifying in this respect the position it adopted in the *Lohmann* judgment (Case 129/78 [1979] ECR 853, paragraph 3), found that the term 'civil servant' in Article 4(4) of Regulation No 1408/71 refers not only to civil servants covered by the derogation provided for in Article 48(4). The Court thereby recognised that the scope *ratione personae* of the regulation includes all civil servants employed by a public authority who exercise their freedom of movement within the Community (see the *Vougioukas* judgment, cited in footnote 4, paragraph 21). However, it must be observed that the fact of being within the scope *ratione personae* of the regulation does not automatically mean that it applies to such persons because its scope *ratione materiae* (in the version in force at the material time) does not include the coordination of special schemes for civil servants, such as that of the ABPW.

the legitimate freedom of regulation of the Netherlands legislature. [17]

(b) The implications of the interpretation of the relevant provisions of the annex

26. Just as, since the *Vougioukas* judgment, the Court has avoided ruling that provisions of Regulation No 1408/71 are invalid, [18] so also, it appears, does it avoid confining itself to the literal wording of the provisions of the regulation, and rather seeks to give them a purposive, [19] and sometimes even a maximalist, [20] interpretation, so as to ensure the fullest possible attainment of the objectives of Articles 48 and 51 of the Treaty.

27. Could such an interpretation lead, with regard to the question of taking account of Mr Nijhuis' periods of insurance, to an answer different from that to which a literal interpretation of the provisions of the annex appears to lead, in view of the *Vougioukas* judgment?

More particularly, would it be possible to apply the *Olivieri-Coenen* judgment, cited in footnote 11, to the facts of the present case? In that judgment, the Court held that it was clear from the provisions in question of Annex VI to Regulation No 1408/71 (in the version in force at the material time) that, on the basis of the WAO, all periods of paid employment or periods treated as such prior to 1 July 1967, the date when the WAO came into force, [21] had to be taken into account, irrespective of the scheme under which the person concerned was insured against invalidity during those periods. This conclusion could not be altered by the fact that the scheme in question was a special scheme for civil servants. [22] In view of the abovementioned

17 — For an assessment of the validity of Annex I to Regulation No 1408/71, see the judgment in Case C-266/95 *Merino García* [1997] ECR I-3279, paragraphs 27 to 31, and the opinion of Advocate General Fennelly in that case (paragraph 28).

18 — Certain provisions had been ruled invalid before that judgment. See, for example, the judgment in Case 41/84 *Pinna* [1986] ECR 1, which ruled that Article 73(2) of the regulation, concerning family allowances, was invalid because it was incompatible with the principle of equal treatment laid down in Article 48 of the Treaty, and the judgment in Case 20/85 *Roviello* [1988] ECR 2805, which ruled that point 15, Part C of Annex VI to the regulation was invalid, again because it was incompatible with that principle.

19 — In an interpretation of point 4(a) of Annex VI to Regulation No 1408/71, the Court held, in the *Olivieri-Coenen* judgment, cited in footnote 12, that the provisions of the annex and the other provisions of the regulation must be interpreted together in the light of the purpose of that article, which is to contribute to freedom of movement for migrant workers, a principle which is one of the foundations of the Community (paragraph 16). With regard to the purposive interpretation of the regulation, see my opinion (paragraph 21 et seq.) in Case C-475/93 *Thévenon* [1995] ECR I-3813).

20 — See, for example, the *Grahame and Hollanders* judgment, cited in footnote 3, where, in relation to the interpretation of 'periods of paid employment' and 'periods treated as such', compared with periods of military service completed before 1 July 1967, the Court found in effect that the provisions of the regulation could have a Community content, that is to say, relatively independent of national law, and determined in relation to the objectives of Community legislation, i.e. the objectives of Articles 48 and 51 of the Treaty (paragraphs 21 and 25 to 32).

21 — See also the *Grahame and Hollanders* judgment, cited in footnote 3, paragraph 24.

22 — See the *Olivieri-Coenen* judgment, cited in footnote 12, paragraphs 15 and 16. As the Court observed in that judgment, 'if the period of paid employment subject to the special scheme for civil servants or persons treated as such was not treated as a period of insurance for the purposes of Annex V to the regulation [point 4(a) of the section on the Netherlands], the person completing it would thereby suffer a disadvantage contrary to Article 51 of the Treaty whereas to take that period into account does not entail any overlapping of different entitlements' (paragraph 17).

judgment, is it possible that insurance periods completed under the special scheme for civil servants after 1 July 1967, as were those of Mr Nijhuis, must be taken into account in relation to the WAO scheme, even if as periods of employment?

28. In my opinion, the application by analogy of the *Olivieri-Coenen* judgment to the present case is not justified by the spirit of that judgment or by the scope for interpretation which it may allow, or by the systematic interpretation of the relevant provisions of the annex.

From 1 July 1967 — and the insurance periods completed by Mr Nijhuis are subsequent to that date — Annex VI refers expressly to insurance periods completed under the WAO or the AAW. Insurance periods completed under any other scheme could not be taken into account, even as periods of employment, because to classify them as such would be contrary to the express terms of the annex, which contrasts periods of paid work before 1 July 1967 with insurance periods completed after the WAO came into force.

As the Commission points out, the interpretation of the annex given in the *Olivieri-Coenen* judgment does not constitute an exception to the exclusion of special schemes for civil servants which is laid down by Article 4(4) of Regulation No 1408/71 because the person concerned derives no pension entitlement from that scheme. On the other hand, periods completed before 1 July 1967 are taken into account for calculating benefits under the general scheme, that of the WAO. In other words, those periods are treated as periods of employment, not as insurance periods, as expressly laid down by the relevant provisions of the annex. Consequently the obligation to take them into account does not depend on the type of scheme by which the person concerned was covered during those periods. [23]

Moreover, a purposive interpretation of the annex, so as to take account of insurance periods completed under the ABPW, seems to be ruled out from the systematic viewpoint. The relevant provisions of the annex were introduced in order to ensure that persons who had worked before the WAO scheme took effect [24] had uniform insurance cover similar to that of persons who completed insurance periods under that scheme. Since the WAO came into force, only insurance periods completed under the WAO or the AAW schemes have been taken into account. This applies particularly to periods completed under special schemes for civil servants. As the respondent institution in the main proceedings and the Netherlands Government point out, it would be truly paradoxical to

23 — See paragraphs 12 and 13 of the Opinion of Advocate General Lenz in the *Olivieri-Coenen* judgment, cited in footnote 12.

24 — As the respondent in the main proceedings observes, the purpose of the operation was to enable migrant workers to avoid the unfavourable consequences of the transition from the former scheme, that of the Invaliditeitswet to the so-called risk scheme of the WAO.

interpret a coordination rule in such a way as to take account of insurance periods which are expressly excluded from the scope of the regulation. Such an interpretation would be conceivable only if it were accepted that Article 4(4) of the regulation (in the version in force at the material time) is invalid because it is contrary to Articles 48 and 51 of the Treaty. However, this would be to ignore the *Vougioukas* judgment, cited above, which expressly settled the question by finding that Article 4(4) is valid. [25]

29. For the same reasons, it could not be said that there is a lacuna in the relevant provisions of the annex with regard to insurance periods completed under the special scheme for civil servants after 1 July 1967 and up to 1 October 1976. Although the *Vougioukas* judgment refers to a lacuna, this must be taken to refer to the continued failure to implement Article 51 of the Treaty, that is to say, the Council's prolonged failure to take action to coordinate the special schemes for civil servants, and it does not refer to a gap in the law in the strict sense, which would arise only if the legislation concerned were found to be invalid or were annulled, and the gap would have to be filled by the application of the former legislation or the application, by analogy, of other rules, or again by the application of a more general rule.

(c) The possible direct application of Articles 48 and 51 of the Treaty

30. Following the model of the *Vougioukas* judgment, the Commission proposes the direct application of Articles 48 and 51 of the Treaty, from which it follows, as it contends in its observations, that Mr Nijhuis must be paid a Netherlands benefit calculated *pro rata* to the insurance periods completed under the ABPW scheme.

31. Indeed, although the said judgment did not question the validity of Article 4(4) of Regulation No 1408/71, it found that the validity, thus defined, of the exclusion of the coordination of special schemes for civil servants did not mean that 'a request for aggregation is to be refused when it may be satisfied, in direct application of Articles 48 and 51 of the Treaty, without recourse to the coordination rules adopted by the Council'. [26]

32. Therefore, in order to decide whether the direct application of Articles 48 to 51 is possible and whether it actually gives rise to an entitlement to Netherlands benefits *pro rata* for Mr Nijhuis, it is necessary to examine

25 — See paragraph 23 of the present Opinion.

26 — See the *Vougioukas* judgment, cited in footnote 4, paragraph 36.

whether the conditions for the direct application of those articles, as set out in the *Vougioukas* judgment and construed in the Court's subsequent decisions, are fulfilled in the present case.

33. According to the *Vougioukas* judgment, an essential condition for the direct application of Articles 48 to 51 is, as indicated above, that it should be unnecessary to have recourse to the coordination rules adopted by the Council, that is to say, in the present case the provisions of Regulation No 1408/71. This condition is entirely consistent with the manner in which the Court found, in the abovementioned judgment, that Article 4(4) of the regulation is valid (in the version in force at the material time). [27] Therefore, even dismissing any suggestion of the direct application of Article 51 as such, that is to say, as a provision requiring the adoption of essential measures of coordination (because the Council has a wide discretion with regard to choosing the measures for implementing the Treaty), nevertheless individuals may rely directly before the national courts on provisions which the Treaty requires the Council to apply through Article 51. [28] In other words, because the entire margin of discretion of the political authorities lies between the obligation laid down in Article 51 of the Treaty and the application thereof, the direct application of Article 51 is not in effect conceivable. On the other hand, the direct application of Article 48 is imperative, provided, of course, that it is not necessary to have recourse to the Community rules of coordination adopted on the basis of Article 51.

This last condition was easily to fulfil in the factual circumstances in point in the *Vougioukas* judgment, which did indeed apply the Treaty directly. In that case there was doubt as to the application of the legislation of a single Member State concerning the recognition of periods of employment completed in that State or in another Member State for the purpose of acquiring the right to a pension. In effect, it was not a question of technical coordination between different national social security schemes, but primarily of the applicability *ratione personae* of Regulation No 1408/71 and the existence of a national provision entailing discrimination between workers who had moved within the Community and the others.

34. With regard to the judgments which followed the *Vougioukas* judgment, the Commission contends in effect that the Court does not appear to attach particular importance to the abovementioned condition of direct application of the articles of the Treaty. The Commission refers specifically to the judgment in Joined Cases C-4/95 and C-5/95 [29] in support of its argument that, first, direct application

27 — See paragraph 23 of the present Opinion.

28 — Specifically, as commentators have also observed, individuals may rely directly on the principles of freedom of movement for workers and equal treatment with regard to social security, even as against Member States or in relation to provisions of a Council regulation which is adopted on the basis of Article 51 and does not conform, in its wording or its application, to the objectives of the Treaty. See Commentaire Mégret, *Le Droit de la CEE*, vol. 3. Libre circulation des personnes, des services et des capitaux. Transport, 2ème édition, 1990. Éditions de l'Université de Bruxelles, Études européennes. Collection dirigée par l'Institut d'Études Européennes, pp. 99 and 100.

29 — *Stöber and Piosa Pereira* [1997] ECR I-511.

of the Treaty is necessary to establish a right to *pro rata* benefits even for those who, like Mr Nijhuis, belonged during the relevant periods to special schemes for civil servants and, secondly, that the provisions of Annex VI to Regulation No 1408/71 should be applied by analogy (because there were no specific Community provisions for the coordination of special schemes for civil servants) for calculating the abovementioned *pro rata* benefits.

35. In some cases the Court does seem to apply Article 48(2) of the Treaty directly without expressly considering whether the condition concerning the absence of a need to have recourse to the coordination rules adopted by the Council [30] is fulfilled. In the *Stöber and Piosa Pereira* judgment, it is true that the Court went so far as to state that the problems which could arise from the removal (because it was contrary to Article 52) of a residence condition required by the legislation of a Member State for the calculation of family benefits must be resolved by the application, by analogy, of the provisions of Regulation No 1408/71. [31] However, the judgments mentioned above cannot be interpreted as the Commission would wish in the present case.

36. Firstly, it would appear from a closer examination of the case-law referred to by the Commission that the Court also considers the adoption by the Community legislature of the measures necessary for the implementation of the Treaty to be decisive for the purpose of enabling the Treaty to be directly applied. Thus in the *Stöber and Piosa Pereira* judgment the Court expressly maintains the position it took in the *Middleburgh* judgment, according to which the legislation of a Member State which precluded the payment of child benefit in respect of the children resident in another Member State of a self-employed person was not incompatible with Article 52 of the Treaty because at the material time the Council had not yet adopted measures implementing that provision. [32] In other words, the Court finds that direct application of Article 52 is precluded if applying it requires the adoption of certain measures beforehand — in the *Middleburgh* case, to ensure that the benefits were actually used for the maintenance of dependent children and to avoid concurrent benefits — which the Community legislature had not taken. However, if — as happened in the case which led to the *Stöber and Piosa Pereira* judgment — those measures have been taken, the national authorities may apply them by analogy so as to fill the gap arising from the non-application of national provisions incompatible with the Treaty.

37. Secondly, it must be stressed that the case-law referred to by the Commission concerns the direct application of the articles of

30 — See the *Stöber and Piosa Pereira* judgment, cited in footnote 29, and the *Merino García* judgment, cited in footnote 17. On the other hand, in the related judgment in Case C-194/96 *Kulzer* [1998] ECR I-895, the Court did not apply Article 48(2) directly because, as Advocate General Fennelly pointed out (paragraph 61), the person concerned in that case was not a migrant worker.
See also the judgment in Case C-53/95 *Kemmler* [1996] ECR I-703, where the Court applied Article 52 directly, finding that it precludes a Member State from requiring contributions to be paid to the social security scheme for self-employed persons by persons already working as self-employed persons in another Member State where they have their habitual residence and are affiliated to a social security scheme, that obligation affording them no additional social security cover (paragraph 14).

31 — See the *Stöber and Piosa Pereira* judgment, cited in footnote 29, paragraph 40.

32 — See the *Stöber and Piosa Pereira* judgment, cited in footnote 29, paragraph 40, in conjunction with the judgment in Case C-15/90 *Middleburgh* [1991] ECR I-4655, paragraphs 14 and 15.

the Treaty and the possible application by analogy of Regulation No 1408/71 in the context of cases similar to the *Vougioukas* case, where the direct application of the Treaty relates mainly to the incompatibility with the Treaty of national measures of a discriminatory nature, and not to the need to apply Community coordination measures. [33] However, I do not think that the Court's case-law on discrimination caused by national social security legislation can be applied in the present case.

38. According to the Court's case-law, the body of provisions of the Treaty relating to the free movement of persons is thus intended to facilitate the pursuit by Community citizens of occupational activities of all kinds throughout the Community, and precludes national legislation which might place Community citizens at a disadvantage when they wish to extend their activities beyond the territory of a single Member State. [34]

Therefore the direct application of Article 48 *et seq.* of the Treaty means not only that the national provisions must not lead to discrimination on grounds of nationality between nationals of the host State and nationals of other Member States, [35] but also that they must not lead to discrimination between those who exercise their freedom of movement and those who do not. [36] That is why, as the Commission says in its observations, the Court determines whether such discrimination exists by comparing the situation of the

33 — For example, after finding, in the *Stöber and Piosa Pereira* judgment, cited in footnote 29, that it followed from the interpretation of Article 73 of Regulation No 1408/71, in conjunction with Article 1(a)(ii) and with point I, C, (b) of Annex 1 of the same regulation, that Mr Stöber and Mr Pereira did not come within the scope of the regulation, the Court first stated that, in view of the same regulation, which is a coordination measure, the German legislation was free to determine the conditions for entitlement to social security benefits, so long as it did not give rise to discrimination which would be incompatible with Article 52 of the Treaty. Subsequently, the Court applied that article directly in finding that the German legislation in question was discriminatory and therefore incompatible with the Treaty. Likewise, in the *Merino García* judgment, cited in footnote 17, after finding that no factor had been disclosed such as to affect the validity of point I, C, of the regulation, the Court applied Article 48(2) of the Treaty directly to national rules which were contrary to it, in holding that an employed person whose children were resident in another Member State had no right to family benefits for the full calendar months falling within an extended period of unpaid leave, whereas employed persons whose children were resident in the Member State concerned were entitled to such benefits. In addition, in the *Kemmler* judgment, cited in footnote 30, the Court applied Article 52 of the Treaty directly to national provisions impeding the pursuit of different occupational activities in the Member States of the Community.

34 — See the judgment in Case 143/87 *Stanton* [1988] ECR 3877, paragraph 13. See also the judgment in Case C-10/90 *Masgio* [1991] ECR I-1119, paragraphs 16 to 18, and the *Vougioukas* judgment, cited in footnote 4, paragraph 39.
In the same connection, the Court has observed that while it is true that 'Article 51 of the Treaty leaves in being differences between the Member States' social security systems and hence in the rights of persons working in the Member States, it is not, however, in dispute that the aim of Articles 48 to 51 of the Treaty would not be met if, through exercising their right to freedom of movement, migrant workers were to lose social security advantages guaranteed to them by the laws of a Member State. Such a consequence might discourage Community workers from exercising their right to freedom of movement and would therefore constitute an obstacle to that freedom'. See the judgment in Case C-165/91 *Van Munster* [1994] ECR I-4661, paragraph 27, which cites the judgment in Case C-349/87 *Paraschi* [1991] ECR I-4501, paragraph 22. See also the judgment in Case C-12/93 *Drake* [1994] ECR I-4337, paragraphs 20 and 22.

35 — See the judgments in Case 368/87 *Hartmann-Troiani* [1989] ECR 1333, paragraphs 19 and 21, and Case C-340/94 *De Jaeck* [1997] ECR I-461, paragraphs 36 and 37.

36 — See the *Vougioukas* judgment, cited in footnote 4, paragraph 38. See also Commentaire Mégret, cited in footnote 28, p. 123.

migrant worker once he has exercised his freedom of movement with the situation he would be in if he had not done so. [37]

39. So far as the present case is concerned, the appellant in the main proceedings and the Commission consider that literal interpretation of the annex puts at a disadvantage those who use their freedom of movement within the Community. In particular, the Commission mentions that, if Mr Nijhuis had not done so and had continued to work only in the Netherlands and had become incapacitated for work there, he would, being insured under the Netherlands legislation, have been entitled to incapacity benefits calculated irrespective of insurance periods. However, as he used his freedom of movement he cannot obtain benefits in the Netherlands and he obtains benefits in Germany only *pro rata temporis*. According to Mr Nijhuis and the Commission, the fact that he has no *pro rata* Netherlands benefits is, for Mr Nijhuis, manifestly contrary to the aims of Articles 48 and 51 of the Treaty.

40. Even assuming that using his freedom of movement within the Community has placed Mr Nijhuis in a less favourable situation, the pertinent question is to what must the responsibility for this be attributed. If it must be attributed to the rules laid down — or not laid down — by Regulation No 1408/71, which excludes from its scope special schemes for civil servants, the question then arises as to whether the regulation is valid by reference to Articles 48 and 51. However, in the first place, this question is not related to the direct application of those articles in national law and, secondly, it has been decided to the effect, essentially, that the regulation is valid. [38] In the present case, direct application of the Treaty might be in issue only if the migrant worker were in a less favourable situation because of national rules. [39]

41. Similarly, the only points in the Netherlands legislation which might be thought to have a causal link with the fact that Mr Nijhuis was placed in a less favourable situation are the special insurance scheme for civil servants which applied during the relevant periods, the exclusion from the ambit of the WAO of insurance periods completed under that scheme, the choice of a risk insurance scheme (type A) which precludes the right to benefits if the person concerned works in Germany and, finally — it must be admitted — the fact that, as the Commission observes,

37 — See the *Vougioukas* judgment, cited in footnote 4, paragraphs 40 and 41.

38 — See paragraph 20 et seq. of this Opinion.

39 — Shared responsibility, as the Commission contends in its observations, would not alter the approach I have taken in so far as, in the present case, direct application of the Treaty would concern only the portion of responsibility attaching to the national provisions. However, acceptance that responsibility is shared by the regulation and the national provisions shows an incipient trend towards attributing responsibility for the coordination of insurance schemes to the national legislatures. See paragraph 43 of this opinion.

the Netherlands legislation does not permit *pro rata* benefits paid to the person concerned in another Member State to be taken into account.

42. To begin with, it must be observed that each of these four points is applied to all civil servants without distinction. However, it is clear that the question of the recognition and aggregation of periods completed in the Netherlands and other Member States arises only for workers who have used their freedom of movement within the Community and that they are the only ones who may suffer the unfavourable consequences thereof.

43. Secondly, it must be noted that to regard these points of the Netherlands legislation as causing discrimination against civil servants moving within the Community would amount to imposing on the Netherlands an obligation to abolish special schemes for civil servants and persons treated as such or to announce that insurance periods completed thereunder are taken into account by general insurance schemes of the Netherlands or, again, to abolish type A insurance schemes, or even to provide that the payment of *pro rata* benefits in another Member State is to be taken into account.

The recognition of such an obligation would lead, however, notwithstanding the spirit of the Treaty provisions, to calling into question the validity of the national rules which arise by nature from the perfectly legitimate freedom of the national legislature to regulate the social security sector, [40] not so much because those rules lead by themselves to an unfavourable situation for those who have exercised their freedom of movement within the Community, but primarily because they have not been coordinated, let alone harmonised, with the rules of the other Member States. [41] That would in substance be equivalent to a paradoxical form of abolition of the relevant provisions of the regulation by placing with the national legislatures the responsibility for the coordination — not

40 — See sections 24 and 25 of this Opinion. In the same connection the Court has held that point 4 of Section I (now J) of Annex VI to Regulation No 1408/71, as amended, is not contrary to Articles 48 and 51 of the Treaty in so far as it introduces a new factor, that is to say, the status of the employed person when the incapacity arises, in order to determine, pursuant to that provision, under which Netherlands legislation, the WAO or the AAW, the right to benefits may be acquired: see the *Drake* judgment, cited in footnote 34, paragraphs 18 and 20 to 25. With regard to the legitimate right of the national legislature to regulate social security, see also the *Stöber and Piosa Pereira* judgment, cited in footnote 29, paragraph 36.

41 — The four points of the Netherlands legislation mentioned above, particularly that mentioned by the Commission, the fact that the Netherlands legislation does not permit *pro rata* benefits paid to Mr Nijhuis in Germany to be taken into account, cannot be likened to the national provisions concerned in the abovementioned cases of *Vougioukas* (footnote 4), *Graham and Hollanders* (footnote 3), *Stöber and Piosa Pereira* (footnote 29), *Merino García* (footnote 17), *Kemmler* (footnote 30) and *Masgio* (footnote 34). Those cases relate to conditions for the grant or calculation of insurance benefits in relation to the choice of the national insurance scheme and in conjunction with exercise of the freedom of movement. In contrast, the points of the Netherlands legislation to which the possible application, in the present case, of the articles of the Treaty would relate can lead to discrimination only in conjunction with a scheme of another Member State. In so far as a Member State adheres to the aims of the Treaty, it may choose whichever insurance scheme it prefers, and the scheme cannot be considered as the cause of discrimination merely because it has unfavourable consequences when it is applied in conjunction with a scheme of another Member State. On this point, the Court has held that 'by prohibiting every Member State from applying, within the field of application of the Treaty, its law differently on the ground of nationality, Articles 7 and 48 are not concerned with any disparities in treatment which may result, between Member States, from divergences existing between the laws of the various Member States, so long as the latter affect all persons subject to them in accordance with objective criteria and without regard to their nationality' (see the judgment in Case 1/78 *Kenny* [1978] ECR 1489, paragraph 18).

to mention the harmonisation — of insurance schemes. [42]

the Commission is in effect asking the Court to reformulate the principles of the *Vougioukas* case-law, which would amount in practice to setting aside the fundamental points of that case-law.

44. Therefore, and having regard to the terms of the *Vougioukas* judgment, I think any direct application of Article 48 must be ruled out in the present case because, as the respondent in the main proceedings and the Netherlands Government observe, the method of calculating the benefit — which is essential for granting the *pro rata* Netherlands benefits — that is to say, the method of coordination of the different schemes under which Mr Nijhuis was insured, is not in principle fixed in the present case. In other words, it does not necessarily follow from the Treaty or national law, but requires recourse to Community coordination provisions. [43]

So far as the present case is concerned, the reformulation of the *Vougioukas* case-law proposed in the Commission's observations and also by certain commentators, [44] would consist in saying that, so long as the Council takes no 'technical' measures to extend the regulation to special schemes for civil servants, the national authorities may apply by analogy the general scheme of Regulation No 1408/71. Referring to its proposal for amending the regulation, [45] the Commission adds that the solution which would result from the adoption of the proposal would be in effect, in the case of the ABPW, the application by analogy of Articles 45(4) and 46 of the regulation.

45. Judging by its interpretation of the case-law following the *Vougioukas* judgment,

The reversal of interpretation to which I refer above is completely contrary to the *Vougioukas* case-law, which expressly precludes direct application of the Treaty where it is necessary to apply Regulation No 1408/71, even if only by analogy. Furthermore, since, in particular cases falling outside the literal

42 — As Advocate General Roemer observed in his Opinion in Case 14/68 *Wilhelm and Others* [1969] ECR 1, in particular p. 29, 'the only purpose of the prohibition against discrimination is to avoid the existence within one and the same Member State of different systems dependent on the nationality of those subject to them. On the other hand, the prohibition does not have as its function the prevention of the unfavourable consequences of the territorial limitation of the sovereignty and laws of the State, that is to say, to bring about the harmonisation of laws within the Community'.

43 — Moreover this requirement is not called into question either by the Commission which, firstly, suggests, as I have already said, the application by analogy — and therefore necessarily — of the regulation in order to calculate the benefit and, secondly, expressly points out in its written observations that it would not be appropriate to refrain from applying the relevant provision of Annex VI of the regulation because that would render the other provisions of Regulation No 1408/71 applicable, although it is impossible to find a provision in it which would compel the competent Netherlands institutions to grant benefits on the basis of belonging to the special scheme for civil servants.

44 — See P. Mavridis, 'L'arrêt *Vougioukas*: une révolution discrète? (Réflexions sur la mobilité et la protection sociale des agents publics en Europe)', *Cahiers de Droit Européen* 1998, p. 191 ff., in particular p. 206 ff.

45 — See the Commission's proposal for the amendment of Regulation No 1408/71, cited in footnote 8.

wording of the regulation, it would be possible to apply the articles of the Treaty directly, in conjunction with the application by analogy of the regulation in question, no-one could say that the validity of the provisions of the regulation concerning the exclusion of special schemes for civil servants is not called into question. In particular, whether those provisions are considered invalid or not, in practice the regulation would be disapplied in favour of the coordination — or even harmonisation — by case-law of national schemes through the direct application of the Treaty. Consequently it is perfectly clear from the foregoing observations that, although it does not turn the clock back completely, the revision by way of interpretation of the *Vougioukas* case-law proposed by the Commission gives it an entirely different meaning in any case.

(d) The necessary clarification of the *Vougioukas* case-law

46. As is clear from much of what is said above, the outcome of the present case, so far as the interpretation of the relevant provisions of Annex VI of Regulation 1408/71 is concerned (in the version in force at the material time), depends on how the Court will see fit to follow on from the *Vougioukas* case-law.

47. Even though, as I have said, the Court seems sometimes, on the one hand, to widen the interpretation of the provisions of Regulation No 1408/71 by giving them a Community content [46] and, on the other, to accept the direct application of Article 48 *et seq.* of the Treaty without expressly considering whether the conditions laid down by the *Vougioukas* judgment are fulfilled, [47] I do not think the Court, by virtue of a certain tendency towards the harmonisation of national laws, which conflicts with the declared intention of coordination on which the abovementioned regulation is based, [48] should go so far as to go back on the actual terms of that judgment.

48. I shall not repeat the specific arguments in support of my position. I shall merely mention certain general points with regard to the advisability of clarifying the *Vougioukas* case-law in relation to the validity and interpretation of the relevant provisions of the regulation.

49. First, it must be observed that the Court's finding, in the *Vougioukas* judgment, that Article 4(4) of the regulation (which excluded special schemes for civil servants and persons treated as such from the scope of the regulation and which was inseparably connected with the provisions of Annex VI which are relevant in this case) is valid is in harmony

46 — See paragraph 26 of this opinion.

47 — See paragraph 35 of this opinion.

48 — The Court has constantly stated that Regulation No 1408/71 is limited to coordinating national laws and does not have the object of harmonising them. See, for example, the judgments in Case 100/78 *Rossi* [1979] ECR 831, paragraph 13; Case 733/79 *Laterza* [1980] ECR 1915, paragraph 8; *Vougioukas*, cited in footnote 4, paragraph 13; *Stöber and Piosa Pereira*, cited in footnote 29, paragraph 36, and *Merino García*, cited in footnote 17, paragraph 27.

with the nature of the Council's obligation under Article 51 of the Treaty to adopt coordination measures. Although Article 51 imposes an obligation, as a matter of principle, to adopt coordination measures, a ruling that failure to adopt such measures is invalid cannot in practice be of assistance because, even if one took the view, on the basis of the articles of the Treaty, that the validity of the relevant provisions of Annex VI to the regulation is affected by the fact that they do not allow the insurance periods completed by Mr Nijhuis under the ABPW scheme to be taken into account, the coordination of special schemes for civil servants would not thereby be attained. Even though the Court may declare acts of the Council to be invalid, it cannot take the Council's place, particularly since, as the *Vougioukas* judgment observes, the Council has a broad discretion with regard to the choice of the most appropriate measures. [49] As Advocate General Jacobs point out in his Opinion in the *Hartmann Troiani* case, although it is undeniable that a broad interpretation must be given to Article 48, it is doubtful whether it is possible to rely on general Treaty provisions — such as Article 48 — in order to fill gaps in Community social security legislation. And he added that 'if that were so, the need for legislation, and particularly for amending legislation, would be minimal'. [50]

50. Secondly, the coordination of special schemes for civil servants can under no circumstances be effected by the application by analogy of the provisions of Regulation No 1408/71 relating to the coordination of general schemes. Apart from the question whether there is a lacuna in the law, which is doubtful, [51] application by analogy also presupposes a similitude of situations, which simply does not exist in this case. To claim that the rules on the coordination of general schemes may in principle apply to special schemes is hardly convincing. It is primarily because the situations to be regulated are not at all similar, and also because the differences between the special schemes for civil servants in the Member States were originally insurmountable, that the Court found that the Council's

49 — See the Opinion of Advocate General Ruiz-Jarabo Colomer in the *Vougioukas* case, cited in footnote 4, paragraph 23. The obligation imposed by Article 51 corresponds to the obligation for positive action by the national authorities in connection with giving concrete expression to social security rights at the national level (*status positivus*). Although this obligation exists in principle, there are no measures which can usefully be called upon against authorities which have neglected to take steps leading to the concrete expression of rights. In other words, a declaration that failure to adopt such measures is invalid would not lead to the requisite implementation because there is no previous scheme which could be applied and the courts cannot take the place of the competent legislative or administrative authorities in their respective tasks. Only where the authorities take such measures can a power of review be exercised and the annulment of new measures may have a positive effect. In that case, the new measures may be reviewed on the basis of the purposes of the rights, as already formulated by the existing scheme. If those measures are annulled, it then becomes possible to apply that scheme. The foregoing considerations are confirmed by the Court's case-law, which has found, first, that by providing for coordination measures, Regulation No 1408/71 confers on workers '*rights which they would not otherwise enjoy* and which thus help to ensure freedom of movement for workers in accordance with Article 51 of the Treaty' (see the judgment in Case C-62/91 *Gray* [1992] ECR I-2737, paragraph 10, emphasis added) and, secondly, the power of review comprises safety mechanisms which have the effect that 'the Community rules on social security, introduced pursuant to Article 51 of the Treaty, must refrain from adding to the disparities which already stem from the absence of harmonisation of national legislation' (see the *Pinna* judgment, cited in footnote 18, paragraph 21).

50 — See the Opinion of Advocate General Jacobs in the *Hartmann Troiani* case, cited in footnote 35.

51 — See paragraph 29 of this opinion.

delay in taking coordination measures might be justified up to a certain point. [52]

51. Finally, there is no question of applying by analogy, as the Commission in essence proposes, subsequent Community legislation, which was intended to extend coordination to special schemes for civil servants, and in fact did so.

Firstly, the fact that the Court cannot act in place of the Council, particularly where the latter has a discretion, is not affected by the actual position which the Council finally adopted — as expected — in exercising its discretionary powers for coordinating special schemes for civil servants. [53]

Secondly, the retrospective application of the new Regulation No 1606/98 which, although expressly precluded by Article 1, point 11, thereof, was sought by Mr Nijhuis at the hearing, would be inconsistent with legal certainty since the facts of each case must be governed by the rules which were in force at the time when those facts occurred. [54]

52 — See the *Vougioukas* judgment, cited in footnote 4, paragraph 32.
For the same reason, there can likewise be no question of annulling an exception which would entail a return to the rule (with regard to the consequences of the *Pinna* judgment, cited in footnote 18, see the judgment in Case 359/87 *Pinna II* [1989] ECR 585, paragraphs 12 to 17, and the Opinion of Advocate General Lenz in that case, in particular paragraph 25), because there simply is no general rule coordinating special schemes for civil servants from which certain classes of person, for example, are excepted. No such rule exists at all. Finally, in any case it cannot be said that the non-coordination of special schemes for civil servants is an exception to the rule coordinating general schemes; nor, of course, can it be an exception to the rules for special social security schemes of other classes of workers (see Articles 38(2) and 45(2) of Regulation No 1408/71, in the version in force at the material time). Likewise, no-one can say that the latter schemes and the special schemes for civil servants have the necessary degree of similarity to justify the application by analogy of the same scheme.

53 — Therefore I do not think it necessary to examine the substance of the LISV's argument at the hearing that it follows from the eighth recital and from Articles 43a and 53a, which were added to the basic regulation by Regulation No 1606/98, that the measures finally adopted by the Council for the coordination of special schemes for civil servants must not be treated as the application by analogy of Regulation No 1408/71 (Article 45(4)) in the version in force at the material time, as referred to by the Commission.

54 — While noting, firstly, the ever greater tendency in the Member States to bring their civil servants under general schemes and the gradual disappearance of the differences which historically distinguished special schemes from general schemes and, secondly, that, if the Commission's proposal were approved, it would extend the scope of Regulation No 1408/71 to special schemes for civil servants, Advocate General Ruiz-Jarabo Colomer never questioned the validity of the provisions of the regulation in question or even touched on the possibility of applying by analogy the new proposed provisions, although he recognised that there was a lacuna which ought to be filled, which the Court subsequently confirmed (see the Opinion of Advocate General Ruiz-Jarabo Colomer in the *Vougioukas* case, cited in footnote 4).
See also the *Middleburgh* judgment, cited in footnote 32, where the Court was not in favour of the application by analogy of the measures relating to employees or the provisions of Council Regulation (EEC) No 3427/89 of 30 October 1989 (OJ 1989 L 331, p. 30), which amended Regulation No 1408/71 by bringing self-employed persons within the scope of the latter, in spite of the fact that the amendment, although subsequent to the periods in question, was made before the Court's judgment was given (paragraph 14). For confirmation of the Court's position, see the *Stöber and Piosa Pereira* judgment, cited in footnote 29, paragraph 40. See, finally, the *Kemmler* judgment, cited in footnote 30, where the Court found that in accordance with its Article 2, Council Regulation (EEC) No 1390/81 of 12 May 1981, extending Regulation No 1408/71 to self-employed persons and to members of their families (OJ 1981 L 143, p. 1), no rights are acquired thereunder in respect of a period prior to the date of its entry into force and that as it entered into force after both the periods relevant to the main proceedings, that regulation was not applicable to the dispute (paragraph 7).

52. Just as it is not possible for the Court itself to draw up the coordination rules which the Community legislature ought to have adopted, so it would not be good for doubts to subsist on the interpretation of the *Vougioukas* judgment. Therefore it would not be advisable, from the viewpoint of legal certainty, to circumvent the conditions laid down by that judgment for the direct application of the articles of the Treaty or to evade the question of the validity of coordination regulations adopted on the basis of Article 51 of the Treaty, in order to develop, in substance, by a process which often reflects an underlying tendency towards the harmonisation of national laws, a parallel body of case-law which, by means of the direct application of articles of the Treaty, would take the place of action by the Council.

53. Therefore I propose that the Court's reply to the first question referred by the Centrale Raad van Beroep be in the negative.

54. If, however, the Court were to take the view that the relevant provisions of Annex VI of Regulation No 1408/71 must be construed differently and if, therefore, Mr Nijhuis must be paid a *pro rata* Netherlands benefit on the basis of the direct application of Articles 48 to 51 of the Treaty, I think it would be advisable, on grounds of legal certainty relating to the reversal of the *Vougioukas* case-law, to grant the application made at the hearing by the respondent in the main proceedings and by the Netherlands Government, by limiting the retrospective effects [55] of the judgment to persons who have already commenced legal proceedings or raised equivalent claims seeking the recognition of such a right to the aggregation of periods. [56]

B — *The second question*

55. As the reply to the first question is in the negative, it is unnecessary to reply to the

55 — It must be noted that to limit the effects of such a judgment to the future (*ex tunc*) would be pointless as Regulation No 1408/71 now applies in the version amended by Regulation No 1606/98, cited above. Therefore to limit the effects in time of such a judgment makes sense only as limiting the extent of its retrospective effect.

56 — In view of the Court's current case-law arising from the *Vougioukas* judgment, the Member States and competent national authorities might legitimately believe that insurance periods completed under a special scheme for civil servants should not be taken into account for calculating *pro rata* invalidity benefits. Therefore a judgment of the Court departing significantly from the *Vougioukas* judgment could have serious financial consequences, particularly by reason of the large number of legal relationships formed in good faith on the basis of legislation which has been judged valid in the light of Community law, and also by reason of the fact that the Member States and national authorities have adopted an approach which is inconsistent with Community law because of serious, objective uncertainty as to the exact meaning of the Community rules, as interpreted by the Court. However, the Court's own case-law will have largely contributed to creating or increasing that uncertainty. With regard to the protection of legitimate expectation created by the Court's case-law, see the judgment in Case C-308/93 *Cabanis-Issarte* [1996] ECR I-2097, paragraphs 47 and 48, and point 2 of the operative part.

second. However, for the sake of completeness, I shall examine the second question, without prejudice to the foregoing arguments.

56. If the Court considers that Mr Nijhuis should be paid *pro rata* Netherlands benefits, the institution responsible for making payment will be determined according to the legal basis adopted for the payment obligation, as the respondent in the main proceedings has observed.

57. If, on the basis of a broad interpretation of the annex to the regulation, the Court finds that the periods in question completed under the ABPW must be taken into account under the WAO scheme, it would necessarily follow that the responsibility rests with the institution referred to in point 2(b) of Section J of Annex 2 to Regulation No 574/72, which in the present case is the NAB (or, since 1 March 1997, the LISV).

58. However, should the Court apply Article 48 of the Treaty directly in order to take into account periods completed under the ABPW, in other words, if it applies the Treaty and not the regulation, the institution responsible under national law for administering invalidity insurance for civil servants would be the competent institution for determining the entitlement to benefits which arose during those periods. [57]

59. In any case, the Court's reply will have to emphasise, as the Commission observes with reference to the case-law, that practical difficulties, owing to the absence of special rules for the payment of certain types of contributions, must not prejudice the rights which individuals derive from the principles of the social legislation of the Community. [58] Likewise it must be observed that, as laid down by Articles 84 and 86 of Regulation No 1408/71 (in the version in force at the material time), national authorities and institutions responsible for social security must in any case cooperate and forward claims for benefits to the proper institution if they consider that they themselves are not competent to handle such claims, and this must not adversely affect the persons concerned with regard to time-limits and admissibility.

57 — If this interpretation is adopted, it does not seem possible to justify the responsibility of the NAB because the latter is responsible for applying the WAO. Even if it is found that Regulation No 1408/71 applies by analogy, it would relate to the coordination of the schemes under which Mr Nijhuis completed insurance periods, and not to the institution responsible for determining the right to benefits. The latter would simply be determined by reference to the insurance scheme applicable.

58 — See the judgment in Case C-236/88 *Commission* v *France* [1990] I-3163, paragraph 17.

VI — Conclusion

60. Therefore I propose that the Court reply as follows to the questions referred by the Centrale Raad van Beroep:

— Point 4(a) of Section J of Annex VI to Regulation 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 (in the version amended and updated by Council Regulation (EEC) No 2001/83 of 2 June 1983) must be interpreted as meaning that the period from 15 October 1968 to 1 April 1974, during which a person was employed exclusively in the Netherlands while insured against invalidity under a special scheme for civil servants, must not be taken into account when determining invalidity benefits under the combined provisions of Articles 46(2) and 45(4) of that regulation, having regard also to Articles 48 and 51 of the Treaty.

— As the reply to the first question is in the negative, it is unnecessary to reply to the second question.