2. Neither Article 51 of the EEC Treaty nor any provision of Regulation (EEC) No 1408/71 requires the periods referred to in Point 2 (c) of Part 1 of Annex VI to that regulation to be regarded as insurance periods for the purpose of determining the period within which an application to pay voluntary contributions under national legislation may be submitted.

REPORT FOR THE HEARING
delivered in Case 43/86 *

I — Facts and written procedure

1. *National legislation at issue: the scheme established by the Netherlands Algemene Ouderdomswet (Law on general old-age insurance, hereinafter referred to as 'the old-age law')*

Since the main proceedings relate to a period before 1 April 1985 (the date of which the old-age law was revised), the old-age insurance scheme described below is the one which was in force before that date.

The old-age law provides for a scheme under which the amount of the old-age pension is basically determined solely by the number of years of insurance.

The maximum old-age pension is achieved by the completion of an insurance record of 50 years, beginning on the 15th and ending on the 65th birthday. In principle, Netherlands residents and persons in gainful employment in the Netherlands are subject to a scheme of compulsory insurance.

Any gaps occurring in a record of compulsory insurance may in principle be filled by voluntary insurance. If, at the end of the period of compulsory insurance, a person wishes to continue his insurance on a voluntary basis, he must apply to the Bestuur van de Sociale Verzekeringsbank (Board of the Social Insurance Bank, hereinafter referred to as 'the Board') within a period of one year following the end of the compulsory insurance.

A married woman has no separate entitlement to an old-age pension. Only the husband, on reaching 65 years of age, may claim a pension, for himself and his spouse, on the basis of the insurance periods completed by each of them.

A married man's pension is calculated on the basis of the full pension amount (in the case of single men and single women, this is reduced to 70%), but the amount of the pension is reduced by 1% for each year during which either spouse was not insured (in the case of a man, between his 15th and 65th birthdays and likewise in the case of a woman or, if she is younger than her

* Language of the Case: Dutch.

husband, between her 15th birthday and the husband's 65th birthday).

Since the old-age law entered into force on 1 January 1957 and entitlement to a pension only arises after 50 years of insurance, logically no one could claim the maximum amount before the year 2007. It was therefore necessary to establish a transitional scheme, which is provided for by Articles 43 to 45 of the old-age law and is outlined below.

Under Article 43 (1) of the old-age law, any person who has resided in the Netherlands, whether continuously or not, for six years after his or her 59th birthday is deemed to have been insured under the old-age law during the period between his or her 15th birthday and 1 January 1957. The same rule applies to a married woman who is younger than her husband who qualifies for a pension, provided that, after the 59th birthday of her spouse, she lived in the Netherlands, whether continuously or not, for six years.

That transitional advantage can only be conferred on Netherlands citizens and persons treated as such, provided that they reside in the Netherlands. The advantage is also conferred on Netherlands citizens and persons treated as such who reside outside the Netherlands but who were continuously insured under the old-age law — whether on a compulsory or a voluntary basis — from 1 January 1957 until their 65th birthday. For the purpose of that provision, a married woman who is younger than her husband is deemed to have reached the age of 65 on the same day as her husband.

Periods prior to 1 January 1957, which are the only periods taken into account for the purposes of calculating the old-age pension, are not actual insurance periods but notional periods. Entitlement to the transitional advantages therefore requires no premium in respect of those periods; it is based on the abovementioned criteria of nationality and residence. On the other hand, entitlement to an old-age pension under the old-age law, based on actual periods of insurance after 1 January 1957, accrues irrevocably, irrespective of later circumstances.

2. *The relevant Community legislation: Point 2 of Part I of Annex VI to Council Regulation (EEC) No 1408/71*

Part I of Annex VI contains rules for calculating the old-age pension under the old-age law for migrant workers, for their own benefit and for the benefit of their spouses, in respect of certain periods for which they cannot otherwise claim any entitlement by virtue of the provisions of the old-age law.

Point 2 (a) of the Annex provides as follows:

'Periods of insurance before 1 January 1957 during which a recipient, not satisfying the conditions [laid down by Articles 43 and 44 of the old-age law] ... resided in the territory of the Netherlands after the age of 15 or during which, whilst residing in the territory of another Member State, he pursued an activity as an employed person in the Netherlands for an employer established in that country, shall also be considered as periods of insurance completed in application of Netherlands legislation ...'.

Point 2 (c) goes on to provide:

'As regards a married woman whose husband is entitled to a pension under Netherlands legislation ..., periods of the marriage preceding the date when she reached the age of 65 years and during which she resided in the territory of one or more Member States shall also be taken into account as insurance periods, in so far as those periods coincide with periods of

insurance completed by her husband under that legislation and with those to be taken into account in pursuance of subparagraph (a).'

Finally, subparagraph (f) provides that the periods referred to in subparagraphs (a) and (c) are only to be taken into account for the purpose of calculating the pension 'if the person concerned has resided for six years in the territory of one or more Member States after the age of 59 years and for as long as that person is residing in the territory of one of those Member States'.

3. *History of the dispute*

The facts of the dispute in the main proceedings may be summarized as follows:

The defendants in the main proceedings, Mr and Mrs de Rijke, (hereinafter referred to as 'the defendants'), are both Netherlands nationals. They were born on 14 July 1916 and 6 July 1919 respectively and were married on 11 September 1946.

They lived in the Netherlands continuously until 2 July 1978, when they took up residence in France.

After moving to France, Mr de Rijke remained (compulsorily) affiliated to the scheme established by the old-age law as the recipient of a benefit which had been awarded to him on 18 February 1978 under the Wet op de Arbeidsongeschiktheidsverzekering (Law on insurance against incapacity for work), which was calculated on the basis of a degree of incapacity of 80 to 100%. The (compulsory) insurance of Mrs de Rijke, on the other hand, came to an end with their departure.

On 14 July 1981 Mr de Rijke reached the age entitling him to a pension (65 years) and, by a decision dated 28 July 1981, the Board awarded him, with effect from 1 July 1981, an old-age pension under the old-age law equal to a married man's full pension, thereby granting him the full benefit of the transitional advantages for himself and for his wife for the period from their 15th birthday to 1 January 1957. Mr de Rijke was entitled to the full benefit of the transitional advantages for himself because he had been continuously insured since 1 January 1957 until he reached the age at which he could claim the pension. In its decision the Board took the view that, under Netherlands law, Mrs de Rijke was not insured under the old-age law during the period from 2 July 1978 (when the couple left for France) to 14 July 1981 (when her husband reached the age of 65), but that that period should none the less be regarded as a period of insurance pursuant to Point 2 of Part I of Annex V (now Annex VI) to Council Regulation (EEC) No 1408/71.

The portion of the old-age pension attributable to the insurance record of Mrs de Rijke was based partly on the old-age law itself and partly on the provisions in Annex VI to Regulation (EEC) No 1408/71. The allocation was carried out as follows:

(i) period between the date on which Mrs de Rijke reached the age of 15 and the date of her marriage: Point 2 (a) of Part I of Annex VI (Period 1);

(ii) period between the date of her marriage and 1 January 1957: Point 2 (c) and (a) of Part 1 of that Annex (Period 2);

(iii) period between 1 January 1957 and 2 July 1978: Article 6 of the old-age law (Period 3);

(iv) period between 2 July 1978 and 14 July 1981: Point 2 (c) of Part I of the Annex (Period 4).

Thus the Board did not reduce in any way the amount of the pension awarded to Mr de Rijke. Although he had been awarded the full pension of a married man, his wife asked to continue her insurance under the old-age law voluntarily because, should her husband die, she would request an unmarried person's pension under the old-age law. Unless she were insured voluntarily, she could not obtain a full unmarried person's pension since the years elapsing between her husband's 65th birthday (July 1981) and the date on which she herself would reach that age would entail a reduction on account of her residence outside the Netherlands.

Her request for voluntary affiliation was submitted on 15 May 1981, more than one year after her departure from the Netherlands but before the date on which her husband reached the age of 65.

By a decision of 2 September 1981 the request was rejected on the grounds that it had not been lodged within one year of the termination of Mrs de Rijke's compulsory insurance under the old-age law, so that she had not been affiliated since 2 July 1978.

On 15 October 1982 the defendants decided to move to Monaco, where they are still living. As a result of their moving outside the territory of the EEC, the Board decided to reduce Mr de Rijke's pension by 25% on the ground that, in accordance with Point 2 (f) of Part 1 of Annex VI, he could no longer count Periods 1, 2 and 4, completed by his wife, which had conferred entitlements on her by virtue of Annex VI. According to the Board, the couple could have overcome that disadvantage if Mrs de Rijke had insured herself on a voluntary basis in order to cover the period following their departure for France.

The defendants appealed against the aforesaid decisions of the Board, dated 28 July and 2 September 1981, to the Raad van Beroep (Social Security Court), Amsterdam. By a judgment of 6 June 1983 the Raad van Beroep annulled the contested decisions in so far as the first had stated that Mrs de Rijke had not been insured under the old-age law since 2 July 1978 and in so far as the second held that she could not pay contributions on a voluntary basis.

The Board appealed against that judgment to the Centrale Raad van Beroep (Court of Last Instance in social security matters). By a judgment of 28 August 1984 that court set aside the contested judgment and ordered the Board to take a fresh decision concerning the voluntary insurance of Mrs de Rijke. It held that the defendant's application for affiliation was lodged in good time, since the periods of insurance which she completed between 2 July 1978 and 14 July 1981 and which gave her entitlements under Annex VI to Regulation (EEC) No 1408/71 were to be regarded as actual insurance periods under the old-age law. Consequently, Mrs de Rijke's insurance did not end until 14 July 1981 and her application had been submitted in good time.

The Board appealed in cassation to the Hoge Raad (Supreme Court). The Hoge Raad took the view that the question whether or not Mrs de Rijke's notification of her intention to continue with voluntary insurance had been lodged in good time depended on whether the insurance periods which she had completed between 2 July 1978 and 14 July 1981 (which period gave her entitlements on the basis of Annex VI to Regulation (EEC) No 1408/71) were to be regarded as insurance periods under Article 6 of the old-age law. Considering that the interpretation of a provision of Community

law was decisive in answering that question, the Hoge Raad decided to stay the proceedings and pursuant to Article 177 of the EEC Treaty to request the Court of Justice to give a preliminary ruling on the following question:

'Where, in the case of a married woman whose husband is entitled to a pension under the Netherlands Algemene Ouderdomswet, a period must be taken into account as an insurance period by virtue of Annex VI, Part I, Point 2 (c) (originally Annex V, Part F, Point 2 (c)) of Council Regulation (EEC) No 1408/71 of 14 June 1971, but it does not qualify as an insurance period under Netherlands law (that is to say under the provisions laid down by or pursuant to Article 6 of the Algemene Ouderdomswet),

(a) does the aforesaid provision of Community law, or any other provision thereof, confer upon that woman a right, enforceable against the competent Netherlands institutions, to be regarded and treated as an insured person for the purposes of the Algemene Ouderdomswet, in derogation from the provisions laid down by or pursuant to Article 6 thereof, or

(b) does the principle which emerges from the judgment of the Court of Justice of 12 July 1979 in Case 266/78 *Brunori* v *Landesversicherungsanstalt Rheinprovinz* [1979] ECR 2705 and the judgment of 24 April 1980 in Case 110/79 *Coonan* v *Insurance Officer* [1980] ECR 1445 apply, namely that it is for each Member State to lay down the conditions for affiliation and cessation of affiliation to social security schemes?'

4. *Procedure*

The judgment of the Hoge Raad was lodged at the Court Registry on 17 February 1986.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were submitted on 22 May 1986 by the appellant in the main proceedings, the Bestuur van de Sociale Verzekeringsbank, represented by B. H. Ter Kuile, of The Hague Bar, on 20 May 1986 by the Government of the Netherlands, represented by E. F. Jacobs, acting as Agent, and on 21 May 1986 by the Commission, represented by J. Griesmar of its Legal Department, acting as Agent, assisted by F. Herbert, of the Brussels Bar.

Upon hearing the Report of the Judge-Rapporteur and the views of the Advocate General the Court decided to open the oral procedure without any preparatory inquiry. By a decision of 19 November 1986 adopted pursuant to Article 95 (1) and (2) of the Rules of Procedure, the Court assigned the case to the Third Chamber.

II — Written observations submitted to the Court

The appellant in the main proceedings, after describing the scheme established by the old-age law and summarizing the relevant provisions of Community law, observes first of all that the question referred to the Court in this case is essentially the same as the question submitted to it in Case 254/84 *de Jong* v *Bestuur van de Sociale Verzekeringsbank*, [1986] ECR 671. In that case, the situation of Mrs de Jong was essentially the same as that of Mrs de Rijke: the question was whether she could not qualify for the full transitional advantages accruing under national law if the periods completed during the time between her departure from the Netherlands and the date of her husband's

65th birthday, and which afforded entitlement to pensions under Annex VI, were regarded as actual insurance periods under the old-age law. In other words, the issue was whether or not the periods to be taken into consideration in the case of a married woman, as referred to in Point 2 (c) of Part 1 of Annex VI to Regulation (EEC) No 1408/71, should be regarded as actual insurance periods under the old-age law.

In *de Jong* the answer given by the Court to that question was that the completion of insurance periods within the meaning of Point 2 (c) of Part I of Annex VI did not confer on a married woman in Mrs de Jong's situation any entitlement to transitional advantages in respect of the period preceding her marriage during which she had had no connection with the Netherlands by way of residence or employment. The Court thus held in substance that the periods referred to in Annex VI did not constitute actual insurance periods for the purposes of the old-age law.

The Board argues that the same solution may be applied in the present case and that consequently the periods referred to in Annex VI and completed by Mrs de Rijke cannot be regarded as periods during which she was insured in accordance with Netherlands law. The periods referred to in Annex VI cannot therefore affect the period laid down in the old-age law for giving notice of the intention to continue with insurance on a voluntary basis.

The Board further claims that it is not necessary to examine the matter by reference to the principle of the free movement of workers, as was the case in *de Jong*, because in the present case the provisions of Community law are pleaded with the sole aim of ensuring the continuity of pension rights after the persons concerned have left the territory of the Community.

The Board concludes that the preliminary question should be answered as follows:

'Neither Article 51 of the EEC Treaty nor Point 2 (c) of Part I of Annex VI to Regulation (EEC) No 1408/71 confers on a married woman, in respect of whom certain periods after 1 January 1957 are regarded as insurance periods pursuant to the aforesaid provision of Annex VI to Regulation (EEC) No 1408/71, a right, enforceable against the Netherlands authorities responsible for implementing the relevant Community law, to be regarded and treated as having been insured under the old-age law during such periods in derogation from the provisions laid down by or pursuant to Article 6 thereof.'

The Netherlands Government points out that the purpose of Annex VI is to facilitate the free movement of workers who, as nationals of other Member States, settle in the Netherlands whilst their wives remain in the country of origin. For that purpose, it is provided therein that, for the calculation of the husband's old-age pension, account may be taken of the periods during which the wife was not living in the Netherlands and was therefore not insured.

There are consequently notional insurance periods provided for in Point 2 (c) of Part 1 of Annex VI, so that that the 1% reduction to the pension, imposed in respect of those uninsured years, does not apply in the case of husbands whose wives have remained outside the Netherlands. However, Annex VI may not be interpreted as having the purpose of conferring on the married woman in question the status of an insured person under the old-age law in respect of those periods. The Government refers in this connection to the *de Jong* judgment (paragraph 19), in which the Court ruled that the periods under Point 2 (c) of Part I of Annex VI completed by a married woman do not entitle her to claim the

advantages provided for by Netherlands legislation. Indeed, the 'transitional advantages' provided for thereunder cannot be granted on the basis of the old-age law unless a person is insured.

The Commission also submits that the answer to the question submitted by the national court is implicated in the *de Jong* judgment. According to the Commission, it follows from that judgment that the periods referred to in Point 2 (c) of Part I of Annex VI to Regulation (EEC) No 1408/71 are not 'true' periods, so that the conditions which the Netherlands legislature places on the benefit of the transitional advantages, whereby the years falling between the 15th birthday and 1 January 1957 are treated as periods of insurance, cannot be satisfied by the operation of Point 2 (c). The provisions of Point 2 (c) of Part 1 of Annex VI cannot therefore entail affiliation to the national insurance scheme.

The Commission further observes that it appears from the judgment of the national court that Mr and Mrs de Rijke now live in Monaco, which allows Point 2 (f) of Part I of Annex VI to Regulation (EEC) No 1408/71 to be applied; Point 2 (f) requires residence on the territory of one of the Member States. It is, however, extremely doubtful that the scope of the EEC Treaty extends to the principality of Monaco.

The Commission proposes the following answer to the the question submitted in this case for a preliminary ruling:

'The provisions of Point 2 (c) of Part I (now Point J) of Annex VI to Regulation (EEC) No 1408/71 are designed to prevent a situation in which the old-age pension of a married woman whose husband is entitled to a pension under the Netherlands Algemene Ouderdomswet is reduced on account of the periods of her married life prior to the date of her 65th birthday during which she lived in the territory of one or more Member States, in so far as those periods coincide with the periods of insurance completed by her husband under that law and with the periods to be taken into account by virtue of Point 2 (c) of Part I, mentioned above; they do not, however, entail affiliation to the national insurance scheme. The periods referred to in Point 2 (c) of Part I (now Part J) cannot therefore be regarded as periods of insurance under the Netherlands Algemene Ouderdomswet.'

J. C. Moitinho de Almeida
Judge-Rapporteur