Under such legislation, the reimbursement of contributions which may be claimed by an employee who enters the national public administration after contributing to a compulsory insurance scheme is granted to make up for the fact that, where a minimum contribution period has not been completed, his transfer to the civil service scheme causes him to lose any right to a pension under the scheme to which he was previously affiliated, whereas an employee who enters the public administration of another Member State enjoys, under the legislation concerned, the right to maintain his affiliation and to pay voluntary contributions; there are thus two situations, which are not comparable and to which the principle of non-discrimination does not apply.

REPORT FOR THE HEARING
in Case C-28/92 *

I — Facts and procedure

Pursuant to Paragraph 1229(1)(3) and 1229(2) of the Reichsversicherungsordung (Social insurance law, hereinafter 'RVO'), corresponding to Paragraph 6(1)(3) and 6(2) of the Angestellten-Versicherungsgesetz (Law on social insurance for employed persons, hereinafter 'AVG'), as in force at the material time,

'The following persons shall not be subject to compulsory insurance:

...

3. Civil servants and other employees of public bodies listed in subparagraph 2 if they are entitled to the benefit of a social insurance scheme providing life assurance and assistance for surviving beneficiaries pursuant to the rules or principles of the civil service or corresponding provisions of church law.

(2) The question whether, and as from what date, a right arises to the benefit of a social insurance scheme providing life assurance and assistance for surviving beneficiaries within the meaning of Paragraph 1229(1)(3) shall be determined, for staff of the federal authorities or a body functioning under the auspices of the federal authorities, by decision of the appropriate federal minister and, for the staff of other bodies, by decision of the supreme administrative authority of the Land in whose departments or in whose service the work is carried out or in the area of which the authority concerned has its seat.'

* Language of the case: German.

Pursuant to Paragraph 1233(1) of the RVO, corresponding to Paragraph 10(1) of the AVG,

'(1) Persons not subject to compulsory insurance by virtue of this Law, the Law on insurance for employed persons, the Law on insurance for mineworkers, the Law on insurance for craft workers or the Law on social insurance for handicapped persons in protected institutions who are habitually domiciled or resident in the territory to which this law applies may pay voluntary contributions for the periods following their 16th birthday. The first sentence shall also apply to German citizens within the meaning of Paragraph 116(1) of the Basic Law who are habitually domiciled or resident abroad.

(1a) Subparagraph 1 shall not apply to persons not subject to compulsory insurance by virtue of Paragraph 1229 of this Law, Paragraph 6 of the Law on insurance for employed persons or Paragraph 31 of the Law on insurance for mineworkers or the persons exempted from compulsory insurance pursuant to Paragraphs 1230 and 1231 of this Law and Paragraphs 7 and 8 of the Law on insurance for employed persons and Paragraph 32 of the Law on insurance for mineworkers unless they have paid contributions for 60 months.'

Pursuant to Paragraph 1303(1) of the RVO, corresponding to Paragraph 82(1) of the AVG,

'(1) Where, in the event of cessation of the obligation to be insured under any part of the statutory pension scheme an insured persons has no right to voluntary insurance, or if his right to voluntary insurance ceases otherwise than because an insurance obligation arises under part of a statutory pension scheme, there shall be reimbursed to the insured, at his request, half the contributions paid in respect of the period following 20 June 1948 in the federal territory, in respect of the period following 24 June 1948 in the Land of Berlin and in respect of the period following 19 November 1947 in Saarland.'

2. *The main proceedings*

Marie-Hélène Leguaye-Neelsen, a French national born in 1951, paid from 1973 to 1977, when employed in Germany, compulsory contributions to the Bundesversicherungsanstalt für Angestellte (hereinafter 'the BfA') for a total period of less than 60 months. Since 1973, she has paid compulsory contributions to the French civil service scheme.

In preparation for her return to France, where she is now employed as a teacher in the civil service, in September 1990 Mrs Leguaye-Neelsen applied for reimbursement of the contributions she had paid into the statutory pension scheme in Germany.

That application was rejected by decision of the BfA of 19 September 1990, which was confirmed by decision of 11 January 1991 in response to a complaint from Mrs Leguaye-Neelsen.

According to the BfA, the plaintiff in the main proceedings, being a French national resident in Germany, is treated as if she were a German citizen and therefore is entitled to voluntary insurance, which excludes the right to reimbursement of the contributions paid. The right to voluntary insurance is not excluded merely because, as a French civil servant, she is covered by a French social insurance scheme for civil servants. Civil servants who acquire or have acquired the status of civil servant in another State are not excluded from voluntary insurance.

In the course of the action brought before it by Mrs Leguaye-Neelsen, on 7 February 1991 the Sozialgericht Reutlingen stayed the proceedings and referred the following question to the Court of Justice for a preliminary ruling:

'Are Articles 9, 10(2) and 13(2)(d) of Regulation (EEC) No 1408/71 to be interpreted as meaning that entitlement to reimbursement of contributions under national law exists even when an employee is a member of a comparable social security scheme for civil servants not under national legislation but under the legislation of another Member State?'

The national court considers that the scheme at issue is contrary to the principle of equal treatment laid down in Article 3(1) of Regulation No 1408/71.

First, it is common ground that the plaintiff would have been entitled to reimbursement of half the contributions paid, as requested by her in the main proceedings, if she had been a German civil servant. Moreover, the cover provided by the German and French schemes is similar. Finally, Article 4(4) of Regulation No 1408/71, which excludes from the scope of the regulation special schemes for civil servants and persons treated as such, is not, contrary to the view expressed by the Bundessozialgericht in a judgment of 12 September 1979, applicable in cases like this one in so far as the contested rules do not form part of a special social security scheme for German civil servants. The German pension scheme simply took account of the fact that it is necessary to avoid, as far as possible, double payment of contributions.

3. *Procedure before the Court of Justice*

The order for reference was received at the Registry of the Court of Justice on 3 February 1992.

Pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the European Economic Community, written observations were lodged on 14 May 1992 by the defendant in the main proceedings, represented by Tilo Herrmann, Leitender Verwaltungsdirektor bei der Bundesversicherungsanstalt für Angestellte, and by the German Government, represented by Ernst Röder, Ministerialrat in the Federal Ministry for Economic Affairs, and Claus-Dieter Quassowksi, Regierungsdirektor in the same ministry, acting as Agents, and on 31 July 1992 by the Commission of the European Communities, represented by Maria Patakia,

of its Legal Service, acting as Agent, assisted by Bernd Schulte, of the Max-Planck-Institut für ausländisches und internationales Sozialrecht, Munich.

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.

Pursuant to Article 95(1) and (2) of the Rules of Procedure, the Court, by decision of 18 January 1993, assigned the case to the Fifth Chamber.

II — Summary of the written observations submitted to the Court

The *BfA* observes that Paragraph 210 of the Sechtes Buch Sozialgesetzbuch (SGB VI, hereinafter 'the Social Code'), to which Paragraph 82 of the AVG corresponded until 31 December 1991, makes lack of entitlement to voluntary insurance a precondition for entitlement to reimbursement of contributions duly paid into the German pension insurance scheme.

The plaintiff in the main proceedings does not fulfil that condition. Her status as a French national and the fact that she resides in France does not preclude the application of the provisions on voluntary insurance to the German retirement insurance scheme since Paragraph (C)(7)(b) of Annex VI to Regulation No 1408/71 provides for the application of those provisions on voluntary insurance to the nationals of a Member State whose residence or domicile is in a Member State other than Germany.

Whilst Paragraph 7(2) of the Social Code (until 31 December 1991 Paragraph 10(1)(a) of the AVG) limits the right of voluntary affiliation of persons who are under no obligation to be insured — such as, for example, civil servants within the meaning of Paragraph 5(1)(1) of the Social Code — or who have been exempted from that obligation, the plaintiff cannot benefit from that provision since she cannot be regarded as a German civil servant and German law does not provide for a civil servant of another Member State to be treated in the same way as a German civil servant.

In those circumstances, the BfA suggests that the Court answer the preliminary question in the negative.

It considers, however, that there is another way of meeting the plaintiff's claim. Article 17 of Regulation No 1408/71 made it possible for Member States or their competent authorities to provide, by agreement, for exceptions in favour of certain categories of persons, including, by virtue of the conflict rule contained in Article 13(2)(a) thereof, pursuant to which a person who was employed at the material time in Germany falls in principle to be covered by the legislation of that State.

Thus, it would be possible to regard Mrs Leguaye-Neelsen as having been subject at that time not to the German legislation but to the French legislation, and to consider that the contributions at issue were wrongly paid into the German pension insurance scheme and that it is appropriate, therefore, to reimburse them pursuant to Paragraph 26(2) of the Social Code.

The BfA adds, in that connection, that Mrs Leguaye-Neelsen without doubt falls within one of the categories of persons referred to in Article 17 of Regulation No 1408/71 and that the exception could be applied, without any special consent from the French authorities, by the Bundesverband der Ortskrankenkassen, the competent authority for that purpose. According to the information at its disposal, the French authorities would not in such circumstances require any additional contribution for the period concerned.

The *German Government*, by way of preliminary, refers to the applicable German legislation.

Pursuant to Paragraph 82 of the AVG, persons who are not subject to compulsory insurance and are not entitled to voluntary insurance qualify for repayment, on request, of the contributions paid.

Pursuant to Paragraph 6(1)(3) of the AVG (since 1 January 1992, Paragraph 5(1) of the Social Code), German civil servants are not subject to statutory insurance since they are covered by a special social security scheme.

It is clear from Paragraph 10(1)(a) of the AVG that if such civil servants have paid less then 60 months' contributions to the pension scheme, they are not entitled to pay voluntary contributions to that scheme and may, consequently, claim repayment of the contributions paid.

The right to reimbursement guaranteed by Paragraph 82 of the AVG is thus a consequence of the civil servant's affiliation to the special social security scheme for German civil servants.

That provision does not apply to those working in the civil service of other Member States. The term civil servant, under the relevant German law, implies dependence on a given public employer and compulsory insurance is available only where the supreme federal authority or the competent authority in the Land by which the person is employed has formally declared that that person has a right to assistance under German civil service law (Paragraph 6(2) of the AVG and the second sentence of Paragraph 5(1) of the Social Code). Other employees have no right to reimbursement since they retain the right to voluntary insurance.

The German Government considers that Article 3(1) of Regulation No 1408/71 does not require the plaintiff in the main proceedings to be able to claim, as a French civil servant, the reimbursement of contributions to which a civil servant governed by German civil service law would be entitled. That article requires observance of the principle of equal treatment of workers to whom Regulation No 1408/71 applies *ratione personae* only 'subject to the special provisions of this regulation'. However, although the plaintiff, as an employee in Germany subject to compulsory insurance, is covered by Regulation No 1408/71, Article 4(4) of that regulation specifically provides that it is not applicable to 'special schemes for civil servants and persons treated as such'.

The German Government states in that connection that the exemption from the obligation to pay contributions for compulsory insurance — available to civil servants — is based on the fact that their social security scheme is organized independently and that that exemption therefore forms an integral part of the special scheme for civil servants and persons treated as such.

In so far as the regulation is not applicable to the special scheme for German civil servants, the plaintiff cannot, under Article 3(1) of Regulation No 1408/71, be treated as such as regards the effects of that scheme in the sphere of social insurance.

According to the German Government, the plaintiff must therefore be regarded, in relation to the claim for reimbursement, as a German employee insured under the ordinary scheme and not as a German civil servant. It follows, pursuant to Paragraph 82 of the AVG, that she is not entitled to reimbursement of the contributions paid since she retains the right to voluntary insurance under Paragraph 10(1)(a) of the AVG. That provision and Paragraph C(7)(b) of Annex VI to Regulation No 1408/71, read in conjunction, show that the right to pay voluntary contributions to the pension scheme persists even in the event of a period of residence or of work in France.

The German Government considers that no other conclusion can be drawn from the other provisions cited by the national court.

First, Article 9 of Regulation No 1408/71 states that an insured person cannot lose his right to continued voluntary insurance merely because he resides in another Member State, and the position is the same under the German legislation.

Secondly, Article 10(2) of Regulation No 1408/71 expressly assimilates, as regards the reimbursement of contributions, compulsory insurance in another Member State to compulsory insurance in the Member State of origin. Therefore, the condition for entitlement to reimbursement of contributions under the German legislation, namely cessation of the obligation to be insured for the purposes of the statutory pension scheme, is not deemed to be fulfilled if the person concerned is engaged in an activity in France for which insurance is compulsory. If the plaintiff was engaged in an activity subject to the general social security scheme in France, Community law would exclude reimbursement of the contributions paid to the German retirement pension scheme.

Finally, in so far as the plaintiff claims rights based on her status as a French civil servant, the application of Article 13(2)(d) of Regulation No 1408/71 would mean that those rights could be evaluated only in accordance with French legislation. Therefore, she should take proceedings against the French State.

According to the German Government, since Community law does not provide for equality of treatment in favour of civil servants, it cannot create corresponding obligations attaching to Member States.

The German Government also considers that the scheme at issue is not unjust since, by paying voluntary contributions for at least 60 months, the plaintiff, unlike a German civil servant, will become entitled to an old-age pension in Germany as from retirement age. That outcome is more favourable than the reimbursement applied for, which covers only some of the contributions paid by the employee.

The German Government therefore proposes that the Court give the following answer to the preliminary question:

'The provisions of Regulation No 1408/71 do not preclude national legislation under which only national civil servants are entitled to the reimbursement of social insurance contributions'.

The *Commission* observes first that by virtue of Article 9 and Paragraph (C)(7)(b) of Annex VI to Regulation No 1408/71, the nationals of a Member State other than Germany may pay voluntary contributions into the German pension insurance scheme even if they are not resident or domiciled in the territory covered by the RVO, which is applicable in the main proceedings.

As regards German nationals, their right to voluntary insurance is limited by Paragraph 1233(1)(a) of the RVO, in so far as that provision restricts the rights of persons not subject to compulsory insurance (Paragraph 1229 of the RVO) and of persons exempted from that obligation at their request (Paragraph 1230 et seq. of the RVO). The right to pension insurance is available to them only if they have previously paid at least 60 months' contributions in respect of employment or an activity for which insurance is compulsory.

The Commission emphasizes that the purpose of the requirement of 60 months' prior insurance is to ensure that, in particular, German civil servants do not resort to voluntary contributions in order to obtain supplementary old-age insurance.

Since that limitation on the right to voluntary insurance means in many cases that the contributions previously paid can no longer give rise to entitlement to any benefit, Paragraph 1303(1) of the RVO is intended to provide, by means of reimbursement of one-half of the contributions paid, compensation for those persons who have lost any chance of receiving a pension.

However, that restriction on the right to voluntary insurance does not apply to nationals of other Member States who do not fulfil the prescribed conditions as to freedom of affiliation (Paragraph 1229 of the RVO) or exemption from the obligation to be insured (Paragraph 1230 et seq.). Thus, a national of another Member State who is a civil servant in his country of origin does not qualify as one of the 'civil servants and other employees' within the meaning of Paragraph 1229(1)(3) of the RVO, since the freedom of affiliation of those civil servants presupposes, *inter alia*, that their employer is one of the public bodies exhaustively listed in subparagraph 2 of that provision.

It follows, according to the Commission, that the restriction of the right to voluntary insurance under Paragraph 1233(1)(a) of the RVO cannot be applied to foreign nationals, including those of other Member States.

In that connection, the Commission points out that the existence of a right to voluntary insurance excludes reimbursement of the contributions paid, even if the person concerned does not in fact exercise that right.

The Commission then observes that, pursuant to Article 9(1) of Regulation No 1408/71, a Member State is precluded from making admission to voluntary or optional continued insurance conditional upon residence in the territory of that State where the person concerned was, at some time in his past working life, subject to the legislation of that State as an employed person.

As regards Article 10(2) of Regulation No 1408/71, the Commission observes that that provision has the effect that, where under the domestic law of a Member State, as in this case Paragraph 1303 (now Paragraph 210 of the Social Code), the right to reimbursement presupposes in particular that the insured is no longer subject to compulsory insurance, that reimbursement is also excluded where the person concerned is subject to compulsory insurance in another Member State.

As regards Article 13 of that regulation, it is based on the principle that an insured person of the kind referred to in Article 2 thereof is subject, regardless of domicile and nationality, to the legislation of the Member State in which he works.

The Commission considers that the above-mentioned provisions must be read in the light of the fundamental principle of the prohibition of all discrimination based on nationality as between nationals of the Member States, which applies both to the Community legislature and to the Member States.

That principle, laid down *inter alia* in Articles 7 and 48 of the Treaty and incorporated in Article 3(1) of Regulation No 1408/71, precludes not only discrimination based directly on nationality but also all discrimination based on other criteria which in fact achieve the same result (Case 41/84 *Pinna* [1986] ECR 1, paragraphs 23 to 25, and Case 20/85 *Roviello* [1988] ECR 2805, paragraphs 14 to 16), the general purpose of those provisions being to guarantee freedom of movement by abolishing all discrimination regarding employment, remuneration and other working conditions.

The Commission therefore considers that the question which arises in this case is whether the fact that, with respect to admission to voluntary insurance in Germany, nationals of other Member States who become civil servants in those States are not treated in the same way as German nationals who become civil servants in Germany, and the resulting exclusion from the right to reimbursement of contributions, constitute indirect discrimination within the meaning of Article 3(1) of Regulation No 1408/71.

The Commission states in that connection that the exclusion from the scope of Regulation No 1408/71 of special schemes for

civil servants applies only to those schemes and not to the provisions adopted — as part of a statutory pension scheme — because of the existence of special schemes for civil servants.

Article 4(1) of Regulation No 1408/71 lists the various branches of social security to which it applies and is apparent from Article 4(2) that in each instance the legislation concerned is referred to in its entirety, including the provisions concerning the reimbursement of contributions.

The Commission also states that although the exclusion from reimbursement provided for in Article 10(2) of Regulation No 1408/71 in the event of continued compulsory insurance in another Member State is in the interests of the insured, that is not the case where the person concerned is not subject to compulsory insurance in another Member State and therefore no longer has, as a person subject to compulsory insurance, the right to have periods of insurance previously completed in another Member State taken into account.

The Commission considers that the limitation of the right to reimbursement where a person enters the German civil service is indirectly discriminatory against nationals of other Member States because it is normally the latter who, having exercised their right of freedom of movement, are affected by the schemes of those other Member States as regards retirement insurance for civil servants. Accordingly, only the application of a uniform set of conditions for the reimbursement of contributions to people entering the German civil service and those entering the civil service of another Member State can ensure that the principle of non-discrimination is not breached.

In view of the foregoing considerations, the Commission proposes the following answer to the preliminary question:

'The provisions of Regulation No 1408/71 must be interpreted as meaning that an employee is also entitled to reimbursement of contributions under the national legislation of a Member State, that entitlement being linked to the exclusion from the right to voluntary insurance under the legislation of that Member State as a result of affiliation to a social insurance scheme for civil servants where the employee in question is subject to a social insurance scheme for civil servants not by virtue of the legislation of that Member State but pursuant to that of another Member State'.

J. C. Moitinho de Almeida
Judge-Rapporteur