Opinion of Advocate General Cosmas delivered on 17 July 1997

R.O.J. Grahame and L.M. Hollanders v Bestuur van de Nieuwe Algemene Bedrijfsvereniging

Reference for a preliminary ruling: Arrondissementsrechtbank Amsterdam - Netherlands

Social security - Incapacity for work - Periods of paid employment and periods treated as such - Military service - Part J, point 4, of Annex VI to Regulation (EEC) No 1408/71

Case C-248/96

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Opinion of the Advocate-General

I - Preliminary observations

1 In this case the Arrondissementsrechtbank, Amsterdam, has referred to the Court three questions concerning the interpretation of point 4 of the part relating to the Netherlands of Annex VI to Council Regulation (EEC) No 1408/71 of 14 June 1971 (1) and the validity of those provisions in the light of Articles 48 and 51 of the EC Treaty.

These questions have arisen in the context of proceedings between two Netherlands nationals and the competent Netherlands social security institution concerning the question whether the periods of military service served by the former must be taken into account for the purpose of their obtaining a social security benefit for incapacity for work.

II - The Netherlands legislation

2 It appears from the file that compulsory insurance against invalidity is governed in the Netherlands by two laws: the Wet op de Arbeidsongeschiktheidsverzekering of 18 February 1966 (Law on Insurance against Incapacity for Work, `the WAO') and the Algemene Arbeidsongeschiktheidswet of 11 December 1975 (General Law on Incapacity for Work, `AAW').

3 The WAO, which came into force on 1 July 1967, provided for the compulsory insurance of employed persons against invalidity.

Article 3 of the WAO states that `employed person' means any natural person in an employment relationship governed by private or public law.

Under Article 6(1)(a), civil servants are excluded from the ambit of the WAO. (2)

Article 6(1)(b) of the WAO provides inter alia that a person who is fulfilling an obligation imposed on him by law or arising out of an undertaking other than a contract of employment, entered into by him vis-à-vis the public authorities responsible for the defence of the country, is not to be regarded as being in an employment relationship.

According to the WAO, the right to benefits and the amount thereof are independent of the duration of insurance periods. The amount is determined on the basis of the degree of invalidity and the worker's salary (subject to a certain maximum).

4 The AAW, which came into force on 1 October 1976, provides for the compulsory insurance of all Netherlands residents against invalidity. The acquisition of the right to benefits and the calculation of the amount are not subject to any conditions with regard to the duration of insurance periods.

III - The facts

5 Mr Grahame, a Netherlands national, worked in the Netherlands from 1957 to 1969/70. From 2 December 1959 to 7 May 1960 he performed compulsory military service in the Netherlands and then, until 1 May 1961, in the former Netherlands New Guinea. Subsequently he resided and worked in Germany, latterly as a waiter. On 16 October 1989 he became unfit for work and he received sickness benefit (but not invalidity benefit) there until 19 July 1991.

By decision of 18 October 1993, the competent Netherlands social security institution, the Nieuwe Algemene Bedrijfsvereniging (`NAB'), granted him a social security benefit under the WAO from 20 July 1991 for a degree of invalidity of 80 to 100%. In calculating the amount of the benefit payable, the NAB took into account approximately five years' employment in the Netherlands, excluding the period of military service.

6 Mr Hollanders, also a Netherlands national, performed compulsory military service in the Netherlands from 10 June 1953 to 16 May 1955 and then a period of voluntary military service until 11 February 1958. From 1960 he worked in Luxembourg, where be became unfit for work in 1991.

By decision of 22 March 1994, the NAB granted him benefit under the WAO from 17 June 1992 on the basis of a degree of invalidity of 80 to 100%. In calculating the benefit, it took account of 35 years' insurance, including approximately four in the Netherlands.

7 In both cases the NAB took the view that the periods of military service could not be treated as paid work/employment for the purposes of part I, point 4(a) (as in force on 20 July 1991), or point 4(c) (as in force on 17 June 1992) of Annex VI to Regulation No 1408/71.

8 The persons concerned initiated proceedings against those decisions before the Administrative Law Section of the Arrondissementsrechtbank, Amsterdam. That court expressed doubts as to whether the abovementioned provision of Regulation No 1408/71 was compatible with the principle of the freedom of movement for workers laid down in Articles 48 and 51 of the Treaty and, in particular, whether the exception laid down in Article 48(4), to the effect that the provisions of Article 48 do not apply to employment in the public service, also covered cases such as those before the national court. Furthermore, it was uncertain as to the meaning of the terms `periods of paid work' and `periods of paid employment', used in point 4 of Annex VI to the regulation, in the light of Community law. It therefore referred the following questions to the Court.

IV - The questions referred for a preliminary reference

`1. Are Articles 48 and 51 of the EC Treaty to be interpreted as meaning that the provisions of point 4(a) or 4(c), depending on the relevant time, of Part J of Annex VI to Regulation No 1408/71 are incompatible with those articles in so far as no account is taken of certain periods of work when calculating a pro rata benefit for migrant workers under the WAO?

2. Is point 4(a) or 4(c), depending on the relevant time, of Part J of Annex VI to Regulation No 1408/71, as they stood on 20 July 1991 and 17 June 1992 respectively, to be interpreted as meaning that periods of paid employment and periods treated as such completed in the Netherlands before 1 July 1967 include:

(a) periods during which the person concerned was performing his compulsory military service under the Netherlands legislation;

(b) periods during which the person concerned was an enlisted member of the Netherlands armed forces and in that capacity came under a special statutory insurance scheme against incapacity for work for civil servants and persons treated as such?

3. Is the answer to question 2 different if the periods during which the person concerned was performing his compulsory military service under the Netherlands legislation were completed within or outside the territory of the European Union (at that time the European Community)?'

V - The Community context

9 Article 48 of the Treaty lays down 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'.

10 In addition, Article 51 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.'

11 On the basis of Article 51 the Council adopted Regulation No 1408/71 and Regulation (EEC) No 574/72 of 22 March 1972 laying down the procedure for implementing the abovementioned regulation (OJ, English Special Edition, 1972 (I), p. 1). The main purpose of those regulations was to coordinate the different national laws in this field so that freedom of movement for workers did not result in the workers who exercised this freedom finding themselves in a less favourable situation than those who worked in only one Member State.

12 Article 40(1) of Regulation No 1408/71, which concerns the conditions governing the grant of invalidity benefits where a worker has been successively subject to the legislations of different Member States, according to at least one of which (such as, in this case, the Netherlands legislation) the amount of benefit depends on the duration of periods of insurance, refers, for calculating the amount of benefit, to the provisions of Chapter 3 of the regulation, relating to old-age and death pensions, particularly Article 46, which deals with the award of benefits by each of the competent insurance institutions of the Member States.

13 With regard to the application of the Netherlands legislation concerning insurance against incapacity for work, Regulation No 1408/71, as worded at the time material to the Grahame case, in the form codified by Regulation No 2001/83, (3) contained the following provision in Annex VI, Part I concerning the Netherlands, (4) point 4:

`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),

- ...

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

14 Furthermore, the regulation as worded at the time material to the Hollanders case, as amended by Regulation No 1248/92, contained the following provision in the same Annex VI, Part J, point 4:

`(a) ...

(b) If ... the person concerned is entitled to a Dutch invalidity benefit, that benefit shall be awarded in accordance with rules laid down by Article 46(2) of the regulation:

(i) in accordance with the provisions laid down by the ... WAO, if, at the time of occurrence of the incapacity for work he was insured for the same risk under the legislation of another Member State as an employed person within the meaning of Article 1(a) of the regulation;

(ii) ...

(c) In the calculation of the benefits awarded in accordance with the abovementioned Law of 18 February 1966 (WAO) or in accordance with the abovementioned Law of 11 December 1975 (AAW), the Dutch institutions shall take account of:

- periods of paid employment and periods treated as such completed in the Netherlands before 1 July 1967,

- ... .'

15 Finally, Article 1 reads as follows:

`(s) "periods of employment" and "periods of self-employment" mean periods so defined or recognized by the legislation under which they were completed, and all periods treated as such, where they are regarded by the said legislation as equivalent to periods of employment or self-employment'.

VI - Substance of the case

16 It is common ground that Mr Grahame and Mr Hollanders were employed persons when they became unfit for work and that therefore they are subject to the regulation, that they are entitled to invalidity benefits from the Netherlands institution and that the benefits in this case are awarded in accordance with Article 46 in conjunction with the abovementioned provisions of Annex VI, point 4(a) or (c) respectively.

Moreover, as the successive versions of the said provisions, on which the present case turns, are not fundamentally different they will be referred to hereafter as `the relevant provisions of Annex VI'. (5)

It will be expedient to consider the second question first, then the third and, finally, the first.

A - Second question

17 With this question, the national court asks whether periods of compulsory and voluntary military service in the Netherlands armed forces before 1 July 1967 are periods of paid work or equivalent periods within the meaning of the relevant provisions of Annex VI.

18 The NAB and the Netherlands Government contend that the terms `periods of paid work and equivalent periods' in the relevant provisions of the Annex must be given the same meaning as in Dutch law. In the light of the special provisions to which they are subject, members of the armed forces are not deemed in Dutch law to be employed persons and therefore military service does not constitute paid work, or the equivalent.

19 Relying on Article 13(2)(e) of the regulation and the judgments of the Court in Olivieri-Coenen (6) and Van Poucke, (7) the Commission contends that the abovementioned terms cover both voluntary and compulsory military service, particularly in view of the relationship of subordination.

20 At the hearing, the French Government relied on Article 1(s) of the regulation to contend that the terms must be given the same meaning as in the WAO, which does not recognize a period of military service as a period of paid work or equivalent period, also in view of the special disciplinary system which characterizes it. However, the French Government observes that, under Article 13(2)(e), last sentence, an employed person who is called up for service in the armed forces and who is insured is to retain the status of employed person and consequently, in that case, the period of military service is treated as a period of paid work.

21 It must be observed, first, that the Court has consistently held that, in interpreting a provision of Community law, it is necessary to consider not only its wording but also, where appropriate, the context in which it occurs and the objects of the rules of which it is part. (8)

22 Secondly, the Court has also consistently held that Article 51 of the Treaty, which Regulation No 1408/71 implements, provides for the coordination, not the harmonization, of the legislation of the Member States in the area of social security. Substantive and procedural differences between the social security systems of individual Member States and hence in the rights of persons working there, are therefore unaffected by that provision. (9)

23 In the present case, as the Commission correctly observes, the relevant provisions of Annex VI were introduced so that persons who worked before the WAO came into force and were therefore not insured under that law would also be covered for social security purposes. (10) I would add that they were also introduced so that such persons should be covered uniformly and in the same manner as those who completed insurance periods under the WAO. (11)

24 It follows from the express terms of those provisions to the effect that incapacity benefit is calculated, in a case such as this, in accordance with the provisions of the WAO, taking account of periods of paid work prior to the WAO, that periods of work before 1 July 1967 are treated, for the purposes of the regulation, as work under the WAO. Therefore those periods can be described as `periods of paid work and equivalent periods' and taken into account in determining the benefit payable only if they can be described as such pursuant to the WAO in cases where they were completed under that law.

In other words, periods of paid work or equivalent periods within the meaning of the relevant provisions of Annex VI must be construed as periods which would be insurance periods if they had been completed under the WAO, as the Netherlands Government correctly observes. Consequently, the military service performed by the applicants in the main proceedings is a `period of work or equivalent period' within the meaning of Annex VI of the regulation if it is insured under the WAO.

25 That interpretation which, in my opinion, is clear from the very wording of the relevant provisions of Annex VI, also conforms with the definitions of `periods of employment' and `periods of self-employment' in Article 1(s) cited above (see paragraph 15). It is clear from the introductory words of that article that those definitions apply to the whole of the regulation and, for the purpose of classifying the work in question in each case, they refer to the national legislation under which the particular periods were completed. (12)

26 The Commission's argument that the relevant terms of Annex VI must be construed as including voluntary and compulsory military service cannot be accepted. It presupposes that those terms have an autonomous Community meaning irrespective of (or even contrary to) the provisions of national law.

That assumption seems to me to be mistaken.

27 Were it to be accepted, it would mean that, instead of being a means of coordination, the regulation had become a means of harmonizing the laws of the Member States relating to social security, which would be contrary to the declared aim of the Community legislature, as stated above (see paragraph 22).

28 Furthermore, that argument has been disposed of by the case-law. In De Jaeck in particular, (13) the Court, when interpreting the phrases `a person who is employed' and `a person who is self-employed' for the purposes of Title II of the regulation, observed that `just as the description "employed person" or "self-employed person" for the purposes of Article 1(a) and 2(1) of the regulation depends on the national social security scheme under which the person is insured, "a person who is employed" (or "engaged in paid employment") and "a person who is self-employed" for the purpose of Title II of the regulation should be understood to refer to activities deemed such by the legislation applicable in the field of social security in the Member State in whose territory those activities are pursued.' (14) Moreover, in the same judgment the Court added that the abovementioned terms in Title II do not have an autonomous Community meaning based on employment law, in view of the fact that the purpose of the regulation is merely to coordinate the social security legislation of the Member States. (15)

29 In the present case, it appears from the order for reference that the criterion for determining whether a person is deemed to be an employed person and covered by the WAO is the existence of an employment relationship under private or public law. Civil servants are expressly excluded, and activity for purposes of national defence is not deemed to be paid employment.

In particular, persons performing compulsory military service are not employed on the basis of a contract or on that of an appointment as a civil servant. They are not deemed to be in an employment relationship and their work is not deemed to be paid employment. From the social security viewpoint, they are covered by the Wet Arbeidsongeschiktheidsvoorziening Militairen (Netherlands Law on Incapacity for Work in Members of the Armed Forces), which came into force in 1972.

So far as persons performing voluntary military service are concerned, the order for reference merely states that their position does not differ fundamentally from that arising from compulsory military service. The defendant in the main proceedings states that they serve in the armed forces on the basis of public law and perform their tasks as military civil servants. From the social security viewpoint, the order for reference states that they are covered by special rules relating to the insurance of military personnel against incapacity for work.

30 It may be concluded from this that military service in the Netherlands is not deemed to be a period of paid work within the meaning of the WAO and that persons performing military service are not subject to the WAO, but to special social security schemes. Furthermore, there is nothing in the file to show that the WAO has been extended to those categories, either indirectly or by reference. Therefore, in view of what has been said above, the periods of military service served by the applicants in the main proceedings cannot be regarded as `periods of paid work or equivalent periods', within the meaning of the relevant provisions of Annex VI to the regulation.

31 The Commission contends that persons performing voluntary military service are in a relationship of subordination, that logically they receive pay for their services and that they must therefore be deemed to be civil servants and the period of military service must be regarded as a `period of paid work' within the meaning

of the relevant provisions of Annex VI. On this point the Commission relies on the abovementioned judgments in Van Poucke and Olivieri-Coenen. (16)

32 In so far as this argument seeks to construe the relevant provisions of Annex VI autonomously and independently of the WAO, on the basis of the specific or presumed characteristics of voluntary military service in the Netherlands, the argument must be rejected in view of what was said above.

So far as the Van Poucke judgment is concerned, I do not think it is material to the present case. In that judgment, the Court held that a Belgian military doctor (a civil servant) was within the category of persons covered by the regulation in view of the fact that certain social security legislation, to which the regulation applied, had been extended to that category. (17) Accordingly the Court found, further, that the employment as a civil servant of a person falling within the scope of the regulation was an activity as a person `employed' within the meaning of Article 14c of the regulation. (18) Consequently the Court did not hold either that civil servants, particularly soldiers, are covered by the regulation, or that their employment is automatically regarded as an activity of an employed person within the meaning of the regulation.

33 The Olivieri-Coenen judgment likewise has no bearing on the present case. In that judgment, the Court found that, for the purposes of a similar invalidity benefit in the Netherlands, periods in which a person worked as a teacher under a contract of employment concluded with a private educational establishment were periods of paid employment within the meaning of the provisions of Annex VI of the regulation (which are also at issue in the present case), even if that person was insured during that period under a special scheme for civil servants and persons treated as such. (19) Since, in that case it was common ground that the activity of the person concerned constituted paid employment under Dutch law, (20) I consider that that judgment indicates merely that the fact that the person concerned belonged simultaneously to a special scheme for civil servants did not have the effect that her activity ceased to be paid employment within the meaning of the regulation.

34 The fact that Article 13(2)(e) of the regulation provides that `a person called up or recalled for service in the armed forces, or for civilian service, of a Member State shall be subject to the legislation of that State' does not affect the view set out above. Article 13 forms part of Title II, which relates to the determination of the legislation applicable. As the Court has observed with regard to different provisions of Article 13(2), the provisions in question are designed to resolve conflicts of legislation which may arise where, over the same period, the place of residence and the place of employment are not situated in the same Member State, (21) and not to define the conditions creating the right or the obligation to become affiliated to a social security scheme, which is a matter for the legislation of each Member State. (22) In the present case, it is not a question of which legislation is applicable (it is unquestionably that of the Netherlands) and there is no conflict of laws in any form regarding the relevant period of military service and, in any case, that provision does not have the object of compelling a Member State to regard as a period of insurance or of paid work a period which the social security legislation of that State does not recognize as such. (23)

35 During the oral procedure the French Government referred to the last sentence of the same Article 13(2)(e), which provides that `the employed or self-employed person called up or recalled for service in the armed forces or for civilian service shall retain the status of employed or self-employed person'. The French Government maintains that, under that provision, the first applicant's military service must be regarded as a period of paid work because, as the order for reference makes clear, that applicant was working as a waiter when he was called up. However, as I mentioned in the preceding paragraph, point (e), like the whole of Article 13, seeks only to determine the legislation applicable in the event of conflict of laws and not to lay down the substantive conditions for insurance, and therefore all this provision means is that, for the purpose of determining the legislation applicable, the person who is called up retains the status he had as an employed or self-employed person up to that date. Therefore, as the conditions for applying this provision are not fulfilled in the present case, the French Government's argument cannot be accepted.

B - Third question

36 This question requires a reply only if the period of military service may be deemed a period of paid work or an equivalent period within the meaning of Annex VI. Consequently I propose to examine the third question, subject to my observations concerning the second.

37 According to the relevant provisions of Annex VI, for calculating the benefits due under the WAO, account is to be taken of periods of paid work completed in the Netherlands before 1 July 1967. It is clear from the Court's case- law in similar cases that the criterion which permits these periods to be taken into account cannot consist in the fact that the person concerned works in the Netherlands, but may consist in a sufficient link which exists between the worker and the Netherlands through his membership of a social security scheme covered by the regulation, in this case, the WAO. (24)

38 Therefore, and subject of course to my observations concerning the second question, the fact that the first applicant performed part of his military service in the Netherlands armed forces (i.e. with the Netherlands State) outside the territory of the Netherlands does not affect the present case. This is all the more true in that, as the written observations of the defendant in the main proceedings point out, the former Netherlands New Guinea, where the applicant performed his military service, was an overseas territory of the Netherlands (see Article 227(1) and (3) and Annex IV to the Treaty and the Protocol of 25 March 1957) until the Treaty of 15 August 1962 whereby sovereignty over this territory was transferred to the Republic of Indonesia, and it therefore maintained special relations with the Netherlands. (25)

C - First question

39 With this question the national court asks in essence whether the relevant provisions of Annex VI of the regulation are compatible with Articles 48 and 51 of the Treaty in so far as they do not provide for periods of military service to be taken into account for the purpose of obtaining benefits for incapacity for work, and whether that exception is justified on the basis of Article 48(4) of the Treaty.

40 To reply to this question, it is first necessary to consider whether persons performing compulsory or voluntary military service are deemed to be workers within the meaning of Article 48 of the Treaty and whether they might fall within the exception laid down by paragraph 4 of that Article.

41 First of all it must be pointed out that the Court has consistently held that the term `worker' in Article 48 has a Community meaning and must be defined in accordance with the objective criteria which characterize the employment relationship, taking into account the rights and duties of the persons concerned, the essential characteristic of the employment relationship being that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration, regardless of whether this legal relationship is governed by public or private law. (26) However, the rules relating to freedom of movement for workers guarantee only the free movement of persons who pursue or are desirous of pursuing an economic activity. (27) Interpreting the term `worker' broadly, the Court has held that in the scheme of the Treaty civil servants are regarded as employed persons, (28) and even as a separate category of employed person. (29)

42 Article 48(4) has a limited sphere of application. It provides only that Member States may exclude nationals of other Member States from access to certain posts in the public service in view of the legitimate interest of the Member States in reserving to their own nationals a range of posts connected with the exercise of powers conferred by public law and with the protection of general interests. (30) The Court assesses in each particular case whether an activity or a post forms part of these specific activities of the public service. For example, it has found that the posts of head technical office supervisor, principal supervisor, works supervisor, stock controller and night watchman with the municipality of Brussels and architect with the municipalities of Brussels and Auderghem are within the scope of that provision, (31) whereas posts of nurses in public hospitals (32) and trainee teachers in the public service (33) etc. are not. In any case it must be accepted, as has already been observed, (34) that certain activities closely involved in the exercise of State authority and the coercive powers flowing from it, such as defence of the State and policing, maintenance of order, imposition of tax and the administration of justice, are unquestionably covered by Article 48(4). (35)

43 On the basis of those considerations, a person performing compulsory military service cannot be regarded as an employed person and is accordingly in principle not covered by Article 48 either. As the defendant in the main proceedings and the Netherlands Government correctly pointed out, military service is the performance of an obligatory service to the State and not an economic activity for which payment is received on the basis of an employment relationship. This applies even if a soldier is presumed to receive financial assistance from the State to meet his personal expenses. (36) Consequently it is unnecessary to ascertain whether soldiers are covered by the special provision of Article 48(4). (37)

44 Conversely, in my opinion the information in the file, sparse though it is, justifies the conclusion that persons performing voluntary military service in the Netherlands must be deemed, for the purposes of the Treaty, to be employed persons in the broad sense, as the Commission correctly observes. As already mentioned, (38) these persons serve in the army on the basis of public law and perform their tasks as military civil servants. Furthermore, according to the Commission, which has not been contradicted on this point, those persons must be paid for their services. I conclude that this activity constitutes professional service and as such is covered by Article 48. Furthermore, by nature it falls within the scope of paragraph 4.

45 We come now to Article 51, which provides that the Council is to adopt such measures in the field of social security as are necessary to provide freedom of movement for workers. I think it is clear, for obvious reasons of consistency, that the definition of `worker' in Article 51 is as broad as in Article 48. Therefore the Council must carry out the coordination prescribed in relation to all workers covered by Article 48. (39)

46 Nevertheless, the scope of Regulation No 1408/71 in relation to persons and subject-matter is both narrower and wider than that of Articles 48 and 51 of the Treaty. Thus, whereas the original version of the regulation stated that its legal basis was Article 51 and that the regulation was limited to employed persons, Regulation No 1390/81 extended the scope to self-employed persons. However, as the latter are covered by Chapters 2 and 3 of Title III of the Treaty, which relate to the right of establishment and services respectively (Articles 52 to 66), and accordingly Article 51 did not provide a legal basis for that extension (see the third recital in the preamble to Regulation No 1390/81), the Council also had recourse to Article 235 of the Treaty. In addition, although, as already mentioned, (40) civil servants are deemed to be employed persons within the meaning of Article 48 of the Treaty, Article 4(4) of the regulation still excludes from its scope special schemes for civil servants and persons treated as such, although in 1991 the Commission presented a proposal for amending the regulation so as to cover civil servants also. (41)

47 The continued failure by the Council to settle this question was castigated with unusual force in the Vougioukas judgment. (42) However, the Court pointed out that this did not affect the validity of Article 4(4) of the regulation since, having regard to the Council's wide discretion regarding 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 currently provided for in the regulation (paragraph 35).

48 That interpretation is consistent with the nature of the regulation as a means of coordinating, not harmonizing, the laws of the Member States relating to social security and it shows that the fact that a person is an employed person for the purposes of the Treaty does not automatically guarantee him the benefit of the favourable provisions of the regulation. That is because, whereas the abovementioned articles of the Treaty apply on the basis of the objective characteristics of the employment relationship, the regulation applies by reason of a person's belonging to a national social security scheme which is covered by the regulation, and membership of such a scheme is subject to substantive conditions laid down by the national legislature.

49 Consequently I see no contradiction between the relevant provisions of Annex VI and Articles 48 and 51 of the Treaty in so far as they refer to the WAO for determining the periods to be taken into account in order to calculate the invalidity benefit payable, which is at issue here. Moreover, the fact that, under the Netherlands social security system, military service is not covered by the general social security scheme in relation to invalidity, applying to employed persons, but by a special scheme applying to civil servants (which is why the periods in question cannot in principle be taken into account in the present case), has nothing to do with the validity of the relevant provisions of the regulation, but arises from the perfectly legitimate freedom of the national legislature to regulate the social security sector.

50 Nevertheless, as appears from paragraph 36 of the Vougioukas judgment, which has already been cited several times, the validity of the relevant provisions of Annex VI (and I shall propose a ruling that they are valid) does not entail the refusal of a request for aggregation when it may be satisfied, in direct application of Articles 48 to 51 of the Treaty, without recourse to the coordination rules adopted by the Council.

51 In the present case, as appears from the order for reference and as the second applicant pointed out in his written and oral observations and the French Government stated at the hearing, with regard to employed persons comparable to the applicants, but who have not transferred their residence to another Member State, the benefit to which they are entitled under the WAO is not in principle reduced with regard to the periods in question in this case. Therefore it seems that if the applicants had remained in the Netherlands and worked there, they would have been entitled to have the periods of military service taken into account, but they have lost this right for the sole reason that they exercised their freedom of movement in the Community.

52 The Netherlands Government did not challenge that finding during the oral procedure, nor put forward any convincing reason to justify objectively the difference in treatment of workers who remain in the Netherlands and those who move to other Member States; nor, moreover, does the file on the case reveal anything different. Therefore I take it that the factual basis of the finding has been established.

53 I consider that the abovementioned treatment is likely to deter employed persons who are Dutch nationals from exercising their right to freedom of movement and that it is therefore discriminatory treatment prohibited by Articles 48 and 51 of the Treaty. Consequently I propose that the Court rule that legislation such as the Netherlands legislation in question is contrary to the abovementioned articles of the Treaty, as the Court held in its judgments in the similar cases of Vougioukas and Stöber and Piosa Pereira, (43) to which I refer.

V - Conclusion

54. In view of the foregoing, I propose that the following reply be given to the national court:

(1) The terms `periods of paid work and equivalent periods completed in the Netherlands before 1 July 1967' in Annex VI, Part concerning the Netherlands, point 4(a), and `periods of paid employment and periods treated as such completed in the Netherlands before 1 July 1967' in point 4(c), of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended and updated by Council Regulation (EEC) No 2001/83 of 2 June 1983 and Council Regulation (EEC) No 1248/92 of 30 April 1992 respectively, include compulsory or voluntary military service in the Netherlands armed forces provided that such service is regarded by the WAO as a period of paid work or equivalent period. Subject to that proviso, the fact that military service was performed outside the territory of the Netherlands is immaterial.

(2) Examination of the provisions of Annex VI, as interpreted above, has revealed nothing capable of affecting their validity by reference to Articles 48 and 51 of the EC Treaty.

(3) Articles 48 and 51 of the EC Treaty must be interpreted as meaning that they preclude periods of military service performed in the Netherlands armed forces from not being taken into account for the purpose of calculating invalidity benefit payable by the competent Netherlands institution in relation to an employed person who has exercised his right to freedom of movement in the territory of the Community, whereas national legislation permits such periods to be taken into account in relation to employed persons who remain in the Netherlands.

(1) - See the codified text of that regulation contained in Council Regulation (EEC) No 2001/83 of 2 June 1983 (OJ 1983 L 230, p. 6) and Council Regulation (EEC) No 1248/92 of 30 April 1992 (OJ 1992 L 136, p. 7).

(2) - In the Netherlands, civil servants and persons treated as such were originally insured against incapacity for work under the 1922 Pensioenwet (Law on pensions), which was replaced in 1965 by the Algemene Burgerlijke Pensioenwet (General Pensions Law, `ABPW'): see Case C-227/94 Olivieri-Coenen [1995] ECR I-3301, paragraph 5.

(3) - Incorporating the amendments made by Regulation (EEC) No 1390/81 (OJ 1981 L 143, p. 1).

(4) - Now Part J (originally Part F).

(5) - Translator's note: There is a difference in the wording of the successive English language versions; `periods of paid work and equivalent periods' becomes `periods of paid employment and periods treated as such'. For the sake of convenience, the wording `periods of paid work and equivalent periods' will be used throughout the Opinion, since the differences are immaterial in this case.

(6) - Cited in footnote 2.

(7) - Case C-71/93 [1994] ECR I-1101.

(8) - See, for example, Case C-340/94 De Jaeck [1997] ECR I-461, paragraph 17.

(9) - See Case C-266/95 García [1997] ECR I-3279, paragraph 27; De Jaeck, cited in footnote 7, paragraph 18; Joined Cases C-4/95 and C-5/95 Stöber and Piosa Pereira [1997] ECR I-511, paragraph 36; and Case 41/84 Pinna [1986] ECR 1, paragraph 20.

(10) - This is why the abovementioned provisions refer, on the one hand, to `insurance periods' completed under the WAO and, on the other, to `periods of paid work etc.' completed before 1 July 1967, when the WAO came into force.

(11) - This is clear from the original wording of Annex V, Part F, point 4(a) of the regulation: `For the purposes of Article 46(2) of the regulation, periods of paid employment and periods treated as such completed under Netherlands legislation before 1 July 1967 shall also be considered as insurance periods completed under Netherlands legislation on insurance against incapacity for work.'

(12) - This footnote applies to the Greek and other language versions and relates to a discrepancy similar to that in English between `paid work' and `paid employment'.

(13) - See footnote 7.

(14) - Paragraphs 23 and 24. See also Case C-221/95 Hervein and Hervillier [1997] ECR I-609, paragraph 21.

(15) - Paragraph 28.

(16) - See footnotes 6 and 2 respectively.

(17) - Paragraphs 9 and 11.

(18) - Paragraph 19.

(19) - Paragraph 18.

(20) - That was also stressed by the Netherlands social security institution which was the defendant in the main proceedings (see the Opinion of Advocate General Lenz in that case, point 12).

(21) - See Case C-245/88 Daalmeijer [1991] ECR I-555, paragraph 13, and Case C-198/90 Commission v Netherlands [1991] ECR I-5799, paragraph 10.

(22) - See Case C-2/89 Kits van Heijningen [1990] ECR I-1755, paragraph 19; De Jaeck, cited above, paragraph 27, and Stöber and Piosa Pereira, cited above, paragraph 36.

(23) - Of course, if and in so far as military service is regarded as an insurance period under the law of the State where it is performed, the other Member States must recognize it as such for calculating the benefit payable, even if those periods did not have to be taken into account under their own legislation (see Joined Cases C-113/92, C-114/92 and C-156/92 Fabrizzi and Others [1993] ECR I-6707, paragraphs 22 and 25). Conversely, if they recognize it as such for their nationals, they must, under the same conditions, recognize military service performed in another Member State (see Case C-131/96 Romero [1997] ECR I-3659, paragraphs 33 and 36). Likewise, a `social advantage' within the meaning of Regulation No 1612/68 which is granted to nationals (the taking into account of periods of military service for determining seniority in an undertaking) must also be granted to migrant workers who have performed their military service in their homeland (judgment in Case 15/69 Südmilch v Ugliola [1969] ECR 363). However, an advantage which is granted to nationals who are called up, but which is not a `social advantage' within the meaning of Regulation No 1612/68 because it is closely linked with military service, does not have to be granted to migrant workers also (Case C-315/94 De Vos [1996] ECR I-1417, paragraphs 20 to 23). The above cases concerned the extension to migrant workers of rights which a Member State grants to those whom it calls up, and not an autonomous obligation, imposed on a Member State, to grant such rights to its own conscripts, as in the present case.

(24) - See Case C-282/91 De Wit [1993] ECR I-1221, paragraph 21. See also Case 300/84 Van Roosmalen [1986] ECR 3097, paragraphs 29 and 30, and Joined Cases 82/86 and 103/86 Laborero and Sabato [1987] ECR 3401, paragraph 24.

(25) - See Case 87/76 Bozzone [1977] ECR 687, paragraph 21.

(26) - See, for example, Case 66/85 Lawrie-Blum [1986] ECR 2121, paragraphs 16 and 17, and De Jaeck, cited in footnote 7, paragraphs 26 and 27.

(27) - See Case 53/81 Levin [1982] ECR 1035, paragraph 17.

(28) - See Van Poucke, cited in footnote 6, paragraph 17.

(29) - See Case C-308/94 Naruschawicus [1996] ECR I-207, paragraph 21.

(30) - See, for example, Case 149/79 Commission v Belgium (interim judgment) [1980] ECR 3881, paragraph 10, and (final judgment) [1982] ECR 1845, paragraph 7; Case 307/84 Commission v France [1986] ECR 1725, paragraph 12; and Case C-443/93 Vougioukas [1995] ECR I-4033, paragraphs 19 and 20.

(31) - See Case 149/79 Commission v Belgium [1982] ECR 1845, paragraphs 8 and 11.

(32) - See Commission v France, cited in footnote 29, paragraph 13.

(33) - See Lawrie-Blum, cited in footnote 25, paragraph 29.

(34) - See the Opinion of Advocate General Mancini in Commission v France, cited in footnote 29, point 5, and that of Advocate General Mayras in Case 2/74 Reyners [1974] ECR 631.

(35) - See also the Commission Declaration of 18 March 1988 concerning the application of Article 48(4), which mentions, in addition to the specific activities in question, diplomatic representation, employment in ministries, regional governments, central banks and legislative committees, etc.

(36) - See the Opinion of Advocate General Ruiz Jarabo Colomer in De Vos, cited in footnote 22, point 41.

(37) - In any case it is clear that, if persons who are called up wished to be considered employed persons in the wide sense, they would fall within the scope of paragraph 4.

(38) - See point 29 above.

(39) - See Vougioukas, cited in footnote 29, paragraph 30.

(40) - See paragraph 41.

(41) - OJ 1992 C 46, p. 1.

(42) - See paragraphs 32 and 33, which state that the differences between the national schemes and the resulting technical difficulties of coordination which originally justified this failure to act cannot justify indefinitely the lack of any coordination, and paragraph 34, which states that, by this failure to act, the Council has not fully discharged its obligation under Article 51.

(43) - Cited in footnote 29, paragraph 38 et seq., and footnote 8, paragraphs 36 to 39, respectively.