REPORT FOR THE HEARING
in Case C-188/90 *

I — Legal context of the dispute

Article 1(u) 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 consolidated by Council Regulation (EEC) No 2001/83 of 2 June 1983 (Official Journal 1983 L 230, p. 6, hereinafter referred to as 'the regulation') provides as follows:

'(i) "family benefits" means all benefits in kind or in cash intended to meet family expenses under the legislation provided for in Article 4(1)(h), excluding the special childbirth allowances mentioned in Annex II;

(ii) "family allowances" means periodical cash benefits granted exclusively by reference to the number and, where appropriate, the age of members of the family.'

Article 78(1) and (2) of the regulation provides that:

'1. The term "benefits", for the purposes of this article, means family allowances and, where appropriate, supplementary or special allowances for orphans and orphans' pensions except those granted under insurance schemes for accidents at work and occupational diseases.

2. Orphans' benefits shall be granted in accordance with the following rules, irrespective of the Member State in whose territory the orphan or the natural or legal person actually maintaining him is resident:

(a) ...

(b) for the orphan of a deceased employed or self-employed person who was subject to the legislation of several Member States:

(i) in accordance with the legislation of the Member State in whose territory the orphan resides provided that, taking into account, where appropriate, the provisions of Article 79(1)(a), a right to one of the benefits referred to in paragraph 1 is acquired under the legislation of that State; ...'

By judgment of 9 July 1980 in Case 807/79 (*Gravina* v *Landesversicherungsanstalt Schwaben* [1980] ECR 2205) the Court

* Language of the case: German.

interpreted Article 78(2)(b)(i) of the regulation as meaning that where the amount of the benefits actually received in the Member State of residence is less than that of the benefits provided for by the legislation of the other Member State alone the orphan is entitled to supplementary benefits, payable by the competent institution of the latter State, equal to the difference between the two amounts.

Pursuant to Article 81(a) of the regulation, the Administrative Commission on Social Security for Migrant Workers adopted on 17 October 1985 Decision No 129 concerning the application of Article 78 of the regulation.[1] Paragraph 3 of the decision states that where the amount of the benefits granted to an orphan under the legislation of one Member State is higher than the amount of benefits due under the legislation of another Member State regarded as competent according to the provisions of Article 78 of the regulation, the right to benefits under the legislation of the former Member State must be maintained in so far as the amount of such benefits exceeds the amount actually received under the legislation of the latter Member State. Pursuant to paragraph 5 of the decision, the supplement to the benefits which the competent institution of the first Member State must award is determined taking account solely of orphans in respect of whom an event confers rights, simultaneously, under the legislation of one Member State alone and under the legislation of another Member State in accordance with the Community provisions.

II — Facts and procedure

The plaintiffs in the main proceedings, who have always been resident in Italy, are the children of a worker of Italian nationality who died on 29 August 1983 after completing periods of insurance both in Italy and in Germany (123 and 78 calendar months respectively).

Since 1 September 1983 the Italian insurance institution, the Istituto Nazionale della Previdenza Sociale (INPS), has been paying the plaintiffs an orphan's pension of LIT 73 960 per month and per child, together with family supplements amounting to a monthly sum of LIT 19 760 per child.

After first refusing benefit, the German institution, the defendant in the main proceedings, decided by notice dated 7 May 1987 to grant the defendants a supplement for the period from 1 September 1983 to 31 December 1985. The sum granted is equal to the difference between the orphan's pension calculated on the basis of the German insurance contributions and according to German legislation, on the one hand, and the pension paid by the INPS, including family supplements, on the other.

The plaintiffs brought an action for the annulment of that decision. When their action was dismissed at first instance they appealed to the Bayerisches Landessozialgericht, which referred the following questions to the Court of Justice:

'1. What benefits of the Italian insurance institution are to be taken into account in calculating the supplement to the orphan's pension payable by the German institution?

2. In particular, are the monthly family supplements of LIT 19 760 per child

1 — OJ 1986 C 141, p. 7.

paid by the Italian institution to be included?'

The order of the national court was lodged at the Court Registry on 11 June 1990.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice, written observations were submitted by:

Mario and Marzio Doriguzzi-Zordanin, represented by Luciano Fazi, Secretary of the Patronato ACLI (Associazioni Cristiane dei Lavoratori Italiani), Augsburg,

the Landesversicherungsanstalt Schwaben, represented by Mr Schachtner, Erster Direktor, Augsburg,

the Government of the Kingdom of Belgium, represented by P. Busquin, Minister of Social Affairs, acting as Agent,

the Commission of the European Communities, represented by Maria Patakia and Bernd Langeheine, members of its Legal Service, acting as Agents.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court, by decision of 9 July 1991, assigned the case to the Second Chamber pursuant to Article 95 of the Rules of Procedure, and opened the oral procedure without any preparatory inquiry.

III — Written observations submitted to the Court

The *plaintiffs* in the main proceedings submit that family supplements are not a component of the orphan's pension but are a separate benefit comparable to the German family allowances paid in respect of dependent children without regard to any event conferring entitlement to insurance benefits.

Accordingly, when the legislation applicable in a Member State provides that several institutions are responsible for granting orphans' pensions and family allowances, the responsibilities at national level must be arranged in such a way that the total benefits to be paid by each of those institutions shall not be less than the benefit supplement mentioned above.

In order to apply the German provisions the German insurance institutions must categorize the benefits paid in the other States pursuant to Regulation No 1408/71. The competent institutions must therefore take separate account of the orphans' pensions and family allowances paid by the authorities of another Member State.

The plaintiffs are thus entitled to receive a supplement equal to the difference between the pensions and family allowances which they would be able to claim if they resided in Germany, by virtue of the applicable legislation and pursuant to the regulation, and all the orphans' pensions or family allowances which are actually granted to them by the institution of the competent Member State, by virtue of the applicable

legislation in that State and pursuant to the regulation.

The *Landesversicherungsanstalt Schwaben* takes the view that the Italian family supplement paid with the orphan's pension forms part of the 'benefits actually received' by the orphan and should therefore be brought into account in calculating the supplement payable by the German institution. It is clear from the declaration made by the Italian Republic under Article 5 of the regulation that both the Italian orphan's pension and the Italian family supplement make up the 'benefits' for the purposes of Article 78.

The *Landesversicherungsanstalt* contends that, whereas payment of the Italian family supplement is based on the principle that it continues to be needed as long as the family income remains below a given ceiling, the orphan's pension in the strict sense of the term has the further aim of offsetting previous losses of income. A comparison between German and Italian legislation shows that the legislation is based on the principle that orphans need the basic protection of a fixed sum which may be supplemented as the individual's circumstances require. In any case, such a comparison shows that a formalistic approach does not produce a sensible result. It is crucial to establish which 'benefits' under Article 78 of the regulation are provided for by national legislation in the event of the death of the insured worker. The adoption of the purposive approach cannot be challenged on the ground that the institutions responsible for paying the family benefits are not the same in the various Member States. The Landesversicherungsanstalt was therefore right to compare the total of those benefits with the orphan's pension which it would be required to pay under its national law if the plaintiffs were resident in Germany.

According to the *Belgian Government* the recipients of a benefit supplement may not be deprived of rights acquired under the laws of a Member State, but the system must not lead to the unjustified overlapping of benefits. Pensions, and supplementary pensions, for children and orphans must be regarded as benefits comparable to family supplements. Furthermore, family supplements are expressly mentioned in Article 78 and are a component part of orphans' pensions. In its view, the German benefits must be granted after deduction of any supplements of the same kind granted in Italy, and hence the family supplements must be brought into account in the calculation.

According to the *Commission* the benefits covered by Article 78 are clearly defined in paragraph (1) thereof. Since Article 78(2)(b)(i) can apply only to benefits falling within that statutory definition, it follows that only those benefits can be taken into account in calculating the difference to be paid by the German institution.

The fact that the Italian institution made entitlement to the benefit conditional upon the surviving parent's being gainfully occupied does not preclude the view that the benefits are to be regarded as falling within the scope of Article 1(u) of the regulation, since the family supplements for which the regulation provides are closely linked to gainful occupation.[2] The question

2 — See judgment in Case 115/77 Laumann v Landesversicherungsanstalt Rheinprovinz [1978] ECR 805, paragraphs 7 and 8.

whether benefits in cash are granted solely by reference to the number and, where appropriate, the age of members of the family must always be answered solely in terms of the persons actually covered by the social security scheme.

In view of the definition of 'family allowances' and 'family benefits' given in Article 1(u) of the regulation and in the case-law of the Court,[3] the Commission submits that the benefits granted by the Italian institution must be considered to be 'family allowances' within the meaning of Article 78(1) of the regulation, read in conjunction with Article 1(u)(ii) thereof, and must be brought into account in calculating the difference payable.

Turning to the calculation of the difference, the Commission argues that Article 78(1) of the regulation embraces not only family allowances of which the claimant is the orphan himself but also precisely those family allowances which are granted to the person maintaining him. It is, indeed, absolutely necessary that it should do so in order to ensure the protection of the orphan concerned; if it were otherwise, the increased family allowances granted in various Member States to persons maintaining the orphan in lieu of an orphan's pension would not be subject to the rule under Article 78(1) for determining the competent State. Since the provisions in question themselves have regard to the orphan's position as a whole, including the benefits received on his behalf by the person maintaining him, any isolated comparison of individual benefits would not be consistent with the aim of those provisions. Instead of adopting the purely formalistic approach which seems appropriate in the case of the provisions against overlapping benefits in Article 79(3), preference should therefore be given, in the context of Article 78, to the purposive approach, concentrating not on the person of the claimant but on the aim pursued in awarding the benefit.

The Commission proposes that the following answers be given to the questions referred to the Court:

'1. Article 78(1) must be interpreted as meaning that family supplements such as those which were granted under Italian legislation during the period material to the dispute are "family allowances" within the meaning of that article and must therefore be brought into account in calculating any differential amount which may be payable in accordance with the rulings of the Court of Justice.

2. Article 78(2) must be interpreted as meaning that, for the purpose of calculating the differential amount to be paid in accordance with the rulings of the Court by the Member State other than the competent Member State, a comparison must be made between the respective totals of all the benefits to which Article 78(1) refers.'

J. L. Murray
Judge-Rapporteur

3 — See in particular the judgment in Case 313/86 Lenoir v Caisse d'Allocations Familiales des Alpes-Maritimes [1988] ECR 5391, paragraphs 8 to 11.