OPINION OF ADVOCATE GENERAL LENZ

delivered on 6 May 1993 *

Mr President,
Members of the Court,

A — Introduction

1. The case before you concerns the interpretation of Articles 4 and 68 of Council Regulation (EEC) No 1408/71 [1] and Article 7 of Council Regulation (EEC) No 1612/68. [2]

2. The applicant in the main proceedings, Mr Acciardi, is an Italian national who was employed in the Netherlands and is resident there. His wife and son live in Italy. In 1985 he became unemployed and received benefits under the Werkloosheidswet, the Netherlands Law on Public Unemployment Benefits, for the maximum period allowed thereunder.

3. In February 1988 he was granted benefits under the Wet inkomensvoorziening oudere en gedeeltelijk arbeidsongeschikte werkloze werknemers, the Netherlands Law on the Provision of Income for Unemployed Workers who are Elderly or suffering from Partial Incapacity to Work ('the IOAW'). [3] Under Article 4(1) of the IOAW entitlement to benefit under that law is subject to the condition that the monthly income of the person concerned and, where applicable, that of his spouse is below the basic amounts laid down in the law. Under Article 4(3), for an unemployed worker and his spouse, half each of the net basic amount is equal to half of the net minimum wage. For a single unemployed worker with a child the net basic amount equals 90% of the net minimum wage, while for an unemployed worker without children it is 70% of the net minimum wage.

4. The benefit payable is calculated in principle by deducting the recipient's income from the relevant basic amount (Article 9(1) of the IOAW). Under Article 26(1) of the IOAW the benefit is granted only if the person concerned meets certain conditions aimed at his reintegration in working life (such as the obligation to seek work), unless this is impossible on health grounds or for other reasons. The same conditions apply in principle to the spouse of the person concerned (Article 26(2) of the IOAW).

5. Under Article 4(2) of the IOAW the unemployed worker and his spouse have

* Original language: German.

1 — 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 (OJ 1983 L 230, p. 6) and last amended by Council Regulation (EEC) No 1249/92 of 30 April 1992 (OJ 1992 L 136, p. 28).

2 — Council Regulation (EEC) No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition 1968 (II), p. 475).

3 — By way of clarification, it should be noted that the benefits under this law are paid to two categories of persons: elderly unemployed persons on the one hand and unemployed persons suffering from partial incapacity to work on the other.

equal rights to the benefit in question. On application by one or both of the spouses, each is paid half of the benefit.

6. Article 5 of the IOAW lays down that an unemployed worker living outside the Netherlands has no claim to the benefit in question. If only the spouse lives abroad, she has no claim to benefit; in that case the unemployed worker will be treated as though he were single (Article 5(2) of the IOAW).

7. The application of the abovementioned provision by the competent Netherlands authorities had the consequence that Mr Acciardi was deemed to be a single person without children. [4] He referred this decision to the courts. The Raad van State, which has to deliver judgment in the dispute, submitted the following questions to the Court for a preliminary ruling:

'1. Must Article 4(1) of Regulation (EEC) No 1408/71, which provides that that regulation applies to certain branches of social security, be interpreted as meaning that a scheme such as that contained in the IOAW, which has characteristics both of social security and of social assistance, falls within the scope of that regulation?

2. If so, must Article 68(2) of Regulation (EEC) No 1408/71 be interpreted as preventing a Member State from maintaining a legislative provision under which the benefit of a Community national residing in the Netherlands who is to be regarded as being an unemployed worker for the purposes of the IOAW and whose spouse lives in another Member State or resides there other than on a temporary basis, is determined without taking the spouse into account?

3. If the reply to the first question is in the negative, does the prohibition of discrimination on grounds of nationality laid down in Community law preclude the application of a legislative provision under which the benefit of a Community national residing in the Netherlands who is to be regarded as being an unemployed worker for the purposes of the IOAW and whose spouse lives in another Member State or resides there other than on a temporary basis, is determined without taking the spouse into account?'

B — Analysis

I — *Scope of Regulation No 1408/71*

8. In its first question, the national court seeks in essence to ascertain whether a scheme such as that of the IOAW falls within the scope of Regulation No 1408/71.

4 — As the representative of the Netherlands Government explained during the oral procedure, classification of the applicant as a worker without children is based on Article 3(7) of the IOAW. Under that provision a child belonging to the household of a third person is not deemed to be a 'child' for the purposes of the IOAW. During the hearing, counsel for Mr Acciardi stated that in the main proceedings Mr Acciardi had claimed in the alternative that he should at least be classified as a worker *with* a child. It is beyond dispute that the questions submitted do not address this issue, so that the Court is not required to rule thereon. However, the following observations on the questions from the national court are also relevant to the question of whether the applicant's son should be taken into account

9. Pursuant to Article 4(1)(g) of Regulation No 1408/71, the regulation applies to all legislation concerning the branch of social security relating to 'unemployment benefits'. Article 4(4) of the regulation provides that it shall not apply to social assistance.

10. The Netherlands Government considers that IOAW benefits should be classified as social assistance, since the IOAW belongs to a group of laws designed to guarantee recipients a minimum means of subsistence. According to the Commission, [5] already when the law was being debated in Parliament the Netherlands Government expressed the view that it was a social assistance law that did not fall within the scope of Regulation No 1408/71.

11. As the Court has consistently held, the reply to the question whether a benefit falls within the scope of Regulation No 1408/71 'essentially depends on the fundamental characteristics of the benefit, in particular its purpose and the conditions for its grant, and not on whether or not the national legislation describes the benefit as a social security benefit'. [6]

12. It is not difficult to see that the IOAW benefit has certain features usually characteristic of a social assistance benefit. As the Netherlands Government indicated in its observations, the net basic amounts granted under the IOAW correspond to the amounts provided for by the Algemene Bijstandswet (the General Law on Social Assistance, 'the ABW'). In both cases the maximum net basic amount is equal to the net minimum wage (for a married couple). Both laws are therefore intended to provide recipients with a specific sum sufficient to cover their basic needs. For that reason the other income of the person concerned (and, where applicable, that of his spouse) is taken into consideration when calculating the benefit.

13. The fact that a benefit has certain features resembling social assistance does not, however, necessarily lead to the conclusion that Regulation No 1408/71 does not apply to it. The Court has held on several occasions that

'whilst it may seem desirable from the point of view of applying Community regulations on social security to establish a clear distinction between legislative schemes that fall respectively within social security and assistance, the possibility cannot be excluded that by reason of the persons covered, its objectives and its methods of application, national legislation may, at one and the same time, have links to both those categories'. [7]

5 — See paragraph 17 in the written observations of the Commission of 9 June 1992.

6 — Case C-45/90 *Paletta* [1992] ECR I-3423, paragraph 16. See also the recent judgment in Case C-111/91 *Commission* v *Luxembourg* [1993] ECR I-817, paragraph 28.

7 — Case C-356/89 *Newton* [1991] ECR I-3017, paragraph 12. See also Case 187/73 *Callemeyn* [1974] ECR 553, paragraph 6, and Case 39/74 *Costa* [1974] ECR 1251, paragraph 6.

14. According to the case-law of the Court, a benefit is a social security benefit within the meaning of Regulation No 1408/71 if it is awarded on the basis of legally defined conditions and irrespective of any individual assessment of the needs of the person concerned that would give the authorities scope for the exercise of discretion. Moreover, the benefit must relate to one of the risks listed in Article 4(1) of Regulation No 1408/71. In its recent judgment in *Commission* v *Luxembourg* the Court summarized this case-law as follows:

'The Court has often stated that a benefit may be regarded as a social security benefit in so far as it is granted, without any individual and discretionary assessment of personal needs, to recipients on the basis of a legally defined position and provided that it concerns one of the risks expressly listed in Article 4(1) of Regulation No 1408/71.' [8]

15. It is obvious that the IOAW confers upon claimants a 'legally defined position'. [9] If the conditions laid down in the law are met, the claimant is entitled to benefit. The competent authorities may have a certain scope for assessment when examining whether these conditions, and especially those of Article 26 of the IOAW, are met. This does not, however, mean that the grant of the benefit is within the discretion of the authorities.

In my opinion, no particular importance can be attached to this circumstance. In the oral procedure the representative of the Netherlands Government rightly pointed out that in an advanced welfare state it is not unusual for recipients of social assistance to have a legal right to it. [10]

16. What this criterion means is, in my opinion, much clearer from the judgment of the Court in the *Scrivner* case, [11] which related to the scheme for a guaranteed minimum means of subsistence under Belgian law. The Court found that there was entitlement to this benefit and that it was granted to any person who did not have adequate means and was unable to obtain them in any other way. It concluded that:

'it thus adopts need as an essential criterion for its application and does not make any stipulation as to periods of work, contribution or affiliation to any particular social security body covering a specific risk'. [12]

The Court therefore ruled that the benefit in question did not fall within the scope of Regulation No 1408/71.

Further light is shed by the judgment in the *Piscitello* case, [13] where the Court ruled that

8 — Case C 111/91, cited in footnote 6, paragraph 29, and Case C 78/91 *Hughes* [1992] ECR I 4839, paragraph 15.

9 — The phrase used in the *Callemeyn* judgment, cited in footnote 7, at paragraph 7.

10 — In Germany, for example, there is a legally enforceable right to social assistance

11 Case 122/84 [1985] ECR 1027.

12 *Scrivner*, paragraph 20.

13 Case 139/82 [1983] ECR 1427.

a benefit such as the social aid pension provided for under Italian law was to be regarded as a social security benefit. It based its decision primarily on the fact that the relevant law made no provision for 'individual assessment, which is a feature of social assistance'. [14]

17. If these criteria are applied to the present case, it will be found that the Netherlands measure does not provide for the circumstances of the individual case to be examined. The conditions for the payment of benefit are listed exhaustively in the law and, as already mentioned, the authorities have no discretion whatever in this regard.

18. As to the question of the relevance of need, it is necessary to look at the way in which the personal circumstances of beneficiaries are taken into consideration in the grant of IOAW benefits. As already mentioned, the Netherlands Government relies particularly on the parallels between the IOAW and the ABW to support its contention that the IOAW is outside the ambit of Regulation No 1408/71. According to its observations, benefits on the basis of this general social assistance law are paid only if the person concerned is unable to support himself out of his own resources. Consequently, his other assets as well as his income are taken into consideration when assessing need. By contrast, the payment of benefits under the IOAW depends solely on whether the *income* of the person concerned (and, where applicable, that of his spouse) exceeds a particular amount. [15] This means that a person with little or no income may obtain benefits under the IOAW even if he has substantial assets (such as valuable building land). Although no statutory limit has been placed on the generosity of Member States in this regard, I seriously doubt whether such a benefit could be classified as 'social assistance'.

It is also necessary to refer to Article 9(4) and (5) of the IOAW. If the person concerned previously drew benefits under the Werkloosheidswet and those benefits (including any supplements) were less than the IOAW benefits, the latter are reduced accordingly on the basis of these provisions. This shows quite clearly that the IOAW does not hinge primarily on the need of the person concerned, which obviously does not depend on the income he had *before* he claimed benefits under the IOAW.

19. The latter circumstance shows instead that the purpose of the IOAW, at least as regards the elderly unemployed persons for whom it caters, is to ensure that, even after the expiry of the maximum period for benefits under the general law on unemployment benefits, these persons receive corresponding

14 — *Piscitello*, paragraph 11.

15 — The IOAW also contains more favourable provisions than the ABW with regard to the taking of income into consideration (cf. Article 8 of the IOAW).

benefits or at least a minimum means of subsistence and are not obliged to rely on the general social assistance scheme. It is therefore, in my opinion, a scheme which is clearly related to the risk of unemployment mentioned in Article 4(1) of Regulation No 1408/71. This close connection is reinforced by Article 26 et seq. of the IOAW, which aim to promote the reintegration of the persons concerned into working life. Finally, it should be noted that assistance is granted only if the beneficiary is less than 65 years of age (that is, has not reached pensionable age).

The Netherlands Government's objection that benefit under the IOAW does not depend on the fact of being unemployed but on the continuance of unemployment is not persuasive. Every unemployment benefit is paid only so long as the person concerned is unemployed. Indeed, this argument confirms the close relationship between benefits under the IOAW and the unemployed status of the beneficiary.

20. The argument of the Netherlands Government that IOAW benefits are non-contributory can be dealt with briefly. Article 4(2) of Regulation No 1408/71 provides that the regulation applies to both contributory and non-contributory social security schemes. The Court has confirmed this on a number of occasions. [16]

21. The fact that the IOAW is not specified in the declarations notified by the Netherlands in accordance with Article 5 of Regulation No 1408/71 does not alter the fact that, for the reasons already discussed, the IOAW falls within the scope of the regulation. Laws specified in such a declaration are automatically covered by Regulation No 1408/71. [17] However, as the Court has ruled, national legislation may lie within the scope of the regulation even if it is not mentioned in the declaration made by a Member State. [18]

22. The reply to the first question should therefore be that a scheme such as that laid down by the IOAW falls within the scope of Regulation No 1408/71.

II — *Applicability of Article 68(2)*

23. As the IOAW falls within the scope of Regulation No 1408/71 because it relates to unemployment, the provisions of the regulation concerning unemployment (Article 67 et seq.) apply to the IOAW. The first sentence of Article 68(2) of the regulation contains the following provision on the calculation of benefits:

'The competent institution of a Member State whose legislation provides that the

16 — See for example Joined Cases 379/85 to 381/85 and 93/86 *Giletti* [1987] ECR 955, paragraph 7

17 — Case 35/77 *Beerens* [1977] ECR 2249, paragraphs 9 and 10.

18 — Case 70/80 *Vigier* [1981] ECR 229, paragraph 15.

amount of benefits varies with the number of members of the family, shall take into account also members of the family of the person concerned who are residing in the territory of another Member State, as though they were residing in the territory of the competent State.'

It should be noted that, under Article 1(f) of the Regulation No 1408/71, 'members of the family' means persons recognized as such by the national legislation (in this case the IOAW). However, if the said legislation regards a person as a family member only if that person lives under the same roof as the worker, this condition is deemed to be fulfilled if the person in question is mainly dependent on the worker. Whether these conditions are satisfied is a matter for the national court but they do appear to be met in the present case. The following remarks are therefore based on the assumption that Mr Acciardi's wife is a family member within the meaning of Article 68(2).

24. The Commission has rightly pointed out that at first sight it may appear doubtful whether the first sentence of Article 68(2) applies to the present case. It manifestly relates to national provisions under which the benefit payable to the recipient is increased if he has to provide for members of his family. However, in the case of a married unemployed worker it will be seen that, under the IOAW, the recipient's benefits are not increased, but the spouse herself becomes entitled. I agree with the Commission that these special features do not preclude the application of the first sentence of Article 68(2). Firstly, it must be observed that for an unmarried claimant the level of benefit under the IOAW undoubtedly depends on the number of members of the family: for a childless worker the net basic amount is 70% of the net minimum wage, but for a worker with a child it is 90%. [19] The same applies to married claimants. The law gives the spouse of an unemployed worker her own entitlement to half of the benefit payable (Article 4(2) of the IOAW). As the Commission has stated in its written observations, the spouse still has no independent right, but a derived right. It is clear from Article 5(2) of the IOAW that the spouse has a right only if the unemployed worker is entitled to draw benefit under the IOAW. The spouse's entitlement therefore stands or falls with the entitlement of the unemployed worker.

Bearing this dependent relationship in mind, it follows that an unmarried worker can expect a maximum net basic amount of 90% of the net minimum wage, whereas the corresponding amount for a married claimant, together with his spouse, is 100%. The level of benefits under the IOAW therefore depends on the number of members of the family within the meaning of the first sentence of Article 68(2).

25. The reply to the second question should therefore be that, in relation to the grant of benefits under a law such as the IOAW, the first sentence of Article 68(2) of Regulation No 1408/71 must be interpreted as meaning that it precludes a provision whereby the calculation of benefits does not take account of a spouse living in another Member State.

19 — See paragraph 3 above.

26. During the oral procedure the representative of the Netherlands Government claimed that the Netherlands would face serious financial consequences if spouses living abroad had to be taken into consideration in awarding benefits under the IOAW. Although it would certainly not be acceptable to make the interpretation of Community law conditional on the economic consequences which might ensue from such interpretation, I consider this objection worthy of closer examination.

Firstly, in response to a question from the Court, the representative of the Netherlands Government was unable to quantify even approximately the consequences he feared. Secondly, the classification of benefits under the IOAW as social security benefits is based on the settled, consistent case-law of the Court, which must also have been known to the Netherlands legislature. Above all, however, it is difficult to see what the adverse repercussions of any such interpretation might actually be. As I remarked in the oral procedure, Mrs Acciardi would undoubtedly have the right to move to the Netherlands to live with her husband. If she exercised that right, the full amount of the benefit claimed by Mr Acciardi in the main proceedings would unquestionably have to be paid.

27. More important, in my view, is the question whether this interpretation can be reconciled with the special conditions laid down by the IOAW for the grant of benefits. As we have seen, Article 26 of the IOAW in principle requires the recipient and his spouse to seek employment. It is clear that Mrs Acciardi is unlikely to be able to fulfil in the Netherlands the obligations placed upon her by this provision.

In its written observations the Commission stated that these difficulties could be resolved by applying the principles developed in the *Bronzino* [20] and *Gatto* [21] cases, which revolved around the question whether a migrant worker living in Germany was entitled to child allowance for unemployed children aged between 16 and 20 years even if they lived abroad. The German Government claimed that the provisions of German law restricting the payment of benefit to children living in Germany was objectively justified. The German authorities are able to arrange training or jobs only if the young person is registered with the careers advisory service or employment office in Germany. If it were seen that the German authorities had to pay child allowance in such cases, the employment agencies in other Member States would have no particular reason rapidly to find work for the person concerned ahead of others. [22]

The Court ruled that it was sufficient if the child was registered with the employment office of the Member State in which he resided. [23] It rejected the German Government's argument that this made it impossible for the German authorities to relieve themselves of

20 - Case C 228/88 [1990] ECR I 531.

21 - Case C 12/89 [1990] ECR I 557 (summary publication)

22 - See the Report for the Hearing in the *Bronzino* case, [1990] ECR I 537.

23 *Bronzino*, cited in footnote 20, paragraph 12.

the obligation to pay benefits by offering employment to the child. It nevertheless remarked that this argument 'may be relevant with regard to unemployment benefits'. [24]

I share the Commission's view that in the present case it is sufficient for Mrs Acciardi to register with the employment services in Italy. The slight reservations which might arise in this connection from the passage in the *Bronzino* judgment I have just quoted would not be appropriate in the present case for the following reasons. Firstly, if a spouse living abroad is taken into account, this means that the spouse's income will also be taken into account when calculating the benefits under the IOAW. It is quite possible that this method of calculation will be less advantageous to the unemployed worker living in the Netherlands than the method currently applied. [25] Moreover, the conditions stated in Article 26(1) for the unemployed worker apply only to a very limited extent. According to Article 26(2) of the IOAW, the spouse has the obligations listed in the first paragraph only if his or her reintegration into working life can 'reasonably' be expected on the basis of a recent employment record; if the spouse's last employed activity dates back more than two years, these obligations do not apply. By contrast with the situation in the *Bronzino* and *Gatto* cases, in the present case there are ways in which the Netherlands authorities can relieve themselves of the obligation to pay benefits other than by offering employment to the spouse: as we have seen, it is sufficient if the unemployed worker himself is found a job with an adequate income.

24 — Bronzino, paragraph 14. The *Bronzino* and *Gatto* cases concerned the interpretation of Article 73 of Regulation No 1408/71, which relates to 'family benefits'.

25 — If the spouse has a sufficiently high income, the unemployed worker may lose his entitlement entirely.

III — *Violation of prohibition of discrimination*

28. The third question relates to the possible violation of the prohibition of discrimination on grounds of nationality. As the Court has found, the general principle of equal treatment in Article 7 of the EEC Treaty was applied specifically, with regard to freedom of movement for workers within the Community, in Article 48 of the EEC Treaty. This provision was in turn implemented by Regulation No 1612/68, which provides in Article 7(2) that in the host State a worker who is a national of another Member State must enjoy the same social and tax advantages as national workers. [26] The question from the national court therefore seeks an interpretation of Article 7(2) of that regulation.

29. As the national court raised this question only in the event of a negative reply to the first question, in the light of the opinion I have expressed there is no need to examine this question. In case the Court should take a different view, I shall examine the issues raised by this question below in the alternative.

A reply to the third question would be required not only in the event of a negative

26 — See Case 316/85 *Lebon* [1987] ECR 2811, paragraph 10.

reply to the first question (that is, if the benefits under the IOAW were to be classified as social assistance benefits). As counsel for Mr Acciardi has stated, an answer to this question would also be useful if the reply to the first question were in the affirmative, as I have proposed, but the second question were answered in the negative. As regards this eventuality (which I shall not consider further), it may be observed that it is quite possible for a benefit to fall within the scope of both Regulation No 1408/71 and Regulation No 1612/68. [27]

30. Pursuant to Article 7(2) of Regulation No 1612/68, a worker from another Member State is entitled to the same 'social and tax advantages' as national workers in the Member State in which he resides. The Court has consistently held that this phrase covers all advantages

'which, whether or not linked to a contract of employment, are generally granted to national workers primarily because of their objective status as workers or by virtue of the mere fact of their residence on the national territory and whose extension to workers who are nationals of other Member States therefore seems likely to facilitate the mobility of such workers within the Community'. [28]

This definition is so broad that it may even cover social assistance benefits. [29]

31. In the present case this question need not be examined further, as the Netherlands Government itself has stated that the IOAW benefits are to be regarded as advantages within the meaning of Article 7(2) of Regulation No 1612/68. The representative of the Netherlands Government endeavoured to qualify this statement towards the end of the oral procedure in a rather remarkable way by pointing out that Mr Acciardi may possibly not (now) be a 'worker' within the meaning of this provision. Even if this argument were accepted, the result would be the same because there can be no doubt that the fact of his unemployment cannot alter his status as a worker within the meaning of the law.

32. According to the wording of the law, the Netherlands scheme does not contemplate the nationality of the persons concerned. An unemployed worker of Netherlands nationality not living in the Netherlands is therefore not entitled to draw benefits under the

27 — See Case C 111/93, cited in footnote 6, paragraph 21, and the Opinion of Advocate General Jacobs delivered in that case on 16 December 1992 (particularly paragraphs 32 and 34). See also my Opinion delivered on 12 January 1993 in Case C 310/91 *Schmid* [1993] ECR I 3011, point 54 et seq.

28 — See for example Case 249/83 *Hoeckx* [1985] ECR 973, paragraph 20.

29 — See Cases 122/84 and 249/83, cited in footnotes 11 and 28 respectively, which related to a benefit designed to ensure generally a minimum means of subsistence.

IOAW, even if he meets all the other conditions. If both the unemployed worker and his spouse have Netherlands nationality, he is also treated as a single person if his spouse lives abroad. Claimants who are Netherlands nationals and those from other Member States are therefore treated in the same manner.

33. According to the case-law of the Court, the rules on equal treatment prohibit 'not only manifest discrimination based on nationality, but also all concealed forms of discrimination which, by the application of other criteria of differentiation, achieve in fact the same result'. [30] As the problem of family members living outside the Netherlands is likely to arise primarily for migrant workers, [31] it could be argued that the IOAW scheme leads to concealed discrimination against workers from other Member States.

34. I am, however, of the opinion that such a conclusion would not be appropriate in the present case, as the link between the IOAW and the place of residence appears to be objectively justified. If the benefits under the IOAW are social assistance benefits, [32] it is correct that they should serve to support persons living in the State in question. The Netherlands Government has rightly pointed out that social assistance schemes are typically conditional on the person concerned having his place of residence (or abode) in the country.

Under Article 10 of Regulation No 1612/68 the spouse and certain other members of the family of the worker concerned have the right to live with him. If they exercise that right, the full benefits under the IOAW accrue to the person concerned. If they do not, it does not seem unfair to require them to seek any necessary support from the State in which they live.

35. This conclusion is, in my opinion, supported by the case-law of the Court. The *Hoeckx* case, for example, related to a benefit which did not fall within the scope of Regulation No 1408/71; the benefit was granted under the Belgian rules to nationals of other Member States only if they had lived in Belgium for at least five years. The Court ruled on the basis of Article 7(2) of Regulation No 1612/68 that the grant of such a social advantage may not be made subject to the requirement that the claimant 'should have actually resided within the territory of a Member State for a prescribed period *where that requirement is not imposed on nationals of that Member State*'. [33]

30 — Case 152/73 *Sotgiu* [1974] ECR 153, paragraph 11. See also for example Case 175/88 *Biehl* [1990] ECR I-1779, paragraph 13, and Case 111/91, cited in footnote 6, paragraph 9.

31 — See Case 41/84 *Pinna (I)* [1986] ECR 1, paragraph 24.

32 — I would remind the Court that, in the context of the discussion of the third question in the alternative, I am assuming this to be the case.

33 — Case 249/83, cited in footnote 28, paragraph 25 (emphasis added).

The *Bernini* case concerned the question whether the Netherlands was obliged to grant benefits to an Italian national studying in Italy. Under Netherlands law only Netherlands nationals and (in certain circumstances) foreign students with their residence in the Netherlands could claim assistance. In this case too, the Court focused on the fact that the residence requirement did not apply to nationals of the Member State in question (the Netherlands). [34]

36. The *Frascogna* judgment [35] also confirms the conclusion that the grant of benefits within the meaning of Article 7(2) of Regulation No 1612/68 may be made subject to the requirement that the person concerned resides in the State granting the benefits. That case concerned the question whether an Italian national was entitled to a particular old-age benefit provided under French law. The claimant lived in France with her son, who was employed there. Under French law the benefit was granted to French nationals. Foreigners were entitled only if they came from a State which had a reciprocal agreement with France or if they had lived in France for at least 15 years. In either case the person in question had to be resident in France.

The Court ruled on the basis of Article 7(2) that 'any discrimination against the relatives in the ascending line of a worker from another Member State where those relatives *have exercised the right conferred upon them under Article 10 of Regulation No 1612/68 to install themselves with the worker*' is prohibited. [36]

37. In Case 111/91 *Commission* v *Luxembourg* [37] Advocate General Jacobs took the view that Luxembourg was entitled to make the grant of childbirth benefit subject to the condition that the mother was resident in Luxembourg at the time of the birth. [38]

38. During the oral procedure in the present case, by contrast, the Commission argued that Mr Acciardi's claim could also be based on Article 7(2) of Regulation No 1612/68. In support of this view it referred to a proposal to amend this regulation, which it had submitted in 1990. [39] This draft provides for the addition of the following paragraph 5 to Article 7 of the regulation:

'A Member State whose laws, regulations or administrative provisions attribute legal

34 — Case C 3/90 *Bernini* [1992] ECR I 1071, paragraph 28.

35 — Case 157/84 *Frascogna* [1985] ECR 1739.

36 — *Frascogna*, paragraph 23 (emphasis added). It is worth noting that in this case likewise the Court did not object to the residence criterion as such. It emphasized rather that 'the grant of such a social advantage may not be made subject to a condition requiring actual residence in the territory of a Member State for a specified number of years if such a condition is not laid down in respect of nationals of that Member State' (paragraph 25).

37 — Cited in footnote 6. This case concerned childbirth benefit and maternity benefit under Luxembourg law.

38 — Opinion of 16 December 1992, paragraph 25.

39 — Amended proposal for a Council Regulation (EEC) amending Regulation (EEC) No 1612/68 on freedom of movement for workers within the Community, OJ 1990 C 119, p. 10.

effects or make social or tax advantages subject to the occurrence of certain facts or events shall, where necessary, take into account the said facts or events which occurred in any other Member State as if they had occurred on the national territory.'

It appears to me that this proposal, which has not yet been taken up by the legislature, is irrelevant for the resolution of the present case. The Commission's view would remove the present differences in this respect between Regulations Nos 1408/71 and 1612/68. [40]

39. The reply to the third question should therefore be that a scheme such as that operated under the IOAW does not constitute discrimination within the meaning of Regulation No 1612/68.

C — Conclusion

40. I therefore propose that the Court should reply as follows to the questions raised by the Raad van State:

(1) A scheme such as that laid down by the Wet inkomensvoorziening oudere en gedeeltelijk arbeidsongeschikte werkloze werknemers (IOAW) falls within the scope of Regulation (EEC) No 1408/71.

(2) In relation to the grant of benefits under a law such as the IOAW, the first sentence of Article 68(2) of Regulation (EEC) No 1408/71 must be interpreted as meaning that it prohibits a provision under which a spouse living in another Member State is not taken into consideration in calculating the amount of benefit.

40 — See for example my Opinion in Case 375/85 *Campana* [1987] ECR 2395, point 39.