OPINION OF MR ADVOCATE GENERAL VAN GERVEN
delivered on 17 September 1991 *

Mr President,
Members of the Court,

1. The Corte Suprema di Cassazione (Supreme Court of Cassation — Joint Civil Chambers) has referred to the Court a question concerning the interpretation of several provisions of Chapter 8 (Benefits for dependent children of pensioners and for orphans) of Title III of Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community. [1]

The question arose in proceedings between Mr G. Durighello and the Istituto Nazionale della Previdenza Sociale (National Social Welfare Institution, hereinafter: 'INPS') concerning Mr Durighello's entitlement to 'assegni familiari' (hereinafter: 'family allowances') for his dependent spouse.

Background

2. The order for reference gives particulars as appropriate of the relevant provisions of the Italian legislation governing the award of benefits for dependent spouses. For the sake of clarity I shall summarize these provisions briefly here, although they are already outlined in the Report for the Hearing.

Articles 20 and 21 of Law No 903 of 21 July 1965 [2] provide, *inter alia*, that pensions adjusted to, and those supplemented to the level of, minimum payments under compulsory insurance schemes for invalidity, old age and the survivors of employed persons are to be 'increased' by a given amount in respect of each dependent child, and in respect of a dependent spouse — that is, a spouse whose income does not exceed an amount laid down in the Law. These provisions must be read together with Article 4(1) of Decree Law No 30 of 2 March 1974 [3] (converted, with amendments, into Law No 114 of 16 April 1974 [4]), which provides:

'With effect from 1 January 1974, recipients of a pension under a compulsory general insurance scheme for invalidity, old-age and the survivors of employed persons . . . shall be entitled, for the persons referred to in Article 21 of Law No 903 of 21 July 1965 . . . to the family allowances referred to in the Consolidated Law adopted by Presidential Decree No 797 of 30 May 1955,

* Original language: Italian.

1 — In view of the date on which the main action was brought (26 April 1984, according to the documents annexed to the order for reference), I believe that the national court is seeking the interpretation of the aforementioned provisions of Regulation (EEC) No 1408/71, in the version set out at Annex I to Regulation (EEC) No 2001/83 of the Council, of 2 June 1983 (Official Journal 1983 L 230, p. 6).

2 — *Official Gazette of the Italian Republic* No 190 of 31 July 1965.

3 — *Official Gazette of the Italian Republic* No 59 of 4 March 1974.

4 — *Official Gazette of the Italian Republic* No 113 of 2 May 1974.

as subsequently amended, in place of the increased pension amounts.'

As a result of that provision, the national court points out that, as from 1 July 1974, family allowances for a pensioner's dependants, including a dependent spouse, 'may no longer be regarded — as was the case before — as an "increase" in (and therefore as an integral part of) the pension, but have assumed the legal status and form of a separate social security benefit'. While it presupposes the existence of entitlement to a pension, the benefit is autonomous in administrative, financial and legal terms; it is even paid separately from the pension by a body set up for the purpose, known as the family allowances fund, and administered by the INPS.

Subsequently, the national court explains, a new benefit, the 'assegno per il nucleo familiare' (family unit allowance) was introduced into the Italian social security system by Article 2 of Law No 153 of 13 May 1988[5] (converting Decree Law No 69 of 13 March 1988[6]); it replaced the family allowances previously granted to employed persons and to the recipients of social welfare benefits paid in respect of employment. The new benefit is not at issue in the main proceedings.

3. The situation with which the main proceedings are concerned is summarized in the order for reference. Mr Durighello, who lives in Italy, is the holder of a right to an old-age pension. Having been employed in three Member States (Italy, France and Germany) he receives a *pro rata* pension from the competent institutions in the States in which he worked and paid contributions. He acquired entitlement to the pension paid by the competent institution in Italy by aggregation of the insurance periods completed in each country, pursuant to the provisions of Chapter 3, of Title III, 'Old age and death (pensions)' of Regulation 1408/71.

If my understanding is correct, Mr Durighello was unable to claim a pension from the Italian institution on the basis of Italian legislation alone (that is, independently of Community legislation), since under Italian law acquisition of entitlement to a pension is conditional upon the completion of a number of insurance periods in Italy, a requirement which Mr Durighello did not meet. However, the provisions of Chapter 3 of Title III of Regulation 1408/71 place the competent institution under a duty to take account of insurance periods completed in another Member State. Thus Article 45(1) of Regulation 1408/71 states:

'An institution of a Member State whose legislation makes the acquisition, retention or recovery of the right to benefits conditional upon the completion of insurance periods shall take into account, to the extent necessary, insurance periods completed under the legislation of any Member States

5 — *Official Gazette of the Italian Republic* No 112 of 14 May 1988.

6 — *Official Gazette of the Italian Republic* No 61 of 14 March 1988.

as though they had been completed under the legislation which it administers.'

I am assuming that it was on that basis that the competent institution in Italy decided to award a pension to Mr Durighello.

4. However, the subject of the main proceedings is not the pension awarded to Mr Durighello, but his claim to family benefit in respect of his dependent spouse. As I have indicated above (para. 2), the national court has stated that the benefit in question became a separate social security benefit in 1974.

Mr Durighello's claim was rejected by the INPS, a decision upheld both by the Pretore (Magistrate's Court), Udine, and, on appeal, by the Tribunale (District Court), Udine. In its judgment the Tribunale stated that Regulation 1408/71 was the only legislation on which Mr Durighello's claim could be based, and that while it provided for family allowances for dependent children, it did not make such provision for a dependent spouse. Nor could the divergent provision of Italian law be relied on because Community law took precedence over any provision of national law.

5. Mr Durighello then appealed to the Corte di Cassazione, arguing that Regulation 1408/71 was not the only legislation applicable to his case, since it merely supplemented Italian law, which did not cease to apply simply because the Community rules made no provision for an allowance for a dependent spouse.

For its part INPS made the following contentions before the national court:

— the only legal basis for Mr Durighello's pension entitlement is not national law but Community law; accordingly, reference must be made to that law in order to determine whether a right to family allowances for a dependent spouse subsists;

— Article 77 of Regulation 1408/71 provides for family allowances only for dependent children, not for a dependent spouse;

— the Italian legal system, however, does make such provision, but only in the case of recipients of a pension under a compulsory general insurance scheme for invalidity, old-age and the survivors of employed persons — that is, persons who — unlike Mr Durighello — are in receipt of an autonomous pension acquired on the basis of insurance periods completed under Italian legislation.

6. The problem raised by Mr Durighello was not new to the Corte di Cassazione. In a judgment of 4 February 1988, the Labour Chamber of the court had held that a pensioner in a situation similar to that of Mr Durighello was not entitled to a family allowance for a dependent spouse, again on the ground that the sole basis for the pension entitlement of the person concerned was the Community legislation, which made no provision for the benefit in question. The judgment stated further that under the Italian legislation only 'recipients of an Italian pension' — that is, a pension acquired exclusively on the basis of contributions paid in Italy, are entitled to the family allowance in respect of a spouse.

Some months later, however, in a judgment of 21 June 1988, the Labour Chamber decided a similar case differently, on the premise that the family allowance rules in Regulation No 1408/71 do not preclude the adoption under national (Italian) law of provisions more favourable to the person concerned. On the basis of a systematic examination of the Italian legislation on 'increased amounts' in family allowances and their replacement by family allowances for dependants (see point 2), the judgment states that allowances are payable in respect of a dependent spouse 'without distinction to recipients of compulsory pensions generally, which must include . . . all those who are entitled on any basis to a minimum pension' granted by the INPS, and therefore also to recipients of a pension calculated under the (aggregation) provisions of the aforesaid Regulation.

7. In the light of the two conflicting rulings, Mr Durighello's appeal was assigned to the Joint Chambers of the Corte di Cassazione. The order for reference states that the appeal raises the problem of the relationship between Community and national legislation where they both govern — either in whole or in part -the same subject-matter (in this case, family allowances for pensioners), in addition to the related problem of whether, in the situation before the court, only the Community legislation applies — on the principle that it overrides 'conflicting' national law — or whether there is scope for the application of national provisions conferring entitlement to a social security benefit of the same kind as that contemplated in, but not specifically regulated by, a Community regulation.

Accordingly, the national court is seeking an answer to the following question:

'In the situation described above, do the provisions of Chapter 8 of Title III, and in particular Articles 77 to 79 of Regulation (EEC) 1408/71 of the Council (as subsequently amended and supplemented) preclude the application to a person residing in Italy in receipt of an old-age pension calculated and granted under Chapter 3 of Title III of that Regulation ("aggregation" of periods of employment and insurance periods completed in Italy, France and

Germany) of the Italian legislation entitling (from 1 January 1974 until the date of entry into force of Decree Law No 69 of 1988) a pensioner to family allowances for his dependent spouse as well?'

Reply to the question submitted

8. In its written observations submitted to the Court, the INPS submits two pleas in law challenging the Court's jurisdiction. First it claims, referring to the order in *Falciola*,[7] that the reference for a preliminary ruling is not necessary in order to enable the national court to settle the dispute before it, since the question submitted bears no relation to the subject-matter of the main action. According to the INPS, the provisions of Community law which the Court is asked to interpret concern allowances for the dependent children of pensioners, whereas the main action concerns a family allowance for a dependent spouse. The provisions cannot be construed as extending to cover allowances for a dependent spouse. Secondly, the question referred essentially concerns the compatibility of the Italian legislation with Community law, a matter on which the Court cannot give a ruling.

Both pleas are plainly unfounded. As to the first, the Court has consistently held that it is for the national court to decide whether it requires a preliminary ruling in order to be able to settle a dispute before it, and whether the questions referred to the Court are relevant.

The second plea must also be rejected on the basis of the settled case-law of the Court. The Court has repeatedly ruled that

'whereas it is not for the Court, in the context of Article 177 of the Treaty, to rule on the compatibility of a national law with Community law, it does have jurisdiction to provide the national court with all the elements of interpretation under Community law to enable it to assess that compatibility for the purpose of deciding the case before it'[8]

9. The question submitted concerns the case of a pensioner whose *entitlement to a pension* in the Member State in which he resides was calculated by that State's competent institution taking into account, pursuant to Article 45(1) of Regulation 1408/71, the insurance periods which he completed in other Member States. The national Court wishes to know whether the provisions of Chapter 8 of Title III of that Regulation, and in particular Articles 77 to 79, *preclude* that pensioner from deriving an *entitlement to a family allowance* for a dependent spouse from the legislation of the Member State concerned.

7 — Order in Case C-286/88 *Falciola* [1990] ECR I-191.

8 — Judgment in Case C-369/89 *Piageme* [1991] ECR I-2971, paragraph 7.

10. The national court and the parties to the main action are assuming that Articles 77 to 79 of Regulation 1408/71 concern solely family allowances for dependent children, and not for a dependent spouse; however, this is not free from doubt. The term 'family allowances' (in French: 'allocations familiales'; in Italian: 'assegni familiari') is defined as follows in Article 1(u)(ii) of Regulation 1408/71:

'periodical cash benefits granted exclusively by reference to the number and, where appropriate, the age of members of the family'.

Couched in those general terms, the definition can include periodical benefits other than those in respect of dependent children, in particular periodical benefits for a dependent spouse when the amount of such benefits is calculated in relation to the number of members of the family.

Nevertheless, there are several arguments based on the wording of the regulation to suggest that Articles 77 and 79 of Regulation 1408/71 do not concern allowances for a dependent spouse. Thus the heading to Chapter 8 of Title III expressly refers only to 'dependent children', as do the headings to Articles 77 and 79. Moreover, Articles 77 and 79 do not refer to any family members other than children. An additional argument may be found in the distinction which the Regulation draws between 'family benefits' and 'family allowances'. Allowances for a dependent spouse come under the heading of 'family benefits'[9] defined in Article 1(u)(i) of the Regulation, but not under the narrower terms of 'family allowances'. Articles 72 to 76 of the Regulation apply to both family benefits and family allowances, whereas the benefits referred to in Article 77 concern only family allowances for pensioners and certain pension supplements in respect of children of such pensioners.

11. However, the question hitherto examined is not central to this case. The Court is not asked to rule whether Mr Durighello *derives* directly from Article 77 and 79 entitlement to an allowance for a dependent spouse. The national court does not come to that question, though the way in which the question submitted is framed indicates that it is of the opinion that a pensioner like Mr Durighello whose *pension* is calculated in accordance with the provisions of Article 45(1) of Regulation 1408/71 is also entitled to an *allowance* for his dependent spouse under Italian law alone. The national court wishes merely to know whether Articles 77 and 79 have the effect of *depriving* a pensioner such as Mr Durighello of that right.

9 — Article 1(u)(i) of Regulation 1408/71 states that 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.

12. Like the Commission I consider that Community law affords no warrant for a refusal such as that by the INPS to pay Mr Durighello an allowance for his dependent spouse when he is entitled to it under Italian law.

The Court has consistently held that the rules on social security for migrant workers

'did not set up a common scheme of social security, but allowed different schemes to exist, creating different claims on different institutions against which the claimant possesses direct rights by virtue either of national law alone or of national law supplemented, where necessary, by Community law' (paragraph 13 of the *Rossi* judgment [10]).

This decision clearly shows that the social security rights of a person such as Mr Durighello do not derive primarily, much less exclusively, from Regulation 1408/71. Thus he derives his right to a pension directly from Italian legislation, albeit 'supplemented' by Article 45(1). Under this provision the competent Italian institution may not object that Mr Durighello had not completed solely in Italy the requisite number of insurance periods prescribed by the Italian legislation, but must take account of the insurance periods completed by him in France and Germany.

What applies to pension entitlement also applies to entitlement provided for under Italian legislation to an allowance for a dependent spouse. That right, too, is based on the national legislation concerned. That legislation links it to pension entitlement. The same applies, as is clear from the terms in which the question submitted is couched, to the case of pensioners whose pension is calculated in the manner described.

Accordingly, the INPS is incorrect to assert that, because Mr Durighello's pension entitlement is calculated in accordance with the rules on aggregation contained in Regulation 1408/71, he may claim only social security benefits expressly provided for in that Regulation. That conclusion is based on a false premise and is incompatible with the Regulation which did not set up a Community system of benefits, but allowed the various national schemes to continue in existence.

13. Moreover, it is apparent from the Court's case-law on Article 51 of the EEC Treaty, on which Regulation 1408/71 is based, that Mr Durighello cannot lose a right acquired under Italian legislation to an allowance for his dependent spouse.

10 — Judgment in Case 100/78 *Rossi* v *Caisse de Compensations pour Allocations Familiales* [1979] ECR 831. See further the judgment in Case 733/79 *CCAF* v *Laterza* [1980] ECR 1915, at paragraph 8, and in Case 807/79 *Gravina* v *Landesversicherungsanstalt Schwaben* [1980] ECR 2205, at paragraph 7.

The Commission rightly recalls the Court's statement on the matter as early as 1964 in its judgment in *Kaalsbeek* v *Sociale Verzekeringsbank* [11]

'... Article 51 ... cannot allow the regulations to fall short of the objectives which it sets, which are intended to favour freedom of movement for workers and which would be incompatible with any reduction in their rights'.

Likewise in the abovementioned *Rossi* judgment, which dealt specifically with the provisions of Chapter 8 of Title III of Regulation 1408/71, the Court stated at paragraph 14:

'The Community rules could not, in the absence of an express exception consistent with the aims of the Treaty, be applied in such a way as to deprive a migrant worker or his dependants of the benefits of a part of the legislation of a Member State.' [12]

In regard to the facts of the present case I cannot discern in the Community rules, in particular Articles 77 and 79 of Regulation 1408/71, any express exception which would warrant the loss of entitlement to an allowance for a dependent spouse received by Mr Durighello under Italian legislation.

Conclusion

14. I therefore propose that the Court give the following answer to the question submitted:

'Articles 77 and 79 of Regulation No 1408/71 of the Council of 14 June 1971, in the consolidated version in Annex 1 to Council Regulation No 2001/83 of 2 June 1983, do not preclude the application to a pensioner resident in a Member State, whose pension entitlement is calculated by the competent institution of that State taking into account insurance periods completed in other Member States, of that State's legislation entitling a pensioner to an allowance for a dependent spouse as well.'

11 — Judgment in Case 100/63 *Kaalsbeek* v *Sociale Verzekeringsbank* [1964] ECR 565 at p. 574.

12 — See also the aforementioned judgments in *Laterza* (paragraph 8) and *Gravina* (paragraph 7).