OPINION OF ADVOCATE GENERAL VAN GERVEN
of 26 November 1992

Mr President,
Members of the Court,

1. The 14th Senate of the Bayerisches Landessozialgericht (which I shall henceforth refer to as the court which made the reference) has referred to the Court of Justice for a preliminary ruling two questions concerning the calculation of orphans' benefits pursuant to Regulation No 1408/71. [1]

Article 78(2)(b)(i) of that regulation provides that benefits for orphans of a deceased employed or self-employed person who was subject to the legislation of several Member States shall be granted:

'in accordance with the legislation of the Member State in whose territory the orphan resides provided that ... a right to one of the benefits referred to in paragraph 1 is acquired under the legislation of that State ...'.

Article 78(1) of the regulation defines 'benefits' for the purposes of that article as:

'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.'

The Court has established the principle (known as the Gravina principle), recently confirmed in *Doriguzzi*, that orphans' benefits must be calculated in accordance with that provision in such a way that

'lorsque le montant des prestations effectivement perçues dans l'État membre de résidence est inférieur à celui des prestations prévues par la seule législation d'un autre État membre, un orphelin a droit, à charge de l'institution compétente de ce dernier État, à un complément de prestations égal à la différence entre les deux montants'. [2]

The Gravina supplement is based on one of the fundamental principles of Regulation No 1408/71, namely that workers — or those claiming under them — who move within the Community must be guaranteed the full amount of benefits acquired in the different Member States up to the limit of the greatest amount of those benefits. [3]

1 — Regulation (EEC) No 1408/71 of the Council on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, in the version contained in Annex I to Council Regulation (EEC) No 2001/83 of 2 June 1983 (OJ 1983 L 230, p. 6).

2 — Case C-188/90 [1992] ECR I-2039, para. 14; the principle was first laid down in *Gravina*, Case 807/79 [1980] ECR 2205, para. 8.

3 — *Gravina*, para. 7 *in fine*.

Background to the reference

2. In order to appreciate the scope of the questions which have been referred a short explanation of the relevant Italian legislation and of the facts of the main case is necessary. Under Article 22 of Italian Law No 903 of 21 July 1965 the orphan of a deceased worker is entitled to a pension equal to 20% of the pension to which the deceased person was entitled on the day of his death. The surviving spouse of a deceased worker is entitled to a survivor's pension equal to 60% of the deceased person's pension. However, the survivor's pension may not be less than a certain minimum guaranteed by the Italian legislation. If the orphan lives with the surviving spouse, the orphan's pension and the survivor's pension (increased to the aforementioned minimum amount where necessary) are paid concurrently to the spouse; that total amount will be referred to hereinafter as the total survivor's pension.

It should also be noted that under the Italian legislation any person with a dependent child is entitled, regardless of whether the child is an orphan or not, to a family supplement (assegno familiare) until the day on which the child reaches the age of 18 years.

3. Miriam Gobbis, the appellant in the main proceedings, was born in Lüdenscheid in August 1969. She is the daughter of an employed person who died in November 1984 and who had completed periods of insurance in Italy and Germany. As long as the appellant resided in Germany, the Landesversicherungsanstalt Schwaben (the LVA), the respondent in the main proceedings, paid her an orphan's pension. When she returned to Italy, the LVA stopped payment of the benefit with effect from 1 April 1985 on the ground that the Italian authorities were thenceforth responsible for payment of the orphan's benefits. At the same time, it declared that it was prepared to pay the difference between the orphan's benefits provided for under the German legislation and those which the appellant would actually receive under the Italian legislation.

The Italian insurance institution (the Istituto Nazionale della Previdenza Sociale, the INPS) paid the appellant's mother a total survivor's pension which included both the benefits payable to the appellant and the abovementioned family supplement. However, since the survivor's pension, even after the addition of the orphan's pension, did not reach the minimum statutory level, the total survivor's pension paid to the applicant's mother was increased to the level of the minimum pension. Payment of the family supplement ceased when the appellant reached the age of 18; the total survivor's pension paid out remained unchanged, however, since her mother remained entitled to the statutory minimum.

By a decision of 12 September 1989 the LVA granted the appellant an amount equal to the difference between the orphan's benefits calculated exclusively under German legislation and the benefits which, according to its calculations, the Italian insurance institution was liable to pay by way of orphan's benefits. The latter, according to the LVA's calculations, was equal to the sum of the family supplement plus 25% of the total survivor's pension paid monthly to the appellant's

mother. The LVA based that percentage on the fact that the ratio (1 to 4) in the total survivor's pension between the portion attributable to the surviving spouse (as I said, 60% of the pension to which the deceased worker was entitled) and that attributable to the orphan (20% of the deceased worker's pension) should be applied to the total survivor's pension, even if that was increased to the statutory minimum.

Before the national court the appellant contested the inclusion of the family supplement in the calculation of the orphan's benefits payable under the Italian legislation. She did not contest the fact that the calculation took into account the increase to meet the statutory minimum. As regards the latter, the court which made the reference does not consider itself bound by the appellant's opinion (at that time), as the German legislation permits the court to grant the amounts claimed by the appellant on a different legal basis.

4. The court considered that the case raised questions concerning the interpretation of Community law and therefore referred the following questions to the Court of Justice for a preliminary ruling:

'Is Community law to be interpreted as meaning that on granting the amount of the difference between the orphan's pension payable under Italian law and the one payable under German law the German pension insurance institution

(a) may take into account the orphan's proportion of the Italian (total) survivor's pension even where the widow and the orphan are granted a minimum survivor's pension which would also be payable to the widow alone — irrespective of the orphan? If so, is the supplementary amount included in the total survivor's pension to bring it up to the minimum pension also to be taken into consideration for the purposes of the part representing the orphan's pension and, if so, in what amount?

(b) may take into account the family supplement (assegno familiare) granted under Italian law?'

The inclusion in the calculation of a 'family supplement' payable under the legislation of the Member State of residence.

5. I shall first consider the second question referred because in my view it has been answered in the recent Doriguzzi judgment, which in its turn provides useful guidance on the answer to the first question. In Doriguzzi the same court of reference as in this case (but on that occasion the 11th Senate) asked the Court of Justice whether, *inter alia*, the family supplements paid by the INPS should be deducted when calculating the Gravina supplement. In its judgment the Court referred to *Gravina* (see section 1 of this Opinion), but went on to say that the orphan of a migrant worker

'ne saurait se voir accorder plus de droits que ceux auxquels il pourrait prétendre en vertu de la législation de cet autre État membre s'il résidait sur son territoire. Un tel résultat ne

peut être atteint que si l'institution de ce dernier État membre peut imputer sur les prestations qu'elle doit servir toutes les prestations qui sont versées dans l'État membre de résidence pour l'entretien de l'orphelin, abstraction faite de leur nature ou de leur dénomination.' [4]

Next, the Court referred to the fact that there were considerable differences between the national rules on orphans' benefits. In order to avoid arbitrary differences arising as a result of the applicable national rules, the Court held that the term 'orphans' benefits' for the purposes of Article 78(1) of Regulation No 1408/71 must be interpreted as meaning

'qu'elle vise toute prestation destinée, d'après le régime national applicable, à l'entretien des orphelins, quelles que soient par ailleurs sa nature et sa dénomination.' [5]

The Gravina supplement must therefore be determined

'en comparant l'ensemble des prestations destinées à l'entretien de l'orphelin en question, effectivement servies dans l'État membre de résidence, avec l'ensemble des prestations destinées à l'entretien de ce même orphelin auxquelles il aurait droit s'il résidait dans l'autre État membre.' [6]

6. All benefits which are already actually received in the Member State of residence — in this case Italy — for the upkeep of the orphan, regardless of their nature or description or the organ responsible for payment, are thus to be included in the calculation of the Gravina supplement. In making that calculation there must also be included all payments which are intended in the other Member State — in this case Germany — for the upkeep of the orphan and to which the orphan would be entitled if he or she resided in the latter Member State.

The mere fact that the family supplement payable under the Italian legislation is, according to the court which made the reference generally available for children regardless of whether they are orphans or not is not sufficient to exclude that supplement from the scope of the calculation of the Gravina supplement: the family supplement is to be excluded only if it cannot be regarded as a benefit within the meaning of Article 78 of Regulation No 1408/71 and if it is not in fact paid for the upkeep of the orphan. Article 78(1) refers expressly to 'family allowances', however, which are defined in Article 1(u)(ii) of the regulation as 'periodical cash benefits granted exclusively by reference to the number and, where appropriate, the age of members of the family'. [7] As it is not disputed that the Italian

4 — *Doriguzzi*, para. 15.

5 — *Doriguzzi*, para. 15.

6 — *Doriguzzi* para. 17; cf. also my Opinion in that case, not yet published, section 8.

7 — I see no reason to doubt that the definition of 'family allowances' in Article 1(u)(ii) of Regulation No 1408/71 — which according to Article 1 is applicable 'for the purpose of this regulation' — applies for the purposes of Article 78. As regards the similar use of the term 'family allowance' in Article 77 (regarding benefits for dependent children of pensioners) the Court decided in *Lenoir that the term 'corresponds to the definition of the family "allowances" referred to in Article 1(u)(ii) of the ... regulation, which defines family allowances according to the exclusive criterion of the number and, where appropriate, the age of the members of the family', Case 313/86 [1988] ECR 5391, para. 10.*

'assegno familiare' satisfies that definition (cf. section 2, above), [8] I do not see why the amount actually received should not be taken into account for the purposes of calculating the Gravina supplement in accordance with the decision of the Court of Justice in *Doriguzzi*.

The inclusion of an 'orphan's portion' of a survivor's pension paid to the surviving spouse

7. The answer to be given to the first question is less apparent. The question falls into two parts. The first asks whether for the purposes of calculating the Gravina supplement the German social insurance institution may also take into account the orphan's portion of the total Italian survivor's pension if the widow and the orphan are paid a single survivor's pension increased to the amount of the statutory minimum pension, the amount of which would still be payable to the widow alone were the orphan to be left out of account. The second part of the question asks whether, if the answer to the first part is yes, for the purposes of calculating the Gravina supplement account must be taken in the case of the orphan's portion also of the increase in the total survivor's pension to the statutory minimum, and if so, in what amount.

8. As regards the first part of the question the appellant did not, at the time of the LVA's decision, challenge the inclusion of the statutory minimum pension in the calculation. Now, however, she argues that the minimum pension payable under the Italian legislation is neither in whole nor in part a 'benefit for orphans' within the meaning of Article 78 of Regulation No 1408/71. She maintains that the pension is a benefit covered by Article 50 of the regulation, [9] so that in accordance with Article 44(3) of the regulation [10] it is not permissible to include the orphan's portion of such a pension for the purposes of calculating the Gravina supplement.

Like the LVA, the Italian, Dutch and Portuguese Governments and the Commission, I am of the opinion that the basic premise of that reasoning is wrong. I agree with their view that part of the total survivor's pension must be regarded as orphans' benefit. It is in fact clear that under the Italian legislation a well-defined portion of the total survivor's pension — a quarter, as is apparent from what I have said in section 2 — does in fact constitute an orphan's pension. It is obvious that a faithful application of the Gravina principle laid down by the Court, as clarified in *Doriguzzi* (see section 5, above) requires that portion of the total survivor's pension to be regarded for the purposes of

8 — In *Doriguzzi* both the Bayerisches Sozialgericht, 11th Senate (the court of reference in this case) and the parties to the main proceedings, as well as the Commission, agreed that the 'assegno familiare' was a family allowance within the meaning of that definition: see my Opinion in that case, section 5.

9 — That article concerns the award of a supplement to a benefit payable in respect of old age or death (pensions) where the amount of the benefit payable under the legislation of the *various* Member States is lower than the minimum laid down by the legislation of the Member State in which the recipient resides.

10 — According to which increases in or supplements to pensions in respect of children or to orphans' pensions granted in accordance with the provisions of Chapter 8 (Article 77 to 79) are excluded from the provisions of Chapter 3, covering such benefits in respect of old age and death.

calculating the Gravina supplement as an orphan's benefit.

9. As regards the special circumstance referred to in the second part of the first question, however, I cannot agree with the German Government and must rather follow the view taken by the other commentators referred to above. I agree that the whole of the *increase* which is intended to bring the total survivor's pension up to the level of the Italian statutory minimum pension should not be regarded as orphans' benefit within the meaning of Article 78. As the Italian Government has emphasized, it is a form of social assistance which is granted *regardless* of whether the surviving spouse has dependent children. As such it is therefore not, in the words of the judgment in *Doriguzzi*, a 'prestation destinée, d'après le régime national applicable, à l'entretien des orphelins'. That is also apparently the conclusion to which the German and Italian authorities came as a result of consulations in Rome in November 1988. [11]

Accordingly, I conclude that in a case such as the present for the purposes of calculating the Gravina supplement the portion of the total survivor's pension which corresponds to the orphan's pension, that is to say 25% of the total survivor's pension — or 20% of the pension to which the deceased employed person was entitled on the day of his death — is to be taken into account *before* the total survivor's pension is increased to the level of the Italian statutory minimum pension.

10. I suggest that the Court of Justice answer the questions which have been referred as follows:

(1) For the purposes of calculating the supplementary amount which is payable under Article 78(2)(b)(i) of Regulation No 1408/71 of the Council whenever the amount of the benefits referred to in Article 78(1) of that regulation received in the Member State of residence is lower than the amount of the benefits to which the orphan may be entitled under the legislation of another

11 — The minutes of that meeting are annexed to the written observations of the Italian Government. The relevant passage, point 3, states that the authorities of both countries agree that the INPS must notify the German social insurance institution of the amounts payable to the orphan and to the surviving spouse separately, without including them in the minimum pension.

Member State account must be taken of that portion of the total survivor's pension paid to the surviving spouse which is intended by the legislation of the Member State of residence to be for the orphan. The amount by which that survivor's pension payable under the legislation of the Member State of residence is increased to the level of the statutory minimum pension provided for in that State is not to be taken into account for the purpose of that calculation, provided that that increase is payable regardless of whether or not the surviving spouse has dependent children.

(2) In calculating the supplement referred to above all benefits already actually received in the Member State of residence for the upkeep of the orphan, regardless of their nature or description or the organ responsible for payment, are to be taken into account, provided that they constitute benefits as defined in Article 78(1) of Regulation No 1408/71.