OPINION OF MR ADVOCATE GENERAL VAN GERVEN
delivered on January 1992 *

Mr President,
Members of the Court,

1. The Eleventh 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 the supplementary benefit ('Unterschiedsbetrag') for orphans which is referred to in the case-law of the Court in connection with Article 78 of Regulation No 1408/71. [1]

Article 78(2)(b)(i) of Regulation No 1408/71 provides that benefits for the orphan of a deceased 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 . . . '.

In *Gravina* [2] the Court interpreted that provision in the light of Article 51 of the EEC Treaty and held that it must not lead to a reduction of the benefits available under national law. The Court ruled as follows:

'Article 78(2)(b)(i) of Regulation No 1408/71 of the Council of 14 June 1971 must be interpreted as meaning that the entitlement to benefits payable by the State in whose territory the orphan to whom they have been awarded resides does not remove the entitlement to benefits greater in amount previously acquired under the legislation of another Member State alone. 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.'

The Court confirmed that ruling in *D'Amario,* [3] *Ventura* [4] and *Athanasopoulos.* [5]

Background to the reference

2. The questions referred for a preliminary ruling arose in the course of a dispute which occurred in the context of those decisions. The parties are Mario and Marzio

* Original language: Dutch.

1 — Council Regulation 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 Community, in the version contained in Annex I to Council Regulation No 2001/83 of 2 June 1983 (OJ 1983 L 230, p. 6).

2 — Case 807/79 [1980] ECR 2205.

3 — Case 320/82 [1983] ECR 3811.

4 — Case 269/87 [1988] ECR 6411, para. 14.

5 — Case C-251/89 [1991] ECR I-2797, first paragraph of the operative part.

Doriguzzi-Zordanin (which I will refer to as the plaintiffs in the main proceedings, or the Doriguzzi orphans) on the one hand and the German insurance institution Landesversicherungsanstalt Schwaben (LVA Schwaben) on the other.

The plaintiffs in the main proceedings are the children under the age of majority of Giancarlo Doriguzzi-Zordanin, a worker who died on 29 August 1983 after completing periods of insurance both in Germany (78 months) and in Italy (123 months). The mother survives and has custody of the children. They have always been resident in Italy.

Since 1 September 1983 the Italian insurance institution, the Istituto Nazionale della Previdenza Sociale (INPS), has being paying the plaintiffs an orphan's pension based on the insurance of the deceased father. The amount per child of the benefits was between LIT 59 710 (from 1 September 1983) and LIT 73 960 (from 1 November 1985) per month. In addition, the INPS paid a fixed sum per month per child of LIT 19 760 by way of 'family supplements'.

The plaintiffs' application to LVA Schwaben for supplementary benefits was rejected by a decision of that institution of 3 September 1985. It was based on the provision in Article 78(2)(b)(i) of Regulation No 1408/71, cited above. In view of the fact that the plaintiffs lived in Italy and drew their entitlement to an orphan's pension from Italian legislation, it was of the opinion that the INPS was the sole competent institution.

3. On 16 July 1986 the plaintiffs in the main action appealed to the Sozialgericht Augsburg seeking an order that LVA Schwaben recognize their entitlement to supplementary benefits.

By a decision of 7 May 1987 LVA Schwaben reversed its earlier decision. It informed the plaintiffs that it was prepared on the basis of the judgments of the Court of Justice in *Gravina* and *D'Amario* to recognize their entitlement to supplementary benefits (which I may refer to as 'Gravina' benefits) for the period between 1 September 1983 and 31 December 1985, the only period at issue in the dispute.

The new decision did not put an end to the dispute because the plaintiffs were not satisfied with the way in which the supplementary benefits were calculated. The German institution had taken all the payments made by the INPS together — both the monthly amount of the orphan's pension and the monthly amount of the family supplements — and compared that sum with the benefits payable under German legislation solely on the basis of the German insurance premiums. From 1 September 1983 the resulting supplementary benefit was DM 29.30 per child and per month, but that sum is being gradually reduced as the Italian orphan's pension increases, so that on 31 December 1985 it was only DM 19.10 per child per month.

The plaintiffs consider that the supplementary benefits must be calculated without taking into account the family supplements of LIT 19 760 per child per month paid by the INPS. In their view the family supplements do not form part of the

orphan's pension but constitute in the same way as German 'Kindergeld' an independent payment made in respect of all children regardless of whether they are orphans or not.

The Sozialgericht Augsburg dismissed the appeal. It shared the view taken by LVA Schwaben that the Italian family supplements should be taken into account when calculating the supplementary 'Gravina' benefits. The plaintiffs appealed against that judgment to the Bayerisches Landessozialgericht.

4. The court which made the reference is inclined to dismiss the appeal for the following two reasons. In the first place, it considers that the family supplements granted by the INPS are 'family allowances' ('Familienbeihilfen', 'allocations familiales'), which Article 78(1) of Regulation No 1408/71 expressly provides are covered by the rules contained in that article concerning orphans' benefits. According to the court which made the reference they must therefore be taken into account when calculating the supplementary benefits to be paid by the German institution.

It is also of the opinion that orphans living in Italy would be given more favourable treatment than those living in Germany if family supplements were not taken into account when calculating supplementary benefits, since orphans living in Germany are precluded from receiving 'Kindergeld' in addition to an orphan's pension by Paragraph 8(1)(1) of the Bundeskindergeldgesetz (BKGG).

Nevertheless, it considers that the relevant provisions of Community law (it refers in that regard to Article 51 of the EEC Treaty and to Articles 77 and 78 of Regulation No 1408/71) require interpretation and that the following questions should therefore be referred to the Court of Justice for a preliminary ruling:

'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 paid by the Italian institution to be included?' [6]

Examination of the questions

5. As regards the application of the rules contained in Article 78 of Regulation No 1408/71 to provisions of national legislation under which 'orphans' benefits' are payable, the term 'benefits', according to paragraph 1 of that article, means:

6 — The Bayerisches Landessozialgericht (14th Senate) has again referred to the Court of Justice, in Case C-218/91 Gobbis v LVA Schwaben, the question whether German insurance institutions must take into account the family supplements (referred to by that Senate as 'assegni familiari') payable under Italian legislation when calculating the supplementary Gravina benefits for orphans. Unlike the 11th Senate (which made the reference in this case) the 14th Senate is of the opinion that such supplements should not be taken into account, because they are family allowances intended not specifically for orphans but for children in general.

'... 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 wording of that provision indicates unequivocally that orphans' benefits includes both 'orphans' pensions' and 'family allowances' (and consequently 'supplementary or special allowances for orphans') which mean, according to Article 1(u)(ii) of Regulation No 1408/71, 'periodical cash benefits granted exclusively by reference to the number and, where appropriate, the age of members of the family'.[7] I would point out straight away that the parties to the main action and the court which made the reference, and also the Commission, according to the written observations it has submitted to the Court, agree that the 'family supplements' paid by the INPS pursuant to the Italian legislation do constitute such 'family allowances' ('assegni familiari' in the Italian) as defined in Article 1(u)[ii) of Regulation No 1408/71. That is important, as the Commission points out, because if the Italian 'family supplements' fall only within the broad definition of 'family benefits' contained in Article 1(u)(i) of the regulation and not under the narrower concept of 'family allowances',[8] they escape the application of Article 78. Inasmuch as the court which made the reference describes the family supplements as 'family allowances', it must be concluded that in its view the family supplements are 'periodical cash benefits granted exclusively by reference to the number and, where appropriate, the age of members of the family' within the meaning of Article 1(u)(ii) of the regulation. I shall therefore consider that as established and not go further into it.

6. The questions referred for a preliminary ruling arose because the benefits for orphans which must be compared for the purpose of calculating the supplementary 'Gravina' benefits are regulated in different ways by the Italian and German legislation.

As described at 2, above, the amounts paid in the Member State of residence (Italy) by the competent institution (the INPS) to the plaintiffs are of two kinds: in the first place, the INPS pays a variable amount by way of an orphan's pension, and in the second place it pays a fixed family allowance within the meaning of Article 78(1) of Regulation No 1408/71 (in conjunction with Article 1(u)(ii) of the regulation). However, the legislation in the other Member State

7 — In a judgment of 16 March 1978 (Case 115/77 Laumann [1978] ECR 805) the Court declared, regarding the Community rules against the overlapping of benefits contained in Article 79(3) of the regulation, that family allowances are generated by an actual occupation and the direct and sole recipient is the worker himself, whereas the direct sole recipient of the orphan's pension is the orphan himself (paragraph 7). See 10, below.

8 — The Court drew a distinction in fact, in connection with Article 77(1) of Regulation No 1408/71, in a judgment of 27 September 1988 (Case 313/86 Lenoir [1988] ECR 5391) within the broad definition of 'Family benefits' between 'Family allowances' and 'Other benefits' (such as school allowances) (para. 11).

(Germany) in which the plaintiffs are entitled to benefits provides for an orphan's pension and in addition to that, depending on times and circumstances, a 'Kinderzuschuss' [9] or 'Kindergeld'. [10] The 'Kinderzuschuss' is an integral part of the orphan's pension (within the meaning of Article 78(1) of Regulation No 1408/71) whereas the 'Kindergeld' is not part of it but is a 'family allowance' (within the meaning of that provision in conjunction with Article 1(u)(ii) of the regulation). In addition to that the 'Kinderzuschuss', as part of the orphan's pension, is paid out by an insurance institution (in this case LVA Schwaben), whereas 'Kindergeld' is paid out by the Bundesanstalt für Arbeit. In the case before the court which made the reference it is not clear, however, which additional benefit (the 'Kinderzuschuss' or the 'Kindergeld') is payable to orphans such as the plaintiffs whose father died before 1 January 1984. From the observations submitted on behalf of the plaintiffs and those of LVA Schwaben [11] it appears that they are entitled to 'Kindergeld'. However, the Commission is of the opinion that although payment of the 'Kinderzuschuss' to orphans after 1 January 1984 is in principle covered by payments of 'Kindergeld', that does not apply in the case of orphans with a surviving parent and those entitled to pensions who were already entitled before 1 January 1984 to the 'Kinderzuschuss'. The court which made the reference also take that view, [12] which explains why in the first question it refers to 'the' German institution, in this case LVA Schwaben (that is to say the sole institution competent in this matter).

7. The differences between the Italian and German legislation which I have described are the reason for that court's hesitation as regards the method of calculating the supplementary 'Gravina' benefit.

In the cases in which the Court of Justice has ruled on those supplementary benefits up to now, the comparison to be made was always between benefits of the same kind: in *Gravina*, *D'Amario* and *Ventura* the amount paid in the Member State of residence (Italy) as an *orphan's pension* was compared with the orphan's pension to which the party was already entitled under the legislation of another Member State (Germany); in *Athanasopoulos* the comparison was of the *family allowances* which could be paid also to orphans under the legislation of both the Member States concerned.

In this case, however, it is necessary to compare payments of different natures with each other for the purposes of calculating the 'Gravina' benefits — at least on the basis of the interpretation adopted by the court making the reference for the purposes of

9 — See Paragraph 1269 of the Reichsversicherungsordnung (RVO).

10 — See Paragraph 1 et seq. of the Bundeskindergeldgesetz (BKGG).

11 — In its written observations LVA Schwaben points out that whether the Bundesanstalt für Arbeit must pay the plaintiffs 'Kindergeld' to supplement the family allowances paid in Italy depends on whether the residence requirement laid down in the BKGG is applicable to beneficiaries entitled under a migrant worker. In a judgment delivered since then, Athanasopoulos (see footnote 5), the Court made it clear, however, that the supplementary benefit is payable even if the legislation of the relevant Member State makes the payment of family allowances dependant on the condition that the beneficiary or his children reside in the territory of that State.

12 — It is in fact of the opinion that in this case, pursuant to Paragraph 8(1) of the BKGG, 'Kindergeld' is not payable.

German law. What is to be compared is, on the Italian side, an orphan's pension and a family supplement (which is a family allowance within the meaning of Article 78(1) of Regulation No 1408/71) and, on the German side, an orphan's pension including the 'Kinderzuschuss' which forms part of the pension. In that connection the court making the reference wishes to know whether, in order to calculate the 'Gravina' benefit, account must be taken of the family allowances paid by the Italian institution to the Doriguzzi children (in this case 'assegni familiari') despite the fact that under German legislation, at least in the opinion of the court making the reference, the Doriguzzi children are entitled only to orphans' pensions (payable by LVA Schwaben) *including* the 'Kinderzuschuss' but not 'Kindergeld' (payable by a different German institution).

8. I share the view of the court making the reference, LVA Schwaben and the Commission, that when calculating the supplementary 'Gravina' benefit for orphans it is necessary to take into account *all* benefits actually paid by the Member State of residence in so far as they fall within the definition of benefits contained in Article 78(1) of Regulation No 1408/71 — which is not contested in this case (see No 5 above) — and are intended for the support of orphans. I find support for that broad interpretation in the phrase 'allowances for orphans' in Article 78(2) which indicates that the purpose (and not so much the nature or the title) of the allowance is decisive just as it is in the broad definition in Article 78(1) of what is meant by 'benefits'. Consequently, the amount of the supplementary benefits must be determined by comparing the sum of all the benefits intended in the Member State of residence to support the orphan in question and actually paid out with the sum of all the benefits intended for the support of the same orphan to which the orphan may be entitled in the other Member State.

In my view that also means that when a comparison is made the general total of all such payments in both Member States must be considered. Were it otherwise and not all the payments in both Member States for orphans were compared *in toto* but only payments of the same nature (in other words, payments in the Member State of residence which have no counterpart in the other Member State were to be left out of the count), that would in my view be incompatible with the purpose of the principle laid down in *Gravina* and similar cases. According to those decisions, orphans may not be *deprived* of any entitlement to greater payments to which they may be entitled under the legislation of a Member State other than the Member State of residence, without *granting* them at the same time *more* entitlements, on the same footing as orphans resident in the other Member State, than those which he may have in that Member State. That can only be achieved if the institution in the other Member State (or the institutions, if in that Member State more than one institution is competent) may deduct from the benefits payable by it (or them) all payments already paid in the Member State of residence for the support of the orphan, regardless of the nature or title of the benefits in both Member States, and also regardless of

which institution (or institutions) is (or are) responsible for paying the benefits in both Member States (provided always, however, that they are benefits which fall within the description contained in Article 78(1) of Regulation No 1408/71).

9. The Commission rightly points out that in any case a special comparison of benefits which are of the same nature would defeat the underlying purpose of the *Gravina* line of decisions, in view of the very different rules governing orphans' allowances in the Member States. It is apparent from the description given by the Commission of the various national rules that in some Member States only one (increased) family allowance is payable for orphans, whereas in other Member States an orphan's pension is payable generally together with a family allowance. To compare only benefits of the same nature with each other would lead to arbitrary results: the amount received by the orphan or the person responsible for him would then always depend on the manner in which orphans' allowances were governed in the relevant Member State, and only if they were comparable in both Member States would they be taken into account. That would lead to unjustifiable differences, orphans receiving sometimes more and sometimes less than the amount to which they would be entitled under the legislation of the Member State other than the Member State of residence were they resident there. The only approach which avoids that is to compare all the allowances intended for the support of orphans within the meaning of Article 78(1) which are available in the Member States concerned.

10. Finally, I would just mention the possible consequences of the *Laumann* judgment cited above (in footnote 7) as regards this case. According to that decision, family allowances are distinguished by the fact that they are paid directly and exclusively to the worker himself, whereas the sole recipient of an orphan's pension (or pensions) is the orphan (paragraph 7). The Court took the view that that difference as regards the recipient of the benefits was relevant to the interpretation of the rule against overlapping of benefits contained in Article 79(3) of Regulation No 1408/71. The suspension of benefits which that article requires in order to prevent the overlapping of benefits relates only, according to the Court, to benefits of the same kind, implying that they exist in favour of one and the same recipient. That is because

'it would be contrary to the objectives of the Community provisions against the overlapping of benefits in the field of social security if the grant of a benefit to one dependant could be adversely affected by a benefit paid to another dependant' (paragraph 8).

Should importance be attached in this case, too, to that distinction as regards the recipient and in particular the circumstance that an orphan's pension is received by the orphan himself whereas family allowances are paid to the person responsible for them (in this case Mrs Doriguzzi), and more particularly can that serve as an argument against the global approach to calculating the supplementary benefits referred to

above? I think not. I agree with the Commission that the rule against the overlapping of benefits in Article 79(3) and the case-law on that provision were inspired by a quite different consideration. Whereas the rule against overlapping benefits in Article 79(3) is intended to prevent *double* benefits being paid, the purpose of the 'Gravina' benefit is to enable those entitled to receive *full* benefits based on the highest amount. In view of those different aims the distinction drawn in *Laumann* as regards the recipient of the benefit is not applicable when calculating the supplementary 'Gravina' benefit for orphans. On the contrary, if one considers the underlying purpose the reasoning adopted in *Laumann* goes in the same direction as that proposed here, both approaches being based on the requirement that the benefits to which the recipient is entitled must be paid in full, neither more nor less.

Reply proposed

11. In conclusion, I propose that the Court reply to the questions referred for a preliminary ruling as follows:

'Article 78(2)(b)(i) of Council Regulation No 1408/71 of 14 July 1971 is to be interpreted as meaning that in order to calculate the amount payable by way of supplementary benefits where the amount of benefits actually received in the Member State of residence is lower than the benefits to which the orphan is entitled under the legislation of the other Member State, the total of all the benefits intended for orphans in the Member States in question must be taken into account, regardless of the nature, the name or the recipient of those benefits, and also regardless of whether the benefits are paid by one or more institutions, in so far as the benefits fall within the definition given in Article 78(1) of Regulation No 1408/71.'