OPINION OF MR ADVOCATE GENERAL VAN GERVEN
delivered on 9 November 1988 *

Mr President,
Members of the Court,

1. The Bayerische Landessozialgericht (Bavarian Higher Social Court) has referred the following question to the Court for a preliminary ruling:

'Must Article 44 (3) of Regulation (EEC) No 1408/71 of the Council of 14 June 1971 be interpreted as meaning that orphans' benefits within the meaning of Article 79 of the regulation must be provided to an orphan residing in Italy without application of Article 48 (1) of the regulation if the insured person has in fact completed in Italy alone an insurance period of less than 12 months (Article 48 (1) of Regulation No 1408/71) but meets the qualifying period requirement and other requirements of Italian law once regard is had to periods completed in other Member States?'

Background

2. The background to this question can be summarized as follows:

Natalino Ventura's father, who died on 30 August 1974, was an Italian migrant worker who paid social security contributions in Germany for 125 months and in Italy for some five months. When, in June 1975, Natalino Ventura moved to Italy, the Landesversicherungsanstalt (Regional Insurance Office) Schwaben (hereinafter referred to as 'the Landesversicherungsanstalt') ceased to pay an orphan's pension to him. The Landesversicherungsanstalt based its decision on Council Regulation 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 amended and supplemented by Council Regulation (EEC) No 2001/83 of 2 June 1983, Official Journal 1983, L 230, p. 8). Under Article 78 (2) (b) (i) of that regulation the applicable legislation is that of the Member State in which the orphan resides. However, the Italian social security institution, the INPS, refused to pay Mr Ventura any benefit, on the basis of a provision of Italian law requiring a minimum insurance period of 60 months and of Article 48 (1) of Regulation No 1408/71 according to which a Member State in which the insurance period completed does not amount to one year may refuse to pay benefit under its legislation. Nevertheless, on 2 December 1980 the Landesversicherungsanstalt decided, having regard to the case-law of the Court mentioned in Section 9 below, to award Mr Ventura a supplementary orphan's pension of DM 80 per month, corresponding to the difference between the German orphan's pension and the (estimated) orphans' pension payable in Italy.

* Translated from the Dutch.

3. Mr Ventura brought an unsuccessful action before the Sozialgericht (Social Court) Augsburg for the annulment of the Landesversicherungsanstalt's decision. He appealed to the Bayerisches Landessozialgericht, which referred to the Court for a preliminary ruling the question set out above.

The non-applicability of Article 48 (1) of Regulation No 1408/71

4. The question put by the national court is concerned with the applicability to orphans' pensions (dealt with in Articles 78 and 79 of Regulation No 1408/71) of Article 48 (1) of that regulation. Article 48 (1) precludes any entitlement to benefit from a given Member State

'if the total length of the periods of insurance or residence completed under the legislation of a Member State does not amount to one year and if under that legislation no right to benefit is acquired by virtue only of those periods'.

Consequently, if Article 48 (1) applied the Italian social security institution would not have to provide any benefit.

5. The answer to this question is to be found in Article 44 (3) of Regulation No 1408/71, to which the national court refers in its question. That provision reads as follows:

'This chapter (Chapter 3) shall not apply to increases in or supplements to pensions in respect of children or to orphans' pensions granted in accordance with the provisions of Chapter 8' (that is to say Articles 77, 78 and 79).

Article 48 (1) is part of Chapter 3. Consequently, it is not applicable to orphans' pensions.

6. Admittedly, there is in Chapter 8 and in particular in Article 79 (1) a reference to Article 45, which also forms part of Chapter 3, but that does not, in my view, detract from the plain, general scope of Article 44 (3). The reference is intended solely to avoid having to repeat the description of a particular calculation method. It is therefore a drafting device intended to avoid repetition and can have no substantive effects.

7. It appears to me that the reason why Article 48 (1) is not stated to be applicable to orphans' pensions is connected with the rule set out in Article 78 (2) (b). Of the various national bodies of social security legislation which are potentially applicable, that article designates only one as being applicable to orphans' pensions rather than, as in the case of old-age and invalidity pensions, appointing the legislation of various Member States, in particular in proportion to the duration of the insurance periods completed in each of those States. Where a system of apportionment exists, as in the case of old-age and invalidity pensions, the rule set out in Article 48 (1) is designed to exclude minimal benefits arising under the legislation of one (or more) Member States. Such a rule is unnecessary

in a system of the type applicable to orphans' pensions in which the designation of a single corpus of legislation automatically precludes minimal benefits.

8. It seems, as the Landesversicherungsanstalt states in its written observations, that it was a deliberate decision on the part of the Council to opt for the solution whereby the legislation of only one Member State is to apply in the case of orphans' pensions. That solution was adopted for the first time, in the case of family allowances for orphans, in Article 42 (2) (a) of Council Regulation No 1/64 of 1 February 1964 and subsequently also, in the case of orphans' pensions, in Article 78 (2) (b) (i) of Council Regulation No 1408/71. That decision was taken with a view to simplifying the system, as the first recital in the preamble to Regulation No 1/64 (*Journal officiel* 1964, p. 1) indicates:

'Whereas the method of calculating family allowances for orphans and children of pensioners which is laid down in Article 42 of Regulation No 3 and in Articles 69 and 70 of Regulation No 4 has proved to be excessively complex to apply and the present system should be replaced by a simpler one.'

9. Admittedly, in its subsequent decisions on Article 51 of the EEC Treaty, in particular its judgment of 9 July 1980 in Case 807/79 (*Gravina* [1980] ECR 2205, at p. 2218, paragraph 6), the Court held that the insurance institution of another Member State, other than the only Member State designated, was under a duty to provide supplementary benefits — a duty which the Landesversicherungsanstalt has acknowledged and carried out in this case since 2 December 1980 (see also Section 14, *infra*) — and this has somewhat restricted the scope of the simplification which the Council sought to pursue, as the Italian Government observes in its written observations. As a result, two or possibly more institutions are once again involved in the payment of benefits. The reason for the designation of an additional insurance institution lies in the need to take account of vested rights; however, in view of the clear wording of Article 44 (3) and the underlying policy decision discussed in Sections 7 and 8 above, that fact cannot cause Article 48 (1) to apply (judgment of 12 June 1986 in Case 302/84 *Ten Holder* [1986] ECR 1821, paragraph 22).

10. The foregoing observations suffice to answer the preliminary question raised by the national court. Nevertheless, it seems worthwhile to dwell briefly on two of the arguments raised, the first by the Italian Government, the second by Mr Ventura.

Conformity with Article 51 of the EEC Treaty

11. The Italian Government argues in its written observations that Articles 78 and 79 of Regulation No 1408/71 conflict with the objectives and wording of Article 51 of the EEC Treaty. Its reasoning relates in particular to Article 78 (2) (b) (i), discussed above, as a result of which in this case the only legislation which is in principle applicable is that of the Member State in whose territory the orphan resides ('où réside l'orphelin') that is to say in this instance the legislation of Italy.

12. Although the preliminary question raised by the national court is concerned solely with the interpretation of articles of Regulation No 1408/71, it seems that one must not rule out *a priori* the possibility that the Court may consider an important legal question relating to the validity of part of the regulation where that question is closely linked with the question raised by the national court or contained in it implicitly so that the Court's answer may have an impact on the proceedings pending before the national court (see the judgments of 15 October 1980 in Case 145/79 *Roquette Frères* [1980] ECR 2917, paragraph 7, of 2 June 1976 in Case 125/75 *Milch-, Fett- und Eierkontor* [1976] ECR 771, paragraph 7, and of 1 December 1965 in Case 16/65 *Schwarze* [1965] ECR 877). In this case, if Article 78 (2) (b) (i) were invalid Italian legislation would no longer be the applicable legislation and that would certainly have such an effect.

13. Nevertheless, I would suggest that that approach should not be taken here. As can be seen from Article 78 of the regulation, the fact that the Council decided to opt for the legislation of the State in which the orphan resides as, in principle, the only applicable legislation — unlike in the case of the provisions governing, in particular, old-age pensions (see Section 7 above) — seems to me to be a choice (motivated, as I pointed out in Section 7 above, by the aim of simplification) which falls within

'the freedom conferred on the Council by Article 51 to choose ... any means which, viewed objectively, are justified, even if the provisions adopted do not result in the elimination of all possibility of inequality between workers arising by reasons of disparities between the national schemes in question' (judgment of 13 July 1976 in Case 19/76 *Triches* [1976] ECR 1243, paragraph 18).

Admittedly, the Council may not add disparities additional to those which already stem from the absence of harmonization of national legislation and certainly not if, as a result, it introduced a covert form of discrimination based on nationality (see the judgment of 15 January 1986 in Case 41/84 *Pinna* [1986] ECR 1, paragraph 21, in conjunction with Article 73 (2) of Regulation No 1408/71). However, it seems that that is not true of Article 78 (2) (b) (i) of Regulation No 1408/71.

Conflicts of competence between insurance institutions

14. Secondly, I would briefly dwell on an argument developed by Mr Ventura and also referred to by the Commission during the hearing, because it has to do with what is at stake in practice in this case. Mr Ventura complains that he has been the victim of a conflict of competence between the national insurance institutions of the two Member States. Indeed, since 1 August 1980 Mr Ventura has been receiving only DM 80 supplementary benefit from the German insurance institution in accordance with the Court's judgment in *Gravina* to which I have already referred and which has been confirmed (see Section 9 above) on several occasions (for that matter, it is remarkable that the German insurance institution has not complied retroactively with that judgment of the Court, even though it is an interpretative judgment). As a result of that situation, Mr Ventura claims that the German social security institution,

the Landesversicherungsanstalt Schwaben, as the institution with secondary responsibility under Article 78 (2) (b) *(ii)* of Regulation No 1408/71, should have continued to provide the whole benefit, given that the Italian social security institution, the INPS, did not consider itself to be competent.

15. On that view, the social security institution of one Member State could, on the basis of its own interpretation of Article 78 (2) (b) *(i)*, cause the alternative rule of the provision set out in Article 78 (2) (b) *(ii)* to apply. That argument cannot be accepted (see the judgment of 12 June 1986 in Case 302/84 *Ten Holder* [1986] ECR 1821, paragraph 21). In the event of a dispute between national social security institutions with regard to the interpretation of a provision of Community law, they must apply the relevant provisions: that is to say, as regards the procedure to be followed, Article 81 (a) of Regulation No 1408/71 and, as regards provisional measures, Article 114 of Regulation No 574/72 of 21 March 1972 laying down the procedure for implementing Regulation (EEC) No 1408/71 (Official Journal 1972, L 74, p. 1). That article reads as follows:

'In the case of a dispute between the institutions or competent authorities of two or more Member States, either as to which legislation should apply under Title II of the regulation, or as to which institution should provide the benefits, the person concerned who could claim benefits if there were no dispute shall provisionally receive the benefits provided for by the legislation administered by the institution of the place of residence or, if the person concerned does not reside in the territory of one of the Member States concerned, the benefits provided for by the legislation administered by the institution to which his claim was submitted in the first instance.'

Obviously the 'institution of the place of residence' of the person concerned which is appointed under that provision must, when it applies its legislation, take account of the insurance periods which the migrant worker completed in the various Member States.

Proposed reply to the preliminary question

16. In view of the findings set out in Sections 4 to 9 with regard to the non-applicability of Article 48 (1) of Regulation No 1408/71 to orphans' pensions referred to in Article 78 of that regulation — findings which do not detract from the Italian Government's observations with regard to the validity of Article 78 or from Mr Ventura's observations with regard to the conflict between the national social security institutions — I concur with the reply suggested by the Commission

in its written observations and consider that the question referred by the Bayerische Landessozialgericht should be answered in the following terms:

'Article 44 (3) of Regulation No 1408/71 must be interpreted as meaning that orphans' benefits within the meaning of Article 78 of the regulation must be provided by the Member State in which the orphan resides, without application of Article 48 (1) of that regulation, if the insured person has in fact completed in that Member State an insurance period of less than 12 months but meets the qualifying period requirement and the other requirements of the law of that Member State on the basis of insurance periods completed in other Member States.'