OPINION OF ADVOCATE GENERAL GEELHOED
delivered on 24 February 2005 [1]

I — Introduction

1. This case raises the question as to how the rules of conflict in Regulations Nos 1408/71 and 574/72 [2] should be interpreted and applied in allocating competence in respect of the provision of family benefits between the Member State of employment and the Member State of residence in a situation in which a person is employed in one Member State (Austria), but lives together with her spouse or partner and children in another Member State (Germany) where the spouse or partner is employed. The same question is also at issue in Case C-153/03, *Weide*, [3] relating to a similar conflict of competence between Luxembourg, as the Member State of employment and, again, Germany, as the Member State of residence. Advocate General Kokott presented her Opinion in this case on 15 July 2004. [4]

1 — Original language: English.

2 — 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 (OJ English Special Edition 1971(II), p. 416), as amended and updated by Regulation (EC) No 1386/2001 of the European Parliament and of the Council of 5 June 2001 (OJ 2001 L 187, p. 1) (hereinafter: Regulation No 1408/71) and Council Regulation (EEC) No 574/72 of 21 March 1972 laying down the procedure for implementing Regulation No 1408/71 (OJ English Special Edition 1972(I), p. 159), as amended and updated by Regulation No 1386/2001 (hereinafter: Regulation No 574/72).

3 — Judgment is still pending in this case.

4 — The Opinion may be found at www.curia.eu.int.

II — Relevant provisions

2. The relevant provisions of Community law are the following:

Article 13 of Regulation No 1408/71

'1. Subject to Articles 14c and 14f, persons to whom this Regulation applies shall be subject to the legislation of a single Member State only. That legislation shall be determined in accordance with the provisions of this Title.

2. Subject to Articles 14 to 17:

(a) a person employed in the territory of one Member State shall be subject to the legislation of that State even if he resides in the territory of another Member State or if the registered office

or place of business of the undertaking or individual employing him is situated in the territory of another Member State;

....'

Article 73 of Regulation No 1408/71

'An employed or self-employed person subject to the legislation of a Member State shall be entitled, in respect of the members of his family who are residing in another Member State, to the family benefits provided for by the legislation of the former State, as if they were residing in that State, subject to the provisions of Annex VI.'

Article 76 of Regulation No 1408/71

'1. Where, during the same period, for the same family member and by reason of carrying on an occupation, family benefits are provided for by the legislation of the Member State in whose territory the members of the family are residing, entitlement to the family benefits due in accordance with the legislation of another Member State, if appropriate under Article 73 or 74, shall be suspended up to the amount provided for in the legislation of the first Member State.

...'

Article 10 of Regulation No 574/72

'1. (a) Entitlement to benefits or family allowances due under the legislation of a Member State, according to which acquisition of the right to those benefits or allowances is not subject to conditions of insurance, employment or self-employment, shall be suspended when, during the same period and for the same member of the family, benefits are due only in pursuance of the national legislation of another Member State or in application of Articles 73, 74, 77 or 78 of the Regulation, up to the sum of those benefits.

(b) However, where a professional or trade activity is carried out in the territory of the first member State:

(i) in the case of benefits due either only under national legislation of another Member State or under Articles 73 or 74 of the Regulation to the person entitled to family benefits or to the person to whom they are to be paid, the right to family benefits due either only under national legislation of that other Member State or under these Articles shall be suspended up to the sum of family benefits provided for by the legislation of the Member State in whose territory the member of the family is residing. The cost of the benefits paid by the Member State in whose territory the member of the family is residing shall be borne by that Member State;

(ii) ...'

III — Facts, procedure and preliminary questions

3. Ms Dodl and Ms Oberhollenzer (hereinafter: the claimants) have Austrian nationality, work in Austria, but live in Germany with their husband and partner respectively, both of whom have German nationality. Following the birth of their sons, the claimants took unpaid parental leave for a period of three and a half months (in the case of Ms Dodl) and almost two years (in the case of Ms Oberhollenzer). During this period their working relationship was suspended.

4. The claimants both applied for a child-raising allowance (*Bundeserziehungsgeld*) in Germany. These applications were rejected by the German authorities on the grounds that, in their view, Austria, as the Member State of employment, was the competent Member State in respect of these benefits. In Ms Dodl's case, moreover, the income limit applicable under German legislation for entitlement to this allowance had been exceeded. The claimants thereupon attempted to obtain a child-care allowance (*Kinderbetreuungsgeld*) in Austria. However, these applications, too, were rejected. Applying Articles 73, 75 and 76 of Regulation No 1408/71, in conjunction with Article 10 (1)(b) of Regulation No 574/72, the competent body, the Tiroler Gebietskrankenkasse considered that the benefits concerned should be provided by priority by the Member State of residence.

5. These decisions were challenged by the claimants before the Landesgericht Innsbruck. Considering that in situations where parents to a child work in different Member States, family benefits should be provided by the state where the child resides permanently, this court dismissed the actions brought by the claimants. In Austria they were only entitled to payment of the difference between the Austrian benefit and

the German benefit, in case the latter is lower. The claimants lodged an appeal against this judgment before the Oberlandesgericht Innsbruck, asserting that, as the benefits concerned were intended to assure income to parents whose professional activities had been suspended in order to permit them to spend time raising their children, the Member State of employment is responsible for providing the family benefits concerned.

6. The Oberlandesgericht Innsbruck decided to stay the proceedings and refer the following two questions to the Court for a preliminary ruling under Article 234 EC:

'1) Is Article 73 of Regulation (EEC) No 1408/71 of the Council 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, in conjunction with Article 13 of that regulation, as amended, to be interpreted as extending even to employed persons whose employment relationships are still in existence but do not involve any duty to carry out work or pay remuneration (unpaid parental leave) or any social security obligations under national law?

2) If the answer to the first question should be in the affirmative:

Is the State of the place of employment responsible for the benefit payment in such a case even if the employed person and those members of his or her family for whom family benefit such as Austrian 'Kinderbetreuungsgeld' (child-care allowance) might be payable have not lived in the State of the place of employment, particularly during the period of unpaid parental leave?'

7. Written observations were submitted by the Tiroler Gebietskrankenkasse (the defending party in the main proceedings), the Governments of Austria, Germany and Finland and by the Commission. The Austrian and German Governments and the Commission presented further submissions at the oral hearing on 14 December 2004.

8. Prior to the hearing the German Government was requested by the Court to explain the nature of the family allowance (*Kindergeld*) corresponding to the Austrian family benefits and received by the spouse and the partner of the claimants respectively and to explain how these differ from the German child-raising allowance (*Bundeserziehungsgeld*). This information was received by the Court on 5 November 2004. In its answer the German Government explains that the

Kindergeld and *Bundeserziehungsgeld* differ in respect of method of payment, design and the conditions under which they are granted. For the purposes of the present proceedings it is clear, and indeed is not disputed by any of the intervening parties, that both these benefits and the Austrian *Kinderbetreuunngsgeld* are family benefits within the meaning of Article 4(1)(h) of Regulation No 1408/71 as interpreted by the Court. [5]

IV — The answers to the preliminary questions

A — *The first preliminary question*

9. By its first question the referring court essentially asks whether a worker who takes unpaid parental leave for a certain period of time, but whose employment relationship remains intact, although the mutual obligations of carrying out work and payment of remuneration are suspended, and who does not have any social security obligations under national law, retains worker status for the purposes of the application of Article 73 of Regulation No 1408/71.

10. The intervening parties all agree that this question should be answered in the affirmative.

11. In answering this question it must first be pointed out that according to Article 2 of Regulation No 1408/71 the provisions of that regulation apply to inter alia employed persons who are or have been subject to the legislation of one or more Member States and who are nationals of a Member State. The term employed person is defined in Article 1(a) of Regulation No 1408/71 and designates any person insured under one of the social security schemes for the contingencies and under the conditions mentioned in that provision. [6] As the Court has held, this implies that a person has the status of an employed person within the meaning of Regulation No 1408/71 where he is covered, even if only in respect of a single risk, on a compulsory or optional basis, by a general or special social security scheme mentioned in Article 1(a) of Regulation No 1408/71, irrespective of the existence of an employment relationship. [7]

12. In the light of this caselaw it is, therefore, not so much the status of the employment

5 — See e.g. Joined Cases C-245/94 and C-312/94 *Hoever and Zachow* [1996] ECR I-4895, at paragraphs 23 to 27, and Case C-255/99 *Humer* [2002] ECR I-1205, at paragraphs 31 to 32.

6 — Case C-2/89 *Kits van Heijningen* [1990] ECR I-1755, paragraph 9, and Joined Cases C-4/95 and C-5/95 *Stöber and Piosa Pereira* [1997] ECR I-511, paragraph 27.

7 — Case C-85/96 *Martínez Sala* [1998] ECR I-2691, paragraph 36, and Case C-275/96 *Kuusijärvi* [1998] ECR I-3419, paragraph 21.

relationship which determines whether or not a person continues to fall within the scope *ratione personae* of Regulation No 1408/71, but the coverage against risks under a social security scheme mentioned in Article 1(a) of this regulation. It follows from this that the mere suspension of the main obligations of an employment relationship for a given period of time cannot deprive the employee of his or her status as an employed person within the meaning of Article 73 of Regulation No 1408/71.

13. The answer to the first question is therefore that Article 73 of Regulation No 1408/71, in conjunction with Article 13 of that regulation, extends to employed persons whose employment relationships are still in existence but do not involve any duty to carry out work or pay remuneration, due to unpaid parental leave, nor any social security obligations under national law.

B — *The second preliminary question*

14. The second question referred to the Court by the Oberlandesgericht Innsbruck relates to the division of competence between the Member States in the field of the provision of family benefits in the situation that a Community worker is employed in one Member State, but lives with his or her partner and child or children in another Member State. Must the Member State which is responsible by priority be determined solely by reference to the status as a worker of the person concerned or can account be taken of his or her family circumstances? Different approaches may be followed to resolving this problem, as may become apparent from the following summary of parties' submissions.

1. Observations by intervening parties

15. The Tiroler Gebietskrankenkasse and the Austrian Government take the view that in the situation where both parents work in different Member States and are entitled to family benefits in both these States, the location of the main centre of interests of the family should be decisive in determining which Member State is responsible by priority for providing family benefits. In this respect reference is made to the Court's judgment in *Hoever and Zachow* [8] in which it was held that in this context regard should be had for the situation of the family as a whole. Although recognising that the claimants are workers within the meaning of Article 73 of Regulation No 1408/71 and that, therefore, it would appear that the Member State of employment is responsible, they point out that it is not correct only to take their situation into account. Where under the so-called principle of unicity there is a right to a single compensation for family costs per child, accumulation of benefits should be avoided. In this respect, Article 76 of Regulation No 1408/71 and Article 10 of

8 — Cited in footnote 5, at paragraph 37.

Regulation No 574/72 provide that, where a professional activity is exercised in the Member State of residence, benefits provided by the Member State of employment are suspended up to the amount of the benefits provided in the former Member State. If these benefits are lower than the benefits provided by the Member State of employment, this Member State is obliged to top them up to the level of the benefits it provides. This solution is in the best interests of the persons concerned as it guarantees them the highest level of benefits and thus contributes to the objective of the regulations to facilitate worker mobility. In their view, therefore, Germany, as the Member State of residence, is primarily responsible for providing the family benefits concerned.

16. The German Government, on the other hand, maintains that it follows from Articles 13 and 73 of Regulation No 1408/71 that because the claimants are employed in Austria, they are entitled to family benefits in that Member State. Such benefits are intended to provide income to a parent during the period in which professional activity is suspended for reasons of child care. Regulation No 1408/71 does not provide a basis for taking account of their family situation. It observes that *Hoever and Zachow* concerned a specific situation and that the rule laid down in that judgment only applies to situations in which the persons concerned have no right to family benefits in the Member State of employment as a result of them having exercised their right of free movement. Article 76 of Regulation No 1408/71, moreover, does not apply in the present case as the claimants' partners do not fulfil the conditions under German law for receiving such benefits. The Finnish Government agrees that the Member State of employment is responsible in the present case. The Member State of residence is only responsible if it is not possible to apply the law of the Member State of employment. It adds, however, that if there is an accumulation of rights, the responsible Member State must be determined on the basis of Article 10 (1)(b)(i) of Regulation No 574/72.

17. The Commission, in fact, has defended both points of view. In its written observations in the present case, it refers to the fact that in *Weide* [9] it argued that, in allocating competence for the provision of family benefits under Article 10(1) of Regulation No 574/72, the 'family approach' which the Court applied in *Hoever and Zachow* should be adopted rather than an 'individual approach'. In the circumstances of that case, which are identical to those underlying the present case, this would result in the Member State of residence being responsible by priority. By contrast, in the present case the Commission first indicates that it seized

9 — Pending, see footnote 3.

the opportunity to re-examine the 'family approach', which it had endorsed in *Weide*. In its written submissions, it states that this approach should not be applied in a general way, but should be restricted to situations such as that in *Hoever and Zachow* where the persons concerned were in danger of losing their rights to family benefits after having exercised their right to free movement. As the principle of the competence of the Member State of employment is the basic principle of Regulations No 1408/71 and No 574/72, it should be given preference, unless its application leads to unacceptable consequences. However, at the oral hearing, the Commission again reversed its position. Referring to the Court's judgments in *McMenamin*,[10] *Hoever and Zachow* and to Advocate General Kokott's Opinion in *Weide*, it submits that after further profound internal debate, it now considers that the 'family approach' should be applied in determining which Member State should take precedence in providing family benefits. In a case such as the present one, in which one spouse works in the Member State of residence and the bonds of the family obviously are stronger with this State, it, in accordance with Article 10(1)(b)(i) of Regulation No 574/72, is competent by priority to provide the family benefits concerned.

10 — Case C-119/91 [1992] ECR I-6393

2. Assessment

18. It is apparent from the submissions of the intervening parties that there is a fair amount of confusion about the correct interpretation and application of the provisions in the social security regulations on the allocation of competence between the Member State of employment and the Member State of residence in respect of the provision of family benefits in situations where the parents of a child work in two different Member States, but live together in one of these Member States. Not only is this illustrated by the diametrically opposed interpretation given to these provisions by two Member States concerned, it is also highlighted by the vacillating positions adopted by the Commission on this matter.

19. In the meantime, the claimants in this case are the victims of a negative conflict of competence between the two Member States concerned. On the one hand, the Member State of residence (Germany) follows the 'individual approach' to the interpretation of these provisions which leads to the competence of the Member State of employment. On the other hand, the Member State of employment of the claimants (Austria) applies the 'family approach' which results in competence being allocated to the Member State of residence. In this situation there clearly is a need for a single and uniform approach to the interpretation of these provisions to prevent such situations arising. Where on the face of it, either approach appears to be defendable, it would seem to me that the approach which is most appropriate to circumstances such as those of the case in hand should be adopted.

20. First it is useful to recount the essence of the main provisions concerned in order to identify the legal problem involved. Although these provisions do not explicitly refer to the Member States of employment and of residence, I will do so for purposes of simplifying the presentation.

21. The basic rule in allocating competence in respect of social security benefits is laid down in Article 13 of Regulation No 1408/71 which, to state it succinctly, in its first paragraph, establishes that Community workers [11] shall be subject to the legislation of a single Member State and, in its second paragraph, provides that that State shall be the Member State of *employment*, even if he or she resides in the territory of another Member State. Article 73 of Regulation No 1408/71 extends this rule to the enjoyment of family benefits in respect of family members residing in another Member State. They are to be treated as if they were residing in the Member State of employment.

22. Subsequently, Regulations Nos 1408/71 and 574/72 make provision for various situations in which entitlement to family benefits arises in respect of the same family member in both the Member State of employment and the Member State of residence. The aim of these provisions is to establish which of these two Member States must provide the benefits concerned by priority, thus preventing overlapping benefits being enjoyed.

23. The first of these situations is the subject of Article 76 of Regulation No 1408/71. This provision concerns the situation where 'by reason of carrying on an occupation' family benefits are provided for by the legislation of the Member State of residence. In that case, entitlement to family benefits under the legislation of the Member State of employment is suspended up to the amount of the benefits provided by the Member State of residence. This implies that the Member State of employment is obliged to top up the difference between the benefits which it provides and the benefits enjoyed in the Member State of residence where the level of the latter is lower. In this situation, therefore, the Member State of *residence* is competent by priority.

24. The second situation is characterised by the fact that entitlement to family benefits in the Member State of residence, is not subject to conditions of insurance or employment which distinguishes it from the situation envisaged by Article 76 of Regulation No 1408/71. Here, it is presumed that there is no employment relationship in the Member State of residence. In these circumstances, under Article 10(1)(a) of Regulation No 574/72, the right to benefits provided by the Member State of residence is suspended in favour of the family benefits provided by the Member State of employment for the

11 — Used here to denote the term 'employed person' as defined in Article 1(a) of Regulation 1408/71.

same member of the family, again up to the sum of these benefits. In this case, then, the Member State of *employment* takes priority.

25. In the third situation, too, the benefits provided by the Member State of residence are provided independent of conditions of insurance or employment. However, as distinct from the second situation, in this case, 'a professional or trade activity' is carried out in the Member State of residence 'by [12] the person entitled to family benefits or to whom they are to be paid'. Under Article 10(1)(b)(i) of Regulation No 574/72, the effect of this economic activity in the Member State of residence, again, is to reverse the priorities between the Member States concerned: entitlement to family benefits provided by the Member State of employment is suspended up to the sum of the benefits provided by the Member State of *residence*.

26. Finally, Article 10(1)(b)(ii) of Regulation No 574/72 relates to a fourth situation concerning the dependent children of pensioners and orphans, which for obvious reasons is irrelevant to the present case.

27. Before continuing the analysis, it must first be determined which of these provisions is applicable to the case in hand on the basis of the facts established in the order for reference. The second question does not specify which of the above provisions the Oberlandesgericht Innsbruck deems to be applicable, although the first preliminary question relates to Article 73 of Regulation No 1408/71. However, given the fact that the spouse and partner of the claimants are employed in the Member State of residence, Germany, whilst the claimants themselves are employed in Austria, and continue to be so during their unpaid parental leave, it is clear that the applicable provision is Article 10(1)(b)(i) of Regulation No 574/72. The question which then remains to be answered is whether, for the purposes of establishing priority between the Member States concerned in respect of the payment of family benefits, the profession or trade activity carried out in the Member State of residence must be performed by the Community worker involved or whether this may also be his or her spouse or partner.

28. This question has, in fact, already been dealt with by the Court in its judgment in *McMenamin*. [13] This case concerned a situation similar to that which is at the basis of the main proceedings in the present case. Here, a frontier worker, who was entitled to

12 — The English version here, confusingly, uses the word '*to* the person', thus disassociating 'the person' concerned from 'the carrying out of the professional or trade activity'. It is apparent from other language versions, however, that '*by* the person' is intended. The Court, too, uses the phrase 'by the person', see Case C-119/91, cited in footnote 10, at paragraph 19.

13 — Case C-119/91, cited in footnote 10.

family benefits paid by the Member State of employment (the United Kingdom), was also entitled to allowances paid by the State of residence (Ireland), in whose territory only her spouse worked. Having first established that Article 13 of Regulation No 1408/71 does not preclude certain benefits from being governed by the more specific rules of that regulation, the Court went on to examine 'whether the exercise of a professional or trade activity in the Member State of residence by the spouse of the person entitled to family allowances within the meaning of Article 73 of Regulation No 1408/71 is such as to suspend the right laid down by Article 73 even though the spouse is not, under the legislation of the State of residence, the 'person entitled to the family benefits or family allowances, or the person to whom they are paid within the meaning of Article 10(1)(b)(i) of Regulation No 574/72'. [14] Following an analysis of the rationale of the wording of this provision which was 'to extend, not to limit the cases in which benefits due in pursuance of Article 73 of Regulation No 1408/71 were to be suspended', [15] the Court concluded that 'where a person having the care of children exercises a professional or trade activity in the territory of the State of residence of those children, the allowances payable by the State of employment in pursuance of Article 73 are suspended'. [16]

29. In other words, where one of the parents a child is employed in the Member State of residence of the family or otherwise carries out a professional or trade activity there, the Member State of residence is competent by priority to provide family benefits. In reaching this conclusion, the Court did not distinguish between the frontier worker and his or her spouse or partner for the purposes of the application of Article 10(1)(b)(i) of Regulation No 574/72. It thereby clearly endorsed a 'family approach' to the interpretation and application of this provision.

30. The Court expressed itself more explicitly in this regard in *Hoever and Zachow* where it observed that 'family benefits by their nature cannot be regarded as payable to an individual in isolation from his family circumstances. Since the grant of a benefit, such as German child-raising allowance, is intended to meet family expenses, the choice of the parent who is to receive the allowance is not of importance'. [17] Although the German Government seeks to distinguish this case from the present one on the basis of the differences in the underlying facts, it is clear that the Court's observation in *Hoever and Zachow* must be regarded as a more general guiding principle in interpreting the provisions on the allocation of competence for the provision of family benefits. Confirmation for this may be found in the Court's more recent judgment in *Humer*, [18] in which it repeated this consideration in yet another factual context.

14 — At paragraph 16.
15 — At paragraph 23.
16 — At paragraph 25.
17 — Cited in footnote 5 at paragraph 37.
18 — Cited in footnote 5, at paragraph 50.

31. From a substantive point of view, taking the circumstances of the family into account in order to allocate competence in respect of the payment of family benefits is wholly in line with their nature and function as not being, at least not primarily, related to employment. Thus the Court has elucidated that where family benefits, according to Article 1(u)(i) of Regulation No 1408/71, are defined as being intended to meet family expenses this must be understood as meaning that these benefits refer 'to a public contribution to a family's budget to alleviate the financial burdens involved in the maintenance ... of children'. [19] Thus child-raising allowances may be intended 'to enable one of the parents to devote himself or herself to the raising of a young child and, more particularly, to remunerate the service of bringing up a child, to meet other costs of caring for and bringing up a child and, as the case may be, to mitigate the financial disadvantages entailed in giving up income from full-time employment'. [20] Although the last named purpose does involve an element of compensation for loss of income involved in taking unpaid parental leave, this in my view, is insufficient to accept that such benefits are especially employment related, particularly as it may be presumed that there is no link between such a benefit and the level of income previously enjoyed by the employee concerned.

32. I would observe further that if the 'individual approach' were to be adopted in the interpretation of Article 10(1)(b)(i) of Regulation No 574/72, this could in theory result in a family enjoying double benefits where the spouse or partner employed in the Member State of residence is entitled to the payment of benefits, contrary to the objectives of the rules on the prevention of overlapping benefits in Regulations Nos 1408/71 and 574/72.

33. Finally, it must be emphasised that allocating competence to the Member State of residence does not in any way affect the material interests of the beneficiaries of the family benefits concerned where the level of benefits is lower than that of the benefits provided in the Member State of employment. In that case, the Member State of employment is obliged to top them up to the level of the benefits it provides. They are always guaranteed benefits at the level of either the Member State of residence or of employment, whichever is highest. This in itself is an expression of the more general principle that persons who have exercised their right of free movement should not, as a result, be treated less favourably than if they had not exercised this freedom. [21]

34. The conclusion must be, therefore, that in a situation in which a person is employed in one Member State, but lives together with his or her spouse or partner in another Member State where this spouse or partner is engaged in gainful activity, the Member State of residence is competent by priority to provide family benefits.

19 — Case C-85/99 *Offermanns* [2001] ECR I-2261, at paragraph 41.

20 — Offermanns, cited in the previous footnote, at paragraph 39.

21 — See, e.g., Hoever and Zachows, cited in footnote 5, at paragraph 36, and Case C-224/98 *D'Hoop* [2002] ECR I-6191, at paragraph 30.

V — Conclusion

35. I therefore recommend to the Court to provide the following answers to the preliminary questions referred by the Oberlandesgericht Innsbruck under Article 234 EC:

(1) Article 73 of Regulation (EEC) No 1408/71 of the Council 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, in conjunction with Article 13 of that regulation, extends to employed persons whose employment relationships are still in existence, but do not involve any duty to carry out work or pay remuneration, due to unpaid parental leave, nor any social security obligations under national law.

(2) In a situation in which a person is employed in one Member State, but lives together with his or her spouse or partner in another Member State where this spouse or partner is engaged in gainful activity, under Article 10(1)(b)(i) of Council Regulation (EEC) No 574/72 of 21 March 1972 laying down the procedure for implementing Regulation No 1408/71, the Member State of residence is competent by priority to provide a family benefit, such as a child care allowance.