On those grounds,

THE COURT,

in answer to the questions referred to it by the Landessozialgericht für das Land Nordrhein-Westfalen by an order of 1 September 1977, hereby rules:

The right to the benefits referred to in Article 79 (3) of Regulation No 1408/71 of the Council is to be suspended, pursuant to the provisions of that paragraph, in order to prevent duplication of benefits only in so far as that right overlaps rights to benefits of the same kind acquired by virtue of the pursuit of a professional or trade activity.

Kutscher Sørensen Bosco

Mertens de Wilmars Pescatore Mackenzie Stuart O'Keeffe

Delivered in open court in Luxembourg on 16 March 1978.

A. Van Houtte
Registrar

H. Kutscher
President

OPINION OF MR ADVOCATE GENERAL REISCHL DELIVERED ON 2 MARCH 1978 [1]

Mr President,
Members of the Court,

Both appellants in the main action, German nationals born in 1965 and 1967, moved to Belgium following the divorce of their parents and the remarriage of their mother to a Belgian national, to the home of their mother and stepfather. The stepfather has from 1 August 1972 received family benefits by reason of his employment in Belgium, that is dependent child allowances under Belgian legislation. Initially the allowance for the first child amounted to Bfrs 845.25 and for the second Bfrs 1 168.75; subsequently these sums were increased to Bfrs 3 599.50 for the first child and Bfrs 5 185 for the second child, until August 1977.

1 — Translated from the German.

After the death of the father of the children on 11 January 1974 the Landesversicherungsanstalt Rheinprovinz (the regional insurance institution for the Rhine province) further acknowledged entitlement to an orphans' pension in accordance with Article 1267 of the Reichsversicherungsordnung (the national insurance regulation) in respect of the insurance periods completed by the deceased father. This orphans' pension was to amount initially to DM 197.20 each per month and from 1 July 1975 to DM 219.10 each per month. However, in view of the payment of the Belgian dependent child allowances . this entitlement was suspended. In this connexion the Landesversicherungsanstalt relied upon Article 79 (3) of Regulation No 1408/71 on the application of social security schemes to employed persons and their families moving within the Community (Official Journal, English Special Edition 1971 (II), p. 416). In that paragraph it is stated that rights to benefits under Article 77 (family allowances for persons receiving pensions for old age and increases or supplements to such pensions in respect of the children of such pensioners) and under Article 78 (family allowances and supplementary or special allowances for orphans and orphans' pensions) are to be suspended if the children become entitled to family benefits or family allowances under the legislation of a Member State by virtue of the pursuit of a professional or trade activity. In such a case the persons concerned shall be considered as members of the family of a worker.

The two children in question, represented by their mother, first instituted proceedings against the decision to suspend the benefits before the Sozialgericht Düsseldorf. When their action was dismissed they appealed to the Landessozialgericht für das Land Nordrhein-Westfalen.

By an order of 1 September 1977 that court then stayed the proceedings and referred the following two questions to the Court for a preliminary ruling under Article 177 of the EEC Treaty:

1. Where, following the remarriage of a widowed mother who is entitled in Germany to a family allowance under the Bundeskindergeldgesetz (Federal Law on family allowances) in addition to an orphans' pension, an orphan moves to Belgium and the stepfather receives a family allowance in respect of the orphan from the Caisse de Compensation pour Allocations Familiales de la Région Liégeoise, is the right to a German orphans' pension under Article 1267 of the Reichsversicherungsordnung (National insurance regulation), having regard to Article 79 (3) of Regulation (EEC) No 1408/71, suspended:

   (a) in its entirety or

   (b) only in so far as the German orphans' pension and the Belgian family allowance together exceed the sum of the German orphans' pension and the German dependent child allowance under the Bundeskindergeldgesetz?

2. Or is Article 79 (3) of Regulation (EEC) No 1408/71 to be understood in the sense that rights to benefits under Articles 77 and 78 and Article 79 (2) of that regulation are to be suspended in order to avoid duplication of benefits only where rights which by their nature are similar are given in another Member State? That is to say: rights to an orphans' pension against insurance institutions in two Member States lead to the suspension of one of the rights to an orphans' pension and rights to a family allowance in two Member States lead to the suspension of one of the rights to a family allowance, while rights in two Member States which by their nature are different

(for example on the one hand a family allowance and on the other an orphans' pension) are not covered by Article 79 (3).

My views on these questions are as follows:

1. From the evidence presented to us it appears that the appellants' father, after whose death the German orphans' pension became payable by reason of his status as an insured person, worked exclusively in the Federal Republic of Germany, that is, he was not a worker who moved within the Community. Similarly the Belgian stepfather, in respect of whose professional or trade activity family allowances are paid in Belgium, has completed periods of employment only in Belgium and thus is also not a migrant worker. The legislation of two Member States came to apply to the appellants or rather, with regard to the Belgian family allowances, in connexion with the appellants, only because their mother, who had never been employed and plainly did not intend to pursue a professional or trade activity in Belgium, moved to Belgium, after her remarriage, to the home of her second husband.

In those circumstances it is clearly necessary, as the Commission has properly emphasized, first of all to consider the preliminary point as to whether the appellants' pension entitlement, to which Article 79 (3) of Regulation No 1408/71 is considered to apply, in any way comes within the scope of the regulation as regards the persons covered thereby.

There are in fact considerable grounds for doubt on this point as the coinciding of the German orphans' pension with the Belgian family allowance is clearly unrelated to the free movement of *workers* within the Community; the problems of co-ordination which arise in this case do not, as is at once evident, stem from the exercise of freedom of movement within the meaning of the Treaty.

Against this it might indeed be objected that in the previous decisions of the Court in a series of cases, specified by the Commission in the oral procedure, the provisions concerning the persons covered by Regulation No 3, the predecessor of Regulation No 1408/71, were very liberally interpreted. In the sphere of accident insurance those were cases where the injury which occurred in another Member State was not connected with employment and where pursuit of a professional or trade activity did not necessitate a change of residence and, in relation to sickness insurance, where survivors transferred their residence or temporarily stayed in another Member State. I refer details to the judgment of 19 March 1964 in Case 75/63, *Hoekstra (née Unger)* v *Bedrijfsvereniging voor Detailhandel en Ambachten* [1964] ECR 177; the judgment of 11 March 1965 in Case 31/64, *"De Sociale Voorzorg" Mutual Insurance Fund* v *W.H. Bertholet* [1965] ECR 81; the judgment of 9 December 1965 in Case 44/65, *Hessische Knappschaft* v *Singer et Fils* [1965] ECR 965; the judgment of 30 June 1966 in Case 61/65, *Vaassen (née Göbbels)* v *Management of the Beamtenfonds voor het Mijnbedrijft* [1966] ECR 261; and the judgment of 12 November 1969 in Case 27/69, *Caisse de Maladie des CFL "Entr'aide Médicale" and Société Nationale des Chemins de Fer Luxembourgeois* v *Compagnie Belge d'Assurances Générales sur la Vie et contre les Accidents* [1969] ECR 405.

In addition it could also be pointed out that, in accordance with the general provision contained in Article 2 (1) on the persons covered by Regulation No 1408/71, that regulation also applies to workers who are or have been subject to the legislation of only one Member State. Furthermore Article 78 (2) refers to benefits for the orphan of a deceased worker who was subject to the legislation of one Member State only.

Nevertheless, it is my impression that the doubt to which I have previously referred cannot be eliminated entirely by the foregoing considerations.

With regard to the said case-law concerning Regulation No 3 I consider it important that it relates to problems of accident and sickness insurance and that the aim clearly has been to ensure that the extension which has been indicated is in the interests of the persons entitled or at any rate does not affect them adversely. On the other hand, the present case relates to survivors' pension insurance and to a provision which is intended to curtail rights.

Furthermore, it is difficult to reach the conclusion on the basis of the provisions of Regulation No 1408/71 which have been cited that the regulation covers in general all workers irrespective of whether they move within the Community or not. In fact that would plainly go beyond the objectives and limits of Article 51 of the EEC Treaty, in accordance with which the systems of social security are to be co-ordinated merely in order to provide freedom of movement for workers. The most probable reason for the general wording employed is that not all movements by workers necessarily lead to the application of the legislation of several States. Regard must be had for instances where persons cross frontiers before beginning work for the first time after the completion of training or for those in which the principle contained in Article 13 (2) (a) (the precedence of the law of the State where a worker is employed) does not apply. The said wording was no doubt adopted with regard to cases of that nature, which in fact concern migrant workers properly so-called.

On these grounds I am inclined to interpret Article 79 (3) of Regulation No 1408/71 to mean that it concerns orphans' benefits only where such benefits are affected directly or indirectly by the movement of a parent and that it does not apply to orphans who have claims on other grounds under the legislation of several Member States.

Since in the main action the suspension of the orphans' pension is based exclusively on Community law — it is clear that the Reichsversicherungsordnung and the Bundeskindergeldgesetz do not preclude the overlapping of orphans' pensions with German family allowances, and indeed it seems possible under the Reichsversicherungsordnung to transfer the orphans' pension abroad — such suspension would mean that non-payment of the German orphans' pension cannot be lawful, precisely because the said provision of Community law is irrelevant.

2. However, having arrived at that conclusion I do not wish to leave matters there. Instead I should like to consider the questions themselves which have been submitted, in case doubts are entertained regarding my conclusions or in case it must be accepted that the appellants' father or stepfather have moved between the Member States in question. In this connexion it appears to me logical to treat first of all the question whether, since the relevant allowances are not of the same kind, suspension is entirely excluded, because if this question is answered in the affirmative consideration of the other questions becomes superfluous.

It is clear that the allowances in question are by no means of the same kind. The Italian Government indeed made this point in its observations in connexion with the definitions contained in Article 1 of Regulation No 1408/71. Thus it is clear that with regard to family allowances at least two persons are concerned: the member of the family himself does not have a claim and the person entitled is characterized

by the existence of a further legal relationship, generally that arising from employment. In the case of orphans' pensions only the orphans are entitled and they are not dependent on an existing legal relationship based on employment. In fact orphans' pensions constitute survivors' pensions and, but for the express provision in Article 44 (3), it would have been necessary to consider them in the context of Chapter III (old-age and death (pensions)).

Article 79 in fact appears to disregard the foregoing factor and the fact that, as the Commission has emphasized, it is impossible to discern any logical reason based on social policy for the prohibition on the overlapping of family benefits and orphans' pensions. It clearly concerns allowances for orphans as such as well as in their capacity of members of a family. As is clear from the wording, the acquisition of a right by children to family benefits or family allowances under the legislation of a Member State by virtue of the pursuit of a professional or trade activity entails the suspension of rights under Article 77, that is rights to family allowances for pensioners and to supplements to such pensions in respect of children, and rights under Article 78, that is rights to family allowances and special or supplementary allowances for orphans and orphans' pensions.

Nevertheless, the matter cannot rest there. The endeavour must instead be made to find an interpretation which avoids internal contradictions within the system, permits the proper expression of the spirit and objective of the provisions and observes important principles which are to be inferred from the Treaty.

Viewed in this light it is impossible not to accord a certain weight to the observation of the Italian Government that the principle that the right to benefit is retained upon transfer of residence to another Member State may be traced back to Article 51. The Italian Government is also justified in maintaining that in the decisions of the Court concerning social security for migrant workers it is possible to discern the constant endeavour to prevent the loss of rights. In this connexion it must be borne in mind that orphans who remain in a Member State are entitled to several overlapping rights to benefits whilst, on a literal interpretation of Article 79, such orphans would suffer a loss of rights because of the movement of another person to a different place, which is especially serious since the right in question is financed from insurance contributions. Furthermore, I consider relevant the statement of the Italian Government that, in accordance with the provisions of Article 12, in principle overlapping is excluded only where there are a number of benefits of the same kind and where one person acquires the right to a number of overlapping benefits.

In this connexion the observation of the Commission are helpful. It considers that the interpretation is conditioned by the fact that Article 79 (3) governs only one instance of overlapping (overlapping with benefits by reason of the pursuit of a professional or trade activity) and that another instance (overlapping with benefits on the basis of residence) is covered by Article 10 (1) (b) of Regulation No 574/72 fixing the procedure for implementing Regulation No 1408/71, as amended by Regulation No 878/73 (Official Journal L 86 of 31 March 1973, p. 1). That provision is as follows:

"Entitlement to family benefits or family allowances due under the legislation of one Member State only, according to which acquisition of the right to those benefits or allowances is not subject to conditions of insurance or employment, shall be suspended when, during the same period and for the same member of the family:

(a) ...

(b) benefits are due in pursuance of Article 77 or 78 of the Regulation. If, however, a pensioner who is entitled to benefits under Article 77 of the Regulation, his spouse or the person looking after the orphans to whom benefits are due under Article 78 of the Regulation, exercises a professional or trade activity in the territory of the said Member State, entitlement to family allowances due in pursuance of Article 77 or 78 of the Regulation under the legislation of another Member State shall be suspended; where this is the case, the person concerned shall be entitled to the family benefits or family allowances of the Member State in whose territory the children reside, the cost to be borne by that Member State, and, where appropriate, to benefits other than the family allowances referred to in Article 77 or 78 of the Regulation, the cost to be borne by the competent State as defined by those Articles'.

It is to be inferred from the foregoing that when the specified conditions obtain, that is, entitlement in the State of residence which is not dependent on conditions pertaining to insurance or employment and the pursuit of a professional or trade activity in the territory of such State by the person having custody of the orphan, rights under Article 78 are indeed suspended, but not rights to benefits which are not classified as family allowances, that is, including orphans' pensions. It is thus quite in order that orphans' pensions in the State responsible for payment under Article 78 should overlap with family allowances in the State of residence. It seems to me quite plain that, on the basis of the foregoing the same must apply to Article 79 (3) and that this is the only interpretation which corresponds to the spirit and objective of that provision.

Accordingly, in connexion with the question of the Landessozialgericht, it is clear that in Article 79 (3) of Regulation No 1408/71 it was intended to exclude only the overlapping of benefits *of the same kind*.

3. As the Commission has suggested, the reply to the questions of the Landessozialgericht should be as follows:

(a) Article 79 (3) of Regulation No 1408/71 prohibits the overlapping of rights under Article 78 and Article 79 (2) of the said regulation with rights to family benefits or family allowances acquired by virtue of the pursuit of a professional or trade activity where the overlapping of such rights is due to circumstances relating to the movement within the Community of the insured worker.

(b) According to the provisions of Article 79 (3) the right to supplementary or special allowances for orphans or orphans' pensions is to be suspended only in so far as it overlaps with rights similar in kind to family benefits or family allowances acquired by virtue of the pursuit of a professional or trade activity.