The rule against overlapping also applies where family benefits or family allowances are payable under the legislation of one Member State alone, according to which acquisition of the right to those benefits or allowances is conditional on residence alone.

OPINION OF MR ADVOCATE GENERAL DARMON
delivered on 23 April 1985 *

Mr President,
Members of the Court,

1. On 6 March 1981 Mrs Johanna W. H. Kromhout, a Netherlands national, divorced Mr Thomas Beelitz, a German national. Mr and Mrs Beelitz, who lived together in Germany, had separated in January 1980 and Mrs Kromhout returned to the Netherlands in order to settle there with the two children of the marriage who were born on 18 May 1973 and 3 December 1979 respectively.

From the second quarter of 1980 onwards Mrs Kromhout obtained family allowances in respect of her two children under the Netherlands Algemene Kinderbijslagwet [General Law on Family Allowances] and, in particular, Articles 6 and 7 thereof which lay down conditions relating to residence as regards the recipient and relating to age as regards the children.

For his part, Mr Beelitz, who continued to live and work in the Federal Republic of Germany, received family allowances there in respect of the same children for the same period under Article 73 of Regulation (EEC) No 1408/71 of 14 June 1971 which provides that:

'an employed person subject to the legislation of a Member State other than France shall be entitled to the family benefit provided for by the legislation of the first Member State for members of his family residing in the territory of another Member State, as though they were residing in the territory of the first State', even though the German Bundeskindergeldgesetz [Federal Law on Child Allowances] excludes in principle from its field of application children not residing in the Federal Republic of Germany.

In the divorce proceedings, Mr Beelitz was ordered to pay maintenance to his former wife and to make a contribution towards the cost of providing for and bringing up the two children of some HFL 200 per child per month. It is uncertain whether that sum was fixed having regard to other family allowances or family benefits. In any event, as from the second quarter of 1982, Mrs Kromhout was refused payment of the full family allowances by the Raad van Arbeid [Labour Council], Leiden, the competent authority for the award and payment of such benefits.

In its decision, which was notified on 7 October 1982, the Raad van Arbeid refers to the provisions of Article 6 of the Algemene Kinderbijslagwet in conjunction

* Translated from the French.

with those of Article 73 of Regulation No 1408/71 and of Article 10 of Regulation (EEC) No 574/72 of 21 March 1972.

Article 6 (1) of the Algemene Kinderbijslagwet provides that:

'(1) Any person who has reached the age of 15 shall be insured for the purposes of this law provided that he or she

(a) is resident in the Netherlands;

(b) is not so resident but is liable to income tax by virtue of an occupation pursued as an employed person in the Netherlands.'

The first sentence of Article 10 (1) (a) of Regulation No 574/72 provides that:

'Entitlement to family 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:

(a) benefits are due in pursuance of Article 73 or 74 of the regulation . . . '.

The Raad van Arbeid decided that as from the second quarter of 1982 Mrs Kromhout was to be 'entitled to family allowances under Netherlands law in respect of her two children only in so far as those allowances exceed the family allowances under German law'. In one of the grounds for its decision the Raad van Arbeid stated that the Netherlands family allowances were higher than the German family allowances. As regards the preceding period, Mrs Kromhout was not required to repay the sums which she had already received, on the ground that she could not reasonably have known that the amount paid to her was excessive.

Since Mr Beelitz did not pay over to Mrs Kromhout the allowances which he received, the competent Netherlands authority attempted to secure from its German counterpart payment direct to the Netherlands of the allowances paid in the Federal Republic of Germany. That request was turned down on the ground that payment to a person other than the recipient was impossible since Mr Beelitz was complying with the maintenance obligations imposed on him by a judicial decision.

On 15 November 1982 Mrs Kromhout brought an action challenging that decision before the Raad van Beroep [Social Security Court], The Hague, for a declaration that she was entitled to the full Netherlands family allowances in respect of her two children. That court was the first to put certain questions to the parties concerning the scope *ratione personae* of Community Regulations Nos 1408/71 and 574/72.

Having regard to the fact that Mrs Kromhout was entitled in her own right to family allowances under the Algemene Kinderbijslagwet and that she was not a person covered by the relevant Community regulations, the Raad van Beroep sought guidance on the scope of those regulations and on whether they could affect a right acquired under national legislation alone. In the light of the observations submitted by the parties in the course of the main proceedings, the national court referred to the Court of Justice the following four questions for a preliminary ruling:

'(1) Is it sufficient for the application of the first sentence of Article 10 (1) (a) of Regulation (EEC) No 574/72 that the child in respect of whom family allowances are paid (as a member of the family) is a person covered by the relevant regulations, or must all those who are entitled to family allowances pursuant to national law or to whom family allowances are paid be persons covered by those regulations?

(2) If the answer to Question 1 is that it is not necessary for all those who are entitled to family allowances or to whom family allowances are paid to be

persons covered by the relevant regulations, does it follow that under the first sentence of Article 10 (1) (a) of Regulation (EEC) No 574/72 family allowances due exclusively under national law to an insured person who is not a person covered by those regulations can or may be suspended?

(3) May family allowances that are due exclusively under national law in respect of a member of the family who, by virtue of another legal system, is a person covered by the relevant regulations be suspended by the application of the first sentence of Article 10 (1) (a) of Regulation (EEC) No 574/72?

(4) Is Article 10 (1) of Regulation (EEC) No 574/72 applicable in relation to legislation such as the Netherlands Algemene Kinderbijslagwet, under which the right to family allowances is subject to the condition of insurance, if such insurance exists by virtue of residence alone?'

In other words the Raad van Beroep is asking the Court:

(1) whether, in order to apply the rule against overlapping benefits which was referred to earlier, not only the person *for whom* the benefits are paid (in this case the child) but also *all* the recipients *to whom* the benefits are or may be paid (in this case *both* parents) must fall within the scope of the relevant Community regulations (Question No 1);

(2) if that second condition is unnecessary, whether the rule against overlapping benefits is valid as against:

(a) a recipient who has acquired entitlement under national legislation alone and who is not a person covered by those regulations (Question No 2);

(b) a recipient who has acquired entitlement under national legislation alone, but by virtue of a member of the family who is a person covered by those regulations (Question No 3);

(3) finally, how are the 'conditions of insurance' referred to in Article 10 to be interpreted (Question No 4)?

2. The first question submitted by the Raad van Beroep can be explained by Mrs Kromhout's status which is that of a divorced woman. Under Article 2 (1) of Regulation No 1408/71 which provides that:

'this regulation shall apply to employed or self-employed persons who are or have been subject to the legislation of one or more Member States and who are nationals of one of the Member States ... as well as to the members of their families . . . ',

and under Article 1 (f) of the same regulation which provides that:

' "member of the family" means any person defined or recognized as a member of the family or designated as a member of the household by the legislation under which benefits are provided . . . ',

Mrs Kromhout, if her marriage had not been dissolved, would in all likelihood be regarded as a member of the family and her case would therefore be governed by Community Regulations Nos 1408/71 and 574/72.

The plaintiff has contended that since she was in receipt of an allowance under Netherlands law alone, the relevant provisions of Community law could not be applied to her on the ground that those provisions do not cover the possibility of divorce.

In order to resolve that difficulty, it is necessary, as is moreover suggested by the Commission and by the Raad van Arbeid, to determine *for whose benefit* family allowances are granted. Hence the aim pursued by systems which provide for the grant of family allowances must be considered and the operative factor which gives right to entitlement to such benefits must be identified. As regards family allowances, the operative factor is in particular — as in this case — the existence of one or more children. Article 1 (u) (ii) of Regulation No 1408/71 provides that:

' "family allowances" means periodical cash benefits granted exclusively by reference to the number and, where appropriate, the age of members of the family'.

According to Article 1 (u) (i) of the same regulation, such benefits are 'intended to meet family expenses . . . '.

In this case two children have acquired in respect of the same period parallel rights to family allowances, by virtue of the mother under national legislation and by virtue of the father under a provision of Community law, namely Article 73 of Regulation No 1408/71, to which reference is expressly made by the competent German institution in a letter dated 26 May 1980 and addressed to the Raad van Arbeid. That situation may lead to the payment of excess compensation for family expenses resulting from the existence of children.

The relevant Community legislation has as its purpose to provide social safeguards for members of the family of employed persons. It is common ground that Mr Beelitz is an employed person and that his children are members of the family. However, that legislation does not and cannot have the effect of compelling society to make an excess contribution towards family expenses resulting from one and the same situation in respect of one and the same period.

If, therefore, as a member of the family of only one of the parents a child is a person covered by the relevant Community regulations and consequently a possibility of overlapping with another right of the same kind arises by virtue of the other parent, the rules against overlapping laid down by Community law must be applied in order to prevent unjust enrichment, even if the second parent, as a result of his or her marital status, is not a person covered by those regulations.

That reasoning, which is based on the purpose of the right to family allowances, is supported by the Court's judgment of 3 February 1983 in Case 149/82 *(Robards* v *Insurance Officer* [1983] ECR 171), which is referred to by the Commission. There the Court was asked to give a ruling on the application of the *second sentence* of Article 10 (1) (a) of Regulation No 574/72 which, in the event of overlapping, seeks to give priority to the benefits of the Member State in whose territory the children reside and in which one of the recipients in question, who is divorced, pursues a professional or trade activity. The Court ruled that:

'The problem of overlapping benefits which the provision in question is intended to resolve is not to be answered differently according to whether or not the marriage bond still exists between the two parents who might, depending on the case, be entitled to benefits *in respect of the same child.* [1] In view of the purpose of that provision, it should not be interpreted in a restrictive manner'.

The Court therefore acknowledged that the decisive factor as regards family allowances is the existence of a child in respect of whom entitlement to benefits has arisen,

1 — Emphasis added.

regardless of the marital status of the child's parents. In my view the Court's decision can be extended without difficulty to the *first sentence* of Article 10 (1) (a) since that provision viewed as a whole contains a rule against overlapping as regards entitlement to family benefits or family allowances, and the two sentences in subparagraph (a) apply to two different factual situations, namely where a professional or trade activity is pursued by one parent and where it is pursued by both parents.

The Court's answer should therefore be, in my view, that the rule against overlapping benefits is applicable if the child in respect of whom the benefits are paid comes within the scope of the rules referred to earlier.

3. The second and third questions submitted for a preliminary ruling call for a joint answer concerning the relationship between the rights acquired under national legislation alone and those arising under Community law. In this area, the case-law of the Court is well established. The Court has elicited from Article 51 of the EEC Treaty and from the regulations adopted for its implementation the following principles:

'The Community rules could not, in the absence of an express exception consistent with the aims of the Treaty, be applied in such a way as to deprive a migrant worker or his dependants of the benefit of a part of the legislation of a Member State' (judgment of 6 March 1979 in Case 100/78, *Rossi* v *Caisse de compensation pour allocations familiales* [1979] ECR 831 at p. 844, paragraph 14 of the decision).

Shortly afterwards, in two cases concerning family allowances (judgments of 12 June 1980 in Case 733/79, *Caisse de compensation des allocations familiales* v *Laterza* [1980] ECR 1915, and 19 February 1981 in Case 104/80, *Beeck* v *Bundesanstalt für Arbeit* [1981] ECR 503), the Court added that:

'In laying down and developing the rules for coordinating national laws Regulation No 1408/71 is . . . guided by the fundamental principle stated in the seventh and eighth recitals of the preamble to the regulation, that the aforesaid rules must guarantee to workers who move within the Community all the benefits which have accrued to them in the various Member States whilst limiting them "to the greatest amount" of such benefits' (Case 733/79, paragraph 8 of the decision *in fine*); and that

'. . . under well-established case-law based on the fundamental principle of freedom of movement for workers and the objective of Article 51 of the EEC Treaty, a rule designed to prevent the overlapping of family allowances is applicable only to the extent to which it does not, without cause, deprive those concerned of an entitlement to benefits conferred on them by the legislation of a Member State' (Case 104/80, paragraph 12 of the decision).

Hence, it follows from the interpretation of Regulations Nos 1408/71 and 574/72 that the most favourable right acquired under the legislation of one Member State alone must be preserved, notwithstanding the existence of an applicable rule against overlapping benefits which can in those circumstances be applied only 'in part' (Case 104/80, paragraph 12 of the decision *in fine*).

Those decisions were recently followed by the Court in its judgment of 24 November 1983 in Case 320/82 *(D'Amario* v *Landesversicherungsanstalt Schwaben* [1983] ECR 3811, paragraph 10 of the decision) which, as regards the award of orphans' pensions, refers expressly to the earlier case-law and recalls the fundamental principle elicited from the objectives of Article 51 of the Treaty and from the regulations adopted for its implementation.

I therefore suggest that the Court should answer the second and third questions submitted for a preliminary ruling in the affirmative.

4. The fourth and final question submitted by the national court is concerned with the scope of Article 10 (1) of Regulation No 574/72, in so far as that provision applies to allowances the acquisition of entitlement to which is not conditional on either *insurance* or employment. The Algemene Kinderbijslagwet establishes a statutory system of compulsory insurance as regards family allowances.

The national court observes that Articles 6 and 7 of that law refer to the 'insured' person and that under Article 6 an insured person means either a person who is resident in the Netherlands or a non-resident who is liable to income tax by virtue of the pursuit of an occupation in the Netherlands.

It seeks an interpretation of the expression 'conditions of insurance' and asks whether a condition of residence which a person must satisfy in order to be treated as 'insured' and which is laid down by national legislation corresponds to the definition that is required.

At the hearing, the Raad van Arbeid pointed out, in reply to a question from the Court, that all residents, regardless of their income, qualify automatically for social assistance, which is granted in the form of family allowances. In those circumstances, there does not have to be a connection between the right to the benefit on the one hand and income, payment of contributions or employment on the other.

In order to grasp the meaning of Article 10 (1) it is necessary to examine, as the Commission has done, the general scheme of the provisions against overlapping as regards entitlement to family benefits or family allowances. Article 76 of Regulation No 1408/71 and Article 10 (1) of Regulation No 574/72 are rules which supplement one another (see the Opinion of Mr Advocate General Mancini in Case 149/82, *Robards* v *Insurance Officer* [1983] ECR 171, particularly at pp. 190 to 193).

Article 76 of Regulation No 1408/71 suspends entitlement to family allowances which is acquired under Articles 73 and 74 of that regulation if, by reason of the *pursuit* of a professional or trade activity, other family allowances are also payable under the legislation of the Member State in whose territory the members of the family are residing.

Article 10 (1) of Regulation No 574/72 applies to situations where the right to family allowances under Articles 73 and 74 competes with the right to family allowances *in the absence of* employment, that is, of a professional or trade activity, in which case the second right is suspended, either wholly or in part.

In both cases, the right acquired by virtue of the pursuit of a professional or trade activity takes precedence over that acquired by virtue of another criterion.

Moreover, the payment of contributions may serve as a further criterion. That question does not arise in this case. The conclusion must be drawn that under the provisions referred to earlier, viewed as a whole, a right acquired by virtue of the pursuit of a professional or trade activity as an employed person takes precedence over a right acquired otherwise than for valuable consideration or in the absence of employment or insurance, for instance by virtue of the place of residence alone.

That is confirmed by the origin of Article 10 of Regulation No 574/72, as amended by Regulation (EEC) No 878/73 of 21 March 1973, which was adopted in order to take account of the specific features of the national laws of the three new Member States of the Community which based the right to family benefits exclusively on the residence of members of the family within national territory but did not contain any internal or external provision against overlapping (see the Opinion of Mr Advocate General Mayras in Case 9/79, *Koschniske* v *Raad van Arbeid* [1979] ECR 2717, at p. 2727). Under the new rule against over-

lapping, a right acquired by virtue of employment or in return for valuable consideration takes precedence over a right acquired otherwise than for valuable consideraton.

Article 10 (1) of Regulation No 574/72 must therefore be regarded as applicable in relation to legislation which makes entitlement to family allowances conditional on residence alone.

5. In conclusion, therefore, I consider that the Court should answer the questions submitted by the Raad van Beroep, The Hague, as follows:

(1) For the application of the first sentence of Article 10 (1) (a) of Regulation (EEC) No 574/72, it is sufficient for the child in respect of whom family allowances are paid to be, as a member of the family of one of the recipients, a person covered by that regulation;

(2) The legislation of a Member State which makes entitlement to family allowances conditional on residence alone falls within the scope of that provision;

(3) Where family allowances are paid in two Member States in respect of the same child for the same period, in the first place under the legislation of one Member State alone to a recipient who is not a person covered by Regulations (EEC) Nos 1408/71 and 574/72, and secondly by virtue of a member of the family who is so covered, the aforesaid provision of Regulation No 574/72 makes it possible to suspend, for the amount in respect of which the benefits overlap, the family allowance payable under national legislation alone.