OPINION OF ADVOCATE GENERAL MAZÁK
delivered on 15 April 2010 [1]

I — Introduction

1. By order of 30 October 2008, received at the Court on 15 January 2009, the Bundesfinanzhof (Federal Finance Court) (Germany) referred questions to the Court of Justice for a preliminary ruling on the interpretation of Article 76 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, as amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996 [2] ('Regulation No 1408/71'), [3] and of Article 10 of Regulation (EEC) No 574/72 of the Council of 21 March 1972 fixing the procedure for implementing Regulation No 1408/71, as amended by Regulation (EC) No 647/2005 [4] ('Regulation No 574/72'). [5]

2. The reference was made in the course of proceedings brought by Ms Gudrun Schwemmer, a divorced German national resident in Germany whose former husband works in Switzerland, against the Agentur für Arbeit Villingen-Schwenningen – Familienkasse (Employment Agency, Villingen-Schwenningen – Family Allowances Office) ('the Family Allowances Office'), concerning its refusal to grant her the full amount of family benefits in respect of two of her children.

3. The referring court essentially wishes to ascertain whether, in a post-divorce situation where the father of the children intentionally refrains from applying for child benefit in the competent State of employment, the Member State of residence of the mother need pay child benefit only to the extent to which the amount payable in that State exceeds the amount of the child benefit which the father could obtain in his State of employment.

1 — Original language: English.

2 — OJ 1997 L 28, p. 1.

3 — OJ, English Special Edition 1971(II), p. 416.

4 — Regulation of the European Parliament and of the Council of 13 April 2005 amending Council Regulations (EEC) 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 the Community and (EEC) No 574/72 laying down the procedure for implementing Regulation (EEC) No 1408/71 (OJ 2005 L 117, p. 1).

5 — OJ, English Special Edition 1972(I), p. 159.

II — Legal framework

A — *Community law*

1. The Agreement between the Community and Switzerland

4. By virtue of Annex II to the Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons, signed in Luxembourg on 21 June 1999,[6] Regulations No 1408/71 and No 574/72 are applicable in relations between the parties to that agreement.

2. Regulation No 1408/71

5. Article 13 of Regulation No 1408/71, entitled 'General Rules', provides, so far as is relevant for present purposes, as follows with respect to the determination of the legislation applicable:

'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.

…'

6. Article 73 of Regulation No 1408/71, entitled 'Employed or self-employed persons, the members of whose families reside in a Member State other than the competent State', provides:

'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

6 — OJ 2002 L 114, p. 6.

State, to the family benefits provided for by the legislation of the former State, as if they were residing in that State …'

7. Article 75(2) of that regulation provides:

'… if the family benefits are not used by the person to whom they should be provided for the maintenance of the members of the family, the competent institution shall discharge its legal obligations by providing the said benefits to the natural or legal person actually maintaining the members of the family, at the request of, and through the agency of, the institution of their place of residence or of the designated institution or body appointed for this purpose by the competent authority of the country of their residence.'

8. Article 76 of Regulation No 1408/71, which lays down rules of priority in cases of overlapping entitlement to family benefits under the legislation of the competent State and under the legislation of the Member State of residence of the members of the family, provides:

'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.

2. If an application for benefits is not made in the Member States in whose territory the members of the family are residing, the competent institution of the other Member State may apply the provisions of paragraph 1 as if benefits were granted in the first Member State.'

3. Regulation No 574/72

9. Article 10(1) of Regulation No 574/72, entitled 'Rules applicable in the case of overlapping of rights to family benefits or family allowances for employed or self-employed persons', provides:

'(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 …

Regulation [No 1408/71], 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 … Regulation [No 1408/71] 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;

…'

B — *National legislation*

10. Entitlement to German child benefit is governed by Paragraphs 62 and 63 of the Law on Income Tax (Einkommensteuergesetz, 'the EStG').

11. Paragraph 62.1.1 of the EStG reads:

'In respect of children within the meaning of Paragraph 63, a person shall be entitled to child benefit under this law if he has a residence in Germany or normally resides there.'

12. Paragraph 63.1.1 provides:

'Children shall mean: Children within the meaning of Paragraph 32.1.'

13. Paragraph 32.1.1 reads:

'Childen are children related in the first degree to the taxpayer.'

14. Paragraph 65.1 of the EStG provides that no child benefit is to be paid for children in respect of whom there is or would be, if

applied for, entitlement to child benefit in another country.

17. By decision of 21 March 2006, the Family Allowances Office set the child benefit at the partial amount of EUR 44.25 per child from January 2006, in so far as the German child benefit of EUR 154 exceeded the family benefit of EUR 109.75 per child to which the father was entitled in Switzerland.

III — Facts, procedure and the questions referred

15. As appears from the order for reference, Ms Schwemmer lives in Germany with two of her children, born in 1992 and 1995. In 2005 she took up self-employment in the field of property management, caretaking and cleaning services. As from May 2006 she was in marginal employment with a firm. Over the period at issue, Ms Schwemmer paid voluntary contributions to the Deutsche Rentenversicherung (German Pension Insurance Fund) ('the DRV') and contributions in respect of health and care insurance to the Deutsche Angestelltenkrankenkasse (Sickness Insurance Fund for Employees, 'the DAK').

16. The father of the children, from whom Ms Schwemmer has been divorced since 1997, works in Switzerland. He has not applied for the family benefits to which he is entitled under Swiss law in the amount of EUR 109.75 per child.

18. The Family Allowances Office took the view, upheld on appeal by the Finanzgericht (Finance Court), that Ms Schwemmer's entitlement to child benefit falls to be determined by reference to the rules on overlapping entitlement laid down in Regulation No 1408/71 and Regulation No 574/72. Since Ms Schwemmer did not carry out any professional or trade activity within the meaning of Article 10(1)(b)(i) of Regulation No 574/72, the entitlement to family benefits in Switzerland takes priority, under Article 10(1)(a) of that regulation, over the German entitlement to child benefit. According to the Finanzgericht and the Family Allowances Office, the question whether or not the family benefits were actually claimed in Switzerland is irrelevant, pursuant to Article 76(2) of Regulation No 1408/71, which applies *mutatis mutandis*. The discretion conferred under that provision can be interpreted only as meaning that it is solely in well-founded exceptional circumstances that the assumption can be made that no family benefits have been granted in the country of employment, with the consequence that the country of residence is required to pay the family benefits in full.

19. In the proceedings before the referring court, Ms Schwemmer opposes that view, arguing that she is already entitled to the full child benefit in Germany because of her professional activity there. According to Ms Schwemmer, workers in minimal employment are to be treated in the same way as compulsorily insured workers. In any event, the father of the children had deliberately refrained from applying for family benefits in Switzerland, the competent country of employment, in order to cause her detriment. That situation is not envisaged by Article 10(1) of Regulation No 574/72.

20. The referring court states that, in the case before it, the problem of concurrent entitlements to family benefits must be resolved by reference to Article 10(1)(a) of Regulation No 574/72, since, in its view, Ms Schwemmer did not carry out any professional or trade activity in Germany within the meaning of Article 10(1)(b)(i) of that regulation. In that regard, the referring court points out that, according to the wording of Article 10(1)(a) of Regulation No 574/72, entitlement to child benefit in the country of residence is suspended only where family benefits are due in the country of employment. In the case before it, however, no family benefits are due from the country of employment: in Switzerland, family benefits can be granted only if they are applied for and the father of the children, despite being entitled to the benefits in question, has made no such application.

21. Moreover, the referring court entertains doubts as to whether, in the case before it, Article 76(2) of Regulation No 1408/71 falls to be applied *mutatis mutandis*, as maintained by Ms Schwemmer.

22. It is in those circumstances that the Bundesfinanzhof decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

‘1. Is the rule in Article 76(2) of Regulation No 1408/71 to be applied *mutatis mutandis* to Article 10(1)(a) of Regulation No 574/72 in cases where the parent with a right to claim does not apply for the family benefits to which he is entitled in the country of employment?

2. In the event that Article 76(2) of Regulation No 1408/71 is to be applied *mutatis mutandis*: on the basis of which discretionary considerations may the institution competent for family benefits in the country of residence apply Article 10(1)(a) of Regulation No 574/72 as if benefits had been granted in the country of employment? May the discretion to assume that family benefits have been received in the country of employment be restricted where the person entitled intentionally does not apply for the family benefits to which he is entitled in the country of employment in order to cause

detriment to the person entitled to child benefit in the country of residence?'

IV — Legal analysis

A — *Main submissions of the parties*

23. In the present proceedings, written observations have been submitted by the Governments of Lithuania and Austria and by the European Commission. Ms Schwemmer, the German Government and the Commission were represented at the hearing on 10 February 2010.

24. According to Ms Schwemmer's submissions at the hearing, she should be regarded as a person covered by Article 1 of Regulation No 1408/71 despite the fact that she was only in minimal employment and that she was not compulsorily insured against unemployment as required under point I.E of Annex I to that regulation. That annex is not relevant in this context. Furthermore, according to Ms Schwemmer, Article 75(2) of Regulation No 1408/71 applies *mutatis mutandis* to circumstances such as these, where the person who is employed in another Member State has not requested and received the family benefits for the maintenance of the members of the family concerned.

25. The German Government points out that, under Paragraph 65 of the EstG, there is no right to family benefits in Germany if there is a right to comparable benefits in another Member State. Furthermore, in the case of Ms Schwemmer, no such right arises on the basis of Regulation No 1408/71 either, since – pursuant to point I.E of Annex I to that regulation – Chapter 7 of Title III of Regulation No 1408/71 is not applicable. By contrast, Article 10 of Regulation No 574/72 applies in principle to Ms Schwemmer's situation, except that she has not been carrying out a professional or trade activity within the meaning of Article 10(1)(b)(i) of that regulation. Accordingly, Switzerland has primary competence as regards the payment of family allowances.

26. With regard to Article 76(2) of Regulation No 1408/71, the German Government maintains that that provision should be applied *mutatis mutandis*, so that the benefits concerned can be deemed to have been granted in Switzerland. The German Government suggests, however, that use should be made of Article 75(2) of that regulation to resolve situations of this kind, where a parent refuses to apply for family benefits.

27. The Lithuanian Government, too, takes the view that Article 76(2) of Regulation No 1408/71 is applicable to the circumstances

of the case before the referring court, which are governed by Article 10(1)(a) of Regulation No 574/72 and that it is therefore irrelevant whether or not the benefits concerned were applied for. It argues that the correctness of this approach is borne out by the main objective of the system set up under Regulation No 1408/71 and Regulation No 574/72, which is to prevent the overlapping of benefits. A different interpretation would, moreover, run counter to the principle that there should be an adequate burden-sharing in the field of social assistance between the Member States [7] and would also be difficult to implement in practice, given the restraints which still exist as regards the exchange of necessary information between the Member States.

28. With regard to Question 2, the Lithuanian Government suggests that, given the discretion which Article 76(2) of Regulation No 1408/71 appears to confer on the Member States, the competent authorities have to decide, with regard to all the circumstances of the individual case, whether that provision should be applied and whether the benefits concerned can thus be deemed to have been granted in the other Member State.

29. According to the Austrian Government, it is impossible, on the basis of the information provided by the referring court, to regard Ms Schwemmer either as an employed person within the meaning of Article 1 of Regulation No 1408/71, read in conjunction with point I.E of Annex I thereto, or as a person carrying out a professional or trade activity within the meaning of Article 10(1)(b)(i) of Regulation No 574/72.

30. The Austrian Government argues, however, that, in principle, Article 76(2) of Regulation No 1408/71 is applicable in such a case, since that provision is generally intended to prevent a reversal of competences, to the detriment of the Member State with only secondary competence, solely because of intentional failure to apply for the benefit. Accordingly, it is irrelevant whether Ms Schwemmer's former spouse deliberately refrained from applying for child benefits and whether he did so in order to cause her detriment.

31. However, since that interpretation would, as the Austrian Government admits, lead to a rather unsatisfactory result, consideration should be given to whether the rules on the overlapping of entitlements apply without restriction to divorced or separated parents. It could reasonably be argued in the case before the referring court that Regulation No 1408/71 is not applicable at all, as the father has to be regarded as separated from the children and, in consequence, no longer a member of the family within the meaning

7 — In this context it refers to Case C-184/99 *Grzelczyk* [2001] ECR I-6193, paragraph 44, and Case C-209/03 *Bidar* [2005] ECR I-2119, paragraph 56 et seq.

of the regulation. As a result, the entitlement to child benefit would fall to be assessed only by reference to the legislation of the Member State of residence.

32. The Commission points out that Article 76(2) of Regulation No 1408/71 applies only if the condition laid down in Article 76(1) of that regulation is fulfilled, that is to say, only if family benefits are provided for by the Member State of residence by reason of the carrying on of an occupation. Since Ms Schwemmer is not an employed person within the meaning of point I.E of Annex I to Regulation No 1408/71 and therefore falls outside the scope *ratione materiae* of that regulation, Article 76(2) of the regulation is in principle not applicable to her.

33. In any event, according to the Commission, there is no *lacuna* which would justify the application mutatis mutandis of Article 76(2) of Regulation No 1408/71. In that context, the Commission recalls, furthermore, that according to the case-law of the Court, there cannot be a suspension of entitlement to benefits on the basis of Article 76 of Regulation No 1408/71, if allowances are not payable in the Member State concerned because of failure to satisfy all the conditions laid down in the legislation of that Member State for the actual receipt of such allowances, such as the condition that they must first be applied for.[8] Although that principle was formulated in cases where no application was made in the State of residence, it should also apply in the case of failure to apply for benefits in the State of employment.

34. The Commission points out, next, that under Article 10(1)(a) of Regulation No 574/72, entitlement to child benefits is suspended only where family benefits are due in the country of employment. In its view, since the father did not apply for the family benefits to which he is entitled in Switzerland and since, consequently, not all requirements governing the payment of those benefits have been met, no family benefits are 'due' to him, within the meaning of that provision, in the country of employment. Accordingly, there can be no overlapping of entitlements, either.

35. Moreover, in the view of the Commission, Article 10(1)(b) of Regulation No 574/72 does not appear to be pertinent, since Ms Schwemmer does not carry out a professional or trade activity in Germany.

36. Finally, the Commission suggests that the German authorities could avoid having to bear the costs of the child benefits alone by making use of Article 75(2) of Regulation No 1408/71.

8 — Case 191/83 *Salzano* [1984] ECR 3741, paragraph 10; Case 153/84 *Ferraioli* [1986] ECR 1401, paragraph 15; and Case C-117/89 *Kracht* [1990] ECR I-2781, paragraph 18.

B — *Appraisal*

37. By its questions, which it is appropriate to examine together, the referring court essentially seeks to ascertain whether, under the rules against overlapping of entitlements laid down in Article 76 of Regulation No 1408/71 and Article 10 of Regulation No 574/72, entitlement to child benefit payable under the legislation of the Member State where a parent is resident with the children concerned may (partially) be suspended in a situation, such as that in the case before the referring court, in which the former spouse, the other parent of the children concerned, would be entitled to family benefits under the legislation of the State of employment but in fact does not receive those benefits because they have deliberately not been applied for.

38. It should be noted at the outset, first, that it is undisputed that the German child benefit at issue fulfils the conditions for being regarded as 'family benefits' within the meaning of Article 4(1)(h) of Regulation No 1408/71. [9] That regulation is therefore applicable *ratione materiae* to the situation at issue.

39. As regards, secondly, the applicability *ratione personae* of Regulation No 1408/71, it is common ground that, in any event, Ms Schwemmer's former spouse pursues in Switzerland, his country of residence, an activity as an 'employed person' within the meaning of Article 1(a) of that regulation.

40. Accordingly, in this context, it is not necessary to establish that Ms Schwemmer, too, can be regarded as an employed person within the meaning of Article 1 of Regulation No 1408/71, read in conjunction with point I.E of Annex I thereto, since, under Article 2 of that regulation and the case-law of the Court, Regulation No 1408/71 also covers, in principle, the situations of members of the family or, as in this case, of former spouses of employed or self-employed persons. [10]

41. In that regard, since Regulation No 1408/71 also covers family situations following a divorce, [11] it cannot be held – contrary to the assertions made by the Austrian Government – that Ms Schwemmer's situation could be regarded as purely internal and as falling entirely outside the scope of that regulation on the grounds that the father of the children concerned is divorced from

9 — Cf. in this context Case C-352/06 *Bosmann* [2008] ECR I-3827, which also concerned German child benefit.

10 — See, to that effect, inter alia, Case 149/82 *Robards* [1983] ECR 171, paragraph 15; Case C-194/96 *Kulzer* [1998] ECR I-895, paragraph 32; and Case C-255/99 *Humer* [2002] ECR I-1205, paragraph 42.

11 — See also, to that effect, Case C-363/08 *Slanina* [2009] ECR I-11111, paragraph 30.

Ms Schwemmer and separated from their children.

42. It should therefore be noted that Regulation No 1408/71 is applicable *ratione materiae* and *ratione personae* to a situation such as that of Ms Schwemmer, which I shall now proceed to examine in the light of the relevant provisions of Regulations No 1408/71 and No 574/72.

43. As regards family benefits, Article 73 of Regulation No 1408/71 provides that an employed or self-employed person subject to the legislation of Member State A is to be entitled, in respect of the members of his family who are residing in Member State B, to the family benefits provided for under the legislation of State A, as if they were resident in State A. The precise purpose of that provision is to guarantee members of the family residing in a Member State other than Member State A the grant of the family benefits provided for under the applicable legislation. [12]

44. Accordingly, as the referring court has stated and as was never disputed in the proceedings before that court, entitlement to family benefits for Ms Schwemmer's children arises in principle, pursuant to Article 73 of Regulation No 1408/71, under the legislation of Switzerland, the State of employment of her former spouse.

45. On the other hand, it should be noted that, in Germany, where she resides with the two children, Ms Schwemmer is entitled to German child benefit in respect of her children since, under German legislation, that benefit is payable on the basis of the residence in Germany of both the parent and the children concerned. [13]

46. Given, therefore, that entitlement to family allowances is possible both under the legislation of the State of residence of Ms Schwemmer and under the legislation of the State of employment and residence of her former spouse, the dispute must be considered in the light of the provisions against overlapping of entitlements, as laid down in Article 76 of Regulation No 1408/71 and Article 10 of Regulation No 574/72.

12 — Joined Cases C-245/94 and C-312/94 *Hoever and Zachow* [1996] ECR I-4895, paragraph 32, and *Humer*, cited in footnote 10, paragraph 39.

13 — In my view, it is not relevant in this regard that, as the German Government argued at the hearing, Article 65 of the EStG excludes any right to child benefit in Germany if a corresponding benefit is due in another Member State. Manifestly, that provision is designed to solve conflicts of competences or, more specifically, to avoid overlapping entitlements as regards family allowances. As such, it constitutes the counterpart in national law to Regulation No 1408/71 and Regulation No 574/72 and must – given the primacy of Community law – be interpreted and applied in conformity with those regulations. To accept the line of argument put forward by the German Government and to take account of Article 65 of the EStG in order to establish whether Ms Schwemmer is, in principle, entitled to child benefit under German legislation would be, in a way, to turn that relationship between the regulations and national law on its head.

47. In that regard, it should be observed, first of all, that Article 76 of Regulation No 1408/71 is intended to resolve cases where, owing to the fact that the family member pursues an occupation, entitlement to family benefits under Article 73 of that regulation overlaps with entitlement under the legislation of the family member's State of residence. [14]

48. However, as the German child benefit at issue is conditional solely upon residence being established in Germany and is not provided by reason of engagement in an occupation, Article 76 of Regulation No 1408/71 is not relevant in the case under consideration.

49. By contrast, Article 10 of Regulation No 574/72 refers to cases where there is a risk of overlap between entitlement to receive family benefits under Article 73 of Regulation No 1408/71 and entitlement to receive family benefits under the national legislation of the State of residence which is granted irrespective of engagement in any such professional or trade activity. [15]

50. It therefore appears that, for present purposes, Article 10 of Regulation No 574/72 is the relevant provision against overlapping.

51. Article 10(1)(a) of Regulation No 574/72 provides, in particular, that where family benefits are due in the State of residence irrespective of conditions of insurance or employment, such entitlement is to be suspended where benefits are due pursuant to Article 73 of Regulation No 1408/71.

52. Consequently, according to that provision, allowances payable by the State of employment take priority over allowances payable by the State of residence, which are thus suspended. [16]

53. However, where the person entitled to the family benefits at issue, or the person to whom they are paid, also carries out a professional or trade activity in the Member State of residence, Article 10(1)(b)(i) of Regulation No 574/72 reverses the order of priority in favour of the competence of that Member State, in that it provides for the suspension of entitlement to benefits in the State of

14 — See Case C-543/03 *Dodl and Oberhollenzer* [2005] ECR I-5049, paragraph 53, and *Slanina*, cited in footnote 11, paragraph 36.

15 — Cf. *Dodl and Oberhollenzer*, cited in footnote 14, paragraph 54.

16 — See, inter alia, Case C-119/91 *McMenamin* [1992] ECR I-6393, paragraph 17.

employment under Article 73 of Regulation No 1408/71. [17]

54. It follows that, as she indeed maintained in the proceedings before the referring court, if it were established that Ms Schwemmer carried out a professional or trade activity within the meaning of Article 10(1)(b)(i) of Regulation No 574/72 in Germany, the State of residence, she would in any event be entitled to the full amount of German child benefit.

55. However, according to the findings of the referring court, that is not the case, the primary reason being that Ms Schwemmer cannot be regarded as an 'employed' or a 'self-employed' person within the meaning of Article 1 of Regulation No 1408/71, read in conjunction with point I.E of Annex I thereto, as she was not compulsorily insured and thus fails to meet one of the requirements laid down in that annex with regard to Germany.

56. In that connection, the question was raised at the hearing before the Court as to whether, contrary to what the referring court appears to have assumed, Ms Schwemmer could – in view of her self-employment in the field of property management, caretaking and cleaning services in 2005 and her marginal employment as from 2006 – be regarded as carrying out a professional or trade activity within the meaning of Article 10(1)(b)(i) of Regulation No 574/72, while at the same time not qualifying as an 'employed' or a 'self-employed' person within the meaning of Article 1 of Regulation No 1408/71, read in conjunction with point I.E of Annex I thereto.

57. In my view, however, the Court cannot resolve the issues raised by the present case simply on the basis of that hypothesis. Even if the referring court were to revise its interpretation of the notion 'professional or trade activity', as used in Article 10(1)(b)(i) of Regulation No 574/72, it would still have to establish whether those conditions are indeed fulfilled in the case of Ms Schwemmer. Moreover, in the light of the reply that should, in my view, be given to the questions referred, it does not seem to me to be necessary to consider that issue. [18]

58. On the assumption, therefore, that Ms Schwemmer did not carry out any professional or trade activity within the meaning of Article 10(1)(b)(i) of Regulation No 574/72, it must be examined whether, under Article 10(1)(a) of that regulation, child benefit due in the State of residence is to be suspended in the particular circumstances of the case

17 — See, inter alia, *McMenamin*, cited in footnote 16, paragraph 17, and *Bosmann*, cited in footnote 9, paragraph 22.

18 — See point 65 below.

before the referring court, in which the former spouse is entitled, pursuant to Article 73 of Regulation No 1408/71, to comparable family benefits in his State of employment but those benefits are not actually paid, because they have not been applied for.

59. In that regard, it should be noted that, in *Salzano*, [19] *Ferraioli* [20] and *Kracht*, [21] the Court has already had the opportunity to consider the converse case, that is to say, the question whether allowances due in the State of employment pursuant to Article 73 of Regulation No 1408/71 are to be suspended in a situation where corresponding allowances payable in the State of residence have not been applied for and, consequently, have not actually been paid. The Court held that no suspension of allowances is triggered in the competent Member State – in those cases, the State of employment – if allowances have not been paid in the other Member State concerned on the ground that not all the conditions laid down in the legislation of that Member State for the actual receipt of such allowances are satisfied, including the condition that they must first be applied for. [22]

60. Thus, in those cases, the Court proceeded on the basis of the principle that rights due pursuant to Article 73 of Regulation No 1408/71 are to be suspended only if allowances are actually paid in the State of residence. [23] Although that approach was adopted in relation to the overlapping of benefits covered by Article 76 of Regulation No 1408/71, there is no reason, in my view, why it should not also be applied here, where the situation is governed by Article 10(1)(a) of Regulation No 574/72 and where there is a right to allowances in the State of employment, but those allowances have not actually been paid as they have not been applied for.

61. Admittedly, after the material time in the cases referred to above, Article 76 of Regulation No 1408/71 was amended to include a new paragraph 2 to the effect that the Member State of employment is allowed to suspend entitlement to family benefits if an application for benefits is not made in the Member State of residence and, consequently, no payment is made by that Member State.

19 — Cited in footnote 8.

20 — Cited in footnote 8.

21 — Cited in footnote 8.

22 — See to that effect *Salzano*, cited in footnote 8; *Ferraioli*, cited in footnote 8, paragraph 14; and *Kracht*, cited in footnote 8, paragraphs 11 and 18.

23 — See also *McMenamin*, cited in footnote 16, paragraph 26.

62. No such rule has been adopted, however, in the case of Article 10(1)(a) of Regulation No 574/72. It should be noted in this context that, in *Kracht*, the Court refused to reconsider the above case-law in the light of the new version of Article 76 of Regulation No 1408/71 even though the new paragraph 2 (albeit not yet applicable) had already been adopted. The Court noted, inter alia, that its previous interpretation of Article 76 of that regulation had been consistent with the Treaty objective of establishing freedom of movement for workers. [24] Moreover, in that context, the Court rejected arguments, similar to those put forward in the present case, according to which any possibility of choice on the part of the persons entitled to benefit – or alteration of the apportionment of financial burdens between the Member States concerned – must be excluded. [25]

63. In those circumstances, it does not seem appropriate to apply the rule laid down in Article 76(2) of Regulation No 1408/71 by analogy with Article 10(1)(a) of Regulation No 574/72, the provision at issue here. [26]

64. Finally, an approach whereby, in circumstances such as these, entitlement to benefits in the Member State of residence would not be suspended is consonant with settled case-law to the effect that a rule designed to avoid the overlapping of family allowances – such as Article 10(1)(a) of Regulation No 574/72 – should not be applied in such a way as to deprive the persons concerned, without cause, of an entitlement to benefits conferred on them by the legislation of a Member State. [27]

65. It follows from all the foregoing considerations that the answer to the questions submitted by the national court should be that Article 76 of Regulation No 1408/71 and Article 10 of Regulation No 574/72 must be interpreted as meaning that entitlement to child benefit payable under the legislation of the Member State where a parent is resident with the children concerned is not to be suspended in a situation such as that in the case before the referring court, in which the former spouse, the other parent of those children, would be entitled, pursuant to Article 73 of Regulation No 1408/71, to family benefits under the legislation of the State of employment but in fact does not receive those benefits because they have not been applied for.

24 — See *Kracht*, cited in footnote 8, paragraphs 12 to 14.

25 — See *Kracht*, cited in footnote 8, paragraphs 12 and 13.

26 — By the same token, I am not convinced that Article 75(2) of Regulation No 1408/71, which refers to a situation where family benefits are 'not used' by the person not actually taking care of the members of the family concerned for the purposes of the maintenance of those family members, can be applied by analogy in circumstances such as those at issue in the present case where the family benefits at issue have not been applied for and, consequently, not even been received.

27 — See to that effect, in particular, Case 104/80 *Beeck* ?1981? ECR 503, paragraph 12.

V — Conclusion

66. For the reasons given above, I propose that the questions referred by the Bundesfinanzhof should be answered as follows:

'Article 76 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, as amended by Council Regulation (EC) No 118/97 of 2 December 1996, and Article 10 of Regulation (EEC) No 574/72 of the Council of 21 March 1972 fixing the procedure for implementing Regulation (EEC) No 1408/71, as amended by Regulation (EC) No 647/2005, must be interpreted as meaning that entitlement to child benefit payable under the legislation of the Member State where a parent is resident with the children concerned is not to be suspended in a situation such as that in the case before the referring court, in which the former spouse, the other parent of those children, would be entitled, pursuant to Article 73 of Regulation No 1408/71, to family benefits under the legislation of the State of employment but in fact does not receive those benefits because they have not been applied for.'