# OPINION OF MR ADVOCATE GENERAL MISCHO
delivered on 29 January 1987 *

*Mr President,*
*Members of the Court,*

The Bundeskindergeldgesetz (German Law on Family Allowances for Dependent Children), as amended on 31 January 1975, provides as follows:

'Paragraph 1: *Persons entitled*

Under the provisions of this law, the following shall be entitled to family allowances in respect of their children:

1. any person domiciled or habitually resident within the area covered by this law;

...

...

Paragraph 8: *Other benefits for children*

(1) The family allowance shall not be granted for a child in respect of whom a person is entitled, under paragraph 2 (1), to one of the following benefits:

...

4. benefits which are granted in respect of a child by an international or supranational institution and which are comparable to the family allowance.'

The Commission considers that, by adopting paragraph 8 (1) (4) of that law, the Federal Republic of Germany has failed to fulfil its obligations under Article 67 (2) of the Staff Regulations of Officials of the European Communities ('the Staff Regulations') and two other provisions having the same scope as Article 67 (2), namely the second paragraph of Article 68 of the Staff Regulations and Article 20 of the Conditions of Employment of Other Servants of the European Communities ('the Conditions of Employment').

Article 67 (2) is worded as follows:

'Officials in receipt of family allowances specified in this article shall declare allowances of like nature paid from other sources; such latter allowances shall be deducted from those paid under Articles 1, 2 and 3 of Annex VII.'

The last-mentioned provisions lay down the conditions for the grant of the household allowance, the dependent child allowance and the education allowance.

I — It is clear from the wording of Article 67 (2) that, when it adopted that provision, the Council relied on the conclusion, or at any rate the assumption, that in certain circumstances family allowances *were paid* to Community officials by the competent institution of a Member State. Accordingly, in order to prevent cases of unjust enrichment, the Council imposed an obligation on the officials concerned to declare those allowances and on the Community institutions to deduct such allowances from those paid under the Staff Regulations.

The question on which the outcome of this application depends is whether the Council also intended to stipulate, in the same provision, that family allowances *had to* be paid by national institutions in respect of the children of Community officials.

In the application initiating the proceedings, the Commission quite clearly advocated that

* Translated from the French.

view since it stated in paragraph II.2 that 'in deciding that it was necessary for national benefits to be paid and to be taken into account first, the Community legislature laid down the principle that, in general, the children of Community servants are also entitled to benefits if they fulfil the conditions for entitlement laid down by national law'.

That argument is logical if the premise underlying it is accepted.

If the view is taken, as it is by the Commission, that Article 67 (2) is more than a mere provision against the overlapping of benefits and that it imposes an obligation on the Member States, that obligation must be the one indicated by the Commission, namely the payment of family allowances provided for by national law whenever the national conditions for the grant thereof, whatever they may be, are fulfilled.

However, I am not at all convinced by the Commission's argument.

To begin with, there is no support for it in the actual wording of Article 67 (2), which, as I have just pointed out, applies only to Community officials and, secondarily, to the Community institutions.

Next, it creates unequal financial burdens for the various Member States within whose territory Community officials reside.

Countries like Germany, which grant family allowances in respect of all the children residing within their territory, will be required to assume responsibility for paying family allowances in respect of all the children of Community officials who reside within their territory, with the Community paying no more than a supplement.

Member States like Belgium, which make the payment of allowances dependent on affiliation to a social insurance fund, will grant allowances only where one of the spouses works otherwise than as a Community official. Even in that case, a country like France, which pays family allowances in respect of the first child only until the age of three, will not be called upon to contribute towards the financing of the family allowances payable in respect of the first child of Community officials who reside within its territory where the child is older than three.

Finally, Member States like Luxembourg, which apply a mixed system and grant family allowances in respect of all the children residing within their territory but at the same time require the payment of contributions by employers and self-employed persons earning an income, would have to pay family allowances to Community officials by equating them to persons without means.

I cannot believe that the Council intended, by adopting Article 67 (2) as it is worded, to create a system whose consequences vary so greatly from one Member State to another.

In support of its argument, however, the Commission relies on the judgment of 13 July 1983 in Case 152/82 *Forcheri* v *Belgium* [1983] ECR 2323 at p. 2334, paragraph 9 of the decision, in which the Court held that 'the legal position of officials of the Community in the Member States in which they are employed comes within the scope of the Treaty on a dual basis by reason of

their post with the Community and because they must enjoy all the benefits flowing from Community law for the nationals of Member States in relation to freedom of movement, freedom of establishment and social security'.

For my part, I consider that the principle that the social security rules in force in the country of employment apply extends to Community officials only in so far as the Staff Regulations have not made any special arrangements.

It is clear that, with regard to sickness insurance, accident insurance and the pension scheme, Community officials are subject to special arrangements and not to those in force in the country in which they are employed.

Hence Community officials working in the United Kingdom continue to be covered by the sickness insurance scheme established by the Staff Regulations and not by the free health-care system in force in that country.

It would therefore be incomprehensible if, in relation to the family allowance scheme, which was also set up by the Staff Regulations, Community officials were to be regarded as coming within the scope of the host country's scheme first, particularly since in the Staff Regulations the provisions concerning family allowances are set out in the section headed 'Remuneration'.

Finally, as I explained in detail in the Opinion which I delivered on 15 May 1986 in Case 186/85 *Commission* v *Belgium*, I am not at all convinced by the Commission's argument that its interpretation of Article 67 (2) can be fully explained by the Council's concern to relieve the strain on the Community's finances.

Accordingly, I was not surprised to find that, in this case, the Commission itself gradually retreated from the argument which it had initially put forward. First, it 'adjusted' its original argument, requiring family allowances payable under German law to be granted only in cases where it is the Community official's spouse who is entitled to them (paragraph 7 of the reply).

Finally, at the hearing, the Commission took a further step in that direction and explained that its application against the Federal Republic of Germany was in fact directed only at 'borderline cases' ('Randgebiete'), that is to say cases involving children who were brought into the marriage by one of the spouses and formerly came within the scope of the national scheme, the children of retired officials and the children of widows or widowers of Community officials.

The question which arises, however, is what right does the Commission have to give what it terms itself a 'minimal interpretation' of a provision which, in its view, is in principle much broader in scope? Either Article 67 (2) has the scope initially ascribed to it by the Commission, in which case it is neither for the Commission nor for any other Community institution to restrict it, or else that provision applies in practice only to 'borderline cases', in which case that interpretation must also hold true for the other Member States, including Belgium. However, there is no reference to those 'borderline cases' in the wording of Article 67.

It would be utterly inconceivable for the scope of that provision to vary from one Member State to another and, for instance, for it to apply in Belgium to a spouse carrying on another occupation and in Germany only to 'borderline cases'.

In fact, the Commission's tergiversations show that Article 67 (2) of the Staff Regulations and the other two provisions to which reference has been made are merely

rules against the overlapping of benefits which operate only if family allowances are actually paid under a national scheme. Those provisions do not restrict the Member States' freedom of action in granting social security benefits, which is the principle underlying the Community's legislation as a whole.

II — However, the fact remains that Article 67 (2) is based on the notion that in certain circumstances family allowances may be paid by the competent national institutions in respect of the children of Community officials.

Accordingly, the question arises whether, at the time of the adoption of the Staff Regulations, there was a kind of tacit agreement between the Commission and the Member States with regard to situations in which that possibility might exist. Unfortunately, there is scarcely any information on that point.

The documents relating to Case 186/85 *Commission* v *Belgium* [1987] ECR 2029 and the practice applied by Belgium for many years suggest, however, that at the time Belgium and the Commission were agreed on the principle that, where the spouse of a Community official carried on in Belgium an occupation involving affiliation to a family allowance scheme, the allowances provided for by that scheme were to be paid first.

Article 5 of the EEC Treaty provides that the Member States are under an obligation to facilitate the achievement of the Community's tasks.

Article 15 of the Protocol on the Privileges and Immunities of the European Communities provides that 'the Council shall . . . lay down the scheme of social security benefits for officials and other servants of the Communities'.

According to Article 19 of the Protocol, 'the institutions of the Communities shall . . . cooperate with the responsible authorities of the Member States concerned' for the purpose of applying the Protocol.

Accordingly, any alteration in the practice previously applied by a Member State must be the subject of such cooperation. That is why I suggested in Case 186/85 that the Court declare that Belgium had failed to fulfil its obligations in that respect.

In this case the Commission has indeed referred to the three aforementioned provisions in its application but it has not based its action on the allegation that they have been infringed.

The Court cannot therefore make a declaration in that regard, and it is unnecessary to consider whether the 1975 version of the Bundeskindergeldgesetz actually alters the previous situation (the Commission's argument) or whether it preserves the status quo (the Federal Government's argument).

There is a further point: I do not deny the existence of arguments which militate in favour of equating the spouses of Community officials who carry on an occupation in the host country with workers or employees in that country in every respect, including the payment of family allowances. It could also be argued that, in such cases, family allowances should be paid under the scheme which covers the spouse primarily responsible for bearing the burden of the child's education.

Whatever the merits of that argument, if the Commission considers it necessary to find a clear and definitive solution in that regard,

it may always submit proposals to the Council with a view to supplementing the Staff Regulations, or make an express 'arrangement' between itself and the Member States.

What is beyond doubt, in my view, is that no obligation regarding the payment of family allowances under national law can be inferred from Article 67 (2) of the Staff Regulations.

I therefore suggest that the Court dismiss the Commission's application against Germany for failure to fulfil its obligations and order the applicant to pay the costs.