1. Article 77 of Regulation No 1408/71 must be interpreted as giving a person entitled to family benefits who is a national of a Member State and has dependent children but resides in another Member State entitlement to payment by the social security institutions of his country of origin only of 'family allowances', as defined in Article 1 (u) (ii) of Regulation No1408/71, to the exclusion of other family benefits such as the 'rentrée scolaire' (school expenses) allowance and the 'salaire unique' (single wage) allowance provided for by French legislation.

2. Article 51 of the Treaty provides for the coordination, not the harmonization, of the legislation of the Member States and leaves in being differences between the Member States' social security systems and, consequently, in the rights of persons working in the Member States. It follows that substantive and procedural differences between the social security systems of the Member States, and hence in the rights of the persons working in the Member States, are unaffected by Article 51 of the Treaty. However, the Community rules on social security must refrain from adding to the disparities which already stem from the absence of harmonization of national legislation, and the principle of equal treatment laid down in Articles 7 and 48 of the Treaty prohibits not only overt discrimination based on nationality but also all covert forms of discrimination which, by applying other distinguishing criteria, in fact achieve the same result.

Article 77 of Regulation No 1408/71, under which the benefits for dependent children which a Member State must pay to its nationals who are in receipt of a pension and reside in another Member State are restricted to family allowances, is not contrary to those principles. It is a rule of general scope which applies indistinctly to all nationals of the Member States and is based on objective criteria concerning the nature of benefits of that kind and the conditions for granting them; it does not of itself lead to discrimination.

REPORT FOR THE HEARING
delivered in Case 313/86 *

I — Facts and written procedure

1. As is apparent from the request for a preliminary ruling and the documents in the case, the plaintiff in the main proceedings, Mr O. Lenoir, a French national and recipient of an old-age pension under French legislation, transferred in June 1983 his family residence from Peymeinade (Alpes-Maritimes, France) to Eastbourne (East Sussex, United Kingdom). He continued to receive family allowances

* Language of the Case: French.

under the French scheme from the competent French institution, the Caisse d'allocations familiales des Alpes-Maritimes, in respect of his two children.

By letter dated 10 November 1984 the Caisse d'allocations familiales des Alpes-Maritimes informed Mr Lenoir that following his departure from France his entitlement was confined to family allowances alone, to the exclusion of the 'rentrée scolaire' (school expenses) and 'salaire unique' (single wage or salary) allowances, and that he must refund the amount of those allowances wrongly received in 1983 and 1984.

Mr Lenoir's application for the benefits to the commission des recours gracieux (Appeals Committee) of the Caisse d'allocations familiales was rejected by the Commission's decision of 20 March 1985. The ground for rejecting his application was that payment of the 'rentrée scolaire' and 'salaire unique' allowances was 'contrary to the provisions of Article 77 of Regulation No 1408/71, as amended by Regulation No 2001/83.'

On 28 June 1985 Mr Lenoir appealed against that decision to the tribunal des affaires de sécurité sociale des Alpes-Maritimes.

The court took the view that the interpretation given by the competent national body to Article 77 of Regulation No 1408/71 was in accordance with the wording of that provision, which is contained in Chapter 8 of Title III on benefits for dependent children of pensioners and for orphans and provides as follows:

'(1) The term "benefits", for the purposes of this article, shall mean family allowances for persons receiving pensions for old-age, invalidity or an accident at work or occupational disease, and increases or supplements to such pensions in respect of the children of such pensioners, with the exception of supplements granted under insurance schemes for accidents at work and occupational diseases.

(2) Benefits shall be granted in accordance with the following rules, irrespective of the Member State in whose territory the pensioner or the children are residing:

(a) to a pensioner who draws a pension under the legislation of one Member State only, in accordance with the legislation of the Member State responsible for the pension;

...'.

According to the national court the interpretation given by the national body is consistent with Article 77 of Regulation No 1408/71 because the article refers to 'family allowances' and not 'family benefits', which, according to the applicable French legislation (Article L 511-1 of the Social Security Code) include the 'rentrée scolaire' allowance and the 'salaire unique' allowance, which since 1977 has been incorporated with other benefits in the 'complément familial' (supplementary family allowance).

Nevertheless, after observing that it was not disputed that Mr Lenoir met the conditions

for the grant of the contested benefits in France and that the interpretation adopted by the Caisse des allocations familiales was based on the 'guide des prestations' (Benefits Guide), a purely administrative document to be used merely for guidance, the national court concluded that the scope of Article 77 of Regulation No 1408/71 had to be viewed in the light of the statements contained in its preamble, which refers to family benefits and not to family allowances in the strict sense.

By judgment of 21 October 1986, which was received at the Court Registry on 15 December 1986, the tribunal des affaires de sécurité sociale des Alpes-Maritimes stayed the proceedings and referred the following question to the Court for a preliminary ruling under Article 177 of the EEC Treaty:

'Must Article 77 of Community Regulation No 1408/71 of 14 June 1971 be interpreted as entitling a person in receipt of family benefits who is a national of a Member State of the Community and resides in the territory of another Member State to payment by the social security institution of his country of origin solely of family allowances and not of other family benefits, in particular the "rentrée scolaire" (school expenses) allowance and the "complément familial" (family supplement) allowance?'

2. Pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were lodged by the plaintiff in the main proceedings, by the French Government, represented by G. Guillaume, acting as Agent, and C. Chavance, acting as Deputy Agent, by the Italian Government, represented by P. G. Ferri, avvocato dello Stato, acting as Agent, and by the Commission of the European Communities, represented by J. Griesmar, acting as Agent.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General the Court decided to open the oral procedure without any preparatory inquiry.

II — Written observations submitted to the Court

1. The plaintiff in the main proceedings states that he agrees with the views expressed in the judgment of the national court according to which he met the conditions laid down by the national legislation for the grant of the benefits at issue in France and that the interpretation adopted by the Caisse des allocations familiales des Alpes-Maritimes was based on a purely administrative document which was intended to be used merely for guidance.

2. The French Government states that the definition of 'benefits for the dependent children of pensioners' given in Article 77 of Regulation No 1408/71 is specific and applies within the framework of that provision which covers family allowances for pensioners and increases or supplements to their pensions for dependent children without extending to all family benefits in general.

The French Government emphasizes that according to Article 1 (u) (ii) of Regulation No 1408/71 the term 'family allowances' means periodical cash benefits granted by reference to the number and, where appropriate, the age of members of the family, without reference to additional conditions relating to the beneficiary's resources, which come under the definition of family benefits in the wide sense referred to in Article 1 (u) (i).

It observes that the nature of each benefit must, according to Article 77 (2) of Regulation No 1408/71, be determined according to the applicable national law; in the present case that is French law, which clearly distinguishes between family allowances properly so called and the benefits at issue, entitlement to which is subject under the national legislation to additional conditions.

(i) Family allowances, which are the subject of Chapter 1 of Title II of the French Social Security Code, are paid to all persons who are entitled to social security cover provided they satisfy the conditions of entitlement.

(ii) However, the 'salaire unique' allowance, which is now included in the family supplement by virtue of French Law No 77-765 of 12 July 1977, and is the subject of Chapter 2 of Title II of the Social Security Code, depends on two additional conditions, a condition relating to the beneficiary's resources, which must not exceed a certain amount, and a condition relating to the age of the dependent children (Article L 522-1 of the Social Security Code).

(iii) In the same way the 'rentrée scolaire' allowance is subject to specific additional conditions relating to the beneficiary's resources and the enrolment of the dependent children in an educational establishment (Article L 543 (1) and (2)).

The French Government thus concludes that as defined by the French legislation the benefits at issue are not family allowances and do not fall within the scope of Article 77 of Regulation No 1408/71. It proposes that the following answer should be given to the national court:

'The provisions of Article 77 of Regulation No 1408/71/EEC are to be interpreted as entitling an old-age pensioner who is a national of a Member State and resides in the territory of another Member State only to payment by the social security institutions of his country of origin of increases or supplements to the pension in respect of his children and of family allowances to the exclusion of other family benefits, in particular, in the case of a French national, the "rentrée scolaire" allowance and the family supplement.'

3. The Italian Government considers that Article 51 of the EEC Treaty is relevant to the question put to the Court, and that the contradictions in Regulation No 1408/71 referred to by the national court should be examined and resolved in the light of that article. In that respect it considers that notwithstanding the fact that the question concerns the interpretation of Article 77 of Regulation No 1408/71 it will *ipso facto* become a question concerning the validity of that provision if it appears contrary to the principles contained in Article 51 of the EEC Treaty, which is a higher-ranking provision and is the enabling basis for Regulation No 1408/71.

The Italian Government contends that the allowances at issue in the main proceedings are undoubtedly family benefits as referred to in Article 1 (u) (i) of Regulation No 1408/71, and thus form part of the subject-matter of the Community regulations adopted in application of Article 51 of the Treaty. It follows that the guarantee provided for by Article 51 (b) of the EEC

Treaty must be extended to them in the same way as to the other benefits, that is to say, family allowances. In consequence there is no place for a literal interpretation of Article 77 (1) of Regulation No 1408/71 since it would not allow application to those benefits of the provision in Article 77 (2), which excludes the criterion of residence and guarantees payment of benefits entitlement to which has been acquired under the legislation of a Member State by migrant workers who have left it.

The Italian Government considers that it would be illogical and arbitrary in view of the purpose of Article 51 of the EEC Treaty to deprive a pensioner of family benefits the payment of which is guaranteed by Article 73 of Regulation No 1408/71 to employed persons even if the members of their family reside in another Member State. In that respect it cites the judgment of 15 January 1986 in Case 41/84 *(Pinna* v *Caisse d'allocations familiales de la Savoie* [1986] ECR 1), which is very similar to the present case; there the Court held Article 73 (2) of Regulation No 1408/71 to be invalid in so far as it precluded the award to employed persons subject to French legislation of French family benefits for members of their family residing in the territory of another Member State. That judgment found unlawful a rule which established a system of payment in a Member State different from that in force in other Member States, discriminating indirectly against migrant workers returning to their country of origin *vis-à-vis* workers who are nationals of the State in question, who normally remain in their country and receive the whole of the family benefits.

Consequently, according to the Italian Government, there is no good reason for refusing family benefits to a pensioner who himself, and not only his family, resides in another Member State, thus penalizing him for returning to his country and forcing him to waive the rights which he has acquired in another Member State, contrary to the aims of the Treaty.

Finally, the Italian Government adds that to limit the application of Article 77 to family allowances would disregard the fact that in France they are only one item in a complex system, a feature of which is the unity both of the sources of finance (employers' contributions) and its purpose, to compensate for family burdens. Along with the salary or pension it creates an integral economic scheme guaranteed to workers and would be thrown out of balance if one of its items, such as benefits other than family allowances, were excluded.

The Italian Government therefore proposes that the Court give the following answer, after it has declared, if necessary, Article 77 (1) of Regulation No 1408/71 to be void:

For the purposes of Article 77 (2) of Regulation (EEC) No 1408/71 the family benefits defined in Article 1 (u) (i) are payable to a pensioner who draws a pension under the legislation of a Member State even if he resides in another Member State. The 'rentrée scolaire' allowance and the family supplement are family benefits within the meaning of Regulation (EEC) No 1408/71.

4. The Commission states that according to Article 77 (2) of Regulation No 1408/71 the benefits granted to a pensioner are payable 'in accordance with the legislation of the Member State responsible for the pension' and that according to Article 77 (1) the benefits referred to are solely family allowances for persons receiving pensions for old age or invalidity and increases or supplements to such pensions in respect of their children.

It points out that Article 1 (u) of Regulation No 1408/71 defines 'family benefits' as all benefits in kind or in cash intended to meet family expenses, whereas 'family allowances' are periodical cash benefits granted exclusively by reference to the number and, where appropriate, the age of members of the family.

With regard to the 'rentrée scolaire' allowance the Commission points out that it was established by French Law No 74-644 of 16 July 1974 and consists of a single cash payment at the beginning of every school year; it is granted to recipient families for each child registered in an educational establishment or institution pursuant to the compulsory schooling obligation, under Article L 543-1 of the Social Security Code. The benefit is subject to observance of the general conditions for entitlement to family benefits and, in addition, to special conditions relating to the child (entitlement to one of the family benefits listed in Article L 511-1 of the Social Security Code, age and registration in an educational establishment) and to the pensioner (his resources must not exceed a certain amount).

The Commission considers that the allowance fulfils the criteria of 'family allowances' within the meaning of Article 1 (u) (ii) of Regulation No 1408/71 in so far as it is a periodical cash benefit granted by reference to the number and age of the dependent children. However, the Commission observes that even disregarding the fact that payment of the benefit is subject to the resources of the beneficiary, which is not a criterion for family allowances within the meaning of Regulation No 1408/71, it is clear from the preparatory documents for the regulation that the draughtsmen intended to exclude from the definition of family allowances in Article 1 (u) (ii) various special benefits the grant of which depends on circumstances abroad which are difficult to check. The Commission considers that that is the position with regard to the 'rentrée scolaire' allowance, which is a special allowance paid once a year and intended to cover the specific needs of the child; it is a lump sum to cover the temporary increase in expenditure connected with the start of the school year.

With regard to the second allowance at issue in the main proceedings the Commission observes that although the question referred for a preliminary ruling refers to the 'complément familial' it is clear from the order making the reference for a preliminary ruling that what is at issue is the 'salaire unique' allowance which since 1978 has been incorporated with other benefits in the family supplement pursuant to French Law No 77/765 of 12 July 1977, although it continues to apply in certain cases where those concerned satisfy the conditions for entitlement to the allowance although they do not satisfy the conditions for entitlement to the family supplement. That is the position of the plaintiff in the main

proceedings, for since he has only two children he does not satisfy the conditions for entitlement to the family supplement as defined in Article 522-1 of the French Social Security Code (three dependent children).

The Commission considers that the 'salaire unique' allowance, which is thus the only one to be taken into account, satisfies the criteria of cash benefits, periodical benefits and the number and age of children, notwithstanding the fact that the national legislation also imposes other conditions connected with the family resources. However, in the Commission's view, it is not a 'family allowance'; the preparatory documents for Regulation No 1408/71 show that it was agreed to exclude the 'salaire unique' allowance from the definition in Article 1 (u) (ii) since it was a 'special family benefit' which according to French legal opinion was intended to serve as a salary to be paid to the spouse who remained at home as consideration for the work in looking after the children.

With regard to the 'complément familial' the Commission queries the relevance of the question for a preliminary ruling to the purpose of the main proceedings; it observes, in the alternative, that according to the national legislation it is a periodical cash benefit granted on the basis of the number and age of the children, although it is not a 'special family benefit'. In contrast to the 'salaire unique' allowance it is granted even when both spouses are working; the fact that entitlement depends on the recipient's resources does not stop it from being a family allowance since that is a criterion which is applicable in several countries in the case of family allowances in the strict sense and supplements thereto. The family supplement is thus a 'supplement' to the family allowances and is similar in nature, in view of Article 1 (u) of Regulation No 1408/71, according to which the term 'benefit' also covers supplementary allowances, and the fact that the supplementary benefit, like the main benefit, falls within the definition of family allowances contained in Article 1 (u) (ii) of Regulation No 1408/71.

The Commission argues generally, however, that Article 77 (1) must be understood as meaning that benefits other than those referred to, in particular the allowances at issue in the main proceedings, are not payable abroad. The principle that social security benefits are not payable abroad is recognized by Regulation No 1408/71 in relation, for example, to the benefits listed in Article 10, which may not be payable abroad in view of the general reservation in that article: 'save as otherwise provided in this regulation'. In any event the fact that benefits other than 'family allowances' within the meaning of Article 1 (u) (ii) are not payable abroad is justified by the nature of the special benefits, the grant of which depends on circumstances which are difficult to check abroad.

The Commission thus proposes that the Court should answer the question put to it as follows:

(1) Article 77 of Regulation No 1408/71 must be interpreted as meaning that a person who receives a pension for old age, invalidity or an accident at work or occupational disease payable under the legislation of a single Member State and who resides with his children in the territory of another Member State is entitled in accordance with the legislation of the Member State responsible for the pension to the family allowances defined in Article 1 (u) (ii) of Regulation No 1408/71.

(2) Such allowances do not include the 'rentrée scolaire' allowance or the 'salaire unique' allowance provided for by French legislation which are the subject of the proceedings pending before the national court.

(3) The question referred for a preliminary ruling does not call for an answer in so far as it relates to the family supplement provided for by French legislation, since that allowance is not at issue in the proceedings pending before the national court.

(4) Alternatively and in the event that the view expressed in paragraph 3 above is not accepted: the family supplement provided for by French legislation and granted by way of a general maintenance allowance on the basis in particular of the number and age of the children, in addition to the family allowances provided by the legislation at issue, is a family allowance within the meaning of Article 1 (u) (ii) of Regulation No 1408/71.

III — Answers to the question put by the Court

1. The Court requested the Commission of the European Communities and the French Government to submit their views in writing on the arguments of the Italian Government to the effect that 'Article 77 (1) ... has a limiting effect only in respect of France' and that 'the family benefits other than family allowances provided for in the other Member States are insignificant'.

2. In answer to that question the Commission of the European Communities observes that Member States other than the French Republic do have family benefits other than family allowances, such as the Luxembourg allowance for the start of the school year, the Belgian and Portuguese special education allowance and the Belgian and Portuguese allowances for handicapped children, and that in view of the interpretation which it proposes for the definition of family allowances the restrictions of Article 77 (1) should have limited effects in respect of the French Republic itself. Thus the Commission considers that benefits other than family allowances in the strict sense which may be classified as family allowances under Community law are payable abroad under Article 77 of Regulation No 1408/71. In any event the Commission is of the opinion that the statements in paragraphs 20 to 22 of the judgment of 15 January 1986 in Case 41/84 *Pinna* v *Caisse d'allocations familiales de la Savoie* should be carefully interpreted if the coordination of national legislation is not to be jeopardized. The Commission considers that it is not unlawful for Community law to make distinctions, whether direct or indirect, in social security rules where they are the inevitable and necessary technical reflection of national disparities. In the Commission's view,

Article 77 (1) covers only family allowances within the meaning of Article 1 (u) (ii), which may nevertheless include benefits other than 'family allowances' as defined in the national legislation.

The Commission states that as regards the principle of equal treatment there is no basic difference between the situation covered by Article 73 (2) of Regulation No 1408/71, declared invalid by the Court of Justice in Case 41/84 *Pinna*, and that covered by Article 77 (1). The principle of equal treatment does not cover differences which may result from differences in the legislation of the Member States provided that they apply to everyone according to objective criteria and without regard to nationality. The prohibition of discrimination is not intended to encourage the harmonization of laws in the Community. Thus application of Article 77 (1) may entail differences of treatment from one State to another owing to the existence of differences between national family benefit schemes.

In conclusion, the Commission considers that the observations of the Italian Government do not justify a declaration that Article 77 (1) of Regulation No 1408/71 is invalid.

3. The French Government takes the view that Article 77 of Regulation No 1408/71 applies only to the benefits which are specifically mentioned and excludes from its scope 'family benefits' such as those defined in Article 1 (u) (i), since it defines 'benefits' limitatively.

From the legal point of view the argument that a provision in Regulation No 1408/71 may apply only to the legislation of a minority of Member States or even only to a single Member State is of no consequence. Article 77 is not aimed at any specific legislation. In any event, it could be aimed at French legislation indirectly only if French legislation were one of the only legislations to provide for family benefits other than family allowances, and that is not the case.

Consequently, Article 77 is a provision coordinating national legislation and its substantive scope certainly does not lead indirectly to a system of payment in one State which differs from that applicable in all the other Member States.

The analogy drawn with the judgment of the Court of Justice of 15 January 1986 in Case 41/84 *Pinna* is irrelevant since in that case the Court was concerned with a dual coordinating provision distinguishing workers subject to French legislation from workers subject to the legislation of a Member State other than the French Republic, whereas the article at issue applies to the legislation of all Member States.

In its judgment of 13 July 1976 in Case 19/76 *Triches* v *Caisse Liegoise pour allocations familiales*, on the validity of Article 42 (2) of Regulation No 3, which was the forerunner of Article 77 (2) of Regulation

No 1408/71 and contained similar provisions, the Court held that consideration of the question raised had disclosed no factor of such a kind as to affect the validity of the provision at issue.

The table in Annex 1 to the French Government's answer reveals considerable differences and shows that the French Republic is not the main State concerned.

Moreover, Annex 2 to the French Government's answer shows that the French Republic is in no case the only State to have a particular type of benefit and that to consider that only the French family benefits are at issue deliberately ignores the various benefits which almost all the Member States have.

In conclusion the French Government gives the following answer to the question put by the Court of Justice:

'In view of the diversity of the family benefits provided for by the legislation of the Member States it is not possible to contend that they are insignificant; there is no ground for claiming that Article 77 (1) of Regulation No 1408/71 is of limitative effect only in relation to France; it is clear from the judgment of the Court of Justice of the European Communities of 13 July 1976 in Case 19/76 that the validity of such provisions is not open to question.'

C. N. Kakouris
Judge-Rapporteur

SUPPLEMENTARY REPORT FOR THE HEARING
delivered in Case 313/86 *

Reopening of the oral procedure

1. By an order of 18 March 1988 the Court decided to reopen the oral procedure in this case and invited the parties to the main action, the Member States, the Council and the Commission to express their views on the following question:

'If the term "benefits" in Article 77 of Regulation No 1408/71 of the Council is to be interpreted as covering solely family allowances in the strict sense, to the exclusion of other family benefits such as the "rentrée scolaire" allowance and the "salaire unique" allowance provided for by French law, the question arises whether Article 77 is incompatible with the provisions of the Treaty, in particular Article 51, and therefore invalid inasmuch as, so interpreted, its effect is to prevent the payment abroad of benefits other than

* Language of the Case: French.