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.

family allowances in the strict sense awarded to the beneficiary of an old-age pension.'

2. In accordance with paragraph 3 of that order written observations were lodged on 22 April 1988 by the Italian Republic, represented by P. G. Ferri, avvocato dello Stato, on 26 April 1988 by the French Republic, represented by E. Belliard, acting as Agent, on 27 April 1988 by the Federal Republic of Germany, represented by M. Seidel, designated by the Government of the Federal Republic of Germany to represent it in the proceedings before this Court, and on 28 April 1988 by the Commission of the European Communities, represented by its Legal Adviser J. Griesmar, acting as Agent.

3. The Council of the European Communities informed the Court by letter of 28 April 1988 that it preferred to rely wholly on the wisdom of the Court as regards the question set out in the order of 18 March 1988.

Observations of the Italian Republic

4. The Government of the Italian Republic reiterates its view that Article 77 of Regulation No 1408/71 covers solely family allowances in the strict sense, to the exclusion of other family benefits. The Government of the Italian Republic submits that that article, so interpreted, is incompatible with Article 51 of the EEC Treaty inasmuch as its effect is to prevent 'the payment abroad of benefits other than family allowances in the strict sense'.

5. The Government of the Italian Republic maintains that the judgment delivered in *Pinna* shows that the approach based on the country of residence may in certain circumstances be unlawful, being incompatible with Article 51 of the EEC Treaty. In the case of Article 77 of the regulation in question the position is even worse, since the result is not to substitute for the benefits to which the worker is entitled under the legislation of the country where he has worked the benefits granted by the legislation of the country of residence, but to block payment of benefits which fall objectively within the scope of Article 51 of the Treaty.

6. The Government of the Italian Republic maintains that preventing the payment abroad of family benefits other than family allowances goes against the interests of migrant workers and that limits on the 'exportability' of family benefits would restrict the mobility of such workers and frustrate their expectations.

Observations of the French Republic

7. The Government of the French Republic submits that Article 77 of the regulation covers solely family allowances within the meaning of Article 1 (1) (u) (ii) of the regulation. Such benefits are payable 'in accordance with the legislation of the Member State responsible for the pension', in this case French legislation.

8. Regulation No 1408/71 is a coordinating regulation which does not affect the existing organization of national social security schemes. Since Article 77 of the regulation covers only family allowances in the strict sense, other benefits must be

'non-exportable'. Article 10 of Regulation No 1408/71 concerns waiver of residence clauses 'save as otherwise provided in this regulation'; Article 77 falls well into that general scheme.

9. In the opinion of the Government of the French Republic the fact that benefits other than family allowances in the strict sense are not payable abroad is justified by the very nature of such benefits. To make them payable in another Member State would, moreover, distort their very nature because they are designed to compensate for certain very specific family expenses incurred in and governed by local conditions in connection with a particular cost of living, so that they may prove, if transported to another place, abnormally advantageous or inadequate.

10. The Government of the French Republic considers that the judgment in *Pinna* does not apply either in this case or in the event that Article 77 is invalid, because differences in family benefits due to the lack of harmonization between national schemes cannot be permitted to give rise to discrimination which is prohibited by Community law. Article 77 of the regulation concerns not workers but former workers.

11. In view of those considerations, the Government of the French Republic considers that the question put by the Court should be answered as follows:

'The term "benefits" within the meaning of Article 77 of Regulation No 1408/71 covers "family allowances" as defined in Article 1 (1) (u) (ii) of that regulation, together with pension increments granted to the beneficiaries by law in some countries on the basis of their family expenses. That specific definition for the purposes of Article 77 is compatible with Article 51 of the Rome Treaty, with the case-law of the Court of Justice and with the rules governing the coordination of national legislation introduced by Regulation No 1408/71 and its implementing regulation, Regulation No 574/72'.

Observations of the Federal Republic of Germany

12. The Government of the Federal Republic of Germany submits that to interpret the term 'benefits' as used in Article 77 of Regulation No 1408/71 so as to exclude certain benefits which do not constitute 'family allowances' within the meaning of paragraph 1 (u) (ii) of the regulation does not make Article 77 incompatible with Article 51 of the EEC Treaty.

13. The Government of the Federal Republic of Germany is of the opinion that Article 77 satisfies the obligation to exclude any discrimination between nationals of the Member States even if its scope is restricted to family allowances within the meaning of Article 1 (u) (ii) of Regulation No 1408/71. Restricting such benefits to beneficiaries residing in the territory of the State in question gives rise to a difference in treatment which is not objectively justified and would in fact damage principally nationals of other Member States. It would be otherwise were the benefits designed to cover a specific need created by living conditions in the Member State in question. Such benefits may certainly justify a difference in treatment based on the place of residence of the beneficiary.

14. The Government of the Federal Republic of Germany cites, as an example of the latter case, the allowance given to parents for purchasing books for their children: if the beneficiary has transferred his residence to a Member State where school books and supplies are free, such expenditure does not arise. That example, according to the Government of the Federal Republic of Germany, shows clearly that it is not necessary, from the point of view of equal treatment, to include allowances of that kind in the scope of Article 77 of Regulation No 1408/71; hence their exclusion is compatible with the aim of Article 51 of the EEC Treaty.

Observations of the Commission

15. The Commission considers that to interpret the term 'benefits' as used in Article 77 of Regulation No 1408/71 to cover solely family allowances in the strict sense would make Article 77 invalid on the ground of incompatibility with Article 51 of the Treaty, inasmuch as that interpretation would prevent other benefits from being paid abroad.

16. According to the Commission, it is not possible to regard persons who never left the country of which they are nationals as long as they were employed but who, once retired in that Member State, decide to transfer their residence to another Member State without seeking to work there as persons still governed by the provisions of the Treaty governing freedom of movement for workers, which are intended to encourage in all the Member States access to and the pursuit of employment by non-nationals in the same conditions as nationals. The Commission cites the judgment of 23 March 1982 in Case 53/81 *Levin* [1982] ECR 1035, according to which the rules governing the free movement of workers guarantee freedom of movement only for workers who are pursuing or who wish to pursue an economic activity.

17. The Commission concedes that the term 'worker' as defined for the purposes of Community law on the coordination of social security schemes is considerably wider than the definition of a 'migrant worker' in the strict sense, and that that is borne out by the case-law of the Court of Justice. Nevertheless, where, as in this case, the question is whether a provision in Regulation No 1408/71 is compatible with superior rules of law enshrined in the Treaty, it is important to decide whether entitlement to certain social security benefits must be preserved for any beneficiary of a pension who transfers his residence, for reasons unconnected with work, to a Member State other than the Member State responsible for paying the benefits.

18. In that context, the Commission considers three separate possibilities: (a) a worker who never exercised his right to freedom of movement while he was working and has now become entitled to an old-age pension transfers his residence for the first time to another Member State for reasons unconnected with work; (b) a worker who during his working life exercised his right to freedom of movement and has become entitled in the country in which he was last employed to one, or more than one pension (under one, or more than one national scheme) transfers for the first time his residence to a Member State other than his Member State of origin, without seeking to work there; (c) a worker who throughout his working life has exercised his right to

freedom of movement and returns to his country of origin once he is in receipt of an old-age pension.

19. In the first two cases, case (a) of which corresponds to that at issue in the main proceedings in this case, the Commission maintains that Article 51 of the Treaty does not require the preservation of social security entitlements and therefore Article 77 of Regulation No 1408/71 is not open to criticism on the ground that it fails to take into account Article 51 of the EEC Treaty because it does not guarantee the payment outside the country of employment of family benefits other than family allowances in the strict sense.

20. In the third case, however, when the former worker has returned to his country of origin and is entitled to a pension only under the legislation of another Member State, a somewhat rare case, it might be considered that to withhold family benefits other than family allowances in the strict sense could be held to be incompatible with Article 51 of the Treaty. However, contrary to the case considered in *Pinna*, there would be no discrimination between active workers within the country of employment, such as that referred to in Article 48 (2) of the Treaty, and it would be rather in the context of obstacles to freedom of movement that the criticism might be held to be justified, for a future worker might be dissuaded from seeking work outside his country of origin (where entitlement to family benefits is based *ex hypothesi* on employment) if he knows that at the end of his working days, which have been spent entirely outside his country of origin, his return when he is in receipt of an old-age pension to that latter country would entail for him the loss of any family benefits other than family allowances.

21. In conclusion, the Commission considers that as long as the Treaty does not guarantee freedom of movement for former workers who have become entitled to an old-age pension under the legislation of their Member State of origin, outside which they have never, throughout their working life, exercised the right of free movement, the fact that Article 77 of Regulation No 1408/71 does not permit family benefits other than family allowances in the strict sense to be paid in the Member State where they now reside does not infringe Article 51 of the Treaty.

C. N. Kakouris

Judge-Rapporteur