OPINION OF ADVOCATE GENERAL DARMON
delivered on 1 July 1992 *

Mr President,
Members of the Court,

1. Is it the Member State in which one of the spouses is employed or the Member State of residence of the family that is responsible for providing family benefits when the mother falls into the category of frontier workers and the husband is employed in the State of residence of the family? This is, in substance, the question asked by the Court of Appeal in Northern Ireland.

2. Mrs McMenamin, the respondent in the main proceedings, lives with her husband and children in Ireland and works as a teacher in Northern Ireland, whose border she crosses every working morning and evening. Her husband is employed in Ireland.

3. On 1 December 1986, she applied for Child Benefit in Northern Ireland under the Child Benefit (Northern Ireland) Order 1975. The Adjudication Officer decided that Mrs McMenamin — who had been receiving children's allowance from Ireland since 1975 — was entitled from 2 December 1985 to a supplement equal to the difference between the child benefit due under Irish law and the higher benefit payable under the 1975 United Kingdom legislation.

4. The Social Security Appeal Tribunal confirmed the Adjudication Officer's decision. Mrs McMenamin appealed to the Social Security Commissioner ('the Commissioner').

5. At that stage of the proceedings, the Adjudication Officer accepted that the claim for benefit received on 16 July 1979 in Ireland should be considered as a valid claim for child benefit in Northern Ireland. [1]

6. By an interim decision of 26 April 1989, [2] the Commissioner held that from 17 July 1978 (one year before the claim) until 19 June 1985 (the day before Article 10 of Council Regulation (EEC) No 574/72 [3] as amended by Article 2 of Council Regulation (EEC) No 1660/85 [4] entered into force) family benefits were payable by Ireland and that Mrs McMenamin was entitled, in Northern Ireland, to a supplement of benefit.

* Original language: French.

1 — See point 7 of the Commissioner's interim decision, Annex I to the Adjudication Officer's observations.

2 — Ibid., points 3, 4, 7 and 8.

3 — Regulation of 21 March 1972 laying down the procedure for implementing Council Regulation (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, version annexed to Regulation No 2001/83, OJ 1983 L 230, p. 6.

4 — Regulation of 13 June 1985 amending Regulation (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 Regulation (EEC) No 574/72 laying down the procedure for implementing Regulation (EEC) No 1408/71 (OJ 1985 L 160, p. 1).

7. In his final decision of 2 November 1989, the Commissioner held that the burden of paying the benefits should be transferred from Ireland to the United Kingdom, that there was no suspension of the entitlement to benefit in the State of employment and that, as from 20 June 1985, Mrs McMenamin was entitled to receive the full amount of child benefit due in the United Kingdom. [5] The Adjudication Officer appealed against the latter decision only to the Court of Appeal in Northern Ireland.

8. This is a case of *overlapping* entitlements to family benefits *of one and the same person.*

9. Mrs McMenamin is entitled to family benefits in Northern Ireland, by virtue of her professional activity there, under the Child Benefit (Northern Ireland) Order 1975.

10. The Irish national legislation also provides for entitlement to family benefits. That entitlement is not subject to a condition of professional or trade activity: it is based on the concept of assistance. The benefit is payable to the mother when the child on whose behalf the entitlement arises lives with both parents. [6]

11. Under Article 13(1) of Council Regulation (EEC) No 1408/71, [7] persons to whom that regulation applies are to be subject to the legislation of a single Member State only.

12. Under Article 13(2)(a), a person employed in the territory of a Member State is subject to the legislation of that State even if he resides in the territory of another Member State. As far as family benefits are concerned, pursuant to Article 73 of Regulation No 1408/71 ('Article 73') the residence of members of the family in another Member State is treated in the same way as residence in the State in which the employed or self-employed person is working: [8] family benefits are therefore subject to *lex loci laboris.*

13. In cases of overlapping entitlements to family benefits stemming from the legislation of the State of employment pursuant to Article 73 on the one hand and the legislation of the country of residence of the members of the family on the other hand, Article 76(1) of Regulation No 1408/71 [9] provides for the suspension of entitlement in the State of employment if, '*by reason of carrying on an occupation*', [10] family benefits are provided for by the legislation of the Member State in whose territory the members of the family are residing. [11] Therefore it is the *lex loci laboris of the country of residence* which prevails.

14. Article 76 concerns entitlement in the country of residence of the child which

5 — Annex II to the Adjudication Officer's observations, points 12 and 13.

6 — See Section 224 of the Irish Social Welfare (Consolidation) Act 1981 and Rule 2 of the Social Welfare (Children's Allowances) (Normal Residence) Rules 1974.

7 — Regulation 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, version annexed to Regulation No 2001/83, OJ 1983 L 230, p. 6.

8 — Since the amendment of Article 73 by Article 1 of Council Regulation (EEC) No 3427/89 of 30 October 1989, amending Regulation (EEC) No 1408/71 and Regulation (EEC) No 574/72 (OJ 1989 L 331, p. 1).

9 — Article 76 was amended by Article 1 of Regulation No 3427/89.

10 — Emphasis added.

11 — That suspension is up to the amount provided for in the legislation of the State of residence.

arises by reason of the carrying on of an occupation. As we have seen, this is not the case under the Irish legislation.

15. Article 10(1) of Regulation No 574/72, which supplements the said Article 76, [12] applies to situations where the right to family allowances under Articles 73 and 74 of Regulation No 1408/71 [13] overlaps with rights arising in the country of residence of the child without any condition as to a professional or trade activity *by virtue of the place of residence alone.*

16. Although the exercise of a professional or trade activity in that State is not a condition for the grant of those benefits, it is relevant in order to determine the rules of priority as to the legislation which applies.

17. Thus, under Article 10(1), as it stood before it was amended by Article 2 of Regulation No 1660/85, when entitlement exists in the country of residence of the child independently of conditions of insurance or employment and when the spouse of the worker does not exercise a professional or trade activity on the territory of that State, entitlement is suspended in the country of residence (priority of the *lex loci laboris*). If, on the other hand, the spouse does exercise a professional or trade activity there, the entitlement pursuant to Article 73 in the country of employment of the worker is suspended: *the lex loci laboris of the country of residence prevails.*

18. The rationale of the provisions is clear: it is normal to give priority to the legislation of the State of employment in which the employed person makes contributions to the social security scheme. It is equally justifiable that priority over that legislation should in turn be given to the legislation of the State of residence when the spouse works there in so far as it is in that State that the children are brought up and that the family situation can best be taken account of by the administration.

19. Under that version of Article 10, in the case of overlapping family benefits, entitlement to benefits due in the country of residence of the child therefore always took precedence when the spouse exercised a professional or trade activity there.

20. It was in implementation of that provision that, from 1979 to 1985, when it was amended, the entitlement to the family benefits provided by the State of employment was suspended by the Commissioner's interim decision on the grounds that benefits without any condition of employment were provided by the Member State of residence where the spouse of the respondent in the main proceedings worked. [14] However, she obtained from the United Kingdom the difference between the child benefit provided by Ireland and the amount of child benefit payable by the United Kingdom. In his interim decision of 24 April 1989, [15] the Commission also cites the Court's judgment in *Rossi* v *Caisse de compensation pour allocations familiales des régions de Charleroi et de Namur* [16] according to which, when the amount of the allowances of which payment is suspended is greater than that of the allowances received by virtue of the pursuit of a professional or trade activity, it is appropriate that the rule against the overlapping of benefits should be applied only partially and

12 — See point 4 of my Opinion in Case 104/84 *Kromhout* v *Raad van Arbeid* [1985] ECR 2211.

13 — Article 74 designates the State responsible for providing family benefits when members of the family of an unemployed person are residing in another State. It is not relevant here.

14 — Annex I to the Adjudication Officer's observations, point 3.

15 — Ibid., point 4.

16 — Case 100/78 [1979] ECR 831, paragraph 17.

that the difference between those amounts should be granted in the form of a supplement.

21. Article 10(1) was amended following the judgment of the Court in *Robards* v *Insurance Officer*. [17] In that case, the applicant's ex-husband lived and worked in Ireland and received, by virtue of Article 73, the family benefits provided by that State for all the children of the marriage, including those who resided with the applicant in the United Kingdom.

22. The Court held that a *divorced parent* who exercises a professional or trade activity in the State of residence of the children is to be treated in the same way as the *spouse* of an employed person within the meaning of Article 10(1)(a) of Regulation No 574/72 and that consequently the family benefits payable by the State of employment of the other parent under Article 73 should be suspended.

23. Following the Advocate-General's Opinion, the Court did not accept that the term 'spouse' covered any person having legal custody of the child, and stated:

'the interpretation of the provision in question should be confined to the case which is before the national court, namely that of a divorced spouse who has not remarried and is carrying on a professional or trade activity. It would be for the Commission and the Council to take the necessary measures in order to amend the provision in question if it appeared that such an amendment were necessary in order to enable other cases to be satisfactorily resolved.' [18]

17 — Case 149/82 [1983] ECR 171.

18 — Ibid., paragraph 19.

24. In order that the suspension of entitlement under Article 73 should also apply when the person entitled to benefit in the Member State of residence where the professional or trade activity is exercised is not or is no longer married to the employed person, Article 10(1) was amended by Article 2 of Regulation No 1660/85. [19] It was further amended by Article 2 of Council Regulation (EEC) No 2332/89 [20] and by Article 2(1) of Council Regulation (EEC) No 1249/92. [21]

It is now worded as follows: [22]

'(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 the Regulation, *up to the sum of those benefits.*

19 — See the twelfth, thirteenth and fourteenth recitals in the preamble to Regulation No 1660/85.

20 — Regulation of 18 July 1989 amending Regulation (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 Regulation (EEC) No 574/72 laying down the procedure for implementing Regulation (EEC) No 1408/71 (OJ 1989 L 224, p. 1).

21 — Regulation of 30 April 1992 amending Regulation (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 Regulation (EEC) No 574/72 laying down the procedure for implementing Regulation (EEC) No 1408/71 (OJ 1992 L 136, p. 28). *Article 2(1) of this regulation is applicable from 15 January 1986.*

22 — Amendments made by Regulation No 2332/89 are shown in italics; those made by Regulation No 1249/92 are shown in bold.

(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* under Articles 73 or 74 of the Regulation [by] the person entitled to family benefits or [by] 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 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.* (...)'

25. The amendment of Article 10 by Regulation No 1660/85 therefore had the following effect: it is no longer the exercise of a professional or trade activity in the State of residence by a 'spouse' which leads to a suspension of the benefit due under Article 73, but the exercise of a professional or trade activity in the State of residence by 'the person entitled to family benefits or ... the person to whom they are to be paid'.

26. In the situation described to us by the national court, does the amendment of Article 10 by Regulation No 1660/85 have the effect of transferring the burden of the benefits from Ireland to the United Kingdom?

27. According to the Commissioner, such a transfer occurred from the day of entry into force of the amended article, which can longer suspend Mrs McMenamin's entitlement to benefits payable by the United Kingdom under Article 73 since the professional or trade activity on the territory of the State of residence is exercised not by her but by her husband who is not 'the person entitled to the family benefits' within the meaning of the new Article 10 of Regulation No 574/72 as amended by Regulation No 1660/85. [23]

28. Those are the circumstances in which the Court of Appeal in Northern Ireland has asked the following questions:

'1. Whether, by reason of the provisions of Article 13 of Council Regulation (EEC) No 1408/71 (the effect of which appears to be that the Respondent is to be treated as subject to United Kingdom legislation only) the words "the person entitled to the family benefits or family allowances" in Article 10(1)(b)(i) of Council Regulation (EEC) No 574/72 (as amended) do not apply to the Respondent despite the fact that under the Republic of Ireland legislation (and apart from the said Article 13) she is the person entitled to child benefit.

2. Whether, since the Respondent's husband is exercising or pursuing a professional or trade activity in the Republic of Ireland and is entitled to child benefit under the Republic of Ireland legislation if, for any reason, the Respondent either loses, or is unable to

23 — See the Commissioner's final decision, point 11, Annex II to the Adjudication Officer's observations.

assert, her title to that benefit, the said Article 10(1)(b)(i) (as amended) operates to suspend the Respondent's right, under Article 73(1) of Council Regulation (EEC) No 1408/71, to child benefit in the United Kingdom.'

29. As we have seen, a particular feature of the present case is that one and the same person is entitled to benefits under Article 73 and to those resulting from the application of the legislation of the State of residence: the respondent in the main proceedings.

30. The first question is, in effect, asking whether, in such a case, the principle laid down by Article 13 of Regulation No 1408/71 that a person may be subject to only one social security scheme at a time excludes the application of the rule against overlapping in Article 10.

31. According to the Adjudication Officer, Mrs McMenamin is entitled by virtue of Article 13 to benefits in the State of employment. She has lost all entitlement in the State of residence. [24] Article 13 is therefore interpreted as precluding the application of the rule against overlapping in Article 10(1)(b)(i) of Regulation No 574/72 where one person has overlapping entitlements to benefits in two different Member States.

32. In the judgment in *Aubin* v *Unedic et Assedic* [25] the Court held:

'That general provision [Article 13(2)(a)], however, which appears in Title II of Regulation No 1408/71, headed "Determination of the Legislation Applicable", applies only in the absence of provision to the contrary in the special provisions relating to the various categories [of] benefits which constitute Title III of the same regulation.' [26]

As can be seen, this is a case where the rule *specialia generalibus derogant* applies.

33. The person concerned in that case was covered by the provisions of Title III on unemployment benefit: Article 71(1)(b)(ii).

34. The Court concluded that Article 13, under which the claimant was subject to the legislation of the State of employment, was overridden by Article 71(1)(b)(ii) under which the burden of unemployment benefit, in such cases, is to be borne by the competent institution of the *State of Residence*.

35. Likewise in *Beeck* v *Bundesanstalt für Arbeit*, [27] the facts of which were very similar to those of the present case, the Court held that the general provision of Article

24 — See the Adjudication Officer's observations, point 7.6.

25 — Case 227/81 [1982] ECR 1991.

26 — Ibid., point 11.

27 — Case 104/80 [1981] ECR 503.

13 did not preclude the application of the special provisions in Title III of Regulation No 1408/71 and even the provisions of later implementing regulations.

36. The plaintiff in the main proceedings, a German national employed in Germany, lived in Denmark with his spouse and their children. His spouse worked in Denmark where she received family allowances unrelated to her employment, by virtue of residence. The Arbeitsamt (Employment Office) Flensburg refused Mr Beeck's application for German family benefits, basing that decision on the old Article 10(1)(a) of Regulation No 574/72.

37. The Court held:

'Therefore, for Article 73(1) to apply, it is sufficient for the worker to be employed on the territory of a Member State whilst the members of the worker's family reside on the territory of another Member State. That provision goes together with the rule laid down in Article 13(2)(a) of the same regulation which states that a worker 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. That arrangement stems from the objective of Regulation No 1408/71, which is to guarantee all workers who are nationals of the Member States and who move within the Community equality of treatment in regard to the different national laws and the enjoyment of social security benefits irrespective of the place of their employment or of their residence, and it must be interpreted uniformly in all Member States regardless of the arrangements made by national laws on the acquisition of entitlement to family benefits.' [28]

38. The Court found that the plaintiff's entitlement to family allowances payable by virtue of Article 73 overlapped with his spouse's entitlement to benefits in the State of residence of the child and that, pursuant to the old Article 10(1)(a) of Regulation No 574/72, the latter should take priority over the entitlement of the employed person: [29] the spouse was entitled in her own right to the family benefits which were actually paid to her.

39. Consequently, it is clear that the entitlement enjoyed by an employed person by virtue of Articles 13 and 73 of Regulation No 1408/71 must be set against the Community rules against overlapping in Article 76 of that regulation and in Article 10 of Regulation No 574/72 in cases where family benefits are payable both in the Member State of employment by virtue of Article 73 and in the Member State of residence under national legislation.

40. Does the fact that the person entitled to allowances in the State of employment (under Article 73) and in the State of residence (by virtue of the domestic legislation) is one and the same person preclude the application of Article 76 of Regulation No 1408/71 or of Article 10 of Regulation No 574/72?

41. When asked to define the concept of the overlapping of family benefits, the Court held:

28 — Ibid., point 7.

29 — Ibid., point 12.

'It follows from the wording of that provision (Article 12(1) of Regulation No 1408/71) [30] that overlapping occurs not only *when one person is entitled to two different family benefits at the same time*, but also when two different persons — in this case two parents — are entitled to such benefits *in respect of the same child*.' [31]

42. In *Georges* v *ONAFTS*, [32] the plaintiff in the main proceedings was entitled concurrently to family benefits as an employed person in France and as a self-employed person in his State of residence, Belgium.

43. As the family benefits were provided for by the legislation of the State of residence by virtue of a professional or trade activity, the applicable Community rule against overlapping was that in Article 76; Advocate General Tesauro, in his Opinion in that case, examined the applicability of that article where one and same person is entitled to overlapping benefits:

'(...) does such a provision come into play only in the case in which the activities pursued in the Member State in which the members of the family of an employed person who works in another Member State reside is carried on by a member of the family or also, as is the case here, *where the employed person himself* carries on the second activity?

In my view, nothing militates in favour of the restrictive interpretation represented by the first alternative. The terms of Article 76 in no way lend themselves to such an interpretation. Moreover, beyond purely literal considerations, the *raison d'être* itself of Article 76, which is and remains an anti-overlapping provision, requires that payment of benefits and family allowances due under Articles 73 and 74 should also be suspended where it is the worker himself who pursues the second activity in the Member State of residence ...'. [33]

44. The Court held that the entitlement under Article 73 of Regulation No 1408/71 is suspended only up to the amount of benefits of the same kind actually paid in the State of residence and that benefits payable under Article 76 as a result of the professional or trade activity exercised in the State of residence should be paid. *That article has not been rendered inapplicable by the effect of Article 13.*

45. Article 10 of Regulation No 574/72 was adopted in order to take into account the particularities of the domestic legislation of certain Member States of the Community which base the entitlement to family benefits solely on the criterion of the family's residence on the national territory with no condition of employment. [34] Its aim is the same as that of Article 76 inasmuch as the entitlement to benefit in the State of residence takes priority over the entitlement to benefit in the State of employment where a professional or trade activity is carried out in the first State.

30 — That general provision lays down that Regulation No 1408/71 can neither confer nor maintain the right to several benefits of the same kind for one and the same period of compulsory insurance.

31 — Judgment in Case 168/88, *Dammer* v *Securex and Another* [1989] ECR 4553, point 10, emphasis added; see also S. Van Raepenbusch, *La sécurité sociale des personnes qui circulent à l'intérieur de la CEE*, No 222, p. 351, ed. E. Story-Scientia, 1992.

32 — Case 24/88 [1989] ECR 1905.

33 — Points 11 and 12, ibid., pp. 1914 and 1915.

34 — See the Opinion of Advocate General Mayras in Case 9/79 *Koschniscke* v *Raad van Arbeid* [1979] ECR 2717.

46. In *Robards* v *Insurance Office*, [35] the Court underlined that affinity between the two articles:

'The provision in question (Article 10(1)(a) as it stood before the 1985 amendment), like Article 76 of Regulation No 1408/71 which is also concerned with an instance of the overlapping of family benefits, seeks to give priority to the benefits of the Member State in the territory of which the children reside and in which one of the recipients in questions pursues a professional or trade activity ...'. [36]

47. The two provisions are therefore complementary, one applying when the exercise of a professional or trade activity is a condition of obtaining entitlement to benefits in the State of residence, the other applying when that is not the case. Both those rules against overlapping benefits have the same effect. In accordance with the requirements of Article 13, the person concerned will be subject to the legislation of a single Member State only.

48. It follows, in my view, that both the provisions should be subject to the same regime. Since Article 76 applies in cases where one person has overlapping entitlements to benefits, Article 10 must also apply in such cases.

49. In the present case, it is not disputed that, until 1985, the overlapping of entitlement to benefits under Article 73 on the one hand and under the Irish national legislation on the other hand enjoyed by *one and the same person* (the respondent in the main proceedings) had to be resolved by applying Article 10 of Regulation No 574/72, without Article 13 presenting any obstacle to such application.

50. Therefore, the fact that an employed person receives benefits in the State of employment does not *ipso facto* mean that he loses the right to benefits in the State of residence: the Community rules against overlapping benefits should be applied.

51. In the judgment in *Luijten* v *Raad van Arbeid*, [37] which the Adjudication Officer cites in support of his view that Article 10 does not apply, the plaintiff in the main proceedings, a Dutch national, was residing in the Netherlands with his wife. As he worked on a self-employed basis in Belgium, he was entitled to Belgian family allowances. By virtue of its residence, the Luijten family also received family allowances from the Netherlands.

52. The Court was unable to resolve the resulting conflict of entitlement to benefits by applying Articles 73 and 76 of Regulation No 1408/71 and Article 10 of Regulation No 574/72, Article 73 being at that time inapplicable to self-employed persons. [38]

53. In the absence of applicable special provisions, the Court resolved the problem of overlapping entitlement by applying Article 13.

'(...) It must be borne in mind that, according to a consistent line of decisions of the Court, the aim of the provisions of Title II of

35 — Cited above.
36 — Ibid., point 15.
37 — Case 60/85 [1986] ECR 2365.
38 — See the Opinion of Advocate General Sir Gordon Slynn, ibid., at p. 2367.

Regulations Nos 3/58 and 1408/71, which determine the legislation applicable to workers moving within the Community, is to ensure that the persons concerned shall be subject to the social security scheme of only one Member State, in order to prevent more than one national legislative system from being applicable and to avoid the complications which may result from that situation.' [39]

54. Article 13 of Regulation No 1408/71 therefore applies in such circumstances on a *subsidiary basis*, since the overlapping of the benefits in question does not fall within the scope of the provisions of Title III of that regulation.

55. Furthermore, today Mr Luijten's situation would be covered by Article 73 — which is now applicable to self-employed persons [40] and the overlapping entitlement to Belgian and Netherlands benefits would come under Article 10(1)(b(i) of Regulation No 574/72, since the entitlement to family benefits in the Netherlands is subject only to a condition of residence and not of employment.

56. Thus, it cannot be inferred from the *Luijten* judgment that Article 13 may have the effect of impeding the application of the rules against overlapping benefits in Article 76 or Article 10(1)(b)(i) since those provisions were, in any event, inapplicable in that case.

57. Nor does the Adjudication Officer's reference to the judgment in *Ten Holder* v *Nieuwe Algemene Bedrijfsvereniging* [41] appear any more relevant.

58. Mrs Ten Holder was a Netherlands national who had been employed in Germany before suffering incapacity for work whereupon she returned to live in the Netherlands. She received German sickness benefits for a time but soon all her benefits stopped. The question therefore arose whether she continued to be subject to German legislation by virtue of Article 13.

59. Strictly speaking, the case was not one of overlapping benefits, but, on the contrary, of a sort of 'negative conflict', as there was no legislation that took account of the plaintiff's situation.

60. The Court held:

'(...) although that provision (Article 13(2)(a)) does not expressly mention the case of a worker who is not employed when he seeks sickness benefit, it is appropriate to interpret it as meaning that, where necessary, it refers to the legislation of the State in whose territory the worker was last employed.' [42]

61. Therefore, it cannot be inferred from either the *Ten Holder* or the *Luijten* judgment that Article 13 of Regulation No 1408/71 entails the non-applicability of Article 10(1)(b)(i) of Regulation No 574/72 to a frontier worker in a situation such as that put before us by the national court.

39 — Ibid., paragraph 12 of the judgment.

40 — Since its amendment by Article 1 of Regulation No 3427/89, cited above.

41 — Case 302/84 [1986] ECR 1821.

42 — Ibid., paragraph 13.

62. I must stress that the purpose of the provisions of Regulation No 1408/71 governing the overlapping of family benefits is to prevent both the person directly entitled to family benefits, that is to say the worker and the indirect beneficiaries, primarily the children, from receiving at the same time two benefits of the same kind, without distinguishing whether the entitlements to benefits in respect of one child are enjoyed by several persons or only one.

63. Furthermore, Form E411, [43] by which the competent institution for granting family benefits in the worker's State of employment asks whether a right to such benefits exists in the Member State of residence of the family members, does not preclude overlapping entitlements to those benefits vesting in one and the same person. [44]

64. Consequently, overlapping concurrent entitlements held by one person can give rise to the application of Article 10 of Regulation No 574/72 in the same way that it can give rise to the application of Article 76 of Regulation No 1408/71, as the Court has held in the judgment in *Georges* v *ONAFTS*. [45]

65. Since Article 13 of Regulation No 1408/71 lays down the principle that an employed person is subject to the social security scheme of a single Member State only, the person concerned cannot be obliged to contribute twice. [46] Conversely, he may not gain any unjust enrichment from the overlapping of the legislation of different States where the advantages acquired under national laws are preserved. *That provision does not have the effect of suspending the application of the articles of Title III and the rules against overlapping contained therein.* [47] On the contrary, it is applied, as was seen in *Luijten* v *Raad van Arbeid*, in the absence of any specific Community provision. [48]

66. The first question, as it is drafted, must in my view, therefore, be answered in the negative: Article 13 forms no obstacle to the application of Article 10(1)(b)(i); a frontier worker in the same situation as the respondent in the main proceedings may be 'the person entitled to the family benefits or family allowances' in the State of residence within the meaning of Article 10.

67. In my opinion, the difficulties in applying this Article lie elsewhere.

68. As the entitlement to family benefits pursuant to the Irish legislation is based on the sole criterion of residence, the issue of the overlapping of rights is dealt with not by Article 76 of Regulation No 1408/71 but by Article 10 of Regulation No 574/72.

43 — See Annex I to the Commission's observations.

44 — See Form E 411 box 2: 'Spouse *or other person* whose entitlement to benefits in the country of residence of the members of the family must be verified' (emphasis added).

45 — Cited above.

46 — See on this point Case 102/76, *Perenboom* v *Inspecteur der Directe Belastingen, Nijmegen* [1977] ECR 815.

47 — As well as the rules against overlapping benefits contained in other regulations which complement Title III, such as Regulation No 574/72.

48 — For another example of the application of Article 13(2)(a) of Regulation No 1408/71 in the absence of a specific Community provision, see the judgment in Case 58/87 *Rebmann* v *Bundesversicherungsanstalt für Angestellte* [1988] ECR 3467.

69. Under Article 10(1)(b)(i), the right conferred by Article 73 is suspended where *the person entitled to the benefits* exercises a professional or trade activity in the territory of the State of residence.

70. What is the position when the recipient of the benefits in the State of residence is not the person exercising a professional or trade activity there?

71. A literal application of the provision in question would necessarily preclude the suspension of the rights pursuant to Article 73.

72. It is as a result of this, and not of Article 13 of Regulation No 1408/71, that suspension might prove to be impossible.

73. Let us examine the consequences of such a literal interpretation.

74. Until 20 June 1985, the date on which the amendment to Article 10 took effect, the entitlement to benefit in the State of employment resulting from the application of Article 73 was suspended by virtue of the old Article 10(1) if the employed person's spouse exercised a professional or trade activity in the State of residence. That suspension would have to terminate from that date as the employed person's spouse is not, in the State of residence, 'the person entitled to the family benefits' within the meaning of Article 10(1)(b)(i), as amended.

75. However, the object of the 1985 amendment to that article was precisely, following the judgment in *Robards*, to *extend* the list of persons residing with their children for whom the right to benefits in the State of employment was to be suspended on the grounds that they were working in the State of residence. The purpose was, in particular, to enable a divorced spouse with custody of the children to receive directly in his own name, the family benefits in his State of residence. [49]

76. A literal and restrictive interpretation of the new Article 10(1)(b)(i) of Regulation No 574/72 would narrow its scope to the point that suspension of the entitlement pursuant to Article 73 would be impossible in cases where such suspension was provided for prior to the 1985 amendment.

77. If the Community legislature had intended, by virtue of the amendment to Article 10 of Regulation No 574/72 resulting from Regulation No 1660/85, to call into question again the principle of priority being given to the legislation of the State of residence when a professional or trade activity is being exercised there, that would doubtless have been mentioned in the preamble to that regulation.

78. Furthermore, a literal interpretation of Article 10(1)(b)(i) would lead to the following paradox.

79. When, as in the *Robards* case, divorced parents, one of whom works in one Member State and the other in the State of residence

49 — See the thirteenth and fourteenth recitals in the preamble to Regulation No 1660/85.

of the children, are residing separately in each of those States, Article 10(1)(b)(i) applies and the entitlement pursuant to Article 73 is suspended.

80. However, when both spouses work in two different Member States and live together with their children in the same State, Article 10(1)(b)(i) does not apply and the legislation of the State of employment prevails for the sole reason that the spouse entitled to the benefits from the State of residence is not the person who exercises a professional or trade activity there, whilst the links between the family and the State of residence are particularly strong in this instance.

81. It should not be forgotten that Article 76 and Article 10 have the same goal: to give priority to the legislation of the State of residence of the family when (1) a professional or trade activity is exercised there, (2) benefits are payable there either by virtue of employment (Article 76) or with no condition of employment (Article 10).

82. Applying Article 76 will always enable the entitlement to benefit in the State of residence to be given priority when a professional or trade activity is exercised there. It is that activity which gives rise to the right to benefits. On the other hand, a restrictive interpretation of the new Article 10 of Regulation No 574/72 would preclude suspension of the entitlement to benefits in the State of residence, even if a professional or trade activity is exercised there by the spouse, simply because it is not exercised by 'the person entitled to the family benefits'.

83. Thus, when, in the State of residence of all the family,

— there exists an entitlement to benefit with no condition of employment, and

— the spouse of the person in receipt of the benefits exercises a professional or trade activity,

the conditions for giving priority to the *lex loci laboris* of the State of residence seem to me to be fulfilled. It is true that the professional or trade activity is not being exercised by the person to whom the benefits are payable but those benefits, being on an assistance basis, are due even when the person entitled to them does not exercise a professional or trade activity in that State. What is important is that one of the spouses works there, and *the fiction of residence in the State of employment* provided for by Article 73 does not come into play.

84. That solution is in accordance with the Court's judgment in *Dammer* [50] which, in a case of overlapping entitlements to benefits not expressly covered by the Community anti-overlapping rules, applied the rule of the priority of the State of residence of the child.

85. If the final condition laid down in the Court's case law for the application of the suspension of entitlements pursuant to Article 73 is fulfilled, that is the *actual* receipt of allowances in the State of residence, [51] I cannot see any obstacle to the application of Article 10(1)(b)(i) of Regulation No 574/72.

50 — Case 168/88 *Dammer* v *Securex and Another* [1989] ECR 4553, paragraphs 15 and 16.

51 — Judgment in Case 191/83 *Salzano* v *Bundesanstalt für Arbeit* [1984] ECR 3741, paragraphs 10 and 11; judgment in Case 134/77 *Raggazzoni* v *Assubel* [1978] ECR 983, paragraph 12.

86. In contrast to the field of unemployment or sickness benefits, [52] Regulation No 1408/71 and Regulation No 574/72 do not take into account the *specificity* of the situation of frontier workers with regard to family benefits, even though those workers are subject to the provisions of those regulations and in particular Article 10(1)(b)(i) of Regulation No 574/72. [53] They do not expressly envisage the case where both spouses reside in the same State and the one entitled to benefits in that State is not the one working there but the one who works in the neighbouring State.

87. In the latter case, the family's links to the State of residence are much stronger than its links to the other State. I do not consider that this type of overlap should be dealt with differently from that where the person entitled to family benefits in the State of residence without any condition of employment is also the person working there, which covers the position in the *Robards* case and that of divorced parents.

88. In *Robards*, moreover, the Court pointed out that, in view of the purpose of Article 10 of Regulation No 574/72, 'it should not be interpreted in a restrictive manner'. [54]

89. I conclude from this that Article 10(1)(b)(i), as amended, should be interpreted as suspending the entitlement to benefits pursuant to Article 73 of Regulation No 1408/71 when a professional or trade activity is being exercised in the State of residence by the person entitled to benefits by virtue of the criterion of residence or *by the spouse* where he is residing in that State.

90. It must be noted, finally, that the suspension of the entitlement pursuant to Article 73 can only be partial. As the Court has held:

'according to the well-established case-law of the Court based on the fundamental principle of freedom of movement for workers and on the purpose of Article 51 of the EEC Treaty, a rule designed to prevent the overlapping of family allowances is applicable only to the extent to which it does not, without cause, deprive those concerned of an entitlement to benefits conferred on them by the legislation of a Member State'. [55]

If, therefore, the amount of benefits received in the State of residence is less than that which would have been received in the State of employment under Article 73, the competent institution in that State must pay the supplement. [56] That requirement is now embodied in Article 10(1)(b)(i) following its amendment by Article 2 of Regulation No 1249/92. [57]

91. The reply I have suggested to the first question should enable the national court to decide the case before it. The second question consequently requires only a brief examination as a subsidiary matter.

52 — See for example Article 20 of Regulation No 1408/71.

53 — For an example of the application of that article application to frontier workers, see the judgment in the *Beeck* case, cited above.

54 — *Robards* v *Insurance Officer*, cited above, paragraph 15, final sentence.

55 — Judgment in *Kromhout*, cited above, paragraph 21.

56 — Judgment in *Beeck* cited above, paragraph 12; judgment in Case 153/84 *Ferraioli* v *Deutsche Bundespost* [1986] ECR 1401; judgment in *Georges* v *ONAFTS*, cited above.

57 — Cited above; that provision applies from 15 January 1986.

92. We have seen that the respondent in the main proceedings has not, in my view, *lost* her rights in the State of residence by virtue of Article 13.

93. But if she had, it would be for the national court, applying its domestic legislation, to decide to whom the benefits in that State are payable.

94. If the benefits were payable to the husband, Article 10(1)(b)(i) of Regulation No 574/72 would still apply, the person entitled to the allowance without any condition of employment in the State of residence being also the one who works there.

95. I therefore propose that the Court should rule as follows:

(1) Article 13 of Regulation (EEC) No 1408/71 should be interpreted as not precluding the application of Article 10(1)(b)(i) of Regulation (EEC) No 574/72, as amended, in cases where a person entitled to receive family benefits in the State of his employment, within the meaning of Article 73 of Regulation (EEC) No 1408/71, is also entitled to receive similar benefits, but without any condition as to a professional or trade activity, in the State of residence where his spouse exercises such an activity.

Article 10(1)(b)(i) of Regulation (EEC) No 574/72 should be interpreted as suspending, up to the amount of the family benefits actually received in the State of residence without any condition as to a professional or trade activity, the rights to family benefits due pursuant to Article 73 of Regulation (EEC) No 1408/71 where a professional or trade activity is being exercised in the State of residence by the person entitled to benefits in that State or by his spouse who resides there with him.

(2) If the worker entitled to benefits under Article 73 loses or is no longer able to assert his rights to benefits in the State of residence, it is for the national court to determine who is entitled to those benefits by applying its national law.

Where the person entitled to the benefits without any condition as to employment in the State of residence is also the person who works there, Article 10(1)(b)(i) has the effect of suspending, up to the amount of the family benefits actually received, the rights enjoyed by his spouse pursuant to Article 73 of Regulation (EEC) No 1408/71.