OPINION OF MR ADVOCATE GENERAL REISCHL DELIVERED ON 18 DECEMBER 1980 [1]

Mr President,
Members of the Court,

In the proceedings for a preliminary ruling before it today the Court has again to concern itself with the problem of overlapping social security benefits. In the main action a decision is required on the overlapping of family allowances granted under German and Danish law.

The plaintiff, who was born in 1935, is a German national and lives in Denmark with his wife and two children, who were born in 1967 and 1968. He is employed in Flensburg and travels daily to his place of work where he has no living accommodation. His wife is in employment in Denmark and draws the Danish family allowance (børnetilskud) for both children.

In December 1977 the plaintiff applied to the Arbeitsamt [Employment Office] Flensburg for payment from 1 January 1978 of half the family allowance for the second child on the basis of Article 8 (2) of the Bundeskindergeldgesetz [Federal Law on Family Allowances], hereinafter referred to as "the Federal Law", of 14 April 1964 (Bundesgesetzblatt I, p. 265) in the amended version published on 31 January 1975 (Bundesgesetzblatt I, p. 412). That half family allowance was a particular feature of the version of the Federal Law then in force. According to Article 8 (1) (2) of that Law, family allowance is not payable in respect of a child for whom benefits comparable to the German family allowance are granted outside the area of application of the Federal Law. At the same time Article 8 (2) of the Law provided, in the version in force up to 31 December 1978, that half the German family allowance may be paid if the other benefits do not amount to 75 % of the German allowance. By the Law of 14 November 1978 (Bundesgesetzblatt I, p. 1757) that provision was given the wording applying after 1 January 1979 according to which the amount of the difference between the German family allowance and the other benefits is to be paid if the gross amount of the other benefits is lower than that of the German family allowance.

On 12 January 1978 the Arbeitsamt Flensburg refused the application which had been based on that provision. The grounds of the refusal were that family allowances for his children were provided under Danish law because the plaintiff's wife was in employment and that Article 10 (1) (a) of Regulation (EEC) No 574/72 of the Council of 21 March 1972 laying down the procedure for implementing Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons and their families moving within the Community (Official Journal, English Special Edition 1972 (I), p. 159), as amended by Regulation (EEC) No 1209/76 of the Council of 30 April 1976 (Official Journal 1976, L 138, p. 1), required that entitlement under the Federal Law be suspended in such cases. That provision was to the effect that only the family allowances of the Member State in whose territory the member of the family resides were to be paid, the cost to be borne by that Member State.

After lodging an unsuccessful objection the plaintiff brought an action before the Sozialgericht [Social Court] Schleswig relying on a judgment of the Bundessozialgericht [Federal Social Court] of 25 October 1977 (Reports of Cases before the Bundessozialgericht, BSGE

1 — Translated from the German.

Vol. 45, p. 95). In that decision, concerning a case in which the facts were very similar to these, the Bundessozialgericht held that on account of the close connexion between the legislation on family allowances and provisions on taxation, a German frontier worker employed in the Federal Republic of Germany and living with his family in Denmark is to be treated as if his habitual residence, within the meaning of Article 1 (1) of the Federal Law, were within the area of application of that Law. Under subparagraph 1 (a) of the second paragraph of Article 2 (5) of the Federal Law his children qualified for consideration. A suspension of the entitlement to German family allowance under Article 10 (1) (a) of Regulation No 574/72 in conjunction with Article 73 of Regulation No 1408/71 did not operate since the entitlement in question was already excluded by national law in Article 8 (1) (2) of the Federal Law, to which Community law referred.

By a decision of 19 November 1979 the Sozialgericht Schleswig, which apparently did not wish to follow that interpretation, stayed the proceedings and submitted the following questions to the Court of Justice for a preliminary ruling under Article 177 of the EEC Treaty:

"1. Is a German national who resides with his wife and children in Denmark and is employed in the Federal Republic but returns daily from his place of work to his residence in Denmark, and whose wife is employed also in Denmark, entitled to receive a family allowance under the national laws of the Federal Republic of Germany pursuant to Article 20 in conjunction with Article 4 and Article 1 of Regulation No 1408/71 of the Council of 14 June 1971 as a 'frontier worker' within the meaning of those overriding provisions of European law?

2. Is such an employed person also so entitled if, independently of European law, he is already treated under national law as if he had his habitual residence in the Federal Republic of Germany?

3. Is an entitlement to family allowance conferred on a worker residing in Denmark by German national legislation totally suspended under Article 10 (1) (a) of Regulation No 574/72 on the implementation of Regulation No 1408/71 [as amended by Article 1 (5) of Regulation No 878/73] if his wife receives the Danish family allowance (børnetilskud) for those children in Denmark, even though Article 8 (2) of the German Bundeskindergeldgesetz provides for payment of a family allowance to the extent of the difference between the Danish and the German family allowances?"

My views on those matters are as follows:

1. By the first two questions the court making the reference wishes to know whether a "frontier worker" within the meaning of Article 1 (b) of Regulation No 1408/71 is entitled to receive German family allowance under the provisions of that regulation irrespective of whether or not there is any primary entitlement under the Federal Law. There is reference in the first question to Article 20 of Regulation No 1408/71. However, as may be seen from its place in the scheme of the regulation, that article is concerned with the provision for frontier workers of sickness and maternity benefits within the meaning of Article 4 (1) (a), and not with family benefits, amongst which family allowances must be included, within the meaning of Article 4 (1) (h) of that regu-

lation. Family benefits for employed and unemployed persons are regulated by Chapter 7 of the regulation which does not lay down any special rules for frontier workers designed to coordinate such entitlements.

The determination of the applicable legal provisions accordingly turns on the rules applying to workers which are contained in Articles 73 and 13 (2) (a) of the regulation. Article 13 (2) (a) provides, as a general principle, that in the case of a migrant worker the provisions of the State of employment apply. Article 73 (1) states that "a worker subject to the legislation of a Member State other than France shall be entitled to the family benefits provided for by the legislation of the first Member State for members of his family residing in the territory of another Member State, as though they were residing in the territory of the first State". Thus according to those provisions a frontier worker employed in the Federal Republic of Germany is in principle entitled to family allowance under German legal provisions for his children living in another Member State.

Entitlement to family allowance accordingly arises solely from the combination of national provisions on family allowances with the provision of Community law contained in Article 73, which affirms the principle that the place of residence is immaterial. Article 73 (1) lays down in favour of the worker who avails himself of his freedom of movement an independent rule which creates an exception to the provisions of national law and which must be interpreted uniformly in all the Member States regardless of the form taken by national legal provisions on the acquirement of entitlement to family allowances. That is clearly apparent from the purpose of the provision which, according to the fifth recital in the preamble to Regulation No 1408/71, is to guarantee "equality of treatment for all nationals of Member States under the various national legislations and social security benefits for workers and their dependants regardless of their place of employment or of residence".

Contrary to the Commission's opinion, the function of founding an entitlement which is served by Article 73 (1), a provision which by virtue of the second paragraph of Article 189 of the EEC Treaty is directly binding in each Member State, cannot be cast in doubt by the fact that a frontier worker is, irrespective of Community law, treated under national law as if his and his family's habitual place of residence were in the country of employment. If one were to accept the view, evidently held by the Commission, that recourse to the provisions of Articles 73 (1) and 13 (2) of Regulation No 1408/71 is not necessary for so long and in so far as a person is already entitled to family allowances under national law, it would be within the Member States' power to "oust" directly applicable and overriding Community law by framing their own legal system in suitable terms and the result would be that the provisions of Community law on overlapping benefits, which are linked to the entitlements granted under Article 73 of Regulation No 1408/71, would not come to be applied in such cases.

So on the basis of those considerations the answer to the first two questions submitted by the national court should

be that a German national who lives with his wife and children in Denmark, who works as a frontier worker in the Federal Republic of Germany and whose wife also works in Denmark is entitled to family allowance in accordance with Article 73 *et seq.* taken together with Article 13 (2) (a) of Regulation No 1408/71, irrespective of whether under national law he is treated as if he and his children were habitually resident in the Federal Republic of Germany.

2. By the third question, which is practically the only pertinent one, the national court seeks to ascertain whether the prohibition in Community law of overlapping benefits contained in Article 10 (1) (a) of Regulation No 574/72 also encompasses the rules on augmentation contained in the old and new versions of Article 8 (2) of the Federal Law or whether those rules may still stand despite the existence of a provision in Community law against overlapping benefits.

As we have seen, the plaintiff in the main action fulfils the conditions entitling him to family allowance under Article 73 of Regulation No 1408/71 in conjunction with the provisions of the Federal Law, while his wife is directly entitled to the Danish family allowance, which is granted irrespective of the income or occupation of the person entitled thereto.

In the case of two concurrent and comparable benefits for the same child there are two different provisions against overlapping. By Article 8 (1) (2) of the Federal Law, German family allowance is not granted for a child in respect of whom benefits comparable to the German family allowance are granted ouside the area of application of the Law. At the same time Community law has established its own independent rule on overlapping benefits in cases where family allowances of the same kind are available simultaneously in two Member States. In the event of entitlement to family allowance in the State of employment overlapping with entitlement to family allowance in the State of residence of the children, the provisions of Article 76 of Regulation No 1408/71 and of Article 10 (1) (a) of Regulation No 574/72 apply.

Article 76 of Regulation No 1408/71, which is concerned with entitlement in the country where the child is resident, which is granted there by virtue of gainful employment, provides that "entitlement to family benefits or family allowances under the provisions of Articles 73 and 74 shall be suspended if, by reason of the pursuit of a professional or trade activity, family benefits or family allowances are also payable under the legislation of the Member State in whose territory the members of the family are residing".

On the other hand Article 10 of Regulation No 574/72 is concerned with entitlement in the country where the child is resident, which is granted by virtue of residence alone. According to the first sentence of paragraph (1) of that article, if entitlement exists in the country where the child is resident, which is not subject to conditions of insurance or employment, and the spouse of the worker does not exercise a professional or trade activity in the territory of that State, the entitlement in the country of residence is suspended. If, however, the spouse does exercise a professional or trade activity then under the second sentence of that provision any entitlement under Article 73 of Regulation No 1408/73, that is to say any entitlement in the country of employment of the migrant worker, is suspended. Accordingly, where family benefits of the same kind overlap, entitlement in the country of residence of

the child always has priority provided that the spouse living there is employed.

Since the Danish family allowance is granted irrespective of the income of the recipient or whether he is employed, then, as the Sozialgericht Schleswig, the defendant in the main action and the Commission rightly accept, its overlapping with the German family allowance fulfils the requirements of Article 10 (1) (a) of Regulation No 574/72. Since, furthermore, the wife of the plaintiff exercises a professional or trade activity in the country of residence of the children, the entitlement to German family allowance arising from Article 73 of Regulation No 1408/71 taken in conjunction with the German provisions on family allowance must consequently be suspended.

Contrary to the view expressed by the Bundessozialgericht in the judgment of 25 October 1977, mentioned by the Sozialgericht Schleswig, the application of that provision of Community law prohibiting overlapping of benefits is not frustrated by the fact that entitlement to family allowance is already excluded by the provision of national law contained in Article 8 (1) (2) of the Federal Law. In the first place a provision of national law may only exclude an entitlement existing under national law alone, and not an entitlement acquired with the assistance of Community law; secondly, so far as both provisions have the same object, the rule that Community law takes precedence applies. Consequently, the court making the reference, the defendant and the Commission correctly proceed upon the basis that the overlapping of benefits of the same kind is governed solely by the provisions against overlapping contained in Article 10 (1) (a) of Regulation No 574/72.

Accordingly, whether the rule on augmentation or the half family allowance rule in Article 8 (2) of the Federal Law must also be suspended depends solely on the scope of Article 10 (1) (a) of that regulation.

The parties to these proceedings have given different answers to that question.

In the defendant's view the provision in question constitutes a mandatory and conclusive rule which allows no latitude for supplementing the family allowance available in the country where the children reside with benefits payable in the country where the migrant worker is employed. That is apparent in particular from the final passage in subparagraph (a) which reads "only those family benefits or family allowances of the Member State in whose territory the member of the family is residing shall be paid, the cost to be borne by that Member State".

On the other hand the Government of the Italian Republic takes the view that the entitlement to part of the German family allowance should not be impaired by the provisions of Community law. Article 76 of Regulation No 1408/71 and the implementing provision contained in Article 10 (1) (a) of Regulation No 574/72 must in fact be considered in conjunction with the provisions of the Treaty on freedom of movement, which must also be applied to the members of the family of the worker concerned. Consequently the provisions in question, like other parallel provisions against overlapping, are to be applied in accordance with the case-law of the Court of Justice which was confirmed in particular by its judgment of 6 March 1979 in the *Rossi* case (Case 100/78 *Claudino Rossi* v *Caisse de Compensation pour Allocations Familiales des Régions de Charleroi et Namur* [1979] ECR 831) in such a way that they do not deprive migrant workers or their dependants of a part of the benefits to which they are entitled under the law of a Member State.

The Commission on the other hand distinguishes two cases. In its opinion when applying the rules of Community law on overlapping benefits a distinction must be drawn according to whether the legal situation before or after 1 January 1980 is being considered. Under the version of the Federal Law in force until 31 December 1978, which by virtue of a transitional provision could be applied until 31 December 1979, it was in fact possible for a frontier worker to fulfil the requirements for entitlement to family allowance in respect of his children living in another Member State without needing to rely on provisions of Community law. The question whether a frontier worker has his habitual residence, within the meaning of Article 1 (1) of the Federal Law, in the area of application of the German law was answered in the affirmative by the Bundessozialgericht in the decision which I mentioned earlier. Moreover under subparagraph (1) (a) of Article 2 (5) of the old version of the Federal Law, which applied up to 31 December 1979, the requirement that the children should be permanently or habitually resident in Germany was dispensed with if the frontier worker had been permanently or habitually resident in Germany for at least 15 years. If that was so in his case, the plaintiff in the main action was entitled under national law, regard being had to the transitional provision, to receive the German family allowance up to and including December 1979. The Commission believes that in that event the approach to be adopted must be that under the "Rossi principle", whereby the application of a prohibition of overlapping benefits contained in Community regulations may not lead to the withdrawal of entitlement to family allowances based on domestic law alone, the prohibition of overlapping benefits in Community law must remain limited to an amount equivalent to the amount of the Danish allowance so that consequently the advantages under the ousted German rule against overlapping are retained.

On the other hand the legal position after 1 January 1980 is different. As it now stands, Article 2 (5) of the Federal Law excludes entitlement to family allowance in respect of children residing abroad. In the plaintiff's case, that means that once the present version came into force, only Community law afforded a basis for entitlement to German family allowance. Since that time the rules of Community law on overlapping benefits no longer lead to the withdrawal of an entitlement founded on national law alone. Community law must accordingly regulate overlapping benefits in such a way that the German entitlement to family allowance is suspended in full.

I agree with the Commission that when examining this argument it should be borne in mind that pursuant to the previous case-law of the Court of Justice it is settled that Article 51 of the EEC Treaty does not empower the Council to promulgate legal provisions which take rights away from a migrant worker to which he is already entitled under the law of a *single* Member State *alone.* This was made clear by the Court in, amongst others, the *Rossi* case which concerned overlapping rights to family allowances which a migrant worker who was unfit for work held against various social security insurance institutions. That principle was then confirmed in the *Laterza* judgment (judgment of 12 June 1980 in Case 733/79 *Caisse de Compensation des Allocations Familiales*

des Régions de Charleroi et Namur v *Cosimo Laterza* [1980] ECR 1915), which concerned allowances for the dependent children of a worker who was drawing an invalidity pension, and lastly in the *Gravina* judgment (judgment of 9 July 1980 in Case 807/79 *Giacomo Gravina and Others* v *Landesversicherungsanstalt Schwaben* [1980] ECR 2205), which concerned benefits for orphans. In those cases the Court of Justice stated in effect that provisions which are designed to prevent the overlapping of family allowances are applicable only in so far as they do not, without cause, deprive those entitled of a part of the benefits given to them by the law of one Member State alone. The appropriate provisions on overlapping are accordingly to be applied only in part and a sum making up the difference is to be granted as a supplement if the amount of the benefits the payment of which is suspended exceeds that of the benefits to be paid.

Even though the issues in the main actions which form the basis for those judgments differ from the case now under consideration (in the cases just mentioned entitlements already existed under national law on the basis of contributions which had been paid whereas in the present case, as German law stood at the time, entitlement to German family allowance arose only by virtue of Community law), the principle underlying those judgments must not, in my view, be overlooked in construing Article 10 (1) (a) of Regulation No 574/72.

Although at first sight it may appear from the wording of that provision that it is reasonable to assume that the claim against the institution responsible for paying the benefit in the State of employment should be excluded outright, it is still not so plain as to rule out another interpretation which is more in keeping with the object and purpose of the provisions and the general principles of the Community rules.

It should here be pointed out that, as the seventh recital in the preamble to Regulation No 1408/71 puts it, "the provisions for coordination adopted for the implementation of Article 51 of the Treaty must guarantee to workers who move within the Community their accrued rights and advantages, whilst not giving rise to unjustified overlapping of benefits". Thus the intention is simply that whilst workers are to retain as far as possible advantages accruing to them under national law they are not to be enriched unjustifiably on account of the overlapping of the various legal systems.

That aim must also be borne in mind in the construction of Article 10 (1) (a). That provision is meant to prevent a worker who exercises his right to freedom of movement from acquiring full entitlement to several benefits as against different institutions. The last sentence of the provision in question seems to have that purpose too inasmuch as it once again expressly provides, as a rule of reference as it were, that only the family allowances of the Member State in whose territory the member of the family is residing shall be paid, the cost to be borne by that Member State. The sentence does not however say, and cannot in my opinion be construed to mean, that a rule on augmentation of benefits laid down by national law, that is to say a provision of positive scope

which affords entitlement to family allowances even when other benefits are available, should remain inapplicable.

For that reason the Bundessozialgericht was right to assume in the decision relied on by the plaintiff that as regards that *additional payment* which is intended to be *supplementary* to the foreign benefits there is no scope for suspension within the meaning of Article 10 (1) (a) of Regulation No 574/72, since that provision presupposes the overlapping of several *comparable* benefits. As is further apparent from that decision, the payments under Article 8 (2) of the Federal Law are not seen by German law as overlapping with the Danish benefits but as necessarily presupposing their existence since only then does "augmentation" have any meaning.

If that legal approach is adopted it remains the case that the aim of Article 51 of the EEC Treaty, namely to facilitate such measures in the field of social security as are necessary to provide freedom of movement for workers, would not be achieved if, as a result of exercising their right to freedom of movement, workers lost social security privileges which the legal provisions of a single Member State guarantee them in any event.

The same must apply in the present case as regards benefits to which workers are entitled under Community law in conjunction with the provisions of national law. If Article 10 (1) (a) of Regulation No 574/72 were taken to cover the rule on augmentation contained in the Federal Law, a plaintiff employed in the Federal Republic of Germany would be deprived of part of his entitlement to German family allowance accorded to him by virtue of Article 73 of Regulation No 1408/71 if his wife were to exercise her right to freedom of movement by taking up a professional or trade activity in another Member State and the family resided in that State. In that case the plaintiff would be entitled to the lower Danish benefit only whereas, if his wife were not to work in Denmark, he would be entitled to the German family allowance in full. So the exercise by a spouse of the right to freedom of movement guaranteed by the Treaty would lead to a reduction in the entitlement which the other spouse would have under Community law in conjunction with the provisions of German law on family allowances. Such a result, which cannot be reconciled with the object and purpose of Article 51 of the EEC Treaty, may be avoided only by an interpretation of the rules of Community law on overlapping benefits which is in keeping with the Treaty.

In view of those considerations, I conclude by proposing that the questions from the Sozialgericht Schleswig should be answered as follows:

1. A German national who lives in Denmark with his wife and children and is employed in the Federal Republic of Germany as a frontier worker is in principle entitled to German family allowance in accordance with Article 73 *et seq.* of Regulation No 1408/71.

2. Article 10 (1) (a) of Regulation No 574/72, which in the event of the spouse of a migrant worker exercising a professional or trade activity in the territory of another Member State provides for the suspension of the family benefits payable by virtue of Community law, does not exclude payment of a supplementary amount in accordance with Article 8 (2) of the German Bundeskindergeldgesetz.