On those grounds,

THE COURT (First Chamber)

hereby:

1. **Annuls the decisions whereby sums paid in Belgium as family holiday allowance and special family allowance were deducted from the salary of the applicant for March and August 1976;**

2. **Orders the defendant to bear the costs.**

Bosco Donner O'Keeffe

Delivered in open court in Luxembourg on 13 October 1977.

A. Van Houtte
Registrar

G. Bosco
President of the First Chamber

OPINION OF MR ADVOCATE-GENERAL MAYRAS DELIVERED ON 28 SEPTEMBER 1977 [1]

Mr President,
Members of the Court,

Section 1 of Chapter 1 of Title V of the Staff Regulations of Officials of the European Communities, headed 'Remuneration', contains Article 67 which reads as follows:

'1. Family *allowances* shall comprise:
(a) household allowance equal to 5 % of the basic salary or BF 2 100 per month, whichever is the greater;
(b) dependent child allowance of BF 3 263 per child per month;
(c) education allowance.

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

Annex VII contains the provisions concerning remuneration and reimbursement of expenses. Article 2 thereof establishes the conditions for paying the dependent child allowance.

On the other hand the grant on the birth of a child referred to in Article 74

1 — Translated from the French.

appears in Chapter 2, 'Social Security Benefits'. In the national systems family allowances, or more precisely family *benefits*, like child-birth allowances, are generally classified as *social security* and not as remuneration.

The interpretation and application of Article 67 (2) raise a number of questions.

What is to be understood by allowances 'of like nature'?

Who decides on the 'identity of nature'? It appears that this must normally be settled by the administration. Nevertheless the provision renders it the responsibility of the recipient official himself to take the initiative in declaring allowances paid 'from other sources'. Since family allowances 'paid from other sources', that is to say from the various Member States, have expanded and developed it is possible for officials in good faith to fail to make the declaration required of them and the situation will only be definitively settled after some time.

Finally, assuming the identity of the nature of the allowances to have been established, from what time must the deduction be effected? If this identical nature is established on the basis of a decision of the administration and if that decision is only made after a certain time must the deduction be made with retroactive effect? The present disputes which concern, apart from the applicants, almost eight hundred spouses, who are employed persons or treated as such and work in Belgium, are indicative of those difficulties.

Belgium, which is an importer of labour, is justly proud of having a very advanced social security system. In connexion with the 'family benefits' which concern us here this system had two special features which distinguished it from those of the other Member States: in addition to the child-birth allowance and the 'ordinary' family allowance, which corresponds in principle to the dependent child allowance under the Community Staff Regulations, the system includes the payment, subject to conditions which I shall describe, of a special family allowance and a family holiday allowance.

I – The special or supplementary family allowance, which is sometimes termed the 'back-to-school allowance' because it is paid in September, or the 'fourteenth month of family allowances' because of the amount and the payment of the family holiday allowance, which is itself described as the 'thirteenth month', came to be granted in the following conditions:

The Belgian legislature, by Article 28 of the Royal Decree of 25 October 1960, which inserted Article 106 in the laws on family allowances for employed persons, which were consolidated by the Royal Decree of 19 December 1939, decided to constitute a reserve fund through the Office National d'Allocations Familiales pour Travailleurs Salariés (the National Bureau for Family Allowances for Employed Persons, hereinafter referred to as 'the ONAFTS').

This fund is principally intended to compensate any lack of income and to cover any sums which cannot be recovered because they are time-barred (Article 21 of the Royal Decree of 10 November 1967).

The Management Committee of the ONAFTS may, however, apply this fund to 'other ends' if authorized in advance by the competent minister (Article 2 (1) of the Royal Decree of 8 April 1965).

Thus a *special* allowance of an amount equivalent to the value of half the family allowances at the ordinary rate for one month was granted from the fund in September 1971.

Nevertheless, since the Government refused to bind itself for the future, the grant of the special allowance has always been decided annually.

This allowance was not granted in 1973.

Since the ONAFTS had considerable reserves the principle of paying the allowance was established in 1974; this principle was put into practice in an extraordinary law of 28 March 1975. Pursuant to Article 1 of that law, the following provision, Article 50 quinquies, was inserted in the consolidated laws: 'The compensation funds for family allowances and the public authorities and undertakings referred to in Article 18 shall grant a *special* allowance for the year 1974. This allowance shall be paid in respect of children entitled to family allowances for the month of July 1974'.

The amount of this special allowance is equal to the amount of the family allowances provided for by Articles 40, 42, 47, 50 bis or 50 ter, increased if appropriate by the age supplement provided for by Article 44 which was actually paid for July 1974.

The conditions for payment of this *special* allowance are the same as those fixed for payment of family allowances.

Pursuant to the abovementioned law a Royal Decree of 2 September 1975 granted a special allowance for the year 1975 to certain categories of persons paid by the state, including the husband of the applicant in Case 106/76.

In 1976, as the reserves of the ONAFTS had again recorded a surplus the legislature re-enacted (so to speak) Article 126 (1) and (2), through the law of 5 January 1976, with the difference that the reference month was August and not July.

In Belgian law, then, the relevant allowance constitutes a family social security benefit, which has by no means been established as a principle, which is granted on one occasion at a time and which, according to Article 74 of the consolidated laws 'does not in any way constitute a supplement to salary or remuneration', whilst the dependent child allowance under the Staff Regulations constitutes a part of the remuneration of officials. Proof of this essentially discretionary and contingent nature is furnished by the fact that the Management Committee of the ONAFTS requested the Minister for Social Security to enact legislation *definitively* establishing this benefit but, so far as I am aware, the Minister has not yet acceded to this request.

In the view of the Commission Consultative du Contentieux (the Advisory Committee on Disputes) it is quite clear that the other purposes referred to in Article 2 (1) of the Royal Decree of 8 April 1965 'must of necessity be different from the grant of allowances in cases in which there exists a legal right to the said allowances ... Accordingly, since the first purpose mentioned in the text refers, where appropriate, to the payment of family allowances legally due, the second must necessarily be of a different nature. It may thus constitute the payment of family allowances in cases in which they are *not legally due*'.

As Mr Michel Magrez has written in the Revue Belge de Sécurité Sociale, 1972, p. 1090, the system of family allowances for employed persons is thus the only area of social security where extra-legal benefits may be granted by a decision of the Management Committee of the ONAFTS, the definitive payment of which is uncertain from the outset.

This view is confirmed by the Community provisions on social security.

According to Article 1 (u) (ii) of Regulation No 1408/71 of the Council of 14 June 1971 the expression 'family allowances' means *periodical* cash

benefits granted exclusively by reference to the number and, where appropriate the age of members of the family. Accordingly it is not surprising that the Belgian special family allowance does not appear in the comparative tables of the social security systems in the Member States of the European Communites (special system) edited by the Commission (situation on 1 July 1976).

Consequently, whilst, as we shall see, it appears that this criterion of the periodic nature of the payments is met in the case of family holiday allowances, the same can by no means be said of the special family allowance, although it is termed the 'fourteenth month of family allowance'. Although the amount of the special family allowance is identical with that of the monthly dependent child allowance, the *nature* of the two allowances is different despite the fact that they are paid by the same agency: the special family allowance is so to speak an *ex gratia* payment granted because of a surplus in the fund based on employers' contributions to family allowances, after consultation with the Belgian trade unions as to the application of such surpluses.

If, as indeed it was suggested in certain quarters this surplus had been applied to set up kindergartens, for example, the applicants would have been able to benefit from those allowances which would then have taken the form of benefits *in kind* and could not have been 'of like nature' to the dependent child allowance under Article 67 which is paid in cash. Accordingly it is hard to see why the applicants could not benefit if such surpluses were paid in this form.

With regard to this first point I should like to make a final observation:

Supposing, and this does not seem to be the case, that the allowance in question were of like nature within the meaning of the Staff Regulations there seems no reason why the Community should benefit by the amount of the deduction. As, in September, the allowances paid from the Belgian funds exceeded the allowances paid by the Community, pursuant to Article 60 of the Belgian consolidated laws, the authors of which, according to the Commission, have the same aim as the authors of Article 67 (2) of the Staff Regulations, the persons concerned should have declared the allowances 'of like nature' paid by the Communities and these allowances should have been deducted from the Belgian payments and not *vice versa*. If for some reason the sums in question were to be paid to anyone it would be appropriate that this should be the agency which had disbursed the sums from its own funds. In fact in Belgium family benefits are basically financed by a contribution from the employers (7·5 % of salary) and any contribution from public authorities is merely an annual subsidy.

II — With regard to the family holiday allowance the consolidated laws have, since the enactment of Article 5 of a Law of 25 June 1962, contained an Article 73 quater which provides (in the wording of Article 1 of the Law of 15 April 1965):

'The compensation funds for family allowances and the public authorities and institutions referred to in Article 18 shall grant a family holiday allowance. This allowance shall be paid each year during May in respect of children for whom family allowances were payable for the month of April in the year for which the allowance is granted. The conditions of payment of the family holiday allowance shall be the same as those laid down for the payment of family allowances ...'.

Article 1 of the Royal Decree of 1 February 1968 on family holiday allowances as amended by Article 6 of the Royal Decree of 5 October 1973 provides:

'The amount of the family holiday allowance shall be equal to the amount

of the family allowances provided for in Articles 40, 42, 47, 50 bis or 50 ter increased if appropriate by the age supplement provided for by Article 44 which was actually paid for the month of April of the relevant year'.

Article 2 of that provision reads: 'The family holiday allowance and the family allowances for the month of April shall be made in a single payment by the paying agencies. The paying agencies shall maintain separate accounts for transactions relating to the payment of the family holiday allowance'.

Article 4 reads: 'The Royal Decree of 25 April 1958 fixing the method of calculating the *subsidy* which the compensation funds for family allowances are entitled to use to cover their administrative expenses ... shall not apply to the transactions referred to in this decree'.

In terms of Article 3 the administrative expenses incurred in payment of the family holiday allowance shall be paid as a lump sum by the ONAFTS to the compensation funds affiliated to it.

The procedures for paying the family holiday allowance are thus substantially the same as those for paying the special family allowance under Article 50 quinquies of the consolidated laws. Nevertheless, like the special allowance, the holiday allowance 'does not in any way constitute a supplement to salary or remuneration' (Article 74). In this respect also, although those characteristics caused the family holiday allowance to be termed the 'thirteenth month of family allowances' and although the fact that the *amounts* of these allowances were identical caused the 'meeting of heads of administration' to regard the holiday allowance as a mere 'increase' in family allowances, it cannot mean that they are actually identical. The family benefit in question, although paid periodically, unlike the special family allowance, is an allowance for a specific purpose, that is, a benefit differing from the 'ordinary family allowances', which are the counterpart of the dependent child allowance referred to in Article 67 (1) (b) of the Staff Regulations. This is clear from the comparative tables of the social security systems in the Member States of the European Communities.

Article 1 (u) (i) of Regulation No 1408/71 states that 'family benefits' means all benefits in kind or in cash intended to meet family expenses under the legislation provided for in Article 4 (1) (h) excluding the special child-birth allowances for which provision is made under Belgian and Luxembourg legislation respectively as also the prenatal and maternity allowances provided in France under the Social Security Code.

According to the provisions of Regulations No 1408/71 and No 574/72 at present in force workers subject to French legislation are entitled, in respect of children residing on Community territory outside France, to the family allowances provided for by the legislation of the place of residence, whilst workers subject to the legislation of other Member States are entitled to the family benefits provided for in the country where they work regardless of the place of residence of the members of the family.

As regards the former, the advantages referred to are solely the family allowances *strictly so called* whilst the advantages of the latter include, in addition to the family allowances properly so called, benefits for a specific purpose.

There thus exist under the national legal systems classical family allowances and benefits for a specific purpose which are peculiar to one or more States and which do not recur in all Member States. In this connexion there exist child-minding allowances, housing and removal allowances and this does not constitute an exhaustive list.

It thus follows for example that an Italian worker employed in France whose family remains in Italy receives Italian family allowances which are *less* than those received by French workers and furthermore French workers are entitled to *supplementary* family benefits which are not payable to foreign workers.

These differing outcomes raise difficult problems and result in divergencies which still exist at the present moment.

The applicants' husbands in respect of whom the Commission is effecting the deduction come under the Belgian system of social security. In that system neither the identity of the paying agency nor the identity of the amount paid necessarily means that the *nature* of the benefits is *identical*. Inasmuch as the holiday allowance and the special allowance were not integrated into the 'statutory' family allowance the first two allowances must be considered as distinct from the latter. I thus consider it impossible to establish unilaterally that, from the point of view of the Staff Regulations, a specialized national benefit, which is expressly distinguished from the family allowance for dependent children, is 'of like nature' to the dependent child allowance provided for by the Staff Regulations. I also consider it extremely risky to maintain that the advantages granted to a person in employment, albeit of a 'specific' nature in the legislation pursuant to which they are paid, are deprived of this nature if such person has a spouse working in the institutions of the European Communities and must be considered as having already been paid 'in another form' under the Staff Regulations.

A considerable number of the officials concerned are women who for a long time have not enjoyed the household allowance and who lost through marriage, or have only recently recovered, the expatriation allowance and to make them repay a slight advantage to which their children are undoubtedly entitled by reason of the spouses' employment or activity treated as such seems to me profoundly unjust. This, I think, is a matter of principle.

Furthermore the argument that, having regard to its amount, the dependent child allowance under the Staff Regulations paid to a spouse who is an official has a comprehensive function is contradicted by the fact that provision is actually made in Article 67 (1), in addition to that allowance, for a specialized allowance, the education allowance, which is even granted in respect of children who attend the European schools where instruction is free and where there are no registration charges or examination fees.

Nevertheless it cannot be considered that this education allowance was granted to cover *all* the costs of children's education: since more and more children are following courses in winter sports, and taking holidays by the sea and in the open air, even outside their holiday periods, the institutions, whilst not actually creating a special allowance for those purposes, have at least increased the amount of the existing education allowance.

Furthermore, as well as the education allowance granted to European officials and featuring in the budget of the Communities the European institutions make a financial contribution to the holiday costs of the children of such officials in holiday camps organized by the European institutions: there seems no reason why officials who do not send their children to such camps should not be able to claim national family holiday allowances to which they are incontestably entitled under their national legislation and which are plainly intended to cover, in part at least, the costs involved in sending children to 'national' camps, if they so prefer.

I should like to add a final point: in the Communities there is no specific allowance for a dependent person other

than children. It is merely provided in Article 2 (4) of Annex VII that 'Any person whom the official has a legal responsibility to maintain and whose maintenance involves heavy expenditure may, *exceptionally*, be treated as if he were a dependent child ...'. The amount of the dependent person allowance is strictly identical to that of the dependent child allowance and naturally is paid by the same department.

Maintaining such persons, who in the majority of cases are retired relatives in the ascending line, certainly does not entail holiday expenses.

If the dependent person allowance takes the form of a flat-rate payment and does not include the item 'holidays', likewise the dependent child allowance, which is strictly identical to it, cannot contain this item although it takes the form of a flat-rate payment.

III — Finally the problems involved in the present disputes relate to the date when the declaration and the deduction of allowances 'of like nature' must be made.

It should be recalled that in the present case we are dealing with benefits which are only paid (the holiday allowance) or which can only be paid (the special allowance) once a year. There is accordingly a risk that a time lag will occur between the date when the annual individual record sheet which the officials must complete is returned to the administration and the date of payment of the two benefits in question.

This time lag is reflected in the divergence between the space provided in officials' pay slips for amounts witheld and the 'counterfoils' submitted by officials since the sums deducted in order to 'square' preceding months do not generally state the months or periods to which they relate. Thus in the case of Mrs Francine Gelders (née Deboek) the payments made to her husband, Lodewijk Gelders, in respect of the holiday allowance and the special allowance in May and September 1975 on the one hand and in May 1976 on the other were deducted by an entry on her pay slips for March and August 1976 respectively. In the case of Mrs Gerarda Emer (née van den Branden) the payments made to her husband, Piergiorgio Emer, in respect of the holiday allowance and the special allowance from January 1975 to May 1976 were deducted from her salary for June, July and August 1976.

The applicants duly declared the ordinary family allowances which their husbands received and indeed Mrs Emer declared the family holiday allowance after February 1967. Furthermore the problem has existed for a long time since as far back as 1965 the legal department formulated its views which were indeed favourable to the applicants.

In those circumstances if it is supposed that the allowances in question were of like nature, which I do not think is the case, such an interpretation could only have effect for the future and not retroactively. It is for the Commisson to notify its officials which allowances it considers are of like nature in order that the officials can complete their individual record sheets appropriately, instead of informing the officials, without making it clear that only Belgians were concerned, that they should send every six month *for example* the counterfoil of their family allowance payments in order to check whether they have been increased. The Individual Rights and Privileges Division has enough competent staff to keep abreast of the modifications which occur in national legislation, in particular in Brussels where such modifications are published in the Moniteur Belge before they enter into force.

The Commission maintains that for administrative reasons and in order not to burden its officials with multiple

declarations such deductions are in part effected after a certain time lag. Nevertheless with regard to the recovery of social security benefits any delay is particularly undesirable and resented; this is why in social security matters recovery of undue payments follows rules which afford special protection to recipients.

In fact this delay does not result from consideration for the officials, rather from the specialized or contingent nature of the allowances in question which led me to consider that they are not of like nature to the benefits which form part of the monthly remuneration of officials.

Furthermore it would be pleasant to feel quite certain that the comparison which the Commission maintains it carried out showed that only the spouses of employed persons working in Belgium were in a position to receive 'allowances of like nature' and that the same approach is adopted by all the institutions in all places of employment. Non-discrimination seems to me to constitute a fundamental principle in this sphere.

I am of the opinion:

— that in Case 106/76 the deductions from the applicant's salary for March and August 1976 on account of the amounts paid in Belgium to her husband in respect of the family holiday allowance and the special family allowance in May and September 1975 on the one hand and in May 1976 on the other should be annulled;

— that in Case 14/77 the deductions from the applicant's salary for June, July and August 1976 on account of the sums paid in Belgium to her husband in respect of the family holiday allowance and the special family allowance from January 1975 to May 1976 should be annulled; and

— that the interest on account of delay which the applicants have claimed, together with the costs, should be paid by the Commission.