OPINION OF MR ADVOCATE GENERAL TESAURO
delivered on 14 March 1989 *

Mr President,
Members of the Court,

1. In the reference for a preliminary ruling before it today, the Court is once again asked to rule on the legal position arising from the relationship between Articles 73 and 76 of Regulation 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 1971 (II), p. 416).

2. The characteristic factor which distinguishes the facts of the case before the national court, the tribunal du travail (Labour Tribunal), Dinant, from other cases dealt with in the Court's previous decisions [1] is the fact that the plaintiff, who in the proceedings before the national court is seeking to avoid or limit the application of Article 76, has *himself* held two jobs: one as an employed person in the territory of one Member State, France, and the other, as a self-employed person, in the Member State in which the members of his family reside, Belgium.

As the Court will be aware, in the other cases previously brought before it, the occupation under consideration for the purposes of the rule against overlapping benefits contained in Article 76 was pursued by a member of the worker's family residing in a Member State other than the one in which the worker himself was employed.

3. In order to understand the reasons which led the tribunal du travail, Dinant, to refer a question to the Court for a preliminary ruling involving a choice between three possible solutions, let us briefly consider the facts of the case.

4. Mr Georges, of Belgian nationality, works at the same time as an employed person in France and as a self-employed person in Belgium. The members of his family reside in Belgium. Under Article 73(2) (the facts at issue occurred before the Court's judgment of 15 January 1986 in Case 41/84 *Pinna* v *Caisse d'allocations familiales de la Savoie* [1986] ECR 1, and the declaration that that provision is void is not applicable to this case), family allowances for family members are paid in Belgium by the competent Belgian institution, the Office national d'allocations familiales pour travailleurs salariés (National Office for Family Allowances for Employed Persons, hereinafter referred to as 'the Office') for the account of the French institution.

As a result of a check carried out in 1982, it appeared that in the period from 1977 to 1982 Mr Georges had worked in Belgium as a self-employed person in respect of which activity he had received, during the same period, family allowances paid by the

* Original language: Italian.

1 — In particular, the judgment of 19 February 1981 in Case 104/80 *Beeck* v *Bundesanstalt für Arbeit* [1981] ECR 503; the judgment of 12 June 1980 in Case 733/79 *CCAF* v *Laterza* [1980] ECR 1915; the judgment of 13 November 1984 in Case 191/83 *Salzano* v *Bundesanstalt für Arbeit* [1984] ECR 3741; the judgment of 4 July 1985 in Case 104/84 *Kromhout* v *Raad van Arbeid* [1985] ECR 2205 and the judgment of 23 April 1986 in Case 153/84 *Ferraioli* v *Deutsche Bundespost* [1986] ECR 1401.

Belgian social security institution for self-employed persons, the Caisse d'assurances sociales des travailleurs indépendants de Belgique (Belgian Social Insurance Fund for Self-Employed Persons).

Considering that the pursuit of those two activities fulfilled the conditions for the application of Article 76 of Regulation No 1408/71, which provides for the suspension of the payment of family allowances due under Article 73 and 74 (in this case, the benefits paid by the Office for the account of the French institution), the Office decided:

(i) first, that in the future family allowances would be paid to Mr Georges by the Belgian social security institution for self-employed persons;

(ii) secondly, since under the Belgian rules, the amount of the family allowances for employed persons is higher than those paid to self-employed persons, so that Mr Georges had been paid amounts higher than those which were in fact due to him, that the amount incorrectly paid would be recovered.

Mr Georges brought an action against that decision before the tribunal du travail, Dinant, alleging, *inter alia*, that the Office's interpretation of Article 76 was wrong and that in any event he was not obliged to repay the amount claimed by the Office.

In those circumstances, the national court referred the following question to the Court for a preliminary ruling:

'Where a Belgian worker residing in Belgium with his family, including children in respect of whom there is entitlement to family benefits, is at the same time in employment in the territory of another Member State (France) and engaged in a secondary activity as a self-employed person in the country of residence, should it not be held that, if the family benefits obtained in the country of residence by virtue of the activity as a self-employed person are of less value than those obtainable in the other Member State by virtue of his employment there, the rules of priority and overlapping entitlement in Articles 73 and 76 respectively of Regulation (EEC) No 1408/71 (as it stood at the time) allow it to be held that:

(i) he is entitled to family allowances payable by the other Member State (the country of employment);

(ii) his entitlement to allowances payable by the country of residence takes priority;

(iii) entitlement in the country of employment is suspended only up to the amount received for the same period and for the same members of the family in the country of residence?'

5. Before discussing the question referred to the Court, I think it would be appropriate to draw the Court's attention to two aspects which emerge from consideration of the file

in the case and which have some importance in this case.

In the first place, the Belgian Government has informed the Court that with effect from 1 July 1982 the Belgian rules have been amended so that persons working only secondarily as self-employed persons are no longer entitled to family benefits in that respect. The Belgian Government observes, however, that the question referred to the Court is still relevant in cases in which the worker's principal activity is as a self-employed person or when another person is working as a self-employed person and is required to pay full contributions in the country of residence.

In the second place, the decision of the tribunal du travail, Dinant, and the observations submitted by the Office reveal that the Belgian courts have already been seised of disputes similar to the one in this case. In particular, in the judgment of 4 December 1981 in *Donnay et Marchand* v *Office national d'allocations familiales pour travailleurs salariés*, confirmed, following the lodging of an objection, by a decision of 28 June 1985 (still pending before the cour du travail (Labour Court), Liège, as a result of an appeal lodged on 21 August 1985) the national court decided in a similar case that the plaintiff was entitled to payment of the difference between the amount of the family allowances paid to self-employed persons and those paid to employed persons. However, on that occasion, the tribunal du travail, Dinant, decided that it was not appropriate to refer a question to the Court of Justice for a preliminary ruling. The same situation seems to have arisen in the *Lepoivre* case now pending before the cour du travail, Brussels. In its observations, the Office draws the Court's attention to the fact that, notwithstanding those judicial decisions, France has not agreed to accept liability for the payment of the difference between the two amounts.

6. Turning now to the question referred to the Court, I would say at once that in the result I agree with the reply proposed to the Court in their observations by the Belgian and Netherlands Governments and the Commission. I consider that in cases such as this one, the payment of benefits due under Articles 73 and 74 must be suspended only up to the amount of the benefits of the same kind actually paid in the Member State in which the members of the worker's family reside.

7. However, it does not seem to me (and I agree here with the national court and with the observations of the Belgian Government and the Office and disagree with the Commission's argument, which I find particularly weak) that that result automatically follows from the Court's judgment in *Ferraioli* (judgment of 23 April 1986 in Case 153/84 [1986] ECR 1401).

8. In my view, the true problem in the present case is to determine what family allowances should be paid in a case such as that described by the national court and which Member State should be liable for the payment of such allowances.

9. When the problem is expressed in those terms, it seems clear that the Court's

solution in *Ferraioli*, although providing useful indications of the *ratio decidendi*, does not in itself provide a solution which may be automatically transposed to the case at hand. The guidance which may be gained from the reply given in *Ferraioli* is in fact circumscribed by the facts of the case which led the national court to ask for a preliminary ruling and which the Court itself sets out with considerable precision in its judgment. In *Ferraioli*, the worker's spouse, entitled to the benefits provided for in Article 73 on the basis of activities carried on in the Member State in which the worker was employed, worked in the Member State in which the family resided but did not receive family benefits for the children because they did not fulfil all the conditions required by the rules of the Member State of residence for entitlement to those allowances.

10. The present case involves a different situation which offers the prospect of a wholly Belgian alternative and ultimately of possible Franco-Belgian implications. In clearer language, the Court must resolve three questions. First, must the family allowances be paid by the Belgian social security institution responsible for self-employed persons (as the defendant in the main proceedings argues) or by the Belgian institution responsible for employed persons, as a consequence of the obligation imposed on it by Article 73 of Regulation No 1408/71, that institution acting in that case on behalf of the French institution? Second, if the reply to the first question is that the allowances must be paid by the institution responsible for self-employed persons, in so far as the amount of those allowances is lower than that paid by the institution responsible for employed persons, is an employed person entitled to payment of an additional allowance equal to the difference between the two amounts? Third, if the second question is answered in the affirmative, who is responsible for paying the additional allowance?

The case-law of the Court will be of help in considering those problems and, in particular, but not exclusively, the judgment in *Ferraioli*.

First question: which social security institution must pay the family allowances?

11. The reply depends on the scope which is to be given to Article 76. In particular, 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?

12. 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. However — and the Court's case-law assists us here — this can be so only under all the conditions defined by the Court: the family benefits must actually have been paid in the Member State of residence and the mere possibility of obtaining them is not sufficient (see, in particular, the judgments in *Ferraioli* and *Salzano*).

13. Consequently, within the limits in which Article 76 operates, that is to say, in so far as family benefits have actually been paid in the Member State of residence in respect of activities actually carried on there (which seems to be the situation in the case before the national court), the payment of family allowances under Article 73 is to be suspended. It also follows that those allowances must be paid to the worker in respect of the activity pursued in the Member State of residence and therefore, in a case such as this, by the social security institution responsible for self-employed persons.

Second question: if there is a difference in amount between the two kinds of family allowance, must a supplementary allowance be paid?

14. The reply flows from the principle, to which attention has been drawn several times by the Court, of observing the purpose which Article 51 of the EEC Treaty seeks to achieve, namely the provision of freedom of movement for workers. I would like to draw attention in passing to the line of authority represented, in particular, by the Court's judgments in *Laterza*, *Krombout* and *Ferraioli*. On the one hand, in *Laterza*, the Court expressly indicated at the end of paragraph 8 that: 'In laying down and developing the rules for coordinating national laws Regulation No 1408/71 is in fact guided by the fundamental principle stated in the seventh and eighth recitals of the preamble to the Regulation, that the aforesaid rules must guarantee to workers who move within the Community all the benefits which have accrued to them in the various Member States whilst limiting them "to the greatest amount" of such benefits'.

Similarly, in *Krombout*, the Court stated in paragraph 21 that: 'Where the amount of the allowances the payment of which is suspended exceeds that of the allowances received by virtue of the pursuit of a professional or trade activity, the rule on overlapping benefits contained in Article 10(1)(a) of Regulation No 574/72 should be applied only in part and the difference between those amounts should be granted as a supplement'. In the same judgment, it is stated at paragraph 27 that the said Article 10 'supplements the rule in Article 76 of Regulation No 1408/71'.

On the other hand, paragraph 17 of the judgment in *Ferraioli* clearly states that it is not permissible 'to deprive the worker of the benefit of the more favourable allowances by substituting the allowances payable in one Member State for the allowances payable in another Member State'. That applies, *mutatis mutandis*, to the reply to the second question. It is certainly true that this case does not involve the substitution of benefits payable by one Member State for those payable by another Member State but rather the substitution, under the rules of the same Member State, of the lower benefits payable to self-employed persons for the higher benefits paid to employed

persons. However, it is equally true that the extension of the solution adopted in *Ferraioli* to this case seems to be correct if a totally unjustifiable paradox is to be avoided.

15. If such an extension is denied, a worker who has paid contributions giving him a right to receive family allowances as an employed person would have the amount of such allowances reduced solely because he had paid contributions as a self-employed person in another Member State and was receiving in that State family allowances of a lower amount. The situation would be even more paradoxical if it were to be compared with the situation in a case in which the activity pursued in the Member State of residence did not give rise to the actual payment of family allowances. In the latter case, Article 76 would not enter consideration and would not prevent the application of Article 73. Consequently, a self-employed person carrying on two activities would receive family allowances at the higher level provided for in the case of employed persons. I must say that I would regard that difference of treatment as completely unjustified.

16. I therefore conclude on this point by saying that if a solution is not to be adopted which impedes attainment of the aim of Article 51 of the EEC Treaty, in a case such as this the family allowances paid under the rules applicable by virtue of the combined provisions of Articles 73 and 76 of Regulation No 1408/71 must be supplemented by an additional benefit so that, overall, the worker receives family allowances equal to the higher amount to which he is entitled in his capacity as an employed person.

Third question: which Member State must pay the additional benefit?

17. As I have already pointed out, the Court has recognized that Article 76 is an anti-overlapping rule.[2] Such a provision achieves its purpose when it successfully avoids overlapping between the payment of two kinds of family allowances paid in respect of two activities pursued by the worker or by members of his family. Once the purpose for which the rule was laid down is achieved, it is not lawful to deduce from the same provision other, unintended effects, which would be clearly excessive.[3] In particular, I see no reason to accept the argument that it is for the Member State of residence to accept the burden of paying the additional benefits. That is all the more the case because in a situation in which, by virtue of the second activity pursued in the country of residence, the country of employment does not have to pay the family allowances paid by the institution responsible for self-employed persons, by virtue of Article 76. I consider that it is in accordance with the intended scheme of

2 — In *Kromhout* the Court clarified the scope of the anti-overlapping provision contained in the first sentence of Article 10(1)(a) of Regulation No 878/73 of the Council, stating the following in paragraph 14:
'It is clear from those provisions that family benefits or family allowances are intended to provide social assistance for workers *with dependent families in the form of a contribution by society* towards their expenses. The rule against overlapping of benefits at issue is designed therefore to prevent duplication of the compensation for those expenses, an excess payment to the worker's family which would not be justified. Accordingly, the rule must be interpreted as having the effect of precluding the payment of parallel social security benefits for one and the same situation in respect of one and the same period'.

3 — See the similar statement of the Court in regard to the purpose of Article 51 of the EEC Treaty in Case 69/79 *Jordens-Vosters* v *Bedrijfsvereniging voor de Leder- en Lederverwerkende Industrie* [1980] ECR 75.

Regulation No 1408/71 that the differential allowance should be paid by the Member State in which the employed person works. That is also the solution adopted by the Court in *Ferraioli*, continuing the line of decisions established in *Laterza*.

18. I therefore conclude by proposing that the Court should reply as follows to the question referred to it by the tribunal du travail, Dinant:

Articles 73 and 76 of Regulation No 1408/71 (Official Journal, English Special Edition 1971 (II), p. 416) must be interpreted as meaning that a worker pursuing an activity as an employed person in a Member State other than that in which he resides with the members of his family and in which he pursues an activity as a self-employed person, is entitled, if the amount of the family allowances actually received in the Member State of residence is lower than the amount of the allowances provided for under the legislation of the other Member State, to be paid the difference between the two amounts, such payment to be borne by the Member State in which he works as a self-employed person.