OPINION OF ADVOCATE GENERAL KOKOTT

delivered on 3 May 2007 [1]

I — Introduction

1. The scope of Regulation No 1408/71 [2] — since amendment by Regulation No 1247/92 [3] — also includes special non-contributory benefits, that is to say, benefits which exhibit both social insurance and social assistance characteristics. Special rules apply to those benefits, however; in particular, the fact that they do not have to be paid to non-residents.

2. Regulation No 647/2005 [4] amending Regulations No 1408/71 and No 574/72 redefined special non-contributory benefits. The legislature now refers to those benefits as special non-contributory cash benefits. [5] Moreover, it amended Annex IIa, which lists the different national benefits falling into that category.

3. By way of the present action for annulment, the Commission contests entries in Annex IIa concerning Finland, Sweden and the United Kingdom. It takes the view that the benefits in question do not constitute special benefits within the meaning of Article 4(2a) of Regulation No 1408/71 as amended and that, therefore, they must be deleted from Annex IIa.

1 — Original language: German.

2 — Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community (OJ, English Special Edition 1971 (II), p. 416).

3 — Council Regulation (EEC) No 1247/92 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 (OJ 1992 L 136, p. 1).

4 — Regulation (EC) No 647/2005 of the European Parliament and of the Council of 13 April 2005 amending Council Regulations (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 (EEC) No 574/72 laying down the procedure for implementing Regulation (EEC) No 1408/71 (OJ 2005 L 117, p. 1).

5 — Hereinafter, both expressions will be used synonymously.

II — Legal framework

A — *Community law*

4. The first recital to Regulation No 647/2005 is worded as follows:

'Certain amendments should be made to Regulations (EEC) No 1408/71 and (EEC) No 574/72, in order to take account of recent developments in the [case-law] of the Court of Justice of the European Communities, to facilitate the application of those Regulations and to reflect changes in the social security legislation of the Member States.'

5. The legislative aim pursued in amending the provisions on special non-contributory benefits is specified in the third recital:

'The judgments in *Friedrich Jauch* v *Pensionsversicherungsanstalt der Arbeiter* and *Ghislain Leclere [and] Alina Deaconescu* v *Caisse nationale des prestations familiales*, concerning the classification of special non-contributory cash benefits, require, for reasons of legal safety, that the two cumulative criteria to be taken into account be specified so that such benefits can feature in Annex IIa to Regulation (EEC) No 1408/71. On this basis, there is a case for revising the Annex, taking into account legislative amendments in the Member States affecting this type of benefits, which are subject to specific co-ordination given their mixed nature ...'

6. As regards the amendments concerning Annex IIa to Regulation No 1408/71, the sixth recital explains:

'The revision of Annex IIa to Regulation (EEC) No 1408/71 will lead to the removal of some existing entries and, taking into account legislative amendments in some Member States, to the inclusion of certain new entries ...'

7. Article 1 of Regulation No 1408/71 provides:

'For the purposes of this Regulation:

...

(u) (i) the term "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 childbirth or adoption allowances referred to in Annex I'.

8. To date,[6] Article 4 has specified the matters covered by Regulation No 1408/71 as follows:

'1. This Regulation shall apply to all legislation concerning the following branches of social security:

(a) sickness and maternity benefits;

(b) invalidity benefits, including those intended for the maintenance or improvement of earning capacity;

...

(h) family benefits.

2a. This Regulation shall also apply to special non-contributory benefits which are provided under legislation or schemes other than those referred to in paragraph 1 or excluded by virtue of paragraph 4, where such benefits are intended:

(a) either to provide supplementary, substitute or ancillary cover against the risks covered by the branches of social security referred to in paragraph 1(a) to (h), or

(b) solely as specific protection for the disabled.

...

4. This Regulation shall not apply to social ... assistance ... .'

6 — Article 4 of Regulation No 1408/71, as amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996 (OJ 1997 L 28, p. 1). Paragraph 2a was first inserted by Regulation No 1247/92 (cited in footnote 3).

9. Regulation No 647/2005 amended Article 4(2a) of Regulation No 1408/71 as follows:

'This Article shall apply to special non-contributory cash benefits which are provided under legislation which, because of its personal scope, objectives and/or conditions for entitlement, has characteristics both of the social security legislation referred to in paragraph 1 and of social assistance.

"Special non-contributory cash benefits" means those:

(a) which are intended to provide either:

(i) supplementary, substitute or ancillary cover against the risks covered by the branches of social security referred to in paragraph 1, and which guarantee the persons concerned a minimum subsistence income having regard to the economic and social situation in the Member State concerned;

or

(ii) solely specific protection for the disabled, closely linked to the said person's social environment in the Member State concerned,

and

(b) where the financing exclusively derives from compulsory taxation intended to cover general public expenditure and the conditions for providing and for calculating the benefits are not dependent on any contribution in respect of the beneficiary. However, benefits provided to supplement a contributory benefit shall not be considered to be contributory benefits for this reason alone;

and

(c) which are listed in Annex IIa.'

10. In deleting existing entries and inserting a number of new benefits, point 2 of Annex I to Regulation No 647/2005 reformulated Annex IIa[7] to Regulation No 1408/71 in its entirety. The entries for Finland, Sweden and

7 — Originally inserted by Regulation No 1247/92 (cited in footnote 3).

the United Kingdom list inter alia, without alteration as to the substance, the following benefits:

'W. FINLAND

...

(b) Childcare allowance (Childcare Allowance Act, 444/69); [8]

...

X. SWEDEN

...

(c) Disability allowance and care allowance for disabled children (Law 1998: 703). [9]

Y. UNITED KINGDOM

...

(d) Disability living allowance (Disability Living Allowance and Disability Working Allowance Act 1991 of 27 June 1991, section 1 and Disability Living Allowance and Disability Working Allowance (Northern Ireland) Order 1991 of 24 July 1991, Article 3); [10]

(e) Attendance allowance (Social Security Act 1975 of 20 March 1975, section 35, and Social Security (Northern Ireland) Act 1975 of 20 March 1975, section 35); [11]

8 — First inserted in Annex IIa at Point (a) of Section N by means of the Act concerning the conditions of accession of the Kingdom of Norway, the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded, Annex I — List referred to in Article 29 of the Act of Accession — IV. Social policy — A. Social security (OJ 1994 C 241, p. 61).

9 — By means of the Act on the conditions of accession of the Kingdom of Norway, the Republic of Austria, the Republic of Finland and the Kingdom of Sweden (cited in footnote 8), the corresponding predecessor national law provisions were inserted as Points (b) and (c) of Section O of Annex IIa.

10 — Since the adoption of Regulation No 1247/92 (cited in footnote 3), listed under Point (f) of Section L of Annex IIa.

11 — On insertion of Annex IIa by Regulation No 1247/92 (cited in footnote 3), listed under Point (d) of Section L.

(f) Carer's allowance (Social Security Act 1975 of 20 March 1975, section 37, and Social Security (Northern Ireland) Act 1975 of 20 March 1975, section 37).' [12]

B — *National law*

1. Finnish childcare allowance (Childcare Allowance Act, 444/1969)

11. The Finnish Law on childcare allowance grants a cash benefit in circumstances where by reason of illness, disability or other injury a child requires for a period of at least six months special care, assistance or rehabilitation and that situation results in specific hardship of a financial or other nature. Entitlement to that benefit is granted to children under the age of 16 resident in Finland.

12. The amount of the allowance is determined solely by reference to the individual requirements of the child for care, assistance or rehabilitation and is payable at three rates. No account is taken of the parental income of the child requiring care nor of the parents' periods of contribution or employment. Whether entitlement to the benefit is granted merely for a limited period or on an indefinite basis depends on the duration of the period for which a child is reliant on care. A change in a child's state of health may result in loss of the entitlement or in an adjustment to the allowance amount.

13. In accordance with Article 4 of the Finnish Law, entitlement to the childcare allowance ceases once a child has been receiving care in a hospital or another public or State-financed care institution for a period of more than three months.

2. Disability allowance and care allowance for disabled children in Sweden (Law 1998: 703)

14. The Swedish allowances are interconnected and share the essential prerequisites for entitlement. Up to the age of 19, care allowance for disabled children is granted. Thereafter the period of entitlement to disability allowance commences. Benefit entitlement is neither conditional on employment nor on specific employment or contribution periods. Nor does a link to a contribution-based system exist in functional or organisational terms. Entitlement to both benefits requires an assessment of individual needs. If those needs change, entitlement is reassessed in the light of the qualifying conditions.

12 — Corresponds to Point (b) of Section L of Annex IIa in the version as originally inserted by Regulation No 1247/92 (cited in footnote 3).

(a) Care allowance for disabled children

15. That benefit is granted to parents whose child for a period of at least six months by reason of illness, mental handicap or other disability is reliant on care or requires supervision. Moreover, entitlement to the care allowance exists where a child's sickness or disability results in additional costs.

16. The amount of the care allowance, which under the Swedish Law is payable at four different monthly rates, is determined exclusively according to the degree of reliance on care, individual supervision requirements and to the scale of additional costs. In determining the award period, the same criteria apply.

17. Except in situations of a change in need, entitlement is reassessed in accordance with legally determined criteria at the earliest every two years. Neither parental income nor the circumstance whether, as a result of caring for their child, parents have ceased to be employed or reduced their working hours is, however, taken into account.

18. Entitlement to the care allowance ceases, as a rule, as soon as a child is placed in a public or State-financed care institution.

(b) Disability allowance

19. Insured persons are entitled to disability allowance if as a result of a reduction in their functional ability which occurs before the age of 65 they require assistance in their daily activities on a permanent basis (point 1 of Article 5 of the Swedish Law), they require permanent third-party assistance in order to pursue their employed activities (point 2 of Article 5), or have to bear considerable additional costs in a variety of situations (point 3 of Article 5). Where all three requirements are present, or where in conjunction with the criterion of point 3 the requirements of point 1 or point 2 are satisfied, entitlement is determined on the basis of total need. For the purposes of that assessment, a claimant's periods of contribution or employment are not taken into consideration.

20. The degree of reliance on care and the scale of additional costs are decisive in determining the amount of disability allowance in an individual case, with Article 6 of the Swedish Law providing, in that context, for three different rates of benefit. The Swedish Government has indicated that no specific criteria exist in order to determine need in an individual case. Instead, to the extent that expenditure is regarded as appropriate and justified, the financial burdens arising by reason of the claimant's needs are taken into account.

3. National provisions in the United Kingdom

21. Entitlement to disability living allowance and to attendance allowance depends essentially on satisfying the same conditions. Carer's allowance is supplementary to both benefits.

(a) Disability living allowance — Disability Living Allowance and Disability Working Allowance Act 1991 of 27 June 1991, section 1, and Disability Living Allowance and Disability Working Allowance (Northern Ireland) Order 1991 of 24 July 1991, Article 3

22. Disability living allowance consists of two components, a care component and a mobility component. The parties agree that the mobility component as a special non-contributory benefit within the meaning of Article 4(2a)(a)(ii) of Regulation No 1408/71 as amended by Regulation No 647/2005 correctly remains listed in Annex IIa.

23. Persons under the age of 65 with a severe physical or mental disability requiring regular or constant care and satisfying the residence or presence condition are entitled to receive the care component. Entitlement may also continue beyond that age, if the benefit was already granted before the claimant attained the age of 65. More specifically, according to national provisions, the benefit is subject to conditions concerning claimants' requirements for third-party assistance in connection with bodily functions during specific periods of the day or night or their need for permanent supervision in order to avoid the risk of substantial danger to themselves or other persons.

24. Award of the benefit and the amount thereof are determined solely by reference to the period of time for which the individual needs assistance or supervision. The three different rates of benefit are granted irrespective of whether the claimant has an income, pursues an employed activity, is unable to work for health reasons or is in receipt of other benefits. Claimants are entitled to spend their benefits as they wish.

(b) Attendance allowance — Social Security Act 1975 of 20 March 1975, section 35, and Social Security (Northern Ireland) Act 1975 of 20 March 1975, section 35

25. Attendance allowance can be distinguished from disability living allowance in

so far as entitlement is possible only from the age of 65 upwards and merely two rates of benefit are available. The benefit cannot be awarded if the claimant already receives disability living allowance.

(c) Carer's allowance — Social Security Act 1975 of 20 March 1975, section 37, and Social Security (Northern Ireland) Act 1975 of 20 March 1975, section 37

26. The benefit is payable to individuals resident or present in the United Kingdom who regularly provide unpaid care for a minimum period of 35 hours per week to a recipient of disability living allowance or attendance allowance. It cannot be determined with certainty by reference to the case-file whether entitlement to carer's allowance is dependent on the income of the carer. [13]

13 — In its intervention, the United Kingdom Government describes carer's allowance as a benefit which is not income-related and confirms that carers in receipt of carer's allowance may pursue gainful employment provided that such activity is compatible with the minimum weekly care requirement. According to the information provided by the United Kingdom Government, around 30 000 claimants are in work. The European Parliament contends, however, in its defence, that grant of carer's allowance depends on the carer not already having adequate resources. The Commission, likewise, appears to assume that the benefit is capped by reference to the carer's own income. From the provisions of national law annexed to the Council's defence, it cannot be discerned that the benefit is income-related.

III — Procedure and forms of order sought

27. On 26 July 2005, the Commission lodged its application with the Court and claims that the Court should:

— annul the provisions of point 2 of Annex I to Regulation (EC) No 647/2005 of 13 April 2005 amending Council Regulations (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 (EEC) No 574/72 laying down the procedure for implementing Regulation (EEC) No 1408/71 relating to Point (b) of Section W (Finland), Point (c) of Section X (Sweden) and Points (d), (e) and (f) of Section Y (United Kingdom);

— order the defending parties to pay the costs.

28. The European Parliament contends that the Court should:

— declare the application lodged by the Commission inadmissible;

— in the alternative, reject the application as unfounded;

— order the Commission to pay the costs.

29. The Council contends that the Court should:

— dismiss the application;

— order the Commission to pay the costs.

30. The United Kingdom, Sweden and Finland have intervened in support of the forms of order sought by the European Parliament and the Council.

IV — Legal appraisal

A — *Admissibility*

1. Expiry of the time-limit for the action and existence of a legal act capable of challenge

31. The Parliament takes the view that the time-limit for bringing the present action for annulment has expired. In calculating the two-month time-limit under Article 230(5) EC, the date of publication of Regulation No 647/2005 is not decisive, since that regulation retained the benefits at issue in this case — with the exception of amendments in the citation thereof — unamended in the annex. Instead, time began to run with the legal act which first included the benefits in Annex IIa to Regulation No 1408/71. [14] If the legislature elects for reasons of legal clarity and transparency to adopt the route of recasting Annex IIa, instead of deleting individual points, as regards provisions already existing, the principle of legal certainty precludes permitting the time period for bringing proceedings under Article 230 (5) EC to run afresh.

32. The Parliament points to the fact that the reformulated definition of special non-contributory cash benefits in Article 4(2a) of Regulation No 1408/71 has not resulted in substantive amendment to the legal framework, but has merely brought the wording of the provision into line with the Court's interpretation thereof. [15]

33. By way of reference to the third recital to Regulation No 647/2005, the Commission

14 — The United Kingdom benefits were already included in Annex IIa by way of Regulation No 1247/92 (cited in footnote 3) which inserted that annex. The 1994 Act of Accession (cited in footnote 8) added the Finnish and Swedish benefits to the list (see above, point 10 of this Opinion).

15 — The Parliament refers to Case C-215/99 *Jauch* [2001] ECR I-1901 and Case C-43/99 *Leclere and Deaconescu* [2001] ECR I-4265.

counters that argument, contending that the regulation did not merely verify the terms of Annex IIa. The criteria for special non-contributory benefits were amended in accordance with case-law and numerous benefits which did not meet those criteria were deleted from Annex IIa. Deletion of the benefits contested in these proceedings failed, however, since the Member States concerned withheld their consent in the Council.

34. Moreover, the Commission takes the view that recasting an act of secondary law — even where the legislature leaves the content of an annex unchanged — constitutes a legislative decision capable of review. That principle is especially applicable in the present case, in the light of the Commission's assertion that, in part, the annex infringes Community law.

35. According to the Commission, a further reason in favour of the action's admissibility is the fact that it pleads infringement of the principle of legal certainty constituted by Annex IIa. [16] In retaining entries in Annex IIa which do not in fact constitute special non-contributory benefits, the legislature impedes individuals concerned in recognising their Community law rights in a clear and foreseeable manner and, where applicable, in relying on the exportability of a benefit.

36. First, the issue concerning the expiry of the time-limit for bringing the action must be distinguished from the question of whether Regulation No 647/2005 — having regard to the contested provisions in Annex IIa — constitutes a reviewable legal act.

37. It is undeniable that the Commission's action for annulment of Regulation No 647/2005 was lodged within the period — as laid down in Article 230(5) EC — of two months from the publication of the contested legal act in the Official Journal. [17]

38. In fact, the Parliament's complaint is more properly concerned with the matter, in relation to the contested provisions, that Regulation No 647/2005 does not constitute a reviewable act but merely reiterates existing legislation, and does not therefore cause new time-limits for bringing an action to run.

16 — The Commission makes reference in that regard to Case 169/80 *Gondrand Frères and Garancini* [1981] ECR 1931; Case C-143/93 *Van Es Douane Agenten* [1996] ECR I-431, paragraph 27; Case C-63/93 *Duff and Others* [1996] ECR I-569, paragraph 20; and Case T-229/94 *Deutsche Bahn* v *Commission* [1997] ECR II-1689, paragraph 113.

17 — The regulation was published on 4 May 2005. Admittedly, the action was not lodged until 26 July 2005. In accordance with Article 81(1) of the Rules of Procedure, the period of time for bringing proceedings must be calculated, however, from the end of the 14th day following publication of a measure and pursuant to Article 81(2) of the Rules of Procedure is to be extended on account of distance by 10 days.

39. An action for annulment in accordance with Article 230 EC must be available in the case of all measures adopted by the institutions which are intended to have legal effects. [18]

40. The Court has consistently held, in relation to decisions, that such measures cannot form the subject-matter of an action for annulment if they merely constitute confirmatory acts. [19] If an act merely confirms an earlier measure, it cannot result in starting a fresh period for bringing proceedings to run. [20] An action for annulment brought against a confirmatory act would, in fact, constitute an indirect challenge to the earlier decision and would thus permit the time-limit for bringing proceedings laid down in Article 230(5) EC to be circumvented. [21]

41. For the purposes of the present proceedings, it is unnecessary to determine whether that case-law can be applied to regulations. Regulation No 647/2005 does not merely confirm the existing provisions on special non-contributory benefits, but amends the previous legal position.

42. The fact that Regulation No 647/2005 retained the contested provisions in Annex IIa unamended is not decisive in determining the question whether, to that extent, it produces legal effects. In *Jauch*, [22] the Court determined that the substantive criteria of Article 4(2a) of Regulation No 1408/71 set out the legal framework for special non-contributory benefits and — as the Commission correctly observes — that mere listing of a benefit in Annex IIa does not produce any independent legal consequences.

43. Accordingly, the question whether Regulation No 647/2005 modified the legal position as regards special non-contributory benefits cannot be determined by reference to Annex IIa in isolation. Instead, the benefits listed in the annex are to be assessed in the light of Article 4(2a). That provision was amended, however, by Regulation No 647/2005. Admittedly, the third recital to

18 — See my Opinion in Joined Cases C-138/03, C-324/03 and C-431/03 *Italy* v *Commission* [2005] ECR I-10043, point 45, with further references therein.

19 — Joined Cases 42/59 and 49/59 *SNUPAT* v *High Authority* [1961] ECR 53, 75; Case 26/76 *Metro* v *Commission* [1977] ECR 1875, paragraph 4; Joined Cases 166/86 and 220/86 *Irish Cement* v *Commission* [1988] ECR 6473, paragraph 16; Case C-199/91 *Foyer culturel du Sart-Tilman* v *Commission* [1993] ECR I-2667, paragraph 23; Case C-480/93 P *Zunis Holding and Others* v *Commission* [1996] ECR I-1, paragraph 13 et seq.; and Case C-123/03 P *Commission* v *Greencore* [2004] ECR I-11647, paragraph 39.

20 — Case 1/76 *Wack* v *Commission* [1976] ECR 1017, paragraph 7.

21 — Case C-135/93 *Spain* v *Commission* [1995] ECR I-1651, paragraph 17, and Case C-180/96 *United Kingdom* v *Commission* [1998] ECR I-2265, paragraph 28.

22 — Cited in footnote 15, paragraph 21.

Regulation No 647/2005 refers to specifying criteria in the light of the judgments in *Jauch* and *Leclere and Deaconescu.* [23] However, even though the Court's criteria were successfully inserted unamended into the legislative text, as a result of that process, those criteria acquired a different legal quality.

44. Nor can one accept the Parliament's argument that the Treaty infringement proceedings against Finland, Sweden and the United Kingdom are proof of the fact, prior to the adoption of Regulation No 647/2005, that even the Commission proceeded on the basis of the contested provisions' existence. In those actions, the Commission criticised the fact that in substantive terms the measures concerned did not meet the conditions laid down in the previous version of Article 4(2a).

45. Even if one assumes that recasting of the substantive criteria did not modify the legal framework for special non-contributory benefits, nevertheless, as regards the individual entries in Annex IIa, the legislature took a reviewable decision.

46. In its proposal for Regulation No 647/2005, [24] the Commission had already called upon the Parliament and Council to reassess the entries. In the Council's draft statement of reasons concerning the adoption of a common position, [25] the Council indicated that it had sought to agree criteria for the inclusion of entries in Annex IIa and that on that basis unanimous agreement had been reached on classifying the vast majority of the entries. [26] Admittedly, unanimous agreement had not been reached on the Commission's proposal to remove certain specific entries from Annex IIa since the Member States concerned regarded them as fulfilling the requirements of Article 4(2a) of Regulation No 1408/71 after amendment. [27] In order to allow for the adoption of the regulation, the Council agreed, however,

'to maintain these entries in Annex IIa pending future ECJ jurisprudence which could clarify the relevant criteria and subsequently entail revision of the Annex'. [28]

47. Putting it another way, an assessment that all entries in Annex IIa unquestionably

23 — Cited in footnote 15.

24 — Proposal for a regulation of the European Parliament and of the Council 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 (COM(2003) 468 final of 31 July 2003, pp. 7 and 8).

25 — Draft statement of the Council's reasons concerning the common position adopted by the Council with a view to the adoption by the European Parliament and the Council of a regulation 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 of 5 November 2004 (12062/04 ADD 1, SOC 382, CODEC 968, Interinstitutional File 2003/0184 (COD)). See with regard to the whole matter also the Council's defence, points 8 to 11.

26 — Council's draft statement of reasons (cited in footnote 25), p. 7. See also the sixth recital to Regulation No 647/2005 (cited in footnote 4).

27 — Council's draft statement of reasons (cited in footnote 25), p. 7.

28 — Council's draft statement of reasons (cited in footnote 25), p. 8.

corresponded to the reformulated criteria set out in Article 4(2a) of Regulation No 1408/71 did not constitute the basis for adopting Regulation No 647/2005. However, the legislature took the decision to retain the entries contested in these proceedings in Annex IIa in order to make them accessible to scrutiny by the Court.

48. Nor does the Parliament's argument, that already in Article 70(2) of Regulation No 883/2004 [29] the legislature, using the same wording, employed the reformulated criteria, lead to a different conclusion. Since the Parliament and the Council have not yet determined the content of Annex X (special non-contributory cash benefits) to Article 70(2)(c) of that regulation, the Commission could not bring an annulment action in that case in order to have the compatibility of individual entries with the criteria for special non-contributory benefits assessed.

49. Finally, the Commission is correct in arguing that the principle of legal certainty requires an assessment to be made. Otherwise, the individuals concerned would be left in doubt as to the compatibility of entries in Annex IIa with the criteria of Article 4(2a) of Regulation No 1408/71 at least until the Court rules in an action for a preliminary ruling on the nature of individual benefits in a given case.

29 — Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ 2004 L 200, p. 1).

50. I conclude, therefore, that as regards the contested provisions of Annex IIa, Regulation No 647/2005 constitutes a reviewable legal act within the meaning of Article 230(1) EC.

2. Challenge to part of the regulation

51. According to consistent case-law, if the contested provisions are so inseverably linked with a legal act in its entirety that in the event of the annulment of those provisions the substance of that legal act would be altered, the Court is precluded from partially annulling that legal act. [30]

52. Since the benefits listed in Annex IIa must always fulfil the substantive conditions set out in Article 4(2a) of Regulation No 1408/71 in order to qualify as special non-contributory benefits, [31] deletion of a benefit from Annex IIa has no effect on the criteria. In ordering in the operative part of *Leclere and Deaconescu* [32] the annulment of Annex

30 — See my Opinion in Case C-540/03 *Parliament* v *Council* [2006] ECR I-5769, point 46, with further references.

31 — See *Jauch* (cited in footnote 15), paragraphs 21 and 22, and below, point 56 et seq.

32 — Cited in footnote 15.

IIa, to the extent that it listed the Luxembourg maternity allowance at issue in that case, the Court has already acknowledged that the entries in Annex IIa constitute severable elements.

B — *Merits*

1. Preliminary observation on the alleged infringement

53. The action is well founded if the contested provisions of point 2 of Annex I to Regulation No 647/2005, that is to say, the amended version of Annex IIa as regards the entries at issue concerning Finland, Sweden and the United Kingdom, are unlawful.

54. The Commission complains that the respective benefits do not correspond with criteria set out in the definition — likewise revised by Regulation No 647/2005 — of special non-contributory cash benefits in Article 4(2a) of Regulation No 1408/71. [33]

55. Since Annex I likewise constitutes an element of Regulation No 647/2005, that is to say, it results from the same author and was adopted as part of the same procedure as the other elements of the regulation, the argument appears at first sight to be that there is a contradiction between two rules of the same rank. Such a contradiction infringes the principle of legal certainty. That fundamental principle of Community law requires, namely, that rules should be clear and precise, so that individuals may ascertain unequivocally what their rights and obligations are and may take steps accordingly. [34] It does not follow simply from an infringement of the principle of legal certainty, however, that only one of the contradictory provisions of the same order must be annulled and which of those it is to be.

56. As is apparent from established case-law, however, this is not merely a question of a conflict between rules of the same rank. The starting point in elucidating this problem is the judgment in *Jauch*, [35] in which the Court held as follows:

'As the Court has consistently held ..., the provisions of Regulation No 1408/71 adopted to give effect to Article 51 of the EC Treaty (now, after amendment, Article 42 EC) must be interpreted in the light of the

33 — See page 7 of the application, Point III: 'MOYEN: INCOMPATIBILITE AU REGARD DES CRITERES DE L'ARTICLE 4 PARAGRAPHE 2 BIS ET DE LA JURISPRUDENCE DE LA COUR DES PRESTATIONS FIGURANT AU POINT 2 DE L'ANNEXE I SOUS W. b) X. c) ET Y d) e) ET f) DU REGLEMENT N° 647/2005'.

34 — *Gondrand Frères and Garancini* (cited in footnote 16); *Van Es Douane Agenten* (cited in footnote 16) , paragraph 27; and Case C-344/04 *IATA and ELFAA* [2006] ECR I-403, paragraph 68.

35 — Cited in footnote 15, paragraph 20. See also Case C-286/03 *Hosse* [2006] ECR I-1771, paragraph 24.

objective of that article, which is to contribute to the establishment of the greatest possible freedom of movement for migrant workers. The aim of Articles 48 and 49 of the EC Treaty (now, after amendment, Articles 39 EC and 40 EC) and Article 50 of the EC Treaty (now Article 41 EC) and Article 51 of the Treaty would not be attained if, as a consequence of the exercise of their right to freedom of movement, workers were to lose the social security advantages guaranteed them by the legislation of one Member State, especially where those advantages represent the counterpart of contributions which they have paid.'

57. In the final analysis, the *Jauch* case-law indicates a priority of Article 4(2a) of Regulation No 1408/71 over the entries in Annex IIa to that regulation, which are formally of the same rank. That priority arises from the fact that the Court considers the combined provisions of Articles 4, 10 and 10a of Regulation No 1408/71 as the concrete implementation of the higher-ranking principle of the free movement of workers. The Commission has in the meantime taken note of that, and tried to adapt Annex IIa to the rules arising from the case-law, as it stated at the hearing. The resulting limitation on the legislature's liberty to give content to the indeterminate legal concept of the special non-contributory benefit is intended to guarantee the free movement of workers. Whilst the concept of worker is broader in Regulation No 1408/71 than in Article 39 EC, the benefits at issue in this case are in any event also available to workers within the meaning of the Treaty and members of their families.

58. Admittedly, the Community legislature is free in those circumstances to adopt provisions which derogate from the principle that social security benefits are exportable. [36] Such derogating provisions which subject the grant of certain special benefits to a condition of residence in the national territory must, however, be interpreted strictly. [37]

59. It follows, therefore, that to include benefits in Annex IIa to Regulation No 1408/71, if the conditions for their categorisation as special non-contributory cash benefits in accordance with Article 4(2a) are absent, infringes Articles 39 EC and 42 EC. [38] Restricting the freedom of movement for workers by means of residence clauses in national benefits legislation is justified only as regards 'genuine' special non-contributory benefits.

36 — Case C-20/96 *Snares* [1997] ECR I-6057, paragraph 41; *Jauch* (cited in footnote 15), paragraph 21; and *Hosse* (cited in footnote 35), paragraph 25.

37 — See *Jauch* (cited in footnote 15), paragraph 21; *Hosse* (cited in footnote 35), paragraph 25; and Case C-265/05 *Perez Naranjo* [2007] ECR I-347, paragraph 29.

38 — See *Leclere and Deaconescu* (cited in footnote 15), paragraph 37.

60. As the Commission correctly concludes, it must be determined, therefore, whether the contested benefits fulfil the criteria of special non-contributory cash benefits in accordance with Article 4(2a) of Regulation No 1408/71 as amended by Regulation No 647/2005. If that is not the case, to the extent that Regulation No 647/2005 provides for the inclusion of the contested benefits in Annex IIa to Regulation No 1408/71, it must be annulled.

2. The scheme of Article 4(2a) of Regulation No 1408/71

61. The opening sentence of Article 4(2a) describes special non-contributory cash benefits as benefits provided under legislation which, because of its personal scope, objectives and/or conditions for entitlement, possesses features both of *classic social security benefits* within the meaning of Article 4(1) and of *social assistance*.

62. Article 4(2a)(a) mentions two categories of special benefits, that is to say, benefits (i) which are intended to provide supplementary, substitute or ancillary cover against the classic social security contingencies and which guarantee claimants a minimum income having regard to the economic and social situation in the Member State concerned and (ii) which are intended solely to provide specific protection for the disabled, closely linked to that person's social environment in the Member State concerned.

63. Aside from the opening sentence, only point (i) imposes the express requirement of a link to a classic branch of social security and the guarantee of a minimum income as a social assistance element. Point (ii), on the contrary, repeats neither the reference to a branch of social security nor to social assistance. The question arises, therefore, whether benefits providing specific protection for the disabled, likewise, must combine both features.

64. That approach can be supported by the fact that the hybrid nature of the benefits is already mentioned in the opening sentence of Article 4(2a) which refers to both categories of special benefits mentioned in the subsequent point (a).

65. It is necessary in any event that benefits for the special protection of the disabled within the meaning of Article 4(2a)(a)(ii) of Regulation No 1408/71 must have a link to a

branch of social security, otherwise that would negate the very possibility of Regulation No 1408/71 applying.

66. In addition, those benefits must also display features of social assistance. If it were enough for there to be a link to a branch of social security, benefits for the special protection of the disabled would always constitute special benefits within the meaning of point (ii), and under Article 10a of Regulation No 1408/71 would generally be excluded from the principle according to which social security benefits are exportable. Apart from the fact that the wording of the introductory sentence of Article 4(2a) is against it, such an approach would considerably disadvantage the disabled, because similar benefits for persons who are not disabled, care allowances for the old, for example, are exportable.

67. Irrespective of the individual characteristics of special non-contributory cash benefits, the scheme of Regulation No 1408/71, retained also by Regulation No 647/2005, precludes in any event the categorisation of a benefit as a special benefit, if it falls solely within the scope of Article 4(1).[39] The Court, in consistent case-law, considers a benefit to constitute a social security benefit in so far as, first, it is granted to claimants on the basis of a legally defined position without a discretionary individual assessment of personal needs and, second, it relates to one of the risks listed in Article 4(1) of Regulation No 1408/71.[40]

68. If it is established that the contested benefits do not fall within Article 4(1), but merely exhibit *features* of a social security benefit, the hybrid nature of benefits within the meaning of Article 4(2a) requires that those benefits also display social assistance features. That is the case if they are granted without reference to particular periods of employment or contribution in accordance with personal need, determined on the basis of objective criteria provided by law.[41]

69. Benefits designed specifically to protect disabled persons are further characterised by the aim of promoting the integration of those persons into society and enabling them to play a role within it.

39 — *Hosse* (cited in footnote 35), paragraph 36.

40 — See my Opinion in *Hosse* (cited in footnote 35), point 51, with further references.

41 — See my Opinion in Case C-160/02 *Skalka* [2004] ECR I-5613, points 55 and 56.

3. Assessment of the contested benefits

(a) Special benefit characteristics of the Finnish childcare allowance

(i) Inclusion of the Finnish childcare allowance within one of the branches of social security mentioned in Article 4(1) of Regulation No 1408/71

70. The question of whether the Finnish childcare allowance may be classified under one of the branches of social security depends on the purpose of the benefit.

71. The Council, the Parliament and the Finnish Government argue that the purpose of the childcare allowance is to ensure special protection and the integration into society of disabled or sick children. Its objective is to facilitate special care measures and physical and psychological rehabilitation measures and to avert the risk of the claimant subsequently being unfit for work. The Finnish Government emphasises that the general aim of the childcare allowance is not to make good the loss of parental income [42] or to meet family expenses.

72. The Commission, on the other hand, takes the view that in any event the childcare allowance is intended also to alleviate the financial burden on parents who — rather than placing the child in an institution — care for their sick or disabled child within the family. The aim of the allowance, therefore, is also to mitigate financial losses incurred in giving up income from full-time employment. In the light of the Court's case-law, [43] the Commission, having regard to the features mentioned, concludes that the childcare allowance constitutes a family benefit within the meaning of Article 1(u)(i) of Regulation No 1408/71.

73. In *Offermanns*, [44] the Court held that the expression 'to meet family expenses' within the meaning of Article 1(u)(i) means a public contribution to a family's budget to alleviate the financial burdens involved in the maintenance of children.

42 — According to the observations of the Republic of Finland, any loss of income is covered by the care allowance (*erityishoitoraha*). That allowance is granted under the *sairausvakuutuslaki* (Law 1224/2004 on health insurance) and constitutes a social security benefit within the meaning of Regulation No 1408/71.

43 — Case C-78/91 *Hughes* [1992] ECR I-4839, paragraphs 15 to 17, 19 and 20; Case C-85/99 *Offermanns* [2001] ECR I-2261, paragraph 41; Case C-333/00 *Maaheimo* [2002] ECR I-10087, paragraphs 24 and 25; and Joined Cases C-245/94 and C-312/94 *Hoever and Zachow* [1996] ECR I-4895, paragraph 25.

44 — Cited in footnote 43, paragraph 41.

74. The Finnish Government correctly points out, however, that every cash benefit has an impact on the resources available to a family. The mere fact that a benefit has the effect of increasing family income is inadequate, therefore, in order to categorise it as a special benefit within the meaning of Article 4(2a)(a)(ii). Instead, the benefit must be specifically intended to relieve families of the financial burdens involved in the maintenance of children.

75. The Finnish childcare allowance does not relate, however, to general expenses for maintenance but to the special needs involved in caring for a disabled child. The amount of the benefit thus depends on the child's reliance on care and on the economic burden thereby arising. Moreover, benefit entitlement is reduced or withdrawn if there is an improvement in the child's state of health or it is placed in a public or State-financed care institution for more than three months. What is decisive, therefore, is the continuing existence of special needs.

76. Having regard to its purpose of facilitating specific care and rehabilitation measures within a family framework and of improving the claimant's living circumstances, the childcare allowance thus aims to cover the contingency of reliance on care. According to the Court's consistent case-law,[45] care benefits — as a form of sickness benefit — fall within the scope of Article 4(1)(a) of Regulation No 1408/71.

77. The contention that the Finnish childcare allowance, as a care benefit, falls within the scope of the contingency specified in Article 4(1)(a) of Regulation No 1408/71 did not form part of the Commission's argument. Instead, it characterised the benefit, incorrectly, as a family benefit within the meaning of Article 4(1)(h). The Commission's action would, to that extent, already have to be dismissed as unfounded, if of its own motion the Court could not attribute the childcare allowance to one of the other contingencies mentioned in Article 4(1) but were bound by the Commission's categorisation.

78. The Commission in its application, however, did not plead that the Finnish benefit had the quality of a family benefit; rather, it challenged the incompatibility of the contested benefits with the criteria laid down in Article 4(2a) and the Court's case-law. In that regard, the Commission argued in general terms that the benefit should possess the necessary hybrid features, that is to say, first, affiliation to a branch of social

45 — Case C-160/96 *Molenaar* [1998] ECR I-843, paragraphs 22, 24 and 25; *Jauch* (cited in footnote 15), paragraph 28; Joined Cases C-502/01 and C-31/02 *Gaumain-Cerri and Barth* [2004] ECR I-6483, paragraph 20; and *Hosse* (cited in footnote 35), paragraph 46.

security and, second, dependence on personal need. [46]

79. Since the special nature of a benefit depends on the cumulative existence of both those elements, for a benefit to be regarded as incompatible with the criteria of Article 4 (2a) it would be sufficient to demonstrate that one of those features was absent. The Commission bases its complaint also on the absence of a social assistance element — to be examined below under subheading (ii) — and amplifies that argument in its reply. [47] Accordingly, categorisation of the Finnish benefit under Article 4(1)(h) must be understood merely as an argument with which the Commission sought to support the plea it has advanced.

80. Admittedly, the Court is bound by the pleas in law relied upon by the applicant, not, however, by the individual arguments advanced in substantiation thereof. Otherwise, it would potentially be precluded from basing its decision on the correct legal considerations. [48] Accordingly, contrary to the Commission's line of argument, the Court may categorise the Finnish childcare allowance also under one of the other branches of social security within the meaning of Article 4(1) of Regulation No 1408/71.

(ii) Grant of the benefit on the basis of legislative criteria and independently of a discretionary individual assessment of personal needs

81. The Finnish childcare allowance is granted on the basis of legally defined conditions. If the conditions set out in the Finnish law are fulfilled, a legal entitlement to the childcare allowance arises in accordance with Article 1 thereof.

82. The Council, the Parliament and the Finnish Government put forward, as evidence of the special benefit nature of the childcare allowance, the fact that its award is dependent on a comprehensive assessment of a child's reliance on care and of its individual personal circumstances, in which the economic burden resulting from the child's condition is taken into consideration but the parents' periods of employment and contribution are not.

83. If social security benefits and social assistance are understood as opposing con-

46 — See points 18 and 19 of the application.

47 — That approach is lawful; see Case 306/81 *Verros* v *Parliament* [1983] ECR 1755, paragraphs 9 and 10, and Case C-301/97 *Netherlands* v *Council* [2001] ECR I-8853, paragraph 169.

48 — On the matter as a whole, see the order in Case C-470/02 P *UIER* v *Commission*, not published in the ECR, paragraph 69; the Opinion of Advocate General Léger in Case C-252/96 P *Parliament* v *Gutiérrez de Quijano y Lloréns* [1998] ECR I-7421, points 34 to 37; and the Opinion of Advocate General Cosmas in Joined Cases C-174/98 P and C-189/98 P *Netherlands and Van der Wal* v *Commission* [2000] ECR I-1, points 95 and 96.

cepts, it may be concluded conversely from the Court's definition of social security that social assistance is granted on the basis of a discretionary decision with reference to personal needs. [49]

84. According to Article 2 of the Finnish law, the amount of the childcare allowance in an individual case is calculated in accordance with objective criteria, that is to say, primarily in accordance with the degree of the financial or other burden resulting from the child's care needs. According to the Finnish Government's observations, the extent of the care needs is determined on the basis of medical reports, a report on the necessity of care measures and further reports from health and social security authorities. From the case-file, it cannot be deduced with certainty the extent to which the legislation permits the competent institution of the pension fund 'kela' (*kansaneläkelaitos*) any discretion in that regard.

85. Contrary to the view taken by the Council and the United Kingdom Government, the Commission correctly observes that a benefit — irrespective of the scope of discretion involved — only displays social assistance features if its grant depends on *financial* need. [50] Otherwise, social assistance cannot be distinguished from social security benefits. Typically, the latter provide cover for specific needs arising by way of other personal circumstances without taking claimants' income into account. [51]

86. Financial need, however, does not constitute a criterion for the award of the childcare allowance. Admittedly, according to the Finnish Government's argument, 'kela' also takes account of additional family expenses, such as travel expenses for doctors' visits, in its assessment and has regard to burdens of a different nature mentioned by the family in its benefit application. Entitlement to the childcare allowance, however, does not depend on parents' inability to cover the additional expenses from their own resources. On the contrary, their income and capital are specifically excluded from consideration.

87. In *Kersbergen-Lap and Dams-Schipper*, [52] the Court held, however, that the benefit at issue in that case, granted under the Law on provision of incapacity benefit to disabled young people, displayed the characteristics of a social assistance benefit even though it was granted without any means test or financial needs assessment of the claimant. The Court justified that conclusion by the argument that 'the majority of disabled young people would not have

49 — See my Opinion in *Hosse* (cited in footnote 35), point 67.
50 — Ibid., point 69.
51 — Ibid.
52 — Case C-154/05 [2006] ECR I-6249, paragraphs 31 and 32.

sufficient means of subsistence if they did not receive that benefit'. [53]

88. That conclusion cannot be reached in a generalised manner as regards the childcare allowance. The circumstances in which childcare allowance claimants — children under the age of 16 — live are derived from those of their parents. Thus, a child's reliance on care does not in all cases result in its financial need. Even when one considers the position of parents, that consequence does not follow. Despite their child's reliance on care, parents may dispose of sufficient financial resources drawn from income or capital, especially as grant of the benefit is not dependent on one or both parents ceasing to be gainfully employed.

(iii) Further requirements of Article 4(2a)(a)(ii)

89. Apart from the conclusion that the Finnish childcare allowance does not constitute a special benefit, neither does it fulfil the further requirements of Article 4(2a)(a)(ii). The benefit does not solely provide special protection for the disabled, but, in accordance with Article 2 of the Finnish law, it is also granted to children whose reliance on need arises by reason of sickness. Even long-term or chronic sickness giving rise to special care needs cannot be equated, without more, to a disability. [54]

90. Nor, likewise, does the observation of the Council, the Parliament and the Finnish Government that the childcare allowance is closely linked with the socioeconomic environment in Finland justify its characterisation as a special benefit. Even if the benefit rates reflect the costs arising in the care of disabled or sick children in Finland, the remaining characteristics of a hybrid benefit are, however, absent.

(iv) Interim conclusion

91. The Finnish childcare allowance does not constitute a special benefit within the meaning of Article 4(2a)(a)(ii) of Regulation No 1408/71, as amended by Regulation No 647/2005, but a sickness benefit within

53 — Ibid., paragraph 32.

54 — On delimiting the concept of disability within the meaning of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p. 16) from that of sickness, see Case C-13/05 *Chacón Navas* [2006] ECR I-6467, paragraph 43 et seq.

the meaning of Article 4(1)(a) of Regulation No 1408/71. Therefore, Point (b) of Section W (Finland) of point 2 of Annex I to Regulation No 647/2005 must be annulled.

(b) Special benefit characteristics of the Swedish care allowance for disabled children

92. The Swedish care allowance for disabled children displays considerable similarities to the Finnish childcare allowance and can be distinguished only in so far as — in place of three — it provides for four different monthly benefit rates.

93. As regards the benefit's objective, the Swedish Government emphasises that the care allowance for disabled children is intended to cover only those needs which go beyond those of a non-disabled child. Thus, the benefit does not relate to contingencies addressed by Article 4(1)(h) of Regulation No 1408/71. Instead, the care allowance, as financial support, ensures that a sick or disabled child receives the care necessary for its optimum development at home and not in an institution. The sole aim of the care allowance, therefore, is to provide special protection for the disabled, closely linked to the claimant's social environment in that Member State.

94. It follows from the benefit's purpose that the care allowance for disabled children covers the special needs arising by reason of a child's reliance on care. Contrary to the view taken by the Commission, it does not therefore constitute a family benefit within the meaning of Article 1(u)(i) and Article 4(1)(h) of Regulation No 1408/71 for the very reason that it does not address the general costs of raising and caring for a child. Rather, in the same way as the Finnish benefit considered above, the benefit must be classified as a sickness benefit within the meaning of Article 4(1)(a) of Regulation No 1408/71.

95. Contrary to the argument adopted by the Council, the Parliament and the Swedish Government, no scope exists to classify the care allowance as a special benefit within the meaning of Article 4(2a)(a)(ii). As is the case with the Finnish childcare allowance, the benefit already lacks a hybrid nature because it is granted without reference to income and on the basis of a legal entitlement in accordance with Article 8 of the Swedish Law and does not depend on a discretionary individual assessment of financial need.

96. The Swedish care allowance for disabled children does not constitute a non-contributory cash benefit within the meaning of Article 4(2a) of Regulation No 1408/71, but a sickness benefit within the meaning of

Article 4(1)(a) of that regulation. To that extent, therefore, Point (c) of Section X (Sweden) of point 2 of Annex I to Regulation No 647/2005 must be annulled.

(c) Special benefit characteristics of the Swedish disability allowance

97. Taking the purpose of the disability allowance as a starting point, it must be assessed in turn whether the benefit falls within one of the branches of social security mentioned in Article 4(1).

98. The parties unanimously consider it to be the function of the disability allowance to make good the additional everyday expenses incurred by the claimants by reason of their disability. In the light of that function, the Council, the Parliament and the Swedish Government conclude — especially as disability may not be equated with sickness — that the benefit relates to circumstances other than those resulting from sickness. The benefit thus provides solely for the protection of disabled people and their integration into society. Accordingly, it constitutes a special benefit within the meaning of Article 4(2a)(a)(ii). The Commission, however, referring to *Jauch*, [55] comes to the conclusion that the benefit aims to improve the state of health and quality of life of persons reliant on care and, thus — as a sickness benefit — falls within the scope of Article 4(1)(a).

99. In assessing the characteristics of the disability allowance, the alternative conditions for entitlement must be distinguished.

100. To the extent that the disability allowance makes good the special needs resulting from claimants' disability-related reliance on care (point 1 of Article 5 of the Swedish Law), it ensures the necessary assistance and care for claimants on an everyday basis. As the Council correctly argues, the benefit aims to establish the same starting point and opportunities as people without disabilities experience. In providing disabled people with the financial resources to cover their needs for third-party care, the benefit aims, at the same time, to improve claimants' state of health. Thus, the benefit is not based on disability as such, but covers the contingency of reliance on care. In determining the nature of the benefit, the reason underlying those care needs cannot be decisive. To that extent, therefore, the benefit cannot be

55 — Cited in footnote 15, paragraph 28.

distinguished from care benefits which the Court in consistent case-law [56] has categorised as sickness benefits within the meaning of Article 4(1)(a) of the regulation.

101. Having regard to point 2 of Article 5 of the Swedish Law, it follows that the disability allowance is intended also to ensure the claimant's fitness for work. To that extent, the disability allowance does not aim to improve the state of health and quality of life of the disabled person. Accordingly, that precludes categorisation as a sickness benefit within the meaning of Article 4(1)(a). Where these conditions for entitlement apply, however, the benefit relates to the contingency of a reduction in, or loss of, fitness for work and — as an invalidity benefit — falls within the scope of Article 4(1)(b). [57] The fact that the Commission's assessment, to that extent, differs from mine does not preclude such categorisation. [58]

102. Under the third alternative set of conditions for entitlement (point 3 of Article 5 of the Swedish Law), the benefit aims to make good other additional expenses which must be borne by disabled persons in various situations. The Swedish provision does not specify in detail which additional expenses the third alternative is intended to cover. Nor is that question resolved by the parties' observations. Alongside additional financial expenditure, on special diets for example, additional expenses for special furniture, equipment or mobility and transport are also conceivable.

103. Having regard to the diversity of the expenditure which falls to be considered, I am not convinced by the Commission's view that the benefit exclusively or predominantly aims to improve the state of health of claimants. Possibly, however, the benefit could be categorised as an invalidity benefit, because according to consistent case-law Article 4(1)(b) of Regulation No 1408/71 also includes benefits for the disabled. [59]

104. It need not be determined, however, whether the benefit falls within a branch of social security and, if so, which one. First, that subcategory of benefit does not specifically appear amongst the Swedish benefits in Annex IIa to Regulation No 1408/71, so that a partial annulment affecting only that subcategory is not to be countenanced even if this variant of the benefit is designed to

56 — See the judgments cited in footnote 45.

57 — See Case 14/72 *Heinze* [1972] ECR 1105, paragraph 8; Case 15/72 *Land Niedersachsen* [1972] ECR 1127, paragraph 8; and Case 16/72 *Allgemeine Ortskrankenkasse Hamburg* [1972] ECR 1141, paragraph 8.

58 — See above, point 77 et seq.

59 — Case 187/73 *Callemeyn* [1974] ECR 553, paragraph 11; Case 24/74 *Biason* [1974] ECR 999, paragraph 12; Case C-356/89 *Newton* [1991] ECR I-3017, paragraph 15; Case C-310/91 *Schmid* [1993] ECR I-3011, paragraph 10; Case 39/74 *Costa* [1974] ECR 1251, paragraph 11; and Case C-58/93 *Youfsi* [1994] ECR I-1353, paragraph 25.

give special protection to the disabled. [60] In this case, moreover, the benefit lacks the social assistance element, which confers the hybrid quality required for classification as a special benefit, since it is granted without taking account of the financial needs of the beneficiary.

105. As observed already with regard to the Finnish childcare allowance, the judgment in *Kersbergen-Lap and Dams-Schipper* [61] does not affect that assessment. It is incorrect to assert that disabled people who require time-consuming help on an everyday basis or constant assistance in performing their employment activities or who by reason of their limited functional ability must bear additional financial expenditure do not generally have adequate material resources at their disposal. As long as they are engaged in gainful employment, they can by way of their income, in part at least, cover their living expenses. Even to the extent that those circumstances do not apply, the possibility cannot be excluded that claimants have at their disposal capital which covers their living expenses.

106. Thus, the Swedish disability allowance does not fulfil the criteria of a special non-contributory benefit. Therefore, Point (c) of Section X (Sweden) of point 2 of Annex I to Regulation No 647/2005 must be annulled in its entirety.

(d) Special benefit characteristics of disability living allowance and attendance allowance under United Kingdom law

107. Leaving aside the age thresholds, the conditions of entitlement for disability living allowance and attendance allowance are essentially the same. Therefore, the benefits cannot differ in their nature. Since the parties have unanimously recognised the mobility component of disability living allowance as constituting a benefit within the meaning of Article 4(2a)(a)(ii), it is only necessary to assess — in the light of the benefit's purpose — the characteristics of the care component and attendance allowance.

(i) Assessment of the care component of disability living allowance and attendance allowance

108. The Commission, referring to *Jauch*, [62] attributes the allowances to the category of

60 — On this problem, see points 116 to 119 below.

61 — Cited in footnote 52.

62 — Cited in footnote 15, paragraph 28.

sickness benefits within the meaning of Article 4(1)(a). The Parliament, the Council and the United Kingdom Government refer, on the other hand, to *Snares* [63] and *Partridge* [64] and consider the requirements for special non-contributory benefits within the meaning of Article 4(2a)(a)(ii) as fulfilled. In their view, the allowances contribute to affording claimants a quality of life as similar as possible to that of the remaining population and are, therefore, closely linked to the economic and social environment of the claimant.

109. Having regard to the link between the benefits and the degree of third-party assistance to a disabled person, it can be concluded that the allowances are intended to reimburse on a flat-rate basis the additional expenses resulting from claimants' disability-related reliance on care. Thus, not the disability itself but the reliance on care arising therefrom constitutes the basis for awarding the allowances. Disability alone is insufficient to found entitlement to the allowances. Although, according to the United Kingdom Government, the beneficiaries are free to use the funds as they wish, the fact that the legislature links the granting of the benefit to the amount of financial need nevertheless indicates that it is primarily intended to compensate for equivalent costs. As care benefits, the allowances — in accordance with the Court's consistent case-law — fall within the scope of Article 4(1)(a) of Regulation No 1408/71. [65] That conclusion is not precluded by *Snares* [66] and *Partridge* [67] since the Court in those cases did not examine the character of both benefits on the basis of substantive criteria. [68]

110. The Parliament counters, however, that the allowances under United Kingdom law can be distinguished from the care benefit at issue in *Jauch* because they are granted independently of pension entitlement. Thus, Advocate General Alber in his Opinion in *Jauch* emphasised, on determining the character of a benefit, the need to take that feature into account. [69]

111. Contrary to that approach, the Court considered it of no importance in categorising the benefit — having regard to a person's reliance on care — that the care allowance was intended to provide a financial supplement to a pension. [70] Referring to *Molenaar*, [71] the Court specified that the conditions for granting the care allowance did not have the effect of changing its character. [72]

63 — Cited in footnote 36, on disability living allowance.

64 — Case C-297/96 [1998] ECR I-3467 on attendance allowance.

65 — See the judgments cited in footnote 45.

66 — Cited in footnote 36.

67 — Cited in footnote 64.

68 — See *Jauch* (cited in footnote 15), paragraph 17.

69 — Opinion in *Jauch* (cited in footnote 15), points 98 and 99.

70 — *Jauch* (cited in footnote 15), paragraph 28.

71 — Cited in footnote 45.

72 — *Jauch* (cited in footnote 15), paragraph 28.

112. The benefits at issue also lack social assistance elements. Under the conditions set out in section 72 of the Social Security Contributions and Benefits Act 1992 (SSCBA 1992), the claimant has a legal entitlement to the care component of disability living allowance. A legal entitlement to attendance allowance exists when the conditions set out in section 64 of that act are satisfied.

113. The allowance amounts are determined by reference solely to the degree of care required. In accordance with section 65(3) of the SSCBA 1992, the higher rate of attendance allowance is granted if during a specifically determined period the claimant requires supervision day and night. In all other cases, the lower rate applies. section 72(4) of that act, similarly, allocates the three rates of disability living allowance in accordance with the period of time and degree of care involved. In neither case does financial need have any influence on the amount of the allowances.

114. Admittedly, the United Kingdom Government argues that determining the allowances by reference to reliance on care rests on the assumption that the persons who receive allowances are also those who must bear the greatest additional costs by reason of their handicap, and are therefore most dependent on the allowances.

115. The scheme of the benefits in the present case does not, however, permit the conclusion — reached by the Court in *Kersbergen-Lap and Dams-Schipper*[73] — that most claimants would not have sufficient means of subsistence if they did not receive the benefit. Admittedly, it may be unimportant that assets are ignored, because most claimants probably do not have sufficient capital resources. As the United Kingdom Government states, however, entitlement to benefit is not conditional on unfitness for work. According to the account of the United Kingdom Government, approximately 100 000 disability living allowance claimants are in gainful employment. It has not been established, therefore, that in the absence of one of the two allowances most claimants would not have sufficient means of subsistence.

(ii) Interim conclusion

116. Disability living allowance — with the exception of the mobility component — and attendance allowance constitute sickness benefits within the meaning of Article 4(1)(a) of Regulation No 1408/71.

73 — Cited in footnote 52, paragraph 32.

117. Since the entry under Point (d) of Section Y (United Kingdom) refers to the legislation governing disability living allowance in its entirety, without mentioning the care and mobility components separately, that entry may also be annulled only in its entirety.

118. Although, by so doing, one annuls from Annex IIa a benefit which partially fulfils the requirements for special benefits, that fact cannot lead to the entry being maintained in its entirety. In the interests of legal certainty, Annex IIa to Regulation No 1408/71 must indicate the benefits which fall within Article 4(2a)(c) of the regulation. The principle of legal certainty requires that the persons concerned must be able to ascertain their rights and obligations from the provision. [74] If the entry were not entirely removed, the recipient of the living allowance, with the exception of the mobility component, would not be in a position to know that that benefit is not in fact a special non-contributory benefit which, in accordance with Article 10a, can be claimed only at the place of residence.

119. It would be open to the legislature, however, to reinstate the mobility component of disability living allowance separately into the annex. Until that happens, the mobility component — even though it satisfies the substantive conditions for a special non-contributory benefit — may not be considered as such. Article 4(2a)(c) of Regulation No 1408/71 imposes the additional requirement of listing in Annex IIa to the regulation.

120. Admittedly, under the second paragraph of Article 231 EC, the Court may state which of the effects of a regulation which it has declared void are to be maintained. One could conceive of adopting that solution as regards the mobility component since its inclusion in Annex IIa to Regulation No 1408/71 is, in principle, possible. However, in the same way that an entry cannot be partially annulled, nor may it be divided in order for the Court to maintain its effects.

(e) Special benefit characteristics of carer's allowance under United Kingdom law

121. Carer's allowance constitutes a supplement to disability living allowance or attendance allowance. It is granted only when the person reliant on care is in receipt of one of those benefits. As a result of the complementary character of carer's allowance,

74 — See Case C-483/99 *Commission* v *France* [2002] ECR I-4781, paragraph 50; Case C-463/00 *Commission* v *Spain* [2005] ECR I-4581, paragraphs 74 and 75; and Case C-370/05 *Festersen* [2007] ECR I-1129, paragraph 43.

according to the Court's case-law,[75] no reason exists to consider that benefit as differing in nature from that of disability living allowance and attendance allowance. Thus, carer's allowance can likewise be attributed to the branch of social security mentioned in Article 4(1)(a).

122. In turn, neither the grant of the benefit nor its amount depends on financial need. In determining the nature of the benefit, the issue of whether income or capital of the *person providing care* may result in that benefit being capped or withdrawn is irrelevant. Even though carer's allowance is granted to the third-party care provider, it nevertheless constitutes a supplementary benefit for the claimant in receipt of disability living allowance or attendance allowance.[76] On awarding carer's allowance, however, neither the income nor the capital of the latter is taken into account.

123. Accordingly, carer's allowance falls, as a sickness benefit, within the scope of Article 4(1)(a) of Regulation No 1408/71. Therefore, Point (f) of Section Y (United Kingdom) of point 2 of Annex I to Regulation No 647/2005 must be annulled.

V — Costs

124. In accordance with Article 69(2) of the Rules of Procedure, the unsuccessful party is to pay the costs of the proceedings, if the other party has applied for them in its pleadings. Where there are several unsuccessful parties, it is for the Court to decide how the costs are to be shared. The Commission has applied for costs. The Council and the Parliament must each share half of the costs.

125. In accordance with Article 69(4) of the Rules of Procedure, Member States which have intervened in the proceedings are to bear their own costs. Therefore, Finland, Sweden and the United Kingdom must each bear their own costs.

75 — See, most recently, *Gaumain-Cerri and Barth* (cited in footnote 45), paragraphs 20 and 21, and *Molenaar* (cited in footnote 45).

76 — See *Gaumain-Cerri and Barth* (cited in footnote 45), paragraph 21.

VI — Conclusion

126. In conclusion, I propose that the Court should:

(1) annul the provisions of point 2 of Annex I to Regulation (EC) No 647/2005 of the European Parliament and of the Council of 13 April 2005 amending Council Regulations (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 (EEC) No 574/72 laying down the procedure for implementing Regulation (EEC) No 1408/71 relating to Point (b) of Section W (Finland), Point (c) of Section X (Sweden), and Points (d), (e) and (f) of Section Y (United Kingdom);

(2) order the Council of the European Union and the European Parliament each to pay half of the costs of the proceedings, not including the costs of Finland, Sweden and the United Kingdom;

(3) order Finland, Sweden and the United Kingdom to bear their own costs.