REPORT FOR THE HEARING
in Case E-5/06

APPLICATION to the Court pursuant to the second paragraph of Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice in the case between

EFTA Surveillance Authority

and

The Principality of Liechtenstein

seeking a declaration that the Principality of Liechtenstein (hereinafter "the Defendant") has failed to fulfil its obligations pursuant to Articles 19(1) and (2), 25(1) and 28(1) of the Act referred to at point 1 of Annex VI to the EEA Agreement, i.e. Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community (hereinafter "Regulation 1408/71"), as adapted to the EEA Agreement by Protocol 1 thereto.

I Introduction

1. The case concerns the correct classification of the Liechtenstein helplessness allowance (*Hilflosenentschädigung*) within the system of Regulation 1408/71. The EFTA Surveillance Authority (hereinafter "ESA") and the Defendant agree that the benefit at stake is covered by the Regulation but take opposing positions as to which category of benefits the allowance belongs to. Whereas the Defendant holds that the helplessness allowance is a 'special non-contributory benefit' in accordance with Article 4(2a) of the Regulation and in any event a benefit in kind, ESA is of the opinion that the benefit should be regarded as a 'sickness benefit in cash' within the meaning of Article 4(1).

2. Under the rules of Regulation 1408/71, the correct classification of the helplessness allowance will in turn determine whether the Defendant is obliged to grant the benefit to applicants residing in an EEA State other than Liechtenstein, or whether entitlement to the allowance can remain subject to the requirement of residence in Liechtenstein currently applied by the Defendant.

II Legal background

EEA law

3. Article 29 EEA reads:

> *In order to provide freedom of movement for workers and self-employed persons, the Contracting Parties shall, in the field of social security, secure, as provided for in Annex VI, for workers and self-employed persons and their dependants, in particular:*
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> *(a) aggregation, for the purpose of acquiring and retaining the right to benefit and of calculating the amount of benefit, of all periods taken into account under the laws of the several countries;*
>
> *(b) payment of benefits to persons resident in the territories of Contracting Parties.*

4. Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community (hereinafter "Regulation 1408/71") is referred to at point 1 of Annex VI to the EEA Agreement. The Regulation is adapted to the EEA Agreement by way of Protocol 1 thereto and the adaptations contained in Annex VI.

5. Under Title I *General provisions*:

> Article 4 *Matters covered*:
>
> *1. This Regulation shall apply to all legislation concerning the following branches of social security:*
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> *(a) sickness and maternity benefits;*
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> *(b) invalidity benefits, including those intended for the maintenance or improvement of earning capacity;*
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> *(c) old-age benefits;*
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> *(d) survivors' benefits;*
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> *(e) benefits in respect of accidents at work and occupational diseases;*
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> *(f) death grants;*
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> *(g) unemployment benefits;*
>
> *(h) family benefits.*
>
> *2. This Regulation shall apply to all general and special social security schemes, whether contributory or non-contributory, and to schemes concerning the liability of an employer or shipowner in respect of the benefits referred to in paragraph 1.*

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 and medical assistance.

6. Under Title I *General provisions*:

Article 10a *Special non-contributory benefits*, paragraph 1:

1. Notwithstanding the provisions of Article 10 and Title III, persons to whom this Regulation applies shall be granted the special non-contributory cash benefits referred to in Article 4 (2a) exclusively in the territory of the Member State in which they reside, in accordance with the legislation of that State, provided that such benefits are listed in Annex IIa. Such benefits shall be granted by and at the expense of the institution of the place of residence.

7. As referred to at point 1 adaptation (m) of Annex VI to the EEA Agreement, the following has been added to Annex IIa *Special non-contributory benefits* to Regulation 1408/71:

ZB. LIECHTENSTEIN

[…]

(d) Helplessness allowance (Law on supplementary benefits to the old age, survivors' and invalidity insurance of 10 December 1965 as revised on 12 November 1992).

8. Under Title III *Special provisions relating to the various categories of benefits*, Chapter I *Sickness and maternity*:

Section 2 *Employed or self-employed persons and members of their families*:

Article 19 *Residence in a Member State other than the competent State – General rules*:

1. An employed or self-employed person residing in the territory of a Member State other than the competent State, who satisfies the conditions of

the legislation of the competent State for entitlement to benefits […] shall receive in the State in which he is resident:

(a) benefits in kind provided on behalf of the competent institution by the institution of the place of residence in accordance with the provisions of the legislation administered by that institution as though he were insured with it;

(b) cash benefits provided by the competent institution in accordance with the legislation which it administers. […]

2. The provisions of paragraph 1 shall apply by analogy to members of the family who reside in the territory of a Member State other than the competent State in so far as they are not entitled to such benefits under the legislation of the State in whose territory they reside. […]

9. Under Title III *Special provisions relating to the various categories of benefits*, Chapter I *Sickness and maternity*:

Section 3 *Unemployed persons and members of their families*:

Article 25(1):

1. An unemployed person who was formerly employed or self-employed and to whom the provisions of Article 69(1) or Article 71(1)(b)(ii), second sentence apply and who satisfies the conditions laid down in the legislation of the competent State for entitlement to benefits in kind and cash benefits […] shall receive for the period of time referred to in Article 69(1)(c):

(a) benefits in kind which become necessary on medical grounds for this person during his stay in the territory of the Member State where he is seeking employment, taking account of the nature of the benefits and the expected length of the stay. These benefits in kind shall be provided on behalf of the competent institution by the institution of the Member State in which the person is seeking employment, in accordance with the provisions of the legislation which the latter institution administers, as if he were insured with it;

(b) cash benefits provided by the competent institution in accordance with the provisions of the legislation which it administers. […]

10. Under Title III *Special provisions relating to the various categories of benefits*, Chapter I *Sickness and maternity*:

Section 5 *Pensioners and members of their families*:

Article 28 *Pensions payable under the legislation of one or more States, in cases where there is no right to benefits in the country of residence*, paragraph 1:

1. A pensioner who is entitled to a pension under the legislation of one Member State or to pensions under the legislation of two or more Member States and who is not entitled to benefits under the legislation of the Member State in whose territory he resides shall nevertheless receive such benefits for himself and for members of his family, in so far as he would […] be entitled thereto under the legislation of the Member State or of at least one of the Member States competent in respect of pensions if he were resident in the territory of such State. The benefits shall be provided under the following conditions:

(a) benefits in kind shall be provided on behalf of the institution referred to in paragraph 2 by the institution of the place of residence as though the person concerned were a pensioner under the legislation of the State in whose territory he resides and were entitled to such benefits;

(b) cash benefits shall, where appropriate, be provided by the competent institution as determined by the rules of paragraph 2, in accordance with the legislation which it administers.

National law

11. Pursuant to Article 3bis(1) of the Liechtenstein Act of 10 December 1965 on Supplementary Benefits to Old-age, Survivors' and Invalidity Insurance (hereinafter "the Supplementary Benefits Act"):[1]

persons with residence in Liechtenstein are, irrespective of their economic circumstances, entitled to the helplessness allowance (Hilflosenentschädigung), if they are helpless and are not entitled to a helplessness allowance under the law of mandatory accident insurance or a comparable benefit provided by a foreign social insurance.

12. According to Article 3bis(3) of the Supplementary Benefits Act, a person is considered to be helpless if he permanently requires a degree of help from third persons or personal surveillance in order to carry out daily tasks. The Defendant has listed getting up, getting dressed and undressed, nutrition, personal hygiene and social interaction as examples of daily tasks. For persons over the age of 65, "permanently" implies that the state of helplessness has been present without substantial interruption during the previous three months, for persons under this age the relevant period is one year.

13. The helplessness allowance does not supplement any other social security benefit provided by Liechtenstein authorities, meaning that the allowance is awarded irrespective of whether the recipient is entitled to a sickness insurance benefit or a pension on any other basis.

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[1] Translation by ESA.

14. In 2006, the helplessness allowance amounted to between CHF 430 and CHF 860 per month depending on the degree of helplessness.[2]

15. The helplessness allowance is granted without reference to the recipient's income and the size of his property. It is, in other words, not means-tested. Nor is it a condition that the recipient lives in his own home, as also persons residing in special homes for the elderly or the disabled are entitled to the allowance.

16. Where the recipient resides in a special home for the elderly or the disabled, an additional charge, equivalent to the amount paid out in helplessness allowance, is added to the monthly fee paid to the institution.

17. The helplessness allowance is financed from the State budget and is not linked to past contributions.

18. The recipient of a helplessness allowance does not have to be sick in the strict sense of the word, and e.g. an elderly person would qualify for the allowance. Nor is the allowance contingent upon the need for medical care. Rather, health care costs are met according to the provisions of the Sickness Insurance Act of 24 November 1971 (hereinafter "the Sickness Insurance Act").

19. A separate benefit, domiciliary health care (*Leistungen bei häuslicher Pflege*) is provided for under the Sickness Insurance Act up to an amount of CHF 100 per day. According to Article 62(3) of the Sickness Insurance Regulation of 14 March 2000, the amount is reduced if the recipient also draws helplessness allowance. However, an exemption from this curtailment is provided for if the recipient of a helplessness allowance is also entitled to means-tested supplementary benefits or if the helplessness allowance has been awarded solely for the purpose of helping the recipient to maintain social interaction.

III Pre-litigation procedure leading to the Application

20. By letter of 18 November 2003, ESA informed the Liechtenstein Government that, on 10 November 2003, it had received a complaint alleging that the requirement of residence in Liechtenstein for entitlement to helplessness allowance is not in accordance with EEA law.

21. In its reply of 22 December 2003, the Liechtenstein Government stated that the highest Liechtenstein Administrative Court (*Verwaltungsgerichtshof*) had held the helplessness allowance to be a special non-contributory social security benefit that should be granted only to residents in Liechtenstein. Furthermore, the Government argued that the helplessness allowance had been qualified as a

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[2] In its Defence, the Principality of Liechtenstein notes that the amounts awarded per month are currently, as of 1 January 2007, CHF 884, CHF 663 and CHF 442 in cases of helplessness of a high, medium and low degree, respectively.

special non-contributory benefit when the Principality of Liechtenstein acceded to the EEA Agreement.

22. By letter of 2 November 2004, ESA informed the Liechtenstein Government of its preliminary conclusion that the helplessness allowance is a sickness benefit in cash that should be granted also to beneficiaries in other EEA States.

23. In its reply of 3 January 2005, the Liechtenstein Government maintained the views expressed in its previous reply.

24. On 6 April 2005, ESA proceeded to issue a letter of formal notice concluding that, by applying a requirement of residence in Liechtenstein for entitlement to helplessness allowance, the Principality of Liechtenstein is in breach of Articles 19(1) and (2), 25(1) and 28(1) of Regulation 1408/71. The conclusion applied to all employed or self-employed persons who were covered by the social security legislation of Liechtenstein pursuant to Regulation 1408/71, unemployed persons who received unemployment benefit from Liechtenstein while seeking work in another EEA State, and persons who were entitled to draw a Liechtenstein pension, but resided in another EEA State where there is no entitlement to sickness cash benefits, as well as members of these persons' families.

25. In its reply of 17 June 2005, the Liechtenstein Government maintained that the helplessness allowance qualified as a 'special' benefit within the meaning of Article 4(2a) of the Regulation. The Government stressed that there are two systems in place in Liechtenstein which cover the need for domiciliary care. The basic system, on the one hand, of which the helplessness allowance is a part, provides specific protection for the disabled and has a strong emphasis on improving or maintaining quality of life. The sickness insurance system, on the other hand, of which domiciliary health care is a part, has as its aim to improve or maintain the state of health. It was argued that these two benefits should be distinguished, and that only the latter benefit is a sickness insurance benefit in accordance with Article 4(1) of Regulation 1408/71. The helplessness allowance is a "mixed-type benefit", which has characteristics both of social security and social assistance, thereby rightfully belonging in Annex IIa to Regulation 1408/71. Moreover, it was argued that the helplessness allowance differs from the benefits at issue in *Molenaar* and *Jauch*[3], in that those cases concerned contribution-based schemes, the purpose of which was more closely linked to health care than the Liechtenstein benefit. The helplessness allowance bears greater resemblance to the UK systems at issue in *Snares* and *Partridge*[4].

26. Also in the reply, the importance for Liechtenstein of the listing of the helplessness allowance in Annex IIa to Regulation 1408/71 was emphasised.

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[3] Case C-160/96 *Molenaar* [1998] ECR I-843 and Case C-215/99 *Jauch* [2001] ECR I-1901.

[4] Case C-20/96 *Snares* [1997] ECR I-6057 and Case C-297/96 *Partridge* [1998] ECR I-3467.

Furthermore, it was argued that the other Contracting Parties to the EEA Agreement had made an assessment of the benefit against the conditions for listing it in Annex IIa, and that the Principality of Liechtenstein had adapted its scheme in order to fit those conditions. Therefore, the Principality of Liechtenstein could in good faith rely on the consensus and the result reached by the Contracting Parties.

27. Still in the reply, the Liechtenstein Government referred to the political process with regard to inclusion into the EEA Agreement of Regulation 647/2005[5], amending Article 4(2a) and Annex IIa to Regulation 1408/71, and suggested that the outcome of this process be awaited before advancing with the present case.

28. On 22 March 2006, ESA delivered a reasoned opinion, stressing that, irrespective of the basis for listing the helplessness allowance in Annex IIa to Regulation 1408/71, the case law of the Court of Justice of the European Communities (hereinafter "the ECJ") has confirmed that the listing itself does not have constitutive effect. Rather, it is only one of three conditions that have to be fulfilled in order for Article 10a of the Regulation to apply. This interpretation is, according to ESA, equally valid in the EEA.

29. In its reasoned opinion, ESA further maintained that the helplessness allowance should be classified as a social security benefit according to Article 4(1) of Regulation 1408/71 since it is based on a legally defined position, without any individual and discretionary assessment of personal needs. ESA found the Liechtenstein helplessness allowance to be similar to the Austrian and German care allowances, which the ECJ has found to be sickness benefits. On this point, ESA referred *inter alia* to *Molenaar* and *Jauch*[6]. As for *Snares* and *Partridge*[7], ESA stated that these judgments were of lesser relevance, as later case law has confirmed that the interpretation in those British cases no longer represent EEA law as it stands today.

30. Also in its reasoned opinion, ESA alleged that the helplessness allowance does not, in any event, constitute a 'special' benefit within the meaning of Article 4(2a) of Regulation 1408/71. In this regard, ESA pointed out, in particular, that the helplessness allowance is not granted on a precondition of financial need. ESA maintained that the helplessness allowance should be classified as an exportable benefit in cash and not as non-exportable benefit in kind.

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5 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.

6 Case C-160/96 *Molenaar* and Case C-215/99 *Jauch*.

7 Case C-20/96 *Snares* and Case C-297/96 *Partridge*.

31. Lastly in its reasoned opinion, ESA addressed the issue of including Regulation 647/2005 into the EEA Agreement, but did not see the need for awaiting such an inclusion. According to ESA, what mattered was the incompatibility between Liechtenstein law and Regulation 1408/71 as it stood at the time the reasoned opinion was delivered. In addition, it was argued that Regulation 647/2005 would not alter the conclusion in any event, as that Regulation merely codifies case law.

32. In its reply of 30 June 2006, the Liechtenstein Government maintained the position set out in its reply to the letter of formal notice. As an alternative argument, it was put forward that, should the helplessness allowance be a sickness benefit, the allowance, in any event, constitutes a benefit in kind and not a cash benefit. In support of this, reference was made to the situation where the recipient of the helplessness allowance is institutionalised. The recipient is then obliged to "forward" the allowance to the institution. This allegedly shows that the benefit corresponds to the exact costs incurred in providing care to the recipient. The fact that recipients of helplessness allowance who live at home are not asked to provide evidence of how the allowance is spent was explained by the need for Liechtenstein authorities to show a certain level of respect and trust towards the recipient and carer.

33. On 14 November 2006, ESA lodged the present Application at the Court.

IV Forms of order sought by the parties

34. The EFTA Surveillance Authority requests that the Court declare that:

*(i) By applying a requirement of residence for entitlement to the helplessness allowance, the Principality of Liechtenstein has failed to fulfil its obligations pursuant to Articles 19(1) and (2), 25(1) and 28(1) of the Act referred to at point 1 of Annex VI to the EEA Agreement (*Council Regulation EEC No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community*), as adapted to the EEA Agreement by Protocol 1 thereto;*

(ii) The Principality of Liechtenstein be ordered to bear the costs.

35. The Principality of Liechtenstein requests that the Court:

(i) Dismisses the Application;

(ii) Orders the EFTA Surveillance Authority to pay the costs of the Defendant.

V Written procedure before the Court

36. Written arguments have been received from the parties:

- the EFTA Surveillance Authority, represented by Niels Fenger, Director, and Arne Torsten Andersen, Senior Officer, Department of Legal & Executive Affairs, acting as Agents;
- the Principality of Liechtenstein, represented by Dr. Andrea Entner-Koch, Director, EEA Coordination Unit, acting as Agent.

37. Pursuant to Article 20 of the Statute of the Court and Article 97 of the Rules of Procedure, written observations have been received from:

- the United Kingdom, represented by Elizabeth O'Neill, Treasury Solicitors, acting as Agent, and Christopher Vajda QC;
- the Commission of the European Communities, represented by Viktor Kreuschitz, its Legal Adviser, and Nicola Yerrell, a member of its Legal Service, acting as Agents.

VI Summary of the pleas in law and arguments

The EFTA Surveillance Authority

Summary of ECJ case law on the delimitation of Article 4(1) and (2a)

38. To begin with, ESA summarises ECJ case law concerning the delimitation between benefits falling under Article 4(1) and (2a), respectively. ESA contrasts early case law regarding Article 4(2a) and Annex IIa, which seemed to be based on the listing of a benefit in Annex IIa having constitutive effect,[8] with later case law where the ECJ has changed this approach and held that Annex IIa has no such constitutive effect.[9] The ECJ assesses, independently of a listing in the Annex, whether the benefit in question fulfils the conditions in Article 4(2a) or rather should be classified as a benefit under either Article 4(1) or 4(4). The ECJ has held that a benefit will only fall under Article 4(2a) if it does not constitute a benefit falling within the scope of Article 4(1).[10]

39. ESA details how the ECJ has found German and Austrian care allowances not to fall under Article 4(2a) but rather under Article 4(1)(a) as sickness benefits

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8 ESA refers to Cases C-20/96 *Snares*, C-297/96 *Partridge*, C-90/97 *Swaddling* [1999] ECR I-1075 and C-132/96 *Stinco and Panfilo* [1998] ECR I-5225.

9 ESA refers to Cases C-215/99 *Jauch*, at paragraphs 16–22; C-43/99 *Leclere and Deaconescu* [2001] ECR I-4265, at paragraph 36; C-160/02 *Skalka* [2004] ECR I-5613, at paragraphs 19–21; C-154/05 *Kersbergen-Lap* [2006] ECR I-6249; and, concerning Annex II to Regulation 1408/71, C-286/03 *Hosse* [2006] ECR I-1771, at paragraph 22 [*et seq*].

10 ESA refers to Case C-43/99 *Leclere and Deaconescu*, at paragraph 35 and Case C-286/03 *Hosse*, at paragraph 22 [36].

in cash.[11] Later, ESA maintains that the Liechtenstein helplessness allowance is the same kind of benefit as those care allowances.

40. As examples of other kinds of benefits, ESA refers to the ECJ having classified certain benefits – those which are intended to guarantee a minimum income and linked to the particular socio-economic situation in the Member State at issue – as falling within the ambit of Article 4(2a).[12]

41. On a more general note, ESA remarks that the ECJ has held that the provisions in Articles 4(2a) and 10a must be interpreted strictly, as they derogate from the general principle of the exportability of social security benefits.[13] In the same vein, the ECJ has underlined that the provisions of Regulation 1408/71 must be interpreted in light of the objective of Article 42 EC, which is to contribute to the establishment of the greatest possible freedom of movement for migrant workers. The aims of Articles 39–42 EC 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 to them by the legislation of one Member State.[14]

On the amendments to Regulation 1408/71 through Regulation 647/2005

42. ESA comments on the issue of Regulation 647/2005 chiefly as follows. On 31 July 2003, the Commission of the European Communities (hereinafter "the Commission") proposed to amend Regulation 1408/71.[15] First, the proposal intended to clarify the constitutive elements of a special non-contributory cash benefit by amending Article 4(2a). In this regard, the Commission intended the revised Regulation to reflect, in particular, the finding in *Jauch*[16] that being listed in Annex IIa was no longer sufficient for a benefit to fulfil the conditions in Article 4(2a). Second, the proposal intended to redraw the list of benefits in Annex IIa after a renewed assessment of whether these benefits fulfilled the conditions set out in case law for qualifying as special non-contributory benefits. That led the Commission to propose exclusions from the Annex, *inter alia* benefits intended to improve the state of health and quality of life of persons reliant on care, which in *Jauch* had been found to be sickness benefits in cash.

43. Broadly agreeing with this double purpose, the European Parliament and the Council issued Regulation 647/2005 amending Regulation 1408/71. According to

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11 ESA refers to Case C-160/96 *Molenaar*; Joined Cases C-502/01 and C-31/02 *Gaumain-Cerri* and *Barth* [2004] ECR I-6483, including the Opinion of AG Tizzano; Case C-215/99 *Jauch*; and Case C-286/03 *Hosse*.

12 ESA refers to Case C-160/02 *Skalka*, at paragraphs 22–26 and Case C-154/05 *Kersbergen-Lap*.

13 ESA refers to Cases C-215/99 *Jauch*, at paragraph 21; C-132/96 *Stinco and Panfilo*, at paragraph 16; and C-160/02 *Skalka*, at paragraph 19.

14 ESA refers to Case C-286/03 *Hosse*, at paragraphs 24–25.

15 ESA refers to COM(2003) 468 final.

16 Case C-215/99 *Jauch*.

its amended wording, Article 4(2a) defines special non-contributory cash benefits as benefits which "guarantee the persons concerned a minimum subsistence income having regard to the economic and social situation" in the State concerned. It was also decided to withdraw from the Annex several of the benefits previously listed therein. However, during the Council deliberations, Finland, Sweden and the United Kingdom blocked the exclusion of five benefits which the Commission had proposed be removed from the Annex, amongst them the benefits in question in *Snares*, *Partridge* and *Swaddling*[17].

44. In light of this, the Commission has initiated two parallel proceedings. First, on 26 July 2005, an action for annulment was lodged against the European Parliament and the Council.[18] ESA is of the understanding that the Commission's pleas are based on the view that certain of the benefits listed on the revised list in Annex IIa do not belong there, as they should not be considered 'special' within the meaning of Article 4(2a). Second, on 28 October 2004, the Commission issued letters of formal notice to Finland, Sweden and the United Kingdom concluding that residence requirements connected to the five benefits mentioned above violate Articles 39 and 42 EC as well as Articles 19, 28 and 29 of Regulation 1408/71.

45. Regulation 647/2005 has not yet been incorporated into the EEA Agreement. One of the reasons for this is disagreement as to whether the Liechtenstein helplessness allowance should still be listed in Annex IIa.

Application of Article 4(1) rather than 4(2a) in the present case

46. Before considering the conditions laid down in Article 4(1) and 4(2a) respectively, ESA takes issue with the specific arguments advanced in the course of the pre-litigation procedure as to why the Defendant must be allowed to rely on the classification of the Liechtenstein helplessness allowance as a special non-contributory benefit, as expressed through the listing of that benefit in Annex IIa to Regulation 1408/71. ESA identifies two main arguments. Firstly, that the other Contracting Parties have examined and verified that the helplessness allowance should indeed be classified as a benefit covered by Article 4(2a) and that the Defendant should be able to rely in good faith on that examination. Secondly, that the Liechtenstein situation is characterised by the specific circumstance that the national rules with regard to the financing of the helplessness allowance were changed precisely in order to make it a benefit that could be placed in Annex IIa. In ESA's opinion, however, these circumstances are in no way particular to Liechtenstein and cannot justify a departure from the case law of the ECJ, according to which the listing in Annex IIa has no constitutive effect.

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17 Case C-20/96 *Snares*, Case C-297/96 *Partridge* and Case C-90/97 *Swaddling*.

18 Case C-299/05 *Commission* v *Parliament and Council*, pending. The Opinion of AG Kokott in the Case was delivered on 3 May 2007.

47. ESA contends that the relationship between Annex IIa and Articles 4(2a) and 10a of Regulation 1408/71 is the same in EEA Council Decision 1/95 and in the EC legal order. In both situations, the relationship between the inclusion of the benefit in Annex IIa and the provisions of the Regulation itself is purely one of interpretation between different provisions in the same legal instrument.

48. While, according to ESA, the Defendant argues that the inclusion of the Liechtenstein benefit should be treated in a manner different from the inclusion of benefits from other Contracting Parties, no statements by the Contracting Parties supporting that view have been adduced. Nor was any specific adaptation stipulating that the case law of the ECJ should not apply to Liechtenstein negotiated. Furthermore, ESA finds no reason to believe that the Defendant is the only State having attached importance to the question as to whether one of its benefits was to be exportable or not. Both under EC law and in the EEA, a given benefit can only be included in the Annex if the other Member States/Contracting Parties agree thereto, and both in the EU and in the EEA, one must expect that the other States studied the benefit in question before giving that consent. Yet, this has not barred the ECJ from concluding that Annex IIa has no constitutive effect. In this respect, the ECJ has never ventured into an assessment as to how important it was for the State in question that the benefit was non-exportable. Nor has the ECJ looked into whether the benefit in question had been modified in order to fulfil the conditions in Article 4(2a), as that provision might have been interpreted by the States on the basis of the case law existing at the time when the benefit was inserted into the Annex. On the contrary, the ECJ has focused exclusively on whether the objective elements of the benefit fulfil the conditions in Article 4(2a).

49. Turning to the application of Article 4(1) in the present case, ESA submits that according to the ECJ, a benefit may be regarded as a social security benefit within the meaning of Article 4(1) in so far as it is: first, granted without any individual or discretionary assessment of personal needs to recipients on the basis of a legally defined position, and second, provided that it concerns one of the risks expressly listed in Article 4(1) of Regulation 1408/71.[19] Moreover, the ECJ has found that benefits to persons reliant on care "must be regarded as 'sickness benefits' within the meaning of Article 4(1)(a) of Regulation No 1408/71".[20]

50. ESA submits that the helplessness allowance is granted on the basis of legally defined criteria which, if met, confer entitlement to the benefit. The competent authority has no power to take account of other personal circumstances and thus no discretion to assess personal need on the basis of criteria other than those defined in the law. Hence, the parties agree that the first condition for Article 4(1) to be applied is fulfilled.

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19 ESA refers to Case 249/83 *Hoeckx* [1985] ECR 973, at paragraphs 12–14, Case 122/84 *Scrivner* [1985] 1027, at paragraphs 19–21 and Case C-78/91 *Hughes* [1992] ECR I-4839, at paragraph 15.

20 ESA refers to Case C-286/03 *Hosse*, at paragraph 38.

51. As to the second condition for Article 4(1) to be applied, ESA acknowledges that there is, in medical terms, a difference between sickness (which is expressly listed in Article 4(1)) and reliance on care, as argued by the Defendant. However, to ESA this difference is immaterial for the classification of the helplessness allowance under Regulation 1408/71. According to ESA, the ECJ has held that the notion of sickness benefits has to be interpreted widely and that it covers care benefits.[21]

52. ESA further addresses the Defendant's argument that the helplessness allowance bears closer resemblance to the British benefits at stake in *Snares* and *Partridge*[22] than to the Austrian and German care allowances assessed in *Jauch* and *Molenaar*,[23] as the two latter cases dealt with benefits which were, first, contribution based, and second, allegedly had a "much closer link to health care" than the helplessness allowance.

53. As regards the first difference, i.e. whether a benefit is contributory or non-contributory, ESA maintains that this is not decisive for the assessment of whether it falls under Article 4(1) or Article 4(2a). It follows from Article 4(2) that also non-contributory benefits can fall under Article 4(1). Just as the Liechtenstein helplessness allowance, the Austrian benefit in *Hosse*[24] was financed by the general State budget and non-contributory, but still it fell under Article 4(1). Moreover, *Jauch* is not based on the benefit in question being viewed as a contributory benefit, as this aspect was only discussed by the ECJ as an *obiter dictum* after it had concluded that the character of the benefit made it a sickness benefit; and as the ECJ explicitly stated that this conclusion had to be made independently of whether the benefit should be regarded as contributory or non-contributory.[25]

54. As regards the second difference, i.e. the link between the allowance and health care, ESA maintains that the helplessness allowance constitutes the same kind of benefit as the care allowances at issue in *Molenaar*, *Jauch*, *Gaumain-Cerri* and *Hosse*[26]. In particular, the care benefit at stake in *Hosse* is said to be almost identical to the Liechtenstein helplessness allowance when comparing the features of the benefits which have been important for the ECJ when determining the status of care allowances. Firstly, both benefits are intended to improve the state of health and quality of life of persons reliant on care. Secondly, both

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21 ESA refers to the Opinion of AG Kokott in Case C-286/03 *Hosse*, at point 53.

22 Cases C-20/96 *Snares* and Case C-297/96 *Partridge*.

23 Case C-215/99 *Jauch* and Case C-160/96 *Molenaar*.

24 Case C-286/03 *Hosse*.

25 ESA refers to Case C-215/99 *Jauch*, at paragraph 28; and, further, to the Opinion of AG Kokott in Case C-160/02 *Skalka*, at point 32; the Opinion of AG Kokott in Case C-286/03 *Hosse*, at points 47–50; and the Opinion of AG Alber in Case C-215/99 *Jauch*, at point 83.

26 Case C-160/96 *Molenaar*, Case C-215/99 *Jauch*, Joined Cases C-502/01 and C-31/02 *Gaumain-Cerri* and *Barth* and Case C-286/03 *Hosse*.

benefits consist of a fixed amount calculated with respect to the degree of reliance on care and irrespective of the financial situation of the recipient. Thirdly, both benefits are awarded to recipients who are reliant on care irrespective of whether the recipients receive any sickness insurance benefits or any pension awarded on a basis other than sickness insurance. Compared with *Molenaar* and *Jauch*, the Liechtenstein helplessness allowance is said to be identical to the benefits at issue in those cases with respect to the first two of the three elements just listed.

55. Moreover, ESA contends, any similarities between the helplessness allowance and the British allowances described in *Snares* and *Partridge*[27] cannot lead to another classification, as these judgments were based on the now out-dated view that the listing of a benefit in Annex IIa in itself made the benefit subject to Article 4(2a).[28]

56. Lastly, ESA also addresses the Liechtenstein argument that the distinction between the helplessness allowance and sickness benefits covered by Article 4(1) of Regulation 1408/71 is supported by the fact that the domiciliary care allowance granted under the Sickness Insurance Act is, in most cases, reduced if the recipient also draws helplessness allowance. This interrelation between the two benefits leads ESA to the opposite conclusion. In ESA's opinion, the curtailment underpins that the helplessness allowance is designed to alleviate similar needs as that for domiciliary care, which is a sickness benefit covered by Article 4(1) of Regulation 1408/71.

57. Underlining that a benefit falling under Article 4(1) cannot constitute a benefit within the meaning of Article 4(2a), ESA nevertheless, for the sake of completeness, specifically addresses two of the conditions for Article 4(2a)(a) to apply, namely that the benefit be "special" and "supplementary, substitute or ancillary" to a benefit listed in Article 4(1).

58. ESA does not agree with the Defendant's argument that the helplessness allowance is a 'mixed-type benefit' having characteristics of both social security and social assistance. ESA cannot see that the allowance displays the characteristics of social assistance which hallmark the benefits which the ECJ has found to be of a 'mixed' and consequently 'special' nature. The helplessness allowance is not intended to fight poverty by providing a minimum overall income to a group of recipients who otherwise would have no or insufficient means of subsistence.[29] Rather, the intention is to "improve or maintain the quality of life by providing the helpless person with surveillance and help to carry out daily tasks". Moreover, the risk of reliance on care has no specific

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27 Case C-20/96 *Snares* and Case C-297/96 *Partridge*.

28 ESA refers to the Opinion of AG Kokott in Case C-286/03 *Hosse*, at point 53; and, further, to Case C-215/99 *Jauch*, at paragraph 17.

29 ESA refers, *a contrario*, to Case C-154/05 *Kersbergen-Lap*, at paragraph 32.

connection with economic or social conditions prevailing in Liechtenstein and the allowance is independent of the social context in which it is granted.

59. Nor does the helplessness allowance, according to ESA, qualify as a benefit which provides supplementary, substitute or ancillary cover as regards the traditional social security benefits listed in Article 4(1) of the Regulation. Entitlement to the benefit is not connected to any other security benefit. On the contrary, domiciliary care allowance under the sickness insurance scheme is, in most cases, reduced where the recipient also draws helplessness allowance. ESA finds that this underlines the autonomous status of the helplessness allowance.

60. As to Article 4(2a)(b), ESA points out that a benefit must not only be "special" but be intended "solely" to provide "specific" protection for disabled persons, in order for this provision to apply. However, ESA submits, the helplessness allowance is a general benefit granted to all persons in need of care. Hence, although the allowance is surely of particular advantage to many disabled persons, it is not limited to that group. This is so, as some beneficiaries, in particular older people, cannot necessarily be considered as disabled persons.[30] Should the helplessness allowance nevertheless be considered as a benefit for the disabled, ESA submits that, in any case, the allowance does not fulfil the condition of being "special". Reference is made to the arguments set out above.

Sickness benefit in cash rather than benefit in kind – exportability

61. Admittedly, the ECJ has held that the term 'benefits in kind' does not exclude the possibility that such benefits may comprise payments made by the debtor institution, in particular in the form of direct payments or the reimbursement of expenses.[31] However, the ECJ has also held that a given benefit cannot be classified as a benefit in kind if it takes the form of financial aid which enables the standard of living of persons requiring care to be improved as a whole, in other words to compensate for the additional expense brought about by their condition. ESA contends that this will e.g. be the case if: (i) the benefit is periodical; (ii) the benefit is not subject either to certain expenditure, such as care expenditure, having already been incurred, or *a fortiori* to the production of receipts for the expenditure incurred; (iii) the allowance is fixed and independent of the costs actually incurred by the recipient in meeting his daily requirements; (iv) recipients are to a large extent unfettered in their use of the sums thus allocated to them, e.g. the allowance may be used by the recipients to remunerate a member of their family or entourage who is assisting them on a voluntary basis. This is so, ESA contends, even if the benefit in question is designed to cover

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30 ESA refers to the Opinion of AG Kokott in Case C-286/03 *Hosse*, at point 79.

31 ESA refers to Case 61/65 *Vaassen* v *Beambtenfonds Mijnbedrijf* [1966] ECR English special edition 261, at page 278 and Case C-160/96 *Molenaar*, at paragraph 31.

certain costs entailed by reliance on care rather than to compensate for loss of earnings on the part of the recipient.[32]

62. The Liechtenstein helplessness allowance, ESA submits, has all the above-mentioned characteristics, thus precluding it from being a benefit in kind.

63. The fact that the rate of the payment corresponds to the extra amount an institutionalised recipient of the allowance is charged by a Liechtenstein institution does not, according to ESA, constitute proof that the amount paid out is cost-based. It merely highlights the principle that institutionalised recipients of the helplessness allowance should not be allowed to keep the benefit for themselves as their care assistance is provided by the institution.

64. In conclusion, ESA submits that the helplessness allowance must be regarded as a sickness benefit in cash within the meaning of Article 4(1) of Regulation 1408/71. According to Article 19(1)(b) it follows that persons employed or self-employed in Liechtenstein but residing outwith that State shall receive the helplessness allowance. Article 25(1)(b) stipulates that the same be the case for unemployed persons residing outside Liechtenstein that were formerly employed or self-employed in that State, provided they fulfil the other conditions in Regulation 1408/71 for being subject to Liechtenstein social security law. As for pensioners receiving a pension from Liechtenstein without residing in that State, the same principle follows from Article 28(1)(b) of the Regulation. Hence, the entitlement to the helplessness allowance may not, as regards the circle of persons covered by these provisions, be made subject to the condition that the person be resident in the territory of Liechtenstein.

The Principality of Liechtenstein

Introduction and outline

65. To the Defendant, the main question in the case at hand is whether the Liechtenstein helplessness allowance constitutes a sickness benefit according to Article 4(1) or a special non-contributory benefit according to Article 4(2a) of Regulation 1408/71. The delimitation is of importance because under Regulation 1408/71 sickness benefits must, in principle, be paid in whichever EEA State the beneficiary resides while special non-contributory benefits are payable only in the EEA State which provides them, and cannot be exported by the beneficiary to another EEA State (see Article 10a of Regulation 1408/71). Furthermore, with regard to the exportability of sickness benefits, two categories have to be distinguished: sickness benefits in cash and sickness benefits in kind. Under Regulation 1408/71, the general rule is that sickness benefits in cash are always paid according to the legislation of the competent State regardless in which EEA

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[32] ESA refers to Case C-160/96 *Molenaar*, at paragraphs 34–35; Joined Cases C-502/01 and C-31/02 *Gaumain-Cerri* and *Barth*, at paragraphs 26–27; Case C-286/03 *Hosse*, at paragraph 48; Case C-215/99 *Jauch*, at paragraph 35; and Case C-466/04 *Herrera* [2006] ECR I-5341, at paragraphs 32–33.

State the beneficiary resides, while sickness benefits in kind are provided according to the legislation of the State of residence at the expense of the competent State (see Articles 19(1), 25(1) and 28(1) of Regulation 1408/71). This means that a sickness benefit in kind in fact cannot be exported to another EEA State.

66. Maintaining that the helplessness allowance is not to be exported to persons residing in other EEA States, the Defendant argues that the circumstances of the entry of the allowance into Annex IIa of Regulation 1408/71 are decisive as to the benefit not having to be exported. Alternatively, it is argued that the allowance is a special non-contributory benefit according to Article 4(2a) of the Regulation. Should the Court disagree and hold the helplessness allowance to be a sickness benefit, it is argued in the alternative that the allowance is a benefit in kind rather than a benefit in cash.

On whether it is necessary to deal with the present Application

67. In its Defence, the Defendant notes that in December 2006, Liechtenstein authorities received information that by decision of 6 February 2006, the complainant's pension fund in his EEA State of residence had retroactively recognised his right to a pension there, with effect as of 1 October 2003. The complainant therefore was not only entitled to draw a pension under Liechtenstein legislation but also under the legislation of the EEA State where he resided. In such a situation, Article 27 of Regulation 1408/71 determines that the pensioner shall receive the benefits in question in the country of residence. Against this background, the Defendant points out that irrespective of the outcome of the present Application, the complainant's request cannot be satisfied by the Liechtenstein authorities, as under the rules of Regulation 1408/71 the Defendant was not the competent State for awarding the benefit in question. Therefore, it is contended, the case should not have been pursued further against the Defendant. It is added that it is up to the Court to decide whether it deems it necessary to deal with the Application or not.

On the amendments to Regulation 1408/71 through Regulation 647/2005

68. The Defendant submits that as a consequence of the judgments of the ECJ in 2001 concerning the classification of special non-contributory cash benefits, Article 4(2a) and Annex IIa of Regulation 1408/71 have been modified by Regulation 647/2005.[33] The Regulation is yet to be incorporated into the EEA Agreement. Although the incorporation process has started, a formal position has not yet been taken by the EEA EFTA States. ESA's finding – that one of the reasons for this is disagreement on whether the Liechtenstein helplessness allowance should still be listed in Annex IIa – is, however, not correct. Although there have been informal talks on an expert level, until now no negotiations have taken place on a formal level between Liechtenstein and the Commission on the

[33] The Defendant refers to Cases C-215/99 *Jauch* and C-43/99 *Leclere and Deaconescu*.

classification of the helplessness allowance. Therefore, the Defendant has argued that the legal steps taken by ESA should not prejudge the outcome of these rather political negotiations. In any event, Regulation 647/2005 is not yet part of the EEA Agreement, and therefore cannot be applied in order to qualify the nature of the helplessness allowance.

The Liechtenstein entry into Annex IIa of Regulation 1408/71

69. The Defendant acknowledges the dynamic character of the EEA Agreement as well as the principle of homogeneity in the EEA. However, it is contended that the entry of the Liechtenstein helplessness allowance into Annex IIa was a matter of great concern when the Principality of Liechtenstein negotiated accession to the EEA Agreement. At that time, the entry into Annex IIa was considered as having constitutive effect, meaning that benefits listed therein were recognised as being non-exportable. According to the Defendant, this can be derived from the fact that until 2001 the ECJ did not question whether the listing of a benefit in Annex IIa was compatible with Community law.[34] In view of the Liechtenstein accession to the EEA, the modalities of financing the helplessness allowance were changed in order to meet the criteria for an entry into Annex IIa. The helplessness allowance was taken out of the contribution-based system and entered into the tax-financed system. On the basis of these changes, the Contracting Parties agreed by EEA Council Decision 1/95[35] to enter the helplessness allowance as a non-exportable benefit into Annex IIa to Regulation 1408/71.

70. According to the Defendant, the non-exportability of the helplessness allowance was a condition *sine qua non* when acceding to the EEA. The entry in Annex IIa was the result of the accession negotiations and has thus to be considered as a consent amongst the Contracting Parties that the Liechtenstein helplessness allowance does not have to be exported to residents in other EEA States. The fact that the Liechtenstein entry into Annex IIa formed part of EEA Council Decision 1/95 is vital, as this Decision follows the rules of public international law. Hence, the Defendant submits, the Decision is to be interpreted in accordance with Article 26 of the Vienna Convention on the Law of Treaties so that every treaty in force is binding upon the parties to it and must be performed by them in good faith in the sense of *pacta sunt servanda*. When applying a residence requirement, Liechtenstein is thus relying in good faith on this Agreement.

71. It is also noted that in order to vitiate the argument that the Liechtenstein entry into Annex IIa has constitutive effect, ESA refers to judgments of the ECJ which were rendered after the date of signature of the EEA Agreement.

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[34] The Defendant refers to Case C-20/96 *Snares*, at paragraph 32, Case C-297/96 *Partridge*, at paragraph 33 and Case C-90/97 *Swaddling*, at paragraph 24.

[35] Decision of the EEA Council No 1/95 of 10 March 1995 on the entry into force of the Agreement on the European Economic Area for the Principality of Liechtenstein.

According to the Defendant, it goes without saying that according to Article 6 EEA such judgments are not binding in EEA law (although pursuant to Article 3(2) SCA "due account" has to be paid to relevant developments in the jurisprudence of the ECJ after the date of signature of the EEA Agreement).

Application of Article 4(2a)(b) of Regulation 1408/71

72. The Defendant and ESA concur that the helplessness allowance qualifies as a non-contributory benefit, as its financing derives solely from compulsory taxation.

73. As opposed to ESA, however, the Defendant contends that the helplessness allowance is a special benefit intended as specific protection for the disabled within the meaning of Article 4(2a)(b) of Regulation 1408/71. The allowance must be regarded as a system which provides specific protection for the disabled, who are unfortunate enough not to be able to accomplish daily tasks (such as getting dressed etc.) on their own. In this context, it is also noted that one can be disabled without receiving an invalidity pension. A person drawing old age pension and thus not being entitled to an invalidity pension can be handicapped just the same as a person under the legal retirement age.

74. With regard to the criteria of the "special" nature of the benefit, the Defendant admits that the helplessness allowance used to contain stronger elements of social assistance in the past. Formerly, it was a means-tested benefit, but this requirement was stricken in 1969 after it had become clear that costs which have to be met by a helpless person justified this. The Defendant notes, however, that the "special" nature of a benefit does not require a means test when it is obvious that the majority of beneficiaries would not have sufficient means of subsistence without the benefit.[36] The ECJ has also accepted in the past that the grant of benefits closely linked to the social environment may be subject to a condition of residence in the State of the competent institution. The award of helplessness allowance is not conditional upon the completion of periods of insurance, but depends only on the degree of helplessness. Thus, helplessness allowance and social assistance are linked.

75. The Defendant further submits that the essential criterion for a "sickness benefit", on the other hand, is the need of a sick person for medical care. However, in Liechtenstein this is provided under the sickness insurance system, while the helplessness allowance is received regardless of any sickness and regardless of any need for medical care. Benefits under the sickness insurance system are considered benefits within the meaning of Article 4(1) of Regulation 1408/71, and thus fall under the normal co-ordination rules. ESA's interpretation would entail that e.g. the service of a child minder looking after young infants (and their need of help when getting dressed and fed etc.) would have to be regarded as medical care.

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[36] The Defendant refers to Case C-154/05 *Kersbergen-Lap*.

76. It is admitted that there is a certain link between the two systems. The amount of the domiciliary care benefits awarded by the Sickness Insurance can be reduced if the recipient also draws helplessness allowance. The Defendant notes, however, that domiciliary care benefits do not have to be reduced if the recipient of a helplessness allowance also draws means-tested supplementary benefits or if the helplessness allowance has been awarded solely for the purpose of helping the recipient maintain social intercourse. This illustrates the "special" nature of the helplessness allowance as a "mixed" benefit between social security and social assistance.

77. The Defendant stresses that the helplessness allowance differs from the German and Austrian care allowances at issue in *Molenaar* and *Jauch*[37]. Those benefits were contribution-based and had a purpose more closely linked to health care. The Liechtenstein system is not comparable to this.

78. Furthermore, the Defendant contends that *Snares* and *Partridge,*[38] concerning the British attendance allowance and the British disability living allowance, bear a greater resemblance to the questions posed regarding the Liechtenstein helplessness allowance. It is recognised that in these cases the ECJ did not examine whether the listing of the benefits in question was compatible with Community law. However, these British benefits were not withdrawn from the list of non-exportable benefits when Annex IIa to Regulation 1408/71 was modified by Regulation 647/2005. As a consequence, the Commission has opened infringement proceedings against the United Kingdom, but as long as that case has not been decided by the ECJ, it cannot be assumed that the said benefits are not correctly listed in Annex IIa.

A benefit in kind rather than in cash

79. The Defendant draws attention to the fact that the helplessness allowance is not only granted to persons living in their own home but also to persons residing in special homes for the elderly or the disabled. If a person resides in such a home, a certain daily or monthly fee has to be paid. In case of the recipient of a helplessness allowance, an additional charge is added to the normal fee. The amount of this extra charge is the exact equivalent to the amount granted as helplessness allowance. In this instance, the helplessness allowance is clearly a benefit in kind, since it covers the exact costs met by the [elderly or] handicapped person.

80. The Defendant considers it important that elderly and handicapped persons should be enabled to remain in familiar surroundings (preferably their own home) and be looked after by persons whom they are close to (normally family members). Therefore, it is found to be only just and fair when the same charge that a special home can put on its bill is awarded as a benefit to those who stay at

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37 Case C-160/96 *Molenaar* and Case C-215/99 *Jauch*.

38 Case C-20/96 *Snares* and Case C-297/96 *Partridge*.

home with their family. The amounts of the helplessness allowance are small and cover only basically or partially the burden encountered by the carer or the carers. Of course, in a situation like this, the carer (often a family member) is not asked to provide the administration with a bill for his or her services. The administration has to show a certain level of respect and trust towards the [elderly or] handicapped person and the carer, and leave it to the discretion of the helpless person to use the benefit awarded in the way it was intended, i.e. to reward or to compensate the carer or the carers for their help.

The United Kingdom

Stay of the present proceedings pending judgment from the ECJ

81. The issue of whether the Liechtenstein helplessness allowance qualifies as a "special non-contributory benefit" under Regulation 1408/71 is similar to the issue in a case pending before the ECJ.[39] According to the United Kingdom, the Commission considers that certain Finnish, Swedish and UK benefits are not special non-contributory benefits under Regulation 1408/71, and thus improperly listed in Annex IIa as amended by Regulation 647/2005. Hence, the Commission has brought an action for annulment. The relevant UK benefits are disability living allowance, attendance allowance and carer's allowance. The United Kingdom has intervened in the said case before the ECJ.

82. In these circumstances, the United Kingdom submits that it would be appropriate to stay the present proceedings pursuant to Article 79 ROP, pending judgment from the ECJ. A stay would enable full account to be paid to the principles set out in Article 3(2) SCA. The United Kingdom also notes that the present proceedings were initiated following a complaint. As the complainant, unfortunately, is now deceased, the interests of justice in the present case would not appear to outweigh the wider interests of uniformity of jurisprudence of the EFTA Court and the ECJ that would be advanced by a stay in the proceedings.

Outline of the UK submissions on the substance

83. The submissions of the United Kingdom as to the substance of the present case can be grouped under four heads: (i) it is not fatal that a benefit has any of the characteristics of social security for it to be a hybrid ("mixed") or special benefit; (ii) the judgments in *Snares* and *Partridge*[40] did consider the nature of the benefits in light of the criteria for hybrid benefits set out in the case law; (iii) for a benefit to have the characteristics of social assistance, it does not have to be based on financial need; and (iv) not all care benefits are to be categorised as sickness benefits falling within Article 4(1) of Regulation 1408/71.

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39 The United Kingdom refers to Case C-299/05 *Commission* v *Parliament and Council*, pending. The Opinion of AG Kokott in the case was delivered on 3 May 2007.

40 Case C-20/96 *Snares* and Case C-297/96 *Partridge*.

Hybrid or special benefits and characteristics of social security

84. The United Kingdom sets out that Regulation 1408/71 originally applied to a number of defined social security benefits, including sickness and invalidity benefits. The Regulation did not apply to social assistance benefits. However, it soon became apparent that there were a number of benefits which had features of both social security and social assistance. These became known as "hybrid" or mixed benefits.[41]

85. Benefits which the ECJ had found to be such mixed or hybrid benefits under Regulation 1408/71 in its original form included, according to the United Kingdom, guaranteed income for old persons in Belgium and France, a social benefit accorded under Dutch law to certain unemployed persons and disabled persons' allowances provided for by Belgian, French and UK legislation.[42] The question then arose as to what extent, if at all, such hybrid benefits should fall within the regime set up by Regulation 1408/71. The question was resolved by Regulation 1247/92[43] which by way of amendment brought hybrid benefits, called special non-contributory benefits, within Regulation 1408/71, but under a special regime. This was in order to mitigate the application of rules contained in Regulation 1408/71 that had not been designed with such benefits in mind. One facet of the special regime was Article 10a, which provided a limited exception to the general rule that benefits falling under Regulation 1408/71 are exportable.

86. The United Kingdom points out that in making these changes, the legislator had regard to the existing case law on hybrid benefits.[44] It is apparent from recitals 3 and 4 of the preamble to Regulation 1247/92 and from Article 4(2a) of Regulation 1408/71 that for a benefit to be a special non-contributory benefit, three conditions had to be fulfilled: (i) it had to be special, that is to say hybrid within the terms of the existing case law; (ii) it had to be non-contributory; and (iii) its purpose had to be to provide *either* supplementary, substitute or ancillary cover for certain defined social security risks *or* solely specific protection for the disabled. Thus it is not fatal that a special non-contributory benefit has characteristics falling within the social security risks set out in Article 4(1).

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41 The United Kingdom refers to Case 1/72 *Frilli* [1972] ECR 457, at paragraph 13, in the context of Règlement no 3 concernant la sécurité social des travailleurs migrants (OJ 30 of 16.12.1958 p. 561), the precursor of Regulation 1408/71.

42 The United Kingdom refers to the Opinion of AG Jacobs in C-43/99 *Leclere and Deaconescu*, at point 70; Case 1/72 *Frilli*; Case 261/83 *Castelli* [1984] ECR 3199; Case 24/74 *Biason* [1974] ECR 999; Joined Cases 379/85, 380/85, 381/85 and 93/86 *Giletti* [1987] ECR 966; Case C-236/88 *Commission* v *France* [1990] ECR I-3163; Case C-66/92 *Acciardi* [1993] ECR I-4567; Case 39/74 *Costa* [1974] ECR 1251; Case 7/75 *Mr. and Mrs. F.* [1975] ECR 679; Case 187/73 *Callemeyn* [1974] ECR 553; Case 63/76 *Inzirillo* [1976] ECR 2057; and Case C-356/89 *Newton* [1991] ECR I-3017.

43 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.

44 The United Kingdom refers to recitals 3 and 4 of the preamble to Regulation 1247/92.

Indeed it is precisely because a special non-contributory benefit has *some* such characteristics but also other characteristics that it is a hybrid or special benefit. In determining what the characteristics of a benefit are, it is necessary to consider all its characteristics including its organisational structure in national law.

87. According to the United Kingdom, one of the first benefits to be considered by the ECJ under the new regime was the UK disability living allowance. In *Snares*, the ECJ was specifically asked whether the "effect of the terms of Article 4(2a) and 10a" was to treat this allowance as governed exclusively by Article 10a, i.e. that the benefit was non-exportable, to which the ECJ replied in the affirmative.[45] The ECJ gave two reasons for its conclusion. First, that the allowance was listed in Annex IIa. Secondly, and contrary to what ESA asserts, it concluded, adopting the detailed reasoning of the Advocate General, that the allowance was in substance a hybrid benefit, in the sense that it had elements of both social assistance and social security and thus fell within the concept of a special non-contributory benefit.[46]

88. The United Kingdom then addresses *Partridge*[47], where the ECJ was asked whether the classification of the UK attendance allowance was any different from that of the disability living allowance, to which the ECJ replied in the negative. Again, the same two reasons were given for that conclusion. First, the allowance was listed in Annex IIa and, second, contrary to what ESA asserts, a detailed analysis of the allowance showed that it was a hybrid benefit.[48]

89. According to the United Kingdom, the same approach was taken in *Skalka*, where the ECJ looked at all the characteristics of the benefit and concluded that it was as special (hybrid) benefit.[49] The benefit there was a compensatory supplement, listed in Annex IIa, to an Austrian pension. The fact that the benefit was meeting one of the Article 4(1) risks, namely that of old age could not be, and was not, decisive. It was precisely because the benefit was partly connected to social security but also to social assistance that it was a special benefit.

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45 The United Kingdom refers to Case C-20/96 *Snares*, at the operative part of the judgment.

46 The United Kingdom refers to Case C-20/96 *Snares*, at paragraph 33, where the ECJ endorses points 59–63 of the Opinion of AG Léger in the case. The United Kingdom also refers to point 64 of the said Opinion.

47 Case C-297/96 *Partridge*.

48 The United Kingdom refers to Case C-297/96 *Partridge*, at paragraphs 30–34 containing further reference to point 24 of the Opinion of AG Léger in that Case and to Case C-356/89 *Newton*, of which the United Kingdom calls attention to paragraphs 12–14. The United Kingdom also refers to the Opinion of AG Jacobs in C-43/99 *Leclere and Deaconescu*, at points 69–73.

49 The United Kingdom refers to Case C-160/02 *Skalka*, at paragraphs 22–26 and to the analysis in the Opinion of AG Kokott in that Case, at points 37–58 (in particular 48) which, according to the United Kingdom, was followed by the ECJ.

90. The United Kingdom then addresses *Molenaar*[50], which concerned German care insurance benefits giving entitlement, *inter alia*, to benefits designed to cover the costs of care provided by a third person in a person's home. Those benefits were *contributory* and hence not listed in Annex IIa to Regulation 1408/71. Consequently, the ECJ did not look at the case law on hybrid benefits and the ECJ was able to hold that the benefit was a social security benefit; it was essentially intended to supplement sickness insurance benefits in order to improve the state of health and the quality of life of persons reliant on care. On that basis, the ECJ concluded that the benefit was a sickness benefit within the meaning of Article 4(1)(a). The Advocate General rejected the idea that the benefits in question had a sufficient link with invalidity benefits for them to be deemed to be invalidity benefits and it is clear from his Opinion that the classification as a sickness benefit was because of the close link with sickness insurance.[51] It is thus plain that there is nothing in *Molenaar* to undermine the scope of *Snares*[52]. Further, shortly after *Molenaar* the ECJ not only confirmed the reasoning in Snares but applied that reasoning to hold, in *Partridge*[53], that the UK attendance allowance was also a special non-contributory benefit.

91. *Jauch*[54] concerned an Austrian care allowance that was, according to the United Kingdom, very similar to the German care benefit which the ECJ in *Molenaar*[55] had held to be a sickness benefit. However, unlike the benefit in *Molenaar*, the benefit in *Jauch* was listed in Annex IIa. The ECJ decided to follow *Molenaar* and held that, because of this similarity, also the Austrian care allowance was a sickness benefit within Article 4(1)(a).[56] The ECJ also found that the Austrian care allowance was contributory (like the German benefit in *Molenaar*).[57] Accordingly, the care allowance could not be a special non-contributory benefit within Article 4(2a). It followed that its inclusion in Annex IIa was not determinative of its classification. Thus it was the similarity with the benefit in *Molenaar* that was decisive in the reasoning of the ECJ in *Jauch*.

92. In *Jauch*[58], the United Kingdom points out, both the ECJ and the Advocate General referred to the earlier cases of *Snares* and *Partridge*[59]. They did so in the context of an argument advanced by Austria that the effect of *Snares* and

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50 Case C-160/96 *Molenaar*.

51 The United Kingdom refers to the Opinion of AG Cosmas in Case C-160/96 *Molenaar*, at points 41–47.

52 Case C-20/96 *Snares.*

53 Case C-297/96 *Partridge*.

54 Case C-215/99 *Jauch.*

55 Case C-160/96 *Molenaar*.

56 The United Kingdom refers to Case C-215/99 *Jauch*, at paragraphs 24–28.

57 The United Kingdom refers to Case C-215/99 *Jauch*, at paragraphs 29–34.

58 Case C-215/99 *Jauch.*

59 Case C-20/96 *Snares* and Case C-297/96 *Partridge.*

Partridge was that once a benefit was listed in Annex IIa that was conclusive of its status as a special non-contributory benefit. Austria no doubt ran the argument to seek to avoid the inevitable parallel with the benefit in *Molenaar*[60]. Given the similarity between the two benefits, it is readily understandable that the ECJ found the argument unattractive and sought a way of defeating it. A clear way of defeating that argument would have been to say that in *Snares* and *Partridge* the ECJ had concluded that the benefits were special non-contributory benefits not just because they were listed in Annex IIa but also because they were in substance hybrid benefits. However, the ECJ (and, with some equivocation the Advocate General) considered that *Snares* and *Partridge* had not discussed the "special non contributory character" of the benefits.[61] With respect, the United Kingdom submits that this conclusion is simply wrong.

93. The United Kingdom submits that properly analysed, *Jauch*[62] cannot be read as indicating that the ECJ was departing from its previous case law on hybrid benefits. In particular, there is nothing in the analysis of the Advocate General (which the ECJ followed) to suggest such a departure. Indeed he sets out the case law on hybrid benefits and then proceeds to point out that the care allowance at issue in *Jauch* was fundamentally different from hybrid benefits because it was dependent on entitlement to a pension.[63] Because of this dependency, the care allowance had to be characterised in the same way as the pension.[64]

94. The United Kingdom then turns to *Gaumain-Cerri* and *Barth*[65], where the ECJ considered care insurance designed to cover the costs incurred by an insured person if he becomes reliant on care allowances. The ECJ concluded the national measure was indistinguishable from the measure in *Molenaar*[66] and was therefore to be treated as a sickness benefit within the meaning of Article 4(1)(a). Under the scheme in *Gaumain-Cerri* and *Barth* any person insured against sickness had to contribute to the care insurance scheme. So again, as in *Molenaar*, the benefit was contributory, and so for that reason alone could not be a special non-contributory benefit. The care insurance gives rise to various entitlements, including paying the old age contribution of third party carers caring for the insured person. It was argued that there was a material difference between the benefit in *Molenaar* and that in *Gaumain-Cerri* and *Barth* on the basis that in the latter case the contributions were paid to the pension body to which the carer was

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60 Case C-160/96 *Molenaar*.

61 The United Kingdom refers to Case C-215/99 *Jauch*, at paragraph 17 and the Opinion of AG Alber in that Case, at points 69–73.

62 Case C-215/99 *Jauch*.

63 The United Kingdom refers to the Opinion of AG Alber in Case C-215/99 *Jauch*, at points 91–98 and 99 respectively.

64 The United Kingdom refers to the Opinion of AG Alber in Case C-215/99 *Jauch* 1901, at points 99 and 104.

65 Joined Cases C-502/01 and C-31/02 *Gaumain-Cerri* and *Barth*.

66 Case C-160/96 *Molenaar*.

affiliated, unlike in *Molenaar* where the benefit was paid directly to the carer. The ECJ rejected that argument. Again there is nothing in that judgment to indicate a departure from the ECJ's existing case law on hybrid or special benefits or to suggest that *Snares* and *Partridge*[67] were no longer good law. Indeed like the benefit in *Molenaar*, the benefit in *Gaumain-Cerri* and *Barth* was not listed in Annex IIa, and so the test for inclusion in that Annex was not relevant.

95. In *Hosse*[68], the ECJ once again had to consider a care allowance, and held that the allowance was "of the same kind" as those in *Molenaar* and *Jauch*[69]. Indeed, the only real distinction was that in *Hosse* the allowance was not supplementary to a pension. The ECJ concluded that it was a sickness benefit within the meaning of Article 4(1)(a), and not a special non-contributory benefit. The United Kingdom finds that two points should be made about *Hosse*. First, there were obvious difficulties in characterising the care benefit as a special non-contributory benefit falling within Article 4(2a). It could not fall within Article 4(2a)(a) since it was not supplementary etc. to a social security risk (unlike the benefit in *Skalka*[70]). Nor could it fall within Article 4(2a)(b), since it was not intended to be solely for the protection of the disabled as the care benefit was available to all who had care needs.[71] Secondly, there is nothing in *Hosse* to indicate that the ECJ has departed from its previous well-settled case law that a hybrid benefit is capable of being a special non-contributory benefit.

96. The United Kingdom submits that insofar as ESA is suggesting, in light of *Hosse*[72], that if the benefit has characteristics of a social security benefit, it cannot be a special non-contributory benefit, that is wrong. Such an approach is not only contrary to the case law cited above, but also to the clear purpose of the 1992 amendment to Regulation 1408/71. If the fact that a benefit with some of the characteristics of social security may cover an Article 4(1) risk had the effect that it could not be a special non-contributory benefit, that would deprive Article 4(2a)(b), which deals expressly with benefits for the disabled, of its purpose.

97. The United Kingdom adds that it does not agree with the observation of the Advocate General in *Hosse* that the organisational structure of a benefit (i.e. the absence of a link with a contributing benefit scheme and the absence of any link with a "classical" social security benefit) is irrelevant in determining whether such a benefit is a special non-contributory benefit.[73] It is clear from case law that

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67 Case C-20/96 *Snares* and Case C-297/96 *Partridge*.

68 Case C-286/03 *Hosse*.

69 Case C-160/96 *Molenaar* and Case C-215/99 *Jauch*.

70 Case C-160/02 *Skalka*.

71 The United Kingdom refers to Case C-286/03 *Hosse*, at paragraph 41 and the Opinion of AG Kokott in that Case, at point 79.

72 Case C-286/03 *Hosse*.

73 The United Kingdom refers to the Opinion of AG Kokott in Case C-286/03 *Hosse*, at points 57–58.

those characteristics are relevant. Thus, the question of whether a benefit is contributory is decisive in determining whether a benefit is a special non-contributory benefit falling under Article 4(2a). Equally in *Skalka*[74] the ECJ, in reaching its conclusion that the benefit in question was a special non-contributory benefit, examined the organisational structure of the benefit in national law. Here, the ECJ followed the careful and full approach of the Advocate General, an approach which is to be preferred to her summary of the case law in *Hosse*.[75]

98. The United Kingdom also adds that more recently, in *Perez Naranjo*[76], the ECJ found that the supplementary old age allowance, which it had previously considered in *Giletti*[77], was a special benefit within the meaning of Article 4(2a) of Regulation 1408/71. This was despite the fact that in *Giletti* (decided before the insertion of Article 4(2a) into Regulation 1408/71), the ECJ had ruled that the allowance had sufficient characteristics of a social security benefit so as to fall within Regulation 1408/71 and to be caught by the rule against non-exportability.

Snares and *Partridge* and the criteria for hybrid benefits set out in case law

99. The United Kingdom points out that ESA relies on a dictum in *Jauch* stating that "in those three cases [*Snares*, *Partridge* and *Swaddling*[78]] the special non-contributory character of the benefits in question was not discussed", and on another dictum of the Advocate General in *Hosse*, to the same effect.[79] However, the United Kingdom contends, these dicta are simply wrong. Reference is made to the arguments set out above. Moreover, further support for the view that these dicta are wrong is found in two recent judicial statements from the ECJ. First, in *Kersbergen-Lap*, the ECJ cited *Snares* as a case where it had found that the benefit at issue was closely linked with the social environment, and hence was a special benefit that was lawfully subject to a residence requirement.[80] This confirms that *Snares* involved a substantive analysis of the benefit in question. Secondly, the Advocate General in *Perez Naranjo* carefully analysed whether a French benefit was in substance a special non-contributory benefit and in the course of that analysis referred to *Snares*, *Partridge* and *Swaddling* as cases where the ECJ had found the benefit to be a special non-contributory benefit.[81] The Advocate General plainly considered that, in those cases, the ECJ had

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74 Case C-160/02 *Skalka*.

75 The United Kingdom refers to Case C-160/02 *Skalka*, at paragraphs 22–26 and the Opinion of AG Kokott in that Case, at points 37–58.

76 Case 265/05 *Perez Naranjo*, judgment of 16 January 2007, not yet reported.

77 Joined Cases 379/85, 380/85, 381/85 and 93/86 *Giletti* [1987] ECR 966.

78 Cases C-20/96 *Snares*, C-297/96 *Partridge* and C-90/97 *Swaddling*.

79 Case C-215/99 *Jauch*, at paragraph 17 and the Opinion of AG Kokott in Case C-286/03 *Hosse*, at point 53. The United Kingdom also refers to the Opinion of AG Alber in Case C-215/99 *Jauch*.

80 The United Kingdom refers to Case C-154/05 *Kersbergen-Lap*, at paragraph 33.

81 The Opinion of AG Gelhooed in Case 265/05 *Perez Naranjo*, judgment of 16 January 2007, not yet reported.

looked at the substance, and not just the question whether the benefit was listed in Annex IIa to Regulation 1408/71.

Financial need and benefits having the characteristics of social assistance

100. The United Kingdom refutes the argument that a benefit can only have the characteristics of social assistance if it is based on financial need. No authority was cited in support of the Advocate General's contention in *Hosse* that a benefit can be classified as social assistance only where its grant depends on financial need, and the point was not dealt with by the ECJ in its judgment.[82] Insofar as that dictum is intended to apply to disability benefits, it is directly contrary to *Newton*, *Snares* and *Partridge* as well as *Kersbergen-Lap*[83] where the ECJ held that the benefit at issue was by its nature social assistance, even though it was granted without any means test or needs assessment. The ECJ accepted the submission of the Commission that one could presume need in the case of the majority of the beneficiaries (disabled young people) of that benefit. Further, if the said contention of the Advocate General were correct, that would deprive Article 4(2a)(b) of much of its purpose. There would be little point in including benefits specially intended to protect the disabled if the special needs of the disabled were an irrelevant consideration in determining whether a benefit was a special non-contributory benefit. It is correct that an important factor to determine whether it is a special benefit is that need should be an essential criterion.[84]

Sickness benefits falling within Article 4(1) and care benefits

101. The United Kingdom contends that whatever category of Article 4(1) risks disability benefits fell into *prior* to Regulation 1247/92 introducing the new Article 4(2a) in Regulation 1408/71, such benefits are *capable* of being special or hybrid benefits if they are solely intended to provide protection for the disabled. The use of such words in that provision indicates that benefits for the protection of the disabled are to be distinguished from sickness benefits. This argument is reinforced when one recalls that in none of the cases prior to Regulation 1247/92 did the ECJ classify disabled persons' allowances as sickness benefits. The disability benefits provided for by Belgian, French and UK legislation were all held to be invalidity benefits.[85] Furthermore, despite such benefits falling within one of the categories of Article 4(1) of Regulation 1408/71, namely invalidity, they were nonetheless hybrid or special benefits within the meaning of the new Article 4(2a).

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82 The United Kingdom refers to the Opinion of AG Kokott in Case C-286/03 *Hosse*, at point 69.

83 Cases C-356/89 *Newton*, C-20/96 *Snares*, C-297/96 *Partridge* and C-154/05 *Kersbergen-Lap*.

84 The United Kingdom refers to the Opinion of AG Jacobs in C-43/99 *Leclere and Deaconescu*, at point 73; and Case C-20/96 *Snares*, at paragraph 35 and the Opinion of AG Léger in that Case, at point 63.

85 The United Kingdom refers to Case 39/74 *Costa*, Case 7/75 *Mr. and Mrs. F.*, Case 187/73 *Callemeyn*, Case 63/76 *Inzirillo* and Case C-356/89 *Newton*.

102. According to the United Kingdom, disability benefits are a very specific form of benefit and are to be distinguished from general care benefits. They help with the extra costs that disabled people face as a result of their disabilities. They help promote the independence and social integration of disabled people so that they can, as far as possible, lead the same sort of life as others. They address the specific needs that arise from a person's disability and assist the disabled to address the economic and environmental barriers which he may encounter. They are not intended to improve the recipient's state of health – see by contrast the criteria for sickness benefits set out in *Hosse*.[86]

103. By way of contrast, a sick person may, or may not, be disabled. Equally, someone who is disabled may or may not be sick. The United Kingdom submits that there is a distinction between the concept of disability and sickness and that this is confirmed by the ECJ having held that the prohibition on discrimination on grounds of disability in Directive 2000/78/EC did not cover a person who was sick.[87] A similar analogy may be drawn from the distinction the ECJ has drawn in the context of equal treatment between pregnancy and sickness.[88]

104. The United Kingdom thus holds that the existence of a care component in a benefit does not mean that a benefit which is plainly intended to provide specific protection for disabled persons is to be categorised as a sickness benefit simply because of that care component. One cannot equate disability and sickness.

The Commission of the European Communities

General

105. The Commission submits at the outset that it fully shares the legal analysis made by ESA in the Application and that ESA's position reflects the approach developed by the ECJ in *Hosse*.[89]

On whether it is necessary to deal with the present Application

106. The Commission submits that the Defendant's argument as to why the Court need not deal with the case is not relevant. The fact remains that the Liechtenstein legislation in force reserves the helplessness allowance to persons resident in Liechtenstein and thus is incompatible with Regulation 1408/71.

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86 The United Kingdom refers to Case C-286/03 *Hosse*, at paragraphs 38–39.

87 The United Kingdom refers to Case 13/05 *Chacón Navas* [2006] ECR I-6467, at paragraphs 43–47.

88 The United Kingdom refers to Case C-177/88 *Dekker* [1990] ECR I-3941, at paragraphs 12–13; and Case 179/88 *Hertz* [1990] ECR I-3979, at paragraphs 13–19; and the Joined Opinions of AG Darmon in those cases, at points 48–50.

89 The Commission refers to Case C-286/03 *Hosse*, at paragraphs 24–25.

On the amendments to Regulation 1408/71 through Regulation 647/2005

107. The Commission underlines that in Regulation 647/2005, the Community legislator has translated the recent case-law of the ECJ on special non-contributory benefits, both in the body of the Regulation itself and in the number of benefits listed in Annex IIa. As a result, a large number of benefits previously listed in this Annex were deleted because they were not to be treated as "special non-contributory" benefits. It is important that the same criteria are used for all EEA States, including the Principality of Liechtenstein.

On Article 26 of the Vienna Convention on the Law of Treaties

108. The Commission notes that Article 26 of the Vienna Convention on the Law of Treaties follows the traditional principle of *pacta sunt servanda* but the Commission cannot see how this could be relevant in the present case. First of all, the Principality of Liechtenstein did not make it clear by any means to the other Contracting Parties that the entry in Annex IIa to Regulation 1408/71 concerning the helplessness allowance constituted a condition *sine qua non* for its accession to the EEA Agreement and, thus, it cannot rely on such a condition. Secondly, an entry in that Annex does not have constitutive nature. As the ECJ held in *Jauch*, it is not sufficient for classification as a special non-contributory benefit for the benefit in question to be listed in Annex IIa.[90] In that case, the benefit at stake was declared to be a traditional social security benefit although there was an entry for it in Annex IIa. The substantive conditions for the existence of a special non-contributory benefit under Article 4(2a) of Regulation 1408/71 must also be satisfied.

Application of Article 4(1) rather than 4(2a) in the present case

109. According to the Commission, the factor which determines whether a benefit is a benefit intended exclusively to provide for "specific protection for the disabled" according to Article 4(2a)(b) of Regulation 1408/71 is the *need for social integration*. A disabled person's need for social integration, which is normally closely linked to the person's social environment, must be the sole purpose of the benefit, to the exclusion of any other objectives. The existence of a close link with the social environment, as referred to by the ECJ in *Lenoir* to justify the non-exportability of a benefit,[91] is usually verified in the case of benefits designed to meet specific needs in terms of the integration of recipients into society where this is rendered more difficult by their disability. Of course, this criterion of a disabled person's need for social integration, like all essential characteristics of special non-contributory benefits, must be interpreted and applied in a restrictive manner.[92]

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90 The Commission refers to Case C-215/99 *Jauch*, at paragraphs 21–22.

91 The Commission refers to Case 313/86 *Lenoir* [1988] ECR 5391, at paragraph 16.

92 The Commission refers to Case C-286/03 *Hosse*, at paragraph 36.

110. The Commission submits that the first task when examining a deemed special non-contributory benefit is to assess whether according to its nature, aims and characteristics it cannot be regarded as a "classic" or "traditional" social security benefit, i.e. as a benefit falling within the scope of Article 4(1) of Regulation 1408/71.[93] The Commission is of the opinion that the Liechtenstein helplessness allowance meets the criteria of such a "classic" social security benefit and thus cannot be qualified as a special non-contributory benefit under Article 4(2a) of Regulation 1408/71.

111. Contrary to what the Defendant alleges, the Commission finds that the Liechtenstein helplessness allowance covers services and care which are very similar to those assessed by the ECJ in *Molenaar* and *Jauch*[94]. According to the Commission, the helplessness allowance has the same essential purpose, namely to enable a person to live autonomously, meaning a protection against dependency, even if this word does not figure in the title of the benefits. The helplessness allowance is essentially intended to supplement sickness benefits in order to improve the state of health of persons reliant on care. With *Jauch*, the ECJ has clearly linked to the normal risk of sickness, benefits which cover several aspects that are completely independent of that sickness.

112. Furthermore, the Commission endorses the view that "there is no longer any doubt that in Community law benefits to cover the risk of reliance on care are covered by Article 4(1)(a) of Regulation 1408/71".[95] This notion was also confirmed in *Gaumain-Cerri* and *Barth*,[96] from which it follows that a "sickness benefit" comprises all the care granted to a person in order to enable him to live autonomously at his home by means of the receipt of an aid adapted to his age or disability.[97]

113. The Commission adds that the fact that the helplessness allowance is not ancillary to the receipt of "classical" social security benefits within the meaning of Article 4(1) of Regulation 1408/71, that the allowance is entirely non-contributory and that it is directly funded from general State income, is not decisive for the classification of this allowance as a sickness benefit within the scope of Article 4(1)(a) of that Regulation. The ECJ already refuted similar arguments in *Jauch*.[98]

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93 The Commission refers to Case C-286/03 *Hosse*, at paragraph 37 where the criteria for this assessment are spelled out.

94 Case C-160/96 *Molenaar* and Case C-215/99 *Jauch*.

95 The Commission refers to the Opinion of AG Kokott in Case C-286/03 *Hosse*, at point 53.

96 Joined Cases C-502/01 and C-31/02 *Gaumain-Cerri* and *Barth*.

97 In this context, the Commission also refers to Case C-286/03 *Hosse*, at paragraph 42.

98 Case C-215/99 *Jauch*. In this context, the Commission also refers to Case C-286/03 *Hosse*, at paragraph 41 and the Opinion of AG Kokott in that Case, at points 57–58.

114. The Commission does not see striking differences between the Liechtenstein helplessness allowance and the benefit at issue in *Jauch*[99]. Moreover, the Commission submits that the position put forward by the Defendant cannot be supported by reference to *Snares* and *Partridge*.[100]

115. The Commission submits that the EFTA Court should declare that:

> *By applying a requirement of residence for entitlement to the helplessness allowance, the Principality of Liechtenstein has failed to fulfil its obligations pursuant to Articles 19(1) and (2), 25(1) and 28(1) of the Act referred to at point 1 of Annex VI to the EEA Agreement (*Council Regulation EEC No 1408/71*), as adapted to the EEA Agreement by Protocol 1 thereto.*

Henrik Bull
Judge-Rapporteur

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99 Case C-215/99 *Jauch*.

100 Case C-20/96 *Snares* and Case C-297/96 *Partridge*. In support of its submission, the Commission refers to the Opinion of AG Kokott in Case C-286/03 *Hosse*, at point 53.