

JUDGMENT OF THE COURT (Second Chamber)

18 October 2007*

In Case C-299/05,

ACTION for annulment under Article 230 EC, brought on 26 July 2005,

Commission of the European Communities, represented by M.-J. Jonczy, D. Martin and V. Kreuzschitz, acting as Agents, with an address for service in Luxembourg,

applicant,

v

European Parliament, represented by G. Ricci and A. Troupiotis, acting as Agents, with an address for service in Luxembourg,

* Language of the case: French.

Council of the European Union, represented by M. Veiga, J. Leppo and G. Curmi,
acting as Agents,

defendants,

supported by:

Republic of Finland, represented by T. Pynnä, J. Heliskoski and E. Bygglin, acting as
Agents, with an address for service in Luxembourg,

Kingdom of Sweden, represented by A. Kruse and R. Sobocki, acting as Agents,
with an address for service in Luxembourg,

United Kingdom of Great Britain and Northern Ireland, represented by
E. O'Neill and C. Vajda, acting as Agents,

interveners,

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, J. Makarczyk,
P. Küris, J.-C. Bonichot (Rapporteur) and C. Toader, Judges,

Advocate General: J. Kokott,
Registrar: J. Swedenborg, Administrator,

having regard to the written procedure and further to the hearing on 18 April 2007,

after hearing the Opinion of the Advocate General at the sitting on 3 May 2007,

gives the following

Judgment

- 1 By its application, the Commission of the European Communities seeks the annulment of the provisions of point 2 of Annex I to Regulation (EC) No 647/2005 of the European Parliament and of the Council of 13 April 2005 amending Council Regulations (EEC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community and (EEC) No 574/72 laying down the procedure for implementing Regulation (EEC) No 1408/71 (OJ 2005 L 117, p. 1), under the headings 'FINLAND', (b), 'SWEDEN', (c), and 'UNITED KINGDOM', (d) to (f).

Legal context

- 2 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, in the version amended and updated

by Council Regulation (EC) No 118/97 of 2 December 1996 (OJ 1997 L 28, p. 1; 'Regulation No 1408/71'), as amended by Regulation No 647/2005 ('Regulation No 1408/71 as amended'), takes into account, according to the preamble to Regulation No 647/2005, the interpretation given by the Court of some of the provisions of Regulation No 1408/71 relating to, inter alia, special non-contributory benefits, in order to facilitate their application. Regulation No 647/2005 was adopted on the Commission proposal seeking inter alia to amend Annex IIa to Regulation No 1408/71 ('Annex IIa').

- 3 Under Article 1(u)(i) of Regulation No 1408/71 as amended, the term 'family benefits' means all benefits in kind or in cash intended to meet family expenses.

- 4 Under Article 4(1)(h) thereof, the regulation is to apply to family benefits.

- 5 Under Article 4(2a) of that regulation:

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

“Special non-contributory cash benefits” means those:

(a) which are intended to provide either:

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

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

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

(c) which are listed in Annex IIa.’

6 Those provisions replaced the following:

‘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.’

7 Article 10a of Regulation No 1408/71 as amended provides:

‘1. The provisions of Article 10 and of Title III shall not apply to the special non-contributory cash benefits referred to in Article 4(2a). The persons to whom this Regulation applies shall receive these benefits exclusively in the territory of the Member State in which they reside and under the legislation of that State, in so far as these benefits are mentioned in Annex IIa. Benefits shall be paid by, and at the expense of, the institution of the place of residence.

...’

Background to the proceedings

- 8 Annex IIa to Regulation No 1408/71 lists the special non-contributory benefits which the persons to whom that regulation applies can be granted only in the territory of the Member State in which they reside, pursuant to Article 10a of that regulation.
- 9 The Member States did not raise any objection to the Commission proposal to amend Article 4(2a) of Regulation No 1408/71 with the aim of specifying the definition of special non-contributory cash benefits, according to the principles established by the Court in Case C-215/99 *Jauch* [2001] ECR I-1901 and Case C-43/99 *Leclere and Deaconescu* [2001] ECR I-4265.
- 10 Pursuant to that case-law, only those benefits which have the dual characteristic of being special and non-contributory can be included in the list in Annex IIa.
- 11 The Commission, having examined all the benefits which could be categorised as 'special non-contributory' benefits in the light of the criteria in Article 4(2a) of Regulation No 1408/71 and the Court's interpretation of that provision, drew up and proposed a new list of the benefits which could be included in Annex IIa.

12 Applying criteria drawn from the case-law of the Court, the Commission did not include in that new list:

- benefits under Article 4(1)(b) of Regulation No 1408/71, namely ‘invalidity benefits, including those intended for the maintenance or improvement of earning capacity’;

- benefits granted to disabled children, the primary objective of which is to meet the extra family expenses caused by the presence of a disabled child in the home;

- care benefits, characterised by the Court in *Jauch* as sickness benefits in cash for the purpose of improving the state of health and quality of life of persons reliant on care, even if those benefits may cover independent aspects of the sickness itself.

13 At the request of the Republic of Finland, the Kingdom of Sweden and the United Kingdom of Great Britain and Northern Ireland, the Council of the European Union nevertheless agreed to reinsert in the list in Annex IIa, as proposed by the Commission, the following benefits (together, ‘the benefits at issue’)

- as regards the Republic of Finland, ‘child care allowance’;

— concerning the Kingdom of Sweden, disability allowance and care allowance for disabled children;

— as regards the United Kingdom, disability living allowance ('DLA'), attendance allowance ('AA'), and carer's allowance ('CA').

¹⁴ The European Parliament, during the second reading of the draft amending regulation, approved the Council's position and took formal notice of a declaration in which the Commission reserved the right to refer the matter to the Court of Justice and to submit, if necessary, on the basis of the Court's judgment, a further proposal to revise the list in Annex IIa.

¹⁵ On 13 April 2005, the Parliament and the Council adopted Regulation No 647/2005 taking into account the requests of the three Member States mentioned in paragraph 13 of this judgment. The Commission seeks the annulment of that regulation in so far as it refers to the benefits at issue in the list in Annex IIa to Regulation No 1408/71 as amended ('Annex IIa as amended').

¹⁶ The Commission submits that those various benefits do not meet the conditions allowing their grant to be restricted to only those persons who reside in the territory of each of those Member States.

The action*The request to reopen the oral procedure*

- 17 By letter of 19 June 2007, the United Kingdom submitted observations on the Advocate General's Opinion. It submits that it has not had the opportunity to respond to the argument in that Opinion to the effect that the reference to DLA in the list in Annex IIa as amended should be annulled in its entirety, even though it is not in dispute that the 'mobility' component of that allowance meets the requirements for it to be regarded as a special benefit.
- 18 The United Kingdom is consequently requesting the Court to reopen the oral procedure so that it may put forward the Court's case-law relating to the possibility of partially annulling a legislative provision. It refers, to support its line of argument, to the rules relating to the partial annulment of a provision in a measure, reiterated in Case C-244/03 *France v Parliament and Council* [2005] ECR I-4021, paragraphs 13 to 15.
- 19 The Court may of its own motion, on a proposal from the Advocate General, or at the request of the parties, order the reopening of the oral procedure in accordance with Article 61 of the Rules of Procedure if it considers that it lacks sufficient information, or that the case must be dealt with on the basis of an argument which has not been debated between the parties (see Case C-309/99 *Wouters and Others* [2002] ECR I-1577, paragraph 42; Case C-434/02 *Arnold André* [2004] ECR I-11825, paragraph 27; and Case C-210/03 *Swedish Match* [2004] ECR I-11893, paragraph 25).

- 20 However, first, the issue of the severability of the DLA had been mentioned in the Commission's pleadings, so that the United Kingdom could have responded to it in its statement in intervention. Second, the Court finds that it has all the information needed in order to respond to the questions raised.
- 21 Consequently, there is no need to order the reopening of the oral procedure.

Admissibility

Arguments of the parties

- 22 The Parliament considers that the time-limit laid down in Article 230 EC had already expired when the proceedings were initiated. It is of the opinion that that time-limit must be calculated from the publication of the measure which amended Regulation No 1408/71 by including the benefits at issue for the first time in the list in Annex IIa. The DLA, AA and CA have been referred to in that annex since the entry into force of Council Regulation (EEC) No 1247/92 of 30 April 1992 amending Regulation No 1408/71 (OJ 1992 L 136, p. 1), the Finnish allowance and Swedish benefits having been added to them by the Act concerning the conditions of accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded (OJ 1994 C 241, p. 21, and OJ 1995 L 1, p. 1).
- 23 The Parliament submits that, by replacing Annex IIa in its entirety on the adoption of Regulation No 647/2005, instead of merely making the planned amendments to that annex, the legislature did not intend to make it possible to challenge the inclusion of benefits already in that annex.

- 24 The Parliament accepts that, under Article 1(2) of Regulation No 647/2005, the Community legislature amended the wording of Article 4(2a) of Regulation No 1408/71. It nevertheless submits that that was merely a reformulation of the definition of special non-contributory benefits. By contrast, the substance of the previous definition was not changed. In support of its view, it points out that it was by examining and interpreting the provisions of that latter article as it was prior to the adoption of Regulation No 647/2005 that the Court delivered the judgments in *Jauch* and *Leclere and Deaconescu*.
- 25 The Parliament thus takes the view that the criteria used, reformulated by Regulation No 647/2005, were already among the factors which governed those benefits and that the legislature merely included them in the actual text of Article 4(2a) of Regulation No 1408/71 as amended.
- 26 The Commission considers that, where the Community legislature has adopted a new text of secondary legislation, even if it has left intact the content of an annex, it has taken a new 'decision' on that annex. That is particularly true where the Commission has drawn to the legislature's attention the fact that the former annex had become partially incompatible with Community law in the light of the Court's case-law.
- 27 That new decision should therefore be reviewable by the Court without it being possible to argue in an action for annulment that the criticised part of the text has remained unchanged.

Findings of the Court

- 28 Under the last paragraph of Article 230 EC, an action for annulment must be brought within two months of the publication or notification of the contested measure or, in the absence thereof, of the date on which it came to the applicant's knowledge, as the case may be.
- 29 It is clear from the actual wording of that provision, as from its aim which is to guarantee legal certainty, that a measure which has not been challenged within that period becomes definitive. That definitive nature concerns not only the measure itself, but also any later measure which is merely confirmatory. That approach, which is justified by the requirement of legal stability, applies to individual measures as well as those which have a legislative character, such as a regulation.
- 30 By contrast, where a provision in a regulation is amended, a fresh right of action arises, not only against that provision alone, but also against all the provisions which, even if not amended, form a whole with it.
- 31 The application of those principles results in the Commission's action being declared admissible.
- 32 The wording of Article 4(2a) of Regulation No 1408/71 as amended is substantially different from the earlier wording and clearly amends the scope of that article, and the fact, relied on by the Parliament, that the Court interpreted the earlier version in a way that corresponds to the new wording does not make that wording

confirmatory of the former version. That amendment was adopted specifically in order to redefine the content of the list of non-exportable benefits in Annex IIa.

33 It follows that Article 4(2a) of Regulation No 1408/71 as amended forms a whole with the list in Annex IIa as amended, which also follows from the actual wording of Article 10a of that regulation, which provides that '[t]he persons to whom this Regulation applies shall receive [the special non-contributory cash benefits referred to in Article 4(2a)] exclusively in the territory of the Member State in which they reside and under the legislation of that State, in so far as these benefits are mentioned in Annex IIa [as amended].'

34 The Commission's application is, therefore, admissible.

Merits

35 The Commission raises a single plea in support of its action. It claims that Regulation No 647/2005 is vitiated by an error in law in so far as it confers on the benefits at issue, by including them in the list in Annex IIa as amended, the status of special benefits.

Arguments of the parties

36 So far as the Finnish child care allowance is concerned, the Commission accepts that that benefit may assist a disabled child to integrate in his social environment, but it

takes the view that it is also used to meet the expenses resulting, for the child's family, from the child's disability or sickness. However, the Court has held that a benefit intended to alleviate the financial burdens involved in the maintenance of children is included in the category of family benefits defined in Article 1(u)(i) of Regulation No 1408/71 and relates to the risk mentioned in Article 4(1)(h) of that regulation (Case C-85/99 *Offermanns* [2001] ECR I-2261, and Case C-333/00 *Maaheimo* [2002] ECR I-10087).

37 The Commission considers that the fact that that benefit is granted on the basis of an individual assessment of the needs of the disabled or sick child does not change the nature of that benefit.

38 In respect of the Swedish care allowance for disabled children, the Commission advances the same reasoning as that which it put forward concerning the Finnish child care allowance, with which the allowance shares many similarities. It takes the view that, for the same reasons, the Swedish benefit must also be regarded as a 'family benefit' within the meaning of Article 1(u)(i) of Regulation No 1408/71 as amended.

39 In the case of the Swedish disability allowance, the Commission claims that it is mainly intended to meet the additional expenses which a person may have to bear because of his or her disability in order to improve his or her state of health and quality of life as a person reliant on care.

40 It must therefore be regarded, in the light of *Jauch*, as a 'sickness benefit' for the purpose of Article 4(1)(a) of Regulation No 1408/71 as amended.

- 41 As regards the DLA, AA and CA, the Commission takes the view that such benefits are mainly intended to meet the additional expenses which a person may have to bear because of his or her disability with a view to improving his or her state of health and quality of life as a person reliant on care. They serve, as the Court observed in *Jauch*, to supplement sickness insurance benefits.
- 42 Accordingly, the Commission submits that even if such benefits have their own characteristics, they must be regarded as 'sickness benefits' for the purpose of Article 4(1)(a) of Regulation No 1408/71 as amended.
- 43 The Council, Parliament, Republic of Finland, Kingdom of Sweden and United Kingdom contend that, in the light of their specific characteristics, in particular their components, purposes and conditions for entitlement, those benefits are, on the contrary, 'special non-contributory benefits', since they fulfil the criteria set out in Article 4(2a) of Regulation No 1408/71 as amended, as interpreted by the Court.
- 44 Those institutions and Member States submit that to be classified as 'special' a benefit must have characteristics which make it fall simultaneously within the categories of both social security and social assistance because of the persons to whom it applies, its objectives and the conditions for its application. The benefits at issue are akin to social assistance benefits in that the concept of need is an essential criterion and entitlement to them is not subject to a condition of aggregation of periods of employment or contributions, whilst in other features they are close to social security benefits inasmuch as the competent bodies have no discretion in respect of awarding them and because their grant places recipients in a statutorily defined position.

45 The benefits at issue are therefore ‘hybrid’ benefits which the Council considers to be closely linked to the economic and social situation of the three Member States concerned.

46 The position adopted by the Court in Case C-160/96 *Molenaar* [1998] ECR I-843, *Jauch* and *Leclere and Deaconescu* does not affect that analysis since the characteristics and the conditions for the grant of the benefits with which those cases were concerned differ substantially from those of the benefits at issue.

47 The Parliament submits, in addition, that the fact that some features of the benefits at issue enable them to be classified as social security benefits is not inconsistent with their being special benefits.

48 Such an approach is borne out by paragraph 25 of Case C-160/02 *Skalka* [2004] ECR I-5613, according to which a special benefit within the meaning of Article 4(2a) of Regulation No 1408/71 is defined by its purpose. It must either replace or supplement a social security benefit and be by its nature social assistance justified on economic and social grounds and fixed by legislation setting objective criteria.

49 In other words, a benefit can be covered simultaneously by both Article 4(1) and Article 4(2a) of Regulation No 1408/71 as amended.

50 The United Kingdom points out that the Court has already ruled in Case C-20/96 *Snares* [1997] ECR I-6057 and Case C-297/96 *Partridge* [1998] ECR I-3467 that the DLA and the AA are allowances covered by Article 4(2a)(b) of Regulation No 1408/71.

Findings of the Court

- 51 The scheme and wording of Article 4 of Regulation No 1408/71 as amended show that a benefit cannot be classified simultaneously as a family benefit and a special benefit. Family benefits are dealt with in Article 4(1) while special benefits are dealt with in Article 4(2a), the aim of that distinction being to enable the respective schemes for those two categories of benefits to be identified (see, to that effect, Case C-286/03 *Hosse* [2006] ECR I-1771, paragraphs 36 and 37 and the case-law cited).
- 52 It is therefore necessary to examine whether the benefits at issue, referred to on the list in Annex IIa as amended, are special, having regard to the fact that their non-contributory nature is not in dispute.
- 53 First, under Article 4(2a)(a)(ii) of Regulation No 1408/71 as amended, a benefit can be deemed to be special only if its purpose is solely that of specific protection for the disabled, closely linked to the social environment of those persons in the Member State concerned.
- 54 In the present case, the benefits at issue do not have that sole function. In fact, although they unquestionably promote the independence of the persons who receive them and protect the disabled in their national social context, they are also intended to ensure the necessary care and the supervision of those persons, where it is essential, in their family or a specialised institution. They cannot, therefore, be classified as special benefits in the light of Article 4(2a)(a)(ii) of Regulation No 1408/71 as amended.

55 Secondly, besides the specific case described in the preceding paragraphs, pursuant to Article 4(2a)(a)(i) of Regulation No 1408/71 as amended, a special benefit for the purpose of that provision is also defined by its purpose. It must either replace or supplement a social security benefit, while being distinguishable from it, and be by its nature social assistance justified on economic and social grounds and fixed by legislation setting objective criteria (see Case C-154/05 *Kersbergen-Lap and Dams-Schipper* [2006] ECR I-6249, paragraph 30, and the case-law cited).

56 By contrast, a benefit is regarded as a social security benefit where it is granted, without any individual and discretionary assessment of personal needs, to recipients on the basis of a statutorily defined position and relates to one of the risks expressly listed in Article 4(1) of Regulation No 1408/71 (Case 249/83 *Hoeckx* [1985] ECR 973, paragraphs 12 to 14; Case C-356/89 *Newton* [1991] ECR I-3017; Case C-78/91 *Hughes* [1992] ECR I-4839, paragraph 15; *Molenaar*, paragraph 20; and *Jauch*, paragraph 25). It was on the basis of that case-law, which takes account of the components of German care insurance benefits, that the Court held, in paragraph 25 of *Molenaar*, that those benefits were to be regarded as 'sickness benefits' for the purpose of Article 4(1)(a) of Regulation No 1408/71 and, in paragraph 36 of that judgment, that they were to be regarded as 'cash benefits' of sickness insurance as referred to inter alia in Article 19(1)(b) of that regulation (see also *Jauch*, paragraph 25).

57 First, the purpose of the Finnish and Swedish care allowances for children, in the very words of the governments concerned, is to enable the parents of disabled children to provide for the care, supervision of and possibly re-habilitation of those children. They are provided for in Finland by the Law on Child Care Allowance (*laki lapsen hoitotuesta*) and in Sweden by the Law on Social Security (*lag om allmän försäkring*).

- 58 The fact that entitlement to those allowances would not be subject to having worked or made contributions for a certain length of time, that they would be awarded on a case-by-case basis depending on the needs of the child and in accordance with criteria fixed by the legislation, and that, in addition, they would form part of a package of benefits and services for disabled persons and would, on that account, be closely linked to the economic and social context in the Member States concerned, is not such as to influence their main purpose, which is of a medical nature.
- 59 Since, accordingly, those allowances must be classified as sickness benefits, the Commission is justified in claiming that Regulation No 647/2005 is vitiated by an error of law in so far as those allowances are referred to on the list in Annex IIa as amended, which is reserved for special non-contributory benefits.
- 60 As regards, secondly, the Swedish disability allowance, the explanations of the Swedish Government, inter alia, show that that benefit, provided for under the Law on Disability Allowance and Care Allowance (lag om handikappersättning och vårdbigrad) is granted to disabled people for whom a reduction in their mobility occurred between the ages of 19 and 65. It is intended to finance the care of a third person or to allow the disabled person to bear the costs caused by his or her disability and to improve that person's state of health and quality of life, as a person reliant on care.
- 61 Benefits granted objectively on the basis of a statutorily defined position and which are intended to improve the state of health and quality of life of persons reliant on care have as their essential purpose supplementing sickness insurance benefits and must be regarded as 'sickness benefits' for the purpose of Article 4(1)(a) of Regulation No 1408/71 (*Molenaar*, paragraphs 24 and 25; *Jauch*, paragraph 28; and *Hosse*, paragraph 38).

62 The Swedish disability allowance, which has those characteristics that purpose, must consequently be classified as a sickness benefit, as the Court held in *Molenaar, Jauch* and *Hosse*, even if the scheme under the Swedish legislation differs from that governing the allowances at issue in those cases.

63 Contrary to what the Kingdom of Sweden claims, the fact that the reduction in mobility must be of a significant duration and must have occurred before the age of 65 is not such as to change the purpose of the Swedish disability allowance, which consists in meeting the needs stemming from the disability and covering the risk caused by the sickness which is at the origin of that disability.

64 Consequently, the Commission is justified in claiming that Regulation No 647/2005 is vitiated by an error of law to the extent that that allowance is referred to on the list in Annex IIa as amended, which is reserved for special non-contributory benefits.

65 As regards, thirdly, the DLA, AA and CA, those benefits are all by nature, although only partially so in the case of the DLA, care allowances.

66 According to the United Kingdom, they are specific benefits whose purpose is to help promote the independence and social integration of the disabled and also, as far as possible, to help them lead a life similar to non-disabled persons. The criterion which determines entitlement to those benefits is the need for care. Entitlement to the DLA or AA does not depend on being unable to work and the three benefits at issue are granted regardless of the level of income of their recipients, simply at different rates.

- 67 Contrary to what the United Kingdom asserts, only the DLA can be considered to include a social assistance component. The other two benefits at issue have a single purpose which is akin to that of the Swedish disability allowance, namely to help the disabled person to overcome, as far as possible, his or her disability in everyday activities.
- 68 Accordingly, those three allowances as well as the preceding allowances must be regarded as sickness benefits, even though the DLA includes a distinct part relating to mobility.
- 69 As the Commission indeed observes, the ‘mobility’ component of the DLA, which might be regarded as a special non-contributory benefit, is severable, so that that component alone could be included on the list in Annex IIa as amended if the United Kingdom decided to create an allowance which concerned that component alone.
- 70 The fact that the DLA, AA and CA, unlike the benefit at issue in *Jauch* and *Hosse*, do not have as their essential purpose supplementing sickness insurance benefits does not affect the categorisation of those allowances.
- 71 In addition, the fact that the Court ruled in *Snares* and *Partridge* that the DLA and AA were, in the legal context at the time, allowances coming under Article 4(2a)(b) of Regulation No 1408/71 does not affect the analysis which the Court may make of those allowances in the post-*Jauch* legal context.

72 Accordingly, the Commission is justified in claiming that Regulation No 647/2005 is vitiated by an error of law in so far as the DLA, AA and CA are referred to on the list in Annex IIa as amended, which is reserved for special non-contributory benefits.

73 It follows from all the foregoing that the provisions of point 2 of Annex I to Regulation No 647/2005, under the headings 'FINLAND', (b), 'SWEDEN', (c), and 'UNITED KINGDOM', (d) to (f), are vitiated by an error of law and must therefore be annulled.

Temporal effects of this judgment

74 It is necessary, however, for the Court to state that the straightforward annulment of the inclusion of the DLA in the list in Annex IIa as amended would lead to the United Kingdom being forced to grant the 'mobility' element of that benefit to an unspecified number of recipients throughout the European Union, although the fact that that part of the DLA is in the nature of a non-contributory benefit cannot be disputed and it could lawfully be included in that list as a non-exportable benefit.

75 That fact warrants the Court exercising the power expressly conferred on it by the second paragraph of Article 231 EC in the event of annulment of a regulation, provisionally to maintain the effects of inclusion of the DLA as regards solely the 'mobility' part so that, within a reasonable period, appropriate measures can be taken to include it in Annex IIa as amended.

Costs

- 76 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Under the first subparagraph of Article 69(3) of the same Rules, the Court may nevertheless order that the costs be shared or decide that each party is to bear its own costs where each party succeeds on some and fails on other claims, or where the circumstances are exceptional. Since the Parliament and the Council have been unsuccessful, they should bear their own costs and pay, in equal shares, those of the Commission. Pursuant to Article 69(4) of the Rules of Procedure, the Member States that have intervened in the proceedings should bear their own costs.

On those grounds, the Court (Second Chamber) hereby:

- 1. Annuls the provisions of point 2 of Annex I to Regulation (EC) No 647/2005 of the European Parliament and of the Council of 13 April 2005 amending Council Regulations (EEC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community and (EEC) No 574/72 laying down the procedure for implementing Regulation (EEC) No 1408/71 under the headings 'FINLAND', (b), 'SWEDEN', (c), and 'UNITED KINGDOM', (d) to (f);**
- 2. Maintains the effects of the inclusion of the Disability Living Allowance under the heading 'UNITED KINGDOM', (d), of Annex IIa to 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, in the version amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996, as amended by Regulation No 647/2005, as regards solely the ‘mobility’ part of that allowance so that, within a reasonable period, appropriate measures can be taken to include it in that annex;

- 3. Orders the European Parliament and the Council of the European Union to bear their own costs and to pay, in equal shares, those of the Commission of the European Communities;**

- 4. Orders the Republic of Finland, the Kingdom of Sweden and the United Kingdom of Great Britain and Northern Ireland to bear their own costs.**

[Signatures]