

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 25 November 2003¹

I — Introduction

1. By this reference for a preliminary ruling the Oberster Gerichtshof (Supreme Court), Austria, is seeking to determine how a compensatory supplement provided for under the Austrian Bundesgesetz vom 11. Oktober 1978 über die Sozialversicherung der in der gewerblichen Wirtschaft selbständig Erwerbstätigen (Federal Law of 11 October 1978 on Social Insurance for Persons engaged in Trade and Commerce; hereinafter: ‘GSVG’)² should be classified in the terms of Regulation (EEC) No 1408/71.³ Previously self-employed pension recipients are awarded such a compensatory supplement ancillary to their pension if the pension falls short of the subsistence minimum.

2. If the benefit in question is to be regarded as a special non-contributory benefit, the Sozialversicherungsanstalt der

gewerblichen Wirtschaft (Social Insurance Institution for Trade and Commerce; hereinafter: ‘Sozialversicherungsanstalt’) — the defendant in the main proceedings — could make receipt thereof conditional upon the pensioner’s residence in Austria. On the other hand, if the supplement is to be considered a general old-age benefit, the Sozialversicherungsanstalt would have to remit it to the recipient even if he or she were resident in another Member State.

II — Relevant legislation

A — Community law

3. Regulation No 1408/71 applies, in accordance with Article 4(1)(c) thereof, to the branch of social security relating to old-age benefits.

1 — Original language: German.

2 — BGBl. 1978, No 560.

3 — Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community (OJ, English Special Edition 1971 (II), p. 416), as amended by Council Regulation (EC) No 118/97 of 2 December 1996 (OJ 1997 L 28, p. 1), hereinafter: ‘Regulation No 1408/71’.

4. Article 4(2a) of Regulation No 1408/71 provides:

‘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 ... , 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.’

5. As regards special non-contributory benefits, Article 10a(1) of Regulation No 1408/71 provides:

‘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 legisla-

tion 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.’

6. Compensatory supplement provided for under the GSVG is one of the benefits listed in Annex IIa at (a) under Point K.

7. Regulation (EEC) No 1247/92,⁴ which inserted Articles 4(2a) and 10a into Regulation No 1408/71, provides as follows under the third and fourth recitals in the preamble thereto:

‘Whereas it is also necessary to take account of the case-law of the Court of Justice stating that certain benefits provided under national laws may fall simultaneously within the categories of both social security and social assistance because of the class of persons to whom such laws apply, their objectives and their manner of application;

Whereas the Court of Justice has stated that, in some of its features, legislation

⁴ — Council Regulation (EEC) No 1247/92 of 30 April 1992 amending Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, OJ 1992 L 136, p. 1.

under which such benefits are granted is akin to social assistance in that need is an essential criterion in its implementation and the conditions of entitlement are not based upon the aggregation of periods of employment or contributions, whilst in other features it is close to social security to the extent that there is an absence of discretion in the manner in which such benefits as are provided thereunder are awarded and in that it confers a legally defined position upon beneficiaries;’

in accordance with the provisions of this subsection, provided that he or she is habitually resident in Austria.’

9. The standard rate in this context corresponds to the minimum income required to ensure a reasonable lifestyle. Under Paragraph 150 of the GSVG, that rate depends *inter alia* on the recipient’s personal circumstances, in particular on the number of people living with him, and is adjusted in line with changes in consumer prices. If the relevant conditions have been met, the compensatory supplement is calculated and awarded automatically upon submission of a pension application.

B — National law

8. Paragraph 149(1) of the GSVG lays down the conditions governing receipt of the compensatory supplement as follows:

10. In accordance with Paragraph 156(1) of the GSVG, compensatory supplement granted by the Sozialversicherungsanstalt is, in principle, to be reimbursed by the Austrian *Land* in which the main office of the social assistance agency responsible for the recipient of the compensatory supplement is situated. In practice, however, the Austrian State bears the expenditure incurred as a result of the award of the compensatory supplement.

‘If a pension plus any other net income accruing to a pensioner, together with amounts to be taken into account pursuant to Paragraph 151,⁵ fall short of the appropriate standard rate (Paragraph 150), the pensioner shall be entitled to a compensatory supplement to that pension

III — Facts and question referred for a preliminary ruling

11. Friedrich Skalka, the claimant in the main proceedings (hereinafter: ‘claimant’),

⁵ — The amounts referred to in Paragraph 151 of the GSVG relate to certain maintenance claims and to the spouse’s income, where he or she lives in the same household as the pensioner.

is an Austrian national. From 1 May 1990 he had been receiving a pension in respect of his incapacity for work from the Sozialversicherungsanstalt. Since reaching the age of 60, he has been receiving that benefit in the form of an early retirement pension calculated on the basis of a lengthy period of insurance.

12. Since late 1999 the claimant has been habitually resident on Tenerife (Spain).

13. On 16 December 1999 he applied to the Sozialversicherungsanstalt for compensatory supplement as provided for under the GSVG. The Sozialversicherungsanstalt rejected the claimant's application on 12 October 2000 on the ground that he was habitually resident abroad and the benefit concerned could not be exported.

14. In the light of that decision, the claimant instituted legal proceedings against the Sozialversicherungsanstalt. The court adjudicating at first instance and the court of appeal took the view that the compensatory supplement was a special non-contributory benefit within the meaning of Article 10a of Regulation No 1408/71 which could not be granted to persons habitually resident in a Member State other than Austria. Relying on the judgment delivered by the Court of Justice in *Jauch*,⁶ the appellate court saw no

reason to refer the matter to the Court of Justice.

15. The claimant appealed on a point of law against the judgment of the appellate court. The Oberster Gerichtshof, before which the appeal on a point of law is pending, has referred the following question to the Court for a preliminary ruling:

'Is Article 10a of Regulation (EEC) No 1408/71 of the Council 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 amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996, in conjunction with Annex IIa, to be interpreted as meaning that the compensatory supplement provided for under the Bundesgesetz vom 11 Oktober 1978 über die Sozialversicherung der in der gewerblichen Wirtschaft selbständig Erwerbstätigen (Federal Law of 11 October 1978 on Social Insurance for Persons engaged in Trade and Commerce — "the GSVG") falls within its scope and therefore constitutes a special non-contributory benefit within the meaning of Article 4(2a) of the regulation, so that only the coordinating provisions laid down by Article 10a of the regulation are applicable to a person who, like the claimant, after 1 June

⁶ — Case C-215/99 *Jauch* [2001] ECR I-1901.

1992, fulfils the conditions for the granting of that benefit?'

A — *Comments regarding the national legislation*

IV — Observations of the parties

16. The Sozialversicherungsanstalt, the Austrian, German, United Kingdom, Finnish and Netherlands Governments and the Commission have each submitted observations in the proceedings before the Court.

17. All the parties essentially consider that a benefit such as the compensatory supplement provided for under the GSVG constitutes a special non-contributory benefit within the meaning of Articles 4(2a) and 10a of Regulation No 1408/71. However, the Commission points out that the provisions of Article 10a of Regulation No 1408/71 depart from the general rule laid down in Article 10 that social security benefits in principle must be granted, whether or not the recipient resides in the Member State of the paying institution. The Finnish and United Kingdom Governments note that the Court has already found the residence requirement inserted into the regulation by Article 10a to be compatible with Articles 39 and 42 EC.⁷

18. The Austrian Government begins by commenting on the principles underlying the adoption of the GSVG. In Austria, the amount of pension received depends, in principle, on the length of the periods of insurance accumulated and on the amount of contributions paid on average over a given observation period. In some cases, it explains, the pension due to be paid out on that basis may fall short of the subsistence minimum. In order to spare those pensioners entitled to such small amounts the humiliation of attending the social services office the compensatory supplement, calculated automatically on submission of a pension application, was introduced.

B — *Significance of Annex Ila to Regulation No 1408/71*

19. Almost all the parties cite the Court's finding in *Jauch* that reference to a benefit in Annex Ila to Regulation No 1408/71 is not in itself the decisive factor in establishing whether that benefit is to be classified

⁷ — The two governments have reference to the judgments in Case C-20/96 *Snares* [1997] ECR I-6057, paragraphs 38 to 52, and Case C-297/96 *Partridge* [1998] ECR I-3467, paragraph 34, and to the Opinion of Advocate General Léger in *Snares*, points 70 to 104.

definitively as a special non-contributory benefit.⁸ If the Court did not consider the supplement at issue to be a special non-contributory benefit, the United Kingdom Government adds, then it would have to declare Annex IIa invalid, albeit only in so far as it applies to that supplement.⁹

C — Special benefit

20. In interpreting the concept of special benefit mentioned in Articles 4(2a) and 10a of Regulation No 1408/71, the Netherlands and United Kingdom Governments and — in a slightly different context — the Austrian Government have analysed the Court's less recent case-law on 'mixed benefits'.¹⁰ In the Court's view, those benefits display features peculiar not only to social security but also to state welfare assistance and social assistance. The legislature followed up that case-law by insert-

ing special rules applying to such mixed benefits into Regulation No 1408/71 in the form of Articles 4(2a) and 10a.¹¹

21. All the parties agree that, unlike care allowance, which came under Court scrutiny in the *Jauch* case,¹² the benefit at issue in this case is a special benefit. They argue, on the one hand, that the compensatory supplement is related to social security benefit in that it is paid as a supplement to the old-age pension. They also argue, on the other hand, that it is granted subject to the recipient's need, thus making it akin to a social assistance benefit. In this connection the United Kingdom Government submits that need in this context may arise not only out of a person's financial situation but also out of other circumstances, such as the degree of his disablement.¹³

22. The Finnish, Austrian, Netherlands and United Kingdom Governments and the Commission further point out that the rules governing the compensatory supplement are focused on the specific circum-

8 — *Jauch* (cited in footnote 6), paragraphs 20 to 22.

9 — In that connection the United Kingdom Government cites Case C-43/99 *Leclere and Deaconescu* [2001] ECR I-4265, paragraph 38.

10 — Case 1/72 *Frilli* [1972] ECR 457, Case 24/74 *Biason* [1974] ECR 999, Case 139/82 *Piscitello* [1983] ECR 1427, Joined Cases 379/85 to 381/85 and 93/86 *Giletti* [1987] ECR 955, Case 147/87 *Zaoui* [1987] ECR 5511, Case C-307/89 *Commission v France* [1991] ECR I-2903 and Case C-65/92 *Levatino* [1993] ECR I-2005.

11 — In that connection the governments refer to the recitals in the preamble to Regulation (EEC) No 1247/92 which are quoted at point 7 above.

12 — Cited in footnote 6.

13 — In support of that point, the United Kingdom Government cites Case C-356/89 *Newton* [1991] ECR I-3017.

stances of the place of residence,¹⁴ that is to say, on the minimum subsistence income required in Austria.

bility for disbursing the supplement falls to the Sozialversicherungsanstalt.

D — *Non-contributory nature*

23. The parties unanimously consider the compensatory supplement to be non-contributory because it is financed exclusively out of the Austrian State budget, not through the contributions made by insured persons.

24. As far as the Austrian and German Governments are concerned, it is clear from inter alia the Resolution of the Administrative Commission of 29 June 2000 ‘concerning criteria for the inclusion of benefits as “special non-contributory benefits” in Annex II, Section III, or in Annex IIa of Regulation (EEC) No 1408/71’¹⁵ that funding is the decisive factor in establishing whether a benefit is non-contributory.

25. The German and Finnish Governments stress that it is irrelevant that the responsi-

26. The German, Netherlands and Austrian Governments ultimately reject the argument that the supplement is none the less (indirectly) dependent on the payment of social security contributions because it is awarded only if there is a pension entitlement. They maintain that one of the specific characteristics of special benefits is that they are awarded as a supplement to a social benefit. That conclusion can indeed be drawn, they add, from the clear wording of Article 10a(3) of Regulation No 1408/71 and from the Court’s less recent case-law on ‘mixed benefits’.¹⁶ They conclude that the issue of whether benefits are contributory must be assessed separately for principal and supplementary benefits.

27. The German Government further submits that the exportability of contributory benefits is essential because claimants become eligible for such benefits as a result of the contributions they have paid. That argument does not apply to special supplementary benefits as they are not granted on the basis of contributions paid.

14 — As regards that criterion, the governments cite Case 313/86 *Lenoir* [1988] ECR 5391, paragraph 16, and *Leclere and Deaconescu* (cited in footnote 9), paragraph 32.

15 — OJ 2001 C 44, p. 13.

16 — See, to that effect, point 20 above.

E — *Other considerations*

28. The Austrian Government refers to the principle that Member States are free to arrange their respective social security systems as they see fit. The freedom enjoyed by the Member States would be limited if the exportability of benefits having the same objective depended solely on whether the Member State concerned treated them as supplementary benefits or as independent social assistance benefits.

V — *Legal Assessment*

29. It must be examined whether a benefit such as the compensatory supplement, which is the subject-matter of the main proceedings, is a special non-contributory benefit within the meaning of Article 4(2a) of Regulation No 1408/71. If that were the case, payment of that benefit could be restricted to persons residing in the Member State concerned pursuant to Article 10a(1) of the regulation, and there would be no need to award it to the claimant in the main proceedings, who is resident in another Member State.

30. That derogation from the principle of exportability, which is laid down in Article

10a(1) of the regulation, is compatible with the Treaty provisions on freedom of movement.¹⁷ Of course, as a derogating provision, Article 10a(1) of Regulation No 1408/71 must be interpreted strictly.¹⁸

31. Compensatory supplement is expressly defined as a special non-contributory benefit at (a), under Point K, in Annex IIa to Regulation No 1408/71. However, as the Court held in *Jauch*, reference to the benefit in question in Annex IIa to the regulation is not in itself sufficient to ensure its classification as a special non-contributory benefit; indeed, the benefit in question must also satisfy the conditions which define such benefits.¹⁹ Thus, the benefit must actually be in the nature of a special benefit and be non-contributory.

32. The ‘non-contributory’ criterion alone cannot be decisive in this context, since Article 4(2) of Regulation No 1408/71 applies to all general and special social

¹⁷ — *Snares* (cited in footnote 7), paragraph 49.

¹⁸ — *Jauch* (cited in footnote 6), paragraph 21.

¹⁹ — *Jauch* (cited in footnote 6), paragraph 21. See also the detailed line of argument presented by Advocate General Alber in his Opinion in the *Jauch* case, points 61 to 79.

security schemes, whether contributory or non-contributory.²⁰

the payment of contributions because it can be granted only in tandem with a pension financed through contributions.

A — Meaning of ‘non-contributory’

33. A benefit is non-contributory if it is not financed through contributions paid by persons insured under a social security scheme. The funding of the benefit is the decisive factor, as is clear from the Court’s findings in *Jauch*²¹ and highlighted in the Resolution of the Administrative Commission cited by the parties.²² Although the compensatory supplement is disbursed in this case by the Sozialversicherungsanstalt, the funds allocated for that purpose are in fact taken exclusively from the Austrian State budget, as explained in the order for reference and by the Austrian Government in its observations.

34. The referring court entertains doubts about that interpretation of the concept of non-contributory nature. It maintains that, in the light of the Opinion of Advocate General Alber in the *Jauch* case,²³ the compensatory benefit in any event must be considered to be indirectly dependent on

35. In that connection I would point out first of all that the Court did not accept that argument in the *Jauch* judgment. Secondly, there appears to be even less justification for that interpretation if the German version of the regulation, which simply states that the benefit is independent of contributions, is compared with other language versions which state with greater clarity that the special benefit itself may not be financed through contributions. Accordingly, the concept in question is referred to as ‘special non-contributory benefits’ in the English version and as ‘prestations spéciales à caractère non contributif’ in the French version.

36. Moreover, the concept of special non-contributory benefits as defined in Article 4 (2a)(a) of Regulation No 1408/71 applies precisely to those benefits which provide cover *ancillary or supplementary* to a social security benefit. To regard a supplement consistently as contributory on the ground that it is granted as a supplement to a principal benefit which is in itself contributory would, in those circumstances, effectively render the special provisions applying to special non-contributory benefits nugatory. Even though Article 10a(1) of Regula-

20 — Cf. Opinion in *Jauch* (cited in footnote 19), point 83.

21 — *Jauch* (cited in footnote 6), paragraph 29 et seq.

22 — Cited in footnote 15.

23 — Cited in footnote 19, at point 110.

tion No 1408/71 must be interpreted strictly, any interpretation of the concept of non-contributory nature which — as regards supplementary benefits at least — reduces the scope of such a concept almost to nothing cannot be accepted.

B — *Special benefit*

37. The concept of the special benefit is not defined in detail in the regulation. All the same, it emerges from Article 4(2a) of the regulation that special benefits can be defined by distinguishing them from two other concepts. First, they may not in themselves be social security benefits for the purposes of Article 4(1); they may, however, be awarded — in the circumstances referred to in Article 4(2a)(a) — solely to provide cover which is supplementary, substitute or ancillary to social security benefits. Secondly, they may not be straightforward social [and medical] assistance benefits as provided for in Article 4(4).

38. In other words, special benefits are characterised by their link to social security benefits, thereby making them distinct from social assistance. However, they at the same time bear a certain similarity to social assistance. The fact that the grant of the benefit — in terms of the reason for its

award and the amount awarded — is conditional on the recipient's need rather than on specific periods of employment or contribution may be regarded as a feature of social assistance.

39. It follows from the recitals in the preamble to Regulation (EEC) No 1247/92²⁴ that, by inserting Articles 4(2a) and 10a into the regulation, the legislature was seeking to establish a special set of rules applying to national laws which, according to case-law, display features peculiar to social security benefits as well as social assistance features.

40. Before those provisions were adopted, the Court had in fact been concerned with benefits of that kind in a number of judgments.²⁵ For instance, the French supplementary allowance ('allocation supplémentaire') at issue in the *Giletti* case,²⁶ which provides cover in addition to old-age, invalidity and survivors' pensions that fall short of the subsistence minimum, bore a close resemblance to the compensatory supplement under the GSVG. The Court's view was that the relevant French legislation fulfilled a dual function 'in so far as, in

24 — Quoted at point 7 above.

25 — See the case-law cited in footnote 10.

26 — Cited in footnote 10.

the first place, it guarantees a minimum means of subsistence to persons in need and, in the second place, it provides additional income for the recipients of social security benefits which are inadequate.’²⁷

by the State social security system. However, it did not rule out the option of classifying that benefit differently in the case of other categories of beneficiaries.²⁸

41. It held further: ‘In so far as such legislation confers a right to supplementary benefits designed to increase the amount of pensions paid by way of social security, without any assessment of individual needs or circumstances, which is a characteristic of assistance, it comes within the social security scheme within the meaning of Regulation No 1408/71. The fact that a single law may also provide for advantages which can be classified as assistance cannot alter, for the purposes of Community law, the intrinsic social security character of a benefit linked to an invalidity, old-age or survivor’s pension to which it is an automatic supplement.’

43. The Court held that those mixed benefits, by and large, fell under the legislation applying to social security benefits with the result that they could be exported.

44. However, in its judgment in *Lenoir*²⁹ it interpreted the concept of family benefits restrictively. Thus, even the earlier legal arrangements precluded the export of benefits intended to cover costs which are closely linked with the social environment and, therefore, with the place where the persons concerned reside. The Court adopted the same reasoning, this time in relation to special non-contributory benefits, in its judgment in *Leclere*, which was delivered after Articles 4(2a) and 10a had been inserted into the regulation.³⁰

42. In its judgment in *Newton* the Court held that a mobility supplement awarded to handicapped persons must be classified as a social security benefit inasmuch as it is awarded to persons who, by reason of their previous occupational activity, are covered

45. The Community legislature responded to the case-law cited above by expressly including benefits which fulfil a dual function within the scope of Regulation No 1408/71 in the form of special non-con-

28 — *Newton* (cited in footnote 13), paragraphs 14 and 15.

29 — Cited in footnote 14.

30 — Cited in footnote 9, at paragraph 32.

27 — *Giletti* (cited in footnote 10), paragraph 10.

tributory benefits. At the same time, however, it adopted provisions which differ in terms of their legal consequences. Although it precluded the export of special benefits on account of their link with social assistance, it none the less ensured, by adopting Article 10a(2) and (3) of Regulation No 1408/71, that persons covered by a social security scheme in any other Member State are accorded the same treatment as regards any special benefits that may be awarded in the host State.

46. Ultimately, therefore, in order to determine whether this matter concerns a special benefit, it is essential primarily to ascertain whether the granting of the benefit is linked with a social security benefit and is thus distinct from a social assistance benefit. Secondly, the benefit in question must not itself constitute a social security benefit, which is ruled out if the benefit has features characteristic of social assistance.

47. A benefit such as the compensatory supplement provided for under the GSVG is not simply a social assistance benefit. After all, for entitlement to the benefit, potential claimants must primarily be covered by a social security scheme — in this case, they must be affiliated to the pension insurance scheme for self-employed persons — and be entitled to an old-age benefit within the meaning of Article 4(1)(c) of Regulation No 1408/71.

48. However, that link to the old-age pension does not mean that the supplement itself constitutes a social security benefit. Of course, reaching pensionable age is an indirect condition for drawing the compensatory supplement because the supplement can be claimed only in tandem with the principal benefit, namely the old-age pension. In the same way as its link with the pension does not make the supplement contributory,³¹ that link likewise does not divest the supplement of the nature of a special benefit. After all, if a contested benefit were consistently considered to be devoid of special nature whenever it was granted as a supplement to a social security benefit, there would be virtually no circumstances in which the supplementary and ancillary benefits expressly mentioned in Article 4(2a)(a) of Regulation No 1408/71 would come into play.

49. The parties have further pointed out that the compensatory supplement displays social assistance features in that its award depends on the need of recipients.

50. On the subject of the distinction between social assistance and social security

31 — To that effect, see point 36 above.

benefits, I should first outline the Court's definition of social security benefits in its consistent case-law:

'[A] benefit may be regarded as a social security benefit in so far as it is granted, without any individual and discretionary assessment of personal needs, to recipients on the basis of a legally defined position and relates to one of the risks expressly listed in Article 4(1) of Regulation No 1408/71.'³²

51. In the *Hughes* judgment the Court addressed the objection that the supplement for families ('family credit') at issue in that case was granted on the basis of an assessment of need and, consequently, that the benefit constituted social assistance. The Court held in that regard:

'Whilst it is true that a benefit such as family credit is granted or refused solely on the basis of the claimant's assets, income, and the number and age of his dependent children, it does not follow that the grant of the benefit is dependent on an individual

assessment of the claimant's personal needs, which is a characteristic feature of social assistance The criteria applied are objective, legally defined criteria which, if met, confer entitlement to the benefit, the competent authority having no power to take account of other personal circumstances.'

52. If the same approach were adopted in assessing the compensatory supplement, it would, in fact, also have to be regarded as a social security benefit. After all, it too is granted on the basis of legally defined, objective criteria. The recipient of the pension is entitled to the supplement if his income falls short of a specific standard value which is also determined, in each case, on the basis of objective criteria. For instance, the standard value may depend on whether the pensioner lives with his or her spouse and on the number of children he or she has. There is nothing to suggest that the Sozialversicherungsanstalt has any discretion to assess personal need on the basis of criteria other than those defined by law.

53. However, it should be examined whether the position adopted by the Court in *Hughes* can be generalised. The definition of a social security benefit, as it is

32 — *Jauch* (cited in footnote 6, at paragraph 25), which in turn refers to the judgments in Case 249/83 *Hoeckx* [1985] ECR 973, paragraphs 12 to 14, *Newton* (cited in footnote 13), Case C-78/91 *Hughes* [1992] ECR I-4839, paragraph 15, and Case C-160/96 *Molenaar* [1998] ECR I-843, paragraph 20.

construed in that judgment, might, conversely, support the argument that a benefit constitutes social assistance only if it is granted on the basis of an assessment of the needs of the person concerned, which falls within the discretion of the competent authority, rather than on the basis of objective, legally defined criteria.

54. However, in many national legal orders, social assistance is granted on the basis of objective, legally defined criteria for assessing personal need simply so as to observe the principle of equal treatment. Furthermore, guaranteeing the minimum level of subsistence is no longer considered to be a charitable measure on the part of the State. On the contrary, in many modern welfare States, individuals have such a right as an expression of their human dignity.

55. It follows that a benefit can display social assistance features, which are the criteria necessary for its classification as a special benefit, even when it is granted according to personal need which can be determined on the basis of objective, legally defined criteria.

56. A further crucial factor, in addition to indicators of personal need, in establishing

that the benefit concerned is akin to social assistance is that the grant of the compensatory supplement does not depend on the aggregation of given periods of employment or contribution. Classification as a special non-contributory benefit means that the benefit is paid only if the pension recipient is resident in the country providing the benefit. As the German Government correctly points out, that derogation from the principle of exportability is lawful only so long as the person concerned has not acquired any pension entitlements as a result of periods of employment or contribution.

57. Moreover, the restriction on exportability is justified if the objective of the special benefit is to provide the recipient with the means required to maintain his standard of living in the Member State providing the benefit.³³

58. The view that the function of the compensatory supplement is to guarantee the subsistence minimum in view of the cost of living in Austria, is to a significant extent borne out in the provisions concerning the adjustment of the standard value used to determine the amount of compensatory supplement paid. Indeed, under Paragraph 150(2) of the GSVG, that value is increased each year by an adjustment factor which must at least match the rate of increase in consumer prices in Austria.

33 — Cf. *Lenoir* (cited in footnote 14), paragraph 16, and *Leclere* (cited in footnote 9), paragraph 32.

VI — Conclusion

59. I propose that the Court give the following answer to the question referred by the national court for a preliminary ruling:

A benefit constitutes a special non-contributory benefit within the meaning of Article 4(2a)(a) of Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community, as amended by Council Regulation (EC) No 118/97 of 2 December 1996, the grant of which may be subject to a residence requirement for the purposes of Article 10a(1) of that regulation, provided that

- it is listed in Annex IIa to Regulation No 1408/71,

- it is not funded through contributions paid into a social security scheme, and

- it is granted as a benefit ancillary or supplementary to an old-age benefit within the meaning of Article 4(1)(c) of Regulation No 1408/71 and, at the same time, has features characteristic of social assistance, such as

- the fact that the grant of the benefit — in terms of the reason for its award and the amount awarded — is conditional on the need of the pension recipient rather than on specific periods of employment or contribution, in which case personal need likewise may be determined on the basis of objective, legally defined criteria, and

- the fact that the amount of benefit granted is determined by the means needed to maintain the beneficiary's standard of living in the State providing the benefit.