Social security, social assistance, and "special non-contributory benefits": the never-ending story

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This commentary looks at a number of recent cases concerning the definition of social security and, in particular, special non-contributory benefits under the EU regulation on social security for migrant workers, regulation 1408/71.¹

Background

The distinction, in EU law, between social security and social assistance dates back to regulation 3/58 on social security for migrant workers. At that time there was a very clear distinction between the social security and social assistance in the initial six member states of the European Community, most of which had social security systems primarily based on social insurance. Social security was a payment, payable as of right, based on contributions paid by a worker and his or her employer and generally related to previous earnings. In contrast, social assistance was often a local or regional payment, payable in many cases on a somewhat discretionary basis, based on an assessment of need of the person (and his or her wider family or household), and set at a level to provide a minimum income in the particular country or region. In that context, it seemed reasonable, given that the primary purpose of regulation 3/58 was to encourage free movement of workers, to confine portability of entitlements to social security and to exclude social assistance from the scope of the regulation. This approach was carried over into regulation 1408/71.

However, over time the difference between social security and social assistance became increasingly blurred. A number of countries (such as the United Kingdom, Denmark and Ireland) whose social security systems placed much more emphasis on flat rate and non-contributory benefits joined the EC. In addition, in many countries, the legal status of social assistance changed over time becoming payable as of right, and non-contributory but non-means tested payments were introduced. This led to a number of references to the Court of Justice in which non-contributory benefits, considered by member states to be social assistance, were argued to fall within the category of social security. In a number of cases, the Court of Justice held that such benefits were in fact within the scope of regulation 1408/71, i.e. they fell within the definition of social security for the purposes of the regulation.² The Court held that a benefit fell within the definition of social security where two criteria applied: firstly the benefit in question must cover one of the risks specified in article 4 (1) of the regulation (the classic social security risks such as old-age, sickness, unemployment, etc);³ and, secondly, the benefit must place

¹ This regulation is to be replaced by regulation 883/2004. The "new" regulation is in force but is not yet applicable and will not become applicable until a new implementing regulation is agreed by the EU legislature. This process is likely to take some time. In any case, the new regulation does not make any significant changes in relation to the issues under discussion.
³ Therefore a general minimum income payment does not fall within the scope of the regulation: case 249/83 Hoecks [1985] ECR 973.
claimants in a legally defined position as a result of which they have a right to benefit.\textsuperscript{4} The result of these decision was that such benefits were exportable\textsuperscript{5} – an outcome which concerned several member states due to its possible financial implications.

Arising from this case law, regulation 1408/71 was amended in 1992 to introduce a new concept of "special non-contributory benefit".\textsuperscript{6} These were defined as benefits which were intended to provide "supplementary, substitute or ancillary cover" against general social security risks (as listed in article 4 (1)) for "solely as specific protection for the disabled". Member states were required to list the special non-contributory benefits in an annex to the regulation (annex IIa). Such benefits fell within the scope of regulation 1408/71 (so that, for example, the general principles in relation to nondiscrimination on grounds of nationality applied) but were not exportable.\textsuperscript{7} This amendment addressed the main concerns of member states in that it removed exportability of such non-contributory benefits. And they are the matter rested for a number of years.

\textit{Snares}-oh yes it is!

In 1996 the first case concerning the impact of the 1992 amendment came before the Court.\textsuperscript{8} In the (pre-1992) \textit{Newton} case the Court had held that the UK mobility allowance was a social security benefit.\textsuperscript{9} However, following the 1992 amendment, the United

\begin{itemize}
\item \textsuperscript{4} See the discussion in P. Watson "free movement of workers and social security" European law review, 335-343.
\item \textsuperscript{5} Subject to limitations developed by the Court in CaseC-356/89 \textit{Newton} [1991] ECR I-3017.
\item \textsuperscript{6} This introduced a new Article 4 (2a) and (2b) which provided:
\begin{itemize}
\item \textsuperscript{2a} This Regulation shall also apply to special non-contributory benefits which are provided under a legislation or schemes other than those referred to in paragraph 1 or excluded by virtue of paragraph 4, where such benefits are intended:
\begin{itemize}
\item (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
\item (b) solely as specific protection for the disabled.
\end{itemize}
\item \textsuperscript{2b} This Regulation shall not apply to the provisions in the legislation of a Member State concerning special non-contributory benefits, referred to in Annex II, Section III, the validity of which is confined to part of its territory.”
\end{itemize}

With effect from 5 May 2005, Article 4(2a) of Regulation No 1408/71 was amended and now provides:
‘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:
\begin{itemize}
\item (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
\item (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.”
\item \textsuperscript{7} Article 10 a (1).
\item \textsuperscript{8} Case C-20/96 \textit{Snares} [1997] ECR I-6057.
\item \textsuperscript{9} Case C-356/89 \textit{Newton} [1991] ECR I-3017.
\end{itemize}
Kingdom had listed mobility allowance as a special non-contributory benefit. Subsequently, mobility allowance was replaced by disability living allowance (also listed as a special non-contributory benefit). This benefit covered a wider range of disability issues than had the mobility allowance but was otherwise broadly similar in purpose and structure. The UK courts referred a question to the Court of Justice as to whether the effect of the 1992 amendment was to remove from the scope of Article 4(1) of Regulation No 1408/71 a benefit which prior to 1 June 1992 would have been considered as social security with the consequence that a person who after 1 June 1992 becomes entitled to such a benefit was not entitled to export it to another member state. The referring court further asked whether, if so, Regulation 1247/92 was compatible with the Treaty of Rome.

The Court of Justice held that "it is clear that the intention of the legislature was to provide a specific system of coordination taking account of the special characteristics of certain benefits falling simultaneously within the categories of both social security and social assistance and treated, according to the Court's case-law, as social security benefits in regard to workers already covered by the social security scheme of the State whose legislation is relied on." Without really considering the details of the benefit in question, the Court held that "a benefit such as DLA must, by reason of the fact that it is listed in Annex IIa, be regarded as being exclusively governed by the coordination rules of Article 10a and, consequently, as being a special non-contributory benefit within the meaning of Article 4(2a)."

The Court also held that the 1992 regulation was not invalid under the Treaty provisions. It pointed out that it had, in the past, accepted that the grant of benefits closely tied to the social environment might be made subject to a condition of residence. In addition, the Court argued that the system established by Regulation 1247/92 was intended to protect the interests of migrant workers in accordance with the provisions of the Treaty.

However, in 2001 the issue again came before the Court of Justice in two cases. Both concerned benefits which had been listed by member states in annex IIa but where the Court was asked to decide whether the benefits were in fact within the definition of social security. A number of member states argued, following the court's decision in Snares, that the inclusion of a benefit in annex IIa was sufficient for it to be classified as a special non-contributory benefit. Fortunately, the court, noting that the special non-contributory character of the benefits in question in Snares was "not discussed" by the Court in that case, ruled that the Court must examine whether the benefits at issue were special and non-contributory and that the fact that they were listed in the annex was not, in itself,

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10 Paragraph 35 of the judgment.
11 Paragraph 34 of the judgment. This approach was confirmed in Case C-297/96 Partridge [1998] ECR I-3467 and was also followed in Case C-90/97 Swaddling [1999] ECR I-1075.
13 Referring, for example, to the fact that member states were required to take account of periods of employment, self-employment or residence completed in other member states: see article 10a of regulation 1408/71.
sufficient.\textsuperscript{14} In \textit{Jauch}\textsuperscript{15} the Court, following its decision in relation to a similar German payment in \textit{Molenaar},\textsuperscript{16} held that an Austrian care payment, which was payable at the legally defined right, which was contributory in character, and aimed to improve the state of health and quality of life of persons reliant on care, was to be regarded as a sickness benefit.\textsuperscript{17} In \textit{Leclere} the Court held that a Luxembourg maternity allowance was clearly a general maternity benefit and could not be regarded as "special".\textsuperscript{18} Neither of these cases was particularly surprising on its own facts as while Regulation 1247/92 was intended to address the issue of the categorisation of "hybrid" benefits (sharing categories of both social security and social assistance) it was never intended to allow member states to classify benefits that were clearly social security as special non-contributory benefits.

The approach taken by the Court in these cases led the EU Commission to re-examine the benefits listed at annex IIa and to reconsider whether benefits listed by member states were, in fact, special non-contributory benefits. This led to a recategorisation of benefits in a number of member states and to significant numbers of benefits being removed from the annex. However, in the case of three countries (United Kingdom, Finland and Sweden) the Commission and the member states involved were unable to come to an agreement as to the qualifying benefits. The solution adopted, given the need for unanimity for such an amendment, was to agree an amendment to the regulation retaining the existing listings for the three member states concerned on the understanding that this would subsequently be challenged by the Commission. This case is currently pending before the Court of Justice.\textsuperscript{19}

However, a number of other cases have recently come before the Court of Justice in relation to the definition of social security and special non-contributory benefits and it is to these which we now turn.

\textit{Skalka}-oh yes it is!

\textbf{In \textit{Skalka} the Court was required to consider precisely the type of benefit which appeared to have been an issue in the 1992 amendment.}\textsuperscript{20} This case involved an Austrian supplementary pension. Under Austrian legislation if the level of pension payable to a person (in addition to other net income) is not sufficient to ensure an appropriate way of life, a compensatory pension supplement is payable to bring the pension level of to a "standard rate". However, this is only payable as long as the person is habitually resident in Austria. Mr Skalka was an Austrian national who was in receipt of an Austrian early retirement pension. He was now habitually resident in Tenerife in Spain and had been refused the compensatory supplement on the basis of his residence abroad. The

\begin{itemize}
\item \textsuperscript{14} Case C-215/99 \textit{Jauch} [2001] ECR I-1901 at paragraphs 17-22.
\item \textsuperscript{15} Case C-215/99 \textit{Jauch} [2001] ECR I-1901.
\item \textsuperscript{16} Case C-1 60/96 \textit{Molenaar} [1998] ECR I-843.
\item \textsuperscript{17} The court pointed out that although the care payment was not directly linked to payment of contributions the financing of the payment was made possible by increasing contributions to sickness insurance. The court therefore considered the allowance to be contributory in character: paragraph 33.
\item \textsuperscript{18} Case C-43/99 \textit{Leclere} [2001] ECR I-4265.
\item \textsuperscript{19} Case C-299/05, \textit{Commission v. Parliament and Council}
\item \textsuperscript{20} Case C-160/02 \textit{Skalka} [2004] ECR I-5613.
\end{itemize}
A compensatory supplement was listed by Austria as a special non-contributory benefit. The Court was asked to decide whether this was correct.

There appear to be no question but that the supplement was non-contributory in nature, so the issue in question was whether or not it was "special". The Court held that the supplement ensures the provision of an income supplement to those persons receiving insufficient social security benefit by guaranteeing a minimum means of subsistence to those persons whose total income falls below a statutory threshold. As it is intended to guarantee a minimum subsistence income for pensioners, the benefit is by nature social assistance. Such a benefit is always closely linked to the socio-economic situation of the country concerned and its amount, fixed by law, takes account of the standard of living in that country. As a result its purpose would be lost if it were to be granted outside the State of residence.

It ruled that a special benefit, within the meaning of article 4 (2a), was defined by its purpose and that 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. It pointed out that the supplement in question topped up a retirement pension and was social assistance insofar as it was intended to ensure a minimum means of subsistence. Accordingly, the Court ruled that it must be classified as a special non-contributory benefit.

_Hosse_-oh no it isn't!

However, in the recent _Hosse_ case, the grand chamber of the Court took a quite different approach and arrived at a different outcome. This case concerned an Austrian care allowance which was payable in the province of Salzburg. It was non-contributory but did not take into account the financial circumstances of the individual concerned. It was listed as a special non-contributory benefit and accordingly had been refused to the individual concerned who was resident in Germany. As it was claimed to be a regional benefit, the care allowance was listed as an article 4 (2b) benefit (confined to part of the

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21 Although see the doubts of the referring court discussed at paragraph 33-36 of advocate general Kokott’s opinion.

22 Paragraph 24 of the judgment.

23 In adopting this approach the court was broadly following that recommended by the administrative commission in its resolution of 29 June 2000 concerning criteria for the inclusion of benefits as special non-contributory benefits (2001/C44/06). This provides that a benefit was to be considered special where it gave the beneficiary a legally defined right to benefit but also contained features of social assistance in that the particular financial or other needs of the individual were taken into account; the benefit was closely linked to a particular social and economic context in the member state; the benefit was designed to provide assistance in the case of insufficient economic resources; and means-testing was an important though not essential criterion.

24 Case C-286/03 _Hosse_ [2006] ECR I-000.
member states territory) to which, unlike article 4 (2a) benefits, the regulation does not apply.\textsuperscript{25}

The Court reiterated its previous case law to the effect that the Community legislature is entitled to adopt provisions which derogate from the principle of social security benefits are exportable and that such derogating provisions must be interpreted strictly.\textsuperscript{26} In a very important statement the Court went on to say that

\begin{quote}
The scheme of Regulation No 1408/71 shows that the concept of ‘social security benefit’ within the meaning of Article 4(1) and the concept of ‘special non-contributory benefit’ within the meaning of Article 4(2a) and (2b) of the regulation are mutually exclusive. A benefit which satisfies the conditions of a ‘social security benefit’ within the meaning of Article 4(1) of Regulation No 1408/71 therefore cannot be analysed as a ‘special non-contributory benefit’.
\end{quote}

The Court restated its previous case law to the effect that a benefit is to be regarded as a social security benefit insofar as it has granted to a person "without any individual and discretionary assessment of personal needs, 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".\textsuperscript{28} It went on to consider the particular characteristics of the care allowance. Firstly, it pointed out that benefits intended to improve the state of health and life of persons reliant on care are to be regarded as sickness benefits (following the decisions in \textit{Molenaar} and \textit{Jauch}). The Court stated that the care allowance was intended to compensate for the additional expenditure resulting from the reliance on care and, in particular, the cost of necessary assistance. It was payable to persons who did not receive a pension under Austrian federal law. The amount of the care allowance depended on the degree of reliance on care, i.e. it corresponded to the time spent on care expressed in hours per month (the assessment of which was regulated in accordance with a specific classification scheme). The income of the person reliant on care had no effect on the amount of the allowance. On the basis of this assessment, the Court ruled that while the allowance might have a different system from that applicable to the German benefits at issue in \textit{Molenaar} and to the Austrian federal care allowance considered in \textit{Jauch}, nonetheless it remained “of the same kind as those benefits”. It considered that the conditions for the grant of the care allowance and the way in which was financed could not have the effect of changing the character of the allowance. Accordingly, the Court held that the allowance must be regarded as a social security payment within the meaning of article 4(1).

Thus, in this case, rather than seeking to examine whether the benefit in question was "special", the Court’s analysis rather proceeded from the point of view of whether or not it was a social security benefit.

\textsuperscript{25} Advocate general Kokott had suggested that the benefit was not, in fact, regional as it formed part of a system of benefits set up under uniform rules throughout Austria: paragraphs 27-37 of the opinion. The Court did not address this issue.

\textsuperscript{26} See, for example, \textit{Jauch} paragraphs 20-21.

\textsuperscript{27} Paragraph 36 of the judgment.

\textsuperscript{28} See also the similar approach in case C-406/04 \textit{de Cuyper} [2006] ECR I-000.
The decision of the grand chamber in *Hosse* appeared, at least to some observers, to have marked an important shift in the Court's approach to the analysis of special non-contributory benefits. However only five months later, without waiting for a written opinion from advocate general Kokott, the third chamber of the Court returned to the *Skalka* line of analysis.29 The case involved a benefit under the Dutch law on incapacity benefit for disabled young people (the Wajong). The legislation, which came into effect from January 1988, replaced previous legislation which provided for general insurance against incapacity for work. The new law provided for the payment of the benefit to young persons who were already affected by total or partial long-term incapacity for work before entering the labour market. The amount of the benefit depended on the rate of incapacity and could be up to 70% of the minimum legal wage in the case of total incapacity for work. Entitlement was not dependent on payment of contributions but neither was it means tested although it might be reduced if paid work was undertaken or where the benefit were paid in addition to other work incapacity benefits. Unlike the pre-1998 legislation, the Wajong was only exportable in very limited circumstances. The two claimants involved in the case had been in receipt of the benefit, but having taken up residence in France and Germany the benefit had been withdrawn.

As in the *Skalka*, there did not appear to be much dispute that the benefit was non-contributory in nature. Accordingly, the Court considered whether or not it was a special benefit. The Court reiterated its statement in *Skalka* that a special benefit must either replace or supplement a social security benefit and be by its nature social assistance justified on economic and social grounds. It pointed out that the benefit was a replacement allowance intended for those who did not satisfy the conditions of insurance for obtaining invalidity benefits under Dutch law. The Court also held that by guaranteeing a minimum income to a socially disadvantaged group, the benefit was by its nature social assistance justified on economic and social grounds. With regard to the fact that the benefit was granted without any means test and needs assessment, the Court referred to the submission by the Commission that the majority of disabled young people would not have sufficient means of subsistence if they did not receive that benefit. The Court pointed out that the benefit was closely linked to the socioeconomic situation in the Netherlands since it was based on the minimum wage and the standard of living in that state. It recalled that the Court had in the past accepted that the grant of benefits are closely linked with the social environment might be made subject to a condition of residence in the state of the competent institution.30 Accordingly, the Court ruled that a benefit under the Wajong must be classified as a special non-contributory benefit and therefore was not exportable.31

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29 Case C-154/05 *Kersbergen-Lap* [2006] ECR I-000.
31 The Court also rejected the argument that the claimants, who had been in receipt of the previous exportable benefit, had any acquired right.
Analysis

Thus it is clear that there are two different lines of approach in relation to the analysis of special non-contributory benefits. Firstly, there is the approach adopted in Skalka and Kersbergen. These cases broadly accept the objective of the 1992 amendment. In so far as a benefit is non-contributory, the Court will then go on to examine whether or not it is special in the sense that it replaces or supplements a social security benefit and is, by its nature, social assistance justified on economic and social grounds. The decisions in these two cases would appear to reflect the intention of the Council of Ministers in adapting the 1992 amendment. However, leaving aside the broader issue of the consistency of these decisions with Hosse, there is still some lack of clarity about when a benefit would be considered to be social assistance "by its nature". The Court appear to take the view that in both cases the benefits involved provided a minimum income and accordingly were closely linked to the socioeconomic situation in the relevant member states. The approach whereby minimum income type benefits are categorised as social assistance is perhaps sensible (although it may not always be easy to distinguish minimum income benefits from "general" social security benefits).  

However, the reference to a link to the socioeconomic situation in the member states is perhaps more tenuous. Firstly, the cases cited by the Court in support of this point provide very limited justification for the argument. As we have seen, the Court in Snares did not really consider the nature of the benefit in any detail and upheld the classification of that benefit largely on the basis that it had been listed by the member state in annex IIa (an approach which is clearly not tenable in the light of the Court’s subsequent case law). In Leclere, the Court did repeat its previous ruling to the effect that “a condition of residence in the State of the competent institution may legitimately be required for the grant of benefits closely linked with the social environment”. However, in doing so the Court was simply addressing the argument put forward by the member state in that case-an argument which is rejected on the facts. In the Lenoir case the Court did uphold national legislation which confined the payment of certain family allowances to residents pointing out that the allowances in question were "closely linked with the social environment and therefore the place where the persons concerned reside". However, this interpretation simply upheld the existing wording of regulation 1408 and is of limited benefit in the analysis of special non-contributory benefits. Secondly, a general reference to the fact that a certain benefit is linked to the socioeconomic situation in a particular member state is surely of limited assistance in identifying a specific characteristic of a benefit. One might well ask how many benefits are not linked to the socioeconomic situation in the member state in which they are paid. Surely, a more specific linkage to the socioeconomic situation is required if this criteria is to be of any assistance in identifying which benefits are and are not special.

Secondly, we have the Hosse approach. Here the Court adopted an entirely different line of analysis. Having stated that social security and special non-contributory benefits are mutually exclusive, the Court, rather than examining the care allowance to see if it was

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32 As, for example, in Ireland where the minimum income benefit is payable at the same rate as a general unemployment and disability payments.
special, analysed its characteristics to see if it fell within the category of social security. Here it reiterated its previous case law to the effect that social security benefits are those which are granted objectively at the basis of a legally defined position, without any individual and discretionary assessment of personal needs, and which relate to one of the risks expressly listed in the regulation. The problem, of course, is that if one examines the benefits in the Skalka and Kersbergen cases, they also satisfied these criteria. Conversely one could argue that the care allowance in Hosse was closely linked to the social environment insofar as the care allowance rates were determined with reference to the expenditure required for the care of disabled people in Austria.

**Conclusion**

A number of points are clear in relation to the definition of social security and the exportability of social benefits. Firstly, it is clear that limits on exportability are compatible with the Treaty (at least in so far as they do not add to disparities in treatment which may result from divergences between the laws of the various member states). Secondly, benefits which are not non-contributory (as in Jauch) or which are not special (as in both Jauch and Leclere) cannot be categorised as special non-contributory benefits. However, there remains a total lack of clarity as to where the line is to be drawn between social security and special non-contributory benefits.

If one looks only at the outcome of these recent cases, one can possibly arrive at a rationale (albeit not a particularly satisfactory or logical one) for the different results. In Skalka and Kersbergen, the Court ruled that minimum income benefits were to be considered as special non-contributory benefits. In contrast, in Hosse, the Court followed its previous case law and held that a carer allowance, payable as of right, was a social security benefit. However, when one looks at the approach adopted in both lines of analysis, any reconciliation is unfortunately impossible.

The statement by the Court, in Hosse, that social security and special non-contributory benefits are mutually exclusive is an extremely important one. It is clearly inconsistent with what the member states thought they were doing in amending the legislation in 1992 and with the approach adopted by the Court in, for example, Snares. If social security

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33 See the opinion of advocate general Kokott in Hosse at paragraphs 70-71. The advocate general’s rejection of this argument on the basis that this link may only be required where the benefit in question is a special non-contributory benefit and not a social security benefit is surely inconsistent with the approach in both Skalka and Kersbergen where the Court relied on the fact that the benefit was closely linked to be socioeconomic environment to support its conclusion that it was a special non-contributory benefit rather than a social security benefit. See contra the opinion of advocate general Alber in Jauch where he argued that as the care allowance was designed to give persons reliant on care the opportunity of leading an independent life in accordance with their needs, it was relatively independent of the social context in which it was granted (paragraph 101).

34 Case 313/86 Lenoir op cit.

35 It might, perhaps, be suggested that the 1992 regulation, which inserted the definition of special non-contributory benefits, implicitly amended the definition of social security benefit. However, this would surely be inconsistent with the Court’s repeated statement that exceptions to the principle of exportability must be construed strictly and, perhaps more importantly, with the fact that the Court has gone on using the
and special non-contributory benefits are mutually exclusive, member states could not have recategorised benefits which were defined by the Court as social security pre-1992. If this is the case, the decisions in Snares is wrongly decided on this point. The Hosse decision would also give new life to a number of old decisions in relation to the definition of social security. The decision of the Court in Skalka, for example, appears inconsistent with a number of earlier Court decisions in which it held that the income benefits, whether payable as a supplement or not, were social security benefits and, therefore, exportable. It is also somewhat unclear where the dividing line falls between the non-contributory incapacity benefit for disabled young people (considered to be a special non-contributory benefit in Kersbergen) and the Belgian unemployment allowance for older workers who had exhausted a right to contributory benefits (considered to be social security in de Cuyper).

There is a good deal to be said for either interpretation adopted by the Court. The Skalka approach certainly reflects the intention of the member states in adapting the 1992 regulation and would allow member states to provide "special" benefits to those resident on their national territory without the risk of having to export the benefit. Conversely, the approach in Hosse is in line with the overall approach of regulation 1408 of encourage free movement of workers by removing national boundaries to the payment of social security benefits. However, there is very little to be said for the continuing lack of clarity and inconsistency of the Court's judgments on this issue (which is not one of them more complicated issues before it). Fortunately, the Court has a number of pending cases which may allow it to clarify the legal position in relation to this important issue.

Postscript: In its most recent decision – Perez Naranjo – the Grand Chamber of the Court (and the Advocate General) took the opportunity to ignore entirely the apparent inconsistency in its earlier decisions. In that case, which concerned a French supplementary allowance payable to older people, the Court followed the Skalka line of analysis and ruled that the benefit was a special non-contributory benefit. The Hosse decision is not mentioned at all in either the judgment or the conclusions of the Advocate General. However, the Court does appear to have ‘clarified’ its statement in Hosse to the effect that the concept of ‘social security benefit’ and the concept of ‘special non-contributory benefit’ are ‘mutually exclusive’ insofar as it has now held that a benefit

pre-1992 approach to defining social security benefits without making any reference to such an implicit amendment.

36 See, for example, Case 24/74 Biason [1974] ECR 999 and Case 139/82 Piscetello [1983] ECR 1427. Of course, the exportability of such benefits would be subject to the restrictions imposed by the Court in Newton.

37 Although, interestingly, the presumed link between free movement of workers and portability of social security benefits appears to be almost entirely untested by any economic or sociological research.

38 In addition to the case involving the commission and the three member states (referred to above), see also case C-265/05 Perez Naranjo and case C-287/05 Hendrix (which again concerns the Wajong).

39 Case C-265/05 Perez Naranjo [2007] ECR 000. The case also involved discussion as to when a benefit can be considered to be non-contributory
previously held to be ‘social security’ is a ‘special non-contributory benefit’, i.e. the concepts are not mutually exclusive.\textsuperscript{40}

\textsuperscript{40} As the Court points out at para. 26 of the \textit{Perez Naranjo} judgement, it had previously ruled to this effect in Joined Cases 379-381/85 and 93/86 \textit{Giletti} [1987] ECR I-955 and in Case C-236/88 \textit{Commission v France} [1990] ECR I-3163.