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OPINION OF ADVOCATE GENERAL

RICHARD DE LA TOUR

delivered on 20 January 2022 ([1](#))

Case C-328/20

European Commission

v

Republic of Austria

(Failure of a Member State to fulfil obligations – Coordination of social security systems – Regulation (EC) No 883/2004 – Articles 4, 7 and 67 – Freedom of movement for workers – Regulation (EU) No 492/2011 – Article 7 – Equality of treatment – Family benefits – Social and tax

advantages – Adjustment of the amount of benefits and advantages in line with the price level in the children’s State of residence)

I. Introduction

1. By its application, the European Commission requests that the Court declare that, by putting in place:

(1) an adjustment mechanism in relation to *the family allowance* and *the child tax credit* for *workers whose children reside permanently in another Member State*, the Republic of Austria has failed to fulfil its obligations under:

– Articles 4, 7 and 67 of Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, (2) and

– Article 7(2) of Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union, (3) and,

(2) an adjustment mechanism in relation to the Familienbonus Plus (Family Bonus Plus tax credit, ‘the Family Bonus Plus’), the sole earner’s allowance, the single parent’s allowance and the tax credit for maintenance payments, for migrant workers whose children reside permanently in another Member State, the Republic of Austria has failed to fulfil its obligations under Article 7(2) of Regulation No 492/2011.

2. The Commission submits, in essence, that, as EU law currently stands, it does not allow the Member States a margin of discretion to adjust the amount of family benefits paid by them according to the price level in the State of residence of the child concerned and that that adjustment together with the adjustment of certain tax advantages granted to families is discriminatory and cannot be regarded as a necessary and proportionate measure.

3. In this Opinion, I shall explain the reasons why I consider that the complaints made by the Commission are well founded.

II. Legal framework

A. EU Law

1. Regulation No 883/2004

4. Recitals 8, 12 and 16 of Regulation No 883/2004 state:

‘(8) The general principle of equal treatment is of particular importance for workers who do not reside in the Member State of their employment, including frontier workers.

...

(12) In the light of proportionality, care should be taken to ensure that the principle of assimilation of facts or events does not lead to objectively unjustified results or to the overlapping of benefits of the same kind for the same period.

...

(16) Within the [European Union] there is in principle no justification for making social security rights dependent on the place of residence of the person concerned; nevertheless, in specific cases, in particular as regards special benefits linked to the economic and social context of the person involved, the place of residence could be taken into account.'

5. Article 1(z) of that regulation provides:

'For the purposes of this Regulation:

...

(z) "family benefit" means all benefits in kind or in cash intended to meet family expenses, excluding advances of maintenance payments and special childbirth and adoption allowances mentioned in Annex I.'

6. Article 3(1)(j) of Regulation No 883/2004 provides:

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

...

(j) family benefits.'

7. Article 4 of Regulation No 883/2004, entitled 'Equality of treatment', provides:

'Unless otherwise provided for by this Regulation, persons to whom this Regulation applies shall enjoy the same benefits and be subject to the same obligations under the legislation of any Member State as the nationals thereof.'

8. Article 5 of Regulation No 883/2004, entitled 'Equal treatment of benefits, income, facts or events', is worded as follows:

'Unless otherwise provided for by this Regulation and in the light of the special implementing provisions laid down, the following shall apply:

(a) where, under the legislation of the competent Member State, the receipt of social security benefits and other income has certain legal effects, the relevant provisions of that legislation shall also apply to the receipt of equivalent benefits acquired under the legislation of another Member State or to income acquired in another Member State;

(b) where, under the legislation of the competent Member State, legal effects are attributed to the occurrence of certain facts or events, that Member State shall take account of like facts or events occurring in any Member State as though they had taken place in its own territory.'

9. Article 7 of Regulation No 883/2004, entitled 'Waiving of residence rules', provides:

‘Unless otherwise provided for by this Regulation, cash benefits payable under the legislation of one or more Member States or under this Regulation shall not be subject to any reduction, amendment, suspension, withdrawal or confiscation on account of the fact that the beneficiary or the members of his family reside in a Member State other than that in which the institution responsible for providing benefits is situated.’

10. Article 67 of Regulation No 883/2004, entitled ‘Members of the family residing in another Member State’, provides:

‘A person shall be entitled to family benefits in accordance with the legislation of the competent Member State, including for his family members residing in another Member State, as if they were residing in the former Member State. However, a pensioner shall be entitled to family benefits in accordance with the legislation of the Member State competent for his/her pension.’

2. ***Regulation No 492/2011***

11. In Chapter I of Regulation No 492/2011, Article 7(1) and (2), in Section 2, entitled ‘Employment and equality of treatment’, provides:

‘1. A worker who is a national of a Member State may not, in the territory of another Member State, be treated differently from national workers by reason of his nationality in respect of any conditions of employment and work, in particular as regards remuneration, dismissal, and, should he become unemployed, reinstatement or re-employment.

2. He shall enjoy the same social and tax advantages as national workers.’

B. **Austrian law**

1. ***The FLAG***

12. In accordance with Paragraph 1 of the Bundesgesetz betreffend den Familienlastenausgleich durch Beihilfen (Federal Law on compensation for family expenses by means of allowances), (4) of 24 October 1967, the benefits provided are ‘granted with a view to compensating for expenses in the interests of the family’.

13. Paragraph 2(1) and (8) of the FLAG provides:

‘(1) Persons who are domiciled or habitually resident in the federal territory are entitled to family allowances

(a) for minor children;

...

(8) Persons are entitled to receive family allowances only if their centre of interests is in the federal territory. A person’s centre of interests is located in the State with which he has the closest personal and economic links.’

14. Under Paragraph 4 of the FLAG:

‘(1) Persons who are entitled to an equivalent benefit granted by another State shall not be entitled to family allowances.

(2) Austrian nationals who are excluded from entitlement to family allowances pursuant to subparagraph 1 or Paragraph 5[(4)] shall receive a supplementary payment if the amount of the equivalent benefit granted by another State, to which those Austrian nationals or other persons are entitled (Paragraph 5[(4)]), is lower than the family allowances which, in the absence of the aforementioned equivalent benefit, would have to be granted to them under this federal law.

(3) The supplementary payment corresponds to the difference between the equivalent benefit granted by another State and the family allowances which would have to be granted under this federal law.

...

(6) Supplementary payments are regarded as family allowances within the meaning of this federal law, however the provisions on the amount of family allowances do not apply to supplementary payments.

...’

15. Paragraph 5(3) and (4) of the FLAG is worded as follows:

‘(3) There is no entitlement to family allowances for children who permanently reside abroad.

(4) There is no entitlement to family allowances for children for whom there is an entitlement to the payment of an equivalent benefit granted by another State. This does not exclude the granting of a supplementary payment (Paragraph 4(2)).’

16. Paragraph 8 of the FLAG provides:

‘(1) The amount of family allowances payable to a person is determined by reference to the number and the age of the children for whom those family allowances are granted.

(2) The monthly amount of family allowances shall be

...

3. from 1 January 2018

(a) EUR 114 for each child with effect from the beginning of the calendar month of birth,

(b) EUR 121.90 for each child with effect from the beginning of the calendar month in which the child reaches the age of three,

(c) EUR 141.50 for each child with effect from the beginning of the calendar month in which the child reaches the age of 10,

(d) EUR 165.10 for each child with effect from the beginning of the calendar month in which the child reaches the age of 19.

(3) Family allowances shall be increased per month, for each child, by the following amounts,

...

3. from 1 January 2018, if they are

- (a) granted for two children: EUR 7.10,
- (b) granted for three children: EUR 17.40,
- (c) granted for four children: EUR 26.50,
- (d) granted for five children: EUR 32,
- (e) granted for six children: EUR 35.70,
- (f) granted for seven or more children: EUR 52.

(4) Family allowances shall be increased per month, for each severely disabled child, by the following amounts,

...

3. EUR 155.90 from 1 January 2018.

...

(8) For each child who, in a calendar year, has already reached the age of 6 or reaches the age of 6 and has not yet reached the age of 16, family allowances shall be increased by EUR 100 as from September of the present calendar year.'

17. Paragraph 8a of the FLAG provides:

‘(1) The amounts of family allowances (Paragraph 8) for children who are permanently resident in the territory of another EU Member State ..., another State party to the Agreement on the European Economic Area [of 2 May 1992 ([5](#))] or Switzerland shall be determined on the basis of the comparative price levels, published by the Statistical Office of the European Union [Eurostat] for each of the Member States of the European Union, for each of the States party to the [EEA] Agreement and for Switzerland in relation to Austria.

(2) The amounts of family allowances referred to in subparagraph 1 shall apply from 1 January 2019 on the basis of the values in accordance with subparagraph 1, published on 1 June 2018. Subsequently, those amounts shall be adjusted every two years on the basis of the values published on 1 June of the previous year.

(3) The Bundesminister für Frauen, Familien und Jugend [Federal Minister for Women’s Affairs, Family and Youth, Austria] shall publish, by means of a regulation adopted jointly with the Bundesminister für Finanzen (Federal Minister for Finance, Austria), the bases of calculation and the amounts referred to in subparagraphs 1 and 2, and the amounts referred to in Paragraph 33(3), point 2 of the [Bundesgesetz über die Besteuerung des Einkommens natürlicher Personen (Federal Law on the taxation of the income of natural persons), ([6](#)) of 7 July 1988 ([7](#))].’

18. Paragraph 53 of the FLAG provides:

‘(1) For the purposes of this federal law, nationals of the contracting parties to the [EEA] Agreement shall, in so far as this follows from the abovementioned agreement, be treated in the same way as Austrian nationals. In that context, the permanent residence of a child in a State of the European Economic Area [EEA] must, in accordance with Community legislation, be treated as equivalent to the permanent residence of a child in Austria.

...

(4) The second sentence of subparagraph 1 shall not apply in relation to Paragraph 8a(1) to (3).

(5) Paragraph 26(3) of the Bundesabgabenordnung [Federal Tax Code] ... shall apply to the benefits referred to in this federal law until 31 December 2018. As from 1 January 2019, Paragraph 26(3) of the Federal Tax Code shall apply, in respect of benefits provided for by this federal law, only to persons whose place of employment is abroad and who are acting on behalf of a local authority, and to their spouses and children.’

2. *The EStG*

19. Paragraph 33 of the EStG provides:

‘...

(2) Tax credits must be deducted from the [amount of tax] resulting from the application of subparagraph 1 in the following order:

1. the “Family Bonus Plus” tax credit referred to in subparagraph 3a; there is no need to deduct the Family Bonus Plus in so far as it exceeds the tax due on taxable income under subparagraph 1;

2. the tax credits referred to in subparagraphs 4 to 6.

(3) Taxpayers who receive family allowances under the [FLAG] shall be entitled, alongside the payment of family allowances, to a tax credit of EUR 58.40 per month for each child. This shall not apply in the following cases:

1. No tax credit shall be granted for children who are permanently resident outside an [EU] Member State ..., an [EEA] State or Switzerland.

2. In respect of children who are permanently resident in the territory of another [EU] Member State, of another party to the [EEA] Agreement or Switzerland, the amount of the child tax credit shall be determined on the basis of the comparative price levels, published by [Eurostat] for each of the Member States of the European Union, for each of the States party to the [EEA] Agreement and for Switzerland in relation to Austria:

(a) From 1 January 2019, the amount of child tax credits shall be adjusted on the basis of the values published on 1 June 2018. Subsequently, the amount of child tax credits shall be adjusted every two years on the basis of the values published on 1 June of the previous year.

(b) The amount of child tax credits shall be published in accordance with Paragraph 8a(3) of the [FLAG].

...

(3a) A child who receives a family allowance under the [FLAG] and is permanently resident in an [EU] Member State or the territory of another party to the [EEA] Agreement or Switzerland shall be entitled, upon application, to the Family Bonus Plus tax credit, in accordance with the following provisions:

1. The amount of the Family Bonus Plus is

(a) EUR 125 per calendar month until the end of the month in which the child reaches the age of 18,

(b) EUR 41.68 per calendar month after the end of the month in which the child reaches the age of 18.

2. By way of derogation from point 1, in respect of children who are permanently resident in the territory of another [EU] Member State, another party to the [EEA] Agreement or Switzerland, the amount of the Family Bonus Plus and the tax credits referred to in subparagraph 4 shall be determined on the basis of the comparative price levels, published by [Eurostat] for each of the Member States of the European Union, for each of the States party to the [EEA] Agreement and for Switzerland in relation to Austria:

(a) From 1 January 2019, the amount of the Family Bonus Plus and the tax credits referred to in subparagraph 4 shall be adjusted on the basis of the values published on 1 June 2018. Subsequently, that amount shall be adjusted every two years on the basis of the values published on 1 June of the previous year.

(b) The Federal Minister for Finance is required to publish, by means of a regulation, the bases of calculation and the amounts at the latest on 30 September following the reference date referred to in point (a). [(8)]

...

5. The second sentence of Paragraph 26(3) of the Federal Tax Code does not apply. The spouses and children of taxpayers whose place of employment is abroad and who work for a local authority are an exception to this rule.

...

(4) In addition, where the child is permanently resident in an [EU] Member State or the territory of another party to the [EEA] Agreement or Switzerland, the following tax credits are applicable:

1. Persons who are the sole earners in a household are entitled to the sole earner's allowance. That allowance shall be:

– EUR 494 for one child (Paragraph 106(1)),

– EUR 669 for two children (Paragraph 106(1)).

That amount shall be increased by EUR 220 per year for the third child and for each additional child respectively (Paragraph 106(1)).

...

2. Single parents are entitled to a single parent's allowance. That allowance shall be:

- EUR 494 for one child (Paragraph 106(1)),
- EUR 669 for two children (Paragraph 106(1)).

That amount shall be increased by EUR 220 per year for the third child and for each additional child respectively (Paragraph 106(1)). Single parents are taxpayers who live with at least one child (Paragraph 106(1)) for more than six months per calendar year but do not live together with a partner or spouse.

3. Taxpayers who have maintenance obligations in respect of a child are entitled to a tax credit for maintenance payments of EUR 29.20 per month

4. By way of derogation from points 1 to 3, the amount of tax credits in respect of children who are permanently resident in the territory of another [EU] Member State, another party to the [EEA] Agreement or Switzerland shall be determined in accordance with subparagraph 3a, point 2. Where the taxpayer is entitled to a tax credit in respect of several children and those children are in different countries, account must be taken first of the eldest children who are entitled to the benefit before the younger children are considered.

5. The second sentence of Paragraph 26(3) of the Federal Tax Code does not apply. The spouses and children of taxpayers whose place of employment is abroad and who work for a local authority are an exception to this rule.

...

(7) If the income tax due under subparagraph 1 is less than EUR 250 and the sole earner's allowance or single parent's allowance is applicable, the following shall apply where there is one child (Paragraph 106(1)):

1. The difference between EUR 250 and the tax referred to in subparagraph 1 must be reimbursed in the form of a child supplement.
2. Where the child is permanently resident in an [EU] Member State or the territory of another party to the [EEA] Agreement or Switzerland, the amount of EUR 250 shall be replaced by the amount resulting from the application of subparagraph 3a, point 2.

...

That amount shall be increased, for each additional child (Paragraph 106(1)), by an amount of EUR 250 or the amount replacing it.

(8) 1. If the income tax resulting from subparagraphs 1 and 2 is less than zero, the sole earner's allowance or single parent's allowance must be paid.

...'

3. ***The Federal Tax Code***

20. Paragraph 26 of the Federal Tax Code provides:

- ‘(1) A person is domiciled within the meaning of the tax provisions where he occupies a dwelling in circumstances which lead to the conclusion that he will maintain and use that dwelling.
- (2) A person is habitually resident within the meaning of the tax provisions where he resides in circumstances that indicate that he is not staying only temporarily in that place or country. ...
- (3) Austrian nationals who have concluded a contract of employment with a public body and whose place of employment is abroad (foreign civil servants) are treated as persons who are habitually resident in the place where the service granting the remuneration is located. The same applies to their spouses, in so far as the spouse forms a permanent residential household, and to their minor children who are part of that household.’

III. Pre-litigation procedure

21. By letter of formal notice dated 25 January 2019, the Commission drew the attention of the Republic of Austria to concerns raised by the introduction, since 1 January 2019, of a mechanism for adjusting the amount of family benefits and social and tax advantages granted by the Republic of Austria to workers with children, in line with the general price level in the Member State in which those children reside permanently.

22. The Commission considered that an adjustment of the amount of family benefit in line with the child’s place of residence was contrary to Articles 7 and 67 of Regulation No 883/2004, in accordance with which cash benefits are not to be subject to any reduction on account of the fact that a family member, such as a child, resides in another Member State. Moreover, it is essentially workers from other Member States, and not Austrian workers, who are affected by the adjustment of the benefits and advantages granted by the Republic of Austria for children. Such indirect discrimination is, in the Commission’s view, contrary to the principle of equal treatment set out in Article 4 of Regulation No 883/2004 and Article 7 of Regulation No 492/2011.

23. In its reply to the letter of formal notice of 25 March 2019, the Republic of Austria submitted that:

- EU law provides for mechanisms comparable to that which it has implemented;
- since Article 67 of Regulation No 883/2004 does not stipulate that the amount of benefits paid for children residing in another Member State must correspond to that paid for children residing in Austria, the adjustment of the amount of family benefit in line with the child’s place of residence is authorised; and
- there is no indirect discrimination on the ground that the adjustment of the flat-rate amounts of benefits or the advantage in line with the price level charged in the child’s place of residence is objectively justified and results from the comparable reduction in costs for all workers being consistent.

24. As the Commission was not satisfied with that reply, on 26 July 2019 it issued a reasoned opinion in which it essentially maintained its position. It stated that there is no relevant reference in EU law and noted that the amounts granted are flat-rate amounts, without any adjustment in line with the price level in the various regions of Austria according to the child’s permanent residence. Thus, a difference in the level of benefits and advantages granted for children which applies to

those residing in another Member State constitutes indirect discrimination because it affects migrant workers more severely than Austrian workers. The fact that those benefits and advantages are flat-rate amounts is said to demonstrate that they are not dependent on the actual costs associated with child maintenance and they do not therefore guarantee a fairer distribution of the costs borne by families to provide for their child's needs.

25. By letter dated 24 October 2019, the Republic of Austria replied to that reasoned opinion stating that the amounts of the family benefits and the social and tax advantages at issue were not merely lump sums, but corresponded to actual needs. Moreover, the fact that the benefits and advantages at issue are granted in the form of flat-rate amounts does not preclude their adjustment in line with the price level in the child's place of residence. It stated that such an adjustment does not constitute unequal treatment, but ensures that the worker receiving the benefits and advantages benefits in any event from an identical reduction in costs, irrespective of the child's actual place of residence. Even if indirect discrimination were to exist, this would be justified, *inter alia*, by the objective of balancing expenditure in the social security system and by the objective of taking into account the ability of beneficiaries to pay.

26. Since it was not convinced by that reply, the Commission brought the present action under Article 258 TFEU.

IV. Forms of order sought

27. By its application, the Commission claims that the Court should:

- declare that, by introducing an adjustment mechanism in relation to the *family allowance* and the *child tax credit* for workers whose children reside permanently in another Member State, the Republic of Austria has failed to fulfil its obligations under:

- Articles 7 and 67 of Regulation No 883/2004 and

- Article 4 of Regulation No 883/2004 and Article 7(2) of Regulation No 492/2011;

- declare that, by introducing an adjustment mechanism in relation to the *Family Bonus Plus*, the *sole earner's allowance*, the *single parent's allowance* and the *tax credit for maintenance payments*, for migrant workers whose children reside permanently in another Member State, the Republic of Austria has also failed to fulfil its obligations under Article 7(2) of Regulation No 492/2011; and

- order the Republic of Austria to pay the costs.

28. The Republic of Austria contends that the Court should:

- dismiss the action; and

- order the Commission to pay the costs.

29. By decisions of the President of the Court, the Czech Republic (6 November 2020), the Republic of Croatia (20 November 2020), the Republic of Poland (19 November 2020), Romania (12 November 2020), the Republic of Slovenia (22 October 2020) and the Slovak Republic (22 October 2020) were granted leave to intervene in support of the form of order sought by the Commission.

30. By decision of the President of the Court, the Kingdom of Denmark (20 November 2020) was granted leave to intervene in support of the form of order sought by the Republic of Austria.

31. By order of the President of the Court of 18 December 2020, the EFTA Surveillance Authority and the Kingdom of Norway were granted leave to intervene in support of the forms of order sought by the Commission and the Republic of Austria respectively.

32. The Commission concludes its observations on the statements in intervention to the effect that the pleadings of the Czech Republic, the Republic of Croatia, the Republic of Poland, Romania, the Republic of Slovenia, the Slovak Republic and the EFTA Surveillance Authority fully support its arguments, whereas the arguments put forward in the statements in intervention submitted by the Kingdom of Denmark and the Kingdom of Norway are not such as to invalidate them.

33. In its observations on the statements in intervention, the Republic of Austria states that it fully agrees with the observations submitted by the Kingdom of Denmark and the Kingdom of Norway and notes that the interveners in support of the Commission do not put forward any new arguments. It maintains its conclusions in full, as set out in its defence and repeated in its rejoinder.

V. Analysis

34. The Commission raises two complaints in support of its action based on the finding that, by departing from the flat-rate amount laid down by law, the Republic of Austria makes provision for an adjustment of the amount of the family allowance and the child tax credit and various other tax advantages, namely the Family Bonus Plus, the sole earner's allowance, the single parent's allowance and the tax credit for maintenance payments, in line with the price level in the Member State (9) in which the child in respect of whom entitlement to those benefits is conferred is permanently resident.

35. The first complaint alleges infringement of Articles 7 and 67 of Regulation No 883/2004. The second complaint alleges infringement of the principle of equal treatment laid down in Article 4 of Regulation No 883/2004 and Article 7(2) of Regulation No 492/2011.

A. The first complaint, alleging infringement of Articles 7 and 67 of Regulation No 883/2004

1. *Arguments of the parties*

(a) *The Commission*

36. By its first complaint, the Commission claims that the Republic of Austria has failed to fulfil its obligations under Articles 7 and 67 of Regulation No 883/2004 in so far as the legislation of that Member State provides for the *adjustment of the family allowance and child tax credit* for workers who are affiliated to the Austrian social security scheme but whose children reside in another Member State.

37. The Commission states that:

– the Republic of Austria grants to persons who work in Austria, for their children, family benefits and the social advantage consisting of family allowance and child tax credit, in the form of uniform flat-rate amounts;

- according to the evidence provided by the Republic of Austria and contrary to the opinion expressed by the Kingdom of Denmark and the Kingdom of Norway, those amounts are fixed by the Austrian legislature only on the basis of the age of the children and their number, irrespective of their actual needs and therefore their social environment; and
- since 1 January 2019, the Austrian rules have provided that those State benefits must be adjusted in line with the general price level in the Member State in which the child is permanently resident.

38. The Commission submits that:

- it is established that the family allowance and child tax credit, which are cash benefits paid by the State and intended to alleviate the financial burdens involved in caring for children, are family benefits within the meaning of Article 1(z) and Article 3(1)(j) of Regulation No 883/2004;
- those benefits are granted without any individual and discretionary assessment of the child's personal needs, on the basis of a legally defined situation. (10) According to the wording of Paragraph 8(1) of the FLAG, family allowances are calculated by reference to the number and the age of the children, as are the tax credits granted in accordance with the conditions laid down in Paragraph 33(3), (3a), (4), (7) and (8) of the EStG;
- although the Republic of Austria asserts that the Austrian legislature took as its starting point the expenses necessary for the maintenance of children, it has not adduced evidence of a link between the level of the Austrian family allowance and standard child maintenance costs;
- that is also the case with regard to the supplements granted for school fees and for severely disabled children, in respect of which the Republic of Austria also fails to have demonstrated that those flat-rate amounts are linked to the social environment of the children, especially since it states that those fees are based on compulsory schooling in Austria and not on the schooling provided for in the Member State in which the child attends school. Thus, the additional amount for school fees is not dependent on actual attendance at school, but solely on the age of the child;
- by contrast, the maintenance payment which must be made by a parent to a child in cash under Austrian private law is calculated specifically and individually on the basis of the parents' living conditions and the needs of the child;
- *the amount of family benefits cannot be dependent on members of the worker's family being resident (11) in the Member State paying the benefit, as expressly provided for in Article 7 of Regulation No 883/2004, in the event of a reduction of or an amendment to benefits, and in Article 67 of that regulation, as interpreted by the Court in the judgment of 18 September 2019, Moser; (12)*
- the provisions in Articles 7 and 67 were adopted after the Court had delivered its judgment of 15 January 1986, *Pinna*, (13) interpreting Article 73 of Regulation (EEC) No 1408/71, (14) which was succeeded by Article 67 of Regulation No 883/2004, essentially reproducing that content. It follows, in the light of the Opinion of Advocate General Mancini in that case, (15) that it is not permissible *to adjust the level* of family benefits solely on the ground that family members reside in another Member State;

- Article 67 of that regulation contains no indication that Article 7 of the regulation should be applied differently, unlike Articles 63 and 70(3) of that regulation concerning, respectively, unemployment benefits and special non-contributory cash benefits;
- the objective pursued by the EU legislature is to avoid deterring workers from another Member State from exercising their right to free movement, as set out by the Court in the judgment in *Pinna*; and
- by providing for a mechanism for adjusting family benefits, which results in the level of those benefits being altered on the basis of the Member State in which the children reside, the Republic of Austria does not treat those benefits *as if the family members* were resident in Austria.

39. In that regard, the Commission submits, in response to the Kingdom of Denmark's argument that Article 5(b) of Regulation No 883/2004 also supports the lawfulness of adjusting family benefits in line with the child's place of residence that, on the contrary, the same fiction of residence in the competent Member State within the meaning of that provision is contained therein where that Member State has to take into account facts or events occurring in another Member State, thereby confirming its interpretation of Articles 7 and 67 of that regulation.

40. Moreover, as regards the decision of the Heads of State or Government, meeting within the European Council, concerning a new settlement for the United Kingdom of Great Britain and Northern Ireland within the European Union, (16) on which the Republic of Austria relies because that decision provided that the Commission was to submit a proposal for amending Regulation No 883/2004 in order to allow Member States to index social benefits for children residing in a Member State other than that where the worker resides, the Commission notes, first, that, by reason of the withdrawal of the United Kingdom from the European Union, that regulation has not been amended. Secondly, it considers that it does not follow from the impact assessment of the amendment to that regulation, cited by the Republic of Austria, in so far as one of the options considered was to adjust exported family benefits according to the standard of living in the Member State of residence of the children, (17) that such indexation was consistent with the EU law in force as the impact assessment contains reservations in that regard (18) and the Commission did not pursue that option.

(b) *The Republic of Austria*

41. In the first place, with regard to *family allowances*, the Republic of Austria states that, under Paragraph 1 of the FLAG, the objective of granting family allowances is to provide compensation for expenses in the interests of the family and that the increase in the amount of family allowances, provided for in Paragraph 8(2) of the FLAG, on the basis of the age of the child, which determines the level of expenditure, corresponds to that objective. It recalls that the FLAG has brought together into a single aid package various provisions of family support which had been granted in the years immediately following the Second World War, initially in the form of benefits in kind, to support families in a targeted manner.

42. The Republic of Austria points out, relying on Paragraph 8 of the FLAG, that:

- the family allowances have always been calculated on the basis of the criterion of the standard expenses necessary to safeguard the means of subsistence of children in Austria;
- those allowances are in the form of flat-rate amounts without there being any need to prove actual expenditure;

– that system is based on the idea that the ‘basic costs’ incurred by a child in Austria are always the same for all parents; and

– the fact that the benefits are calculated on the basis of the child’s actual needs and the maintenance costs closely linked to the child’s economic and social situation (19) is apparent, first ‘as a matter of principle’, from the fact that their amount increases according to the age of the children, (20) and especially, in September, for the start of the school year, throughout the period of compulsory schooling, and if children are severely disabled. Secondly, the amount of those allowances falls when the child who has reached the age of 19 has an income of a certain level.

43. The Republic of Austria states that the amount of family allowances, corresponding to average living costs or basic needs, has increased in line with the level of wages and prices as well as inflation. Conversely, it could have been reduced for State budgetary reasons.

44. With regard to the financing of and the conditions for granting family allowances, the Republic of Austria explains that:

– the costs relating to family allowances are borne by the Ausgleichsfonds für Familienbeihilfen (compensation fund for family allowances, Austria); (21)

– the resources for that fund come from, inter alia, (22) contributions paid by employers (23) who employ workers in the federal territory; (24)

– self-employed workers pay those contributions only in their capacity as employers, those contributions being calculated not on the basis of their income but on the basis of the wages paid to their employees;

– that type of contribution is designed to be a kind of special tax which is calculated on the basis of the total wages of all workers, (25) irrespective of whether or not they are raising children; and

– unlike social security contributions, no deduction is made from the gross wages of each worker and the payment of family allowances is not linked to carrying on an occupation in Austria, in accordance with Paragraph 2(1) of the FLAG, or to the amount of the contributions paid by the employer or self-employed workers.

45. In the second place, with regard to *child tax credit*, the Republic of Austria states that, in accordance with Paragraph 33(3) of the EStG, a taxpayer who receives family allowances under the FLAG is entitled, for each of his or her children, to a child tax credit of EUR 58.40, which is paid at the same time as the family allowance. From an economic point of view, the child tax credit therefore has the characteristics of an increase in family allowance. Unlike the latter, child tax credit however is not financed using resources from the compensation fund for family allowances, but from general tax revenue.

46. By contrast, the Family Bonus Plus and the other tax advantages (26) at issue are not a contribution to the maintenance of children, but compensation, by means of a reduction in the tax burden, for the fact that, for those with equal incomes, taxpayers carrying on an occupation who have children have a lower ability to pay tax than taxpayers carrying on an occupation who do not. That ability is assessed by considering the basic material needs (or average needs) in respect of the maintenance of a child, including activities that are essential to the child’s life.

47. The Republic of Austria explains its decision to adjust the amount of the family benefits and tax advantages (27) at issue, depending on the child's State of residence, on the basis of the comparative price levels published by Eurostat, on account of the purpose in particular of family allowances and child tax credit, which is to reimburse parents for some of the costs which they typically have to bear for the maintenance of their child, and the fact that those costs are essentially dependent on the price level in the place of permanent residence.

48. The increase in freedom of movement for workers within the European Union and the resulting indiscriminate export of family allowances and child tax credit, irrespective of the State in which the children for whom the benefits were granted were permanently resident, led to increasing distortions in that social security scheme. If the child lived in a Member State with low purchasing power, the effect of the support exceeded the relief sought. (28) Conversely, if the child lived in a Member State with a higher purchasing power, the relief fell short of the targeted measure.

49. In the third place, *in response to the first complaint* raised by the Commission, the Republic of Austria considers that the mechanism for adjusting the amount of the family allowance and the child tax credit, for all workers, whether Austrian or not, is not prohibited by Articles 7 and 67 of Regulation No 883/2004.

50. The Republic of Austria submits that:

- only Article 67 of Regulation No 883/2004 is applicable in the present case, in so far as it contains specific provisions relating to the export of family benefits for family members residing in another Member State, whereas Article 7 of that regulation covers all of the social security benefits governed by it;
- the wording of Article 67 does not preclude account being taken of the specific nature, the purpose and detailed rules of the family benefit concerned and, as the Kingdom of Norway rightly submits, the obligation to export absolute amounts in all cases would run counter to that provision and to Article 7 of Regulation No 883/2004; and
- the amount of family allowances and the child tax credit is not dependent, *so far as its value is concerned*, on the child being resident in Austria, since those benefits are intended to compensate for part of the costs of child maintenance which are *dependent on the price level in the place where the children live*.

51. In that regard, the Republic of Austria also refers to:

- recital 16 of Regulation No 883/2004, which states that, as regards special benefits linked to the economic and social context of the person involved, the place of residence may be taken into account; (29)
- the judgment of 15 March 2001, *Offermanns*, (30) from which it follows that the expression 'to meet family expenses' refers, in particular, to a public contribution to a family's budget to alleviate the financial burdens involved in the maintenance of children, which has the effect of demonstrating that family benefits have a direct link with the costs incurred in the maintenance of a child and may therefore be adjusted to take account of actual costs;
- the Opinion of Advocate General Slynn in the case which gave rise to the judgment in *Lenoir*, (31) and paragraph 16 of that judgment *in which the Court held, in respect of assistance in the form of a lump sum at the beginning of the school year, that Regulation No 1408/71 did not*

preclude that a recipient of family benefits, who is a national of a Member State and resides in the territory of another Member State, cannot claim payment by the social security institutions of his or her country of origin of the ‘rentée scolaire’ (school expenses) allowance if it was calculated not exclusively by reference to the number and the age of the children, but taking into account the economic and social environment and, therefore, the place where the persons concerned reside; as well as

– the judgment in *Moser*, in particular paragraphs 53 and 54, from which it follows that the objective (32) pursued by the national legislation is decisive. Since that case concerned the provision of a benefit in replacement of earnings during a period of childcare, the Court held that it was appropriate to refer to the actual pay conditions in the Member State of employment in order to calculate the amount of the differential payment for a family benefit to be granted under Article 68 of Regulation No 883/2004.

52. Thus, the Republic of Austria considers, first, that the Commission cannot maintain, by referring to the judgments in *Lenoir* and *Moser*, that benefits granted in the form of a flat-rate amount, unlike those granted directly in relation to the actual situation of recipients, cannot be adjusted in any event. In that regard, the Republic of Austria takes the view that the benefits at issue are comparable to those which formed the subject matter of the judgment in *Lenoir*. It submits that the costs of purchasing everyday necessities, which are connected, inter alia, with the return to school, are also reimbursed on a flat-rate basis as part of the family allowances it pays. Moreover, it notes that the consideration of the objective of the benefit at issue in the judgment in *Moser* can be transposed to the present case.

53. Specifically, the Republic of Austria submits that the family allowances adjusted to the purchasing power in the Member State of residence of the children under the adjustment mechanism are even in a number of Member States with a coefficient of less than 100% still and in some cases to a considerable degree higher than the benefit provided for in the children’s place of residence. It gives the following two examples concerning the amount paid to a family with one newborn child: while the amount of family allowances in Hungary in 2020 was 12 200 Hungarian forint (HUF) per month, thus the equivalent of approximately EUR 34, the adjusted family allowances and child tax credit paid by the Republic of Austria amounted to EUR 99.13, thus almost three times as much. Similarly, while family allowances in Slovakia in 2020 amounted to approximately EUR 24.95 per month, the adjusted family allowances and child tax credit amounted to EUR 122.57, thus almost five times the amount of the Slovak allowance. (33)

54. Secondly, the Republic of Austria takes the view that the Commission cannot refer to the judgment in *Pinna*, since it concerned national legislation which precluded *the award* of family benefits, which distinguishes it from the mechanism for adjusting the amount of family benefits paid which it has introduced.

55. It adds that, having regard to the purpose of the French legislation at issue in the case giving rise to that judgment, the Court was right not to adopt the considerations of Advocate General Mancini (34) concerning legislation providing for the adjustment of exported benefits. Moreover, that opinion cannot be transposed in respect of Austrian family allowances on the ground that they take account of the cost of living and that neither family allowances nor the child tax credit are ‘*an element supplementary to basic pay*’, (35) since they are granted independently of any income from employment.

56. Thirdly, with regard to the Commission’s argument that *the new settlement for the United Kingdom* never entered into force, (36) the Republic of Austria notes that, nevertheless, the

commitment to the United Kingdom was intended to take account of different price levels in the European Union and, moreover – in contrast to the rules to be assessed in the context of the action for failure to fulfil obligations – of the scale of the benefits granted for children in the State of residence. It also notes that, in point 2 of its conclusions, the European Council stated that the arrangements it had adopted were ‘*fully compatible with the Treaties*’ (37) and the Commission considered that the option chosen would not infringe Article 48 TFEU. (38)

57. In that regard, the Republic of Austria notes that, while an amendment to Regulation No 883/2004 was indeed envisaged, that was not the case for Regulation No 492/2011. It infers from this that Article 7 of that regulation – like Article 4 of Regulation No 883/2004 – does not contain a principle of non-discrimination going beyond that which is enshrined in primary law.

58. In conclusion, the Republic of Austria emphasises that an amendment to Regulation No 883/2004 would not have been necessary for cases in which a Member State adjusts, in the event of export, in accordance with objective rules, ‘upwards’ or ‘downwards’, a family benefit linked to the economic and social situation in the Member State and that that is the case with its legislation, which should, therefore, be distinguished from the measures envisaged in 2016 for the United Kingdom.

2. *Assessment*

59. The action for failure to fulfil obligations brought by the Commission concerns Austrian legislation which, since 1 January 2019, has provided for the amount of certain family benefits and social and tax advantages to be adjusted upwards or downwards in line with the general price level in the Member State in which the children conferring entitlement to those benefits are permanently resident, on the basis of the ratio between the comparative price levels published by Eurostat for each of the Member States of the European Union and that of the Republic of Austria. (39)

60. The first complaint in that action, alleging infringement of Articles 7 and 67 of Regulation No 883/2004, concerns family allowances and child tax credit.

61. Under Article 3(1)(j) of Regulation No 883/2004, that regulation is to apply to all legislation concerning the branches of social security which relate to *family benefits*.

62. In the present case, it is common ground that the Austrian benefits at issue are a ‘family benefit’ within the meaning of Article 1(z) of that regulation, since that expression designates all benefits in kind or in cash *intended to meet family expenses*, excluding advances of maintenance payments and special childbirth and adoption allowances mentioned in Annex I to that regulation. (40)

63. Consequently, as the Commission rightly submits, those benefits are subject to the general rule set out in Article 7 of Regulation No 883/2004, entitled ‘Waiving of residence rules’, relating in particular to *the amount* of cash benefits, since that article provides that those benefits are not to be subject to any *reduction* or *amendment* on account of the fact that the beneficiary or the members of his or her family reside in a Member State other than that in which the institution responsible for providing benefits is situated.

64. That rule reiterates the principle of the exportability of social security benefits laid down in point (b) of the first paragraph of Article 48 TFEU. To fix the amount of those benefits on the basis of the residence of family members therefore constitutes an infringement of the right of free movement conferred on EU citizens. (41)

65. It is true that Article 7 of Regulation No 883/2004 provides for exceptions expressly set out in that regulation. (42) However, Article 67 of that regulation is not one of them. On the contrary, as the Commission and the majority of the Member States which intervened in support of the Commission have submitted, that provision sets out, in Chapter 8 of that regulation, which is devoted to family benefits, the principle that the residence of family members in a Member State which is not the one granting those benefits is irrelevant.

66. In that regard, the Court has very recently reiterated that Article 67 of Regulation No 883/2004 is designed to prevent a Member State from being able to make the grant *or the amount* of family benefits dependent on members of the worker's family being resident in the Member State paying the benefit. (43)

67. Consequently, I am of the opinion that, in view of the rule of the fiction of the residence of the worker in the Member State in which he or she has exercised his or her right of free movement and of the residence of the whole of his or her family, (44) set out in Article 67 of Regulation No 883/2004, which ensures equal treatment of migrant workers, it is not permissible, without amending that provision, (45) for a Member State to introduce into its legislation an exception to the principle of strict equivalence of the amount of family benefits by considering that that requirement can be satisfied solely in terms of value, in accordance with the objective pursued by the national legislature, namely that of meeting family expenses.

68. This analysis is supported, first, by the general scheme of Regulation No 883/2004, Article 68 of which lays down priority rules intended to avoid the unjustified overlapping of benefits where, during the same period and for the same family members, benefits are provided for under the legislation of more than one Member State (46) and, secondly, by Article 60 of Regulation (EC) No 987/2009, (47) cited by the EFTA Surveillance Authority and the Czech Republic, which defines the procedure for applying Articles 67 and 68 of Regulation No 883/2004. In that regard, the Court has noted that the objective pursued is to ensure that the person entitled to benefits paid by several Member States receives a total amount of benefits which is equal to the amount of the most favourable benefit to which he or she is entitled under the legislation of a single Member State. (48) That system is based on the general idea that, if a migrant worker pays social contributions and taxes in a Member State, he or she must be able to benefit from the same allowances as nationals of that State. (49) That system would be rendered ineffective if one of the Member States was entitled to adjust the amount of benefits in line with the recipient's place of residence.

69. The Republic of Austria, supported by the Kingdom of Denmark and the Kingdom of Norway, argues against that interpretation, relying on the judgments in *Pinna*, (50) *Lenoir* (51) and *Moser*. (52) In my view, those arguments must be rejected on account of changes in the content of the applicable social security legislation and the scope of those judgments.

70. In the first place, it should be noted that the principle of the exportability of family benefits was accepted by the Court in the judgment in *Pinna*, and subsequently in the judgment in *Lenoir* which refers to it. (53) It may even be noted from the arguments of the parties recalled by the Court in the judgment in *Pinna* (54) that the dispute which gave rise to that judgment concerned the difference in the amounts or rate of benefits according to the State in which the family members concerned resided, which had the effect of calling into question the rights acquired by the worker under the law to which he or she was subject and, therefore, the objective of securing free movement for workers.

71. In the second place, in my view, the exception allowed in the judgment in *Lenoir* for the granting of benefits which are closely linked with the social environment (55) is limited in scope.

72. That decision must be placed in the legal framework on the basis of which it was delivered, namely Article 1(u) of Regulation No 1408/71, which distinguished between *family allowances* – designating periodical cash benefits granted exclusively by reference to the number and, where appropriate, the age of members of the family – and *family benefits*, designating all benefits in kind or in cash intended to meet family expenses, excluding the special childbirth allowances mentioned in Annex I. (56)

73. Moreover, as the Republic of Poland pointed out, the derogation from the principle of exportability of social security benefits accepted by the Court in the judgment in *Lenoir* has been extended to other *special* non-contributory benefits. (57)

74. First, in Article 1(z) of Regulation No 883/2004, the EU legislature did not reproduce such a distinction between the various family benefits. Secondly, by way of exception to the general principle laid down in Article 7 of that regulation relating to residence rules, the criterion of the economic and social situation was accepted only in respect of benefits falling within the material scope of Article 70 of that regulation. (58)

75. In the third place, with regard to the judgment in *Moser*, which, according to the Republic of Austria and the Kingdom of Norway, justifies the finding that the objective of the benefit concerned is decisive, I am of the opinion that the Court's interpretation is not transposable. The case which gave rise to that judgment concerned a childcare allowance which, in its income-dependent variant, constituted a benefit in replacement of earnings. Its amount was expressly dependent on the amount of previous income, which justified the Court's interpretation that was consistent with the objective of compensating for a loss of earnings by holding that the amount of the allowance had to be calculated on the basis of the actual salary. Thus, the solution adopted by the Court in that judgment is not based on the possibility of adjusting a family benefit to the economic and social situation according to its recipient's place of residence.

76. In the present case, the reference to the judgment in *Moser* is, a fortiori, not relevant for the purposes of justifying the adjustment of the amount of family benefits where that amount is not dependent on actual costs and is determined without any individual and discretionary assessment of the personal needs of recipients on the basis of a legally defined position. (59)

77. I note, like the Commission and the Member States which have intervened in support of it, that it is apparent from the documents before the Court that the family allowances granted by the Republic of Austria correspond to the definition of such allowances in Regulation No 1408/71, namely periodical cash benefits granted to the recipient's family exclusively by reference to the number and, where appropriate, the age of family members.

78. In that regard, I note, first, that, according to the wording of Paragraph 8 of the FLAG, the amount of family allowances payable to a person is determined by reference to the number and the age of the children for whom those family allowances are granted. Secondly, no details have been given as to the relationship between the amount of that benefit and the actual price level used as the basis for its calculation. (60) The Republic of Austria cannot therefore simply maintain that the fact that the amount of that benefit increases with age demonstrates that it is 'in principle' linked to the maintenance costs of the child.

79. In general, it is not clear from the national legislation in question precisely which living costs are used as a basis for fixing the flat-rate amount of family benefits, (61) or which factors other than the age or the number of children might justify an increase in those benefits, or in what proportions. In those circumstances, the Commission is justified in maintaining that the actual expenditure (62) linked to specific needs is not taken into consideration, which is corroborated by the uniformity of the amounts throughout the territory of Austria without consideration of variations in price levels in Austria.

80. Accordingly, for all of the reasons set out above, I propose that the Court should rule that the first complaint raised by the Commission is well founded.

B. The second complaint, alleging infringement of the principle of equal treatment laid down in Article 4 of Regulation No 883/2004 and Article 7(2) of Regulation No 492/2011

1. Arguments of the parties

(a) The Commission

81. By its second complaint, the Commission claims that the Republic of Austria has infringed the principle of equal treatment laid down, first, in Article 4 of Regulation No 883/2004 and Article 7(2) of Regulation No 492/2011 in so far as the legislation of that Member State implements the adjustment of the *family allowance* and the *child tax credit* and, secondly, in Article 7(2) of the latter regulation in so far as the legislation of that Member State provides for the adjustment of the *Family Bonus Plus*, the *sole earner's allowance*, the *single parent's allowance* and the *tax credit for maintenance payments*, in line with the child's place of residence.

82. The Commission states that:

- the object of Article 4 of Regulation No 883/2004 is to ensure, in accordance with Article 45(2) TFEU, equality of treatment in matters of social security, without distinction based on nationality, for the workers concerned, by abolishing all discrimination in that regard deriving from the national legislation of the Member States; (63)
- Article 7(2) of Regulation No 492/2011 also gives concrete expression to the principle of equal treatment laid down in Article 45(2) TFEU, which protects migrant workers not only against direct discrimination based on nationality, but also all indirect forms of discrimination; and
- that provision covers all the social and tax advantages which, whether or not linked to a contract of employment, are generally granted to national workers primarily because of their objective status as workers or by virtue of the mere fact of their residence on the national territory. (64)

83. The Commission submits that:

- family allowance and child tax credit are both family benefits which are subject to the principle of equal treatment, set out in Article 4 of Regulation No 883/2004, and social advantages which are governed by Article 7(2) of Regulation No 492/2011; (65)
- the Family Bonus Plus, the sole earner's allowance, the single parent's allowance and the tax credit for maintenance payments, which are granted by the Republic of Austria to persons working in its territory for their children, irrespective of their actual needs and therefore their social

environment, are tax advantages since they reduce the amount of income tax. In so far as, where no tax is payable, the sole earner's allowance and single parent's allowance are paid in the form of a child supplement, it is assumed that the recipient is also subject to tax in Austria. Those tax credits are therefore also subject to the principle of equal treatment set out in Article 7(2) of Regulation No 492/2011; and

- the adjustment, since 1 January 2019, of the flat-rate amount of family benefits and social and tax advantages, solely on the basis of the criterion of the child's place of residence, essentially affects migrant workers whose family members reside outside the Member State paying the benefit, which is not disputed by the Republic of Austria.

84. In that regard, the Commission notes that:

- according to the travaux préparatoires for the law establishing that mechanism for adjusting those benefits and advantages, the Republic of Austria pursued an objective of reducing State budgetary expenditure by assuming that the number of children residing in Member States where the price level is lower than that in Austria is greater than the number of children residing in Member States where the price level is higher than that in Austria, and

- it is apparent from the Austrian legislation that, with regard to the Member States bordering the Republic of Austria, the adjustment coefficient is 0.619 for the Czech Republic, 0.974 for Germany, 0.948 for Italy, 0.562 for Hungary, 0.79 for Slovenia and 0.641 for Slovakia. It is only in respect of Switzerland and Liechtenstein that the adjustment results in a higher amount or the same flat-rate amount as in Austria.

85. The Commission adds that, however, the Austrian legislation excludes cases in which the children of the family of an Austrian civil servant have followed him or her when he or she was seconded to another Member State in the context of a service assignment, treating the benefits as if those children were resident in Austria.

86. According to that institution, having regard to the criteria for assessing the comparability of situations laid down by the Court, (66) the situation of frontier workers who live with their children is no different from that of Austrian civil servants on secondment. While they are disadvantaged by being posted to Member States where the cost of living is higher than that in the Republic of Austria, they are far smaller in number than migrant workers. The Commission also takes the view that the international, European and national legal differences on which that Member State relies are ineffective.

87. The Commission concludes that the Republic of Austria gives rise to indirect discrimination against migrant workers which does not appear to be justified by any legitimate objective.

88. In response to the Republic of Austria's arguments that, in the first place, *there is no discrimination* on the ground that the principle of equal treatment requires that the amount of the financial advantages in respect of the maintenance of a child payable to a worker corresponds to the amount of the worker's expenditure in that child's place of residence, (67) the Commission observes that the family benefits and the social and tax advantages at issue are not calculated, generally speaking, on the basis of the actual level of prices in that place and that the flat-rate amount of those benefits and advantages is uniform throughout the national territory, despite the disparity in purchasing power in the various regional units. In that regard, it notes that the explanation given by the Kingdom of Denmark in support of that given by the Republic of Austria, that that uniformity results from the calculation of the amount of family allowances and child tax

credit, by reference to the category of persons with the lowest income, is not based on any evidence provided by the Republic of Austria.

89. The Commission also states that it is difficult to imagine how that Member State can argue that the family benefits and the social and tax advantages it grants are genuinely linked to the expenditure incurred for children while at the same time considering that it must, for example with regard to Germany and Italy, make an adjustment to those benefits and advantages for a difference in purchasing power of only 2.6% and 5.2%, which is much lower than the 8% difference that exists within the Republic of Austria between the federal state of Vienna and that of Lower Austria, which is not taken into account. (68)

90. The Commission adds that the adjustment mechanism provided for in Austria the implementation of which depends on the child's place of residence is not comparable to the correction coefficients applied to the remuneration and financial aid provided for in European Union acts on the ground that they are dependent on the place in which the EU official is employed or the place where that aid is to be paid and the Austrian family allowances are paid to the migrant worker for his or her children and not for himself or herself.

91. The Commission also points out that the Kingdom of Denmark cannot argue at the same time that different situations must be treated differently and that the Member States are not required to adjust the amount of allowances where the purchasing power is greater in the children's Member State of residence.

92. As regards, in the second place, the *justification* given by the Republic of Austria for the existence of possible discrimination, deriving from the *objective of guarding against a risk of undermining the financial balance of the social security system*, (69) the Commission observes that that risk must be serious. (70) It notes that it is apparent from the report by the Rechnungshof (Court of Auditors, Austria), on which the Republic of Austria itself relied during the pre-litigation procedure in support of that alleged justification, that, first, support from the national budget to finance family benefits has become necessary following the increase in the flat-rate amounts and the concomitant reduction in the funding sources of family benefits. (71)

93. Secondly, the proportion of family benefits for children residing in a Member State other than the Republic of Austria corresponds to approximately 6% of all payments.

94. Thirdly, although the grant of those benefits has an impact on the financing of family benefits, this is mainly due to the lack of appropriate checks on the conditions for granting those benefits by the Austrian authorities. (72)

95. Fourthly, the adjustment of family benefits in line with the price level in the Member State concerned in relation to that in the Republic of Austria makes it more difficult to manage those benefits, from a technical and economic point of view, on account of the system for paying the differential supplement compared with family benefits paid in the child's Member State of residence. That system, introduced by Article 68(2) of Regulation No 883/2004, is applicable in three quarters of the cases where family benefits are paid for children residing in other Member States.

96. As regards, in the third place, the *justification for the existence of discrimination* on which the Republic of Austria relies, in the alternative, *deriving from the objective of ensuring equivalence in value of the financial support and relief in Austria with the other Member States by reference to the child's residence*, the Commission submits that that justification is not a recognised overriding

reason in the public interest and is based on arguments relating to the absence of unequal treatment and the coherence of the adjustment mechanism which are, moreover, contradicted by the exception to that mechanism for seconded Austrian civil servants.

97. Moreover, the Commission, supported by the Slovak Republic, takes the view that the Republic of Austria, in considering that it had to react to distortions in the system resulting from the fact that the financial support for migrant workers exceeded the level of relief from their expenditure, seems to lose sight of the fact that workers from other Member States contribute to the financing of the Austrian social security and tax system in the same way as Austrian workers, irrespective of the place of residence of their children. The Commission points out that the income which those workers receive in Austria in return for their economic performance is taken into account in equal measure both in the calculation of the contribution paid by employers to finance family allowances and the calculation of tax.

(b) *The Republic of Austria*

(1) *Indirect discrimination against migrant workers as a result of the application of a reference criterion linked to children's place of residence*

(i) *There is no indirect discrimination*

98. According to the Republic of Austria, the adjustment mechanism does not lead to unequal treatment of identical situations, but ensures that different situations are also treated differently. The Republic of Austria points out that the objective pursued by the Austrian legislature in granting social and tax advantages to parents who have dependent children is to enable them to meet some of the costs incurred in raising their children. It leads to the need to distinguish the situation of workers with children residing abroad from that of workers with children residing in Austria, who are not comparable *ratione materiae* on account of the differences in the cost of living in the Member States and, consequently, the level of expenditure for equivalent purchases.

99. It also observes, as does the Kingdom of Denmark, that, according to the position adopted by the European Committee of Social Rights, which is responsible for ensuring the implementation of the European Social Charter (73) and the Charter as amended on 3 May 1996, the requirement of non-discrimination in respect of social security benefits under Article 12(4) of that Charter does not preclude their adjustment if the child resides in a State where the cost of living is significantly lower. (74)

100. The Republic of Austria states that the guarantee of the same purchasing power according to the cost of living in different States is also implemented not only by weighting the remuneration of EU officials, including family allowances, where they are payable to a person other than those officials, (75) which means that the children's place of residence is taken into account, but also by classifying the countries participating in the Erasmus+ programme into three categories in order to adjust the amount of the student grant for travel and subsistence. (76)

101. In addition, the Republic of Austria refers to the Council Conclusions of 9 October 2020 on Strengthening minimum income protection to combat poverty and social exclusion in the COVID-19 pandemic and beyond. (77) It notes that, referring to Council Recommendation 92/441/EEC of 24 June 1992 on common criteria concerning sufficient resources and social assistance in social protection systems, (78) the Council identified, among three key principles, the principle of 'adequacy', which leads it to consider that 'basic needs should be covered by minimum income

benefits in an adequate manner taking account of [national] living standards and price levels ... in the Member State concerned’.

102. With regard to the Commission’s arguments concerning the lack of uniformity of purchasing power in Austria, the Republic of Austria submits, first, that the differences in purchasing power are very small compared with those in the Member States (79) and that an adjustment according to region should also be provided for in those States. It states that the difficulties that would be caused by such a system justify recourse to Eurostat’s calculation of an average value per State, which has the advantage of being an objective criterion that avoids questioning cases in which small differences in purchasing power exist, for example in Germany or Italy.

103. The Republic of Austria considers, next, that, according to the case-law of the Court, such a reference to uniform and approximate amounts (80) like the choice of the criterion of the difference in the cost of living (81) is lawful. In that regard, it also refers to the Opinion of Advocate General Kokott in *Hosse* (82) in accordance with which ‘the State paying the benefit could possibly be given the right to adjust the benefit where the cost level in the State in which the recipient is resident is significantly different, in so far as this is not precluded by Regulation No 1408/71. However, under no circumstances can the consequence of this argument be that the person in question is denied the benefit entirely’.

104. Finally, the Republic of Austria notes that the European Union refers to regions which do not belong to more than one Member State in any event, in particular in the context of the assessment of eligibility for regional support, the aim of which is precisely to promote cohesion and, as a result, to harmonise living conditions within the European Union. (83) It considers that, although the argument put forward by the Commission in the present proceedings was correct, it would be difficult to consider it appropriate that the regions of Burgenland (Austria), Bratislava (Slovakia) and Western Transdanubia (Hungary) – together with the directly adjacent municipalities of Deutsch Jahrndorf (Austria), Rusovce (Slovakia) and Rajka (Hungary) – have very different entitlements to EU regional support resources despite the fact that they share borders.

(ii) *Objective justification for indirect discrimination, in the alternative*

105. In the first place, the Republic of Austria submits that the Commission has cited documents which do not justify its pursuit of a specific objective of making savings and that its analysis is invalidated by the travaux préparatoires for the national legislation (84) and, in particular, the assessment of its consequences in terms of efficiency. (85)

106. In the second place, with regard to *family allowances* and *child tax credit*, the Republic of Austria points out, first, that, according to the settled case-law of the Court, (86) it is for the Member States to organise their respective social security systems and, in that context, it has modified the method of calculating benefits, in line with actual living costs, upwards or downwards, in order to satisfy the objectives of meeting part of the costs typically associated with caring for children and ensuring that the social security system is fair. Secondly, the Republic of Austria refers to the case-law of the Austrian civil courts concerning maintenance payments for children living abroad. Such a maintenance payment is calculated according to the average living conditions of the maintenance debtor and the purchasing power in the country in which the child lives. On that basis, the needs of the maintenance recipient are specifically and individually compared with the parents’ living conditions. It also submits that the finding that family allowances cover only basic needs in no way alters their supportive function, (87) since those benefits, in principle, pursue the same objective as the maintenance payment, namely to cover the costs normally borne by the parents in raising their child and it is irrelevant that the level of abstraction is, by its nature, slightly higher in

the case of a State benefit for all children than when the maintenance payment paid to a parent for a specific child is assessed individually.

107. In the third place, with regard to the *Family Bonus Plus* and the *other tax credits*, the Republic of Austria submits that the adjustment mechanism ensures that actual expenditure is taken into account fairly and that all taxpayers carrying on an occupation who have children are treated equally as regards their ability to pay tax.

108. In that regard, it again refers to the principle of the ability to pay tax (88) under which the costs incurred by children must be taken into account for tax purposes to an appropriate extent. That principle is said to have its basis in EU law in the field of direct taxation and to constitute a general principle of tax law within the European Union. Thus, in the judgment of 15 September 2011, *Schulz-Delzers and Schulz*, (89) the Court held that the comparability of two factual situations in relation to expatriation allowances ‘[did not exist] in the light of the objective pursued by the application of a progressive tax scale which is necessarily based ... on an assessment of the taxpayer’s ability to pay tax carried out on the basis of the living conditions on the territory of the Member State concerned’.

109. In the fourth place, it asserts that, since the mechanism for adjusting the family benefits and tax advantages at issue ensures that support or relief of the same value is granted, it does not go beyond what is necessary in order to attain the objective pursued.

110. With regard to the Commission’s arguments based on the Court of Auditors’ report, the Republic of Austria observes that:

- the fact that the grant of tax credits on the basis of family circumstances is linked to the child tax credit and, accordingly, to family allowances which require the establishment of the State in which the child concerned has his or her place of residence for payment, the additional administrative expense resulting from the adjustment mechanism according to the State of residence is very limited, and
- it has been found that the number of children residing in other Member States for whom there is an entitlement to family allowances increased from 1 500 in 2002 to approximately 130 000 in 2016 and that cases with a foreign element ‘*have been checked more often than national situations on account of the risk classification*’.

111. As to the Commission’s argument that, for approximately three quarters of the children residing in other Member States, the Republic of Austria makes only differential payments, (90) it points out that even those payments, including the child tax credit, are, in many cases, greater than the primary benefits in the child’s State of residence.

112. With regard to the Commission’s general argument, which is also supported by the Republic of Croatia, the Republic of Poland and the Republic of Slovenia, that it is unfair for workers to pay taxes in Austria as well as contributions from their salaries and thus to contribute to the financing of the benefits at issue if ultimately they receive those benefits only in the form of adjusted benefits in respect of their children who reside in another Member State, the Republic of Austria considers that the basis for calculating employers’ contributions is irrelevant and that there is no connection between any tax liability and entitlement to State benefits. Conversely, if the worker’s tax liability were to have an influence on the export of social security benefits, the rule set out in Article 70 of Regulation No 883/2004 would be contrary to EU law.

(2) *Indirect discrimination against migrant workers as a result of the rules applicable to civil servants who are abroad*

(i) *There is no indirect discrimination*

113. The Republic of Austria submits that the Commission's argument in support of the existence of indirect discrimination can concern only the situation of Austrian civil servants who are abroad and whose children have also moved with them and that that situation is not comparable to the situation of migrant workers for legal and material reasons. First, civil servants who are abroad are subject to a special scheme exempting them from the social security and tax regime of the host State under Articles 33, 34 and 37 of the Vienna Convention on Diplomatic Relations (91) and Articles 48 and 49 of the Vienna Convention on Consular Relations. (92)

114. Moreover, the specific nature of the situation of civil servants who are abroad is also reflected in EU law, in Article 45(4) TFEU and in Article 11(3)(b) and Article 13(4) of Regulation No 883/2004, (93) from which it follows that civil servants who are abroad are not entitled to family allowances in host States, or, consequently, to differential payments or additional benefits related to their family situation.

115. Finally, under Austrian law, civil servants who are abroad are regarded as working on national territory for the purposes of social security and tax treatment. Moreover, in civil matters, they still fall within the general jurisdiction of the Austrian courts.

116. Secondly, as far as material differences are concerned, civil servants who are abroad are subject to a system of regular transfers and, as a general rule, keep their domicile and centre of interests in Austria.

117. In addition, according to the Republic of Austria, if the situation of civil servants who are abroad were to be regarded as comparable to that of migrant workers, this would result in those civil servants, who are excluded from the application of the adjustment mechanism, if considered as a whole, being disadvantaged and not favoured. It states that account must be taken of the fact that the majority of the Republic of Austria's civil servants who are abroad as they have been seconded to other Member States, to parties to the EEA Agreement and to Switzerland, are in countries in which the cost of living is higher than in Austria.

118. In that regard, the Commission cannot argue that more migrant workers are affected by the adjustment mechanism than Austrian civil servants on secondment without demonstrating, in accordance with the case-law of the Court, (94) that the proportion of migrant workers concerned is greater than that of civil servants placed in the same unfavourable situation.

(ii) *Objective justification for indirect discrimination, in the alternative*

119. If the Court were to find that the rules applicable to civil servants abroad constitute indirect discrimination, the Republic of Austria maintains that such discrimination is justified, as an overriding reason in the public interest, by the State's duty of care towards those civil servants, which is correlated to their duty of loyalty to the State. After noting that the Commission does not call into question the basis of that justification in the context of the action for failure to fulfil obligations, the Republic of Austria refers, in that regard, to a number of decisions of the Court concerning the duty to have regard for the welfare of staff in respect of activities carried out by members of staff within the EU institutions and in the public service of the Member States. (95)

120. According to the Republic of Austria, it shows, in its capacity as an employer, a greater concern for its civil servants working on national territory and abroad by making them subject to a coherent system which is manageable from a practical point of view, based on international law, which makes them subject to the national law of the State of origin on the premiss that all legal consequences are linked to their domicile in that State. It also points out that the application of the adjustment mechanism within the European Union, but not outside it, conflicts with the Republic of Austria's duty of care towards its civil servants, whose equal treatment it must guarantee.

(iii) *In the alternative, a possible argument alleging that the adjustment mechanism is inconsistent*

121. As a preliminary point, the Republic of Austria notes that, in the reasoned opinion, the Commission challenged the rules applicable to civil servants who are abroad only from the point of view of indirect discrimination. It submits that, if, in connection with its arguments put forward in support of its application, the Commission were also to criticise it for the lack of coherence of the rules forming the subject matter of the action establishing the adjustment mechanism, that argument must be rejected as inadmissible, in accordance with the case-law of the Court. (96)

122. However, if that argument were to be examined, the Republic of Austria reiterates the points made in its reply to the effect that the rules applicable to civil servants who are abroad form part of an inherently coherent overall system. It adds that the Court has held that not every exception to national legislation renders it inconsistent, in particular if its scope is particularly restricted and that is so in the present case. (97)

2. *Assessment*

(a) *The existence of indirect discrimination*

123. With regard to the basis of the second complaint raised by the Commission, which is not disputed, it may be recalled that the Court has held that:

– the concept of a 'social advantage', within the meaning of Article 7 of Regulation No 492/2011, must include all advantages which, whether or not linked to a contract of employment, are generally granted to national workers *primarily because of their objective status as workers or by virtue of the mere fact of their residence on the national territory* and the extension of which to workers who are nationals of other Member States therefore seems suitable to facilitate their mobility within the European Union and, consequently, their integration into the host Member State, (98) and

– Article 7(2) of that regulation may apply to social advantages which, at the same time, come specifically within the scope of Regulation No 883/2004. (99)

124. In the present case, the family allowance and child tax credit are both family benefits which are subject to the principle of equal treatment, set out in Article 4 of Regulation No 883/2004, and social advantages which are governed by Article 7(2) of Regulation No 492/2011, whereas the Family Bonus Plus, the sole earner's allowance, the single parent's allowance and the tax credit for maintenance payments are subject to the principle of equal treatment set out in Article 7(2) of Regulation No 492/2011.

125. In that regard, it follows from the case-law of the Court that:

- the principle of equal treatment, as laid down in Article 4 of Regulation No 883/2004, (100) in accordance, in particular, with Article 45(2) TFEU, prohibits not only overt discrimination based on the nationality of the beneficiaries of social security schemes but also all covert forms of discrimination which, through the application of other distinguishing criteria, lead in fact to the same result; (101)
- that prohibition also follows from Article 7(2) of Regulation No 492/2011, (102) which is the particular expression, in the specific area of the grant of social advantages, of the principle of equal treatment enshrined in Article 45(2) TFEU; (103) and
- Article 7(2) of Regulation No 492/2011 must be accorded the same interpretation as Article 45 TFEU. (104)

126. Consequently, the interpretation of Article 4 of Regulation No 883/2004 and Article 7 of Regulation No 492/2011, in so far as they are intended to ensure freedom of movement for workers, must be coordinated.

127. With regard to the relationship between those two regulations, the scopes of which overlap, (105) the Court has noted that Regulation No 492/2011 is of general application as regards the *free movement of workers*. (106) It thus reiterated the solution adopted when examining an action for failure to fulfil obligations, which the Commission based on both infringement of Regulation No 1408/71, on account of the setting of a residence criterion for sickness benefits to be exportable, and the ability to justify the choice of that criterion, in the light of Article 7 of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community. (107) Therefore, the application of Article 4 of Regulation No 883/2004 may be reserved to situations which are not covered by Regulation No 492/2011, even though Regulation No 883/2004 contains specific provisions prohibiting residence rules, in particular in Article 7. (108)

128. The Republic of Austria submits, primarily, that the mechanism for adjusting family benefits and social and tax advantages does not lead to unequal treatment. It argues, in essence, first, that, since the objective of the benefits and advantages is either to reimburse some of the costs incurred by parents for the maintenance of children, or to reduce their tax burden, the situation of workers with children who are not resident in Austria is not comparable because of the differences in the standard of living between the Member States. Secondly, under the adjustment mechanism, migrant workers receive the support they need according to the cost of living in the child's State of residence.

129. However, as the Court has held, conditions imposed by national law must be regarded as indirectly discriminatory where, although applicable irrespective of nationality, *they affect essentially migrant workers or the great majority of those affected are migrant workers*, where they are applicable without distinction but can more easily be satisfied by national workers than by migrant workers or where there is a risk that they may operate to the particular detriment of the latter. (109)

130. In the present case, it follows from the criterion relating to the residence of children laid down by the Austrian legislation that the reduction in the amount of family benefits and social and tax advantages essentially affects migrant workers since their children are more likely to reside in another Member State. (110) Moreover, it is very clear from the tables setting the coefficients for adjusting the amounts (111) of benefits in respect of the States bordering the Republic of Austria that, because of the differences in the standard of living in the majority of those States compared

with the Republic of Austria, the workers who have exercised their freedom of movement from those States are largely those who will receive benefits and social and tax advantages of a lesser amount than that granted in Austria. According to the data in the Court of Auditors' report produced by the Commission (112) and referred to by the Republic of Austria, approximately 50% of payments in 2016 concerned children residing in Hungary and Slovakia and 40% of those payments concerned children residing in the Czech Republic, Poland, Romania and Slovenia.

131. That analysis is corroborated by the Austrian Government's explanations of the estimated effects of the adjustment in relation to the Family Bonus Plus. (113) Those factors are in line with the Court of Auditors' finding that the number of child beneficiaries increased sixfold between 2004 and 2016 alongside the opening up of the Austrian labour market. (114)

132. In my view, those factors alone are sufficient to establish, without having to examine the additional arguments discussed by the parties, that the distinction in the Austrian legislation which makes the amount of exportable benefits dependent on a child's place of residence in the Member States affects migrant workers to a greater extent and constitutes indirect discrimination on the ground of nationality which is permissible only if it is objectively justified. (115)

133. To my knowledge, the Court did not expressly refer to that condition when applying Article 4 of Regulation No 883/2004. However, the Court's only decision on Article 3(1) of Regulation No 1408/71 which set out in similar terms the principle of equal treatment is, in my view, transposable. (116) Moreover, I note that the Court has interpreted Article 67 of Regulation No 883/2004, which is intended to ensure that a worker is not deterred from exercising his or her right to freedom of movement, (117) in conjunction with Article 7(2) of Regulation No 492/2011, and has assessed the justifications put forward by the referring court on that basis alone. I infer from this that the choice by a Member State to use a residence criterion which applies to family benefits may also be justified on account of the rule of the coordinated interpretation of Article 4 of Regulation No 883/2004 and Article 7(2) of Regulation No 492/2011, resulting from their common basis, namely Article 45 TFEU, laying down the objective of guaranteeing freedom of movement for workers. (118)

(b) *Justification for indirect discrimination*

134. According to the Court's settled case-law on the application of Article 7(2) of Regulation No 492/2011, in order to be justified, indirect discrimination must be appropriate for securing the attainment of a legitimate objective and must not go beyond what is necessary to attain that objective. (119)

135. The Commission rightly submits that the Republic of Austria does not put forward any ground capable of justifying the indirect discrimination caused by the mechanism for adjusting the amount of benefits and social and tax advantages which it introduced.

136. In the present action, the Republic of Austria submits, first, with the support in essence of the Kingdom of Denmark and the Kingdom of Norway, that adjusting the amount of the benefits is intended to ensure that *the support and consequential relief from family expenses correspond in value to those granted in Austria*. (120)

137. First, it must, in my view, be reiterated once more that the benefits granted are flat-rate benefits (121) and do not take account of the child's actual needs. In that regard, I also share Romania's view that the Republic of Austria cannot use the same arguments to dispute the existence of discrimination and to justify it.

138. Secondly, it is clear from the Commissions' figures, (122) which are not challenged by the Republic of Austria, that that correspondence in value is not ensured in Austria (123) and that there is no correlation in proportion between the differences in the cost of living found in Austria and the coefficients applied in certain Member States. (124) Moreover, as the Slovak Republic points out, disparities may exist within those Member States (125) which demonstrates the importance of the place in which purchases are made if a system of correspondence with price levels were to be accepted.

139. The Republic of Austria's argument that the differences in purchasing power are significantly greater, in particular with regard to Bulgaria, (126) which also serves to offset the effects of the adjustment mechanism, is not such as to call into question all of those findings.

140. Consequently, the objective of ensuring that the support and consequential relief from family expenses correspond in value to those granted in Austria is not, in my opinion, capable of justifying the indirect discrimination at issue.

141. Secondly, the Republic of Austria submits that the overriding objective of the mechanism for adjusting the amount of social and tax advantages is *the establishment or restoration of the supportive function and the fairness of the social system*.

142. Like the Commission, I note, first, that it follows from the Court of Auditors' report (127) that the adjustment of family benefits in line with the price level in the Member State concerned in relation to the Republic of Austria is likely to result in additional costs, even though that impact is minimised by the Republic of Austria. Those costs must necessarily be borne by all those who contribute to the State budget. In that context, it seems to me appropriate to point out that it is also stated in that report, (128) as the Commission and the Republic of Poland point out, that the reason which could jeopardise the financial equilibrium of the social security system is not the payment of benefits to workers whose children reside outside the Republic of Austria, which accounts for approximately 6% (129) of the expenditure in respect of family benefits, but the lack of appropriate checks with regard to the grant of those benefits.

143. Secondly, I share the views expressed by the Commission (130) and by the EFTA Surveillance Authority and the Republic of Slovenia, according to which it is of fundamental importance to recall that the rules protecting the freedom of movement for workers within the European Union and the EEA, (131) including equality of treatment, are based on an overall system in which, first, the applicable social security legislation is, in general, that of the Member State in which the person concerned pursues his or her activity as an employed or self-employed person (132) and, secondly, migrant workers contribute to the financing of the social policies of the host Member State through the taxes and social contributions which they pay by virtue of their employment there, (133) which justifies the equality of the benefits or advantages granted. (134)

144. In the present case, I note, like the Czech Republic, the Republic of Croatia and the Republic of Poland, that, from a purely economic point of view, since Austrian family allowances are financed by employers' contributions calculated on the basis of the total amount of workers' wages, a migrant worker therefore participates in the same way as a national worker in determining the amount of the sums paid by his or her employer.

145. Moreover, with regard to the Family Bonus Plus and the other tax credits at issue, the Republic of Austria stated that those advantages were financed by workers' income tax, which also invalidates any justification for the Austrian legislature's choice of non-reciprocity on the basis of an objective of social equity.

146. I am therefore of the opinion that the difference in treatment according to the place of residence of the child of the worker concerned is neither appropriate nor necessary in order to establish or restore the supportive function and the fairness of the social system.

147. For all of the reasons set out above, I consider that the Austrian legislation on the adjustment of the amount of family benefits and social and tax advantages for persons working in Austria whose children reside in another Member State is contrary to the principle of equal treatment set out in both Article 4 of Regulation No 883/2004 and Article 7(2) of Regulation No 492/2011.

148. Consequently, I propose that the Court should rule that the second complaint raised by the Commission is well founded.

VI. Costs

149. Under Article 138(1) of the Rules of Procedure of the Court of Justice, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. In so far as the Court should, in my view, grant the form of order sought by the Commission, the Republic of Austria must be ordered to pay the costs.

150. In accordance with Article 140(1) and (2) of the Rules of Procedure, under which the Member States, the States, other than the Member States, which are parties to the EEA Agreement, and also the EFTA Surveillance Authority, which have intervened in the proceedings are to bear their own costs, the Czech Republic, the Kingdom of Denmark, the Republic of Croatia, the Republic of Poland, Romania, the Republic of Slovenia and the Slovak Republic, and the Kingdom of Norway and the EFTA Surveillance Authority must bear their own costs.

VII. Conclusion

151. In the light of the foregoing considerations, I propose that the Court should:

(1) Declare that, by introducing an adjustment mechanism in relation to the family allowance and the child tax credit for workers whose children reside permanently in another Member State, the Republic of Austria has failed to fulfil its obligations under:

– Articles 7 and 67 of Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, and

– Article 4 of Regulation No 883/2004 and Article 7(2) of Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union;

(2) Declare that, by introducing an adjustment mechanism in relation to the Familienbonus Plus (Family Bonus Plus tax credit), the sole earner's allowance, the single parent's allowance and the tax credit for maintenance payments for migrant workers whose children reside permanently in another Member State, the Republic of Austria has failed to fulfil its obligations under Article 7(2) of Regulation No 492/2011;

(3) Order the Republic of Austria to pay the costs;

(4) Order the Czech Republic, the Kingdom of Denmark, the Republic of Croatia, the Republic of Poland, Romania, the Republic of Slovenia and the Slovak Republic, and the Kingdom of Norway and the EFTA Surveillance Authority to bear their own costs.

[1](#) Original language: French.

[2](#) OJ 2004 L 166, p. 1, and corrigendum OJ 2004 L 200, p. 1.

[3](#) OJ 2011 L 141, p. 1.

[4](#) BGBl. 376/1967, ‘the FLAG’.

[5](#) OJ 1994 L 1, p. 3, ‘the EEA Agreement’.

[6](#) BGBl. 400/1988, ‘the EStG’.

[7](#) The adjustment of the family allowance and the child tax credit was introduced, with effect from 1 January 2019, by the Verordnung der Bundesministerin für Frauen, Familien und Jugend und des Bundesministers für Finanzen über die Anpassung der Familienbeihilfe und des Kinderabsetzbetrages in Bezug auf Kinder, die sich ständig in einem anderen Mitgliedstaat der EU oder einer Vertragspartei des Europäischen Wirtschaftsraumes oder der Schweiz aufhalten (Order of the Federal Minister for Women’s Affairs, Family and Youth and the Federal Minister for Finance on the adjustment of the family allowance and the child tax credit in respect of children permanently residing in another Member State of the European Union or in a State party to the [EEA] Agreement or in Switzerland) of 10 December 2018 (BGBl. II, 318/2018), available at: <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20010489&FassungVom=2019-07-08>, adopted on the basis of the Bundesgesetz, mit dem das Familienlastenausgleichsgesetz 1967, das Einkommensteuergesetz 1988 und das Entwicklungshelfergesetz geändert werden (Federal Law amending the [FLAG], the [EStG] and the Law on the status of development aid workers) of 4 December 2018 (BGBl. I, 83/2018).

[8](#) The adjustment of the Family Bonus Plus and the sole earner’s allowance, the single parent’s allowance and the tax credit for maintenance payments was introduced, with effect from 1 January 2019, by the Verordnung des Bundesministers für Finanzen über die Anpassung des Familienbonus Plus, des Alleinverdiener-, Alleinerzieher- und Unterhaltsabsetzbetrages sowie des

Kindermehrbetrages in Bezug auf Kinder, die sich ständig in einem anderen Mitgliedstaat der EU oder einer Vertragspartei des Europäischen Wirtschaftsraumes oder der Schweiz aufhalten (Order of the Federal Minister for Finance on the adjustment of the Family Bonus Plus, the sole earner's allowance, the single parent's allowance and the tax credit for maintenance payments in respect of children permanently residing in another Member State of the European Union or in a State party to the [EEA] Agreement or in Switzerland) of 27 September 2018 (BGBl. II, 257/2018), available at: <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20010319>, adopted on the basis of the Jahressteuergesetz 2018 (Annual Tax Law 2018) of 14 August 2018 (BGBl. I, 62/2018), amending inter alia the EStG.

⁹ See, with regard to the coefficients applied according to the Member States concerned, footnotes 7 and 8, and the second indent of point 84 of this Opinion by way of illustration of the diversity of the coefficients applied by the Member States bordering the Republic of Austria.

¹⁰ The Commission refers to the judgment of 2 April 2020, *Caisse pour l'avenir des enfants (Child of the spouse of a frontier worker)* (C-802/18, EU:C:2020:269, paragraphs 38 and 39 and the case-law cited; 'the judgment in *Caisse pour l'avenir des enfants (Child of the spouse of a frontier worker)*').

¹¹ The Commission also reaffirmed its position in response to the argument to the contrary put forward by the Kingdom of Norway based on an example of the reimbursement of 50% of the cost of a pushchair by a family benefit, the amount of which could vary according to the Member State (see also footnote 20 of this Opinion). The Commission pointed out that, in such a case, for a migrant worker, the amount of the allowance depends on the cost of *his or her expenses*. The Austrian adjustment mechanism is based on the presumption that those expenses are incurred in the place where the child resides and disregards the economic and social situation of a child who resides in a Member State other than the State in which the parent works. Consequently, taking the same example, it is unacceptable for the reimbursement for the cost of a pushchair worth EUR 100 that is purchased by two workers to be EUR 50 if the child resides in Austria and a different amount if that child resides elsewhere, even though the expenditure is identical.

¹² Case C-32/18, EU:C:2019:752, paragraph 36 and the case-law cited; 'the judgment in *Moser*'. Referring also to paragraphs 10 and 54 of that judgment, the Commission added that it was precisely because the amount of the Austrian childcare allowance was expressly dependent on the amount of previous earnings that it was possible to calculate its amount on the basis of the economic and social environment of the recipient.

¹³ Case 41/84, EU:C:1986:1; 'the judgment in *Pinna*'. See, in particular, paragraph 25 of that judgment.

[14](#) Regulation 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 1971 L 149, p. 2). The Commission states that it follows from the judgment of 27 September 1988, *Lenoir* (313/86, EU:C:1988:452, paragraphs 9, 11 and 16; ‘the judgment in *Lenoir*’), *that it is not possible to adjust ‘periodical cash benefits granted exclusively by reference to the number and, where appropriate, the age of members of the family’ to the economic and social environment.*

[15](#) Opinion of Advocate General Mancini in *Pinna* (41/84, not published, EU:C:1985:215, point 7).

[16](#) See Annex I, Section D, point 2(a) to the Extract of the conclusions of the European Council of 18 and 19 February 2016 (OJ 2016 C 69 I, p. 1).

[17](#) See point 56 of this Opinion.

[18](#) The Commission refers to Impact assessment SWD(2016) 460 final/2, part 1/6, p. 135, point 7.3.2.

[19](#) The Republic of Austria and the Kingdom of Norway consider that the link between family benefits and the cost of living is confirmed in the FreSsco report ‘Assessment of the impact of amendments to the EU social security coordination rules on export of family benefits’, contained in Annex VI to the impact assessment cited in footnote 18 of this Opinion, part 3/6, point 1.7.2, p. 44. The Republic of Austria points out that that demonstrates, in particular, that family benefits are, in principle, adjusted, with that adjustment always being based on inflation rates.

[20](#) The Republic of Austria notes that the criterion of the number of children and their age is not in itself decisive in order to assess the nature of the benefit and the specific characteristics taken into account. In that regard, it considers the following example given by the Kingdom of Norway to be ‘eloquent’: ‘Member State A has learned from the statistics that a pushchair costs on average EUR 100 and that a reimbursement of 50% therefore amounts to EUR 50. In order to avoid the unnecessarily burdensome system of reimbursement, that State decides to pay the benefit from the outset in the form of a flat-rate amount of EUR 50, together with an indexation rule correcting the increase in the price of pushchairs for babies. Moreover, in order to ensure that the purpose and function of the benefit are achieved irrespective of the place of residence of the children, which was the case automatically under the previous system for reimbursement, the legislature adds an indexation mechanism to correct the actual costs of purchasing pushchairs in the various Member States’. See, in that regard, footnote 11 of this Opinion.

[21](#) See Paragraph 39(1) of the FLAG.

[22](#) The Republic of Austria states that, in addition, the compensation fund for family allowances is financed essentially by a fixed amount of income tax, quotas of corporation tax and income tax and contributions from farming and forestry businesses and compensation from various federal ministries. See Paragraph 39(2)(b) to (h) of the FLAG.

[23](#) See Paragraph 39(2)(a) of the FLAG.

[24](#) See Paragraph 41(1) of the FLAG.

[25](#) See Paragraph 41(3) of the FLAG.

[26](#) See point 34 of this Opinion.

[27](#) See the first and second indents of point 83 of this Opinion.

[28](#) See, by way of illustration, point 53 of this Opinion.

[29](#) According to the Republic of Austria, recital 16 of Regulation No 883/2004 does not relate to Article 70 of that regulation on the ground that its purpose is to exclude from the rule on exportability special benefits financed by tax providing substitute income or special protection for the disabled which are expressly due at the beneficiary's place of residence.

[30](#) Case C-85/99, EU:C:2001:166, paragraph 41, concerning the interpretation of Article 1(u)(i) of Regulation No 1408/71 concerning family benefits as distinct from the family allowances which were defined in point (ii) of that provision. See, also, point 72 of this Opinion. The rule laid down in Article 73(1) of that regulation for the export of family benefits did not apply to those benefits.

[31](#) Opinion of Advocate General Slynn in *Lenoir* (313/86, not published, EU:C:1988:87).

[32](#) Linking to the Kingdom of Norway's statement in intervention, the Republic of Austria also submits that Article 67 of Regulation No 883/2004 and the case-law of the Court confirm that account must be taken of the specific nature, the purpose and the terms of benefits and, for example, the fact that at issue is a benefit based on the needs of the child or calculated by reference to the parents' income. Consequently, an obligation to export benefits in absolute amounts in all cases would run counter to Article 67 – and Article 7 – of Regulation No 883/2004.

[33](#) In order to emphasise, also, the importance of making the adjustment in the light of the price level in Denmark, where consumer prices are the highest in the European Union, the Republic of Austria uses as an example a comparison with Bulgaria, which has the lowest consumer prices in the European Union. Thus, in the case of a worker who is a Union citizen and has a one-year-old child, the Danish monthly allowance is 10 times higher than that provided for in Bulgaria. With an adjustment in line with price levels in Bulgaria (about index 40 if Denmark is 100), the Danish allowance is four times the amount of the Bulgarian allowance.

[34](#) Opinion of Advocate General Mancini in *Pinna* (41/84, not published, EU:C:1985:215).

[35](#) Opinion of Advocate General Mancini in *Pinna* (41/84, not published, EU:C:1985:215, point 7). Emphasis added.

[36](#) See point 40 of this Opinion.

[37](#) Emphasis added in the Republic of Austria's defence.

[38](#) The Republic of Austria refers to the 'Declaration of the European Commission on the indexation of child benefits exported to a Member State other than that where the worker resides', which is contained in Annex V to those conclusions (see footnote 16 of this Opinion), and the impact assessment cited in footnote 18 of this Opinion, point 7.3.2, p. 135.

[39](#) That mechanism also applies between the Republic of Austria and each of the parties to the EEA Agreement and Switzerland.

[40](#) In that regard, the Court noted that the phrase ‘to meet family expenses’ is to be interpreted as referring in particular to a public contribution to a family’s budget to alleviate the financial burdens involved in the maintenance of children. See judgment in *Caisse pour l’avenir des enfants (Child of the spouse of a frontier worker)* (paragraph 38 and the case-law cited).

[41](#) See judgments of 19 July 2012, *Reichel-Albert* (C-522/10, EU:C:2012:475, paragraph 38), and in *Caisse pour l’avenir des enfants (Child of the spouse of a frontier worker)* (paragraph 69).

[42](#) See, inter alia, Article 70 of Regulation No 883/2004, which concerns special non-contributory cash benefits.

[43](#) See judgments of 25 November 2021, *Finanzamt Österreich (Family allowances for development aid workers)* (C-372/20, EU:C:2021:962, paragraph 76), and in *Moser* (paragraph 36 and the case-law cited). Cf. judgment in *Pinna* (paragraph 9), and judgment of 5 October 1995, *Imbernon Martínez* (C-321/93, EU:C:1995:306, paragraph 22).

[44](#) See judgments of 7 June 2005, *Dodl and Oberhollenzer* (C-543/03, EU:C:2005:364, paragraph 45); of 22 October 2015, *Trapkowski* (C-378/14, EU:C:2015:720, paragraph 35); and in *Moser* (paragraphs 37 and 38 and the case-law cited). In that judgment, the Court confirmed that Article 67 of Regulation No 883/2004 is applicable to a worker who works in a Member State other than the one whose legislation is applicable to him. See also Article 5(b) of that regulation, which enshrines the principle of equal treatment of facts, which also includes the expression ‘as though’, and judgment of 12 March 2020, *Caisse d’assurance retraite et de la santé au travail d’Alsace-Moselle* (C-769/18, EU:C:2020:203, paragraphs 42 to 44).

[45](#) I note, in that regard, that there has been no change since the draft envisaged for the United Kingdom in 2016. See points 40 and 56 of this Opinion.

[46](#) See, for a reminder of the details of the rule that benefits may not overlap in the case of benefits payable by more than one Member State on the same basis, judgment in *Moser* (paragraph 41).

[47](#) Regulation of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems (OJ 2009 L 284, p. 1).

[48](#) See judgment in *Moser* (paragraphs 42 and 46).

[49](#) See judgment of 10 July 2019, *Aubriet* (C-410/18, EU:C:2019:582, paragraph 33 and the case-law cited).

[50](#) See point 54 of this Opinion.

[51](#) See the third indent of point 51 of this Opinion.

[52](#) See the fourth indent of point 51 of this Opinion.

[53](#) See judgments in *Pinna* (paragraph 21), and in *Lenoir* (paragraph 14).

[54](#) See judgment in *Pinna* (paragraphs 10, 11 and 14).

[55](#) See judgment in *Lenoir* (paragraph 16).

[56](#) See judgments in *Lenoir* (paragraph 9), for a reminder to the legislative history, and in *Pinna* (paragraphs 9 and 18).

[57](#) See judgments of 6 July 2006, *Kersbergen-Lap and Dams-Schipper* (C-154/05, EU:C:2006:449, paragraph 33 and the case-law cited), and of 18 December 2007, *Habelt and Others* (C-396/05, EU:C:2007:810, paragraph 81).

[58](#) See recital 16 of Regulation No 883/2004. It is, in this respect, logical that the EU legislature adopted that criterion on account of the purpose of the benefits, namely to ensure a minimum subsistence income which can be determined only on the basis of the economic and social situation in the place of residence.

[59](#) See judgment in *Caisse pour l'avenir des enfants (Child of the spouse of a frontier worker)* (paragraphs 36 and 37).

[60](#) It should be noted that the FreSsco report, on which the Republic of Austria relied after the Kingdom of Norway (see footnote 19 of this Opinion), with regard to the situation in 2016 and 2017, contains no details to that effect and refers only to an adjustment based on the rate of inflation.

[61](#) The same is true of the education allowance or the allowance related to a child's disability, as is apparent from the evidence submitted to the Court for assessment. See the fourth indent of point 38 and the fourth indent of point 42 of this Opinion.

[62](#) See footnote 11 of this Opinion. The example given by the Kingdom of Norway demonstrates in that regard that, specifically, the actual level of expenditure is not taken into account in relation to the place of purchase. The same applies to the variety of factors that should be taken into consideration with regard to the situation of migrants, including additional financial burdens on account inter alia of the absence of one of the parents, as noted by Romania.

[63](#) The Commission refers to the judgment of 22 June 2011, *Landtová* (C-399/09, EU:C:2011:415, paragraph 42 and the case-law cited).

[64](#) The Commission refers to the judgment of 12 May 1998, *Martínez Sala* (C-85/96, EU:C:1998:217, paragraph 25).

[65](#) The Commission refers to the judgment in *Caisse pour l'avenir des enfants (Child of the spouse of a frontier worker)* (paragraph 45 and the case-law cited).

[66](#) The Commission refers to the judgment of 12 December 2019, *Instituto Nacional de la Seguridad Social (Pension supplement for mothers)* (C-450/18, EU:C:2019:1075, paragraph 45 and the case-law cited).

[67](#) See point 98 of this Opinion.

[68](#) See footnote 79 of this Opinion.

[69](#) See, with regard to that argument in the context of the pre-litigation procedure, point 25 of this Opinion.

[70](#) The Commission refers to the judgment of 28 April 1998, *Kohll* (C-158/96, EU:C:1998:171, paragraph 41).

[71](#) The Commission refers to the report by the Court of Auditors entitled ‘Familienbeihilfe – Ziele und Zielerreichung, Kosten und Kontrollsystem’ (Family allowance – objectives and attainment of the objectives, costs and monitoring system, ‘the Court of Auditors’ report’), available at: <https://www.rechnungshof.gv.at/rh/home/home/Familienbeihilfe.pdf> (points 6.1 and 6.3, pp. 25 to 27).

[72](#) The Commission refers to the Court of Auditors’ report (point 15.1, pp. 42 to 45, point 19.2, p. 53, and points 23 to 29, pp. 59 to 69).

[73](#) Signed at Turin on 18 October 1961.

[74](#) The Republic of Austria cites the Council of Europe document entitled ‘Digest of the case-law of the European Committee of Social Rights’, December 2018, p. 141 (available at: <https://rm.coe.int/digest-2018-parts-i-ii-iii-iv-en/1680939f80>).

[75](#) The Republic of Austria refers to Articles 64 and 67(4) of the Staff Regulations of Officials of the European Union and the fourth recital of Council Regulation (EC, ECSC, Euratom) No 2594/98 of 27 November 1998 amending Regulation (EEC, Euratom, ECSC) No 259/68 laying down the Staff Regulations of officials of the European Communities and the Conditions of Employment of other servants of the Communities (OJ 1998 L 325, p. 1). In that regard it refers to the Kingdom of Denmark’s argument that the Court emphasised in the judgment of 8 May 2014, *Wiering* (C-347/12, EU:C:2014:300), which also concerned Regulation No 1408/71, that it is the child who is the recipient of family allowances. The adjustment of such allowances is therefore consistent with the interpretation which has already been given in respect of the principle of equal treatment.

[76](#) The Republic of Austria refers to the Commission document entitled ‘Erasmus+ Programme Guide’, Version 2 (2020) of 26 February 2020, p. 45 (available at: https://erasmus-plus.ec.europa.eu/sites/default/files/2021-09/erasmus_programme_guide_2020_v2_en.pdf).

[77](#) Document 11721/2/20 REV 2 (available at: <https://data.consilium.europa.eu/doc/document/ST-11721-2020-REV-2/en/pdf>).

[78](#) OJ 1992 L 245, p. 46.

[79](#) The Republic of Austria provided the following illustration: ‘Purchasing power in Vienna (the federal State with the lowest rate) is about 92% of the purchasing power in Lower Austria. Moreover, the differences in purchasing power per capita in the districts of Lower Austria are greater than the differences in purchasing power between the federal States in Austria. See <https://retailreport.at/sites/default/files/2019-05/GfK%20Kaufkraft%20C3%B4sterreich%202019.pdf>. In contrast, purchasing power in Bulgaria in 2019 was 52% of the average purchasing power of the 27 Member States ..., whereas purchasing power in Austria was 113% of that average purchasing power (see <https://ec.europa.eu/eurostat/databrowser/view/tec00120/default/table?lang=en>)’.

[80](#) The Republic of Austria cites the judgment of 24 February 2015, *Sopora* (C-512/13, EU:C:2015:108, paragraph 34).

[81](#) The Republic of Austria cites the judgments of 17 July 1963, *Italy v Commission* (13/63, EU:C:1963:20, Heading 4), and of 18 September 2014, *Bundesdruckerei* (C-549/13, EU:C:2014:2235, paragraph 34).

[82](#) Case C-286/03, EU:C:2005:621, point 109. This is Advocate General Kokott’s response to the argument, put forward in that case, against the export of a benefit, according to which *the amount of the benefit is correlated to costs of living and of care* in the State in which the competent institution is based.

[83](#) Commission Implementing Decision 2014/99/EU of 18 February 2014 setting out the list of regions eligible for funding from the European Regional Development Fund and the European Social Fund and of Member States eligible for funding from the Cohesion Fund for the period 2014-2020 (OJ 2014 L 50, p. 22).

[84](#) These are the draft laws which gave rise to the federal laws cited in footnotes 7 and 8 of this Opinion and the government's explanations of those drafts contained in the documents referenced under No 111 and No 190 of the annexes to the minutes of the sittings of the Nationalrat (National Council, Austria) concerning the XXVIth parliamentary term (available at: https://www.parlament.gv.at/PAKT/VHG/XXVI/I/I_00111/fname_692212.pdf and https://www.parlament.gv.at/PAKT/VHG/XXVI/I/I_00190/fname_698479.pdf).

[85](#) The Republic of Austria refers to the documents referenced under No 111 and No 190 of the annexes to the minutes of the sittings of the National Council concerning the XXVIth parliamentary term, p. 3 and p. 8 et seq., respectively.

[86](#) The Republic of Austria refers to the judgments of 28 June 2018, *Crespo Rey* (C-2/17, EU:C:2018:511, paragraphs 45 et seq. and the case-law cited), and in *Caisse pour l'avenir des enfants* (*Child of the spouse of a frontier worker*) (paragraph 68).

[87](#) In that regard, the Republic of Austria refers to the explanations in the document referenced under No 111 of the annexes to the minutes of the sittings of the National Council concerning the XXVIth parliamentary term, p. 1 et seq. (see footnote 84 of this Opinion).

[88](#) See point 46 of this Opinion.

[89](#) Case C-240/10, EU:C:2011:591, paragraph 37.

[90](#) See point 95 of this Opinion.

[91](#) Done at Vienna on 18 April 1961 and entered into force on 24 April 1964.

[92](#) Done at Vienna on 24 April 1963 and entered into force on 19 March 1967.

[93](#) The Republic of Austria states that, although a migrant worker is affiliated to the Austrian social security scheme by virtue of Article 11(3)(a) of Regulation No 883/2004, an Austrian civil servant who is seconded to another Member State remains affiliated to the Austrian social security scheme by virtue of Article 11(3)(b) of Regulation No 883/2004. The same applies to civil servants

who have secondary employment as an employed person or who pursue an economic activity as a self-employed person by virtue of Article 13(4) of Regulation No 883/2004.

[94](#) The Republic of Austria refers to the judgment of 17 June 2010, *Commission v Portugal* (C-105/08, EU:C:2010:345, paragraph 26 et seq.).

[95](#) The Republic of Austria cites the judgments of 28 May 1980, *Kuhner v Commission* (33/79 and 75/79, EU:C:1980:139, paragraph 22), and of 13 July 2018, *SQ v EIB* (T-377/17, EU:T:2018:478, paragraph 146), in addition to the judgments of 22 June 2017, *Bechtel* (C-20/16, EU:C:2017:488, paragraph 35 and the case-law cited), and of 12 November 2020, *Fleig v EEAS* (C-446/19 P, not published, EU:C:2020:918, paragraph 67).

[96](#) The Republic of Austria refers to the judgment of 18 December 2007, *Commission v Spain* (C-186/06, EU:C:2007:813, paragraph 18 and the case-law cited).

[97](#) The Republic of Austria refers to the judgment of 19 May 2009, *Commission v Italy* (C-531/06, EU:C:2009:315, paragraphs 69 and 73).

[98](#) See judgment in *Caisse pour l'avenir des enfants (Child of the spouse of a frontier worker)* (paragraphs 24 and 25 and the case-law cited).

[99](#) See judgment in *Caisse pour l'avenir des enfants (Child of the spouse of a frontier worker)* (paragraphs 44 and 46 and the case-law cited).

[100](#) See, also, as a particular expression of the general principle of non-discrimination, Article 5(b) of that regulation, which enshrines the principle of equal treatment of facts, as the Court pointed out in the judgment of 12 March 2020, *Caisse d'assurance retraite et de la santé au travail d'Alsace-Moselle* (C-769/18, EU:C:2020:203, paragraph 44).

[101](#) See, by analogy, judgment of 22 June 2011, *Landtová* (C-399/09, EU:C:2011:415, paragraphs 42 and 44 and the case-law cited), relating to Article 3(1) of Regulation No 1408/71, giving effect to the principle set out in Article 39 EC, now Article 45 TFEU, which was drafted, in essence, using the same wording as Article 4 of Regulation No 883/2004. However, the scope *ratione personae* of the latter regulation differs from the former in that it is not limited to workers and their family members. In that regard, very recently, in the judgment of 15 July 2021, *A (Public*

health care) (C-535/19, EU:C:2021:595, paragraph 40), the Court noted that the principle of non-discrimination on grounds of nationality, set out in the first paragraph of Article 18 TFEU, is specified in Article 4 of Regulation No 883/2004 with regard to Union citizens who rely on the benefits referred to in Article 3(1) of that regulation. It also recalled its settled case-law according to which the first paragraph of Article 18 TFEU is intended to apply independently only to situations governed by EU law in respect of which the FEU Treaty lays down no specific prohibition of discrimination. That is not the case in the area of the free movement of workers. See, in that regard, inter alia, judgment of 25 November 2021, *Finanzamt Österreich (Family allowances for development aid workers)* (C-372/20, EU:C:2021:962, paragraph 68).

[102](#) See judgment in *Caisse pour l'avenir des enfants (Child of the spouse of a frontier worker)* (paragraph 54 and the case-law cited).

[103](#) See judgment in *Caisse pour l'avenir des enfants (Child of the spouse of a frontier worker)* (paragraphs 24 and 70 and the case-law cited).

[104](#) See judgment in *Caisse pour l'avenir des enfants (Child of the spouse of a frontier worker)* (paragraph 70 and the case-law cited).

[105](#) See, by analogy, judgment of 15 July 2021, *A (Public health care)* (C-535/19, EU:C:2021:595, paragraph 61).

[106](#) See judgment in *Caisse pour l'avenir des enfants (Child of the spouse of a frontier worker)* (paragraph 44 and the case-law cited).

[107](#) OJ 1968 L 257, p. 2. Regulation No 1612/68 was repealed by Regulation No 492/2011. The Court referred inter alia to the judgment of 5 May 2011, *Commission v Germany* (C-206/10, EU:C:2011:283, paragraph 39). See, also, paragraphs 36 and 37 of that judgment.

[108](#) See, by analogy, judgment of 11 September 2007, *Hendrix* (C-287/05, EU:C:2007:494, paragraphs 51 and 52). See, also, judgment in *Caisse pour l'avenir des enfants (Child of the spouse of a frontier worker)* (paragraphs 65 and 69 to 71).

[109](#) See judgments of 18 January 2007, *Celozzi* (C-332/05, EU:C:2007:35, paragraph 24), and of 5 December 2019, *Bocero Torrico and Bode* (C-398/18 and C-428/18, EU:C:2019:1050, paragraph 41).

[110](#) See judgments of 20 June 2013, *Giersch and Others* (C-20/12, EU:C:2013:411, paragraph 44), and in *Caisse pour l'avenir des enfants (Child of the spouse of a frontier worker)* (paragraph 56).

[111](#) See footnote 9 of this Opinion.

[112](#) See point 15.1, illustration 6, p. 45, of the Court of Auditors' report.

[113](#) See the document referenced under No 190 of the annexes to the minutes of the sittings of the National Council concerning the XXVIth parliamentary term, p. 2 (see footnote 84 of this Opinion).

[114](#) See point 15.1, illustration 5, p. 44, and point 15.2, p. 45, of the Court of Auditors' report. In that regard, it is stated in footnote 34 of that report that, on 1 May 2004, the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic joined the European Union, followed by the Republic of Bulgaria and Romania on 1 January 2007. In the area of the free movement of workers, the Republic of Austria benefited from transitional periods of seven years, with the result that the Austrian labour market was opened up in 2011 to the States which acceded in 2004 and in 2014 to the States which acceded in 2007. The Republic of Croatia joined the European Union on 1 July 2013 and the Austrian labour market was opened up in 2020.

[115](#) See judgment in *Caisse pour l'avenir des enfants (Child of the spouse of a frontier worker)* (paragraph 56).

[116](#) See judgment of 22 June 2011, *Landtová* (C-399/09, EU:C:2011:415, paragraphs 46 to 48).

[117](#) See points 66 and 67 of this Opinion and, by analogy, judgment of 7 November 2002, *Maaheimo* (C-333/00, EU:C:2002:641, paragraph 34).

[118](#) See, in that regard, point 127 of this Opinion.

[119](#) See, inter alia, judgments of 14 December 2016, *Bragança Linares Verruga and Others* (C-238/15, EU:C:2016:949, paragraph 44), and in *Caisse pour l'avenir des enfants (Child of the spouse of a frontier worker)* (paragraph 58 and the case-law cited).

[120](#) It should be noted that the Republic of Austria contests the Commission's claim that its objective was to make budgetary savings. The documents produced by it show an assessment of the reduction in expenditure without, however, confirming such an intention.

[121](#) See points 77 to 79 of this Opinion.

[122](#) In paragraph 44 of its application, the Commission refers to the table ranking the Austrian federal States in 2019, available at:
https://cdn2.hubspot.net/hubfs/2405078/cms-pdfs/fileadmin/user_upload/dyna_content/de/documents/news/20190508_news_kaufkraft_dach_dfin.pdf, p. 3.

[123](#) The Commission explains that, for example, purchasing power in Lower Austria is 104.7% of the Austrian average, compared with only 97.6% in Carinthia. Thus, under the Austrian rules on social and tax advantages in Austria, a worker receives, for a child residing, for example, in the municipality of Arnoldstein in Carinthia, a contribution towards the maintenance costs of his or her child in the amount of 100% of the flat-rate amount which is 7.1% higher than that received by a worker whose child resides in Lower Austria.

[124](#) Further to the previous example, the Commission illustrates the effects of the Austrian adjustment mechanism by stating that persons who work in Austria but whose children reside in Arnoldstein in Carinthia, Tarvisio (Italy) or Kranjska Gora (Slovenia), each receive three different flat-rate amounts, thus, respectively, 100%, 94.8% and 79% of the amount of the benefit. The flat-rate amount is higher than the average cost of living in Austria and it must be considered that, in those three adjacent municipalities, even though they are located in three different Member States, the cost of living for everyday needs is objectively comparable precisely because of the free movement of goods and services guaranteed by the European Union.

[125](#) For example, according to the Slovak Republic, the cost of living varies between the east of the country and the Bratislava city region, where it is even much higher than in the Vienna city region.

[126](#) The Republic of Austria states that, in 2019, purchasing power in Bulgaria represented 52% of the average purchasing power of the 27 EU Member States, whereas purchasing power in Austria represented 113% of that average purchasing power (see footnote 79 of this Opinion). See, also, point 53 of this Opinion.

[127](#) See point 18.2, p. 51, of the Court of Auditors' report.

[128](#) See point 23.2, pp. 60 and 61, point 23.4, p. 62, and point 25, pp. 62 to 65, of the Court of Auditors' report.

[129](#) See point 15.1, Table 8, of the Court of Auditors' report.

[130](#) See point 97 of this Opinion.

[131](#) See Article 28(2) of the EEA Agreement, which prohibits any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment, like Article 45(2) TFEU.

[132](#) See recital 17 of Regulation No 883/2004.

[133](#) See judgment of 14 December 2016, *Bragança Linares Verruga and Others* (C-238/15, EU:C:2016:949, paragraphs 49 and 50).

[134](#) The EFTA Surveillance Authority summarised the principle as follows: 'With regard to the attainment of freedom of movement for workers, the EEA internal market requires equal benefits for equal work'.
