

Provisional text

JUDGMENT OF THE COURT (Second Chamber)

16 June 2022 (\*)

(Failure 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 – Equal treatment – Family benefits – Social and tax advantages – Adjustment of amounts on the basis of price levels in the children’s State of residence)

In Case C-328/20,

ACTION for failure to fulfil obligations under Article 258 TFEU, brought on 22 July 2020,

**European Commission**, represented by B.-R. Killmann and D. Martin, acting as Agents,

applicant,

supported by:

**Czech Republic**, represented by J. Pavliš, M. Smolek and J. Vlácil, acting as Agents,

**Republic of Croatia**, represented by G. Vidović Mesarek, acting as Agent,

**Republic of Poland**, represented by B. Majczyna, acting as Agent,

**Romania**, represented by E. Gane and L. Lițu, acting as Agents,

**Republic of Slovenia**, represented by J. Morela, acting as Agent,

**Slovak Republic**, represented by B. Ricziová, acting as Agent,

**EFTA Surveillance Authority**, represented by E. Gromnicka, C. Howdle, J.S. Watson and C. Zatschler, acting as Agents,

interveners,

v

**Republic of Austria**, represented by M. Klamert, C. Pesendorfer, A. Posch and J. Schmoll, acting as Agents,

defendant,

supported by:

**Kingdom of Denmark**, represented by M. Jespersen, J. Nymann-Lindegren and M. Wolff, acting as Agents,

**Kingdom of Norway**, represented by S. Hammersvik, J.T. Kaasin, L. Tvedt and P. Wennerås, acting as Agents,

interveners,

THE COURT (Second Chamber),

composed of A. Prechal, President of the Chamber, J. Passer, F. Biltgen (Rapporteur), N. Wahl and M.L. Arastey Sahún, Judges,

Advocate General: J. Richard de la Tour,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 20 January 2022,

gives the following

## Judgment

- 1 By its application, the European Commission seeks a declaration from the Court that:
  - by establishing a mechanism for adjusting family allowances 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 (OJ 2004 L 166, p. 1) and under 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 (OJ 2011 L 141, p. 1), and
  - by establishing a mechanism for adjusting 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.

### Legal framework

#### *European Union law*

##### *Regulation No 883/2004*

- 2 Recitals 8, 12 and 16 of Regulation No 883/2004 read as follows:

‘(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 Community 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.’

- 3 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.’

4 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.’

5 Article 4 of that regulation, 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.’

6 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.’

7 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/her family reside in a Member State other than that in which the institution responsible for providing benefits is situated.’

8 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/her 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.’

9 Article 68 of that regulation lays down priority rules in the event of overlapping, as follows:

‘1. Where, during the same period and for the same family members, benefits are provided for under the legislation of more than one Member State the following priority rules shall apply:

- (a) in the case of benefits payable by more than one Member State on different bases, the order of priority shall be as follows: firstly, rights available on the basis of an activity as an employed or self-employed person, secondly, rights available on the basis of receipt of a pension, and, finally, rights obtained on the basis of residence;

- (b) in the case of benefits payable by more than one Member State on the same basis, the order of priority shall be established by referring to the following subsidiary criteria:
- (i) in the case of rights available on the basis of an activity as an employed or self-employed person: the place of residence of the children, provided that there is such activity ...

...

2. In the case of overlapping entitlements, family benefits shall be provided in accordance with the legislation designated as having priority in accordance with paragraph 1. Entitlements to family benefits by virtue of other conflicting legislation or legislations shall be suspended up to the amount provided for by the first legislation and a differential supplement shall be provided, if necessary, for the sum which exceeds this amount. ...'

*Regulation No 492/2011*

- 10 Article 7(1) and (2) of Regulation No 492/2011, which is found in Chapter I thereof, under 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.'

*Austrian law*

*The FLAG*

- 11 The Bundesgesetz betreffend den Familienlastenausgleich durch Beihilfen (Federal Law on compensation for family expenses by means of allowances) of 24 October 1967 (BGBl. 376/1967), as amended by the Bundesgesetz mit dem das Familienlastenausgleichsgesetz 1967, das Einkommensteuergesetz 1988 und das Entwicklungshelfergesetz geändert werden (Federal Law amending the Federal Law of 1967 on compensation for family expenses by means of allowances, the Federal Law of 1988 on the taxation of the income of natural persons and the Law on the status of development aid workers) of 4 December 2018 (BGBl. I, 83/2018) ('the FLAG') states, in Paragraph 1 thereof, that the benefits which it provides for are 'granted with a view to compensating for expenses in the interests of the family'.

- 12 Under Paragraph 2(1) of the FLAG, persons who have their domicile or habitual residence in Austria are to be entitled to family allowances for minor children.

- 13 Paragraph 4 of the FLAG provides:

'(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 shall correspond 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 shall be regarded as family allowances within the meaning of this federal law; however, the provisions on the amount of family allowances shall not apply to supplementary payments.'

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

'(3) There shall be no entitlement to family allowances for children who permanently reside abroad.

(4) There shall be 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 grant of a supplementary payment (Paragraph 4(2)).'

15 Paragraph 8 of the FLAG states:

'(1) The amount of family allowances payable to a person shall be 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.’

16 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 (OJ 1994 L 1, p. 3) (“the EEA Agreement”)] 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 point 2 of Paragraph 33(3) of the [Bundesgesetz über die Besteuerung des Einkommens natürlicher Personen (Federal Law on the taxation of the income of natural persons), of 7 July 1988 (BGBl. 400/1988), as amended by the Jahressteuergesetz 2018 (Annual Tax Law of 2018) of 14 August 2018 (BGBl. I, 62/2018) and by the Federal Law amending the Federal Law of 1967 on compensation for family expenses by means of allowances, the Federal Law of 1988 on the taxation of the income of natural persons and the Law on the status of development aid workers of 4 December 2018 (‘the EStG’)].’

17 Paragraph 53 of the FLAG reads as follows:

‘(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.’

*The EStG*

18 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, 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.

...

(3a) A child who receives a family allowance under the [FLAG] and is permanently resident in an [EU] Member State or in 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 shall be

(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.

...

5. The second sentence of Paragraph 26(3) of the Federal Tax Code shall not apply. The spouses and children of taxpayers whose place of employment is abroad and who work for a local authority shall be 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 shall apply:

1. Persons who are the sole earners in a household shall be 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 shall be 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 shall be 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 point 2 of subparagraph 3a. 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 shall not apply. The spouses and children of taxpayers whose place of employment is abroad and who work for a local authority shall be 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 shall 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 point 2 of subparagraph 3a.

...

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.

...'



- 19 The amount of family benefits for children who have their permanent residence in another Member State is governed by the Familienbeihilfe-Kinderabsetzbetrag-EU-Anpassungsverordnung (Regulation adjusting family allowances and the child tax credit in the European Union) of 10 December 2018 (BGBl. II, 318/2018) ('the Adjustment Regulation').
- 20 Paragraph 2(1) of the Adjustment Regulation states:
- 'For the purposes of determining the amounts referred to in Paragraph 1, a correction coefficient shall be set based on the indices published by [Eurostat] on 1 June 2018 under "Comparative price levels of final consumption by private households, including indirect taxes (EU-28 = 100)".'
- 21 Paragraph 2(2) of the Adjustment Regulation contains a table setting out the correction coefficients applicable to the different States. Those coefficients vary between 0.450 (Bulgaria) and 1.520 (Switzerland), while the coefficient for the Czech Republic is set at 0.619.

#### *The Federal Tax Code*

- 22 Paragraph 26 of the Federal Tax Code provides:
- (1) A person shall be domiciled within the meaning of the tax provisions where he or she occupies a dwelling in circumstances which lead to the conclusion that he or she will maintain and use that dwelling.
- (2) A person is habitually resident within the meaning of the tax provisions where he or she resides in circumstances that indicate that he or she 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) shall be treated as persons who are habitually resident in the place where the service granting the remuneration is located. The same shall apply to their spouses, in so far as the spouses form a permanent residential household, and to their minor children who are part of that household.'

#### **Pre-litigation procedure and proceedings before the Court**

- 23 By letter of formal notice of 25 January 2019, the Commission requested the Republic of Austria to submit its observations with regard to the concerns raised by the entry into force, as from 1 January 2019, of the adjustment mechanism resulting from the amendments made to Paragraph 8a of the FLAG and Paragraph 33 of the EStG by the Annual Tax Law of 2018 and the Federal Law of 4 December 2018 ('the adjustment mechanism'). The Commission took the view that that mechanism for adjusting family benefits and social and tax advantages granted by that Member State to workers with children, on the basis of the price level in the Member State in which those children are permanently resident, was contrary to Articles 7 and 67 of Regulation No 883/2004, according to which cash benefits may not be reduced on account of the fact that a family member, such as a child, resides in another Member State. Furthermore, the Commission claimed that, since it essentially concerns not Austrian workers but workers from other Member States, the adjustment mechanism constitutes indirect discrimination contrary to the principle of equal treatment laid down in Article 4 of Regulation No 883/2004 and in Article 7 of Regulation No 492/2011.
- 24 On 25 March 2019, the Republic of Austria replied to the Commission stating that Article 67 of Regulation No 883/2004 authorises the adjustment of family benefits according to the child's place of residence. That Member State argued, first of all, that EU law itself provides for comparable mechanisms. Next, Article 67 of that regulation does not require the amount of benefits paid for children residing in another Member State to correspond to that paid for children residing in Austria. Finally, it claimed that there is no indirect discrimination, since the adjustment of family benefits and social and tax advantages on the basis of the price level in the State in which the child resides is objectively justified and reduces expenses for all workers.

- 25 Since the Commission was not satisfied with that reply, on 26 July 2019 it issued a reasoned opinion in which it essentially maintained its position. The Commission noted the fact that the family benefits and the social and tax advantages granted for children are flat-rate amounts, without any adjustment on the basis of price levels in the different regions of Austria according to the child's permanent place of residence. Therefore, it argues that a difference in the level of those benefits and advantages for children residing in another Member State affects migrant workers more severely than Austrian workers and amounts to indirect discrimination. According to the Commission, the fact that those benefits and advantages are flat-rate amounts shows that they are not dependent on the actual costs associated with maintaining a child and that they do not therefore guarantee a fairer distribution of the expenses borne by families in providing for their children's needs.
- 26 By letter of 24 October 2019, the Republic of Austria replied to that reasoned opinion stating that the family benefits and the social and tax advantages at issue were not merely flat-rate amounts, but corresponded to the actual needs of beneficiaries. Moreover, the fact that those benefits and advantages are granted in the form of flat-rate amounts does not preclude their adjustment on the basis of the price level in the children's place of residence. It submitted that such adjustment does not constitute unequal treatment, but ensures a uniform reduction in expenses for the workers receiving those benefits and advantages, irrespective of the child's actual place of residence. Even if indirect discrimination were to exist, that 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 beneficiaries' ability to pay.
- 27 Since it was not convinced by that reply, the Commission brought the present action for failure to fulfil obligations.
- 28 By decisions of the President of the Court of 22 October, 6, 12, 19 and 20 November, and 18 December 2020, the Czech Republic, the Republic of Croatia, the Republic of Poland, Romania, the Republic of Slovenia, the Slovak Republic and the EFTA Surveillance Authority were granted leave to intervene in support of the form of order sought by the Commission. By decisions of the President of the Court of 20 November and 18 December 2020, the Kingdom of Denmark and the Kingdom of Norway were granted leave to intervene in support of the form of order sought by the Republic of Austria.

### **The action**

- 29 In support of its action, the Commission puts forward two complaints. The first alleges infringement of Articles 7 and 67 of Regulation No 883/2004 and the second alleges infringement of Article 4 of Regulation No 883/2004 and of Article 7(2) of Regulation No 492/2011.

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

#### *Arguments of the parties*

- 30 The Commission submits that the Republic of Austria has failed to fulfil its obligations under Articles 7 and 67 of Regulation No 883/2004 by establishing, in respect of workers affiliated to the Austrian social security system whose children reside in another Member State, the mechanism for adjusting the amount of the family allowances and the child tax credit provided for in Paragraph 2(1) of the FLAG and in Paragraph 33(3) of the EStG respectively.
- 31 The Commission claims that it is common ground that the family allowances and the child tax credit, which are cash benefits paid by the State and intended to alleviate the expenses involved in the maintenance of children, constitute family benefits within the meaning of Article 1(z) and Article 3(1) (j) of Regulation No 883/2004. Those benefits are granted without individual and discretionary assessment of personal needs, on the basis of legally defined criteria, and are calculated by reference to the number and age of the children. The Republic of Austria, it argues, has not adduced evidence of any link between the level of the family allowances and the average cost of maintaining a child, since that level depends solely on the age of the child.

- 32 According to the Commission, the combined provisions of Articles 7 and 67 of Regulation No 883/2004, which have the same purpose, prohibit the Member States from making the grant or the amount of family benefits dependent on members of the worker's family having their place of residence in the Member State paying the benefit (judgment of 18 September 2019, *Moser*, C-32/18, EU:C:2019:752, paragraph 36). Those provisions were adopted following the judgment of 15 January 1986, *Pinna* (41/84, EU:C:1986:1), in which the Court partially annulled Article 73 of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community (OJ English Special Edition 1972(II), p. 416), a provision the content of which was essentially reproduced in Article 67 of Regulation No 883/2004. According to the Commission, it follows from that judgment that a Member State is not permitted to adjust the level of family benefits to those of another Member State on the sole ground that members of the beneficiary's family reside in the territory of that other Member State. The specific effect of the adjustment mechanism is that those benefits are not granted 'as if' the family members were residing in Austria.
- 33 The Commission submits that that interpretation of Articles 7 and 67 of Regulation No 883/2004 is supported by Article 5(b) of that regulation, which requires each Member State not simply to take account of facts or events occurring in another Member State, such as the presence of children giving rise to entitlement to benefits, but to take them into account 'as though' they had taken place in its own territory.
- 34 The Commission maintains that no inference may be drawn from the fact that the decision of the Heads of State or Government, meeting within the European Council of 18 and 19 February 2016, concerning a new settlement for the United Kingdom within the European Union (OJ 2016 C 69 I, p. 1; 'the new settlement for the United Kingdom within the European Union') envisaged the indexation of the amount of social benefits for children on the basis of the cost of living in the child's place of residence. According to that decision, the Commission was to submit a proposal to amend Regulation No 883/2004. However, as a result of the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union, that regulation did not undergo any amendment. Moreover, in its proposal of 13 December 2016 for a regulation of the European Parliament and of the Council amending Regulation No 883/2004 (COM(2016) 815 final), the Commission did not include an indexation mechanism, since its services had expressed reservations about the compatibility of such a mechanism with EU law.
- 35 The Republic of Austria submits, as a preliminary point, that the FLAG, under the term 'family allowances', brought together several types of family support which existed before its adoption in 1967 and which were intended to compensate for part of the costs of maintaining dependent children. The family allowances, it states, are calculated on the basis of the actual needs of the children and the standard expenses necessary to support them in Austria, without the beneficiary being required to provide evidence of the expenses actually incurred. The allowances increase with the age of the children or in the case of a disability.
- 36 The Republic of Austria states that the system of family allowances is based, first, on the grant of direct support and, secondly, on tax advantages. The costs of those allowances are borne by the Ausgleichsfonds für Familienbeihilfen (Compensation Fund for Family Allowances, Austria), the resources of which come not from workers, but from contributions paid by employers. In addition, under Paragraph 2(1) of the FLAG, all persons with children who reside in Austria are entitled to family allowances of the same amount, irrespective of any condition relating to the exercise of a professional activity or the amount of the contributions paid by the employer.
- 37 According to the Republic of Austria, the purpose of the child tax credit is not to provide parents with a direct benefit, but to cover part of the expenses typically associated with maintaining children. That tax credit is intended to restore a degree of tax fairness between persons without children and those with children. From an economic point of view, the child tax credit amounts to an increase in family allowances financed from general tax revenue.
- 38 The Republic of Austria submits that family allowances were introduced at a time when there was less labour migration. Due to increased movement of workers within the European Union, the

indiscriminate export of family allowances and the child tax credit led to increasing distortions in the Austrian system of family benefits. The adjustment mechanism makes it possible to address those distortions by taking into account differences in price levels between the Member States as published by Eurostat. It is therefore not simply a cost-saving measure.

39 As regards the interpretation of Articles 7 and 67 of Regulation No 883/2004, the Republic of Austria submits, first, that the latter provision, which relates specifically to the situation of family members residing in another Member State, takes precedence over Article 7, which lays down a general rule. Therefore, the Republic of Austria confines itself to examining the compatibility of the adjustment mechanism in the light of Article 67 of that regulation and submits that the mechanism is consistent with the objectives of that provision, as interpreted by the Court, in particular in its judgment of 18 September 2019, *Moser* (C-32/18, EU:C:2019:752, paragraph 35). It argues that the grant and the amount of the family allowances and the child tax credit are not dependent on the child's residence in Austria. Since the costs of maintaining children depend on the price level in their Member State of residence, and since that level varies from one Member State to another, the amount of those benefits should be adjusted in order to ensure that it is granted 'as if' the family members were living in Austria. That interpretation, it submits, is supported by recital 16 of that regulation and by the case-law of the Court, in particular the judgments of 27 September 1988, *Lenoir* (313/86, EU:C:1988:452, paragraph 16), and of 18 September 2019, *Moser* (C-32/18, EU:C:2019:752, paragraphs 53 and 54). Accordingly, the Republic of Austria takes the view that, since the purpose of the family allowances and the child tax credit is to reimburse parents for part of the costs of maintaining children, it is lawful to adjust the amount of those benefits on the basis of the price level of the Member State in which the children reside.

40 Next, the Republic of Austria states that, unlike the situation which gave rise to the judgment of 15 January 1986, *Pinna* (41/84, EU:C:1986:1), on which the Commission relies, the adjustment mechanism does not preclude the export of family benefits to other Member States. By reflecting the cost of living, that adjustment mechanism ensures that a benefit of equal value is granted for all children.

41 Finally, the Republic of Austria submits that the new settlement for the United Kingdom within the European Union was intended, as regards the export of family benefits, to take into consideration the scale of the benefits granted in the children's State of residence and to take account of differences in price levels between the Member States. Although that settlement never entered into force, the European Council took the view that the measures thus envisaged in respect of the United Kingdom were fully compatible with the Treaties. The Commission itself also considered those measures to be compatible with Article 48 TFEU. In that regard, the Republic of Austria states that no amendment of Regulation No 492/2011 was necessary, which indicates that Article 7 of that regulation – like Article 4 of Regulation No 883/2004 – does not lay down a rule going beyond the principle of non-discrimination enshrined in primary law. According to the Republic of Austria, an amendment of Regulation No 883/2004 would not have been necessary for cases in which a Member State, in the event of the export of a family benefit linked to the economic and social context of that Member State, adjusts the amount of that benefit upwards or downwards in accordance with objective rules.

### *Findings of the Court*

42 As a preliminary point, it is not disputed that the family allowances and the child tax credit referred to in the first complaint constitute family benefits within the meaning of Article 1(z) of Regulation No 883/2004 and that that regulation, in so far as it applies to all legislation concerning the branches of social security relating to family benefits, is applicable to the adjustment mechanism.

43 Accordingly, the family allowances and the child tax credit must, inter alia, comply with Article 7 of Regulation No 883/2004, which stipulates that, unless otherwise provided for in that regulation, such benefits '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/her family reside in a Member State other than that in which the institution responsible for providing benefits is situated'.

- 44 In that regard, it must be borne in mind that Article 67 of Regulation No 883/2004 establishes the principle that a person may claim family benefits for members of his or her family who reside in a Member State other than that responsible for paying those benefits, as if they resided in that latter Member State (judgment of 22 October 2015, *Trapkowski*, C-378/14, EU:C:2015:720, paragraph 35).
- 45 Since Article 67 of Regulation No 883/2004 reproduces the requirements of Article 7 of that regulation specifically with regard to family benefits, an infringement of the former provision also entails an infringement of the latter provision.
- 46 Furthermore, the Court has repeatedly held that the purpose of Articles 7 and 67 of Regulation No 883/2004 is to prevent a Member State from making entitlement to, or the amount of, family benefits dependent on residence of the members of the worker's family in the Member State providing the benefits (see, in particular, judgment of 25 November 2021, *Finanzamt Österreich (Family benefits for development aid workers)*, C-372/20, EU:C:2021:962, paragraph 76 and the case-law cited).
- 47 Article 67 of Regulation No 883/2004 must therefore be interpreted as requiring strict equivalence between the amounts of family benefits provided by a Member State to workers whose family members reside in that Member State and the amounts provided to workers whose family members reside in another Member State. Contrary to what the Republic of Austria maintains, the differences in purchasing power between the Member States do not, in the light of that provision, justify a Member State being able to provide that second category of persons with benefits of an amount different from that granted to persons falling within the first category.
- 48 It is true that the principle of equivalent treatment established by Article 67 of Regulation No 883/2004 is not absolute, in the sense that, where several entitlements are payable under different laws, the rules against overlapping benefits laid down in Article 68 of that regulation apply (judgment of 18 September 2019, *Moser*, C-32/18, EU:C:2019:752, paragraph 40 and the case-law cited).
- 49 With regard specifically to Article 68(2) of Regulation No 883/2004, the Court has held that such a rule against overlapping seeks 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 (judgment of 18 September 2019, *Moser*, C-32/18, EU:C:2019:752, paragraph 42 and the case-law cited).
- 50 The examination of the treatment afforded to workers covered by Regulation No 883/2004 must therefore relate to the economic value of those benefits based not on the purchasing power and price level of the place of residence of the persons concerned, but on the amount of the benefits payable.
- 51 In the light of the deeming provision laid down in Article 67 of Regulation No 883/2004, according to which a person may claim family benefits for his or her family members residing in a Member State other than the Member State competent for paying those benefits, as if they were residing in the latter Member State, and taking into account the fact that migrant workers must be able to benefit from the social policies of the host Member State under the same conditions as national workers, since they contribute to the financing of those policies through the taxes and social contributions which they pay in that State by virtue of their employment there (see, to that effect, judgment of 10 July 2019, *Aubriet*, C-410/18, EU:C:2019:582, paragraph 33 and the case-law cited), Member States cannot, without infringing that regulation, carry out an adjustment of family benefits according to the State of residence of the beneficiary's children.
- 52 It is clear that that is precisely the case here. Only the recipients of family benefits whose children reside outside Austria are subject to the mechanism for adjusting the amount of those benefits on the basis of the price levels and purchasing power in their children's place of residence. Such a mechanism does not apply to family benefits granted for children residing in different regions of Austria, even though there are, as between those regions, differences in price levels of a scale comparable to those which may exist between the Republic of Austria and other Member States.
- 53 Moreover, as the Advocate General stated in points 77 to 79 of his Opinion, it has not been established that the amount of the family benefits granted by the Republic of Austria varies according to the actual cost of living or the expenditure actually incurred in maintaining children, since those amounts are

allocated on a flat-rate basis by reference to the number and, where appropriate, the age of the children, or even by reference to a disability that they might have.

- 54 Therefore, no argument can be derived from the fact that, in its judgment of 18 September 2019, *Moser* (C-32/18, EU:C:2019:752, paragraphs 53 and 54), the Court held that the objective pursued by the national legislation was decisive and that a Member State could take account of the actual remuneration in the State of employment. The case which gave rise to that judgment concerned a childcare allowance which, in its income-dependent variant, constituted a benefit in replacement of previous earnings and did not concern a family benefit entirely unrelated to the actual costs and the amount of which was determined without any individual and discretionary assessment of the recipients' personal needs, on the basis of a legally defined position (see, to that effect, 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, paragraph 36).
- 55 Furthermore, although it is true, as the Republic of Austria has submitted, that the Court recognised, in its judgment of 27 September 1988, *Lenoir* (313/86, EU:C:1988:452), that benefits intended to cover certain costs incurred at the beginning of the school year are closely linked to the social context and, therefore, the residence of the persons concerned, such that account may be taken of that place of residence, the fact remains that the Court held, in paragraph 16 of that judgment, that if periodical cash benefits are granted 'exclusively by reference to the number and, where appropriate, the age of the members of the family, the grant of such benefits continues to be justified wherever the recipient and his family reside'. The Republic of Austria cannot therefore base any argument on that judgment.
- 56 Lastly, as regards the relevance of the judgment of 15 January 1986, *Pinna* (41/84, EU:C:1986:1), on which the Republic of Austria relies, it is sufficient to note, as the Advocate General stated in point 70 of his Opinion, that the dispute which gave rise to that case concerned a difference in the amounts or rates of benefits according to the State in which the family members concerned resided, which had the effect of reducing the rights acquired by the migrant worker and, consequently, disregarding the objective of securing freedom of movement for workers. The Court has held that, in the light of the fact that freedom of movement for workers constitutes a fundamental freedom, EU legislation must refrain from adding to the disparities which already stem from the absence of harmonisation of national social security legislation. That assessment applies, a fortiori, in regard to a national provision which departs from the principle of equivalent treatment established by the EU legislature and set out in Article 67 of Regulation No 883/2004.
- 57 As regards the conformity with EU law of the indexation mechanism which had been envisaged by the new settlement for the United Kingdom within the European Union, two factors should be noted. First, that settlement never entered into force and the Commission did not therefore submit a proposal to amend Regulation No 883/2004 allowing Member States to index social benefits for children residing in a Member State other than that in which the worker resides. Secondly, and in any event, as the judgment of 15 January 1986, *Pinna* (41/84, EU:C:1986:1), illustrates, if such an amendment had been adopted by the EU legislature, it would have been invalid under Article 45 TFEU.
- 58 In the light of the foregoing, the first complaint, alleging a failure to fulfil the obligations arising from Article 67 of Regulation No 883/2004, must be regarded as well founded.

***The second complaint, alleging infringement of Article 4 of Regulation No 883/2004 and of Article 7(2) of Regulation No 492/2011***

*Arguments of the parties*

- 59 The Commission submits that the Republic of Austria has failed to fulfil its obligations under the principle of equal treatment laid down in Article 4 of Regulation No 883/2004 and in Article 7(2) of Regulation No 492/2011 by establishing the mechanism for adjusting, according to the child's place of residence, the amount of family allowances and the child tax credit, the Family Bonus Plus provided for in Paragraph 33(3a) of the EStG, and the sole earner's allowance, the single parent's allowance and the tax credit for maintenance payments referred to in Paragraph 33(4) of the EStG.

- 60 The Commission points out that Article 4 of Regulation No 883/2004 and Article 7(2) of Regulation No 492/2011 give concrete expression, in their respective fields, to the principle of equal treatment laid down in Article 45(2) TFEU, which protects the workers concerned against any discrimination, direct or indirect, based on nationality resulting from the national laws of the Member States. In particular, 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 are covered (judgment of 12 May 1998, *Martínez Sala*, C-85/96, EU:C:1998:217, paragraph 25).
- 61 The Commission maintains that it is clear from 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, paragraph 45 and the case-law cited), that the family allowances and the child tax credit are both family benefits subject to the principle of equal treatment laid down in Article 4 of Regulation No 883/2004 and social advantages governed by Article 7(2) of Regulation No 492/2011. The Family Bonus Plus, the sole earner's allowance, the single parent's allowance and the tax credit for maintenance payments reduce the amount of income tax. Since it is presumed that the beneficiary is subject to tax in Austria, those measures constitute tax advantages that are subject to the principle of equal treatment laid down in Article 7(2) of Regulation No 492/2011.
- 62 The Commission reiterates that the adjustment mechanism essentially affects migrant workers whose family members reside outside the Member State providing the benefit.
- 63 According to the Commission, it is clear from the *travaux préparatoires* for the adoption of the adjustment mechanism that the Austrian legislature pursued an objective of reducing State budgetary expenditure. That legislature assumed that the number of recipients of family benefits and social and tax advantages whose children live in Member States where the price level is lower than that in Austria was greater than the number of beneficiaries whose children reside in Member States where the price level is higher. It is only in the case of the Swiss Confederation and the Principality of Liechtenstein that the adjustment mechanism results in an amount greater than or equal to the flat-rate amount to be paid in Austria.
- 64 The Commission adds that the adjustment mechanism does not apply to the situation of children of Austrian civil servants seconded abroad, even though, in the light of the criteria developed by the Court for assessing the comparability of situations, there is no difference between Austrian civil servants and migrant workers whose children do not reside in Austria.
- 65 It argues that the adjustment mechanism therefore gives rise to indirect discrimination against migrant workers which does not appear to be justified by any legitimate objective.
- 66 The Commission notes that the family benefits and the social and tax advantages subject to the adjustment mechanism are not calculated on the basis of the price level in the child's place of residence. Their flat-rate amount is uniform throughout Austria, despite the disparity in purchasing power between different regions.
- 67 The Commission takes the view that it is contradictory for the Republic of Austria to claim that the family benefits and the social and tax advantages subject to the adjustment mechanism are linked to the expenditure actually incurred in the maintenance of children, while excluding an adjustment of their amounts based on differences in purchasing power between the Austrian regions, approximately 8% between the province of Vienna and that of Lower Austria for example, despite the fact that that Member State considers that such an adjustment is necessary on account of the differences in purchasing power in relation to the Federal Republic of Germany or the Italian Republic, estimated at only 2.6% and 5.2% respectively.
- 68 The Commission argues that the adjustment mechanism is not comparable to the correction coefficients applicable to the remuneration of officials of the European Union and to financial support. In particular, that correction coefficient is determined not according to the children's place of residence but according to the officials' place of employment or the place of payment of the financial support concerned.

- 69 The Commission maintains that the justification for the existence of possible discrimination based on the objective of seeking to guard against a risk of undermining the financial balance of the social security system presupposes that that risk is serious. According to a report of the Rechnungshof (Court of Auditors, Austria) entitled ‘Familienbeihilfe – Ziele und Zielerreichung, Kosten und Kontrollsystem’ (Family allowance – objectives and attainment of the objectives, costs and monitoring system), published in July 2018 (‘the Court of Auditors report’) and relied on by the Republic of Austria during the pre-litigation procedure, support from the national budget for financing of family benefits became necessary following the increase in flat-rate amounts and the concomitant reduction in the sources of funding for family benefits. Furthermore, the family benefits intended for children residing in another Member State represent only around 6% of all payments, and the impact of those benefits on the financing of family benefits is attributable primarily to the lack of appropriate checks on the conditions for the grant of those benefits by the Austrian authorities.
- 70 According to the Commission, the Republic of Austria cannot therefore claim, by way of justification, that it had to react to imbalances caused by financial support to migrant workers, particularly as workers from other Member States contribute to the financing of the Austrian social and tax system in the same way as Austrian workers, irrespective of their children’s place of residence.
- 71 The Commission submits that the intention of the Austrian legislature to ensure that family benefits or social and tax advantages are of equal value for all children, irrespective of their place of residence, does not constitute a justification based on an overriding reason in the public interest. Moreover, the justifications based on considerations of equal treatment and the consistency of the adjustment mechanism are contradicted by the exception to the adjustment mechanism for Austrian civil servants seconded abroad.
- 72 The Republic of Austria denies that there is any indirect discrimination against migrant workers. It submits that the grant of social and tax advantages to parents is intended to compensate for part of the costs incurred in maintaining dependent children. In order to attain that objective, it is necessary to distinguish the situation of workers whose children reside abroad from that of workers whose children reside in Austria. Those situations, it contends, are not substantively comparable because of differences in the cost of living between the Member States. The adjustment mechanism does not result in identical situations being treated unequally, but ensures that different situations are treated differently.
- 73 The Republic of Austria cites several examples of mechanisms for adjusting family benefits according to the place of residence which are considered lawful, in particular under EU law. That Member State, supported by the Kingdom of Denmark, contends 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 signed at Turin on 18 October 1961 and the amendment to that charter of 3 May 1996, the principle of non-discrimination laid down in Article 12(4) of that charter does not preclude a Member State from adjusting the social security benefits paid for a child residing in another State where the cost of living is significantly lower.
- 74 According to the Republic of Austria, the adjustment mechanism is comparable to the correction coefficient provided for by the Staff Regulations of Officials of the European Union, which, in order to ensure that those officials enjoy the same purchasing power irrespective of their place of employment, takes account of differences in the cost of living between the Member States. The Erasmus + programme contains a comparable rule in order to adjust the amount of the grant for students’ living and travel expenses.
- 75 Furthermore, it is clear from 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 (11721/2/20), and more specifically from the reference to Council Recommendation 92/441/EEC of 24 June 1992 on common criteria concerning sufficient resources and social assistance in social protection systems (OJ 1992 L 245, p. 46), that, for the grant of benefits intended to cover a specific need, the standard of living and the price level in the State of stay must be properly taken into account.
- 76 The Republic of Austria maintains that, contrary to what the Commission claims, the disparities in purchasing power or price levels within Austria are very small in comparison with those between



Member States. It submits that an adjustment of family benefits according to the regions of a single Member State would give rise to difficulties, which justifies recourse to Eurostat's calculation of an average value per State. That has the advantage of being an objective criterion which avoids questioning cases in which small differences in purchasing power exist in comparison with the situation in, for example, Germany or Italy.

- 77 Next, it submits, the Court has already recognised, first, that it is lawful to set uniform amounts for large regions (judgment of 24 February 2015, *Sopora*, C-512/13, EU:C:2015:108, paragraph 34) and, secondly, that differences in the cost of living between Member States may constitute a lawful criterion for differentiation (judgments of 17 July 1963, *Italy v Commission*, 13/63, EU:C:1963:20, and of 18 September 2014, *Bundesdruckerei*, C-549/13, EU:C:2014:2235, paragraph 34).
- 78 The Republic of Austria disputes the Commission's argument that the adjustment mechanism constitutes indirect discrimination since it does not apply to children residing in a State to which one of their parents who has the status of an Austrian civil servant has been seconded. It argues that the situation of a civil servant on secondment is not comparable to that of a migrant worker, from either a legal or a substantive point of view.
- 79 First, international law, EU law and national law recognise the specific nature of the situation of civil servants seconded abroad. It is clear from Article 45(4) TFEU and Articles 11(3)(b) and 13(4) of Regulation No 883/2004 that civil servants seconded abroad do not have any entitlement to family allowances in host States or, consequently, to differential payments or additional benefits related to their family situation. Moreover, under Austrian law, civil servants seconded abroad are regarded as working within Austria for the purposes of their social security and tax situation. In civil matters, they continue to come under the general jurisdiction of the Austrian courts.
- 80 Secondly, the situation of migrant workers differs from that of civil servants in that transfers, within Austria or abroad, are an integral part of the latter's activity. Although the partners and children of civil servants seconded abroad generally live with the latter, the family's domicile and centre of interests remain, as a general rule, in Austria.
- 81 To accept that the situation of civil servants seconded abroad is comparable to that of migrant workers would be tantamount to holding that the former, who are excluded from the adjustment mechanism, are disadvantaged in comparison with the latter. For the majority of Austrian civil servants seconded to other Member States, Switzerland or the territory of parties to the EEA Agreement, the cost of living is higher than in Austria.
- 82 If the Court were to find that the rules applicable to Austrian civil servants seconded abroad amount to indirect discrimination, the Republic of Austria contends that such discrimination would be justified by the State's duty of care towards those civil servants, which is linked to their duty of loyalty towards the State, both of those factors constituting overriding reasons in the public interest.
- 83 Furthermore, the Republic of Austria submits that, if the Commission now intends to claim that the Austrian legislation is inconsistent, that complaint is inadmissible since it was not raised in the reasoned opinion.
- 84 In any event, the Republic of Austria maintains that that complaint is unfounded. The rules applicable to civil servants seconded abroad, while admittedly derogating from the ordinary rules applicable in Austria, nevertheless form part of a coherent system founded on international law and EU law. Those rules concern approximately 400 Austrian civil servants seconded abroad to the territory of a party to the EEA Agreement or to Switzerland. Only some of those officials receive family allowances. Account must therefore be taken of the case-law of the Court according to which not every exception to national legislation has the effect of rendering that legislation inconsistent. Provisions laying down exceptions with a particularly limited scope of application do not give grounds for concluding that there is an inconsistency (judgment of 19 May 2009, *Commission v Italy*, C-531/06, EU:C:2009:315, paragraphs 69 and 73).
- 85 In the alternative, the Republic of Austria submits that, even if indirect discrimination could be found to exist, such discrimination would be justified by a legitimate objective and would not go beyond

what is necessary in order to attain that objective.

- 86 In the first place, it submits, the Commission has not established that the Austrian legislature pursued a specific objective of making budgetary savings. That claim by the Commission is invalidated by the *travaux préparatoires* for the adoption of the adjustment mechanism and, in particular, by the assessment of its consequences in terms of efficiency.
- 87 In the second place, as regards the family allowances and the child tax credit, the Republic of Austria argues that, when those family benefits have ceased to fulfil their objective of compensating for part of the costs typically associated with maintaining children, because their amount was exported indiscriminately to Member States whose price level was different from that of the Republic of Austria, it became necessary to introduce the adjustment mechanism. That mechanism was intended to restore the function of supporting the maintenance of children and the fairness of the social system. In order to attain that socio-political objective, it was necessary to abolish benefits showing surpluses or shortfalls due to the undifferentiated application of the amounts of family allowances. Since the adjustment mechanism provides for an increase or decrease in the amounts paid in Austria, in proportion to the price level in the dependent child's Member State of residence, it ensures that each child actually receives a benefit of equal economic value. That, it is submitted, is not only proportionate, but also in accordance with recital 12 of Regulation No 883/2004, according to which care should be taken to ensure that the principle of assimilation of facts or events does not lead to objectively unjustified results.
- 88 In the third place, with regard to the Family Bonus Plus and the other tax credits, the Republic of Austria submits that application of 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. That mechanism takes account of the principle of equal treatment and of the principle of the ability to pay tax. The latter principle, enshrined in national legal systems, has its basis in EU law in the field of direct taxation and constitutes a general principle of EU tax law. The Court has rejected the comparability of two factual situations in relation to expatriation allowances, holding that 'no such comparability exists 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' (judgment of 15 September 2011, *Schulz-Delzers and Schulz*, C-240/10, EU:C:2011:591, paragraph 37).
- 89 In the fourth place, the Republic of Austria asserts that, since the adjustment mechanism ensures that support or relief of equal value is granted, it does not go beyond what is necessary in order to attain the objective pursued.
- 90 Contrary to what the Commission claims, the additional administrative expense resulting from the adjustment mechanism is very limited. For the purposes of determining the competent State in accordance with Regulation No 883/2004, it is in any event necessary, in a large number of cases, to determine the State of residence of the child concerned. The number of children residing in other Member States in respect of whom entitlement to family allowances exists increased from 1 500 in 2002 to approximately 130 000 in 2016. The Court of Auditors found that cases with a foreign element 'have been checked more often than national situations on account of the risk classification'.
- 91 The Republic of Austria states that the differential payments which it makes in respect of children resident in other Member States often exceed the primary benefits in the children's State of residence.
- 92 The Republic of Austria denies that it is unfair for workers to pay taxes and contributions in Austria, thereby contributing to the financing of family benefits and social and tax advantages, in order ultimately to receive them only in the form of benefits the value of which is adjusted when their children reside in other Member States. It submits that the basis for calculating employers' contributions is irrelevant. There is no connection between any tax liability and entitlement to State benefits.

### *Findings of the Court*

- 93 It should be noted that the Court has already held that the purpose of Article 3(1) of Regulation No 1408/71, which was drafted using, in essence, the same wording as Article 4 of Regulation No 492/2011, was to ensure, in accordance with Article 39 EC, now Article 45 TFEU, equality of treatment in matters of social security, without distinction based on nationality, for the persons to whom that regulation applies by abolishing all discrimination in that regard deriving from the national legislation of the Member States (judgment of 22 June 2011, *Landtová*, C-399/09, EU:C:2011:415, paragraph 42).
- 94 The principle of equal treatment laid down in Article 45 TFEU is also given concrete expression in Article 7(2) of Regulation No 492/2011. That provision states that a worker who is a national of a Member State is to enjoy, in the territory of another Member State, the same social and tax advantages as national workers, and must be interpreted in the same way as Article 45 TFEU (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 24 and 70 and the case-law cited).
- 95 The concept of a 'social advantage', extended by Article 7(2) of Regulation No 492/2011 to workers who are nationals of other Member States, comprises 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 in 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. Furthermore, the reference made by that provision to 'social advantages' cannot be interpreted restrictively (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 25 and 29 and the case-law cited).
- 96 It is also clear from the Court's case-law that certain benefits are capable of constituting both family benefits within the meaning of Article 3(1)(j) of Regulation No 883/2004 and a social advantage within the meaning of Article 7(2) of Regulation No 492/2011 (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 45 and 46 and the case-law cited).
- 97 In the present case, it is not disputed that, as the Advocate General observed in point 124 of his Opinion, the family allowance and the child tax credit are both family benefits subject to the principle of equal treatment laid down in Article 4 of Regulation No 883/2004, and social advantages falling within the scope of 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 solely to the principle of equal treatment laid down in Article 7(2) of Regulation No 492/2011.
- 98 In any event, Article 4 of Regulation No 883/2004 and Article 7(2) of Regulation No 492/2011 both give concrete expression to the principle of equal treatment in social security matters laid down in Article 45 TFEU. Therefore, those two provisions must, in principle, be interpreted in the same way and in conformity with Article 45 TFEU.
- 99 In accordance with the Court's case-law, a distinction based on residence, which is liable to operate mainly to the detriment of nationals of other Member States, as non-residents are in the majority of cases foreign nationals, constitutes indirect discrimination on the ground of nationality which is permissible only if it is objectively justified (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, paragraph 56 and the case-law cited).
- 100 In the present case, the adjustment mechanism varies the amount of the family benefits and social advantages covered by it on the basis of the price level in the children's place of residence. Upward or downward adjustments are therefore applied only where the child resides outside Austria. In those circumstances, the direct link with the children's State of residence cannot be disputed.
- 101 As the Advocate General observed in points 130 and 131 of his Opinion, the reduction in the amount of family benefits and social and tax advantages resulting from the criterion relating to the residence of children laid down by the adjustment mechanism essentially affects migrant workers, since their children are more likely to reside in another Member State (judgment of 20 June 2013, *Giersch and*

*Others*, C-20/12, EU:C:2013:411, paragraph 44). Furthermore, it is apparent from the file before the Court that, due to differences between the cost of living in those States and the cost of living in Austria, as reflected by the correction coefficients contained in the Adjustment Regulation, it is for the most part the workers who have exercised their freedom of movement from those States who will receive family benefits and social and tax advantages of an amount lower than that granted to national workers.

- 102 As regards the Republic of Austria's argument that the adjustment mechanism ensures that different situations are treated differently because of differences in price levels with the States concerned, it is sufficient to note that the family benefits and the social and tax advantages subject to the adjustment mechanism are not established on the basis of the actual costs incurred in maintaining children. Those benefits and advantages are flat-rate and vary according to the number and, where appropriate, the age of the children, without taking account of their actual needs.
- 103 It follows that the adjustment mechanism, which is based on the criterion of the children's residence abroad for determining the amount of the family benefits and social and tax advantages, affects migrant workers more. It therefore constitutes indirect discrimination on grounds of nationality, which is permissible only if it is objectively justified.
- 104 The Court has repeatedly held that, in order to be justified, such 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 (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, paragraph 58 and the case-law cited).
- 105 The justification put forward by the Republic of Austria, according to which the adjustment of the amount of benefits for non-resident children is intended to ensure that the support and consequential relief from family expenses have an economic value corresponding to that of the benefits for children residing in Austria, is, for the reasons set out in paragraph 102 above, unfounded. Moreover, as has already been pointed out in paragraph 52 above, the family benefits and social advantages at issue are not subject to the adjustment mechanism where the children reside in Austria, even though it is common ground that there are, between the regions of that Member State, differences in price levels comparable in scale to those which may exist between the Republic of Austria and other Member States. That lack of consistency in the application of the mechanism confirms that the justification put forward by the Republic of Austria cannot be accepted.
- 106 Furthermore, the unequal treatment resulting from the adjustment mechanism cannot be justified by the objective, relied on by the Republic of Austria, of ensuring the supportive function and the fairness of the social system.
- 107 First, as the Commission stated during the written procedure before the Court, the Court of Auditors report shows neither that there is a risk of serious undermining of the financial balance of the system that could be remedied only by the establishment of an adjustment mechanism, nor that the adjustment mechanism is capable of simplifying the management of family benefits and social and tax advantages. Even if, as the Republic of Austria claims, the additional costs of the adjustment mechanism are very limited, the fact remains that such additional costs exist. However, it is not disputed, as the Advocate General rightly observed in point 142 of his Opinion, that those costs are borne by all persons who contribute to the State budget. Furthermore, it may be inferred from the Court of Auditors report that the risk of jeopardising the financial balance of the social security system does not result from the payment of benefits to workers whose children reside outside Austria, since those payments are estimated to represent only around 6% of expenditure in respect of family benefits, but that that risk could result from the lack of appropriate checks regarding the grant of those benefits.
- 108 Next, freedom of movement for workers within the European Union is based on a number of principles, including the principle of equal treatment. Its implementation in the field of social security is, moreover, ensured by EU legislation which is based, inter alia, on the principle that the legislation of a single Member State is to apply in that field. That principle, laid down in Article 11(1) of Regulation No 883/2004, seeks to eliminate unequal treatment which, for workers moving within the European Union, would be the consequence of a partial or total overlapping of the applicable legislation. Thus, in accordance with Article 11(3) of that regulation, in order to guarantee the equality

of treatment of all persons occupied in the territory of a Member State as effectively as possible, a person who is employed or self-employed in a Member State is subject, as a general rule, to the legislation of that Member State and, in accordance with Article 4 of that regulation, is to enjoy the same benefits there as the nationals of that State.

109 Finally, the Court has repeatedly held that migrant workers contribute to the financing of the social policies of the host Member State through the tax and social security contributions which they pay in that State by virtue of their employment there. They must therefore be able to profit from them under the same conditions as national workers (judgment of 10 July 2019, *Aubriet*, C-410/18, EU:C:2019:582, paragraph 33 and the case-law cited). Accordingly, that factor reinforces the importance of the approach whereby migrant workers must enjoy equal treatment as regards family benefits and tax and social advantages.

110 In the present case, it is not disputed that Austrian family allowances are financed by employers' contributions calculated on the basis of the total amount of the wages of the workers whom they employ, with the result that the migrant worker participates in the same way as a national worker in determining the amount of the sums paid by his or her employer, without the place of residence of those workers' children being taken into consideration. The same applies to the Family Bonus Plus and the other tax credits subject to the adjustment mechanism, since those tax advantages are financed by workers' income tax, without any distinction according to whether or not their children reside in Austria.

111 In those circumstances, and as the Advocate General stated in point 146 of his Opinion, it must be held that the difference in treatment according to the place of residence of the child of the worker concerned established by the adjustment mechanism is neither appropriate nor necessary for the purposes of ensuring the supportive function and the fairness of the social system.

112 Therefore, the Commission's second complaint must also be regarded as well founded.

113 In the light of all the foregoing, it must be held that:

- by establishing the adjustment mechanism applicable to family allowances 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 and 67 of Regulation No 883/2004 and under Article 7(2) of Regulation No 492/2011; and
- by establishing an adjustment mechanism applicable 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 failed to fulfil its obligations under Article 7(2) of Regulation No 492/2011.

### **Costs**

114 Under Article 138(1) of the Rules of Procedure of the Court, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the Republic of Austria has been unsuccessful, the latter must be ordered to pay the costs.

115 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.

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

- 1. Declares that, by establishing the adjustment mechanism resulting from the amendments to Paragraph 8a of the Bundesgesetz betreffend den Familienlastenausgleich durch Beihilfen (Federal Law on compensation for family expenses by means of allowances) of 24 October 1967, as amended by the Bundesgesetz mit dem das Familienlastenausgleichsgesetz 1967, das Einkommensteuergesetz 1988 und das Entwicklungshelfergesetz geändert werden (Federal Law amending the Federal Law of 1967 on compensation for family expenses by means of allowances, the Federal Law of 1988 on the taxation of the income of natural persons and the Law on the status of development aid workers) of 4 December 2018, and to Paragraph 33 of the Bundesgesetz über die Besteuerung des Einkommens natürlicher Personen (Federal Law on the taxation of the income of natural persons) of 7 July 1988, as amended by the Jahressteuergesetz 2018 (Annual Tax Law of 2018) of 14 August 2018, and by the Federal Law amending the Federal Law of 1967 on compensation for family expenses by means of allowances, the Federal Law of 1988 on the taxation of the income of natural persons and the Law on the status of development aid workers of 4 December 2018 applicable to family allowances 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 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 under 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. Declares that, by establishing the adjustment mechanism resulting from the amendments to Paragraph 8a of the Bundesgesetz betreffend den Familienlastenausgleich durch Beihilfen (Federal Law on compensation for family expenses by means of allowances) of 24 October 1967, as amended by the Bundesgesetz mit dem das Familienlastenausgleichsgesetz 1967, das Einkommensteuergesetz 1988 und das Entwicklungshelfergesetz geändert werden (Federal Law amending the Federal Law of 1967 on compensation for family expenses by means of allowances, the Federal Law of 1988 on the taxation of the income of natural persons and the Law on the status of development aid workers) of 4 December 2018, and to Paragraph 33 of the Bundesgesetz über die Besteuerung des Einkommens natürlicher Personen (Federal Law on the taxation of the income of natural persons) of 7 July 1988, as amended by the Jahressteuergesetz 2018 (Annual Tax Law of 2018) of 14 August 2018, and by the Federal Law amending the Federal Law of 1967 on compensation for family expenses by means of allowances, the Federal Law of 1988 on the taxation of the income of natural persons and the Law on the status of development aid workers of 4 December 2018 applicable 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 failed to fulfil its obligations under Article 7(2) of Regulation No 492/2011;**
- 3. Orders the Republic of Austria to bear its own costs and to pay those incurred by the European Commission;**
- 4. Orders 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.**

[Signatures]

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\* Language of the case: German.