Department of Political Science

INDEXATION OF CHILD BENEFITS: A REVIEW OF THE LEGALITY OF THE AUSTRIAN MEASURE IN THE LIGHT OF EU LAW

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Abstract

This master thesis analyses the legality of the Austrian measures about the indexation of child benefit with EU law. From 1 January 2019, Union citizens residing in Austria and having their child(ren) abroad will be subject to this indexation. Therefore, the amount of the benefit exported will be adjusted to the cost of living of the member state where the child(ren) reside(s). This measure affects the rights of Union citizens to move and reside within the Union. It creates an impermissible indirect discrimination and contravene the rules on the coordination of the social security systems of the member states. Namely, the principle of equal treatment, the principle of exportability and the fiction of residence for family members concerning the granting of family allowances. Austria fails to fulfil its obligation under EU law, this shall lead to an infringement action of the European Commission or an action from an individual before a national court.

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1. Introduction

1.1. Context of the research

The European Union has established a common market with several freedoms in order to ensure the free movement of its citizens, notably its workers. These freedoms, to be effective, have needed the removal of the barriers to freedom movement. These removals were accompanied by the coordination of the system of social security in the European Union (EU). This coordination entitled an access to social benefits to intra-EU migrants when moving within the Union. The EU is promoting for social rights through Europe in order to have a European labor market which is the fairest as possible for its citizens.[1]

However, the issue of access to social benefits for migrant EU citizens is quite contentious in the European Union although this intra-EU migration concerns few European citizens.[2] Traditionally, Member states have the power to decide who should have access to social benefits, yet, the European rules are interfering with the sovereignty of Member states and the jurisprudence of the Court tends to extend the access to social benefits. Member states often argue that this access creates higher burden on the public finances, especially on the sustainability of their national security system.

The debate is mostly centred on the 'welfare tourism', the idea that EU migrants, like low-income workers, jobseekers and persons economically that are inactive, would emigrate solely in order to obtain advantageous welfare benefit from the host state. However, the numbers demonstrate that there isn't welfare tourism in the EU.[3]

The hypothesis of 'welfare magnet,' according to which migrant chose the host country in function of the generosity of its welfare system, has also been tested in the European Union. The researches demonstrate that the generosity of welfare state is of weak influence on this choice. Other factors are predominant, like unemployment rate or the level of salaries.[4] The Commission also founds that the generosity of a welfare state was weak or non-existent.[5] Despite the empirical evidences, the idea remain popular.

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[1] President Juncker on the proclamation of the European Pillar of Social Rights, 17 November 2017. The more inclusive and fairer European Union wished by President Juncker is based on three pillars: equal opportunities and access to the labor market; fair working conditions; social protection and inclusion.
[2] Eurostats, Citoyens de l'UE résidant dans d'autres États membres ; Communiqué de presse 87/2018 of 28 May 2018.
[3] Fernandes, S., L'accès aux prestations sociales pour les citoyens mobiles de l'UE : « tourisme » ou fantasme ? Policy paper of 20 June 2016, Institut Jacques Delors, page 8.
[4] Ibid., page 8.
[5] Medgyesi M. and Pölöskei P. « Access of mobile EU citizens to social protection », Research note n° 10/2013 of February 2014.

In 2016, the United-kingdom (UK) expressed its wish to limit access to welfare benefits, including child assistance through indexation, for new migrants entering there for work. Indexation consist in the following: when exporting[6] child benefits to a member states other than that where the worker resides, the amount of the benefit can be indexed to the conditions of the member state where the child resides. A deal was reach at the European Council and the EU accepted the demands of the UK.[7] The agreement was conditioned to the fact that the UK would remain in the EU. The negative vote of the referendum on the European membership of the UK rendered the deal null and void.

However, this opened the debate about the indexation of child benefit and the Commission envisaged its insertion in its proposal to modify secondary legislation on the coordination of social security system.[8] The idea was supported by other member states[9], like Germany and Austria that are the biggest exporters of child benefits in the European Union with Luxemburg.[10] The preoccupation about the export of child benefit in Austria and Germany is really high. In 2016, Austria exported an amount of €273 million of 'Kinderbeihilfe' and the export for Germany amounted €414 million of 'Kindergeld'. These amounts seam tremendous, yet they have to be replaced in their context. Migrants workers are contributing to the wealth of the country where they work, notably by paying taxes and social contributions. The fact that the children are abroad and not with the worker also represent economies for public finances since education and health costs remain the charge of the residency state of these children.

Finally, the Commission went back on the issue of indexation in its proposal to modify secondary legislation and also declared that it would be illegal.[11] The Commission also put the emphasizes on the fact that only one percent of child benefits are exported and that the impact

[6] European Commission, Impact assessment of the Commission, SWD 2016 460, page 124: 'The principle of exportability contained within the EU social security coordination rules means that when the child of a worker resides in another State, the worker can export the full amount of the family benefits received from the State of activity to the State where the child resides.'

[7] European Council, Extract of the conclusions of the European Council of 18-19 February, A new settlement for the United-Kingdom within the European Union, published at the Official Journal of the European Union Cl 69/1 of the 23 February 2016, EUR-Lex 52016XG0223(01).

[8] European Commission, Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 883/2004 on the coordination of social security systems and regulation (EC) No 987/2009 laying down the procedure for implementing Regulation (EC) No 883/2004 (Text with relevance for the EEA and Switzerland) {SWD (2016) 460 final}{SWD(2016) 461 final}.

[9] Denmark and Ireland were also strongly in favor of such mechanism when it was proposed by the UK. See Fernandes, S., Allocations familiales : leur montant ne doit pas dépendre du pays où vit l'enfant, Décryptage of 17 April 2018, Institut Jacques Delors.

[10] Germany export 11.2% of all family benefits exported in the European Union, though it represents only 0.3% of its budget. For Austria it is 15.6% representing 3.4%. With Luxemburg being the biggest exporter of family benefits (50.6% representing 47.4%). See Fernandes, S., 2018 (supra 9).

[11] Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 883/2004 (supra), page 135, particularly foot note 378.

on public finances of the indexation of family allowances would be minimal compared to the administrative costs that an indexation mechanism would represent.[12]

However, Austria was the more fervent advocate of this measure, and threatened to apply it unilaterally. This threat became a reality with the introduction of indexation on child benefits from 1 January 2019.

1.2. Problem statement

The rules of the internal market promote for the freedom of movement of workers and the principle of equality between them. This means that a worker, when deciding to make use of its right to move and seek a job in another, should not be deterred from exercising its right of freedom from movement. Migrants workers shall be treated equally with national of the host member states where they decided to move. Indexation creates differences in the attribution of child benefits although workers are subject to the same legislation. This differentiation in the export of benefits according to the residence of the child seems to contradict the European Treaties and the rules laid down in secondary legislation about the coordination of social security systems.

The Commissioner Thyssen stated about posted workers that "equal pay for equal work at the same place" would also include "equal benefits for equal contributions at the same place."[13] However, this position was not always the one that the European Union has held, notably when it was dealing with the UK to avoid Brexit. The jurisprudence of the Court of Justice of the European Union (CJEU) on this case is helpful, yet the theme of indexation is a matter that was never ruled. Therefore, it is unclear whether the CJEU would approve such measure, especially unilaterally.

1.3. Research question

The main research question of this thesis is the following:

From a European point of view, is the law introducing indexation of child benefits adopted by the Republic of Austria legal?

[12] Commission Européenne, Fiche d'information, Questions et réponses sur la révision des règles de coordination sociale, 13 December 2016, MEMO/16/4302, point 5.
[13] European Commission – Indexation of family benefits: Speaking points of Commissioner Thyssen on the Launch of the infringement procedure against Austria, Speech 19/664 made at Brussels.

This research question is relevant since the adoption of this measure will affect numerous citizens of the European union having their children living abroad. The main incompatibility remains with article 45 of the Treaty on the Function of the European Union (TFEU) about the freedom of movement for workers and the prohibition of any discrimination. Would the CJEU recognizes a discrimination in this case? Could it be justifiable?

Another conflict arises with the principle of exportation contained in the primary law and in Regulation (EC) 883/2004 prohibiting the modification of the amount of the benefits exported. Is indexation a modification? Specifically, the legislator decided to set up a fiction of residence concerning children in the European union. They should always be considered as residing with the parent entitled to the benefits. Could an indexation be made despite this fiction of residence?

These interrogations will be tackled in the present research about the indexation of child benefits.

1.4. Plan announcement

The thesis is composed of five chapters. Chapter two will present the law at stake and how it was adopted through the Austrian legislative system. Chapter three is the hearth of this research and deals with the compatibility of the Austrian law with EU law. The chapter exposes the conflicting provisions contained in the secondary legislation and explain why they jeopardizes the legality of the Austrian law. Chapter four provides for the remedies available against Austria. Chapter 5 concludes.

2. The contested legislation

2.1. Aim of the legislation

The law provides for a reduction or augmentation in family benefits through the indexation of child benefits. The child benefits, that are distributed to meet expenses done by the family for the living of kids, are functionally a partial relief from the burden arising from the maintenance obligation.[14] They consist in a refund part of expenditure for securing the basket of goods on which the standard requirement of the child is based. The goal is to permit the parent to acquire part of the good and services which are essential for the fulfilment of his or her maintenance obligation, not from his or her own resources, but rather with support and funds from the general public,[15] i.e. public funds.

According to the government, if the refunds is based on the average cost of a basket of goods, the latter would not fulfil its missions if the refund was to be exported indifferently without taking in account the divergences in living costs.[16] Therefore, the indexation aims at equilibrating charges by diminishing/augmenting the allowance of benefits by adjusting them to the price level of the children's state of residence. The values of price level are to be adjusted every two years to the "comparative price levels of the final consumption of private households including indirect taxes" published by the Statistical Office of the European Union.

This measure is aimed at avoiding 'distortion' of the freedom of movement, moreover. By implementing this measure, the Austrian government will make substantial savings of around 114 million per year. This measure will mainly affect Hungarian, Slovak, Polish and Rumanian according to the data.

2.2. Adoption process

The Austrian government envisaged the modification of the previous "*Familienausgleischsgesetz 1967, Einkommensteuergesetz 1968, Änderung"*[17] despite previous warnings from the Commission that this kind of measures would not be permitted under EU law. The European Commission, during question session in the European Parliament, was able to clarify twice the situation regarding the indexation, first envisaged by many

[14] Mazal W., 2017, Rechtsgutachten zur Neugestaltung der Familienbeihilfe für Kinder, die im EU-Ausland leben.
[15] Ibid.
[16] Ibid.
[17] "Family Burden Compensation Act 1967, Income Tax Act 1988, Amendment"

European countries in 2017,[18] and then, more specifically, the indexation envisaged by the Austrian regime in 2018.[19] On both occasions, the commissioner for Employment, Social Affairs, Skills and Labour Mobility, Marianne Thyssen, replied that the proposed indexation was contrary to European law. In 2017, she generally admitted that indexation is "not compatible with the existing rules, as interpreted by the Court of Justice of the European Union"[20] without further clarification. In 2018, she gave a more precise answer and asserted in a more elaborated answer that "mobile workers are entitled to the same child allowances as local workers, irrespective of the place of residence of the children concerned", that the rule of the internal market allowed worker to enjoy the same benefits for the same contribution paid in a work context and that "the Treaty forbids any discrimination of workers on the basis of nationality, either direct or indirect". She concluded its answer affirming that the Commission would examine if the planned indexation would be in accordance with EU law.[21]

Nevertheless, the Austrian government decided to go ahead relying on the legal opinion of Wolgang Mazal,[22] an Austrian expert of Social law, and decided to make a draft proposal that arrived in the *Nationalrat*, the national chamber of the bicameral Austrian parliament, the 05.01.2018. After the termination of the legislative process, the law was finally voted the 24.10.2018 by the *Nationalrat*[23] and non-vetoed by the *Bundesrat.*[24] Ultimately, the *Bundespräsident*, Alexander Van der Bellen, after having required a legal expertise,[25] approved officially the law and made it published at the Official Journal[26], rendering thus the law officially in effect. However, the legal expertise required by the *Bundespräsident* makes clear that the constitutionality of the law does not entail its compliance with European law[27]. The legal opinion also makes a reference to a similar project in the Germany that was abandoned after that the German Bundestag issued a critical legal expertise that was going contrary to the

[18] Question for written answer E-001852-17, Rule 130, Pascal Arimont (PPE); Answer given by Ms Thyssen on the behalf of the Commission, Question reference: E-001852/2017.
[19] Question for written answer E-000191-18 to the Commission, Rule 130, Romana Tomc (PPE), Milan Zver (PPE), Angelika Mlinar (ALDE), Csaba Sógor (PPE), Renate Weber (ALDE), Franc Bogovič (PPE), Danuta Jazłowiecka (PPE), Agnieszka Kozłowska-Rajewicz (PPE), Martina Dlabajová (ALDE), Ádám Kósa (PPE), Igor Šoltes (Verts/ALE), Patricija Šulin (PPE), Claude Rolin (PPE), Michaela Šojdrová (PPE), Alojz Peterle (PPE), Tanja Fajon (S&D), Terry Reintke (Verts/ALE), Monika Vana (Verts/ALE), Ivo Vajgl (ALDE), Jana Žitňanská (ECR) ; Answer given by Ms Thyssen on the behalf of the Commission, Question reference: E-000191/2018.
[20] Answer given by Ms Thyssen on the behalf of the Commission, Question reference: E-001852/2017.
[21] Answer given by Ms Thyssen on the behalf of the Commission, Question reference: E-000191/2018.
[22] Mazal 2017.
[23] '111 der Beilagen XXVI. GP, Beschluss des Nationalrates': decision of the Nationalrat modidying the Familienlastenausgleichsgesetzes 1967.
[24] '111 der Beilagen XXVI. GP - Beschluss des Bundesrates': Non-objection to the decision of the Nationalrat
[25] Stellungnahme von Univ. Prof. Dr. Ludwig Adamovich zur Beurkundung des Gesetzesbeschlusses vom 27. Oktober d.J. betreffend den Entwurf eines Bundesgesetzes, mit dem das Familienlastenausgleichsgesetz 1967, das Einkommenssteuergesetz 1988 und das Entwicklungshelfergesetz geändert werden.
[26] BGBl. Nr. 376/1967 zuletzt geändert durch BGBl. I Nr. 83/2018
[27] Adamovich, L., Stellungnahme von Univ. Prof. Dr. Ludwig Adamovich (Supra 25), paragraph 3.

one of Mazal[28]. The approbation of a law contrary to EU law does not mean that such illegality is desirable or should be rejected, the president approves laws on a question of competences and not on a question of content.[29] Moreover, the certification of the law should not be seen as any opinion emanating from the *Bundespräsident* on the content.[30] The expertise recommends then to the certification of the law, since from the point of view of the Austrian legal system the law was not unconstitutional.[31] The expertise is interesting since it touches upon a controversial law and expose clearly that the certification of the law is only a national procedure and cannot render a law compatible to EU law since such review isn't possible in this procedure and the latter should only be seen as procedural with a neutral stand of the *Bundespräsident*.

[28] Ibid., paragraph 2.
[29] Ibid., paragraph 4.
[30] Ibid., paragraph 5.
[31] Ibid., paragraph 6.

3. Compatibility with EU law

For the interaction between child benefit under Austrian law on the one hand and EU law on the other, the nature of the child benefit will be of first importance since it is argued by the Austrian government expert that child benefits do not fall under the scope of the regulation 883/2004.[32] The Austrian legislation, imagined first as a tax relief and then distributed jointly with family allowances, is a direct monetary allowance funded from taxes[33] and seems to fall under the areas of social security. It is therefore subject to member state's competences.[34] Nevertheless, when exercising their competences, member states are still obliged to observe Union law and its case law.[35] In the following case, general provisions of the treaties like the non-discrimination clause contained in article 18 (1) TFEU, as well specific provisions, like the freedom of movement of worker contained in article 45 TFEU, shall apply.

According to the *lex specialis* principle, special rules shall apply in derogation from the general provisions. In European law, provisions of primary law have been made more concrete in secondary law. Thus, the relevant secondary legislation is, in principle, primary applicable. This is clear from the case law of the Court of Justice, in the case *Raugevicius*[36] the Court stated that '[e]very Union citizen may therefore rely on the prohibition of discrimination on grounds of nationality laid down in article 18 TFEU in all situations falling within the scope *ratione materiae* of EU law,'[37] the scope being defined by more specific secondary legislations. The same can be seen in the case *Dano,*[38] where Union citizens using their liberty of freedom of movement have to comply with the specific relevant secondary legislation, therefore, the court interpret the specific relevant legislation instead of the primary law.[39] This implies that in order to examine the legality of the Austrian measure, it is necessary to compare it with the relevant secondary law.

In the field of social security, and specifically child benefits, EU law proposes two relevant legislations that take precedence over fundamental freedoms, especially the one contained in article 45 TFEU, the freedom of movement from workers.

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[32] Mazal, W. 2017 (supra 14).
[33] Ibid.
[34] Deutscher Bundestag, 2014, Kürzung des Kindergeldes und EU-Recht, PE 6 – 3000 – 08/14, page 9; Case C-70/95 *Sodemare SA, Anni Azzurri Holding SpA and Anni Azzurri Rezzato Srl v Regione Lombardia* [1997] I-3395, paragraph 27
[35] Ibid.
[36] Case C-247/17 *Denis Raugevicius* ECLI:EU:C:2018:898.
[37] Ibid., paragraph 44.
[38] Case C-333/13 *Elisabeta Dano and Florin Dani v Jobcenter* Leipzig ECLI:EU:C:2014:2358.
[39] Ibid., paragraph 58-62.

One the one hand, there is the Regulation (EC) No 883/2004 on the coordination of social security systems[40] and on the other hand Regulation (EU) No 492/2011 on freedom of movement for workers within the Union.[41] The general aim and relevant articles of each regulation will be analysed in the following section in order to establish whether the contested Austrian legislation falls under their scope. Its compatibility will be assessed with each article.

3.1. Regulation (EC) 883/2004

In order to study the relevance of regulation 883/2004 in question, this section will be divided as follows: the first part will define the objectives and principles of the Regulation, the second will define its scope, material and personal, and then the following parts will deal with the articles relevant to our case.

3.1.1. General aim of Regulation (EC) 883/2004

The European Union guarantees the principle of free movement of persons and the removal of its obstacles as provided in the treaties.[42] In order to achieve this, it was necessary to adopt social security measures permitting the protection of the rights of European citizens when they are working or residing in another member state. Union citizens, when they are residing or working in another member state, can be subject to the social security system of one or more states, notably when they are working in a member state and residing in another, or when family has access to the system of two countries. To ensure that social security rights of these persons are respected, the legislator adopted firstly the Council regulation No 3 [4] on social security for migrant worker in 1958[43], which was subsequently repealed by Regulation (ECC) No 1478/71 of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community. Regulation 883/2004 was adopted on 29 April 2004 and repealed the previous regulation 1478/71, but only with effect from 1 May 2010.[44]

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[40] Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security system (Text with relevance for the EEA and for Switzerland) published at the Official Journal of the European Union L 166/1 the 30 April 2004 (thereafter Regulation (EC) 883/2004).
[41] 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. (codification) (Text with relevance for the EEA and for Switzerland) published at the Official Journal of the European Union L 141/1 of 27 April 2011. (Thereafter Regulation (EU) 492/2011).
[42] Article 3(2) TEU Article 45, 48, 49 TFEU; Recital 1 of regulation 883/2004, Case C-41/84 *Pietro Pinna v Caisse d'allocations familiales de la Savoie* [1986] ECR 1, paragraph 21.
[43] Règlement No 3 concernant la sécurité des travailleurs migrants' published in the Official Journal of the European Communities n°30 of 1 December 1958, page 561/58.
[44] Regulation (EC) No 987/2009 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

Regulation 883/2004 was adopted in order to 'modernized EU social security coordination.' Indeed, with increasing number of member states and a greater diversity in social security system, it was necessary to amend this field and take into account these changes. The previous regulation has been subject to numerous judgments of the CJEU rendering its application complicated. For these reasons a new regulation was adopted with the aim of clarifying the rules on the coordination of social security.[45]

The old and new texts, in their formulations, applications and regulatory concerns, conserve some identical provisions, thus the case-law of the European Court of Justice can mostly be transferred on the new regulation 883/2004.[46]

This legislation, based on article 48 TFEU, aims at coordinating the social security system of all member states. The regulation does not aim at harmonizing or standardizing the systems of member states and respect all of their specific characteristics.[47]

3.1.2. Main principles

The main principles to which the regulation is anchored are the principle of equality,[48] the aggregation principle (i.e. the continuity of insurance and employment rights),[49] the principle of single applicable law (i.e. the legislation of which Member State applies)[50] and the principle of exportability (i.e. the prohibition of residence clauses).[51]

In the case of more than one member state involved the principle of single applicable law permits to determine which sole member state is competent.[52] This state is determined by the rule of priority that permits to ensure that all persons are covered by social security. The priority

systems in its Article 96 repealing the previous Regulation (ECC) No 574/72 of the Council of 21 March 1972 fixing the procedure for implementing Regulation (ECC) No 1408/71 on the application of social security schemes to employed persons and their families and in its article 97 affirming its entry into force.

[45] International Labor Organization (ILO), 2010, Coordination of Social Security System in the European Union: An explanatory report on EC Regulation 883/2004 and its Implementing Regulation No 987/2009.

[46] Deutscher Bundestag, 2014 (supra 34), page 10-1; Deustcher Bundestag, 2016, Kürzungen von Kindergeld im Licht des EU-Rechts, PE 6-3000-71/16, page 6; Kühbacher T., 2018, Die geplante Indexierung der Familienbeihilfe aus unionsrechtlicher Sicht Die Wohnsitzfiktion des Art 67 der Verordnung (EG) Nr 883/2004 zwingt zur absoluten Gleichbehandlung, page 86, on the transferability of the ECJ ruling in the Pinna Case; Laudacher, M., 2018, Unionsrechtswidrige Indexierung der Familienleistungen Anpassung an ausländisches Preisniveau mit VO (EG) 883/2004 unvereinbar, page 484; Marhold F. and Ludvik C., 2018, Dürfen die Behörden die Indexierung der Familienleistungen anwenden? Unionsrechtlicher Anwendungsvorrang und Vorlagerecht bzw -plifcht, ASoK 6/2018, on the transferability of the Pinna case.

[47] Recital 4 of Regulation (EC) 883/2004 (supra 40).

[48] Article 4 of Regulation (EC) 883/2004 (supra 40).

[49] Article 6 of Regulation (EC) 883/2004 (supra 40).

[50] Article 10, 11 of Regulation (EC) 883/2004 (supra 40).

[51] Article 7 of Regulation (EC) 883/2004 (supra 40).

[52] Article 11 of Regulation (EC) 883/2004 (supra 40): "Persons to whom this Regulation applies shall be subject to the legislation of a single Member State only"; Recital 15 of Regulation (EC) 883/2004 (supra 40): "only one single Member State in order to avoid overlapping of the applicable provisions of national legislation and the complications which could result therefrom."

rule also permits to avoid any overlapping of benefits when the situation of an assured grants him access to benefit in more than one state[53]. Priority is determined by *lex loci laboris* principle, meaning that the person who pursues a professional activity in the territory of a Member State shall be subject to the legislation of that State.[54] This criterion was adopted as a general criterion by the legislator in 1971, whereas the use of other criterions (i.e. *lex loci domicilii*, or the state of pension) is admitted only when it is more practical, in accordance with the nature of the benefits, or the method to determine it.[55] A benefit that cannot be exported (such as a benefit in kind) shall therefore be granted on the basis of the state of residence.[56]

The principle of aggregation means that the competent Member State must take account of periods of insurance and employment completed in another Member State as if they were accomplished under the legislation of this member state, and therefore protect right acquired under the legislation of another member state.[57]

The two next principles are of high importance for our studies and are also central to the Regulation (EC) 883/2004. The equality principle aims at eradicating any discrimination based on nationality, meaning that migrant workers and national of the host member states shall have the same benefits and obligations under the legislation of the host member state.[58] We will come back further on this principle and its implications in the part below since this principle is at risk of infringement in the Austrian case.

The last general principle of this regulation, crucial to our study, is the principle of exportability of cash benefits and the abolition of residence clauses.[59] It means that the attribution of benefits shall not, in principle, be subjected to residence conditions. This is accompanied by a total prohibition to modify, reduce the amount of the benefit[60]. In our situation this principle will be of peculiar interest since the Austrian law on child benefit provides that the amount of the benefits has to be indexed to the living cost of the member state where the child resides, therefore it will be treated in more details in a following part.

The general principle of exportation is also accompanied, in the field of family benefits, by a more specific clause, the residence fiction clause provided in article 67 of Regulation (EC)

[53] Article 10 of Regulation (EC) 883/2004 (supra 40).
[54] Article 11 (3) a of Regulation (EC) 883/2004 (supra 40); Opinion of Mr Advocate General Mancini, Case 41/84 delivered 21 May 1985, point 5, page 8.
[55] Opinion AG Mancini, Case 41/84 (supra 54), point A, page 10.
[56] Ibid.
[57] Article 6, recital 10 of Regulation (EC) 883/2004 (supra 40).
[58] Recital 5, 8, Article 4 of Regulation (EC) 883/2004 (supra 40).
[59] Article 7, Recital 16 and 37 of Regulation (EC) 883/2004 (supra 40).
[60] Article 7 of Regulation (EC) 883/2004 (supra 40): "shall not be subject to any reduction, amendment, suspension, withdrawal or confiscation."

883/2004. This article alone poses serious threat to the legality of the Austrian legislation[61] and will be of great interest for the legal analysis.

3.1.3. The scope of the regulation

After having defined the personal scope of the regulation (3.1.3.1.), we will make a focus on the material scope (3.1.3.2.), this will be of main importance since it is argued by Mazal that the child benefit proposed by the Austrian government does not fall under the scope of the regulation 883/2004.[62]

3.1.3.1. Scope *ratione personae*

Originally the Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community applied only to workers and self-employed persons including workers' and self-employed persons' families and their dependents. The scope was progressively extended to civil servant in 1998,[63] to all persons insured, especially students and employees without enough means of subsistence in 1999,[64] to nationals from third countries legally resident in the EU in 2003[65] whose coverage has been extended to third-country nationals who are legally residing in the EU and in cross border situation and to their family members and survivors if they are in the EU in 2010.[66]

Regulation (EC) 883/2004 applies now to a broad range of persons referred to in article 2:

[61] Kühbacher T., 2018 (supra 46).
[62] Mazal W., 2017 (supra 14).
[63] Council Regulation (EC) No 1606/98 of 29 June 1998 amending Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community and Regulation (EEC) No 574/72 laying down the procedure for implementing Regulation (EEC) No 1408/71 with a view to extending them to cover special schemes for civil servants
[64] Council Regulation (EC) No 307/1999 of 8 February 1999 amending Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community and Regulation (EEC) No 574/72 laying down the procedure for implementing Regulation (EEC) No 1408/71 with a view to extending them to cover students
[65] Council Regulation (EC) No 859/2003 of 14 May 2003 extending the provisions of Regulation (EEC) No 1408/71and Regulation (EEC) No 574/72 to nationals of third countries who are not already covered by those provisions solely on the ground of their nationality.
[66] Regulation (EU) No 1231/2010 of the European Parliament and of the Council of 24 November 2010 extending Regulation (EC) No 883/2004 and Regulation (EC) No 987/2009 to nationals of third countries who are not already covered by these Regulations solely on the ground of their nationality

- Under article 2(1): ‘This Regulation shall apply to nationals of a Member State, stateless persons and refugees residing in a Member State who are or have been subject to the legislation of one or more Member States, as well as to the members of their families and to their survivors’;
- Under article 2(2): ‘It shall also apply to the survivors of persons who have been subject to the legislation of one or more Member States, irrespective of the nationality of such persons, where their survivors are nationals of a Member State or stateless persons or refugees residing in one of the Member States.’

The ‘member of the family’ are defined as follows in Regulation (EC) 883/2004:

- Under article 1(i)(1), ‘any person defined or recognised as a member of the family or designated as a member of the household by the legislation under which benefits are provided’;
- Under article 1(i)(2): ‘If the legislation of a Member State which is applicable under subparagraph does not make a distinction between the members of the family and other persons to whom it is applicable, the spouse, minor children, and dependent children who have reached the age of majority shall be considered members of the family’;
- Under article 1(i)(3): ‘If, under the legislation which is applicable under subparagraphs (1) and (2), a person is considered a member of the family or member of the household only if he lives in the same household as the insured person or pensioner, this condition shall be considered satisfied if the person in question is mainly dependent on the insured person or pensioner’.

3.1.3.2. Scope *ratione materiae*

The scope *ratione materiae* has evolved since the first regulation. In regulation No 3/58, migrant workers were solely entitled to ‘family allowances’, namely ‘periodical cash benefits granted exclusively by the reference to the number, and, where appropriate, the age of members of the family’.[67] Regulation (EEC) No 1408/71 enlarged the range of benefits which migrant workers could claim to ‘all benefits in kind or cash intended to meet family expenses.’[68]

In Regulation (EC) 883/2004, the material scope is defined as follows:

- Under article 3: ‘This Regulation shall apply to all legislation concerning the following branches of social security: (j) family benefits.’
- Under article 1(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.’[69]

[67] Article 1(u)(ii) of Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community.
[68] Article 1(u)(i) of Regulation (EEC) No 1408/71 (supra 67); Case C 41/84 Pinna (supra 42), paragraph 17-18.
[69] Annex I enumerates benefits excluded from the scope of Article 1(z) for each member state.

On the first sight family allowances and child benefits seems to fall under the scope of the regulation because they are benefits in cash which function is to reimburse costs based on a basket of goods. However, Mazal argues that their primary function renders this kind of benefit different from the classical cash benefits.[70] Since they are based on the average cost of a basket of goods, they are not classical cash benefits and mere monetary support and differs other social security benefits contained in Tittle III, like maternity and paternity benefit, cash benefit for pensioners, family benefits, etc.[71] This benefit is paid by the general public and the condition of attribution is neither the receipt of income nor the payment of contributions or a tax benefit. The sole condition is the fact that the person cares a child. Thus, according to Mazal, this benefit is a solidarity payment made by the general public in isolation from gainful employment.[72]

Nevertheless, this argument is not valid, as we can see from the case law of the Court. In the case *Hoever and Zachow,*[73] the Court stated that, in order to determine which benefits are excluded from the scope of Regulation (EEC) 1408/71 and those which fall within its scope, the constituent elements of each particular benefit are relevant. Notably, their purpose, the way in which they are granted and not whether this particular benefit is classified as a social benefit under national legislation.[74] Braümann also argue that the classification of the benefit according to the system of national law doesn't matter and that the decisive elements are rather the basic characteristics of the service and that its financing is insignificant in determining its classification.[75]

A child benefit is a family benefit treated as a social security benefit subject to Regulation (EC) 883/2004 if the benefit is 'automatically granted to persons fulfilling certain objective criteria, without any individual and discretionary assessment of personal needs, and which is intended to meet family expenses.'[76] However, benefits of another kind, that are not granted automatically, like a benefit intended to cover certain cost at the beginning of the school year, can be excluded from the material scope of the regulation 883/2004 if they are 'closely linked with the social environment and therefore with the place where the persons concerned reside'.[77]

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[70] Mazal W., 2017, page 37-39.
[71] Regulation (EC) 883/2004 (supra 40).
[72] Mazal W., 2017, page 37-39.
[73] Joined Cases C-245/94 and C-312/94 *Hoever and Zachow* [1996] ECR I-4895.
[74] Ibid., paragraph 17; Case C-78/91 *Hughes* [1992] ECR I-4839, paragraph 14
[75] Braümann P., 2018, Der Ministerial Entwurf zum „Familien Plus", page 477; C-78/91 *Hughes* (supra 74), paragraph 14; Joined Cases C-245/94 and C-312/94 *Hoever and Zachow* [(supra 73), paragraph 17; Case C-85/99 *Offermanns* [1999] ECR I-2261, paragraph 37; Joined Cases C-216/12 and C-217/12 *Hliddal and Bornand* [2013] paragraph 47.
[76] Joined Cases C-245/94 and C-312/94 *Hoever and Zachow* [(supra 73), paragraph 27; Case C-85/96 *María Martinez Sala v Freistaat Bayern* [1998] ECR I-2691, paragraph 22.
[77] Case C-313/86 *O. Lenoir v Caisse d'allocations familiales des Alpes-Maritimes* [1988] ECR 5391, paragraph 16.

Marhold and Ludvik argue that in Austria the child benefit is accorded without taking into account the residence of the beneficiaries and is granted on the basis of a lump sum amount. Therefore, the uniform amount paid to the family does not suggest a needs-based relief for families and would render the Austrian legislation subject to Regulation 883/2004, since it's granted not on real needs, but on a lump sum basis.[78]

In the opinion of the author, it is clear that the Austrian child benefit is granted automatically to person fulfilling certain objective criteria: the mere fact of having a child entitles the grant of this benefit under Austrian law. The amount of the benefit also varies depending on the number of children, which is also an objective criterion. No further discretionary assessment or evaluation of the personal needs is required.

Lastly, the benefit has to be intended to meet family expenses. As defined in the case-law of the Court, 'family expenses' are '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.'[79] As Mazal explained, the child benefit is a relief from the burden of raising a child paid by the general public,[80] therefore it matches with the definition given by the court concerning 'family expenses'.

It can be concluded that the Austrian child benefits, even if the government claims otherwise, are family benefit within the meaning of the Court's case law and thus fall under the material scope of Regulation 883/2004.

3.1.4. Article 67 of Regulation (EC) 883/2004

Article 67 of Regulation (EC) 883/2004 is a central element of our study, it can be found in Title III entitled 'Special provisions concerning the various categories of benefits' and its chapter 8 on 'family benefits.' It is therefore a special provision that should be apply in derogation of the general provision of the Regulation (EC) 883/2004, especially in relation to provision 7 of the same Regulation, for this reason it shall be the first article to be presented here.

3.1.4.1. Wording and aim of article 67 of Regulation (EC) 883/2004

Article 67 of Regulation (EC) 883/2004 provides as follows:

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[78] Marhold F. and Ludvik C., 2018 (supra 46), page 204.
[79] Joined Cases C-216/12 and C-217/12 *Hliddal (supra 74),* paragraph 55; Case C-85/99 *Offermanns* (supra 75), paragraph 41; Case C-333/00 *Maaheimo* [2002] ECR I-10087, paragraph 25.
[80] Mazal W., 2017 (supra 14).

> Members of the family residing in another Member State.
>
> 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.

The aim of this article can be found in the jurisprudence on ancient versions of this article. The purpose is to ensure that the granting of social benefits and the amount of these benefits in a Member state cannot be dependent on the place of residence of the worker's family members.[81] This article is a derogation from the export principle (i.e. the general prohibition on residence clauses) contained in article 7 of Regulation (EC) 883/2004 and in the Treaty.[82] By ensuring this, the Union guarantees that 'Community workers may not be deterred from exercising their right to freedom of movement.'[83] This mean, that a member state, when granting family benefits, like a child allowance, should consider members of the family living in another member state 'as if they were residing in the former state.'[84]

Here it says that, even if there is a residence clause, the place of residence cannot prevent the grant of the benefits since member of the family living in another member state are considered 'as if they were residing' in the country granting the benefit. As a result, they fulfil the residence clause.

3.1.4.2. History of article 67 of Regulation (EC) 883/2004

In the first regulation on the matter, Regulation No 3/58,[85] article 40 provided for the coordination of family benefits among member States. The article was treating situations where workers' family members where residing in a member state different from the one granting benefits. The article stated that they were entitled to benefit in the member state where the worker was employed according to the legislation of the former, however family benefits

[81] Case 381/93 *José Imbernon Martinez v Bundesanstalt für Arbeit* [1995] ECR I-2821 paragraph 21; Case C-228/88 *Giovanni Bronzino v Kindergeldkasse* [1990] ECR 1-531, paragraph 12.
[82] Article 48 TFEU.
[83] Case 381/93 Imbernon Martinez (supra 80), paragraph 21
[84] Article 67 of Regulation (EC) 883/2004.
[85] Règlement No 3 concernant la sécurité des travailleurs migrants' published in the Official Journal of the European Communities n°30 of 1 December 1958, page 561/58, states in its article 40 (1) that: "Un travailleur salarié ou assimilé occupé sur le territoire d'un État membre et ayant des enfants qui résidênt ou sont élevés sur le territoire d'un autre État membre, a droit pour lesdits enfants aux allocations familiales selon les dispositions de la législation du premier État, *jusqu'à concurrence des montants d'allocations que la législation du second État accorde*. ; for the English version see: Opinion of Mr Mancini, case 41/84, point 3, page 5.

granted to family members residing in another member state had to be limited up to the amount of the allowance granted in the state of residence of the child.[86]

On 14 June 1971, as well known, the Council adopted a legislative act repealing regulation No 3/58. The Council adopted the Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community. The new regulation had a larger scope of application as Regulation No 3/58 and eliminated the restriction contained in the previous legislation. The limitation of the family allowances up to the amount granted by the legislation under which a worker's family was residing was abolished. The new system was now covering a broader range of family benefits and they could be granted in full, wherever the residence was. The new Article 73 (1) replacing the previous article 40 contained the following:

> A worker subject to the legislation of a Member State other than France shall be entitled to the family benefits provided for by the legislation of the first Member State for members of his family residing in the territory of another Member State, as though they were residing in the residing in the territory of the first State.

Here we finally have a provision that is very similar to the actual one contained in article 67 of Regulation (EC) 883/2004.[87] As is evident in the first paragraph of this article, it contains an exception for France that was due to a lack of unanimity for the application of this article to the entire community. France had an exception clause contained in the second paragraph of article 73 and was formulated as follows:

> 'A worker subject to French legislation shall be entitled, in respect of members of his family residing in the territory of a Member State other than France, to the family allowances provided for by the legislation of such Member State; the worker must satisfy the conditions regarding employment on which French legislation bases entitlement to such benefits.'

The exception clause for France consisted in keeping on applying previous article 40. Therefore, France was still entitled to limit access to its family benefits for workers whose family was residing in another member state; these workers were still subject to the legislation of the latter in regard to the attribution of family benefits. The payment of benefits was done by the institution of the member state of residence and was reimbursed by the French government. The rule was destined to be revised by the Council after 2 years,[88] but a deal was

[86] Kühbacher T., 2018, page 84; 'Règlement No 3 concernant la sécurité des travailleurs migrants' published in the Official Journal of the European Communities n°30 of 1 December 1958, page 561/58, article 40 (1).
[87] Regulation (EC) 883/2004 (supra 40).
[88] Article 98 (now Article 99) of Regulation (EEC) No 1408/71 provides that: 'Before 1 January 1973 the Council shall, on a proposal from the Commission, re-examine the whole problem of payment of family benefits

not reached, and this paragraph continued to apply until the *Pinna*[89] case. In this case, the court of Justice invalidated the second paragraph of article 73 by declaring the latter contrary to the treaty. This case is of particular merit since the situation is very similar to indexation, therefore it will be exposed in detail in the next section.

3.1.4.3. The Pinna Case

Mr. Pinna and Mrs. Pinna were Italian citizens residing in France with their two children, Rosetta and Sandro. The mother and the children went to Italy for long periods, respectively 3 months for the son and 6 months for the daughter. The Caisse d'allocations familiales de la Savoie (the public institution granting family benefits) decided to suspend the payment of family benefits for the abovementioned periods on the ground that the benefits should be paid by the institutions present in the territory of residence, namely the Istituto Nazionale della Previdenza Sociale at Aquila, the Italian institution in charge of granting similar benefits.

As a result, Mr. Pinna filed an ex gratia remedy that was dismissed, as well as the following claims to the Court of First Instance and the Court of Appeal on the ground that section 73 (2) applied. He appealed the case to the Supreme Court, the French Cour de Cassation, that decided to stay the proceeding and made a reference to the European court of Justice with two questions. The first question is whether Article 73 (2) of the Regulation (EEC) No 1408/71 is valid and can continue to apply, the second questions the meaning of the word 'residence.'[90]

The argumentation of Mr. Pinna is the following, firstly he contests the validity of article 73 (2) (EEC) No 1408/71 on the basis that the provision has the effect of reducing the amount of family benefits for migrant workers working in France rendering the latter being treated differently from other migrant workers working in a diverse member state.[91]
The second part of his argument is as follows, according to him, paragraph 2 is contrary to Article 51 of the Treaty of Rome. Article 51 of the Treaty of Rome introduces the principle of exportability according to which Mr. Pinna consider to be entitled to any cash benefit independently of where he decides to have is residence or that of his family. Therefore, this partial 'non-exportability' would be in breach of article 51 of the Treaty of Rome.[92]

to members of families who are not residing in the territory of the competent State, in order to reach a uniform solution for all Member States.'
[89] Case C 41/84 *Pinna (supra 42)*.
[90] Ibid., paragraph 5.
[91] Ibid., paragraph 10.
[92] Ibid., paragraph 10.

In order to respond to the 2 questions, the court first made a reference to the old system, similar to indexation, contained in article 40 of regulation No 3/58[93] before tackling the new provisions contained in Regulation (EEC) No 1408/71. According to the Court, Regulation (EEC) No 1408/71 creates 'a distinction between workers employed in France and workers employed in other Member States.'[94] Such distinction has the effect to create two different systems and adds a further difference to the differences arising from the national legislation itself and thus undermine the achievement of the objective provided by the Treaty of Rome in article 48 to 51, namely 'securing the free movement of workers within the Community.'[95] The achievement of this objective 'is facilitated if conditions of employment, including social security rules, are as similar as possible in the various Member States.'[96]

To declare the paragraph invalid, the court based its argument on a second point according to which the principle of equality must be respected and prohibits any form of discrimination. The court points out that this measure also creates a risk of discrimination between French workers and migrant workers in France. Although French workers and migrant workers are subject to the same law concerning children residing abroad, the residence criterion is the kind of criterion that can affect predominantly migrant workers 'since the problem of members of the family residing outside France arises essentially for migrant workers.'[97] According to the court, this criterion cannot be used in the context of coordination of national legislation and infringes the principle of equal treatment.[98]

Consequently, the court ruled that 'Article 73 (2) of Regulation No 1408/71 is invalid in so far as it precludes the award to employed persons subject to French legislation of French family benefits for members of their family residing in the territory of another Member State.'

The effects of such exception are quite similar to indexation and hence the next part will seek to determine whether this exception regime for France is similar to indexation.

3.1.4.4. Comparison with the indexation case

As pointed out by Marhold and Ludvik, the *Pinna* case is often compared to the indexation case, but they differ for the following reason: in the Pinna case the problem concerned the replacement of benefit instead of adjustment of benefits. The exception clause provided by Article 73 (2) of the Regulation (EEC) No 1408/71 was determining the amount of the benefit

[93] Ibid., paragraph 17.
[94] Ibid., paragraph 19.
[95] Ibid., paragraph 21.
[96] Ibid., paragraph 21-22.
[97] Ibid., paragraph 24.
[98] Ibid., paragraph 24.

in accordance with the legislation of the member state of residence and granted by the latter, France reimbursing after. In the indexation case, the worker would not be subject to the legislation of the member state of residence but rather to the legislation of the member state of work, the latter granting the benefits but adapting its amount according to the country of residence of the family.[99]

The two situations differ, however a parallel, a comparison, is feasible. The German Bundestag in 2016 was of the opinion that, even if the provision was not based on indexation but coordination, linking the provision to the benefit in the member state of residence was leading to the same result.[100]

In the same vein, Kühbacher is of the view that the effect of the derogation contained in article 73 (2) of Regulation (EEC) No 1408/71 is quite close to that of the planned indexation of family allowances. He argues that family allowances are regularly used to alleviate maintenance cost and that they are based on the living cost of each Member state. He deduces that Member states with a higher price level are more incline to grant higher family benefits than member states with a lower price level. Therefore, linking the amount of benefit to the member state of residence would have a similar effect as indexation.[101] This argument is quite convincing.

Indeed, this could be compared to indexation since France was still liable to pay the allowances but 'at the rate in force in the country of residence'[102] and the accordance between price level and amount of allowances has been recently demonstrated for a panel of member states.[103] However, some countries, like Austria, have more generous social family benefits policies and higher amount are therefore political choices and are not really in accordance with price level. It can lead to a false indexation when countries have low wages and high benefits, and some have high wages and low benefits.[104] But in general, we see that the amount of family benefits is accorded to social and economic conditions and therefore link in some way to the price level.[105]

Even if the case is not fully comparable, the results are quite similar. According to the European Commission, while indexation must be distinguished from the exceptional regime for France, 'it must be given due weight to the case law *Pinna*.'[106] The President of the European

[99] Marhold F. and Ludvik C., 2018 (supra 46), page 203.
[100] Deutscher Bundestag, 2016, (supra 46) page 13.
[101] Kühbacher T., 2018, (supra 46), page 86.
[102] Opinion AG Mancini, case 41/84 (supra 54), point 3, page 5.
[103] Fernandes F and Daniel J., 2018 (supra 9), page 2, table 1.
[104] Opinion AG Mancini, case 41/84 (supra 54).
[105] Fernandes S., 2016 (supra 3), page 13, graphic 6.
[106] SWD (2016) 460, page 135 foot note 378: "... was unlawful because it gave rise to an indirect discrimination on grounds of nationality and that the right to freedom of movement was at stake if the migrant worker received

court of Justice, Koen Lenaerts, also pointed out the illegality of indexation referring to a case from 1986.[107]

In the opinion of the author, the indexation is similar as long as indexation is practised unilaterally by a country, because it creates a situation where migrant workers are treated differently from migrant workers working in another Member State. Unilateral indexation creates two different systems and adds further differences between the social security of the member states, which is contrary to the objectives of the treaty, namely 'securing the free movement of workers within the Community'. Additionally, the author believes that at the European level it would be complicated to have a general indexation system because there is also a risk to have a different treatment between workers having their family residing in Austria and workers having their family residing in another member state, as in the Pinna case. This possible infringement of the principle of equality contained in article 4 of Regulation (EC) 883/2004 will be examined latter in the analyse.

3.1.4.5. Fiction of residence or relative equivalence

Article 67 of Regulation (EC) 883/2004 provides that member of the family must be treated 'as if they were residing in the former member state.'[108] However, there are some doubts about the meaning of 'as if' and what it really implies. Looking at the various language versions of the regulation, the meaning of 'as if' remain the same as in the English version.[109] With this wording arises the question to know whether indexation is compatible with article 67 of Regulation (EC) 883/2004.

Mazal argue that undifferentiated exportation of child benefit does not provide a benefit to children living abroad 'as if' they were living in Austria. For Mazal, the wording, meaning and purpose of Article 67 of Regulation (EC) 883/2004 is respected only if it is taken into account that the maintenance relief is indexed in a form of participation of the regular needs.[110] The problem of undifferentiated export arises with country with higher or lower purchasing power. In the case of a country with a lower living standard, the amount of the benefit granted is too

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less than the national workers just because his or her spouse and children remained in the Member State of origin. While there are grounds to distinguish Option 1a [Indexation] from Pinna as it proposes adjustment not substitution of benefits and sets objective criteria for ensuring benefits are linked to protective needs irrespective of the place of residence, the *CJEU's findings must be given due weight*."

[107] Czarnowska, M., 2018 "Interveniert hat bei mir noch nie jemand", Wiener Zeitung, 11 January.

[108] Article 67 of Regulation (EC) 883/2004 (supra 40).

[109] For the English, French, German and Italian versions: 'as if they were residing in the former Member State', 'comme si ceux-ci résidaient dans le premier État membre', 'als ob die Familienangehörigen in diesem Mitgliedstaat wohnen würden' and 'come se questi ultimi risiedessero nel primo Stato membro'.

[110] Mazal W, 2017 (supra 14), page 36.

high in relation to the real needs of the child. In the case of a country with higher living standard, the exported benefit is insufficient to cover the real needs of the child abroad. Therefore, undifferentiated export creates a situation where the relief does not correspond to the real needs and does not permit to fulfil the needs 'as if' the child was living in Austria. Mazal argue that 'every child must be of equal value to the general public' and equivalence can be achieved only if each child has is needs fulfilled adequately.[111]

This argument is interesting, yet the crucial point is missing. The aim of article 67 of Regulation (EC) 883/2004 is not to treat children relatively equally 'as if' they were residing in Austria, the true aim of article 67 of Regulation (EC) 883/2004 is to establish a fiction of residence.[112] This mean that children and members of the family have to be considered as residing with the worker.

Kühbacher describes the role of a legal fiction as rending deliberately equal what is known as unequal,[113] meaning that it is faked that children are living in Austria. By faking it, this means that they are entitled to the same amount as that paid to children resident in Austria.

It is true that workers with a family living abroad and workers with a family next to them are not in the same situation, but the legislator has made their situation comparable and the court of justice confirmed it in the Pinna case ruling that the rule contained in article 73 (2) of Regulation (EEC) No 1408/71 was leading to indirect discrimination.[114]

The fiction of residence is confirmed in the case *Trapkowski*[115] where the court clearly uses the word 'fiction.'[116] The court states that the fiction 'has the effect that a person may claim family benefits for members of his family who reside in a Member State other than that responsible for paying those benefits, as if they resided in that Member State.'[117]

This fiction of residence has the effect of rendering residence clauses void. The residence of family members shall not play a role,[118] neither in granting a benefit nor in defining its amount.[119] The aim of this provision is to EC worker being 'deterred from exercising their right

[111] Mazal W, 2017 (supra 14), page 37.
[112] Laudacher M., 2018 (supra 46), page 484; Kühbacher T., 2018 (supra 46), page 87; Marhold F. and Ludvik C., 2018 (supra 46), page 202.
[113] Kühbacher T., 2018 (supra 46), page 88.
[114] Case C-41/84 *Pinna* (supra 42).
[115] Case C-378/14 *Bundesagentur für Arbeit — Familienkasse Sachsen v Tomislaw Trapkowski* [2015] ECLI:EU:C:2015:720.
[116] Ibid. paragraph 34-5. It is necessary to have a look at the German or the French version in order to clearly see the word 'fiction'. The English version uses a different formula.
[117] Ibid., paragraph 35.
[118] Deutscher Bundestag, 2014 (supra 34), page 15.
[119] Case C-321/93 *Imbernon Martínez* (supra 81), paragraph 21; Joined Cases C-245/94 and C-312/94 *Hoever and Zachow* (supra 73), paragraph 34; Laudacher M., 2018 (supra 46), page 484

to freedom of movement.'[120] Therefore, if 'entitlement to and the amount of benefits for dependent children are subject to their being resident in the national territory, that condition must be regarded as fulfilled, for the purposes of determining entitlement to and the amount of the benefits in question, where the children reside in the territory of another Member State.'[121]

These findings of the Court are relevant for our case and clearly contradict any indexation thoughts. The court clearly states that there is a fiction of residence resulting in the granting of benefits wherever is the children' residence. This fiction has two effects, first children have the right to be entitled to benefits, also when they reside outside, secondly, the amount cannot be modified because of the residence.

In the view of the author, the incompatibility is striking. Indexation, if based on the living cost of the child's member state of residence, must then use the child's residence as a reference. As the German Bundestag pointed out, the residence shall not be considered.

Secondly, if the residence was considered, the indexation would have the effect of indexing Austrian benefit to Austrian living standard, since the children are reputed to live there. Moreover, they are legally entitled to the same amount as if they were in Austria.

Except Mazal, Authors are unanimous on this issue,[122] the wording of article 67 clearly prohibits any indexation of child benefits or any differentiation of child benefits based on the residence of the child(ren).

3.1.4.6. Interim conclusions

From what we saw above, article 67 of Regulation (EC) 883/2004 has evolved to reduce the importance of residence when granting family benefit. The *Pinna* case[123] reviewed the exceptional provision for France that had similar effect to indexation, with the objectives of guaranteeing the freedom of movement from workers and to limit differences between social security system. If the indexation was accepted at a union level, since it cannot be accepted at a national level, it would be a clear regression of article 67 of Regulation (EC) 883/2004 and a kind of return in 1958 and its Regulation No 3/58.[124] This seems contrary to the objective of an

[120] Case C-228/88 *Bronzino* (supra 81); Case C-321/93 *Imbernon Martínez* (supra 81), paragraph 21; Joined Cases C-245/94 and C-312/94 *Hoever and Zachow* (supra 73), paragraph 34.
[121] Case C-321/93 *Imbernon Martínez* (supra 81), paragraph 22.
[122] Braümann P., 2018 (supra 75), page 477; Deutscher Bundestag, 2014 (supra 34), page 23; Kühbacher T., 2018 (supra 46), page 90; Laudacher M., 2018 (supra 46), pages 480 and 485; Marhold F. and Ludvik C., 2018 (supra 46), page 202 affirming that opinions are unanimous to say that a differentiation based on the residence would be contrary to article 67 of Regulation (EC) 883/2004.
[123] Case 41/84 *Pinna* (supra 42)
[124] In the Pinna case, the effect of article 40 of Regulation 3/58, transferred in the exception rule for France are quite similar to indexation.

'ever closer union' contained in the treaties. Moreover, from the fact that the exception rule for France was sanctioned because it was not respecting the freedom of movement from worker and the principle of equality, it seems that even an indexation at the European level[125] would be contrary to primary law.[126]

Braümann and Kühbacher argue,[127] contrarily to Mazal, that 'relative equal treatment' cannot be reconciled with article 67 of Regulation (EC) 883/2004 and also contradict the general guidelines of article 7 of Regulation (EC) 883/2004, that shall be studied immediately.

3.1.5 Article 7 of Regulation (EC) 883/2004, the principle of exportability.

This article is important for our study, it can be found in Title I entitled 'General provisions'. It is therefore a general provision that should be applied to each provision of Regulation (EC) 883/2004, except when it provides otherwise.[128] In the case that the indexation measures planned by the Austrian government was not subject to article 67 of Regulation (EC) 883/2004, article 7 of Regulation (EC) 883/2004 would apply.

3.1.5.1. Aim and wording

The principle of exportability can be found in the Treaty and follows from article 48 TFEU that provides that a worker or self-employed and its dependent shall be entitled to the 'payment of benefit to persons resident in the territories of Member States.'[129] This rule is translated in Article 7 of Regulation (EC) 883/2004 and provides as follows:

> Waiving of residence rules
>
> 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.

The principle of exportation concerns all cash benefits and states that cash benefits shall be accorded to the members of the family residing abroad. Strict conditions are also laid down to

[125] Even if it is not part of the planned of the commission and the member states. (16 Member States are for the status quo, see Fernandes S., and Daniel J., 2018 (supra 9), page 2).
[126] Article 48 TFEU on the freedom of movement from worker that is strongly interlinked with the non-discrimination principle.
[127] Braümann P., 2018 (supra 75); Kühbacher T., 2018 (supra 46).
[128] Recital 37 of Regulation (EC) 883/2004 (supra 40).
[129] Paragraph 1 (b) of article 48 TFEU.

benefits exported. The legislator uses a whole range of words to describe the prohibition on changing the amount of the benefit on the grounds that the beneficiary resides in another Member State. By doing this, the legislator renders void any residence clause.

The aim of this clause can be found in the Treaty[130] and in the jurisprudence of the Court. The clause shall 'promote freedom of movement for workers and members of their families by protecting them against any adverse consequences which might arise as a result of the transfer of their residence from one Member State to another.'[131] Therefore, it intends to ensure that social security benefits are provided by the competent state even when the person entitled to them move their residence across the EU.[132]

3.1.5.2. Waiving of residences clauses and interdiction of amount modification

The waiving of residence rules is primordial in order to permit persons entitled to a benefit to move across the communities without being afraid to lose their social right. It obliges the competent state to export the benefit to the recipient, even if the latter has changed its state of residence and is not present anymore in the state of origin.[133] This interdiction of residence clauses is associated with a strict prohibition to 'the competent institutions of the Member States, in general terms, from reducing, modifying, suspending, withdrawing or confiscating benefits covered by the regulation by reason of the fact that the recipient resides in the territory of another Member State.'[134]

The indexation planned by the Austrian government seems hard to reconciliate with this clause. First, with indexation, worker's families will still be entitled to the benefit, but the latter will be granted on the base of the place of residence. This is contrary to this article. The benefit should be exported without asking where it should be exported, as long as it remains within the member states of the EU and the EEA member states. Secondly, the interdiction to modify the amount does not allow indexation since it leads to a restriction of the benefit that can be exported.[135] For Laudacher, the indexation is designed in such a way, that it has to be regarded as a reduction (in the case where the benefit is exported toward a country with a lower

[130] Article 48 TFEU.
[131] Case C-139/82 *Paola Piscitello v Istituto nazionale della previdenza sociale (INPS)* [1983] ECR 1427, paragraph 15; Cases C-379 to 381/85 and 93/86 *Caisse régionale d'assurance maladie Rhône-Alpes v Anna Giletti, Directeur régional des affaires sanitaires et sociales de Lorraine v Domenico Giardini, Caisse régionale d'assurance maladie du Nord-Est v Feliciano Tampan and Severino Severini v Caisse primaire centrale d'assurance maladie* [1987] ECR 955, paragraph 14.
[132] Deutscher Bundestag, 2016 (supra 46).
[133] Cases C-379 to 381/85 and 93/86 *Giletti* (supra 131), paragraph 15.
[134] Ibid., paragraph 16.
[135] Deutscher Bundestag, 2016 (supra 46), page 25.

purchasing power), such a reduction leads to a restriction to exports and is not justified.[136] According to the German Bundestag, indexation is clearly incompatible with the wording of article 7 of Regulation (EC) 883/2004, however it doubts that it could be contrary to the primary principle of exportation if the exception was planned at the Union level.[137]

In the next part, we will see that the principle of exportability is not conclusive, and that derogation are permitted. This is clear from the wording of the article: 'Unless otherwise provided' and the case-law stating, that such derogation can be justified.[138]

3.1.5.3. Exception

The 16th recital disposes that 'there is in principle no justification for making social security rights dependent on the place of residence of the person concerned.' This means that exceptions will be rare as it is clear from the 37th recital of Regulation (EC) 883/2004 stating that 'provisions which derogate from the principle of exportability of social security benefit must be interpreted strictly'[139] and that the 'principle of the exportability of social security benefits applies so long as derogating provisions have not been adopted by the Community legislature'.[140]

The regulation provides, in its article 70, for exceptions. These exceptions are provided for 'special non-contributory cash benefits':

- Under Article 70 (2) (a), these benefits means those which are intended to provide either: (i) | supplementary, substitute or ancillary cover against the risks covered by the branches of social security referred to in Article 3(1), and which guarantee the persons concerned a minimum subsistence income *having regard to the economic and social situation in the Member State concerned*; | or | (ii) | solely specific protection for the disabled, *closely linked to the said person's social environment in the Member State concerned*.
- Under article 70 (2) (b) and (c) these benefits mean those 'where the financing exclusively derives from compulsory taxation intended *to cover general public expenditure and the conditions for providing and for calculating the benefits are not*

[136] Laudacher M., 2018 (supra 46), page 484.
[137] Deutscher Bundestag, 2016 (supra 46), page 26
[138] Cases C-396/05, C-419/05 and C-450/05 *Doris Habelt, Martha Möser and Peter Wachter v Deutsche Rentenversicherung Bund* [2007] ECR I-11895, paragraph 80.
[139] Recital 37 of the Regulation (EC) 883/2004 (supra 40).
[140] Case 139/82 *Piscitello* (supra 131).
1427, paragraph 16; Joined Cases 379/85, 380/85, 381/85 and 93/86
Giletti (supra 131) paragraph 16; Case 20/96 *Kevin Albert Snares v The Adjucation Officer* [1997] ECR I-6057, paragraph 41.

dependent on any contribution in respect of the beneficiary. However, benefits provided to supplement a contributory benefit shall not be considered to be contributory benefits for this reason alone' and 'are listed in Annex X'.

- Under Article 70 (3), Article shall 7 not apply to article 70 (2).
- Under Article 70 (4), 'the benefits referred to in paragraph 2 shall be provided exclusively in the Member State in which the persons concerned reside, in accordance with its legislation. Such benefits shall be provided by and at the expense of the institution of the place of residence'.

The legislator put forward that benefits linked to the economic and social situation of a person in the member state or linked to the social environment in the member states may be subject to residency restriction. For example, concerning benefit in kind, this makes sense when the beneficiary needs to be present in order to profit from the benefit.

The court also recognized that the important element in setting aside the principle of waiver of residence clauses laid down in article 7 of Regulation (EC) 883/2004 is the existence of a strong link between the granting of a benefit and the social environment. In this case, the grant of the benefit 'may be made subject to a condition of residence in the State of the competent institution.'[141] This is understandable for employment benefits that are designed to find a job in a specific labor market[142] or when it concerns specific child benefit linked to the social environment.[143] The fact that the benefit in question has not been mentioned in a declaration by the member states in question does not preclude that those benefit fall within the scope of the regulation and the principle of exportation.[144]

In the case *Lenoir*,[145] the Court had to deal with a specific child benefit like 'rentrée scolaire' (school expenses), that was granted at each beginning of the year in order to meet school expenses. The reasoning of the court was the following: if the benefit is payable periodically to the recipient's family and is granted only by reference to the number, and where appropriate, the age, then the general rules shall apply. On the contrary, benefits subject to additional conditions such as 'a benefit intended to cover certain costs incurred at the beginning of the school year, are in most cases closely linked with the social environment and therefore with the

[141] Case 20/96 *Snares* (supra 140), paragraph 42.
[142] Ibid., paragraph 39.
[143] Case 313/86 *Lenoir* (supra 77).
[144] Case 70/80 *Vigier v Bundesversicherungsanstalt für Angestellte* [1981] ECR 229, paragraph 15; Case C-251/89 *Athanasopoulos and Others v Bundesanstalt für Arbeit* [1991] ECR 1-2797, paragraph 28; and Joined Cases C-88/95, C-102/95 and C-103/*95 Martínez Losada and Others v Instituto Nacional de Empleo and Instituto Nacional de la Seguridad Social* [1997] ECR 1-869, paragraph 21; Case 20/96 *Snares* (supra 140), paragraph 35.
[145] Case 313/86 *Lenoir* (supra 77).

place where the persons concerned reside.'[146] Then, the principle of exportability shall not apply.

If we compare the conditions of the case *Lenoir* with indexation, it is apparent that the Austrian child benefit is granted on objective criteria, namely the number of children. The benefit is not linked to the cost of living or the place of residence since it is accorded on a lump sum basis throughout Austria. In the case that the benefit would take into account the specific situation of the recipient, such as the average cost of living or housing of the city[147] where the child lives, it could be argued that the benefit is connected to social environment. Since it is not the case in Austria it must be considered that the Austrian child benefit is subject to the principle of exportability.

3.1.5.4. Interim conclusion

It follows from this section that the Austrian measure cannot be accepted as being subject to a derogation from the export principle because the measure is objectively attributed without taking into account the social environment. In this case, the measure must be subject to the full export principle, which clearly states that the benefit must be exported without '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.'[148] Consequently, the indexation provided for is made impossible by the application of the export principle contained in Article 7 of Regulation (EC) 883/2004.

3.1.6. Article 4, Principle of equal treatment

Article 4 is a central element of Regulation (EC) 883/2004 and specifically focus on the non-discrimination based on ground of national. It is of great concern since the measure proposed by the Austrian government will affect an important number of migrant workers. The first section will recall what is principle of equality and its importance. The second section will tackle the specific non-discrimination on ground of nationality and its application in EU law. the third section will tackle the most visible discrimination, the direct discrimination, then the

[146] Ibid., paragraph 16.
[147] The average cost of living can vary greatly depending on whether the household lives in a large or small-sized city or in a particular neighbourhood.
[148] Article 7 of Regulation (EC) 883/2004 (supra 40).

fourth part will deal with the winding indirect discrimination and the final part will expose the possible justification to discrimination if the latter is proven.

3.1.6.1 Principle of equal treatment

The non-discrimination principle, or equality principle, is a quite old principle that can be found in numerous constitutions[149] and Declarations of Human Rights[150] and also in Rousseau's thought.[151] It is designed to create an equality before the law, and specifies that no one should be discriminated 'on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status'[152] and in the context of the European Union 'any discrimination on grounds of nationality shall be prohibited'.[153]

Nevertheless, the principle of discrimination can raise some problems in its application[154]. The Court said that the principle of equality 'requires that similar situations shall not be treated differently unless differentiation is objectively justified.'[155] This means that two persons in 'objectively different'[156] situations (e.g. a parent with two children, another with only one child) can be treated differently. This should not be mistaken with an absolute equality, which simply involves the systematic treatment of all persons in the same way regardless of differences which may exist between them as evocated by Aristotle.[157] Therefore, it is important to determine how

[149] Article 7 of Austrian Constitution, Article 3 of the German Constitution, in the Préambule and aArticle 1 of the French Constitution.
[150] Article 14 of the European Convention of Human Rights (ECHR), Article 1 of the 'Déclaration des droits de l'Homme et du Citoyen de 1789.'
[151] Rousseau J., Du contrat social ou principes de droit politique, in Collection complète des œuvres, 1780-1789, volume 1, Chapter IV, Chapter XI, with this interesting part explaining why the equality before the law is indispensable to ensure a true '*volonté générale*' and true happiness for everyone in the 'Corps Social' thus, ensuring a true principle of equity: "*Les engagemens qui nous lient au Corps social ne sont obligatoires que parce qu'ils sont mutuels, & leur nature est telle qu'en les remplissant on ne peut travailler pour autrui sans travailler aussi pour soi. Pourquoi la volonté générale est-elle toujours droite, & pourquoi tous veulent-ils constamment le bonheur de chacun d'eux, si ce n'est parce qu'il n'y a personne qui ne s'approprie ce mot chacun, & qui ne songe à lui-même en votant pour tous? Ce qui prouve que l'égalité de droit & la notion de justice qu'elle produit dérive de la préférence que chacun se donne & par conséquent de la nature de l'homme, que la volonté générale pour être vraiment telle, doit l'être dans son objet ainsi que dans son essence, qu'elle doit partir de tous pour s'appliquer à tous, & qu'elle perd sa rectitude naturelle lorsqu'elle tend à quelque objet individuel & déterminé, parce qu'alors jugeant de ce qui nous est étranger, nous n'avons aucun vrai principe d'équité qui nous guide.*"
[152] Article 4 of the ECHR.
[153] Article 21 of the Charter of Fundamental Rights of the European Union.
[154] Craig, P., & De Búrca, G. (2011). *EU law: text, cases, and materials*. Oxford University Press, page 538; Chalmers, D., Davies, G. T., & Monti, G. (2010). EU law, page 452.
[155] Cases 117/76 and 16/77 *Ruckdeschel v Hauptzollamt Hamburg-St Annen* [1977] ECR 1753, paragraph 7; Case C-148/02 *Garcia Avello* [2003] ECR I-11613, paragraph 31.
[156] Case C-63/89 *Les Assurances du Crédit SA v Council and Commission* [1991] ECR I-01799.
[157] Barrett, G. Re-examining the Concept and Principle of Equality in EC Law' (2003). *Yearbook of European Law*, *22*, 117.

people are similarly situated and how a difference in treatment between two individuals in a similar situation is discriminatory, and whether this difference in treatment can be justified.

To clarify this, the court has a discriminatory test that consists of two questions, the first is to find whether one group or another tends to be advantaged by the measure in question, and, secondly, if it does, whether the measure is sufficiently justified, meaning that it is based on objective and legitimate criteria and is proportionate.[158]

The Court also specified that a different 'treatment may be justified only if it is based on objective considerations independent of the nationality of the persons concerned and is proportionate to the objective being legitimately pursued', thus nationality cannot be considered in a justification for a discrimination.[159]

3.1.6.2. Non-discrimination on ground of nationality

The treaty provides clearly in article 18 TFEU that discrimination based on nationality is forbidden: this provision can be used in order to declare the incompatibility of a national law with EU law as we can see in the judgment *Grzelczyk.*[160] However article 18 TFEU 'must be read in conjunction with the provisions of the Treaty concerning citizenship of the Union in order to determine its sphere of application.'[161] The provision on citizenship are contained in Directive 2004/38. Its article 24, provides that the principle of equality shall be enjoyed by 'all Union citizens residing on the basis of this directive.'[162] This means that there is not a clear direct effect of article 18 TFEU. Therefore, citizens can rely on the principle on non-discrimination on ground of nationality only in 'situations which fall within the scope *ratione materiae* of Community law.'[163]

The same applies for Regulation 883/2004, each person falling under the scope of the latter shall be subject to the principle of equality contained in Article 4 of Regulation (EC) 883/2004 stating the following:

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[158] Case 152/73 *Sotgiu v Deutsche Bundespost* [1974] ECR 153; Case C-237/94 *O'Flynn v Adjudication Officer* [1996] ECR I-2617.
[159] Case C-224/98 *D'Hoop* [2002] ECR I-6191 [36]; Case C-148/02 *Garcia Avello* [2003] ECR I-11613, paragraph 31; Case C-274/96 *Bickel and Franz* [1998] ECR I-7637 paragraph 27.
[160] Case C-184/99 *Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* [2001] ECR I-06193.
[161] Ibid., paragraph 30.
[162] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (Text with EEA relevance).
[163] Case C-184/99 *Grzelczyk* (supra 160), paragraph 32.

> Equality of treatment
>
> 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.

Articles 45,[164] 49,[165] 56[166]/57[167] also provide for the prohibition of such discrimination and are directly applicable in order to remove any legislation contrary to the latter, the Court of Justice hold them as 'directly applicable in the legal order of the Member states,'[168] meaning that no further legislation is needed in order to sanction the violation of the equality clause provided by these articles. Economically active migrants have an unconditional right not to be discriminated.

Then, the principle of equality is a principle that comes hand in hand with a lawfully residence in the host member states or an economic activity. This precondition entails the access to benefits and would deprive a non-economically or non-independent migrant to pretend access to welfare benefits.[169] On the contrary, economically active migrants, the workers, enjoy fully the principle of equality as a twin principle with the freedom of movement.[170]

In the case of discrimination based on nationality, discrimination would be established when a migrant in the same situation as a national would have limited access to employment or benefit. It will be to the judge to research if they are in the same situation, or in a comparable situation. It doesn't matter if the discrimination is direct, or indirect, emanate from public powers or a private organism.[171]

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[164] Case 167/73 *Commission v French Republic* [1974] ECR 359; Case C-185/96 *Commission v Hellenic Republic* [1998] ECR I-06601; Case C-94/08 *Commission v Spain* [2008] ECR I-04923; Case C-318/05 *Commission v Germany* [2007] ECR I-6957; Case C-460/08 *Commission v Greece* [2009] ECR I-216.
[165] Case-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti* [2007] ECR I-10779.
[166] Case 341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet and Svenska Byggnadsarbetareförbundets avd. 1, Byggettan and Svenska Elektrikerförbundet* [2007] ECR I-11767.
[167] Direct effect of article 56 and 57: Case 33/74 *Johannes Henricus Maria van Binsbergen v Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid* [1974] ECR 1299.
[168] Ibid., [97].
[169] Case C-333/13 *Elisabeta Dano and Florin Dano v Jobcenter Leipzig* [2014].
[170] Article 45 (2) TFEU : 'Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States'; Article 49 para 2 TFEU: 'Freedom of establishment shall include the right to take up and pursue activities as self-employed persons […] under the conditions laid down for its own nationals by the law of the country where such establishment is effected'; under article 56 para 1, 'restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended' and in respect to article 57 para 3 this should be done 'under the same conditions as are imposed by that State on its own nationals'.
[171] Case 36-74 *B.N.O. Walrave and L.J.N. Koch v Association Union cycliste internationale, Koninklijke Nederlandsche Wielren Unie and Federación Española Ciclismo* [1974] ECR 01405; Case C-415/93 *Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman, Royal club liégeois SA v Jean-*

3.1.6.3. Direct discrimination

The direct discrimination is the most evident and the easiest to determine, it is when the law clearly make a difference between nationals and EU-migrants, it is when a person receives a treatment that is less favourable on one of the prohibited grounds (nationality, but also sex, racial or ethnic origin, age, religion, disability or sexual orientation) than another person would receive in comparable circumstances.[172] The fact that France reserves permanent jobs in French hospitals for French citizens constitutes direct discrimination,[173] or making the granting of assistance conditional on the nationality of a person child or on that of her/his children,[174] or provisions of the French Maritime Code that requires a certain proportion of the crew of a ship to be of French nationality,[175] or when additional fees are required for non-nationals and are not imposed on students who are nationals of the host member state,[176] or when Italian public universities do not recognize the acquired rights of former foreign-language assistant,[177] when a football team imposes quota on player that are not national of the host member state.[178] The cases for direct discrimination are not so common because more obvious however, still exists. In our case, a direct discrimination would have been evident if the Austrian law was to apply only to migrant workers and not to Austrian citizens.

3.1.6.4. Indirect Discrimination

An indirect discrimination can be determined when an apparently neutral rule, provision, criterion, or practice, applying to everyone independently of its personal characteristic (e.g. nationality), is found to put persons bearing some characteristic at a disadvantage when compared with persons who do not possess those characteristics.[179] The controversial law of the Austrian government that affect indifferently national and non-national at first stance doesn't seems discriminatory, nevertheless, if this neutral law having effect on the two groups would be found to have more effect on the non-nationals than nationals, an indirect discrimination could be well founded.

Marc Bosman and others and Union des associations européennes de football (UEFA) v Jean-Marc Bosman [1995] ECR I-4921.

[172] Steiner, J., Woods, L., & Watson, P. (2012). *Steiner & Woods EU Law*. Oxford University Press, page 601.

[173] Case 307/84 *Commission of the European Communities v French Republic* [1986] ECR 1725.

[174] Case 237/78 *Caisse Régionale D'Assurance Maladie Lille v Diamante Palermo, née Toia* [1979] ECR 2645.

[175] Case 167/73 *Commission v French Republic* [1974] ECR 359.

[176] Case C-293/83, *Gravier v Ville de Liège* [1985] ECR 593.

[177] Case C-212/99 *Commission v Italy* [2001] ECR I-4923

[178] Case C-415/93 *Bosman* (supra 171).

[179] Steiner, J., Woods, L., & Watson, P.,2012 (supra 172), page 601.

The court found in the case *O'Flynn*[180] and referring to previous case law, that an indirect discrimination is to be found when a national law 'although applicable irrespective of nationality'[181] affect essentially migrant workers[182] or the great majority of people affected are migrant workers.[183] An indirect discrimination is also to be found when a national can more easily satisfy the conditions imposed by the law than non-nationals[184] (e.g. language requirements, residence clause, place-of-origin requirement, place-of-education requirement) or even in the sole eventuality that it could affect migrant workers in a more detrimental way.[185] For example, an indirect discrimination can be found when a national law calculates military service in the length of employments, also if the nationality of the worker was irrelevant.[186] A job requiring previous experience in a public service cannot, in regard to EU citizens, requires that this experience was made in the public service of a particular state or in the public service of another Member State.[187]

An increase of the separation allowance paid to workers employed in the German Post office living in Germany and not to the one living abroad, without considering their nationality was found indirectly discriminatory in *Sotgiu*[188] since the one living abroad has more chances non to be nationals. A point pension system that is found to be more easily fulfillable by national of the country is found to discriminate indirectly worker from other member states[189] A criterion that can easily be fulfilled by the nationals of a country remains the language requirement and thus can discriminate indirectly nationals from other member states.[190]

In our case, the Austrian legislation applies indifferently to migrant workers and Austrian citizens, the only thing that count is the place of residence. Thus, the legislation is apparently based on a neutral criterion. However, this criterion is more easily met by nationals and migrant workers risk to be more exposed to the indexation than Austrians, because it is more common

[180] C-237/94 *O'Flynn v Adjudication Officer* [1996] ECR I-2617.
[181] Ibid., paragraph 18.
[182] Case 41/84 *Pinna* (supra 42), paragraph 4; Case 33/88 *Allué and Another v Università degli Studi di Venezia* [1989] ECR 1591 [12]
[183] Case C-279/89 *Commission v United Kingdom* [1992] ECR I-05785, paragraph 42; Case C-272/92 *Spotti v Freistaat Bayern* [1993] ECR I-5185, paragraph 18.
[184] Case C-349/87 *Paraschi v Landesversicherungsanstalt Württemberg* [1991] ECR I-04501, paragraph 23; Case C-355/98 *Commission v Belgium* [2000] ECR I-01221; Case C-350/96 *Clean Car Autoservice GmbH v Landeshauptmann von Wien* [1998] ECR I-03289; Case C-276/07 *Nancy Delay v Università degli Studi di Firenze, Istituto nazionale della previdenza sociale (INPS) [2008] ECR I-3635.*
[185] Case C-175/88 *Biehl v Administration des Contributions* [1990] ECR I-01779, paragraph 14; Case C-204/90 *Bachmann v Belgium* [1992] ECR I-249, paragraph 9.
[186] Case 15/69 *Württembergische Milchverwertung-Südmilch-AG v Salvatore Ugliola* [1970] ECR 363.
[187] Case C-419/92 *Ingetraut Scholz v and Opera Universitaria di Cagliari, Cinzia Porcedda* [1994] ECR I-505.
[188] Case 152/73 *Sotgiu* (supra 158).
[189] Case 35/97 *Commission v Belgium* [1998] ECR I-5325.
[190] Cases C-259, 331-332/91 *Allué and Conan* [1993] ECR I-4309; Case C-124/94 *Commission v Greece* [1995] ECR I-1457; Case C-90/96 *Petrie v Università degli studi di Verona and Camilla Bettoni* [1997] ECR I-6527

for migrants to have their family residing in another country.[191] Therefore we can deduct that a worker having its children abroad is treated in a different way than a worker having its children as his/her side. The question is, are these workers in the same situation? The Court found in the Case Pinna that these workers were in a comparable situation and have to be treated in the same way. As seen above, the two groups are put in a comparable situation through the fiction of residence. The two groups have to be treated in the same way, since it is not the case, we can conclude that there exists a discrimination that is prohibited by the treaties. However, it is still possible to justify this infringement, and this should be examined in the next section.

3.1.6.5. Justification to discrimination

A discrimination does not lead systematically to a breach of the article on the freedom of movement and the principle of equality. A discrimination, if proven, can nevertheless, be justified. To this end, the court evokes an 'objective justification,'[192] or justification in the 'public or 'general interest' or 'imperative requirement.'[193] All these justifications seem to be 'objective justification' as pointed by Barnard that are recognized to protect national interests which are worthy of protection.[194] Only in this case the provision of free movement can be overridden. Although the Court recognizes these objective justifications, it is to the defendant state elaborating the rule to prove the existence of any justification[195] and to make it clear what is the link between the measures and the justification.[196]

In our case of indexation, the Austrian government said explicitly that they were not discriminating, since the objective is to introduce relative equality, though relative equality seems not possible. Thus, it does not provide for any justification and nor elaborated on how the measure could be suitable to the objective.

There is a four-point justification found by the Court, in *Gebhard,*[197] a case concerning services. Nevertheless, this case applies just as well to 'the exercise of fundamental freedom guaranteed by the Treaty', including freedom of movement for workers, as the court pointed

[191] Opinion AG Mancini, case 41/84 (supra 54), point 6B, page 11; Case 41/84 *Pinna* (supra 42), paragraph 24
[192] C-237/94 *O'Flynn* (supra 180).
[193] Case C-76/90 *Manfred Säger v Dennemeyer & Co. Ltd* [1991] ECR I-04221, paragraph 15; Case C-55/94 *Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165, paragraph 37.
[194] Barnard, C. (2013). *The substantive law of the EU: the four freedoms*. Oxford University Press, page 528; Case C-195/98 *Österreichischer Gewerkschaftsbund, Gewerkschaft öffentlicher Dienst v Republik Österreich* [2000] ECR I-10497, paragraph 45.
[195] Case C-260/04 *Commission v Italy* [2007] ECR I-7083, paragraph 33.
[196] Case C-243/01 *Piergiorgio Gambelli and Others* [2003] ECR I-13031, paragraph 63.
[197] Case C-55/94 *Gebhard* (supra 193).

out.[198] To be justified, a measure must, first, be applied in a non-discriminatory manner. Secondly, it must be justified by an imperative requirement in the general interest. Thirdly it must be suitable for securing the attainment of the objectives which they pursued and, finally, not go beyond what was necessary to attain it.[199] The last three elements shall be studied in the next sections.

3.1.6.5.1. Imperative requirement in the general interest

The imperative requirement in the general interest are multiple, and the court broadly recognized them. In the case *Gouda*,[200] the Court made a non-exhaustive list about which imperatives are already recognized as 'overriding reasons relating to the public interest.'[201] Among them there is the protection of workers, consumer protection, cultural policy, etc.[202]

Chalmers[203] divides the justifications in four groups, the first one is about market externalities and concerns the situation where the interest of somebody are not taken into account, this can concern the preservation of environment,[204] promotion of tourism[205] or road safety.[206]

The second one concerns civil liberties and aims that economic freedoms do not affect political values. The case *Omega*[207] is representative in this field, it was the case of German company that made a franchising contract with a British company about a technology that should be used as a game in order to 'play at killing people', a so-called 'Lasergame'. The German authority decided to prohibit such games because it was not respecting human dignity. The court accepted the argument and stated that 'Community law does not preclude an economic activity […] being made subject to a national prohibition measure adopted on grounds of protecting public policy by reason of the fact that that activity is an affront to human

[198] Ibid., point 6 of the ruling.
[199] Ibid., paragraph 37.
[200] Case C-288/89 *Stichting Collectieve Antennevoorziening Gouda and Others v Commissariaat voor de Media* [1991] ECR I-4007.
[201] Ibid., paragraph 14.
[202] Ibid., paragraph 14.
[203] In Barnard, C. 2013 (supra 194), page 529/33.
[204] Case C-17/00 *François De Coster v Collège des bourgmestre et échevins de Watermael-Boitsfort* [2001] ECR I-9445 paragraph 36-7 ; C-338/09 *Yellow Cab Verkehrsbetriebs GmbH v Landeshauptmann von Wien* [2010] ECR I-12927 paragraph 50.
[205] Ibid., paragraph 50.
[206] Ibid., paragraph 50.
[207] Case C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR I-9609.

dignity.'[208] Equal treatment between citizens[209] and freedom of expression and assembly[210] are also reason justifying a restriction.

The third group of reasons justifying a discrimination are the justification protecting 'socio-cultural' practices like ensuring the balance between sports clubs.[211] It can also aim at preventing of abuses of free movement of services.[212]

The last group of justifications concerns the one related to the preservation of public order and the 'machinery of government'. The member state dispose of enough discretion in these cases especially when it concerns 'moral, religious of cultural factors.'[213] Preventing fraud on the social security system,[214] combating drug tourism[215] or preserving the financial balance of a social security scheme are possible justifications.[216]

The latter could be considered as a justification in the case with Austria, the Austrian government, if confronted with the European jurisdiction, could argue that this measure was established in order to preserve the financial balance of their social security system. Nevertheless, it seems complicated to argue in this direction since the previous situation was costlier and was apparently not putting in danger the Austrian social security system. Marhold and Ludvik argue that this argument is generally not successful.[217]

Concerning these justifications economic in nature, the Court rejected some of them, notably when the measure is purely of administrative nature[218] or when the measure is only imposing a cost on the national exchequer.[219] In the case *Kranemann*, the court clearly stated that 'aims of a purely economic nature cannot constitute pressing reasons of public interest justifying a restriction of a fundamental freedom guaranteed by the Treaty.'[220] The court recognized that 'budgetary considerations may underlie a Member State's choice of social policy and influence the nature or scope of the social protection measures which it wishes to adopt, they do not in themselves constitute an aim pursued by that policy and cannot therefore justify discrimination against migrant workers.'[221] Thus, in the view of the author, this argument cannot be used by

[208] Ibid., paragraph 41.
[209] Case C-208/09 *Ilonka Sayn-Wittgenstein c Landeshauptmann von Wien* [2010] ECR I-13693, paragraph 89.
[210] Case C-112/00 *Eugen Schmidberger,Internationale Transporte und Planzüge v Republik Österreich* [2003] ECR I-5659.
[211] Case C-415/93 *Bosman* (supra 171).
[212] Case C-244/04 *Commission v Germany* [2006] ECR I-885, paragraph 38.
[213] Case C-243/01 *Gambelli* (supra 96).
[214] Case C-406/04 *Gérald De Cuyper v Office National de l'emploi* [2006] ECR I-6947, paragraph 41.
[215] Case C-137/09 *Marc Michel Josemans v Burgemeester van Maastricht* [2010] ECR I-5473, paragraph 78-9.
[216] Case C-158/96 *Raymond Kohll v Union des Caisses de Maladie* [1998] ECR I-1931, paragraph 41.
[217] Marhold F. and Ludvik C., 2018 (supra 46) page 203.
[218] Case C-18/95 *F.C. Terhoeve v Inspecteur van de Belastingdienst Particulieren/Ondernemingen Buitenland* [1999] ECR I-345, paragraph 45.
[219] Case C-109/04 *Karl Robert Kranemann v Land Nordrhein-Westafalen* [2005] ECR I-2421.
[220] Ibid., paragraph 34.
[221] Case C-542/09 *Commission v. Kingdom of the Netherlands* ECLI:EU:C:2012:346, paragraph 57.

the Austrian government although it seems that the Austrian government made a clear forecast about the substantial economies that the measure would involve. It will be hard to have an economic justification for the Austrian government.

Another justification put forward is the equalisation of the (financial) burdens arising from family or child maintenance.[222] Mazal argue that undifferentiated export of child benefit does not make justice to the principle of equality contained in the treaty and that a relative equal treatment is needed in order to ensure that child benefit are granted in support of the acquisition of concrete goods in need, which is a legitimate regulatory objective.[223] For Kühbacher the relative equal treatment is not permitted and there must be an equal treatment in terms of amount. If it wasn't the case, there has to be an objective justification. The reference to different housing and maintenance needs in the other member states cannot be used as objective justification because it would have been used when comparing the two groups. Since equalisation should lead to absolute equality, this argument cannot be used to justify indexation.

Although the Advocate General Mancini also rejected this argument in its opinion in the Pinna case,[224] the Bundestag argue that equalisation of burden forms the basis of the definition of the current concept of family benefits and that if it was rejected at the time it is because none of the member states, at this time, were tailoring 'benefits specifically and directly to the cost of maintaining a family.'[225] The equalisation of burden could not have been cited in the first place as a justifiable regulatory purpose because the old legislation did not include family benefits but only family allowances based on the number, and if applicable, the age of the member of the family. Moreover, the rejection of the equalisation of burden in the case Pinna did not concerned an adjustment of benefits but rather a change of claim. Thus, according to the Bundestag, it is not clear if the CJEU would reject this argument in the case of indexation. The unequal treatment would have to be proportionate to the purpose of the legislation which will be the subject of our next section.[226]

For Marhold and Ludvik, such justification seems hard to justify since the lump-sum character of the benefit does not suggest a needs-based relief for families.[227]

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[222] Mazal W., 2017 (supra 14) page 41; Caritas, 2018, Stellungnahme der Caritas Österreich zum Entwurf eines Bundesgesetzes, mit dem das Familienlastenausgleichsgesetz 1967 und das Einkommensteuergesetz 1988 geändert warden, page 5, Deustcher Bundestag, 2016 (supra 46), page 31-33.
[223] Mazal W., 2017 (supra 14), page 41.
[224] Opinion AG Mancini, case 41/84 (supra 54), point 7, page 12-13.
[225] Ibid.
[226] Deustcher Bundestag, 2016 (supra 46).
[227] Marhold F. and Ludvik C., 2018 (supra 46) page 204.

In the opinion of the author, the equalisation of the burden could be a receivable argument if the benefit was really granted on the basis of true needs and not on a lump sum basis. Therefore, a justification to this discrimination seems not possible.[228]

In the eventuality that this justification was accepted by the Court, a proportionality test would have to be carried.

3.1.6.5.2. Proportionality test

A proportionality test must be performed once a public-interest requirement accepted by the court has been identified. A proportionality test operates as follow, first the court ask whether the measures are suitable for securing the attainment of the objective, and secondly whether they go beyond what is necessary in order to attain it. Therefore, a measure must be suitable and necessary.

About the suitability of the measure, the court held that such measure should 'guarantee the achievement of the intended aim'. In the case *De Coster,*[229] the Municipality of Watermael-Boitsfort introduced a tax on satellite dishes, but by doing so it was no longer in compliance with the freedom to provide services contained in Community law. To justify this infringement the municipality stated that the tax was introduced in order 'to prevent, the uncontrolled proliferation of satellite dishes in the municipality and thereby preserve the quality of the environment.'[230] This objective was justifying the restriction of the freedom to provide services and the tax was effectively capable of reducing the number of dishes and was therefore suitable to the objective of preserving the environment.

However, in addition to being suitable, the rule must be necessary, this means that it 'must not be possible to obtain the same result by less restrictive rules.'[231] The idea of necessity is really to see whether the aim of the objective could be fulfilled with a less arming measure. It means that if the arm done is not the lowest one, it is not suitable. In *De Coster*, the court find that the measure was exceeding what was deemed to be necessary and stated that less restrictive solutions were available, like the use of communal dishes. In the case *Petruhhin*, the Finish government wanted to extradite Mr. Petruhhin a Lithuanian national, who has exercised his right to move freely, to a third country in order to prevent the risk of impunity, a legitimate objective. Extradition was not imposed on nationals if they could accomplish their sentence on

[228] Deutscher Bundestag 2014 (supra 34), page 20.
[229] Case 17/00 *De Coster* (supra 204).
[230] Ibid., paragraph 36.
[231] Case C-288/89 *Gouda* (supra 200), paragraph 15, Case C-182/15 *Aleksei Petruhhin v Latvijas Republikas Ģenerālprokuratūra* EU:C:2016:630, paragraph 38; Case C-247/17 *Raugevicius* (supra 36) paragraph 40.

the finish soil. In this situation, the objective of preventing risk of impunity could be fulfilled by serving the sentence on finish soil. Therefore, there was a more suitable measure to fulfil the objective of the finish government and the extradition was not necessary.

In the case of indexation, the discrimination is harming the principle of freedom of movement of workers in the EU. If the measure is justified, it must also be suitable and necessary. Although indexation seems to be suitable for the objective of equalisation of the burden, it is complicate to use a method based on the residence since residence is a criterion that cannot be used when granting benefits. In this line, the Deutscher Bundestag argues that the appropriate structure of the indexation is the relevant element in determining if the measure is suitable and necessary for the equalisation of maintaining cost.[232]

In its actual form the indexation is based only on the cost of living in the different member states, this is relevant though not completely suitable since it fails to take into account the cost involved from transnational situations, like transport or housing. Such a system should be adapted to the cost of living of different areas within a country and take into account the peculiar situations of family concerned by the measure.

Concerning the necessity of the measure, the author argues that in the case of a country with a higher cost of living the measure is necessary in order to ensure the equalisation of burden, however in the case of a country with a lower living cost, the burden of maintenance is already covered without indexation, therefore it is possible to obtain the same result with a less restrictive rule.

3.1.6.6. Interim conclusion

A measure such as indexation would lead to indirect discrimination based on nationality since workers with children abroad and workers with children residing in Austria are reputed to be in the same situation according to the fiction of residence contained in article 67 of the same regulation. This central element prohibits such indirect discrimination based on the residence. After examination, the measure at stake is not justifiable.

3.2. Regulation (EU) 492/2011 on freedom of movement of workers within the Union

The freedom of movement of worker is a right protected by the treaties, it confers positive and negative obligations to the member states towards migrant workers. These rights are protected and fleshed out by the secondary legislation, namely Regulation (EU) 492/2011. The

[232] Deutscher Bundestag, 2016 (supra 46), page 33.

latter shall only apply to workers. In enjoying rights, workers have a more favourable position because they can also rely on this regulation. It is particularly important in terms of social advantages than can be enjoyed from day one of their arrival in the host state. In this section, it will be first studied the aim of Regulation (EU) 492/2011, secondly it will be examined what is the personal scope of the regulation and, thirdly, its material scope. Finally, the definition of the concept of social advantage will permit to determine in which measure the prohibition of discrimination contained in this regulation can be applied in regard to the grant of the Austrian child benefit.

3.2.1. Aim of Regulation (EU) 492/2011

This regulation is a specific legislation for workers aiming at enabling the objectives laid down in article 45 and 46 of the TFEU.[233] It ensures that workers can move freely within the communities without any restrictions from the labour market of the host state.[234] The regulation aims at ensuring an equality of treatment in all aspects when they exercise their rights, like as regards access to social benefits.[235] The objective of freedom of movement of worker can only be attained if accompanied by the abolition of any discrimination based on nationality.[236] For Craig and Búrca, the approach of Regulation (EU) 492/2011 is to protect and facilitates the exercise of the primary rights conferred by the treaty, rather than creating rights in itself.[237] However, the regulation is going a little bit beyond what is stated in the treaty and requires member states to ensure that Union workers enjoy a wide range of the substantive benefits available to nationals. This is also extended to the workers' family members that are not covered by the treaty.

Through the freedom of movement, the regulation aims at guaranteeing to migrant workers the possibility to improve their living and working conditions and promote their social advancement.[238] This attainment of this aim could be diminished for migrant workers with family members living in a country with a lower purchasing power. Indeed, their living standard and social advancement are diminished when they receive a lower amount of child benefit.

[233] Recital 3 of Regulation (EU) 492/2011 (supra 41).
[234] Schütze, R., 2015, *An introduction to European law*, Cambridge University Press, page 276
[235] Czekaj-Dancewicz, A., Analytical Note on social and Tax advantages and Benefits Under EU law', European Report 2013.
[236] Recital 2 and Recital 6 of Regulation (EU) 492/2011 (supra 41).
[237] Craig, P., & De Búrca, G., 2011 (supra 154), page 776
[238] Recital 4 of Regulation (EU) 492/2011 (supra 41).

It is noticeable that the principle of equality is a central element of the Regulation (EU) 492/2011.[239]

3.2.2. The scope of the regulation

After having defined the personal scope of the regulation (3.2.2.1.), we will make a focus on the material scope (3.2.2.2.).

3.2.2.1. Scope *ratione personae*

This regulation shall apply to workers and the member of their family. In order to define the personal scope of this regulation, the meaning of the word worker is of peculiar importance. The Court has the monopoly of interpretation of the scope of the term 'worker' according to Schütze.[240] It shall be so in order to offer the greater protection possible to workers. If a member state could modify the meaning of 'workers', it would undermine the protection granted to the latter.

The Court gave a broad definition of 'worker' in the case *Lawrie-Blum*.[241] The court found that the essential element was the existence of 'an employment relationship' whose essential feature is 'that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration.'[242] The court specified its jurisprudence and stated that the rules cover the 'pursuit of effective and genuine activities, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary.'[243] Therefore, a person having a part-time jobs was also to be considered as a worker and thus fall under the scope of article 45 TFEU and this regulation.[244]

Quasi-Worker, the person who does not have a job yet or have lost their job, are also covered. In the case *Lair*,[245] the award of a maintenance grant considered was a social advantage under article 7(2) of Regulation (EU) 492/2011.[246] In this case, Mrs Lair has ceased work in order to study and asked for a study grant. It was for the court to determine whether she was still a worker and retained certain rights. The court found that 'migrant workers are guaranteed certain

[239] Recital 2, 5, 6 and 7, article 7, 8 and 9 of Regulation (EU) 492/2011 (supra 41).
[240] Schütze, R., 2015 (supra 234), page 272.
[241] Case 66/85 *Lawrie-Blum v. Land Baden-Württemberg* [1986] ECR 2121.
[242] Ibid., paragraph 17.
[243] Case 53/81 *Levin v. Staatssecretaris van Justitie* [1982] ECR 1035, paragraph 15-17.
[244] Case 139/85 *Kempf v. Staatssecretaris van Justitie* [1986] ECR 1741; Case C-456/02 *Trojani v. Centre public d'aides sociales de Bruxelles* [2004] ECR I-7573, paragraph 22.
[245] Case 39/86 *Lair v. Universität Hannover* [1988] ECR 3161.
[246] Ibid., paragraph 28.

rights linked to the status of worker even when they are no longer in an employment relationship.'[247] It is possible to conserve such right if there is 'some continuity between the previous occupational activity and the course of study'. It is possible only in the same field in order to avoid abuses of the host state's social welfare system.

In the case *Antonissen*,[248] the court also found that the term worker englobes job-seekers,[249] nevertheless job-seekers retain the statue of worker only for a limited period that should be a 'reasonable time' period.[250]

The regulation applies in numerous occasions and covers workers. Not only during the time of their employment relationship, but also before and in some cases, after. During this period, they shall have access to all elements falling under the scope of this regulation. It shall be studied in the next sub-section.

3.2.2.2. Scope *ratione materiae*

The regulation is composed by three chapter divided in titles. Whereas Chapter II and III concerning cooperation between states are of weak legal interest for our case. Regarding the material scope of the regulation the focus has to be made on chapter I concerning the eligibility for employment, (1-6), the principle of equality within employment (7-9) and workers' families (10).

The first chapter provides for the protection of migrant workers in various situations and assures them the right to seek a job in another MS under the same conditions as its nationals (article 1), to conclude contracts of employment without being discriminate (Article 2), not to be discriminated by administrative practices (articles 3 and 4), to be guaranteed the same assistance as nationals (article 5), to be subject to the same vocational and medical criteria for recruitment and appointment (article 6). Within their position, the regulation ensures that workers have access to the same social and tax advantages, that they have equal access to vocational training and that they are not discriminated by any collective or individual employment agreement (article 7). Workers must be treated equally in regarding trade-union rights (article 8) and have equal access to housing (article 9). Their children shall have access to education (article 10).

[247] Ibid., paragraph 36.
[248] Case C-292/89 *The Queen v. Immigration Appeal Tribunal, ex parte Antonissen* [1991] ECR I-745.
[249] Ibid., paragraph 13.
[250] Ibid., paragraph 16.

These are all matters covered by the legislation. Relevant for our case will be article 7 of Regulation (EC) 883/2004 that prohibits discrimination and confers equal access to tax and social advantages. It shall now be examined the relevant article.

3.2.3 Article 7 of Regulation (EU) 492/2011, the principle of equal treatment

According to Schütze, this article had a great impact on the material scope in the field of free movement of workers. It provides a negative and a positive expression of the equal treatment principle.[251]

3.2.3.1. Article 7(1) of Regulation (EU) 492/2011

Article 7(1) of Regulation (EU) 492/2011 is a negative application of the equal treatment principle that provide the prohibition of any discrimination. This also cover discrimination based on nationality. In the case *Sotgiu*,[252] the court find that this was not limited to direct discrimination. Thus, the treaty and article 7 of Regulation (EU) 492/2011 'forbid not only overt discrimination by reason of nationality but also all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result.'[253] This mean that indirect discrimination, as the one at stake in the case with Austria, fall under the scope of the regulation. This result was confirmed in more recent cases.[254]

Therefore, the above interim conclusion of article 4 dealing with the principle of equal treatment can also be transposed to article 7(1).

3.2.3.2. Article 7(2) of Regulation (EU) 492/2011: the concept of social advantage

Article 7(2) of Regulation (EU) 492/2011 contains a positive obligation of the principle of equal treatment and states the following for workers:

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

Then the question is, could a child benefit like the one granted by Austrian authorities be subject to article 7 of Regulation (EU) 492/2011?

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[251] Schütze, R., 2015 (supra 234), page 272.
[252] Case 152/73 *Sotgiu* (supra 158).
[253] Ibid., paragraph 11.
[254] Case 152/73 *Sotgiu* (supra 158); Case 542/09 *Commission v. Netherlands* (supra 221), paragraph 37.

The concept of social advantage is important in order to determine what workers have access for. Initially article 7(2) of Regulation (EU) 492/2011 was read in a limited way by the court of justice and only benefits linked to employment where concerned.[255]

In a second time, short afterwards, the CJEU extended the scope of article 7(2) in order to include all social and tax advantages, regardless of whether they are job-related or not.[256] In the case *Even*[257], the court define social advantages as to include all benefits

> 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 Community.[258]

The court had an extensive interpretation of the notion of 'social advantages.' Each measure facilitating the migration of workers and their integration into the labor market of the new host state can be included.[259] It covers also advantages for member family which confer an indirect advantage to the worker.[260] The Austrian child benefit whose is not a linked to the statute of worker could then be subject to this provision.

In the case *Martínez Sala*[261] the court has to determine if a benefit like a child raising allowance could be determined as a 'social advantage' within the meaning of article 7(2) of Regulation No 1612/68.[262] The court found that a child raising allowance

> which is automatically granted to persons fulfilling certain objective criteria, without any individual and discretionary assessment of personal needs, and which is intended to meet family expenses, falls within the scope ratione materiae of Community law as a family benefit within the meaning of Article 4(l)(h) of Regulation No 1408/71 and as a social advantage within the meaning of Article 7(2) of Regulation No 1612/68.[263]

As it was established above, the child benefit granted by the Austrian government is a benefit fulfilling these criteria. The benefit is granted without individual and discretionary assessment

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[255] Case 76/72 *Michel S v Fonds National de Reclassement Handicapés* [1973] ECR 457.
[256] Case 32/75 *Cristini v SNCF* [1975] ECR 1085, paragraph 13; Case 207/78 *Criminal Proceedings against Even* [1979] ECR 2019, paragraph 22.
[257] Case 207/78 *Even* (supra 255).
[258] Ibid., paragraph 22.
[259] Barnard, C., & Peers, S., 2017, *European union law*. Oxford University Press, page 390, like access to language rights Case 137/84 *Criminal proceedings against Mutsch* [1985] ECR 2681; access to death benefits, C-237/94 *O'Flynn v Adjudication Officer* [1996] ECR I-02617; rights to be accompanied by the unmarried companions, Case 59/85 *Netherlands v Reed* [1986] ECR 1283.
[260] Case 65/81 *Reina v Landeskreditbank Baden-Württemberg* [1982] ECR 33.
[261] Case C-85/96 *María Martínez Sala v Freistaat Bayern* [1998] ECR I-2691.
[262] Repealed by Regulation (EU) 492/2011 (supra 41).
[263] Case C-85/96 *Martínez Sala* (supra 242), paragraph 28.

of personal needs and is intended to meet family expenses, namely alleviate parent's burden in the purchasing of goods for their children. Indeed, the benefit is granted on the sole factor that the person has a kid. The fact that this benefit is not linked to a working situation is irrelevant as it can be deduced from the above case law.

3.2.4. Interim conclusion

The Austrian child benefit is a 'social advantage' to which migrant worker have right on the same basis as national of the host state. The granting of this benefit shall not create a discriminating situation between national workers and migrant workers. The indexation creates an indirect discrimination and is therefore not permitted by article 7 of Regulation (EU) 492/2011 prohibiting any discrimination.

4. Remedies against the unlawful indexation

In this chapter the first section will expose the remedies available against the contested legislation. At the European level, institutions and member states have a direct access to the European Court of Justice (4.1.). However, this direct access is restricted for private parties. The latter shall prefer an action at the national level with a national court which can grant them indirect access to the CJEU through a preliminary reference (4.2).

4.1. An action at the European level: Infringement procedure[264]

At the European level, an infringement procedure is possible when a member state has breached EU law. It occurs when a state refuse to enact the correct legislation in order to implement a directive or when it implements a law contrary to European law.[265] The procedure permits to bring an action before the Court against the state failing to fulfil its obligations.

The infringement procedure is governed by articles 258 (i.e. at the initiative of the commission) and 259 (i.e. at the initiative of a member state) TFEU. This procedure is not open to individual or private parties. Remedies available to private parties will be the subject of the next section (5.2.).

Action for infringement are mostly brought by the Commission and rarely used between states.[266] However, it is worth recalling the procedure as Hungary has indicated that it intended to use it in the event that the commission has remained inactive.[267]

This section will be subdivided as follow: first, the main elements of the articles will be defined (5.1.1.), secondly the procedure will be detailed (5.1.2.) and finally, the last subsection will examine the consequences in the case that a state has effectively failed to fulfil its obligations. (5.1.3).

[264] At the moment of writing, an infringement procedure has been engaged by the Commission against Austria. European Commission – Indexation of family benefits: Speaking points of Commissioner Thyssen on the Launch of the infringement procedure against Austria, Speech 19/664 made at Brussels.
[265] Barnard, C., & Peers, S., 2017 (supra 259), page 268.
[266] Ibid.; Schütze, R., 2015 (supra 234), page 193.
[267] Dailynews Hungary, 15 January 2019, Hungary initiates infringement procedure against Austria over family benefits changes. Available at: https://dailynewshungary.com/hungary-initiates-infringement-procedure-against-austria-over-family-benefits-changes/
Hungary Journal, 14 January 2019, Hungary initiates infringement procedure against Austria. Available at: https://thehungaryjournal.com/2019/01/14/hungary-initiates-infringement-procedure-against-austria/?utm_source=samizdat&utm_medium=partner&utm_campaign=free

4.1.1. The main element of articles

An infringement procedure can be initiated if 'a member stated has failed to fulfil an obligation under the treaties.'[268] Here it is useful to define what is exactly a 'Member state' and what it means to fail 'to fulfil an obligation under the treaties.'

The court has a broad interpretation of what is a 'member state.'[269] The liability of a member state is founded under article 258 TFEU 'whatever the agency of the sate whose action or inaction is the cause of the failure to fulfil its obligation, even in the case of a constitutionally independent institution.'[270] This means that every branches are covered as well as the administration of the state. The procedure can be initiated if the potential infringement is attributable to the state or one of its agencies.[271] In any case, the state itself will be the defendant party before the court of justice, independently of which entity is responsible for the breach in EU law.[272]

The 'failure to fulfil a Treaty obligation' covers a broad range of measure imputable to the member state. It can be positive actions or omissions. It is the case when a state adopts a legislative act or pursue administrative practices contrary to European law.[273] The inaction of the state can be sanctioned if its inaction lead to the perpetration of unlawful acts by private parties.[274]

In the case of the Austrian child benefit, there is a law voted by the Austrian parliament, the latter is used by the administration when granting child benefits. The rule seems to be contrary to EU law, therefore a procedure can be open against Austria.

4.1.2. Procedure

4.1.2.1. Under Article 258 TFEU

This sub-section concerns action for infringement brought by the commission. The procedural regime is contained in article 258 TFEU that states the following:

> If the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the

[268] The formulation is the same for both article 258 and 259 TFEU.
[269] Barnard, C., & Peers, S., 2017 (supra 259), 269.
[270] Case 77/69 *Commission v Belgium* [1970] ECR 237, paragraph 15.
[271] Barnard, C., & Peers, S., 2017 (supra 259), page 269; Schütze, R., 2015 (supra 234), 194
[272] Case C-97/97 *Région Wallone v Commission* [1997] ECR I-1787, paragraph 7.
[273] Barnard, C., & Peers, S., 2017 (supra 259), page 269: it includes primary law, secondary law and general principles as well.
[274] Case C-265/95 *Commission v France ('Strawberries')* [1997] ECR I-6959.

> matter after giving the State concerned the opportunity to submit its observations.
>
> If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union.

The procedure initiates with an administrative phase composed of exchanges between the European Commission and the Member state. Before the reasoned opinion, the Commission shall address to the Member state a 'letter of formal notice' explaining the reasons why it believes that the member state has failed to fulfil its obligations.[275] This letter gives 'the state concerned the opportunity to submit its observations.'[276] This procedure permits the state to defend itself or to adapt its behaviour.[277]

In the event that the commission is not convinced, it shall emit a reasoned opinion. This opinion contains a period of time during which the member state has to take appropriate measure to change its behaviour. If the behaviour does not change, the Commission shall go to Court.

The 24 January 2019, the Commissioner Thyssen has launched an infringement procedure against Austria and has addressed a letter of formal notice to the latter. This letter is accompanied with a two months delay for Austria to reply to the Commission.[278]

In the absence of response of Austria or in the eventuality that the response is insufficient, the Commission will then deliver a reasoned opinion with a new delay during which Austria will have to comply with EU law. After this delay, if Austria has not changed its behaviour, the Commission will have the possibility to bring an action before the court. An action before the Court is not immediately foreseeable since there are still two months to wait and an additional delay with the reasoned opinion that must be reasonable.[279] The chance of litigation before the court are high since the Austrian government has indicated that the measure is legal and was ready to go to court.

4.1.2.2. Under Article 259 TFEU

Even if this article is rarely used (see supra 5.1.), the case at stake could have seen this procedure used. Indeed, the Hungarian government has expressed its wish to initiate such

[275] Schütze, R., 2015 (supra 234), page 194.
[276] Article 258 TFEU paragraph 1.
[277] Case 293/85 *Commission v Belgium* [1988] ECR 305, paragraph 13.
[278] Indexation of family benefits: Speaking points of Commissioner Thyssen on the launch of the infringement procedure against Austria, 24 January 2019 SPEECH/19/664.
[279] Case 293/85 *Commission v Belgium* (supra 276).

procedure after that a diplomatic letter to the Austrian government remained unanswered.[280] In the eventuality that the commission would not have initiated the procedure under article 258 TFEU, Hungary was threatening to make use of the procedure contained in article 259 TFEU.

The Austrian indexation measure is affecting a great number of migrant workers from numerous member states; therefore, it is comprehensible that these member states wish to initiate such procedure.[281] Especially Hungary that have the greatest number of citizens concerned by the measure.

The procedure is quite similar as the one in article 258 TFEU, and the role of the commission remain central. Though both member states have to be heard by the commission before it renders its reasoned opinion.

After the reasoned opinion or after three months, if the Commission didn't emit a reasoned opinion, the member state has the possibility to bring the case to the court.

Under both procedures, once the Court of justice has ruled on the issue, the member state has to comply with the judgement of the court. In the event it does not respect the latter, article 260 TFEU provides to impose penalties on the recalcitrant member state.

4.1.3. Pecuniary penalties

Article 260 was included in order to ensure the enforcement of the Court's judgment by giving some 'teeth' to the procedures contained in articles 258 and 259 TFEU.[282] It provides the following:

> 1. If the Court of Justice of the European Union finds that a Member State has failed to fulfil an obligation under the Treaties, the State shall be required to take the necessary measures to comply with the judgment of the Court.
>
> 2. If the Commission considers that the Member State concerned has not taken the necessary measures to comply with the judgment of the Court, it may bring the case before the Court after giving that State the opportunity to submit its observations. It shall specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances.
>
> If the Court finds that the Member State concerned has not complied with its judgment it may impose a lump sum or penalty payment on it.

[280] By a diplomatic letter of 7 January 2019, the Hungarian government presented a diplomatic note explaining that the measure adopted by the Austrian government was violating EU law. This letter remained unanswered.
[281] Hungary, Poland, Slovakia, Republic Czech, Slovenia, Romania.
[282] Craig, P., & De Búrca, G., 2011 (supra 154), page 454.

When it was introduced with the Maastricht Treaty, the procedure in article 260 was providing for repetition of the administrative and judicial phase in order to obtain a new judgement from the Court with the imposition of sanctions.[283]

With the Lisbon Treaty, the commission is no longer obliged to emit a reasoned opinion and must solely notify a letter of formal notice. This renders the penalty procedure much efficient and speedier than before.[284]

However, the procedure is constraining because it obliges the Commission to obtain a second judgement from the court in the event that the member state did not complied with the first judgement.[285]

The amount of the lump sum or penalty payment is to be determined by the Commission without upper limit, it is then to the Court to impose it. The is not bound by the Commission proposal, the sole limit is that the Court shall not impose a greater penalty than the one decided by the Commission.[286]

4.1.4. Interim conclusion

Through this procedure the Commission will seek to obtain a change in behaviour from Austria. If after the delays provided by the formal letter of notice and the reasoned opinion Austria has not cancelled the contested legislation, the Commission will be allowed to bring a case to the court of justice. If the Court find the law to be contrary to EU law, the Court will require Austria comply with EU law.

4.2. An action before a national court

Instead of an institution, a private party could consider that, by infringing EU law, Austria is interfering with its rights. In order to obtain the respect of its rights, a citizens affected by the measure would have to bring a case to a national court since direct access to the CJEU has always been restricted for private parties according to the *Plaumann* jurisprudence.[287] The logic behind is that private parties should bring a complaint before a national court and the latter shall bring an action to the CJEU through the procedure provided by article 267 TFEU, namely the preliminary reference. This shall ensure the protection of judicial right of private parties.

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[283] 455
[284] Barnard, C., & Peers, S., 2017 (supra 258), page 27 ; Craig, P., & De Búrca, G., 2011 (supra 154), page 455.
[285] Schütze, R., 2015 (supra 234), page 195
[286] Barnard, C., & Peers, S., 2017 (supra 258), page 455.
[287] Case 25/62 *Plaumann & Co. v the European Economic Community* [1963] ECR 199.

A national court must consider the effect of EU law on the legal national order (4.2.1.) especially when they deal with a law in conflict with the European legal order. When such conflict arises, national courts shall request a preliminary ruling to the CJEU in the event that an interpretation of EU law is needed (4.2.2.)

4.2.1 The effect of EU law on national legal order

European law has a deep effect on national legal orders, especially since the famous ruling of the CJEU concerning direct effect (4.2.1.1.) and the primacy (4.2.1.2.) of European law.

4.2.1.1. Direct effect

The notion of direct effect means that a disposition in a treaty is directly applicable in the national legal order. This means that the disposition in question does not need any further application, like a transposition law, to be effective. A private party can rely on it in a case brought before a national court.[288]

The doctrine of direct effect appeared in the famous case *Van Gen den Loos,*[289] in this case a company based in the Netherlands was importing goods from Germany. The company claimed that a duty imposed by the Dutch government was contrary to the Treaty. However, international treaties are normally binding between states and rarely create rights for individuals that are directly enforceable before a national court.

The Court, despite a united opposition of the member states against the direct effect of EU law within the national legal orders stated the following:

> The objective of the EEC Treaty, which is to establish a Common Market, the functioning of which is of direct concern to interested parties in the Community, implies that this Treaty is more than an agreement which merely creates mutual obligations between the contracting states[.]
>
> The conclusion to be drawn from this is that the community constitutes a new legal order of international law for the benefit of which states have limited their sovereign rights, albeit within fields, and the subjects of which comprise not only Member States but also their nationals. Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligation

[288] Barnard, C., & Peers, S., 2017 (supra 259), page 146.

[289] Case 26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* [1963] ECR 3.

> which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community.[290]

This statement is of a particular importance for Member States and individuals for the reason that since this date individuals can rely on the provision contained in the Treaty and enforce them before a national court.[291]

This direct effect of a Treaty provision is subordinated to the three following conditions:[292]

- be clear;
- be unconditional;
- not be dependent on any subsequent further implementation measure.

In the Austrian context, an individual could rely directly on article 45 of the treaty on the freedom of movement from workers and stating for their equal treatment before a national court.

Other provisions can have direct effect within the legal order of the member state, it is notably the case for the regulations. The Court stated that direct effect of regulation is presumed,[293] therefore regulations are justiciable before national courts.

An individual could rely on Regulation (EC) 883/2004 and Regulation (EU) 492/2011 before a national court in order to seek the annulment of the indexation measure. However, in a case of a conflict of rules, it is important to determine which norm shall apply, this is the subject of the next section.

4.2.1.2. Primacy of European law

The principles of primacy of EU law means that EU law must be applied primary in case of conflict between national law and EU law.[294] The view of the European Union is that there is an 'absolute' supremacy, though this view is not unanimously shared from the national perspective.[295] The national perspective is mainly determined by the constitution of the member state and the integration of EU law in their own 'pyramid of norms.'[296]

Some member states, especially their supreme court have challenged the supremacy of European law. The most famous example is given by the Bundesverfassunggericht (German

[290] Ibid., page 12 of the judgement.
[291] Barnard, C., & Peers, S., 2017 (supra 259).
[292] Case 26/62 *Van Gend en Loos (supra 288)*, page 13.
[293] Case C-367/09 *Belgisch Interventie- en Restitutiebureau v SGS Belgium NV and Others* [2010] ECR I-10761, paragraph 32.
[294] Barnard, C., & Peers, S., 2017 (supra 259), page 161.
[295] Schütze, R., 2015 (supra 234), 143
[296] Kelsen H., 1949, General Theory of law and state, Harvard University Press, page 123. The 'pyramid of norms theory' is the theory according to which norms have to be conform to the norms of superior ranking. The idea is schematized with a pyramid, where the top of the pyramid is represented with the highest norm, in general the constitution. Some countries, like France, consider the Constitution to be the highest norm and European law to be inferior.

Supreme Court) with its rulings *Solange*[297] where it protected fundamental liberties against EU law. The German supreme court also has expressed the possibility to effectuate an *ultra vires* control over the European Union in the case *Gauweiler*.[298]

France has also a different view on the question. Indeed, in its internal legal order the constitutional court consider that the French Constitution has the primacy. In its Décision No 2007-560 DC of 20 December 2007, the Conseil Constitutionnel (French Constitutional Court) confirmed the 'place of the constitution at the top of the domestic legal order.'[299] In this case, the *non conformité partielle* of the Lisbon treaty, was rendering impossible its adoption. Since the Constitution is at the top of the legal order, the Court was requiring the legislator to modify the Constitution in order to adopt the Lisbon Treaty in accordance with article 54 of the French Constitution.[300]

On the European point of view, the clear views on primacy of EU law was stated by the Court of justice in its famous case Costa. In this question, the CJEU has to respond to the question whether a national law could derogate from the Treaty. The response of the Court was unequivocally negative. The Court accompanied its response explaining the 'ideological dimension of the European project'[301] as follow:

> By contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply. By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves.
>
> The integration into the laws of each Member State of provisions which derive from the Community, and more generally the terms and the spirit of the Treaty, make it impossible for the States, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on a basis of reciprocity. Such a measure cannot therefore be inconsistent with that legal system. The executive force of Community law cannot vary from one State to another in deference to subsequent

[297] BVerfG, 29 May 1974, BvL 52/71 Solange I; BVerfG, 22 October 1986, 2 BvR 197/83 Solange II; BVerfG, 15 December 2015, 2 BvR 2735/14 Solange III.
[298] BVerfG, 21 June 2016, 2 BvR 2728/13 Urteil des Zweiten Senats; Case C-62/14 *Peter Gauweiler and others v Deutscher Bundestag* ECLI:EU:C:2015:400.
[299] Décision No 2007-560 DC of 20 December 2007, Traité de Lisbonne modifiant le traité sur l'Union européenne et le traité instituant la Communauté européenne, paragraph 8: « Considérant que, tout en confirmant la place de la Constitution au sommet de l'ordre juridique interne. »
[300] Article 54 of the French constitution states: « Si le Conseil constitutionnel […] a déclaré qu'un engagement international comporte une clause contraire à la Constitution, l'autorisation de ratifier ou d'approuver l'engagement international en cause ne peut intervenir qu'après la révision de la Constitution. »
[301] Barnard, C., & Peers, S., 2017 (supra 258), page 162

> domestic laws, without jeopardizing the attainment of the objectives of the Treaty[.]
>
> It follows from all these observations that the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question.
>
> The transfer by the States from their domestic legal system to the Community legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of the Community cannot prevail.

This decision had a really strong effect and permitted a strong enforcement of EU law in in national legal order. This means that in the case of a conflict of law between a national provision and a European provision, the latter must prevail. This does not mean that the national provision is void from the national legal order. The law remains valid, except for the case at stake.[302]

The consequences are that the national judges will have to consider European provision that have direct effect and apply these provisions primary to national law when two rules are conflicting. In our case, the national rule concerning child benefit is contrary to the provisions of Regulation (EC) 883/2004 and Regulation (EU) 492/2011, therefore the latter European provisions benefiting from the primacy and the direct effect of EU law shall be applied by the national judge if a case is brought before a national.

However, a national judge is not empowered to interpret European law. If there are some doubts about the interpretation of EU law and its compatibility with the national rule at stake, national judges shall refer a preliminary question to the CJEU. This mechanism will be tackled in the next section.

4.2.2. Preliminary ruling under article 267 TFEU

Article 267 permits national courts to refer a question to the CJEU (4.2.2.1.) if necessary (4.2.2.2.). This preliminary reference is mandatory for court of last instance (4.2.2.2) although this reference can be avoided according to the jurisprudence of the CJEU (4.2.2.3.).

[302] Barnard, C., & Peers, S., 2017 (supra 259), page 163.

4.2.2.1. General principles of the procedure

A national court, during a proceeding, can have some difficulties to apply EU law to its case. When such problem arises, they have the possibility to refer a question to the CJEU in order to require a 'preliminary ruling.' This ruling is preliminary because it is made before the ruling they will render after having obtained the interpretation of European provisions. Schütze describe this mechanism as a 'cornerstone of the Union's judicial federalism.'[303]

The procedure of the preliminary ruling is detailed by article 267 TFEU as the following:

> The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:
>
> (a) the interpretation of the Treaties;
>
> (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;
>
> Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.
>
> Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.

The first remark is that such procedure is not a contentious procedure, the court will not give a judgement on the fact of the case. The court, in the event of a preliminary ruling has only two possibilities, the first is to give the interpretation of EU law (i.e. explain how a European rule shall apply), the second is to examine the validity of EU law (i.e. the court will declare if a secondary legal act of the Union is compatible with the Treaties). The preliminary reference is limited to these judicial functions.[304]

Preliminary rulings are not 'decisions' but are legal precedent binding erga omnes upon national courts.[305] This means that the national court will have to consider the preliminary ruling when it will give its final judgement. In the event that the CJEU found a national law

[303] Schütze, R., 2015 (supra 234), page 177.
[304] Schütze, R., 2015 (supra 234), page 178.
[305] According to the common law view, preliminary rulings are binding erga omnes on all national court. However, this view contradicts the civil law tradition. See Schütze, R., 2015 (supra 234), page 180 for a discussion on the subject.

incompatible with EU law, the national court will have to ignore the incriminated provision for the solution of the case.

4.2.2.2. Reference from a national Court

Article 267 TFEU put the emphasis on the role of national court in referring the questions for a preliminary ruling. The CJEU has a wide definition of what it considers to be a court. According to the jurisprudence, the court take into account numerous factor 'as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent.'[306]

The national courts have the opportunity to refer such reference when such questions are raised before them. The reference it at the discretion of the national court and the latter have a broad margin of discretion.[307] The article states that the court may refer a question 'if it considers that a decision on the question is necessary to enable it to give judgment.'[308] It is to the national court to decide if the question is necessary, and the CJEU shall not interfere with its choice.[309]

Nevertheless, the treaty provides for an obligation to refer and the jurisprudence of the court has extended this principle, this is the subject of the next section.

4.2.2.3. Obligation to refer

This reference is made obligatory when the case is 'pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law.'[310] This means that court or last instance like supreme court cannot refuse, in principle, to make a reference to the CJEU when it is requested. This obligation is not limited to court of last instance, court where an appeal is not possible also have an obligation to refer. The key element there is the 'appealability' of the case at stake.[311]

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[306] Case C-54/96 *Dorsch Consult Ingenieurgesellschaft v Bundesbaugesellschaft Berlin mbH* [1997] ECR I-4961.
[307] Barnard, C., & Peers, S., 2017 (supra 258), page 298.
[308] Article 267 TFEU.
[309] Barnard, C., & Peers, S., 2017 (supra 258), page 298.
[310] Ibid.
[311] Schütze, R., 2015 (supra 234), page 187.

This obligation to refer was extended by the CJEU, that stated that all national court, even the court of first instance, have the obligation to make such reference in there is a doubt about the validity of EU law.[312]

4.2.2.4. Exception to the obligation to refer

The CJEU has introduced two exceptions to the duty to refer, despite its absolute wording in the treaty. The first exception is quite obvious, it is when the question referred to the CJEU is materially identical to a question that has already been answered in a preliminary ruling[313] or where the point of law at stake as already received a response from the CJEU in a previous ruling.[314] This does not mean that court shall refrain to make a reference in this case, they still can refer the questions but without obligation.[315]

The second exception is the doctrine *Acte clair* that was imported by the CJEU from the French legal doctrine. This doctrine means that when an act is clear and gives no doubts about how to act, the obligation to refer a question fall.[316] In the case *CILFIT*,[317] the Court offered general guidelines about the doctrine of *Acte Clair*. In this case the CJEU exempted court of last resort from the obligation to refer where 'the correct application of Community law may be so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved.'[318]

Nevertheless, the court added several safeguards in order to avoid any abuses of this doctrine. The court initiate by stating that 'the existence of such a possibility must be assessed on the basis of the characteristic features of Community law and the particular difficulties to which its interpretation gives rise.'[319] This implies that the judges have to make a comparison between the different language versions of the provisions. This implies to take into account terminologies, legal concept of EU and national law and to interpret in the light of EU law.[320]

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[312] Case C-344/04 *The Queen on the Applicaion of Internatinal Air Transport Association et al. v Department for Transpor*t [2006] ECR I-403, paragraph 30.
[313] Joined Cases 28-30 *Da Costa en Schaake NV, Jacob Meijer NV, Hoechst-Holland NV v Netherlands Inland Revenue Administration* [1963] ECR 61.
[314] Case 283/81 *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health* [1982] ECR I-4839, paragraph 14.
[315] Ibid., paragraph 14.
[316] Schütze, R., 2015 (supra 234), page 188.
[317] Case 283/81 CILFIT (supra 313)
[318] Ibid., paragraph 16.
[319] Ibid., paragraph 17.
[320] Ibid., paragraph 19-20; Barnard, C., & Peers, S., 2017 (supra 259), page 300.

4.2.2.5. Interim conclusion

An individual affected by the reduction in child benefit could bring an action before the national jurisdiction and argue that the Austrian measure is contrary to EU law.

In the proceeding, judges could decide to suspend the proceeding and refer a question to know whether the Austrian measure is compatible with the provisions of Regulation (EC) 883/2004 and Regulation (EU) 492/2011. The court of last resort would be constrained to do so except if it considers that the jurisprudence is clear on the issue. The court of last instance could then rely on the fact from the case Pinna and assess its comparability with the case at stake. If the law is found to be contrary to European law, the latter will be applied primary.

5. Conclusion

The Austrian measures at stake infringes EU law on many aspects. First, the principle of equality present in the Treaties, in article 4 of Regulation (EC) 883/2004 and article 7 of Regulation (EU) 492/2011 prohibits indexation since it treats differently two situations that are deemed comparable. Workers having their kids abroad and those having their kid residing with them are in the same situation according to the CJEU. This is also evidenced with the fiction of residence created by article 67 of Regulation (EC) 883/2004. Therefore, indexation of child benefits creates an impermissible indirect discrimination.

The principle of exportability contained is quite clear about the exportation of benefits. The amount of the latter cannot be modified according to the residence of the beneficiaries. The formulation of this provision is clear regardless of the language of the Regulation.

Finally, the equality of treatment provided for workers in article 7 of Regulation (EU) 492/201 states that workers are entitled to the same 'social advantages', child benefits have been recognized as such. A differentiation in the attribution of child benefit would result in an indirect discrimination between.

Against this illegality and in order to protect the rights of migrant workers, this law has to be void. This will be possible through the infringement procedure initiated by the Commission. An individual can also rely on the national judicial system in order to see its rights protected since EU law has the direct effect and primacy over national legal order.

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Case 32/75 *Cristini v SNCF* [1975] ECR 1085.

Cases 117/76 and 16/77 *Ruckdeschel v Hauptzollamt Hamburg-St Annen* [1977] ECR 1753.

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Case 237/78 *Caisse Régionale D'Assurance Maladie Lille v Diamante Palermo, née Toia* [1979] ECR 2645.

Case 70/80 *Vigier v Bundesversicherungsanstalt für Angestellte* [1981] ECR 229.

Case 53/81 *Levin v. Staatssecretaris van Justitie* [1982] ECR 1035.

Case 65/81 *Reina v Landeskreditbank Baden-Württemberg* [1982] ECR 33.

Case 283/81 *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health* [1982] ECR I-4839.

Case C-139/82 *Paola Piscitello v Istituto nazionale della previdenza sociale (INPS)* [1983] ECR 1427.

Case C-293/83, *Gravier v Ville de Liège* [1985] ECR 593.

Case 137/84 *Criminal proceedings against Mutsch* [1985] ECR 2681.

Case 41/84 *Pietro Pinna v Caisse d'allocations familiales de la Savoie* [1986] ECR 1.

Case 307/84 *Commission of the European Communities v French Republic* [1986] ECR 1725.

Case 59/85 *Netherlands v Reed* [1986] ECR 1283.

Case 66/85 *Lawrie-Blum v. Land Baden-Württemberg* [1986] ECR 2121.

Case 139/85 *Kempf v. Staatssecretaris van Justitie* [1986] ECR 1741;

Joined Cases C-379 to 381/85 and 93/86 *Caisse régionale d'assurance maladie Rhône-Alpes v Anna Giletti, Directeur régional des affaires sanitaires et sociales de Lorraine v Domenico Giardini, Caisse régionale d'assurance maladie du Nord-Est v Feliciano Tampan and Severino Severini v Caisse primaire centrale d'assurance maladie* [1987] ECR 955.

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Case C-350/96 *Clean Car Autoservice GmbH v Landeshauptmann von Wien* [1998] ECR I-03289.

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Summary

1. Introduction

The issue of access to social benefits for migrant EU citizens is quite contentious in the European Union although this intra-EU migration concerns few European citizens.[321] Normally, Member states have the power to decide who should have access to social benefits, however, the European rules are interfering with the sovereignty of Member states and the jurisprudence of the Court tends to extend the access to social benefits. Member states often argue that this access creates higher burden on the public finances, especially on the sustainability of their national security system.

In 2016, the United-kingdom (UK) expressed its wish to limit access to welfare benefits, including child assistance through indexation, for new migrants entering there for work. Indexation consist in the following: when exporting[322] child benefits to a member states other than that where the worker resides, the amount of the benefit can be indexed to the conditions of the member state where the child resides. A deal was reach at the European Council and the EU accepted the demands of the UK.[323] The agreement was conditioned to the fact that the UK would remain in the EU. The negative vote of the referendum on the European membership of the UK rendered the deal null and void.

However, this opened the debate about the indexation of child benefit and the Commission envisaged its insertion in its proposal to modify secondary legislation on the coordination of social security system.[324] The idea was supported by other member states[325], like Germany and Austria that are the biggest exporters of child benefits in the European Union with Luxemburg.[326] Finally, the Commission went back on the issue of indexation in its proposal to

[321] Eurostats, Citoyens de l'UE résidant dans d'autres États membres ; Communiqué de presse 87/2018 of 28 May 2018.
[322] European Commission, Impact assessment of the Commission, SWD 2016 460, page 124: 'The principle of exportability contained within the EU social security coordination rules means that when the child of a worker resides in another State, the worker can export the full amount of the family benefits received from the State of activity to the State where the child resides.'
[323] European Council, Extract of the conclusions of the European Council of 18-19 February, A new settlement for the United-Kingdom within the European Union, published at the Official Journal of the European Union Cl 69/1 of the 23 February 2016, EUR-Lex 52016XG0223(01).
[324] European Commission, Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 883/2004 on the coordination of social security systems and regulation (EC) No 987/2009 laying down the procedure for implementing Regulation (EC) No 883/2004 (Text with relevance for the EEA and Switzerland) {SWD (2016) 460 final}{SWD(2016) 461 final}.
[325] Denmark and Ireland were also strongly in favor of such mechanism when it was proposed by the UK. See Fernandes, S., 2018, Allocations familiales : leur montant ne doit pas dépendre du pays où vit l'enfant, Décryptage of 17 April, Institut Jacques Delors.
[326] Germany export 11.2% of all family benefits exported in the European Union, though it represents only 0.3% of its budget. For Austria it is 15.6% representing 3.4%. With Luxemburg being the biggest exporter of family benefits (50.6% representing 47.4%). See Fernandes, S., 2018 (supra 5).

modify secondary legislation and also declared that it would be illegal.[327] The Commission also put the emphasizes on the fact that only one percent of child benefits are exported and that the impact on public finances of the indexation of family allowances would be minimal compared to the administrative costs that an indexation mechanism would represent.[328]

However, Austria was the more fervent advocate of this measure, and threatened to apply it unilaterally. This threat became a reality with the introduction of indexation of child benefits from 1 January 2019.

The Commissioner Thyssen stated about posted workers that "equal pay for equal work at the same place" would also include "equal benefits for equal contributions at the same place."[329] However, this position was not always the one that the European Union has held, notably when it was dealing with the UK to avoid Brexit. The jurisprudence of the Court of Justice of the European Union (CJEU) on this case is helpful, yet the theme of indexation is a matter that was never ruled. Although it is unclear whether the CJEU would approve such measure at the European level, indexation seems hardly compatible with EU law, especially if implemented unilaterally.

Research question

The main research question of this thesis is the following:

From a European point of view, is the law introducing indexation of child benefits adopted by the Federal Republic of Austria legal?

This research question is relevant since the adoption of this measure will affect numerous citizens of the European union having their children living abroad. The main incompatibility remains with article 45 of the Treaty on the Function of the European Union (TFEU) about the freedom of movement for workers and the prohibition of any discrimination. Would the CJEU recognizes a discrimination in this case? Could it be justifiable?

Another conflict arises with the principle of exportation contained in the primary law and in Regulation (EC) 883/2004 prohibiting the modification of the amount of the benefits exported.

[327] Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 883/2004 (supra), page 135, particularly foot note 378.
[328] Commission Européenne, Fiche d'information, Questions et réponses sur la révision des règles de coordination sociale, 13 December 2016, MEMO/16/4302, see point 5.
[329] European Commission – Indexation of family benefits: Speaking points of Commissioner Thyssen on the Launch of the infringement procedure against Austria, Speech 19/664 made at Brussels.

Is indexation a modification? Specifically, the legislator decided to set up a fiction of residence concerning children in the European union (article 67 of Regulation 883/2004). They should always be considered as residing with the parent entitled to the benefits. Could an indexation be implemented despite this fiction of residence?

These interrogations will be tackled in the present research about the indexation of child benefits.

2. Compatibility with EU law

According to the *lex specialis* principle, special rules shall apply in derogation from the general provisions. In European law, provisions of primary law have been made more concrete in secondary law.

In the field of social security, and specifically child benefits, EU law proposes two relevant legislations that take precedence over fundamental freedoms, especially the one contained in article 45 TFEU, the freedom of movement from workers.

One the one hand, there is the Regulation (EC) No 883/2004 on the coordination of social security systems[330] and on the other hand Regulation (EU) No 492/2011 on freedom of movement for workers within the Union.[331] The general aim and relevant articles of each regulation will be analysed in the following section in order to establish whether the contested Austrian legislation falls under their scope. Its compatibility will be assessed with each article.

2.1. Regulation (EC) No 883/2004

The aim of Regulation (EC) No 883/2004 is to coordinate the social security system of the member states in order to protect the principle of free movement of persons and the removal of its obstacles as provided in the treaties.[332]

In Regulation 883, the material scope englobes family benefits that are 'all benefits in kind or in cash intended to meet family expenses.' According to the case law of the CJEU, a child benefit is a family benefit treated as a social security benefit subject to Regulation (EC)

[330] Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security system (Text with relevance for the EEA and for Switzerland) published at the Official Journal of the European Union L 166/1 the 30 April 2004 (thereafter Regulation (EC) 883/2004).
[331] 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. (codification) (Text with relevance for the EEA and for Switzerland) published at the Official Journal of the European Union L 141/1 of 27 April 2011. (Thereafter Regulation (EU) 492/2011).
[332] Article 3(2) TEU Article 45, 48, 49 TFEU; Recital 1 of regulation 883/2004, Case C-41/84 *Pietro Pinna v Caisse d'allocations familiales de la Savoie* [1986] ECR 1, paragraph 21.

883/2004 if it is 'automatically granted to persons fulfilling certain objective criteria, without any individual and discretionary assessment of personal needs, and which is intended to meet family expenses.'[333] The Austrian child benefit respond to such criteria and must therefore be considered to be subject to the regulation.

The Austrian legislation seems difficultly reconcilable with three articles of the Regulation 883/2004, namely article 67 creating a fiction of residence for family members living abroad, article 7 about the principle of exportability (i.e. waiving of residence clauses) and article 4 about the principle of equality (i.e. prohibition of any discrimination based on nationality).

2.1.1. Article 67 of Regulation (EC) 883/2004: Fiction of residence

Article 67 provides as follow

> Members of the family residing in another Member State.
>
> 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*.

The formula 'as if' is the central element of this article. Whereas Mazal interpret this article as creating the obligation of a relative equality between children living abroad and children residing in Austria, the CJEU clearly explained that this article is to be seen as a fiction residence.[334] This fiction of residence has the effect of rendering residence clauses void. The residence of family members shall not play a role,[335] neither in granting a benefit nor in defining its amount.[336] The aim of this provision is to EC worker being 'deterred from exercising their right to freedom of movement'.[337] Therefore, if 'entitlement to and the amount of benefits for dependent children are subject to their being resident in the national territory, that condition

[333] Joined Cases C-245/94 and C-312/94 *Hoever and Zachow* [1996] ECR I-4895, paragraph 27; Case C-85/96 *María Martinez Sala v Freistaat Bayern* [1998] ECR I-2691, paragraph 22.
[334] Case C-378/14 *Bundesagentur für Arbeit — Familienkasse Sachsen v Tomislaw Trapkowski* [2015] ECLI:EU:C:2015:720, paragraph 34-35.
[335] Deutscher Bundestag, 2014, Kürzung des Kindergeldes und EU-Recht, PE 6 – 3000 – 08/14, page 15.
[336] Case 381/93 *José Imbernon Martinez v Bundesanstalt für Arbeit* [1995] ECR I-2821, paragraph 21; Joined Cases C-245/94 and C-312/94 *Hoever and Zachow* [1996] ECR I-4895, paragraph 34; Laudacher, M., 2018, Unionsrechtswidrige Indexierung der Familienleistungen Anpassung an ausländisches Preisniveau mit VO (EG) 883/2004 unvereinbar, page 484
[337] Case C-228/88 *Giovanni Bronzino v Kindergeldkasse* [1990] ECR 1-531; Case C-321/93 *Imbernon Martínez* (supra 16), paragraph 21; Joined Cases C-245/94 and C-312/94 *Hoever and Zachow* (supra 73), paragraph 34.

must be regarded as fulfilled, for the purposes of determining entitlement to and the amount of the benefits in question, where the children reside in the territory of another Member State'.[338]

One case of the CJEU is of particular importance. In the *Pinna* case,[339] the Court found that the exceptional provision for France was not allowed by the Treaty. The exception clause for France consisted limiting access to its family benefits for workers whose family was residing in another member state, whereas workers in another Member states were subject to the actual rule of article 67 of Regulation (EC) 883/2004. France was granting benefit in accordance with the amount of benefit granted by the member state of residence. This effect was similar to indexation. Therefore, the result of this case can be transposed to indexation. The President of the CJEU also pointed out

The fiction residence and the result of the case Pinna render impermissible the application of indexation, especially unilaterally.

2.1.2. Article 7 of Regulation (EC) 883/2004: Principle of Exportability

The principle of exportability can be found in the Treaty and follows from article 48 TFEU that provides that a worker or self-employed and its dependent shall be entitled to the 'payment of benefit to persons resident in the territories of Member States.'[340] This rule is translated in Article 7 of Regulation (EC) 883/2004 and provides as follows:

> Waiving of residence rules
>
> 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.

This article aims at securing the freedom of movement for worker and avoid the application of any residence in the granting of social benefit. This means that a worker having a child

[338] Case C-321/93 *Imbernon Martínez* (supra 16), paragraph 22.
[339] Case C-41/84 *Pinna* (supra 12).
[340] Paragraph 1 (b) of article 48 TFEU.

abroad can export the full amount of the benefit received from the state where she/he has a social right.

This article is subject to some exception as regards to certain kind of benefits, the CJEU explained in the case *Lenoir*[341] which benefits were subject to the principle of exportability. In this case, the Court had to deal with a specific child benefit like 'rentrée scolaire' (school expenses), that was granted at each beginning of the year in order to meet school expenses. The reasoning of the court was the following: if the benefit is payable periodically to the recipient's family and is granted only by reference to the number, and where appropriate, the age, then the general rules shall apply. On the contrary, benefits subject to additional conditions such as 'a benefit intended to cover certain costs incurred at the beginning of the school year, are in most cases closely linked with the social environment and therefore with the place where the persons concerned reside.'[342] Then, the principle of exportability shall not apply.

If we compare the conditions of the case *Lenoir* with indexation, it is apparent that the Austrian child benefit is granted on objective criteria, namely the number of children. The benefit is not linked to the cost of living or the place of residence since it is accorded on a lump sum basis throughout Austria. In the case that the benefit would take into account the specific situation of the recipient, such as the average cost of living or housing of the city[343] where the child lives, it could be argued that the benefit is connected to social environment. Since it is not the case in Austria it must be considered that the Austrian child benefit is subject to the principle of exportability.

2.1.3. Article 4 of Regulation (EC) 883/2004: Principle of Equality

2.1.3.1. Application of the principle

Article 4 is a central element of Regulation (EC) 883/2004 and specifically focus on the non-discrimination based on ground of national. It is of great concern since the measure proposed by the Austrian government will affect an important number of migrant workers.

The Court said that the principle of equality 'requires that similar situations shall not be treated differently unless differentiation is objectively justified'.[344] This means that two persons

[341] Case C-313/86 *O. Lenoir v Caisse d'allocations familiales des Alpes-Maritimes* [1988] ECR 5391.
[342] Ibid., paragraph 16.
[343] The average cost of living can vary greatly depending on whether the household lives in a large or small-sized city or in a particular neighbourhood.
[344] Cases 117/76 and 16/77 *Ruckdeschel v Hauptzollamt Hamburg-St Annen* [1977] ECR 1753, paragraph 7; Case C-148/02 *Garcia Avello* [2003] ECR I-11613, paragraph 31.

in 'objectively different'[345] situations (e.g. a parent with two children, another with only one child) can be treated differently. This should not be mistaken with an absolute equality, which simply involves the systematic treatment of all persons in the same way regardless of differences which may exist between them as evocated by Aristotle.[346] Therefore, it is important to determine how people are similarly situated and how a difference in treatment between two individuals in a similar situation is discriminatory, and whether this difference in treatment can be justified.

To clarify this, the court has a discriminatory test that consists of two questions, the first is to find whether one group or another tends to be advantaged by the measure in question, and, secondly, if it does, whether the measure is sufficiently justified, meaning that it is based on objective and legitimate criteria and is proportionate.[347]

In the case of discrimination based on nationality, discrimination would be established when a migrant in the same situation as a national would have limited access to employment or benefit. It will be to the judge to research if they are in the same situation, or in a comparable situation. It doesn't matter if the discrimination is direct, or indirect, emanate from public powers or a private organism.[348]

In our case, the Austrian legislation applies indifferently to migrant workers and Austrian citizens, the only thing that count is the place of residence. Thus, the legislation is apparently based on a neutral criterion. However, this criterion is more easily met by nationals and migrant workers risk to be more exposed to the indexation than Austrians, because it is more common for migrants to have their family residing in another country.[349] Therefore we can deduct that a worker having its children abroad is treated in a different way than a worker having its children as his/her side. The question is, are these workers in the same situation? The Court found in the Case Pinna that these workers were in a comparable situation and have to be treated in the same way. As seen above, the two groups are put in a comparable situation through the fiction of residence. The two groups have to be treated in the same way, since it is not the case, we can

[345] Case C-63/89 *Les Assurances du Crédit SA v Council and Commission* [1991] ECR I-01799.
[346] Barrett, G. Re-examining the Concept and Principle of Equality in EC Law' (2003). *Yearbook of European Law*, *22*, 117.
[347] Case 152/73 *Sotgiu v Deutsche Bundespost* [1974] ECR 153; Case C-237/94 *O'Flynn v Adjudication Officer* [1996] ECR I-2617.
[348] Case 36-74 *B.N.O. Walrave and L.J.N. Koch v Association Union cycliste internationale, Koninklijke Nederlandsche Wielren Unie and Federación Española Ciclismo* [1974] ECR 01405; Case C-415/93 *Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman, Royal club liégeois SA v Jean-Marc Bosman and others and Union des associations européennes de football (UEFA) v Jean-Marc Bosman* [1995] ECR I-4921.
[349] Opinion of Mr Advocate General Mancini, Case 41/84 delivered 21 May 1985, point 6B, page 11; Case 41/84 *Pinna* (supra 12), paragraph 24.

conclude that there exists a discrimination that is prohibited by the treaties. However, it is still possible to justify this infringement, and this should be examined in the next sub-section.

2.1.3.2. Justification to a discriminatory measure

A discrimination, if proven, can nevertheless, be justified. To this end, the court evokes an 'objective justification,'[350] or justification in the 'public or 'general interest' or 'imperative requirement'.[351] All these justifications seem to be 'objective justification' as pointed by Barnard that are recognized to protect national interests which are worthy of protection.[352]

Two possible justification were evocated: the first is linked to economic consideration such as the preservation of the financial balance of the social security system.[353] Marhold and Ludvik argue that this argument is generally not successful.[354] The court recognized that 'budgetary considerations may underlie a Member State's choice of social policy and influence the nature or scope of the social protection measures which it wishes to adopt, they do not in themselves constitute an aim pursued by that policy and cannot therefore justify discrimination against migrant workers.'[355] Thus, in the view of the author, this argument cannot be used by the Austrian government although it seems that the Austrian government made a clear forecast about the substantial economies that the measure would involve. It will be hard to have an economic justification for the Austrian government.

The second justification put forward is the equalisation of the (financial) burdens arising from family or child maintenance.[356] Mazal argue that undifferentiated export of child benefit does not make justice to the principle of equality contained in the treaty and that a relative equal treatment is needed in order to ensure that child benefit are granted in support of the acquisition of concrete goods in need, which is a legitimate regulatory objective.[357] In the opinion of the author, the equalisation of the burden could be a receivable argument if the benefit was really

[350] C-237/94 *O'Flynn* (supra 27).
[351] Case C-76/90 *Manfred Säger v Dennemeyer & Co. Ltd* [1991] ECR I-04221, paragraph 15; Case C-55/94 *Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165, paragraph 37.
[352] Barnard, C. (2013). *The substantive law of the EU: the four freedoms*. Oxford University Press, page 528; Case C-195/98 *Österreichischer Gewerkschaftsbund, Gewerkschaft öffentlicher Dienst v Republik Österreich* [2000] ECR I-10497, paragraph 45.
[353] Case C-158/96 *Raymond Kohll v Union des Caisses de Maladie* [1998] ECR I-1931, paragraph 41.
[354] Marhold F. and Ludvik C., 2018 (supra 46) page 203.
[355] Case C-542/09 *Commission v. Kingdom of the Netherlands* ECLI:EU:C:2012:346, paragraph 57.
[356] Mazal W., 2017 (supra 14) page 41; Caritas, 2018, Stellungnahme der Caritas Österreich zum Entwurf eines Bundesgesetzes, mit dem das Familienlastenausgleichsgesetz 1967 und das Einkommensteuergesetz 1988 geändert warden, page 5, Deustcher Bundestag, 2016 (supra 46), page 31-33.
[357] Mazal W., 2017 (supra 14), page 41.

granted on the basis of true needs and not on a lump sum basis. Therefore, a justification to this discrimination seems not possible.[358]

In the opinion of the author, article 4 prohibiting any discrimination based on nationality renders impermissible the introduction of an indexation of child benefit since indexation would mainly affect migrant workers.

2.2. Regulation (EU) 492/2011 on freedom of movement of workers within the Union

The freedom of movement of worker is a right protected by the treaties, it confers positive and negative obligations to the member states towards migrant workers. These rights are protected and fleshed out by the secondary legislation, namely Regulation (EU) 492/2011. The latter shall only apply to workers. In enjoying rights, workers have a more favourable position because they can also rely on this regulation. It is particularly important in terms of social advantages than can be enjoyed from day one of their arrival in the host state.

Article 7 provides for the *prohibition of any discrimination based on nationality* and provides that migrant workers '*shall enjoy the same social and tax advantages as national workers*.'[359] The solution for Article 4 of Regulation (EC) 883/2004 can be applied to article 7.

Regarding the second paragraph of article 7, the court had an extensive interpretation of the notion of 'social advantages.' Each measure facilitating the migration of workers and their integration into the labor market of the new host state can be included.[360] It covers also advantages for member family which confer an indirect advantage to the worker.[361] The Austrian child benefit whose is not a linked to the statute of worker could then be subject to this provision.

In the case *Martínez Sala*[362] the court has to determine if a benefit like a child raising allowance could be determined as a 'social advantage' within the meaning of article 7(2) of Regulation No 1612/68.[363] The court found that a child raising allowance

> which is automatically granted to persons fulfilling certain objective criteria, without any individual and discretionary assessment of personal needs, and which is intended to meet family expenses, falls within the scope ratione

[358] Deutscher Bundestag 2014 (supra 34), page 20.
[359] Article 7(2) of Regulation (EU) 492/2011 (supra 11).
[360] Barnard, C., & Peers, S., 2017, *European union law*. Oxford University Press, page 390, like access to language rights Case 137/84 *Criminal proceedings against Mutsch* [1985] ECR 2681; access to death benefits, C-237/94 *O'Flynn* (supra 27); rights to be accompanied by the unmarried companions, Case 59/85 *Netherlands v Reed* [1986] ECR 1283.
[361] Case 65/81 *Reina v Landeskreditbank Baden-Württemberg* [1982] ECR 33.
[362] Case C-85/96 *María Martínez Sala v Freistaat Bayern* [1998] ECR I-2691.
[363] Repealed by Regulation (EU) 492/2011 (supra 11).

> materiae of Community law as a family benefit within the meaning of Article 4(l)(h) of Regulation No 1408/71 and as a social advantage within the meaning of Article 7(2) of Regulation No 1612/68.[364]

Therefore, the *Austrian child benefit is a 'social advantage'* to which migrant worker have right on the same basis as national of the host state. The granting of this benefit shall not create a discriminating situation between national workers and migrant workers. The indexation creates an indirect discrimination and is therefore not permitted by article 7 of Regulation (EU) 492/2011 prohibiting any discrimination.

3. Remedies against the unlawful indexation

At the European level, institutions and member states have a direct access to the European Court of Justice However, this direct access is restricted for private parties. The latter shall prefer an action at the national level with a national court which can grant them indirect access to the CJEU through a preliminary reference.

3.1. An action at the European level: Infringement procedure[365]

Through this procedure the Commission will seek to obtain a change in behaviour from Austria. If after the delays provided by the formal letter of notice and the reasoned opinion Austria has not cancelled the contested legislation, the Commission will be allowed to bring a case to the court of justice. If the Court find the law to be contrary to EU law, the Court will require Austria comply with EU law.

3.2. An action before a national court

An individual affected by the reduction in child benefit could bring an action before the national jurisdiction and argue that the Austrian measure is contrary to EU law.

In the proceeding, judges could decide to suspend the proceeding and refer a question to know whether the Austrian measure is compatible with the provisions of Regulation (EC) 883/2004 and Regulation (EU) 492/2011. The court of last resort would be constrained to do so except if it considers that the jurisprudence is clear on the issue. The court of last instance

[364] Case C-85/96 *Martínez Sala* (supra 42), paragraph 28.
[365] At the moment of writing, an infringement procedure has been engaged by the Commission against Austria. European Commission – Indexation of family benefits: Speaking points of Commissioner Thyssen on the Launch of the infringement procedure against Austria, Speech 19/664 made at Brussels.

could then rely on the fact from the case Pinna and assess its comparability with the case at stake. If the law is found to be contrary to European law, the latter will be applied primary

4. Conclusion

The Austrian measures at stake infringes EU law on many aspects. First, the principle of equality present in the Treaties, in article 4 of Regulation (EC) 883/2004 and article 7 of Regulation (EU) 492/2011 prohibits indexation since it treats differently two situations that are deemed comparable. Workers having their kids abroad and those having their kid residing with them are in the same situation according to the CJEU. This is also evidenced with the fiction of residence created by article 67 of Regulation (EC) 883/2004. Therefore, indexation of child benefits creates an impermissible indirect discrimination.

The principle of exportability contained is quite clear about the exportation of benefits. The amount of the latter cannot be modified according to the residence of the beneficiaries. The formulation of this provision is clear regardless of the language of the Regulation.

Finally, the equality of treatment provided for workers in article 7 of Regulation (EU) 492/201 states that workers are entitled to the same ‘social advantages’, child benefits have been recognized as such. A differentiation in the attribution of child benefit would result in an indirect discrimination between.

Against this illegality and in order to protect the rights of migrant workers, this law has to be void. This will be possible through the infringement procedure initiated by the Commission. An individual can also rely on the national judicial system in order to see its rights protected since EU law has the direct effect and primacy over national legal order.