Reports of Cases

OPINION OF ADVOCATE GENERAL
SZPUNAR
delivered on 25 January 2024[1]

Case C-27/23 [Hocinx][i]

FV
v
Caisse pour l'avenir des enfants

(Request for a preliminary ruling from the Cour de cassation (Court of Cassation, Luxembourg))

(Reference for a preliminary ruling – Article 45 TFEU – Social security for migrant workers – Regulation (EC) No 883/2004 – Article 1(i) – Freedom of movement for persons – Equal treatment – Social advantages – Regulation (EU) No 492/2011 – Article 7(2) – Family allowance – Directive 2004/38/EC – Article 2(2) – Concept of 'member of the family' – Exclusion of a child who is the subject of a court placement order – Difference in treatment between a child who is the subject of such an order on the territory of the Member State of residence and a non-resident child – No justification)

I. Introduction

1. May a Member State exclude a cross-border worker from entitlement to a family allowance linked to the pursuit of his or her activity as an employed person in that Member State in respect of a child with whom he or she has no child-parent relationship who has been placed by a court order in his or her household and of whom he or she has custody, whereas children who have been placed in care by a court order in that Member State are entitled to receive that allowance paid to the natural or legal person who has custody of them?

2. That is, in essence, the question referred by the Cour de cassation (Court of Cassation, Luxembourg) in the course of proceedings between FV, a frontier worker residing in Belgium, and the Caisse pour l'avenir des enfants (Children's future fund; 'the CAE') concerning the latter's refusal to grant a family allowance to a child placed by a court order in FV's household who has no child-parent relationship with FV.

[1] Original language: French.

[i] The name of the present case is a fictitious name. It does not correspond to the real name of any party to the proceedings.

3. In that context, the Court is called upon once again to interpret Article 45 TFEU and Article 7(2) of Regulation (EU) No 492/2011,[2] read in conjunction with Article 67 of Regulation (EC) No 883/2004[3] and Article 60 of Regulation (EC) No 987/2009,[4] and must determine whether there is indirect discrimination which is prohibited by the principle of equal treatment of workers.

4. The present case follows on from the case which gave rise to the judgment in *Caisse pour l'avenir des enfants (Child of the spouse of a non-resident worker)*,[5] which concerned the same family allowance from the CAE and gives the Court the opportunity to clarify the extent to which the solution adopted in that judgment can be transposed to the present case, by addressing, in particular, the question whether, for the purposes of granting that family allowance, the concept of 'member of the family' must also include a child placed in the household of a frontier worker.

II. Legal framework

A. European Union law

1. Regulation No 492/2011

5. Article 7 of Regulation No 492/2011 provides:

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

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

…'

2. Regulation No 883/2004

6. Under Article 1 of Regulation No 883/2004:

'For the purposes of this Regulation:

…

(i) "member of the family" means

[2] Regulation of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union (OJ 2011 L 141, p. 1).

[3] Regulation of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ 2004 L 166, p. 1, and corrigendum OJ 2004 L 200, p. 1).

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

[5] Judgment of 2 April 2020 (C-802/18, 'the judgment in *Caisse pour l'avenir des enfants*', EU:C:2020:269).

(1) (i) 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;

(ii) with regard to benefits in kind pursuant to Title III, Chapter 1 on sickness, maternity and equivalent paternity benefits, any person defined or recognised as a member of the family or designated as a member of the household by the legislation of the Member State in which he resides;

(2) If the legislation of a Member State which is applicable under subparagraph (1) 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;

(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;

…'

7. Article 4 of that regulation, entitled 'Equality of treatment', states:

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

8. Under Article 67 of Regulation No 883/2004:

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

3. Regulation No 987/2009

9. Article 60 of Regulation No 987/2009, entitled 'Procedure for applying Articles 67 and 68 of the basic Regulation', provides in paragraph 1:

'The application for family benefits shall be addressed to the competent institution. For the purposes of applying Articles 67 and 68 of the basic Regulation, the situation of the whole family shall be taken into account as if all the persons involved were subject to the legislation of the Member State concerned and residing there, in particular as regards a person's entitlement to claim such benefits. Where a person entitled to claim the benefits does not exercise his right, an application for family benefits submitted by the other parent, a person treated as a parent, or a person or institution acting as guardian of the child or children, shall be taken into account by the competent institution of the Member State whose legislation is applicable.'

4. Directive 2004/38/EC

10. Under Article 2(2) of Directive 2004/38/EC: [6]

'For the purposes of this Directive:

…

2. "family member" means:

…

(c) the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner as defined in point (b);

(d) the dependent direct relatives in the ascending line and those of the spouse or partner as defined in point (b)'.

5. Directive 2014/54/EU

11. Article 1 of Directive 2014/54/EU [7] provides:

'This Directive lays down provisions which facilitate the uniform application and enforcement in practice of the rights conferred by Article 45 TFEU and by Articles 1 to 10 of Regulation [No 492/2011]. This Directive applies to Union citizens exercising those rights and to members of their family …'

12. Under Article 2 of that directive:

'1. This Directive applies to the following matters, as referred to in Articles 1 to 10 of Regulation [No 492/2011], in the area of freedom of movement for workers:

…

(c) access to social and tax advantages;

…

2. The scope of this Directive is identical to that of Regulation [No 492/2011].'

[6] Directive 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 (OJ 2004 L 158, p. 77, and corrigenda OJ 2004 L 229, p. 35 and OJ 2005 L 197, p. 34).

[7] Directive of the European Parliament and of the Council of 16 April 2014 on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers (OJ 2014 L 128, p. 8).

B. Luxembourg law

13. The relevant provisions are Articles 269 and 270 of the code de la sécurité sociale (Social Security Code). [8]

14. Article 269 of the Code, entitled 'Conditions for award', provides in paragraph 1:

'An allowance for children's future, "the family allowance", is hereby established.

The following persons shall give rise to entitlement to the family allowance:

(a) any child actually living in Luxembourg on a continuous basis and officially resident there;

(b) the members of the family, as defined in Article 270, of any person subject to Luxembourg law and covered by EU regulations or any other bilateral or multilateral instrument relating to social security concluded by Luxembourg providing for the payment of family allowances in accordance with the legislation of the country of employment. The family members referred to in this provision must reside in one of the countries to which the regulations or instruments in question apply.'

15. Article 270 of that code provides:

'For the purposes of Article 269(1)(b), the following shall be regarded as members of a person's family and give rise to entitlement to family allowances: children born within marriage, children born outside marriage and adopted children of the person.'

16. Article 273(4) of that code states, with regard to resident children:

'Where a child is placed in custody by a court order, family allowance shall be paid to the natural or legal person who has custody of the child and with whom the child is officially resident and actually lives on a continuous basis.'

III. The facts in the main proceedings, the question referred for a preliminary ruling and the procedure before the Court

17. FV, who works in Luxembourg and resides in Belgium, has frontier worker status and is therefore dependent on the Luxembourg system for family allowances. Since 26 December 2005, the child FW has been placed in FV's household pursuant to a Belgian court order. FV had been in receipt of Luxembourg family allowances for the child FW for several years on account of his status as a frontier worker.

18. With effect from the date of entry into force of the Law of 23 July 2016 which amended the Code, FV ceased to receive family allowances for the child placed in his household. By decision of 7 February 2017, the Governing Board of the CAE withdrew from FV, with retroactive effect from

[8] In the version applicable from 1 August 2016, the date of entry into force of the loi du 23 juillet 2016, portant modification du code de la sécurité sociale, de la loi modifiée du 4 décembre 1967 concernant l'impôt sur le revenu, et abrogeant la loi modifiée du 21 décembre 2007 concernant le boni pour enfant (Law of 23 July 2016 amending the Social Security Code and the Law of 4 December 1967 on income tax, as amended, and repealing the Law of 21 December 2007 on the 'boni pour enfant' (child bonus), as amended) (*Mémorial* A 2016, p. 2348) ('the Code').

1 August 2016, the family allowances received for the child FW on the ground that that child, who has no child-parent relationship with FV, was not a 'member of the family' in accordance with of Article 270 of that code.

19. On 27 January 2022, the conseil supérieur de la sécurité sociale (Higher Social Security Board, Luxembourg) confirmed, by alteration, the decision of the CAE of 7 February 2017. FV has lodged an appeal on a point of law before the Cour de cassation (Court of Cassation).

20. In those circumstances, the Cour de cassation (Court of Cassation), by decision of 19 January 2023, received at the Court on 23 January 2023, decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Do the principle of equal treatment guaranteed by Article 45 TFEU and by Article 7(2) of Regulation [No 492/2011] and the provisions of Article 67 of Regulation [No 883/2004] and Article 60 of Regulation [No 987/2009] preclude provisions enacted by a Member State under which frontier workers may not receive a family allowance associated with their employment in that Member State for children placed in care with them under a court order, whereas any child placed in care under a court order and living in that Member State is entitled to receive that allowance which is paid to the natural or legal person who has custody of the child and with whom the child is officially resident and actually lives on a continuous basis? Does the answer to that question depend on whether the frontier worker provides for the upkeep of that child?'

21. Written observations were submitted to the Court by FV, the CAE and the European Commission. The Court decided not to hold a hearing in the present case.

IV. Analysis

22. By its question for a preliminary ruling, the referring court asks, in essence, whether Article 45 TFEU and Article 7(2) of Regulation No 492/2011, read in conjunction with Article 67 of Regulation No 883/2004 and Article 60 of Regulation No 987/2009, must be interpreted as precluding the legislation of a Member State under which cross-border workers may not receive a family allowance associated with their pursuit of an activity as an employed person in that Member State for children who have been placed with them and of whom they have custody, whereas children who have been placed in care by a court order in that Member State are entitled to receive that allowance paid to the natural or legal person who has custody of the child, and whether the fact that the frontier worker provides for the maintenance of the child has a bearing on the answer to that question.

23. As regards the situation at issue in the main proceedings, I would point out that, by decision of 7 February 2017, the CAE, relying on Articles 269 and 270 of the Code, held that FV was no longer entitled, with retroactive effect from 1 August 2016, to the family allowance for the child FW, on the ground that that child had no child-parent relationship with him and, consequently, could not be regarded as a member of his family under Article 270 of that code.[9] As the referring court

[9] It is apparent from the documents submitted to the Court that it was under the former Article 269(5) and Article 270(5) of the Code that FV was entitled, until 1 August 2016, to Luxembourg family allowances for the child FW on account of his status as a frontier worker. In addition, the former Article 270(5) of that code allowed the competent authorities *to extend the family unit of the guardian or actual custodian to children placed in custody by a court order*.

states, the situation of a child placed in care by a court order in the household of a cross-border worker is not provided for by that code and therefore does not give rise to entitlement to that family allowance. [10]

24. With regard to the legislation at issue, the referring court explains that a resident child has, in all cases, a direct right to the payment of family benefits. [11] However, for non-resident children, such a right is provided for only by secondary law for 'members of the family' of the cross-border worker, who do not include children placed by a court order in the household of such a worker. [12] That court, referring in particular to the judgment in *Caisse pour l'avenir des enfants*, therefore wishes to ascertain whether that difference in treatment is consistent with EU law. It follows from that judgment that a 'child of a cross-border worker' who is able to benefit indirectly from social advantages must also be understood to mean a child who has a child-parent relationship with the spouse or registered partner of the worker in question.

25. FV and the Commission take the view that the provisions at issue in the main proceedings constitute indirect discrimination on grounds of nationality. By contrast, the CAE contends that, in the present case, the child FW has no child-parent relationship with the cross-border worker or with his spouse. It maintains, therefore, that FV cannot rely on the principle of equal treatment either directly and personally or in respect of members of his family.

26. In order to answer the question referred by the referring court, I shall, in the first place, briefly examine the applicability of Regulations No 883/2004 and No 492/2011 to facts such as those at issue in the main proceedings (Section A); in the second place, I shall set out the relevant case-law of the Court on the principle of equal treatment in the context of freedom of movement for workers by referring, in particular, to the judgment in *Caisse pour l'avenir des enfants* (Section B); in the third place, I shall address the concept of 'member of the family' for the purposes of granting a family allowance (Section C); in the fourth place, in the light of the case-law, I will consider the interpretation of Article 45 TFEU, read in conjunction, inter alia, with Regulations No 883/2004 and No 492/2011, in order to determine whether the legislation at issue in the main proceedings constitutes indirect discrimination for the purposes of Article 45 TFEU and Article 7(2) of Regulation No 492/2011, by examining, in particular, the arguments put forward by the CAE (Section D); and, in the fifth and last place, I will clarify what impact the fact that the frontier worker provides for the maintenance of the child has on the proposed answer (Section E).

[10] The former Article 269(5) of the Code provided that 'persons subject to Luxembourg law are entitled, *in respect of children residing abroad who have the status of members of their family*, to family allowances in accordance with the relevant provisions of Community regulations … relating to social security'. Moreover, the former Article 270(5) of that code provided that 'the National Family Benefits Fund *may extend the family unit* of the guardian or actual custodian to children taken in by a person exercising guardianship or custody rights by virtue of a final court order with the force of res judicata or any other statutory custody measure, duly certified by the competent authority, provided that the placement is permanent and that that solution is more favourable for the beneficiary'. Emphasis added.

[11] See Article 273(4) of the Code.

[12] See Article 269(1) and Article 270 of the Code.

A. The applicability of Regulations No 883/2004 and No 492/2011 to facts such as those at issue in the main proceedings

27. In view of the Court's extensive case-law on social security benefits and social advantages available to migrant and cross-border workers for their children [13] and, in particular, the fact that the Court has already ruled, in the judgment in *Caisse pour l'avenir des enfants*, on the applicability of Regulations No 883/2004 and No 492/2011 to a family allowance such as that at issue in the main proceedings, I shall be brief as regards that question. [14]

28. I note, first of all, that a worker such as FV who, while working in Luxembourg and therefore subject to Luxembourg social security legislation, resides in Belgium, [15] falls, in accordance with Article 2(1) of Regulation No 883/2004, within the scope *ratione personae* of that regulation. [16]

29. As regards, next, the scope *ratione materiae* of Regulation No 883/2004, the Court has already held, in the judgment in *Caisse pour l'avenir des enfants*, that a family allowance, such as that provided for in Article 269(1)(a) of the Code, is a social security benefit falling within the scope of family benefits, within the meaning of Article 1(z) of that regulation. [17] First, the Court stated that such an allowance is paid for all children residing in Luxembourg and for all children of non-resident workers who have a child-parent relationship with those workers. That benefit is, in consequence, granted without any individual and discretionary assessment of personal needs, on the basis of a legally defined situation. [18] Second, the Court observed that that allowance appears to represent a public contribution to a family's budget intended to alleviate the financial burdens involved in caring for children. [19]

30. As regards, lastly, Regulation No 492/2011, [20] the Court has repeatedly recalled that the purpose of Article 7(2) of that regulation is to achieve equal treatment, and therefore the concept of a 'social advantage', extended by that provision to workers who are nationals of other Member

[13] With regard to grants for maintenance and training for the pursuit of university studies for professional purposes, see, in particular, judgment of 21 June 1988, *Lair* (39/86, EU:C:1988:322, paragraphs 21 to 24); with regard to grants for maintenance and training with a view to the pursuit of secondary or further education, see, in particular, judgment of 15 March 1989, *Echternach and Moritz* (389/87 and 390/87, EU:C:1989:130, paragraphs 31 to 36); and, with regard to study finance granted by a Member State to the children of migrant workers, see judgment of 26 February 1992, *Bernini* (C-3/90, EU:C:1992:89, paragraphs 23 and 29).

[14] I would point out that, in the judgment in *Caisse pour l'avenir des enfants*, the Court transposed its case-law on financial aid for higher education to family allowances for the children of cross-border workers; see judgments of 20 June 2013, *Giersch and Others* (C-20/12, EU:C:2013:411), and of 15 December 2016, *Depesme and Others* (C-401/15 to C-403/15, 'the judgment in *Depesme and Others*', EU:C:2016:955).

[15] Article 1(f) of Regulation No 883/2004 provides that '"frontier worker" means any person pursuing an activity as an employed or self-employed person in a Member State and who resides in another Member State to which he returns as a rule daily or at least once a week'.

[16] Article 2(1) of Regulation No 883/2004 provides that 'this Regulation shall apply to nationals of a Member State … [or] 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'.

[17] Article 1(z) of Regulation No 883/2004 provides that '"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'.

[18] Judgment in *Caisse pour l'avenir des enfants* (paragraphs 37 and 39). See, also, judgments of 14 June 2016, *Commission* v *United Kingdom* (C-308/14, EU:C:2016:436, paragraph 60), and of 21 June 2017, *Martinez Silva* (C-449/16, EU:C:2017:485, paragraph 22 and the case-law cited).

[19] Judgment in *Caisse pour l'avenir des enfants* (paragraphs 38 and 39). See, also, judgment of 21 June 2017, *Martinez Silva* (C-449/16, EU:C:2017:485, paragraph 23 and the case-law cited).

[20] It is settled case-law that a benefit may be covered simultaneously by Regulation No 883/2004 and Regulation No 492/2011. See, in particular, with regard to birth and maternity allowances, judgment of 10 March 1993, *Commission* v *Luxembourg* (C-111/91, EU:C:1993:92, paragraphs 20 and 22). See, also, judgment in *Caisse pour l'avenir des enfants* (paragraphs 43 and 45). Article 7(2) of Regulation No 492/2011 constitutes the link between those two regulations, since they overlap as regards both the concept of 'social advantage' and the principle of non-discrimination. See, inter alia, Morsa, M., *Sécurité sociale, libre circulation et citoyenneté européennes*, Anthemis, 2012, p. 49. With regard to the relationship between those regulations, see, also, Opinion of Advocate General Richard de la Tour in *Commission* v *Austria (Indexation of family benefits)* (C-328/20, EU:C:2022:45, point 127).

States, must include all advantages which, whether or not linked to a contract of employment, are generally granted to national workers primarily because of their objective status as workers or by virtue of the mere fact of their residence on the national territory and the extension of which to workers who are nationals of other Member States therefore seems suitable to facilitate their mobility within the European Union and, consequently, their integration into the host Member State. [21]

31. It is in the light of that concept that the Court has also held that a family allowance linked to the pursuit of an activity as an employed person by a frontier worker, such as FV in the present case, constitutes a social advantage within the meaning of Article 7(2) of Regulation No 492/2011. [22]

32. Accordingly, there is little doubt that a family allowance such as that referred to in Article 269(1)(a) of the Code falls within the material scope of EU law as a *family benefit*, within the meaning of Article 3(1)(j) of Regulation No 883/2004, and as a *social advantage*, in accordance with Article 7(2) of Regulation No 492/2011. [23]

B. Case-law of the Court

1. Brief overview of the case-law on the principle of equal treatment in the context of the free movement of workers

33. As we know, Article 45 TFEU secures freedom of movement for workers within the European Union. That freedom is one of the foundations of the European Union. In particular, paragraph 2 of that article provides that freedom of movement for workers entails the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.

34. It was in the judgment in *Kempf* [24] that the Court first referred to the principle that the provisions laying down the freedom of movement for workers must be given a broad interpretation. [25] Such a broad interpretation stems from the fact that the term 'worker' – and 'activity as an employed person' – defines the sphere of application of one of the fundamental freedoms guaranteed by the Treaty. [26]

35. In that context, Article 7(2) of Regulation No 492/2011 is, according to settled case-law, the particular expression, in the specific area of the grant of social advantages, of the principle of equal treatment enshrined in Article 45(2) TFEU, and must be accorded the same interpretation

[21] The Court defined the concept of 'social advantage' for the first time in its judgment of 31 May 1979, *Even and ONPTS* (207/78, EU:C:1979:144, paragraph 22). Since then, that definition has been reiterated many times in its case-law. See, inter alia, judgments of 12 May 1998, *Martínez Sala* (C-85/96, EU:C:1998:217, paragraph 25), and of 18 December 2019, *Generálny riaditeľ Sociálnej poisťovne Bratislava and Others* (C-447/18, EU:C:2019:1098, paragraph 47 and the case-law cited).

[22] Judgment in *Caisse pour l'avenir des enfants* (paragraphs 25, 30 and 31 and the case-law cited).

[23] Judgment in *Caisse pour l'avenir des enfants* (paragraph 45 and the case-law cited). Article 3(1)(j) of Regulation No 883/2004 provides that 'this Regulation shall apply to all legislation concerning the following branches of social security: … family benefits'.

[24] Judgment of 3 June 1986 (139/85, EU:C:1986:223, paragraph 13).

[25] See, also, judgments of 18 June 1987, *Lebon* (316/85, EU:C:1987:302, paragraph 23); of 26 February 1991, *Antonissen* (C-292/89, EU:C:1991:80, paragraph 11); of 26 February 1992, *Bernini* (C-3/90, EU:C:1992:89, paragraph 14); and of 6 November 2003, *Ninni-Orasche* (C-413/01, EU:C:2003:600, paragraph 23). See, more recently, judgments of 21 February 2013, *N.* (C-46/12, EU:C:2013:97, paragraph 39), and in *Depesme and Others* (paragraph 58).

[26] Judgments of 3 June 1986, *Kempf* (139/85, EU:C:1986:223, paragraph 13); of 3 July 1986, *Lawrie-Blum* (66/85, EU:C:1986:284, paragraph 16); and in *Depesme and Others* (paragraph 58).

as the latter provision.[27] Thus, workers who have already entered the employment market, as is the case with FV, may claim, on the basis of the former provision, the same social advantages as national workers.[28] The Court has repeatedly held that that provision equally benefits both migrant workers and frontier workers.[29]

36. Moreover, as the Court has pointed out on numerous occasions, the principle of equal treatment laid down in Article 45(2) TFEU and Article 7(2) of Regulation No 492/2011 prohibits not only direct discrimination on grounds of nationality but also all indirect forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result.[30]

37. In particular, the Court held in the judgment in *Caisse pour l'avenir des enfants*, which is at the heart of the concerns raised by the referring court, that EU law does preclude provisions of a Member State according to which frontier workers are entitled to receive a family allowance, on the basis of the fact that they pursue an activity as employed persons in that Member State, solely for their own children, and not for a spouse's children with whom those workers have no child-parent relationship, but whom those workers support, whereas any child residing in that Member State is entitled to receive that allowance.[31]

38. As I stated in my introduction, the question arises whether such a response by the Court can be transposed to the situation of FV at issue in the main proceedings, that is to say that of a child who has been placed by a court order in the household of a cross-border worker. I must therefore examine whether, in the light of the fundamental principles derived from the case-law of the Court recalled above, the legislation at issue is liable to create a difference in treatment in respect of frontier workers which could constitute indirect discrimination on grounds of nationality.

39. That said, in view of the differences between the legal situation of a child placed in care by a court order and that of a child who has a child-parent relationship, including an adoptive relationship, with one or both parents with whom he or she lives, a preliminary question arises: must the concept of 'member of the family', for the purposes of granting the family allowance at issue, also include a child placed in the household of the frontier worker?

40. For the reasons which I will set out below, I am convinced that that question must be answered in the affirmative.

27 See, inter alia, judgments of 23 February 2006, *Commission* v *Spain* (C-205/04, EU:C:2006:137, paragraph 15); of 20 June 2013, *Giersch and Others* (C-20/12, EU:C:2013:411, paragraph 35); in *Depesme and Others* (paragraph 35); and of 6 October 2020, *Jobcenter Krefeld* (C-181/19, EU:C:2020:794, paragraph 44). As a reminder, the wording of Article 7(2) of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community was reproduced in Article 7(2) of Regulation No 492/2011. Moreover, the second paragraph of Article 41 of Regulation No 492/2011 provides that references to Regulation No 1612/68 are to be construed as references to Regulation No 492/2011.

28 See, to that effect, judgment in *Depesme and Others* (paragraph 36).

29 See, inter alia, judgments of 18 July 2007, *Geven* (C-213/05, EU:C:2007:438, paragraph 15), and of 18 December 2019, *Generálny riaditeľ Sociálnej poisťovne Bratislava and Others* (C-447/18, EU:C:2019:1098, paragraph 41).

30 Judgments of 12 February 1974, *Sotgiu* (152/73, EU:C:1974:13, paragraph 11); of 23 May 1996, *O'Flynn* (C-237/94, EU:C:1996:206, paragraph 17); of 13 April 2010, *Bressol and Others* (C-73/08, EU:C:2010:181, paragraph 40); of 10 July 2019, *Aubriet* (C-410/18, EU:C:2019:582, paragraph 26); and in *Caisse pour l'avenir des enfants* (paragraph 54).

31 Judgment in *Caisse pour l'avenir des enfants* (paragraph 64 and operative part). Point (b) of the second subparagraph of Article 269(1) of the Code was amended by the Law of 23 December 2022 (*Mémorial* A-2022-668 of 23.12.2022) to include, in the concept of 'members of the family', the children of the spouse or partner for whom the person referred to in that article provides maintenance and with whom that person shares, with his or her spouse or partner, an official common place of residence and actually lives on a continuous basis.

2. The judgment in Caisse pour l'avenir des enfants*: the concept of 'family member' within the meaning of Article 2(2) of Directive 2004/38*

41. The question whether the concept of 'family member' must, for the purposes of granting family allowance, also include a child placed in the household of the frontier worker, is important in so far as, in the judgment in *Caisse pour l'avenir des enfants*, the Court relied on the concept of 'member of the family' in accordance with Article 2(2) of Directive 2004/38. [32]

42. In the case which gave rise to the judgment in *Caisse pour l'avenir des enfants*, unlike the present case, [33] the referring court sought to ascertain, by its second question, whether the definition of 'family member' laid down in Article 2(2) of Directive 2004/38 was applicable to the family allowance referred to in Article 269(1)(a) of the Code and, if so, by its third question, whether the exclusion of the child of a spouse from the definition of a 'member of the family' in Article 270 of the Code constituted indirect discrimination.

43. In order to answer those two questions, the Court relied, inter alia, on paragraphs 40 and 64 of the judgment in *Depesme and Others*, recalling, first, that the members of a migrant worker's family are the indirect beneficiaries of the equal treatment granted to that worker under Article 7(2) of Regulation No 492/2011 and, second, that Article 45 TFEU and Article 7(2) of Regulation No 492/2011 must be interpreted as meaning that a child of a frontier worker, who is able to benefit indirectly from the social advantages referred to in the latter provision, means not only a child who has a child-parent relationship with that worker, but also a child of the spouse or registered partner of that worker, in the case where that worker provides for the upkeep of that child. [34] It therefore held that the concept of a 'member of the family' of a frontier worker able to benefit indirectly from equal treatment under Article 7(2) of Regulation No 492/2011 is the same as that of a 'family member' for the purposes of Article 2(2) of Directive 2004/38, which includes the spouse or partner with whom the EU citizen has contracted a registered partnership. [35]

44. I share that conclusion. I would point out that the Court has, in particular, taken into consideration, in that regard, first, the development of EU legislation [36] and the fact that Article 7(2) of Regulation No 492/2011 simply reproduced the wording of Article 7(2) of Regulation No 1612/68 without amendment and, second, recital 1, Article 1 and Article 2(2) of Directive 2014/54. The latter provisions confirm the intention of the EU legislature to reproduce in Article 2 of Directive 2004/38 the concept of 'member of the family' as defined in the case-law of the Court relating to Regulation No 1612/68, repealed and replaced by Regulation No 492/2011. [37]

[32] I note that the backdrop to the questions raised in that case was, as in the present case, the reform of the family benefits system in Luxembourg, which entered into force on 1 August 2016 and which had amended the Code by excluding, inter alia, the children of a spouse or registered partner from the definition of 'members of a person's family' in Article 270 thereof. See judgment in *Caisse pour l'avenir des enfants* (paragraph 17).

[33] As I have already stated, it is clear from the documents before the Court that the situation of the child in care did not fall within the concept of 'member of the family' in the former Article 270 of the Code. However, paragraph 5 of that article provided for the possibility of extending the family unit of the guardian or actual custodian to children placed by a court order in the household of a cross-border worker. That factor enables a better understanding of the terms used by the referring court to formulate its question.

[34] Judgment in *Caisse pour l'avenir des enfants* (paragraphs 49 and 50).

[35] Judgment in *Caisse pour l'avenir des enfants* (paragraph 51). See, also, judgment in *Depesme and Others* (paragraphs 51 to 54).

[36] See judgment in *Depesme and Others* (paragraphs 46 and 47), and Opinion of Advocate General Wathelet in those joined cases (C-401/15 to C-403/15, EU:C:2016:430, points 39 to 43).

[37] I note that recital 1 of Directive 2014/54 states that 'the free movement of workers is a fundamental freedom of Union citizens and one of the pillars of the internal market in the Union enshrined in Article 45 [TFEU]. Its implementation is further developed by Union law aiming to guarantee the full exercise of rights conferred on Union citizens and the members of their family. "Members of their family" should be understood as having the same meaning as the term defined in point (2) of Article 2 of Directive [2004/38], *which applies also to family members of frontier workers*.' Emphasis added. See point 10 of this Opinion.

45. Admittedly, the fact that the Court relied in that judgment on the concept of 'family member' within the meaning of Article 2(2) of Directive 2004/38 might suggest that that fact precludes the concept of 'member of the family' from being considered, *for the purposes of granting a family allowance in the context of the free movement of workers*, as including inter alia a child placed in care by a court order in the household of a cross-border worker.

46. However, I am convinced that this is not the case for the reasons which I shall set out below.

C. The concept of 'member of the family' in the specific context of equal treatment of cross-border workers

47. In the first place, as I have already noted,[38] unlike in the case which gave rise to the judgment in *Caisse pour l'avenir des enfants*, the referring court does not ask the Court whether, in accordance with Article 2(2) of Directive 2004/38, the scope of Article 270 of the Code should be extended to include children placed in custody by a court order. That court merely asks whether, as regards entitlement to the family allowances at issue, the difference in treatment between a non-resident child placed by a court order in the household of a cross-border worker and a resident child placed in care by a court order is consistent with EU law.

48. The legal issue at the heart of the dispute in the main proceedings is therefore not the possibility of regarding children placed in care by a court order as 'members of the family' in the legal systems of the Member States, but the right to *freedom of movement and equal treatment of a cross-border worker*. While the persons entitled to family benefits are to be determined in accordance with national law,[39] the fact remains that, as the Court has repeatedly held, when exercising those powers, Member States must comply with EU law, in this case the provisions relating to the free movement of workers.[40]

49. In that context, in order to determine the 'family members' of a worker, it should be recalled, as I have already pointed out,[41] that freedom of movement for workers within the European Union is based on a number of principles, including the principle of equal treatment. The implementation of that principle in the field of social security is, moreover, ensured by EU legislation which is based, inter alia, on the principle that the legislation of a single Member State is to apply in that field.[42] Thus, in order to guarantee the equality of treatment of all persons occupied in the territory of a Member State as effectively as possible, according to Article 4 of Regulation No 883/2004 read in the light of recital 8 thereof,[43] a person who is, inter alia, employed in a Member State is *subject, as a general rule, to the legislation of that Member State* and, in accordance with that article, is to enjoy the same benefits there as the nationals of that State. The Court has repeatedly held that migrant workers contribute to the financing of the

[38] See point 42 of this Opinion.

[39] See Article 67 of Regulation No 883/2004 and Article 60 of Regulation No 987/2009.

[40] Judgment in *Caisse pour l'avenir des enfants* (paragraphs 68 and 69 and the case-law cited). See, also, Article 1 of Regulation No 883/2004.

[41] See point 33 et seq. of this Opinion.

[42] That principle, laid down in Article 11(1) of Regulation No 883/2004, seeks to eliminate unequal treatment which, for workers moving within the European Union, would be the consequence of a partial or total overlapping of the applicable legislation.

[43] Recital 8 of Regulation No 883/2004 states that 'the general principle of equal treatment is of particular importance for workers who do not reside in the Member State of their employment, *including frontier workers*.' Emphasis added.

social policies of the host Member State through the tax and social security contributions which they pay in that State by virtue of their employment there. They must therefore be able to profit from them under the same conditions as national workers. [44]

50. Similarly, Article 7(2) of Regulation No 492/2011 provides that the worker from another Member State is to enjoy the same social advantages as national workers. As I have already pointed out, those two provisions give concrete expression, in their respective fields, to the principle of equal treatment laid down in Article 45(2) TFEU, which protects the workers concerned against any discrimination, direct or indirect, based on nationality resulting from the national laws of the Member States, and must be interpreted in the same way as the latter provision. [45]

51. In the second place, account should be taken of the principle that the provisions establishing the free movement of workers, which constitutes one of the foundations of the Union, must be construed broadly. [46] That means, in my opinion, that, *in the context of equal treatment of workers*, the concept of 'member of the family' must be interpreted broadly, so that it also covers, where appropriate, persons other than those listed in Article 2(2) of Directive 2004/38, in particular a child placed under long-term legal guardianship by a court order, *where they are in a situation comparable to that of a child covered by that provision.* [47]

52. In that regard, I would point out that recital 31 of Directive 2004/38 states that that directive respects the fundamental rights and freedoms and observes the principles recognised, in particular, by the Charter of Fundamental Rights of the European Union ('the Charter').

53. The principle of the primacy of the best interests of the child, recognised in Article 24(2) of the Charter, is one of the principles permeating the EU legal order. [48] The Court has held that that principle is the prism through which the provisions of EU law must be read. [49] In its case-law, the Court also takes into account the interest of children in maintaining their family life, protected by Article 7 of the Charter, [50] which corresponds to Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. [51] It follows from the case-law of the

44 See, inter alia, judgment of 16 June 2022, *Commission* v *Austria (Indexation of family benefits)* (C-328/20, EU:C:2022:468, paragraphs 108 and 109 and the case-law cited). See, inter alia, Fuchs, M. and Cornelissen, R. (eds), *EU Social Security Law – A Commentary on EU Regulations 883/2004 and 987/2009*, C.H. Beck-Hart-Nomos, 2015, p. 151.

45 See point 35 of this Opinion.

46 Judgments of 18 June 1987, *Lebon* (316/85, EU:C:1987:302, paragraphs 21 to 23), and in *Depesme and Others* (paragraph 58).

47 It follows from point 2.1.2 of the Communication from the Commission to the European Parliament and the Council of 2 July 2009 on guidance for better transposition and application of [Directive 2004/38] (COM(2009) 313 final) that a child under the legal guardianship of a Union citizen falls within the concept of 'direct descendant' within the meaning of Article 2(2)(c) of that directive. See, in that connection, Guild, E., Peers, S. and Tomkin, J., *The EU Citizenship Directive. A Commentary*, 2nd edition, Oxford University Press, Oxford, 2019, p. 43.

48 Article 24(2) of the Charter provides for the right of children to have their best interests a primary consideration in all actions concerning them. For an overview of the EU acquis on the rights of the child, see European Commission, DG Justice, *EU Acquis and Policy Documents on the Rights of the Child*, December 2015, p. 1 to 83.

49 See, inter alia, judgment of 13 September 2016, *Rendón Marín* (C-165/14, EU:C:2016:675, paragraphs 66, 81 and 85). See, also, judgment of 31 May 2018, *Valcheva* (C-335/17, EU:C:2018:359, paragraph 36), and my Opinion in that case (C-335/17, EU:C:2018:242, points 33 to 38).

50 See, inter alia, judgments of 10 May 2017, *Chavez-Vilchez and Others* (C-133/15, EU:C:2017:354, paragraph 70), and of 26 March 2019, *SM (Child placed under Algerian kafala)* (C-129/18, EU:C:2019:248, paragraph 67).

51 Convention signed at Rome on 4 November 1950. It follows from the explanations relating to the Charter (OJ 2007 C 303, p. 17) that, in accordance with Article 52(3) of the Charter, the rights guaranteed in Article 7 thereof have the same meaning and scope as those guaranteed in Article 8 of that convention. Judgment of 26 March 2019, *SM (Child placed under Algerian kafala)* (C-129/18, EU:C:2019:248, paragraph 65 and the case-law cited).

European Court of Human Rights that the existence of de facto family life between foster parents and a child placed with them must take into account a number of elements, such as the time spent together, the quality of the relationship and the role played by the adult vis-à-vis the child. [52]

54. In the present case, the following information is apparent from the order for reference and the documents before the Court. First, the child FW was placed by a court order of a Member State, namely Belgium, in the household of FV and his wife and the couple have two biological children together; second, that court placement is of a lasting nature since the child FW has lived in FV's household since 2005, thus since very early childhood; [53] third, FV has custodial rights over the child FW and provides directly for the upkeep of FW and, fourth and lastly, the child FW is officially resident and actually lives on a continuous basis with FV.

55. Those factors must be taken into account by the competent authorities in order to determine, after examining the actual family situation of the worker concerned, whether the child placed in the household of a cross-border worker is in, *in fact*, a 'member of the family' of that worker for the purposes of granting family allowances.

56. Lastly, in the third place, I would point out that it follows from Article 1(2)(d) of Regulation (EU) 2019/1111 [54] that the placement of a child in foster care falls within the scope of that regulation and that it follows from Article 30(1) of that regulation that a decision given in a Member State must be recognised in the other Member States without any special procedure being required. Therefore, in the present case, the competent Luxembourg authorities are required to recognise a court placement order for the purposes of granting the family allowance at issue.

57. In the light of those considerations, I take the view that a child who is placed by a court order in the household of a frontier worker must, for the purposes of granting the family allowance, fall within the scope of a 'member of the family', since that concept also covers persons other than those listed in Article 2(2) of Directive 2004/38.

58. It is still necessary to examine whether, in the light of the fundamental principles derived from the case-law of the Court to which I have referred, [55] the legislation at issue is liable to create a difference in treatment in respect of frontier workers which could constitute indirect discrimination on grounds of nationality.

[52] ECtHR, 22 November 2010, *Moretti and Benedetti v. Italy* (CE:ECHR:2010:0427JUD001631807, § 48).

[53] It is apparent from the information before the Court that the court placement of the child FW took place before that child reached the age of one year.

[54] Council Regulation of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (OJ 2019 L 178, p. 1).

[55] See point 33 et seq. of this Opinion.

D. Does the legislation at issue constitute indirect discrimination for the purposes of Article 45 TFEU and Article 7(2) of Regulation No 492/2011?

1. The difference in treatment based on residence

59. The CAE submits, relying on paragraph 51 of the judgment in *Caisse pour l'avenir des enfants*, that, in so far as a child placed by a court order in the household of a cross-border worker does not have a child-parent relationship with that worker or with his or her spouse, that worker cannot rely on the principle of equal treatment in respect of that child. The CAE argues that the present case must therefore be distinguished from the case which gave rise to that judgment.

60. I do not share that view. Although the two cases may to some extent be distinguished, I am of the opinion that that distinction does not, however, concern the comparability of the situation of the children concerned with regard to the grant of the family allowance at issue.

61. First of all, it is true that the situation of children who have been placed by a court order in the household of a cross-border worker is legally distinct from that of children who have a child-parent relationship, including an adoptive relationship, with one or both of the parents with whom they live. However, in accordance with the case-law, discrimination occurs when different rules are applied to comparable situations or when different situations are subject to the same rule.[56] According to settled case-law, the objective comparability of the two groups must be examined having regard to the aim pursued by the provision at issue.[57] As I have already noted, the family allowance at issue in the main proceedings constitutes a social advantage falling within the scope of Article 7(2) of Regulation No 492/2011,[58] which prohibits all indirect forms of discrimination.

62. In accordance with the case-law of the Court, a distinction based on residence – which is liable to operate mainly to the detriment of nationals of other Member States as non-residents are, in the majority of cases, foreign nationals – constitutes indirect discrimination on the ground of nationality which is permissible only if it is objectively justified.[59]

63. With regard to the present case, I would point out that it is apparent from the order for reference that, under Article 269(1)(a) of the Code, all children actually *living* in Luxembourg on a continuous basis and officially resident there give rise to entitlement to the family allowance. In the context of that category of resident children, Article 273(4) of the Code provides that, in the case of placement by a court order, that allowance is to be paid to the natural or legal person who has custody of the child and with whom that child is officially resident and actually lives on a continuous basis. However, a child placed by a court order with a frontier worker and, therefore, a *non-resident*, who has custody of that child does not give rise to entitlement to that allowance. In accordance with Article 269(1)(b) and Article 270 of the Code, for a frontier worker, only children born within marriage, children born outside marriage and adopted children of that person give rise to entitlement to the family allowance.

[56] See, inter alia, judgment of 17 July 2008, *Raccanelli* (C-94/07, EU:C:2008:425, paragraph 47 and the case-law cited).

[57] See, inter alia, judgment of 14 June 2012, *Commission* v *Netherlands* (C-542/09, EU:C:2012:346, paragraph 42).

[58] Judgment in *Caisse pour l'avenir des enfants* (paragraphs 37, 38 and 39). See point 29 of this Opinion.

[59] Judgment in *Caisse pour l'avenir des enfants* (paragraph 56 and the case-law cited).

64. It follows from the national legislation at issue in the main proceedings that all children resident in Luxembourg may claim the family allowance concerned, which means that *all children* forming part of the household of a *worker resident* in Luxembourg may claim that allowance, including children placed in the household of that worker by a court order. However, *non-resident workers* are not entitled to claim that allowance in respect of *children placed in their household by a court order* with whom they do not have a child-parent relationship.

65. I therefore consider that that legislation establishes two different regimes as regards entitlement to the family allowance depending on whether or not the children reside in Luxembourg, thus introducing a difference in treatment which is based on a *criterion of residence* and, therefore, prohibited by Article 45(2) TFEU and Article 7(2) of Regulation No 492/2011. Such a distinction based on residence with regard to the grant of a social advantage is, in my view, liable to operate mainly to the detriment of cross-border workers and, accordingly, constitutes indirect discrimination on the ground of nationality which is permissible only if it is objectively justified. [60]

66. Finally, the Court noted that the fact that, under the national legislation at issue in the main proceedings, entitlement to the family allowance at issue in those proceedings is conferred directly on the child residing in Luxembourg, including children who have been placed in care by a court order, whereas, for non-resident workers, the entitlement is conferred on the worker, in respect of the members of that person's family as defined by that legislation, is irrelevant for that purpose. It is clear from the case-law of the Court that family benefits, *by their very nature, cannot be regarded as payable to an individual in isolation from his or her family circumstances*. [61]

2. Justification for the indirect discrimination against cross-border workers

67. The Court has consistently held that, in order to be justified, indirect discrimination must be appropriate for securing the attainment of a legitimate objective and must not go beyond what is necessary to attain that objective. [62]

68. In the present case, the referring court does not point to any justification and, subject to the checks which it is required to carry out, I see no legitimate objective capable of justifying discrimination between a child placed in care by a court order in Luxembourg and a child placed by a court order in the household of a cross-border worker.

69. Accordingly, I take the view that Article 45 TFEU and Article 7(2) of Regulation No 492/2011, read in conjunction with Article 67 of Regulation No 883/2004 and Article 60 of Regulation No 987/2009, must be interpreted as precluding the legislation of a Member State under which cross-border workers may not receive a family allowance associated with their pursuit of an activity as an employed person in that Member State in respect of children who have been placed with them and of whom they have custody, whereas children who have been placed in care by a court order in that Member State are entitled to receive that allowance paid to the natural or legal person who has custody of the child.

[60] Judgment in *Caisse pour l'avenir des enfants* (paragraph 56 and the case-law cited).

[61] Judgment in *Caisse pour l'avenir des enfants* (paragraph 57 and the case-law cited).

[62] Judgment in *Caisse pour l'avenir des enfants* (paragraph 58 and the case-law cited).

E. The impact on the proposed answer of the fact that the frontier worker provides for the upkeep of the child

70. The referring court also wishes to know whether the fact that the frontier worker provides for the upkeep of the child has an impact on the answer to the question referred for a preliminary ruling.

71. I must point out that it is clear from paragraph 50 of the judgment in *Caisse pour l'avenir des enfants* that, as regards the requirement that the frontier worker provides for the upkeep of the child, the Court held that that requirement must also result from a *factual situation*, which it is for the national authorities and, if appropriate, the national courts, to assess, on the basis of evidence provided by the applicant, and it is not necessary for them to determine the reasons for that contribution or to make a precise estimation of its amount.

72. In that regard, I consider it relevant to state that, as the Commission has rightly pointed out, that condition must be applied with regard to the grant of a family allowance to a non-resident worker *only* if the national legislation lays down such a condition for the grant of that allowance to a resident who has custody of the child placed in his or her household and with whom that child is officially resident and actually lives on a continuous basis. A different conclusion would be contrary to the *equal treatment of non-resident and resident workers*. In that vein, I am of the opinion that any requirement with regard to the grant of a family allowance that the frontier worker must *fully* support the child in care cannot be accepted if that requirement does not apply to the resident who has custody of the child in care, since the obligation to provide maintenance or the possible participation in the maintenance of the child by the biological parents, if they are known, does not, *in fact*, result in the cross-border worker with whom the child has been placed in care not participating in that maintenance. In any event, the biological parents' contribution to the child's maintenance may be either very limited or non-existent because of their often very precarious situation. [63]

V. Conclusion

73. In the light of all the foregoing considerations, I propose that the Court should answer the question referred for a preliminary ruling by the Cour de cassation (Court of Cassation, Luxembourg) as follows:

Article 45 TFEU and Article 7(2) of Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union, read in conjunction with Article 67 of Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems and Article 60 of 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 systems,

must be interpreted as precluding the legislation of a Member State under which cross-border workers may not receive a family allowance associated with their pursuit of an activity as an employed person in that Member State for children who have been placed with them and of whom they have custody, whereas children who have been placed in care by a court order in that

[63] The reasons for placing young children in foster care can be due to the complete absence of parents, but also to problems relating to housing, health, poverty, abuse, violence, addiction or even difficulties for parents in assuming their parental role or authority.

Member State are entitled to receive that allowance paid to the natural or legal person who has custody of the child. The application of a condition in relation to the grant of a family allowance to a non-resident worker under which that worker must provide for the maintenance of the child must be applicable only if the national legislation lays down such a condition for the grant of that allowance to a resident who has custody of the child placed in his or her household and with whom that child is officially resident and actually lives on a continuous basis.