



Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

16 September 2015*

(Failure of a Member State to fulfil obligations — Regulation (EC) No 883/2004 — Article 7 — Article 21 — Sickness benefit — Care allowance, assistance allowance and compensatory allowance for extra costs — Residence requirement)

In Case C-433/13,

ACTION for failure to fulfil obligations under Article 258 TFEU, brought on 31 July 2013,

European Commission, represented by A. Tokár, D. Martin and F. Schatz, acting as Agents, with an address for service in Luxembourg,

applicant,

v

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

defendant,

THE COURT (First Chamber),

composed of A. Tizzano, President of the Chamber, S. Rodin, A. Borg Barthet, E. Levits (Rapporteur) and M. Berger, Judges,

Advocate General: E. Sharpston,

Registrar: A. Calot Escobar,

having regard to the written procedure,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

- 1 By its application, the European Commission asks the Court to declare that, by failing to grant to beneficiaries residing in a Member State other than the Slovak Republic care allowance, assistance allowance and a compensatory allowance for increased costs provided for by Law No 447/2008 on benefits to compensate for severe disability, amending and supplementing certain laws, as amended

* Language of the case: Slovak.

(‘Law No 447/2008’), the Slovak Republic has failed to fulfil its obligations under Article 48 TFEU and Articles 7 and 21 of Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ 2004 L 166, p. 1 and corrigendum OJ 2004 L 200, p. 1), as amended by Regulation (EC) No 988/2009 of the European Parliament and of the Council of 16 September 2009 (OJ 2009 L 284, p. 43) (‘Regulation No 883/2004’).

Legal context

EU law

- 2 Recital 16 in the preamble to Regulation No 883/2004 reads:

‘Within the Community there is in principle no justification for making social security rights dependent on the place of residence of the person concerned; nevertheless, in specific cases, in particular as regards special benefits linked to the economic and social context of the person involved, the place of residence could be taken into account.’

- 3 Recital 37 in the preamble to that regulation is worded as follows:

‘As the Court of Justice has repeatedly stated, provisions which derogate from the principle of the exportability of social security benefits must be interpreted strictly. This means that they can apply only to benefits which satisfy the specified conditions. It follows that Chapter 9 of Title III of this Regulation can apply only to benefits which are both special and non-contributory and listed in Annex X to this Regulation.’

- 4 Article 3 of Regulation No 883/2004, headed ‘Matters covered’, states:

‘1. This Regulation shall apply to all legislation concerning the following branches of social security:

(a) sickness benefits;

...

2. Unless otherwise provided for in Annex XI, this Regulation shall apply to general and special social security schemes, whether contributory or non-contributory, and to schemes relating to the obligations of an employer or shipowner.

3. This Regulation shall also apply to the special non-contributory cash benefits covered by Article 70.

...

5. This Regulation shall not apply to:

(a) social and medical assistance;

...’

5 Under Article 7 of Regulation No 883/2004, entitled ‘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/her family reside in a Member State other than that in which the institution responsible for providing benefits is situated.’

6 Article 21 of that regulation, entitled ‘Cash benefits’, provides:

‘1. An insured person and members of his/her family residing or staying in a Member State other than the competent Member State shall be entitled to cash benefits provided by the competent institution in accordance with the legislation it applies. By agreement between the competent institution and the institution of the place of residence or stay, such benefits may, however, be provided by the institution of the place of residence or stay at the expense of the competent institution in accordance with the legislation of the competent Member State.

...’

7 Article 70 of that regulation provides:

‘...’

2. For the purposes of this Chapter, “special non-contributory cash benefits” means those which:

(a) 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,

and

(b) where the financing exclusively derives from compulsory taxation intended to cover general public expenditure and the conditions for providing and for calculating the benefits are not dependent on any contribution in respect of the beneficiary. However, benefits provided to supplement a contributory benefit shall not be considered to be contributory benefits for this reason alone,

and

(c) are listed in Annex X.

3. Article 7 and the other chapters of this Title shall not apply to the benefits referred to in paragraph 2 of this Article.’

Slovak law

8 Article 1 of Law No 447/2008 entitled ‘Subject matter’, provides:

‘1. This Law regulates the legal relationships relating to the grant of benefits to offset the social consequences of severe disability ... and seeks to determine the need for appropriate support in accordance with the specific rules.

2. The purpose of regulating the legal relationships mentioned in paragraph 1 is to contribute to the social integration of severely disabled persons, with their active participation and respecting their human dignity, under the conditions and in the areas defined by this Law.’

9 Article 3(1) of that law provides:

‘The parties to the legal relationships referred to by this Law are

(a) natural persons who are:

1. citizens of the Slovak Republic who are permanently or temporarily resident in Slovakia, in accordance with the specific rules, or
2. foreign citizens who are nationals of a Member State of the European Union, nationals of a State party to the Agreement on the European Economic Area or nationals of the Swiss Confederation (‘the EEA’), who are registered as having their permanent residence in Slovakia, in accordance with the specific rules, and who work or study in an educational establishment recognised by the State in Slovakia, or
3. foreign citizens, who are nationals of an EEA State and who are registered as having their permanent residence in Slovakia for an unlimited period in accordance with the specific rules, or
4. family members of a foreign citizen referred to in paragraph 2 and who have the right of permanent residence in Slovakia, or
5. foreign citizens who are family members of a Slovak citizen who has his permanent residence in Slovakia, who have the right to permanent residence in Slovakia in accordance with the specific rules, or
6. foreign citizens who are not nationals of an EEA State, whose right to compensation is guaranteed by an international convention to which the Slovak Republic is a party and which is published in the Statute Book of the Slovak Republic, or
7. foreign nationals who have the right to asylum in accordance with the specific rules,

...’

10 Article 10(1) of that law provides that ‘the examination for the purpose of offsetting [the social consequences of a severe disability, ‘compensation’] and for obtaining a disability certificate ... shall consist in a medical examination and a social examination’.

11 Under Article 11(11) of Law No 447/2008, ‘the medical examination shall give rise to a medical opinion, which shall include the degree of functional impairment, a finding that the person concerned has a serious disability, findings relating to the various types of dependency experienced by the severely disabled person, set out in Article 14, and the period within which a medical review should be carried out, except where this Law provides otherwise ...’

12 Article 13 of that law governs the social examination which is to include the evaluation of the individual capacities of the severely disabled person, his family background and his environment, including an assessment of the transport systems and housing conditions, in particular, the accessibility of public buildings.

13 Article 14 of that law lists the types of dependency experienced by the severely disabled person for the purposes of compensation. That article lays down the conditions under which a severely disabled person is to be considered to be dependent on personal assistance, care, a device, adaptations to the device, lifting equipment, adaptations to a personal motor vehicle, modifications to accommodation, the family home or garage, or individual transport by a personal motor vehicle, compensation for the extra costs generated by a specific diet or bodily care regime, or costs linked to wear and tear to clothing, household linen, shoes, furniture and on a carer.

14 Under Article 15 of Law No 447/2008, entitled ‘Detailed examination’

‘1. On the basis of the medical examination referred to in Article 11(11) and the findings of the social examination referred to in Article 13(9), for the purpose of compensation, the competent authority shall prepare a detailed report which includes the following information:

- (a) the degree of functional impairment,
- (b) a finding as to whether the person concerned is severely disabled,
- (c) the social consequences of the severe disability in all the areas concerned by the compensation,
- (d) a proposal as to the type of benefit to be granted as compensation,
- (e) a finding, where appropriate, that the severely disabled person is dependent on a carer.
- (f) a finding, where appropriate, that the severely disabled person is dependent on individual transport by a personal motor vehicle, or is affected by legal blindness or total blindness in both eyes,
- (g) the period within which there is to be a medical review, if it is fixed by the medical expert,
- (h) the reasons for the detailed report.

2. If the severely disabled person is dependent on care provided by another person in the form of personal assistance, the detailed report shall also contain an indication, expressed the number of hours per year, of the extent of the personal assistance the severely disabled person requires for each activity listed in Annex 4.

...’

15 Article 18 of that law sets out provisions relating to the examination and determination of the income and assets of the severely disabled person for the purpose of granting the compensatory benefits.

16 Article 20 of that law, which governs personal assistance, provides:

‘1. Personal assistance is care provided to a severely disabled person to carry out the activities listed in Annex 4. That assistance shall be provided by a personal carer.

2. Personal assistance is intended to help severely disabled persons with their mobility, to aid their social integration and independence, to give them the opportunity to take decisions and influence the family dynamic and to aid them in the performance their professional, educational and leisure activities.’

- 17 Article 21 of Law No 44/2008, concerning the examination of the extent of the need for personal assistance, provides:

‘1. The extent of the need for personal assistance shall be determined in accordance with the activities listed in Annex 4 that the severely disabled person is unable to perform by himself, and the number of hours required for that purpose.

...

3. The number of hours of personal assistance does not include the hours of personal assistance during which the severely disabled person receives residential care on a daily or weekly basis. A severely disabled person who receives residential care on an annual basis may be offered personal assistance in the form of accompaniment to an educational establishment, if that establishment is not situated on social services premises or on the premises of the socio-legal protection services for children and the legal guardianship services.

...’

- 18 Article 22 of that law governs the personal assistance allowance as follows:

‘1. A severely disabled person who, after a detailed examination carried out in accordance with Article 15(1), is found to be dependent on personal assistance, may receive an allowance for that purpose if the personal assistance is provided for the activities listed in Annex 4.

...

7. The personal assistance allowance shall be paid in accordance with the extent of the personal assistance for one year expressed in euros. The amount of that allowance shall be reduced by the amount of increase in the incapacity pension paid for the entire calendar year.

...

9. If the income of the severely disabled person is greater than four times the minimum subsistence income for an adult ... the amount corresponding to four times the minimum subsistence income for an adult ... shall be deducted from the income of the severely disabled person. If the result of that deduction is less than the amount corresponding to the extent of the personal assistance expressed in euros, the amount of the personal assistance allowance shall be equal to that difference. If the difference between the income of the severely disabled person and the amount represented by four times the minimum subsistence income for an adult ... is greater than the amount corresponding to the extent of the personal assistance expressed in euros, personal assistance allowance shall not be granted; paragraphs 7 and 8 shall apply *mutatis mutandis*.

10. The hourly rate for personal assistance for the purpose of calculating the amount of the allowance shall be equal to 1.39% of the minimum subsistence income for an adult ...

11. The personal assistance allowance shall be paid each month on presentation of a time sheet for the personal assistance provided in the previous month.

12. The personal assistance allowance shall be paid to a severely disabled person or, with the written consent of that person, to a personal assistance agency if the severely disabled person has concluded with that agency an agreement for assistance for the performance of administrative acts which provides *inter alia* for payment to be made to a personal assistant.

...'

19 Article 23(9) and (10) of that law provide that a severely disabled person is required to submit a timesheet for the number of hours of personal assistance worked each month to the competent authority so that those hours may be invoiced together with a confirmation of the remuneration paid each month to a personal assistant.

20 Article 38 of Law No 447/2008 on the compensatory allowance for extra costs provides:

'1. A severely disabled person who, following a detailed examination undertaken pursuant to Article 15(1), is declared to be dependent on compensation for excess costs may, except where provided otherwise by this Law, receive an allowance for extra costs

(a) generated by a specific dietary regime;

(b) related

(1) to a specific bodily care regime or to wear and tear on clothing, household linen, shoes and furniture,

(2) to maintaining a personal motor vehicle,

(3) to the upkeep of a specially trained dog,

2. The need shall be examined separately with respect to each of the items of extra cost listed in paragraph 1.

...

4. The amount of the monthly compensatory allowance for extra costs for a specific dietary regime shall be equal to

(a) 18.56% of the minimum subsistence income for an adult ... for the diseases and disorders listed in Annex 5, Group 1;

(b) 9.28% of the minimum subsistence income for an adult for the diseases and disorders listed in Annex 5, Group 2;

(c) 5.57% of the minimum subsistence income for and adult ... for the diseases and disorders listed in Annex 5, Group 3;

...

10. The amount of the compensatory monthly allowance for extra costs related to the maintenance of a personal motor vehicle shall be equal to 16.70% of the minimum subsistence income for an adult ...

...

14. The amount of the monthly allowance for compensation for extra costs related to the upkeep of a specially trained dog shall be equal to 22.27% of the minimum subsistence income for an adult ...

...

17. the allowance for compensation extra costs shall not be paid if the income of the severely physically disabled person is greater than three times the minimum subsistence income for an adult ...

...'

21 Article 39 of that law, relating to care, provides:

'1. For the purposes of this Law, 'care' means assistance given to a severely disabled person who is dependent on care in accordance with Article 14(4), except where this Law provides otherwise.

2. The care is intended to provide daily assistance to a severely disabled person for personal care, household tasks and social activities, in order to maintain the person concerned in his normal home environment.'

22 Under Article 40 of that Law, entitled 'Care Allowance':

'1. If an individual as described in paragraphs 3 and 4 cares for a severely disabled person of more than 6 years of age who, following a detailed examination undertaken in accordance with Article 15(1), has been declared dependent on care, that individual may receive an allowance for that purpose.

...

7. The amount of the monthly care allowance shall be equal to 111.32% of the minimum subsistence income for an adult ... for the care of a severely disabled person and 148.42% of the minimum subsistence income for an adult ... for the care of at least two severely disabled persons, unless this Law provides otherwise.

8. The amount of the monthly care allowance shall be equal to 98.33% of the minimum subsistence allowance for an adult ... if the severely disabled person who is dependent on home care on a daily basis or attends an educational institution for more than 20 hours per week. The amount of the monthly care allowance shall be equal to 139.15% for the minimum subsistence allowance for an adult ... if the individual cares for at least two severely disabled persons dependent on care and who receive home care on a daily basis or attend an educational establishment more than 20 hours per week.

9. The amount of the monthly care allowance shall be equal to 144.7% of the minimum subsistence income for an adult ... if the individual cares for a severely disabled person dependent on care who receives home care or attends an educational institution more than 20 hours per week and, at the same time, provides care for another severely disabled person dependent on care who does not receive home care on a daily basis or receives a maximum of 20 hours per week, or who does not attend an educational institution or who does so for a maximum of 20 hours per week.

10. If the individual who provides the care mentioned in paragraphs 3 and 4 receives an old age pension, an early old age pension, an invalidity pension on account of an incapacity of more than 70% for the purpose of carrying out paid work, a military or police pension, the amount of the monthly care allowance shall equal 46.38% of the minimum subsistence income for an adult ... and 61.22% of the minimum subsistence allowance for an adult ... for care of at least two severely disabled persons, except where this Law provides otherwise. The reduction of the allowance provided for in paragraph 12 shall not apply.

...

12. If the income of the severely disabled person is greater than 1.4 times the minimum subsistence income for an adult ... the amount of the care allowance referred to in paragraphs 7 to 9 shall be reduced by the amount exceeding that income; if the severely physically disabled person is a dependent child, and if his income exceeds three times the minimum subsistence income for an adult ... the care allowance shall be reduced by the difference between those amounts.

...

15. The care allowance may also be paid if the individual who provides care for a severely disabled person is in paid employment, if the monthly income from that employment is not more than double the minimum subsistence income for an adult ... that employment cannot however be incompatible with the purpose and amount of the care for the severely disabled person.

...

18. The amount of the care allowance shall be reduced *pro rata* for the days spent by the severely disabled person in an establishment dispensing in-patient medical care, if the length of the stay exceeds 30 days. The amount of the care allowance shall be reduced for days spent by the severely disabled person in an 'open air school', in a centre for social integration, or in a place of recreation. The amount of the care allowance shall not be reduced pursuant to the second sentence of this paragraph if the individual provides care for the severely disabled person during his stay at the 'open air school', the place for social integration or the place of recreation. Overpayments of the care allowance may be taken into account in the amount to be paid in the following calendar months.

...'

- 23 Article 42 of Law No 447/2008 lays down common provisions concerning the grant of compensatory allowances. According to that article:

'1. Allowances shall not be paid outside the territory of the Slovak Republic. If a severely disabled person travels outside Slovakia for a period of more than 60 consecutive days, the compensatory allowances shall be stopped and their payment shall be suspended from the first day of the calendar month after the month in which the 60-day period expired.

2. The personal assistance allowance and the care allowance cannot be granted if another State of the EEA pays, for personal assistance or care for the severely disabled person, an allowance or contribution having the same purpose.

...'

- 24 Article 43 of that law, entitled 'Entitlement to compensatory allowances and their payment ...', provides:

'1. The right to a compensatory allowance and its payment shall arise from a valid decision of the competent authority recognising that right.

...'

The pre-litigation procedure

- 25 The Commission states that it has received a large number of complaints concerning the non-payment of various benefits to persons entitled to Slovak pensions, who are recognised as dependent on care, and who have moved to the Czech Republic in order to live with their adult children. Accordingly, by letter of 17 March 2010, the Commission informed the Slovak authorities that, in its view, the care allowance, personal assistance allowance and compensatory allowance for extra costs ('the benefits at issue') had the characteristics of sickness benefits, within the meaning of Article 3(1)(a) of Regulation No 883/2004 and, therefore, that they should be paid, in accordance with Article 21 thereof, to the beneficiaries of those benefits and their family members residing in the Czech Republic.
- 26 Having initially indicated that it was going to take the measures necessary to comply with Regulation No 883/2004, the Slovak Republic did not, however, change its practice and, in response to another letter from the Commission, argued that the benefits at issue did not fall within the scope of that regulation, on the ground that they did not relate to any of the categories of risk referred to in Article 3(1) thereof.
- 27 Since it disagreed with that opinion, the Commission sent the Slovak Republic a letter of formal notice, which it received on 26 March 2012, stating that the benefits at issue had to be regarded as sickness benefits, within the meaning of Regulation No 883/2004, and that, in accordance with Article 21 thereof, the payment of those benefits could not be dependent on the beneficiary's place of residence.
- 28 The Slovak Republic replied to the letter of formal notice by a letter dated 25 May 2012, arguing that the benefits at issue did not fall within the scope of Regulation No 883/2004 because they were paid after an individual examination of the beneficiary's social and economic circumstances.
- 29 Not being persuaded by the Slovak Republic's arguments, on 25 October 2012, the Commission sent a reasoned opinion to the Slovak authorities which they received the same day. In that reasoned opinion, the Commission stated, in particular, that the conditions to be fulfilled in order to qualify for the benefits at issue were defined by the national legislation in a general and objective manner, without the competent authorities having discretionary powers in that regard. Therefore, it would be incorrect to state that the benefits at issue did not correspond to any of the categories of risk referred to in Article 3(1) of Regulation No 883/2004. Furthermore, according to the Commission, those benefits could not be regarded as special non-contributory cash benefits, within the meaning of Article 70(2) of Regulation No 883/2004.
- 30 Therefore, the Commission took the view that, by refusing to grant the benefits at issue to beneficiaries residing outside Slovak territory, the Slovak Republic has failed to fulfil its obligations under Article 48 TFEU and Articles 7 and 21 of Regulation No 883/2004, and called on that Member State to take the measures necessary to comply with the reasoned opinion within a period of two months from its reception.
- 31 In response to that reasoned opinion, the Slovak Republic indicated, in a letter dated 20 December 2012, that it maintained the position that the benefits at issue did not fall within the scope of Regulation No 883/2004 on the ground that they did not relate to any of the categories of risk referred to in Article 3(1) of that regulation, since their purpose was to integrate disabled persons into society, not to improve their state of health.
- 32 In those circumstances, the Commission decided to bring the present action.

The action

Admissibility

Arguments of the parties

- 33 As its principal argument, the Slovak Republic pleads that the action is inadmissible on the ground that during the pre-litigation phase of the infringement proceedings the Commission did not express its views on the fundamental issues relied on by the Slovak Republic in support of its defence, but instead examined other issues which were not disputed between the parties.
- 34 First, the Commission did not reply to the arguments seeking to establish that the benefits at issue were measures of ‘social assistance’, within the meaning of Article 3(5) of Regulation No 883/2004, which are excluded from the scope of that regulation. Therefore, the Commission has failed to comply with the condition requiring the proper conduct of the pre-litigation procedure (order in *Commission v Spain*, C-266/94, EU:C:1995:235, paragraph 25) and failed to define the subject-matter of the dispute with sufficient clarity. Second, the Commission alleged that, during the pre-litigation phase, the Slovak Republic had claimed that the benefits at issue constituted ‘special non-contributory cash benefits’ covered by Article 70 of Regulation No 883/2004, whereas that is not the case. Those incorrect allegations by the Commission made the originating application confusing.
- 35 The Commission contends that it has neither broadened nor changed the subject-matter of the dispute and has not prejudiced the Slovak Republic’s rights of defence. First, it stated, both in its letter of formal notice and in its reasoned opinion, that it did not classify the determination of the income of the beneficiaries of the benefits at issue as an individual and discretionary assessment of their circumstances, for the purposes of the case-law of the Court in that regard. Although it is true that the subject-matter of proceedings brought under Article 258 TFEU is circumscribed by the pre-litigation procedure provided for in that provision and that, consequently, the Commission’s reasoned opinion and the application must be based on the same objections, that requirement cannot go so far as to mean that in every case exactly the same wording must be used in both, where the subject-matter of the proceedings has not been extended or altered (judgment in *Commission v Germany*, C-433/03, EU:C:2005:462, paragraph 28). In addition, the Commission submits that it follows from the judgments in *Commission v Ireland* (C-362/01, EU:C:2002:739, paragraphs 18 to 20) and *Commission v Luxembourg* (C-519/03, EU:C:2005:234, paragraph 21) that the failure to take account of the answer of the Member State concerned to the letter of formal notice and the reasoned opinion does not lead to the inadmissibility of that action.
- 36 Second, in order to give a ruling on the dispute concerned, it is necessary to know whether Article 70 of Regulation No 883/2004 is applicable in the present case. Thus, the Commission could deal with that issue without being asked to do so by the Slovak Republic.
- 37 Alternatively, the Slovak Republic claims that the Commission’s action is inadmissible in so far as concerns the complaint relating to the infringement of Article 48 TFEU, since that complaint was not mentioned in the letter of formal notice and was raised for the first time only at the stage of the reasoned opinion.
- 38 While it takes the view that the objection of partial inadmissibility actually concerns the substance of the case, the Commission argues that by failing to pay the benefits at issue to beneficiaries residing outside its territory, the Slovak Republic infringes both Regulation No 883/2004 and the principle of exportability of benefits laid down in Article 48 TFEU.

Findings of the Court

- 39 As regards the objection of inadmissibility of the Commission's action raised by the Slovak Republic as its principal argument, it should be recalled that the purpose of the pre-litigation procedure is to give the Member State concerned the opportunity to comply with its obligations arising from EU law or to present its defence effectively against the complaints put forward by the Commission. The proper conduct of that procedure constitutes an essential guarantee not only in order to protect the rights of the Member State concerned, but also so as to ensure that any contentious procedure will have a clearly defined dispute as its subject-matter (see, *inter alia*, *Commission v France*, C-1/00, EU:C:2001:687, paragraph 53; *Commission v Germany*, C-135/01, EU:C:2003:171, paragraph 19 and 20; and *Commission v Netherlands*, C-79/09, EU:C:2010:171, paragraph 21).
- 40 Thus, the pre-litigation procedure pursues the following three objectives: to allow the Member State to put an end to any infringement, to enable it to exercise its rights of defence and to define the subject-matter of the dispute with a view to bringing an action before the Court (judgments in *Commission v Ireland*, C-362/01, EU:C:2002:739, paragraph 18; *Commission v Germany*, C-135/01, EU:C:2003:171, paragraph 21; and *Commission v Netherlands*, C-79/09, EU:C:2010:171, paragraph 22).
- 41 In accordance with the foregoing, it is, in principle, for the Commission to set out, in its reasoned opinion, its assessment of the observations made by the Member State in its response to the letter of formal notice (see judgments in *Commission v Ireland*, C-362/01, EU:C:2002:739, paragraph 19, and *Commission v Germany*, C-135/01, EU:C:2003:171, paragraph 22).
- 42 However, in the present case, the fact that the Commission responded only briefly or not at all to the arguments of the Slovak Republic seeking to establish that the benefits at issue were measures of 'social assistance', within the meaning of Article 3(5) of Regulation No 883/2004, even if established, has no effect on the delimitation of the subject-matter of the dispute and does not make it impossible for that Member State to put an end to the alleged infringement, nor has it prejudiced the rights of the defence.
- 43 The Commission stated, both in its letter of formal notice and in its reasoned opinion, that it considered that the benefits at issue were social security benefits and that it did not classify the determination of income of the beneficiaries of the benefits at issue as an individual and discretionary assessment for the purposes of the relevant case-law of the Court. By such an analysis, the Commission excluded the applicability of Article 3(5) of Regulation No 883/2004 on social assistance.
- 44 Contrary to the Slovak Republic's arguments, the fact that, in its originating application, the Commission examined the applicability of Article 70 of Regulation No 883/2004 to the benefits at issue in order to show that they did not fall within the scope of that article, without the Slovak Republic expressing its views on that issue in the pre-litigation phase, even though, in any event, the parties agree before the Court that that article is not applicable in the present case, does not either constitute an infringement of the Slovak Republic's rights of defence or an inadequate delimitation of the subject-matter of the dispute.
- 45 First, during the pre-litigation procedure, having consistently stated that the benefits at issue were 'social security benefits', within the meaning of Article 3(1) of Regulation No 883/2004, which should therefore be exportable, the Commission clearly conferred on them the legal classification that it considered appropriate and thereby identified the subject-matter of the dispute. In so far as the concept of 'social security benefit', within the meaning of Article 3(1) thereof, and the concept of 'special non-contributory cash benefits', within the meaning of Article 3(2) and 70 of that regulation, are mutually exclusive (judgment in *Hosse*, C-286/03, EU:C:2006:125, paragraph 36), the Commission's argument as to the inapplicability of Article 70 to the benefits at issue, raised during the pre-litigation procedure, falls within the scope of the dispute thus delimited, without extending it.

- 46 Second, since there is no rule of procedure which requires the Member State concerned to put forward, during the pre-litigation procedure, all the arguments in its defence, in an application based on Article 258 TFEU (see judgments in *Commission v Spain*, C-414/97, EU:C:1999:417, paragraph 19, and *Commission v Netherlands*, C-34/04, EU:C:2007:95, paragraph 49), the Commission cannot be criticised for having presented, in its application, arguments relating to the inapplicability of Article 70 of Regulation No 883/2004 to the benefits at issue, even though the Slovak Republic has not invoked the applicability of that provision in the pre-litigation procedure, while retaining the right to do so in the contentious procedure.
- 47 The objection of inadmissibility raised by the Slovak Republic as its principal argument must be rejected.
- 48 As far as concerns the objection of partial admissibility of the action, based on the fact that the infringement of Article 48 TFEU was raised for the first time only at the stage of the reasoned opinion, it must be noted that the letter of formal notice of 22 March 2013 does not mention the complaint alleging infringement of that article, but merely states that Article 21 of Regulation No 883/2004 implements Article 48 TFEU.
- 49 Furthermore, although the Commission states in its originating application that Regulation No 883/2004 must be interpreted in the light of Article 48 TFEU, it does not contain any arguments specifically in support of the complaint relating to the infringement of Article 48 TFEU, but derives that infringement from the infringement of the provisions of Regulation No 883/2004.
- 50 It follows that the present action is not admissible in as far as it seeks a declaration that the Slovak Republic has failed to fulfil its obligations under Article 48 TFEU.

Substance

Arguments of the parties

- 51 The Commission claims that benefits at issue must be classified as ‘sickness benefits’ within the meaning of Article 3(1)(a) of Regulation No 883/2004. Accordingly, they must also be paid to beneficiaries who do not or who no longer have their habitual residence in Slovakia. Limiting the right of such beneficiaries to the benefits at issue fails to comply with Articles 7 and 21 of Regulation No 883/2004.
- 52 First of all, the benefits at issue are granted without any individual and discretionary assessment of the personal needs of the claimants on the basis of a legally defined situation. The criteria for assessing the state of health and the social and financial circumstances of applicants derive from Law No 447/2008 and are objective and binding on the competent authorities. The latter’s decision may be subject to judicial review in order to ensure compliance with the conditions for eligibility for the benefits at issue laid down by that law and its objectives. The fact that the Slovak authorities apply an additional criterion when they decide to grant the benefits at issue, consisting in an examination as to whether the compensation for a disability may be made by other valid means, does not mean that those authorities have discretion in that regard. It is clear from Articles 43 to 48 of Law No 447/2008 that the validity of that additional criterion may also be subject to review by the courts and that its application forms part of the applicable rules.
- 53 Law No 447/2008 defines the criteria pursuant to which a person may receive the benefits at issue, limiting in this way the discretion of the authorities responsible for its application. Further, although it is true that those authorities have discretion in granting those benefits, the discretion is exercised within the limits laid down by that law. While noting the discretionary character of the benefits at

issue, the Najvyšší súd Slovenskej republiky (Supreme Court of the Slovak Republic) confirmed, in the judgment concerning the benefits at issue, relied on by the Slovak Republic, that the benefits may be granted only to persons who meet the conditions laid down by that Law.

- 54 Next, the Commission states that, in accordance with the case-law of the Court, benefits granted objectively on the basis of a statutorily defined position and which are intended to improve the state of health and quality of life of persons reliant on care have as their essential purpose supplementing sickness insurance benefits and must be regarded as ‘sickness benefits’ for the purpose of Article 3(1)(a) of Regulation No 883/2004 (see, in particular, judgments in *Gaumain-Cerri and Barth*, C-502/01 and C-31/02, EU:C:2004:413, paragraph 20; *Hosse*, C-286/03, EU:C:2006:125, paragraph 38; and *Commission v Parliament and Council*, C-299/05, EU:C:2007:608, paragraph 61).
- 55 Thus, first, it is clear from Articles 39(2) and 40(1) of Law No 447/2008, that the care allowance is a benefit enabling persons dependent on care to offset the extra costs generated by their state of health. Although that allowance has particular characteristics, it must be regarded as a ‘sickness benefit’, for the purposes of Article 3(1)(a) of Regulation No 883/2004.
- 56 Second, under Article 20(2) of Law No 447/2008, personal assistance is intended to improve the mobility of severely disabled persons, to contribute to their social integration and their independence, to give them the opportunity to take decisions and influence the family dynamic and to help in undertaking professional, educational and leisure activities. The purpose of the personal assistance allowance is therefore to supplement sickness benefits and to improve the conditions and quality of life of persons dependent on this assistance. The personal assistance allowance consists of financial aid, and the fact that it is paid on the presentation of a timesheet of the hours of personal assistance worked in the previous month does not enable it to be classified as benefits in kind.
- 57 Third, the compensatory allowance for extra costs must also be regarded as a ‘sickness benefit’, for the purpose of Article 3(1)(a) of Regulation No 883/2004, since its aim is to enable severely disabled persons to lead a more fulfilling life. In accordance with Article 38(1) of Law No 447/2008, that allowance may be granted in order to compensate for the extra costs generated by a specific dietary regime or related to a specific bodily care regime, for wear and tear to clothing, household linen, shoes and furniture, the running of a personal motor vehicle or the upkeep of a specially trained dog. The Court has already held that a similar allowance granted in Sweden had to be considered as a ‘sickness benefit’ (*Commission v Parliament and Council*, C-299/05, EU:C:2007:608, paragraph 62).
- 58 The benefits at issue are intended to cover the risk of dependence and not to compensate the material deprivation of the beneficiaries, because they do not raise the income of the beneficiaries to the level of the minimum subsistence income, but may be granted to them even where their income exceeds 1.4 to 4 times the minimum subsistence income.
- 59 Finally, since the benefits at issue cover risks listed by Regulation No 883/2004, they are not measures of social assistance. Nor are they ‘special non-contributory cash benefits’ within the meaning of Article 70(2) of Regulation No 883/2004.
- 60 The Slovak Republic claims, in the first place, that the personal assistance allowance is a benefit in kind, since, pursuant to Article 22(11) of Law No 447/2008, it is paid each month on presentation of an hourly timesheet for the hours of personal assistance worked in the previous month. A benefit in kind may also be granted in the form of money, if the amounts are paid by the competent authority on presentation of proof of the costs incurred.
- 61 In the second place, the care allowance, compensatory allowance for extra costs, and — to a lesser extent — the personal assistance allowance aim to compensate for material deprivation for a category of beneficiaries and have the characteristics of social assistance benefits, excluded, by virtue of Article 3(5)(a) of Regulation No 883/2004, from the scope of that regulation.

- 62 First, those benefits are closely linked to the socio-economic circumstances of their beneficiaries and are not intended to improve their state of health or, in a general manner, their situation of dependency or to offset the extra costs engendered by their state of health. Those benefits aim to contribute to social integration of severely disabled persons whose income is low and who have modest assets. The improvement in the quality of life of their recipients is a logical and intended consequence of their improved social integration, but does not lead to the conclusion that those benefits are sickness benefits within the scope of Regulation No 833/2004.
- 63 Second, the individual circumstances of the benefit claimants are the subject of various examinations, at the end of which a report relating to the detailed examination is compiled. On that basis, the competent authority adopts a decision as to whether to grant a benefit. Even if the claimant meets all the criteria giving entitlement to a benefit, the grant of such a benefit is discretionary and the entitlement to the benefit is not guaranteed, since the authority may decide, in the light of the specific circumstances, not to grant it. Law No 447/2008 does not impose any particular decision on the administrative authority, but allows it to adopt the best possible decision, taking account of the specific features of each situation in a manner consistent with the general interest, by way of an individual assessment of the needs of the severely disabled person in a manner which respects the purpose and objective of that law.
- 64 The Slovak Republic bases its arguments in that respect on the terms ‘may receive or be offered’ in Articles 22(1), 38(1) and 40(1) of Law No 447/2008, on Article 52(o) of Law No 447/2008, which provides that the Agency for Employment, Social Affairs and the Family shall ‘carry out a review of the appropriateness of the compensation’, on the case-law of the Slovak courts, according to which the allowances provided for by Law No 447/2008 are discretionary benefits, and Article 43(1) of Law No 447/2008, which provides that the right to a compensatory allowance and its payment arise from a valid decision of the competent authority as to the recognition of that right.
- 65 Furthermore, the Slovak Republic takes the view that the non-contributory nature and method of financing of the three benefits at issue, associated with the purpose and the conditions of their payment, confirm their character of social assistance benefits.
- 66 In the alternative, the Slovak Republic claims that the three allowances at issue do not have the characteristics of social security benefits, because, first of all, there is no entitlement to their grant, next, their grant depends on an individual and discretionary assessment of the personal needs of the claimants in the light of the legally defined situation and, finally, those benefits do not relate to one of the categories of risks set out in Article 3(1) of Regulation No 883/2004.
- 67 With regard to the latter point, the Slovak Republic argues that since those benefits are not intended to improve the state of health of the dependent persons or offset in the short term the lack of income during illness, they cannot be classified as a sickness benefit *strictu sensu* (judgment in *da Silva Martins*, C-388/09, EU:C:2011:439, paragraph 47) or as supplementary sickness benefits within the meaning of the judgments in *Molenaar* (C-160/96, EU:C:1998:84) and *Jauch* (C-215/99, EU:C:2001:139).

Findings of the Court

- 68 According to settled case-law, in an action for failure to fulfil obligations it is for the Commission to prove the allegation that the obligation has not been fulfilled. It is the Commission which must provide the Court with the evidence necessary for the Court to establish that the obligation has not been fulfilled, and it may not rely on any presumption (see, *inter alia*, *Commission v Italy*, C-135/05, EU:C:2007:250, paragraph 26, and *Commission v Greece*, C-305/06, EU:C:2008:486, paragraph 41).

- 69 In order to assess the merits of the Commission's action, it must be determined whether the benefits at issue constitute, as the Commission claims, 'sickness benefits' within the meaning of Article 3(1)(a) of Regulation No 883/2004.
- 70 The distinction between benefits excluded from the scope of Regulation No 883/2004 and those which fall within it is based essentially on the constituent elements of each particular benefit, in particular its purpose and the conditions on which it is granted, and not on whether a benefit is classified as a social security benefit by national legislation (see, to that effect, judgment in *Molenaar*, C-160/96, EU:C:1998:84, paragraph 19).
- 71 According to settled case-law, a benefit may be regarded as a social security benefit in so far as it is granted, without any individual and discretionary assessment of personal needs, to beneficiaries on the basis of a legally defined position and provided that it relates to one of the risks expressly listed in Article 4(1) of Regulation No 883/2004 (see, judgment in *da Silva Martins*, C-388/09, EU:C:2011:439, paragraph 38 and the case-law cited).
- 72 Therefore, it is necessary to examine, in the first place, whether the benefits at issue are granted to beneficiaries, as the Commission states, without any individual and discretionary assessment of their personal needs, on the basis of a legally defined situation, or if, as the Slovak Republic claims, those benefits are granted only after an assessment of their individual circumstances, which does not give rise to any right to payment of one of those benefits even if all the criteria for eligibility have been met.
- 73 It follows from settled case-law that the first of the two conditions mentioned in paragraph 71 of the present judgment is satisfied if the grant of a benefit is made with regard to objective criteria which if satisfied, give entitlement to the benefit without the competent authority being able to take other personal circumstances into consideration (see to that effect, in particular, judgments in *Hughes*, C-78/91, EU:C:1992:331, paragraph 17; *Molenaar*, C-160/96, EU:C:1998:84, paragraph 21; *Maaheimo*, C-333/00, EU:C:2002:641, paragraph 23; and *De Cuyper*, C-406/04, EU:C:2006:491, paragraph 23).
- 74 It is clear from the file that the benefits at issue may be granted where a severely disabled person is, following a detailed examination compiled on the basis of a medical report and a social report, declared dependent on personal assistance, compensation for extra costs or care.
- 75 For that purpose, in accordance with Article 11(11) of Law No 447/2008, the medical report gives rise to a medical opinion which contains the degree of functional impairment, the finding that the persons concerned has a severe disability, the findings relating to the various types of dependence of the severely disabled person, referred to in Article 14 of that law, and the period for the medical review of his state of health.
- 76 The social report referred to in Article 13 of that law includes the evaluation of the individual capacities of the severely disabled person, his family background and his environment, including the assessment of the transport systems and housing conditions, and including the accessibility of public buildings.
- 77 Finally, the detailed examination includes, in accordance with Article 15(1) of Law No 447/2008, inter alia the following elements: the degree of functional impairment, the finding that the person concerned has a severe disability, the social consequences of the severe disability in all the areas covered by the compensation, a proposal as to the type of allowance to be granted as compensation, the finding, if appropriate, that the severely disabled person is dependent on a carer, the finding, if appropriate, that the severely disabled person is dependent on individual transport by personal motor vehicle or is affected by legal blindness or total blindness in both eyes, and the period for review of the state of health, if it is fixed by the medical expert.

- 78 It follows from the foregoing that the objective pursued by the Slovak legislation is to grant to severely disabled persons the benefit which is the most appropriate to their personal needs. The fact remains that the medical and social examinations and the detailed report, in which the proposal as to the type of allowance to be granted as compensation is set out, is carried out on the basis of objective and legally defined criteria. Furthermore, it is not disputed that the benefits at issue are not granted outside the situations provided for by Law No 447/2008 and that those benefits are withdrawn if the beneficiaries no longer meet the conditions for eligibility.
- 79 However, the Commission has not established that those criteria give entitlement to the benefits at issue without the competent authority having any discretion as to their grant.
- 80 The expression ‘may receive’ in Articles 22(1), 38(1) and 40(1) of Law No 447/2008 and Article 43(1) thereof, which provide that the entitlement to a compensatory allowance and its payment arise from a valid decision of the competent authority as to the recognition of that right, tend to support the position of the Slovak Republic, according to which the administration has discretion as to the grant of the benefits at issue.
- 81 As is clear from the observations of the Slovak Republic, that interpretation is also confirmed by the case-law of the Najvyšší súd Slovenskej republiky. It follows from settled case-law that the scope of national laws, regulations or administrative provisions must be assessed in the light of the interpretation given to them by national courts (see, inter alia, judgment in *Commission v Germany*, C-490/04, EU:C:2007:430, paragraph 49 and the case-law cited).
- 82 The existence of such a discretion, which must be exercised in a consistent and reasonable manner, does not give rise to the conclusion that the benefits at issue are granted to beneficiaries in the absence of any individual and discretionary assessment of their personal needs, on the basis of a legally defined position.
- 83 Accordingly, those benefits do not constitute social security benefits within the meaning of Regulation No 883/2004.
- 84 In those circumstances, the Commission’s action must be dismissed.

Costs

- 85 Under Article 138(1) of the Rules of Procedure of the Court of Justice, the unsuccessful party must be ordered to pay the costs if they have been applied for in the other party’s pleadings. Since the Slovak Republic applied for costs and the Commission has been unsuccessful, the latter must be ordered to pay the costs.

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

- 1. Dismisses the action;**
- 2. Orders the European Commission to pay the costs.**

[Signatures]