Case C-574/20

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

3 November 2020

Referring court or tribunal:

Bundesfinanzgericht (Austria)

Date of the decision to refer:

21 October 2020

Appellant:

XO

Respondent authority:

Finanzamt Waldviertel

Subject matter of the main proceedings

Social policy – Family benefits granted to migrant workers in respect of children residing permanently in another EU Member State – National rule adjusting those benefits to the purchasing-power conditions in the State of residence of the children.

Subject matter and legal basis of the request

Interpretation of EU law and validity of secondary law, Article 267 TFEU; in particular:

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, corrigendum in OJ 2004 L 200, p. 1)

Questions referred

Question 1, concerning the validity of secondary legislation:

Are Articles 4 and 7 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, corrigendum in OJ 2004 L 200, p. 1), as amended by Regulation (EU) No 465/2012 of the European Parliament and of the Council of 22 May 2012 (OJ 2012 L 149, p. 4), ('Regulation No 883/2004', 'the New Coordination Regulation' or 'the Basic Regulation') valid?

Question 2:

Is Article 7 of Regulation No 883/2004, in particular its title 'Waiving of residence rules', to be interpreted as meaning that it precluded the legally valid adoption of the general rules governing the indexation of family allowances by reference to the purchasing-power conditions in the State of residence – Paragraph 8a of the Familienlastenausgleichsgesetz 1967 (1967 Law on compensation for family expenses; 'the FLAG'), point 2 of Paragraph 33(3) of the Einkommensteuergesetz 1988 (1988 Law on income tax; 'the EStG') and the Familienbeihilfe-Kinderabsetzbetrag-EU-Anpassungsverordnung (Order adapting family allowances and tax credits for the European Union – in so far as they entail a decrease in the value of family benefits for certain Member States?

Question 3:

Is the prohibition of the reduction of cash benefits laid down in Article 7 of Regulation No 883/2004, in particular its wording 'cash benefits … shall not be subject to any reduction, amendment, suspension, withdrawal or confiscation', to be interpreted as meaning that that provision did not preclude the legally valid adoption of the provisions governing the indexation of family allowances by reference to the purchasing power conditions in the State of residence – Paragraph 8a of the FLAG and point 2 of Paragraph 33(3) of the EStG – in so far as the value of the family allowances in question is to be increased?

Questions 4 and 5, concerning the expert report on which the legislative amendment was based:

Question 4:

Are Articles 7 and 67 of Regulation No 883/2004 to be interpreted – and delimited in relation to one other – to the effect that Article 7 relates to the law-making process in which the residence rule is created as a general, abstract rule by the Member State's parliament, whereas Article 67 concerns the law-making process for an individual, specific rule in an actual specific case and is addressed directly to the institution, as initially established under Title II of the Basic Regulation?

Question 5:

Are Articles 67, 68(1) and (2) of Regulation No 883/2004 and Article 60(1) of Regulation No 987/2009 to be interpreted as meaning that, like their predecessor provisions – Articles 73, 76 of Regulation No 1408/71 and Article 10 of Regulation No 574/72 – they are to be applied in conjunction with one another and therefore understood only in context, and they pursue, in conjunction with one another and in compliance with the anti-accumulation principle, the objective of ensuring that the person concerned does not lose any entitlements, as guaranteed by the classification and hierarchisation of the Member States prescribed in Article 68(1) and (2) and by the express requirement that the competent Member State whose legislation is applicable on a secondary basis will be required to make a supplementary payment if necessary, with the result that an isolated interpretation of Article 67 of Regulation 883/2004, such as that in the expert report, is not permissible?

Question 6:

Are the concept of 'general application' of a regulation and the wording 'It shall be binding in its entirety and directly applicable' in the second paragraph of Article 288 TFEU to be interpreted as meaning that they also precluded the valid adoption of the competent institutions' individual rules which build on the rules governing indexation and that the administrative decision under appeal in the main proceedings has not acquired the force of formal *res judicata* (*Bestandskraft*)?

Question 7:

Do Paragraph 53(1) of the FLAG in the original version of the Budgetbegleitgesetz (Law accompanying the budget) of 29 December 2000, BGBl 1142/2000, and Paragraph 53(4) of the FLAG in the original version of the Federal Law of 4 December 2018 amending the 1967 Law on compensation for family expenses, the 1988 Law on income tax and the Entwicklungshelfergesetz (Law on development aid workers), BGBl I 83/2018, infringe the prohibition of the transposition of regulations within the meaning of the second paragraph of Article 288 TFEU?

Questions 8 to 12, which are to be examined together

[Question 8:]

Are the requirement of equality of treatment with nationals under Article 4 of Regulation No 883/2004 and the underlying prohibition of discrimination under Article 45(2) TFEU to be interpreted as meaning that they are complied with only if a migrant worker is treated in the same way as a national in a domestic situation and is therefore notified of the family allowance in advance and is paid the family allowance monthly in advance on an ongoing basis pursuant to Paragraph 12, in conjunction with Paragraphs 2 and 8, of the FLAG, or is there compliance with the requirement of equality of treatment with nationals if a migrant worker is treated in the same way as a national who, like him, is in a cross-border situation

pursuant to Paragraph 4 of the FLAG, but, in the second case, by way of derogation, it is only annually after the end of the calendar year that he receives the family allowance under Paragraph 4(4) of the FLAG for the calendar year in question?

Question 9:

Is the suspension of entitlements to family benefits by virtue of other conflicting legislative provisions up to the amount provided for by the legislation designated as having priority, as prescribed in the second sentence of Article 68(2) of Regulation No 883/2004, to be interpreted as precluding a Member State's anti-accumulation rule, such as Paragraph 4(1) to (3) of the FLAG, which, in a situation such as the present one, entitles Austria, as the Member State with primary responsibility, to reduce family allowances by entitlements to 'an equivalent foreign allowance' in the other Member State, because the rule of EU law has already prevented anti-accumulation and the anti-accumulation rule in Paragraph 4(1) to (3) of the FLAG therefore serves no purpose?

Question 10:

Is the suspension of entitlements to family benefits by virtue of other conflicting legislative provisions up to the amount provided for by the legislation designated as having priority, as prescribed in the second sentence of Article 68(2) of Regulation No 883/2004, to be interpreted as meaning that the Member State whose legislation is applicable on a secondary basis and which must comply with the suspension of family benefits provided for in its legislation due to the requirement under EU law is obliged to reject an application of a migrant worker or a member of his family or a person otherwise entitled under the legislation of the Member State and not to grant family benefit up to the amount provided for by the legislation designated as having priority, even if an approach based solely on the situation of the Member State – possibly on an alternative legal basis – would permit the granting of that family benefit?

Question 11:

If Question 10 is answered in the affirmative, the question then arises as to whether the Member State whose legislation is applicable on a secondary basis and which must comply with the suspension of family benefits provided for in its legislation due to the requirement under EU law, but which is not required to provide the differential supplement for the sum which exceeds the amount provided for by the first legislation, owing to the lack of such a sum, would have to reject an application on the ground that the suspension under the second sentence of Article 68(2) of Regulation No 882/2004 precludes the granting of entitlements to family allowances?

Question 12:

Must Article 68(1) and (2) of Regulation No 883/2004 be interpreted as meaning that, in a situation such as that at issue in the main proceedings, points 6 and 7 of form E 411 of the Administrative Commission on Social Security for Migrant Workers, which are to be completed by the Member State whose legislation is applicable on a secondary basis, no longer meet the information requirements of the Member State whose legislation is applicable on a primary basis, because the Member State with primary responsibility needs to be informed by the other Member State, within the meaning of Questions 10 and 11, that the latter Member State will be enforcing the suspension under the second sentence of Article 68(2) of Regulation No 883/2004, as a result of which there is no need to examine the Member State's legal situation, which includes earnings thresholds?

Question 13:

Is the obligation to recast legislation, as developed by the Court of Justice in settled case-law on the basis of the principle of loyalty under Article 4(3) TEU, to be understood as meaning that it could also be discharged by the Verfassungsgerichtshof (Constitutional Court, Austria) pursuant to a request from the referring court?

Question 14:

Are point (b) of the first paragraph of Article 267 TFEU on questions concerning the validity of secondary law, which is mandatory even for a referring court not adjudicating at last instance, and the referring court's obligation, which is linked to questions concerning validity, to ensure the application of valid EU law by adopting, by decision, an interim order refusing leave for an appeal on a point of law, owing to the primacy of application of EU law, to be interpreted as precluding rules of Member States such as Article 133(4) and (9) of the Bundes-Verfassungsgesetz (Federal Constitutional Law; 'the B-VG'), in conjunction with Paragraph 25a(1) to (3) and Paragraph 30a(7) of the Verwaltungsgerichtshofgesetz (Law on the Supreme Administrative Court; 'the VwGG'), which grant, at national level, the parties to the underlying administrative proceedings a review of legal protection conducted by the Verwaltungsgerichtshof (Supreme Administrative Court, Austria) against a decision of the Verwaltungsgericht (Administrative Court, Austria) in the form of an 'extraordinary' appeal on a point of law?

Provisions of EU law cited

Article 4(3) TEU

Articles 45, 48, 263 and 267 and second paragraph of Article 288 TFEU

Articles 4, 7, 67 and 68(1) and (2) of Regulation No 883/2004, as amended by Regulation (EU) No 465/2012 of the European Parliament and of the Council of 22 May 2012 (OJ 2012 L 149, p. 4)

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 (OJ 2009 L 284, p. 1; 'Regulation No 987/2009')

Articles 73 and 76 of Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and to their families moving within the Community (OJ, English Special Edition 1971(II), p. 416; 'Regulation No 1408/71')

Article 10 of Regulation (EEC) No 574/72 of the Council of 21 March 1972 fixing the procedure for implementing Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons and their families moving within the Community (OJ, English Special Edition 1972(I), p. 160; 'Regulation No 574/72')

Provisions of national law cited

Familienlastenausgleichsgesetz 1967 (1967 Law on compensation for family expenses; 'the FLAG'): Paragraph 2 of the FLAG grants persons who have their residence or habitual abode in Austria entitlement to family allowances in respect of minor children, including stepchildren. Foreign nationals are entitled to family allowances only if they are lawfully resident in Austria (Paragraph 3 of the FLAG).

Pursuant to Paragraph 4 of the FLAG, persons entitled to an equivalent foreign allowance are not entitled to family allowances (subparagraph 1). If the equivalent foreign allowance is lower than the Austrian family allowance, Austrian nationals receive a supplementary allowance (subparagraph 2) equal to the difference (subparagraph 3), the allowance being granted annually after the end of the calendar year – or after the entitlement to the equivalent foreign allowance lapses, if it lapses earlier (subparagraph 4).

Paragraph 8 of the FLAG governs the amount of the family allowance on the basis of the number and age of the children. Paragraph 8a of the FLAG, which was introduced by the Federal Law of 4 December 2018 and has been in force since 1 January 2019 ('Paragraph 8a of the FLAG, new version'), provides for the adjustment of family allowances, with regard to, among others, children permanently residing in another EU Member State, to the purchasing-power conditions in the State of residence on the basis of the comparative price levels published by the Statistical Office of the European Union for each individual EU Member State.

Pursuant to Paragraph 12 of the FLAG, the tax office must issue a notification when an entitlement to family allowance arises or ceases to exist.

Paragraph 53(1) of the FLAG places nationals of other Member States on an equal footing with Austrian nationals under the FLAG, whereby the permanent residence of a child in another Member State must be regarded as being equivalent to permanent residence in Austria. The provisions of Paragraph 53(4) and (5), which were introduced by the Federal Law of 4 December 2018 and have been in force since 1 January 2019, provide for an exception to this with regard to the adjustment of family allowances under Paragraph 8a of the FLAG.

Einkommensteuergesetz 1988 (1988 Law on income tax; 'the EStG'): Point 2 of Paragraph 33(3) of the EStG, which was introduced by the Federal Law of 4 December 2018 and has been in force since 1 January 2019 (point 2 of Paragraph 33(3) of the EStG, new version), governs the tax credits to be paid out together with the family allowance, which are adjusted for, among others, children who are permanently residing in another Member State.

Familienbeihilfe-Kinderabsetzbetrag-EU-Anpassungsverordnung (Order adapting family allowances and tax credits for the European Union)

Bundes-Verfassungsgesetz (Federal Constitutional Law; 'the B-VG'), in particular Article 133(4) and (9) on appeals on a point of law against administrative rulings and decisions of the Administrative Courts.

Verwaltungsgerichtshofgesetz 1985 (1985 Law on the Supreme Administrative Court; 'the VwGG'), in particular Paragraph 25a(1) to (3) and Paragraph 30a(7), pursuant to which the Administrative Court must state in its administrative ruling or decision whether an appeal on a point of law is permitted or – if such an appeal is excluded – on what grounds an 'extraordinary' appeal on a point of law is permitted.

Bundesabgabenordnung (Federal Tax Code; 'the BAO')

Brief summary of the facts and procedure

1 The request for a preliminary ruling has been made in the context of a dispute between the appellant and the Finanzamt Waldviertel (Waldviertel Tax Office) ('the respondent authority') concerning the granting of family allowances and tax credits at a reduced amount, since, with effect from 1 January 2019, Austria has been adjusting those family allowances, with regard to, among others, children permanently residing in another EU Member State, to the purchasing-power conditions in the State of residence by virtue of Paragraph 8a of the FLAG, new version, and Paragraph 33(3) of the EStG, new version.

2 The appellant, her husband, her stepson and their two biological daughters are Czech nationals and live in the Czech Republic. The appellant was employed in Austria by various Austrian employers from July 2017 to February 2020. Owing to their family income level, the appellant and her husband are not entitled in the Czech Republic to the corresponding family benefit in that country.

3 The period in dispute is that from January 2019 to March 2020. Until 31 December 2018, the appellant was in receipt of the Austrian family allowance in full, in relation to which she received notifications on 20 April 2018 and 20 August 2019. With effect from 1 January 2019, the adjustment of family allowances to the purchase-price conditions in the State of residence was introduced, in relation to which no separate notification was issued. The appellant noticed the reduction solely on the basis of the amounts paid out. As of April 2020, the family allowance was no longer paid due to loss of employment in Austria.

4 On 14 February 2019, the appellant submitted an application requesting that the family allowance be granted from 1 January 2019 in the non-indexed amount and that the differential amounts be paid retroactively. The respondent authority, by way of an administrative decision referring to the new legal situation, rejected the application as unfounded. The appellant's appeal against the administrative decision was, in turn, dismissed by the respondent authority as unfounded by preliminary appeal decision, against which the appellant made a request for referral and proposed that the matter be referred to the Court of Justice of the European Union ('the Court of Justice') for a preliminary ruling. By reference report of 17 April 2020, the appeal against the administrative decision was referred to the Bundesfinanzgericht (Federal Finance Court, Austria; 'the BFG').

Principal arguments of the parties to the main proceedings

5 The appellant takes the view that the reduction in family allowances infringes EU law, and refers in this regard to Articles 45 and 48 TFEU, Regulation No 883/2004, Regulation No 492/2011 and the judgment of the Court of Justice of 15 January 1986 in Case 41/84, *Pinna I*. She submits that the indexation discriminates against her in comparison with Austrian nationals because her children live in another Member State, even though, under the applicable EU law, cross-border workers have the same entitlement to family benefits as local workers. In support of the indexation of family allowances, the respondent authority refers to the Government's draft legislation and to the expert report on which the legislative amendment introducing the indexation was based.

Brief summary of the grounds for the request

6 The main proceedings hinge on the question of the validity of regulations and the interpretation of EU law in areas on which there is no case-law of the Court of Justice.

The situation under national law

7 As a general rule, the pursuit of employment is not a condition for the granting of family allowances, for which reason Austria acquires the status of State of employment only by virtue of EU law. The Austrian family allowance and tax

credits are family benefits pursuant to Article 3(1)(j) of Regulation No 883/2004, which are to be provided as cash benefits and are 'exportable' pursuant to Article 7 of Regulation No 883/2004.

The first question referred

8 In implementation of Article 45 TFEU, Articles 4 and 7 of Regulation No 883/2004 provide for equivalence between persons covered by the regulation and nationals and for the waiving of residence rules. In the *Pinna I* case (judgment of 15 January 1984, 41/84), the Court of Justice already ruled, in relation to family benefits, that a residence rule in Article 73(2) of Regulation No 1408/71 was contrary to primary law and declared it to be invalid. The link to purchasing-power conditions in the State of residence pursuant to Paragraph 8a of the FLAG, new version, and point 2 of Paragraph 33(3) of the EStG, new version, meets the criteria for such a residence rule and therefore runs counter to Regulation No 883/2004, which is why the question regarding the validity of that regulation must be referred to the Court of Justice on account of its exclusive power to reject illegal acts of secondary legislation (judgment of 22 October 1987, Case 314/85, *Foto-Frost*, paragraph 15 et seq.).

The second question referred

9 The referring court asks whether, in the light of the *Simmenthal II* case concerning the preclusion of the valid adoption of new legislative measures that would be incompatible with provisions of EU law (judgment of 9 March 1978, 106/77, paragraphs 17 and 18), the wording 'waiving of residence rules' in the title of Article 7 of Regulation No 883/2004 must be interpreted in itself as having precluded the valid adoption of Paragraph 8a of the FLAG, new version, and point 2 of Paragraph 33(3) of the EStG, new version. This would give the term 'waiving' a more extensive meaning than has generally been understood up to now, because the national rules on indexation would not have been validly adopted *ex tunc*. This reinforces the assumption that the indexation of family allowances is not binding on the referring court.

The third question referred

10 It is unclear whether the indexation resulting in increases in the value of family allowances – which resembles an excessive transposition of a directive – comes within the scope of EU law and the jurisdiction of the Court of Justice. If not, the Austrian legislature would be obliged to recast the law only in respect of the reduced family allowance, if it were declared to be incompatible with secondary law by the Court of Justice. There is therefore a risk that, although the decreases in the value of family allowances would be eliminated with *ex tunc* effect, the increases in their value would continue to exist. A retroactive abolishment would appear to be problematic with regard to the increases in value, because the

addressees of the rule may have legitimate expectations with regard to the additional entitlement.

11 The indexation resulting in increases in value could also run counter to Article 68(2) of Regulation No 883/2004, which pursues the objective of guaranteeing the highest family benefit and is based on consistent case-law of the Court of Justice (for example, judgment of 12 June 1980, Case 733/79, *Laterza*; judgment of 4 September 2019, C-473/18, *Bundesagentur für Arbeit – Familienkasse Baden-Württemberg West*, paragraph 34; judgment of 12 July 1984, Case 242/83, *Patteri*, paragraphs 8 to 10).

12 The legal nature of the family allowance indexation introduced by Federal law is also unclear. Paragraph 8a of the FLAG, new version, and point 2 of Paragraph 33(3) of the EStG, new version, constitute national law only in formal terms. The persons concerned by the indexation are exclusively nationals of other Member States who are subject to the FLAG only because EU law so requires. Although nationals residing in another Member State may also be concerned by the indexation, the requirement of residence within the national territory is more easily met by nationals, with the result that there is indirect discrimination (Court of Justice, judgment in *Pinna*, paragraph 23). EU law therefore exists here in substantive terms and a law of a Member State seeks to alter it.

The fourth and fifth questions referred

13 With regard to the infringement of EU law as a result of the linking of family allowances to price conditions, the question arises as to the delimitation of Articles 7 and 67 of Regulation No 883/2004. For the purposes of indexation, the expert report and the Government's draft legislation are based on the fiction of Article 67 of Regulation No 883/2004 ('as if [the family members] were residing in the [competent] Member State') inasmuch as it refers to circumstances of value in the competent Member State, and therefore distinguish between 'amount' and 'value'.

14 This isolated consideration of Article 67 of Regulation No 883/2004 is problematic, however. Article 67, which is supplemented by Article 60 of Regulation No 987/2009 (see judgment of 22 October 2015, C-378/14, *Trapkowski*), is, on the one hand, intended to avoid indirect discrimination, in particular as a result of a link to residence requirements, and, on the other hand, must be read in conjunction with the priority rules and the anti-accumulation rule of Article 68(1) and (2) of Regulation No 883/2004, as was the case with the predecessor provisions in Articles 73 and 76(1) of Regulation No 1408/71 (judgment of 7 February 2019, C-322/17, *Eugen Bogatu*, paragraph 24). The priority rules ensure that an applicant receives the highest possible amount of family benefits without infringing the anti-accumulation principle (judgment of 5 June 2005, C-543/03, *Dodl and Oberhollenzer*, paragraph 49). Article 68(2) of Regulation No 883/2004 obliges the Member State with primary responsibility to pay full benefits and the Member State with secondary responsibility to pay any

difference (with regard to the old regulation, see judgment of 12 June 1980, Case 733/79, *Laterza*, with further references regarding acquired rights) or to suspend its family benefits.

15 Articles 7 and 67 of Regulation No 883/2004 pursue the same objective – the prevention of indirect discrimination – but they relate to different law-making processes. Article 7 is addressed to the legislature, so that no residence rules are created in the legislation, whereas, by contrast, Article 67 is addressed to the competent institution *qua* part of the executive, so that it does not require the fulfilment of discriminatory conditions in a specific case of application. Articles 7 and 67 of Regulation No 883/2004 therefore guarantee the primacy of application of EU law using different techniques. Therefore, a residence rule (such as indexation), which has already been waived by Article 7 of Regulation No 883/2004, can no longer be the subject of Article 67.

16 Since, in *Pinna I* (paragraph 23), the Court of Justice has already declared a residence rule laid down in secondary legislation to be invalid on the basis of the principle of equal treatment, a residence rule in a national provision must be regarded as being all the more contrary to EU law. In the light of the case-law of the Court of Justice, according to which 'all covert forms of discrimination [are prohibited]', the differentiation of amount and value in the expert report and the Government's draft legislation does not appear to be permissible. Therefore, the indexation probably infringes primary law, but certainly infringes Articles 4 and 7 of Regulation No 883/2004.

17 The grounds of justification given in the Government's draft legislation are inappropriate: first, the saving resulting from indexation pertains to economic considerations, which are not recognised as an unwritten ground of justification (for example, judgment of 29 April 1999, C-224/97, *Erich Ciola* v *Land Vorarlberg*), while the avoidance of distortions is not a legitimate objective, since social welfare systems in the European Union could no longer be coordinated if each Member State were to index family benefits. Second, it is true that the Government's draft legislation refers to the Conclusions of the European Council of 18 and 19 February 2016, OJ C 2016/69 I, in which, according to the draft legislation, the possibility of indexation under Regulation No 883/2004 was justified 'at a high level', and to the Declaration of the Commission setting out various grounds of justification. However, such grounds of justification must be substantiated and supported by a factual basis (for example, judgment of 7 July 2005, C-147/03, *Commission* v *Austria* (access to university education), paragraph 48). Furthermore, restrictions on the exportability of cash benefits – currently in Article 63 (unemployment benefits) and Article 70(3) of Regulation No 883/2004 (special non-contributory cash benefits, see judgment of 19 September 2013, C-140/12, *Brey*, paragraph 50) – 'at a high level' can be made only in accordance with the ordinary legislative procedure.

18 Finally, there appears to be some doubt surrounding the proportionality of the indexation and the coherent conduct of Austria, since officials of local or regional

authorities are granted full family allowances when they are posted to other EU countries, but the family allowance for the Czech Republic was devalued by 38.1% in accordance with the Order adapting family allowances and tax credits for the European Union, while in the same period the purchasing-power correction coefficient for embassy staff posted to Prague was calculated at between 7% and 10% compared with the (thus lower) domestic price level.

The sixth question referred

19 The statements made in the *Simmenthal II* case would derogate from the principle of allowance of error (*Fehlerkalkül*) applicable in Austria, according to which unlawful provisions are part of the legal order until they are repealed by the competent legal protection institution. This would be the Constitutional Court in the case of Federal laws, and the BFG in the case of the administrative decision in dispute in the main proceedings. If the individual legal rules derived from a general rule that was not validly adopted were also to be regarded as invalid under EU law, this would have implications for the form of the ruling to be given by the referring court.

The seventh question referred

20 The question concerning the prohibition of the transposition of regulations has already been referred, in Case C-372/20 (*Finanzamt für den 8., 16. und 17. Bezirk in Wien*), albeit confined to Paragraph 53(1) and (5) of the FLAG, but is repeated here and extended to Paragraph 53(4) of the FLAG.

21 Paragraph 53(1) of the FLAG obscures, for those subject to the law, the view of directly applicable EU law and the Court of Justice's monopoly on interpretation, since the requirement of equality of treatment with nationals already arises from EU law. Furthermore, Paragraph 53(1) of the FLAG repeats part of Article 67 of Regulation No 883/2004, but without covering the family members referred to in the regulation, and conceals Article 68 of Regulation No 883/2004 and Article 60 of Regulation No 987/2009. Furthermore, together with the indexation, Paragraph 53(4) of the FLAG, new version, restricts the equality of treatment under Paragraph 53(1), which, however, does not have independent normative value due to the direct applicability of the regulation. The referring court takes the view that if Paragraph 53(1) of the FLAG does not stand up to the scrutiny of the Court of Justice, Paragraph 4 must therefore be automatically repealed.

The eighth question referred

22 The respondent authority agreed with the appellant's entitlements by way of 'Mitteilungen über den Bezug der Ausgleichszahlung' ('Notifications regarding the receipt of the supplementary allowance') pursuant to Paragraph 4 of the FLAG. Nationals in cross-border situations are also granted the family allowance in the form of the supplementary allowance under that provision, but, in domestic

situations, nationals are issued a notification in advance in accordance with Paragraph 12 of the FLAG and the family allowances are paid out monthly. The tax offices argue that it is impossible, or at least difficult, to enforce recoveries against certain migrant workers and that Paragraph 4 of the FLAG allows the tax offices to establish limitations in time. However, the referring court takes the view that a national in a domestic situation should be used as the benchmark for the requirement of equality of treatment with nationals. Since Paragraph 53(1) of the FLAG is not applicable because of directly applicable secondary law, the appellant's entitlement under Regulation No 883/2004 would exist solely by virtue of Paragraph 3(1) of the FLAG, which ensures that the appellant legally resides in Austria within the meaning of the EU Citizens' Rights Directive. She must therefore be treated in the same way as an [Austrian] national and the notification should be issued solely under Paragraph 12 of the FLAG.

The ninth question referred

23 Article 68(2) of Regulation No 883/2004 requires the Member State whose legislation is applicable by priority to grant family benefits and the Member State whose legislation is applicable on a secondary basis (usually the State of residence) to suspend benefits up to the amount which is applicable by priority or to provide a differential supplement, in order to avoid an accumulation of entitlements but to guarantee the maximum amount of family benefits. The purpose of Paragraph 4(1) to (3) of the FLAG is to reduce the amount of foreign family benefits which is suspended by virtue of EU law and may no longer be paid. The referring court therefore asks whether those provisions are superseded by Article 68(2) of Regulation No 883/2004 by way of primacy of application. The amount of a cash benefit which has already been suspended under EU law and may therefore not be granted can no longer be the subject of a reduction by a national provision.

The tenth question referred

24 The purpose of the question is to assure the Member State with primary responsibility under EU law that the Member State with secondary responsibility will not pay the amount suspended under Article 68(2) of Regulation No 883/2004 even if, under national rules, it would be granted in respect of the same family members and the same periods in another legal scenario. The BFG takes the view that the suspension must be effective vis-à-vis all persons referred to in Article 60 of Regulation No 987/2009.

The eleventh question referred

25 In the present case, applications were made in the Czech Republic using E 411 forms of the Administrative Commission on Social Security for Migrant Workers. The Czech institution ticked the box 'is not entitled to family benefits for the following reasons' and noted 'high income', which means that it can be assumed

that the application was rejected because the earnings threshold was exceeded. However, due to the primacy of application of the anti-accumulation provision in the second sentence of Article 68(2) of Regulation No 883/2004, the rejection of the application should have been based on EU law and the suspension of family benefits resulting for the Czech Republic. The Czech institution should have informed the Austrian institution of the suspension or, if no application was made, of any future change.

The twelfth question referred

26 The BFG takes the view that the E 411 form does not comply with Regulation No 883/2004, as amended by Regulation No 465/2012, since it does not provide that the Member State whose legislation is applicable on a secondary basis may or must notify the other Member State that it has complied with the suspension prescribed by EU law or will comply with it in the event of an application at a later point in time. Owing to the application primacy of EU law, the fulfilment or non-fulfilment of Member States' connecting criteria (earnings thresholds, level of family benefits) cannot be the decisive factor.

The thirteenth question referred

27 This question concerns the case-law of the Court of Justice, which has imposed the obligation to recast law exclusively on the national parliaments. From the point of view of EU law, it may be irrelevant which Member State institution is responsible for the recast. However, the referring court has a preference for the Constitutional Court, as the highest instance.

The fourteenth question referred

28 Pursuant to the BAO, suspensive effect can be granted only upon application and only in the case of certain orders concerning tax liability. However, some take the view that Article 4(3) TEU and the case-law of the Court of Justice (for example the judgment of 19 June 1990, C-213/89, *Factortame*) give rise to a more far-reaching obligation to grant interim relief where there are doubts as to the conformity of national administrative acts with EU law.

29 In the present case, the BFG has doubts as to whether the general rules on indexation were validly adopted and will therefore assume that Articles 4 and 7 of Regulation No 883/2004 are valid pending the ruling of the Court of Justice. On account of the primacy of application of EU law and the question regarding its validity, the BFG has excluded, contrary to national law, the possibility of an 'extraordinary' appeal on a point of law in its decision on the interim order. Since the request for a preliminary ruling is an intermediate stage in the national appeal procedure, it would be contrary to that concept of EU law if the national supreme courts of public law were to be seised of an 'extraordinary' appeal on a point of law before the Court of Justice had delivered its judgment. The decision on the

interim order is therefore accessory to the request for a preliminary ruling and is also subject exclusively to judicial control by the Court of Justice.