Case C-36/23

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:

25 January 2023

Referring court:

Finanzgericht Bremen (Germany)

Date of the decision to refer:

19 January 2023

Applicant:

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Defendant:

Familienkasse Sachsen der Bundesagentur für Arbeit

Subject matter of the main proceedings

Social security – Regulation (EC) No 883/2004 – Article 68 – Grant of family benefits – Residence of one parent in another Member State – Failure of that parent to apply for child benefit – Application for child benefit by the other parent – Consequences

Subject matter and legal basis of the request

Interpretation of EU law, Article 267 TFEU

Questions referred for a preliminary ruling

1) Does Article 68 of Regulation (EC) No 883/2004 allow German child benefit to be partly recovered retrospectively on the ground of a priority entitlement in another Member State, even though no family benefit has been or is being assessed or paid for the child in the other Member State,

with the result that the amount remaining to the beneficiary under German law effectively falls below the German child benefit?

2) In the event that the first question is answered in the affirmative:

Does the answer to the question as to the grounds on which benefits are payable by more than one Member State within the meaning of Article 68 of Regulation (EC) No 883/2004, or the bases on which the entitlements to be coordinated arise, depend on the conditions of entitlement under the national rules, or on the circumstances on account of which the persons concerned are subject to the legislation of the relevant Member States in accordance with Articles 11 to 16 of Regulation (EC) No 883/2004?

3) In the event that the decisive criterion is the circumstances on account of which the persons concerned are subject to the legislation of the relevant Member States in accordance with Articles 11 to 16 of Regulation (EC) No 883/2004:

Is Article 68 in conjunction with Article 1(a) and (b) and Article 11(3)(a) of Regulation (EC) No 883/2004 to be interpreted as meaning that an activity as an employed person or an activity as a self-employed person in another Member State, or an equivalent situation treated as such an activity for the purposes of social insurance legislation, is to be assumed to be present where the social insurance fund in the other Member State certifies that the person concerned is insured ‘as a farmer’ and the competent family benefits institution in that State confirms the existence of an activity as an employed person, even though the person concerned claims that that insurance is dependent only on ownership of the farm, which is registered as agriculturally productive land but is not actually in use?

Provisions of European Union law relied on

Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (‘Regulation No 883/2004’), in particular Article 1(a) and (b), Articles 11 to 16 and Article 68

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 (‘Regulation No 987/2009’), in particular Articles 59 and 60

Provisions of national law relied on

Einkommensteuergesetz (Law on Income Tax), in the version unchanged, so far as the present case is concerned, since the publication of the revised version of the Law on Income Tax of 8 October 2009 (Bundesgesetzblatt (Federal Law Gazette),

Part I 2009, point 68, pp. 3366-3465) ('the EStG'), in particular the third sentence of Paragraph 31, point 1 of the first sentence of Paragraph 32(1), Paragraph 32(3), the first sentence of Paragraph 62(1), the first and second sentences of Paragraph 63(1) and the first sentence of Paragraph 70(2)

Abgabenordnung (Tax Code), in the version unchanged, so far as the present case is concerned, since the publication of the revised version of the Tax Code of 1 October 2002 (Bundesgesetzblatt (Federal Law Gazette) Part I 2002, point 72, pp. 3866-3953) ('the AO'), in particular Paragraph 37(1) and the first and second sentences of Paragraph 37(2)

Succinct presentation of the facts and procedure in the main proceedings

1 The parties are in dispute over the partial revocation of a child benefit assessment and the recovery of the child benefit overpaid following that assessment in the period at issue, from July 2019 to September 2020.

2 The applicant is a Polish national and has been employed in Germany for years. His child, born in 2008, and his wife (the child's mother) live together in the family household in Poland.

3 By letter of 22 February 2016, the applicant, with his wife's consent, applied to the German authorities for child benefit for his child. To that end, he provided evidence of his employment in Germany and stated that his wife was not gainfully employed in Poland.

4 By decision of 27 October 2016, the defendant granted the applicant child benefit for the period from October 2014 to July 2026. The reason given for that decision was that the applicant was in gainful employment in Germany and, according to the certificate submitted, was subject to unlimited tax liability. As the other parent was not in gainful employment in the country where the child is resident, the priority entitlement to child benefit for the period of employment arises in Germany.

5 On 16 April 2019, the applicant was sent a 'child benefit entitlement review questionnaire' to complete. The applicant completed and returned that questionnaire. In it, the applicant explained that his wife was neither employed nor self-employed. For his part, he submitted an employer's certificate attesting to his having been employed in Germany since 1 January 2016.

6 By request of 6 August 2019, the defendant asked Poland for information on any gainful employment engaged in by the applicant's wife and on any entitlement to Polish family benefits.

7 On 5 October 2020, the defendant received from the Pomeranian Voivodeship in Gdańsk (Polish information authority) an answer, dated 28 September 2020, field 4.1 of which contained the following information: '*[The child's mother] has been*

gainfully employed from 28 September 2006 to date (Social Insurance Fund for Farmers – KRUS). Since 1 November 2013 to date, [the child's mother] has not received any family or childcare benefits under the "Family 500+" programme. [The child's mother] explained that she did not wish to apply for any family or childcare benefits under the "Family 500+" programme'.

8 As a result, the defendant, by decision of 7 October 2020, revoked the child benefit assessment in the amount of the family benefits provided for by law in Poland with effect from October 2020, in accordance with Paragraph 70(2) of the EStG.

9 By a 'request for a decision on competence' of 7 October 2020 which it sent to Poland, the defendant, in reference to an application received on 4 July 2019, the child's father's gainful employment in Germany and the child's mother's gainful employment in Poland, asked: '*Please review as if the application had been submitted to Poland the entitlement to family benefits and the "500+" programme with effect from July 2019*'.

10 In answer to the request, the Polish information authority, on 17 December 2020, sent a record on the applicant's wife containing the following supplementary information. '*[The child's mother] has been gainfully employed from 28 September 2006 to date (Social Insurance Fund for Farmers – KRUS). Since 1 July 2019 to date, [the child's mother] has not received any family or childcare benefits under the "Family 500+" programme. [The child's mother] explained that she did not wish to apply for any family or childcare benefits under the "Family 500+" programme'.*

11 By the decision at issue of 6 January 2021, the defendant revoked the child benefit assessment for the period from July 2019 to September 2020 in the amount of the family benefits provided for by law in Poland, in accordance with Paragraph 70(2) of the EStG, and sought recovery of the child benefit overpaid during that period in the amount of EUR 1 674.60.

12 By letter of 22 January 2021, the applicant applied to have that decision amended, on the ground that he and his wife had not received any family benefits in Poland from July 2019 to date.

13 The defendant treated that letter as an objection to the decision of 6 January 2021 and, by decision of 2 February 2021, dismissed that objection as unfounded.

14 On 2 March 2021, the applicant brought an action against the partial revocation of the child care assessment and the recovery [of the overpaid sum].

The essential arguments of the parties in the main proceedings

15 As grounds for its action, the applicant submits that his wife (the child's mother) is not gainfully employed and does not receive any income. His wife is neither

unemployed nor registered as a job seeker and was given a farm by her parents in order to enable them to receive a pension. Ownership of the farm gives rise to insurance with KRUS, the Polish social insurance fund for farmers. That insurance does not presuppose any activity as a self-employed farmer and is subject only to the condition that the farm, which is not in use, is registered as agriculturally productive land. Since his wife has no income, he pays the insurance contributions to KRUS. His wife neither received nor applied for child benefit in Poland for the period in question. Competence in respect of the entitlement to child benefit therefore lies by priority with Germany.

16 The defendant opposes the action on the ground that, while the applicant is in principle entitled to German child benefit for his child who is resident in Poland, in accordance with Paragraph 62(1) of the EStG, his wife is at the same time entitled to non-German family benefits for the child in Poland. After all, the '500+' benefit has been available for children under the age of 18 in Poland, irrespective of income, since July 2019.

17 According to the defendant, that conflict as to entitlement must be resolved by reference to the coordination rules of the European Union. In accordance with those rules, the decisive criterion is whether, in the States concerned, a gainful activity is pursued or a pension is received or whether the entitlement to family benefits is obtained exclusively on the basis of residence (Articles 67 and 68 of Regulation No 883/2004, Decision F1 of the Administrative Commission of the European Union of 12 June 2009). It is true that the applicant carries on a gainful activity or is in an equivalent situation treated as such within the meaning of Decision F1 of the Administrative Commission of the European Union of 12 June 2009. However, since his wife also carries on a gainful activity or is in an equivalent situation treated as such in the country where the child lives, Poland, the entitlement to family benefits arises by priority in that State (Article 68(1)(b)(i) of Regulation No 883/2004). The German entitlement to child benefit is therefore suspended in the amount of the non-German family benefit. The non-German family benefit is lower than the child benefit granted by the German authorities. There is therefore an entitlement to child benefit from July 2019 to September 2020 in the amount of the difference between the two and the child benefit assessment must be amended to the lower amount represented by that difference.

18 The fact that the benefit is neither applied for nor paid in Poland does not mean that the child benefit must be granted in full in Germany. The information from Poland shows that the applicant's wife reported there that she did not wish to apply for benefit. This was the only reason why no decision was taken on any entitlement to benefit in Poland. In accordance with the first sentence of Paragraph 65(1) of the EStG, however, the fact that a[nother] benefit would be payable if it were applied for is a sufficient ground for not granting child benefit.

19 With regard to the question of the child's mother's employment in Poland, the German authorities and courts are in principle bound by the certification by a non-

German insurance institution of the existence of insurance. On the basis of the information from the Polish information authority, the child's mother must therefore be regarded as carrying on a gainful activity.

20 The obligation to refund arises from Paragraph 37(2) of the Abgabenordnung (German Tax Code) (AO). According to that provision, a tax refund must be made if the tax was paid without legal grounds. That is so in this case, inasmuch as an entitlement did not arise and the child benefit assessment was to that extent revoked.

Succinct presentation of the reasoning in the request for a preliminary ruling

21 Under German law, a child benefit assessment must be retrospectively revoked, in accordance with the first sentence of Paragraph 70(2) of the EStG, where, during the period of receipt of child benefit, the circumstances relevant to entitlement to that benefit have changed in such a way that the conditions of entitlement to child benefit are no longer met. In accordance with Paragraph 37(2) of the AO, any overpaid child benefit must in that event be refunded by the recipient.

22 It is common ground between the parties that the applicant fulfils the conditions laid down by German law with regard to entitlement to child benefit for his child living with its mother in Poland in respect of the period at issue. Child benefit was initially paid in full by the German authorities. It was only during the period of receipt of child benefit that the Polish legal position changed, inasmuch as, since July 2019, the Polish authorities have been paying childcare allowance, irrespective of income and up until the child reaches the age of 18, for the first child too (see Article 4(1) and (2) and Article 5(1) of the Polish Law on State Assistance for Child Rearing of 11 February 2016, as modified by the Amending Law of 26 April 2019).

23 There has been no assessment or payment of Polish benefits to date, however, because the child's mother stated that she did not wish to apply for any. It also follows from Article 18(1) and (2) and Article 21(3) of the Polish Law on State Assistance for Child Rearing of 11 February 2016, as modified by the Amending Law of 26 April 2019, that Polish family benefits are granted annually and not retrospectively and may be applied for only as from 1 April for the following period of 1 June to 31 May. That being the case, the Polish institution itself would probably no longer have been able to make an assessment of family benefits for the period at issue of July 2019 to September 2020, if, on the basis of the notice of an application of 4 July 2019 that was given by means of the 'request for a decision on competence' of 7 October 2020, it had taken the view that Polish family benefits (too) had been applied for.

24 On the first question: The partial recovery of German child benefit is lawful only if the entitlement to German child benefit may, on the basis of Article 68 of Regulation No 883/2004, be reduced by the amount of family benefit provided for

in Polish substantive law, even though no assessment or payment has been made to date, and none is expected in the future, in Poland.

25 With regard to the rules that preceded Regulation No 883/2004, the Court of Justice has repeatedly held that an entitlement to family benefits may be suspended on account of an entitlement to family benefits in another Member State only where the family benefits are actually paid by the other Member State too, it being immaterial whether the non-payment of those benefits is attributable only to the fact that they have not been applied for (see the judgments of 4 July 1990, *Kracht*, C-117/89, EU:C:1990:279, paragraph 18, and of 14 October 2010, *Schwemmer*, C-16/09, EU:C:2010:605, paragraphs 53 to 54 and 58 to 59). In its case-law on Regulation No 883/2004, the Court of Justice has fully adhered to that view (see the judgments of 22 October 2015, *Trapkowski*, C-378/14, EU:C:2015:720, paragraphs 32 to 33, and of 18 September 2019, *Moser*, C-32/18, EU:C:2019:752, paragraph 42).

26 In its judgment of 13 October 2022, *DN*, C-199/21, EU:C:2022:789, paragraph 58, the Court of Justice further held that the third sentence of Article 60(1) of Regulation No 987/2009 must be interpreted as precluding national legislation which allows the recovery of family benefits awarded, where the parent entitled to such benefits pursuant to that legislation has not applied for them, to the other parent, whose application has been taken into account, in accordance with that provision, by the competent institution, and who in fact bears the entire cost associated with the maintenance of the child.

27 The Bundesfinanzhof (Federal Finance Court) (BFH), as the highest German court with jurisdiction in respect of child benefit awarded under the EStG, takes the view with regard to the legal position under Regulation No 883/2004 that the application of the coordination rules laid down in Article 68 of Regulation No 883/2004 and the restriction of the German entitlement to the difference between the amounts payable, in the case where there is an entitlement under the substantive law of another Member State, are not precluded by the fact that the latter entitlement has not been assessed and paid (BFH, judgment of 9 December 2020 – III R 73/18 –, BFHE 271, 508). The retrospective emergence of circumstances relevant to the order of priority triggers a retrospective set-off against the child benefit awarded under German law and, in consequence, a (partial) recovery of sums so paid, and is not contingent upon the assessment and payment of the non-German entitlement (BFH, judgment of 9 December 2020 – III R 73/18 –, BFHE 271, 508, BStBl II 2022, 178). For, in accordance with the second half of the first sentence of Article 68(3)(b) and Article 81 of Regulation No 883/2004, an application for family benefits made in the State under an obligation to pay such benefits but not by priority is also to be regarded as an application for family benefits under the legislation of the Member State under an obligation to pay them by priority, meaning that the formal condition of entitlement consisting in making an application in the other Member State is met (BFH, judgment of 9 December 2020 – III R 73/18 –, BFHE 271, 508). An application for family benefits made in a Member State competent but not by

priority triggers the fiction whereby that application is regarded as having been made in the State competent by priority too, also in the case where the institution to which the application was made is unaware that it is dealing with a situation with a connection outside the country in which that institution is located, for example because the person entitled to child benefit has taken up an activity in another country without informing the Familienkasse (Family Benefits Office) of this. That fiction thus obtains also in the case where, at the time when the application for child benefit was made, there was as yet no reason to forward it to a family benefits institution in another country (BFH, judgment of 9 December 2020 – III R 31/18 –, BFH/NV 2021, 771).

28 In the view of the BFH, the reference by the Court of Justice in the judgment of 22 October 2015, *Trapkowski*, C-378/14, EU:C:2015:720, to its judgment of 14 October 2010, *Schwemmer*, C-16/09, EU:C:2010:605, does not support any other inference, because the judgment of 22 October 2015, *Trapkowski*, C-378/14, EU:C:2015:720, concerned not a failure to meet a formal condition of an application for family benefits but a failure to meet a material condition of such an application, in that the income limit was exceeded (BFH, judgment of 9 December 2020-111 R 73/18-, BFHE 271, 508, BStBl II 2022, 178). It is only in the case where the material conditions for an application are not met in the Member State whose legislation is applicable by priority, for example because the age limit or certain income limits are exceeded, that the priority rules set out in Article 68 of Regulation No 883/2004 do not apply (BFH, judgment of 25 February 2021 – III R 23/20 –, BFH/NV2021, 1344-1347).

29 Thus, in the view of the BFH, the application of the priority rules is in principle conditional (only) upon the existence of a material application for family benefits in the other Member State. In accordance with the case-law of the BFH, however, the German authorities and courts must refrain from examining the material application under the law of another country where an authority in that other country has already made a decision in that regard in respect of the period at issue and that decision is binding on the German authorities and courts (BFH, judgment of 26 July 2017 – III R 18/16 –, BFHE 259, 98, BStBl II 2017, 1237). Otherwise, it is necessary, within the framework of cooperation in good faith between the Member States and in accordance with Article 60(3) of Regulation No 883/2004 in conjunction with Article 59 et seq. of Regulation 987/2009, to clarify by means of a request for information submitted to the competent authority of the other Member State whether and to what extent an application for family benefits for the applicant’s children has been made there (BFH, judgment of 22 February 2018 – III R 10/17 – BFHE 261, 214, BStBl II 2018, 717).

30 In the view of the referring court, the interpretation of the priority rules contained in Article 68 of Regulation No 883/2004, in particular in cases of recovery such as that at issue here, appears not be so clear as the BFH makes out in its case-law. According to recital 35 of Regulation No 883/2004, that regulation is intended to avoid the unwarranted overlapping of benefits in cases involving the overlapping of rights to family benefits from different Member States. The purpose of doing

so, however, is not to restrict rights under national law. In accordance with the first sentence of Article 68(1) of Regulation No 2004/883, the priority rules are to apply only where, during the same period and for the same family members, benefits are provided for under the legislation of more than one Member State. They are not therefore, in principle, meant to cause beneficiaries to receive lower payments than they would if those rules did not apply.

31 The case-law of the Court of Justice also suggests that the priority rules are to apply only where family benefits would otherwise actually be awarded by more than one Member State. After all, the grant of family benefits by more than one Member State could repeatedly lead to a situation in which, because of ambiguities or a lack of knowledge with respect to factual circumstances or legal assessments, child benefit is (partly) recovered retrospectively in Germany without being back-paid in the other Member State. As a result, beneficiaries could thus receive fewer benefits overall than they would be entitled to under German law.

32 As regards the question of the significance of the fiction whereby the Member State whose legislation is applicable by priority treats as if submitted directly to itself an application for family benefits made to another Member State whose legislation is applicable but not by priority, it must also be noted that this is primarily intended to simplify the procedure for beneficiaries. Most importantly, however, it does not change the fact that deadlines for making claims and the possibility of family benefits being granted retrospectively are subject to different rules in the Member States. Thus, as a rule, child benefit in Germany is, first of all, the subject of an assessment valid for an indefinite period until the child reaches the age of 18. In addition, the benefit is back-paid six months from the date of the application. By contrast, other countries – including, to the referring court's knowledge, Poland – have rules requiring an annual and prior application. Furthermore, in cases in which circumstances indicating that entitlements to family benefits fall to be paid by priority in another Member State come to light only retrospectively, there is commonly no longer any guarantee that the application will be promptly forwarded to the other Member State. If the application of the priority rules were contingent only upon the existence of a material application in the other Member State, the domestic courts would regularly have to decide upon the existence of entitlements to family benefits under the law of another country.

33 Article 68(3)(a) of Regulation No 883/2004 in conjunction with the second sentence of Article 60(1) and Article 60(2) and (3) of Regulation No 987/2009 provide for a special procedure for coordinating overlapping entitlements which, according to the wording of those provisions, nonetheless concerns only the case where a decision is to be taken on an as yet undecided application for the grant of family benefits in the future. That procedure does not appear to be immediately transposable to cases of retrospective examination. The same applies, in accordance with Article 60(4) of Regulation No 987/2009, to the so-called

dialogue procedure provided for in Article 6(2) to (5) of Regulation No 987/2009, applicable in the event of a dispute as to the prioritisation of multiple entitlements.

34 Furthermore, in the referring court's experience, the process of coordination between the institutions in the different Member States which are competent to deal with the benefits to be paid in each case does not run smoothly, certainly in cases involving recovery. In the case at issue too, the Polish authority, when disclosing at the defendant's request that no family benefits had been paid during the period at issue, referred only to the fact that the child's mother had failed to apply for any. No decision or other form of substantive position on the presence of the (other) formal and material conditions of Polish entitlement to family benefits could be obtained from the Polish authority. However, practical difficulties in the cooperation between the Member States should not operate to the detriment of the person claiming entitlement to family benefits.

35 On the second question: If, in principle, Article 68 of Regulation No 883/2004 allows sums paid in Germany to be recovered there even though no payment has been made in Poland, the lawfulness of that partial recovery of sums paid depends on whether the entitlement in Poland arises by priority over the entitlement in Germany.

36 The priority rules laid down in Article 68 of Regulation No 883/2004 take as their point of reference the grounds on which the overlapping benefits are payable or the bases on which the entitlements are obtained. If the answer to that question were to depend on the national rules, it would have to be assumed that the situation in the case at issue is one in which the benefits are payable in both instances on the basis of residence, since the family benefits in question are linked in both Germany and Poland to the place of residence/usual abode of the beneficiary. In this case, because of the place of residence of the child, the Polish entitlement would take priority, in accordance with Article 68(1)(b)(iii) of Regulation No 883/2004.

37 If, however, the answer to that question were to depend on the circumstances on account of which the persons concerned are subject to the legislative provisions of the relevant Member States in accordance with Articles 11 to 16 of Regulation No 883/2002, the legislation applicable by priority would, because of the applicant's employment in Germany, be determined by reference to whether the child's mother is to be regarded as gainfully employed in Poland or merely resident there.

38 According to the wording of the provision at issue, priority depends on the grounds on which benefits are payable by more than one Member State or the bases on which entitlements are obtained. This might suggest a link to the conditions of entitlement laid down in the national legislation.

39 The BFH, however, on the question of the bases on which entitlements are obtained for the purposes of Article 68(1) of Regulation No 883/2004, takes into

account the circumstances on account of which the beneficiary is subject to the legislation of the Member State concerned in accordance with Articles 11 to 16 of Regulation No 883/2004 (BFH, judgment of 26 July 2017 – III R 18/16 –, BFHE 259, 98, BStBl II 2017, 1237 and judgment of 1 July 2020 – III R 22/19 –, BFHE 269, 320, BFH/NV2021, 134).

40 In the view of the referring court, the judgment of the Court of Justice of 7 February 2019, *Bogatu*, C-322/17, paragraphs 24 to 25, might support the proposition that account is to be taken of the grounds on which family benefits are awarded under the national rules. That judgment does not, however, clearly indicate to the referring court whether the question as to the grounds on which benefits are payable for the purposes of Article 68 of Regulation No 883/2004 is contingent upon the national rules providing for entitlement to them or upon the provision in Article 11 of Regulation No 883/2004 determining that the beneficiary is subject to the legislation of the Member State concerned, or whether the entitlements are obtained by reason of employment or self-employment or by reason of residence.

41 On the third question: If the question of whether the child's mother is to be regarded as being gainfully employed in Poland can be answered solely on the basis of the Polish institution's confirmation that that is the case, by reference to her insurance with the Social Insurance Fund for Farmers, the Polish entitlement would take priority on account of the child's place of residence, in accordance with Article 68(1)(b)(i) of Regulation No 883/2004. Otherwise, the German entitlement would take priority, in accordance with Article 68(1)(a) of Regulation No 883/2004.

42 In the event that the decisive criterion is the circumstances on account of which the persons concerned are subject to the legislative provisions of the relevant Member States in accordance with Articles 11 to 16 of Regulation No 883/2004, the question arises as to the conditions under which the wife of the person entitled to child benefit, being resident in another Member State, can be said to be in gainful employed or in an equivalent situation treated as such for the purposes of Article 68 in conjunction with Article 1(a) and (b) and Article 11(3)(a) of Regulation No 883/2004.

43 The question as to the presence or otherwise in another Member State of an activity or equivalent situation treated as such, within the meaning of Article 1(b) of Regulation No 883/2004, which is regarded as such for the purposes of the social security legislation of that Member State, involves an assessment of the law of the other Member State. For that reason, the referring court inclines to the view that it is to this extent bound by the information from Poland. This seems not necessarily to be the case, however, since that information is provided only in the course of proceedings between the authorities and no unappealable decision has been adopted in respect of the person concerned. There is – so far as is apparent – no case-law of the Court of Justice on this question.