



## Reports of Cases

JUDGMENT OF THE COURT (Seventh Chamber)

25 April 2024\*

(Reference for a preliminary ruling – Social security – Regulation (EC) No 883/2004 – Family benefits – Article 68 – Rules of priority in the case of overlapping of benefits – Obligation on the institution of the Member State having secondary competence to forward an application for family benefits to the institution of the Member State having primary competence – No application for family benefits in the child’s Member State of residence – Partial recovery of family benefits paid in the Member State of activity as an employed person of one of the parents)

In Case C-36/23,

REQUEST for a preliminary ruling under Article 267 TFEU from the Finanzgericht Bremen (Finance Court, Bremen, Germany), made by decision of 19 January 2023, received at the Court on 25 January 2023, in the proceedings

**L**

v

**Familienkasse Sachsen der Bundesagentur für Arbeit,**

THE COURT (Seventh Chamber),

composed of F. Biltgen (Rapporteur), President of the Chamber, J. Passer and M.L. Arastey Sahún, Judges,

Advocate General: J. Richard de la Tour,

Registrar: N. Mundhenke, Administrator,

having regard to the written procedure and further to the hearing on 22 November 2023,

after considering the observations submitted on behalf of:

- the Familienkasse Sachsen der Bundesagentur für Arbeit, by M. Gößling, acting as Agent,
- the German Government, by J. Möller, acting as Agent,
- the Czech Government, by M. Smolek and J. Vláčil, acting as Agents,

\* Language of the case: German.

- the Italian Government, by G. Palmieri, acting as Agent, and by L. Fiandaca, avvocato dello Stato,
- the Netherlands Government, by E.M.M. Besselink and K. Bulterman, acting as Agents,
- the Polish Government, by B. Majczyna, J. Lachowicz and A. Siwek-Ślusarek, acting as Agents,
- the Slovak Government, by E.V. Drugda and S. Ondrášiková, acting as Agents,
- the European Commission, by F. Clotuche-Duvieusart and B.-R. Killmann, acting as Agents,

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

### **Judgment**

- 1 This request for a preliminary ruling concerns the interpretation of Article 68 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).
- 2 The request has been made in proceedings between L and the Familienkasse Sachsen der Bundesagentur für Arbeit (Family Allowances Office, Saxony, of the Federal Employment Agency, Germany) ('the Family Allowances Office') concerning that office's application for partial reimbursement of family allowances paid to L.

### **Legal context**

#### ***European Union law***

##### *Regulation No 1408/71*

- 3 Article 76 of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996 (OJ 1997 L 28, p. 1) ('Regulation No 1408/71'), provided:
  - '1. Where, during the same period, for the same family member and by reason of carrying on an occupation, family benefits are provided for by the legislation of the Member State in whose territory the members of the family are residing, entitlement to the family benefits due in accordance with the legislation of another Member State, if appropriate under Article 73 or 74, shall be suspended up to the amount provided for in the legislation of the first Member State.
  2. If an application for benefits is not made in the Member States in whose territory the members of the family are residing, the competent institution of the other Member State may apply the provisions of paragraph 1 as if benefits were granted in the first Member State.'

*Regulation No 883/2004*

4 Recital 35 of Regulation No 883/2004 states:

‘In order to avoid unwarranted overlapping of benefits, there is a need to lay down rules of priority in the case of overlapping of rights to family benefits under the legislation of the competent Member State and under the legislation of the Member State of residence of the members of the family.’

5 Article 1(a) to (c) of that regulation contains the following definitions:

‘For the purposes of this Regulation:

- (a) “activity as an employed person” means any activity or equivalent situation treated as such for the purposes of the social security legislation of the Member State in which such activity or equivalent situation exists;
- (b) “activity as a self-employed person” means any activity or equivalent situation treated as such for the purposes of the social security legislation of the Member State in which such activity or equivalent situation exists;
- (c) “insured person”, in relation to the social security branches covered by Title III, Chapters 1 and 3, means any person satisfying the conditions required under the legislation of the Member State competent under Title II to have the right to benefits, taking into account the provisions of this Regulation;

6 Article 11(3) of the same regulation provides:

‘Subject to Articles 12 to 16:

- (a) a person pursuing an activity as an employed or self-employed person in a Member State shall be subject to the legislation of that Member State;

...’

7 Chapter 8, on family benefits, of Title III of that regulation, entitled ‘Special provisions concerning the various categories of benefits’, contains Articles 67 to 69 thereof.

8 Article 67 of Regulation No 883/2004, entitled ‘Members of the family residing in another Member State’, provides:

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

- 9 Under Article 68 of that regulation, entitled ‘Priority rules in the event of overlapping’:
- ‘1. Where, during the same period and for the same family members, benefits are provided for under the legislation of more than one Member State the following priority rules shall apply:
- (a) in the case of benefits payable by more than one Member State on different bases, the order of priority shall be as follows: firstly, rights available on the basis of an activity as an employed or self-employed person, secondly, rights available on the basis of receipt of a pension and finally, rights obtained on the basis of residence;
  - (b) in the case of benefits payable by more than one Member State on the same basis, the order of priority shall be established by referring to the following subsidiary criteria:
    - (i) in the case of rights available on the basis of an activity as an employed or self-employed person: the place of residence of the children, provided that there is such activity, and additionally, where appropriate, the highest amount of the benefits provided for by the conflicting legislations. In the latter case, the cost of benefits shall be shared in accordance with criteria laid down in the Implementing Regulation;
    - ...
    - (iii) in the case of rights available on the basis of residence: the place of residence of the children.
2. In the case of overlapping entitlements, family benefits shall be provided in accordance with the legislation designated as having priority in accordance with paragraph 1. Entitlements to family benefits by virtue of other conflicting legislation or legislations shall be suspended up to the amount provided for by the first legislation and a differential supplement shall be provided, if necessary, for the sum which exceeds this amount. However, such a differential supplement does not need to be provided for children residing in another Member State when entitlement to the benefit in question is based on residence only.
3. If, under Article 67, an application for family benefits is submitted to the competent institution of a Member State whose legislation is applicable, but not by priority right in accordance with paragraphs 1 and 2 of this Article:
- (a) that institution shall forward the application without delay to the competent institution of the Member State whose legislation is applicable by priority, inform the person concerned and, without prejudice to the provisions of the Implementing Regulation concerning the provisional award of benefits, provide, if necessary, the differential supplement mentioned in paragraph 2;
  - (b) the competent institution of the Member State whose legislation is applicable by priority shall deal with this application as though it were submitted directly to itself, and the date on which such an application was submitted to the first institution shall be considered as the date of its claim to the institution with priority.’
- 10 Article 76(4) and (5) of Regulation No 883/2004 is worded as follows:
- ‘4. The institutions and persons covered by this Regulation shall have a duty of mutual information and cooperation to ensure the correct implementation of this Regulation.

...

The persons concerned must inform the institutions of the competent Member State and of the Member State of residence as soon as possible of any change in their personal or family situation which affects their right to benefits under this Regulation.

5. Failure to respect the obligation of information referred to in the third subparagraph of paragraph 4 may result in the application of proportionate measures in accordance with national law. Nevertheless, these measures shall be equivalent to those applicable to similar situations under domestic law and shall not make it impossible or excessively difficult in practice for claimants to exercise the rights conferred on them by this Regulation.'

11 Article 81 of that regulation provides:

'Any claim, declaration or appeal which should have been submitted, in application of the legislation of one Member State, within a specified period to an authority, institution or tribunal of that Member State shall be admissible if it is submitted within the same period to a corresponding authority, institution or tribunal of another Member State. In such a case the authority, institution or tribunal receiving the claim, declaration or appeal shall forward it without delay to the competent authority, institution or tribunal of the former Member State either directly or through the competent authorities of the Member States concerned. The date on which such claims, declarations or appeals were submitted to the authority, institution or tribunal of the second Member State shall be considered as the date of their submission to the competent authority, institution or tribunal.'

12 Article 84 of Regulation No 883/2004, entitled 'Collection of contributions and recovery of benefits', is worded as follows:

'1. Collection of contributions due to an institution of one Member State and recovery of benefits provided by the institution of one Member State but not due may be effected in another Member State in accordance with the procedures and with the guarantees and privileges applicable to the collection of contributions due to the corresponding institution of the latter Member State and the recovery of benefits provided by it but not due.

2. Enforceable decisions of the judicial and administrative authorities relating to the collection of contributions, interest and any other charges or to the recovery of benefits provided but not due under the legislation of one Member State shall be recognised and enforced at the request of the competent institution in another Member State within the limits and in accordance with the procedures laid down by the legislation and any other procedures applicable to similar decisions of the latter Member State. Such decisions shall be declared enforceable in that Member State in so far as the legislation and any other procedures of that Member State so require.

...'

*Regulation (EC) No 987/2009*

- 13 Article 3(2) 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) states:

‘Persons to whom [Regulation No 883/2004] applies shall be required to forward to the relevant institution the information, documents or supporting evidence necessary to establish their situation or that of their families, to establish or maintain their rights and obligations and to determine the applicable legislation and their obligations under it.’

- 14 Article 60 of that regulation provides:

‘1. The application for family benefits shall be addressed to the competent institution. For the purposes of applying Articles 67 and 68 of [Regulation No 883/2004], the situation of the whole family shall be taken into account as if all the persons involved were subject to the legislation of the Member State concerned and residing there, in particular as regards a person’s entitlement to claim such benefits. Where a person entitled to claim the benefits does not exercise his right, an application for family benefits submitted by the other parent, a person treated as a parent, or a person or institution acting as guardian of the child or children, shall be taken into account by the competent institution of the Member State whose legislation is applicable.

2. The institution to which an application is made in accordance with paragraph 1 shall examine the application on the basis of the detailed information supplied by the applicant, taking into account the overall factual and legal situation of the applicant’s family.

If that institution concludes that its legislation is applicable by priority right in accordance with Article 68(1) and (2) of [Regulation No 883/2004], it shall provide the family benefits according to the legislation it applies.

If it appears to that institution that there may be an entitlement to a differential supplement by virtue of the legislation of another Member State in accordance with Article 68(2) of [Regulation No 883/2004], that institution shall forward the application, without delay, to the competent institution of the other Member State and inform the person concerned; moreover, it shall inform the institution of the other Member State of its decision on the application and the amount of family benefits paid.

3. Where the institution to which the application is made concludes that its legislation is applicable, but not by priority right in accordance with Article 68(1) and (2) of [Regulation No 883/2004], it shall take a provisional decision, without delay, on the priority rules to be applied and shall forward the application, in accordance with Article 68(3) of [Regulation No 883/2004], to the institution of the other Member State, and shall also inform the applicant thereof. That institution shall take a position on the provisional decision within two months.

If the institution to which the application was forwarded does not take a position within two months of the receipt of the application, the provisional decision referred to above shall apply and the institution shall pay the benefits provided for under its legislation and inform the institution to which the application was made of the amount of benefits paid.

...

5. If the institution which has supplied benefits on a provisional basis has paid more than the amount for which it is ultimately responsible, it may claim reimbursement of the excess from the institution with primary responsibility in accordance with the procedure laid down in Article 73 of the implementing Regulation.’

***German law***

15 The third sentence of Paragraph 31 of the Einkommensteuergesetz (Law on income tax), in the version applicable to the dispute in the main proceedings (‘the EStG’), provides:

‘During the current calendar year, family allowances shall be paid monthly in the form of a tax refund.’

16 Paragraph 32(1) and (3) of the EStG reads as follows:

‘(1) Children shall mean:

1. children related to the taxpayer in the first degree,

...’

(3) A child shall be taken into account from the calendar month in which he or she was born alive and for each calendar month thereafter at the start of which he or she has not reached the age of 18 years.’

17 Paragraph 62(1) of the EStG provides:

‘In the case of children within the meaning of Paragraph 63, any person:

1. who is domiciled or habitually resident within the national territory, or

2. not having his or her domicile or habitual residence within the national territory,

(a) is subject to unlimited income tax liability pursuant to Paragraph 1(2), or

(b) is treated as subject to unlimited income tax liability pursuant to Paragraph 1(3).

shall be entitled to family allowances under the present Law.

...’

18 Under Paragraph 63(1) of the EStG:

‘Children shall mean:

1. children within the meaning of Paragraph 32(1),

...

<sup>2</sup> Paragraph 32(3) to (5) shall apply *mutatis mutandis*. ...’

19 Paragraph 70(2) of the EStG provides:

‘1 In so far as changes occur in the circumstances relevant to the entitlement to family allowances, the grant of family allowances must be cancelled or amended with effect from the date of change in circumstances. ...’

20 Paragraph 37 of the Abgabenordnung (Tax Code), in the version applicable to the dispute in the main proceedings, provides:

‘(1) Claims arising from the tax debtor-creditor relationship shall be the tax claim, the tax rebate claim, the tax claim from the joint and several third party, the claim to an ancillary tax payment, the refund claim pursuant to subparagraph 2 and the tax refund claims set out in individual tax laws.

(2) <sup>1</sup>Where a tax, a tax rebate, a tax payable by the joint and several third party or an ancillary tax payment was paid or repaid in the absence of legal grounds, the person on whose account the payment was made shall be entitled to a refund from the recipient of the amount paid or repaid. <sup>2</sup>The same applies where the legal grounds for the payment or repayment subsequently disappear.’

### **The dispute in the main proceedings and the questions referred for a preliminary ruling**

21 The applicant in the main proceedings, L, is a Polish national who has been in employment in Germany for several years. His wife lives in Poland with their child, born in 2008.

22 In 2016, L applied for family allowances in Germany, certifying his activity as an employed person in that country and that his wife was not carrying out a professional activity in Poland. The Family Allowances Office granted that application on the ground that the German legislation conferring entitlement to family allowances is applicable by way of priority to L’s period of activity as an employed person.

23 In 2019, in the context of a procedure for reviewing entitlement to family allowances, the Family Allowances Office sent L a questionnaire in order to confirm the data provided and asked the competent Polish authorities for information concerning the existence of any professional activity on the part of his wife and any entitlement to Polish family benefits.

24 Those authorities replied that she had been carrying out a professional activity since 2006 and paid contributions to the Polish social insurance fund for farmers, but that she did not receive Polish family benefits. Although, following a legislative amendment made in Poland in 2019, it was now possible to receive so-called ‘Family 500+’ benefits without any income requirement, L’s wife has, however, stated that she does not wish to submit an application to that effect.

25 Following that reply, the Family Allowances Office, pursuant to Paragraph 70(2) of the EStG, revoked, with effect from October 2020, the grant of German family allowances up to the amount of family benefits legally provided for in Poland.

26 In addition, the Family Allowances Office, by a ‘request for a decision on competence’, asked the competent Polish authorities to examine entitlement to family benefits from July 2019. Those authorities replied, inter alia, that the applicant’s wife had not received any such benefit since 1 July 2019 and that she did not wish to apply for such benefits.



- 27 By decision of 6 January 2021, the Family Allowances Office revoked the grant of family allowances for the period from July 2019 to September 2020 up to the amount of family benefits legally provided for in Poland, and sought from the applicant in the main proceedings reimbursement of the overpaid family allowances, namely the amount of EUR 1 674.60 corresponding to the payment of those allowances during that period.
- 28 Following the rejection of his application for variation of that decision, L brought an action before the Finanzgericht Bremen (Finance Court, Bremen, Germany), which is the referring court.
- 29 In support of his action, L claims that his wife is not carrying out a professional activity, since the agricultural farm which she inherited from her parents was not in use. Insurance with the Polish social insurance fund for farmers, in respect of which he pays contributions, was taken out on account of ownership of that farm and does not presuppose the exercise of a self-employed activity as a farmer. Furthermore, during the period referred to in paragraph 27 above, his wife neither applied for nor received family allowances in Poland.
- 30 The Family Allowances Office submits, inter alia, that L's wife is entitled to 'Family 500+' benefits, the grant of which has not, since July 2019, been subject to receipt of income. Furthermore, as is apparent from the information obtained from the competent Polish authorities, that wife must be regarded as carrying out a professional activity in Poland. It follows from Article 68(1)(b)(i) of Regulation No 883/2004 that family benefits are due by priority in that Member State, since L's child and wife reside there.
- 31 The referring court considers that it follows from the Court's case-law on Regulation No 1408/71 that was repealed by Regulation No 883/2004 and, in particular, from the judgment of 14 October 2010, *Schwemmer* (C-16/09, EU:C:2010:605), that the suspension of a right to family benefits on account of the existence of such a right in another Member State is conceivable only if the family benefits are actually paid by that other Member State and that, in the absence of such payment, it is irrelevant that the non-payment is solely due to the fact that an application to that effect has not been made.
- 32 However, the referring court notes that, as regards situations existing under Regulation No 883/2004, the Bundesfinanzhof (Federal Finance Court, Germany) has taken the view that, by virtue of the deeming provision established in Article 68(3)(b) and Article 81 of that regulation, an application for family benefits made in the Member State whose legislation is not applicable by priority is also to be regarded as an application for family benefits lodged, on the same date, in the Member State whose legislation is applicable by priority, which would permit the conclusion that the formal condition of entitlement, in the context of an application in the latter State, is satisfied. According to the Bundesfinanzhof (Federal Finance Court), that is the case even if the first State is not aware of the existence of a foreign element, since it was not informed by the applicant and therefore does not forward the application to the second Member State. It follows that it is only where, in the Member State whose legislation is applicable by priority, the substantive conditions for entitlement are not satisfied, in particular because the age limit or income thresholds have been exceeded, that the provisions of Article 68 of that regulation do not apply.
- 33 The referring court points out that the purpose of Regulation No 883/2004, as is apparent from recital 35 thereof, is to avoid unwarranted overlapping of benefits in the event of overlapping of entitlements to family benefits under the legislation of several Member States, with the result

that the priority rules referred to in Article 68 of that regulation must not, in principle, have the effect of granting the entitled person benefits lower than those which would be paid to him or her if those priority rules were not applied.

- 34 As regards Article 68(3) of that regulation, the referring court considers that the assimilation of claims, as described in paragraph 32 above, which is provided for therein and which is intended to simplify the procedure for the person entitled, has no bearing on the fact that the time limits for submitting applications for family benefits and the possibility of the retroactive grant of such benefits remain governed by national legislation and that, therefore, the submission of such an annual and prior application is required in Poland. Furthermore, the procedure referred to in paragraph 3(a) concerns only the situation in which a decision must be taken on an application for family benefits which has not yet been dealt with.
- 35 However, if that were not the case and the priority rules laid down in Article 68(1) of Regulation No 883/2004 were to apply in a situation such as that at issue in the main proceedings, the referring court asks whether priority should be determined between the Member States concerned on the basis of the conditions for entitlement laid down by national law or on that of the criteria referred to in Articles 11 to 16 of that regulation. As regards the second situation, the referring court asks whether it must be presumed that a person pursues an activity as an employed or self-employed person in a Member State where the competent authorities of that Member State attest to this, notwithstanding that person's assertion to the contrary.
- 36 In those circumstances the Finanzgericht Bremen (Finance Court, Bremen) decided to stay the proceedings and to refer the following questions to the Court of Justice 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 (2) is answered in the affirmative[, d]oes 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[, i]s Article 68 [read] 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?’

## Consideration of the questions referred

### *The first question*

- 37 By its first question, the referring court asks, in essence, whether Article 68 of Regulation No 883/2004, which lays down the rules of priority in the case of overlapping of family benefits, must be interpreted as allowing the institution of a Member State whose legislation does not have priority in accordance with the criteria set out in paragraph 1 of that article to claim from the person concerned the partial reimbursement of such benefits paid in that Member State, on account of the existence of a right to those benefits provided for in the legislation of another Member State applicable by priority, even if no family benefit has been fixed or paid in that other Member State.
- 38 As a preliminary point, it should be borne in mind that a worker who, like the applicant in the main proceedings, works in one Member State and whose family lives in the territory of another Member State, falls within the scope of Article 67 of Regulation No 883/2004.
- 39 Article 67 of Regulation No 883/2004 establishes the principle that a person may claim family benefits for members of his or her family who reside in a Member State other than the Member State competent for paying those benefits, as if they resided in the latter Member State. Thus, that article is designed to make it easier for migrant workers to draw family allowances in the Member State where they are employed, in cases where their family has not moved with them (see, to that effect, judgment of 18 September 2019, *Moser*, C-32/18, EU:C:2019:752, paragraphs 35 and 36 and the case-law cited).
- 40 However, that principle of equal treatment is not absolute, in the sense that where several entitlements are payable under different laws, the rules against overlapping benefits laid down in Article 68 of Regulation No 883/2004 must apply (see, to that effect, judgment of 13 October 2022, *DN (Recovery of family benefits)*, C-199/21, EU:C:2022:789, paragraph 33 and the case-law cited).
- 41 As is apparent from recital 35 of Regulation No 883/2004, the objective of those rules is to avoid unjustified overlapping of benefits in the case of overlapping of rights to family benefits.
- 42 Thus, Article 68(1)(a) of Regulation No 883/2004 lays down the priority rules where benefits are payable by more than one Member State on different bases, whereas Article 68(1)(b) sets out the order of priority for benefits which are payable on the same basis. Under the terms of Article 68(2), in the case of overlapping entitlements, family benefits are to be provided in accordance with the legislation designated as having priority in accordance with Article 68(1), with entitlements to family benefits by virtue of other legislation being suspended up to the amount provided for by the first legislation and a differential supplement being provided, if necessary, for the sum exceeding that amount.
- 43 As regards the applicability of those priority rules, it should be borne in mind that it follows from the case-law of the Court that, for a finding of such overlapping in a given case, it is not enough for benefits to be due in the Member State of residence of the child concerned and to be, in parallel,

merely capable of being due in another Member State. It is also necessary for the person concerned to fulfil all the conditions, as to both form and substance, imposed by the legislation of that State in order to be able to exercise that right, which may in some cases include the condition that a prior application must have been made (see, to that effect, judgments of 14 October 2010, *Schwemmer*, C-16/09, EU:C:2010:605, paragraphs 52 and 53, and of 13 October 2022, *DN (Recovery of family benefits)*, C-199/21, EU:C:2022:789, paragraphs 34 and 35 and the case-law cited).

- 44 That case-law, which concerns the priority rules that were laid down in Article 76 of Regulation No 1408/71, was not called into question by the introduction of the mechanism provided for in Article 68(3) of Regulation No 883/2004.
- 45 In that regard, it is apparent from Article 68(3)(a) of Regulation No 883/2004 that the competent institution of a Member State to which an application for family benefits has been lodged but whose legislation is not applicable by priority in accordance with paragraphs 1 and 2 of that article, is to forward that application without delay to the competent institution of the Member State whose legislation is applicable by priority, inform the person concerned and, where appropriate, provide the differential supplement referred to in paragraph 2 of that article, without prejudice to the provisions of Article 60 of Regulation No 987/2009 relating to the provisional award of benefits.
- 46 Concerning the latter article, which, because of the reference it makes to Articles 67 and 68 of Regulation No 883/2004, must be examined in relation to those articles (see, to that effect, judgment of 18 September 2019, *Moser*, C-32/18, EU:C:2019:752, paragraph 34), it should be noted that the first subparagraph of Article 60(3) of Regulation No 987/2009 provides that the institution to which an application for family benefits is made, which considers that its legislation does not have priority, is to take a provisional decision on the priority rules applicable and forward that application to the institution of the other Member State, while informing the applicant of that transmission. The second subparagraph of Article 60(3) states that if the institution to which the application has been forwarded does not take a position within two months of receipt of the application, the provisional decision taken by the institution to which the application was first made is to apply and the latter must pay the benefits provided for under its legislation.
- 47 Thus, it is clear from the wording of Article 60 of Regulation No 987/2009 that the institution of a Member State to which an application for family benefits has been made, which considers that its legislation does not have priority, is required, where the institution deemed to have primary competence has not taken a position, to pay the benefits provided for under that legislation.
- 48 Consequently, in such a situation, that institution to which the application has been made cannot suspend payment of those family benefits up to the amount which may be provided for by the legislation considered to have priority and provide them in the form of a differential supplement for the part exceeding that amount.
- 49 That interpretation is, moreover, confirmed by Article 60(5) of Regulation No 987/2009, which provides that, where an institution which has supplied benefits on a provisional basis has paid more than the amount for which it is ultimately responsible, it may claim reimbursement of the excess from the institution with primary responsibility.

- 50 In addition, Article 68(3)(b) of Regulation No 883/2004 provides that the competent institution whose legislation is applicable by priority is to deal with that application as though it had been submitted directly to it, and the date on which the application was submitted to the first institution is to be considered as the date of submission of the claim to the institution with priority.
- 51 The provisions of Article 68(3) of Regulation No 883/2004 are supplemented by those of Article 81 of that regulation, under which the lodging of a claim with an authority, institution or tribunal of a Member State other than the Member State called upon to provide the benefit is to have the same effect as if the claim had been made directly to the competent authority of the latter Member State and the date on which the claim was made in the first Member State is to be regarded as the date of its submission to the competent authority, institution or tribunal.
- 52 Those provisions are intended to facilitate the movement of migrant workers by simplifying the administrative formalities with which they must comply, in view of the complexity of the administrative procedures existing in the various Member States, and to prevent persons concerned from being deprived of their rights on purely formal grounds (see, to that effect, judgment of 29 September 2022, *Chief Appeals Officer and Others*, C-3/21, EU:C:2022:737, paragraph 26).
- 53 Thus, since an application made by the person concerned is deemed to be transmitted automatically to the competent authority of the Member State whose legislation is applicable by priority and since, on account of its being deemed that the date of submission of the application to a competent authority is the date of submission to the authority called upon to adjudicate with primary competence, the condition referred to in paragraph 43 above that a prior application has to have been made is, in principle, no longer required in order to assess whether there is a situation of overlapping benefits for the purpose of applying the priority rules.
- 54 The fact remains that all the other formal and substantive conditions imposed by the legislation of the Member State with priority must be complied with, since a distinction must be made between the making of a claim for family benefits and the right to receive such benefits (see, to that effect, judgments of 22 October 2015, *Trapkowski*, C-378/14, EU:C:2015:720, paragraph 46, and of 13 October 2022, DN (*Recovery of family benefits*), C-199/21, EU:C:2022:789, paragraph 42).
- 55 In that regard, it should be borne in mind that the Member States retain the power to organise their social security systems and that it is for the legislation of each Member State to lay down the conditions under which social security benefits are granted, the amount of such benefits and the period for which they are granted, as well as the time limits for making applications for such benefits (judgment of 29 September 2022, *Chief Appeals Officer and Others*, C-3/21, EU:C:2022:737, paragraph 39 and the case-law cited).
- 56 Furthermore, it follows from the wording of Article 1(a) and (b) of Regulation No 883/2004, which defines an activity as an employed or self-employed person as any activity or equivalent situation treated as such for the purposes of the social security legislation of the Member State in which such activity or equivalent situation exists, that it is for the competent institution of the Member State in which that activity is carried out to determine whether a person carries out such an activity, within the meaning of Article 68 of that regulation.

- 57 Indeed, given that the decision on the grant of family benefits is subject to the interpretation and the application of the legislation of the Member State concerned, the institution of another Member State is not in a position to assess whether all the conditions are met. That institution must therefore confine itself to recording the fact that the competent institution of another Member State has in fact either granted family benefits to the person concerned or has refused to grant them to the recipient (see, to that effect, judgment of 3 February 1983, *Robards*, 149/82, EU:C:1983:26, paragraph 11).
- 58 In the present case, it is apparent from the order for reference that, when the initial application for family allowances was submitted in Germany, that Member State granted the application by reason of it being the Member State with priority, without triggering the mechanism laid down in Article 60(3) of Regulation No 987/2009.
- 59 It was only during a subsequent verification, on account of an amendment to the legislation applicable in Poland, that the Federal Republic of Germany considered that its legislation no longer had priority, within the meaning of Article 68(1) and (2) of Regulation No 883/2004, and informed both the recipient of the family allowances and the competent Polish institution thereof, with the latter institution being required, in accordance with the mechanism introduced by Article 68(3) of that regulation, to deal with the application as if it had been submitted directly to it, on the date on which it was submitted to the competent German institution.
- 60 In that regard, it must be stated that the concept of ‘claim’, which cannot be treated in the same way as receiving a periodic benefit from the authorities of a Member State, requires an administrative formality on the part of the person concerned (see, to that effect, judgment of 29 September 2022, *Chief Appeals Officer and Others*, C-3/21, EU:C:2022:737, paragraph 31), like that of the applicant in the main proceedings, who replied to the questionnaire sent in the context of a procedure for monitoring entitlement to family allowances in order to confirm the information provided.
- 61 In the event that all the other formal and substantive conditions laid down by the Polish legislation for the grant of family allowances are satisfied, the Republic of Poland cannot put forward arguments which are purely formalistic in relation to that application, in order to refuse the grant of family benefits. That is all the more so since the reasons for which a person refuses or does not intend to make a formal application have no relevance to the answer given by the Court (see, to that effect, judgment of 14 October 2010, *Schwemmer*, C-16/09, EU:C:2010:605, paragraph 54).
- 62 In those circumstances, where the Polish institution, which has primary competence, does not pay the family benefits at issue in the main proceedings and fails to take a position on the application for transmission, the German institution, as the institution to which the application was first made, will indeed have to pay the benefits provided for under its legislation, but may subsequently claim from the competent Polish institution reimbursement of the amount of the family benefits which exceeds that which it is required to pay under the provisions of Regulation No 883/2004.
- 63 As the Court has already held, in accordance with the provisions of Article 68(3)(a) of Regulation No 883/2004 and Article 60(2) and (3) of Regulation No 987/2009, the institution of the Member State with primary competence and the institution of the Member State with secondary competence are mutually bound by those provisions and it is for those two institutions jointly to

deal with the application submitted by the applicant for family benefits to one of them (see, to that effect, judgment of 25 November 2021, *Finanzamt Österreich (Family benefits for development aid worker)*, C-372/20, EU:C:2021:962, paragraph 66).

- 64 In addition, it follows from the principle of sincere cooperation, as embodied in Article 60(5) of Regulation No 987/2009 and from Article 84 of Regulation No 883/2004, that a Member State may require another Member State to reimburse the overpayment of the family benefit, including in respect of the past, provided that the formal and substantive conditions laid down in the legislation of the second Member State are regarded as having been satisfied in respect of the past.
- 65 Any other interpretation, consisting in alleging a lack of cooperation on the part of one of the competent institutions as to the amount of family allowances to be paid to the recipient or which would require the recipient to reimburse amounts paid by an institution but which that institution was not obliged to pay, would clearly run counter to the objective of the rules against overlapping, which are intended to ensure that person entitled to benefits paid by several Member States receives a total amount of benefits which is equal to the amount of the most favourable benefit to which he or she is entitled under the legislation of a single Member State (see, to that effect, judgments of 14 October 2010, *Schwemmer*, C-16/09, EU:C:2010:605, paragraph 58 and the case-law cited, and of 18 September 2019, *Moser*, C-32/18, EU:C:2019:752, paragraph 42 and the case-law cited).
- 66 In that context, it should be borne in mind that, in accordance with Article 76(4) of Regulation No 883/2004, while the authorities covered by that regulation are required to respond to all queries within a reasonable period of time and to provide the persons concerned with any information required for validly exercising the rights conferred on them by that regulation, those persons are, for their part, required to inform the institutions of the competent Member State and of the Member State of residence as soon as possible of any change in their personal or family circumstances which affects their right to benefits under that regulation (see, to that effect, judgment of 29 September 2022, *Chief Appeals Officer and Others*, C-3/21, EU:C:2022:737, paragraph 34).
- 67 In the present case, if it were to be held that the declaration by the applicant in the main proceedings that his wife does not work in Poland does not correspond to the true situation, which it is for the referring court to ascertain, the remedy for such a failure to comply with the obligation to provide information would, however, be found not in the recovery of benefits under Article 68 of Regulation No 883/2004, but in the application of proportionate measures provided for by national law which, pursuant to Article 76(5) of that regulation, must also comply with the principles of equivalence and effectiveness (see, to that effect, judgment of 29 September 2022, *Chief Appeals Officer and Others*, C-3/21, EU:C:2022:737, paragraph 43).
- 68 In the light of the foregoing considerations, the answer to the first question is that Article 68 of Regulation No 883/2004, which lays down the priority rules in the event of overlapping of family benefits, must be interpreted as meaning that, although it does not allow the institution of a Member State whose legislation does not have priority according to the criteria referred to in paragraph 1 of that article to claim from the person concerned partial reimbursement of such benefits paid in that Member State, on account of the existence of a right to those benefits provided for in the legislation of another Member State applicable by priority, where no family benefit has been fixed or paid in that other Member State, it nevertheless allows that institution

to claim from the institution with primary competence the reimbursement of the amount of benefits which exceeds that which it is required to reimburse under the provisions of that regulation.

*The second and third questions*

- 69 In the light of the answer given to the first question, there is no need to answer the second and third questions.

**Costs**

- 70 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Seventh Chamber) hereby rules:

**Article 68 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, which lays down priority rules in the event of overlapping family benefits,**

**must be interpreted as meaning that although it does not allow the institution of a Member State whose legislation does not have priority according to the criteria referred to in paragraph 1 of that article to claim from the person concerned partial reimbursement of such benefits paid in that Member State, on account of the existence of a right to those benefits provided for in the legislation of another Member State applicable by priority, where no family benefit has been fixed or paid in that other Member State, it nevertheless allows that institution to claim from the institution with primary competence the reimbursement of the amount of benefits which exceeds that which it is required to reimburse under the provisions of that regulation.**

[Signatures]