



Reports of Cases

OPINION OF ADVOCATE GENERAL

PIKAMÄE

delivered on 2 June 2022¹

Case C-199/21

DN

v

Finanzamt Österreich

(Request for a preliminary ruling from the Bundesfinanzgericht (Federal Finance Court, Austria))

(Reference for a preliminary ruling – Social security – Regulation (EC) No 987/2009 – Article 60(1), third sentence – Legislation of a Member State providing for the award of family benefits to the parent who has taken the child into his or her household – Failure by the parent entitled to claim benefits to exercise his or her right – Obligation to take into account the application submitted by the other parent – Significance of that obligation for the request for the recovery of family benefits granted to the other parent)

I. Introduction

1. In the present case, the Court has been asked by the Bundesfinanzgericht (Federal Finance Court, Austria) to give a preliminary ruling concerning, inter alia, the interpretation of the provisions laid down, for the application of Articles 67 and 68 of Regulation (EC) No 883/2004,² by Regulation (EC) No 987/2009.³

2. More specifically, the fourth and fifth questions, on which this Opinion is focused, ask the Court to clarify the meaning and scope of the third sentence of Article 60(1) of Regulation No 987/2009, the provisions of which stipulate that, where the person entitled to claim family benefits fails to exercise his or her right, the competent institution must take into account the application submitted by one of the persons referred to in that provision.

¹ Original language: French.

² Regulation of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ 2004 L 166, p. 1, and corrigendum OJ 2004 L 200, p. 1).

³ Regulation of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems (OJ 2009 L 284, p. 1).

II. Legal framework

A. *European Union law*

1. *Regulation No 883/2004*

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

‘For the purposes of this Regulation:

...

(i) “member of the family” means:

...

3. if, under the legislation which is applicable under subparagraphs 1 and 2, a person is considered a member of the family or member of the household only if he/she lives in the same household as the insured person or pensioner, this condition shall be considered satisfied if the person in question is mainly dependent on the insured person or pensioner;

...

(q) “competent institution” means:

(i) the institution with which the person concerned is insured at the time of the application for benefit;

...

(s) “competent Member State” means the Member State in which the competent institution is situated;

...

(z) “family benefit” means all benefits in kind or in cash intended to meet family expenses, excluding advances of maintenance payments and special childbirth and adoption allowances mentioned in Annex I.’

4. Article 2(1) of that regulation is worded as follows:

‘This Regulation shall apply to nationals of a Member State, stateless persons and refugees residing in a Member State who are or have been subject to the legislation of one or more Member States, as well as to the members of their families and to their survivors.’

5. Article 3 of that regulation states:

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

...

(j) family benefits.

...’

6. Article 7 of that regulation provides:

‘Unless otherwise provided for by this Regulation, cash benefits payable under the legislation of one or more Member States or under this Regulation shall not be subject to any reduction, amendment, suspension, withdrawal or confiscation on account of the fact that the beneficiary or the members of his/her family reside in a Member State other than that in which the institution responsible for providing benefits is situated.’

7. Article 67, which forms part of Chapter 8 of Title III of that regulation and is 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.’

8. Article 68 of that regulation, which is also set out in Chapter 8 and is entitled ‘Priority rules in the event of overlapping’, is worded as follows:

‘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:

...

(ii) in the case of rights available on the basis of receipt of pensions: the place of residence of the children, provided that a pension is payable under its legislation, and additionally, where appropriate, the longest period of insurance or residence under the conflicting legislations;

...

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.

...'

9. Article 68a⁴ of that regulation, which also forms part of Chapter 8 and is entitled 'Provision of benefits', provides:

'In the event that family benefits are not used by the person to whom they should be provided for the maintenance of the members of the family, the competent institution shall discharge its legal obligations by providing those benefits to the natural or legal person in fact maintaining the members of the family, at the request and through the agency of the institution in their Member State of residence or of the designated institution or body appointed for that purpose by the competent authority of their Member State of residence.'

2. Regulation No 987/2009

10. Under Article 60(1) of Regulation No 987/2009:

'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.'

B. Austrian law

11. Paragraph 2 of the Bundesgesetz betreffend den Familienlastenausgleich durch Beihilfen (Federal Law on compensation for family expenses by means of allowances) of 24 October 1967 (BGBl. 376/1967; 'the FLAG'), in the version applicable to the dispute in the main proceedings, provides:

'(1) Persons who have their domicile or habitual residence in the federal territory shall be entitled to family allowances

...

⁴ This article was inserted into Regulation No 883/2004 by Article 1(18) of Regulation (EC) No 988/2009 of the European Parliament and of the Council of 16 September 2009 amending Regulation (EC) No 883/2004 (OJ 2009 L 284, p. 43).

(b) for adult children who have not yet reached the age of 24 and who are pursuing vocational training

...

(2) The person entitled to receive family allowances shall be the person to whose household the child referred to in subparagraph 1 belongs. A person to whose household the child does not belong but who is mainly responsible for the cost of maintaining that child is entitled to family allowances where no other person is entitled to receive them under the first sentence of this subparagraph.

(3) For the purposes of this section, “children of a person” shall mean:

(a) that person’s descendants,

...

(5) A child shall belong to a person’s household where he or she shares with that person a dwelling that forms a single household. A child does not cease to belong to the household where

(a) the child stays outside the shared dwelling only temporarily.

...’

12. Paragraph 26(1) of the FLAG states:

‘Any person who has received family allowances which were not due to him or her must repay the amounts in question.’

III. Facts of the dispute, the procedure in the main proceedings and the questions referred for a preliminary ruling

13. Since 2001, DN, who was born in Poland, has been an Austrian national and has resided in Austria. He was married to a Polish national until 2011; in 1991, their daughter, who is also a Polish national, was born.

14. Since 2011, DN has been in receipt of an early retirement pension from the competent Polish and Austrian institutions which is calculated on the basis of successive insurance periods in Poland and Austria.

15. Between January and August 2013, DN applied for and received family benefits in the form of a compensatory allowance and a tax credit granted, for his daughter, by the Austrian tax authority. DN paid his benefits to his daughter who was studying in Poland. DN’s former wife did not apply for the award of such benefits.

16. During that same period, no family benefits were paid in Poland since DN’s resources exceeded the income ceiling laid down by the legislation of that Member State for entitlement to such allowances.

17. By a decision of 12 November 2014, the Austrian tax authority sought the recovery of the compensatory allowances and tax credits granted to DN on the ground that, since he was in receipt of an early retirement pension from the Republic of Poland and his daughter's place of residence was in that same State, in accordance with the priority rules laid down in Article 68(1) of Regulation No 883/2004, the Republic of Austria had only secondary competence to provide family benefits. Relying, in addition, on an alternative ground for recovery, that tax authority submits that, under Paragraph 2(2) of the FLAG, only the mother, who resides in Poland with her daughter, was entitled to Austrian family allowances. It infers from this that, under Paragraph 26(1) of the FLAG, those benefits must be recovered from the father even where the mother, who was responsible for submitting an application, can no longer obtain payment of those benefits because the period for doing so retroactively has lapsed.

18. Claiming that the Republic of Austria is obliged to pay him family benefits under Article 68(2) of Regulation No 883/2004, read in conjunction with the relevant provisions of the FLAG, DN has brought an action against that decision before the Bundesfinanzgericht (Federal Finance Court).

19. In those circumstances, the Bundesfinanzgericht (Federal Finance Court) decided, on 19 March 2021, to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

- (1) Is the phrase “Member State competent for [the] pension” in the second sentence of Article 67 of [Regulation No 883/2004], ... to be interpreted as meaning that it refers to the Member State previously competent for family benefits as the State of employment and now required to pay an old-age pension, the right to which is based on the freedom of movement of workers previously exercised in its territory?
- (2) Is the phrase “rights available on the basis of receipt of pensions” in Article 68(1)(b)(ii) of Regulation No 883/2004 to be interpreted as meaning that the right to family benefits is to be regarded as being available on the basis of receipt of pensions if, first, the laws of the EU or of the Member State governing the right to family benefits provide for receipt of pensions as a criterion and, second and additionally, the criterion of receipt of pensions is fulfilled in fact at a factual level, meaning that “simple receipt of pensions” does not fall under Article 68(1)(b)(ii) of Regulation No 883/2004 and the Member State concerned is not to be regarded as the “State of the pension” under EU law?
- (3) If simple receipt of pensions suffices for the purpose of interpretation of the concept of the State of the pension:

In the case of receipt of an old-age pension, the right to which [accrued] under the migrant workers regulations and, prior to that, as a result of the pursuit of an activity as an employed person in a Member State in a period when neither the State of residence alone nor both States were Member States of the EU or the European Economic Area, is the phrase “a differential supplement shall be provided, if necessary” in the second clause of the second sentence of Article 68(2) of Regulation No 883/2004 to be understood, in light of the judgment of 12 June 1980, *Laterza* [(733/79, EU:C:1980:156),] as meaning that EU law guarantees family benefits to the maximum possible extent even in the case of receipt of pensions?

- (4) Is the third sentence of Article 60(1) of Regulation (EC) No 987/2009 to be interpreted as meaning that it precludes Paragraph 2(5) of the FLAG 1967, according to which, in the case of divorce, the right to the family allowance and tax credit for the child remains vested in the parent who is the head of the household but who has not made an application either in the State of residence or in the State of the pension for as long as the adult child in education is a member of his or her household, meaning that the other parent living as a pensioner in Austria, who in fact bears the entire cost of [financially] supporting the child, can exercise the right to the family allowance and tax credit for the child against the institution of the Member State whose laws take precedence based directly on the third sentence of Article 60(1) of Regulation No 987/2009?
- (5) Is the third sentence of Article 60(1) of Regulation No 987/2009 to be further interpreted as meaning that it is also necessary, in order to substantiate the standing of the EU worker as a party in the Member State family benefits procedure, that he/she is mainly responsible for the cost of maintenance within the meaning of Article 1(i)(3) of Regulation No 883/2004?
- (6) Are the provisions governing the dialogue procedure in Article 60 of Regulation No 987/2009 to be interpreted as meaning that that procedure must be conducted by the institutions of the Member States involved not only where family benefits are granted, but also where family benefits are recovered?

IV. The procedure before the Court

20. Written observations have been submitted by the Czech Government and the European Commission.

V. Legal assessment

21. As requested by the Court, this Opinion will focus on the fourth and fifth questions.

A. Reformulation of the questions

22. By its fourth and fifth questions, the referring court seeks to ascertain, in essence, whether the third sentence of Article 60(1) of Regulation No 987/2009 precludes national legislation, such as that at issue in the main proceedings, which restricts entitlement to family benefits to the parent who lives with the child, with the result that, even if that parent does not submit an application for the award of such benefits, the other parent, who in fact bears the entire cost of maintaining the child, cannot obtain payment of those benefits.

23. It is therefore necessary, in the referring court's view, to determine whether, in circumstances such as those in the main proceedings, the other parent derives entitlement to family benefits from that article.

24. In that regard, it seems to me that the judgment in *Trapkowski*⁵ may provide the referring court with some answers. In the grounds of that decision, the Court recalled, first, that Regulations No 987/2009 and No 883/2004 do not determine the persons entitled to family

⁵ Judgment of 22 October 2015 (C-378/14, EU:C:2015:720; 'judgment in *Trapkowski*').

benefits,⁶ even though they lay down the rules which enable the persons entitled to claim those benefits to be determined.⁷ The Court went on to note that it follows both from the wording and the general scheme of the third sentence of Article 60(1) of Regulation No 987/2009 that a distinction must be made between making a claim for family benefits and the right to receive such benefits.⁸ Relying again on the wording of that article, it pointed out that, although it is sufficient if one of the persons able to claim those family benefits makes an application, so that the competent institution of the Member State must take the application from the other parent into consideration, EU law does not preclude such an institution, in accordance with national law, from finding that the person entitled to receive child benefits is a person other than the person who made the application for those benefits.⁹

25. It follows from that case-law that the third sentence of Article 60(1) of Regulation No 987/2009 does not require a Member State to grant a benefit to the ‘other parent’ where the parent entitled to claim family benefits has failed to exercise his or her right. Consequently, that provision does not in any way preclude, in circumstances such as those in the main proceedings, the competent Austrian institution from rejecting the application for the grant of those benefits submitted by DN in the light of the conditions for their award.

26. That said, I note that, in the present dispute, the problem is not really analogous to that addressed by the judgment in *Trapkowski* since, initially, the competent Austrian institution granted the application submitted by DN in respect of his daughter. That authority has only subsequently demanded the repayment of the sums corresponding to the family benefits granted to DN, relying on, as an alternative ground for recovery, the national provisions providing, first, that family allowances are paid to the person to whose household the child belongs and, second, that any person who receives those allowances which are not due to him or her must repay the amount thereof. It will therefore be for the referring court to rule on the relevance of those grounds for the purpose of deciding on the tax authority’s request for the recovery of family benefits.

27. The interpretation of the third sentence of Article 60(1) of Regulation No 987/2009 is likely to have a decisive impact on the outcome of the dispute since, in the present case, the Austrian tax authority, in the absence of an application by the mother, took into account the application submitted by the father and granted him family benefits in respect of the child. In other words, the referring court will have to determine whether, in such circumstances, the third sentence of Article 60(1) of Regulation No 987/2009 precludes legislation which allows the recovery of family benefits paid to DN in respect of his child.

28. In those circumstances, I consider it necessary, with the aim of providing the referring court with an answer that will be of use to it in the resolution of the dispute, to reformulate the questions which it has referred to the Court.¹⁰

⁶ The Court states that it clearly follows from the wording of Article 67 of Regulation No 883/2004 that the persons entitled to family benefits are determined in accordance with national law (see judgment in *Trapkowski*, paragraph 44).

⁷ Judgment in *Trapkowski*, paragraph 43.

⁸ Judgment in *Trapkowski*, paragraph 46.

⁹ Judgment in *Trapkowski*, paragraphs 47 and 48.

¹⁰ See, to that effect, judgment of 6 October 2021, *W.Ž. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment)* (C-487/19, EU:C:2021:798, paragraph 68 and the case-law cited).

29. I therefore suggest that the Court reformulate the fourth and fifth questions as follows:

Must the third sentence of Article 60(1) of Regulation No 987/2009 be interpreted as meaning that it precludes national legislation which allows the recovery of family benefits awarded, where the person entitled to claim those benefits has failed to exercise his or her right, to one of the persons referred to in that provision whose application has been taken into account by the competent institution?

B. The reformulated questions

30. The questions as reformulated therefore require an interpretation of the third sentence of Article 60(1) of Regulation No 987/2009. Since that regulation was adopted for the purpose of implementing Regulation No 883/2004, I consider it necessary to understand the subject matter and purpose of the rules laid down in respect of family benefits by that second regulation. In the present case, that approach seems to me to be all the more necessary because, according to the case-law of the Court, the meaning and scope of Article 60(1) of Regulation No 987/2009 must, on account of the reference it makes to Articles 67 and 68 of Regulation No 883/2004, be examined in relation to the provisions of those articles.¹¹

31. In order to guarantee freedom of movement for workers as defined in Article 45 TFEU, Article 48 of that Treaty provides, in essence, for the establishment of a system for the coordination of social security schemes. First organised by Regulation (EEC) No 1408/71,¹² the mechanisms of which had become too complex,¹³ the coordination of social security schemes is now governed by Regulation No 883/2004. As stated in recital 4 thereof,¹⁴ the purpose of that regulation, like that of Regulation No 1408/71,¹⁵ is not to harmonise social security systems but only to ensure their coordination.

32. In order to attain that objective, Regulation No 883/2004 provides *inter alia* for conflict-of-law rules which make it possible, in the presence of several laws or no law at all, to determine the social security legislation under which benefits may be awarded. Those rules, which are laid down in Articles 11 to 16 of that regulation, are based, in the first place, on the general principle that the law of a single Member State is to apply.¹⁶

33. That said, Regulation No 883/2004 lays down derogating rules which are applicable to the various categories of benefits. To that end, Article 67 of Regulation No 883/2004 determines, in respect of family benefits, the Member State or States competent to provide such benefits.¹⁷ For that purpose, that article establishes a principle that a person may claim family benefits for

¹¹ Judgment of 18 September 2019, *Moser* (C-32/18, EU:C:2019:752, paragraph 34).

¹² Regulation of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community (OJ, English Special Edition 1971(II), p. 416).

¹³ To that effect, it is emphasised, in recital 3 of Regulation No 883/2004, that ‘the Community coordination rules [are] complex and lengthy’ and that it is essential to replace them ‘while modernising and simplifying’ them.

¹⁴ Recital 4 of Regulation No 883/2004 provides that ‘it is necessary to respect the special characteristics of national social security legislation and to draw up only a system of coordination’.

¹⁵ See, to that effect, judgment of 26 September 2000, *Engelbrecht* (C-262/97, EU:C:2000:492, paragraphs 35 and 36 and the case-law cited).

¹⁶ The first sentence of Article 11(1) of Regulation No 883/2004 states that ‘persons to whom this Regulation applies shall be subject to the legislation of a single Member State only’.

¹⁷ Article 68 of Regulation No 883/2004 lays down priority rules in the event of overlapping of legislation and entitlement to benefits. I note, however, that those provisions do not appear to be applicable in the present case. It is clear from the wording used in the order for reference that, during the period that is the subject of the dispute in the main proceedings, no family benefits were paid in Poland. According to the case-law of the Court, overlapping, within the meaning of that article, presupposes that benefits are actually due in several Member States. See, to that effect, judgment in *Trapkowski* (paragraph 32 and the case-law cited).

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.¹⁸ As the Court states, Article 67 of Regulation No 883/2004 is designed, in essence, to prevent a Member State from being able to make the grant or the amount of family benefits dependent on members of the worker's family being resident in the Member State paying the benefit.¹⁹

34. Article 67 of that regulation therefore establishes a fiction whereby the whole family is taken into account as if all the persons concerned were subject to the legislation of the competent Member State and resided there. In other words, that article implies a global approach,²⁰ since the competent institution is required in accordance with that provision to examine the situation of the family as a whole in order to determine entitlement to family benefits. Moreover, such a view has been adopted by the Court which, in order to interpret regulations on the coordination of social security systems, held that family benefits by their nature cannot be payable to an individual in isolation from his or her family circumstances.²¹ As the Commission correctly submits, it follows from this that entitlement to family benefits does not apply to one parent alone, but to the family.

35. That global approach seems to me to be entirely consistent with the purpose of family benefits under Regulation No 883/2004. In that regard, in order to determine whether a benefit constitutes a family benefit within the meaning of Article 3(1)(j) of that regulation, reference must be made to the wording of Article 1(z) of that regulation, in accordance with which the term 'family benefit' means all benefits in kind or in cash *intended to meet family expenses*, excluding advances of maintenance payments and special childbirth and adoption allowances mentioned in Annex I to that regulation. Relying on that definition, the Court has consistently held that family benefits are intended to provide social assistance for workers with dependent families in the form of a contribution by society towards their expenses. The Court has also clarified that the phrase 'to meet family expenses' is to be interpreted as referring in particular to a public contribution to a family's budget to alleviate the financial burdens involved in the maintenance of children.²²

36. That purpose is also illustrated by Article 68a of Regulation No 883/2004 which seeks to ensure that recipients of family benefits use them for the purposes for which they are intended. To that end, that provision stipulates that, in the event that the recipient of the benefit does not use the family allowance to which he or she is entitled for the maintenance of the members of the family, the amount of those family benefits must be paid to the person who in fact maintains the members of the family.

37. The subject matter and purpose of family benefits are therefore decisive criteria for the application and implementation of the rules laid down in that regard by Regulation No 883/2004. It follows from this that Article 60(1) of Regulation No 987/2009 must be read and interpreted in

¹⁸ Judgment of 18 September 2019, *Moser* (C-32/18, EU:C:2019:752, paragraph 35 and the case-law cited).

¹⁹ See judgments of 18 September 2019, *Moser* (C-32/18, EU:C:2019:752, paragraph 36 and the case-law cited), and of 25 November 2021, *Finanzamt Österreich (Family benefits for development aid workers)* (C-372/20, EU:C:2021:962, paragraph 76).

²⁰ For a presentation of the subject matter and principles on which Article 67 of Regulation No 883/2004 is based, see Fuchs, M. and Cornelissen, R., *EU Social Security Law, A Commentary on EU Regulations 883/2004 and 987/2009*, C.H. Beck Hart Publishing Nomos, 2015, p. 405 et seq.

²¹ See, to that effect, judgments of 26 November 2009, *Slanina* (C-363/08, EU:C:2009:732, paragraph 31), and of 2 April 2020, *Caisse pour l'avenir des enfants (Child of the spouse of a frontier worker)* (C-802/18, EU:C:2020:269, paragraph 57 and the case-law cited). Although the former judgment was delivered for the purpose of interpreting Article 73 of Regulation No 1408/71, the wording of that provision is very similar to that of Article 67 of Regulation No 883/2004.

²² Judgment of 28 October 2021, *ASGI and Others* (C-462/20, EU:C:2021:894, paragraph 27 and the case-law cited).

the light of those characteristics. In that regard, that article²³ provides, in essence, that, where the person entitled to claim family benefits fails to exercise his or her right, the application made by one of the other persons referred to in that provision, which include ‘the other parent’, must be ‘taken into account’ by the competent institution of the Member State whose legislation is applicable.

38. In my view, the third sentence of Article 60(1) of Regulation No 987/2009 reflects the family approach to family benefits laid down in Regulation No 883/2004. I consider that, by providing that the application made by ‘the other parent’ should be taken into account as if it had been submitted by the parent entitled to family benefits, the intention of the EU legislature was to ensure that, in all circumstances, those benefits, in accordance with their purpose, contribute to a family’s budget and meet the expenses incurred by the person who actually maintains the child.

39. By the same token, I take the view, following the reasoning which I have just set out, that the recovery of the sums corresponding to the benefits is possible only in so far as it does not conflict with the scheme of the mechanisms established, in respect of family benefits, by Regulations No 883/2004 and No 987/2009. To that end, in order to assess the merits of the request for recovery, it must be verified whether, following the application made by one of the persons referred to in the third sentence of Article 60(1) of Regulation No 987/2009, the overall assessment of the family’s situation carried out by the competent institution has led to the family benefits actually contributing to family expenses. If the answer is in the affirmative, it seems to me that that article precludes the recovery of family benefits, even if the competent institution has granted those benefits to a person who is not the person designated by national law as being entitled to claim those benefits.

40. Such an analysis is, moreover, consistent with the case-law of the Court. Admittedly, as the Court recalled in the judgment in *Trapkowski*,²⁴ the consideration stipulated in the third sentence of Article 60(1) of Regulation No 987/2009 does not preclude the competent institution of the Member State from awarding family benefits to a person other than the person who made the application since the conditions for the award of such benefits, including identifying the person entitled to them, come within the scope of national law. However, there is nothing in the wording used in that judgment to suggest that the competent institution is required to reach such a conclusion. Thus, the overall examination of the family situation provided for in that article gives the competent institution the option to award family benefits to a person other than the one designated by national law.

41. In such a situation, challenging that award on the basis of the criteria laid down by national law cannot have the consequence of contravening the structure of the mechanisms for coordinating social security systems established by Regulation No 883/2004. In that regard I would point out that, although the conditions for the award of family benefits are determined in accordance with national law, Member States, when exercising those powers, must comply with EU law.²⁵ It follows from this, in my view, that the determination, under national law, of the

²³ Article 60(1) of Regulation No 987/2009 was not included in the initial proposal from the Commission to the Council and the European Parliament. They were introduced by amendment during the examination at first reading of the text by the Parliament. However, the reasons for that amendment are not set out in the *travaux préparatoires* (OJ 2004 C 76 E, p. 178).

²⁴ Paragraph 48 of that judgment.

²⁵ See, to that effect, judgment of 2 April 2020, *Caisse pour l’avenir des enfants (Child of the spouse of a frontier worker)* (C-802/18, EU:C:2020:269, paragraphs 68 and 69 and the case-law cited).

person entitled to family benefits must not have the effect of requiring the recovery of those benefits which, following the implementation of the procedure provided for in Article 60(1) of Regulation No 987/2009, have achieved their objective.

42. In any event, the assessment of the merits of the request for the recovery of family benefits made by the Austrian tax authority comes within the exclusive jurisdiction of the national court, which must examine all the particular circumstances of the case. That said, it seems to me that, on the basis of the information provided by the referring court, the interpretation of the third sentence of Article 60(1) of Regulation No 987/2009 which I propose precludes the repayment of the family benefits.

43. Austrian law designated DN's former wife as the person who could claim family benefits for her adult daughter with whom she resided in Poland. Since the mother failed to exercise her right, DN applied to the competent Austrian institution for the award of those benefits. After having considered that application, that institution granted the family benefits to DN, who paid the full amount of the corresponding sums to his daughter. Moreover, the referring court states that, if DN were required to repay the family benefits, his former wife would not be able to obtain payment thereof since, under Austrian law, the time limit for obtaining payment of those benefits has lapsed.

44. In the light of those factors, I note, first, that the application submitted by DN was taken into account and that the family benefits were then awarded to him in the context of the implementation by the competent institution of the procedure provided for, for the purpose of applying Articles 67 and 68 of Regulation No 883/2004, by Article 60(1) of Regulation No 987/2009. I would point out, next, that, even though they were not paid to the mother, the family benefits actually contributed to the maintenance of the child in respect of whom they were awarded.

45. It seems to me that, in such circumstances, the repayment of the family benefits, required under national law, would have the effect of undermining the rules on the coordination of social security systems laid down in respect of family benefits by the EU legislature.

VI. Conclusion

46. In the light of the foregoing, I propose that the Court should answer the fourth and fifth questions referred for a preliminary ruling by the Bundesfinanzgericht (Federal Finance Court, Austria), as reformulated, as follows:

The third sentence of Article 60(1) of Regulation 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 precludes national legislation which allows the recovery of family benefits awarded, where the person entitled to claim those benefits has failed to exercise his or her right, to one of the persons referred to in that provision whose application has been taken into account by the competent institution, since those benefits actually contributed to the maintenance of the family members in respect of whom they were awarded.