Reports of Cases

JUDGMENT OF THE COURT (Eighth Chamber)

25 November 2021 *

(Reference for a preliminary ruling – Articles 45 and 48 TFEU – Free movement of workers – Equal treatment – Family benefits provided to development aid workers who take their family members to the third country to which they have been posted – Withdrawal – Second paragraph of Article 288 TFEU – Legal acts of the Union – Application of regulations – National legislation the scope *ratione personae* of which is broader than that of a regulation – Conditions – Regulation (EC) No 883/2004 – Article 11(3)(a) and (e) – Scope – Employed person who is a national of one Member State, employed as development aid worker by an employer established in another Member State and posted to a third country – Article 68(3) – Right of an applicant for family benefits to lodge a single application with the institution of the Member State having primary competence or with the institution of the Member State having secondary competence)

In Case C-372/20,

REQUEST for a preliminary ruling under Article 267 TFEU from the Bundesfinanzgericht (Federal Finance Court, Austria), made by decision of 30 July 2020, received at the Court on 6 August 2020, in the proceedings

QY

v

Finanzamt Österreich, formerly Finanzamt für den 8., 16. und 17. Bezirk in Wien,

THE COURT (Eighth Chamber),

composed of J. Passer, President of the Seventh Chamber, acting as President of the Eighth Chamber, F. Biltgen (Rapporteur) and N. Wahl, Judges,

Advocate General: J. Richard de la Tour,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– the Austrian Government, by J. Schmoll, E. Samoilova and A. Posch, acting as Agents,

* Language of the case: German.

– the European Commission, by B.-R. Killmann and D. Martin, 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 4(2) and (3) TEU, Article 4(4) and Articles 45, 208 and 288 TFEU, Article 7, Article 11(3)(a) and (e) and Articles 67 and 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), Article 11 and Article 60(2) and (3) 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 No 883/2004 (OJ 2009 L 284, p. 1), and Article 7(1) and (2) of Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union (OJ 2011 L 141, p. 1).

2 The request has been made in proceedings between the appellant in the main proceedings, QY, and the Finanzamt Österreich (Austrian Tax Office), formerly Finanzamt für den 8., 16. und 17. Bezirk in Wien (Tax Office for the 8th, 16th and 17th Districts of Vienna, Austria) ('the tax authority') concerning the latter's refusal to grant family benefits to the appellant.

Legal context

European Union law

Regulation No 883/2004

3 Recitals 12 and 16 of Regulation No 883/2004 read as follows:

'(12) In the light of proportionality, care should be taken to ensure that the principle of assimilation of facts or events does not lead to objectively unjustified results or to the overlapping of benefits of the same kind for the same period.

…

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

4 Under Article 1(z) of that regulation:

'"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.'

5 Article 2 of the regulation, which is entitled 'Persons covered', states, in paragraph 1 thereof:

'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.'

6 Article 3(1) of the same regulation provides:

'This Regulation shall apply to all legislation concerning the following branches of social security:

…

(j) family benefits.'

7 Article 4 of Regulation No 883/2004, which is entitled 'Equality of treatment', provides:

'Unless otherwise provided for by this Regulation, persons to whom this Regulation applies shall enjoy the same benefits and be subject to the same obligations under the legislation of any Member State as the nationals thereof.'

8 Article 5 of that regulation, which is entitled 'Equal treatment of benefits, income, facts or events', reads as follows:

'Unless otherwise provided for by this Regulation and in the light of the special implementing provisions laid down, the following shall apply:

(a) where, under the legislation of the competent Member State, the receipt of social security benefits and other income has certain legal effects, the relevant provisions of that legislation shall also apply to the receipt of equivalent benefits acquired under the legislation of another Member State;

(b) where, under the legislation of the competent Member State, legal effects are attributed to the occurrence of certain facts or events, that Member State shall take account of like facts or events occurring in any Member State as though they had taken place in its own territory.'

9 Article 7 of the Regulation is worded as follows:

'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 family reside in a Member State other than that in which the institution responsible for providing benefits is situated.'

10 Under Article 11 of the same regulation, which is entitled 'General rules':

'1. Persons to whom this Regulation applies shall be subject to the legislation of a single Member State only. Such legislation shall be determined in accordance with this Title.

…

3. 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;

(b) a civil servant shall be subject to the legislation of the Member State to which the administration employing him is subject;

(c) a person receiving unemployment benefits in accordance with Article 65 under the legislation of the Member State of residence shall be subject to the legislation of that Member State;

(d) a person called up or recalled for service in the armed forces or for civilian service in a Member State shall be subject to the legislation of that Member State;

(e) any other person to whom subparagraphs (a) to (d) do not apply shall be subject to the legislation of the Member State of residence, without prejudice to other provisions of this Regulation guaranteeing him benefits under the legislation of one or more other Member States.

…'

11 Articles 12 to 16 of Regulation No 883/2004 lay down the special rules applicable to people on postings (Article 12), people pursuing an activity in two or more Member States (Article 13), people who have opted for voluntary insurance or optional continued insurance (Article 14) and contract staff of the European institutions (Article 15), as well as the exceptions to Articles 11 to 15 of that regulation (Article 16).

12 Articles 67 and 68 of that regulation are contained in Chapter 8, which is entitled 'Family benefits', of Title III of the same regulation. Under the heading 'Members of the family residing in another Member State', that Article 67 provides:

'A person shall be entitled to family benefits in accordance with the legislation of the competent Member State, including for his 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 pension.'

13 Article 68 of Regulation No 883/2004, which 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:

(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;
(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;
(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.'

Regulation No 987/2009

14 Article 11 of Regulation No 987/2009 provides:

'1. Where there is a difference of views between the institutions of two or more Member States about the determination of the residence of a person to whom [Regulation No 883/2004] applies, these institutions shall establish by common agreement the centre of interests of the person concerned, based on an overall assessment of all available information relating to relevant facts, which may include, as appropriate:

(a) the duration and continuity of presence on the territory of the Member States concerned;

(b) the person's situation, including:

(i) the nature and the specific characteristics of any activity pursued, in particular the place where such activity is habitually pursued, the stability of the activity, and the duration of any work contract;
(ii) his family status and family ties;
(iii) the exercise of any non-remunerated activity;
(iv) in the case of students, the source of their income;
(v) his housing situation, in particular how permanent it is;
(vi) the Member State in which the person is deemed to reside for tax purposes.

2. Where the consideration of the various criteria based on relevant facts as set out in paragraph 1 does not lead to agreement between the institutions concerned, the person's intention, as it appears from such facts and circumstances, especially the reasons that led the person to move, shall be considered to be decisive for establishing that person's actual place of residence.'

15 Article 60(2) and (3) of Regulation No 987/2009 provides:

'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.'

Regulation No 492/2011

16 Article 7(1) and (2) of Regulation No 492/2011 provides:

'1. A worker who is a national of a Member State may not, in the territory of another Member State, be treated differently from national workers by reason of his nationality in respect of any

conditions of employment and work, in particular as regards remuneration, dismissal, and, should he become unemployed, reinstatement or re-employment.

2. He shall enjoy the same social and tax advantages as national workers.'

Austrian law

17 Paragraph 4(1) of the Allgemeines Sozialversicherungsgesetz (General Law on social security) of 9 September 1955 (BGBl., 189/1955), in the version thereof applicable to the dispute in the main proceedings, provides:

'The following persons are covered (fully covered) under this Federal Law by sickness, accident and pension insurance, where the employment concerned is neither excluded from full cover pursuant to Paragraphs 5 and 6 nor affords only partial cover in accordance with Paragraph 7:

…

(9) development cooperation staff as covered by Paragraph 2 of the [Bundesgesetz über den Personaleinsatz im Rahmen der Zusammenarbeit mit Entwicklungsländern (Entwicklungshelfergesetz) (Federal Law on staff deployment in the context of development cooperation (Law on the status of development aid workers)) of 10 November 1983 (BGBl., 574/1983)].'

18 Under Paragraph 13(1) of the Law on the status of development aid workers, which was in force until 31 December 2018 and subsequently repealed:

'Members of staff and the members of their family living with them, provided that those persons are Austrian citizens or persons treated as such under EU law, shall be treated, during the preparatory period and the assignment, in relation to entitlement to benefits under the family allowance compensation funds and to tax credit for dependent children pursuant to Paragraph 33(3) of the [Einkommensteuergesetz 1988 (Law of 1988 on income tax)] in each of the applicable versions thereof, as if they were not permanently resident in the country of their assignment.'

19 Paragraph 26(1) and (2) of the Bundesabgabenordnung (Federal Tax Code), in the version thereof applicable to the dispute in the main proceedings ('the BAO'), provides:

'1. For the purpose of tax provisions, a person's domicile shall be in the place where he occupies a dwelling in circumstances that indicate that he will retain and use the dwelling.

2. For the purpose of tax provisions, a person shall have his habitual residence where he resides in circumstances that indicate that he is staying in that place or country not just temporarily.

3. Austrian citizens employed by a body governed by public law who are posted abroad (external staff) shall be treated as persons whose habitual residence is at the premises of the service's head office. The same shall apply to their spouse, provided that the couple lives together as a permanent household, and to their minor children who are part of their household.'

20 Under Paragraph 1 of the Bundesgesetz betreffend den Familienlastenausgleich durch Beihilfen (Federal Law on compensation for family expenses through allowances) of 24 October 1967 (BGBl., 376/1967), in the version thereof applicable to the dispute in the main proceedings ('the FLAG'), the benefits provided for are to be 'granted in order to compensate for expenses incurred in the interests of the family'.

21 Pursuant to Paragraph 2(1) of the FLAG, people who have their domicile or their habitual residence in Austria are to be entitled to the family allowances for minor children.

22 Paragraph 2(8) of the FLAG provides that persons are to be entitled to family allowances only if the centre of their interests is located in Austria. The centre of a person's interests is located in the State with which that person has the closest personal and economic ties.

23 Pursuant to Paragraph 5(3) of the FLAG, children who reside abroad permanently are to have no entitlement to family allowances.

24 Paragraph 8 of the FLAG governs the amounts of the family allowances and establishes, in subparagraphs 1 to 3 thereof, a scale based on the number of children and a scale based on their age. The family allowances are increased at regular intervals pursuant to a decision of the Verfassungsgerichtshof (Constitutional Court, Austria).

25 Paragraph 53 of the FLAG reads as follows:

'(1) In the context of this Federal Law, nationals of the Contracting Parties to the [Agreement on the European Economic Area of 2 May 1992 (OJ 1994 L 1, p. 3)] shall, in so far as provided for in the agreement cited above, be treated as equivalent to Austrian citizens. In that connection, the permanent residence of a child in a State within the European Economic Area must, in accordance with Community provisions, be treated as equivalent to the permanent residence of a child in Austria.

…

(4) The second sentence of subparagraph 1 shall not apply in relation to Paragraph 8a(1) to (3).

(5) Paragraph 26(3) of the BAO … shall apply until 31 December 2018 in relation to the benefits covered by this Federal Law. With effect from 1 January 2019, Paragraph 26(3) of the BAO shall apply to the benefits covered by this Federal Law only in respect of persons posted abroad who pursue an activity on behalf of a local or regional authority.'

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

26 The appellant in the main proceedings and her three children, all four of whom are German nationals, have their registered domicile in Germany. The husband of the appellant in the main proceedings, who is the father of the three children, is a Brazilian national and has never had a registered domicile in Germany.

27 Since 2002, the appellant in the main proceedings has worked as a development aid worker. Between 2013 and 2016, the family lived alternately in Germany and Brazil, where the husband of the appellant in main proceedings owns land and worked as a farmer.

28 On 6 September 2016, the appellant in the main proceedings entered into a contract of employment with an Austrian non-governmental organisation. Under that contract, the place of employment of the appellant in the main proceedings was Vienna (Austria) and both she and her family members were covered in relation to social security by the Wiener Gebietskrankenkasse (Local Health Insurance Fund, Vienna, Austria). After completing a preparatory course in Vienna between 6 September and 21 October 2016, the appellant in the main proceedings started an assignment in Uganda on 31 October 2016. That assignment, during which she was accompanied by her family, lasted until 15 August 2019 and was only interrupted, between 17 October 2017 and 7 February 2018, on account of the birth of the third child of the appellant in the main proceedings. During that interruption, the appellant in the main proceedings stayed in rooms made available to her at her parents' home in Germany and received a childbirth allowance paid by the Local Health Insurance Fund, Vienna. From 15 August to 15 September 2019, that is to say the last month before her contract of employment ended, the appellant in the main proceedings was granted a reintegration period in Vienna. During that period, just like during the preparatory course she completed, the appellant in the main proceedings had a domicile in Vienna which had been made available to her by her employer subject to certain conditions, namely that the appellant in the main proceedings and her family could make use of it only during the training course and the reintegration period. While the appellant in the main proceedings was posted abroad, the accommodation in question was made available to other development aid workers. During those periods, the appellant in the main proceedings, as well as her children and her husband, were registered as having their primary residence in Austria.

29 When the appellant in the main proceedings was carrying out her duties as a development aid worker, her husband, who accompanied her on her assignments abroad, took charge of the domestic tasks. Over the period in which she was on assignment, the appellant in the main proceedings spent her holidays in Germany, where she has bank accounts.

30 Up until September 2016, the appellant in the main proceedings received a family allowance paid by the competent Germany authority for her first two children. By decision of that authority of 26 September 2016, that allowance was cancelled on the ground that the Republic of Austria was competent for family benefits, in view of the fact that the appellant in the main proceedings now worked in Austria and that her husband did not carry out any professional activity in Germany.

31 On 5 October 2016, the appellant in the main proceedings submitted an application for family allowances to the tax authority for her first two children and, on 8 January 2018, made the same application for her third child. She claimed that her family had no joint residence in Germany or Brazil, since all her family members habitually accompanied her to her places of employment during her assignments aboard. When the appellant in the main proceedings submitted those applications, her place of employment was Uganda.

32 The tax authority rejected the applications made by the appellant in the main proceedings on the ground that she was not entitled to Austrian family benefits because her activity as a development aid worker was carried out in a third country. She was therefore not pursuing activity as an employed person in Austria, within the meaning of Article 11(3)(a) of Regulation No 883/2004, and therefore did not fall within the scope of that regulation. In addition, the apartment occupied by the appellant in the main proceedings in Vienna does not constitute a 'residence' any more that it allows for a 'stay' there, within the meaning of Article 1(j) and (k) of the Regulation, and consequently the Republic of Austria is not the Member State of residence within the meaning of Article 11(3)(e) of the same regulation. Moreover, nor is the appellant in the main proceedings entitled to family benefits under national legislation.

33 The appellant in the main proceedings lodged an appeal against those decisions, arguing that the Republic of Austria is the Member State in which she pursued an activity as an employed person, within the meaning of Article 11(3)(a) of Regulation No 883/2004, since, according to her contract of employment, Vienna was her place of employment. In addition, she received her instructions from Vienna and both the preparatory course and the reintegration month also took place in that city. Moreover, she was registered in Vienna and the centre of her interests was located there.

34 In those circumstances, the Bundesfinanzgericht (Federal Finance Court, Austria) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Is Article 11(3)(e) of Regulation (EC) No 883/2004 to be interpreted as covering a situation in which a female worker who is a national of a Member State in which she and her children also reside enters into an employment relationship as a development aid worker with an employer established in another Member State, and that employment relationship is subject to the compulsory insurance scheme under the legislation of the State of establishment, and she is posted by the employer to a third country not immediately after being employed but after completing a preparatory period and returning to the State of establishment for reintegration periods?

(2) Does a legal provision of a Member State such as Paragraph 53(1) of the [FLAG], which, inter alia, makes independent provision for equal status with nationals, infringe the prohibition on the transposition of regulations within the meaning of the second subparagraph of Article 288 TFEU?

Questions 3 and 4 relate to the case where the applicant's situation falls within Article 11(3)(e) of Regulation No 883/2004 and where EU law requires only the Member State of residence to provide family benefits.

(3) Is the prohibition of discrimination based on nationality enshrined for employees in Article 45(2) TFEU and, on a subsidiary basis, in Article 18 TFEU to be interpreted as meaning that it is incompatible with a national provision such as Paragraph 13(1) of the [Law on development aid workers] in the version applicable until 31 December 2018 …, which connects entitlement to family benefits in the Member State not responsible under EU law with the fact that the development aid worker must have had his centre of interests or habitual residence in the territory of the Member State of establishment before commencing employment, whereby that requirement must also be met by nationals?

(4) Are Article 68(3) of Regulation (EC) No 883/2004 and Article 60(2) and (3) of Regulation [No 987/2009] to be interpreted as meaning that the institution of the Member State which was presumed by the applicant to be the State of employment with primary responsibility and to which the application for family benefits was submitted, but whose legislation is applicable on neither a primary nor secondary basis, but in which there is an entitlement to family benefits under an alternative rule of the law of the Member State, must apply by analogy the provisions relating to the obligation to forward the application, to inform the person concerned, to take a provisional decision on the priority rules to be applied and to provide provisional cash benefits?

(5) Is the obligation to take a provisional decision on the priority rules to be applied incumbent solely on the [tax] authority, as the institution, or also on the administrative court seised on appeal?

(6) At what point in time is the administrative court obliged to take a provisional decision on the priority rules to be applied?

Question 7 relates to the case where the [situation of the appellant in the main proceedings] falls within Article 11(3)(a) of Regulation No 883/2004 and EU law requires the Member State of employment and the Member State of residence to provide family benefits jointly.

(7) Are the words "th[e] institution shall forward the application" in Article 68(3)(a) of Regulation No 883/2004 and in Article 60 of Regulation No 987/2009 to be interpreted as meaning that those provisions link the institution of the Member State with primary responsibility and the institution of the Member State with secondary responsibility in such a way that both Member States must jointly settle one (one as in a singular) application for family benefits, or must the applicant make a separate application for the additional payment that may have to be made by the institution of the Member State whose legislation is applicable on a secondary basis, with the result that the applicant must submit two physical applications (forms) to two institutions of two Member States, which, by their nature, will trigger different time limits?

Questions 8 and 9 concern the period from 1 January 2019, when Austria abolished, alongside the introduction of the indexation of family allowances, the granting of family allowances for development aid workers by repealing Paragraph 13(1) of [the Law on the status of development aid workers] …

(8) Are Articles 4(4), 45, 208 TFEU, Article 4(3) TEU and Articles 2, 3, 7 and Title II of Regulation No 883/2004 to be interpreted as meaning that they generally prohibit a Member State from abolishing family benefits for a development aid worker who takes his family members with him to the place of employment in the third country?

In the alternative, Question 9:

(9) Are Articles 4(4), 45, 208 TFEU, Article 4(3) TEU and Articles 2, 3, 7 and Title II of Regulation No 883/2004 to be interpreted as meaning that, in a situation such as that in the main proceedings, they guarantee to a development aid worker who has already acquired entitlement to family benefits for previous periods of time an individual and specific continuation of that entitlement to family benefits for periods of time, even though the Member State has abolished the granting of family benefits for development aid workers?'

Consideration of the questions referred

The first question

35 By its first question, the referring court asks, in essence, whether Article 11(3)(a) of Regulation No 883/2004 is to be interpreted as meaning that an employed person who is a national of a Member State in which she and her children reside, who is hired under a contract of employment as a development aid worker by an employer established in another Member State,

who is covered, pursuant to the legislation of that other Member State, by the compulsory social security scheme of the other Member State, who is posted to a third country not immediately after being employed but after completing a training course in the other Member State and who subsequently returns there for a reintegration period is to be regarded as pursuing an activity as an employed person in that Member State, within the meaning of that provision, or whether, if not, the situation of such a worker comes under Article 11(3)(e) of that regulation.

36 In order to answer that question, it should, first of all, be recalled that, according to the case-law of the Court, the mere fact that a worker carries on his activities outside the territory of the European Union is not sufficient to exclude the application of the EU rules on free movement of workers, in particular Regulation No 883/2004, as long as the employment relationship retains a sufficiently close connection with that territory (judgment of 8 May 2019, *Inspecteur van de Belastingdienst*, C-631/17, EU:C:2019:381, paragraph 22 and the case-law cited).

37 A sufficiently close connection between the employment relationship in question and the territory of the European Union derives, inter alia, from the fact that an EU citizen, who is resident in a Member State, has been engaged by an undertaking established in another Member State on whose behalf he carries on his activities (judgment of 8 May 2019, *Inspecteur van de Belastingdienst*, C-631/17, EU:C:2019:381, paragraph 23 and the case-law cited).

38 In the present case, and in the light of the information contained in the request for a preliminary ruling, it must be held that there is a sufficiently close connection between the employment relationship at issue in the main proceedings and the territory of the European Union, more specifically with Austria. The employer of the appellant in the main proceedings is established in Austria and it was in that Member State that she undertook a period of training before her assignment in Uganda as well as a reintegration period following that assignment. In addition, the contract of employment was concluded in accordance with Austrian law, the appellant in the main proceedings is covered by the Austrian social security scheme and she carries out her assignments in the context of the development aid provided by the Republic of Austria. Those factors are likewise relevant for the purposes of applying the principle that persons are to be subject to the legislation of a single Member State, as laid down in Article 11 of Regulation No 883/2004.

39 Next, with regard more specifically to whether a person such as the appellant in the main proceedings is to be regarded as having pursued her activity as an employed person 'in a Member State' (here: the Republic of Austria), within the meaning of Article 11(3)(a) of Regulation No 883/2004, or whether she is covered by Article 11(3)(e) of that regulation, it must be recalled that the latter provision is a residual rule which is intended to apply to all persons who find themselves in a situation which is not specifically governed by other provisions of the Regulation, with a view to introducing a complete system for determining the applicable legislation (see, to that effect, judgment of 8 May 2019, *Inspecteur van de Belastingdienst*, C-631/17, EU:C:2019:381, paragraph 31).

40 In view of that subsidiarity, it is necessary to examine whether the situation covered by point (a) of Article 11(3) of Regulation No 883/2004 corresponds inter alia to a situation such as that at issue in the main proceedings, it being understood, from the outset, that those envisaged in points (b) to (d) of that paragraph 3 are unconnected with such a situation.

41 In that regard, in the present case, whilst it appears, prima facie, that the appellant in the main proceedings did not pursue her activity 'in a Member State', since she was on assignment in Uganda, the fact remains that it is apparent from the documents before the Court that, before leaving on assignment and following that assignment, the appellant in the main proceedings worked in Austria, where her employer is established, and that that employer even provided her with accommodation there. Furthermore, the appellant in the main proceedings, her children and her husband had their primary residence in Austria for the duration of the contract of employment and enjoyed social security cover there provided by the Local Health Insurance Fund, Vienna.

42 Even assuming that the appellant in the main proceedings had her residence in the territory of another Member State, as the tax authority argued before the referring court, a situation thus characterised has similarities with that at issue in the case that gave rise to the judgment of 29 June 1994, *Aldewereld* (C-60/93, EU:C:1994:271), which concerned the interpretation of Regulation (EEC) No 1408/71 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), which was repealed and replaced by Regulation No 883/2004. That case concerned an employee of an undertaking established in a Member State other than the employee's State of residence who carried on his activities outside the territory of the European Union. In paragraph 24 of that judgment, the Court held that, in such a situation, the 'legislation of the Member State of the worker's residence cannot be applied since there is no factor connecting that legislation with the employment relationship, unlike the legislation of the State where the employer is established, which must therefore be applied'.

43 It follows that, notwithstanding that, on the facts, the work for which the appellant in the main proceedings was engaged by her Austrian employer was carried on outside the territory of the European Union and that she retained ties in her country of origin, namely the Federal Republic of Germany, through the accommodation made available there by her parents, the view must be taken that Article 11(3)(a) of Regulation No 883/2004 is to be interpreted as designating the legislation of the Member State of her employer, that is to say Austrian legislation, as the only legislation to which that appellant must be subject, without there being any need to have recourse to the subsidiary rule laid down in point (e) of that paragraph 3.

44 In those circumstances, the first question must be answered to the effect that Article 11(3)(a) of Regulation No 883/2004 is to be interpreted as meaning that an employed person who is a national of a Member State in which she and her children reside, who is hired under a contract of employment as a development aid worker by an employer established in another Member State, who is covered, pursuant to the legislation of that other Member State, by the compulsory social security scheme of the other Member State, who is posted to a third country not immediately after being employed but after completing a training course in the other Member State and who subsequently returns there for a reintegration period is to be regarded as pursuing an activity as an employed person in that Member State, within the meaning of that provision.

The second question

45 By its second question, the referring court asks, in essence, whether the second paragraph of Article 288 TFEU is to be interpreted as precluding the adoption, by a Member State, of national legislation the scope *ratione personae* of which is broader than that of Regulation No 883/2004, in that it provides for nationals of the Contracting Parties to the Agreement on the European Economic Area to be treated in the same way as its own nationals.

46 It is apparent from the request for a preliminary ruling that the referring court considers that the second paragraph of Article 288 TFEU precludes a national provision, such as Paragraph 53(1) of the FLAG, in so far as, as is clear from paragraph 11 of the judgment of 10 October 1973, *Variola* (34/73, EU:C:1973:101), such a national provision is capable of concealing from those subject to it the directly applicable EU law and thus of effectively undermining the monopoly over the interpretation of EU law conferred on the Court.

47 In that regard, it appears appropriate to point out that, in accordance with the case-law of the Court, whereas, by virtue of their very nature and of their function in the system of sources of EU law, the provisions of regulations generally have immediate effect in the national legal systems without its being necessary for the national authorities to adopt measures of application, some of their provisions may, however, necessitate, for their implementation, the adoption of measures of application by the Member States (see, to that effect, judgment of 21 December 2011, *Danske Svineproducenter*, C-316/10, EU:C:2011:863, paragraphs 39 and 40 and the case-law cited).

48 Member States may adopt rules for the application of a regulation if they do not obstruct its direct applicability and do not conceal its Community nature, and if they specify that a discretion granted to them by that regulation is being exercised, provided that they adhere to the parameters laid down in it (judgment of 21 December 2011, *Danske Svineproducenter*, C-316/10, EU:C:2011:863, paragraph 41 and the case-law cited).

49 In the present case, and without it being necessary for the Court to rule on whether or not a provision such as Paragraph 53(1) of the FLAG is regarded as a measure of application of Regulation No 883/2004, it is sufficient to observe that, in any case, the direct applicability of that regulation has the effect of allowing the national courts to review the compliance of the national measure with the content of that regulation (see, to that effect, judgment of 27 September 1979, *Eridania-Zuccherifici nazionali and Società italiana per l'industria degli zuccheri*, 230/78, EU:C:1979:216, paragraph 34), and, where appropriate, to disapply that measure in order to ensure the primacy of EU law, that is to say, in the case in the main proceedings, that of Regulation No 883/2004.

50 Therefore, EU law does not preclude the adoption of a provision such as Paragraph 53(1) of the FLAG provided, however, that that national provision is interpreted in accordance with Article 4 of Regulation No 883/2004 and the primacy of that regulation is not called into question.

51 In the light of the foregoing, the second question must be answered to the effect that the second paragraph of Article 288 TFEU is to be interpreted as not precluding the adoption, by a Member State, of national legislation the scope *ratione personae* of which is broader than that of Regulation No 883/2004, in that that legislation provides that nationals of the Contracting Parties to the Agreement on the European Economic Area are to be treated in the same way as its own nationals, provided that the legislation is interpreted in accordance with that regulation and that the primacy of that regulation is not called into question.

The third and fourth questions

52 In the light of the answer given to the first question, there is no need to answer the third and fourth questions.

The fifth and sixth questions

53 By its fifth and sixth questions, the referring court asks, in essence, whether the obligation laid down in Article 60(3) of Regulation No 987/2009 to take a provisional decision vis-à-vis the national legislation applicable by priority is incumbent solely on the competent national institution to which the application for family benefits has been made or also on the national court seised of an action in that context and, if so, at what point in time that court must take such a decision.

54 As a preliminary point, it should be recalled that, according to settled case-law of the Court, questions concerning the interpretation of EU law submitted by a national court in the regulatory and factual context which that court determines as a matter of its own responsibility, the accuracy of which is not for the Court to verify, enjoy a presumption of relevance. The Court may refuse to give a ruling on a request for a preliminary ruling from a national court only where it is quite obvious that the interpretation of EU law sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (judgment of 16 June 2015, *Gauweiler and Others*, C-62/14, EU:C:2015:400, paragraph 25 and the case-law cited).

55 In the present case, it must be observed that it is clear from the request for a preliminary ruling that, in the context of the dispute in the main proceedings, the referring court has already taken a provisional decision ordering the competent Austrian institution to forward the application for family benefits at issue in the main proceedings to its German counterpart and to open a dialogue procedure with the latter.

56 That decision is quite clearly based on an application by analogy of Article 60(3) of Regulation No 987/2009, even though it is apparent, paradoxically, from the request for a preliminary ruling that that court considers, first, that it does not have jurisdiction to adopt such a provisional decision and, second, that there is no applicable provision where an action such as that at issue in the main proceedings is brought.

57 However, since the referring court has already taken that decision and the decision is capable of being fully effective, if only on a provisional basis, the fifth question is no longer relevant to the resolution of the dispute in the main proceedings and is, therefore, hypothetical.

58 That finding is borne out by the fact that, as is clear from the answer to the first question, the Republic of Austria is, in the present case, to be regarded as being the Member State having primary competence, pursuant to Article 68(1)(a) of Regulation No 883/2004, to provide the family benefits at issue in the main proceedings, such that the Austrian authorities are not obliged to take, on the basis of Article 60(3) of Regulation No 987/2009, a provisional decision as to the national legislation applicable by priority. In those circumstances, the question of whether the referring court has to take such a 'provisional' decision in place of the Austrian authorities is hypothetical and must, therefore, be declared inadmissible.

59 The inadmissibility of the fifth question renders the sixth question inadmissible, since the latter is based on the assumption of an answer in the affirmative to the fifth question.

60 In the light of the foregoing, the fifth and sixth questions must be declared inadmissible.

The seventh question

61 By its seventh question, the referring court asks, in essence, whether Article 68(3)(a) of Regulation No 883/2004 and Article 60 of Regulation No 987/2009 are to be interpreted as being mutually binding on the institution of the Member State having primary competence and the institution of the Member State having secondary competence, such that the applicant for family benefits must submit only one application to one of those institutions and that it is then for those two institutions to deal with that application jointly, or whether the applicant has to make two separate applications to each of those two institutions.

62 In that regard, it must be observed that, pursuant to Article 68(3) of Regulation No 883/2004, if an application for family benefits is submitted to the competent institution of a Member State whose legislation is applicable, but not by priority right on the basis of paragraphs 1 and 2 of that article, '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' and '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'.

63 The wording of Article 68(3) of Regulation No 883/2004 thus sets out in clear terms that, where an application for family benefits is submitted to the competent institution of a Member State whose legislation does not have priority, that institution must forward the application without delay to the competent institution of the Member State whose legislation is applicable by priority and inform the applicant accordingly. In such circumstances, that second institution is required to deal with the application in question as if it had been submitted to it directly on the date on which it was submitted to the first institution.

64 It is equally clear from the wording of Article 60(2) and (3) of Regulation No 987/2009 that, if the institution to which an application is made in accordance with paragraph 1 of that same article 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' and that, if it takes the view that its legislation is applicable, but not by priority right, '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'.

65 It therefore follows both from Article 68(3)(a) of Regulation No 883/2004 and from Article 60(2) and (3) of Regulation No 987/2009 that the applicant must submit only one application to only one competent institution. That institution, depending on whether it regards itself as having primary or secondary competence, is obliged, in the former scenario, to provide the family benefits applied for itself and, in the latter scenario, to forward the application in question to the competent institution of the Member State which it regards as having primary competence, all with a view to ensuring that such an application for family benefits is dealt with promptly.

66 In the light of the foregoing, the seventh question must be answered to the effect that Article 68(3)(a) of Regulation No 883/2004 and Article 60(2) and (3) of Regulation No 987/2009 are to be interpreted as being mutually binding on the institution of the Member State with primary competence and the institution of the Member State with secondary competence, such that the applicant for family benefits must submit only one application to only one of those institutions and that it is then for those two institutions to deal with that application jointly.

The eighth and ninth questions

67 By its eighth and ninth questions, the referring court asks, in essence, whether Article 4(4) and Articles 45 and 208 TFEU, Article 4(3) TEU and Articles 2, 3, 7 and Title II of Regulation No 883/2004 are to be interpreted as precluding a Member State from withdrawing, as a general rule, the family benefits that it previously provided to development aid workers who take their family members to the third country to which they have been posted.

68 In order to answer that question, it should be recalled, with regard to Article 45 TFEU, first, that any Union national who, irrespective of his place of residence and his nationality, has exercised the right to freedom of movement for workers and who has been employed in a Member State other than that of residence falls within the scope of that provision (see, to that effect, judgment of 12 December 2002, *de Groot*, C-385/00, EU:C:2002:750, paragraph 76 and the case-law cited).

69 Although Article 45 TFEU precludes any measure which, even if applicable without discrimination on the basis of nationality, is capable of hindering or rendering less attractive the exercise by Union nationals of the fundamental freedom of movement guaranteed by that article, that article does not confer on a worker travelling to a Member State other than his Member State of origin any entitlement, in the host Member State, to the same social welfare coverage as that which he enjoyed in his Member State of origin under the legislation of the latter State (judgment of 19 September 2019, *van den Berg and Others*, C-95/18 and C-96/18, EU:C:2019:767, paragraph 57 and the case-law cited).

70 As regards, second, Article 48 TFEU, which provides for a system for coordinating, and not harmonising, the legislation of the Member States, substantive and procedural differences between the social security schemes of individual Member States, and hence in the rights of persons who are insured persons there, are unaffected by that provision, as each Member State retains the power to determine in its legislation, in compliance with EU law, the conditions pursuant to which benefits may be granted under a social security scheme (judgment of 19 September 2019, *van den Berg and Others*, C-95/18 and C-96/18, EU:C:2019:767, paragraph 59 and the case-law cited).

71 It must be added that nor does Regulation No 883/2004 establish a common scheme of social security, but allows different national schemes to exist and its sole objective is to ensure the coordination of those schemes in order to guarantee that the right to free movement of persons can be exercised effectively. Therefore, according to the Court's settled case-law, Member States retain the power to organise their own social security schemes (see, to that effect, judgment of 23 January 2020, *Bundesagentur für Arbeit*, C-29/19, EU:C:2020:36, paragraph 39 and the case-law cited).

72 However, in exercising that power, Member States must comply with EU law and, in particular, the provisions of the FEU Treaty giving every citizen of the European Union the right to move and reside within the territory of the Member States (judgment of 23 January 2020, *Bundesagentur für Arbeit*, C-29/19, EU:C:2020:36, paragraph 41 and the case-law cited).

73 In the present case, it is therefore necessary to examine whether the Republic of Austria did not infringe those provisions when it decided to withdraw the entitlement to the family benefits which it previously provided to development aid workers who take their family members to the third country to which they have been posted.

74 In that regard, it is apparent from the request for a preliminary ruling that that withdrawal, decided upon by the Austrian legislature, is general in nature and applies indiscriminately both to recipients who are nationals of that Member State and to nationals of other Member States; this is, however, for the referring court to verify.

75 It does not appear therefore that that withdrawal, which took effect from 1 January 2019, gives rise to direct discrimination on the ground of nationality.

76 With regard to possible indirect discrimination based on the nationality of the workers concerned, according to the Member State in which they or their family members reside, it must be observed that neither the provisions of Regulation No 883/2004, specifically Articles 7 and 67 thereof, the purpose of which is to prevent a Member State from making entitlement to and the amount of family benefits dependent on residence of the members of the worker's family in the Member State providing the benefits (see, to that effect, judgment of 5 October 1995, *Imbernon Martínez*, C-321/93, EU:C:1995:306, paragraph 21), nor Article 45 TFEU provide that the right to freedom of movement for workers applies outside the territory of the European Union. On the contrary, it is apparent from the clear wording of Article 45 TFEU that freedom of movement for workers 'shall be secured within the Union'.

77 The withdrawal of the family benefits for development aid workers residing with their family in a third county cannot therefore constitute indirect discrimination in the territory of the European Union if – and this is a matter to be verified by the referring court – the treatment applied to such officials with effect from 1 January 2019 in relation to family benefits does not differ according to whether or not they have exercised their right to freedom of movement by having left their Member State of origin to settle in Austria, but rather depends exclusively on whether the children of the development aid workers concerned reside in a third country or in another Member State, including in Austria.

78 That finding is not called into question by the fact that development aid workers who had previously acquired an entitlement to family benefits for periods in the past lost that entitlement further to the entry into force, on 1 January 2019, of the new legislation, since it does not appear that the loss of that entitlement is due to the exercise of their right to free movement, which is for the referring court to verify.

79 In that regard, it must be added, first, that no relevant guidance for the answer to those questions can be derived from the judgments of 12 June 1980, *Laterza* (733/79, EU:C:1980:156), and of 26 November 2009, *Slanina* (C-363/08, EU:C:2009:732), since the cases that gave rise to those judgments are not comparable in fact or in law to the situation at issue in the case in the main proceedings, as described in the request for a preliminary ruling. Those cases were concerned with changes to entitlements acquired following the exercise, in the territory of the European

Union, of the right of free movement by an EU national. However, here, the legislative amendment concerns development aid workers on postings whose children reside with them outside the territory of the European Union.

80 Second, the possibility, mentioned by the referring court, that the withdrawal of the family allowances for development aid workers may hinder the freedom of movement for workers and, as the case may be, make it less attractive, or even entail a decline in demand for the profession of 'development aid worker', even though that would be have to be verified on the facts, cannot, in any case, give rise to a situation that is incompatible with Articles 45 and 48 TFEU. As is clear from paragraphs 71 and 72 of this judgment, those provisions do not harmonise the social security schemes of the Member States, since Member States retain the power to organise their social security systems in accordance with EU law and the FEU Treaty offers no guarantee to a worker that extending his activities into more than one Member State or transferring them to another Member State will be neutral as regards social security. Given the disparities in the social security legislation of the Member States, such an extension or transfer may be more or less advantageous or disadvantageous for the worker in terms of social welfare. It follows that, even where its application is thus less favourable, such legislation is still compatible with Articles 45 and 48 TFEU if it does not place the worker concerned at a disadvantage as compared with those who pursue all their activities in the Member State where it applies or as compared with those who were already subject to it there, and if it does not simply result in the payment of social security contributions on which there is no return (judgment of 14 March 2019, *Vester*, C-134/18, EU:C:2019:212, paragraph 32 and the case-law cited).

81 In the light of those considerations, the eighth and ninth questions must be answered to the effect that Articles 45 and 48 TFEU are to be interpreted as not precluding a Member State from withdrawing, as a general rule, the family benefits that it provided previously to development aid workers who take their family members to the third country to which they have been posted, provided, first, that that withdrawal applies indiscriminately both to recipients who are nationals of that Member State and to recipients who are nationals of other Member States and, second, that the withdrawal entails a difference in treatment between the development aid workers concerned not according to whether or not they exercised their right to free movement before or after that withdrawal, but depending on whether their children reside with them in a Member State or in a third country.

Costs

82 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 (Eighth Chamber) hereby rules:

1. **Article 11(3)(a) 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 is to be interpreted as meaning that an employed person who is a national of a Member State in which she and her children reside, who is hired under a contract of employment as a development aid worker by an employer established in another Member State, who is covered, pursuant to the legislation of that other Member State, by the compulsory social security scheme of the other Member State, who is posted to a third country not**

immediately after being employed but after completing a training course in the other Member State and who subsequently returns there for a reintegration period is to be regarded as pursuing an activity as an employed person in that Member State, within the meaning of that provision.

2. **The second paragraph of Article 288 TFEU is to be interpreted as not precluding the adoption, by a Member State, of national legislation the scope *ratione personae* of which is broader than that of Regulation No 883/2004, in that that legislation provides that nationals of the Contracting Parties to the Agreement on the European Economic Area of 2 May 1992 are to be treated in the same way as its own nationals, provided that the legislation is interpreted in accordance with that regulation and that the primacy of the Regulation is not called into question.**

3. **Article 68(3)(a) of Regulation No 883/2004 and Article 60(2) and (3) 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 No 883/2204 are to be interpreted as being mutually binding on the institution of the Member State with primary competence and the institution of the Member State with secondary competence, such that the applicant for family benefits must submit only one application to only one of those institutions and that it is then for those two institutions to deal with that application jointly.**

4. **Articles 45 and 48 TFEU are to be interpreted as not precluding a Member State from withdrawing, as a general rule, the family benefits that it provided previously to development aid workers who take their family members to the third country to which they have been posted, provided, first, that that withdrawal applies indiscriminately both to recipients who are nationals of that Member State and to recipients who are nationals of other Member States and, second, that the withdrawal entails a difference in treatment between the development aid workers concerned not according to whether or not they exercised their right to free movement before or after that withdrawal, but depending on whether their children reside with them in a Member State or in a third country.**

[Signatures]