Reports of Cases

OPINION OF ADVOCATE GENERAL
BOT
delivered on 12 November 2015 [1]

Case C-453/14

Vorarlberger Gebietskrankenkasse
Alfred Knauer
(Request for a preliminary ruling

from the Verwaltungsgerichtshof (Administrative Court, Austria))

(Reference for a preliminary ruling — Social security — Regulation (EC) No 883/2004 — Article 5 — Principle of equal treatment — National rules including in the basis for calculating health insurance contributions old-age pensions received from other Member States of the European Union or of the EEA — Meaning of 'equivalent benefits')

I – **Introduction**

1. Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, [2] introduced into EU law the principle of the equal treatment of benefits, income, facts or events.

2. Under Article 5 of Regulation No 883/2004:

'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 or to income acquired in 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.'

1 — Original language: French.

2 — OJ 2004 L 166, p. 1, and corrigendum OJ 2004 L 200, p. 1.

3. Does that new provision mean that, where a pensioner who resides in a Member State receives not only a pension from that State but also a pension under a pension scheme of another Member State of the European Union or of the European Economic Area (EEA),[3] the Member State of residence is prevented from including the pension paid by the other State in the basis for calculating health insurance contributions?

4. That, in essence, is the question raised by the present case, which originated in the decision of the Vorarlberger Gebietskrankenkasse (Vorarlberg Regional Health Insurance Fund)[4] to require Mr Knauer and Mr Mathis to pay health insurance contributions on the pensions they receive by reason of their membership of the Liechtenstein occupational pension scheme.

5. The facts of the case are more specifically as follows.

6. Mr Knauer and Mr Mathis, who reside in Austria, each receive an Austrian retirement pension from which are deducted contributions in respect of the health insurance scheme in accordance with the General Law on Social Security (Allgemeines Sozialversicherungsgesetz).[5]

7. On account of their former employment in Switzerland and in Liechtenstein they also receive old-age pensions under the Hilti pension fund of the Liechtenstein occupational pension scheme, governed by the Law on Occupational Benefits (Gesetz über die betriebliche Personalvorsorge) of 20 October 1987.[6]

8. Although until 2010 contributions to the Austrian health insurance scheme were due only on national pensions, the Austrian legislature, when it adopted the Second Law of 2010 amending the Social Security Scheme (2. Sozialversicherungs-Änderungsgesetz 2010),[7] introduced into the ASVG a new Paragraph 73a, subparagraph 1 of which provides that a recipient of a foreign pension which falls within the scope of Regulation No 883/2004 must, where he is entitled to health insurance benefits, pay contributions to the health insurance scheme in respect of that foreign pension also.

9. Under that provision, the Fund, with effect from 2011, required Mr Knauer and Mr Mathis to pay health insurance contributions in respect of their pensions under the Hilti pension fund.

10. By two decisions of 10 December 2013, the Head of Government of the Province of Vorarlberg (Landeshauptmann von Vorarlberg) reduced the amount of those contributions on the ground that only a portion of the occupational pension scheme, namely that corresponding to the statutory minimum benefits, comes within the scope of Regulation No 883/2004 and is thus covered by the obligation to make contributions laid down in Paragraph 73a of the ASVG. The supplementary portion, on the other hand, which corresponds to benefits paid at a higher level than the minimum benefits, does not come within that scope of application, nor does the portion of the occupational pension scheme which corresponds to the benefits paid in respect of the contributions which were made prior to the entry into force of the BPVG, that is to say, before 1 January 1989.

3 — Regulation No 883/2004 and 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) apply to the whole of the EEA under Decision of the EEA Joint Committee No 76/2011 of 1 July 2011 amending Annex VI (Social security) and Protocol 37 to the EEA Agreement (OJ 2011 L 262, p. 33).

4 — 'The Fund.'

5 — BGBl. 189/1955, in the version applicable at the material time in the main proceedings ('the ASVG').

6 — LGBl. 1988, No 12, 'the BPVG'.

7 — BGBl. I, 102/2010.

11. The Fund brought an appeal before the Verwaltungsgerichtshof (Administrative Court) against those two decisions, contending that contributions are due on all pensions under the Hilti pension fund, whilst Mr Knauer appealed against the decision concerning him, arguing that, on the contrary, no contribution is due on those pensions.

12. According to the referring court, equivalence for the purposes of Article 5(a) of Regulation No 883/2004 must be assessed in the light of the structural characteristics of the pension schemes in question viewed in their entirety. In its view, a comparison of the statutory requirements governing old-age pensions covered by the ASVG with those of pensions governed by the BPVG would appear to suggest that they are equivalent benefits.

13. In that regard, so far as the Austrian pension scheme is concerned, the referring court explains that pension insurance, which is concerned with the provision of cover in particular for age-related contingencies, is intended to enable the previous standard of living of the individual concerned to be maintained in an appropriate way. In addition to the individual concerned having to reach the normal retirement age, he or she must also have been insured for a particular number of months in order for an old-age pension to be paid. All persons employed by an employer for more than the threshold of minor employment are, in principle, compulsorily insured. Compulsorily insured persons who wish to supplement the pension to which they would otherwise be entitled have the option, as a matter of their free choice, of insuring themselves to a higher level by paying contributions at a level which exceeds the contribution basis applicable to them; however, the annual contribution is capped. The contributions made are used directly to finance the benefits (pay-as-you-go system) and the implementation of the pension insurance scheme falls to the insurers which are set up as self-governing public bodies.

14. As regards the Liechtenstein retirement pension scheme, the referring court explains that its structure is based on three pillars: the first comprising the contributory scheme of old-age and survivors' insurance, the second corresponding to the occupational pension schemes and the third representing the private supplementary insurance schemes.

15. The occupational pension scheme governed by the BPVG operates according to the principle of capitalisation, is compulsory in principle and, together with the old-age and survivors' insurance, is intended to enable the previous standard of living of the individual concerned to be maintained in an appropriate way. Its implementation falls, in principle, to a pension fund, which is given a degree of freedom, in particular as regards its organisation and the structuring and financing of the benefits it provides. It is therefore free to provide statutory minimum benefits only or to provide more than the minimum benefits. That occupational pension scheme is, to a great extent, not a matter of personal initiative or left to the will of the persons concerned by the age-related contingencies.

16. The BPVG was notified by the Principality of Liechtenstein, under Article 9(1) of Regulation No 883/2004, as falling within the material scope of that regulation.

17. In the view of the referring court, pensions governed by the BPVG fall within the scope of Regulation No 883/2004 since they have their basis in the legislation of the Member State in question relating to the branch or system of social security for old-age benefits, and, in addition, the BPVG was notified in its entirety by the Principality of Liechtenstein under Article 9(1) of Regulation No 883/2004.

18. However, the referring court also contends that it cannot be ruled out (i) that the Liechtenstein occupational pension scheme — regardless of the fact that it falls within the category of coordinated pension schemes as made clear by the abovementioned notification — cannot be regarded as 'equivalent', in view of the possibility it affords persons insured under it of freely arranging their own pension scheme or (ii) that the inclusion of benefits from that pension scheme in their entirety in the contribution basis of the Austrian health insurance scheme has to be regarded, from the perspective of EU law, as an obstacle to the exercise of the freedom of movement.

19. In those circumstances the Verwaltungsgerichtshof (Administrative Court) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Is Article 5 of Regulation No 883/2004, in the light of Article 45 TFEU, to be interpreted as meaning that old-age pensions under an occupational pension scheme (which is initiated and guaranteed by the State, is intended to enable the previous standard of living of the individual concerned to be maintained in an appropriate way, operates according to the principle of capitalisation, is compulsory in principle but may also provide for supplementary, non-compulsory contributions that exceed the statutory minimum amount and for correspondingly higher benefits, and the implementation of which falls to a pension fund to be set up or used by the employer, such as — in the present case — the "second-pillar" pension scheme in Liechtenstein), and old-age pensions under a statutory pension scheme (which is likewise initiated and guaranteed by the State, is intended to enable the previous standard of living of the individual concerned to be maintained in an appropriate way, but operates on the basis of the pay-as-you-go principle, is compulsory and the implementation of which falls to pension insurance funds established by statute, such as — in the present case — Austria's pension scheme) are "equivalent" within the meaning of the abovementioned provision?'

II – **My assessment**

20. Before examining the question raised by the referring court, it is necessary to resolve the preliminary matter of determining whether old-age pensions under the Hilti pension fund of the Liechtenstein occupational pension scheme fall within the material scope of Regulation No 883/2004.

A – *Inclusion of the Liechtenstein occupational pension scheme within the material scope of Regulation No 883/2004*

21. According to Mr Knauer, the Liechtenstein occupational pension scheme constitutes, as regards both its statutory minimum component and its supplementary portion, not a statutory social security scheme coming under Regulation No 883/2004 but a supplementary pension scheme to which only the provisions of Council Directive 98/49/EC of 29 June 1998 on safeguarding the supplementary pension rights of employed and self-employed persons moving within the Community[8] must apply. Mr Knauer contends inter alia in that regard that solidarity is only a minor aspect of that scheme, which operates according to the principle of capitalisation, that the level of cover offered far exceeds that guaranteed by the basic old-age and survivors' insurance scheme, that the capital required for the payment of benefits — which is provided through private-law bodies — is in the form of savings, and that that scheme is compulsory only for some employees.

8 — OJ 1998 L 209, p. 46.

22. Whilst acknowledging, with reference to the judgment in *Beerens*,[9] that all benefits paid in pursuance of national legislation that has been notified under Article 9(1) of Regulation No 883/2004 must be classed as 'social security benefits' that necessarily fall within the scope of that regulation, Mr Knauer maintains that notification does not concern the portion corresponding to benefits that have been paid in respect of contributions paid over and above the statutory obligation, the content of which is not specified in the BPVG. In his view, those benefits are provided under a contract or regulations and not under the law.

23. Without there being any need to examine further the distinction between statutory and supplementary social security schemes,[10] suffice it to note that, according to the established case-law of the Court, whilst the fact that a national law or regulation has not been mentioned in the declaration is not of itself proof that that law or regulation does not fall within the field of application of the system of coordination of social security schemes, the fact that a Member State has specified a law in its declaration must be accepted as proof that the benefits granted on the basis of that law are social security benefits.[11]

24. Both in the declaration made under Article 5 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,[12] and in that notified under Article 9(1) of Regulation No 883/2004,[13] the Principality of Liechtenstein mentioned not only the first pillar, corresponding to the Law on Old-Age and Survivors' Insurance (Gesetz über die Alters- und Hinterlassenerversicherung) of 14 December 1952,[14] but also the second pillar, comprising in particular the BPVG.

25. As the declaration relating to the BPVG did not include any exception for particular benefits, all benefits granted on the basis of that law must be regarded as social security benefits within the meaning of the EU rules applicable in the field of the coordination of social security schemes.

26. It is therefore appropriate to determine whether those rules preclude the inclusion of old-age pensions under the Hilti pension fund of the Liechtenstein occupational pension scheme in the basis for calculating the health insurance contributions paid by an individual insured under the Austrian health insurance scheme.

B – *Equivalence between old-age pensions under the Liechtenstein occupational pension scheme and an old-age pension under the Austrian statutory scheme*

27. As a preliminary point, it should be noted that Article 30 of Regulation No 883/2004 authorises the institution of a Member State which is responsible for payment of a pension to make deductions from that pension in respect of contributions for sickness benefits, provided that the cost of those benefits is borne by an institution of that State.

9 — 35/77, EU:C:1977:194.

10 — I refer, with regard to that distinction, to my Opinion delivered today in *Commission* v *Malta* (C-12/14, pending before the Court).

11 — See, to that effect, judgment in *Martínez Losada and Others* (C-88/95, C-102/95 and C-103/95, EU:C:1997:69, paragraph 21 and the case-law cited).

12 — OJ 2003 C 127, p. 35.

13 — That declaration was published by the European Commission. At the date of drafting the present Opinion, it can be accessed via the internet address:
http://ec.europa.eu/social/keyDocuments.jsp?
advSearchKey=liechtenstein&mode=advancedSubmit&langId=fr&policyArea=&type= 0&country= 0&year= 0.

14 — LGBl. 1952, No 29, in the version applicable at the material time.

28. In a situation such as that of Mr Knauer or Mr Mathis, where one or more pensions are received by a person under the legislation of two or more Member States, Regulation No 883/2004 lays down precise rules for determining the competent institutions in respect of providing and paying for benefits in kind.[15] That set of rules, which is intended to prevent any complications that might result from the overlapping of the applicable provisions of national legislation, includes in particular the rule laid down in Article 23 of that regulation, which provides that benefits in kind are to be paid by the institution of the Member State of residence, provided the person concerned receives a pension and is entitled to such benefits under the legislation of that State.

29. It is not disputed that Mr Knauer and Mr Mathis are entitled both to a pension and to benefits in kind under Austrian legislation and that that legislation provides for deductions of contributions. The conditions for application laid down in Article 30 of Regulation No 883/2004 in respect of levying contributions are therefore met.

30. It remains to be determined whether contributions can be levied not only on the Austrian old-age pension, but also on old-age pensions provided under the Liechtenstein occupational pension scheme.

31. In that regard it should be noted that, as Regulation No 883/2004 is merely a means of coordinating national laws and does not seek to harmonise them,[16] the Member States retain the power to determine the income to be taken into account when calculating social contributions.[17] They may therefore, in principle, include in the basis for calculating health insurance contributions retirement pensions paid by other Member States of the European Union or of the EEA.[18]

32. It is necessary, however, when Member States exercise their powers that they comply with EU law.[19]

33. Article 30 of Regulation No 987/2009 lays down a specific limit by introducing a cap on the amount of contributions based on all the pensions paid, set at the amount deducted in respect of a person who receives the same amount of pension from the competent Member State. The collection of contributions based on pensions provided by more than one Member State is therefore limited in extent. Is it also limited in principle?

34. As the referring court rightly states, such limitation may result from application of the principle of the equal treatment of benefits, income, facts or events set out in Article 5 of Regulation No 883/2004.

35. Although all the interested persons referred to in Article 23 of the Statute of the Court of Justice who submitted observations to the Court agree in recognising the applicability of that principle, they disagree radically over the question as to whether old-age benefits such as those under the BPVG and the ASVG respectively are to be regarded as being equivalent.

36. In the view of the Fund, equivalence does exist between the Austrian statutory retirement pension and pensions paid by the Liechtenstein occupational pension schemes. It argues to that effect that the Austrian system is structured in such a way that the previous standard of living of the individual concerned can be maintained by means of first-pillar statutory benefits alone, whereas in Liechtenstein that level of benefits is provided under the second pillar, which plays an essential role, whilst the first pillar serves merely to ensure a minimum means of subsistence. Furthermore, contributions to the Austrian statutory scheme are three times higher than in Liechtenstein. The Fund also points out that the BPVG lays down an obligation to belong to an occupational pension scheme

15 — Those rules are laid down in Articles 23 to 28 of that regulation.

16 — See judgment in *Derouin* (C-103/06, EU:C:2008:185, paragraph 20 and the case-law cited).

17 — Ibid. (paragraph 24).

18 — See, to that effect, judgment in *Nikula* (C-50/05, EU:C:2006:493, paragraphs 24 and 25).

19 — Ibid. (paragraph 24 and the case-law cited).

and contains clear, precise rules concerning the amount of contributions, the nature of the benefits assured and the organisation and monitoring of the pension funds which manage such schemes. It adds that there are rules applying also to that portion of the occupational scheme which provides more than the statutory minimum benefits, with the result that the 'contractual freedom' of the pension funds is extremely limited. Similarly, individual workers do not have the freedom to join such a scheme or to determine its content. The Fund states that the concept of benefits 'that exceed the statutory obligations' includes not only supplementary voluntary benefits, but also benefits provided in respect of contributions paid before the statutory obligation was imposed. It explains that contributions paid under the BPVG receive the same tax treatment as contributions paid in respect of compulsory insurance under the ASVG in Austria. It notes, lastly, that the ASVG provides that, in the case of membership of a voluntary supplementary pension scheme, contributions to the health insurance scheme must be paid on the benefits provided under such a scheme also. In short, the Fund concludes that failure to take into account benefits that frontier workers receive by reason of their having worked in Liechtenstein would lead to them being treated unequally in relation to persons who have worked exclusively in the national territory.

37. According to Mr Knauer, on the other hand, the benefits paid by the Austrian pension scheme are not equivalent to those paid under the Liechtenstein occupational pension scheme, there being many structural differences between them. In addition to the arguments stated above in connection with the examination of whether the Liechtenstein occupational pension scheme falls within the material scope of Regulation No 883/2004,[20] Mr Knauer points out, in particular, that that scheme is modelled on the Swiss occupational pension scheme, which is characterised, inter alia, by the autonomy enjoyed by pension funds, which may be governed by private law, as regards their organisation, their financing and their administration, and by the application of the principles of capitalisation and equivalence, which means that the amount of benefits is determined by the amount of contributions.

38. The Austrian Government and the European Free Trade Association (EFTA) Surveillance Authority contend that benefits provided by one Member State must be regarded as being equivalent to those provided by another Member State where both fall within the field of application of the system of the coordination of social security schemes.

39. The Commission proposes that the concept of 'equivalent' benefits should be interpreted in the same way as the concept of benefits 'of the same kind' appearing in Article 53(1) of Regulation No 883/2004. Social security benefits should therefore be regarded as being equivalent where their purpose and objective, and the basis for calculating them and the conditions for granting them, are the same.

40. Before assessing the merits of the various arguments in order to answer the question raised by the referring court, it is appropriate to examine the purpose of the principle of the equal treatment of benefits set out in Article 5(a) of Regulation No 883/2004 and the specific meaning that should be given to the concept of equivalence in the context of that provision.

41. As is clear from recital 9 of Regulation No 883/2004, Article 5 of that regulation is the codification of settled case-law that has established the principle of the equal treatment of facts as being the specific expression of the general principle of non-discrimination, applied in the particular field of the coordination of social security legislation. According to that case-law, in order to safeguard the effective exercise of the right to freedom of movement, it is necessary to treat situations that have occurred in one Member State in the same way as if they had occurred in the Member State whose legislation is applicable.

20 — Point 21 of the present Opinion.

42. However, whilst, in accordance with that traditional view, the principle of equal treatment (assimilation) was presented in the Commission's initial proposal [21] as a special variation on the principle of equality of treatment, [22] the EU legislature finally enshrined it in a separate article, from which it may be inferred that it holds new potential which it will be for case-law to reveal. [23]

43. That article is divided into two points, the first dealing with the equal treatment of benefits and other income, the second with the equal treatment of facts or events.

44. It should be noted at the outset that the principle set out in Article 5(b) of Regulation No 883/2004, which attributes to facts or events occurring in another Member State the same legal effects as those produced by 'like' facts or events occurring in the Member State whose legislation is applicable, does not appear to me to apply in a situation such as that at issue in the main proceedings, which calls for a comparison of two benefits. That rule of treating such 'facts or events' in the same way seems rather to correspond to the most recent case-law applying the requirement of such treatment as an extension of equality of treatment in general.

45. We find in the case-law a number of situations in which, as regards the granting, maintaining or extending of entitlement to social security benefits or in respect of the calculation of such benefits, periods completed in another Member State are treated in the same way as those completed in the Member State in which the benefits are claimed.

46. The Court has thus held that national legislation concerning the conditions for granting an invalidity pension has the effect of deterring migrant workers from exercising their right of free movement where it provides for the prolongation in certain circumstances, such as sickness or unemployment, of the reference period preceding the occurrence of invalidity, in which the insured person must have paid a minimum number of contributions in order to qualify for the grant of the pension, while such prolongation is not possible where the circumstances which would enable the period to be prolonged occur in another Member State. [24]

47. Similarly, the Court has held that, where the entitlement to orphan's benefit is extended beyond a certain age for recipients of benefits whose training has been interrupted by their military service, military service in another Member State must be treated in the same way as military service in the Member State whose legislation is applicable. [25]

48. The Court has also held that, for the purpose of calculating an old-age pension, national legislation cannot make the treatment as periods of insurance of periods devoted to child-rearing completed in another Member State subject to conditions when the taking into account of the same periods completed in the national territory is not subject to any conditions. [26]

21 — Proposal for a Council Regulation (EC) on coordination of social security systems (COM(1998) 779 final).

22 — See Article 3(2) and (3) of that proposal.

23 — See, inter alia, for an analysis of that new article, Mavridis, P., 'L'assimilation des faits en droit communautaire: un nouveau principe?', *Revue de droit sanitaire et social*, No 4, 2011, p. 629, and Rennuy, N., 'Assimilation, territoriality and reverse discrimination: a shift in European social security law?', *European Journal of Social Law*, No 4, 2011, p. 289.

24 — Judgment in *Paraschi* (C-349/87, EU:C:1991:372, paragraphs 22 to 27).

25 — Judgment in *Mora Romero* (C-131/96, EU:C:1997:317, paragraph 36).

26 — Judgment in *Kauer* (C-28/00, EU:C:2002:82). See, also, judgment in *Elsen* (C-135/99, EU:C:2000:647), in which the Court held that, for the purpose of the grant of an old-age pension, the competent institution of a Member State is required to take into account, as though they had been completed in its national territory, periods devoted to child-rearing completed in another Member State.

49. The Court has also applied the principle of equal treatment in the context of the implementation of conditions for the loss or suspension of the right to benefits. It thus held that EU law does not prohibit the treatment by a Member State of a corresponding event occurring in another Member State as equivalent to an event, such as imprisonment, which, if it occurred on the national territory, would constitute a ground for the loss or suspension of the right to benefits.[27] Application of the principle of equal treatment may therefore, depending on the circumstances, lead to restoring equality of treatment for the benefit, or to the detriment, of the person concerned.

50. It is less common to find in case-law situations relating to the principle of the equal treatment of benefits and other income, as referred to in Article 5(a) of Regulation No 883/2004.

51. However, three judgments appear to relate to such situations. First, it is clear from the judgment in *Warry*[28] that, where national legislation makes entitlement to invalidity benefits conditional upon entitlement to sickness benefits, the fact that the person concerned was entitled to the latter benefits in another Member State must be taken into account as if that person had received them in the Member State whose legislation is applicable. Next, it can be inferred from the judgment in *Öztürk*[29] that legislation of a Member State must not make entitlement to an early old-age pension in the event of unemployment conditional upon fulfilment of the requirement that the person concerned has received, over a certain period prior to the application for the pension, unemployment insurance benefits from that Member State alone, whilst the same benefits received from another Member State are not taken into account. Lastly, in the judgment in *Klöppel*[30] the Court held that national legislation which provides for an extension of payment of a childcare allowance where the second parent also claims that allowance cannot leave out of account the drawing of a 'comparable' benefit in another Member State. Since recital 9 of Regulation No 883/2004 states that the principle of equal treatment should be adopted explicitly and developed 'while observing the substance and spirit of legal rulings', I shall interpret Article 5 of that regulation on the basis of the earlier case-law, which indicates the principles involved.

52. I note that the Court has not laid down any specific grounds of differentiation and has thus permitted a certain amount of flexibility in the implementation of the principle of equal treatment. That flexibility, authorised by case-law, has not been called in question by the EU legislature, whose intention was to endorse the existing case-law. In my view, in the absence of criteria clearly set out in the case-law or in legislation, the principle of equal treatment involves recourse to a comparative method similar to that of functional equivalence, well-known in comparative law,[31] consisting in seeking, beyond any formal differences, not complete similarity in nature of the benefits in question, but a functional analogy. Significant in that regard is the judgment in *Klöppel*,[32] which merely states that the child-raising allowance in Germany is 'comparable' to the Austrian childcare allowance, without examining whether the two benefits exhibit exactly the same characteristics.

53. Reasoning in terms of functional equivalence has two consequences.

54. First, for an interpretation of the term 'equivalent' benefits within the meaning of Article 5(a) of Regulation No 883/2004, it is not necessary to apply the narrow criteria developed for the interpretation of the term 'benefits of the same kind' within the meaning of Articles 10, 53 and 54 of that regulation. If the EU legislature had intended to refer to those case-law criteria it would have

27 — Judgment in *Kenny* (1/78, EU:C:1978:140).

28 — 41/77, EU:C:1977:177.

29 — C-373/02, EU:C:2004:232.

30 — C-507/06, EU:C:2008:110.

31 — See, inter alia, Godechot-Patris, S., 'Retour sur la notion d'équivalence au service de la coordination des systèmes', *Revue critique de droit international privé*, 2010, p. 271.

32 — C-507/06, EU:C:2008:110.

used in respect of application of the principle of equal treatment the term already used in respect of application of the rules to prevent overlapping rather than create a new term. Lastly, 'equivalent benefit', which is based on more flexible criteria, seems to me to be broader than 'benefit of the same kind'. [33]

55. Secondly, I do not consider that the concept of equivalence used in Article 5(a) of Regulation No 883/2004 should be interpreted more narrowly than that of 'like' facts or events mentioned in Article 5(b) thereof. [34] In neither of the situations envisaged by the EU legislature does the requirement of equal treatment mean strict similarity, which would result in the principle's scope being considerably reduced.

56. To what conclusion does the functional equivalence method lead in the case of the comparison of old-age benefits such as those under the BPVG and the ASVG respectively?

57. I do not think that the inclusion of BPVG benefits within the material scope of Regulation No 883/2004 can, of itself, confer on them the character of equivalent benefits. Apart from such an outcome depriving of its scope the requirement for equivalence on which application of the principle of equal treatment is conditional, determination of that scope of application depends on purely formal characteristics, [35] which should not be regarded as relevant factors for assessing equivalence between benefits.

58. The decisive factor is whether, in order to share out fairly among pensioners — whatever the origin of their pension — the burden of financing health insurance, old-age benefits under the BPVG correspond to a basis for calculation which is comparable to that constituted by ASVG benefits.

59. In order to answer that question, it is sufficient to start from the finding that the Austrian and Liechtenstein retirement schemes present a fundamental difference in that they attribute very different dimensions to the first and second pillars. According to the referring court, the structure of the Liechtenstein retirement scheme is based on three pillars, the first of which is intended solely to meet the vital needs of retired persons, whereas the second-pillar occupational schemes are deemed to enable the previous standard of living of the individual concerned to be maintained. Under the Austrian retirement scheme, on the other hand, the extent of the cover offered by the first pillar is much greater, since the objective of the ASVG old-age pension is to enable the previous standard of living of the individual concerned to be maintained.

60. Therefore, from the point of view of determining the basis for calculating contributions — and from that point of view only — foreign pensions which fulfil functionally the same object of enabling the previous standard of living of the individual concerned to be maintained must be regarded as being the same as those under the ASVG. The fact that the Liechtenstein occupational pension scheme has several characteristics that are different from the Austrian pension scheme does not justify a different conclusion. In particular, neither the fact that the Austrian scheme operates according to the pay-as-you-go principle whereas the Liechtenstein scheme operates according to the principle of capitalisation, nor the possibility open to recipients of BPVG benefits freely to arrange their pension scheme, constitute relevant factors for comparing the basis for calculating contributions.

33 — It is therefore not impossible that benefits which are not of the same kind, such as an old-age pension and a survivors' pension, which are calculated on the basis of periods of insurance completed by different persons (see, to that effect, judgment in *Cordelle*, C-366/96, EU:C:1998:57), may be accepted as functionally equivalent, in particular when it comes to including them in the basis for calculating social contributions.

34 — See, to that effect, Rennuy, N., op. cit., who considers that the Court should 'resist the temptation' to distinguish between the two concepts (paragraph 1, pp. 298 and 299).

35 — Those characteristics relate to the legislative basis for the benefits or to the fact that the benefits are mentioned in the declaration made by the Member State of the European Union or of the EEA pursuant to Article 9(1) of Regulation No 883/2004.

61. In short, I consider that Article 5(a) of Regulation No 883/2004 must be interpreted as not precluding — as regards determination of the basis for calculating the health insurance contributions levied in the Member State of residence of a recipient of pensions payable under the legislation of two or more Member States — old-age benefits paid under a supplementary occupational pension scheme of another Member State of the European Union or of the EEA, which is mentioned in the declaration made by that State pursuant to Article 9(1) of that regulation, from being regarded as equivalent to old-age benefits paid under the basic statutory scheme of the Member State of residence and thus included in that contribution basis, where, in the same way as the pensions received in the Member State of residence, they are intended to ensure that their recipients maintain a standard of living commensurate with that which they enjoyed before their retirement.

III – **Conclusion**

62. In the light of the above considerations, I propose that the answer to the question submitted for a preliminary ruling by the Verwaltungsgerichtshof (Administrative Court) should be as follows: Article 5(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 must be interpreted as not precluding — as regards determination of the basis for calculating the health insurance contributions levied in the Member State of residence of a recipient of pensions payable under the legislation of two or more Member States — old-age benefits paid under a supplementary occupational pension scheme of another Member State of the European Union or of the EEA, which is mentioned in the declaration made by that State pursuant to Article 9(1) of that regulation, from being regarded as equivalent to old-age benefits paid under the basic statutory scheme of the Member State of residence and thus included in that contribution basis, where, in the same way as the pensions received in the Member State of residence, they are intended to ensure that their recipients maintain a standard of living commensurate with that which they enjoyed before their retirement.