



E-1/21-24

REPORT FOR THE HEARING

in Case E-1/21

REQUEST to the Court under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice by the Princely Court of Appeal (*Fürstliches Obergericht*), in the case between

ISTM International Shipping & Trucking Management GmbH

and

**Liechtenstein Old-Age and Survivors' Insurance (AHV),
Liechtenstein Invalidity Insurance (IV), and
Liechtenstein Family Allowances Office (FAK)**

concerning the interpretation 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 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 (EC) No 883/2004 on the coordination of social security systems.

I Introduction

1. By letter of 25 March 2021, registered at the Court on 6 April 2021, the Princely Court of Appeal (*Fürstliches Obergericht*) requested an Advisory Opinion in the case pending before it between ISTM International Shipping & Trucking Management GmbH (“ISTM”) and Liechtenstein Old-Age and Survivors' Insurance (*Liechtensteinische Alters- und Hinterlassenenversicherung*), Liechtenstein Invalidity Insurance (*Liechtensteinische Invalidenversicherung*) and Liechtenstein Family Allowances Office (*Liechtensteinische Familienausgleichskasse*) (“the Liechtenstein Institutions”).

2. The case before the referring court concerns an appeal brought by ISTM against a decision of the Liechtenstein Institutions of 22 September 2020 regarding the non-

applicability of Liechtenstein social security law to ISTM and its employees registered in 2016.

II Legal background

EEA law

3. 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), as corrected by OJ 2004 L 200, p. 1, and OJ 2007 L 204, p. 30, (“Regulation 883/2004”) was incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 76/2011 of 1 July 2011 (OJ 2011 L 262, p. 33) and is referred to at point 1 of Annex VI (Social Security) to the EEA Agreement. Constitutional requirements were indicated by Iceland and Liechtenstein. The requirements were fulfilled by 31 May 2012 and the decision entered into force on 1 June 2012. The following provisions are cited in accordance with the wording applicable at the time when the facts giving rise to the main proceedings took place.

4. Article 11 of Regulation 883/2004, headed “General Rules”, reads, in extract:

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;

...

(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/her benefits under the legislation of one or more other Member States.

4. For the purposes of this Title, an activity as an employed or self-employed person normally pursued on board a vessel at sea flying the flag of a Member State shall be deemed to be an activity pursued in the said Member State. However, a person employed on board a vessel flying the flag of a Member State and remunerated for such activity by an undertaking or a person whose registered office or place of business is in another Member State shall be subject to the

legislation of the latter Member State if he resides in that State. The undertaking or person paying the remuneration shall be considered as the employer for the purposes of the said legislation.

5. Article 13 of Regulation 883/2004, headed “Pursuit of activities in two or more Member States”, reads, in extract:

1. A person who normally pursues an activity as an employed person in two or more Member States shall be subject:

(a) to the legislation of the Member State of residence if he/she pursues a substantial part of his/her activity in that Member State; or

(b) if he/she does not pursue a substantial part of his/her activity in the Member State of residence:

(i) to the legislation of the Member State in which the registered office or place of business of the undertaking or employer is situated if he/she is employed by one undertaking or employer; or

(ii) to the legislation of the Member State in which the registered office or place of business of the undertakings or employers is situated if he/she is employed by two or more undertakings or employers which have their registered office or place of business in only one Member State; or

(iii) to the legislation of the Member State in which the registered office or place of business of the undertaking or employer is situated other than the Member State of residence if he/she is employed by two or more undertakings or employers, which have their registered office or place of business in two Member States, one of which is the Member State of residence; or

(iv) to the legislation of the Member State of residence if he/she is employed by two or more undertakings or employers, at least two of which have their registered office or place of business in different Member States other than the Member State of residence.

...

3. A person who normally pursues an activity as an employed person and an activity as a self-employed person in different Member States shall be subject to the legislation of the Member State in which he/she pursues an activity as an employed

person or, if he/she pursues such an activity in two or more Member States, to the legislation determined in accordance with paragraph 1.

...

5. Persons referred to in paragraphs 1 to 4 shall be treated, for the purposes of the legislation determined in accordance with these provisions, as though they were pursuing all their activities as employed or self-employed persons and were receiving all their income in the Member State concerned.

6. Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems (OJ 2009 L 284, p. 1) (“Regulation 987/2009”) was incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 76/2011 of 1 July 2011 and is referred to at point 2 of Annex VI (Social Security) to the EEA Agreement. Constitutional requirements were indicated by Iceland and Liechtenstein. The requirements were fulfilled by 31 May 2012 and the decision entered into force on 1 June 2012. The following provisions are cited in accordance with the wording applicable at the time when the facts giving rise to the main proceedings took place.

7. Article 14 of Regulation 987/2009, headed “Details relating to Articles 12 and 13 of the basic Regulation”, reads, in extract:

5a. For the purposes of the application of Title II of the basic Regulation, ‘registered office or place of business’ shall refer to the registered office or place of business where the essential decisions of the undertaking are adopted and where the functions of its central administration are carried out.

...

5b. Marginal activities shall be disregarded for the purposes of determining the applicable legislation under Article 13 of the basic Regulation. Article 16 of the implementing Regulation shall apply to all cases under this Article.

...

8. Article 16 of Regulation 987/2009, headed “Procedure for the application of Article 13 of the basic Regulation”, reads:

1. A person who pursues activities in two or more Member States shall inform the institution designated by the competent authority of the Member State of residence thereof.

2. *The designated institution of the place of residence shall without delay determine the legislation applicable to the person concerned, having regard to Article 13 of the basic Regulation and Article 14 of the implementing Regulation. That initial determination shall be provisional. The institution shall inform the designated institutions of each Member State in which an activity is pursued of its provisional determination.*

3. *The provisional determination of the applicable legislation, as provided for in paragraph 2, shall become definitive within two months of the institutions designated by the competent authorities of the Member States concerned being informed of it, in accordance with paragraph 2, unless the legislation has already been definitively determined on the basis of paragraph 4, or at least one of the institutions concerned informs the institution designated by the competent authority of the Member State of residence by the end of this two-month period that it cannot yet accept the determination or that it takes a different view on this.*

4. *Where uncertainty about the determination of the applicable legislation requires contacts between the institutions or authorities of two or more Member States, at the request of one or more of the institutions designated by the competent authorities of the Member States concerned or of the competent authorities themselves, the legislation applicable to the person concerned shall be determined by common agreement, having regard to Article 13 of the basic Regulation and the relevant provisions of Article 14 of the implementing Regulation.*

Where there is a difference of views between the institutions or competent authorities concerned, those bodies shall seek agreement in accordance with the conditions set out above and Article 6 of the implementing Regulation shall apply.

5. *The competent institution of the Member State whose legislation is determined to be applicable either provisionally or definitively shall without delay inform the person concerned.*

6. *If the person concerned fails to provide the information referred to in paragraph 1, this Article shall be applied at the initiative of the institution designated by the competent authority of the Member State of residence as soon as it is appraised of that person's situation, possibly via another institution concerned.*

National law

9. Article 1(1) of the Old-Age and Survivors' Insurance Act (*Gesetz über die Alters- und Hinterlassenenversicherung*) (“AHVG”) provides that an independent public law institution shall exist with the name “Liechtensteinische Alters- und Hinterlassenenversicherung” (Liechtenstein Old-Age and Survivors’ Insurance). Pursuant

to Article 2(1) of the AHVG, the purpose of that institution is to implement old-age and survivors' insurance in accordance with the provisions of that act.

10. Article 1(1) of the Invalidity Insurance Act (*Gesetz über die Invalidenversicherung*) ("IVG") provides that an independent public law institution shall exist with the name "Liechtensteinische Invalidenversicherung" (Liechtenstein Invalidity Insurance). Pursuant to Article 2(1) of the IVG, the purpose of that institution is to implement invalidity insurance in accordance with the provisions of that act.

11. Article 1(1) of the Family Allowances Act (*Gesetz über die Familienzulagen*) ("FZG") provides that an independent public law institution shall exist with the name "Liechtensteinische Familienausgleichskasse" (Liechtenstein Family Allowances Office). Pursuant to Article 2(1) of the FZG, the purpose of that institution is to operate the family allowances fund in accordance with the provisions of that act.

III Facts and procedure

12. ISTM is a limited liability company under Liechtenstein law with a registered office in Liechtenstein. The purpose of ISTM is:

- a. transport management, maritime and inland waterway transport management, truck and shipping fleet management and in this connection provision of the relevant employees;
- b. equipping of transport vehicles (inland waterway and maritime transport and trucks) and associated staff training services, personnel management;
- c. holdings in other companies;

13. ISTM acts as a management company for inland waterway transport on the River Rhine.

14. The Liechtenstein Institutions are institutions governed by public law and established by legislation which provide statutory old-age and survivors' benefits, invalidity benefits and family benefits in Liechtenstein.

15. The facts underlying the proceedings before the referring court are that ISTM's employees, who are resident in Germany, the Netherlands and the Czech Republic, are, in carrying out their activities for ISTM, employed full-time and only by ISTM. The employees pursue their activity usually in two or more EEA States, in particular, in Germany, in the Netherlands, in Belgium, in Luxembourg or in France. Employees who are resident in Germany and/or the Netherlands also pursue activities in their respective state of residence. However, those activities are not a substantial part of their overall

activities and in no case more than 25%.

16. By order of 17 February 2017 and decision of 22 September 2020 in response to ISTM's appeal against that order, the Liechtenstein Institutions determined that Liechtenstein social security law is not applicable to ISTM and its employees registered in 2016. The decision at issue relates to the period from 4 February 2016 (date on which ISTM was established) to 17 February 2017.

17. The Liechtenstein Institutions based this determination on the fact that ISTM did not carry out the essential decisions and functions of its business operations at its registered office in Liechtenstein.

18. In its appeal challenging that determination, ISTM contests this. It argues that its registered office (*statutarischer Sitz* or *satzungsmässiger Sitz*) in Liechtenstein already suffices. Furthermore, ISTM states that the essential decisions and measures were actually taken at the registered office in Liechtenstein. In addition, in its appeal, ISTM relied on the fact that, in relation to individual employees, institutions of other EEA States (those of the state of residence) have made a provisional determination of the applicable legislation within the meaning of Article 16 of Regulation 987/2009 to the effect that Liechtenstein legislation must be applied. In this respect, the determination has become definitive.

19. In this regard, on a point of fact, the referring court states that it has been provided with the provisional determination made by the Czech social security authorities to which the Liechtenstein Institutions did not object within two months. Further provisional determinations made by the Czech social security authorities also exist which, in some cases, were transmitted by ISTM directly to the Liechtenstein Institutions.

20. Against this background, the Princely Court of Appeal decided to stay the proceedings and request an advisory opinion from the Court. The request, dated 25 March 2021, was registered at the Court on 6 April 2021. The Princely Court of Appeal has referred the following questions to the Court:

I. Registered office of an undertaking

- 1. Does the registered office (*statutarischer Sitz* or *satzungsmässiger Sitz*) of an undertaking suffice to be regarded as the registered office (*Sitz*) within the meaning of Article 13(1)(b)(i) 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 in conjunction with Article 14(5a) of Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems and thus as a connecting factor for subjecting the employees of the undertaking to the legislation of the Member**

State in which the registered office (*statutarischer Sitz* or *satzungsmässiger Sitz*) is situated?

2. If Question 1 is answered in the negative:

According to which criteria must the registered office (*statutarischer Sitz* or *satzungsmässiger Sitz*) or place of business where the essential decisions of the undertaking are adopted and where the functions of its central administration are carried out, as provided for in Article 14(5a) of Regulation (EC) No 987/2009, be determined? For these purposes, must reference be had to the interpretation reached by the Administrative Commission for the Coordination of Social Security Systems, as set out in Part II, Section 7 (page [35] et seq.) of the *Practical guide on the applicable legislation in the European Union (EU), in the European Economic Area (EEA) and in Switzerland* of December 2013?

II. Questions on the interpretation of Article 16(3) of Regulation (EC) No 987/2009:

- 1. From what time is the institution of the Member State in which the person pursues an activity regarded as having been informed of the provisional determination by the institution of the place of residence? Does it suffice when, in whatever form, the provisional determination reaches the institution of the place in which the person pursues an activity (for example via the undertaking or the employee)?**
- 2. Is the “definitive nature” of the determination of the applicable legislation that arises as a result of the two-month period expiring without use being made of it not susceptible to further challenge by the designated institution of the Member State and, in particular, even where the person concerned does not pursue any activity in this Member State?**
- 3. If Question II (2) is answered to the effect that the determination, notwithstanding the fact that it has become definitive, may be challenged: What are the legal consequences? Can this result in a retroactive setting aside of the determination?**

IV Written observations

21. Pursuant to Article 20 of the Statute of the Court and Article 97 of the Rules of Procedure, written observations have been received from:

- ISTM International Shipping & Trucking Management GmbH, represented by Dr Karl Mumelter, advocate;
- the Liechtenstein Government, represented by Dr Andrea Entner-Koch and Dr Claudia Bösch, acting as Agents;
- the Netherlands Government, represented by Mielle Bulterman and Jurian Langer, acting as Agents;
- the EFTA Surveillance Authority (“ESA”), represented by Ewa Gromnicka, Romina Schobel, Catherine Howdle and Michael Sanchez Rydelski, acting as Agents; and
- the European Commission (“the Commission”), represented by Denis Martin and Bernd-Roland Killmann, acting as Agents.

V Proposed answers submitted

ISTM

22. ISTM proposes that the questions referred be answered as follows:

Question 1:

The registered office (statutarischer Sitz or satzungsmässiger Sitz) of an undertaking is suffice to be regarded as the registered office (Sitz) within the meaning of Article 13(1)(b)(i) of Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 of the coordination of social security systems in conjunction with Article 14 (5a) of Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems.

Question 2:

There are no formal requirements for informing the concerned institution of the Member State (here: Liechtenstein) of the provisional determination. It is sufficient that the concerned institution obtains knowledge of the provisional determination by whatever means. In any event, it is sufficient that the provisional determination reaches the concerned institution (here: Liechtenstein) by forwarding copies of the respective letters containing the provisional determination to the concerned institution (here: Liechtenstein).

Once the provisional determination of the applicable legislation is “definitive” according to Art. 16 para. 3 of Regulation (EC) 987/2009, such definitive determination is not susceptible to further changes.

The Liechtenstein Government

23. The Liechtenstein Government proposes that the questions referred be answered as follows:

I. Registered office of an undertaking:

1. The registered office (statutarischer Sitz or satzungsmässiger Sitz) of an undertaking does not suffice to be regarded as the registered office (Sitz) within the meaning of Article 13(1)(b)(i) 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 in conjunction with Article 14(5a) of Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems and thus as a connecting factor for subjecting the employees of the undertaking to the legislation of the Member State in which the registered office (statutarischer Sitz or satzungsmässiger Sitz) is situated.

2. If Question 1 is answered in the negative:

In the determination of the term registered office (statutarischer Sitz or satzungsmässiger Sitz) or place of business where the essential decisions of the undertaking are adopted and where the functions of its central administration are carried out, as provided for in Article 14(5a) of Regulation (EC) No 987/2009, reference must be made to the interpretation reached by the Administrative Commission for the Coordination of Social Security Systems, as set out in Part II, Section 7 (page [35] et seq.) of the Practical guide on the applicable legislation in the European Union (EU), in the European Economic Area (EEA) and in Switzerland of December 2013.

II. Questions on the interpretation of Article 16(3) of Regulation (EC) No 987/2009:

1. The institution of the Member State in which the person pursues an activity regarded must be regarded as having been informed of the provisional determination by the institution of the place of residence only if they are informed by the institution of the Member State which has issued the determination, directly. It does not suffice when, in whatever form, the provisional determination reaches

the institution of the place in which the person pursues an activity (for example via the undertaking or the employee).

2. The “definitive nature” of the determination of the applicable legislation that arises as a result of the two-month period expiring without use being made of does not impede that a determination could still retroactively be set aside if it turns out that it was incorrect from the beginning.

The Netherlands Government

24. The Netherlands Government proposes that the questions referred be answered as follows:

Part I:

Questions 1 and 2:

A mere registered office does not suffice but all circumstances of the case should be taken into consideration when determining the place of business.

Part II:

Question 1:

The institution in the place of residence shall inform the designated institutions in each of the EEA States in which an activity is pursued and the designated institution in the EEA State where the employer’s registered office or place of business is located of its provisional determination.

Question 2:

A final determination can be challenged on the basis of Article 5 of Regulation 987/2009.

ESA

25. ESA submits that the Court should answer the questions referred as follows:

I:

The registered office (statutarischer Sitz or satzungsmässiger Sitz) of a company does not suffice to be regarded as registered office (Sitz) within the meaning of Article 13(1)(b)(i) of Regulation No 883/2004 in conjunction with Article 14(5a) of Regulation No 987/2009, as the determinative factor is where the essential decisions

of the undertaking are adopted and where the functions of its central administration are carried out.

II:

With a view to establishing where registered office or place of business of an entity is, account may be taken of the criteria laid down in the Practical Guide. In any case the principle of homogeneity requires that the case law of the CJEU as reflected in the Practical Guide is duly taken account of by the national court in carrying out that assessment.

III:

Article 16(3) of Regulation No 987/2009 must be interpreted as meaning that the provisional determination of the applicable legislation, issued by the institution of another EEA State at the place of residence of the concerned person, does not become definitive as long as the institution of the designated EEA State has not been informed by the first institution as set out in Article 16(2) of that Regulation.

IV:

Article 16(4) of Regulation No 987/2009 must be interpreted as meaning that the institutions of the EEA States may still reassess a provisional determination having become definitive as a result of the two-month period expiring without use being made of it, with retroactive effect, as long as it is in view of reflecting the objective situation of the worker and correct determination of applicable legislation, which is the overarching aim of Regulations No 883/2004 and No 987/2009, and as long as the procedures established therein are followed.

The Commission

26. The Commission proposes that the questions referred be answered as follows:

Part I:

Questions 1 and 2:

Article 13(1)(b)(i) of Regulation 883/2004 in conjunction with Article 14(5a) of Regulation 987/2009 must be interpreted as meaning that the seat (statutarischer Sitz or satzungsmässiger Sitz) of a company does not suffice to be regarded as registered office or place of business where the essential decisions of the undertaking are adopted and where the functions of its central administration are

carried out. With a view to establishing where registered office or place of business of an entity is, account may be taken of the criteria laid down in the Practical Guide.

Part II:

Questions 1, 2 and 3:

Article 16 (3) of Regulation 987/2009 must be interpreted as meaning that the provisional determination of the applicable legislation, issued by the institution of another EEA State at the place of residence of the concerned person, does not become definitive as long as the institution of the designated EEA State has not been informed by the first institution as set out in Article 16 (2) of that Regulation.

Article 16 (4) of Regulation 987/2009 must be interpreted as meaning that the designated institution of the EEA State may still challenge a provisional determination having become definitive as a result of the two-month period expiring without use being made of it. Such a determination may be set aside retroactively where the underlying situation objectively so requires.

Páll Hreinsson
Judge-Rapporteur