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Order

The first chamber of the Fürstliches Obergericht (Princely Court of Appeal), composed of the presiding judge Dr Wilhelm Ungerank LL.M., as well as associate judge Mag. Konrad Lanser and senior judge Mag. Linn Berger as further members of the chamber, in the

Social security matter

appellant:

ISTM International Shipping & Trucking
Management GmbH, Austrasse 49, 9490
Vaduz

represented by Rechtsanwalt Dr. iur. Karl
Mumelter, Paragraph 7 Rechtsanwälte,
Landstrasse 60, 9490 Vaduz

respondents:

1. Liechtensteinische Alters- und Hinter-
lassenenversicherung (Liechtenstein Old-
Age and Survivors' Insurance (AHV))
2. Liechtensteinische Invalidenversicherung
(Liechtenstein Invalidity Insurance (IV))
3. Liechtensteinische Familienausgleichkasse
(Liechtenstein Family Allowances Office
(FAK))

all at: Gerberweg 2, 9490 Vaduz

all represented by Dr. iur. Eva Maria Hiebl,
Legal Service of the AHV-IV-FAK institutions,
also of the same address

concerning:

application of Liechtenstein social security
law

in closed session on **25 March 2021**, in the presence of the court clerk Eva Marte, has

ordered:

The appeal proceedings shall be stayed and, in accordance with Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, a request made to the EFTA Court in Luxembourg for an Advisory Opinion on the following questions:

- 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?

Grounds

1. Facts

The appellant is a limited liability company under Liechtenstein law, registered in the Liechtenstein commercial register under company number FL-0002.514.774-6, with a registered office in Liechtenstein. The purpose of the company is:

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

The appellant is a management company for inland waterway transport on the River Rhine.

The respondents 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.

The facts underlying the appeal proceedings are that the appellant's employees (who are resident in Germany, the Netherlands and the Czech Republic), whose subordination to social security law is at issue in the present case, are, in carrying out their activities for the appellant, employed full-time and only by the

appellant. They pursue their activity - Liechtenstein, as is well known, does not have any navigable waters - usually in two or more Member 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 pursue also an activity in their respective state of residence, however, not a substantial part of their activity and in no case more than 25%.

By order (*Verfügung*) of 17 February 2017 and decision of 22 September 2020 in response to the appellant's appeal (*Vorstellung*) against that order (such appeal does not involve recourse to a higher instance), the respondents determined that Liechtenstein social security law is not applicable to the appellant and its employees registered in 2016. The decision relates to the period from 4 February 2016 (date on which the appellant was established) to 17 February 2017.

In summary, the respondents based this determination on the fact that the appellant did not carry out the essential decisions and functions of its business operations at its registered office in Liechtenstein.

In its appeal challenging that determination, the appellant contests this. It argues that its registered office (*statutarischer Sitz* or *satzungsmässiger Sitz*) (in Liechtenstein) already suffices. In addition, the essential decisions and measures were indeed taken at the registered office (*statutarischer Sitz* or *satzungsmässiger Sitz*) in Liechtenstein. In addition, the appellant relied on the fact that, in relation to individual employees, foreign institutions (those of the state of residence) have made a provisional determination of the applicable legislation within the meaning of Article 16 of Regulation (EC) No 987/2009 to the effect that Liechtenstein legislation must be applied. In this respect, the determination has become definitive.

In this regard, on a point of fact, the appellate court has been provided with the provisional determination made by the Czech social security authority to which the respondents did not object within two months. Further provisional determinations made by the Czech social security authority also exist which, in some cases, were transmitted by the appellant directly to the respondents.

2. National law

Pursuant to Article 1(1) of the Old-Age and Survivors' Insurance Act (*Gesetz über die Alters- und Hinterlassenenversicherung (AHVG)*; available online together with all other Liechtenstein legislation at www.gesetze.li), an independent public law institution exists with the name "Liechtensteinische Alters- und Hinterlassenenversicherung" (AHV) (Liechtenstein Old-Age and Survivors' Insurance). Pursuant to Article 2(1) of the AHVG, the purpose of the institution is to implement old-age and survivors' insurance in accordance with the provisions of that Act.

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

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

Pursuant to Article 84(1) of the AHVG, orders made by the AHV, pursuant to Article 78(1) of the IVG, orders made by the IV and, pursuant to Article 51 of the FZG, orders made by the FAK may be challenged by lodging the appeal known as *Vorstellung* with the relevant institution (AHV, IV or FAK), in response to which the institution itself gives a decision on the appeal. That decision may be challenged by an appeal to the Fürstliches Obergericht (Princely Court of Appeal). In the appeal proceedings before the Princely Court of Appeal, the applicant (as appellant) and the institutions (as respondents) face each other.

The regulations incorporated into the EEA Agreement are part of the Liechtenstein legal order (Dystland, Finstad and Sørebo in Arnesen, Fredriksen, Graver, Mestad and Vedder (eds.), *Agreement on the European Economic Area*, Article 7, point 12) and thereby prevail over any differently worded national provisions (compare Bussjäger, P., "Rechtsfragen des Vorrangs und der Anwendbarkeit von EWR-Recht in Liechtenstein", *Liechtensteinische Juristenzeitung* 2006, 140, at p. 143 left-hand column) without the need for any national transposition.

3. European legal framework

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, 30 April 2004, p. 1) was incorporated into the EEA Agreement by Decision of the Joint Committee No 76/2011 of 1 July 2011.

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, 30 October 2009, p. 1) was incorporated into the EEA Agreement by Decision of the Joint Committee No 76/2011 of 1 July 2011.

4. Questions referred

- 4.1** The questions asked in Part I concern the interpretation of Articles 11 and 13 of Regulation (EC) No 883/2004 in conjunction with Article 14 of Regulation (EC) No 987/2009.

In the present case, it is important to note, at the outset, the following:

First, Article 11(4) of Regulation (EC) No 883/2004 does not apply in the present case. Neither has the appellant claimed that its employees carried out their activities on board a vessel flying the flag of the Principality of Liechtenstein or were resident in the Principality of Liechtenstein nor have the respondents claimed that the appellant's employees pursued their activity on board a vessel at sea flying the flag of a Member State.

Second, as already mentioned, at issue in the present appeal proceedings is only the period from 4 February 2016 to 17 February 2017. Consequently, it is not relevant for the present case that, by additional agreement of 7 August 2018 (Liechtensteinisches Landesgesetzblatt (LGBl.) 2018 No 205), the Principality of Liechtenstein acceded to the Agreement on the determination of applicable legislation for Rhine shipping pursuant to Article 16(1) of Regulation (EC) No 883/2004, done at Strasbourg on 23 December 2010. Namely, as a result of that accession, the legal framework was altered only from 1 September 2018 (compare the judgment of the Constitutional Court of the Principality of Liechtenstein (Liechtensteinischer Staatsgerichtshof) of 4 December 2018, Case StGH 2018/16, paragraphs 1.4, 1.7 and 3.2) and consequently is not applicable to the facts of the present case.

The question whether a mere registered office (*statutarischer Sitz* or *satzungsmässiger Sitz*) of an undertaking suffices to constitute

the connecting factor for subjecting persons to the legislation of a Member State appears by reason of Article 13(1)(b)(i) of Regulation (EC) No 883/2004 in conjunction with Article 14(5a) of Regulation (EC) No 987/2009 to be clear, at least according to the German language version of the latter Regulation, given that the second half of the sentence beginning in German with the words "an dem/der ..." [Translator's note: literally "at which"; in the English version, the phrase beginning "where ..."] refers both to the registered office and to the place of business, so that seemingly the registered office (*statutarischer Sitz* or *satzungsmässiger Sitz*) may be relied on only when the essential decisions of the undertaking are adopted and the functions of its central administration are carried out there.

In the English and French language, however, this does not appear to be as clear, given that there it is worded simply "where" or "où" which in each case also can only refer to the "place of business" (French: "siège d'exploitation" – on the differences between the language versions, see Pörtl in Spiegel, B. (ed.), *Zwischenstaatliches Sozialversicherungsrecht*, Article 13 of Regulation (EC) No 883/2004, point 14).

The appellant relies on this interpretation ("registered office suffices"), and in this regard makes reference to the judgment of the ECJ in *Daily Mail*. To which the reply of the respondents is that the judgment of the ECJ in *Planzer* applies.

If the EFTA Court interprets Article 14(5a) of Regulation (EC) No 987/2009 as meaning that the registered office (*statutarischer Sitz* or *satzungsmässiger Sitz*) does not suffice, the question arises as to the criteria according to which it must be determined "where the essential decisions of the undertaking are adopted and the functions of its central administration are carried out".

In this regard, the document entitled "Practical guide on the applicable legislation in the European Union (EU), in the European Economic Area (EEA) and in Switzerland" exists which is described therein as a "working instrument" and according to its own text does not constitute the official position of the (European) Commission and was "prepared and agreed" by the Administrative Commission. This Guide dates from December 2013 and can be accessed using the link <https://ec.europa.eu/social/BlobServlet?docId=11366&langId=en> (in English).

Pursuant to Article 72(a) of Regulation (EC) No 883/2004, the Administrative Commission deals with all questions of interpretation arising from the provisions of this Regulation or those of the Implementing Regulation.

In Case C-631/17 *Inspecteur van de Belastingdienst*, the ECJ held in paragraph 41 that the "Practical Guide" mentioned is a useful tool for interpreting Regulation [EC] No 883/2004 but that it is not legally binding. On the other hand, for example, in paragraph 46 of Case C-33/18 *Institut national d'assurances sociales pour travailleurs indépendants (Inasti)*, the "Practical Guide" mentioned was expressly used by the ECJ for interpreting Article 87(8) of Regulation (EC) No 883/2004.

Thus, the question arises whether reference must be had to the criteria listed on pages [35 to 37] of that guide for determining the registered office or place of business within the meaning of the provision mentioned (Article 14(5a) of Regulation (EC) No 987/2009). In that regard, it is of also relevance, in the view of the referring court, that this Guide – it would appear – has not been published in the *Official Journal of the European Union* and – it would appear – has, in particular, not been incorporated in the EEA Agreement (compare Annex VI to the EEA Agreement, points 3 and 4; to the same effect, see Zaglmayer in Spiegel, B. (ed.), *Zwischenstaatliches*

Sozialversicherungsrecht, Articles 71 and 72 of Regulation (EC) No 883/2004, points 6 and 7). Thus, the question arises as to what legal quality this guide has at all in the EEA/EFTA Pillar and/or whether regard should be had to it at all.

4.2 On the questions asked in Part II on Article 16 of Regulation (EC) No 987/2009:

In one case at least (relating to at least one employee), the respondents were informed by the Czech social security institution of a provisional determination of the applicable legislation – namely that the Liechtenstein legislation must be applied. An objection on the part of the respondents was raised only more than two months after the provisional determination reached the respondents. Thus, the question arises as to how the term "definitively determined" must be interpreted. Can this subsequently be challenged in any way by the designated institution (in the present case, the respondents) and, if so, under which circumstances? Should it be possible to challenge this, the question arises whether this would have retroactive effect or would apply only for the future, as is argued, for example, by Pörtl (in Spiegel, B. (ed.), *Zwischenstaatliches Sozialversicherungsrecht*, Article 16 of Regulation (EC) No [987]/2009, point 12, final paragraph). For the purposes of making a provisional determination, is it relevant whether the employee concerned pursues an activity at all in the designated Member State (in the present case, in Liechtenstein)?

Further, various documents (further provisional determinations by the Czech social security authority in relation to Liechtenstein legislation) have been presented by the appellant, which, according to its pleadings, the appellant has served directly on the respondents. In this situation, the question arises whether service by a private person (in the present case, the appellant) may at all trigger the two-month period provided for in Article 16(3) of Regulation [EC] No 987/2009 or whether the triggering of the period

results exclusively from "official" service by the authority making the determination.

Regardless of the answer given to the questions asked in Part I, the questions asked in Part II require an answer as even if the appellant does not have its registered office (*Sitz*) (however this term is to be interpreted) in Liechtenstein, the provisional determination may nonetheless have become definitive within the meaning of Article 16(3) of Regulation (EC) No 987/2009.

5. Stay of proceedings

Pursuant to Article 62(1) of the Liechtenstein Act on the Organisation of the Courts (*Gerichtsorganisationsgesetz; GOG*), a stay of the appeal proceedings until the EFTA Court delivers its Advisory Opinion had to be ordered.

FIRST CHAMBER OF THE FÜRSTLICHES OBERGERICHT

Vaduz, 25 March 2021

Presiding judge

Dr Wilhelm Ungerank LL.M.

The accuracy of this copy is confirmed by

Eva Marte



Notice concerning rights of appeal

No appeal may be brought against this order.