Case E-13/15-37

REPORT FOR THE HEARING

in Case E-13/15

REQUEST to the Court pursuant to 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 a case pending before it between

Abuelo Insua Juan Bautista

and

Liechtensteinische Invalidenversicherung

concerning the interpretation of Article 87(2) 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.

I Introduction

1. Mr Abuelo Insua Juan Bautista ("the appellant") is a resident of Spain and in receipt of a Liechtenstein invalidity pension. At the request of the Liechtenstein Invalidity Insurance Fund (*Liechtensteinische Invalidenversicherung*) ("the respondent" or "the Insurance Fund"), Mr Bautista was examined by a doctor in Spain, which led to the suspension of his pension.

2. Mr Bautista lodged objections against the suspension with the Insurance Fund, which upheld the suspension. The appellant then brought the case before the Princely Court of Appeal. In the context of those proceedings, the Princely Court of Appeal has made a request for an Advisory Opinion to establish the nature and scope of the binding effect provided for in Article 87(2) 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 (OJ 2009 L 284, p. 1) ("the implementing Regulation").

II Legal background

EEA law

3. Article 28(1) and (2) EEA reads as follows:

> *1. Freedom of movement for workers shall be secured among EC Member States and EFTA States.*
>
> *2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of EC Member States and EFTA States as regards employment, remuneration and other conditions of work and employment.*

4. Regulation (EC) No 883/2004 on the coordination of social security systems (OJ 2004 L 200, p. 1) ("the basic Regulation") is referred to at point 1 of Annex VI to the EEA Agreement. The preamble to the basic Regulation includes the following recitals:

> *(1) The rules for coordination of national social security systems fall within the framework of free movement of persons and should contribute towards improving their standard of living and conditions of employment.*
>
> …
>
> *(4) It is necessary to respect the special characteristics of national social security legislation and to draw up only a system of coordination.*
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> *(5) It is necessary, within the framework of such coordination, to guarantee within the Community equality of treatment under the different national legislation for the persons concerned.*
>
> …
>
> *(9) The Court of Justice has on several occasions given an opinion on the possibility of equal treatment of benefits, income and facts; this principle should be adopted explicitly and developed, while observing the substance and spirit of legal rulings.*
>
> …
>
> *(26) For invalidity benefits, a system of coordination should be drawn up which respects the specific characteristics of national legislation, in particular as regards recognition of invalidity and aggravation thereof.*
>
> …
>
> *(29) To protect migrant workers and their survivors against excessively stringent application of the national rules concerning reduction, suspension or*

withdrawal, it is necessary to include provisions strictly governing the application of such rules.

5. Article 4 of the basic Regulation reads as follows:

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.

6. Article 46(3) of the basic Regulation reads as follows:

A decision taken by an institution of a Member State concerning the degree of invalidity of a claimant shall be binding on the institution of any other Member State concerned, provided that the concordance between the legislation of these Member States on conditions relating to the degree of invalidity is acknowledged in Annex VII.

7. Article 82 of the basic Regulation reads as follows:

Medical examinations provided for by the legislation of one Member State may be carried out at the request of the competent institution, in another Member State, by the institution of the place of residence or stay of the claimant or the person entitled to benefits, under the conditions laid down in the Implementing Regulation or agreed between the competent authorities of the Member States concerned.

8. The implementing Regulation is referred to at point 2 of Annex VI to the EEA Agreement. Article 49(2) of the implementing Regulation reads as follows:

Where Article 46(3) of the basic Regulation is not applicable, each institution shall, in accordance with its legislation, have the possibility of having the claimant examined by a medical doctor or other expert of its choice to determine the degree of invalidity. However, the institution of a Member State shall take into consideration documents, medical reports and administrative information collected by the institution of any other Member State as if they had been drawn up in its own Member State.

9. Article 87 of the implementing Regulation reads as follows:

1. Without prejudice to other provisions, where a recipient or a claimant of benefits, or a member of his family, is staying or residing within the territory of a Member State other than that in which the debtor institution is located, the medical examination shall be carried out, at the request of that institution, by the institution of the beneficiary's place of stay or residence in accordance with the procedures laid down by the legislation applied by that institution.

The debtor institution shall inform the institution of the place of stay or residence of any special requirements, if necessary, to be followed and points to be covered by the medical examination.

> *2. The institution of the place of stay or residence shall forward a report to the debtor institution that requested the medical examination. This institution shall be bound by the findings of the institution of the place of stay or residence.*
>
> *The debtor institution shall reserve the right to have the beneficiary examined by a doctor of its choice. However, the beneficiary may be asked to return to the Member State of the debtor institution only if he or she is able to make the journey without prejudice to his health and the cost of travel and accommodation is paid for by the debtor institution.*

National law

10. According to Article 53(1) and (5) of the Invalidity Insurance Act (*Gesetz über die Invalidenversicherung; LR 831.20*), a person is entitled to an invalidity pension when regarded as having a degree of invalidity of at least 40%. A quarter pension is granted where the degree of invalidity is at least 40%, a half pension is granted where the degree of invalidity is at least 50%, and a full pension is granted where the degree of invalidity is at least 67%. Invalidity is defined in Article 29(1) and (2) of the same Act as a long-term incapacity to work caused by damage to physical or mental health as a result of congenital defect, illness or accident.

11. The decision whether to grant a claim for benefits under the Invalidity Insurance Act is taken by the Insurance Fund. Pursuant to Article 78 of the Invalidity Insurance Act, that decision may be challenged by way of an administrative complaint before the Insurance Fund, which in that case shall review its decision. The renewed decision may then be appealed to the Princely Court of Appeal for review.

12. Pursuant to Article 90(1) and (2) of the Regulation on the Invalidity Insurance Act (*Verordnung zum Gesetz über die Invalidenversicherung; LR 831.201*), the Insurance Fund may review of its own motion a person's continued entitlement to benefits, in particular whether there are circumstances indicating a possible significant change in the degree of invalidity.

13. The administrative procedure for complaints against the Insurance Fund's decisions is governed by the General State Administration Act (*Gesetz über die allgemeine Landesverwaltungspflege; LR 172.020*) ("the Administration Act"). Article 64(3) of that Act provides, *inter alia*, that each party must be given the opportunity to comment on all facts and circumstances relevant to the determination of the case at hand in order to safeguard their rights and interests as appropriate.

14. Article 60(3) of the Administration Act provides that each party may request the summoning of parties, witnesses, and experts who have not previously been summoned and to request measures of inquiry as appropriate. Pursuant to Article 66(2) of the same Act, each party may address questions to parties, witnesses and experts.

15. According to the referring court, Article 79(1) of the Administration Act provides that the Insurance Fund shall adjudicate on a complaint in accordance with its own conviction reached on the basis of the entire contents of the hearing and the evidence taken ("unfettered evaluation of evidence").

16. The Code of Civil Procedure (*Zivilprozessordnung; LR 271.0*) governs the judicial review procedure. Pursuant to Article 272(1) of the Code of Civil Procedure, civil proceedings in Liechtenstein must also have regard to the principle of unfettered evaluation of evidence. This means that the court must determine, in accordance with its own conviction and giving careful consideration to the results of the entire hearing and the evidence presented therein, which facts may be relied upon for the proceedings. Consequently, the court may review the evaluation of evidence made at first instance (in this case the Insurance Fund's decision) and amend that evaluation of evidence, thus making findings of fact that depart from those made at first instance.

17. As an exception to this rule, Article 292(1) of the Code of Civil Procedure provides that authentic instruments establish full proof of that which is officially ordered or declared in those instruments by an authority or is attested by the authority or the authenticating officer. Nonetheless, Article 292(2) permits evidence to be adduced challenging the veracity of the attested record or fact. Furthermore, Article 190(1) of the Code of Civil Procedure recognises that earlier final decisions by courts or administrative authorities are binding. Consequently, a court dealing with a case building on a final decision must presume in certain circumstances the legal effectiveness of this decision without re-examining the facts or law involved and take the outcome of that decision to be a legal fact binding on the later proceedings.

III Facts and procedure

18. The appellant is a Spanish national, who was employed as a construction worker in Liechtenstein in 1990 and 1991 and from 1995 to 2006. In 2010 he transferred his residence from Liechtenstein to Spain.

19. The appellant received a 25% invalidity pension from the Insurance Fund from 1 August 2005. He was granted a full invalidity pension with effect from 1 September 2008.

20. In 2009 and 2010, the Insurance Fund performed a review of the appellant's entitlement to invalidity pension. Based on information provided by the appellant, the respondent concluded that he was still entitled to the invalidity pension.

21. However, another review was conducted in 2013. In May 2013, the Insurance Fund asked Mr Bautista to answer questions regarding his health. The Insurance Fund

also requested the Spanish Social Security Institute (*Instituto Nacional de la Seguridad Social*) to produce a detailed report on the appellant and referred to the E 213 form. In September 2013, the Spanish Social Security Institute returned an E 213 form signed by a Spanish doctor. According to that document, in the opinion of the examining doctor, Mr Bautista was still capable of regularly performing light work. He was not able to work full time in his last occupation as a construction worker, but adapted work could be performed full time.

22. In November 2013, the Insurance Fund informed the appellant that it intended to stop his invalidity pension and invited him to lodge any objections. Mr Bautista replied, indicating that he disagreed with the proposed course of action, and submitted further medical documents.

23. After obtaining an opinion from its internal medical service, the Insurance Fund decided, on 10 March 2014, that the appellant would have his invalidity pension withdrawn with effect from 30 April 2014. Mr Bautista objected to that decision and submitted further medical documents. After obtaining a further opinion from its internal medical service, the Insurance Fund decided on 2 October 2014 to reject Mr Bautista's objections.

24. Mr Bautista appealed that decision to the referring court. He argues, in essence, that the respondent has based the withdrawal of the invalidity pension solely on the report by the Spanish doctor and the interpretation of that report by its internal medical service, without having regard to various medical opinions suggesting that his health has not improved. He also argues that the Spanish doctor performing the examination did not carry out a professional examination, but based the report merely on a brief, ten-minute conversation. Given the conflicting medical reports, the appellant also argues that the Insurance Fund should have obtained a third and decisive medical expert opinion.

25. The respondent argues that there are no contradictory medical reports. The reports referred to by the appellant were written by the doctors treating him, whereas the detailed medical report included in form E 213 was written by an officially appointed expert. The respondent claims that a differentiated appraisal of medical findings is possible and sometimes even necessary, depending on whether those findings originate from the doctor treating a beneficiary or from an officially or court appointed expert. Consequently, it acted correctly in relying on the detailed medical report when it decided to suspend Mr Bautista's invalidity pension.

26. On 19 May 2015, the referring court decided to stay the proceedings and to refer the following questions to the Court:

1. **Is a recipient of benefits (claimant) prohibited, because the debtor institution is bound by the findings of the institution of the place of stay or residence under the second sentence of Article 87(2) of Regulation No 987/2009, from challenging those findings in the procedure before the debtor institution?**

2. **If the first question is answered in the affirmative: does that binding effect also apply in court proceedings, which under national procedural rules, follow on from the proceedings before a debtor institution?**

27. The request was registered at the Court on 29 May 2015.

28. By letter registered at the Court on 24 June 2015, the appellant requested the Court to grant him legal aid in the proceedings before it. That application was rejected by an order of the Court of 3 July 2015.

IV Written observations

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

- the appellant, represented by Dr Hugo Vogt, Rechtsanwalt, acting as Counsel;

- the Government of Belgium, represented by Liesbet Van den Broek, and Marie Jacobs, Legal Advisers, Ministry of Foreign Affairs, acting as Agents;

- the Government of the Czech Republic, represented by Martin Smolek and Jiří Vláčil, Ministry of Foreign Affairs, acting as Agents;

- the Government of Liechtenstein, represented by Thomas Bischof, Deputy Director, EEA Coordination Unit, acting as Agent;

- the Government of Norway, represented by Dag Sørlie Lund, Adviser, Ministry of Foreign Affairs and Tonje Skjeie, Advocate, Office of the Attorney General (Civil Affairs), acting as Agents;

- the EFTA Surveillance Authority (“ESA”), represented by Maria Moustakali, Officer, and Íris Ísberg, Temporary Officer, Department of Legal and Executive Affairs, acting as Agents;

- the European Commission (“the Commission”), represented by Denis Martin and Nicola Yerrell, members of its Legal Service, acting as Agents.

V Summary of the arguments submitted and answers proposed

The appellant

30. Mr Bautista submits that neither the debtor institution nor any court reviewing its decision is bound by the findings of the institution of the place of stay or residence.

31. In relation to the first question, the appellant contends that the wording of the second sentence of Article 87(2) of the implementing Regulation must not be interpreted too strictly, since an interpretation based on the wording, purpose and general scheme clearly shows that it was not the intention of the legislature that the debtor institution is bound by the findings of the institution of the place of stay or residence without any possibility to review them.

32. The appellant submits that the purpose of Article 87(2) of the implementing Regulation is not to create an absolute binding effect on the beneficiary or the debtor institution. Such an effect would entail harmonisation, going beyond the mere coordinating purpose of the basic and implementing Regulations.[1] That approach would lead to unpredictability in social security systems, *inter alia*, because a foreign institution could, in effect, decide whether a debtor institution is obliged to provide benefits. Consequently, the second sentence of Article 87(2) of the implementing Regulation must be interpreted as meaning that no binding effect is intended.

33. Furthermore, a binding effect of that kind would result in an unequal treatment of beneficiaries, as the right to administrative or judicial review would depend on whether the beneficiary is examined in the EEA State of the debtor institution or in the EEA State of residence or stay.

34. Moreover, Mr Bautista maintains that medical opinions in social security matters are not to be considered as independent opinions, as they are provided at the request of the debtor institution. Therefore, the possibility must exist to submit an independent opinion which may, in principle, be attributed more evidential weight than the opinion of the institution of the place of residence or stay.

35. The appellant contends that the answer to the first question is decisive also for the second question. If the debtor institution is not bound by the medical findings, then also a court reviewing its decision cannot be bound. Conversely, a binding effect in relation to the debtor institution would have to apply in court proceedings.

36. The appellant contends that any requirement for a foreign medical opinion to have binding effect also for the court reviewing the decision of the debtor institution

[1] Reference is made to Petition 0825/2005 to the European Parliament.

would be very difficult to accept given that not even court judgments are necessarily binding in another EEA State. It would also contravene the rules on evidence in the Code of Civil Procedure and undermine the right to an effective complaint pursuant to the Liechtenstein Constitution.

37. The appellant proposes that the Court should answer the questions referred as follows:

> *[1] A recipient of benefits is not prohibited under the second sentence of Article 87(2) of Regulation No 987/2009 from challenging findings of the institution of the place of stay or residence in the procedure before the debtor institution.*
>
> *[2] In court proceedings which, under national procedural rules, follow on from the proceedings before a debtor institution, there is no binding effect.*

The Government of Belgium

38. In the opinion of the Belgian Government, a recipient of benefits is not prohibited from challenging the findings of the institution of the place of stay or residence by reason of Article 87(2) of the implementing Regulation.

39. The Belgian Government observes that the second sentence of Article 87(2) of the implementing Regulation was not found in the predecessor provision of Council Regulation (EEC) No 574/72 (OJ, English Special Edition 1972 (I), p. 160), but is inspired by the case law of the European Court of Justice ("the ECJ") clarifying the content of Article 18 of that latter regulation. That provision concerned the procedure for declaration of incapacity for work, and the subsequent administrative checks and medical examinations for claimants of sickness benefits in cash residing in a Member State other than the competent Member State.

40. The Belgian Government maintains that, in interpreting Article 18 of Regulation No 574/72, the ECJ concluded that the system put in place by that Article had a binding effect on the debtor institution, both in fact and in law, as regards the commencement and the duration of the work incapacity as established by the institution of the place of residence or stay, provided that the debtor institution did not make use of its possibility to have the beneficiary examined by a doctor of its own choice.[2]

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[2] Reference is made to Case 22/86 *Rindone* [1987] ECR 1339, paragraph 15, and Case C-45/90 *Paletta I* [1992] ECR I-3423, paragraph 28.

41. The Belgian Government observes that the case law at issue concerned the recognition of medical examinations related to short-term incapacity for work, whereas the present case concerns invalidity or long term incapacity for work, and the corresponding right to an invalidity pension. In its view, the assessment in the latter situation has a far broader scope than in the first situation and involves an evaluation aimed at establishing the degree of incapacity, and thus an assessment of whether the beneficiary may still perform professional activities in the labour market. The approach to this assessment differs widely among the EEA States. This fact is reflected in Article 46(3) of the basic Regulation, known as the rule of concordance. However, this rule does not apply between Spain and Liechtenstein.

42. The Belgian Government argues that Article 87(2) of the implementing Regulation, read in the light of case law, does not change the fact that it is the debtor institution that is exclusively competent to assess whether a recipient can be considered as having an incapacity under national legislation.

43. The Belgian Government submits that the debtor institution is bound to make this evaluation in light of the medical and functional findings of the medical expert of the institution of the place of residence or stay, but that it is not bound to reach the same conclusion in the assessment of whether or not an individual is entitled to a benefit.[3]

44. The Belgian Government argues that the binding effect mentioned in Article 87(2) of the implementing Regulation must be read in light of the objective of preventing problems of proof for the beneficiary of an incapacity benefit.[4] In those circumstances, Article 87(2) does not prohibit a debtor institution of an EEA State from taking account of other medical reports provided by the beneficiary himself that contradict the findings of the institution of residence or stay.

45. Furthermore, the Belgian Government continues, if national rules allow for the presentation of such contradicting evidence for someone residing or staying in that EEA State, but not for someone residing or staying in another EEA State, this would involve a clear disadvantage for migrant workers. It would also be contrary to the right of free movement and one of the main objectives of the coordination rules for social security.

46. The Belgian Government submits that to deprive an individual of the right to present contradictory evidence in national court proceedings would run counter to the fundamental right to have one's case examined by an independent and impartial tribunal within the context of a judicial procedure allowing for evidence to be challenged. This would harm the guarantee of effective judicial protection for the persons concerned

3 Reference is made to Case 232/82 *Baccini* [1983] ECR 583, paragraph 17.

4 Reference is made to the second reason given by the ECJ in *Rindone*, cited above, in support of a binding effect of such detailed medical reports.

provided for in Article 6(1) of the European Convention on Human Rights (ECHR) and Article 47 of the Charter of Fundamental Rights of the European Union.

47. The Government of Belgium proposes that the Court should provide the following answers to the questions referred.

1. *A recipient is not prohibited from challenging the findings of the institution of the place of stay or residence under the second sentence of Article 87(2) of Regulation No 987/2009 in the procedure before the debtor institution, because the debtor institution is not bound by those findings.*

2. *This non-binding effect also applies in court proceedings which, under national procedural rules, follow on from the proceedings before a debtor institution.*

The Government of the Czech Republic

48. The Czech Government submits that the first question should be answered in the negative. Consequently, it is not necessary to answer the second question.

49. The Czech Government maintains that as the subject matter of the case concerns the determination of the appellant's degree of invalidity, Article 87 of the implementing Regulation should be interpreted in light of the special provisions regarding invalidity benefits in both the basic Regulation and the implementing Regulation.

50. The Czech Government refers to Article 46(3) of the basic Regulation and the special provision for EEA States that have acknowledged the concordance between their legislation regarding the conditions relating to the degree of invalidity, as specified in Annex VII to the basic Regulation. Where there is no concordance between the legislation of the EEA Member States involved, the Czech Government argues that it is solely for the EEA State of the debtor institution to determine the degree of invalidity in accordance with national law.

51. The Czech Government also refers to Article 49(2) of the implementing Regulation. It provides that, in the absence of concordance, the institution of an EEA State shall take into consideration documents, medical reports and administrative information collected by the institution of the other EEA State as if they had been drawn up by the former.

52. In the case at hand, this means that the debtor institution is obliged to take into consideration the detailed medical report included in form E 213, in that it cannot reject the report without a proper justification. However, the debtor institution is not

unconditionally bound by the report. In this regard, the Czech Government refers to case law where certified statements, such as form E 213, have not been considered irrefutable proof.[5]

53. Moreover, it follows from the recognition rule, according to which a medical report issued by the institution of the place of stay or residence is regarded as if it had been issued by the debtor institution, that the possibility to challenge the findings in that report also depends on the legislation of the EEA State of the debtor institution.

54. The Government of the Czech Republic proposes that the Court should provide the following answer to the first question:

> *Article 87(2) of [Regulation No 987/2009] shall not be interpreted as precluding a recipient of invalidity benefits (claimant) from challenging the medical report issued by the institution of the place of stay or residence before the debtor institution.*

The Government of Liechtenstein

55. On the first question, the Liechtenstein Government submits that Article 49(2) of the implementing Regulation is the relevant provision in the present case, and that Article 87(2) of that Regulation is of secondary importance. This rests on the argument that Article 49(2) is the *lex specialis* in the context of the determination of the degree of invalidity.

56. In the view of the Liechtenstein Government, the wording of Article 49(2) of the implementing Regulation is clear with regard to the treatment of information collected by an institution of another EEA State. It must be taken into consideration as if the documents had been drawn up in the State of the debtor institution. A medical report from a foreign institution cannot therefore be ignored. On the other hand, the debtor institution is not bound to follow it.

57. However, even if the Court finds Article 87(2) of the implementing Regulation applicable, the Government of Liechtenstein submits that this leads to the same result.

58. The Liechtenstein Government contends that the principle of equal treatment, which finds expression *inter alia* in Article 4 of the basic Regulation, appears to preclude an absolute binding effect of the findings of the institution of the place of stay or residence of the beneficiary. A binding effect of that kind would apply only in relation to a beneficiary examined in the country of stay or residence, whereas it does

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5 Reference is made to Case C-114/13 *Bouman*, judgment of 12 February 2015, reported electronically, paragraphs 24 and 27.

not apply in relation to a beneficiary examined in the country of the debtor institution. An objective justification for that difference in treatment is not evident.

59. The Liechtenstein Government submits that a binding effect breaches the principle of equal treatment whether the debtor institution requests the institution of the beneficiary's place of stay or residence to carry out the medical examination pursuant to Article 87(1) of the implementing Regulation, or whether it exercises its right to have the beneficiary examined by a doctor of its choice pursuant to the second subparagraph of Article 87(2).

60. The Liechtenstein Government refers to case law, according to which an EEA State applying its own legislation in order to determine an individual's social security rights must have the possibility to review the information received from the competent authority of another EEA State.[6] An absolute binding effect of such information is thus excluded.

61. If the first question is answered in the affirmative, the Liechtenstein Government submits that the binding effect must also apply in court proceedings.[7]

62. The Government of Liechtenstein proposes that the Court should answer the questions referred as follows:

1. *A recipient of benefits (claimant) is not prohibited from challenging the findings of the institution of the place of stay or residence in the procedure before the debtor institution. The wording of the second sentence of Article 87(2) of Regulation No 987/2009, if applicable at all in the case at hand, has no bearing on that conclusion.*

2. *In the light of the proposed answer to the first of the referred questions, it is no longer necessary to consider the second question.*

3. *In eventu, the binding effect does also apply in court proceedings which, under national procedural rules, follow on from the proceedings before a debtor institution.*

The Government of Norway

63. The Norwegian Government is of the opinion that both questions referred should be answered in the negative. The two questions are very similar in nature and may consequently be answered together.

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6 Reference is made to *Bouman*, cited above, paragraphs 24, 26 and 27.

7 Reference is made to *Herbosch Kiere*, cited above, paragraph 33, and *Bouman*, cited above, paragraph 26.

64. The Norwegian Government submits that the binding effect specified in Article 87(2) of the implementing Regulation is limited, first, to the debtor institution, and second, to the medical findings of the institution of the place of stay or residence. This suggests that the binding effect applies only to certain factual circumstances or observations made by the institution of the place of stay or residence, and not to legal findings in the subsequent assessment by the debtor institution.

65. As the basic Regulation and the implementing Regulation merely coordinate the different social security systems of the EEA States, the Norwegian Government submits that it is for each EEA State to establish the terms and conditions for benefit eligibility. This view is supported by Article 49(2) of the implementing Regulation, which provides that it is for the debtor institution to determine whether a claimant is entitled to a benefit.

66. In addition, the Norwegian Government emphasises the principle of national procedural autonomy, which also applies to procedural rules for court proceedings.[8] As Article 87 of the implementing Regulation merely concerns cooperation between the EEA States, it cannot be interpreted in a way that would change more fundamental national rules governing the evaluation of evidence and a claimant's right to challenge evidence submitted.

67. Furthermore, an affirmative answer would give rise to a potential difference in the treatment of claimants, depending on their place of stay or residence. That would be difficult to align with the objective of free movement of persons within the EEA. It would even run the risk of infringing the fundamental right of access to a court or tribunal with full jurisdiction to examine questions of fact and law relevant to the dispute before it, as follows *inter alia* from Article 6 ECHR. In any event, an exception from the binding effect should be made where there is suspicion of abuse or fraud.[9]

68. The Norwegian Government adds that form E 213 is merely concerned with a medical evaluation. The medical evaluation is simply one of many factors to be considered in the assessment whether an applicant is eligible for disability benefit. The doctor is neither asked nor even competent to assess whether the claimant should be considered unable to work according to the national legislation of the country of the debtor institution. This determination must be made by the debtor institution alone.

69. The Government of Norway proposes that the Court should answer the questions referred as follows:

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[8] Reference is made to Case E-1/04 *Fokus Bank* [2004] EFTA Ct. Rep. 11, paragraph 41, and Joined Cases C-222/05 to C-225/05 *van der Weerd and Others* [2007] ECR I-4233, paragraph 28.

[9] Reference is made to Case C-206/94 *Paletta II* [1996] ECR I-2357, paragraphs 24 and 28 and the case law cited.

1. *A recipient of benefits (claimant) is not prohibited from challenging findings from a medical examination performed at the request of the debtor institution as a consequence of the binding effect mentioned in Article 87(2) of Regulation No 987/2009.*

2. *The binding effect mentioned in Article 87(2) of Regulation No 987/2009 does not apply in court proceedings, which, under national procedural rules, follow on from the proceedings before a debtor institution.*

ESA

70. In relation to the first question, ESA argues that Article 87(1) of the implementing Regulation is indicative of the purpose of the regulation, namely to ensure cooperation between the administrations of two EEA States without creating undue burdens for either the institutions or benefit claimants.

71. ESA notes that the wording of Article 87(2) of the implementing Regulation leaves little room for doubt that the medical report produced by the institution of the place of stay or residence is binding upon the debtor institution.

72. ESA submits that the binding effect is absolute unless the debtor institution avails itself of the right mentioned in the third sentence of Article 87(2) of the implementing Regulation of having the beneficiary examined by a doctor of its own choice. ESA submits that the two possibilities set out in Article 87(1) and (2) are not mutually exclusive, the competent institution can avail itself of its right to have the beneficiary examined by a doctor of its choice also in case it has already received a medical report by the institution of the EEA State of stay or residence. This reading of Article 87(2) is in line with the wording and rationale of the provision and the case law of ECJ on Regulation No 574/72.[10] ESA notes that the fact that in the implementing Regulation, the relevant provision explicitly states the binding effect of the finding of the institution of the place of stay or residence could be seen as an attempt to clarify the uncertainty surrounding the issue. Without this binding effect, the objective of effective administrative cooperation between the EEA States and legal certainty for the beneficiary would be jeopardised.

73. As regards the beneficiary's possibility to challenge the medical report, the optimal solution in ESA's view is for the beneficiary to challenge the findings of the institution of the place of stay or residence in that State according to the relevant administrative and court procedures applicable there. If a beneficiary succeeds with that challenge in the State of stay or residence, the provision of Article 5(1) of the

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[10] Reference is made to *Rindone* and *Paletta I*, both cited above.

implementing Regulation will become relevant. If the medical report were eventually withdrawn or declared invalid by Spain, it would obviously no longer be binding on the debtor institution in Liechtenstein. Alternatively, the debtor institution could make use of its right to have the beneficiary examined by a doctor of its own choice, pursuant to Article 87(2) of the implementing Regulation.

74. Turning to the second question, ESA is of the opinion that the binding effect mentioned in Article 87(2) of the implementing Regulation applies equally in court proceedings following an appeal against a decision by a debtor institution.

75. As a starting point, ESA observes that neither the basic Regulation nor the implementing Regulation is intended to regulate or delineate the rights of access to justice for recipients or claimants of social security benefits in EEA States. This is a matter for national procedural rules.

76. ESA contends, however, that, in the light of the clear wording of Article 87(2) of the implementing Regulation, it would be contrary to that provision and its rationale if the Liechtenstein court could disregard the binding effect of the findings in the medical report, and reverse the decision of the respondent.

77. ESA notes that such a binding effect for national courts is not foreign to the system of coordination of social security systems in the EEA. The ECJ has held, *inter alia*, that a certificate concerning the applicable legislation, drawn up in accordance with the provisions of Title III of Regulation No 574/72, is binding on the social security institutions of other EEA States in so far as it certifies that workers on postings are covered by the social security system of the EEA State in which their undertaking is established.[11]

78. ESA maintains that the possibility for a beneficiary to challenge such findings in administrative or court proceedings in the country of stay or residence removes any concerns as to the possibility of discrimination against foreign beneficiaries.[12] This solution also eliminates the risk of contradictory judgments from courts in different EEA States.

79. Finally, ESA argues that a full review of the case by national courts is not contrary to the implementing Regulation as long as the debtor institution has made use of its right to have the beneficiary examined by a doctor of its own choice.

80. ESA proposes that the Court should answer the questions referred as follows:

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[11] Reference is made to Case C-202/97 *FTS* [2000] ECR I-883. Reference is also made to points 29 and 30 of the Opinion of Advocate General Szpunar in *Bouman*, cited above.

[12] Reference is made to *Paletta II*, cited above, paragraph 12.

1. *The debtor institution is bound by the findings of the institution of the place of stay or residence under the second sentence of Article 87(2) of Regulation No 987/2009 unless it avails itself of the right to have the beneficiary examined by a doctor of its choice, under the third sentence thereof. The recipient of benefits should challenge the findings of the medical report in Spain, according to the procedure before the institution which issued the medical report. In the alternative, the claimant could raise objections before the debtor institution seeking to potentially prompt the latter to exercise its discretion to have the claimant examined by a doctor of its choice.*

2. *The binding effect of the medical report such as the one in the main proceedings also applies in court proceedings which, under national procedural rules, follow on from the proceedings before a debtor institution.*

The Commission

81. The Commission is of the opinion that a recipient of benefits is entitled to challenge a decision taken by the debtor institution on the basis of medical findings made by a doctor of the State of stay or residence if such a right is open to a recipient of benefits when examined in the State of the debtor institution and under national procedural rules of that State.

82. The Commission notes, as a preliminary observation, that it is explicitly clear from Article 87(2) of the implementing Regulation that the medical findings by the institution of the place of stay or residence bind the debtor institution.

83. The Commission notes further that there is no case law regarding the interpretation of Article 87(2) of the implementing Regulation. Under Regulation No 574/72, however, the ECJ held that the debtor institution is bound in fact and law by the medical findings made by the doctor of the Member State of residence, unless the debtor institution exercises the option provided for in Article 18(5) of Regulation No 574/72 to have the person concerned examined by a doctor of its choice.[13] In the Commission's view, that same approach is applicable under Article 87(2) of the implementing Regulation.

84. On the question whether a beneficiary may challenge the medical findings of the institution of the place of stay or residence, the Commission submits that the provisions of the social security regulations must be interpreted in light of Article 48 TFEU and thus to facilitate the right of free movement.[14]

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[13] Reference is made to *Rindone* and *Paletta I*, both cited above.

[14] Reference is made to Case C-352/06 *Bosmann* [2008] ECR I-3827, paragraph 29.

85. According to the Commission, the purpose underlying the binding nature of medical findings of the doctor of the EEA State of residence is to avoid potential discrimination to the detriment of migrant workers, which could occur if the debtor institution could question those findings. The purpose of Article 87(2) of the implementing Regulation is to make sure that in legal terms migrant workers are treated as if a doctor of the State of the debtor institution had examined them.[15]

86. The case at hand concerns the question whether a migrant worker may challenge the medical findings of the doctor of the institution of the place of stay or residence where those findings are unfavourable to the worker. According to the Commission, the principle of non-discrimination requires in such situations that the claimant is entitled to challenge the decision taken by the debtor institution on the basis of medical findings by a doctor in the State of residence if a claimant residing in the State of the debtor institution also enjoys such a right.

87. As the legislation in Liechtenstein appears to grant such a right to beneficiaries residing in Liechtenstein, the Commission is of the view that the appellant must be granted the same right and to the same extent.

88. The Commission proposes that the Court should answer the first question referred as follows:

> *Article 87(2) of [Regulation No 987/2009] must be interpreted as entitling a recipient of benefits, who is resident in a State other than the competent State, to challenge the decision taken by the debtor institution on the basis of medical findings made by a doctor of the State of residence if such a right is open to a recipient of benefits when examined in the competent State and under the national procedural rules of that State.*

Per Christiansen
Judge-Rapporteur

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[15] Reference is made to Case C-349/87 *Paraschi* [1991] ECR I-4501, paragraph 24, and Case C-290/00 *Duchon* [2002] ECR I-3567, paragraph 38.