REPORT FOR THE HEARING

in Case E-24/15

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

Walter Waller

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 Walter Waller ("the appellant") is in receipt of a Liechtenstein invalidity pension. As a consequence of a reassessment of his entitlement to this benefit, the Liechtenstein Invalidity Insurance Fund (*Liechtensteinische Invalidenversicherung*) ("the respondent" or "the Insurance Fund") found that the appellant's degree of invalidity was 59 % and consequently reduced the invalidity pension from 100% to 50%.

2. The appellant lodged objections against the reduction. However, the Insurance Fund upheld its decision. 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:

> *1. Freedom of movement for workers shall be secured among EC Member States and EFTA States.*
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> *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.*
>
> *…*
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> *(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.*
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> *…*
>
> *(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:

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:

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:

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:

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(1) and (2) of the implementing Regulation reads:

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 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.

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, 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 final decisions by courts or administrative authorities are binding. Consequently, a court dealing with a case 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 German national, residing in Germany, who worked in Liechtenstein from 1988 to 2000. In 2011 the respondent granted a full invalidity pension to the appellant. In 2013 the appellant applied for a reassessment of his continued entitlement to the invalidity pension. The Insurance Fund thus requested the German statutory pension scheme to provide it with an E 213 form. A doctor appointed by German statutory pension scheme examined the appellant, and concluded that he had a work capacity of less than three hours per day, corresponding to full incapacity under German law. This condition would continue to apply for another two years. Although the appellant's condition had improved in comparison to his prior examination, his ability to work was still reduced.

19. After considering both the E 213 form and further reports from the appellant's general practitioner stating that the appellant was no longer capable of working, the internal medical service of the Insurance Fund decided in July 2014 that he had a degree of invalidity of 59% and granted him a 50% invalidity pension.

20. In August 2014 the appellant launched an administrative appeal against the decision. After contacting the medical officer of the German statutory pension scheme, the Insurance Fund was told that a daily work capacity of less than three hours corresponded to full incapacity under German pension law, and that a more precise quantification of the appellant's incapacity to work thus could not be carried out.

21. The Insurance Fund received further reports from the appellant's general practitioner, stating that his medical condition made him incapable of working. In December 2014 the appeal was dismissed.

22. The appellant brought that decision before the referring court. He argues, in essence, that the respondent has based the reduction of the invalidity pension solely on the internal medical service's interpretation of the information in the E 213 form, concluding that he had a capacity to work. The respondent contends that it was correct to rely on the report from the internal medical service. It maintains that external opinions should only be obtained where a divergence exists between the internal service's report and the general conclusions of the medical file that is not evidently based on different medical actuarial premises.

23. On 17 September 2015, the referring court decided to stay the proceedings and to refer the following questions to the Court:

> **(1) Does the fact that under the second sentence of Article 87(2) of Regulation No 987/2009 the debtor institution shall be bound by the findings of the institution of the place of stay or residence preclude the debtor institution from challenging those findings – and thus the information stated in the detailed medical report provided in form E 213 – in its procedure?**
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> **(2) If the answer to the first question is 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?**

24. The request was registered at the Court on 1 October 2015.

IV Written observations

25. 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 Mag. iur. Antonius Falkner, Rechtsanwalt;
- the Government of Belgium, represented by Liesbet Van der Broek and Marie Jacobs, Legal Advisers, Ministry of Foreign Affairs, acting as Agents;
- the Government of Liechtenstein, represented by Dr Andrea Entner-Koch and Thomas Bischof, Deputy Director, EEA Coordination Unit, acting as Agents;
- the Government of Norway, represented by Christian Fredrik Fougner Rydning, Higher Executive Officer, 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 Affairs, acting as Agents; and
- the European Commission ("the Commission"), represented by Denis Martin and Jonathan Tomkin, members of its Legal Service, acting as Agents.

V Summary of the arguments submitted and answers proposed

The appellant

26. The appellant submits that the binding effect of opinions obtained through the institution in the place of stay of the insured person applies only insofar as the debtor institution does not invoke its independent right to obtain an opinion from a doctor of its own choice.[1] Since the Insurance Fund did not make use of this right, it is consequently bound by the findings by the institution of the appellant's place of residence.

27. The answer to the first question must therefore be that the Insurance Fund is precluded from challenging the information stated in the detailed medical report in form E 213.

28. In relation to the second question, the appellant submits that the binding effect also applies in follow-on proceedings before the Princely Court of Appeal.

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[1] Reference is made to Case E-13/15 *Bautista*, not yet reported, paragraph 39, and the judgment in *Paletta I*, C-45/90, EU:C:1992:236.

The Government of Belgium

29. 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 Court of Justice of the European Union ("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 related to sickness benefits for claimants residing in a Member State other than the competent Member State.

30. 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]

31. 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.[3] 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 Germany and Liechtenstein.

32. 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.

33. 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.

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2 Reference is made to the judgments in *Rindone*, 22/86, EU:C:1987:130, paragraph 15, and *Paletta I*, cited above, paragraph 28.

3 Reference is made to the Opinion of Advocate General Mischo in *Rindone*, 22/86, EU:C:1987:32, pp. 1354-1355.

34. The Belgian Government argues that Article 87(2) of the implementing regulation cannot be interpreted to mean that the finding of long-term total incapacity for work under German legislation obliges the Liechtenstein institution to grant an equivalent invalidity pension for total incapacity for work, irrelevant of the assessment of invalidity status under Liechtenstein law.

35. Any interpretation to the contrary would go beyond the goal of coordination of social security systems and thus breach the principle that Member States may define the fundamental principles of their social security systems. It would also go beyond the reasons underlying the system of mutual administrative cooperation between Member States with regard to medical examinations, which are to prevent the beneficiary from having to travel to the competent state and to allow for the medical examination to be carried out in the language of the country of residence.[4]

36. According to the Belgian Government, whether the competent institution may take into account other medical evidence provided by the beneficiary is a matter for national procedural law, which must ensure at the same time that the principle of equal treatment is respected.

37. As regards the second question, the Government of Belgium notes that this is identical to the question referred in Case E-13/15 *Bautista*, and simply refers to that judgment.

38. The Government of Belgium proposes that the Court should provide the following answer to the questions referred.

> 1. *Article 87(2) of Regulation No 987/2009 must be interpreted in the sense that the debtor institution of an invalidity benefit must accept the validity of the medical and functional findings made by the medical expert of the state of residence or stay, but cannot be interpreted as the debtor institution must align itself to the loss of incapacity for work found under the legislation of that state.*

The Government of Liechtenstein

39. On the first question, the Liechtenstein Government submits that Article 49(2) of the implementing Regulation is the relevant provision in the present case. Article 87(2) of that Regulation is of secondary importance. This rests on the argument that

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[4] Reference is made to the judgments in *Voeten and Beckers*, C-279/97, EU:C:1998:599, paragraphs 34-35, and *Martínez Vidal*, C-344/89, EU:C:1991:277.

Article 49(2) is the *lex specialis* in the context of the determination of the degree of invalidity and the subsequent determination of the entitlement to an invalidity pension.

40. 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. Consequently, a medical report from a foreign institution cannot be ignored. On the other hand, the debtor institution is not bound to follow it.

41. 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.

42. 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 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.

43. 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).

44. 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.[5] An absolute binding effect of such information is thus excluded.

45. If the first question is answered in the affirmative, the Liechtenstein Government submits that the binding effect must also apply in court proceedings.[6]

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5 Reference is made to the judgment in *Bouman*, C-114/13, EU:C:2015:81, paragraphs 24, 26 and 27.

6 Reference is made to the judgments in *Herbosch Kiere*, C-2/05, EU:C:2006:69, paragraph 33, and *Bouman*, cited above, paragraph 26.

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

> 1. *The debtor institution is not precluded from challenging the findings of the institution of the place of stay or residence – and thus the information stated in the detailed medical report provided in an E 213 form – as it is not bound by those findings. 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.*
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> 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.*
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> 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

47. The Norwegian Government notes that Article 87 of the implementing Regulation is a general provision, placed under the heading "Miscellaneous, transitional and final provisions".

48. 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.[7]

49. The Norwegian Government notes that in *Bautista* the Court addressed the question of to what extent the debtor institution is bound, and thus that judgment is relevant to the present case, although the remarks in *Bautista* were made *obiter dicta*, as they were not necessary for the result in that case.

50. 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.

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[7] Reference is made to the judgment in *Bautista*, cited above, paragraph 40.

51. Many of the assessments required in the E 213 form may be based on factors that are specific to the country of residence/stay – both in legal and factual terms. Given that the conditions a claimant has to fulfil to be entitled to a particular benefit are not harmonised, in the view of the Norwegian Government, the term "medical findings" should be construed in a manner not including such assessments. This would also appear consistent with a normal usage of the term medical "findings", suggesting that the binding effect applies only to observations and factual circumstances and not assessments.

52. In addition, the Norwegian Government emphasises the principle of national procedural autonomy.[8] Further, as Article 87 of the implementing Regulation limits the binding effect to the debtor institution, it does not govern proceedings before the courts.

53. 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.

54. The Norwegian Government adds for the sake of completeness that, in its view, Article 87 of the implementing Regulation does not entail an obligation to request the institution of the place of stay or residence to conduct the medical examination. The Norwegian Government observes that Article 82 of the basic Regulation provides that an examination "may" be carried out. The stipulation in Article 87(1) of the implementing Regulation that the medical examination "shall be carried out" may simply refer to an obligation for the institution of residence to make an examination on request or to conduct the examination according to its legislation.

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

1. *Article 87(2) of Regulation No 987/2009 does not preclude the debtor institution from challenging the conclusions stated in the detailed medical report provided in form E 213 in its procedure.*

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.*

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8 Reference is made to the judgment in *van der Weerd and Others*, C-222/05 to C-225/05, EU:C:2007:318, paragraph 28.

ESA

56. 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.

57. 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.

58. 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 to have the beneficiary examined by a doctor of its own choice. In its view, 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 the case where it has already received a medical report from 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 the ECJ on Regulation No 574/72.[9] Moreover, the fact that the relevant provision of the implementing Regulation expressly states that the debtor institution shall be bound by the findings 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.

59. According to ESA, it is not clear from the reference from the national court whether the Insurance Fund availed itself of the possibility to have the appellant examined by a doctor of its choice and in what way the Insurance Fund deviated from the medical report received from the institution of the place of residence. Furthermore, it is not obvious if the deviation concerned the nature of the physical condition of the claimant, or the interpretation of the degree of invalidity of the claimant according to national law.

60. ESA stresses that, in its view, where a debtor institution makes use of the procedure specified in Article 87(1) of the implementing Regulation it is bound by the report from the institution of the place of stay or residence, unless it later makes use of the right to have a claimant examined by a doctor of its choice, in accordance with the third sentence of Article 87(2), in which case it is not bound by the medical report.

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9 Reference is made to the judgments in *Rindone* and *Paletta I*, both cited above.

61. However, ESA continues, the determination of the degree of invalidity and the amount of invalidity pension to which a claimant is entitled is a matter of national law, regulated in full by national substantive and procedural law.

62. Turning to the second question, ESA takes the view 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.

63. 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.

64. ESA contends that, in the light of the clear wording of Article 87(2) of the implementing Regulation, it would be contrary to the language of 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.

65. 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.[10]

66. ESA refers to case law where the ECJ has provided for safeguards in order to avoid abuse or fraud due to the binding effect of the said certificate. In particular, the ECJ has stated that employers are not barred from adducing evidence to support a finding by the national court of abuse or fraudulent conduct on part of the worker.[11]

67. 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.

68. On 29 January 2016, ESA submitted observations on the relevance of the judgment in *Bautista.* As regards the first question, ESA submits that the Court clarified that a debtor institution is indeed bound by a medical examination carried out by the institution of the place of stay or residence when this is done in accordance with Article

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[10] Reference is made to the judgment in *FTS*, C-202/97, EU:C:2000:75. Reference is also made to the Opinion of Advocate General Szpunar in *Bouman*, C-114/13, EU:C:2014:123, points 29 and 30.

[11] Reference is made to the judgment in *Paletta II*, C-206/94, EU:C:1996:182, paragraph 18.

87(2) of the implementing Regulation and the competent institution does not avail itself of the right to have the beneficiary examined by a doctor of its own choice.[12]

69. ESA argues that the Court further stated that that the principle of equal treatment enables recipients or claimants of Liechtenstein invalidity benefits staying or residing in another EEA State to challenge the findings of the institution of the place of stay or residence in the proceedings before the Insurance Fund.[13] ESA submits that the principle of equal treatment applies to persons, whereas in the case of the debtor institution the principle of equal treatment is of no relevance. Consequently, Article 87 of the implementing Regulation prevents the debtor institution from deviating from the information stated in the detailed medical report or challenge such medical report unless it avails itself of the possibility to have the person examined by a doctor of its own choice.

70. As regards the second question, ESA submits that the principle of equal treatment would require that recipients or claimants of Liechtenstein invalidity benefits staying or residing in another EEA State must be entitled to challenge the decision of the debtor institution before the national court of the competent State. This applies irrespective of whether the debtor institution accepted the findings in the medical report issued by the institution of the place of stay or residence or whether it availed itself of the possibility to have the person examined by a doctor of its own choice.[14]

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

1. *The debtor institution is bound by the findings of the institution of the place of residence or stay under the second sentence of Article 87(2) of Regulation No 987/2009 unless the former institution avails itself of the right to have the beneficiary examined by a doctor of its choice, under the third sentence thereof.*

2. *Article 87(2) of Regulation No 987/2009 does not prevent a recipient or claimant of benefits from challenging the findings of an institution of the place of stay or residence before the national courts of the competent State.*

The Commission

72. The Commission notes that the present case concerns two interrelated issues. The first is the concept of "medical findings" and the second is the extent of the binding effect mentioned in Article 87(2) of the implementing Regulation.

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12 Reference is made to *Bautista*, cited above, paragraphs 36 and 39.

13 Reference is made to *Bautista*, cited above, paragraph 42.

14 Reference is made to *Bautista*, cited above, paragraphs 41 to 44.

73. The Commission holds that the concept of "medical findings" does not extend to the legal assessment of whether a claimant is entitled to benefits.[15] The basic Regulation and the implementing Regulation merely seek to ensure the coordination and not harmonisation of social security schemes. The Member States are thus free to determine the criteria and conditions for eligibility for a particular benefit.

74. The Commission finds it unclear from the reference whether the Insurance Fund took full account of the medical findings of the German doctor or whether the Fund's comments on the findings were of a medical nature. This is a factual matter for the national court to determine.

75. The Commission stresses that the medical findings are binding insofar as the debtor institution does not invoke its independent right to obtain an opinion from a doctor of its choice after receiving the medical report from the institution of the place of stay or residence.[16]

76. In the present case it appears to the Commission that the Insurance Fund was not satisfied with the medical findings from the German doctor, but that it did not make use of its right to have a doctor of its choice examine the appellant. Thus, the Commission submits that the debtor institution was precluded from disregarding the medical findings of the doctor in Germany.

77. In relation to the second question, the Commission argues that the binding effect must apply in court proceedings instituted by the claimant where he has received a negative decision. The effectiveness of EU law would be undermined if the binding effect of medical findings did not apply in court proceedings triggered by the fact that the competent institution failed to comply with those findings.

78. The Commission proposes that the Court should answer the questions referred as follows:

> 1. *Article 87(2) of [Regulation No 987/2009] must be interpreted as precluding the debtor institution from disregarding the medical findings of the doctor of the Member State of residence of the beneficiary – and thus the information stated in the detailed medical report provided in form E213, if it has not made use of the possibility of having that beneficiary examined by a doctor of its choice.*

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15 Reference is made to the judgment in *Bautista*, cited above, paragraph 40.

16 Ibid., paragraph 39.

2. *The binding effect of the medical findings of the doctor of the Member State of residence of the beneficiary also applies in court proceedings which, under national procedural rules, follow on from the proceedings before the debtor institution.*

Per Christiansen
Judge-Rapporteur