

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 Konrad Lanser and senior judge Linn Berger as further members of the chamber, in the

Social security matter

appellant: Christian Maitz LL. M., lawyer, resident in Switzerland represented by Schurti Partners Rechtsanwälte AG, Zollstrasse 2, 9490 Vaduz

respondents:

1. Liechtensteinische Alters- und Hinterlassenenversicherung (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 the Legal Service of the AHV-IV-FAK institutions, also of the same address

concerning: issuance of Form A1

in the appellant's appeal of 27 January 2022 (document 1) against the decision of the respondents of 29 December 2021, A. 2020/103, following the hearing of the parties in closed session on **28 April 2022**, in the presence of the court clerk Eva Marte, has

ordered:

- I. Pursuant to Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (SCA), the following questions are referred to the EFTA Court in Luxembourg for an Advisory Opinion:

1. *Is it necessary for the scope ratione personae of Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 (OJ 2004 L 166, p. 1), incorporated in the EEA Agreement by Decision of the EEA Joint Committee of 1 July 2011 (LGBl. 2012 No 202), that the Member State national who is subject to the legislation of one or more Member States within the meaning of Article 2(1) of that Regulation is resident in one of the Member States?*

If the answer to that question is in the negative:

Can an agreement concluded by the EU or an EEA Member State with a third country by which the scope of application of the Regulation mentioned was extended to the third country change the answer to this question?

2. *Must an attestation within the meaning of Article 19(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), incorporated into the EEA Agreement by Decision of the Joint Committee of 1 July 2011 (LGBl. 2012 No 202), be issued necessarily by means of a form (PD A1) laid down by the Administrative Commission for the Coordination of Social Security Systems in order to produce the legal effects specified in Article 5(1) of that Regulation?*

- II. The appeal proceedings are stayed until the EFTA Court delivers its Advisory Opinion.

Grounds

1. Facts and Liechtenstein and Austrian national law

The appellant, Mr Christian Maitz LL.M., is an Austrian national.

In July 2015 he transferred his residence from Austria to Switzerland.

On 13 November 2018, he was entered by the Rechtsanwaltskammer Wien (Vienna Bar Association, Austria) in the register of lawyers, as a result of which he is entitled to practise as a lawyer in Austria (Section 1(3) and Section 3 of the Austrian Lawyers Code (Rechtsanwaltsordnung (RAO)); available online together with all other Austrian legislation at www.ris.bka.gv.at).

On 3 December 2018, he was entered by the Liechtensteinische Rechtsanwaltskammer (Liechtenstein Bar Association) in the register of established European lawyers. For entry in the register it is necessary that the applicant produces a certificate issued by the competent authority in the home State evidencing that he is a member of this profession (Article 60(1)(a) of the Lawyers Act (Rechtsanwaltsgesetz (RAG)); available online together with all other Liechtenstein legislation at www.gesetze.li). Pursuant to Article 62(1) of the Lawyers Act, the established European lawyer is authorised to engage in the same professional activities as any lawyer entered in the register of lawyers, except where otherwise provided.

Pursuant to Section 49(2) of the Lawyers Code, the appellant is under an obligation to pay contributions in Austria to the institution for the provision of old-age and invalidity benefits for lawyers and trainee lawyers and for the provision of survivors' benefits in the event of the lawyer's death – as are, in principle, all lawyers entered in the register of an Austrian bar association, unless they are, by virtue of their activities as a lawyer, already subject to compulsory affiliation to an old-age pension scheme of an EU Member State, another Contracting State of the EEA Agreement or the Swiss Confederation.

For the year 2018, the appellant was exempted by the Vienna Bar Association from the obligation to pay contributions to the Austrian pensions institution.

For the period from 1 January 2019, the appellant was required by the Vienna Bar Association to produce Form A1 completed by the competent social security authority. It is claimed that this serves as an attestation of the national legislation which applies to the relevant person and as confirmation that the appellant does not have to pay contributions in Austria. Production of Form A1 is said to entail an automatic exemption from contributions to the Austrian pensions institution.

The appellant has worked since 1 January 2019 in Liechtenstein as an employed or self-employed lawyer. He obtained an income exclusively from this activity. In Austria he did not obtain any income. In Switzerland he has no employed activity.

On the basis of his professional income in Liechtenstein, the appellant is compulsorily insured with the First Respondent (AHV-Anstalt) against the risk of old-age and under an obligation to pay contributions (Article 34(1)(b), Article 36(1), Article 52 and Article 55 of the Liechtenstein Old-Age and Survivors' Insurance Act (Gesetz über die Alters- und Hinterlassenenversicherung; AHVG)).

The appellant requested the respondents to issue to him for the years 2019 and 2020 Form A1 as evidence of old-age benefits provision.

By order (decision) of the respondents of 4 August 2020, it was determined that the income obtained by the appellant from employed and self-employed activities in Liechtenstein is liable to mandatory contributions payable to the respondents but that a PD A1 certificate, attesting an exclusive liability and insurance obligation in Liechtenstein or in a single State within the meaning of social security coordination, cannot be issued.

An appeal (Vorstellung) brought by the appellant challenging that decision was rejected by the respondents by decision of 29 December

2021. The appellant challenged that decision by an appeal (Berufung) to the Fürstliches Obergericht (Princely Court of Appeal).

In the appeal proceedings, the respondents have offered, in place of Form PD A1, to issue an official attestation concerning the old-age benefits provision existing in Liechtenstein.

2. 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, p. 1) was incorporated into the EEA Agreement by Decision of the Joint Committee No 76/2011 of 1 July 2011, LGBl. (LGBl. = liechtensteinisches Landesgesetzblatt (Liechtenstein Official Gazette), available online at www.gesetze.li) 2012 No 202.

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) was incorporated into the EEA Agreement also by Decision of the Joint Committee No 76/2011 of 1 July 2011 (LGBl. 2012 No 202).

Pursuant to Article 2(1) of Regulation (EC) No 883/2004 ("Persons covered"), this Regulation shall apply, inter alia, to nationals of a Member State. Pursuant to Article 3(1)(d) ("Matters covered"), this Regulation shall apply, inter alia, to legislation concerning the "old-age benefits" branch of social security. According to the general rules of Article 11(1), persons to whom this Regulation applies shall be subject to the legislation of a single Member State only and it shall be determined in accordance with this Title ("Title II") how the legislation applicable shall be determined. Pursuant to Article 71(1) and Article 72(a) and (b), the Administrative Commission for the Coordination of Social Security Systems ("the Administrative Commission") attached to the European Commission shall deal with all administrative questions and questions of interpretation concerning this Regulation and facilitate the uniform application of Community law, especially by promoting exchange of experience and best administrative practices.

Pursuant to Article 4(1) of Regulation (EC) No 987/2009, the Administrative Commission shall lay down the structure, content, format and detailed arrangements for exchange of documents and structured electronic documents. According to Article 5(1), documents issued by the institution of a Member State and showing the position of a person for the purposes of the application of the basic Regulation and of the implementing Regulation, and supporting evidence on the basis of which the documents have been issued, shall be accepted by the institutions of the other Member States for as long as they have not been withdrawn or declared to be invalid by the Member State in which they were issued. Title II of this Regulation contains provisions by which the legislation applicable may be determined. Pursuant to Article 19(2), the competent institution of the Member State whose legislation is applicable pursuant to Title II of the basic Regulation shall provide an attestation that such legislation is applicable and shall indicate, where appropriate, until what date and under what conditions, and, moreover, this shall be done at the request of the person concerned or of the employer.

On 18 October 2017, the Administrative Commission adopted Recommendation No A1 concerning the issuance of the attestation referred to in Article 19(2) of Regulation (EC) No 987/2009. According to that Recommendation, the competent services and institutions are recommended to issue the Portable Document A1 in a particular way, and in that connection reference is made to the Annex to that Recommendation (OJ 2018 C 183, p. 5). The form can be downloaded from the website <https://circabc.europa.eu> (available in English at: https://circabc.europa.eu/ui/group/a075dbdb-23b1-4b40-9ca2-e74cb4d73f32/library/3615e38d-c265-4e04-b2ad-7174128d9a2b?p=1&n=10&sort=modified_DESC → A1 EN v07-18.pdf).

3. International conventions

Between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, an agreement has been concluded on the free movement of persons (OJ 2002 L 114, p. 6). It was amended – to the extent relevant here – on 31 March 2012 by Decision No 1/2012 of the Joint Committee established under the Agreement between the European Community and its Member States,

of the one part, and the Swiss Confederation, of the other, on the free movement of persons replacing Annex II to that Agreement on the coordination of social security schemes (2012/195/EU; OJ 2012 L 103, p. 51). Pursuant to Article 8 of that Agreement ("Coordination of social security systems"), the Contracting Parties shall make provision, in accordance with Annex II, for the coordination of social security systems with the aim in particular of (point (b)) determining the legislation applicable. Pursuant to Article 1(1) of Annex II in conjunction with Section A, the contracting parties agree, with regard to the coordination of social security schemes, to apply among themselves Regulation (EC) No 883/2004 and Regulation (EC) No 987/2009.

Between the Principality of Liechtenstein and the Swiss Confederation (as well as the Kingdom of Norway and the Republic of Iceland) the Convention of 4 January 1960 establishing the European Free Trade Association (EFTA) has been concluded (LGBl. 1992 No 17). The Convention was amended on 21 June 2001 (LGBl. 2003 No 189). A further amendment was made – to the extent relevant here – on 12 November 2015 by Decision No 5/2015 of the EFTA Council amending the EFTA Convention (LGBl. 2015 No 352). Pursuant to Article 21 of the Convention ("Coordination of social security systems"), in order to provide freedom of movement of persons, the Member States shall make provision, in accordance with Appendix 2 of Annex K and with the Protocol to Annex K on the free movement of persons between Liechtenstein and Switzerland, for the coordination of social security systems with the aim in particular of (point (b)) determining the legislation applicable. Pursuant to Article 1(1) of Appendix 2 to Annex K, the Member States agree, with regard to the coordination of social security schemes, to apply among themselves Regulation (EC) No 883/2004 and Regulation (EC) No 988/2009 (referred to in Section A). According to Protocol 2 to Appendix 2, Sections A and B of Appendix 2 are applicable to the relations between Liechtenstein and Switzerland with the following modifications:

1. Compulsory insurance under the sickness insurance scheme
 - 1.1 Persons residing in one of the two States are subject to the legal provisions on compulsory sickness insurance of their State of residence, if:

(a) being gainfully employed, they are subject to the legal provisions relative to the other branches of social security in one of the two States;

...

1.2 The obligation to be insured under the daily allowance insurance is determined by the legislation applicable to the person by reason of his or her gainful employment.

4. The questions referred

Question 1

In relation to the "old-age benefits" branch of social security, the appellant is currently subject to Austrian legislation (obligation to contribute pursuant to Section 49 of the Lawyers Code) and Liechtenstein legislation (obligation to contribute pursuant to Article 36(1) of the Old-Age and Survivors' Insurance Act).

As he is an Austrian national, he falls within the scope *ratione personae* of Regulation (EC) No 883/2004 (see Article 2(1) of that Regulation). Pursuant to Article 11(1) of that Regulation, however, he may be subject to the legislation of a single Member State only. As from 1 January 2019 he has pursued his activities as a self-employed person or an employed person exclusively in Liechtenstein, he is, in the view of the referring court, subject only to the legislation of the Principality of Liechtenstein, for which reason the respondents as the competent institutions are competent to issue an attestation within the meaning of Article 19(2) of Regulation (EC) No 987/2009.

However, these take the view that, as a result of the appellant's residence in a third country (Switzerland), the coordination rules of Regulation (EC) No 883/2004 do not apply.

In the view of the referring court, although Article 2(1) of Regulation (EC) No 883/2004 does not provide for a restriction on the scope *ratione personae* for nationals of a Member State who are subject to the legislation of one or more Member State to the effect that this is dependent on residence (in a Member State), one must concede the point to the respondents that in Regulations (EC) No 883/2004 and (EC)

No 987/2009 reference is repeatedly also made to the "Member State of residence" which in the case of residence in a third country – as in the present case – could lead to difficulties in the application of the legislation ("negative conflict" – *Practical Guide on the applicable legislation*, p. 42). Although in the non-binding (compare the judgment in Case E-1/21 *ISTM*, paragraph 25) *Practical Guide on the applicable legislation* (p. 43), the Administrative Commission presupposes also that the place of residence does not necessarily have to be within the territorial scope of the Regulations and derives this (*e contrario*) from the judgment of the ECJ in Case 13/73 *Hakenberg*, in the view of the Princely Court of Appeal, the legal situation is unclear so that it was necessary to request an Advisory Opinion from the EFTA Court.

If this question is answered to the effect that it is not necessary for the scope *ratione personae* that the national is resident in a Member State, the question then arises whether that answer is changed by the international agreements (Agreement on the free movement of persons EU and Member States – Swiss Confederation; EFTA Convention) by which the scope of application of the Regulations mentioned was extended to a third country (Swiss Confederation).

For the sake of completeness, it should also be mentioned in this connection that, according to ECJ case law (Case C-340/94 *de Jaeck*), Community law does not preclude the legislation of one Member State from insuring the person in question against only some of the risks covered by its social security scheme. Thus, in the view of the referring court, the appellant continues to be insured in Switzerland in relation to the "sickness benefits" branch of social security.

Question 2

For exemption from the obligation to contribute in Austria, the Vienna Bar Association requires the appellant to submit Form A1. Pursuant to Article 19(2) and Article 5(1) of Regulation (EC) No 987/2009, however, a right merely exists to the issuance of an attestation (of some kind) (a Form PD A1 is not mentioned there) and this attestation shall be accepted for as long as it has not been withdrawn or declared invalid by the Member State in which it was issued. Pursuant to Article 4(1) of Regulation (EC) No 987/2009, the Administrative Commission shall lay

down the structure, content, format and detailed arrangements for exchange of documents and structured electronic documents. As the respondents have offered, in place of Form PD A1, to issue an attestation concerning the old-age benefits provision existing in Liechtenstein, the question arises what legal quality Form PD A1 has within the scope of the EEA Agreement i.e. whether the institutions of another Member State may accept only this document (in which case, if the conditions are fulfilled, the respondents would be required to issue an attestation by means of Form PD A1) or if Form PD A1 constitutes a mere (non-binding) recommendation of the Administrative Commission so that also an attestation of another kind (a mere simple letter) suffices for the purposes of Articles 5(1) and 19(2) of Regulation (EC) No 987/2009 and must be accepted by the Austrian institution.

5. 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, 28 April 2022

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.