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EUROPEAN COMMISSION

Brussels, 21 June 2021
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TO THE PRESIDENT AND MEMBERS OF THE EFTA COURT

WRITTEN OBSERVATIONS

Submitted pursuant to Article 20 of the Statute of the EFTA Court by the European Commission, represented by Denis MARTIN and Bernd-Roland KILLMANN, members of its Legal Service, with a postal address for service in Brussels at the Legal Service, *Greffe Contentieux*, BERL 1/169, 200 Rue de la Loi B-1049 Brussels.

in Case **E-1/21,**

concerning an application submitted 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 (Liechtenstein), in the case:

ISTM International Shipping & Trucking Management GmbH,

Appellant

against

1. Liechtenstein Old-Age and Survivors' Insurance (AHV)

2. Liechtenstein Invalidity Insurance (IV)

3. Liechtenstein Family Allowances Office (FAK)

Respondents

requesting an advisory opinion regarding the interpretation of the act referred to in Points 1 and 2 of Annex VI to the EEA Agreement, namely Regulation (EC) No 883/2004 of the European Parliament and of the Council on the coordination of social security schemes (hereinafter: "Regulation 883/2004") and Regulation (EC) No 987/2009 of the European Parliament and of the Council laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems (hereinafter: "Regulation 987/2009").

The Commission has the honour to submit the following written observations:

I. FACTS AND PROCEDURE

1. ISTM International Shipping & Trucking Management (hereinafter: "ISTM") is a limited liability company under Liechtenstein law, registered in the Liechtenstein commercial register with a seat in Liechtenstein.

2. The business of ISTM is to organise inland waterway transport on the River Rhine. The order of the referring judge leaves it open from which EEA State ISTM runs its business. According to the order for reference, its employees are resident in Germany, the Netherlands and the Czech Republic and pursue their activity on any navigable waters usually in two or more Member States, in particular, in Germany, in the Netherlands, in Belgium, in Luxembourg or in France. The order for reference indicates that those employees who are resident in Germany or the Netherlands pursue also an activity in their respective state of residence; however, not a substantial part of their activity and in no case more than 25%.

3. As of the moment of its establishment in February 2016, ISTM considers itself and its employees subordinated to the social security legislation of Liechtenstein. Yet, the competent institutions for social security in Liechtenstein, the AHV, IV and FAK (hereinafter: "the Liechtenstein Institutions") issued an order determining that Liechtenstein social security legislation is not applicable to the employees of ISTM. While the Liechtenstein Institutions concede that ISTM has its seat in Liechtenstein according to its articles of association, they consider that ISTM does not carry out the essential decisions and functions of its business operations at its seat in Liechtenstein, since the acts relating to its central administration were outsourced. Indeed, the manager of ISTM acknowledged that ISTM has neither own premises nor staff in Liechtenstein.

4. In appealing against the determination of the Liechtenstein Institutions, ISTM brought forward provisional determinations issued by the competent institution for social security in the Czech Republic. These determinations conclude in favour of the Liechtenstein legislation as applicable to those employees who reside in the Czech Republic.

5. The order for reference indicates that ISTM's employees, in favour of which the Czech institution was requested to make provisional determinations, were residing in the Czech Republic, but did not perform any economic activity there. The Czech institution addressed the provisional determinations to ISTM, who then transmitted them to the Liechtenstein Institutions. At least with relation to one of these employees, however, the Czech institution informed the Liechtenstein Institutions of its provisional determination.

6. For none of these provisional determinations, the Liechtenstein Institutions informed the Czech institution that the Liechtenstein Institutions cannot yet accept the determination or take a different view on the applicable social security legislation.

II. THE QUESTIONS

7. The questions referred to the EFTA Court by the Princely Court of Appeal are the following:

I. Registered office of an undertaking

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

2. If Question 1 is answered in the negative:

According to which criteria must the registered office (statutarischer Sitzor satzungsmässiger Sitz) or place of business where the essential decisions of the undertaking are adopted and where the functions of its central administration are carried out, as provided for in Article 14(5a) of Regulation (EC) No 987/2009, be

determined? For these purposes, must reference be had to the interpretation reached by the Administrative Commission for the Coordination of Social Security Systems, as set out in Part II, Section 7 (page [35] et seq.) of the Practical guide on the applicable legislation in the European Union(EU), in the European Economic Area (EEA) and in Switzerland of December 2013?

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

1. From what time is the institution of the Member State in which the person pursues an activity regarded as having been informed of the provisional determination by the institution of the place of residence? Does it suffice when, in whatever form, the provisional determination reaches the institution of the place in which the person pursues an activity (for example via the undertaking or the employee)?

2.Is the "definitive nature" of the determination of the applicable legislation that arises as a result of the two-month period expiring without use being made of it not susceptible to further challenge by the designated institution of the Member State and, in particular, even where the person concerned does not pursue any activity in this Member State?

3. If Question II(2) is answered to the effect that the determination, notwithstanding the fact that it has become definitive, may be challenged:

What are the legal consequences? Can this result in a retroactive setting aside of the determination?

III. THE APPLICABLE LAW

EEA and Union Law

8. Regulation No 883/2004 entered into force on 1st May 2010 between Member States and became applicable from 1 June 2012 to Iceland, Liechtenstein and Norway[1]. Its Articles 11, 13 and 72 read as follows:

[1] Annex VI to the EEA Agreement as amended by Joint Committee Decision No 76/2011 of 1st July 2011.

"Article 11

General rules

1. Persons to whom this Regulation applies shall be subject to the legislation of a single Member State only. Such legislation shall be determined in accordance with this Title.

2. …

3. Subject to Articles 12 to 16:

(a) a person pursuing an activity as an employed or self-employed person in a Member State shall be subject to the legislation of that Member State;

…

4. For the purposes of this Title, an activity as an employed or self-employed person normally pursued on board a vessel at sea flying the flag of a Member State shall be deemed to be an activity pursued in the said Member State. However, a person employed on board a vessel flying the flag of a Member State and remunerated for such activity by an undertaking or a person whose registered office or place of business is in another Member State shall be subject to the legislation of the latter Member State if he/she resides in that State. The undertaking or person paying the remuneration shall be considered as the employer for the purposes of the said legislation.

…

Article 13

Pursuit of activities in two or more Member States

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

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

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

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

9. At the same moment as Regulation 883/2004, Regulation 987/2009 also became applicable within the EEA. It refers to Regulation 883/2004 as the 'basic Regulation'. Its Articles 14 and 16 read as follow:

"Article 14

Details relating to Articles 12 and 13 of the basic Regulation

…

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

…

Article 16

Procedure for the application of Article 13 of the basic Regulation

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

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

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

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

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

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

National law

10. A limited liability company under Liechtenstein law is subject to the Persons and Companies Act of 20 January 1926 (Liechtenstein Law Gazette 1926 no. 4). Article 106 of that Act considers a limited liability company a legal person once it is incorporated. Article 239 requires the company to appoint a registered agent in Liechtenstein or, at least, an address for service in Liechtenstein. Articles 389 to 427 stipulate the way a limited liability company is to be organised. According to Article 390(2)(5) and (7), its articles of association have to foresee a seat and to set out the rules on its management.

IV. OBSERVATIONS

Question I

11. The first group of questions are about finding the applicable social security legislation for employees of a company, which has its seat in an EEA State but does not pursue a business activity in that State. The issue arises in the context of a dispute between the Liechtenstein institutions and ISTM concerning the social security legislation applicable to its employees. ISTM considers that, since its seat is in Liechtenstein, this is sufficient to conclude in favour of Liechtenstein legislation applicable to them.

12. The referring judge doubts that the simple fact of having a seat in Liechtenstein is sufficient to render Liechtenstein legislation applicable according to Article 13(1)(b)(i) of Regulation 883/2004 and Article 14(5a) of Regulation 987/2009 to its employees, who are neither resident in Liechtenstein nor exercise any activity there.

13. In that regard, the referring judge indicates that the questions concern only the situation of ISTM as it exists for the period between 4 February 2016 and 17 February 2017.

14. Limiting the questions to this period is relevant because of the factual and legal circumstances. The referring judge states as a fact that, for the relevant period, ISTM had neither own premises nor staff in Liechtenstein. The referring judge further explains that the period also matters because the legal situation with regard to ISTM and its employees has changed since Liechtenstein acceded in 2018 to the Agreement of 23 December 2010 on the Determination of the Legislation applicable to Rhine Boatmen, on the Basis of Article 16 (1) of Regulation 883/2004[2].

15. As a matter of principle, the Commission recalls that, according to a Court of Justice's consistent case law, the application of the system of conflict of law rules established by Title II of Regulation 883/2004 depends solely on the objective situation of the worker concerned[3].

16. In this regard, the Commission notes that the order for reference does not provide the factual circumstances that would be necessary in order to determine with a sufficient degree of legal certainty the applicable legislation. The Commission's submissions hereunder are therefore made in the light of the limited information available. Similarly, the Commission's submissions also treat the two questions together.

17. A provision of EEA law, such as Article 13 of Regulation 883/2004 and Article 14 of Regulation 987/2009, which does not make reference to the laws of the EEA States for the purpose of ascertaining its meaning and scope, must be given an

[2] Liechtenstein Law Gazette 2018 no. 205.

[3] See, to that effect, judgment of the Court of Justice of 4 June 2015, *Fischer-Lintjens*, C-543/13, point 38 and the case law cited.*

autonomous and uniform interpretation throughout the EEA so as to avoid divergent interpretations by the EEA States[4].

18. In view of the foregoing, it is necessary to determine what constitutes "*the registered office or place of business of the undertaking or employer is situated*" in order to ascertain the meaning and scope of Article 13(1)(b)(i) of Regulation 883/2004.

19. In that regard, Article 14(5a) of Regulation 987/2009 clearly explains what the notion of "*registered office or place of business"* is to mean by providing that this is the place *"where the essential decisions of the undertaking are adopted and where the functions of its central administration are carried out."* This provision excludes fictitious or notional presences from being relevant in the context of Article 13(1) of Regulation 883/2004.

20. In the context of the application of Title II of Regulation 883/2004, the Court of Justice has rejected a purely formal understanding of the term "*undertaking or employer"* and has indicated, instead, to take account of the objective situation at stake. The Court of Justice held specifically that, in the context of social security, it is necessary to identify that entity which actually exercises the business[5].

21. The referring judge rightly looks for criteria in order to consider the situation before him. To that end, he will have to take into due consideration the case law developed by the Court of Justice and by the EFTA Court as explained above. Further, the Court of Justice has declared that it may be of assistance to take into account the so-called "Practical guide on the applicable legislation in the European Union (EU)" (hereinafter: "the Practical Guide"), though well indicating that the Practical Guide is not legally binding[6].

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[4] See in general judgment of the EFTA Court of 9 February 2021, *Kerim*, E-1/20, point 46 and case law cited.

[5] Judgment of the Court of Justice of 16 July 2020, *AFMB*, C-610/18, points 48, 60 and 61.

[6] Judgment of the Court of Justice of 8 May 2019, *Inspecteur van de Belastingdienst*, C-631/17, point 41.

22. What is said in the Practical Guide are thus mere indications as the Practical Guide itself is no decision of the Administrative Commission for the Coordination of Social Security Systems (hereinafter: "the Administrative Commission"), foreseen in Article 72 of Regulation 883/2004. It is therefore neither possible nor necessary to incorporate the Practical Guide formally in EEA Law. However, even though not binding, the Commission wishes to recall that the Practical Guide was approved by the representatives of the Member States in the Administrative Commission, which makes it enforceable against the social security institutions over which the Member States exercise supervision[7].

23. Part II point 7 of the Practical Guide[8] reads as follow:

*"**7. How to determine the registered office or place of business?***

Where a person working in more than one Member State does not pursue a substantial part of his/her activity in the Member State of residence, then the legislation of the Member State where the registered office or place of business of the employer or undertaking employing him or her is situated is applicable.

*The meaning of the term "**registered office or place of business**" for the purpose of Title II Regulation 883/2004 has been defined in Article 14(5a) of Regulation 987/2009 as being the registered office or place of business where the essential decisions of the undertaking are adopted and where the functions of its central administration are carried out.*

This definition is derived from extensive guidance in the case law of the Court of Justice of the European Union and from other EU regulations. As a general principle "brass plate" operations, where the social insurance of the employees is linked to a purely administrative company without having transferred actual decision-making powers, should not be accepted as satisfying the requirements in this area. The following guidelines are designed to assist institutions in assessing applications where they feel they may be dealing with a "brass plate" operation.

In a case related to the area of taxation (Case C-73/06 Planzer Luxembourg), the Court of Justice ruled that the term "business establishment" means the place where the essential decisions concerning the general management of a company are adopted and where the functions of its central administration are carried out. The Court of Justice elaborated on this in the following terms:

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[7] See Opinion of Advocate General Bot delivered on 21 May 2015, *Bogdan Chain*, C-189/14, footnote 26.

[8] The Practical Guide is available at https://ec.europa.eu/social/main.jsp?catId=868&langId=en.

"Determination of a company's place of business requires a series of factors to be taken into consideration, foremost amongst which are its registered office, the place of its central administration, the place where its directors meet and the place, usually identical, where the general policy of that company is determined. Other factors, such as the place of residence of the main directors, the place where general meetings are held, the place where administrative and accounting documents are kept, and the place where the company's financial, and particularly banking, transactions mainly take place, may also need to be taken into account [Footnote 38 stating: Case C-73/06 Planzer Luxembourg, [2007] Rec.p. I-5655, paragraph 61.]".

As a specification of the definition in Article 14(5a) of Regulation 987/2009, the following criteria could be taken into account by the institution of the place of residence, on the basis of the available information or, in close cooperation with the institution in the Member State where the employer has its registered office or place of business:

- *the place where the undertaking has its registered office and its administration;*
- *the length of time that the undertaking has been established in the Member State;*
- *the number of administrative staff working in the office in question;*
- *the place where the majority of contracts with clients are concluded;*
- *the office which dictates company policy and operational matters;*
- *the place where the principal financial functions, including banking, are located;*
- *the place designated under EU regulations as the place responsible for managing and maintaining records in relation to regulatory requirements of the particular industry in which the undertaking is engaged;*
- *the place where the workers are recruited.*

If, having considered the criteria outlined above, institutions are still not in a position to eliminate the possibility that the registered office is a "brass plate" operation, then the person concerned should be made subject to the legislation of the Member State in which the establishment is situated with which he or she has the closest connection in terms of the performance of employed activity [Footnote 39 stating: See also Case C-29/10 Koelzsch [2011], not yet published, paragraphs 42-45. ...

In this determination, it should not be forgotten that this establishment actually employs the person concerned, and that a direct relationship exists with the person in the sense of Part I, Paragraph 4 of this Guide."

24. Lacking a legally binding nature, the referring judge is not obliged to draw unto the elements contained in the Practical Guide. However, the criteria mentioned in the Practical Guide are useful elements that may help him to determine where the essential decisions of the undertaking are adopted and where the functions of its central administration are carried out.

25. In conclusion, the Commission is of the opinion that Article 13(1)(b)(i) of Regulation 883/2004 in conjunction with Article 14(5a) of Regulation 987/2009 must be interpreted as meaning that the seat (statutarischer Sitz or satzungsmässiger Sitz) of a company does not suffice to be regarded as registered office or place of business where the essential decisions of the undertaking are adopted and where the functions of its central administration are carried out. With a view to establishing where the registered office or place of business of an entity is, account may be taken of the criteria laid down in the Practical Guide.

26. In the light of the limited information provided in the order for reference, the Commission would conclude that ISTM appears not to fulfil the criteria necessary to be regarded as having its registered office or place of business according to Article 13(1)(b)(i) of Regulation 883/2004 and Article 14(5a) of Regulation 987/2009 in Liechtenstein.

27. The order for reference indicates that the employees of ISTM concerned are resident in Germany, the Netherlands and the Czech Republic, and that they perform their activities usually in two or more Member States, in particular, in Germany, in the Netherlands, in Belgium, in Luxembourg or in France. Employees who are resident in Germany and/or the Netherlands pursue also an activity in their respective state of residence, however, not a substantial part of their activity and in no case more than 25%.

28. The referring judge does not further develop on the implications of considering that the seat of ISTM in Liechtenstein is not sufficient to render Liechtenstein legislation applicable. Further, the information contained in the order for reference does not allow pointing to any other EEA State that could be competent for the various

employees performing their activities in different Member States and whose place of residence is also different.

29. Should the EFTA Court agree with the Commission's suggested answers to Questions 1 and 2, the Commission is of the opinion that the EFTA Court would then lack jurisdiction to answer the remaining questions raised in the order for reference.

30. Indeed, if the social security legislation of Liechtenstein is not the legislation applicable to ISTM's employees, all the factual circumstances of the case at hand would be territorially limited to the EU Member States mentioned in the order for reference (Germany or Netherlands as places of residence and activity, the Czech Republic as place of residence, Belgium, Luxembourg or France as places of activity), without any other fact linking the case to the EEA territory.

31. The Commission will therefore be very brief as to the second set of Questions of the order for reference.

Question II

Introduction

32. The second group of questions in the case at hands concerns the effects of a provisional determination under Article 16 of Regulation 987/2009.

33. The case at issue bears the particularity that, according to the referring judge, a competent Czech institution considered Liechtenstein legislation to be applicable to the EEA workers residing in the Czech Republic.

34. The Commission notes that the order for reference underlines that employees residing in the Czech Republic do not perform any economic activity there. Therefore, pursuant to Title II of Regulation 883/2004, the Commission considers that the Czech Republic can in no case be the competent Member State.

35. The Czech institution informed the Liechtenstein institutions on its determination at least for one of these workers, but not for all of them. It is only in the pending proceedings that the Liechtenstein institutions became aware of the provisional determination of the Czech institution for the others.

Question 1

36. With regard to those EEA workers in respect of which the Czech institution did not inform the Liechtenstein institutions on its determination, the referring judge wishes to know whether the provisional determination may also become definitive in the absence of a challenge of the Liechtenstein institutions. The referring judge indicates that the Liechtenstein institutions became aware of the existence of the provisional determination during the pending proceedings.

37. The provisions of Article 16 of Regulation 987/2009 organise specifically the cooperation among institutions of EEA States, which is the determination of the legislation applicable to a worker in a situation falling under Article 13. The procedure takes place between the institutions of the two EEA States concerned, as can be seen from the clear wording of Article 16(2) to (5), but does not involve the undertaking or employer concerned[9].

38. Once the institution of the place of residence of the EEA worker has determined the legislation applicable to that worker on a provisional basis, Article 16 (2) clearly imposes on that institution the obligation to *"inform the designated institutions of each Member State in which an activity is pursued of its provisional determination."*

39. The wording of Article 16(2) of Regulation 987/2009 refers only and exclusively to a transmission of information from one institution to another. Hence, any alternative way of obtaining this information by other means of the institution where the person

9 See also recital 1 of Decision No A1 [of the Administrative Commission] of 12 June 2009 concerning the establishment of a dialogue and conciliation procedure concerning the validity of documents, the determination of the applicable legislation and the provision of benefits […], referred to in Points 3.A1 of Annex VI to the EEA Agreement.

pursues the activity cannot be acknowledged as being equivalent to the mandatory information to be carried out by the EEA State issuing the provision determination.

40. Consequently, any provisional determination not transmitted in compliance with Article 16(2) of Regulation 987/2009 fails to trigger the effects foreseen in paragraph 3. Indeed, Article 16(3) links the consequences of rendering the provisional determination definitive in the absence of objection explicitly to the information being transmitted *" in accordance with paragraph 2".* In other words, the second EEA State to whom the competence is allocated under the provisional determination is not obliged to react within two months as long as it is not informed as foreseen under Article 16(2).

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

Questions 2 and 3

42. The other two questions concern the provisional determination of the one single Czech employer in respect of which the Liechtenstein institutions have received information from the Czech institution but failed to state within two months that they cannot yet accept the determination as set out in Article 16(3) of Regulation 987/2009. The referring judge wishes to know whether such failure on the part of the Liechtenstein institutions excludes the possibility for them to further challeng the determination. The referring judge wishes also to know what are the legal consequences of such challenge.

43. For this case alone, the Commission assumes that the provisional determination of the Czech institution was deemed definitive in the absence of objection. However, the fact that this provisional determination was regarded as definitive does not

change the conclusion, already put forward by the Commission before, that neither Liechtenstein nor the Czech Republic appear to be the competent EEA State.

44. The Court of Justice has already held that, since the conflict rules laid down in Title II of Regulation 883/2004 are mandatory for the Member States, their application depends solely on the objective situation of the EEA worker concerned and excludes discretionary choices of persons concerned or of the competent authorities of the EEA States[10].

45. This system necessarily implies that an institution of an EEA State can at any moment challenge a determination made by the institution of another EEA State, be it provisional or definitive, if it believes that the determination is objectively unfounded. If the designated institution were barred from challenging such determinations, it would be possible for the institution of the other EEA State, which issued the determination, to impose a discretionary choice on the designated institution unrelated to the objective situation at stake.

46. The wording of Article 16 of Regulation 987/2009 confirms this result. While its paragraphs 2 and 3 are concerned with setting out the rules on when a provisional determination is to be issued and under which conditions it becomes definitive, its paragraph 4 does not set any time-frame for the Liechtenstein institutions to undertake the procedure provided therein to find the applicable legislation for the concerned worker with the Czech institution. Article 16(4) thus can only mean that even in the presence of a definitive determination it remains possible to establish differently the legislation applicable to the employee concerned.

47. In the case at hand, as the referring judge rightly points out, it would be surprising that Liechtenstein legislation should be applicable to an employee that does neither reside nor pursue any activity in Liechtenstein.

48. The purpose of the rules provided in Title II of Regulation 883/2004, namely to find the applicable legislation according to the objective situation of the EEA worker concerned, implies also that a provisional determination, once it has become definitive, may be overthrown as of the moment when the underlying situation so

[10] See, to that effect, judgment of the Court of Justice of 4 June 2015, *Fischer-Lintjens*, C-543/13, point 40.

requires. While it is true that once a determination becomes definitive, the designated institution of the EEA State remains competent until that determination is changed, that does not exclude that the change may lead to a retroactive setting aside of the determination if the objective situation at stake so requires.

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

V. CONCLUSION

50. For the reasons discussed above, the Commission considers that the questions from the Princely Court of Appeal should be answered in the following sense:

I. Article 13(1)(b)(i) of Regulation 883/2004 in conjunction with Article 14(5a) of Regulation 987/2009 must be interpreted as meaning that the seat (statutarischer Sitz or satzungsmässiger Sitz) of a company does not suffice to be regarded as registered office or place of business where the essential decisions of the undertaking are adopted and where the functions of its central administration are carried out. With a view to establishing where registered office or place of business of an entity is, account may be taken of the criteria laid down in the Practical Guide.

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

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

Denis MARTIN Bernd-Roland KILLMANN

Agents of the Commission