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ORIGINAL

IN THE EFTA COURT

WRITTEN OBSERVATIONS

submitted, pursuant to Article 20 of the Statute of the EFTA Court, by

THE EFTA SURVEILLANCE AUTHORITY

represented by
Ewa Gromnicka, Romina Schobel, Catherine Howdle, and
Michael Sanchez Rydelski,
Department of Legal & Executive Affairs,
acting as Agents,

IN CASE E-1/21

ISTM International Shipping & Trucking Management

v

Liechtenstein Old-Age and Survivors' Insurance (Liechtensteinische Alters- und Hinterlassenenversicherung (AHV))
Liechtenstein Invalidity Insurance (Liechtensteinische Invalidernversicherung (IV))
Liechtenstein Family Allowances Office (Liechtensteinische Familienaussgeleichkasse (FAK))

in which the Princely Court of Appeal (*Fürstliches Obergericht*) requests the EFTA Court to give an Advisory Opinion pursuant to Article 34 of the Surveillance and Court Agreement concerning the interpretation and application of Regulation No 883/2004 of European Parliament and of the Council of 29 April 2004 on the coordination of social security systems and Regulation No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation No 883/2004.

Table of Contents

1 THE FACTS OF THE CASE

1. ISTM International Shipping & Trucking Management ("**ISTM**") is a ship management company, *inter alia* managing inland waterway transport on the River Rhine. ISTM is a limited liability company under Liechtenstein law, registered in the Liechtenstein commercial register with a seat in Liechtenstein since 2016.[1]

2. The present case concerns questions on subordination to social security law of ISTM employees (resident in Germany, the Netherlands and the Czech Republic), who are employed full time and carry out their activities only for the applicant on navigable waters usually in two or more EEA 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 also pursue an activity in their respective state of residence; however, not a substantial part of their activity and in no case more than 25%.[2]

3. ISTM at its establishment considered itself and its employees subordinated to the social security legislation of Liechtenstein.

4. However, the competent institutions for social security in Liechtenstein – the Liechtenstein Old-Age and Survivors' Insurance (*Liechtensteinische Alters- und Hinterlassenenversicherung* (AHV)), Liechtenstein Invalidity Insurance (*Liechtensteinische Invalidernversicherung* (IV)) and the Liechtenstein Family Allowances Office (*Liechtensteinische Familienaussgeleichkasse* (FAK))("**the Liechtenstein Institutions**") – issued an order determining that Liechtenstein social security legislation is not applicable to the employees of ISTM.[3] The Liechtenstein Institutions concluded that ISTM has registered its seat in Liechtenstein. However, as it had no premises or staff in Liechtenstein and its central administration was outsourced to other Liechtenstein companies, it did not carry out the essential decisions and functions of its business operations at its seat in Liechtenstein.[4]

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[1] FL-0002.514.774-6.
[2] Request for Advisory Opinion, page 5.
[3] Order of the AHV/IV/FAK of 17 February 2017 (No. 805.622).
[4] Request for Advisory Opinion, page 5.

5. ISTM appealed the decision of the Liechtenstein Institutions, arguing that a registered office suffices to apply Liechtenstein social security law according to Article 13(1)(b)(i) of the Basic Regulation, and that in addition the essential decisions and measures were indeed taken at the registered office in Liechtenstein. ISTM also indicated that the German *GKV Spitzenverband* and the Czech Social Security Authority had provisionally determined, by way of the procedure under Article 16 of Regulation (EC) 987/2009, that only the legal provisions of the Principality of Liechtenstein would apply to ISTM employees, because its registered office was in Liechtenstein.[5]

6. The Liechtenstein Institutions did not object to these provisional determinations within two months to the relevant national institutions that made these determinations.

7. From the facts of the case it seems that the Liechtenstein Institutions have been informed of the provisional determinations by the social security authorities in other countries in case of some employees, while in other cases the provisional determination has been issued by social security authorities in other states and addressed to ISTM, who then forwarded them to the Liechtenstein Institutions.

8. The questions referred by the national court concern the issue of how to establish the legislation applicable to ISTM employees in line with Regulation No 883/2004 and Regulation No 987/2009, in a situation such as that in the present case.

2 EEA LAW

9. Regulation No 883/2004 *of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems* ("**the Basic Regulation**") and its Implementing 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* ("**the Implementing Regulation**"), are referred to at points 1 and 2 of Annex VI to the EEA Agreement respectively. The Basic

[5] Entscheidung GE 2019,94, Urteil des Staatsgerichtshof des Fürstentums Liechtenstein vom 4. Dezember 2018, StGH 2018/116 (hereinafter "Judgment of the Constitutional Court of the Principality of Liechtenstein (Liechtensteinischer Staatsgerichtshof), Case StGH 2018/16").

Regulation and the Implementing Regulation were incorporated into EEA Agreement by Decision of the EEA Joint Committee No 76/2011 of 1 July 2011. Joint Committee Decision No 76/2011 entered into force on 1 June 2012 and both regulations became applicable in Liechtenstein on the same day.

2.1 Regulation No 883/2004: the Basic Regulation

10. Title II of the Basic Regulation is entitled "Determination of the Legislation Applicable". Article 11, the first article within Title II, is entitled "General rules" and reads as follows:

> *"1. Persons to whom this Regulation applies shall be subject to the legislation of a single EEA 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 EEA State shall be subject to the legislation of that EEA State;*
>
> *[…]*
>
> *(e) any other person to whom subparagraphs (a) to (d) do not apply shall be subject to the legislation of the EEA State of residence, without prejudice to other provisions of this Regulation guaranteeing him benefits under the legislation of one or more other EEA States.*
>
> *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 EEA State shall be deemed to be an activity pursued in the said EEA State. However, a person employed on board a vessel flying the flag of a EEA State and remunerated for such activity by an undertaking or a person whose registered office or place of business is in another EEA State shall be subject to the legislation of the latter EEA State if he resides in that State. The undertaking or person paying the remuneration shall be considered as the employer for the purposes of the said legislation."*

11. Article 13 is entitled "Pursuit of activities in two or more EEA States" and reads as follows:

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

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

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

(i) to the legislation of the EEA 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; […]

[…]

3. A person who normally pursues an activity as an employed person and an activity as a self-employed person in different EEA States shall be subject to the legislation of the EEA State in which he/she pursues an activity as an employed person or, if he/she pursues such an activity in two or more EEA States, to the legislation determined in accordance with paragraph 1.

[…]

5. Persons referred to in paragraphs 1 to 4 shall be treated, for the purposes of the legislation determined in accordance with these provisions, as though they were pursuing all their activities as employed or self-employed persons and were receiving all their income in the EEA State concerned."

2.2 Regulation No 987/2009: the Implementing Regulation

12. Article 14 of the Implementing Regulation is entitled "Details relating to Articles 12 and 13 of the basic Regulation". Its relevant provisions read as follows:

"[…]

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.

5b. Marginal activities shall be disregarded for the purposes of determining the applicable legislation under Article 13 of the basic Regulation. Article 16 of the implementing Regulation shall apply to all cases under this Article."

13. Article 16 is entitled "Procedure for the application of Article 13 of the basic Regulation", and reads as follows:

"1. A person who pursues activities in two or more EEA States shall inform the institution designated by the competent authority of the EEA 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 EEA 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 EEA 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 EEA 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 EEA States, at the request of one or more of the institutions designated by the competent authorities of the EEA 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 EEA State whose legislation is determined to be applicable either provisionally or definitively shall without delay inform the person concerned.

6. If the person concerned fails to provide the information referred to in paragraph 1, this Article shall be applied at the initiative of the institution designated by the competent authority of the EEA State of residence as soon as it is appraised of that person's situation, possibly via another institution concerned."

3 NATIONAL LAW

14. A limited liability company under Liechtenstein law is subject to the Persons and Companies Act of 20 January 1926.[6] In line with Article 106 of the Act, a limited liability company is considered a legal person from the moment of its incorporation. Under Article 239, the company is required to appoint a registered agent in Liechtenstein or, at least, an address for service in Liechtenstein. Articles 389 to 427 deal with the way a limited liability company is to be organised. According to Articles 390(2)(5) and (7), its articles of association must foresee a seat and set out the rules on its management.

15. The competent institutions for social security in Liechtenstein are: the AHV, regulated by the Old-Age and Survivors' Insurance Act;[7] the IV, regulated by the Invalidity Insurance Act,[8] and the FAK, regulated by the Family Allowances Act.[9]

16. Orders made by AHV, IV and FAK may be challenged by lodging an appeal with the relevant institution, in response to which the institution itself gives a decision on the appeal. This decision can be challenged by an appeal to the Princely Court of Appeal.

17. As put by the referring Court, EEA Regulations on social security coordination, as incorporated into the EEA Agreement, are part of the Liechtenstein legal order and prevail over differently worded national provisions. ESA notes that by an additional agreement of 7 August 2018[10] the Principality of Liechtenstein acceded to the Agreement on the determination of applicable legislation for Rhine shipping pursuant to Article 16(1) of Regulation 883/2004.[11] In line with this agreement, the employees on the ships must be insured in the State in which the undertaking/company which operates the vessel in question has its registered office (*Sitz*). This agreement falls within the scope of Article 16 of the

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[6] *Personen- und Gesellschaftsrecht (PGR) vom 20. Januar 1926*, Liechtenstein Law Gazette 1926 No. 4.
[7] *Gesetz vom 14. Dezember 1952 über die Alters- und Hinterlassenenversicherung* (AHVG), Liechtenstein Law Gazette 1952 No. 29.
[8] *Gesetz vom 23. Dezember 1959 über die Invalidenversicherung* (IVG), Liechtenstein Law Gazette 1960 No. 5.
[9] *Gesetz vom 18. Dezember 1985 über die Familienzulagen (Familienzulagengesetz;* FZG), Liechtenstein Law Gazette 1986 No. 28.
[10] *Vereinbarung über die Bestimmung der anzuwendenden Rechtsvorschriften für Rheinschiffer gemäss Art. 16 Abs. 1 der Verordnung (EG) Nr. 883/2004,* Liechtenstein Law Gazette 2018 No. 205.
[11] Done at Strasbourg on 23 December 2010.

Basic Regulation, as one providing for exceptions in the interest of certain persons or categories of persons.

18. However, as noted by the referring court, as result of that accession, the legal framework was altered only from 1 September 2018[12] and is consequently not applicable to the facts of the present case, which concern the period from 4 February 2016 to 17 February 2017.

4 THE QUESTIONS REFERRED

19. The referring Court grouped its questions into two parts. Part I concerned the registered office of an undertaking:

> *"I(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 EEA State in which the registered office (statutarischer Sitz or satzungsmässiger Sitz) is situated?*
>
> *If Question 1 is answered in the negative:*
>
> *I(2). According to which criteria must the registered office (statutarischer Sitz or satzungsmässiger Sitz) or place of business where the essential decisions of the undertaking are adopted and where the functions of its central administration are carried out, as provided for in Article 14(5a) of Regulation (EC) No 987/2009, be determined? For these purposes, must reference be had to the interpretation reached by the Administrative Commission for the Coordination of Social Security Systems, as set out in Part II, Section 7 (page [35] et seq.) of the Practical guide on the applicable legislation in the European Union (EU), in the European Economic Area (EEA) and in Switzerland of December 2013?"*

20. Part II sets out a series of questions on the interpretation of Article 16(3) of the Implementing Regulation:

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[12] Compare the Judgment of the Constitutional Court of the Principality of Liechtenstein (*Liechtensteinischer Staatsgerichtshof*), Case StGH 2018/16, paragraphs 1.4, 1.7 and 3.2.

"II(1). From what time is the institution of the EEA 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)?

II(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 EEA State and, in particular, even where the person concerned does not pursue any activity in this EEA State?

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?"

5 LEGAL ANALYSIS

5.1 Introductory remarks

21. One of the main principles of the Basic Regulation, expressed in Article 11, is that any person to whom this Regulation applies is subject to the legislation of a single EEA State only.[13] Recital 15 of the Basic Regulation provides that *"[…] it is necessary to subject persons moving within the Community to the social security scheme of only one single EEA State in order to avoid overlapping of the applicable provisions of national legislation and the complications which could result therefrom."*

22. The Court of Justice of the European Union ("**CJEU**") confirmed that this principle aims to avoid the complications which may arise from the simultaneous application of several national laws, and to eliminate unequal treatment which, for employed and self-employed workers moving within the Union, is the consequence of partial or total overlapping of the applicable legislation.[14]

23. Furthermore, Recital 17 reads that "*with a view to guaranteeing the equality of treatment of all persons occupied in the territory of a EEA State as effectively as possible, it is appropriate to determine as the legislation applicable, as a general*

[13] See, by analogy, Joined Cases C-611/10 and C-612/10 *Hudzinski and Wawrzyniak,* EU:C:2012:339, paragraph 41, and Case C-114/13 *Bouman*, EU:C:2015:81, paragraph 33.
[14] See, to that effect, Case C-493/04 *Piatkowski*, EU:C:2006:167, paragraph 21 and Case C-89/16 *Szoja*, EU:C:2017:538, paragraph 35.

rule, that of the EEA State in which the person concerned pursues his activity as an employed or self-employed person." Recital 18 allows for derogations from the general rule in specific situations which justify other criteria of applicability. By clarifying and safeguarding social security entitlements of persons moving between EEA States, the Basic Regulation grants them a real choice to live or work in another country.

24. With regard to the objectives pursued by the Basic Regulation, ESA notes from a long line of case law that the Basic Regulation does not set up a common scheme of social security, but it allows different national social security schemes to coexist.[15] Recital 4 of the Basic Regulation expressly underlines that *"it is necessary to respect the special characteristics of national social security legislation and to draw up only a system of coordination"*.

25. By laying down a series of common principles which all the EEA States must observe, together with the system of conflict of law rules established therein, the Basic Regulation ensures that persons exercising their right to free movement in the EEA will not be adversely affected by the variances between national systems because they have exercised that right.[16]

26. In accordance with the settled case law, the substantive rules determining the legislation applicable are contained in Title II of the Basic Regulation. These provisions constitute a complete and uniform system of conflict rules which are intended not only to prevent the simultaneous application of a number of national legislative systems and the complications which might ensue, but also to ensure that the persons covered by that regulation are not left without social security cover because there is no legislation which is applicable to them.[17]

27. Articles 11 to 16 of the Basic Regulation form a system of mandatory conflict of law rules. Therefore, insured persons falling within the scope of those rules

[15] Case C-308/14 *Commission v United Kingdom*, EU:C:2016:436, paragraph 67, Case C-551/16 *Klein Schiphorst*, EU:C:2018:200, paragraph 44.
[16] Opinion of Advocate General Cruz Villalón in Case C-308/14 *Commission v United Kingdom*, EU:C:2016:436, paragraph 49.
[17] Case C-308/14 *Commission v United Kingdom*, EU:C:2016:436, paragraph 64, and Case C-451/17 *Walltopia*, EU:C:2018:861, paragraph 41 and the case-law cited; see also Case C-551/16 *Klein Schiphorst*, EU:C:2018:200, paragraph 31.

cannot choose the legislation they will be subject to, unless such freedom of choice is expressly provided for by the Regulation.[18]

28. The underlying premise of the Basic Regulation, i.e. that it sets up a complete and binding system of coordination of social security systems, has also been reiterated by the Court in its case law.[19]

29. Where a person falls within the scope *ratione personae* of the Basic Regulation, as defined in Article 2, the rule in Article 11(1) of that regulation that the legislation of a single EEA State is to apply is, in principle, appropriate. The national legislation applicable is determined in accordance with the provisions of Title II of that regulation.[20]

5.2 Registered office of an undertaking

30. By its first set of questions the referring Court is essentially asking the Court to clarify which body of social security legislation is applicable under the Basic Regulation to a situation such as that of the persons concerned in the main proceedings who are resident in their EEA States of origin, are employed by ISTM which is registered in Liechtenstein, and who work on board of vessels navigating the Rhine.

31. More specifically the referring Court seeks clarification as to whether the registered office (*statutarischer Sitz* or *satzungsmassiger Sitz*) of an undertaking can be regarded as the registered office (*Sitz*) within the meaning of Article 13(1)(b)(i) of the Basic Regulation, in conjunction with Article 14(5a) of the Implementing Regulation.

32. ESA notes that the referring Court and the Basic and Implementing Regulations use the term “registered office” in two modes, referring to the registered office as a statutory seat (*statutarischer Sitz* or *satzungsmässiger Sitz*) and registered office (*Sitz*). Further on in ESA’s submissions, the term “registered office” is used in the meaning of “statutory seat”, if not indicated otherwise.

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[18] See, to that effect, Case C-345/09, *Van Delft*, ECLI:EU:C:2010:610, paragraphs 51-52.
[19] See, to that effect, Case E-2/18 *C v Concordia Schweizerische Kranken- und Unfallversicherung AG, Landesvertretung Liechtenstein*, paragraph 47.
[20] See, to that effect, Case C-266/13 *Kik*, EU:C:2015:188, paragraph 47 and the case-law cited, and Case C-451/17 *Walltopia*, EU:C:2018:861, paragraph 42 and the case-law cited.

33. Article 13(1)(b)(i) of the Basic Regulation provides that a person who normally pursues an activity as an employed person in two or more EEA States, but does not pursue a substantial part of their activity in the EEA State of residence, is to be subject to the legislation of the EEA State in which the registered office (*Sitz*) or place of business of the undertaking or employer is situated if they are employed by one undertaking or employer. In line with Article 13(5) of the Basic Regulation such persons are to be treated, for the purposes of the legislation determined in accordance with these provisions, as though they were pursuing all their activities as employed or self-employed persons and were receiving all their income in the EEA State concerned.

34. Article 14(5a) of the Implementing Regulation establishes that 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.

35. First, ESA underlines that the CJEU has already indicated, in a case concerning different provisions of Article 13 of the Basic Regulation – namely Article 13(3), that in order to determine the national legislation applicable under that provision to a person, the requirements laid down in Article 14(5b) and Article 16 of the Implementing Regulation must be taken into account.[21] In ESA's view any other interpretation of Article 13(1)(b)(i) of the Basic Regulation and Article 14(5a) of the Implementing Regulation would be contrary to the context in which they occur and the purposes of the rules of which they form part.

36. The Request for Advisory Opinion, in its statement of the facts, notes that ISTM argued that only the registered office is sufficient for the application of the conflict of law rules contained in the Regulations. The core of the issue is the disagreement between the Liechtenstein Institutions, which claim that ISTM did not carry out the essential decisions and functions of its business operations at its registered office in Liechtenstein; and ISTM, which claims that the registered office would already be sufficient and, in addition, that the essential decisions and measures were taken at the registered office in Liechtenstein.[22]

[21] Case C 89/16 *Szoja*, cited above, paragraph 44.
[22] Request for Advisory Opinion, page 9.

37. The referring Court is therefore essentially asking whether the conditions of *"where the essential decisions of the undertaking are adopted and where the functions of its central administration are carried out"* apply only to place of business or also to the registered office. The national court recalls that ISTM is of the opinion that these conditions are not applicable in cases where a company has a registered office in Liechtenstein.

38. There are no differences between the different language versions of the relevant provisions of the Regulations, and indeed nothing that would support such an interpretation. A literal interpretation of these provision in all the languages is the same. ESA therefore submits that the conditions of *"where the essential decisions of the undertaking are adopted and where the functions of its central administration are carried out"* are applicable both in the case of a registered office and place of business. Any other reading of these provisions would be contrary to the overall purposes of social security coordination.

39. .According to settled case-law, the need for a uniform application of EEA law and the principle of equality require that the terms of a provision of EEA Law such as Article 13(1)(b)(i) of the Basic Regulation and Article 14(5a) of the Implementing Regulation, which makes no express reference to the law of the EEA States for the purpose of determining its meaning and scope, must normally be given an independent and uniform interpretation throughout the EEA, so as to avoid divergent interpretations by the EEA States.[23]

40. It is not open to national courts, when assessing the exercise of a right arising from EEA law, "*to alter the scope of that provision or to compromise the objectives pursued by it*".[24]

41. The CJEU held also that it must be borne in mind that the meaning and scope of terms for which EEA law provides no definition must be determined by considering, *inter alia*, the context in which they occur and the purposes of the rules of which they form part.[25]

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[23] See Case E-18/11 *Irish Bank* [2012] EFTA Ct. Rep. 592, paragraph 89, Case E-1/20 *Kerim*, paragraph 46, C-287/98 *Linster*, paragraph 43, and Joined Cases C-424/10 and C-425/10 *Ziolkowski and Szeja*, EU:C:2011:866, paragraph 32.
[24] Opinion of Advocate General Szpunar in Case C-202/13 *McCarthy*, EU:C:2014:345, para 114.
[25] See, *inter alia*, Case C-336/03 *easyCar*, EU:C 2005:150, paragraph 21; Case C-549/07 *Wallentin-Hermann*, EU:C:2008:771, paragraph 17; Case C-151/09 *UGT-FSP*, EU:C:2010:452, paragraph 39 and Case C-34/10 *Brüstle*, EU:C:2011:669, paragraph 25.

42. ESA also notes, as a matter of principle, that in line with the CJEU case law the application of the system of conflict of law rules established by Title II of the Basic Regulation depends solely on the objective situation of the worker concerned.[26]

43. ESA therefore submits that it is for the national court, that has to carry out the assessment of the facts, to establish where the essential decisions of the undertaking are adopted, and the functions of its central administration are carried out.

44. Having established that, for the determination of the registered office (*Sitz*) within the meaning of Article 13 of the Basic Regulation in conjunction with Article 14(5a) of the Implementing Regulation, it is decisive where the essential decisions of the undertaking are adopted and where the functions of its central administration are carried out, the Court further asks how the place of essential decision making and the place where the functions of the central administration are carried out is to be determined.

45. The Basic Regulation established an Administrative Commission composed of government representatives and experts. Among its tasks, in line with Articles 72(a) and (b) of that regulation, is dealing with all administrative questions and questions of interpretation arising from the provisions of the Basic Regulation and the Implementing Regulation. This is without prejudice to the right of the authorities, institutions and persons concerned to have recourse to the procedures and tribunals provided for by the legislation of the EEA States, by that regulation or by the EEA Agreement. The Administrative Commission also facilitates the uniform application of EEA law, especially by promoting exchanges of experience and best administrative practices.

46. The Administrative Commission has prepared and agreed "*The Practical guide on the applicable legislation in the EU, in the EEA and in Switzerland*", which was published in December 2013 ("the Practical Guide").[27]

[26] See, to that effect Case C-543/13 *Fischer-Lintjens*, ECLI:EU:C:2015:359, paragraph 38 and the case law cited, and Case C-610/18 *AFMB*, ECLI:EU:C:2020:565, paragraphs 48, 60 and 61.
[27] Accessible at: https://ec.europa.eu/social/BlobServlet?docId=11366&langId=en.

47. This Practical Guide is intended to provide a working instrument to assist institutions, employers and citizens when determining which EEA States legislation applies. The Practical Guide is to an extent derived from the extensive case law of the CJEU and by other EEA regulations as evidenced by references in the text.[28]

48. However, as the referring Court rightly points out, this document is not legally binding. Both the judgments of the CJEU and the opinions of its Advocates General have highlighted that the Practical Guide is a useful tool for interpreting the Basic Regulation.[29] On some occasions the Practical Guide is expressly used by the CJEU for interpretation.[30] Nonetheless, at the same time the CJEU stated on number of occasions that the Practical Guide cannot bind the Court in the interpretation of the Basic Regulation since it is not legally enforceable.[31]

49. Keeping in mind the need for a uniform application of EEA law and the principle of equality as mentioned in paragraph 39 of these observations, the Practical Guide therefore can and should be taken into due account when interpreting Article 13 of the Basic Regulation and Article 14(5a) of the Implementing Regulation as long as it clearly confirms the literal interpretation of the relevant articles of both Regulations and shows a common understanding of the interpretation of the respective provisions.

50. In that context ESA only notes that in any case the criteria included in the Practical Guide seem to reflect both the spirit of the Regulations and the case law of the CJEU. It bears recalling in this context that in line with the principle of homogeneity the provisions of the EEA Agreement, in so far as they are identical in substance to corresponding rules of EU law, are to be interpreted in conformity with the relevant rulings of the CJEU.[32]

51. ESA therefore submits that there is nothing in the Practical Guide that could support the view that the registered office suffices for the application of Article 13(1)(b)(i) in conjunction with Article 14(5a). Therefore, the conditions of *"where*

[28] Practical Guide, page 35.
[29] Case C-631/17 *SF v Inspecteur van de Belastingdienst*, EU:C:2019:381, paragraph 41.
[30] Case C-33/18 *Institut National D'Assurances Sociales Pour Travailleurs Independantes (Inasti),* EU:C:2019:470, paragraph 46.
[31] Case C-631/17 *SF v Inspecteur van de Belastingdienst*, EU:C:2019:381, paragraph 41.
[32] Case E-2/06 *EFTA Surveillance Authority v Norway* [2007] EFTA Court Reports 164, paragraph 59.

the essential decisions of the undertaking are adopted and where the functions of its central administration are carried out" are applicable both in the case of a registered office and place of business. Any other reading of these provisions would be contrary to the overall purposes of social security coordination.

5.3 Provisional and definitive determination of the applicable legislation

52. By its second set of questions the referring Court is essentially asking the Court to clarify what the effects of provisional and definitive determination of the applicable legislation under Article 16 of the Implementing Regulation are.

53. From the Request for Advisory Opinion it appears that in at least one case, relating to at least one employee, the Liechtenstein Institutions were informed by the social security institutions of the place of residence of provisional determination about the applicable legislation. This entity concluded that the Liechtenstein legislation must be applied.

54. According to the Request for Advisory Opinion the Liechtenstein Institutions raised objections only more than two months after they had received the provisional determination. It is not clear from the facts of the case how these objections were raised. The referring Court states that the Liechtenstein Institutions determined by an order that Liechtenstein social security law was not applicable to ISTM and its employees registered in 2016. It is not at all clear whether this has been at all communicated to the employees concerned, as the pending case seems to involve only the Liechtenstein Institutions and ISTM. The Request for Advisory Opinion also remains silent on whether the orders or determinations of the Liechtenstein Institutions have been at all communicated to the institutions of the place of residence who made the provisional determination, despite missing the two-month deadline.

55. It is apparent that ISTM in the course of the proceedings also presented the Liechtenstein Institutions with further provisional determinations by the social security institutions of the place of residence. It is not clear what was their form, whether these documents constituted an actual provisional determination and finally if they were addressed to the Liechtenstein Institutions or to ISTM.

56. In this context the referring Court is essentially asking when the institution can be regarded as having been informed of the provisional determination by the institution of the place of residence. More specifically the referring Court is seeking to understand the significance of the fact that the information has been conveyed in whatever form by an employee or an undertaking

57. Additionally, the referring Court is asking whether "*definitive determination*" under Article 16(3) of the Implementing Regulation can be challenged by the designated institution and if so, under what circumstances. The referring Court also wishes to know if, in the case of a challenge, the results would have retroactive effect or apply only for the future.[33]

58. At the outset, ESA notes that the Basic and Implementing Regulations posit closer and more effective cooperation between social security institutions as a key factor in allowing persons covered by the Basic Regulation to access their rights as quickly as possible and under optimum conditions.[34]

59. In order to protect the beneficiaries and ensure effectiveness, the Implementing Regulation strengthens certain procedures to ensure greater legal certainty and transparency: *"For example, setting common deadlines for fulfilling certain obligations or completing certain administrative tasks should assist in clarifying and structuring relations between insured persons and institutions."*[35]

60. Specifically, EEA States have to cooperate in determining the place of residence of persons to whom the Basic and Implementing Regulations apply and, in the event of a dispute should take into consideration all relevant criteria to resolve the matter.[36]

61. Both the Basic and Implementing Regulation are founded on the principle of sincere cooperation between the institutions. The Basic Regulation devises a system of coordination between the institutions acting in accordance with the principle of good administration, with a duty of direct communication

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[33] The Referring Court refers here to one academic study suggesting that challenge of the definitive determination would only apply for the future citing Poltl, in Spiegel,B (ed.), *"Zwischenstaatiches Soziaiversicherungsrecht".*

[34] Recital 2 of the Implementing Regulation *"Closer and more effective cooperation between social security institutions is a key factor in allowing the persons covered by Regulation (EC) No 883/2004 to access their rights as quickly as possible and under optimum conditions"*.

[35] Recital 6 of the Implementing Regulation.

[36] Recital 11 of the Implementing Regulation.

62. Article 2 of the Implementing Regulation provides that for the purposes of the Implementing Regulation, exchanges between EEA States' authorities and institutions and persons covered by the Basic Regulation "*shall be based on the principles of public service, efficiency, active assistance, rapid delivery and accessibility […].*"

63. Article 2(2) of the Implementing Regulation places the institutions under obligations to provide or exchange without delay all data necessary for establishing and determining the rights and obligations of persons to whom the Basic Regulation applies. Such data is to be transferred between EEA States directly by the institutions themselves or indirectly via the liaison bodies.

64. Article 76 of the Basic Regulation establishes additional rules on mutual information and cooperation between the competent authorities of the EEA States to ensure the correct implementation of the Regulation. In accordance with its provisions the competent authorities and institutions are to lend one another their good offices, they may communicate directly with one another and with the persons involved or their representatives.

65. In the event of difficulties in the interpretation or application of the Basic Regulation which could jeopardise the rights of the persons covered by it, Article 76 of the Basic Regulation obliges the relevant institutions to contact the institutions of the EEA State concerned and if a solution cannot be found within a reasonable period, the authorities and institutions may call on the Administrative Commission to intervene.

66. Similarly, in line with the general obligations expressed in Article 76 of the Basic Regulation, the Implementing Regulation in Article 16 provides for a procedure to be followed where there is a difference of views between the institutions or authorities concerning application of Article 13 of the Basic Regulation, including the possibility to refer the matter to the Administrative Commission in the event that no agreement can be reached.

67. EEA States are obliged to follow the system and the procedures for cooperation between the social security institutions, especially when determining the applicable legislation. This determination procedure typically starts with the obligation of the person pursuing activities in two or more EEA States to inform

the institution in his/her EEA State of residence of the fact that he/she is pursuing activities in two or more EEA States.[37] However, as is evident from Articles 16(2)-(4) of the Implementing Regulation, the procedure of determination of the applicable legislation takes place between the competent institutions of the concerned EEA States only.

68. The institution of the place of residence determines on a provisional basis the legislation applicable to the person concerned. It is then under an obligation to inform the designated institutions of each EEA State in which an activity is pursued. A verbatim/ literal reading of this provision leads to the conclusion that the process of determining the applicable law engages only the relevant institutions.

69. This conclusion cannot be changed even in view of Articles 16(5) and (6) of the Implementing Regulation. Article 16(5) culminates the determination procedure in informing the person concerned by the competent institution of the EEA State whose legislation was determined to be applicable provisionally or definitively. Article 16(6) provides for a situation where a person concerned does not provide information to the institution of the place of residence and therefore fails to "trigger" the procedure. While this paragraph indicates that the institution of the EEA State of residence can be apprised of the person's situation, possibly *via* another institution concerned, this does not change the fact that Article 16 is to be applied at the initiative of the institution of the EEA State of residence and any further contacts will be between the relevant institutions.

70. Article 16(3) of the Implementing Regulation sets out that the provisional determination is to become definitive within two months of the institutions designated therein being informed of it, in accordance with paragraph 2. The wording "*being informed of it, in accordance with paragraph 2*" clearly indicates that only the official contacts between the institutions can produce the effects foreseen in paragraph 3, i.e. changing a provisional determination into a definitive one.

71. ESA therefore submits that Article 16(3) of the Basic Regulation must be interpreted as meaning that the provisional determination of the applicable

[37] Article 16(1) of the Implementing Regulation.

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.

72. According to the request for an advisory opinion, in at least one case, relating to at least one employee, the Liechtenstein Institutions were informed by the social security institutions of the place of residence of the provisional determination. Only more than two months after they had received the provisional determination the Liechtenstein Institutions raised objections to it, although it is not clear if they did so directly to the institutions of the place of residence or in form of a decision directed to the persons concerned.

73. The question arises as whether such a “definitive determination” resulting from the relevant national authority not complying with the deadlines set out in the Regulations can be challenged by the designated institution after the prescribed two months and, if so, in what form.

74. Neither the Basic Regulation nor the Implementing Regulation foresee explicit provisions dealing with the question of challenging the definitive determinisation of the legislation applicable. Potentially, the literal reading of the provision could lend support to a conclusion that if the provisional determination has not been challenged within two months it becomes definitive, with no possibility to alter or amend it. On one hand, such an interpretation can contribute to legal certainty of the situation of the persons concerned; on the other though it can lead to unintended distortions and discrepancies through mere action or inaction of the institutions without the possibility of correcting the situation.

75. According to settled case-law of the CJEU, the purpose of the provisions of those Regulations, which determine the applicable legislation, is not only to prevent the concurrent application of a number of national legislative systems and the complications which might ensue, but also to ensure that persons covered by the regulation are not left without social security cover because there

is no legislation which is applicable to them or because of the discretionary choices of individuals or of the competent authorities of the EEA State.[38]

76. Any other reading would undermine the principle that workers are to be covered by only one social security system, would make it difficult to know which system is applicable and consequently would impair legal certainty. In cases in which it is difficult to determine the system applicable, each of the competent institutions of the two EEA States concerned would be inclined to take the view, to the detriment of the workers concerned, that their own social security system was not applicable to the worker.[39]

77. This principle of exclusive applicability (i.e. the law of only one EEA State should be applicable) contributes to legal certainty.[40] At the same time the principle of legal certainty does not preclude the possibility of the relevant institutions to reassess the situation. However, it also follows from the principle of legal certainty that the position of the beneficiary under the social coordination rules should not be open to any sort of challenge indefinitely.[41]

78. As was noted already in paragraph 42 above, in line with the CJEU case law, the application of the system of conflict of law rules established by Title II of the Basic Regulation depends solely on the objective situation of the worker concerned. This implies that when that objective situation changes this change should be reflected in the determination of the applicable law.[42] Any changes which would affect right to benefits under the Basic Regulation, give the concerned institutions the right to assess the situation and take these new facts into account.

79. ESA submits that the same considerations of correctly reflecting the objective situation of the worker after the two-month period provided for in Article 16(3) of

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[38] Case C-543/13 *Fischer-Lintjens*, cited above, paragraph 39 of the Judgment and paragraphs 40 and 41 of the Opinion of Advocate General Mengozzi; Case C-548/11, *Mulders,* EU:C:2013:249, paragraph 39, Case C-275/*96 Kuusijärvi*, paragraph 28; Case C-227/03 *van Pommeren-Bourgondiën*, paragraph 34, and Case C-619/11 *Dumont de Chassart*, ECLI:EU:C:2013:92, paragraph 38.

[39] By analogy, Case C-2/05, *Herbosch Kiere* NV, EU:C:2006:69, paragraph 25, and Case C-620/15 *A–Rosa Flussschiff*, EU:C:2017:309, paragraph 42.

[40] Joined Cases C-611 & 612/10 *Hudzinski and Wawrzyniak*, cited above, paragraph 67.

[41] See, to that effect, Case C-424/12 *Fatorie*, EU:C:2014:50, paragraph 46.

[42] Article 76(4) of the Basic Regulation: The person concerned has to inform the institutions of the competent EEA State and the State of residence thereof.

the Implementing Regulation had passed are applicable in a situation such as in the present proceedings.

80. As long as the definitive determination does not reflect the objective situation of the worker it has to be possible to rectify a situation regardless of whether the situation arose from changes of the objective situation of the worker concerned, from the assessment carried out by the first national institution being not in line with the Regulations or based on a misinterpretation of the facts of the case or the Regulations. Any other interpretation would mean that as soon as the determination becomes definitive after it was agreed by relevant authorities it cannot be reassessed or changed at all and in any circumstances. This is clearly not the case, as also evidenced by cases concerning various aspects of determination of applicable legislation which are challenged before national courts and on occasion referred to the CJEU.[43]

81. In addition, ESA notes that in line with Article 5 of the Basic Regulation, where there is doubt about the validity of a document issued by the institution of an EEA State,[44] showing the position of a person for the purposes of the application of the Basic Regulation and of the Implementing Regulation, or the accuracy of the facts on which the particulars contained therein are based, the institution of the EEA State that receives the document can ask the issuing institution for the necessary clarification and, where appropriate, to withdraw that document or declare it invalid.

82. Paragraphs 2 to 4 of Article 5 of the Implementing Regulation describe the dialogue and conciliation procedure between the institutions concerned that is to be followed by the EEA State with doubts about the validity of those documents or the accuracy of the facts on which the particulars contained therein are based. Those provisions define the content of the general duty of cooperation as laid down in Article 76(6) of the Basic Regulation.

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[43] See for example facts of the Case C-89/16 *Szoja*, EU:C:2017:538, paragraph 18-25.

[44] Article 5 of the Implementing Regulation provides that documents issued by the institution of an EEA State showing the position of a person for the purposes of the application of both Regulations and supporting evidence on the basis of which those documents have been issued, are to be accepted by the institutions of the other EEA States for as long as they have not been withdrawn or declared to be invalid by the Member State in which they were issued. See also Case C-356/15 *European Commission v Belgium*, ECLI:EU:C:2018:555, paragraph 82.

83. In line with the CJEU case law[45] if the competent institution expresses doubts about the validity of a document or the accuracy of the facts on which the particulars contained therein are based, the issuing institution is to reconsider the grounds for issuing the document and, if necessary, withdraw it. [46]

84. ESA therefore submits that it is possible to reassess a determination made by an institution of another EEA State if this determination is objectively unfounded.

85. However, at the same time, ESA also submits that the relevant institutions wanting to reassess the determination cannot do this arbitrarily and are obliged to follow the system and procedures for cooperation between the social security institutions set up by the Basic and Implementing Regulations, which rely on mutual trust and sincere cooperation between the concerned national institutions. This is also reflected in recital 4 of the Decision A1 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 the Basic Regulation.[47]

86. Such sincere cooperation requires that institutions conduct a proper assessment of the facts relevant for the application of the Regulations. Where there is doubt about the validity of a document, or about the correctness of supporting evidence, or where there is a difference of views between EEA States concerning the determination of the applicable legislation or which institution should provide the benefit, it is in the interest of the persons covered by the Basic Regulation that institutions or authorities of the EEA States concerned reach an agreement within a reasonable period of time.

87. Decision A1 lays down the rules for the application of a dialogue and conciliation procedure which can be used in cases where there is a difference of views between EEA States about the determination of the applicable legislation.

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[45] See amongst other: Case C-356/15 *European Commission v Belgium*, concerning validity of A1 certificates; Case C-2/05, *Rijksdienst voor Sociale Zekerheid v Herbosch Kiere NV*, EU:C:2006:69, para 27 and 30 concerning E101 certificate

[46] See amongst other: Case C-356/15 *European Commission v Belgium*, concerning validity of A1 certificates; Case C-2/05, *Rijksdienst voor Sociale Zekerheid v Herbosch Kiere NV*, EU:C:2006:69, para 27 and 30 concerning E101 certificate

[47] Decision No A1 *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 under Regulation (EC) No 883/2004 of the European Parliament and of the Council* (OJ C 106 24.4.2010, p.1).

Should the institutions concerned not reach an agreement, in particular, on how the facts of a specific case are to be assessed, the matter may be referred to the Administrative Commission.[48]

88. With regard to Decision No A1, the CJEU confirmed its settled case-law that such a decision, although capable of providing assistance to social security institutions responsible for applying EEA law in that sphere, cannot require those institutions to follow certain methods or to adopt certain interpretations when they come to apply EEA law.[49]

89. At the same time however, the CJEU acknowledged that while it is possible that the way in which the cooperation and conciliation procedure operates is not always efficient and satisfactory in practice, EEA States should not be able to rely on possible difficulties in obtaining the information required or on possible shortcomings of cooperation between their competent authorities to justify the fact that they have not complied with their obligations under EU law.[50]

90. Taking into account the above, ESA submits that Article 16(4) of the Implementing Regulation must be interpreted as meaning that the institutions of the EEA States may still reassess a provisional determination having become definitive as a result of the two-month period expiring without use being made of it as long as it is in view of reflecting the objective situation of the worker and correct determination of applicable legislation,[51] which is the overarching aim of the Basic and the Implementing Regulation and as long as the procedures established therein are followed.

91. With regard to the question of whether challenging the definitive determination can produce retroactive effect, ESA does not exclude that such a determination may be set aside retroactively in order to correctly reflect the objective situation of the worker and correct determination of applicable legislation.

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[48] Case C-359/16, *Altun and Others*, EU:C:2018:63, paragraph 44 and the case-law cited.
[49] Case C-102/91 *Knoch*, EU:C:1992:303, paragraph 52; Case C-201/91 *Grisvard and Kreitz*, EU:C:1992:368, paragraph 25, and Case C-365/15 *Commission v Belgium*, EU:C:2018:555, paragraph 110-112.
[50] See, to that effect, Case C-383/10 *Commission v Belgium*, EU:C:2013:364, paragraph 53 and the case-law cited, and Case C-356/15 *European Commission v Belgium*, ECLI:EU:C:2018:555, paragraph 107.
[51] While safeguarding the interests of the worker and his/her legitimate expectations.

92. In this context ESA notes that Article 6(4) of the Implementing Regulation provides that where it is established that the applicable legislation is not that of the EEA State of provisional membership, the institution identified as being competent shall be deemed retroactively to have been so, as if that difference of views had not existed, at the latest from either the date of provisional membership or of the first provisional granting of the benefits concerned. Additionally, if necessary, the institution identified as being competent and the institution which provisionally received contributions shall settle the financial situation of the person concerned as regards contributions, where appropriate, in accordance with Title IV, Chapter III, of the Implementing Regulation.

6 CONCLUSION

93. Accordingly, ESA proposes that the Court responds to the Request for an Advisory Opinion as follows:

I. The registered office (*statutarischer Sitz or satzungsmässiger Sitz*) of a company does not suffice to be regarded as registered office (*Sitz*) within the meaning of Article 13(1)(b)(i) of Regulation No 883/2004 in conjunction with Article 14(5a) of Regulation No 987/2009, as the determinative factor is where the essential decisions of the undertaking are adopted and where the functions of its central administration are carried out.

II. 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. In any case the principle of homogeneity requires that the case law of the CJEU as reflected in the Practical Guide is duly taken account of by the national court in carrying out that assessment.

III. Article 16(3) of Regulation No 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.

IV. Article 16(4) of Regulation No 987/2009 must be interpreted as meaning that the institutions of the EEA States may still reassess a provisional determination having become definitive as a result of the two-month period expiring without use being made of it, with retroactive effect, as long as it is in view of reflecting the objective situation of the worker and correct determination of applicable legislation, which is the overarching aim of Regulations No 883/2004 and No 987/2009, and as long as the procedures established therein are followed.

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