JUDGMENT OF THE COURT

14 December 2021*

(*Social security – Regulation (EC) No 883/2004 – Regulation (EC) No 987/2009 – Registered office or place of business – Provisional determination – Article 3 EEA – Principle of sincere cooperation*)

In Case E-1/21,

REQUEST to the Court under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice by the Princely Court of Appeal (*Fürstliches Obergericht*), in the case between

ISTM International Shipping & Trucking Management GmbH

and

Liechtensteinische Alters- und Hinterlassenenversicherung,
Liechtensteinische Invalidenversicherung, and
Liechtensteinische Familienausgleichskasse,

concerning the interpretation 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 and 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 COURT,

composed of: Páll Hreinsson, President (Judge-Rapporteur), Per Christiansen and Bernd Hammermann, Judges,

Registrar: Ólafur Jóhannes Einarsson,

having considered the written observations submitted on behalf of:

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* Language of the request: German.

- ISTM International Shipping & Trucking Management GmbH ("ISTM"), represented by Dr Karl Mumelter, attorney;

- the Liechtenstein Government, represented by Dr Andrea Entner-Koch and Dr Claudia Bösch, acting as Agents;

- the Netherlands Government, represented by Mielle Bulterman and Jurian Langer, acting as Agents;

- the EFTA Surveillance Authority ("ESA"), represented by Ewa Gromnicka, Romina Schobel, Catherine Howdle and Michael Sanchez Rydelski, acting as Agents; and

- the European Commission ("the Commission"), represented by Denis Martin and Bernd-Roland Killmann, acting as Agents;

having regard to the Report for the Hearing,

having heard the oral arguments of ISTM, represented by Dr Karl Mumelter and Larissa Majer, attorney; the Liechtenstein Government, represented by Dr Andrea Entner-Koch; ESA, represented by Ewa Gromnicka; and the Commission, represented by Denis Martin; at the remote hearing on 28 September 2021,

gives the following

Judgment

I Legal background

EEA law

1 Article 3 of the Agreement on the European Economic Area ("EEA" or "the EEA Agreement") reads as follows:

> *The Contracting Parties shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Agreement.*
>
> *They shall abstain from any measure which could jeopardize the attainment of the objectives of this Agreement.*
>
> *Moreover, they shall facilitate cooperation within the framework of this Agreement.*

2 Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ 2004 L 166, p. 1), as

corrected by OJ 2004 L 200, p. 1, and OJ 2007 L 204, p. 30, ("Regulation 883/2004") was incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 76/2011 of 1 July 2011 (OJ 2011 L 262, p. 33) and is referred to at point 1 of Annex VI (Social Security) to the EEA Agreement. Constitutional requirements were indicated by Iceland and Liechtenstein. The requirements were fulfilled by 31 May 2012 and the decision entered into force on 1 June 2012. The following provisions are cited in accordance with the wording applicable at the time when the events giving rise to the main proceedings took place.

3 Recital 15 of Regulation 883/2004 reads:

> *It is necessary to subject persons moving within the Community to the social security scheme of only one single Member State in order to avoid overlapping of the applicable provisions of national legislation and the complications which could result therefrom.*

4 Recital 18a of Regulation 883/2004 reads, in extract:

> *The principle of single applicable legislation is of great importance and should be enhanced. ...*

5 Article 13 of Regulation 883/2004, headed "Pursuit of activities in two or more Member States", reads, in extract:

> *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*
>
> ...
>
> *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 Member State concerned.*

6 Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems (OJ 2009 L 284, p. 1)

("Regulation 987/2009") was incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 76/2011 of 1 July 2011 and is referred to at point 2 of Annex VI (Social Security) to the EEA Agreement. Constitutional requirements were indicated by Iceland and Liechtenstein. The requirements were fulfilled by 31 May 2012 and the decision entered into force on 1 June 2012. The following provisions are cited in accordance with the wording applicable at the time when the events giving rise to the main proceedings took place.

7 Article 14(5a) of Regulation 987/2009, headed "Details relating to Articles 12 and 13 of the basic Regulation", reads, in extract:

> *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.*
>
> ...

8 Article 16(1) to (4) of Regulation 987/2009, headed "Procedure for the application of Article 13 of the basic Regulation", reads:

> *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.

9 Regulation (EU) No 465/2012 of the European Parliament and of the Council of 22 May 2012 amending Regulation (EC) No 883/2004 on the coordination of social security systems and Regulation (EC) No 987/2009 laying down the procedure for implementing Regulation (EC) No 883/2004 (OJ 2012 L 149, p. 4) ("Regulation 465/2012") was incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 14/2013 of 1 February 2013. That decision entered into force on 2 February 2013.

II Facts and procedure

10 ISTM is a limited liability company under Liechtenstein law with a registered office in Liechtenstein. The purpose of ISTM is:

a. transport management, maritime and inland waterway transport management, truck and shipping fleet management and in this connection provision of the relevant employees;

b. equipping of transport vehicles (inland waterway and maritime transport and trucks) and associated staff training services, personnel management;

c. holdings in other companies.

11 ISTM is a management company for inland waterway transport on the river Rhine.

12 The Liechtenstein Old-Age and Survivors' Insurance (*Liechtensteinische Alters- und Hinterlassenenversicherung*), Liechtenstein Invalidity Insurance (*Liechtensteinische Invalidenversicherung*) and Liechtenstein Family Allowances Office (*Liechtensteinische Familienausgleichskasse*) ("the Liechtenstein Institutions") are institutions governed by public law which provide statutory old-age and survivors' benefits, invalidity benefits and family benefits in Liechtenstein.

13 ISTM's employees, who are resident in Germany, the Netherlands or the Czech Republic, are employed full-time, and only, by ISTM. The employees pursue their activities for ISTM usually in two or more EEA States, in particular, in Germany, the Netherlands, Belgium, Luxembourg and France. Employees who are resident in Germany and/or the Netherlands also pursue activities in their respective state of residence. However, those activities are not a substantial part of the employees' overall activities and in no case more than 25 per cent.

14 The decision under challenge in the main proceedings relates to the period from 4 February 2016 (date on which ISTM was established) to 17 February 2017. By order of 17 February 2017 and decision of 22 September 2020 in response to ISTM's appeal against that order, the Liechtenstein Institutions determined that Liechtenstein social security law is not applicable to ISTM and its employees registered in 2016. The Liechtenstein Institutions based this determination on the fact that ISTM did not carry out the essential decisions and functions of its business operations at its registered office in Liechtenstein.

15 The case before the referring court concerns an appeal brought by ISTM against the decision of the Liechtenstein Institutions of 22 September 2020. ISTM contests the determination made by the Liechtenstein Institutions. It argues that its registered office (*statutarischer Sitz* or *satzungsmässiger Sitz*) in Liechtenstein suffices for ISTM and its employees to be subject to Liechtenstein social security law. Furthermore, ISTM states that the essential decisions and measures were actually taken at the registered office in Liechtenstein. In addition, ISTM relies on the fact that, in relation to individual employees, institutions of other EEA States (those of the state of residence) have made provisional determinations of the applicable legislation within the meaning of Article 16 of Regulation 987/2009 to the effect that Liechtenstein legislation must be applied. ISTM submits that the provisional determinations have become definitive.

16 The referring court states that it has been provided with the provisional determination made by the Czech social security authorities to which the Liechtenstein Institutions did not object within two months. Further provisional determinations made by the Czech social security authorities also exist which, in some cases, were transmitted by ISTM directly to the Liechtenstein Institutions.

17 Against this background, the Princely Court of Appeal decided to stay the proceedings and request an Advisory Opinion from the Court. The request, dated 25 March 2021, was registered at the Court on 6 April 2021. The Princely Court of Appeal has referred the following questions to the Court:

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 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?

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?*

18 Reference is made to the Report for the Hearing for a fuller account of the legal framework, the facts, the procedure and the proposed answers submitted to the Court. Arguments of the parties are mentioned or discussed hereinafter only insofar as is necessary for the reasoning of the Court.

III Answer of the Court

Questions I.1 and I.2

19 By Question I.1, the referring court asks, in essence, whether the mere presence of the registered office of an undertaking suffices for the purposes of point (b)(i) of Article 13(1) of Regulation 883/2004, read in conjunction with Article 14(5a) of Regulation 987/2009. If that question is answered in the negative, the referring court asks, by Question I.2, according to which criteria the existence of a registered office or place of

business within the meaning of those provisions must be determined. The referring court also enquires whether reference must be had to the interpretation reached by the Administrative Commission for the Coordination of Social Security Systems ("the Administrative Commission") as set out in its *Practical guide on the applicable legislation in the European Union (EU), the European Economic Area (EEA) and in Switzerland* ("the Practical Guide"). The Court finds it appropriate to address these two questions together.

20 According to point (b)(i) of Article 13(1) of Regulation 883/2004, a person who normally pursues an activity as an employed person in two or more EEA States shall be subject to the legislation of the EEA State in which the registered office or place of business of the undertaking or employer is situated. Article 14 of Regulation 987/2009 provides further implementing rules relating to Articles 12 and 13 of Regulation 883/2004. According to Article 14(5a) of Regulation 987/2009, "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.

21 It follows from a literal and contextual interpretation of Article 14(5a) of Regulation 987/2009 that the wording "where the essential decisions of the undertaking are adopted and where the functions of its central administration are carried out" in that provision must be understood as referring to both the term "registered office" and "place of business". Otherwise, the inclusion of "registered office" in that provision, which is intended to provide additional detail on the meaning of those terms, would have been devoid of purpose.

22 It is noted in recitals 15 and 18a of Regulation 883/2004 that it is necessary to subject persons moving within the EEA to the social security scheme of only a single EEA State. That is to avoid the overlapping of applicable provisions of national legislation and the complications that could result. Article 14(5a) of Regulation 987/2009 must be interpreted in accordance with those considerations and as aiming to determine a single social security scheme applicable. That interpretation entails that Articles 12 and 13 of Regulation 883/2004 identify a single social security scheme as being applicable. Such an interpretation is in accordance with the aims of Regulations 883/2004 and 987/2009.

23 The objectives of Regulations 883/2004 and 987/2009 could be undermined if the interpretation of the concepts in those regulations were to make it easier for employers to be able to resort to purely artificial arrangements in order to exploit legal acts incorporated into the EEA Agreement with the sole aim of obtaining an advantage from the differences that exist between the national rules. In particular, such exploitation of that legislation would be likely to have a "race to the bottom" effect on the social security systems of EEA States and perhaps, ultimately, reduce the level of protection offered by those systems (compare the judgment in *AFMB and Others*, C-610/18, EU:C:2020:565, paragraph 69). Accordingly, those regulations are not intended to facilitate "forum shopping" (compare the judgment in *TEAM POWER EUROPE*, C-784/19, EU:C:2021:427, paragraph 62).

24 Accordingly, the mere presence of the registered office of an undertaking does not suffice for the purposes of point (b)(i) of Article 13(1) of Regulation 883/2004, read in conjunction with Article 14(5a) of Regulation 987/2009.

25 With regard to Question I.2, as to the criteria for determining where the essential decisions of the undertaking are adopted and where the functions of its central administration are carried out, it follows from the case law of the European Court of Justice ("ECJ") that, while the Practical Guide may be a useful tool for interpreting Regulations 883/2004 and 987/2009, it is not legally enforceable and is, therefore, not binding in the interpretation of those regulations (compare the judgment in *Inspecteur van de Belastingdienst*, C-631/17, EU:C:2019:381, paragraph 41).

26 Although the preparatory works to Regulation 465/2012, which introduced Article 14(5a) into Regulation 987/2009, do not specifically identify the judgments of the ECJ with which consistency was sought by the introduction of the amendment, it is evident from the virtually identical wording of Article 14(5a) of Regulation 987/2009 that it is derived from the judgment in *Planzer* (compare the judgment in *Planzer*, C-73/06, EU:C:2007:397, paragraph 60). Therefore, it is clear that the intention of the legislature was to ensure consistency with the interpretation of the ECJ in *Planzer*, even though that case concerned a legal act in the field of value added tax, which is outside of the material scope of the EEA Agreement.

27 Accordingly, the determination of where the essential decisions of an undertaking are adopted and where the functions of its central administration are carried out, in accordance with Article 14(5a) of Regulation 987/2009, 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 (compare the judgment in *Planzer*, cited above, paragraph 61).

28 A presence such as that of a 'letter box' or 'brass plate' cannot be described as a 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 for the purposes of point (b)(i) of Article 13(1) of Regulation 883/2004, read in conjunction with Article 14(5a) of Regulation 987/2009 (compare the judgment in *Planzer*, cited above, paragraph 62).

29 In the light of the foregoing, the answer to Questions I.1 and I.2 must be that point (b)(i) of Article 13(1) of Regulation 883/2004, read in conjunction with Article 14(5a) of Regulation 987/2009, must be interpreted as meaning that the mere presence of the registered office of an undertaking does not suffice for the purposes of that provision. In determining where the essential decisions of an undertaking are adopted and where the functions of its central administration are carried out, in accordance with Article

14(5a) of Regulation 987/2009, a series of factors must be taken into consideration. These factors include 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.

Question II.1

30 By Question II.1, the referring court asks from what point in time the institution of the EEA State, in which the person pursues an activity, is to be regarded as having been informed of the provisional determination by the institution of the place of residence. Furthermore, the referring court enquires whether it suffices 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 person concerned.

31 Article 16 of Regulation 987/2009 provides for the procedure for the application of Article 13 of Regulation 883/2004. According to Article 16(2) of Regulation 987/2009, 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 Regulation 883/2004 and Article 14 of Regulation 987/2009. 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. Article 16(3) of Regulation 987/2009 provides that the provisional determination of the applicable legislation, as provided for in Article 16(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 Article 16(2). This is the case unless the legislation has already been definitively determined on the basis of Article 16(4) of Regulation 987/2009, or at least one of the institutions concerned has informed the institution of the place 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.

32 It follows from Article 16(3) of Regulation 987/2009 that, in order for a provisional determination under Article 16(2) to become definitive, the institutions of the EEA States concerned must be informed of it in accordance with the procedure laid down in Article 16(2). Article 16(2) provides that it is the designated institution of the place of residence that is to inform the designated institutions of each EEA State in which an activity is pursued. Accordingly, in order for a provisional determination to become definitive in accordance with Article 16(2) and (3), it is the designated institution of the place of residence that must inform the designated institutions of each EEA State in which an activity is pursued. Therefore, it does not suffice for the purposes of Article 16(2) and (3) if the provisional determination reaches the designated institution of an EEA State in which an activity is pursued in whatever form, such as through the undertaking or person concerned.

33 Accordingly, the answer to Question II.1 must be that, in order for a provisional determination to become definitive in accordance with Article 16(2) and (3) of Regulation 987/2009, the designated institution of the place of residence must inform the designated institutions of each EEA State in which an activity is pursued. It does not suffice for the purposes of Article 16(2) and (3) if the provisional determination reaches the designated institution of an EEA State in which an activity is pursued in whatever form, such as through the undertaking or person concerned.

Questions II.2 and II.3

34 By Question II.2 the referring court asks, in essence, if the definitive nature of the determination of the applicable legislation that arises as a result of the expiry of the two-month period set out in Article 16(3) of Regulation 987/2009 is susceptible to further challenge by the designated institution of the EEA State in which an activity is pursued. If that question is answered in the affirmative, the referring court asks, by Question II.3, what the legal consequences are and if this can result in a retroactive setting aside of the determination. The Court finds it appropriate to address these questions together.

35 The system of conflict rules laid down in Title II of Regulation 883/2004 is binding in the sense that an EEA State cannot decide the extent to which its own legislation or that of another EEA State applies (see Case E-3/04 *Tsomakas and Others* [2004] EFTA Ct. Rep. 95, paragraph 28). That system is mandatory for EEA States and its application depends solely on the objective situation of the employed person concerned (see Case E-2/18 *Concordia*, judgment of 14 May 2019, paragraph 47, and compare the judgment in *van Delft and Others*, C-345/09, EU:C:2010:610, paragraph 52). One of the objectives of the conflict rules laid down by Regulations 883/2004 and 987/2009 is to ensure that all insured persons falling within their scope enjoy continuous cover without that continuity being affected by discretionary choices of individuals or of the competent authorities of EEA States (compare the judgment in *Fischer-Lintjens*, C-543/13, EU:C:2015:359, paragraph 40). Accordingly, the conflict of law rules laid down in those regulations depend not on the free choice of the employed person, employers or competent national authorities, but on the objective situation of the employed person (compare the judgment in *AFMB and Others*, cited above, paragraph 67).

36 Article 3 EEA lays down the principle of sincere cooperation between the Contracting Parties. Article 76 of Regulation 883/2004 is an expression of this principle and imposes a duty on the institutions concerned to carry out a proper factual assessment and consequently to guarantee the correctness of the information contained in a decision pursuant to that regulation (see *Tsomakas and Others*, cited above, paragraph 30, and compare the judgment in *Alpenrind and Others*, C-527/16, EU:C:2018:669, paragraph 45). It also follows from the principle of sincere cooperation that the EEA States concerned are under an obligation to apply Regulation 883/2004 correctly (see *Tsomakas and Others*, cited above, paragraph 32). This entails that it is incumbent on the institution concerned, irrespective of its previous decisions, to base its findings on the employed person's actual situation (compare the judgment in *AFMB and Others*, cited above, paragraph 59).

37 Regulations 883/2004 and 987/2009 lay down mechanisms for information and cooperation that are intended to ensure the correct application of the provisions laid down in those regulations (compare the judgment in *AFMB and Others*, cited above, paragraph 72). In particular, the mutual information and cooperation provided for by Article 76 of Regulation 883/2004, as well as the procedure for the application of Article 13 of that regulation, laid down in Article 16 of Regulation 987/2009, is intended to enable the institutions concerned to have the necessary information for the purposes of ensuring the correct application of Article 13(1) of Regulation 883/2004 (compare the judgment in *AFMB and Others*, cited above, paragraph 74).

38 As already stated above in relation to Question II.1, pursuant to Article 16(3) of Regulation 987/2009, a provisional determination of the applicable legislation becomes definitive unless one of the institutions concerned informs the institution designated by the competent authority of the EEA State of residence by the end of the two-month period that it cannot yet accept the determination or that it takes a different view on this. Article 16 of that regulation provides for the procedure to be followed where there is a difference of views between the institutions concerned. It follows from the wording of Article 16 of Regulation 987/2009, as well as the principle of sincere cooperation, that the institutions concerned are under an obligation to participate in the procedure laid down in that provision.

39 However, according to the request, the circumstances of the present case arise where the institution determined to be the competent institution under a provisional determination has failed to make use of the procedure laid down in Article 16(3) of Regulation 987/2009 even though it takes a different view. Nevertheless, the mandatory nature of the system of conflict rules laid down in Regulation 883/2004 requires that its application must depend solely on the objective situation of the employed person concerned.

40 Accordingly, Article 16(4) of Regulation 987/2009 provides that 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 Regulation 883/2004 and the relevant provisions of Article 14 of Regulation 987/2009. 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 Regulation 987/2009 shall apply. If, in that situation, the EEA State provisionally determined to be the competent State does not acknowledge that its legislation applies, the competent institutions of the EEA States concerned are bound to seek a settlement of the issue through all practicable channels (see *Tsomakas and Others*, cited above, paragraph 34).

41 As pointed out by the Commission at the hearing, the fulfilment of the obligations under the EEA Agreement is monitored by ESA and the Commission. Accordingly, it falls to ESA and the Commission to ensure proper compliance with EEA law in the event of a

disagreement between two EEA States that may result in a breach of EEA law.

42 A time limit is not attached to the exercise of the procedure laid down in Article 16(4) of Regulation 987/2009. Accordingly, even if, in accordance with Article 16(3) of that regulation, a provisional determination has become definitive as a result of the two-month period expiring without use being made of it, it remains possible to make use of the procedure laid down in Article 16(4) where uncertainty about the determination of the applicable legislation requires contacts between the institutions or authorities of two or more EEA States. This may be the case where a provisional determination that has become definitive on the basis of Article 16(3) does not reflect the objective situation of the employed person concerned. The procedure may lead to a setting aside of the determination. A setting aside in accordance with the procedure provided for in Article 16(4) would have retroactive effect as Article 6 of Regulation 987/2009 applies in such a case. Article 6(4) provides for this retroactive effect and Article 73 of Regulation 987/2009 sets out in detail the consequences for contributions and benefits in the case of such a retroactive effect.

43 In the light of the foregoing, the answer to Questions II.2 and II.3 must be that Article 16(4) of Regulation 987/2009 must be interpreted as meaning that the designated institution of an EEA State may still challenge a provisional determination that has become definitive in accordance with Article 16(3) of that regulation as a result of the two-month period expiring without use having been made of it. Use of the procedure provided for in Article 16(4) may result in a determination that has become definitive in accordance with Article 16(3) being set aside with retroactive effect.

IV Costs

44 Since these proceedings are a step in the proceedings pending before the national court, any decision on costs for the parties to those proceedings is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds,

THE COURT

in answer to the questions referred to it by the Princely Court of Appeal hereby gives the following Advisory Opinion:

1. **Point (b)(i) of Article 13(1) 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, read 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, must be interpreted as meaning that the mere presence of the registered office of an undertaking does not suffice for the purposes of that provision. In determining where the essential decisions of an undertaking are adopted and where the functions of its central administration are carried out, in accordance with Article 14(5a) of Regulation (EC) No 987/2009, a series of factors must be taken into consideration. These factors include 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.**

2. **In order for a provisional determination to become definitive in accordance with Article 16(2) and (3) of Regulation (EC) No 987/2009, the designated institution of the place of residence must have informed the designated institutions of each EEA State in which an activity is pursued. It does not suffice for the purposes of Article 16(2) and (3) of Regulation (EC) No 987/2009 if the provisional determination reaches the designated institution of an EEA State in which an activity is pursued in whatever form, such as through the undertaking or person concerned.**

3. **Article 16(4) of Regulation (EC) No 987/2009 must be interpreted as meaning that the designated institution of an EEA State may still challenge a provisional determination that has become definitive in accordance with Article 16(3) of that regulation as a result of the two-month period expiring without use having been made of it. Use of the procedure provided for in Article 16(4) may result in a determination that has become definitive in accordance with Article 16(3) of that regulation being set aside retroactively.**

Páll Hreinsson Per Christiansen Bernd Hammermann

Delivered in open court in Luxembourg on 14 December 2021.

Ólafur Jóhannes Einarsson
Registrar

Páll Hreinsson
President