

ORIGINAL

Presented at the EFTA Court under N° E-1/21-21
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BY COURIER

EFTA Court

1, Rue du Fort Thüngen

L-1499 Luxemburg-Kirchberg

Vaduz, 22 June 2021

To the President and Members of the EFTA Court

Written Observations

submitted, pursuant to Article 20 of the Statute and Article 97 of the Rules of Procedure of the EFTA Court, by the

Government of the Principality of Liechtenstein

represented by Dr. Andrea Entner-Koch, Director of the EEA Coordination Unit (*Leiterin der Stabsstelle EWR der Regierung des Fürstentums Liechtenstein, Austrasse 79 / Europark, FL- 9490 Vaduz*), and Dr. Claudia Bösch, Legal Officer of the EEA Coordination Unit (*Juristische Mitarbeiterin der Stabsstelle EWR der Regierung des Fürstentums Liechtenstein, Austrasse 79 / Europark, FL- 9490 Vaduz*), acting as agents of the Government of the Principality of Liechtenstein,

in Case E-1/21

ISTM International Shipping & Trucking Management GmbH

v

AHV-IV-FAK

in which the Princely Court of Appeal (*Fürstliches Obergericht*, hereinafter referred to as the “**Court of Appeal**”), has requested the EFTA Court to give an Advisory Opinion pursuant to Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice regarding 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 in conjunction (hereinafter referred to as “**Regulation (EC) No 883/2004**”)¹ 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 (hereinafter referred to as “**Regulation (EC) No 987/2009**”)².

The Government of the Principality of Liechtenstein (hereinafter referred to as the “**Liechtenstein Government**”) has the honor to submit the following observations:

I. Questions referred to the EFTA Court

The Court of Appeal has stayed its proceedings in order to refer the following questions to the EFTA Court:

1. 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

¹ OJ L 166, 30.4.2004, p. 1.

² OJ L 284, 30.10.2009, p. 1; as amended by Article 2(2)(b) of 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.

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 made 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?

II. Facts

- 1 As regards the facts of the present case, the Liechtenstein Government wishes to refer to the summary of the facts by the Court of Appeal and to supplement as follows:
- 2 The parties in the case at hand are ISTM International Shipping & Trucking Management GmbH (hereinafter referred to as “the **appellant**”) and the Liechtenstein AHV-IV-FAK (hereinafter referred to as “the **respondents**”).
- 3 The case concerns the time period from 4 February 2016 until 17 February 2017.
- 4 The appellant is a management company for inland waterway transport on the River Rhine.
- 5 It has its registered office in Balzers, Liechtenstein and is therefore registered in the Liechtenstein Commercial Register (company number FL-0002.514.774-6).
- 6 The registered purpose of the appellant is transport management, maritime and inland waterway transport management, truck and shipping fleet management and in this connection provision of the relevant employees, as well as equipping of transport vehicles (inland waterway and maritime transport and trucks) and associated staff training services, personnel management and holdings in other companies.
- 7 The appellant does own neither a trade licence according to the Liechtenstein Business Act³ nor a licence according to the Act on Employment Services⁴ in Liechtenstein.

³ Business Act of 22 June 2006 (*Gewerbegesetz vom 22. Juni 2006*), LR 930.1: <https://www.gesetze.li/konso/2006.184>.

⁴ Act of 12 April 2000 on employment services and temporary work agencies (*Gesetz vom 12. April 2000 über die Arbeitsvermittlung und den Personalverleih/Arbeitsvermittlungsgesetz*), LR 823.10: <https://www.gesetze.li/konso/2000103000>.

- 8 In fact, the appellant has never even applied for a trade licence or a licence according to the Act on Employment Services despite being contacted by the competent authorities several times.
- 9 As there are no navigable waters in Liechtenstein, the appellant carries out all of its business outside of Liechtenstein, mainly in Germany, in the Netherlands, in Belgium, in Luxembourg or in France.
- 10 Hence, the point of reference in Liechtenstein is the appellant's registered office.
- 11 However, the appellant did not have a sufficient business premise at the registered office or anywhere else in Liechtenstein during the relevant period of time (February 2016 until February 2017).
- 12 Only in September 2017, and thus after the relevant time period, the appellant has rented a business premise in Liechtenstein.
- 13 The sole shareholder of the appellant is a holding company, situated in the Netherlands.
- 14 The two managing directors are a Dutch entrepreneur and a Liechtenstein trustee.
- 15 Apart from the trustee, who has acted as a managing director, the appellant did not have a single employee in Liechtenstein during the relevant period of time.
- 16 Only in October 2017, a person was employed in Liechtenstein.

III. Legal Framework

- 17 By way of introduction, the Liechtenstein Government considers it appropriate to briefly lay down the legal framework:

1. Regulation (EC) No 883/2004 and Regulation (EC) No 987/2009

18 The Court of Appeal has asked the EFTA Court for an interpretation of Regulation (EC) No 883/2004 and Regulation (EC) No 987/2009.

19 Both legal acts were incorporated into the EEA Agreement with decision of the EEA Joint Committee No 76/2011 amending Annex VI to the EEA Agreement (Social Security). The relevant Decision entered into force for the EEA/EFTA-States on 1 July 2011.⁵

20 In Liechtenstein, a regulation becomes part of the national legal order and is therefore directly applicable as soon as it is incorporated into the EEA Agreement.⁶

21 Thus, since 1 July 2011, Regulation (EC) No 883/2004 and Regulation (EC) No 987/2009 have been directly applicable in Liechtenstein.

22 The respondents are the competent authority in Liechtenstein with regard to Regulation (EC) No 883/2004 and Regulation (EC) No 987/2009. Therefore, the respondents are obliged to apply Regulation (EC) No 883/2004 and Regulation (EC) No 987/2009.

2. Practical guide on the applicable legislation in the European Union (EU), in the European Economic Area (EEA) and in Switzerland

23 With regard to Regulation (EC) No 883/2004 and Regulation (EC) No 987/2009, the Administrative Commission for the Coordination of Social Security Systems has published a “Practical guide on the applicable legislation in the European Union (EU),

⁵ EEA Joint Committee Decision No 76/2011: <https://www.efta.int/media/documents/legal-texts/eea/other-legal-documents/adopted-joint-committee-decisions/2011%20-%20English/076-2011.pdf>.

⁶ *Bussjäger*, Rechtsfragen des Vorrangs und der Anwendbarkeit von EWR-Recht in Liechtenstein, Liechtensteinische Juristenzeitung 2006, 143.

in the European Economic Area (EEA) and in Switzerland” (hereinafter referred to as the “**Practical Guide**”) in 2013.⁷

24 The Administrative Commission for the Coordination of Social Security Systems is comprised of representatives from all EU Member States. Norway, Iceland, Liechtenstein and Switzerland participate as observers.⁸

25 Pursuant to Article 72(a) of Regulation (EC) No 883/2004, the Administrative Commission deals with all questions of interpretation arising from the provisions of this Regulation or those of the Implementing Regulation.

26 The Practical Guide shall secure a uniform application of social security law throughout the entire EEA and Switzerland.

27 Therefore, the Practical Guide is intended to provide a valid working instrument to assist institutions, employers and citizens in the area of determining which Member State’s legislation should apply in given circumstances.⁹

28 The Practical Guide is not only relevant for EU Member States, but also for the European Economic Area (EEA) and for Switzerland. This becomes clear not only from the title of the Practical Guide, but also from the following definition foreseen with regard to the scope of its application:

“In the following text, the term “Member State” also refers to the EEA EFTA States and Switzerland.”¹⁰

⁷ Practical guide on the applicable legislation in the European Union (EU), the European Economic Area (EEA) and in Switzerland: <https://ec.europa.eu/social/BlobServlet?docId=11366&langId=en>.

⁸ See the Practical guide on the applicable legislation in the European Union (EU), in the European Economic Area (EEA) and in Switzerland (<https://ec.europa.eu/social/BlobServlet?docId=11366&langId=en>), page 5.

⁹ See the Practical guide on the applicable legislation in the European Union (EU), in the European Economic Area (EEA) and in Switzerland (<https://ec.europa.eu/social/BlobServlet?docId=11366&langId=en>), page 5.

¹⁰ See the Practical guide on the applicable legislation in the European Union (EU), in the European Economic Area (EEA) and in Switzerland (<https://ec.europa.eu/social/BlobServlet?docId=11366&langId=en>), page 5, FN 2.

29 In Part II, Section 7 (page 35 et seq.), the Practical Guide defines the criteria for determining the registered office or place of business of an undertaking by referring to Title II of Regulation (EC) No 883/2004 and Article 14 (5a) of Regulation (EC) No 987/2009.

3. “*Rheinschifferabkommen*”

30 On 1 September 2018, Liechtenstein acceded to the Agreement on the determination of applicable legislation for Rhine shipping pursuant to Article 16(1) of Regulation (EC) No 883/2004 (“*Rheinschifferabkommen*”).¹¹

31 Liechtenstein has acceded to the “*Rheinschifferabkommen*” to clarify the allocation of employees of undertakings such as the appellant under social security law.

32 Within the scope of the *Rheinschifferabkommen*, the appellant’s employees would not be subject to Liechtenstein social security law.

33 Pursuant to Article 4(1) of the *Rheinschifferabkommen*, the “*Rheinschiffer*”¹² shall be subject to the legislation of the State where the registered office of the undertaking to which the boat belongs, on board of which he carries out his professional activity, is situated.

IV. Legal analysis

1. First Question of the Court of Appeal

34 With its first Question, the Court of Appeal asks the EFTA Court to answer the question if the registered office (*statutarischer Sitz or satzungsmässiger Sitz*) of an undertaking

¹¹ See LGBl 2018.205:

https://www.gesetze.li/konso/2018205000?search_text=rheinschiffe&search_loc=text&lnnr=&lgblid_von=&observe_date=02.06.2021.

¹² According to Article 1(a) of the *Rheinschifferabkommen*, the term “*Rheinschiffer*” means any employee or self-employed person or a person treated as such under the applicable legislation, who carry out their professional activities on board of a boat.

suffices to be regarded as the registered office (Sitz) within the meaning of Article 13(1)(b)(i) of Regulation (EC) No 883/2004 in conjunction with Article 14(5a) of Regulation (EC) No 987/2009 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 is situated.

1.1. Definition of the term “registered office or place of business” within the meaning of Article 13(1)(b)(i) of Regulation (EC) No 883/2004 in conjunction with Article 14(5a) of Regulation (EC) No 987/2009

35 According to Article 13(1) of Regulation (EC) No 883/2004, 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, 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.

36 Hence, within the scope of Regulation (EC) No 883/2004, the first and decisive point of reference is the employee.

37 However, due to the fact that none of the appellant`s employees has pursued a substantial part of their activity in their Member State of Residence, Article 13(1)(a) is not applicable in the present case.

38 Therefore, Article 13(1)(b) is to be assessed. According to this provision, a person working in more than one Member State, who does not pursue a substantial part of

their activity in their Member State of Residence, shall be subject to the legislation of the Member State where the registered office or place of business of the employer or the undertaking employing them, is situated.

39 Article 13(1)(b) refers to the registered office or place of business of the undertaking or employer.

40 Thus, according to the wording of Article 13(1)(b) of Regulation (EC) No 883/2004, the registered office or the place of business seems to be a sufficient criterion for a connection to the social security law of a State.

41 Nevertheless, it must be considered that Regulation (EC) No 883/2004 refers to the (legal) situation of the employee.

42 It would certainly not be compatible with this if the employee were subject to the legislation of a State in which the undertaking has its mere registered office, to which the employee, however, has no relationship at all.

43 Furthermore, Regulation (EC) No 987/2009 lays down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems.

44 Therefore, Regulation (EC) No 987/2009 must also be taken into account when interpreting Regulation (EC) No 883/2004.

45 Article 14(5a) of Regulation (EC) No 987/2009 provides for a uniform definition of the terms “registered office or place of business”.

46 According to this provision, the terms “registered office or place of business” shall be understood as

“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”.

47 Hence, pursuant to the relevant legal acts applicable, the connecting factor for subjecting a person to the system of social security of a Member State is not only the registered office or place of business of the undertaking. Rather, the essential decisions of the undertaking must be adopted there and the functions of its central administration must be carried out there.

Conclusions:

48 It follows from the above observations that Article 13(1)(b)(i) of Regulation (EC) No 883/2004 in conjunction with Article 14(5a) of Regulation (EC) No 987/2009 consider it not sufficient to rely only on the “registered office or place of business” of an undertaking.

49 Article 14(5a) of Regulation (EC) No 987/2009 states explicitly that additional requirements must be fulfilled, in concrete the essential decisions of the undertaking must be adopted at the registered office or place of business and the functions of its central administration must be carried out there.

1.2. Main objectives of Regulation (EC) No 883/2004 and Regulation (EC) No 987/2009

50 According to the settled case-law of the EFTA Court and the European Court of Justice, besides the wording of a legal act, also the context in which it occurs and its objectives must be considered.¹³

¹³ EFTA Court, E-4/11, *Clauder*, paragraphs 33 ff; E-5/20, *SMA SA und Société Mutuelle d'Assurance du Bâtiment et des Travaux Publics v Finanzmarktaufsicht Liechtenstein*, paragraph 45; European Court of Justice, C-527/16, *Alpenrind*, paragraph 88; C-616/15, *Comission v Germany*, paragraph 43; see also recital 3 of Regulation (EC) No 883/2004.

51 The rules for the coordination of national social security systems pursue two main objectives:

(1) The rules for the coordination of national social security systems fall within the framework of free movement of persons and should contribute towards improving the standard of living of an employee and their conditions of employment.¹⁴

(2) The coordination rules shall also ensure that there is no inducement for companies to establish in an EEA Member State for the mere purpose of achieving a connection under social security law.

52 Therefore, a solely statutory seat cannot suffice to be regarded as the registered office within the meaning of Article 13(1)(b)(i) of Regulation (EC) No 883/2004 in conjunction with Article 14(5a) of Regulation (EC) No 987/2009 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 is situated.

53 Rather, the term “registered office” can only imply effective activity carried out in this state.¹⁵

54 Article 14(5a) of Regulation (EC) No 987/2009 defines this “effective activity” for the purpose of Title II Regulation (EC) No 883/2004: “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”.

55 In any case, to meet these requirements, the daily business of the undertaking must be conducted at the “registered office or place of business”.

56 Hence, the mere “registered office or place of business” in an EEA Member State cannot suffice as a link to the social security system of an EEA Member State.

¹⁴ See recital 1 of Regulation (EC) No 883/2004.

¹⁵ See the Opinion of Advocate General Trstenjak in Case C-73/06, *Planzer*, paragraph 61

57 Any other interpretation could provide for the possibility “for social security law shopping” of undertakings, which the coordination rules are expressly designed to prevent.

58 And the Liechtenstein Government would like to point out once again that this is the only conclusion that can be drawn when considering the interests of the employees:

59 An employee has a keen interest to be subject to the legislation of an EEA Member State to which they have a connection. It would not be advantageous for an employee to be insured in a state to which they have no connection at all.

1.3. Definition of the term “registered office or place of business” in the jurisprudence of the European Court of Justice

60 In Case C-73/06, *Planzer*, the European Court of Justice has ruled that the term “place of business” refers to the place where

“the essential decisions concerning the general management of that company are adopted and where the functions of its central administration are carried out”.¹⁶

61 Thus, a fictitious presence, such as that of a Letter Box or Brass Plate Company, cannot be described as a place of business.¹⁷

62 It follows from this that in Case C-73/06, *Planzer*, the European Court of Justice has applied a strict definition of the term “place of business”.

63 In contrast, the European Court of Justice has applied a much less stringent definition to the term “registered office or place of business” in Case C-81/87, *Daily Mail*.¹⁸

¹⁶ European Court of Justice, C-73/06, *Planzer*, paragraph 60.

¹⁷ European Court of Justice, C-73/06, *Planzer*, paragraph 62; see also Case C-341/04, *Eurofood IFSC*, paragraph 35, and *Cadbury Schweppes and Cadbury Schweppes Overseas*, paragraph 68.

¹⁸ The European Court of Justice has confirmed this interpretation in several other cases: European Court of Justice, C-212/97, *Centros*; C-371/10, *National Grid*, paragraph 26; see also European Court of Justice, C-208/00, *Überseering*; C-167/01, *Inspire Art*; C-210/06, *Cartesio*. See also the Opinion of Advocate General Kokott in Case C-371/10, *National Grid*, paragraph 27.

64 The reason for this can be found in the fact that Case C-81/87, *Daily Mail*, has concerned the claim of an undertaking to exercise the freedom of establishment and, in particular, the conditions to which its Member State of origin, in which its registered office is situated, may restrict the transfer of its central management and control to another Member State.¹⁹

65 Case C-81/87, *Daily Mail*, therefore refers to the freedom of establishment, one of the fundamental principles of the European Economic Area.

66 The Liechtenstein Government would, however, like to point out that even in this specific case regarding the freedom of establishment, the Advocate General has held that the concept of establishment itself is essentially an economic one, which is why it always implies a genuine economic link.²⁰

67 In addition, Advocate General *Darmon* has stated the following:

“The concept of central management and control corresponds not merely to the physical location of the principal administrative services, but also, and perhaps principally, to the place from which the company is actually run. The real head office is normally the place where the company's central management and administration is located, since that is the place in which the decisions concerning the company's independent activity are made and from which that activity is set in motion; in other words, it is the centre from which that activity is exercised.”

1.4. Conclusions:

68 According to Article 13(1)(b)(i) of Regulation (EC) No 883/2004 in conjunction with Article 14(5a) of Regulation (EC) 987/2009, the mere “registered office” of an

¹⁹ See the Opinion of Advocate General Darmon in Case C-81/87, *Daily Mail*, paragraph 2.

²⁰ Opinion of Advocate General Darmon in Case C-81/87, *Daily Mail*, paragraph 5.

undertaking in an EEA Member State cannot be considered sufficient in order to justify an allocation to the social security system of this EEA Member State.

69 Thus, within the scope of application of Regulation (EC) No 883/2004 and Regulation (EC) 987/2009, the term “registered office” can only imply effective activity be carried out in this State.²¹

70 Following the above observations, the Liechtenstein Government considers that the EFTA Court should answer the first question as follows:

The registered office (statutarischer Sitz or satzungsmässiger Sitz) of an undertaking does not 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. Question I.2. of the Court of Appeal

71 With Question I.2., the Court of Appeal enquires which criteria must be applied when determining 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.

²¹ See the Opinion of Advocate General Trstenjak in Case C-73/06, *Planzer*, paragraph 61.

72 In addition, the Court of Appeal asks whether reference must be made 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 for these purposes.

73 The Liechtenstein Government would like to first submit on the relevance of the Practical guide, and then explain the criteria which must be applied when determining the registered office or place of business pursuant to Regulation (EC) No 883/2004 and Regulation (EC) 987/2009.

2.1. Practical guide on the applicable legislation in the European Union (EU), the European Economic Area (EEA) and in Switzerland

74 The Practical Guide contains important guidelines for the interpretation of Regulation (EC) No 883/2004 and Regulation (EC) 987/2009.

75 Its clear target is to secure a uniform interpretation of social security law throughout the entire EEA and Switzerland.

76 Therefore, the content of the Practical Guide and the requirements stated therein must be taken into account and duly considered in the EU States and in the EEA/EFTA-States when assessing whether the registered office or place of business of an undertaking is also the place where the essential decisions concerning the general management of a company are adopted and where the functions of its central administration are carried out.

77 However, the Practical Guide can claim binding force for neither the EU Member States nor the EEA/EFTA-States.²²

²² European Court of Justice C-98/80, *Romano*; C-21/87, *Borowitz*; C-631/17, *Inspecteur van de Belastingdienst*, paragraph 41.

78 The relevance of the Practical Guide for the interpretation of Regulation (EC) No 883/2004 and Regulation (EC) 987/2009 has also been confirmed by the European Court of Justice in Case C-33/18, *Institut national d'assurances sociales pour travailleurs indépendants*.²³

79 Furthermore, the European Court of Justice has applied the criteria laid down in the Practical Guide for the interpretation of the term “registered office or place of business” in Case C-73/06, *Planzer*.

2.2. The terms “registered office or place of business” according to Article 14(5a) of Regulation (EC) No 987/2009

80 In its explanations above, the Liechtenstein Government has already explained that, according to Article 14(5a) of Regulation (EC) No 987/2009, the terms registered office or place of business require that “the essential decisions of the undertaking are adopted and that the functions of its central administration are carried out there”.

81 The following comments are intended to explain which criteria must be applied when determining the registered office or place of business according to Article 14(5a) of Regulation (EC) No 987/2009 according to the Practical Guide and the settled case-law of the European Court of Justice.

2.3. Requirements set by the Practical Guide

82 The Practical Guide states as a general principle that “Brass Plate Operations” cannot be accepted as satisfying the requirements for a “registered office or place of business”.

²³ European Court of Justice, C-33/18, *Institut national d'assurances sociales pour travailleurs indépendants*, paragraph 46. See also *Spiegel*, *Zwischenstaatliches Sozialversicherungsrecht*, Article 13 of Regulation (EC) No 883/2004 paragraph 4 and *Pörtl*, *Zwischenstaatliches Sozialversicherungsrecht*, Article 14 of Regulation (EC) 987/2009, paragraph 2.

83 In the case of “Brass Plate Operations”, the social insurance of the employees is linked to a purely administrative company without having transferred actual decision-making powers.²⁴

84 Thus, “Brass Plate Operations” cannot be considered a sufficient link to the social security system of a Member State.²⁵

85 This general principle has already been applied by Advocate General Darmon in Case C-81/87, *Daily Mail*. He has noted that in the light of the judgment in *Leclerc*,²⁶ it is clear that Community law offers no assistance where “objective factors” show that a particular activity was carried out “in order to circumvent” national legislation.²⁷

86 In this regard, the Practical Guide defines the criteria which can be taken into account when assessing where the undertaking has its registered office or place of business:

- “the place where the undertaking has its registered office and its administration;
- the length of time that the undertaking has been established in the Member State;
- the number of administrative staff working in the office in question;
- the place where the majority of contracts with clients are concluded;
- the office which dictates company policy and operational matters;
- the place where the principal financial functions, including banking, are located;

²⁴ See the Practical Guide, page 35.

²⁵ Practical Guide, page 35: “As a general principle “brass plate” operations, where the social insurance of the employees is linked to a purely administrative company without having transferred actual decision-making powers, should not be accepted as satisfying the requirements in this area. The following guidelines are designed to assist institutions in assessing applications where they feel they may be dealing with a “brass plate” operation.” See also Pörtl, *Zwischenstaatliches Sozialversicherungsrecht*, Article 14 of Regulation (EC) 987/2009, paragraph 27.

²⁶ European Court of Justice, C-229/83, *Association des Centres distributeurs Edouard Leclerc*.

²⁷ See the Opinion of Advocate General Darmon in Case C-81/87, *Daily Mail*, paragraph 9.

- the place designated under EU regulations as the place responsible for managing and maintaining records in relation to regulatory requirements of the particular industry in which the undertaking is engaged;
- the place where the workers are recruited.”

2.4. Requirements set by the European Court of Justice

87 The criteria stated in the Practical Guide are also applied by the European Court of Justice when interpreting the term “registered office” pursuant to Article 13(1)(b)(i) of Regulation (EC) No 883/2004 in conjunction with Article 14(5a) of Regulation (EC) 987/2009:

88 In Case C-73/06, *Planzer*, the European Court of Justice has ruled that the term “business establishment” must be understood as the place where the essential decisions concerning the general management of a company are adopted and where the functions of its central administration are carried out.²⁸

89 In the same decision, the European Court of Justice has listed a number of factors which must be taken into account when assessing whether the conditions for a “business establishment” are fulfilled:

“Determination of a company's place of business requires a series of factors to be taken into consideration, foremost amongst which are its registered office, the place of its central administration, the place where its directors meet and the place, usually identical, where the general policy of that company is determined. Other factors, such as the place of residence of the main directors, the place where general meetings are held, the place where administrative and accounting documents are kept, and the

²⁸ European Court of Justice, C-73/06, *Planzer*, paragraph 60.

place where the company's financial, and particularly banking, transactions mainly take place, may also need to be taken into account.”²⁹

90 Concerning transport activities in particular, this term implies at least an office in which contracts may be drawn up and daily management decisions taken, and a place where the vehicles used for the said activities are stored.³⁰

91 Following from this, a fictitious presence, such as that of a “letter box” or “brass plate” company, may not be described as a place of business.³¹

92 In Case C-168/84, *Berkholz*, the European Court of Justice has held that the point of reference to determine tax jurisdiction is the establishment of business if it is of a certain minimum size and both the human and technical resources necessary for the provision of the services are permanently present.³²

93 General Advocate Mancini in C-168/84, *Berkholz*, has stated that the term “business establishment” presupposes, particularly where it provides services over a period of time, a certain degree of organization. And as there is no organization — an ordered structure comprising things and persons — which does not imply some division of labour. As a result, a supplier of services has to have both physical means and staff to help him exploit and operate those physical means.³³

2.5. “Registered office or place of business” in case of the appellant

94 The Liechtenstein Government assumes that the appellant does clearly not fulfil the criteria set by the Practical Guide and the European Court of Justice. The Liechtenstein Government bases this opinion on the following arguments:

²⁹ European Court of Justice, C-73/06, *Planzer*, paragraph 61.

³⁰ European Court of Justice, C-73/06, *Planzer*, paragraph 55; see also Case C-390/96, *Lease Plan*, paragraph 26.

³¹ European Court of Justice, C-73/06, *Planzer*, paragraph 62.

³² European Court of Justice, C-168/84, *Berkholz*, paragraph 18.

³³ See the Opinion of Advocate General Mancini in Case C-168/84, *Berkholz*, page 2255.

95 It is undisputed that the appellant has had its registered office in Liechtenstein since 2016.

96 However, during the relevant time period, February 2016 until February 2017, the appellant did not have any business premises at a suitable size of its own in Liechtenstein.

97 On 22 September 2017 and thus after the relevant time period with regard to the case at hand, the appellant has rented an apartment in Balzers, Liechtenstein, as a business premise.

98 Furthermore, during the relevant period of time, apart from a trustee appointed as a managing director, not a single person was employed in Liechtenstein.

99 Instead, all of the appellant`s employees carry out all their activities for the appellant in other EEA Member States, such as Germany, Belgium, the Netherlands or France.

100 Only on 1 October 2017, a person was employed in Liechtenstein with the intention to conduct their activities in Liechtenstein.

101 Based on the above observations, a business premise of a certain minimum size and both the human and technical resources are, however, necessary to qualify as a “registered office or place of business”.

102 Both criteria were not fulfilled in case of the appellant`s registered office in Liechtenstein during the relevant period of time.

103 The registered purpose of the appellant is, in particular, maritime and inland waterway transport management, truck and shipping fleet management and the provision of the relevant employees.

104 All activities essential for this purpose were performed outside Liechtenstein:

- The operational schedules of the boat crews were drawn up by a Dutch company.
- The ship carrier determined the goods to be transported, the destination and the place of arrival.
- The recruitment of the shipping crew was outsourced.
- The appellant has never owned a trade licence according to the Liechtenstein Business Act³⁴ or a licence according to the Act on Employment Services³⁵ in Liechtenstein.

105 It becomes clear from this that the appellant has not pursued an activity necessary to fulfil its registered purpose in Liechtenstein. In addition, there was no organization in the sense an ordered structure comprising things and persons at the appellant's registered office during the relevant period of time.

106 Hence, there can be no doubt that the appellant did not have its registered office pursuant to Article 13(1)(b)(i) of Regulation (EC) No 883/2004 in conjunction with Article 14(5a) of Regulation (EC) 987/2009 in Liechtenstein during the relevant period of time.

107 As a consequence, the appellant's employees were not subject to the social security law of Liechtenstein during the relevant period of time, February 2016 until February 2017.

³⁴ Business Act of 22 June 2006 (*Gewerbegesetz vom 22. Juni 2006*), LR 930.1: <https://www.gesetze.li/konso/2006.184>.

³⁵ Act of 12 April 2000 on employment services and temporary work agencies (*Gesetz vom 12. April 2000 über die Arbeitsvermittlung und den Personalverleih/Arbeitsvermittlungsgesetz*), LR 823.10: <https://www.gesetze.li/konso/2000103000>.

2.6. Conclusions

108 At this point, the Liechtenstein Government would like to refer to its statements above and emphasize that the Practical Guide must be considered when interpreting Regulation (EC) No 883/2004 and Regulation (EC) 987/2009.

109 According to the Practical Guide, Brass Plate Operations, where the social security of employees is linked to a mere administrative company, which has no decision-making authority of its own, cannot meet the requirements pursuant to Article 13(1)(b)(i) of Regulation (EC) No 883/2004 in conjunction with Article 14(5a) of Regulation (EC) 987/2009.

110 This follows also from the jurisprudence of the European Court of Justice, particularly in Case C-73/06, *Planzer*. Therein, the European Court of Justice has ruled that the term "business establishment" must be understood as the place where the essential decisions concerning the general management of a company are adopted and where the functions of its central administration are carried out.

111 In the same decision, the European Court of Justice has named a number of factors which must be taken into account when assessing where the "registered office/business establishment" of an undertaking is located.

112 With reference to the observations made above, the Liechtenstein Government suggest the EFTA Court to answer Question I.2. as follows:

In the determination of the term 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, reference must be made 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.

Hence, 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, must be determined according to the criteria laid down in the Practical guide on the applicable legislation in the European Union (EU), in the European Economic Area (EEA) and in Switzerland of December 2013 and by the European Court of Justice in its settled case-law.

3 Question II. of the Court of Appeal

113 With Question II., the Court of Appeal asks the EFTA Court to answer the question from what time the institution of the Member State in which the person pursues an activity is regarded as having been informed of the provisional determination by the institution of the place of residence and 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 the employee).

114 In addition, the Court of Appeal enquires whether 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 is 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.

115 If this Question is answered to the effect that the determination, notwithstanding the fact that it has become definitive, may be challenged, the Court of Appeal asks the

EFTA Court what the legal consequences are and whether this can result in a retroactive setting aside of the determination.

3.1. Interpretation of Article 16 of Regulation (EC) 879/2009

116 Article 16(1) of Regulation (EC) 879/2009 states that 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. Pursuant to Article 16(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.

117 This initial determination shall only be provisional.

118 The institution shall inform the designated institutions of each Member State in which an activity is pursued about the provisional determination.

119 According to Article 16(2), the provisional determination of the applicable legislation, as provided for in paragraph 2, becomes definitive within two months of the institutions designated by the competent authorities of the Member States concerned being informed of it, unless 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.

120 Hence, Article 16 states clearly how a preliminary determination acquires final effect.

121 As soon as the the competent institution of the Member State, which are the respondents in the case at hand, is informed about the initial determination by the institution of the place of residence, the two-month period begins to run.

3.2. Consequences of the omitted information to the respondents

122 The respondents have not been informed about the initial determination directly by the institution of the place of residence of the employees concerned.

123 This fact is not questioned by any of the parties.

124 The Liechtenstein Government is, however, of the opinion that in this respect, Article 16(2) is unambiguous:

125 The primary requirement for the commencement of the two-month period foreseen in Article 16(2) is the notification by the institution of the place of residence of the employee.

126 Therefore, the two-month period stated in Article 16(2) has not yet started to run.

127 As a consequence, the provisional determination of the applicable legislation has never become definite.

3.3. Retroactive repeal of a determination

128 Nevertheless, the Liechtenstein Government would like to refer to the settled case-law of the European Court of Justice regarding the retroactive repeal of a determination and to state the following:

129 Even if the respondents would have been informed about the initial determination directly by the institution of the place of residence, the determination would not have become definitive.

130 In Case C-527/16, *Alpenrind*, the European Court of Justice has held that an initial determination shall have binding force until the competent institution of the Member State, which has issued the determination, decides that it is revoked or declared void.³⁶

131 Hence, the competent institution of the Member State concerned is granted a two-month period to react to the initial determination.

132 As soon as this period is over, the determination shall – in the interest of legal certainty – become final.

133 This shall, however, not apply if the determination is incorrect and/or contrary to law.

134 Rather, it shall always be possible to correct a determination if it turns out that it was incorrect from the beginning.³⁷

135 This is particularly relevant in case of fraud or abuse of rights, or in case of doubt about the validity of a document or the accuracy of the facts on which the particulars contained therein are based.³⁸

136 Hence, the determination could still – retroactively – be set aside.³⁹

3.4. Conclusions

137 In line with the above considerations, the Liechtenstein Government would like to summarise as follows:

138 Due to the fact that the respondents in the case at hand have not been informed about the initial determination by the competent national institution which has issued the determination directly, the two-months-period according to Article 16(2) has not yet begun to run.

³⁶ European Court of Justice, C-527/16, *Alpenrind*, paragraph 64.

³⁷ European Court of Justice, C-527/16, *Alpenrind*, paragraphs 60 and 64.

³⁸ European Court of Justice, C-527/16, *Alpenrind*, paragraphs 46 and 60.

³⁹ See also *Pörtl*, *Zwischenstaatliches Sozialversicherungsrecht*, Article 16 of Regulation (EC) 879/2009, paragraph 12.

139 Article 16(2) requires a direct information from one institution to another.

140 Therefore, it is irrelevant if the provisional determination reaches the institution in whatever form.

141 Besides, in the case at hand, an initial determination would not have become definitive, as an incorrect determination can always be revoked – even after the two-month-period has passed.

142 Following from the above, the initial determination can still be set aside.

143 On the basis of the foregoing, the Liechtenstein Government concludes that Question II. must be answered as follows:

The institution of the Member State in which the person pursues an activity regarded must be regarded as having been informed of the provisional determination by the institution of the place of residence only if they are informed by the institution of the Member State, which has issued the determination, directly.

It does not 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).

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 does not impede that a determination could still retroactively be set aside if it turns out that it was incorrect from the beginning.

IV. Conclusions

144 Following the above observations, the Liechtenstein Government proposes that the EFTA Court may answer the first question as follows:

I. Registered office of an undertaking

1. The registered office (statutarischer Sitz or satzungsmässiger Sitz) of an undertaking does not 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:

In the determination of the term 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, reference must be made 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. The institution of the Member State in which the person pursues an activity regarded must be regarded as having been informed of the provisional determination by the institution of the place of residence only if they are informed by the institution of the Member State which has issued the determination, directly. It does not 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. 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 does not impede that a determination could still retroactively be set aside if it turns out that it was incorrect from the beginning.

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