



EUROPEAN COMMISSION

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TO THE PRESIDENT AND MEMBERS OF THE EFTA COURT

WRITTEN OBSERVATIONS

Submitted pursuant to Article 20 of the Statute of the EFTA Court by the

EUROPEAN COMMISSION

represented by: Denis MARTIN and Bernd-Roland KILLMANN, Members of its Legal Service acting as agents, with an address for service at: *Service Juridique, Greffe contentieux, BERL 1/093, 1049 Bruxelles,*

in Case C-5/22

concerning an application submitted pursuant to Article 34 of the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice by the Fürstliches Obergericht (hereinafter referred as “Princely Court of Appeal”), in the case:

Christian Maitz,

Appellant

against

Liechtenstein Old-Age and Survivors Insurance (AHV)

Liechtenstein Invalidity Insurance (IV)

Liechtenstein Family Allowances Office (FAK)

Respondents

requesting an advisory opinion regarding the interpretation of the acts referred to in Points 1 and 2 of Annex VI to the EEA Agreement, namely Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (hereinafter: “Regulation 883/2004”) 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: “Regulation 987/2009”), incorporated in the EEA Agreement.

I. INTRODUCTION

1. The request for advisory opinion concerns, firstly, the geographical scope of Article 2(1) of Regulation 883/2004 and, secondly, the possible obligation to use the Portable Document A1 for the purposes of Article 19(1) of Regulation 987/2009.

II. LAW

II.1. EEA law

2. Regulation 883/2004 entered into force on 1 May 2010 between Member States and became applicable from 1 June 2012 to Iceland, Liechtenstein and Norway due Annex VI, Social Security, to the EEA Agreement as replaced by Joint Committee Decision No 76/2011. Points 1, 2 and 4 of Annex VI in the version of Joint Committee Decision No 236/2019 read:

“I. GENERAL SOCIAL SECURITY COORDINATION

ACTS REFERRED TO

1. 32004 R 0883: Regulation (EC) No 883/2004 ...

...

The provisions of Regulation (EC) No 883/2004 shall, for the purposes of this Agreement, be adapted as follows:

...

(l) The following shall be added to Annex XI:

...

LIECHTENSTEIN

1. Compulsory insurance under Liechtenstein sickness insurance scheme for benefits in kind ("Krankenpflegeversicherung") and possible exemptions:

(a) The Liechtenstein legal provisions governing compulsory sickness insurance for benefits in kind shall apply to the following persons not resident in Liechtenstein:

(i) persons subject to Liechtenstein legal provisions under Title II of the Regulation;

...

2. 32009 R 0987: Regulation (EC) No 987/2009 ...

...

ACTS OF WHICH THE CONTRACTING PARTIES SHALL TAKE NOTE

4. A1 32018 H 0529(01): Recommendation No A1 of 18 October 2017 concerning the issuance of the attestation referred to in Article 19(2) of Regulation (EC) No 987/2009 of the European Parliament and of the Council”

3. Articles 2, 11 and the heading of Annex XI of Regulation 883/2004 read as follows:

“Article 2

Persons covered

1. This Regulation shall apply to nationals of a Member State, stateless persons and refugees residing in a Member State who are or have been subject to the legislation of one or more Member States, as well as to the members of their families and to their survivors

....

TITLE II

DETERMINATION OF THE LEGISLATION APPLICABLE

Article 11

General rules

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

2. ...

3. Subject to Articles 12 to 16:

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

...

ANNEX XI

SPECIAL PROVISIONS FOR THE APPLICATION OF THE LEGISLATION OF THE MEMBER STATES

(Articles 51(3), 56(1) and 83)”

4. Articles 4, 5 and 19 of Regulation 987/2009 read as follows:

“Article 4

Format and method of exchanging data

1. *The Administrative Commission shall lay down the structure, content, format and detailed arrangements for exchange of documents and structured electronic documents.*

2. ...

3. *In their communications with the persons concerned, the relevant institutions shall use the arrangements appropriate to each case, and favour the use of electronic means as far as possible. The Administrative Commission shall lay down the practical arrangements for sending information, documents or decisions by electronic means to the person concerned.*

Article 5

Legal value of documents and supporting evidence issued in another Member State

1. *Documents issued by the institution of a Member State and showing the position of a person for the purposes of the application of the basic Regulation and of the implementing Regulation, and supporting evidence on the basis of which the documents have been issued, shall be accepted by the institutions of the other Member States for as long as they have not been withdrawn or declared to be invalid by the Member State in which they were issued.*

...

Article 19

Provision of information to persons concerned and employers

...

2. *At the request of the person concerned or of the employer, the competent institution of the Member State whose legislation is applicable pursuant to Title II of the basic Regulation shall provide an attestation that such legislation is applicable and shall indicate, where appropriate, until what date and under what conditions.”*

5. Points 4 and 6 of Recommendation No A1 of the Administrative Commission for the Coordination of Social Security Systems concerning the issuance of the attestation referred to in Article 19(2) of Regulation 987/2009 read as follows:

“4. It is recommended that, prior to issuing a Portable Document A1, institutions assess all the relevant facts, whether by means of data contained in official sources, or by requesting the applicant to provide the necessary information. ...

...

6. *It is recommended that the competent institutions have the information about Portable Documents A1 issued available, preferably in an electronic database. ...”*

II.2. National law (Liechtenstein)

6. The Liechtenstein Old-Age and Survivors' Insurance Act of 14 December 1952 (*"Gesetz vom 14. Dezember 1952 über die Alters- und Hinterlassenenversicherung"*, Liechtenstein Law Gazette 1952 no. 29) provides in Article 34(1)(b) that natural persons exercising a gainful activity in Liechtenstein are subject to the compulsory Liechtenstein scheme providing for old-age and survivors' benefits.
7. The Liechtenstein Invalidity Insurance Act of 23. December 1959 (*"Gesetz vom 23. Dezember 1959 über die Invalidenversicherung"*, Liechtenstein Law Gazette 1960 no. 5) refers in its Article 26 back to Article 34 of the Liechtenstein Old-Age and Survivors' Insurance Act as regards the compulsory affiliation to the Liechtenstein scheme providing for invalidity benefits.
8. The Liechtenstein Sickness Insurance Act of 24. November 1971 (*"Gesetz vom 24. November 1971 über die Krankenversicherung"*, Liechtenstein Law Gazette 1971 no. 50) foresees in Article 7(1) (a) that persons exercising a gainful activity in Liechtenstein are subject to the compulsory sickness insurance scheme for benefits in kind (*"Krankenpflege"*). Point (b) of the same provision imposes persons older than 15 years working for a Liechtenstein employer to be subject to the compulsory sickness insurance scheme for benefits in cash (*"Krankengeld"*).
9. Liechtenstein is also, amongst others together with Switzerland, a party to the European Free Trade Association Convention signed in Stockholm on 4 January 1960. According to Article 1(1) of Appendix 2, Co-ordination of social security schemes, to Annex K, Free movement of persons (Chapter VIII), of that Convention, the parties agreed to apply between them Union acts as set out in Section A, which refers back to Regulations 883/2004 and 987/2009. Protocol 2 to said Appendix 2 provides for:

"Sections A and [...] of Appendix 2 are applicable to the relations between Liechtenstein and Switzerland under the conditions set out in this Protocol:

1. Compulsory insurance under the sickness insurance scheme

1.1 Persons residing in one of the two States are subject to the legal provisions on compulsory sickness insurance of their State of residence,

if:

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

...

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

II.3. National law (Austria)

10. Section 49 of the Austrian Lawyers' Code ("*Rechtsanwaltsordnung*", Austrian Imperial Law Gazette 1868 no. 96) lays down the requirements to receive invalidity, old-age and survivors' benefits as a lawyer in Austria. Its paragraph 1 imposes on the regionally competent Bar Association to set up and maintain a social security scheme covering those benefits for lawyers. Its paragraph 2 imposes on all lawyers the obligation to pay contributions to scheme set up by the regionally competent Bar Association. Only when the lawyer concerned is already subject to compulsory affiliation to a scheme providing for invalidity and old-age benefits in an EEA State or in Switzerland due to her or his practice as lawyer in any of them, then she or he is exempted from that obligation.

III. FACTS AND QUESTIONS ASKED

III.1. Facts

11. Mr Maitz is an Austrian national, who transferred his residence from Austria to Switzerland in July 2015.
12. On 13 November 2018, Mr Maitz joined the Bar Association in Vienna, Austria. The registration with the Bar Association entitles him to practice as a lawyer in Austria.
13. According to the referring Court, the Bar Association in Vienna exempted Mr Maitz from paying his contributions to their social security scheme for the year 2018. However, the referring Court does not indicate on which grounds.
14. On 3 December 2018, Mr Maitz became a member of the Liechtenstein Bar Association in the register for established European lawyers.

15. Mr Maitz has been working as an employed and self-employed lawyer in Liechtenstein since 1 January 2019. He never obtained any income in Austria, nor in Switzerland.
16. Because of his activity as an employed or self-employed lawyer in Liechtenstein, Mr Maitz is subject to the compulsory Liechtenstein scheme providing for old-age and survivors' benefits and that providing for invalidity benefits. The Liechtenstein institutions administering the schemes to which he is affiliated are competent to calculate the contributions, which he must pay.
17. For the year 2019, the Bar Association in Vienna refused to exempt Mr Maitz from paying his contributions to the Austrian social security scheme unless he could provide for a Portable Document A1 issued by the competent social institution of the country in which he was paying his contributions for the period starting from 1 January 2019. Presentation of the Portable Document A1 would have automatically exempted Mr Maitz from paying contributions to the Austrian scheme.
18. Mr Maitz asked the competent institutions of Liechtenstein to issue a Portable Document A1 for the years 2019-2020, as an evidence of his affiliation to the Liechtenstein social security scheme.
19. The competent institutions of Liechtenstein issued an order on 4 August 2020 in which they recognised that the income obtained by Mr Maitz from his professional activities was liable to mandatory contributions payable to the Liechtenstein social security scheme. However, they refused to issue a Portable Document A1 to attest an exclusive insurance of Mr Maitz in the Liechtenstein social security scheme because they considered the fact that Mr Maitz's was residing in Switzerland would have impeded them to do so.
20. Mr Maitz asked for a review of that order by the competent institutions of Liechtenstein, who dismissed the review on 29 December 2021. Consequently, Mr Maitz challenged the order before the Princely Court of Appeal. During the proceedings on the review, the competent institutions of Liechtenstein proposed to issue an official attestation concerning the compulsory affiliation to the Liechtenstein schemes providing for invalidity, old-age and survivors' benefits instead of a Portable Document A1.

III.2. Questions

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

1) Is it necessary for the scope ratione personae of [Regulation 883/2004 ...], that the Member State national who is subject to the legislation of one or more Member States within the meaning of Article 2(1) of that Regulation is resident in one of the Member States?

If the answer to that question is in the negative:

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

2) Must an attestation within the meaning of Article 19(2) of [Regulation 987/2009 ...] be issued necessarily by means of a [Portable Document] A1 laid down by the Administrative Commission for the Coordination of Social Security Systems in order to produce the legal effects specified in Article 5(1) of that Regulation?

IV. ANALYSIS

IV.1. First Question

22. The first part of the first question is whether Regulation 883/2004 establishes that persons, subject to the legislation of one or more Member States, as envisaged in Article 2(1) of that Regulation, are only falling within the scope of the Regulation, if they are resident in the territory of the EEA.
23. Due to the incorporation of Regulation 883/2004 in the EEA Agreement, specifically in its Annex VI, its geographical application matches that of all provisions under the EEA Agreement.
24. In defining the geographical scope of the EEA Agreement, the EFTA Court has already stated that EEA law may produce effects outside the territory of EEA States, despite legal acts incorporated into the EEA Agreement being, in principle, applicable to the same area as the EEA Agreement. More concretely, this extension

applies specifically “*to professional activities pursued outside the territory of the EEA States as long as the employment relationship retains a sufficiently close link with the EEA. That principle must be deemed to extend also to cases in which there is a sufficiently close link between the employment relationship, on the one hand, and the law of an EEA State and thus the relevant rules of EEA law, on the other*”¹.

25. Further, it is also within the scope of Article 28 of the EEA Agreement to cover any national of an EEA State, irrespective of her or his place of residence and her or his nationality, who has exercised the right to freedom of movement for workers and who has worked in an EEA State other than that of his residence comes².
26. Regulation 883/2004 was included in the EEA Agreement in order to pursue the aims set out in Article 29 of that Agreement in the field of social security, which again is to promote free movement of workers as provided for by Article 28 of the Agreement, as well as of self-employed persons.
27. Based on the information available from the referring Court, the insured person is an Austrian national, pursues a gainful activity in Liechtenstein, but he is resident outside the EEA, namely in Switzerland. In other words, the current case is about a national of one EEA State, who works in another EEA State, while exercising his rights to freedom of movement under the EEA Agreement. As a national of one EEA State, Austria, he pursues a professional activity within the territory of another EEA State, Liechtenstein, and thus falls within the geographical scope of the EEA Agreement regardless of the fact that he resides outside the EEA. Whether he is an employed or a self-employed lawyer, it is not relevant in view of Article 29 of the EEA Agreement, which covers both situations.
28. In light of the above, the Commission is of the opinion that Article 2(1) of Regulation 883/2004 must be interpreted as meaning that it also covers persons who are nationals of an EEA State and who work in another EEA State, but who reside outside of any EEA State, provided that there is a sufficiently close link between the

¹ Judgment of the EFTA Court of 15 July 2021, *Sverrisson*, E-11/20, paragraphs 63 and 64.

² See for Article 45 TFEU, inter alia, judgment of the European Court of Justice of 28 February 2013, *Petersen*, C-544/11, paragraph 34.

employment relationship, on the one hand, and the law of an EEA State and thus the relevant rules of EEA law, on the other.

29. With the second part of the first question, the referring Court enquires on the relevance of a possible agreement concluded by the EU or an EEA State with a third country, by which the scope of application of Regulation 883/2004 extends to that third country.
30. The Commission submits that such an agreement with a third country, specifically Protocol 2 to Appendix 2 of the European Free Trade Association Convention concerning the relation between Liechtenstein and Switzerland on insurance benefits, falls outside the EEA Agreement. That is why the Commission submits that the second part of the first question does not necessitate an answer or that, in any event, EFTA Court would lack jurisdiction to answer it.
31. However, for the sake of completeness, it appears useful to recall that the provisions of Title II of Regulation 883/2004, one of which is Article 11(3)(a), constitute a complete and uniform system of conflict of laws rules. That system is mandatory for EEA States and its application depends solely on the objective situation of the employed person concerned³.
32. The provisions in Title II of Regulation 883/2004 are intended not only to prevent the simultaneous application of multiple national legislative systems within the EEA and the complications which that might entail, but also to ensure that persons falling within the scope of that regulation are not left without social security protection because no legislation is applicable to them. Accordingly, once a person falls within the scope of Article 2 of the Regulation, the single legislation rule, laid down in Article 11(1) of that regulation is, in principle, applicable, and the national legislation applicable is to be determined in accordance with the provisions of Title II of that regulation⁴.

³ Judgment of the EFTA Court of 14 May 2019, *Concordia*, E-2/18, paragraph 47.

⁴ See judgment of the European Court of Justice of 3 June 2021, *TEAM POWER EUROPE*, C-784/19, paragraphs 32 and 33 and the case-law cited.

33. Applying Article 11(3)(a) of Regulation 883/2004 to the current case leads to the application of the legislation of Liechtenstein. With regard to Liechtenstein, Point 1(l) of Annex VI to the EEA Agreement confirms that, where Regulation 883/2004 requires the application of Liechtenstein legislation, Liechtenstein considers all the insured persons affiliated to its compulsory sickness insurance scheme for benefits in kind, even if they do not reside in Liechtenstein.
34. A bi-lateral agreement of an EEA State with a third country on social security is a matter falling outside the EEA Agreement. Such an agreement is without impact on the obligation of a concerned EEA State to comply with EEA law. Indeed, if the application of a provision of EEA law could be impeded by a measure adopted pursuant to the implementation of a bilateral agreement, falling outside the field of application of the EEA Agreement, this would be against the duty for every EEA State to facilitate the application of that provision of EEA law. The fact that the third country, for its part, is or is not obliged to comply with any obligation stemming from EEA law is irrelevant in that regard. This principle also applies to the application of Regulation 883/2004⁵.
35. Since it results from Regulation 883/2004 that Liechtenstein legislation applies to a given insured person because that person pursues an activity as an employed or self-employed person in Liechtenstein, EEA law requires Liechtenstein to apply Protocol 2 to Appendix 2 of the European Free Trade Association Convention in conformity with this result. It is thus up to Liechtenstein to ensure that its bilateral agreements, amongst which is the European Free Trade Association Convention, applicable to matters of social security with Switzerland, is applied in a way so as not to obstruct the application of Article 2(1) and Article 11(1) and (3)(a) of Regulation 883/2004.
36. Be that as it may, since the European Free Trade Association Convention is outside the scope of the EEA Agreement, the Commission is also of the opinion that the EFTA Court would lack jurisdiction to answer the question on how the provisions on social security contained in the European Free Trade Association Convention are to be applied in the case at hand.

⁵ See, specifically with regard to a bi-lateral agreement with a third country on social security, order of the European Court of Justice of 5 September 2019, *Caisse pour l'avenir des enfants*, C-801/18, paragraphs 35 to 40.

IV.2. Second question

37. In the second question, the referring Court asks to assess whether an attestation within the meaning of Article 19(2) of Regulation 987/2009 must be necessarily a Portable Document A1, in order to produce the legal effects specified in Article 5(1) of that Regulation.
38. It is true that the Administrative Commission determines, according to Article 4(1) of Regulation 987/2009, the structure and the content of documents exchanged between institutions of EEA States. The Portable Document A1 concerning the applicable legislation which applies to the holder is one of these documents. Further, Article 4(3) of Regulation 987/2009 requires EEA States to favour electronic communications for these documents with the insured persons⁶.
39. However, Article 5(1) of Regulation 987/2009 makes no reference that the obligations contained in that provision only apply to documents issued according to the structure and the content as given to them under Article 4(1).
40. The obligation for EEA States' institutions to accept documents issued by other institutions under Article 5(1) of Regulation 987/2009, containing information on the position of a person for the purposes of the Regulation, and supporting evidence on the basis on which the document was issued, is, in essence, an expression of the principle of sincere cooperation. It also follows from the principle of sincere cooperation that the EEA States concerned are under an obligation to apply Regulations 883/2004 and 987/2009 correctly, even in the absence of a Portable Document A1⁷.
41. The principle of sincere cooperation goes both ways. It requires the issuing institution to draw up any document used for the purposes of Article 5 with the same care, regardless whether the document takes the form of a Portable Document A1 or not. Indeed, the issuing institution has the duty to assess all the relevant facts,

⁶ With a view to allowing for exchanging electronic information related, amongst others, to the applicable legislation, institutions across the EEA use an IT system called the Electronic Exchange of Social Security Information (EESSI).

⁷ Judgment of the EFTA Court of 14 December 2004, *Tsomakas and Others*, E-3/04, paragraph 32.

whether by means of data contained in official sources, or by requesting the applicant to provide the necessary information⁸.

42. The principle of sincere cooperation imposes on the receiving institution to accept the content of a document showing the position of a person as regards the application of Regulation 883/2004 and 987/2009, regardless whether the document takes the form of a Portable Document A1 or not. However, sincere cooperation only works if based on mutual trust. Therefore, pursuant to Article 5(2) of Regulation 987/2004, the receiving institution has the right to ask the issuing institution for further clarification and, where appropriate, to withdraw the document.
43. In light of the above, the Commission submits that Articles 5(1) and 5(2) of Regulation 987/2009 do not require the documents to comply with any particular form as they only refer to a generic document without requiring any specific form.
44. Likewise, Article 19(2) of Regulation 987/2009 only refers to an “*attestation*”, without laying down any specificities on the form to follow. Indeed, the Administrative Commission just recommends the issuance of the attestation referred to in Article 19(2) of Regulation 987/2009 in the form of the Portable Document A1, but there is no obligation on the institutions of EEA States to use that form.
45. In the same vein, institutions of EEA States must not refuse to recognise the position of a person as regards the application of Regulation 883/2004 and 987/2009 as expressed by the institution of another EEA State just on the ground that the “*attestation*” did not take the form of the Portable Document A1. In any event, the receiving institution may avail itself of its right under Article 5(2) of Regulation 987/2004 to ask the issuing institution for further clarification and, where appropriate, to withdraw the document.
46. In sum, the Commission is of the opinion that Article 19(2) of Regulation 987/2009 must be interpreted as not requiring an attestation to be issued in the form of a Portable Document A1 in order to produce the legal effects under Article 5(1) of that Regulation. Receiving authorities enjoy, whatever the form of the attestation,

⁸ Judgment of the EFTA Court of 14 December 2021, *ISTM*, E-1/21, paragraph 36.

the right under Article 5(2) of that Regulation to ask the issuing institution for further information and, eventually, the withdrawal of the document.

V. CONCLUSION

47. In the light of the foregoing, the Commission considers that the questions referred to the EFTA Court for an advisory opinion by the Princely Court of Appeal should be answered as follows:

1. Article 2(1) of Regulation 883/2004 must be interpreted as meaning that it also covers persons who are nationals of an EEA State and who work in another EEA State, but who reside outside of any EEA State, provided that there is a sufficiently close link between the employment relationship, on the one hand, and the law of an EEA State and thus the relevant rules of EEA law, on the other.

2. Article 19(2) of Regulation 987/2009 must be interpreted as not requiring an attestation to be issued in the form of a Portable Document A1 in order to produce the legal effects under Article 5(1) of that Regulation. Receiving authorities enjoy under Article 5(2) of that Regulation, whatever the form of the attestation, the right to ask the issuing institution for further information and, eventually, the withdrawal of the document.

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