

Brussels, 25 July 2022
Case No: 88776
Document No: 1300325

ORIGINAL

IN THE EFTA COURT

WRITTEN OBSERVATIONS

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

THE EFTA SURVEILLANCE AUTHORITY

represented by
Ewa Gromnicka, Michael Sánchez Rydelski
and Melpo-Menie Joséphidès
Department of Legal & Executive Affairs,
acting as Agents,

IN CASE E-5/22

Christian Maitz

v

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

in which the first chamber of the Princely Court of Appeal (*Fürstliches Obergericht*) requests the EFTA Court to deliver 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 concerning the interpretation and application of Regulation 883/2004 on the coordination of social security systems and Regulation 987/2009 laying down the procedure for implementing Regulation 883/2004 on the coordination of social security systems

Table of Contents

1	INTRODUCTION	3
2	THE FACTS OF THE CASE	4
3	EEA LAW	6
4	THE QUESTIONS REFERRED	9
5	LEGAL ANALYSIS.....	9
5.1	Residency requirement in Article 2(1) of the Basic Regulation	9
5.1.1	Material Scope of the Basic Regulation.....	9
5.1.2	Lex Loci Laboris principle	11
5.2	Adaptations in the EFTA Convention	15
5.3	Attestation of applicable legislation	17
6	CONCLUSION.....	24

1 INTRODUCTION

1. The present case raises questions concerning the applicability of Regulation 883/2004 (“**the Basic Regulation**”) to an EEA national working in the EEA but residing in a third country; the relevance of adaptations to the Basic Regulation made in a bilateral agreement with a third country that is not a Contracting Party to the EEA Agreement, and the formal requirements for the issuance of an attestation of the applicable legislation pursuant to Article 19(2) of Regulation 987/2009 (“**the Implementing Regulation**”).
2. The underlying premise of the Basic Regulation, i.e. that it sets up a complete and binding system of coordination of social security systems, has been reiterated by the Court in its case-law.¹ ESA also notes, as a matter of principle, that in line with the Court and CJEU case-law, the application of the system of conflict of law rules established by Title II of the Basic Regulation depends solely on the objective situation of the person concerned.²
3. By laying down a series of common principles which all the EEA States must observe, together with the system of conflict of law rules established therein, the Basic Regulation ensures that persons exercising their right to free movement in the EEA will not be adversely affected by the variances between national systems because they have exercised that right.³
4. ESA submits that to fall under the scope *ratione personae* of Article 2(1) of the Basic Regulation it is not necessary that an EEA national who is subject to the legislation of one or more EEA States is resident in an EEA State.
5. Further, ESA submits that an agreement concluded by an EEA State with a third country, by which the scope of application of the Basic Regulation was extended to

¹ See, e.g. Case E-3/04 *Tsomakas Athanasios and Others with Odfjell ASA as an accessory intervener v The Norwegian State*, paragraph 28; Case E-2/18 *C v Concordia Schweizerische Kranken- und Unfallversicherung AG, Landesvertretung Liechtenstein*, paragraph 47.

² See, to that effect Case C-543/13 *Fischer-Lintjens*, EU:C:2015:359, paragraph 38 and the case-law cited; Case C-610/18 *AFMB*, EU:C:2020:565, paragraphs 48, 60 and 61, and Case E-1/21 *ISTM International Shipping & Trucking Management GmbH v AHV-IV-FAK*, paragraph 35.

³ Opinion of Advocate General Cruz Villalón in Case C-308/14 *Commission v United Kingdom*, EU:C:2015:666, paragraph 49.

the third country, with specific adaptations in the field of sickness insurance, cannot change the scope *ratione personae* of Article 2(1) of the Basic Regulation.

6. Finally, ESA submits that an applicable legislation attestation within the meaning of Article 19(2) of the Basic Regulation has to be issued by the EEA State concerned. To produce legal effects, it does not necessarily have to be in the form of Portable Document A1, as long as it fulfils the requirements of Article 19 and contains the relevant information for establishing the situation of the beneficiary.

2 THE FACTS OF THE CASE

7. The appellant (“**the Appellant**”), an Austrian national, transferred his residence from Austria to Switzerland in July 2015.
8. On 13 November 2018, the Appellant was entered in the register of lawyers by the Vienna Bar Association, Austria (*Rechtsanwaltskammer Wien*), as a result of which he is entitled to practise law in Austria.
9. On 3 December 2018, the Appellant was entered in the register of established European lawyers by the Liechtenstein Bar Association (*Liechtensteinische Rechtsanwaltskammer*). Since 1 January 2019 he worked in Liechtenstein as an employed or self-employed lawyer. He has obtained income exclusively from this activity, with no income in Austria or Switzerland.
10. Because of his economic activity in Liechtenstein, the Appellant is subject to compulsory insurance with the Liechtenstein Old-Age and Survivors’ Insurance (*Liechtensteinische Alters- und Hinterlassenenversicherung*) (“**AHV**”), which provides for old-age and survivor’s benefits, as well as invalidity benefits. The Appellant is under an obligation to pay relevant contributions to the AHV.
11. Pursuant to the Austrian Lawyers’ Code, the Appellant is under an obligation to pay contributions in Austria to the relevant institution for the provision of old-age and invalidity benefits for lawyers and trainee lawyers and for the provision of survivors’ benefits in the event of the lawyer’s death. An exemption from this obligation is provided if the person, by virtue of their activities as a lawyer, is already subject to

compulsory affiliation to an old-age pension scheme of an EU Member State, another Contracting Party to the EEA Agreement or the Swiss Confederation.

12. For the period from 1 January 2019, the Appellant was required by the Vienna Bar Association to produce a Portable Document A1 form (“**PD A1**”) as an attestation of the national legislation which applies to the him and as a confirmation that he does not have to pay contributions in Austria. According to the request, a PD A1 form is considered to entail an automatic exemption from contributions to the Austrian pensions institution.⁴
13. The Appellant requested the AHV, the Liechtenstein Invalidity Insurance (*Liechtensteinische Invalidenversicherung* (“*IV*”) and the Liechtenstein Family Allowances Office (*Liechtensteinische Familienausgleichkasse* (“*FAK*”) (“**the Respondents**”) to issue him a PD A1 form for 2019 and 2020 as evidence of contributing to the old-age pension scheme in Liechtenstein.
14. The Respondents by their Order of 4 August 2020 determined that the income obtained by the Appellant from his employed and self-employed activities in Liechtenstein is liable to mandatory contributions payable to the Respondents, but that a PD A1 form, attesting an exclusive liability and insurance obligation in Liechtenstein or in a single State within the meaning of social security coordination, cannot be issued. The reason for this as set out in the request for an Advisory Opinion was that the Respondents considered that the Appellant falls outside of the personal scope of the Basic Regulation because of the adaptations made in Protocol K to the EFTA Convention concerning Liechtenstein and Switzerland.⁵
15. An appeal brought by the Appellant challenging the above Order was rejected by the Respondents by their Decision of 29 December 2021. The Appellant challenged that decision by an appeal to the Princely Court of Appeal.
16. In the course of the appeals proceedings, the Respondents have offered, in place of the PD A1 form, to instead issue an official attestation concerning the old-age benefits provision existing in Liechtenstein.⁶ It is not clear from the request for an Advisory Opinion whether this official attestation was to be limited to information

⁴ Request for an Advisory Opinion, page 4.

⁵ Request for an Advisory Opinion, page 8.

⁶ Request for an Advisory Opinion, page 5.

about the old-age benefit provisions in force in Liechtenstein or whether it was to attest that the Appellant has been subject to compulsory contributions in Liechtenstein, detailing also the duration of the coverage of the insurance.

3 EEA LAW

17. Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (“**Regulation 883/2004**” or “**the Basic Regulation**”) 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 (“**Regulation 987/2009**” or “**the Implementing Regulation**”) have been incorporated into the EEA Agreement by Decision No 76/2011 of the EEA Joint Committee of 1 July 2011.⁷ The two regulations were added to points 1 and 2, respectively, of Annex VI to the Agreement (Social security). The EEA Joint Committee decision entered into force on 1 June 2012.

18. Recitals 15, 16, 17 and 18 of the Basic Regulation provide:

(15) It is necessary to subject persons moving within the [Union] 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. [...]

(16) Within the [Union] there is in principle no justification for making social security rights dependent on the place of residence of the person concerned; nevertheless, in specific cases, in particular as regards special benefits linked to the economic and social context of the person involved, the place of residence could be taken into account. [...]

(17) With a view to guaranteeing the equality of treatment of all persons occupied in the territory of a Member State as effectively as possible, it is appropriate to determine as the legislation applicable, as a general rule, that of the Member State in which the person concerned pursues his/her activity as an employed or self-employed person. [...]

(18) In specific situations which justify other criteria of applicability, it is necessary to derogate from that general rule.” (emphasis added)

19. Article 2 entitled “Persons covered”, sets out the personal scope of the Basic Regulation, and provides in its first paragraph:

“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

⁷ OJ 2011 L 262, p.33.

legislation of one or more Member States, as well as to the members of their families and to their survivors.”

20. Article 9(1) of the Basic Regulation reads:

“The Member States shall notify the Commission of the European Communities in writing of the declarations referred to in Article 1(1), the legislation and schemes referred to in Article 3 [...] as well as substantive amendments made subsequently. Such notifications shall indicate the date of entry into force of the laws and schemes in question or, in the case of the declarations provided for in Article 1(1), the date from which this Regulation will apply to the schemes specified in the declarations by the Member States.”

21. Article 11 entitled “General rules”, which forms part of Title II of the Basic Regulation regarding the determination of the legislation applicable, provides:

“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. [...]

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 [...]”

22. Under Article 76, entitled “Cooperation”, in Title V of the Basic Regulation, itself headed ‘Miscellaneous Provisions’:

“1. The competent authorities of the Member States shall communicate to each other all information regarding:

(a) measures taken to implement this Regulation;

(b) changes in their legislation which may affect the implementation of this Regulation.

2. For the purposes of this Regulation, the authorities and institutions of the Member States shall lend one another their good offices and act as though implementing their own legislation. [...]”

23. Under Title I of the Implementing Regulation, entitled “General Provisions”, Chapter I deals with definitions. It provides, in Article 1(2)(c), that:

““document” means a set of data, irrespective of the medium used, structured in such a way that it can be exchanged electronically and which must be communicated in order to enable the operation of [Regulation No 883/2004] and [Regulation No 987/2009].”

24. Article 4 of the Implementing Regulation, entitled “Format and method of exchanging data”, provides in the first paragraph that:

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

[...]

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.” (emphasis added)

25. Article 5 of the Implementing Regulation, entitled “*Legal value of documents and supporting evidence issued in another Member State*”, provides in the first paragraph:

“1. Documents issued by the institution of a Member State and showing the position of a person for the purposes of the application of [Regulation No 883/2004] and of [Regulation No 987/2009], 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 invalid by the Member State in which they were issued.

2. Where there is doubt about the validity of a document or the accuracy of the facts on which the particulars contained therein are based, the institution of the Member State that receives the document shall ask the issuing institution for the necessary clarification and, where appropriate, the withdrawal of that document. The issuing institution shall reconsider the grounds for issuing the document and, if necessary, withdraw it.

3. Pursuant to paragraph 2, where there is doubt about the information provided by the persons concerned, the validity of a document or supporting evidence or the accuracy of the facts on which the particulars contained therein are based, the institution of the place of stay or residence shall, insofar as this is possible, at the request of the competent institution, proceed to the necessary verification of this information or document.

4. Where no agreement is reached between the institutions concerned, the matter may be brought before the Administrative Commission by the competent authorities no earlier than one month following the date on which the institution that received the document submitted its request. The Administrative Commission shall seek to reconcile the points of view within six months of the date on which the matter was brought before it.” (emphasis added)

26. Article 19 of the Implementing Regulation, entitled “*Provision of information to persons concerned and employers*”, provides in its second paragraph:

“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.” (emphasis added)

27. Under Title V, entitled “*Miscellaneous transitional and final provisions*”, Article 89, entitled “*Information*”, provides in its paragraph 3:

“The competent authorities shall ensure that their institutions are aware of and apply all the [Union] provisions, legislative or otherwise, including the decisions of the Administrative Commission, in the areas covered by and within the terms of [Regulation No 883/2004] and [Regulation No 987/2009].”

4 THE QUESTIONS REFERRED

28. The referring court has asked the EFTA Court the following questions:

*“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 (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, incorporated into the EEA Agreement by Decision of the Joint Committee of 1 July 2011, be issued necessarily by means of a form (PD 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?”

5 LEGAL ANALYSIS

5.1 Residency requirement in Article 2(1) of the Basic Regulation

29. By its first question, the referring court in essence asks whether it is a condition under Article 2(1) of the Basic Regulation that, as well as being a national of an EEA State and being subject to the legislation of one or more EEA States, a person must also be residing in an EEA State in order to be covered by the scope *ratione personae* of the Basic Regulation.

5.1.1 Material Scope of the Basic Regulation

30. Article 3 of the Basic Regulation sets out the material scope of the Regulation and provides that it is applicable to all legislation concerning, *inter alia*, old-age benefits, invalidity benefits and survivors' benefits. Article 9(1) of the Basic Regulation⁸

⁸ Article 9 was introduced in 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. The changes brought about by this regulation had come into the Basic and Implementing Regulations before their incorporation into the EEA Agreement.

imposes on the EEA States a duty to declare on a yearly basis the laws and schemes relating to social security benefits which fall within the scope *ratione materiae* of that Regulation.⁹

31. Among the legislation and schemes referred to in Article 3 of the Basic Regulation the Liechtenstein declaration to ESA lists, amongst other acts, the Liechtenstein Old-Age and Survivors' Insurance Act of 14 December 1952 ("**the Old-Age Insurance Act**").¹⁰ Articles 34(1)(b), 36(1), 52 and 55 of the Old-Age Insurance Act provide that natural persons exercising a gainful activity in Liechtenstein are subject to the compulsory Liechtenstein scheme providing for old-age and survivors' benefits (*AHV*).
32. Likewise, the Liechtenstein Invalidity Insurance Act of 23 December 1959¹¹ is listed in the Declaration pursuant to Article 9. This act in its Article 26 refers back to Article 34 of the Old-Age Insurance Act as regards the compulsory affiliation to the Liechtenstein scheme providing for invalidity benefits.
33. Also listed in the Declaration as the relevant legislation is the Liechtenstein Sickness Insurance Act of 24 November 1971¹² which foresees in its 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*").
34. Taking into account the Article 9 declaration submitted by Liechtenstein, as well as the material scope of the relevant acts, ESA submits that they fall within the scope of the Basic Regulation. This has been recognised by the CJEU in C-453/14 *Knauer*, which referred to the fact that Liechtenstein had notified under Article 9 of the Basic Regulation that old-age benefits under Liechtenstein law fell within the

⁹ Case C-131/96 *Mora Romero*, EU:C:1997:317, paragraph 25 ; Case C-225/10 *Pérez García and Others*, EU:C:2011:678, paragraph 36 ; Case C-12/14 *Commission v Malta*, EU:C:2015:135, paragraph 36 ;

¹⁰ "Gesetz vom 14. Dezember 1952 über die Alters- und Hinterlassenenversicherung", Liechtenstein Law Gazette 1952 no. 29.

¹¹ "Gesetz vom 23. Dezember 1959 über die Invalidenversicherung", Liechtenstein Law Gazette 1960 no. 5.

¹² "Gesetz vom 24. November 1971 über die Krankenversicherung", Liechtenstein Law Gazette 1971 no. 50.

scope of that regulation and therefore, Liechtenstein should be treated as a Member State for the purposes of applying that regulation.¹³

35. ESA notes that that the three acts listed in paragraphs 31-33 of these written observations create a compulsory affiliation to the relevant social security schemes in Liechtenstein by virtue of obtaining professional income.

5.1.2 *Lex Loci Laboris principle*

36. In accordance with settled case-law, the substantive rules determining the legislation applicable are contained in Title II of the Basic Regulation. These provisions constitute a complete and uniform system of conflict rules which are intended not only to prevent the simultaneous application of a number of national legislative systems and the complications which might ensue, but also to ensure that the persons covered by that Regulation are not left without social security cover because there is no legislation which is applicable to them.¹⁴ The system of conflict rules laid down in Title II of the Basic Regulation 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.¹⁵ The system is mandatory for the EEA States and its application depends not on the free choice of the employed person, employers or competent national authorities, but solely on the objective situation of the employed person.¹⁶

37. One of the main principles of the Basic Regulation, expressed in its Article 11, is that any person to whom this Regulation applies is subject to the legislation of a single EEA State only.¹⁷ Recital 15 of the Basic Regulation provides that “[...] it is necessary to subject persons moving within the [Union] to the social security scheme of only one single EEA State in order to avoid overlapping of the applicable

¹³ Case C-453/14 *Vorarlberger Gebietskrankenkasse and Alfred Knauer v Landeshauptmann von Vorarlberg and Rudolf Mathis*, EU:C:2016:37, paragraph 24.

¹⁴ Case C-308/14 *Commission v United Kingdom*, EU:C:2016:436, paragraph 64, and Case C-451/17 *Walltopia*, EU:C:2018:861, paragraph 41 and the case-law cited; see also Case C-551/16 *Klein Schiphorst*, EU:C:2018:200, paragraph 31. Case C-543/13 *Fischer-Lintjens*, cited above, paragraph 39 of the Judgment and paragraphs 40 and 41 of the Opinion of Advocate General Mengozzi; Case C-548/11, *Mulders*, EU:C:2013:249, paragraph 39, Case C-275/96 *Kuusijärvi*, paragraph 28; Case C-227/03 *van Pommeren-Bourgondiën*, paragraph 34, and Case C-619/11 *Dumont de Chassart*, EU:C:2013:92, paragraph 38.

¹⁵ See Case E-3/04 *Tsomakas*, paragraph 28.

¹⁶ Case E-2/18 *Concordia*, paragraph 47, and compare Case C-345/09, *van Delft and Others*, EU:C:2010:610, paragraph 52. E-1/21 *ISTM*, paragraph 35.

¹⁷ See, by analogy, Joined Cases C-611/10 and C-612/10 *Hudzinski and Wawrzyniak*, EU:C:2012:339, paragraph 41, and Case C-114/13 *Bouman*, EU:C:2015:81, paragraph 33.

provisions of national legislation and the complications which could result therefrom.”

38. Where a person falls within the scope *ratione personae* of the Basic Regulation, as defined in Article 2, the core rule, as set out in Article 11(1) of that Regulation, is that the legislation of a single EEA State applies. The question of which national legislation is applicable is determined in accordance with the provisions of Title II of that Regulation.¹⁸
39. The CJEU has confirmed that this principle aims to avoid the complications which may arise from the simultaneous application of several national laws, and to eliminate unequal treatment which, for employed and self-employed persons moving within the Union, would be the consequence of partial or total overlapping of the applicable legislation.¹⁹
40. Recital 17 of the Basic Regulation states that *“with a view to guaranteeing the equality of treatment of all persons occupied in the territory of an EEA State as effectively as possible, it is appropriate to determine as the legislation applicable, as a general rule, that of the EEA State in which the person concerned pursues his activity as an employed or self-employed person.”* Recital 18 allows for derogations from the general rule in specific situations which justify other criteria of applicability. By clarifying and safeguarding social security entitlements of persons moving between EEA States, the Basic Regulation grants them a real choice to live or work in another country.
41. Article 2(1) of the Basic Regulation makes it clear that that Regulation is applicable to nationals of EEA States, to stateless persons and refugees residing in an EEA State who are or have been subject to the legislation of one or more EEA States, as well as to the members of their families and to their survivors. ESA notes that the CJEU case-law on the predecessor of the Basic Regulation, Regulation 1408/71, in applying Article 2 consistently only used the requirement of residing in

¹⁸ See, to that effect, Case C-266/13 *Kik*, EU:C:2015:188, paragraph 47 and the case-law cited, and Case C-451/17 *Walltopia*, EU:C:2018:861, paragraph 42 and the case-law cited.

¹⁹ See, to that effect, Case C-493/04 *Piatkowski*, EU:C:2006:167, paragraph 21 and Case C-89/16 *Szoja*, EU:C:2017:538, paragraph 35.

an EEA State to stateless persons or refugees and not to the nationals of EEA States.²⁰

42. The conflict rules on applicable legislation in the Basic Regulation are based on *lex loci laboris*. In line with Article 11(3)(a) of the Basic Regulation, an EEA national pursuing an activity as an employed or self-employed person in an EEA State is in principle subject to the legislation of the State where they effectively pursue their economic activity.
43. *Lex domicilii*, that is, the application of the legislation of the country of residence, is either to apply in line with Article 11(3)(e) of the Basic Regulation where a person does not pursue an economic activity; or to apply in line with Article 13 where a person carries out economic activities in two or more EEA States or where a worker has several employers. The situation of the Appellant, who pursues all his economic activity in one EEA State while residing in a third country, does not fall within those provisions.
44. With regard to the doubts raised before the national court concerning the significance of the Appellant's residence in determining the applicable legislation, ESA only reiterates that, first, the Basic Regulation does not impose in Article 2(1) such a requirement for the application of the Basic Regulation to EEA nationals. Second, ESA also notes that the significance of the place of residence is specifically accounted for in the Basic Regulation in only two instances: Articles 11(3)(c) and (e) which are, however, not applicable in the situation of the Appellant.²¹ Reference to place of residence is also made in other specific rules governing overlapping

²⁰ In Case C-331/06 *Chuck*, EU:C:2008:188, paragraph 30 the CJEU held that “Article 2 of that regulation requires only, for its application, the fulfilment of two conditions: the worker must be a national of one of the Member States (or be a stateless person or refugee residing within the territory of one of the Member States) and be or have been subject to the legislation of one or several Member States.”; As the Commission put it in Case C-238/83 *Caisse d'allocations familiales v Meade* EU:C:1984:250, on page 2635: “Article 2 of Regulation No 1408/71 [...] in the field of social security, extend that benefit [available to the EEA nationals] to stateless persons or refugees residing within the territory of one of the Member States.”

See also Case C-10/78 *Belbouab*, EU:C:1978:181, paragraph 6, Case C-340/94 *De Jaeck v Staatssecretaris van Financiën*, EU:C:1997:43, paragraph 9, Case C-221/95 *Inasti v Hervein and Hervillier*, EU:C:1997:47, paragraph 8, Case C-194/96 *Kulzer v Freistaat Bayern*, EU:C:1998:85, paragraph 23, Case C-189/00 *Ruhr*, EU:C:2001:583, paragraph 19, and Joined Cases C-396/05, C-419/05 and C-450/05 *Habelt and Others*, EU:C:2007:810, paragraph 96.

²¹ Article 11(3)(c) covers the situation of a person receiving an unemployment benefit in accordance with Article 65 and article 11(3)(e) covers the situation of persons not falling under other rules.

benefits, namely Articles 17, 23, 58, 65, 67 68 and 70, but these are not material to the present instance.²²

45. One of the objectives of the conflict rules laid down by the Basic and Implementing Regulations 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 the EEA States. For the sake of completeness, ESA adds in this respect that it does not share the concerns expressed in the request for an Advisory Opinion to the effect that the residence in a third country would necessarily leave the beneficiary without protection due to negative conflict of applicable legislation.²³

46. “*The Practical Guide on the applicable legislation in the EU, EEA and Switzerland*” to which the national court refers, mentions the possibility of such negative conflict in a specific situation where the Basic Regulation sets out the applicable law on the basis of the beneficiary’s residence (as described in paragraph 44 of these written observations).²⁴ In line with CJEU case-law it is underlined in the Practical Guide that in such situations the beneficiary should have one place of residence within the meaning of the Regulation.²⁵

47. ESA notes that it does not matter however if that place of residence is within the EEA or in a third country. The CJEU has held that even when a worker carries out his activities in a third country but resides in the EEA they can still fall under the scope of Basic Regulation.²⁶ *A fortiori*, a worker carrying out his activities within the EEA but residing in a third country can likewise fall under the scope of the Basic Regulation by virtue of *lex loci laboris* and in line with Article 11(3)(a) thereof.

48. On the first question, ESA therefore submits that it is not a condition under Article 2(1) of the Basic Regulation that an EEA State national who is subject to the

²² These articles concern sickness benefits in kind, award of a supplement, unemployment benefits, family benefits and special non-contributory cash benefits.

²³ Request for an Advisory Opinion, page 9.

²⁴ *The Practical guide on the applicable legislation in the EU, in the EEA and in Switzerland*, which was published in December 2013, pages 42-43. Accessible at: <https://ec.europa.eu/social/BlobServlet?docId=11366&langId=en>.

²⁵ Case C-589/10 *Wencel*, EU:C:2013:303 paragraphs 43-51.

²⁶ Case C-372/20 *QY v Finanzamt Österreich*, EU:C:2021:962, paragraphs 36, 43-44.

legislation of one or more EEA States within the meaning of that Article must reside in one of the EEA States.

5.2 Adaptations in the EFTA Convention

49. The referring Court further asks whether an agreement concluded by the EU or an EEA Member State with a third country, by which the scope of application of the Basic Regulation is extended to the third country with specific adaptations to the conflict rules, can change the answer to the first part of the question.

50. It is the Convention establishing the European Free Trade Association (“**the EFTA Convention**”)²⁷ that ensures the coordination of social security systems between Iceland, Liechtenstein and Norway on the one hand, and Switzerland on the other.

51. According to Article 21 of the EFTA Convention, entitled “*Coordination of social security systems*”, in order to provide for the freedom of movement of persons, the EFTA States “*shall make provision, in accordance with Appendix 2 of Annex K and with the Protocol to Annex K on the free movement of persons between Liechtenstein and Switzerland, for the coordination of social security systems.*” It follows from Article 1(1) of Appendix 2 to Annex K, that the EFTA States agree to amongst themselves apply the Basic and Implementing Regulations, as referred to in Section A of Appendix 2 to Annex K.²⁸

52. The stated aims of the application of those rules are to secure equality of treatment; to determine the legislation applicable, and also to foster mutual administrative assistance and cooperation between authorities and institutions.

53. Protocol 2 to Appendix 2 of Annex K includes the following adaptation text concerning the applicability of the Basic and Implementing Regulations between Liechtenstein and Switzerland:

“Sections A and B of Appendix 2 [to Annex K] 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

²⁷ Convention of 4 January 1960 establishing the European Free Trade Association.

²⁸ Decision of the EFTA Council No 5 of 2015 on the amendments to Appendix 2 to Annex K to the Convention, available at https://www.efta.int/sites/default/files/images/~%2014-65782%20EFTA-CD%202015_5%20Appendix%20%20to%20Annex%20K%20%20%28Social%20Security%29%20611539_3_1.pdf.

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;

[...]”

54. As noted in paragraph 14 of these written observations, the Liechtenstein authorities consider that these adaptations lead to the Appellant falling outside of the scope *ratione personae* of the Basic Regulation. As this argument does not seem to have been repeated before the referring Court, ESA therefore confines itself at this point to noting only that neither the EFTA Convention, nor the amendments and annexes to it, are part of the EEA Agreement.

55. The fact that there is a multilateral agreement extending the scope of application of the Basic Regulation to a third country with specific adaptations to the social security conflict rules cannot result in the Regulation becoming not applicable to an EEA citizen who exercises his right of free movement. As held by the Court, a State cannot rely on its bilateral or multilateral international agreements to renege on their obligations following from the EEA Agreement. In Case E-1/04 *Fokus Bank* the Court held that:

“A Contracting Party cannot make the rights conferred by [EEA law] subject to the contents of a bilateral agreement concluded with another Contracting Party [...].”²⁹

56. As such, the EFTA Convention is aimed at extending the rules to set out the relevant legislation in accordance with the Regulation. To this effect, ESA further notes that Article 49 of the EFTA Convention explicitly states in its paragraph one that

“Nothing in this Convention shall be regarded as exempting any Member State from obligations which it has undertaken by virtue of agreements with third States or multilateral agreements to which they are parties.”

While paragraph 2 underlines that:

“The Convention shall be without prejudice to the rules applicable to Member States governed by the Agreement on the European Economic Area, the Nordic cooperation and the regional union between Switzerland and Liechtenstein.”

²⁹ Case E-1/04 *Fokus Bank*, Judgment of 23 November 2004, paragraph 31.

57. By raising the adaptation of the Basic Regulation to assign competence for *sickness* insurance to the State of residence as a ground for refusing to issue an attestation of *old-age benefit* insurance, ESA submits that Liechtenstein would be deviating from the Basic Regulation and therefore also from its obligations under EEA law.
58. Having concluded in the first part of the first question that it is not a condition under Article 2(1) of the Basic Regulation for nationals of an EEA State to also be residents of an EEA State in order to be covered by the personal scope of the Basic Regulation, ESA submits that an agreement concluded by an EEA EFTA State with a third country, by which the scope of application of the Basic Regulation is extended to the third country, cannot impose place of residence as a conflict rule deviating both from Articles 2(1) and 11 of the Basic Regulation.

5.3 Attestation of applicable legislation

59. By its second question, the referring Court asks whether an attestation within the meaning of Article 19(2) of the Implementing Regulation must necessarily be issued by means of a PD A1 form, as laid down by the Administrative Commission for the Coordination of Social Security Systems, in order to produce the legal effects according to Article 5(1) of the Implementing Regulation.
60. ESA submits that the answer to the question is three-fold: first, whether the States are obliged to issue an attestation within the meaning of Article 19(2) of the Implementing Regulation; second, whether this attestation must be issued by means of a PD A1 form, as laid down by the Administrative Commission, and third, whether the receiving authorities must recognise the attestation, regardless of its form.
61. ESA submits that an attestation within the meaning of Article 19(2) of the Implementing Regulation, in order to produce the legal effects according to Article 5(1) of the Implementing Regulation, does *not* have to be issued by means of a PD A1 form, as laid down by the Administrative Commission.
62. On the basis of the facts as set out in the request for an Advisory Opinion, ESA assumes that the Vienna Bar Association has indicated that it requires the Appellant

to submit a PD A1 form and will only accept this document as a confirmation of his insured status.³⁰

63. ESA notes that in the appeals proceedings, the Respondents have offered, in place of a PD A1 form, to issue an official attestation concerning the old-age benefits provision existing in Liechtenstein. As ESA noted in paragraph 16 of these written observations, it is not clear from the request for an Advisory Opinion whether this official attestation will merely provide general information about the old-age benefit provisions in force in Liechtenstein, or whether it is intended to attest that the Appellant specifically has been subject to compulsory contributions, and detailing also the duration of said contributions.
64. At the outset, ESA reiterates that, taking into account the answer to the first question, the Respondents are obliged to recognise that the Appellant is covered by the Liechtenstein Old-Age Insurance Act. The Liechtenstein authorities therefore cannot claim that the Appellant is not covered by the personal scope of the Basic Regulation, as set out in Article 2(1), because he is not residing in an EEA State.
65. According to Article 19(2) of the Implementing Regulation, the competent institution of the Member State whose legislation is applicable pursuant to Title II of the Basic Regulation is required, at the request of the person concerned or of the employer, to provide an attestation that such legislation is applicable and shall indicate, where appropriate, until what date and under what conditions. ESA submits that, on the basis of the wording of Article 19(2), when it is established what legislation is applicable, the competent institution of that Member State is obliged to provide, upon request, such an attestation.
66. The answer to the national court's second question is important not only from the point of view of the obligations of the issuing authority, that is, whether the Liechtenstein authorities can *only* certify that the Appellant is covered by the Liechtenstein Old-Age Insurance Act by issuing a PD A1 form. It is equally important from the point of view of the authority receiving the document, that is whether they are obliged to accept only a PD A1 form, as laid down by the Administrative Commission.

³⁰ Request for Advisory Opinion page 9.

67. ESA notes that in Article 1(2)(c) of the Implementing Regulation a “document” is defined as *“a set of data, irrespective of the medium used, structured in such a way that it can be exchanged electronically and which must be communicated in order to enable the operation of [Regulation No 883/2004] and [Regulation No 987/2009].”*
68. Further, Article 4(1) of the Implementing Regulation establishes that the structure, content, format and detailed arrangements for exchange of documents and structured electronic documents shall be set up by the Administrative Commission.
69. On 18 October 2017, the Administrative Commission adopted Recommendation No A1 concerning the issuance of the attestation referred to in Article 19(2) of the Implementing Regulation.³¹ Recommendation No A1 was incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 236/2019 of 27 September 2019 as an act of which the EEA Contracting Parties are to take note.³²
70. The Recommendation states in Recitals (2) and (3) that *“[t]he Administrative Commission determines the structure and the content of the Portable Document A1 concerning the applicable legislation which applies to the holder”*, and that, as per Article 5(1) of the Implementing Regulation, this document (if generated) *“shall be accepted by institutions”*. Moreover, as set out in Recitals (4) and (5) of the Recommendation, the principle of sincere cooperation, as specified in Article 76 of the Basic Regulation, confers an obligation on the issuing Member State to confirm the correctness of the information *“contained in a Portable Document A1”* and that such a document establishes a *“presumption that the holder is properly affiliated”* to the social security system of the issuing State.
71. The Recommendation sets out, *inter alia*, common elements that should be used in every application form: *“Surname/Last name, First name, Date of birth, Sex, Personal identification number, Place of birth, Nationality, for third-country nationals whether the person resides legally in an EEA State, Address in the State of*

³¹ 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 (OJ C 183, 29.5.2018, p. 5), available at:

[https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32018H0529\(01\)&rid=7](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32018H0529(01)&rid=7)

³² Available at

<https://www.efta.int/media/documents/legal-texts/eea/other-legal-documents/adopted-joint-committee-decisions/2019%20-%20English/236-2019.pdf>

residence, Address in the State of stay, Contact address of the person, Job-title/Profession/Trade.”

72. In the specific case of a person pursuing an activity as an employed or self-employed person in an EEA State who is subject to the legislation of that EEA State, the Administrative Commission recommends the following additional details to be established: *“Name of the employer and his address (with regard to self-employment activity – Name, Registration number, Social security number, Fiscal number, Address, Starting/ending date of work.”*

73. As regards the question of the binding force of decisions by the Administrative Commission, such as Recommendation No A1, the CJEU in Case C-98/80 *Romano* held that, whilst an Administrative Commission decision *“may provide an aid to social security institutions responsible for applying Community law in this field, it is not of such a nature as to require those institutions to use certain methods or adopt certain interpretations when they come to apply the Community rules.”*³³ ESA submits that the same must be true for Recommendation No A1.

74. Article 2(1) of the Implementing Regulation provides that, for the purposes of the Implementing Regulation, exchanges between EEA States’ authorities and institutions and persons covered by the Basic Regulation *“shall be based on the principles of public service, efficiency, active assistance, rapid delivery and accessibility [...]”* Article 2(2) of the Implementing Regulation places the institutions under obligations to provide or exchange without delay all data necessary for establishing and determining the rights and obligations of persons to whom the Basic Regulation applies.³⁴

³³ Case C-98/80 *Romano*, EU:C:1981:104, paragraph 20. See to the same effect Case C-19/67 *Soziale Verzekeringsbank v Van Der Vecht*, EU:C:1967:49, page 355, Case C-21/87 *Borowitz v Bundesversicherungsanstalt für Angestellte*, EU:C:1988:362, paragraph 19, Case C-102/91 *Knoch v Bundesanstalt für Arbeit*, EU:C:1992:303, paragraph 52, and Case C-201/91 *Grisvard and Kreitz v Assedic*, EU:C:1992:368, paragraph 25.

³⁴ Those provisions have to be interpreted and applied in light of the relevant recitals. For example, Recital 2 of the Implementing Regulation sets out that *“the closer and more effective cooperation between social security institutions is a key factor in allowing the persons covered by [the Basic Regulation] to access their rights as quickly as possible and under optimum conditions.”* Recital 6 thereof sets out that strengthening certain procedures should ensure greater legal certainty and transparency for the users of the Basic Regulation. Furthermore, Recital 12 of the Implementing Regulation makes it clear that measures and procedures provided for in the Regulation are intended to ensure greater transparency concerning the criteria which the institutions of the Member States

75. In more general terms Article 76 of the Basic Regulation establishes rules on mutual information and cooperation between the competent authorities of the EEA States to ensure the correct implementation of the Regulation. In accordance with its provisions the competent authorities and institutions are to lend one another their good offices, they may communicate directly with one another and with the persons involved or their representatives.
76. In the event of difficulties in the interpretation or application of the Basic Regulation which could jeopardise the rights of the persons covered by it, Article 76 of the Basic Regulation obliges the relevant institutions to contact the institutions of the EEA State concerned and if a solution cannot be found within a reasonable period, the authorities and institutions may call on the Administrative Commission to intervene.
77. In line with Article 5(1) of the Implementing Regulation concerning the legal value of the documents and supporting evidence issued in another EEA State, the documents issued by the relevant institution of an EEA State and showing the position of a person for the purposes of the application of the Basic and Implementing Regulation, and supporting evidence on the basis of which the documents have been issued, are to be accepted by the institutions of the other EEA States for as long as they have not been withdrawn or declared invalid by the EEA State in which they were issued.
78. Where there is doubt about the validity of a document issued by the institution of an EEA State, showing the position of a person for the purposes of the application of the Basic Regulation and of the Implementing Regulation, or the accuracy of the facts on which the particulars contained therein are based, the institution of the EEA State that receives the document can ask the issuing institution for necessary clarifications and, where appropriate, to withdraw that document or declare it invalid.³⁵
79. Should the Austrian authorities have any doubts about the validity of the document issued by the Liechtenstein authorities or the accuracy of the facts on which it is

must apply under the Basic Regulation. It also recognises that such measures and procedures are the result of the case-law of the CJEU, the decisions of the Administrative Commission and the experience of more than 30 years of application of the coordination of social security systems in the context of the fundamental freedoms enshrined in the Treaty.

³⁵ See Case C-356/15 *European Commission v Belgium*, EU:C:2018:555, paragraph 82.

based, they should contact the issuing institution for the necessary clarifications and/or withdrawal of the document. Likewise, in line with Article 5(3) of the Implementing Regulation the issuing institution, insofar as possible, is to undertake the necessary verification of this information or document. However, the Austrian authorities cannot in their own power invalidate or decide not to recognise that document. In line with the Court's and CJEU's case-law, if the competent institution expresses doubts about the validity of a document or the accuracy of the facts on which the particulars contained therein are based, the issuing institution is to reconsider the grounds for issuing the document and, if necessary, withdraw it.³⁶

80. More specifically, in the context of the legal value of the documents issued in another EEA State, Article 5(4) of the Implementing Regulation makes it clear that any disagreement between the institutions concerned should be brought before the Administrative Commission within a month so as to avoid maintaining a state of legal uncertainty for the beneficiary.

81. As the Court has consistently held, Article 3 of the EEA Agreement lays down the principle of sincere cooperation between the Contracting Parties.³⁷ Article 76 of the Basic Regulation 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. Paragraphs 2 to 4 of Article 5 of the Implementing Regulation describe the dialogue and conciliation procedure between the institutions concerned that is to be followed by the EEA State having doubts about the validity of those documents or the accuracy of the facts on which the particulars contained therein are based. Those provisions define the content of the general duty of cooperation as laid down in Article 76 of the Basic Regulation.

82. The Court has also held that it also follows from the principle of sincere cooperation that the EEA States concerned are under an obligation to apply the Basic

³⁶ See, for example: Case E-3/04 *Tsomakas* paragraph 30; Case C-356/15 *European Commission v Belgium*; Case C-2/05, *Rijksdienst voor Sociale Zekerheid v Herbosch Kiere NV*, EU:C:2006:69, paragraphs 27 and 30.

³⁷ Case E-3/04 *Tsomakas*, paragraph 30; Case E-1/21 *ISTM*, paragraph 36.

Regulation correctly which entails that it is incumbent on the institution concerned to base its findings on the employed person's actual situation.³⁸

83. At this point ESA seeks to underline that Article 89 of the Implementing Regulation provides that the competent authorities are to ensure that their institutions are aware of and apply all EEA provisions, legislative or otherwise, including the decisions of the Administrative Commission, in the areas covered by and within the terms of the Basic and Implementing Regulations. ESA submits that in the context of the present case the Austrian authorities are responsible for ensuring that all their institutions dealing with social security coordination, including those such as the Vienna Bar Association, are aware of and apply EEA law correctly and effectively, including the recognition of the attestation issued (whether or not in the form of a PD A1 form) by the competent EEA State.
84. ESA submits that the production of that attestation forms part of Liechtenstein's obligation of loyal cooperation as set out in Article 3 of the EEA Agreement and is connected to the intention of the EEA States to ensure the free movement rights of individuals set out under Article 28 EEA and Article 29 EEA. Therefore, although the Liechtenstein authorities can choose not to issue the attestation in the form of a PD A1 form, they cannot choose not to issue an attestation at all; and the information they provide to the Austrian authorities must meet the requirements of the Basic and Implementing Regulation. Similarly, as long as the attestation meets those requirements, the relevant Austrian authorities are bound to recognise what has been certified by the Liechtenstein authorities.
85. In light of the above, in relation to the second question of the referring Court, ESA therefore submits that Article 19(2) of Regulation 987/2009 must be interpreted as not requiring an attestation to be issued exclusively in the form of a Portable Document A1 in order to produce the legal effects set out in Article 5(1) of that Regulation.

³⁸ E-1/21 *ISTM*, paragraph 36 and 37.

6 CONCLUSION

Accordingly, ESA respectfully requests the Court to deliver the following Advisory Opinion:

- 1. In circumstances such as those set out in the request for an Advisory Opinion it is not necessary that an EEA national who is subject to the legislation of one or more EEA States is resident in one of the EEA States in order to fall within the scope ratione personae of Regulation 883/2004 within the meaning of Article 2(1) of that Regulation.***

As it is not a condition under Article 2(1) of the Basic Regulation for nationals of an EEA State to also be residents of an EEA State in order to be covered by the personal scope of the Basic Regulation, an agreement concluded by an EEA EFTA State with a third country, by which the scope of application of the Basic Regulation is extended to the third country, cannot impose place of residence as a conflict rule deviating both from Articles 2(1) and 11 of the Basic Regulation.

- 2. Article 19(2) of Regulation 987/2009 must be interpreted as not requiring an attestation to be issued exclusively in the form of a Portable Document A1 in order to produce the legal effects set out in Article 5(1) of that Regulation.***

Ewa Gromnicka

Michael Sanchez Rydelski

Melpo-Menie Joséphidès

Agents of the EFTA Surveillance Authority