

EFTA Court
1 rue du Fort Thüngen
L-1499 Luxembourg

Vaduz, 25 July 2022

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 Romina Schobel, Deputy Director of the EEA Coordination Unit (*stellvertretende Leiterin 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-5/22

Christian Maitz v AHV-IV-FAK

in which the Princely Court of Appeal (*Fürstliches Obergericht des Fürstentums Liechtenstein*, hereinafter referred to as '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.

The Government of the Principality of Liechtenstein (hereinafter referred to as the 'Liechtenstein Government') has the honour 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. Is it necessary for the scope *ratione personae* of Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 (OJ 2004 L 166, p. 1), incorporated in the EEA Agreement by Decision of the EEA Joint Committee of 1 July 2011 (LGBl. 2012 No 202), 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 (OJ 2009 L 284, p. 1), incorporated into the EEA Agreement by Decision of the Joint Committee of 1 July 2011 (LGBl. 2012 No 202), 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?

II. Factual background of the case

2. With regard to the facts of the present case, the Liechtenstein Government wishes to refer in principle to the summary of the facts provided by the Court of Appeal in its request for an opinion.
3. In addition, the Liechtenstein Government wishes to emphasise that the appellant is an Austrian citizen who resides in Switzerland¹ since 2015 and works in Liechtenstein. The appellant is registered in the Register of lawyers of the Vienna Bar Association, Austria. Since 2018 he is registered in the Register of established European lawyers of the Liechtenstein Bar Association. Since 1 January 2019 he has worked as an employed or self-employed lawyer and obtained his income exclusively from his activity as a lawyer in Liechtenstein.
4. In light of the specific circumstances of this case, the Liechtenstein Government wishes to briefly introduce the three different public international agreements concluded by varying States respectively parties relevant to this case and dealing *inter alia* with the question of social security coordination.² Namely these three agreements are: the EEA Agreement³ concluded by the EU Member States and Iceland, Liechtenstein and Norway (hereinafter referred to as ‘the EEA EFTA States’), the EFTA Convention (hereinafter referred to as ‘Vaduz Convention’)⁴ concluded by Switzerland and the three EEA EFTA States, and the Agreement on the Free Movement of Persons⁵ between Switzerland and the EU.
5. All three agreements mentioned above entail provisions regarding social security rules and, in particular, social security coordination rules. In relation to the States respectively parties listed above the Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on coordination of social security system

¹ Since July 2015.

² This summary does not take into account the various other agreements concluded by the EU concerning social security.

³ Agreement on the European Economic Area, OJ L 1, 3.1.1994, p. 3.

⁴ Convention establishing the European Free Trade Association (EFTA Convention).

⁵ Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons, OJ L 114, 30.4.2002, p. 6.

(hereinafter referred to as 'Regulation 883/2004')⁶ 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 system (hereinafter referred to as 'Regulation 987/2009')⁷ apply due to these agreements.⁸

6. Although, therefore Regulation 883/2004 applies to the EU Member States, the EEA EFTA States and Switzerland, it is important to keep in mind that the application of Regulation 883/2004 is based on three distinct agreements concluded by different States respectively parties including three separate institutional setups, three dispute settlement mechanisms and three territorial scopes.⁹
7. Depending on the case at hand, the application of Regulation 883/2004 is based on either the EEA Agreement, the Vaduz Convention, or the Agreement on the Free Movement of Persons.¹⁰

III. Legal framework

8. The Liechtenstein Government considers it appropriate to briefly outline the legal framework relevant to answer to questions referred for a preliminary ruling.
9. By adopting Regulation 883/2004 on coordination of social security system the European legislator laid down common rules to protect social security rights movement within the EU (as well as Iceland, Liechtenstein, Norway and Switzerland). The guiding principle is that persons to whom the Regulation applies are subject to the legislation of a single State.
10. Regulation 883/2004 was considered EEA relevant and was incorporated into the EEA

⁶ OJ L 166, 30.4.2004, p. 1.

⁷ OJ L 284, 30.10.2009, p. 1.

⁸ Incorporated into Annex VI of EEA Agreement, Annex K Appendix 2 of the Vaduz Convention and Annex II of the Agreement on Free Movement.

⁹ Fuchs/Janda (Hrsg.), *Europäisches Sozialrecht*, 8. Auflage, p. 1058f.

¹⁰ Jürgen Seeliger, *AHV-IV-FAK-Beiträge (Sonderkapitel: Exkurs ins Leistungswesen)*, Skriptum, Stand: January 2021, p. 24.

Agreement by Decision of the EEA Joint Committee No 76/2011 of 1 July 2011.¹¹ The Regulation was inserted in Annex VI and Protocol 37 of the EEA Agreement.

11. Regulation 987/2009 laying down the procedure for implementing Regulation 883/2004 modernises and simplifies the rules for applying Regulation 883/2004. The Regulation strengthens cooperation between social security institution and improves the method of sharing information with one another.
12. Regulation 987/2009 was considered EEA relevant and was incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 76/2011 of 1 July 2011.¹²
13. Recitals 12, 15, 17, 24 and 35 of Regulation 883/2004, and Recitals 3 and 15 of Regulation 987/2009 are relevant. The Liechtenstein Government considers these recitals further in its analysis of the questions referred below.
14. Article 1 of Regulation 882/2004 provides:

For the purposes of this Regulation:

(j) 'residence' means the place where a person habitually resides;

(k) 'stay' means temporary residence;

15. The Liechtenstein Government would like to emphasise that the place of residence plays an important role in determining the competent Member State and applicable legislation. Regulation 883/2004 differentiates between 'residence' and 'stay'. Residence is defined as the place where a person habitually resides and where the habitual centre of their interests is to be found, whereas stay is defined as temporary residence.
16. Article 2 of Regulation 883/2004 concerns the personal scope of the Regulation. Of relevance for the case at hand are persons who are subject to the legislation of one or more Member States and are nationals of one of the Member States.

¹¹ OJ L 262, 6.10.2011, p. 33.

¹² OJ L 262, 6.10.2011, p. 33.

17. Article 2 (1) of Regulation 883/2004 provides:

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.*

18. Article 7 of Regulation 883/2004 concerns the waiving of residence rules and provides:

Unless otherwise provided for by this Regulation, cash benefits payable under the legislation of one or more Member States or under this Regulation shall not be subject to any reduction, amendment, suspension, withdrawal or confiscation on account of the fact that the beneficiary or the members of his/her family reside in a Member State other than that in which the institution responsible for providing benefits is situated.

19. The rules for determining which Member State's legislation is to apply are set out in Articles 11 to 16 of Regulation 883/2004. The related implementing provisions are set out in Articles 14 to 21 of Regulation 987/2009.

20. Article 11 of Regulation 883/2004 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.*
2. *For the purposes of this Title, persons receiving cash benefits because or as a consequence of their activity as an employed or self-employed person shall be considered to be pursuing the said activity. This shall not apply to invalidity, old-age or survivors' pensions or to pensions in respect of accidents at work or occupational diseases or to sickness benefits in cash covering treatment for an unlimited period.*
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;*
 - b. *a civil servant shall be subject to the legislation of the Member State to which the administration employing him/her is subject;*
 - c. *a person receiving unemployment benefits in accordance with Article 65 under the legislation of the Member State of residence shall be subject to the legislation of that Member State;*

- d. *a person called up or recalled for service in the armed forces or for civilian service in a Member State shall be subject to the legislation of that Member State;*
- e. *any other person to whom subparagraphs (a) to (d) do not apply shall be subject to the legislation of the Member State of residence, without prejudice to other provisions of this Regulation guaranteeing him/her benefits under the legislation of one or more other Member States.*

21. Article 13 (1) (a) of Regulation 883/2004 provides:

Pursuit of activities in two or more Member States

- 1. *A person who normally pursues an activity as an employed person in two or more Member States shall be subject:*
 - a. *to the legislation of the Member State of residence if he/she pursues a substantial part of his/her activity in that Member State; or*

22. Article 16 of Regulation 987/2009 provides:

Procedure for the application of Article 13 of the basic Regulation

- 1. *A person who pursues activities in two or more Member States shall inform the institution designated by the competent authority of the Member State of residence thereof.*
- 2. *The designated institution of the place of residence shall without delay determine the legislation applicable to the person concerned, having regard to Article 13 of the basic Regulation and Article 14 of the implementing Regulation. That initial determination shall be provisional. The institution shall inform the designated institutions of each Member State in which an activity is pursued of its provisional determination.*

23. The place of residence also plays a major role as a conflict rule in cases of possible overlapping benefits. This includes for example rights to sickness benefits, award of settlement, rights to unemployment benefits, and so on.

24. Article 17 of Regulation 883/2004 provides:

An insured person or members of his/her family who reside in a Member State other than the competent Member State shall receive in the Member State of residence benefits in kind provided, on behalf of the competent institution, by the

institution of the place of residence, in accordance with the provisions of the legislation it applies, as though they were insured under the said legislation.

25. Article 23 of Regulation 883/2004 provides:

A person who receives a pension or pensions under the legislation of two or more Member States, of which one is the Member State of residence, and who is entitled to benefits in kind under the legislation of that Member State, shall, with the members of his/her family, receive such benefits in kind from and at the expense of the institution of the place of residence, as though he/she were a pensioner whose pension was payable solely under the legislation of that Member State.

26. Article 58 of Regulation 883/2004 provides:

- 1. A recipient of benefits to whom this chapter applies may not, in the Member State of residence and under whose legislation a benefit is payable to him/her, be provided with a benefit which is less than the minimum benefit fixed by that legislation for a period of insurance or residence equal to all the periods taken into account for the payment in accordance with this chapter.*
- 2. The competent institution of that Member State shall pay him/her throughout the period of his/her residence in its territory a supplement equal to the difference between the total of the benefits due under this chapter and the amount of the minimum benefit.*

27. Article 65 (1) to (6) of Regulation 883/2004 provide:

- 1. A person who is partially or intermittently unemployed and who, during his/her last activity as an employed or self-employed person, resided in a Member State other than the competent Member State shall make himself/herself available to his/her employer or to the employment services in the competent Member State. He/she shall receive benefits in accordance with the legislation of the competent Member State as if he/she were residing in that Member State. These benefits shall be provided by the institution of the competent Member State.*
- 2. A wholly unemployed person who, during his/her last activity as an employed or self-employed person, resided in a Member State other than the competent Member State and who continues to reside in that Member State or returns to that Member State shall make himself/herself available to the employment services in the Member State of residence. Without prejudice to Article 64, a wholly unemployed person may, as a supplementary step, make himself/herself available to the employment services of the Member State in which he/she pursued his/her last activity as an employed or self-employed person.*

An unemployed person, other than a frontier worker, who does not return to his/her Member State of residence, shall make himself/herself available to the employment services in the Member State to whose legislation he/she was last subject.

3. *The unemployed person referred to in the first sentence of paragraph 2 shall register as a person seeking work with the competent employment services of the Member State in which he/she resides, shall be subject to the control procedure organised there and shall adhere to the conditions laid down under the legislation of that Member State. If he/she chooses also to register as a person seeking work in the Member State in which he/she pursued his/her last activity as an employed or self-employed person, he/she shall comply with the obligations applicable in that State.*
4. *The implementation of the second sentence of paragraph 2 and of the second sentence of paragraph 3, as well as the arrangements for exchanges of information, cooperation and mutual assistance between the institutions and services of the Member State of residence and the Member State in which he/she pursued his/her last occupation, shall be laid down in the Implementing Regulation.*
5.
 - a. *The unemployed person referred to in the first and second sentences of paragraph 2 shall receive benefits in accordance with the legislation of the Member State of residence as if he/she had been subject to that legislation during his/her last activity as an employed or self-employed person. Those benefits shall be provided by the institution of the place of residence.*
 - b. *However, a worker other than a frontier worker who has been provided benefits at the expense of the competent institution of the Member State to whose legislation he/she was last subject shall firstly receive, on his/her return to the Member State of residence, benefits in accordance with Article 64, receipt of the benefits in accordance with (a) being suspended for the period during which he/she receives benefits under the legislation to which he/she was last subject.*
6. *The benefits provided by the institution of the place of residence under paragraph 5 shall continue to be at its own expense. However, subject to paragraph 7, the competent institution of the Member State to whose legislation he/she was last subject shall reimburse to the institution of the place of residence the full amount of the benefits provided by the latter institution during the first three months. The amount of the reimbursement during this period may not be higher than the amount payable, in the case of unemployment, under the legislation of the competent Member State. In the case referred to in paragraph 5(b), the period during which benefits are provided under Article 64 shall be deducted from the period referred to in the*

second sentence of this paragraph. The arrangements for reimbursement shall be laid down in the Implementing Regulation.

28. Article 67 of Regulation 883/2004 provides:

A person shall be entitled to family benefits in accordance with the legislation of the competent Member State, including for his/her family members residing in another Member State, as if they were residing in the former Member State. However, a pensioner shall be entitled to family benefits in accordance with the legislation of the Member State competent for his/her pension.

29. Article 68 (1) of Regulation 883/2004 provides:

1. *Where, during the same period and for the same family members, benefits are provided for under the legislation of more than one Member State the following priority rules shall apply:*
 - a. *in the case of benefits payable by more than one Member State on different bases, the order of priority shall be as follows: firstly, rights available on the basis of an activity as an employed or self-employed person, secondly, rights available on the basis of receipt of a pension and finally, rights obtained on the basis of residence;*
 - b. *in the case of benefits payable by more than one Member State on the same basis, the order of priority shall be established by referring to the following subsidiary criteria:*
 - i. *in the case of rights available on the basis of an activity as an employed or self-employed person: the place of residence of the children, provided that there is such activity, and additionally, where appropriate, the highest amount of the benefits provided for by the conflicting legislations. In the latter case, the cost of benefits shall be shared in accordance with criteria laid down in the Implementing Regulation;*
 - ii. *in the case of rights available on the basis of receipt of pensions: the place of residence of the children, provided that a pension is payable under its legislation, and additionally, where appropriate, the longest period of insurance or residence under the conflicting legislations;*
 - iii. *in the case of rights available on the basis of residence: the place of residence of the children.*

30. Title IV of Regulation 883/2004 governs the institutional setup and entails the legal basis for the Administrative Commission for the Coordination of Social Security

Systems (hereinafter referred to as 'Administrative Commission') and the Advisory Committee for the Coordination of Social Security Systems.

31. Article 71 of Regulation 883/2004 provides:

1. *The Administrative Commission for the Coordination of Social Security Systems (hereinafter called the Administrative Commission) attached to the European Commission shall be made up of a government representative from each of the Member States, assisted, where necessary, by expert advisers. A representative of the European Commission shall attend the meetings of the Administrative Commission in an advisory capacity.*
2. *The Administrative Commission shall act by a qualified majority as defined by the Treaties, except when adopting its rules which shall be drawn up by mutual agreement among its members.*

Decisions on questions of interpretation referred to in Article 72(a) shall be given the necessary publicity.

3. *Secretarial services for the Administrative Commission shall be provided by the European Commission.*

32. Article 72 (a) to (d) of Regulation 883/2004 provides:

The Administrative Commission shall:

- a. *deal with all administrative questions and questions of interpretation arising from the provisions of this Regulation or those of the Implementing Regulation, or from any agreement concluded or arrangement made thereunder, without prejudice to the right of the authorities, institutions and persons concerned to have recourse to the procedures and tribunals provided for by the legislation of the Member States, by this Regulation or by the Treaty;*
- b. *facilitate the uniform application of Community law, especially by promoting exchange of experience and best administrative practices;*
- c. *foster and develop cooperation between Member States and their institutions in social security matters in order, inter alia, to take into account particular questions regarding certain categories of persons; facilitate realisation of actions of crossborder cooperation activities in the area of the coordination of social security systems;*
- d. *encourage as far as possible the use of new technologies in order to facilitate the free movement of persons, in particular by modernising procedures for exchanging information and adapting the information flow between institutions for the purposes of exchange by electronic means, taking account*

of the development of data processing in each Member State; the Administrative Commission shall adopt the common structural rules for data processing services, in particular on security and the use of standards, and shall lay down provisions for the operation of the common part of those services;

33. Article 76 of Regulation 883/2004 provides:

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. The administrative assistance given by the said authorities and institutions shall, as a rule, be free of charge. However, the Administrative Commission shall establish the nature of reimbursable expenses and the limits above which their reimbursement is due.*
3. *The authorities and institutions of the Member States may, for the purposes of this Regulation, communicate directly with one another and with the persons involved or their representatives.*
4. *The institutions and persons covered by this Regulation shall have a duty of mutual information and cooperation to ensure the correct implementation of this Regulation.*

The institutions, in accordance with the principle of good administration, shall respond to all queries within a reasonable period of time and shall in this connection provide the persons concerned with any information required for exercising the rights conferred on them by this Regulation.

The persons concerned must inform the institutions of the competent Member State and of the Member State of residence as soon as possible of any change in their personal or family situation which affects their right to benefits under this Regulation.

5. *Failure to respect the obligation of information referred to in the third subparagraph of paragraph 4 may result in the application of proportionate measures in accordance with national law. Nevertheless, these measures shall be equivalent to those applicable to similar situations under domestic law and shall not make it impossible or excessively difficult in practice for claimants to exercise the rights conferred on them by this Regulation.*

6. *In the event of difficulties in the interpretation or application of this Regulation which could jeopardise the rights of a person covered by it, the institution of the competent Member State or of the Member State of residence of the person concerned shall contact the institution(s) of the Member State(s) concerned. If a solution cannot be found within a reasonable period, the authorities concerned may call on the Administrative Commission to intervene.*
7. *The authorities, institutions and tribunals of one Member State may not reject applications or other documents submitted to them on the grounds that they are written in an official language of another Member State, recognised as an official language of the Community institutions in accordance with Article 290 of the Treaty.*

34. Article 78 (1) of Regulation 883/2004 provides:

1. *Member States shall progressively use new technologies for the exchange, access and processing of the data required to apply this Regulation and the Implementing Regulation. The European Commission shall lend its support to activities of common interest as soon as the Member States have established such data-processing services.*

35. According to Article 4 of Regulation 987/2009 the Administrative Commission lays down the structure, content, format and detailed arrangements for exchange of documents. The exchange of data between institutions has to be carried out by electronic means.

36. Article 4 of Regulation 987/2009 provides:

1. *The Administrative Commission shall lay down the structure, content, format and detailed arrangements for exchange of documents and structured electronic documents.*
2. *The transmission of data between the institutions or the liaison bodies shall be carried out by electronic means either directly or indirectly through the access points under a common secure framework that can guarantee the confidentiality and protection of exchanges of data.*
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.*

37. Article 5 of Regulation 987/2009 concerns the legal value of documents and supporting evidence issued in another Member State and stipulates that documents have to be accepted by the institutions of the other Member States:

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.*
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 endeavour to reconcile the points of view within six months of the date on which the matter was brought before it.*

38. Article 19 of Regulation 987/2009 provides that at the request of the person concerned or the employer, an attestation regarding the legislation applicable is provided by the competent institution of the Member State:

1. *The competent institution of the Member State whose legislation becomes applicable pursuant to Title II of the basic Regulation shall inform the person concerned and, where appropriate, his employer(s) of the obligations laid down in that legislation. It shall provide them with the necessary assistance to complete the formalities required by that legislation.*
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*

It 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.

39. According to Article 95 of Regulation 987/2009 the Member States may be granted a transitional period for exchanging data by electronic means:

1. *Each Member State may benefit from a transitional period for exchanging data by electronic means as provided for by Article 4(2) of the implementing Regulation.*

These transitional periods shall not exceed 24 months from the date of entry into force of the implementing Regulation.

However, if the delivery of the necessary Community infrastructure (Electronic Exchange of Social Security information — EESSI) is significantly delayed with regard to the entry into force of the implementing Regulation, the Administrative Commission may agree on any appropriate extension of these periods.

2. *The practical arrangements for any necessary transitional periods referred to in paragraph 1 shall be laid down by the Administrative Commission with a view to ensuring the necessary data exchange for the application of the basic Regulation and the implementing Regulation.*

IV. Legal analysis of the referred questions

Question 1

40. With its first question the Court of Appeal enquires whether the national of an EEA State who is subject to the legislation of one or more EEA States also has to be resident in one of the EEA States for Regulation 883/2004 (as applicable in the EEA) to apply.

41. In principle, the personal scope of Regulation 883/2004 is set out in Article 2 of that Regulation, according to which the '*Regulation shall apply to nationals of a Member State [...] who are or have been subject to the legislation of one or more Member States [...]*'.

42. Thus, the personal scope of Regulation 883/2004 draws on two defining features: the nationality respectively family status of the person concerned and a cross-border situation. Meaning, the person concerned has to be either national of a Member

State¹³, family member of such a national or a stateless person or a refugee residing in a Member State and a cross-border situation exists.¹⁴

43. In regards to the residence, Article 2 of Regulation 883/2004 only refers to residence in connection with stateless persons or refugees.
44. However, the place of residence is one of the most central elements in the social security coordination according to Regulation 883/2004. Many other provisions depend on the place of residence.
45. In Regulation 883/2004 this essential element of the place where a person habitually resides and therefore has its centre of interest¹⁵ fulfils three main tasks:
46. Firstly, the place of residence is used as a **distinguishing feature when determining the applicable social security legislation and therefore the competent Member State.**
47. For cross-border cases, the guiding principle in Regulation 883/2004 is that persons to whom Regulation 883/2004 applies, are subject to the legislation of a single Member State only. This principle is of special importance to avoid overlapping of applicable provisions of national legislation and the complications which could result therefrom.¹⁶
48. The legislation of the single Member State the person in question is subject to, is determined according to Title II of Regulation 883/2004 and the accompanying provisions of Regulation 987/2009.¹⁷
49. Decisive for determining the applicable legislation and therefore determining the competent Member State respectively the competent institution is, on one hand, the

¹³ The Member States depend on the underlying Agreement due to which Regulation 883/2004 applies (EEA Agreement, Vaduz Convention, Agreement on the Free Movement of Persons).

¹⁴ Judgement of the ECJ of 22 September 1992 in Case C-153/91 *Camille Petit and Office National des Pensions (ONP)*, ECLI:EU:C:1992:354, para. 8.

¹⁵ Regulation 883/2004 defines this central element of residence pursuant to Article 1 of the Regulation. For this a distinction is made between 'residence' in accordance with Article 1(j) of the Regulation and 'stay' according to Article 1(k) of the Regulation. Residence is defined as the place where a person habitually resides, stay is defined as the place where a person temporarily resides.

¹⁶ Recital 12, 15, 24 and 35 of Regulation 883/2004.

¹⁷ Article 11 of Regulation 883/2004.

Member State in which the activity is carried out and, on the other, the Member State of residence.

50. In the case of employed and self-employed persons the legislation of the Member State in which the activity is carried out usually applies (*lex loci laboris*). Persons pursuing an activity as an employed or self-employed person in a Member State are therefore, in the first place, subject to the legislation of the Member State where the economic activity is pursued.¹⁸
51. However, the place of residence (*lex domicilii*) is used as a distinguishing factor, *inter alia*, where a person does not pursue an economic activity according to Article 11(3)(e) of Regulation 883/2004, where a person carries out economic activities in two or more Member States or where a person has several employers.¹⁹
52. Secondly, the place of residence **lifts restrictions**. Specifically, Article 7 of Regulation 883/2004 governs that if the beneficiary resides in a Member State other than that in which the institution responsible for providing benefits is situated shall not lead to a reduction, amendment, or other of cash benefits payable under the legislation of one or more Member States.
53. Thirdly, **conferring the entitlement to benefit** is *inter alia* dependent upon the place of residence. The place of residence plays a major role as a **conflict rule** in case of possible overlapping benefits. Article 17 of Regulation 883/2004 for example provides the right to sickness benefits in kind in cases where the person concerned resides in a Member State other than the competent Member State. Article 23 provides for the right to sickness benefits in kind for pensioners. Article 58 deals with the award of supplement. Article 65 deals with the right to unemployment benefits in case of an

¹⁸ Recital 17 and Article 11(3) of Regulation 883/2004, see also Practical guide on ‘The applicable legislation in the European Union (EU), the European Economic Area (EEA) and in Switzerland, European Commission, p. 41.

¹⁹ Article 13 of Regulation 883/2004 in conjunction with Article 16 of Regulation 987/2009. Unless other elements are decisive under that Article.

employed person who resided in a Member State other than the competent State and Articles 67 to 70 concern family benefits.²⁰

54. The place of residence entails further effects respectively obligations. For one thing, the element of place of residence can oblige the State of residence to provide benefits in kind respectively benefits in cash on behalf of the competent institution.²¹ Although, the competent institution of the Member State responsible must, in principle, reimburse the institution of the place of residence accordingly, this requires a common legal basis obliging all the States involved.²²
55. When assessing the personal scope, it is important to keep in mind the overall point of view. The personal scope does not just have an effect on the specific social security contributions the person concerned in this case has to provide. It also effects the social security contributions in general²³ as well as the benefits in kind the competent institution has to provide for and the risks the competent institution and the responsible Member State have to bear.
56. In light of the above and considering the personal scope according to Article 2 of Regulation 883/2004 and the importance and indispensability of the place of residence throughout Regulation 883/2004, the Liechtenstein Government considers that it is necessary for the person concerned to be resident in one of the Member States for Regulation 883/2004 to apply.²⁴

²⁰ Practical guide on 'The applicable legislation in the European Union (EU), the European Economic Area (EEA) and in Switzerland, European Commission, p. 41; Spiegel (Hrsg.), *Zwischenstaatliches Sozialversicherungsrecht*, Kommentar, Artikel 1, p. 26, para. 33.

²¹ In particular in the cases of sickness (Article 35 of Regulation 883/2004) and unemployment benefits (Article 65(6) of Regulation 883/2004).

²² Article 76 of Regulation 883/2004; Recital 15 of Regulation 987/2009.

²³ Covered by Regulation 883/2004.

²⁴ The Member States depend on the underlying Agreement due to which Regulation 883/2004 applies (EEA Agreement, Vaduz Convention, Agreement on the Free Movement of Persons).

57. The Liechtenstein Government therefore proposes that the first question should be answered as follows:

It is necessary for the scope *ratione personae* of Regulation 883/2004, as incorporated into the EEA Agreement, that the EEA national who is subject to the legislation of one or more EEA States is resident in one of the EEA States.

Supplementary question to question 1

58. If the answer to the first question is in the negative, the Court of Appeal asks whether an agreement concluded by the EU or an EEA Member State with a third country by which the scope of application of Regulation 883/2004 was extended to the third country, changes the answer to this question.

59. As already touched upon earlier, the agreements extending the scope of the application of Regulation 883/2004 relevant for this case are: the EEA Agreement concluded by the EU Member States and the EEA EFTA States, the Vaduz Convention concluded by Switzerland and the EEA EFTA States and the Agreement on the Free Movement of Persons between Switzerland and the EU.²⁵

60. The Liechtenstein Government is of the opinion that these three different agreements are to be considered individually as they have been concluded by different parties including separate institutional setups, and dispute settlement mechanisms.

61. In addition, all three agreements have a different territorial scope. The territorial scope depends on the Treaty on European Union,²⁶ the EEA Agreement, the Vaduz Convention respectively the Agreement on the Free Movement of Persons and their signing parties, as Regulation 883/2004 does not explicitly regulate the territorial scope.²⁷

²⁵ See para. 4 to 7.

²⁶ As well as the Treaty on the Functioning of the European Union.

²⁷ It might be worth noting, that some of these agreements specifically refer to the place of residence. The Agreement on the Free Movement of Persons even specifically stipulates in Article 8(d) that the Contracting Parties shall make provisions with the aim 'of paying benefits to persons residing in the territory of the Contracting Parties' (see also Judgement of the ECJ of 4 September 2019 in Case C-473/18, *GP v Bundesagentur für Arbeit, Familienkasse Baden-Württemberg West*, ECLI:EU:C:2019:662, para. 24). In turn,

62. Therefore, although all of these agreements in principle extend the application of Regulation 883/2004 as well as of Regulation 987/2009, they are to be treated as separate agreements and do not affect the application and scope of Regulation 883/2004 as applicable according to the specific agreement. Regulation 883/2004 is either applicable in relation between the EU and die EEA EFTA States, or between the EFTA States, or between the EU and Switzerland. The scope is dependent on Regulation 883/2004 in conjunction with the underlying agreement.

63. This understanding is confirmed by the approach of the EU when negotiating the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the EU (hereinafter referred to as 'Withdrawal Agreement').²⁸ Article 33 of the Withdrawal Agreement says:

1. The provisions of this Title applicable to Union citizens shall apply to nationals of Iceland, the Principality of Liechtenstein, the Kingdom of Norway, and the Swiss Confederation provided that:

(a) Iceland, the Principality of Liechtenstein, the Kingdom of Norway, and the Swiss Confederation, as applicable, have concluded and apply corresponding agreements with the United Kingdom which apply to Union citizens; and

(b) Iceland, the Principality of Liechtenstein, the Kingdom of Norway, and the Swiss Confederation, as applicable, have concluded and apply corresponding agreements with the Union which apply to United Kingdom nationals.

64. Therefore, the relationship of the EEA EFTA States, the United Kingdom, Switzerland and the EU and the application of *inter alia* Regulation 883/2004 have been explicitly regulated. This solution was found at the request of the EEA EFTA States to consider and explicitly regulate the multi-layered relationship.²⁹ A similar Article can be found in the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the EEA Agreement.³⁰ In this regard, the Liechtenstein

the Vaduz Convention defines in Article 7 of Appendix 1 of Annex K an employed frontier worker as a national of a Member State who has his residence in the territory of a Member State.

²⁸ Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, OJ C 384I, 12.11.2019, p. 1.

²⁹ Stefan Barriga/Esther Schindler, *Die EWR-rechtliche Dimension des Brexit*, published in *Liechtensteinische Juristen Zeitung* 1/20, p. 79-80.

³⁰ Article 32 of the Agreement on arrangements between Iceland, the Principality of Liechtenstein, the Kingdom of Norway and the United Kingdom of Great Britain and Northern Ireland following the withdrawal

Government also refers to the Decision of the EEA Joint Committee No 210/2020 of 11 December 2020.

65. No comparable provision can be found when it comes to the multi-layered relationship EU-EEA/EFTA-Switzerland.
66. The Liechtenstein Government therefore proposes that the second part to the first question should be answered as follows:

An agreement concluded by the EU or an EEA member state with a third country by which the scope of application of the Regulation 883/2004 was extended to the third country has no effect on the application and scope of Regulation 883/2004 and therefore does not change the answer to the first question.

Question 2

67. By its second question, the Court of Appeal asks whether an attestation within the meaning of Article 19(2) of Regulation 987/2009 must be issued by means of a form (PD A1) laid down by the Administrative Commission in order to produce the legal effect specified in Article 5(1) of that Regulation.
68. According to Article 19(2) of Regulation 987/2009, the competent institution of the Member State whose legislation is applicable pursuant to Regulation 883/2004 has to provide the person concerned or the employer upon request with an attestation that the legislation of the Member State is applicable.
69. The issuance of such an attestation presupposes that the competent institution of the Member State and therefore the applicable legislation has been determined according to Title II of Regulation 883/2004. It also presupposes that the person concerned is within the scope of Regulation 883/2004. The following remarks are made under the assumption that these conditions are fulfilled.

of the United Kingdom from the European Union, the EEA Agreement and other agreements applicable between the United Kingdom and the EEA EFTA States by virtue of the United Kingdom's membership of the European Union, LGBI. 2020.051.

70. When such an attestation is issued by the institution of a Member State, Article 5 of Regulation 987/2009 stipulates that the document has to be accepted by the institutions of the other Member States and is therefore binding on the institutions of the other Member States.³¹
71. To ensure legal certainty and protection of legitimate expectation, the issuing institution is required to carry out a proper assessment of the relevant facts and guarantee that the information on the basis of which attestation is provided is correct.³²
72. In order to harmonise and simplify the process of issuing a document according to Article 19 of Regulation 987/2009, the Administrative Commission laid down the format and method of exchanging data in accordance with Article 4 of Regulation 987/2009 and in conjunction with Article 72 of Regulation 883/2004 regarding the tasks of the Administrative Commission.
73. The Administrative Commission did so by adopting Recommendation No A1 concerning the issuance of the attestation referred to in Article 19(2) of Regulation 987/2009³³ determining the structure and the content of the portable document, specifically the Portable Document A1 (hereinafter referred to as 'PD A1'). The attestations according to Article 19(2) of Regulation 987/2009, concerning the

³¹ Judgement of the ECJ of 6 September 2018 in Case C- 527/16, *Salzburger Gebietskrankenkasse, Bundesminister für Arbeit, Soziales und Konsumentenschutz, Interested parties: Alpenrind GmbH, Martin-Meat Szolgáltató és Kereskedelmi Kft, Martimpex-Meat Kft, Pensionsversicherungsanstalt, Allgemeine Unfallversicherungsanstalt*, ECLI:EU:C:2018:669, para. 36-39. However, the application of EU legislation cannot be extended to cover transaction carried out for the purpose of fraudulently or wrongfully obtaining advantages provided for by EU law. See also Judgement of the ECJ of 6 February 2018 in Case C-359/16, *Ömer Altun, Abubekir Altun, Sedrettin Maksutogullari, Yunus Altun, Absa NV, M. Sedat BVBA, Alnur BVBA, the other party to the proceedings being: Openbaar Ministerie*, ECLI:EU:C:2018:63, para. 48f.

³² Judgement of the ECJ of 4 October 2012 in Case C-115/11, *Format Urządzenia i Montaż Przemysłowe sp. z o.o. v Zakład Ubezpieczeń Społecznych*, ECLI:EU:C:2012:606, para. 42.

³³ 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; Incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 236/2019 of 27 September 2019. Previously: Decision No 202 of 17 March 2005 on model forms necessary for the application of Council Regulations (EEC) No 1408/71 and (EEC) No 574/72 (E 001, E 101, E 102, E 103, E 104, E 106, E 107, E 108, E 109, E 112, E 115, E 116, E 117, E 118, E 120, E 121, E 123, E 124, E 125, E 126 and E 127), OJ L 77, 15.3.2006, p. 1.

applicable legislation which applies to the holder, is therefore to be issued in the form of a PD A1.

74. However, according to the established case law of the European Court of Justice (hereinafter referred to as 'ECJ') decisions and recommendations of the Administrative Commission are not legally binding. They can provide guidance to social security institutions responsible for applying social security law, but they cannot require those institutions to apply certain methods or adopt certain interpretations.³⁴

75. It is therefore for the Member State to decide on the format and structure of the attestation pursuant to Article 19(2) of Regulation 987/2009 as long as the necessary information is included and a proper assessment of the relevant facts has been carried out. Article 5 of Regulation 987/2009 does not explicitly state that the documents must be issued in the form determined by the Administrative Commission in order for them to be binding.

76. The Liechtenstein Government therefore proposes that the second question should be answered as follows:

The attestation within the meaning of Article 19(2) of Regulation 987/2009 must not be issued by means of PD A1 as laid down by the Administrative Commission in order to obtain the legal effect referred to in Article 5(1) of that Regulation.

77. Considering the facts of the case at hand, the Liechtenstein Government finds it important to highlight that the communication between national institutions on social security files takes place through the Electronic Exchange of Social Security Information (hereinafter referred to as 'EESSI') as of 3 July 2019.

³⁴ Article 72(a) of Regulation 883/2004; Judgement of the ECJ of 10 February 2000 in Case C-202/97, *Fitzwilliam Executive Search Ltd and Bestuur van het Landelijk Instituut Sociale Verzekeringen*, ECLI:EU:C:2000:75, para 32; Spiegel (Hrsg.), *Zwischenstaatliches Sozialversicherungsrecht*, Kommentar, Artikel 71-75 VO 883/2004, p. 5, para. 8.

78. According to Article 72(d) of Regulation 883/2004, the Administrative Commission had to adopt common structural rules for data processing services and encourage the use of new technologies in particular by modernising procedures for exchanging information.
79. The Administrative Commission established such a system based on Article 78 of Regulation 883/2004 and Article 4 of Regulation 987/2009³⁵ to enable social security institutions to exchange information related to different branches like applicable legislation, sickness, occupational diseases and accidents at work, pensions, unemployment and family benefits more rapidly and securely.³⁶
80. After extending the transitional period for electronic data exchanges according to Article 95 of Regulation 987/2009 several times, the Administrative Committee decided that the transmission of data between the institutions is to be carried out by electronic means through the EESSI as of 3 July 2019.³⁷ EESSI also includes the EEA EFTA States, Switzerland and the United Kingdom who are therefore also exchanging information by electronic means through the EESSI.

³⁵ According to Article 4(2) of Regulation 987/2009 the transmission of data between the institutions shall be carried out by electronic means through the access points under a common secure framework (see also Recital 3 of Regulation 987/2009).

³⁶ See also Decisions of the Administrative Committee on the Electronic Data Exchange (E series) <https://ec.europa.eu/social/BlobServlet?docId=4987&langId=en>.

³⁷ Administrative Commission for the Coordination of Social Security Systems Decision No E7 of 27 June 2019 concerning practical arrangements for cooperation and data exchange until the Electronic Exchange of Social Security Information (EESSI) is fully implemented in Member States, OJ C 73, 6.3.2020, p. 5. Incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 43/2021 of 5 February 2021.

V. Conclusion

81. Following the observations above, the Liechtenstein Government considers that the questions referred to the EFTA Court for an advisory opinion should be answered as follows:

Question 1

It is necessary for the *scope ratione personae* of Regulation 883/2004, as incorporated into the EEA Agreement, that the EEA national who is subject to the legislation of one or more EEA States is resident in one of the EEA Member States.

An agreement concluded by the EU or an EEA Member State with a third country by which the scope of application of the Regulation 883/2004 was extended to the third country has no effect on the application and scope of Regulation 883/2004 and therefore does not change the answer to the first question.

Question 2

The attestation within the meaning of Article 19(2) of Regulation 987/2009 must not be issued by means of PD A1 as laid down by the Administrative Commission in order to obtain the legal effect referred to in Article 5(1) of that Regulation.

On behalf of the Liechtenstein Government


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