

**In accordance to Article 30 paragraph 1 Rules of Procedure of the EFTA Court,  
the Appellant submits his written observations in German.**

**TO THE PRESIDENT AND MEMBERS OF THE EFTA COURT**

**WRITTEN OBSERVATIONS**

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

**Mag. Christian Maitz, LL.M., Attorney at Law**

represented by

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in Case **E-5/22**

concerning an application submitted pursuant Article 34 of the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice by the Princely Court of Appeal (Liechtenstein), in the case:

**Mag. Christian Maitz, LL.M., Attorney at Law,**

Appellant

**v**

- 1. Liechtenstein Old-Age and Survivors' Insurance (AHV)**
- 2. Liechtenstein Invalidity Insurance (IV)**
- 3. Liechtenstein Family Allowances Office (FAK)**

Respondents

requesting an advisory opinion regarding the interpretation of the act referred to in Points 1 and 2 of Annex VI to the EEA Agreement, namely Regulation (EC) No 883/2004 of the European Parliament and of the Council on the coordination of social security schemes and Regulation (EC) No 987/2009 of the European Parliament and of the Council laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems.

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By notification of 24 May 2022 in Case E-5/22, the EFTA Court requested the appellant to submit, by 25 July 2022, written observations on the questions referred by the Princely Court of Appeal on 28 April 2022 (Case SV.2022.5).

Within the prescribed period, the appellant therefore submits the following

### **(written) observations**

to the EFTA Court.

#### **1 Facts**

- 1 The appellant is an Austrian national. In July 2015 the appellant transferred his residence from Austria to Switzerland. The appellant is prevented from taking up residence in Liechtenstein on account of the national arrangements under Liechtenstein's '*special solution*' for the free movement of persons within the EEA. The distance from the appellant's former place of residence in Austria to his current place of residence in Switzerland is approximately 680 km. In addition, he has been in continuous gainful employment in Liechtenstein since 15 June 2015, except for the period from 1 October 2017 to 31 March 2018.
- 2 On 13 November 2018, the appellant was sworn in as an (independent) Austrian lawyer in Vienna in order to establish himself as a lawyer in Liechtenstein. Registration in Liechtenstein as an established European lawyer admitted to practise in Austria explicitly requires prior registration with an Austrian bar association. This is the only way that the appellant can prove to the Liechtenstein Bar Association that he is a member of the profession of lawyers in his State of origin, which is a requirement for establishment (Article 60(1)(a) of the Rechtsanwaltsgesetz (Lawyers' Act, RAG)). Otherwise, the appellant is unable to exercise his right of establishment in Liechtenstein. The Liechtenstein Bar Association also insists on registration in Austria and requires the appellant to provide evidence of membership at regular intervals.

- 3 After he had been sworn in in Vienna, the appellant immediately applied to the Liechtenstein Bar Association for entry in the register of established European lawyers. This subsequently took place on 3 December 2018. The period which is relevant in assessing the obligation to pay contributions to the Liechtenstein pension scheme therefore begins on 13 November 2018/3 December 2018.
- 4 In the period from 13 November 2018 to 31 December 2019, the appellant was employed by a Liechtenstein law firm based in Schaan, initially (until 2 December 2018) as an articulated clerk with authorisation to substitute and subsequently (from 3 December 2018) as a lawyer. Between 1 September 2019 and 30 November 2019, the appellant was again employed by another Liechtenstein law firm based in Vaduz as an associate lawyer. On 1 December 2019, the appellant opened his own law office in Liechtenstein. Since then, the appellant has pursued an activity as a self-employed lawyer in Liechtenstein. On 20 August 2021, the appellant formed Maitz Rechtsanwälte GmbH in Liechtenstein, of which he is the sole shareholder and managing director. It commenced business on 1 October 2021. Since then, the appellant has worked as a lawyer both on a self-employed, and an employed basis in Liechtenstein.
- 5 Alongside this, since 13 November 2018, the appellant has been entered in the register of the Vienna Bar Association as an Austrian lawyer. He had to register as a self-employed person in Austria in particular because he would otherwise be prevented, despite being an EEA citizen, from exercising his right of establishment in the EEA.
- 6 Since the time he was registered as an Austrian lawyer with the Vienna Bar Association, the appellant has not generated any turnover in Austria. However, the appellant received a monthly salary in the context of his activities as an employed person in Liechtenstein. Since he is working as a self-employed person in Liechtenstein, the appellant again generates turnover only in Liechtenstein. In Switzerland, by contrast, the appellant does not conduct any activity as a lawyer or other employment. On the basis of his economic activity

as a lawyer, the appellant contributed continuously to the Liechtenstein pension scheme in the relevant period.

- 7 On 14 June 2022, the appellant was admitted to practise as a lawyer in Liechtenstein. The appellant was able to achieve this by proving that he had pursued three years of effective and regular activity in Liechtenstein and completing an interview with the Liechtenstein Examination Board for Lawyers. In particular, the appellant was required to submit to the Examination Board lists of the legal cases which he had handled in Liechtenstein (Article 74 of the RAG; Article 75 of the RAG).
- 8 By notices of 20 November 2018, the Vienna Bar Association exempted the appellant in 2018 from the obligation to pay contributions to the Vienna Bar Association pension scheme (part A and B) and thus from the Austrian pension scheme/social security system. Thereupon, the Vienna Bar Association requested the appellant to produce 'Form A1' for the subsequent years (that is, from 1 January 2019 to date). Otherwise, the Vienna Bar Association is unable to exempt the appellant in Austria from the obligation to pay contributions to the Austrian pension scheme.
- 9 However, since the beginning of 2019, the AHV-IV-FAK has refused to issue the abovementioned Form A1 to the appellant. Since then, the appellant has endeavoured, with the Liechtenstein, Austrian and Swiss authorities, to find an alternative solution. At that time, the appellant also contacted the head of the EEA Coordination Unit in Liechtenstein, who, however, referred the appellant to the AHV-IV-FAK. The AHV branch office at the Swiss domicile of the appellant and the Vienna Bar Association concur with the appellant's view that the Liechtenstein AHV-IV-FAK should issue Form A1 to the appellant.

## 2 Procedure

- 10 By application of 22 July 2020, the appellant initiated proceedings at the AHV-IV-FAK under reference A. 2020/103. The appellant claimed that Form A1 should be issued. If the AHV-IV-FAK failed to grant that application, the

appellant claimed that a certificate should be issued concerning contributions paid to the Liechtenstein pension scheme. By order of 4 August 2020, the AHV-IV-FAK decided that the income obtained by the appellant in Liechtenstein from employed and self-employed activities was liable to mandatory contributions payable to the Liechtenstein AHV-IV-FAK. However, the AHV-IV-FAK continued to refuse to issue Form A1 to the appellant. The appellant brought an appeal (*'Vorstellung'*) against that order on 17 September 2020, which was rejected by the AHV-IV-FAK by decision of 29 December 2021. The appellant appealed against that decision to the Princely Court of Appeal on 27 January 2022.

11 In addition, on 2 August 2020 the appellant initiated SOLVIT procedures against the AHV-IV-FAK under reference 3327/20/AT and against the Vienna Bar Association under reference 3328/20/AT. SOLVIT is a European problem-solving network which is described by the Liechtenstein EEA Coordination Unit inter alia as follows:

*'SOLVIT has set itself the target of proposing a solution within a maximum of ten weeks. ... SOLVIT offers citizens, and also companies, the unique opportunity to resolve their cross-border problems without lengthy and costly court proceedings. SOLVIT is quick and non-bureaucratic and, last but not least, the use of SOLVIT is free of charge for citizens and companies.'*

(<https://www.llv.li/inhalt/118635/amtsstellen/problemlosungsnetz-solvit>)

12 Neither the EEA Coordination Unit nor the AHV-IV-FAK proposed a solution to the appellant prior to the initiation of the appeal proceedings by offering to issue to the appellant an official certificate relating to the pension scheme in Liechtenstein ('certificate of coverage') or some other compromise. The (then) deputy head of the EEA Coordination Unit merely forwarded the previous statement made by the AHV-IV-FAK, which maintained its legal position. The purpose of the SOLVIT procedure, which is financed by EEA/EU funds (taxpayers' money) is not therefore evident to the appellant. It would have been the task of the Liechtenstein EEA Coordination Unit and the Liechtenstein AHV-

IV-FAK to work out a proposed solution and not to continue to pursue national political self-interests. Otherwise, this SOLVIT procedure could be dispensed with and parties seeking legal redress could be referred to administrative or judicial remedies. Because the AHV-IV-FAK had also failed to avail itself of the opportunity to come to a solution offered by the appellant, the only possibility remaining to the appellant is to take legal action at the various stages of administrative and judicial appeal in order that the EFTA Court can give definitive clarification on the legal question of the applicability of Regulation (EC) No 883/2004 to the situation at issue.

13 Only after the appellant had submitted the application on 22 July 2020 and initiated the two SOLVIT procedures on 2 August 2020, the Austrian bar association contacted AHV-IV-FAK directly for the first time on 6 August 2020. The AHV-IV-FAK did not actually offer to issue a ‘certificate of coverage’ until the appellant had approached the head of the Legal Service of the AHV-IV-FAK on 25 March 2022 at a training event at Liechtenstein University addressing the present proceedings and proposed this solution. The appellant has not yet received a ‘certificate of coverage’ from the AHV-IV-FAK. Instead, the AHV-IV-FAK is asking the appellant to propose an appropriate wording for such a letter to the AHV-IV-FAK.

### 3 Questions referred

14 The following questions have been referred to the EFTA Court by the Princely Court of Appeal with a request for an advisory opinion:

*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 (LGBI. 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 (LGBI. 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?*

## 4 EEA Agreement

<sup>15</sup> Article 3 of the EEA Agreement provides:

*The Contracting Parties shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Agreement.*

*They shall abstain from any measure which could jeopardise the attainment of the objectives of this Agreement.*

*Moreover, they shall facilitate cooperation within the framework of this Agreement.*

<sup>16</sup> Article 4 of the EEA Agreement provides:



*Within the scope of application of this Agreement, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.*

- 17 Article 30 in Chapter 1 of the EEA Agreement, which has the heading ‘*Workers and self-employed persons*’ provides:

*In order to make it easier for persons to take up and pursue activities as workers and self-employed persons, the Contracting Parties shall take the necessary measures, as contained in Annex VII, concerning the mutual recognition of diplomas, certificates and other evidence of formal qualifications, and the coordination of the provisions laid down by law, regulation or administrative action in the Contracting Parties concerning the taking up and pursuit of activities by workers and self-employed persons.*

- 18 Article 31 in Chapter 2 of the EEA Agreement, entitled ‘*Right of establishment*’, includes the following provision:

*1. Within the framework of the provisions of this Agreement, there shall be no restrictions on the freedom of establishment of nationals of an EC Member State or an EFTA State in the territory of any other of these States. ...*

*2. Annexes VIII to XI contain specific provisions on the right of establishment.*

- 19 By Decision of the EEA Joint Committee No 191/1999, the Contracting States made the following sectoral adaptations in Annex VIII (Right of establishment) to the EEA Agreement:

- 20 Recital 2 of EEA Decision No 191/1999 includes the following provision:

*The joint review, which was undertaken in accordance with Article 9(2) of Protocol 15 at the end of the transitional period, concluded that the specific geographical situation of Liechtenstein*

*still justifies the maintenance of certain conditions on the right of taking up residence in that country. ...*

21 Article 1 of EEA Decision No 191/1999 includes the following provision:

*I*

*Nationals of Iceland, Norway and the EU Member States may take up residence in Liechtenstein only after having received a permit from the Liechtenstein authorities. They have the right to obtain this permit, subject only to the restrictions specified below. No such residence permit shall be necessary for a period less than three months per year, provided no employment or other permanent economic activity is taken up, nor for persons providing cross-border services in Liechtenstein.*

*The conditions concerning nationals of Iceland, Norway and the EU Member States cannot be more restrictive than those which apply to third country nationals. ...*

*II*

*2. The Liechtenstein authorities shall grant residence permits in a way that is not discriminatory and does not distort competition. Half of the net increase in the permits available shall be granted in accordance with a procedure that gives an equal chance to all applicants. ...*

*VII*

*A person employed in but whose residence is not in Liechtenstein (a frontier worker) shall return daily to his country of residence. ...*

4.1 Regulation (EC) No 883/2004

22 The EEA Contracting States incorporated Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of

social security systems into the EEA Agreement by Decision of the Joint Committee No 76/2011 of 1 July 2011.

23 The regulations incorporated into the EEA Agreement form part of the Liechtenstein legal order (*Dystland/Finstad/Sørebø in Arnesen/Fredriksen/Graver/Mestad/Vedder*, Agreement on the European Economic Area, Article 7, paragraph 12). Such regulations thus prevail over any national law which run to the contrary (*Bussjäger*, *Rechtfragen des Vorrangs und der Anwendbarkeit von EWR-Recht in Liechtenstein*, LJZ 2006, 143; *Bussjäger*, Online-Kommentar Liechtenstein Institut [verfassung.li], Article 8 of the Liechtenstein Constitution, paragraph 108).

24 Recital 15 of Regulation No 883/2004 states:

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

25 Recital 16 of Regulation No 883/2004 states:

*Within the Community 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.*

26 Recital 18a of Regulation No 883/2004 states inter alia:

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

27 Article 2 of Regulation No 883/2004, which has the heading 'Persons covered', includes the following provision:

*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. ...*

28 Article 3 of Regulation No 883/2004, which has the heading ‘Matters covered’, includes the following provision:

*1. This Regulation shall apply to all legislation concerning the following branches of social security: ...*

*(d) old-age benefits; ...*

29 Article 11 of Regulation No 883/2004, which has the heading ‘General rules’, includes the following provision:

*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. ...*

30 Article 13 of Regulation No 883/2004, which has the heading ‘Pursuit of activities in two or more Member States’, includes the following provision:

*2. A person who normally pursues an activity as a self-employed person in two or more Member States shall be subject to*

*(a) the legislation of the Member State of residence if he/she pursues a substantial part of his/her activity in that Member State*

*(b) the legislation of the Member State in which the centre of interest of his/her activities is situated, if he/she does not reside in one of the Member States in which he/she pursues a substantial part of his/her activity.*

*3. A person who normally pursues an activity as an employed person and an activity as a self-employed person in different Member States shall be subject to the legislation of the Member State in which he/she pursues an activity as an employed person*

*or, if he/she pursues such an activity in two or more Member States, to the legislation determined in accordance with paragraph 1. ...*

#### 4.2 Regulation (EC) No 987/2009

<sup>31</sup> By Decision of the Joint Committee No 76/2011 of 1 July 2011, the EEA Contracting States incorporated 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 into the EEA Agreement.

<sup>32</sup> The regulations incorporated into the EEA Agreement form part of the Liechtenstein legal order (*Dystland/Finstad/Sørebø in Arnesen/Fredriksen/Graver/Mestad/Vedder*, Agreement on the European Economic Area, Article 7, paragraph 12). Such regulations thus prevail over any national law which run to the contrary (*Bussjäger*, *Rechtfragen des Vorrangs und der Anwendbarkeit von EWR-Recht in Liechtenstein*, LJZ 2006, 143; *Bussjäger*, Online-Kommentar Liechtenstein Institut [verfassung.li], Article 8 of the Liechtenstein Constitution, paragraph 108).

<sup>33</sup> Article 4 of Regulation No 987/2009, which has the heading '*Format and method of exchanging data*', includes the following provision:

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

<sup>34</sup> Article 5 of Regulation No 987/2009, which has the heading '*Legal value of documents and supporting evidence issued in another Member State*', includes the following provision:

*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. ...*

35 Article 19 of Regulation No 987/2009, which has the heading '*Provision of information to persons concerned and employers*', includes the following provision:

*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.*

#### 4.3 Recommendation No P1 concerning the *Gottardo* judgment

36 By Decision No 76/2011 of 1 July 2011, the Joint Committee incorporated into the EEA Agreement Recommendation No P1 of the Administrative Commission for the Coordination Social Security Systems of 12 June 2009 concerning the *Gottardo* judgment, according to which the advantages enjoyed by a State's own nationals under a bilateral convention on social security with a non-member country must also be granted to workers who are nationals of other Member States.

37 Recital 19 of EEA Decision No 76/2011 states:

*Recommendation No P1 of 12 June 2009 concerning the Gottardo judgment, according to which the advantages enjoyed by a State's own nationals under a bilateral convention on social security with a non-member country must also be granted to workers who are nationals of other Member States should be incorporated into the Agreement.*

38 Article 3 of EEA Decision No 76/2011 provides:

*The texts of Regulations (EC) No 883/2004, as corrected by OJ L 200, 7.6.2004, p. 1 and OJ L 204, 4.8.2007, p. 30, (EC)*

*No 987/2009 and (EC) No 988/2009, of Decisions Nos A1, A2, E1, F1, H1, H2, P1, S1, S2, S3, U1, U2 and U3, and of Recommendations No P1, U1 and U2 in the Icelandic and Norwegian languages, to be published in the EEA Supplement to the Official Journal of the European Union, shall be authentic.*

39 Point I(10.1) of the Annex to EEA Decision No 76/2011, which has the heading ‘ACTS OF WHICH THE CONTRACTING PARTIES SHALL TAKE NOTE’, states:

*32010 H 0424(01): Recommendation No P1 of 12 June 2009 concerning the Gottardo judgment, according to which the advantages enjoyed by a State’s own nationals under a bilateral convention on social security with a non-member country must also be granted to workers who are nationals of other Member States.*

40 Recital 2 of Recommendation No P1 states inter alia:

*The principle of non-discrimination on the grounds of nationality is an essential safeguard for the freedom of movement of employed persons, as provided for in Article 39 of the Treaty. ...*

41 Recital 4 of Recommendation No P1 states:

*The Court ruled in this case that when a Member State concludes a bilateral international convention on social security with a non-member country which provides for account to be taken of periods of insurance completed in that non-member country for acquisition of entitlement to old-age benefits, the fundamental principle of equal treatment requires that that Member State grant nationals of the other Member States the same advantages as those which its own nationals enjoy under that convention unless it can provide objective justification for refusing to do so (paragraph 34).*

42 Recital 6 of Recommendation No P1 states:

*The Court considered that disturbing the balance and reciprocity of a bilateral international convention concluded between a Member State and a non-member country did not constitute an objective justification for the refusal by the Member State party to that convention to extend to nationals of the other Member States the advantages which its own nationals derive from that convention.*

43 Recital 7 of Recommendation No P1 states:

*Nor did the Court accept the objections to the effect that a possible increase in the financial burden and administrative difficulties in liaising with the competent authorities of the non-member country in question could justify the Member State which is party to the bilateral convention failing to comply with its Treaty obligations.*

44 Recital 8 of Recommendation No P1 states:

*It is important that all appropriate conclusions be drawn from this judgment, which is crucial for Community nationals who have exercised their right to move freely to another Member State.*

45 Recital 9 of Recommendation No P1 states:

*For this reason, it should be made clear that bilateral conventions on social security between a Member State and a non-member country must be interpreted to the effect that the advantages enjoyed by nationals of the Member State which is party to the convention should in principle also be granted to a Community national who is in the same situation in objective terms.*

46 Recital 10 of Recommendation No P1 states:

*Irrespective of the uniform application of the Gottardo ruling to individual cases, the existing bilateral conventions should be reviewed. With regard to agreements concluded previously, Article 307 of the Treaty states: 'the Member State or States concerned shall take all appropriate steps to eliminate the*



*incompatibilities established’, and with regard to agreements concluded after 1 January 1958, or after the date of a Member State’s accession to the European Community, Article 10 of the Treaty requires that these same Member States ‘abstain from any measure which could jeopardise the attainment of the objectives of the Treaty’.*

47 Recital 11 of Recommendation No P1 states:

*With regard to new bilateral conventions on social security concluded between a Member State and a non-member country, it is important to bear in mind that these should include a specific reference to the principle of non-discrimination on the grounds of nationality in relation to nationals of other Member States who have exercised their right to move freely in the Member State which is a party to the convention concerned.*

48 Point 1 of Recommendation No P1 states:

*In accordance with the principle of equal treatment and non-discrimination between a State’s own nationals and the nationals of other Member States who have exercised their right to move freely pursuant to Article 39 of the Treaty, the advantages as regards pensions which are enjoyed by a State’s own workers (employed and self-employed persons) under a convention on social security with a non-member country are also, in principle granted to workers (employed and self-employed persons) who are nationals of the other Member States and are in the same situation in objective terms.*

49 Point 2 of Recommendation No P1 states:

*New bilateral conventions on social security concluded between a Member State and a non-member country should make specific reference to the principle of non-discrimination, on the grounds of nationality, against nationals of another Member State who have*

*exercised their right of free movement in the Member State which is a party to the convention concerned.*

50 Point 3 of Recommendation No P1 states:

*The Member States should inform the institutions in countries with which they have signed social security conventions whose provisions apply only to their respective nationals about the implications of the Gottardo ruling and should ask them to cooperate in applying the ruling of the Court. Member States which have concluded bilateral conventions with the same non-member countries may act jointly in requesting such cooperation. This cooperation is clearly essential if the ruling is to be complied with.*

#### 4.4 Recommendation No A1 concerning the issuance of Form A1

51 Recital 1 of Recommendation No A1 states:

*Article 19(2) of Regulation (EC) No 987/2009 provides that 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 Regulation (EC) No 883/2004 shall provide an attestation that such legislation is applicable and shall indicate, where appropriate, until what date and under what conditions.*

52 Recital 2 of Recommendation No A1 states:

*The Administrative Commission determines the structure and the content of the Portable Document A1 concerning the applicable legislation which applies to the holder.*

53 Recital 3 of Recommendation No A1 states:

*Article 5(1) of Regulation (EC) No 987/2009 provides that this document shall be accepted by the institutions of the other Member State as long as it has not been withdrawn or declared invalid by the Member State in which it has been issued.*

54 Recital 4 of Recommendation No A1 states:

*The principle of sincere cooperation, as also laid down in Article 4(3) of the Treaty on European Union and specified in Article 76 of Regulation (EC) No 883/2004, requires that institutions conduct a proper assessment of the facts relevant for the determination of the legislation applicable in the matter of social security and consequently to confirm the correctness of the information contained in a Portable Document A1.*

55 Recital 5 of Recommendation No A1 states:

*These documents establish a presumption that the holder is properly affiliated to the social security system of the Member State whose institution has issued it.*

56 Point 4 of Recommendation No A1 states:

*It is recommended that, prior to issuing a Portable Document A1, institutions assess all the relevant facts, whether by means of data contained in official sources, or by requesting the applicant to provide the necessary information. To guide institutions, a non-exhaustive standardised list of common questions and questions specific to the different relevant articles of Regulation (EC) No 883/2004 can be found in the Annex. These may be adapted as appears appropriate in the case involved.*

57 Point 6 of Recommendation No A1 states inter alia:

*... They should notify each other, by means of the Electronic Exchange of Social Security Information (EESSI) System, of any decision taken regarding the applicable legislation in the event of an activity pursued in the other Member State pursuant to Article 15(1) of Regulation (EC) No 987/2009.*

## 5 International agreements

### 5.1 Agreement on the free movement of persons (EU/Switzerland)

58 On 21 June 1999, the European Community and its Member States and the Swiss Confederation concluded an Agreement on the free movement of persons. The Agreement entered into force on 1 June 2002.

59 By Decision No 1/2012 of the Joint Committee of 31 March 2012, the Contracting States replaced Annex II to the Agreement on the coordination of social security schemes.

60 Recital 2 of Decision No 1/2012 of the Joint Committee states:

*Annex II to the Agreement on the coordination of social security schemes was last amended by Decision No 1/2006 of the EU-Swiss Joint Committee and should now be updated to take account of the new legal acts of the European Union that have entered into force since then, in particular Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems and the measures adopted to implement that Regulation.*

61 Recital 3 of Decision No 1/2012 of the Joint Committee states:

*Regulation (EC) No 883/2004 has replaced Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community.*

62 Article 1 of Decision No 1/2012 of the Joint Committee states:

*Annex II to the 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 ('the Agreement') is replaced by the Annex to this Decision.*

63 Article 1 of Annex II to Decision No 1/2012 of the Joint Committee, which has the heading ‘*Coordination of social security schemes*’, provides:

*1. The contracting parties agree, with regard to the coordination of social security schemes, to apply among themselves the legal acts of the European Union to which reference is made in, and as amended by, section A of this Annex, or rules equivalent to such acts.*

*2. The term ‘Member State(s)’ contained in the legal acts referred to in section A of this Annex shall be understood to include Switzerland in addition to the States covered by the relevant legal acts of the European Union.*

64 Section A of Annex II to Decision No 1/2012 of the Joint Committee, which has the heading ‘**SECTION A: LEGAL ACTS REFERRED TO**’, states inter alia:

*1. Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, as amended by Regulation (EC) No 988/2009 of the European Parliament and of the Council of 16 September 2009 amending Regulation (EC) No 883/2004 on the coordination of social security systems, and determining the content of its Annexes.*

*For the purposes of this Agreement, Regulation (EC) No 883/2004 shall be adapted as follows: ...*

*2. 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.*

*For the purposes of this Agreement, Regulation (EC) No 987/2009 shall be adapted as follows: ...*

65 Article 8 of the Agreement on the free movement of persons, which has the heading ‘*Coordination of social security systems*’, includes the following provision:

*The Contracting Parties shall make provision, in accordance with Annex II, for the coordination of social security systems with the aim in particular of:*

*(a) securing equality of treatment*

*(b) determining the legislation applicable ...*

*(e) fostering mutual administrative assistance and cooperation between authorities and institutions.*

## 5.2 EFTA Convention

66 On 4 January 1960, the Republic of Iceland, the Kingdom of Norway, the Principality of Liechtenstein and the Swiss Confederation concluded a Convention establishing the European Free Trade Association (EFTA). That Convention entered into force on 1 June 2002.

67 By Decision No 5/2015 of the EFTA Council on amendments to Appendix 2 to Annex K to the Convention (coordination of social security schemes), the EFTA Contracting States made amendments to the EFTA Convention.

68 Point 1 of Decision No 5/2015 of the EFTA Council states inter alia:

*Appendix 2 to Annex K of the Convention shall be amended as follows:*

*(1) The text of Article 1(1) shall be replaced by the following:*

*The Member States agree, with regard to the coordination of social security schemes, to apply among themselves the Union acts referred to in or as amended by Section A of this Appendix, or rules equivalent to such acts. ...*

*(3) The text of Article 3 shall be replaced by the following: ...*

*2. Sections A and B are applicable to the relations between Liechtenstein and Switzerland under the conditions set out in Protocol 2 to this Appendix.*

*4. The text under Section A (Acts referred to) shall be replaced by the following:*

*1. 32004 R 0883: Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ L 166, 30.4.2004, p. 1), as corrected by OJ L 200, 7.6.2004, p. 1 and OJ L 204, 4.8.2007, p. 30, as amended by: ...*

*2. 32009 R 0987: 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 L 284, 30.10.2009, p. 1), as amended by: ...*

*(8) The text under Protocol 2 to Appendix 2 shall be replaced by the following:*

*Sections A and B of Appendix 2 are applicable to the relations between Liechtenstein and Switzerland under the conditions set out in this Protocol:*

*1. Mandatory insurance under the sickness insurance scheme*

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

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

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

*1. In analogy to Article 17 of the Regulation, frontier workers and their family members who, pursuant to point 1.1 letters a) and d), are subject to the legal provisions on compulsory sickness insurance in their State of residence, shall receive in the State of work benefits in kind as if they were insured there. ...*

69 Article 21 of the EFTA Convention, which has the heading ‘*Coordination of social security systems*’, includes the following provision:

*In order to provide freedom of movement of persons, the Member 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 with the aim in particular of:*

*(a) securing equality of treatment*

*(b) determining the legislation applicable ...*

*(e) fostering mutual administrative assistance and cooperation between authorities and institutions.*

## 6 National law

### 6.1 Liechtenstein law

70 Article 34(1) of the Gesetz über die Alters- und Hinterlassenenversicherung (Old-Age and Survivors’ Insurance Act, AHVG), which has the heading ‘*Insured persons*’, includes the following provision:

*I. Persons subject to mandatory insurance*

*1. The following persons shall be insured under this Act: ...*



*(b) natural persons who are engaged in gainful employment in Liechtenstein; ...*

71 Article 36(1) of the AHVG, which has the heading '*Contributions paid by insured persons*', provides:

*I. Obligation to pay contributions*

*1. Insured persons shall be liable to pay contributions from the time they take up gainful employment, and in any case from 1 January of the year in which they reach the age of 20 until the last day of the month in which they reach the age of 65. ...*

72 Article 60(1) of the RAG, which has the heading '*Entry in the register of established European lawyers*', includes the following provision:

*1. The bar association shall decide on the application for entry in the register of established European lawyers. The applicant shall provide the following evidence:*

*(a) an attestation issued by the competent authority in the State of origin evidencing membership of that profession. The bar association may require that the attestation is no older than three months when it is submitted; ...*

73 Article 74(1) of the RAG, which has the heading '*Integration after three years of activity*', provides:

*Conditions*

*1. Anyone who, in accordance with Article 75, proves at least three years of effective and regular activity in Liechtenstein as an established European lawyer in the field of Liechtenstein law, including EEA or Community law, shall, upon application, be entered in the register of lawyers. ...*

74 Article 75 of the RAG, which has the heading '*Evidence of three years of effective and regular activity*', includes the following provision:

1. *The applicant shall submit his application for entry in the register of lawyers to the bar association and provide any relevant information and documents. He shall submit evidence of the number and nature of the legal cases handled by him in Liechtenstein law and the duration of his activity.*

2. *As evidence of the legal cases handled in Liechtenstein law, the applicant is required to submit lists of cases, which must include details of case numbers, subject-matter, time period, nature and extent of activity and status. In addition, anonymised work samples should be submitted.*

3. *The bar association shall forward the submitted documents to the Examination Board for Lawyers. The Examination Board shall decide on the evidence of three years of effective and regular activity in Liechtenstein law. ...*

## 6.2 Austrian law

75 Paragraph 49 of the Rechtsanwaltsordnung (Lawyers' Code, RAO) includes the following provision:

1. *The bar associations shall establish and maintain old-age and occupational disability pension schemes for lawyers and trainee lawyers and survivor's pension schemes in the event of the death of the lawyer or trainee lawyer in accordance with the statutes to be adopted by the Austrian Bar (Paragraph 36(1)(6)). ...*

2. *Contributions shall be paid in principle by all lawyers entered in the register of an Austrian bar association or in the register of established European lawyers of an Austrian bar association and trainee lawyers entered in the register of trainee lawyers of an Austrian bar association, unless, by virtue of their activity as a lawyer, they are subject, on the basis of other legislation, to mandatory insurance in a pension scheme of a Member State of the*

## 7 The first question

- 76 By the first question, the referring court asks the EFTA Court to interpret the scope *ratione personae* of Regulation (EC) No 883/2004. Specifically, the Liechtenstein court is seeking to ascertain whether a national of an EEA Member State must be resident in an EEA Member State in order to fall within the scope *ratione personae* of Regulation (EC) No 883/2004. Insofar as the scope *ratione personae* of Regulation (EC) No 883/2004 is determined by the residence of an EEA citizen, the court asks whether a bilateral or multilateral agreement with the State of residence by which the scope of Regulation (EC) No 883/2004 was extended to that (third) country changes the assessment.
- 77 This problem arises in proceedings in Liechtenstein between the Austrian appellant and the Liechtenstein AHV-IV-FAK concerning the issue of Form A1 (Portable Document A1). This is the attestation to be provided by the competent institution of the Member State (AHV-IV-FAK) pursuant to Article 19(2) of Regulation (EC) No 987/2009 that the legislation of that institution is applicable to the appellant pursuant to Title II of Regulation (EC) No 883/2004. The Administrative Commission for the Coordination of Social Security Systems recommends in this connection that the competent institutions provide the attestation in accordance with its Recommendation No A1 of 18 October 2017.
- 78 In those proceedings, the AHV-IV-FAK has doubts, in the context of the inter-State relationship between Liechtenstein and Austria, as to the application of Regulation (EC) No 883/2004 to an Austrian national who is gainfully employed in both countries because he is resident in Switzerland. Ultimately, therefore, the AHV-IV-FAK calls into question the scope *ratione personae* of the regulation and thus the appellant's rights in the context of the inter-State relationship between Liechtenstein and Austria. In the view of the AHV-IV-FAK, there is no 'treaty with a triangulation clause' ('trilateration') concluded between

Liechtenstein, Austria and Switzerland. The AHV-IV-FAK then wishes to infer from this that Regulation (EC) No 883/2004 is not applicable in the inter-State relationship between Liechtenstein and Austria and thus within the EEA.

79 Furthermore, in the view of the referring court, the scope *ratione personae* as laid down in Article 2(1) of Regulation (EC) No 883/2004 does **not** provide that the application of Regulation (EC) No 883/2004 to EEA citizens is dependent on their residence in an EEA Member State. The Administrative Commission for the Coordination of Social Security Systems also maintains, in its *‘Practical guide on the applicable legislation in the European Union, the European Economic Area and in Switzerland’*, that the place of residence of an EEA citizen does not necessarily have to be within the territorial scope of the regulations. The place of residence may also be in a third country (see *Practical guide on the applicable legislation in the European Union, the European Economic Area and in Switzerland*, page 43, first paragraph). This can also be inferred (*a contrario*) from the judgment of the Court of Justice of the European Union of 12 July 1973 in Case 13/73 *Hakenberg* (*a contrario* Court of Justice of the European Union, 12 July 1973, Case 13/73 *Hakenberg*, ECLI:EU:C:1973:92, paragraphs 28/31).

## 7.1 Mandatory procedure

80 First of all, the following point should be made:

81 Under Article 76(6) of Regulation (EC) No 883/2004, in the event of difficulties in the interpretation of the scope *ratione personae* of Regulation (EC) No 883/2004, the AHV-IV-FAK should have contacted the Vienna Bar Association. It follows from the principle of sincere cooperation that the institutions concerned are under an obligation to participate in the procedure laid down in Regulation (EC) No 883/2004 and Regulation (EC) No 987/2009 and are also required to apply it (EFTA Court, 14 December 2021, Case E-1/21 *ISTM*, paragraphs 35 to 40). The AHV-IV-FAK, as an institution of an EEA State, cannot decide (autonomously) the extent to which Liechtenstein legislation or that of another State applies in the situation at issue (EFTA Court, 14 December

2021, Case E-1/21 *ISTM*, paragraph 35; EFTA Court, 14 December 2004, Case E-3/04 *Tsomakas and Others*, paragraph 28).

82 According to the legal definition laid down in Article 1(q)(i) of Regulation (EC) No 883/2004 in conjunction with Article 1(s) of Regulation (EC) No 883/2004, the Liechtenstein AHV-IV-FAK is the competent institution, as the appellant was insured under the AHV-IV-FAK pension scheme at the time of his application, and indeed he still is.

## 7.2 Restriction of the right of establishment

83 The failure of the AHV-IV-FAK to issue Form A1 is contrary to EEA law. The decision of the AHV-IV-FAK which is being contested before the Princely Court of Appeal restricts the appellant's right of establishment and thus one of his four (constitutionally) guaranteed fundamental freedoms within the EEA (headnote GE 2013, 125, recital 3.3.2). The appellant may exercise his right of establishment as an established European lawyer only if he is registered with the bar associations both in the State of origin (Austria) and in the host State (Liechtenstein). This is the only way that the appellant is able to prove membership of the profession of lawyers in his State of origin to the bar association of the host State at regular intervals, which is a condition for establishment (Article 60(1)(a) of the RAG). However, this inevitably leads to activity as a self-employed person and/or as an employed person in two EEA States.

84 The refusal by the AHV-IV-FAK to engage in the mandatory coordination within the EEA therefore restricts the appellant's right of establishment (as a lawyer). Because he is not subject to the obligation to pay social security contributions in an EEA State, the appellant is persistently impeded in his activity as an established European lawyer (in two EEA States). In the legal opinion of the AHV-IV-FAK, despite his Austrian citizenship, the appellant is subject to multiple mandatory insurance schemes in different pension systems, on account of his gainful employment in two EEA States, which is unavoidable, due to his establishment as a lawyer there. It is precisely this situation and the application

of the place of employment principle that Regulation (EC) No 883/2004 is intended to prevent for EEA citizens exercising their right of establishment in the EEA (*telos*).

85 Ultimately, the solution cannot be that the appellant is intended to be able to be admitted to practise as a lawyer in Liechtenstein only on the basis of the EEA aptitude test (Article 68 et seq. of the RAG). The appellant is prevented from practising as an established European lawyer in Liechtenstein and from being admitted to practise as a lawyer in Liechtenstein through three years of effective and regular activity (Article 74 et seq. of the RAG) – without having to make double pension payments in the EEA – because of the position adopted by the AHV-IV-FAK. He is actually obliged no longer to be admitted to practice as a lawyer in Austria solely on account of the AHV-IV-FAK. However, despite having now been admitted to practise as a lawyer in Liechtenstein, the appellant should have the possibility to continue to be entered in the register of Austrian lawyers and to pursue his profession in two EEA States.

### 7.3 Primacy of application of EEA law

86 In the context of the inter-State relationship between Liechtenstein and Austria, the AHV-IV-FAK must apply Regulation (EC) No 883/2004 and its implementing regulation, which have been incorporated into the EEA Agreement, where the situation at issue falls within the scope of Regulation (EC) No 883/2004 as regards the **persons covered** (Article 2 of Regulation (EC) No 883/2004) and the **matters covered** (Article 3 of Regulation (EC) No 883/2004). Conflicting national legislation must be disapplied (*Bussjäger*, *Rechtfragen des Vorrangs und der Anwendbarkeit von EWR-Recht in Liechtenstein*, LJZ 2006, 143; *Bussjäger*, *Online-Kommentar Liechtenstein Institut [verfassung.li]*, Article 8 of the Liechtenstein Constitution, paragraph 108). This also applies to provisions of any bilateral and/or multilateral treaties concluded between Liechtenstein and a third country (Switzerland) (*Bussjäger*, *Online-Kommentar Liechtenstein Institut [verfassung.li]*, *Introductory remarks*, paragraph 156).

87 In the event of a conflict between EEA law and a treaty concluded with Switzerland, provisions which conflict with EEA law must therefore be disapplied in the inter-State relationship between Liechtenstein and Austria (falling within the EEA). Consequently, the appellant's Swiss residence does not, as the AHV-IV-FAK subsumes, result in the non-application of a regulation which is valid within the EEA. Instead, the inclusion of Austria results, conversely, in the primacy of application of Regulation (EC) No 883/2004 and Regulation (EC) No 987/2009 in the EEA (Liechtenstein/Austria). Liechtenstein provisions which do not permit EEA citizens who are gainfully employed in two EEA States to have mandatory insurance for all branches of social security (pension insurance, health(care) insurance, occupational and non-occupational accidents and unemployment insurance) in one State and/or preclude coordination within the EEA must therefore be disapplied by Liechtenstein in respect of Austria.

#### 7.4 Scope vs subsumption

88 In the contested decision the AHV-IV-FAK conflates the **scope (*ratione personae*)** of EU legislation with the **subsumption** of the individual provisions of the legislation in respect of the situation at issue. Furthermore, the place of residence must not determine whether or not a person has social security rights (*Schmied Nina (now Maitz Nina)*, Aufenthalt und soziale Recht von Angehörigen im Spannungsfeld zwischen Unionsbürgerschaft und Freizügigkeit, Dissertation, University of Vienna, 2013, p. 161 et seq.; recitals 16 to 18 of Regulation (EC) No 883/2004).

89 First of all, the AHV-IV-FAK should instead have assessed whether the appellant falls within the scope *ratione personae* of Regulation (EC) No 883/2004 (**first step**). If that is the case, the AHV-IV-FAK should have applied the relevant provision of Regulation (EC) No 883/2004 to the situation at issue (**second step**). However, the AHV-IV-FAK simply interprets a condition which is not imposed on EEA citizens falling within the scope *ratione personae* of Regulation (EC) No 883/2004 and seeks to infer from it that that regulation is not applicable.



## 7.5 Scope *ratione personae* (first step)

90 The appellant's actual place of residence is irrelevant to the application of Regulation (EC) No 883/2004 within the EEA for the following reasons:

91 Article 2(1) of Regulation (EC) No 883/2004 defines the **persons covered** as follows:

*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.*

92 Because the appellant is an Austrian national, Regulation (EC) No 883/2004 and its implementing regulation, Regulation (EC) No 987/2009, apply to him in any case as an EEA citizen in the context of the inter-State relationship between Liechtenstein and Austria. The scope *ratione personae* of Regulation (EC) No 883/2004 requires only nationality of an EEA Member State. Residence in the EEA would be a decisive criterion for the applicability of the regulation only in the case of stateless persons and refugees. In the case of EEA citizens, the place of residence therefore does not necessarily have to be within the territorial scope of the regulation. In particular, it may also be in a third country (Switzerland) (*a contrario* Court of Justice of the European Union, 12 July 1973, Case 13/73 *Hakenberg*, ECLI:EU:C:1973:92, paragraphs 28/31; see also Practical guide on the applicable legislation in the European Union, the European Economic Area and in Switzerland, page 43, first paragraph).

93 In other words, an Austrian national may reside in any (third) country outside the EEA and Regulation (EC) No 883/2004 is nevertheless applicable to him within the EEA. Because of the appellant's Austrian citizenship, his Swiss residence does not preclude the applicability of Regulation (EC) No 883/2004 between Liechtenstein and Austria. The legal opinion of the AHV-IV-FAK according to which the scope *ratione personae* of Regulation (EC) No 883/2004



cumulatively requires nationality of an EEA Member State and residence in the EEA is therefore incorrect.

## 7.6 Subsumption (second step)

<sup>94</sup> Persons covered by Regulation (EC) No 883/2004, like the appellant, are subject to the legislation of a single Member State only (Article 11(1) of Regulation (EC) No 883/2004). Article 13 of Regulation (EC) No 883/2004 lays down the applicable rules governing pursuit of activities in two or more Member States.

### 7.6.1 Activity as an employed person (FL) and as a self-employed person (AT)

<sup>95</sup> For the periods in which the appellant was employed in Liechtenstein (activity as an employed person), Article 13(3) of Regulation (EC) No 883/2004 is relevant to the appellant:

*A **person who normally pursues an activity as an employed person and an activity as a self-employed person in different Member States shall be subject to the legislation of the Member State in which he/she pursues an activity as an employed person or, if he/she pursues such an activity in two or more Member States, to the legislation determined in accordance with paragraph 1.***

<sup>96</sup> Because, for a time, the appellant pursued an activity as an employed person in Liechtenstein and (on the basis of his registration with the Vienna Bar Association) pursued an activity as a self-employed person in Austria at the same time, the Liechtenstein legislation is applicable in accordance with that provision.

<sup>97</sup> In this connection, Article 13(5) of Regulation (EC) No 883/2004 provides:

***Persons referred to in paragraphs 1 to 4 shall be treated, for the purposes of the legislation determined in accordance with these provisions, as though they were pursuing all their activities as***

**employed or self-employed persons and were **receiving all their income in the Member State concerned.****

#### 7.6.2 Activity as a self-employed person (FL) and as a self-employed person (AT)

98 Article 13(2) of Regulation (EC) No 883/2004 is relevant for the period in which the appellant pursued an activity as a self-employed person in Liechtenstein:

**A person who normally pursues an activity as a self-employed person in two or more Member States shall be subject to:**

*(a) the legislation of the Member State of residence if he/she pursues a substantial part of his/her activity in that Member State;*

**or**

*(b) the legislation of the Member State, in which the centre of interest of his/her activities is situated, if he/she does not reside in one of the Member States in which he/she pursues a substantial part of his/her activity.*

99 Since, for a period, the appellant pursued an activity as a self-employed person in Liechtenstein and (on the basis of his registration with the Vienna Bar Association) at the same time in Austria, Article 13(2)(b) of Regulation (EC) No 883/2004 is applicable to that period. Under Article 13(5) of Regulation (EC) No 883/2004, the appellant is to be treated as though he was receiving all his income for the activity as a self-employed person in Liechtenstein.

100 The centre of interest of the gainful employment is situated in Liechtenstein, as the appellant pursued his activity as an established European lawyer there. Consequently, the Liechtenstein legislation governing the Liechtenstein pension scheme is applicable. The AHV-IV-FAK is therefore required to coordinate only with the Vienna Bar Association and to issue Form A1 to the appellant. Liechtenstein provisions and bilateral and/or multilateral agreements with Switzerland which conflict with EEA law must be disapplied.

## 7.7 Prohibition of discrimination/principle of equal treatment

101 If residence in an EEA Member State is actually a condition for the applicability of Regulation (EC) No 883/2004 for an EEA citizen within the EEA, the following point should be noted:

102 An additional ‘*treaty with a triangulation clause*’ (*trilateration*) between Liechtenstein, Austria and Switzerland, as demanded by the AHV-IV-FAK, is not, however, necessary. The fact that the situation at issue is not regulated in the inter-State relationship between Liechtenstein and Switzerland does not ultimately lead to a derogation from Regulation (EC) No 883/2004 within the EEA (Liechtenstein/Austria).

103 Rather, Liechtenstein is required to comply with the obligations that EEA law (EU law) imposes on it in respect of Austria (Court of Justice of the European Union, 5 September 2019, Case C-801/18 *Caisse pour l’avenir des enfants*, ECLI:EU:C:2019:684, paragraph 39; Court of Justice of the European Union, 15 January 2002, Case C-55/00 *Gottardo*, ECLI:EU:C:2002:16, paragraph 33). In particular, Liechtenstein must grant nationals of other EEA States (Austria) the same advantages from any agreements (on social security) concluded with non-member countries (Switzerland) as those which its own nationals enjoy (Court of Justice of the European Union, 5 September 2019, Case C-801/18 *Caisse pour l’avenir des enfants*, ECLI:EU:C:2019:684, paragraph 40; Court of Justice of the European Union, 15 January 2002, Case C-55/00 *Gottardo*, ECLI:EU:C:2002:16, paragraph 34). The fact that the non-member country is not obliged to comply with any (EEA law) obligations is irrelevant in that regard (Court of Justice of the European Union, 5 September 2019, Case C-801/18 *Caisse pour l’avenir des enfants*, ECLI:EU:C:2019:684, paragraph 39). Appendix 2 of Annex K to the EFTA Convention concluded between Iceland, Norway, Liechtenstein and Switzerland is such an agreement concerning the coordination of social security schemes.

104 Objective justification for the refusal is not possible (Court of Justice of the European Union, 5 September 2019, Case C-801/18 *Caisse pour l’avenir des*

*enfants*, ECLI:EU:C:2019:684, paragraph 40; Court of Justice of the European Union, 15 January 2002, Case C-55/00 *Gottardo*, ECLI:EU:C:2002:16, paragraphs 36 to 39). Lastly, a possible increase in financial burdens and/or administrative difficulties for Liechtenstein in collaborating with Switzerland does not constitute objective justification for the refusal (Court of Justice of the European Union, 5 September 2019, Case C-801/18 *Caisse pour l'avenir des enfants*, ECLI:EU:C:2019:684, paragraphs 43 and 48; Court of Justice of the European Union, 15 January 2002, Case C-55/00 *Gottardo*, ECLI:EU:C:2002:16, paragraph 38). Furthermore, no additional obligations are imposed on Switzerland through the coordination of pension schemes implemented by Liechtenstein. Switzerland must in any case apply Regulation (EC) No 883/2004 to EU citizens, and thus to the appellant, on the basis of the Agreement on the free movement of persons with European Union.

105

The appellant's residence in Switzerland does not therefore, as the AHV-IV-FAK subsumes, result in the non-application of a regulation which is valid within the EEA. Austria's participation in the inter-State arrangement in question results, conversely, in the application of the mandatory system of coordination under Regulation (EC) No 883/2004 and Regulation (EC) No 987/2009 (EFTA Court, 14 December 2021, Case E-1/21 *ISTM*, paragraphs 35, 37 and 40), as Liechtenstein is required to grant an Austrian citizen the same advantages from Appendix 2 of Annex K to the EFTA Convention as those which Liechtenstein citizens enjoy (Court of Justice of the European Union, 5 September 2019, Case C-801/18 *Caisse pour l'avenir des enfants*, ECLI:EU:C:2019:684, paragraph 40; Court of Justice of the European Union, 15 January 2002, Case C-55/00 *Gottardo*, ECLI:EU:C:2002:16, paragraph 34). On the basis of the exceptions contained in Protocol 2 to Appendix [2] of Annex K to the EFTA Convention, the Austrian appellant can continue to take out sickness insurance in Switzerland in the same way as Liechtenstein citizens. According to the case-law of the Court of Justice of the European Union, Community law does not preclude the legislation of one of the two Member States from insuring the appellant against only some of the risks covered by its social security scheme (Court of Justice of

the European Union, 30 January 1997, Case C-340/94 *de Jaeck*, ECLI:EU:C:1997:43, paragraph 37).

106 The EEA Member States incorporated Recommendation No P1 of the Administrative Commission for the Coordination of Social Security Systems of 12 June 2009 concerning the judgment of the Court of Justice of the European Union of 15 January 2002 in Case C-55/00 *Gottardo* into the EEA Agreement on 1 July 2011. Under point 3 of Recommendation No P1, Liechtenstein (EEA Coordination Unit) was intended and required to have informed its institution (AHV-IV-FAK) about the implications of the *Gottardo* ruling for Appendix 2 of Annex K to the EFTA Convention, because the scope (*ratione personae*) is restricted to nationals of EFTA States.

107 In addition, according to recital 16 of Regulation (EC) No 883/2004, there is in principle no justification for making social security rights dependent on the place of residence of the person concerned (see *Schmied Nina (now Maitz Nina)*, *Aufenthalt und soziale Recht von Angehörigen im Spannungsfeld zwischen Unionsbürgerschaft und Freizügigkeit*, Dissertation, University of Vienna, 2013, p. 161 et seq.). However, this is precisely what is happening in the present case, as the AHV-IV-FAK refuses to issue Form A1 on account of the appellant's residence in Switzerland. In the case of EEA citizens, the place of residence does not necessarily have to be within the territorial scope of Regulation (EC) No 883/2004. It may also be in a third country (Switzerland) (*a contrario* Court of Justice of the European Union, 12 July 1973, Case 13/73 *Hakenberg*, ECLI:EU:C:1973:92, paragraphs 28/31; see also Practical guide on the applicable legislation in the European Union, the European Economic Area and in Switzerland, page 43, first paragraph).

108 Freedom of movement of persons is one of the fundamental freedoms of the internal market, allowing nationals of the EEA Contracting States **freely to choose their place of residence and place of work**. Through the bilateral Agreement on the free movement of persons between the European Union and Switzerland, this also applies in the relationship between Austria and Switzerland. Protocol 15 of the EEA Agreement in turn includes transitional

arrangements which allowed Liechtenstein to contain the influx of nationals from the EEA. By EEA Decision No 191/1990 a '*permanent special solution*' was established for Liechtenstein, whereby, notwithstanding free movement of persons within the EEA, residence in Liechtenstein is dependent on the issue of a residence permit by a Liechtenstein authority. The justification given includes the '*specific geographical situation of Liechtenstein*'. The key factor was that persons economically active in Liechtenstein are able to settle in neighbouring Switzerland because of the '*specific geographical situation*'. Since it was not possible to take up residence in Liechtenstein, the appellant therefore opted for Switzerland as his place of residence. The two countries have the same price levels, the same currency, similar living conditions and a comparable pension scheme. The Liechtenstein pension scheme is ultimately based on the Swiss model.

109 The '*special solution*' for residence granted to Liechtenstein in the EEA cannot, however, result in the other rights of an EEA citizen being restricted. Liechtenstein cannot justify the restriction of Liechtenstein residence permits by the possibility of settling in Switzerland ('*specific geographical situation*') and, where residence is taken up in Switzerland, then refuse to issue Form A1 in the EEA. By the reference to the bilateral agreement between Switzerland and the European Union, Liechtenstein has, as it were, outsourced freedom of movement of persons to Switzerland. Otherwise, the justification of the '*special solution*' in respect of the appellant would have to be called into question. The '*special solution*' does not give Liechtenstein '*carte blanche*' to shape the freedom of movement of persons and to introduce (indirect) restrictions on the other fundamental freedoms (including the right of establishment). Rather, the '*special solution*' includes numerous constraints (such as the prohibition of discrimination).

## 8 The second question

110 By the second question, the referring court is seeking clarification regarding the legal status of the Portable Document A1. More specifically, the national court

asks the EFTA Court whether the competent institution (Article 1(q)(i) of Regulation (EC) No 883/2004) is necessarily required to issue Form A1 where the conditions laid down in the regulation are met. If a person concerned is merely entitled to the issue of (any kind of) an attestation, the institutions of the other Member States (Article 1(p)(i) of Regulation (EC) No 883/2004) are also not permitted to insist on the submission of Form A1.

111 This question arises because the Vienna Bar Association, the competent social security institution in the case at issue, expressly requires the appellant to provide Form A1 in order to be exempted from the obligation to pay pension contributions in Austria. As a self-governing body with public powers, it is required to establish and maintain, inter alia, a pension scheme for all lawyers admitted to practise in Vienna (Paragraph 49 et seq. of the RAO). In any case, the Vienna Bar Association has not accepted the documents submitted thus far by the appellant as proof of contribution to the Liechtenstein pension scheme on the basis of his activity as a lawyer in Liechtenstein (redacted wage statements, redacted instructions from the Liechtenstein AHV-IV-FAK). To date, the appellant has not even received the official certificate relating to the pension scheme in Liechtenstein ('certificate of coverage') which the AHV-IV-FAK offered in the appeal proceedings. The AHV-IV-FAK has nevertheless collected contributions from the appellant to the Liechtenstein pension scheme continuously since 13 November 2018/3 December 2018.

## 8.1 Mandatory procedure

112 First of all, the following point should be made:

113 Under Article 76(6) of Regulation (EC) No 883/2004, in the event of difficulties in the application of the regulation and thus regarding the specific content of the 'certificate of coverage', the AHV-IV-FAK should have contacted the Vienna Bar Association. It follows from the principle of sincere cooperation that the institutions concerned are under an obligation to participate in the procedure laid down in Regulation (EC) No 883/2004 and Regulation (EC) No 987/2009 and are also required to apply it (EFTA Court, 14 December 2021, Case E-1/21



*ISTM*, paragraphs 35 to 40). Regulation (EC) 883/2004 and Regulation (EC) No 987/2009 lay down mechanisms for information and cooperation for the institutions involved that are intended to ensure the correct application of the provisions laid down in those regulations (EFTA Court, 14 December 2021, Case E-1/21 *ISTM*, paragraph 37; Court of Justice of the European Union, 16 July 2020, Case C-610/18 *AFMB Ltd and Others*, EU:C:2020:565, paragraph 72). In particular, the mutual information and cooperation provided for by Article 76 of Regulation (EC) No 883/2004 is intended to enable the institutions concerned to have the necessary information (EFTA Court, 14 December 2021, Case E-1/21 *ISTM*, paragraph 37; Court of Justice of the European Union, 16 July 2020, Case C-610/18 *AFMB Ltd and Others*, EU:C:2020:565, paragraph 74).

114 The AHV-IV-FAK, as an institution of an EEA State, ultimately cannot decide (autonomously) whether or not to participate in the procedure provided for in the two regulations (EFTA Court, 14 December 2021, Case E-1/21 *ISTM*, paragraphs 35 to 40). Nor is it the responsibility of the appellant to act as an intermediary between the Liechtenstein AHV-IV-FAK and the Vienna Bar Association. On the basis of the procedure which must be applied, the AHV-IV-FAK should, in fact, have contacted the Vienna Bar Association almost two years ago and worked out with it an acceptable proposal for the wording of the 'certificate of coverage' (EFTA Court, 14 December 2021, Case E-1/21 *ISTM*, paragraphs 35 to 40).

115 Instead, the persistent refusal by the AHV-IV-FAK to contact the Vienna Bar Association emphasises the fact that, despite the judgment of the EFTA Court of 14 December 2021 in Case E-1/21 *ISTM*, the AHV-IV-FAK has either failed to understand its duty or simply ignores the ruling by the EFTA Court. It is evident in this connection that Liechtenstein is continuing to pursue political self-interests which are contrary to EEA law. Otherwise, there is no explanation why the AHV-IV-FAK has not yet contacted the Vienna Bar Association regarding the nature and content of the 'certificate of coverage' that has been offered.



116 Ultimately, the AHV-IV-FAK is simply seeking to pass on to the appellant the obligations incumbent on it under Regulation (EC) No 883/2004. Ultimately, Regulation (EC) No 883/2004 is specifically intended to prevent a situation where the (mobile) appellant has to deal with numerous authorities in different Member States. The procedure for the coordination of social security schemes laid down in Regulation (EC) No 883/2004 and Regulation (EC) No 987/2009 ultimately serves to facilitate the free movement of persons for (mobile) EEA citizens (*telos*). This is the only way they are able to move and to exercise their four guaranteed fundamental freedoms within the EEA without restriction.

## 8.2 Legal status of the Portable Document A1

117 First of all, the appellant wishes to note that, as an Austrian lawyer, he is liable to pay contributions to the (Austrian) pension scheme of the Vienna Bar Association under Paragraph 49(2) of the RAO regardless of the actual turnover generated. Even if no turnover were generated in Austria, the appellant would thus be obliged to contribute a five-figure sum in euros each year to the pension scheme for Austrian lawyers. The exercise of the right of establishment as an established European lawyer ultimately requires parallel activity in two EEA States.

118 Under Article 5(1) of Regulation (EC) No 987/2009 in conjunction with Article 19(2) of Regulation (EC) No 987/2009, the appellant is entitled, vis-à-vis the competent institution (Article 1(q)(i) of Regulation (EC) No 883/2004), to be provided with an attestation concerning the legislation of a Member State applicable to him in respect of the branch of social security '*old-age benefits*' (Article 3(1)(d) of Regulation (EC) No 883/2004). According to the legal definition laid down in Article 1(q)(i) of Regulation (EC) No 883/2004 in conjunction with Article 1(s) of Regulation (EC) No 883/2004, the Liechtenstein AHV-IV-FAK is the competent institution, as the appellant was insured under the AHV-IV-FAK pension scheme at the time of his application, and indeed he still is. By continuously demanding and retaining pension contributions, the AHV-IV-FAK has declared itself to be competent, at least provisionally, since 13 November 2018/3 December 2018 (Article 6(1)(c) of Regulation (EC)

No 987/2009). Otherwise, the AHV-IV-FAK could not have demanded any contributions from the appellant since 13 November 2018/3 December 2019.

119

The Administrative Commission for the Coordination of Social Security Systems which has been established (Article 71(1) of Regulation (EC) No 883/2004) deals with all administrative questions and questions of interpretation on Regulation (EC) No 883/2004 and Regulation (EC) No 987/2009 and facilitates the uniform application of Community law (Article 72(a) and (b) of Regulation (EC) No 883/2004). Under Article 4(1) of Regulation (EC) No 987/2009, the Administrative Commission is to lay down the structure, content, format and detailed arrangements for exchange of documents and structured electronic documents. Within the scope of the competences conferred by Regulation (EC) No 883/2004, the Administrative Commission for the Coordination of Social Security Systems adopted Recommendation No A1 concerning the issuance of the attestation referred to in Article 19(2) of Regulation (EC) No 987/2009. Under that recommendation, the institutions of the Member States are to produce the Portable Document A1 in a certain format.

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Because the European legislature has expressly conferred on the Administrative Commission for the Coordination of Social Security Systems the competence to lay down the content of the document for the attestation referred to in Article 19(2) of Regulation (EC) No 987/2009 (Article 4(1) of Regulation (EC) No 987/2009), the competent institution is also required to use the Portable Document A1 where the conditions are met. If this were merely a non-binding recommendation, however, the appellant cannot understand the purpose of the Administrative Commission which has been established (Article 71(1) of Regulation (EC) 882/2004). The EEA/EU funds (taxpayers' money) expended for that purpose could – as with the envisaged SOLVIT procedure – have been used much more meaningfully elsewhere.

## 9 Conclusions

121 For the reasons set out above, the appellant takes the view that the questions referred by the Princely Court of Appeal should be answered as follows:

***1. Article 2(1) of Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems is to be interpreted as meaning that a national of an EEA Member State does not have to be resident in an EEA Member State in order to fall within the scope ratione personae of that regulation. It is not therefore necessary for a national of an EEA Member State to be resident in an EEA Member State in order for Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems to be applied to him.***

***If the answer to that question is in the negative:***

***An agreement concluded by an EU or an EEA Member State with a third country can never restrict the scope of application of Regulation (EC) No 883/2004 or the freedom of movement of a national of an EU or an EEA Member State. Rather, such an agreement can only extend the scope of application of Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems to other persons and States. In accordance with the ruling of the Court of Justice of the European Union of 15 January 2002 in Case C-55/00 Gottardo and Recommendation No P1 of the Administrative Commission for the Coordination of Social Security Systems of 12 June 2009 concerning the Gottardo judgment, the fundamental principle of equal treatment requires that the Member States grant the nationals of other Member States the same advantages in***

*respect of social security as those which its own nationals enjoy under the Agreement on the free movement of persons concluded with Switzerland or the EFTA Convention. The conclusion of an additional umbrella agreement between the EU and EEA Member States and Switzerland concerning the coordination of social security schemes is therefore not necessary in order for nationals of an EEA Member State to be able to claim the social security advantages arising from those two agreements.*

*2. 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 is to be interpreted as meaning that the attestation mentioned in that provision must be issued necessarily by means of the form (Portable Document A1) laid down by the Administrative Commission for the Coordination of Social Security Systems in its 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 in order to produce the legal effects specified in Article 5(1) of Regulation (EC) No 987/2009. Under Article 4(1) of Regulation (EC) No 987/2009, the Administrative Commission is to lay down the structure, content, format and detailed arrangements for exchange of documents and structured electronic documents.*

Mag. Christian Maitz, LL.M.

Vaduz, 25 July 2022

MBL/CM/vpa