

ORIGINAL

Registered at the EFTA Court under No. 121-18
24th day of June 2021

TO THE PRESIDENT AND MEMBERS OF THE EFTA COURT

The EFTA Court Registry
1, Rue du Fort Thüngen
L-1499 Luxembourg

In Advance per E-Mail and Telefax:
eftacourt@eftacourt.int; cases@eftacourt.int
+352 43 43 89

WRITTEN OBSERVATIONS

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

APPELLANT
ISTM International Shipping & Trucking Management GmbH
Austrasse 49, FL-9490 Vaduz

Represented by Dr. Karl Mumelter, LL.M., Attorney at Law,
c/o paragraph7 attorneys at law, Landstrasse 60, 9490 Vaduz, Principality of Liechtenstein,

in

CASE E-1/21

ISTM International Shipping & Trucking Management GmbH
Austrasse 49, FL-9490 Vaduz (Appellant)

v.

1. Liechtensteinische Alters- und Hinterlassenenversicherung (AHV)
2. Liechtensteinische Invalidenversicherung (IV)
3. Liechtensteinische Familienausgleichskasse (FAK)
(Respondents)

In accordance with the request of the EFTA Court dated 23 April 2021, Case E-1/21-4, and in accordance with Article 20 of the Statute and Article 97 of the Rules of Procedure of the EFTA Court, the Appellant herewith lodge the following

WRITTEN OBSERVATIONS

with the EFTA Court:

In accordance with Article 32 (1) of the Rules of Procedure of the EFTA Court, this submission is lodged sixfold (original documents each) (five original versions for the EFTA Court and one copy for the Respondent). In accordance with Article 32 (5) of the Rules of Procedure of the EFTA Court, this submission is lodged in advance by e-mail and telefax; the signed original of this submission including annexes and copies will be lodged at the Registry within the timeframe provided by Article 32 (5) of the Rules of Procedure of the EFTA Court.

1	FACTS.....	3
1.1	The Appellant (ISTM).....	3
1.1.1	General	3
1.1.2	The operational organisation of the Company.....	4
1.2	The national proceedings with the Liechtenstein Social Insurance Authority	5
1.3	Confirmation of the Application of Liechtenstein Law by Foreign Social Security Institutions	6
1.4	Liechtenstein's accession to the Rhine Navigation Convention (Rheinschiff-Übereinkommen)	6
2	LEGAL OBSERVATIONS.....	9
2.1	Legal Basis	9
2.2	Registered office (Sitz) of ISTM is in Liechtenstein.....	10
2.2.1	Preliminary legal remarks.....	10
2.2.2	Interpretation of the "registered office" (Sitz) concept in conformity with European law	10
2.2.3	Assessment according to the pure wording	12
2.3	Confirmation by the Social Security Institutions of the States of Residence	14
2.4	On the (other) objections of the AHV	15
2.4.1	On the outsourcing.....	15
2.4.2	On the own premises and own staff	15
2.4.3	Start-up phase	16
2.4.4	No letterbox company.....	16
2.5	Duty of loyal cooperation (Art. 76 para. 6 of Regulation [EC] No. 883/2004).....	16
2.6	On the Rhine Navigation Convention (Rheinschiff-Übereinkommen)	17
3	PROPOSAL FOR ANSWERS	18

1 FACTS

1.1 The Appellant (ISTM)

1.1.1 General

1. The ISTM International Shipping & Trucking Management GmbH («ISTM») is a limited liability company incorporated under the laws of Liechtenstein (Art. 389 ff. of the Liechtenstein Persons' and Companies' Act (PGR), which was entered in the Liechtenstein commercial register on 4 February 2016 under the registration number FL-0002.514.774-6.
2. **Pursuant to the Articles of Association and pursuant to the entry in the commercial register, the registered office (*statutarischer Sitz*) of the ISTM is in 9495 Triesen, thus in Liechtenstein.** The representative office / delivery address was also located in Triesen, Haldenstrasse 10d until 4 July 2016 and since 5 July 2016 has been located in Vaduz, c/o Kranz Treuhand- und Verwaltungsunternehmen, Austrasse 49. **ISTM does not have a registered office (*Sitz*) or establishment outside Liechtenstein.**
3. The managing directors of ISTM are Urs Kranz (since 5 July 2016; until then Marlene Elensohn acted in his place) with individual signing power as well as Hafez Adriaan Barahmeh with collective signing power by two. Urs Kranz is domiciled in Vaduz, Hafez Adriaan Barahmeh has its domicile in the Netherlands. The shareholder of ISTM is the Habara Holding B.V. with its registered office (*Sitz*) in the Netherlands.
4. Pursuant to Art. 16 of the Articles of Association of the ISTM, the managing directors have the following non-transferable and inalienable duties:
 - directing the Company as supreme body and giving of the necessary instructions;
 - determining the organisation within the framework of the law and the Articles of Association;
 - organising the accounting system and the financial control;
 - supervising the persons to whom parts of the management are delegated, in particular with regard to compliance with the laws, the Articles of Association, regulations and directives;
 - preparing the annual report (annual accounts and annual report);
 - preparing the shareholders' meeting and executing its resolutions;
 - notifying the court in the event of over-indebtedness;
 - appointing directors, authorised signatories (*Prokuristen*) and authorised agents (*Handlungsbevollmächtigte*).
5. The purpose of the ISTM is:
 - Transport management, maritime and inland waterway transport management, truck and shipping fleet management, and in this connection provision of the relevant employees;
 - equipping of transport vehicles (inland waterway and maritime transport and trucks) as well as associated staff training services, personnel management.
 - holdings in other companies.
6. The employees of ISTM who have been registered with the Liechtenstein Social Security Authority (AHV) carry out their activities in two or more Member States of the

Regulation (EC) 883/2004, in particular (in addition to Liechtenstein) in Germany, the Netherlands, Belgium, Luxembourg and France. Accordingly, employees with residence in Germany and/or the Netherlands also exercise an activity in their respective country of residence, but not a substantial part of their activity and in no case more than 25%. No one works more than 25% in his/her homecountry. Employees residing in the Czech Republic do not carry out any activities in their home country. **ISTM employees are fully employed in the course of their activity for ISTM and are employed only by ISTM.**

1.1.2 The operational organisation of the Company

7. Urs Kranz (a Liechtenstein citizen with registered office (*Sitz*) in Liechtenstein) is the chief managing director of ISTM having ultimate responsibility: he takes the final decisions, such as which payments are made or which contracts are signed. Urs Kranz also concludes employment contracts with ISTM staff.
8. The second managing director, Hafez Adriaan Barahmeh, has no authority at all to make payments. The task of the second managing director, Hafez Adriaan Barahmeh, is mainly (only) to provide the necessary information and contacts to the staff. But even Hafez Adriaan Barahmeh comes to Liechtenstein regularly to discuss pending issues directly on site with the managing director Urs Kranz who is vested with the power to take final decisions.
9. The management of ISTM has commissioned third party service providers for part of its operational activities: for example, bookkeeping, payroll accounting and establishment of salary statements, the preparation of all annual salary declarations, execution of personnel mutations with the authorities as well as all matters relating to social insurances and tax administration in Liechtenstein are (currently) handled by (BDO) Liechtenstein AG. BDO is a Liechtenstein company with its registered office (*Sitz*) in Vaduz, Städtle 22.

Kranz Treuhand- und Verwaltungsunternehmen (currently) takes over the preparation of management contracts, employment contracts and the administrative processing of wages and payments. Kranz Treuhand- und Verwaltungsunternehmen also has its registered office (*Sitz*) in Vaduz, Austrasse 49.
10. All financial functions are also located in Liechtenstein, namely at LLB AG. Likewise, all company documents, including the board books, are located in Liechtenstein.
11. The operational part of the entrepreneurial activity is therefore carried out entirely in Liechtenstein. Decision-making and administration take place in Liechtenstein. Since only Urs Kranz has sole signature, the participation of Urs Kranz in every management decision is mandatory. Consequently, every management action, including the signing of all contracts, must (at least and in any case) be carried out also in Liechtenstein.
12. In 2016, ISTM employed 26 employees residing in the Netherlands, the Czech Republic, Germany and Poland; the gross monthly salary amounts to CHF 89,000.00. The employees are subject to Liechtenstein withholding tax.
13. ISTM had also hired Mr Jeffrey Kleijnendorst as a member of the Executive Board and as Crew Manager under an employment contract dated 6 July 2017. Mr Kleijnendorst's level of employment was 100% and his place of work was at the ISTM

office in Liechtenstein or at the crews' place of operation, according to point 2 of the employment contract. Mr Kleijnendorst had been working for ISTM since 1-8-2017 and the employment relationship was concluded for an indefinite period. Jeffrey Kleijnendorst has a residence permit for Liechtenstein which was valid until 31 July 2027.

Mr. Kleijnendorst terminated his employment with ISTM on 31 July 2018 for personal reasons, as he was away from home for very long periods of time due to this employment. ISTM then immediately posted a successor position. ISTM conducted job interviews at its registered office (*Sitz*) in Balzers and has already selected one person. Mr Kleijnendorst's potential successor lives in Switzerland, about 20-30 minutes away from Balzers, so travel time will no longer be a problem; the successor will also work at the ISTM office in Balzers. However, ISTM has postponed the conclusion of the contract because of the legal uncertainties due to Liechtenstein's accession to the Rhine Navigation Convention (*Rheinschiff-Übereinkommen*) (more on this later).

14. On 30-06-2016, the ISTM had concluded a rental agreement with Kranz Treuhand- und Verwaltungs-Unternehmen, according to which the ISTM rented the West Office on the first floor in the building at Austrasse 49, 9490 Vaduz, for a rent of CHF 500 per month with effect from 01-07-2016. ISTM had to pay rent for the use of the infrastructure of the Kranz Treuhand- und Verwaltungsunternehmen.

In the meantime, ISTM rented the office building in FL-9496 Balzers, Im Hölfe 42, with a rental agreement dated 22 September 2017 and pays a rent of CHF 1,280.00 per month. The premises were rented as office and business premises as well as residential premises. The premises are used exclusively by ISTM, namely as office and business premises as well as additionally (originally) as residential premises for Jeffrey Kleijnendorst.

1.2 The national proceedings with the Liechtenstein Social Insurance Authority

15. On 17 February 2017, the Liechtenstein Old Age and Survivors' Insurance (AHV) issued an order ("*Verfügung*") against ISTM under settlement number 805.622, stating that Liechtenstein social security law did not apply to ISTM and its employees registered in 2016. ISTM filed an appeal ("*Vorstellung*") against this order with the AHV in due time with submission of 17 March 2017.
16. By letters dated 14 July 2017 and 20 July 2017 as well as dated 25 July 2017, the AHV informed that the employees of ISTM would be subject to Liechtenstein social security law on a provisional basis in accordance with Article 16 of Regulation (EC) 987/2009.
17. In a letter dated 12 April 2017, the AHV informed ISTM, following a corresponding request, that there were still deadline matters to be dealt with in the next 14 days; at the end of April 2017, the AHV would be able to state by when a decision could be expected in the specific case. In a letter dated 27 April 2017, the AHV stated that it would probably be able to issue a decision in the course of May 2017. In a letter dated 19 June 2017, the AHV stated that it would like to make its decision without the interrogation of the party (in the person of Urs Kranz) applied for by the ISTM. Thereupon, the ISTM informed in a submission dated 26 June 2017 that it would not waive the requested interrogation of Urs Kranz. In a letter dated 12 October 2017, the AHV promised that the interrogation would take place within four weeks. On 7 May

2018, a telephone conversation took place between the legal representative of ISTM and the AHV, in which the AHV apologised for the long duration of the proceedings. The reason - according to the AHV - was a change in the legal department. Dr. Feil, the previous head of the legal department, had left the AHV. The vacancy had only been filled in May 2018. The new head of the legal department was now taking care of the matter.

18. In the end, however, the AHV did not decide on the ISTM's appeal until approximately 3 ½ years later, on 22-09-2020: By decision of the AHV of 22-09-2020, settlement number 805.622, appeal no.: A.2017/025, served on the ISTM on 24-09-2020, this appeal was not granted. ISTM appealed against this decision to the Princely Court of Appeal (Fürstliches Obergericht), which now referred the present referral questions to the EFTA Court.

1.3 Confirmation of the Application of Liechtenstein Law by Foreign Social Security Institutions

19. The German GKV-Spitzenverband and the Czech Social Security Authority have provisionally determined by means of the procedure pursuant to Art. 16 of Regulation (EC) 987/2009 that only the legal provisions of the Principality of Liechtenstein apply to the employees of ISTM, precisely because the registered office (*Sitz*) of ISTM is in Liechtenstein.
20. The above-mentioned letters from the Czech Social Security Authority (with the exception of Jakuba Zobace) were all sent in October or November 2016, and the Respondents were informed of them ex officio. In any case, these letters were also immediately forwarded additionally by ISTM to the Respondents by e-mail dated 29 November 2016, 31 October 2016, 15 November 2016, 12 December 2016, 13 December 2016, 31 January 2017, even with a certified German translation.

The letters of the GKV-Spitzenverband (of 20 January 2017) as well as of the Czech Social Security Authority regarding Jakuba Zobace (of 23 January 2017) and the determination of Liechtenstein law and competence of the Liechtenstein authorities in this regard will for the aforementioned reason in any case become binding in the days to come.

21. The relevant determination of Liechtenstein law and of the competence of the Liechtenstein authorities made in these letters is thus binding in any case (Art. 16(3) of Regulation 987/2009 - see later).

1.4 Liechtenstein's accession to the Rhine Navigation Convention (Rheinschiff-Übereinkommen)

22. According to 16 para. 1 of the Regulation (EC) No 883/2004, several Member States may, by common agreement, provide for derogations from Articles 11 to 15 in the interest of certain persons or categories of persons. On 18 May 2018, Liechtenstein (through the Office of Public Health) signed the Addition to the Agreement on determining the legislation applicable to Rhine boatmen pursuant to Article 16 para. 1 of the Regulation (EC) No 883/2004 (Addition to the Rhine Navigation Agreement) (*"Zusatz zur Vereinbarung über die Bestimmung der anzuwendenden Rechtsvorschriften für Rheinschiffer gemäss Artikel 16 Absatz 1 der Verordnung (EG)*

Nr. 883/2004 (Rheinschiff-Zusatzvereinbarung“). Pursuant to Art. 1 of the Addition to the Rhine Agreement, Liechtenstein thereby applies the Agreement on determining the legislation applicable to Rhine boatmen, concluded on the basis of Article 16(1) of Regulation (EC) No. 883/2004 of 23 December 2010 (*Rhine Navigation Agreement*) (Vereinbarung über die Bestimmung der anzuwendenden Rechtsvorschriften für Rheinschiffer gemäss Artikel 16 Absatz 1 der Verordnung (EG) Nr. 883/2004 vom 23. Dezember 2010 (Rheinschiff-Vereinbarung“), with retroactive effect as of 1 September 2018, without providing any transitional period.

23. The Rhine Agreement contains a decisive deviation from the previous legal situation with regard to the determination of the applicable social security law. While the former law is linked to the registered office (*Sitz*) of the enterprise (Art. 13 para. 1 lit. b (i) of Regulation (EC) No. 883/2004), the Rhine Navigation Agreement is linked to the registered office (*Sitz*) of the enterprise to which the respective vessel belongs (there, Article 4 para. 2). According to Art. 1 c), this is the enterprise that operates the vessel in question, irrespective of whether they are the owner of the vessel or not. The information on the certificate of belonging to the navigation of the Rhine (Rheinschiffahrts-Zugehörigkeitsurkunde) is decisive for determining the enterprise.
24. The decisive factor is therefore the enterprise to which the vessel belongs or, respectively, who **operates** the vessel. The ownership of the vessel is not decisive, as explained above. For the legal assessment of who owns the vessel and who operates it, the information on the **certificate of belonging to the navigation of the Rhine** (*Rheinschiffahrts- Zugehörigkeitsurkunde*) is decisive (Art. 1 lit. c of the Rhine Navigation Agreement). The provisions on the issuance of the certificate of belonging to the navigation of the Rhine are set out in the “**Council Regulation (EEC) No. 2919/85 of 17 October 1985 laying down the conditions for access to the arrangements under the Revised Convention for the Navigation of the Rhine relating to vessels belonging to the Rhine Navigation**” (“Verordnung (EWG) Nr. 2919/85 des Rates vom 17. Oktober 1985 zur Festlegung der Bedingungen für die Inanspruchnahme der Regelung, die aufgrund der Revidierten Rheinschiffahrtsakte den Schiffen der Rheinschiffahrt vorbehalten ist“):

«Article 2 par. 1 (Regulation 2919/85)

The authorities of the Contracting State in which a vessel is registered in a public register shall alone be competent to issue and withdraw the document provided for in the third paragraph of Article 2 of the Revised Convention for the Navigation of the Rhine, establishing that the vessel belongs to Rhine navigation.

«Article 5 par. 1 (Regulation 2919/85)

The operator of a vessel must also fulfil the same conditions as the owner in order to obtain the document referred to in the first paragraph of Article 2 for the vessel which he is operating.»

25. The aforementioned Regulation 2919/85 was published in Annex XIII of the EEA Compendium of Laws at the same time as Liechtenstein's accession to the EEA and has remained unchanged since then. The aforementioned Regulation therefore constitutes a part of the *acquis communautaire*, which Liechtenstein was obliged to adopt on the occasion of its accession to the EEA. As a Regulation, this legal act did not and does not require transposition into Liechtenstein law (Art. 7 lit. a EEA-Agreement); the aforementioned Regulation is therefore directly applicable in Liechtenstein and takes effect in Liechtenstein - with the exception of Art. 3 (see LR 0.110, clause 43. lit. b) - without a special national act of transformation (Constitutional Court (StGH) 11.12.1995, Constitutional Court (StGH) 1995/014, LES 1996, 119 [recital 2.1]). It must therefore be noted that the aforementioned Regulation

has been part of Liechtenstein's body of law since Liechtenstein's accession to the EEA until today and is directly applicable in Liechtenstein without a special act of transformation (Art. 7, 47 EEA-Agreement in conjunction with Annex XIII No. 43; Art. 67 Para. 3 of the Liechtenstein Constitution (LV; Verfassung des Fürstentums Liechtenstein)). Apart from that, Liechtenstein is also obliged to implement the EEA inland waterways acquis insofar as it results from directives (Art. 7 lit. b of the Agreement on the European Economic Area; EEA-Agreement).

26. The same provisions are contained in Article 2 of Resolution 1984-I-3 of the Central Commission for the Navigation of the Rhine ("*Zentralkommission für die Rheinschifffahrt*") in conjunction with the *Implementing Regulation concerning the provisions of Article 2, paragraph 3 of the Revised Convention for the Navigation of the Rhine and clauses 1 and 3 of the Protocol to the Additional Protocol No. 2 of 17 October 1979 to the said Convention for the Navigation of the Rhine ("Implementing Regulation of 1984")* ("*Ausführungsverordnung zu den Bestimmungen des Artikels 2 Abs. 3 der Revidierten Rheinschifffahrtsakte und der Ziffern 1 und 3 des Zeichnungsprotokolls zu dem Zusatzprotokoll Nummer 2 vom 17. Oktober 1979 zu genannter Rheinschifffahrtsakte*" (*Ausführungsverordnung 1984*)).¹ At the same time, Article 8 para. 1 of the Implementing Regulation 1984 stipulates that the Contracting States to the said Convention (thus also Liechtenstein) must issue the necessary **implementing regulations**, in particular also with regard to the procedure and conditions for issuing the operator's certificate (*Ausrüsterbescheinigung*).
27. In the **Recommendations of the Central Commission for the Navigation of the Rhine regarding the issuance of the certificate of belonging to the navigation of the Rhine and the operator's certificate** (*Empfehlung der Zentralkommission für die Rheinschifffahrt betreffend die Ausstellung der Rheinschifffahrts-Zugehörigkeitsurkunde und der Ausrüsterbescheinigung*), it is stated on p. 2, para. 2, that the ship chandler (*Ausrüster*) is the operator (*Betreiber*) of the vessel for his own account and risk; if the vessel is equipped for more than one company, it depends on who actually equips the vessel and who has the decision-making power over the economic and commercial management of the vessel. The operator of a vessel can be either the owner or the so-called "**chandler/operator**" of a vessel. According to Article 5 para. 1 of Regulation 2919/85 and the above-mentioned Implementing Regulation 1984, the ship chandler is legally entitled to the issuing of a certificate of belonging to the navigation of the Rhine under the same conditions as an owner. Accordingly, the Central Commission for Navigation on the Rhine also makes available on its website "**Applications for an operator's certificate**" ("*Antragsdossiers auf Erteilung einer Ausrüsterbescheinigung*").
28. ISTM is of the opinion that it qualifies as a ship operator (not owner) within the meaning of the aforementioned agreement (there: Art. 1 lit. c and Art. 4 para. 2), with the consequence that Liechtenstein social security law applies (continues to apply) to it. In accordance with the new legal situation, ISTM wanted to submit an application to the competent authority in Liechtenstein (Office of Health) for the issue of an operator's certificate (ship operator's certificate). However, as will still be shown below, this is however not possible at all. On the basis of the above-mentioned legal situation, the ISTM has requested in a letter dated 21-01-2019 that the implementing provisions for applying for and issuing an operator's certificate within the meaning of Art. 1 lit. c and Art. 4 para. 2 of the Agreement on determining the legislation applicable to Rhine boatmen, concluded on the basis of Article 16(1) of Regulation

¹ Article 5 para. 1: « *The operator of a vessel must also fulfil the same conditions as the owner in order to obtain the document referred to in the first paragraph of Article 2 for the vessel which he is operating* ».

(EC) No. 883/2004 (Vereinbarung über die Bestimmung der anzuwendenden Rechtsvorschriften für Rheinschiffer gemäss Art. 16 Abs. 1 der Verordnung (EG) Nr. 883/2004) be published so that it can properly submit an application for an operator's certificate (ship operator's certificate).

29. On 18-02-2019, the competent Office of Public Health informed that Liechtenstein was not obliged to transpose the EEA inland navigation acquis into national law and that it was therefore not possible to issue an operator's certificate.
30. In its letter of 11 March 2019, the Office of Public Health stated that no implementing provisions had been issued for the Rhine Navigation Agreement.
31. Following the entry into force of the Rhine Navigation Convention (Rheinschiff-Übereinkommen), FKB (Liechtensteinische Gesundheitskasse) has retroactively terminated the health insurance contracts of ISTM and justified this as follows:

*"We refer to the amendment as of 01 September 2018, in which Liechtenstein has now joined the Rhine riparian states derogation agreement. You can view the government's notification at www.regierung.li/de/mitteilungen/216921. Thus, as of September, the employees on the ships must be insured where the Rhine vessel is registered. **This requirement cannot be met in Liechtenstein, as there is no ship register.** This means that your employees who work on the ship must be insured where the ship operator (trister) has its registered office (Sitz).*

32. The same opinion is also expressed by the Liechtenstein government in the government's media release of 26-09-2018:

*« According to the derogation agreement, the place where the Rhine vessel is registered is relevant. **This requirement can currently not be met in Liechtenstein, as there is no ship register.** Many of the boatmen insured under social security in Liechtenstein so far will therefore, as a result of Liechtenstein's accession to the agreement, which took effect on 1 September 2018, now have to be newly insured in the state in which the ship operator ("ship chandler") has its registered office (Sitz)."*

33. The minutes of the state parliament (*Landtag*) show that the purpose of joining the Rhine Navigation Convention (Rheinschiff-Übereinkommen) was to reduce the number of sailors insured in Liechtenstein ("*Liechtenstein, represented by social insurance experts from the AHV-IV-FAK and the Office of Health, is currently attempting to significantly reduce the number of sailors to be insured in Liechtenstein for the future, by concluding a derogation agreement [...]*").

2 LEGAL OBSERVATIONS

2.1 Legal Basis

34. The question of the competence of the social security institution is to be assessed according to Article 13 para. 1 of Regulation (EC) No. 883/2004 (as amended by Regulation (EU) No 465/2012) (see also *Schreiber* in *Schreiber/Wunder/Dern* [eds.], Commentary on the Regulation (EC) No. 883/2004 [2012] Art. 13 recital 16). In this respect, it should first of all be noted that the **purpose** of this Regulation is to **promote the mobility of workers** and to prevent any complications that may arise as a result thereof (Recital 15 of Regulation (EC) No 883/2004).
35. The Regulation is intended to secure the conditions of free movement. It serves to remove national obstacles under social law that are likely to prevent an individual from exercising his/her right to free movement. The so-called coordination mandate

of the Regulation, understood in this way, is to be interpreted **extensively** and **effectively** (in the sense of "*effet utile*") for the employees concerned. The Regulation is intended to **exclude both positive and negative conflicts of law**. The relevant legal system should be determined in a binding manner in relation to all other legal systems involved (*Schreiber*, loc. cit., Intr., recital 3 f., 12 and 20; Pre. Art. 11 recital 1, 3).

It is essential to **prevent** that through a **negative conflict of competence no Member State is responsible** and thus a **gap in social security** in a cross-border situation is created (*Wallrabenstein in Schlachter et. al.* [eds.], European labour law and social law [2016] § 22 recital 35).

2.2 Registered office (Sitz) of ISTM is in Liechtenstein

36. Pursuant to Article 14 para. 5 a of Regulation (EC) 987/2009 as amended by Regulation (EU) No 465/2012, the words "*registered office (Sitz) or place of business*" refer - as the AHV correctly stated in principle in the contested order - to the registered office (*satzungsmässiger Sitz*) or establishment at which the essential decisions of the undertaking are taken and the acts relating to its central administration are performed.

2.2.1 Preliminary legal remarks

37. It is decisive that the European legislator has itself defined the term "Sitz" / "Domicile" in Art. 14 para. 5a of Regulation (EC) 987/2009 in the version of Regulation (EU) No. 465/2012. Article 14 para 5a of Regulation (EC) 987/2009 as amended by Regulation (EU) No 465/2012 reads as follows:

"5a. For the purposes of the application of Title II of the basic Regulation, "registered office or place of business" shall refer to the registered office or place of business where the essential decisions of the undertaking are adopted and where the functions of its central administration are carried out."

In German language:

«Für die Zwecke der Anwendung des Titels II der Grundverordnung beziehen sich die Worte ‚Sitz oder Wohnsitz‘ auf den satzungsmässigen Sitz oder die Niederlassung, an dem/der die wesentlichen Entscheidungen des Unternehmens getroffen und die Handlungen zu dessen zentraler Verwaltung vorgenommen werden»

38. Art. 13(1) of Regulation (EC) 883/2004 is a provision contained in Title II of the basic Regulation. Therefore, this interpretation provision of Art. 14(5a) of Regulation (EC) 987/2009 is applicable to the concept of "Sitz" / "Domicile" according to Art. 13(1) of Regulation (EC) 883/2004.

2.2.2 Interpretation of the "*registered office*" (Sitz) concept in conformity with European law

39. First of all, the question arises whether the criterion of essential decisions and central administration refers only to the establishment or also to the registered office (*satzungsmässiger Sitz*). In the first case, the (mere) registered office (*satzungsmässiger Sitz*) would be sufficient to thereby define the registered office (Sitz) according to Regulation (EC) 883/2004; in other words, it would be sufficient

that the registered office (*satzungsmässiger Sitz*) is located in Liechtenstein, without having to examine whether the essential decisions and central administration are also carried out at this registered office (*statutarischer Sitz*).

40. According to the legislative material, the terms "*registered office (Sitz) or establishment*" within the meaning of Article 13 para. 1 of Regulation (EC) No. 883/2004 or, respectively, Article 14 para. 5a of Regulation (EC) No 987/2009 as amended by Regulation (EU) No. 465/2012 are to be interpreted in accordance with the case law of the European Court of Justice and other EU regulations, i.e. in conformity with European law (COM(2010) 794 final, p. 9).
41. According to the relevant treaties of European law (primary law), the localisation of an enterprise depends on its registered office (*satzungsmässigen Sitz*), its central administration or its principal place of business within the Union (Art. 54 TFEU = ex-Article 48 para. 1 EC-Treaty). According to the prevailing doctrine and case law of the ECJ, the **fulfilment of one of these three criteria alternatively is sufficient** (ECJ 27.9.1988, Daily Mail, ECR 1988/5483; *Steinke*, The transfer of the case law of Keck of the ECJ to the freedom of establishment [2009] 131 with further references; Fischer in Lenz/Borchardt [Hrsg.], EU-Verträge. Kommentar⁶ [2012] Art. 54 AEUV Rz 3). The registered office (statutarische Sitz) is the primarily decisive criterion (ECJ 28-6-2007, Case C-73/06, recital 61).

It is a cornerstone of the EJC's case law that the **location of a legal person's registered office**, central administration or principal place of business (alternative factors!) serves as the **connecting factor with the legal system of a particular Member State** in the same way as does nationality in the case of a natural person (Case C-167/01 Inspire Art Ltd.). Therefore, the registered office is one (of three alternative) factors that is sufficient to submit a legal person to the legal system of a specific Member State. There are no reasonable grounds why these fundamental rules of European law shall not apply to social security law issues.

42. In the sense of an interpretation of Article 13 para. 1 of Regulation (EC) 883/2004 and Article 14 para. 5a of Regulation (EC) 987/2009 in conformity with European law, it is therefore sufficient for the competence of the Liechtenstein social insurance institution if the registered office (*satzungsmässiger Sitz*) of the company is in Liechtenstein. This is indisputably the case. For this reason alone, the contested decision proves to be incorrect and erroneous. This conclusion is also necessary and correct because the jurisdiction of the social insurance institution must not violate primary law (thus also not Article 54 para. 1 TFEU) (*Wallrabenstein*, loc. cit., § 22 recital 42). However, if the criterion of essential decisions and central administration were to be applied not only to the establishment but also to the registered office (*satzungsmässiger Sitz*), there would be a violation of the alternative character of Art. 54 para. 1 TFEU.
43. The Appellant's (ISTM) position is supported by Art. 63 of the Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, which also provides for an autonomous interpretation of the term "Sitz" / "Domicile", and which reads as follows:

"For the purposes of this Regulation, a company or other legal person or association of natural or legal persons is domiciled at the place where it has its

- (a) **statutory seat;**
- (b) *central administration; **or***
- (c) *principal place of business."*

Also Regulation (EU) No 1215/2012 provides for three **alternative** factors that determine the "Sitz" / "Domicile" of a legal person. The European legislator has therefore decided, also in connection with the very far-reaching issues of jurisdiction and enforcement, that the domicile (place of business) of a company is (only) established by its statutory domicile.

44. The Appellant's position is a mandatory consequence of the facts in the present case for the following reasons: it is undisputed that the Appellant has its sole and exclusive domicile in Liechtenstein. It has no other registered office, branch or other establishment outside Liechtenstein. Therefore, if one were to take the view that the Appellant's seat was not in Liechtenstein, the Appellant would have no domicile (place of business) at all.

It should be emphasised that the defendant (AHV) is also unable to explain where else the Appellant (ISTM) should have its domicile other than in Liechtenstein. In its appeal, it merely states that the main business activities of the Appellant are not carried out in Liechtenstein, but by "*different companies in different places*". However, the defendant is also unable to explain how the domicile and the applicable law can be derived from this basis. The defendant's view would be diametrically opposed to the central intention of the regulation, namely to create legal certainty for the benefit of insured persons with regard to the applicable law.

2.2.3 Assessment according to the pure wording

45. Irrespective of this, the ISTM has its registered office (Sitz) in Liechtenstein in any case and without alternative, even according to the pure wording of Article 14 para. 5a of Regulation (EC) 987/2009.
46. **Firstly**, it is undisputed that the ISTM has its registered office (statutarischer or, respectively, satzungsmässiger Sitz) in Liechtenstein.
47. **Secondly**: The registered office (statutarischer or, respectively, satzungsmässiger Sitz) in Liechtenstein is the exclusive registered office (Sitz) of ISTM. ISTM has no other registered office (statutarischer or, respectively, satzungsmässiger Sitz) abroad, nor does it have any establishments abroad. It therefore follows mandatorily that the registered office (Sitz) within the meaning of Regulation (EC) 883/2004 is in Liechtenstein and can also logically only be located there.
48. **Thirdly**: Irrespective of this, the registered office (statutarische or, respectively, satzungsmässige Sitz) of ISTM in Liechtenstein also fulfils all the criteria of Article 14 para. 5a of Regulation (EC) 987/2009 ("*place of business where the essential decisions of the undertaking are adopted and where the functions of its central administration are carried out*"):
49. Namely, the essential decisions of the company are taken in Liechtenstein:

- a) Urs Kranz, a Liechtenstein citizen with registered office (Sitz) in Liechtenstein, is the main director of ISTM having final decision-making power: he takes the final decisions, for example which payments are made or which contracts are signed, and he also concludes the employment contracts with the employees.
 - b) Urs Kranz, a Liechtenstein citizen with registered office (Sitz) in Liechtenstein, is the only managing director with sole signing authority. This means that every decision, in particular of course the essential decisions, must be made by him in a mandatory and decisive manner. It already follows from this that all essential decisions must be made in Liechtenstein.
 - c) As the main managing director of ISTM having final decision-making power with sole signatory power, Urs Kranz has the inalienable and non-transferable right to make the following corporate decisions within the meaning of Art. 16 of the Articles of Association of ISTM:
 - Decisions within the scope of the overall management of the company and the issuing of the necessary directives;
 - Determination of the organisation within the framework of the law and the Articles of Association;
 - Organisation of the accounting system and the financial control;
 - Supervision of the persons to whom parts of the management are delegated, in particular with regard to compliance with the laws, the Articles of Association, regulations and directives;
 - Preparation of the annual report (annual accounts and annual report);
 - Preparation of the shareholders' meeting and executing its resolutions;
 - Notification of the court in the event of over-indebtedness;
 - Appointment of directors, authorised signatories (Prokuristen) and authorised agents (Handlungsbevollmächtigte).
 - d) The second director, Hafez Adriaan Barahmeh, who is not resident in Liechtenstein (and in any case only has collective signing authority), has no authority at all to execute payments. Even he, however, comes to Liechtenstein once or twice a month in order to discuss directly on site pending issues with the managing director, Urs Kranz, having final decision-making power.
50. In Liechtenstein, however, at least and in any case the following administrative acts are also carried out:
- a) The keeping of accounts, the preparation of payroll accounting and salary statements, the preparation of all annual salary declarations, the execution of personnel mutations with the authorities as well as all matters in connection with social insurances and the tax administration.
 - b) Preparation of management contracts, employment contracts and the administrative processing of wages and payments.
 - c) All financial functions and company documents are located in Liechtenstein.
 - d) Employees are subject to Liechtenstein withholding tax and company profits are taxed in Liechtenstein.
51. According to Case C-73/06, Planzer Luxembourg Sàrl (to which the Respondents refer), the determination of a company's place of business requires a series of factors to be taken into consideration, **foremost amongst which are its registered office,**

the place of its central administration, the place where its directors meet and the place, usually identical, where the general policy of that company is determined.

52. Therefore, given the facts outlined above, ISTM has its seat (domicile) in any event in Liechtenstein, even if the seat/domicile has to be determined according to the factors set out in Planzer Luxembourg Sàrl.

2.3 Confirmation by the Social Security Institutions of the States of Residence

53. The procedure for determining the applicable law according to Art. 13 of Regulation (EC) 883/2004 is regulated in Art. 16 of Regulation (EC) 987/2009. First of all, the institution of the country of residence to be informed by the person concerned is in charge (Art. 16 para. 1 of Regulation (EC) 987/2009). Pursuant to para. 2, this institution immediately determines the legislation to which this person is subject. The first determination is made provisionally. The institution shall inform the designated institutions of each Member State, in which the person pursues an activity, of its provisional determination. According to Art. 16 para. 3 of Regulation (EC) 987/2009, this determination shall become definitive within two months after the institutions designated by the competent authorities of the Member State concerned have been informed thereof, unless the institutions concerned indicate that they take a different view. In case of disagreement, Article 6 of Regulation (EC) 987/2009 shall then apply.

54. Art. 16 para. 3 of Regulation (EC) 987/2009 reads as follows:

*«The provisional determination of the applicable legislation, as provided for in paragraph 2, shall become **definitive** within **two months** of the institutions designated by the competent authorities of the Member States concerned **being informed of it**, in accordance with paragraph 2, unless the legislation has already been definitively determined on the basis of paragraph 4, or at least one of the institutions concerned informs the institution designated by the competent authority of the Member State of residence by the end of this two-month period that it cannot yet accept the determination or that it takes a different view on this»*

55. The wording of this provision is exceptionally clear and not open to any divergent interpretation. If the two-month period expires, the provisional determination of the applicable law becomes definitive. The word “definitive” means unequivocally that this determination can no longer be changed. If it were possible to reverse this final determination, this would again run counter to the central purpose of the basic regulation, namely to ensure legal certainty in respect of the applicable social security law for the benefit of insured persons.
56. The provision is also exceptionally clear with regard to the duration of the opposition period of 2 month and is not open to any other interpretation. It is sufficient that the social security institution concerned is informed. The manner in which this information must be communicated cannot matter. In any case, if this provisional determination has been sent to the employers and employees concerned, and they forward the official letters from the foreign social security institution to the social security institution concerned (in Liechtenstein) (with a certified translation to boot), there can be no doubt that sufficient information has been provided.
57. As stated above, the German GKV-Spitzenverband and the Czech Social Security Authority have provisionally established by means of the procedure under Article 16 of Regulation (EC) 987/2009 that only the legislation of the Principality of Liechtenstein applies to the employees of ISTM, precisely because the registered office (Sitz) of ISTM is in Liechtenstein.

58. The above-mentioned letters from the Czech Social Security Authority (with the exception of Jakuba Zobace) were all sent in October or November 2016, and the AHV was informed of them ex officio. In any event, these letters were also immediately forwarded by ISTM to AHV by e-mail dated 29 November 2016, 31 October 2016, 15 November 2016, 12 December 2016, 13 December 2016, 31 January 2017, even with a certified German translation.
59. In any case, more than two months elapsed between the notification by the ISTM of the letters from the institutions of the workers' places of residence concerning the provisional determination of the applicable legislation and the issuing of the order on 17-02-2017 or, respectively, the notification of the competent authority of the Member State of residence in accordance with Article 16 para. 3 of Regulation (EC) 987/2009 in practically all individual cases. In the opinion of the ISTM, the AHV allowed the two-month deadline in Art. 16 para. 3 of Regulation (EC) 987/2009 to lapse and the provisional determination of the foreign institutions became final in accordance with Art. 16 para. 3 of Regulation (EC) 987/2009. In the opinion of the ISTM, the provisional determinations of the application of Liechtenstein social security law by the competent institutions of the places of residence of the employees are accordingly binding.

2.4 On the (other) objections of the AHV

2.4.1 On the outsourcing

60. The commissioning of third-party service providers is undisputedly permissible and has become the norm in business life. The outsourcing of activities is neither prohibited by Regulation (EC) 883/2004 nor does it constitute a relevant criterion for the examination of the competence of the social security institution. However, even if the commissioning of third-party service providers (outsourcing) were relevant in the case at hand, this would not change the fact that ISTM has its registered office (Sitz) and its central administration in Liechtenstein: the commissioned third-party service providers are, in turn, Liechtenstein companies that carry out their activities in connection with ISTM exclusively in Liechtenstein.

2.4.2 On the own premises and own staff

61. Own premises and/or own staff are no criteria that are included in Regulation (EC) 883/2004 for examining the competence of the social security institution. Furthermore, it is also not correct that the ISTM does not have its own staff in Liechtenstein. In any case and at least Urs Kranz is a body of the ISTM, is paid by the ISTM for his function in a body and thus constitutes "staff" of the ISTM. The same applied to Marlene Elsensohn; she too did the work for the ISTM of a "staff" as it were and was also paid accordingly for this. For this reason, too, the AHV's objection is flawed from the outset. Moreover, Jeffrey Kleijnendorst worked for ISTM from 01-08-2017 to 31-07-2018 as a manager in full employment and he had a valid residence permit for Liechtenstein.
62. It is also not correct that ISTM has no own premises. ISTM (also) pays for the administrative activities that are carried out by Urs Kranz, Kranz Treuhand and BDO. Of course, the aforementioned have permanent premises in Liechtenstein and make this very infrastructure available to the ISTM in return for payment. This infrastructure,

for which ISTM pays, also includes office space. Consequently, the ISTM has also expressly paid rent that was expressly dedicated as such. This is also anything but unusual, especially in Liechtenstein. Apart from that, ISTM has in the meantime rented its own and separate office space in Balzers anyway.

2.4.3 Start-up phase

63. The AHV also fails to take into account that ISTM is a very young company that has only just been established and is still in the start-up phase. It is in the nature of any company that is in the process of being set up that huge sums are not invested in office buildings and personnel at the beginning of the company's activity. Co-participation in an existing infrastructure (BDO; Kranz Treuhand) in return for pro-rata payment is in line with reasonable entrepreneurial responsibility. It is simply unfair to hold this against ISTM.

2.4.4 No letterbox company

64. Contrary to the AHV's assertions, ISTM is not a "letterbox company", either. The criteria mentioned in Article 14 para. 5a of Regulation (EC) 987/2009 in the version of Regulation (EU) No 465/2012 (essential decisions; central administration) are only intended to prevent social abuse through the fictitious establishment of letterbox companies (ECJ 28.6.2007, Case C-73/06, recital 61). The AHV has not claimed that ISTM is a fictitious establishment of a letterbox company for the purpose of social abuse, but would such a classification of ISTM be outright wrong against the background of the (undisputed) facts.

2.5 **Duty of loyal cooperation (Art. 76 para. 6 of Regulation [EC] No. 883/2004)**

65. ISTM has used all legal means and remedies to finally obtain a decision on its appeal domestically, including (even) a complaint alleging breach of the duty to reach a timely decision (Säumnisbeschwerde) to the Princely Court of Appeal (Fürstliches Obergericht) with referral to the Princely Supreme Court (Fürstlicher Oberster Gerichtshof). Despite this, the AHV has taken some 3 ½ years to decide on ISTM's appeal of March 2017. Due to the need to file a legal remedy against this decision, further substantial time will pass again before there is clarity for ISTM as to which social security law applies to it.
66. Pursuant to Article 76 para. 6 of Regulation (EC) No 883/2004, the institution of the competent Member State or of the Member State of residence of the person concerned shall contact the institution of the other Member State or the institutions of the other Member States concerned if difficulties in the interpretation or application of this Regulation call into question the rights of a person within the scope of application of the Regulation. If no solution is found within a reasonable period of time, the authorities concerned may refer the matter to the Administrative Commission (Verwaltungskommission). The provision specifies the duty of the competent authorities to loyally cooperate. This is to avoid that disputes between the institutions are carried out on the back of the persons concerned (insured persons; contributors). (*Wunder in Schreiber/Wunder/Dern (eds.), Regulation (EC) No. 883/2004. on the Coordination of Social Security Systems, Commentary (2012) Art. 76 para. 6 Regulation (EC) No. 883/2004 recital 24).*

67. In the opinion of ISTM, the Respondents should have at least clarified the legal situation in consultation with the other social security institutions of the other Member States concerned or referred the matter to the Administrative Commission, even if it refused to deal with the ISTM's appeal within a reasonable period of time. In the view of the ISTM, the AHV has therefore also violated its duty of loyal cooperation within the meaning of Art. 76 para. 6 of Regulation (EC) No. 883/2004.

2.6 On the Rhine Navigation Convention (Rheinschiff-Übereinkommen)

68. In connection with Liechtenstein's accession to the Rhine Navigation Convention (Rheinschiff-Übereinkommen), the AHV (and the Principality of Liechtenstein) have, in the opinion of ISTM, also violated EEA law for the following reasons:
69. Liechtenstein was and is on the basis of the Agreement on determining the legislation applicable to Rhine boatmen, concluded pursuant to Article 16 para. 1 of Regulation (EC) 883/2004 (Liechtenstein Federal Law Gazette (LGBl.) 2018/205) in conjunction with Council Regulation (EEC) No. 2919/85 of 17 October 1985 laying down the conditions for access to the arrangements under the Revised Convention for the Navigation of the Rhine relating to vessels belonging to the Rhine Navigation Council Regulation and in conjunction Art. 2 of the Resolution 1984-I-3 of the Central Commission for the Navigation of the Rhine in conjunction with the *Implementing Regulation concerning the provisions of Article 2, paragraph 3 of the Revised Convention for the Navigation of the Rhine and clauses 1 and 3 of the Protocol to the Additional Protocol No. 2 of 17 October 1979 to the said Convention for the Navigation of the Rhine*, obliged to adopt national implementing provisions for the issue of the certificate of belonging to the navigation of the Rhine (within the meaning of Article 1, letter c of the aforementioned Rhine Navigation Convention (Rheinschiff-Übereinkommen).
70. The country of Liechtenstein is therefore in breach of EEA law and, in particular, of Regulation (EC) No. 883/2004 if it refuses to establish the required bases/pre-requisites for placing a group of persons within the meaning of Article 16 para. 1 of Regulation (EC) No. 883/2004 under its social security law, as laid down in the derogation agreement pursuant to Article 16 para. 1 of Regulation (EC) No. 883/2004.
71. In particular, it is incompatible with Regulation (EC) No. 883/2004 that Liechtenstein accedes to the Agreement on determining the legislation applicable to Rhine boatmen, concluded on the basis of Article 16 para. 1 of Regulation (EC) No. 883/2004, but at the same time does not ensure that the parties subject to the law can assert claims, in particular because no register of ships is introduced, no implementing provisions for the Rhine Agreement are issued and the competent authority takes the legal view that there is no obligation to transpose the EEA inland navigation *acquis* into national law.
72. Furthermore, it is incompatible with EEA law and with Regulation (EC) No 883/2004 that Liechtenstein acceded to the Agreement on determining the legislation applicable to Rhine boatmen, concluded on the basis of Article 16(1) of Regulation (EC) No. 883/2004 only for the purpose of "*significantly reducing the number of sailors to be insured in Liechtenstein for the future*". This motivation constitutes an unobjective discrimination against a certain group of employed workers.

3 PROPOSAL FOR ANSWERS

The Appellants respectfully submit the following proposals for answers to be given by the EFTA Court to the questions submitted by the Liechtenstein Court of Appeal:

I. Concerning Question I (Registered Office)

1. The **registered office** (*statutarischer Sitz* or *satzungsmässiger Sitz*) of an undertaking is **suffice** to be regarded as the registered office (Sitz) within the meaning of Article 13(1)(b)(i) of Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 of the coordination of social security systems in conjunction with Article 14 (5a) of Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems.

II. Concerning Question II (Article 16 (3) Regulation (EC) 987/2009)

1. There are no formal requirements for informing the concerned institution of the Member State (here: Liechtenstein) of the provisional determination. It is sufficient that the concerned institution obtains knowledge of the provisional determination by whatever means. In any event, it is sufficient that the provisional determination reaches the concerned institution (here: Liechtenstein) by forwarding copies of the respective letters containing the provisional determination to the concerned institution (here: Liechtenstein).
2. Once the provisional determination of the applicable legislation is “definitive” according to Art. 16 para. 3 of Regulation (EC) 987/2009, such definitive determination is not susceptible to further changes.

Vaduz, 23 June 2021

ISTM International Shipping & Trucking
Management GmbH