JUDGMENT OF THE COURT
10 May 2011

(Action for annulment of a decision of the EFTA Surveillance Authority – State aid – Special tax rules applicable to captive insurance companies – Notion of undertaking – Selectivity – Existing aid and new aid – Distortion of competition and effect on trade – Recovery – Legitimate expectations – Legal certainty – Obligation to state reasons)

In Joined Cases E-4/10, E-6/10 and E-7/10,

Principality of Liechtenstein, represented by Dr Andrea Entner-Koch, EEA Coordination Unit, Vaduz, Liechtenstein, acting as Agent,

Reassur Aktiengesellschaft, represented by Dr Ulrich Soltèsz and Philipp Melcher, Rechtsanwälte, for Reassur Aktiengesellschaft, Vaduz, Liechtenstein,

Swisscom RE Aktiengesellschaft, represented by Dr Michael Sánchez Rydelski, Rechtsanwalt, for Swisscom RE Aktiengesellschaft, Vaduz, Liechtenstein,

applicants,

v

EFTA Surveillance Authority, represented by Xavier Lewis, Director, and Bjørnar Alterskjær, Deputy Director, Legal and Executive Affairs, acting as Agents, Brussels, Belgium,

defendant,

APPLICATION for the annulment of Decision 97/10/COL of 24 March 2010 regarding the taxation of captive insurance companies under the Liechtenstein Tax Act,

THE COURT,

composed of: Carl Baudenbacher, President, Thorgeir Örlygsson (Judge-Rapporteur) and Per Christiansen, Judges,

Registrar: Skúli Magnússon,

having regard to the written pleadings of the parties and the written observations of

- the Kingdom of Norway, represented by Pål Wennerås, advokat, Office of the Attorney General (Civil Affairs) and Mads Tollefsen, adviser, Ministry of Foreign Affairs, acting as Agents; and

- the European Commission ("the Commission"), represented by Richard Lyal, legal advisor, and Carlos Urraca Caviedes, member of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

having heard oral argument of the Principality of Liechtenstein, represented by Dr Andrea Entner-Koch, Reassur Aktiengesellschaft ("Reassur"), represented by Dr Ulrich Soltèsz and Philipp Melcher, Swisscom RE Aktiengesellschaft ("Swisscom"), represented by Dr Michael Sánchez Rydelski, the EFTA Surveillance Authority ("ESA"), represented by Xavier Lewis, and the Commission, represented by Richard Lyal, at the hearing on 10 March 2011,

gives the following

Judgment

I Introduction

1 According to the provisions of the Liechtenstein Tax Act (Gesetz über die Landes- und Gemeindesteuern, "the Tax Act"), insurance companies which engage exclusively in captive insurance under the Insurance Supervision Act (Gesetz betreffend die Aufsicht über Versicherungsunternehmen, Versicherungsaufsichtsgesetz, "the Insurance Supervision Act") are subject to special tax provisions.

2 The parties disagree whether the special provisions of Liechtenstein law regarding the taxation of captive insurance companies constitute State aid under Article 61(1) of the EEA Agreement ("EEA"). It is also disputed whether and to what extent legitimate expectations entertained by the beneficiaries of the alleged State aid prevent recovery of State aid granted prior to the final decision of ESA on 24 March 2010. Further, the applicants argue that ESA's Decision infringes

the principles of legal certainty, homogeneity and equal treatment, and that it lacks adequate reasoning.

3 Under point 7 of Article 11(1) of the Insurance Supervision Act, "captive reinsurance undertaking" means "a reinsurance undertaking owned either by an undertaking in the financial sector other than an insurance undertaking or a group of insurance undertakings within the meaning of Article 7 of the Act, or by an undertaking not in the financial sector, the purpose of which is to provide reinsurance cover exclusively for the risks of the undertaking or undertakings to which it belongs or of an undertaking or undertakings of the group of which it is a member". Article 6(1) of the same Act stipulates that "self-insurance (captive)" may be provided as direct insurance or reinsurance. Further, according to Article 6(2), insurance companies may provide both self-insurance and insurance of third parties, with Article 6(3) setting out the possibility of supervision being exempted on an individual basis in accordance with Article 2(2) of the Act.

4 The tax provisions applicable to those insurance companies ("captive insurance companies" or "captives") were introduced in the Tax Act in 1997 with effect from 1 January 1998. According to those provisions, captive insurance companies pay a capital tax of 0.1% on their own capital. For capital exceeding CHF 50 million the tax rate is reduced to 0.075% and for capital in excess of CHF 100 million to 0.05%. In addition to paying lower amounts of capital tax, captive insurance companies are also exempt from the obligation to pay coupon tax.

II Legal background

EEA law

5 Article 61 EEA reads as follows:

> *1. Save as otherwise provided in this Agreement, any aid granted by EC Member States, EFTA States or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between the Contracting Parties, be incompatible with the functioning of this Agreement.*
>
> …

6 Article 16 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (ESA/Court Agreement, "SCA") reads as follows:

> *Decisions of the EFTA Surveillance Authority shall state the reasons on which they are based.*

7 Article 36(1) and (2) of the SCA reads as follows:

The EFTA Court shall have jurisdiction in actions brought by an EFTA State against a decision of the EFTA Surveillance Authority on grounds of lack of competence, infringement of an essential procedural requirement, or infringement of this Agreement, of the EEA Agreement or of any rule of law relating to their application, or misuse of powers.

Any natural or legal person may, under the same conditions, institute proceedings before the EFTA Court against a decision of the EFTA Surveillance Authority addressed to that person or against a decision addressed to another person, if it is of direct and individual concern to the former.

8 Article 1 of Part I of Protocol 3 to the SCA ("Protocol 3"), as amended by the Agreements amending Protocol 3 thereto, signed in Brussels on 21 March 1994, 6 March 1998 and 10 December 2001, reads as follows:

1. The EFTA Surveillance Authority shall, in cooperation with the EFTA States, keep under constant review all systems of aid existing in those States. It shall propose to the latter any appropriate measures required by the progressive development or by the functioning of the EEA Agreement.

2. If, after giving notice to the parties concerned to submit their comments, the EFTA Surveillance Authority finds that aid granted by an EFTA State or through EFTA State resources is not compatible with the functioning of the EEA Agreement having regard to Article 61 of the EEA Agreement, or that such aid is being misused, it shall decide that the EFTA State concerned shall abolish or alter such aid within a period of time to be determined by the Authority.

…

3. The EFTA Surveillance Authority shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. If it considers that any such plan is not compatible with the functioning of the EEA Agreement having regard to Article 61 of the EEA Agreement, it shall without delay initiate the procedure provided for in paragraph 2. The State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision.

9 Article 1 of Part II of Protocol 3 reads as follows:

For the purpose of this Chapter:

(a) "aid" shall mean any measure fulfilling all the criteria laid down in Article 61(1) of the EEA Agreement;

(b) "existing aid" shall mean:

(i) all aid which existed prior to the entry into force of the EEA Agreement in the respective EFTA States, that is to say, aid schemes and individual aid which were put into effect before, and are still applicable after, the entry into force of the EEA Agreement;

(ii) authorised aid, that is to say, aid schemes and individual aid which have been authorised by the EFTA Surveillance Authority or, by common accord as laid down in Part I, Article 1 (2) subparagraph 3, by the EFTA States.

(iii) aid which is deemed to have been authorised pursuant to Article 4(6) of this Chapter or prior to this Chapter but in accordance with this procedure;

(iv) aid which is deemed to be existing aid pursuant to Article 15 of this Chapter;

(v) aid which is deemed to be an existing aid because it can be established that at the time it was put into effect it did not constitute an aid, and subsequently became an aid due to the evolution of the European Economic Area and without having been altered by the EFTA State. Where certain measures become aid following the liberalisation of an activity by EEA law, such measures shall not be considered as existing aid after the date fixed for liberalisation;

(c) "new aid" shall mean all aid, that is to say, aid schemes and individual aid, which is not existing aid, including alterations to existing aid;

(d) "aid scheme" shall mean any act on the basis of which, without further implementing measures being required, individual aid awards may be made to undertakings defined within the act in a general and abstract manner and any act on the basis of which aid which is not linked to a specific project may be awarded to one or several undertakings for an indefinite period of time and/or for an indefinite amount;

...

(f) "unlawful aid" shall mean new aid put into effect in contravention of Article 1(3) in Part I;

…

10 Article 14(1) of Part II of Protocol 3 reads as follows:

Recovery of aid

1. Where negative decisions are taken in cases of unlawful aid, the EFTA Surveillance Authority shall decide that the EFTA State concerned shall take all necessary measures to recover the aid from the beneficiary (hereinafter referred to as a "recovery decision"). The EFTA Surveillance Authority shall not require recovery of the aid if this would be contrary to a general principle of EEA law.

National law

11 The Liechtenstein Tax Act comprises two kinds of taxes relating to legal entities (*Gesellschaftssteuern*), a business income tax (*Ertragssteuer*) and a capital tax (*Kapitalsteuer*). The legal entities liable to pay income tax in Liechtenstein are listed in Article 73(a) to (f) of the Act, among which foreign companies operating a branch in Liechtenstein are made subject to the income and capital tax under Article 73(e).

12 According to Article 77(1) of the Tax Act, business income tax is assessed on the entire annual net income, which is defined as the entire revenues minus company expenditures, including write-offs and other provisions. Under Article 79(2) of the Tax Act, the income tax rate depends on the ratio of net income to taxable capital and lies between the minimum level of 7.5% and the maximum level of 15%. This tax rate may be increased by certain percentage points, depending on the relation between dividends and taxable capital, as described in Article 79(3) of the Tax Act.

13 Under Article 76(1) of the Tax Act, the basis for the capital tax is the paid-up capital stock, joint stock, share capital, or initial capital, as well as the reserves of the company constituting company equity. According to Article 76(1), the capital tax is assessed at the end of the company's business year at a rate of 0.2%, in accordance with Article 79(1) of the Tax Act.

14 Section 5 of the Tax Act contains provisions regarding coupon tax, which is levied on coupons under Article 88a(1) of the Tax Act. The subjects of the tax are further defined in Article 88b to Article 88e. Pursuant to Article 88a(1), coupon tax is levied on the coupons of securities (or documents treated as equivalent to securities) issued by "a national". According to Article 88a(2), the term "national" covers any person whose place of residence, domicile or statutory seat is in Liechtenstein and undertakings that are registered in the public register of Liechtenstein.

15 The coupon tax applies to companies the capital of which is divided into shares, as provided for in Article 88d(1)(a) of the Tax Act. According to Article 88h(1)(a) and (b), it is levied at the rate of 4% on any distribution of dividends or profit shares (including distributions in the form of shares).

16 According to Article 88i(1) of the Tax Act, the person liable to pay the coupon is also liable to pay the tax. Article 88k(1) of the Tax Act stipulates that the sum paid out on a coupon must be reduced by the amount of the tax levied on such coupons.

17 By virtue of Act of 18 December 1997 on the amendment of the Liechtenstein Tax Act, the Liechtenstein authorities introduced special tax rules applicable to captive insurance companies. Articles 82a and 88d(3) were introduced into the Tax Act with effect from 1998. These Articles are included in the special tax provisions (*Besondere Gesellschaftssteuern*) listed in Section 4.B of the Tax Act

for certain company forms such as insurance companies, holding companies, domiciliary companies and investment undertakings.

18 Article 82a of the Tax Act refers to captive insurance companies. Article 82a(1) provides that "[i]nsurance companies as defined in the Insurance Supervision Act which exclusively engage in captive insurance ("Eigenversicherung") shall pay a capital tax of 0.1% on the company's own capital. For the capital exceeding 50 million the tax rate is reduced to 0.075% and the capital in excess of 100 million to 0.05%".

19 Under Article 82a(2) of the Tax Act, insurance companies which engage in captive insurance and ordinary insurance activities for third parties are liable to regular capital and income tax, according to Articles 73 to 81 of the Tax Act, for that part of their activities which concern third party insurance. By virtue of Article 88d(3) of the Tax Act, shares or units of captive insurance companies are exempt from the coupon tax.

20 According to point 7 of Article 11(1) of the Insurance Supervision Act, a "captive reinsurance undertaking" means "a reinsurance undertaking owned either by an undertaking in the financial sector other than an insurance undertaking or a group of insurance undertakings within the meaning of Article 7 or by an undertaking not in the financial sector, the purpose of which is to provide reinsurance cover exclusively for the risks of the undertaking or undertakings to which it belongs or of an undertaking or undertakings of the group of which it is a member". Article 6(1) of the same Act stipulates that self-insurance (captive) may be provided as direct insurance or reinsurance. Under Article 6(2), insurance companies may provide both self-insurance and insurance of third parties. According to Article 6(3), supervision may be exempt on an individual basis, in accordance with Article 2(2) of the Act.

21 Articles 17 and 28m of the Ordinance on the Insurance Supervision Act (Verordnung zum Gesetz betreffend die Aufsicht über Versicherungs-unternehmen) set out minimum requirements for the capital of captive insurance companies. According to Article 17(2) of the Ordinance, the minimum guarantee fund for captive insurance undertakings must amount to EUR 2.3 million. If the insurance undertaking covers all or some of the risks included in insurance classes 10 to 15, then the minimum guarantee fund must amount to EUR 3.5 million. According to Article 28m(2), if the captive insurance company in question is a captive reinsurance undertaking, the minimum guarantee fund must amount to EUR 3.2 million. Under the same Article, the supervisory authority may, in the case of captive reinsurance undertakings, permit a reduction of the minimum guarantee fund to an amount of EUR 1.1 million.

III Facts and pre-litigation procedure

22 By a letter of 14 March 2007, ESA requested certain information from the Liechtenstein authorities concerning various tax derogations for particular forms of companies under the Tax Act in order to assess the compatibility of those tax

rules with the State aid provisions of the EEA Agreement, in particular Article 61 thereof. In the letter, the Liechtenstein authorities were requested to explain the tax treatment of captive insurance companies under Article 82a of the Tax Act indicating, inter alia, why they paid a lower rate of capital tax of 0.1% or less compared to other companies which paid capital tax of 0.2%, in accordance with Article 76 of the Tax Act. Further, ESA inquired whether captive insurance companies also paid profit, property and income tax in Liechtenstein and sought information on the timing of the introduction of Article 82a.

23 The Liechtenstein authorities replied by letter of 30 May 2007. They stated that the preferential taxation of foreign insurance companies provided for in Article 82a of the Tax Act had been introduced in order to establish and develop the captive insurance sector as a new field of economic activity in Liechtenstein. According to the letter, the primary aim of this measure was the diversification of the Liechtenstein economy in general and of the insurance sector in particular. The authorities also stated that captive insurance companies which only carried on intra-group risk insurance (*Eigenversicherung)* were not subject to the profit tax. However, if, in addition to intra-group risk insurance, captive insurance companies also carried on insurance with third parties, under Article 82a(2) of the Tax Act, they were subject to profit tax on the element that derived from the insurance with third parties. Further, captive insurance companies were not subject to income and property tax.

24 Following an exchange of correspondence and meetings between ESA and the representatives of the Liechtenstein authorities, by Decision No 620/08/COL of 24 September 2008, ESA initiated the formal investigation procedure provided for in Article 1(2) of Part I of Protocol 3 with regard to the taxation of captive insurance companies. This decision was published in the Official Journal of the European Union and the EEA Supplement thereto (OJ 2009 C 72, p. 50 and EEA Supplement No 17 of 26 March 2009, p. 1). That publication was annulled and replaced in OJ 2009 C 75, p. 45.

25 In that decision, ESA called on interested parties to submit comments and received 12 such comments. By letter of 22 July 2009, ESA forwarded those comments to the Liechtenstein authorities which responded by letter of 2 October 2009.

26 By Decision No 97/10/COL of 24 March 2010 (“the Decision”), ESA found that the tax provisions on captive insurance companies constituted State aid incompatible with Article 61(1) EEA. ESA found that the granting of a full or partial tax exemption involved a loss of tax revenues for the State which was equivalent to consumption of state resources in the form of fiscal expenditure. Accordingly, the special tax rules applicable to captive insurance companies were granted through state resources.

27 In its Decision, ESA concluded that activities carried out by captive insurance companies in providing insurance or reinsurance services to their associated companies constituted an economic activity. On that basis, the captive

reinsurance companies qualified as undertakings within the meaning of Article 61(1) EEA.

28 ESA noted that, according to the case-law of the Court of Justice of the European Union (“ECJ”), the notion of undertaking within the meaning of Article 87(1) of the EC Treaty, now Article 107(1) of the Treaty on the Functioning of the European Union (“TFEU”), which corresponds to Article 61(1) EEA, encompasses every entity engaged in economic activity, regardless of its legal status and the way in which it is financed. Moreover, any activity consisting in offering goods or services on a given market is an economic activity. In this regard, ESA found that providing insurance is a service, which in principle is an economic activity, and that captive insurance companies offer such services for a premium on a given market.

29 ESA took the view that this conclusion was not altered by the fact that the clients of captive insurance companies were restricted to undertakings of the same group to which they belonged. As the undertakings of the group had chosen to purchase insurance from another company within the group, instead of a third-party insurance company, the service provided by the captive insurance was an alternative to purchasing insurance from a third party. On ESA’s analysis, captive insurance companies provided commercial services to private undertakings. Therefore, any assistance provided to them by the state through tax exemptions had to be viewed in that context.

30 ESA stated, moreover, that the tax provisions in question had conferred a selective advantage upon certain undertakings. According to ESA, qualification for a lower rate of taxation than was normally due, or an exemption from paying taxes in general, conferred an advantage on the eligible companies. Those companies were granted an advantage because their operating costs were reduced in comparison with others that were in a similar factual and legal position. Furthermore, by exempting shares or parts of captive insurance companies from coupon tax, the Liechtenstein legislation also made it more attractive to invest in captive insurance companies than in other undertakings. Investors in captive insurance companies were, therefore, granted an advantage.

31 On ESA’s assessment, under the Liechtenstein tax provisions, captive insurance companies received a selective advantage compared to those entities which paid the full income, capital and coupon taxes in Liechtenstein. In ESA’s view, the tax reductions and exemptions accorded to captive insurance companies were designed to attract a mobile and tax sensitive service sector to Liechtenstein. Therefore, there was no reason to conclude that captive insurance companies were in a different legal and factual position to those other parties. In that regard, ESA observed that the tax measures in question were only available and applicable to undertakings that had sufficient resources to form a captive insurance company. Further, ESA held that the measures could not be justified by the logic of the tax system and that they distorted competition.

32 In its Decision, ESA rejected the view that the measures were existing aid. Instead, it qualified those measures as new aid and found that the Principality of Liechtenstein had not complied with its obligations under Article 1(3) of Part I of Protocol 3 to notify.

33 Finally, ESA determined that although, in the light of Commission practice, beneficiaries might have entertained legitimate expectations that the tax measures did not constitute State aid when they were introduced, all beneficiaries should have been aware by the date of publication of the decision to open a formal investigation into the similar tax measures in the Åland Islands on 6 November 2001, at the latest, that the measures were likely to involve incompatible State aid. Therefore, the Liechtenstein authorities were ordered to take all necessary measures to recover from the beneficiaries the aid referred to in Article 1 of the Decision and unlawfully made available to those parties from 6 November 2001 to 31 December 2009.

34 The operative part of the contested Decision, in its relevant points, reads as follows:

Article 1

The aid measures which the Liechtenstein authorities have implemented in favour of captive insurance companies under [82a and 88)(3)] of the Tax Act implemented on 18 December 1997 constitute unlawful State aid within the meaning of Article 61(1) of the EEA Agreement, which is not compatible with the functioning of the EEA Agreement.

Article 2

1. Liechtenstein shall repeal the measures referred to in Article 1 such that they do not apply from the fiscal year 2010 (inclusive) onwards.

2. The Liechtenstein authorities shall inform the Authority of the legislative steps which will be taken to abolish the measure by 30 June 2010.

Article 3

1. The Liechtenstein authorities shall take all necessary measures to recover from the beneficiaries the aid referred to in Article 1 and unlawfully made available to them, from 6 November 2001 to 31 December 2009.

2. The amount of aid to be recovered should be calculated by assessing the income, capital and coupon tax liabilities of captive insurance companies had specific rules not applied to them, less the amounts of capital tax already paid by the beneficiaries.

3. The sums to be recovered shall bear interest from the date on which the tax reductions were applied to the given undertaking until their actual recovery.

4. The interest shall be calculated on a compound basis in accordance with Article 9 in the EFTA Surveillance Authority Decision No 195/04/COL, as

amended by Authority's Decision No 789/08/COL of 17 December 2008, on the implementing provisions referred to under Article 27 of Part II of Protocol 3.

Article 4

Recovery of the aid referred to in Article 1 shall be effected without delay, and in any event by 30 September 2010; and in accordance with the procedures of national law, provided that they allow the immediate and effective execution of the decision.

…

IV Procedure and forms of order sought

35 By an application lodged at the Registry of the Court on 21 May 2010 as Case E-4/10, the Principality of Liechtenstein brought an action under the first paragraph of Article 36 of the SCA for annulment of the contested Decision.

36 By an application lodged at the Registry of the Court on 16 June 2010 as Case E-6/10, Reassur, a limited liability company registered in Vaduz, Liechtenstein, likewise brought an action for the annulment of the contested Decision. Reassur is the captive insurance company of the Schindler Group and is exclusively engaged in reinsuring certain types of risks of companies belonging to that group.

37 By an application lodged on 9 July 2010 as Case E-7/10, Swisscom, also a limited liability company registered in Vaduz, Liechtenstein, brought an action for annulment of the same Decision. Swisscom is a wholly owned subsidiary of Swisscom AG and has carried out captive insurance operations in Liechtenstein exclusively for the Swisscom Group since its establishment in 1997.

38 By a decision of 16 July 2010, pursuant to Article 39 of the Rules of Procedure, and, having received observations from the parties, the Court joined the three cases for the purposes of the written and oral procedures.

39 The Principality of Liechtenstein and Swisscom jointly claim that the Court should:

(i) annul the EFTA Surveillance Authority's Decision No 97/10/COL of 24 March 2010 regarding the taxation of captive insurance companies under the Liechtenstein Tax Act;
(ii) in the alternative, declare void Articles 3 and 4 of the EFTA Surveillance Authority's Decision No 97/10/COL of 24 March 2010, to the extent that they order the recovery of the aid referred to in Article 1 of that Decision; and
(iii) order the EFTA Surveillance Authority to pay the costs of the proceedings.

40 The claim of Reassur is identical to points (i) and (iii) of the claims filed by the other applicants, cited above. Furthermore, Reassur claims that the Court should:

in the alternative, annul Article 3 of the EFTA Surveillance Authority's Decision No 97/10/COL of 24 March 2010 regarding the taxation of captive insurance companies under the Liechtenstein Tax Act, at least insofar as it orders recovery for the period prior to 31 March 2009.

41 ESA submitted a defence in Cases E-4/10, E-6/10 and E-7/10, registered at the Court on 13 September 2010, in which it claims that the Court should:

(i) dismiss the applications as unfounded; and
(ii) order the applicants to pay the costs.

42 The reply from Reassur in Case E-6/10 was registered at the Court on 9 November 2010. The reply from the Principality of Liechtenstein in Case E-4/10 was registered at the Court on 11 November 2010 and the reply from Swisscom in Case E-7/10 was registered at the Court on 12 November 2010. A rejoinder from ESA was registered at the Court on 17 December 2010.

43 Pursuant to Article 20 of the Statute of the Court and Article 97 of the Rules of Procedure, the Kingdom of Norway and the Commission submitted written observations, registered at the Court on 17 November 2010.

44 By letter of 7 March 2011, the Court requested additional information from the parties. The Principality of Liechtenstein was asked to provide further information on the provisions regarding captive insurance companies in national law, inter alia, on the registration of such companies and their treatment for taxation purposes. The Court also requested information from Reassur and Swisscom on the risks covered by the companies and their business operations, while ESA was asked to provide the Court with information on how it became aware of the disputed tax measures. On 8 March 2011, the Court also requested ESA to submit two further documents. The parties replied to the Court's request on 9 March 2011.

45 The parties presented oral argument and replied to questions put to them by the Court at the hearing on 10 March 2011 in Luxembourg.

46 Reference is made to the Report for the Hearing for a fuller account of the facts, the procedure, the pleas and arguments of the parties, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

47 The applicants submit four main pleas in law. According to the first plea, ESA applied Article 61(1) EEA incorrectly. The second plea alleges that ESA erred in classifying the measures in question as "new aid". By their third plea, the applicants allege that ESA violated general principles of EEA law, such as the principles of legitimate expectations, legal certainty, equal treatment and homogeneity. Finally, the fourth plea alleges that ESA failed to provide sufficient reasoning, as required by Article 16 of the SCA, for its Decision of 24 March 2010.

V The first main plea, alleging incorrect application of Article 61(1) EEA

48 The first plea alleges that ESA applied Article 61(1) EEA incorrectly in relation to captive insurance companies. The applicants contend that the contested tax provisions do not distort competition by favouring certain undertakings or the production of certain goods for the purposes of Article 61(1) EEA. Moreover, they submit that captive insurance companies do not qualify as "undertakings" within the meaning of Article 61(1) EEA and that the contested tax measures do not confer a selective advantage. In addition, the contested tax provisions are said to have no effect on intra-EEA trade.

Notion of an undertaking

Arguments of the parties

49 The applicants submit that captive insurance companies do not qualify as undertakings within the meaning of Article 61(1) EEA as they only provide in-house services and, hence, are not active on the free market for insurance. They contend that only operations which are available on the free and open insurance market can be classified as an "economic activity" conferring the status of undertakings within the meaning of Article 61(1) EEA. In that regard, the Principality of Liechtenstein submits that an entity which does not exercise its activity on a market in competition with other market players cannot be considered to carry out an economic activity within the meaning of the competition rules. The applicants also contend that ESA's findings in this regard are not compatible with its own decision practice.

50 ESA, supported by the Commission, contests this argument. In ESA's view, the concept of an "undertaking" has been defined in the case-law of the ECJ as every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed. ESA argues that the pursuit of an "economic activity" is the decisive factor in determining whether an entity is an "undertaking". According to settled case-law of the ECJ, "economic activity" means "any activity consisting in offering goods and services on a given market", thus presupposing the assumption of risk for the purpose of remuneration.

51 ESA also contends that an important distinction must be made between activities that are truly carried out in-house, i.e. by a department within a company, and services which are provided by a separate legal person, even if it is wholly owned by the recipient of the services. ESA argues that in the latter case, the companies concerned have established a formal structure in which risk is transferred to a company within the group which provides insurance services for arm's length remuneration as an alternative to purchasing insurance on the open market. According to ESA, one reason for adopting that structure is to ensure that the economic activity concerned and the profit are subject to different treatment for tax purposes and that the captive insurance companies can be located in a different tax jurisdiction and taxed at a lower rate. These arguments are essentially supported by the Commission.

52 ESA also disputes the assertions that some of the services covered by the Liechtenstein tax measures are not available on the open insurance market and maintains that no evidence has been adduced by the applicants to establish this point. The Commission argues that the applicants' objection concerning the availability of the services is not valid, as it does not demonstrate that there is not a business activity and a flow of services from one distinct legal person to another.

Findings of the Court

53 Under EEA competition rules, the concept of an undertaking encompasses every entity engaged in economic activity, regardless of its legal status and the way in which it is financed (see Article 1 of Protocol 22 to the EEA Agreement, Cases E-8/00 *Landsorganisasjonen i Norge* [2002] EFTA Ct. Rep. 114, paragraph 62, and E-5/07 *Private Barnehagers Landsforbund* [2008] EFTA Ct. Rep. 62, paragraph 78).

54 According to settled case-law of the ECJ, any activity consisting in offering goods or services on a given market is an "economic activity" (compare, in particular, Case 118/85 *Commission* v *Italy* [1987] ECR 2599, paragraph 7, Joined Cases C-180/98 to C-184/98 *Pavlov and Others* [2000] ECR I-6451, paragraph 75, and Case C-49/07 *MOTOE* [2008] ECR I-4863, paragraph 22).

55 In the contested Decision, ESA found that providing insurance was a service, which, in principle, was an economic activity, and that captive insurance companies offered such services for a premium on a given market. In ESA's view, the fact that captive insurance companies met demand for insurance from certain undertakings was sufficient to conclude that they offered their services on a market. By establishing a captive, the insurance of those risks was, according to ESA, "captive" to one company of the group, which meant that other insurance companies active in the market could not compete for that insurance.

56 As regards the arguments of the applicants relating to the activity of captive insurance companies in the free insurance market, from the documents submitted to the Court, it is impossible to conclude that the facts on which ESA based its findings were inaccurately stated or that there has been any manifest error of assessment or a misuse of powers in this regard. On the contrary, it is apparent from the case-file that captive insurance companies are, at least to some extent, exercising economic activities on the market, even if some of their services are not available, or not available at a reasonable price, on the insurance market.

57 With respect to the applicants' arguments regarding the availability of commercial insurance for the risks insured and the absence of an activity on a market in competition with other market players, it should be borne in mind that, as the present case concerns a State aid scheme, it was legitimate for ESA to confine itself to examining the general characteristics of the scheme at issue, without being required to examine each particular case in which it applies (see, for comparison, Case C-75/97 *Belgium* v *Commission* [1999] ECR I-3671).

Therefore, ESA is not required to examine each particular case in which the regime applies (see, to that effect, Case C-278/00 *Greece* v *Commission* [2004] ECR I-3997, paragraph 24, and the case-law cited therein).

58 For the purposes of applying Article 61(1) EEA to an aid scheme, it is sufficient that the scheme benefits certain undertakings, a finding not called into question by the fact that it may also benefit entities which are not undertakings (compare Case C-66/02 *Italy* v *Commission* [2005] ECR I-10901, paragraphs 91 and 92).

59 It follows that ESA could legitimately confine itself to showing that, although it might be the case that certain risks could not be insured in the market, or not at a reasonable price, captive insurance companies in Liechtenstein did not exclusively provide services not available from commercial insurers (see page 16 of the contested decision).

60 In the light of the foregoing, the argument that captive insurance companies do not constitute "undertakings" within the meaning of Article 61(1) EEA must be dismissed as unfounded.

Selectivity

Arguments of the parties

61 In case the Court upholds ESA's finding that captive insurance companies, or part of their activities, qualify as "undertakings", the applicants argue that the contested tax provisions are not selective measures favouring certain undertakings or the provision of certain goods within the meaning of Article 61(1) EEA. Accordingly, the applicants contend that ESA's findings on this issue are erroneous.

62 The Principality of Liechtenstein argues that in order to constitute State aid, a measure must be selective by favouring certain companies. Liechtenstein and Swisscom further submit that tax measures are only selective if they unreasonably discriminate between situations that are legally and factually comparable in light of objectives set by the tax system. In Swisscom's view, the fact that undertakings are treated differently does not automatically imply that they are favoured for the purposes of the State aid assessment. Therefore, in order to determine whether a measure is selective, it has to be examined, within the context of the particular national system, whether the measure constitutes an advantage for certain undertakings in comparison with others that are in a comparable legal and factual situation.

63 The applicants claim that since captive insurance companies are legally and factually in a different situation to insurance companies that are unrelated, the Liechtenstein tax scheme is not selective. They also maintain that, for those purposes, captive insurance companies have to be distinguished from other companies on account of their intra-group relations.

64 In that regard, the Principality of Liechtenstein argues that the reasoning in the Commission's decisions in the *Groepsrentebox* and *Hungarian Tax Scheme* cases applies equally to the taxation of captive insurance companies under the Tax Act, as there is no reason why intra-group insurance transactions should be taxed differently from intra-group financial credit or debt transactions. Additionally, Reassur submits that as regards the types of risks covered, choice of risks and entities to be insured the position of captive insurance companies differs sufficiently from other insurance companies to justify the difference in regulatory framework.

65 The applicants also submit that the Liechtenstein tax measures apply to all captive insurance companies regardless of their size. Therefore, any legal entity, irrespective of the sector of activity or size of operation, can qualify for the tax measures through ownership of a captive insurance company through which it insures its own risks. The Liechtenstein tax measures are not materially selective, as they merely reflect the reality of group structures. According to the Principality of Liechtenstein and Reassur, the Commission has recognised the "economic reality of group structures" as insufficient to categorise a tax measure selective. Moreover, according to the applicants, the contested Liechtenstein provisions differ from the aid scheme implemented by Finland for captive insurance companies in the *Åland Islands* case, as they are not regionally specific, do not require foreign ownership or a minimum level of economic strength or capitalisation.

66 ESA contends that the measures in question are indeed materially selective. In ESA's view, the beneficiary undertakings are in the same legal and factual situation as those which pay the full income, capital and coupon taxes in Liechtenstein. In contrast, captive insurance companies in Liechtenstein receive a selective advantage. The Commission supports ESA's assessment and submits further that in analysing the selective character of a tax measure, only the differences that are relevant to the objective of the tax system in question can be taken into account. Therefore, the elements cited by the applicants as justifying the difference are irrelevant.

67 In the Commission's view, the fact that the tax measures apply to all captive insurance companies regardless of size, or that the requirements for captive insurance companies are horizontal in nature, is equally irrelevant. What is crucial is that other types of companies which are in the same factual and legal situation cannot benefit from the same tax advantages.

68 ESA also disputes the assertion made by the applicants that creating a captive insurance company is an option open to any undertaking. ESA notes that while it was an essential part of the Commission's reasoning in its decisions in the *Groepsrentebox* and *Hungarian Tax Scheme* cases, cited by the applicants, that the action which leads to the beneficial tax treatment is open to any undertaking, the option of forming a captive insurance company is not.

Findings of the Court

69 The Court recalls that the definition of aid is more general than that of a subsidy. The concept of aid not only includes positive benefits, such as subsidies themselves, but also measures which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which, thus, without being subsidies in the strict sense of the word, are similar in character and have the same effect (compare, inter alia, Joined Cases C-393/04 and C-41/05 *Air Liquide Industries Belgium* [2006] ECR I-5293, paragraph 29, and the case-law cited).

70 A measure by which the public authorities grant certain undertakings a tax exemption which, although not involving a transfer of State resources, places the persons to whom the tax exemption applies in a more favourable financial situation than other taxpayers, constitutes State aid within the meaning of Article 61(1) EEA (see, for the purposes of Article 107(1) TFEU, Case C-387/92 *Banco Exterior de España* [1994] ECR I-877, paragraph 14, and *Air Liquide Industries Belgium*, cited above, paragraph 30).

71 The wording of Article 61(1) EEA requires that a measure must favour certain undertakings or the production of certain goods in order to be classified as State aid. The selective application of a measure therefore constitutes one of the criteria inherent in the notion of State aid (see Case E-6/98 *Norway* v *ESA* [1999] EFTA Ct. Rep., p. 74, paragraph 33, and Joined Cases E-5/04, E-6/04 and E-7/04 *Fesil and Finnfjord and Others* [2005] EFTA Ct. Rep., p. 117, paragraph 77).

72 When applying this criterion, it is necessary to determine whether the measure in question entails advantages accruing exclusively to certain undertakings or certain sectors of activity (compare Cases C-241/94 *France* v *Commission* [1996] ECR I-4551, paragraph 24, C-200/97 *Ecotrade* [1998] ECR I-7907, paragraphs 40-41, and *Belgium* v *Commission*, cited above, paragraph 26). It must be noted, however, that aid in the form of a general scheme may concern a whole economic sector and still be covered by Article 61(1) EEA (compare Cases C-251/97 *France* v *Commission* [1999] ECR I-6639, paragraph 36, and *Belgium* v *Commission*, cited above, paragraph 33).

73 In this regard, it has to be examined whether the Liechtenstein tax provisions are selective in their nature by exempting captive insurance companies in full or in part from the duty to pay certain taxes. If necessary, it must also be examined whether those measures can be justified by the nature and overall structure of the Liechtenstein tax system, as the Principality of Liechtenstein submits.

74 The assessment whether tax provisions "favour certain undertakings or the production of certain goods" under a particular statutory scheme must be conducted on the basis of a comparison with other undertakings which are in a comparable legal and factual situation in the light of the objective pursued by the measure in question (compare, to that effect, Cases C-308/01 *GIL Insurance and Others* [2004] ECR I-4777, paragraph 68, and C-172/03 *Heiser* [2005] ECR I-

1627, paragraph 40). In the case of tax measures, the determination of the reference framework has particular importance for this assessment, since the very existence of an advantage may be established only when compared with "normal" taxation, i.e. the tax rate in force in the geographical area constituting the reference framework (compare Case C-88/03 *Portugal* v *Commission* [2006] ECR I-7115, paragraph 56).

75 The contested Decision concerns the tax provisions which the Liechtenstein authorities implemented in favour of captive insurance companies and the effect of these provisions during the period 6 November 2001 to 31 December 2009. Under those provisions, captive insurance companies were fully exempt from the payment of income and coupon tax, and partially from the payment of capital tax.

76 The tax provisions in question accorded an economic advantage to undertakings active in the captive insurance sector, relieving them from some of the costs which they would otherwise have incurred. They did not benefit undertakings in any other economic sector. Rather, they applied exclusively to the insurance sector, benefitting only those companies which conducted captive insurance operations on behalf of their parent company or companies.

77 The tax provisions also departed from the ordinary tax scheme in granting a tax relief to captive insurance companies to which they would not have been entitled under the normal application of that scheme. Undertakings in other sectors carrying out similar operations, or undertakings in the insurance sector which did not carry out operations such as those referred to in the contested tax provisions, were not entitled to the same treatment (see, mutatis mutandis, Case C-148/04 *Unicredito Italiano* [2005] ECR I-11137, paragraph 50).

78 The applicants assert that the option of forming a captive insurance company is open to any undertaking. The fact remains, however, that only captive insurance companies benefitted from the tax measure. That a certain kind of economic activity may in theory be pursued by any economic actor does not place it outside of the ambit of the State aid rules. It is evident from the answers provided by the Principality of Liechtenstein to the Court's questions on the national law governing the registration of captive insurance companies that the establishment of such a company is limited to those who can provide it with the minimum guarantee fund of EUR 2.3 million, for captive insurance undertakings, and EUR 3.2 million for captive reinsurance undertakings with the possibility of reduction to an amount of at least EUR 1.1 million, subject to the permission of the relevant supervisory authority (see Article 17(2) of the Ordinance on the Insurance Supervision Act).

79 It follows, as ESA correctly held in the contested Decision, that the reductions in the tax rates at issue were selective and not general measures.

On the justification of the measures by the nature and general scheme of the Liechtenstein tax system

80 In light of the above, it has to be examined whether the tax measures at issue may be justified by the nature or the general scheme of the Liechtenstein tax system, a matter which is for the EEA State concerned to demonstrate (see Case *Norway* v *ESA*, paragraph 38, and Joined Cases *Fesil and Finnfjord and Others*, paragraph 83, both cited above).

Arguments of the parties

81 The applicants submit that the contested tax provisions are justified by the nature and general scheme of the Liechtenstein tax system. They maintain that captive insurance companies are essentially an in-house self-insurance vehicle which covers its liabilities with its own resources. Further, insurance coverage with a company's own financial reserve has constantly been treated differently for tax purposes in Liechtenstein and other countries. It is argued that the contested tax provisions merely follow that principle.

82 As regards justification, the applicants also contend that the specific nature of captive insurances is recognised by secondary EEA and EU law. The EU Reinsurance Directive acknowledges that captive insurance undertakings do not cover risks deriving from the external direct insurance or reinsurance business of an insurance or reinsurance undertaking belonging to the group. Furthermore, Swisscom submits that Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) (recast) (OJ 2009 L 335, p. 1) provides for specific adaptations for captive insurance companies on minimum capital requirements. Swisscom argues that the definition and treatment provided for in those directives supports the conclusion that captive insurance can be distinguished from the traditional type of insurance business.

83 ESA and the Commission disagree with those submissions. The Commission notes that, according to case-law, a measure which creates an exception to the application of the general tax system with regard to State aid may be justified by the nature and overall structure of the tax system if the State in question can show that it results directly from the basic or guiding principles of its tax system. As justification based on those grounds constitutes an exception to the prohibition of State aid, it must be interpreted strictly.

84 ESA further contends that the exemption for captive insurance companies is not in line with the logic of the tax system, as claimed by the Liechtenstein authorities. The logic of the tax system is to gain revenue from capital and income generated by an economic activity. ESA maintains that the disputed tax measures are not specific taxes on insurance companies or similar companies where a differentiation resulting from the purpose of the tax would have been conceivable.

85 ESA, supported by the Commission, also contests the arguments of the applicants regarding how a company covering risk out of its own resources is treated differently for tax purposes and the apparent differences between the contested tax measures and the measures at stake in the *Åland Islands* case.

86 In ESA's opinion, those factors, as well as the different treatment of captives under EU and EEA law, do not explain why the exemption for captive insurance companies is consistent with the logic of the tax system. The Commission further claims that, according to the Liechtenstein authorities, the tax measures in question were introduced in order to establish and develop the captive insurance sector as a new field of economic activity in Liechtenstein. It follows that the advantageous treatment granted to captive insurance companies does not result from the basic or guiding principles of the Liechtenstein tax system, but from the desire of the Liechtenstein authorities to foster this activity in the country.

Findings of the Court

87 A measure which creates an exception to the application of the general national tax system can be justified by the nature and overall structure of the tax system, if the EEA State concerned can demonstrate that it follows directly from its basic or guiding principles. In that connection, a distinction must be made between, on the one hand, the objectives attributed to a particular tax scheme which are extrinsic to it and, on the other, the mechanisms inherent in the tax system itself which are necessary for the achievement of such objectives (see, for comparison, Cases *Portugal* v *Commission*, cited above, paragraph 81, and Joined Cases T-195/01 and T-207/01 *Government of Gibraltar* v *Commission* [2002] ECR II-2309, paragraph 144).

88 The Principality of Liechtenstein has not shown that the contested provisions entail an adaptation of a general scheme particular to the functioning or effectiveness of the tax system. On the contrary, it is apparent from the case-file that the provisions were expressly adopted by the national authorities as a means of attracting certain undertakings to take up activities in Liechtenstein and improving the competitiveness of such undertakings.

89 Accordingly, it has not been demonstrated that the measures at issue are justified by the nature and overall structure of the Liechtenstein tax system. Therefore, ESA was correct to state in the contested Decision that the difference between the charges resulting from the tax reductions on revenue in question is not justified by the nature or the overall structure of the Liechtenstein tax system.

Distortion of competition and effect on intra EEA-trade

Arguments of the parties

90 In case the Court finds that the contested tax provisions conferred selective advantages on insurance companies, the applicants contend that those provisions did not have an effect on EEA trade or result in a distortion of competition. They

submit that as captive insurance companies neither compete for market share in the open insurance market nor deal with risks that are normally insurable on the open market, as commercial insurers do, their activities have no effect on EEA trade. Hence, there can be no distortion of competition within the meaning of Article 61(1) EEA. Moreover, Reassur submits that ESA failed to assess the contested tax provisions in this regard, thereby violating its obligation to fully investigate the facts and, thus, committing a manifest error of law.

91 ESA argues that it is irrelevant whether the activities of all captive insurance companies may have an effect on EEA trade or distort competition. The measures under assessment in the contested Decision constitute an aid scheme, which, according to settled case-law of the ECJ, is not subject to the same form of examination as individual grants of aid. ESA contends that it follows from case-law that the Commission may confine itself to examining the general characteristics of an aid scheme without being required to examine each particular case to which it applies.

92 The Commission supports ESA's view, adding that a finding that the scheme in question does not constitute State aid may only be made where all possible cases of its application raise no State aid concerns. According to the Commission, in the present case, such a finding would only be possible if no captive insurance operation had the capacity to distort competition and have an effect on trade.

93 In response to this argument, the applicants contend that, given the limited number of beneficiaries of the alleged aid scheme, ESA was not, as a matter of principle, entitled to rely on this less strict standard of assessment. Moreover, they argue that the coverage of risks which are not insurable on the market constitutes an essential characteristic of captive insurance and, thus, of the alleged aid scheme in question. Therefore, even if ESA had been entitled to rely on this less strict standard of assessment, it would have been obliged to investigate further and determine the extent to which captives cover otherwise uninsurable risks and, consequently, the extent to which the contested tax measures do not constitute State aid within the meaning of Article 61(1) EEA. According to the applicants, in the absence of the further investigation and determination needed, ESA has not even satisfied the less strict standard of assessment on which it relies.

Findings of the Court

94 With regard to the argument that ESA erred in concluding that there is an effect on trade between EEA States and a distortion of competition, the Court must consider whether the aid in question is capable of strengthening the position of an undertaking as compared to other undertakings competing in EEA trade.

95 In this context, it must be recalled that ESA is not required to establish that such aid has an appreciable effect on trade between EEA States and that competition is actually being distorted, but only to examine whether such aid is liable to affect trade and distort competition (see Joined Cases *Fesil and Finnfjord and Others*,

paragraph 93, and, for comparison, Case C-66/02 *Italy* v *Commission*, paragraph 111, *Unicredito Italiano*, paragraph 54, and *Air Liquide Industries Belgium*, paragraph 34, all cited above).

96 In the present case, it is not disputed that some of the captive insurance companies are, at least for some of their services, in competition with other insurance undertakings. The advantage conferred on the captive insurance companies by the Liechtenstein tax measures in question strengthened their financial situation and, consequently, was likely to improve their competitive position to the detriment of potential competitors in other EEA States.

97 In the light of those circumstances, the Court holds that ESA sufficiently established that the tax measures at issue in the present proceedings were liable to affect trade and distort competition within the meaning of Article 61(1) EEA. Consequently, ESA was not under an obligation to carry out a market analysis (see Joined Cases *Fesil and Finnfjord and Others*, cited above, paragraph 94).

98 Having regard to the foregoing, the Court concludes that ESA has shown that competition was distorted and intra-EEA trade was liable to be affected by the tax measures at issue.

99 It follows from all of the foregoing considerations that the first plea must be rejected.

VI The second main plea, alleging incorrect classification of the measures as "new aid"

Existing aid or new aid

Arguments of the parties

100 If the Court upholds ESA's conclusion that the contested tax provisions constitute State aid within the meaning of Article 61(1) EEA, the applicants contend that the provisions qualify as "existing" aid under Article 1(b)(i) and/or Article 1(b)(v) of Part II of Protocol 3 to the SCA.

101 The applicants argue that the contested tax provisions did not constitute State aid when they were introduced, but became aid as a result of the evolution of EEA law and without being altered by Liechtenstein. Therefore, Article 1(b)(v) of Part II of Protocol 3 is applicable to the disputed provisions, either directly or by analogy. According to that Article, aid is deemed to be existing aid if it can be established that it did not constitute aid at the time it was put into effect, but subsequently became aid due to the evolution of the EEA and without having been altered by the EFTA State.

102 The applicants submit that prior to the introduction of the measures in 1997, with effect from 1998, the Commission had made its view known on numerous occasions, such as in the *Belgian Co-ordination Centres* case, that comparable

measures relating to intra-group activities did not constitute State aid. The applicants contend that this view started to change in 1998, following the publication of the Council's Code of Conduct for business taxation and the subsequent Commission notice on the application of the State aid rules to measures relating to direct business taxation. However, the Commission did not publicly assert that the Belgian co-ordination centres scheme might constitute State aid before June 2002, when its decision to open a formal investigation on that matter was published in the Official Journal.

103 Reassur and Swisscom submit that, following the 1998 policy change, the Commission reconsidered its position on the Belgian co-ordination centres scheme. However, having regard to its change of interpretation and enforcement of the State aid rules with regard to business taxation, the Commission found that the scheme in question qualified as "existing aid" pursuant to Article 1(b)(v) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the Application of Article 93 of the EC Treaty (OJ 1999 L 83, p. 1). It did so because it could be shown that it was not aid at the time of entry into force, but was classified as aid at a later stage as a result of developments in the common market. Reassur and Swisscom submit that this approach has subsequently been accepted by the ECJ and followed by the General Court and that the Commission has also followed it ever since its decision to reconsider its position on the Belgian co-ordination centres schemes.

104 Furthermore, Reassur specifically argues that no substantial amendment to the taxation of its business took place prior to the date the EEA Agreement came into force. In that regard, Reassur indicates that it has been engaged in insuring risks of companies belonging to the Schindler group in Liechtenstein since 1989, initially in the legal form of an *Anstalt* (institute) and later as an *Aktiengesellschaft* (joint stock company). Reassur maintains that, originally, in its form as an institute, it was subject to capital tax at a rate of 0.1%. When the contested tax provisions were introduced, the tax rates applicable to institutes were extended to captive insurance companies. Consequently, the taxation of Schindler's insurance captive has remained unchanged.

105 Based on this, Reassur argues that the rules on taxation of captive insurance already existed before the EEA Agreement came into force in Liechtenstein. Therefore, and as these rules have not been substantially amended ever since, they should be qualified as "existing aid" in accordance with Article 1(b)(i) of Part II of Protocol 3 to the SCA. Reassur submits that amendments to "existing aid" do not per se qualify as "alterations of existing aid" rendering it "new aid". Only substantial changes affecting the "core" of the advantage can have this effect. Moreover, changes which appear prima facie to be significant are not sufficient for a scheme to qualify as "new aid". Nor does a mere change in the legal form of the eligible beneficiaries, such as the change in Reassur's case from an institute to a company, result in a different conclusion.

106 ESA submits that the contested tax provisions were introduced in December 1997, after the entry into force of the EEA Agreement in Liechtenstein. Hence,

the measures must be classified as new aid, in accordance with Article 1(c) of Part II of Protocol 3.

107 In relation to the argument advanced by the applicants, namely, that the contested tax provisions only became State aid as a result of the “evolution of the common market”, ESA, supported by the Commission, submits that this concept must be understood as a change in the economic and legal framework of the sector concerned by the measure in question, and that it does not cover the situation where the Commission alters its appraisal.

108 ESA, supported by the Commission, further contends that the references made by the applicants to the practice of the Commission are irrelevant for the purposes of determining whether a measure should be classified as new or existing aid. This turns on the interpretation of Article 61(1) EEA, or, mutatis mutandis, Article 107(1) TFEU, neither of which is subject to the discretion of ESA or the Commission.

109 ESA also specifically contests the relevance of the Commission Decision on the *Hungarian Tax Scheme*, referred to by the applicants, for the purposes of the present case. That decision only deals with a particular pre-accession context, whereas the measures in Liechtenstein were introduced well after the EEA Agreement had entered into force.

110 Reassur argues that the measures must be regarded as existing aid on the basis that Schindler’s insurance captive is said to have been active and subject to favourable tax treatment since 1989. In this regard, ESA submits that contentions that a different entity may have had tax concessions before the enactment of a new aid scheme are incapable of turning the new aid scheme into existing aid. In that regard, ESA argues that the classification of the measure as new or existing aid must be made at the level of the measure itself and not at the level of possible individual beneficiaries under the scheme.

Findings of the Court

111 Whether the contested tax provisions constituted “existing aid” not subject to recovery, depends upon the interpretation of the provisions of Protocol 3 to the SCA, which governs the procedure and the powers of ESA in the field of State aid. The Protocol corresponds to Article 108 TFEU and Council Regulation No 659/1999. Part II of Protocol 3 essentially replicates the Regulation.

112 The purpose of Protocol 3 is to enable ESA to examine and keep under constant review aid granted by the States or through State resources. The Protocol makes provision for separate procedures of investigation, depending on whether the aid concerned is existing or new aid.

113 With respect to existing aid, Article 1(1) of Part I of Protocol 3 gives ESA the power to keep under constant review the aid systems existing in the EEA States, in cooperation with these States. In the context of that review, it is ESA’s task to

propose to the EEA States any appropriate measures required by the progressive development or by the functioning of the EEA Agreement.

114 Paragraph 2 of the same Article provides that if ESA finds, after having given notice to the parties concerned to submit their comments, that aid is not compatible with the EEA Agreement, or that such aid is being misused, it shall decide that the EEA State concerned must abolish or alter such aid within a period of time to be determined by ESA (see, for comparison, Case C-47/91 *Italy* v *Commission* [1992] ECR I-4145, paragraph 23). As far as existing aid is concerned, the initiative, therefore, lies with ESA.

115 As for new aid, Article 1(3) of Part I of Protocol 3 provides that ESA is to be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. ESA then proceeds to an initial examination of the planned aid. If, at the end of that examination, it considers that any such plan is not compatible with the EEA Agreement, it must initiate the formal investigation procedure provided for in Article 1(2) of Part I of Protocol 3.

116 In such a case, the final sentence of Article 1(3) of Part I of Protocol 3 prohibits the EEA State concerned from putting the proposed measures into effect until the procedure has resulted in a final decision. New aid is therefore subject to preventive control by ESA, and in principle may not be granted until ESA has declared it compatible with the EEA Agreement (see for comparison Case C-47/91 *Italy* v *Commission*, cited above, paragraph 24).

117 The notion of "existing aid" is defined in Article 1(b)(i) of Part II of Protocol 3 as "all aid which existed prior to the entry into force of the EEA Agreement in the respective EFTA States, that is to say, aid schemes and individual aid which were put into effect before, and are still applicable after, the entry into force of the EEA Agreement".

118 The determination whether a measure constitutes aid and, having regard to the different regimes governing recovery, whether aid is new or existing cannot depend upon a subjective assessment by ESA. The mere fact that for an admittedly long period ESA does not open an investigation into a State measure cannot in itself confer on that measure the objective nature of existing aid, that is, if indeed it constitutes aid (see, for comparison, Case C-295/97 *Piaggio* [1999] ECR I-3735, paragraphs 45 to 47). Any uncertainty which may have existed in that regard may at most be regarded as having given rise to a legitimate expectation on the part of the recipients so as to prevent recovery of the aid granted in the past (see, to that effect, *Fesil and Finnfjord and Others*, paragraph 148, and *Government of Gibraltar* v *Commission*, paragraph 129, both cited above).

119 Accordingly, the question whether a State measure qualifies as existing aid or as new aid must be resolved without reference to the time which has elapsed since the measure was introduced and independently of any previous administrative practice of ESA.

120 In the case at hand, the contested provisions were introduced into the Tax Act in 1997, with effect from 1 January 1998. Therefore, they were enacted after Liechtenstein's accession to the EEA Agreement. Consequently, the measures cannot be regarded as "existing aid" within the meaning of Article 1(b)(i) of Part II of Protocol 3.

121 The applicants refer to the Commission's practice regarding the taxation of intra-group activities in the *Belgian Co-ordination Centres* cases and the judgment of the General Court in Joined Cases T-50/06, T-56/06, T-60/06, T-62/06 and T-69/06 *Ireland and Others* v *Commission* [2007] ECR II-172. However, the factual and legal situation in those cases differs considerably from the one in the present case. Therefore, those rulings cannot serve as precedents for classifying the contested tax provisions in the present dispute as existing aid.

122 Moreover, contrary to the argument advanced by Reassur, it is irrelevant whether the group to which Reassur belongs (Schindler) has operated an insurance captive which has received favourable tax treatment in Liechtenstein since 1989. Whether a measure constitutes new or existing aid must be made by reference to the provisions providing for the aid and not at the level of the beneficiaries (compare Case C-44/93 *Namur-Les Assurances du Crédit* [1994] ECR I-3829, paragraph 28). However, there is nothing in the case-file to suggest that the introduction of the special tax measures for captive insurance undertakings was a non-substantial alteration of a pre-existing tax scheme for captive insurance activity, or, for that matter, that any previous aid scheme for captive insurance activity existed. Apart from its claim that Schindler's captive insurance institute was subject to the same tax treatment, Reassur submitted no information concerning the legal basis, nature or functioning of the alleged pre-existing tax scheme. Therefore, it must be held that the aid measure was introduced in 1997.

123 It follows that the pleas of the applicants asserting that the contested tax provisions constitute "existing aid" within the meaning of Protocol 3 must be rejected.

VII The third main plea, alleging violation of general principles of EEA law

Legitimate expectations

Arguments of the parties

124 The applicants claim that by ordering the recovery of the alleged aid from 6 November 2001 ESA has violated the principle of legitimate expectations. The applicants specifically contest ESA's view that their legitimate expectations ceased to exist with the Commission's decision to open a formal State aid investigation regarding the scheme for captive insurance companies in the *Åland Islands* case.

125 In that regard, the applicants argue that the assessment of business taxation in EU State aid law has been subject to a high degree of uncertainty and that ESA is, in fact, according a much lower standard of protection for legitimate expectations in relation to economic operators under the EEA Agreement than applied by the Commission under EU law. The applicants contend that the decision to open the formal investigation only provides for a preliminary assessment and never expresses a final opinion on the State aid measures under assessment. Consequently, in cases where it assessed intra-group tax schemes, the Commission never ordered the recovery of unlawful State aid from the day of the opening of the formal investigation, and certainly not in cases where the opening decision concerned an unrelated third-party case.

126 The Principality of Liechtenstein submits that in all cases concerning intra-group tax schemes, the period for which legitimate expectations are protected extends to the date of the final decision. Reassur asserts that although the Commission has considered legitimate expectations to cease on the day of the opening decision in individual State aid cases, this has always concerned the opening of the formal investigation procedure concerning a specific measure, and not a parallel case regarding a similar aid measure. The Principality of Liechtenstein and Reassur also argue that the *Åland Islands* case differs substantially from the present case and, as a result, does not affect the legitimate expectations of the applicants. In that regard, the applicants submit that the contested tax measures in those two cases were different, in that the Åland Islands scheme was regionally specific and a captive insurance company had to be initially owned by a foreign entity in order to benefit from the Finnish scheme.

127 Further, the applicants contend that since the full text of the Commission's decision was only available in Finnish, it is difficult to see how captive insurance companies in Liechtenstein could have been adequately informed about their potential repayment obligations.

128 ESA submits that, according to ECJ case-law, the right to rely on the principle of the protection of legitimate expectations applies to any individual in a situation in which an institution of the European Union, by giving that person precise assurances, has led him to entertain well-founded expectations. Such assurances, in whatever form they are given, constitute precise, unconditional and consistent information.

129 ESA argues that information containing such assurances is rare in the field of State aid. In principle, undertakings to which aid has been granted may not entertain legitimate expectations, unless that aid has been granted in accordance with the notification procedure laid down in Article 1(3) of Part I of Protocol 3.

130 In ESA's view, in exceptional cases, an undertaking may rely on the principle of protection of legitimate expectations, despite no specific assurance being given. That applies where an undertaking can be sufficiently certain, as a result of ESA's or, arguably, the Commission's, behaviour or actions, that the tax

exemption they benefited from did not constitute State aid within the meaning of Article 61(1) EEA.

131 However, ESA claims that this does not apply in the case at hand. When the EEA Agreement entered into force in Liechtenstein in 1995, the relevant *acquis communautaire* clearly indicated that exemption from any tax that would otherwise be applicable to an undertaking was likely to constitute State aid within the meaning of Article 61(1) EEA. ESA maintains, moreover, that this position was confirmed shortly afterwards by its decisions on tax measures in Finland and Norway, and that the issue of tax competition became highly relevant as a result of the publication of the Commission notice on State aid and business taxation in 1998.

132 ESA observes that it has given the applicants the benefit of doubt in relation to their legitimate expectations concerning the lawfulness of the contested tax provisions for the period from their enactment to 6 November 2001. At that time, however, when the Commission published its decision to open a formal investigation into tax measures applicable to captive insurance companies in Finland (the Åland Islands), at the latest, their expectations must have come to an end. That decision was taken as a part of a large-scale State aid investigation into business taxation schemes concerning fifteen tax exemption measures across twelve Member States.

133 According to ESA, a meaningful summary in English of the decision to open the formal investigation procedure into tax exemptions for captive insurance companies was published on 6 November 2001 in the Official Journal. That summary describes the measure "as a tax advantage when compared to the normal rate of corporation tax" applicable to "captive insurance companies, satisfying certain conditions". Those conditions required the captive insurance company to be located in the Åland Islands, be owned by a foreign proprietor, and limit its activities to providing insurance services to its owner.

134 In ESA's view, the publication of 6 November 2001 was sufficiently clear and precise to warn any prudent operator that the Liechtenstein captive insurance scheme was likely to be characterised as operating aid. Since such aid would only be declared compatible in exceptional circumstances and could not normally be exempted from the general prohibition on State aid, its recovery from the beneficiaries would be a likely outcome. ESA submits further that the differences, highlighted by the applicants, between the Åland Islands scheme and the contested tax provisions in the case at hand are not relevant.

135 The Commission supports ESA's view. It contends that following the adoption of a decision to initiate the procedure under Article 108(2) TFEU, there is, at the very latest, a significant element of doubt as to the legality of a measure. Accordingly, no prudent operator could entertain a legitimate expectation that a measure such as the one at issue did not constitute State aid.

136 According to the Kingdom of Norway, any trader in regard to whom an institution has given rise to justified hopes may rely on the principle of protection of legitimate expectations. Consequently, it follows from settled Commission practice, implicitly upheld by the ECJ, that beneficiaries under a scheme in one Member State may derive legitimate expectations capable of preventing recovery of aid granted, from, inter alia, a Commission decision finding that a similar scheme in another Member State does not constitute State aid.

137 Norway accepts, in principle, ESA's premise that Commission decisions may negate legitimate expectations concerning the compatibility with State aid rules of similar measures in other Member States, in the same vein as such decisions may give rise to legitimate expectations in the first place. However, Norway takes the view that this likewise dictates that there must be a certain symmetry between the circumstances which gave rise to the justified hopes and those which are capable of disrupting them.

138 Norway observes that in cases where the Commission has acknowledged that the beneficiaries had legitimate expectations based on its practice, it does not consider the decision to open a formal investigation to negate the legitimate expectations held by the beneficiaries. Accordingly, it follows, a fortiori, that a decision to open a formal investigation procedure relating to another Member State, in particular concerning national rules, may not negate legitimate expectations based on previous practice. Hence, legitimate expectations in the case at hand may at the earliest have been countered by the Commission's final decision in the *Åland Islands* case on 5 December 2002.

139 Further, the Kingdom of Norway argues that Commission practice also indicates that the relevant date on which legitimate expectations may be regarded as exhausted under such circumstances is the date of adoption of the final decision where the scheme to which the beneficiaries belong is classified as unlawful aid. In that respect, Norway refers to the numerous cases opened by the Commission on the same date as the *Åland Islands* case on 11 July 2001. In all those cases the Commission found that the relevant beneficiaries entertained legitimate expectations until the adoption of the final decision in the specific case and, thus, barring any recovery of State aid granted before that date.

140 Accordingly, Norway submits that, having regard to the Commission's practice and to ensure an uniform approach to the issue across the European Economic Area, it appears that the legitimate expectations of the beneficiaries prevented recovery of State aid granted before ESA's final decision on 24 March 2010. All the same, Norway does not exclude the possibility that legitimate expectations may have been negated at an earlier date, such as when the beneficiaries of State aid were informed that previous practice has been revised. Therefore, in the alternative, it argues that legitimate expectations prevented recovery of State aid granted before 24 September 2008, when ESA decided to open a formal investigation of the contested tax provisions.

Findings of the Court

141 The abolition, by means of recovery, of State aid which has been unlawfully granted is the logical consequence of a finding that it is unlawful. The aim of obliging the State concerned to abolish aid found by ESA to be incompatible with the EEA agreement is to restore the previous situation (see, to that effect, *Fesil and Finnfjord and Others*, cited above, paragraph 152, and, for comparison, Case C-310/99 *Italy* v *Commission* [2002] ECR I-2289, paragraph 99, and the case-law cited therein).

142 By repaying the aid, the recipient forfeits the advantage which it had enjoyed over its competitors on the market, and the situation prior to payment of the aid is restored (compare Cases C-350/93 *Commission* v *Italy* [1995] ECR I-699, paragraph 22, and C-277/00 *Germany* v *Commission* [2004] ECR I-3925, paragraph 75). It also follows from that function of repayment of aid that, as a general rule, ESA will not, save in exceptional circumstances, exceed the bounds of its discretion, as recognised by case-law, if it asks the EEA State in question to recover the sums granted by way of unlawful aid, since it is only restoring the previous situation (see, to that effect, *Fesil and Finnfjord and Others*, paragraph 170, and the case-law cited).

143 As regards the right of Reassur and Swisscom to rely on the principle of legitimate expectations and the compatibility of ESA's decision with that principle, it has repeatedly been held by the Union Courts that this principle extends to any economic operator in a situation where a European Union institution has caused him to entertain expectations which are justified. However, a person may not plead infringement of that principle unless he has been given precise assurances by that institution. Similarly, if a prudent and alert economic operator could have foreseen the adoption of a measure likely to affect his interests, he cannot plead that principle if the measure is adopted (see, to that effect, Joined Cases C-182/03 and C-217/03 *Belgium and Forum 187* v *Commission* [2006] ECR I-5479, paragraph 147, and the case-law cited, Cases C-519/07 P *Commission* v *Koninklijke FrieslandCampina* [2009] ECR I-8495, paragraph 84, and C-67/09 P *Nuova Agricast and Cofra* v *Commission* [2010] ECR I-0000, paragraph 71).

144 In the contested Decision, recovery of the aid was ordered from 6 November 2001 onwards, that is, from the date when the Commission's decision to open the formal investigation regarding the tax measures in favour of captive insurance companies in the Åland Islands was published in the Official Journal.

145 The applicants specifically submit, in their written and oral pleadings, that, as a result of the Commission's practice in regard to special taxation schemes for intra-group measures, they were led to entertain legitimate expectations as concerns the advantages conferred by the Liechtenstein tax provisions. However, the case-file contains no indication to the effect that Reassur or Swisscom were given any assurances that the tax provisions on captive insurance companies were in accordance with EEA rules on State aid.

146 In response to the applicants' submissions, it must be observed, first of all, that the Commission decisions referred to by the applicants, as forming the basis for legitimate expectations, all concern derogations from the general principle, set out in Article 61(1) EEA and Article 107(1) TFEU, that State aid is incompatible with the internal market of the European Economic Area.

147 Given that such exceptions to the general principle are to be interpreted strictly (see Case C-277/00 *Germany* v *Commission*, cited above, paragraph 20, and Joined Cases C-346/03 and C-529/03 *Atzeni and Others* [2006] ECR I-1875, paragraph 79), no prudent and alert economic operator could have inferred from those decisions that the scheme for the taxation of captive insurance companies in Liechtenstein would be regarded as compatible with the State aid rules of the EEA Agreement or, for that matter, have reached the broader conclusion that the scheme need not be notified to ESA. Even if there may have been some uncertainty regarding the exact scope of the State aid rules prior to the publication of the Commission's notice on State aid and business taxation in 1998, the Court recalls that it was already established at the time of the introduction of the contested measures that the alleged fiscal or social nature of a measure does not suffice to shield it from the application of the State aid rules (see Case *Italy* v *Commission*, cited above, paragraph 13).

148 Further, in light of the mandatory nature of the review of State aid by ESA under Article 63 EEA and Protocol 3, undertakings to which aid has been granted may not, in principle, entertain a legitimate expectation that the aid is lawful, unless it has been granted in compliance with the procedure laid down in that Article. Moreover, a diligent economic operator should normally be able to determine whether that procedure has been followed. In particular, where aid is implemented without prior notification to ESA, so that it is unlawful under Article 1(3) of Part I of Protocol 3, the recipient of the aid cannot as a rule have a legitimate expectation that its grant is lawful (see, for comparison, in relation to Article 88(3) EC, now Article 108(3) TFEU, Joined Cases C-183/02 P and C-187/02 P *Demesa and Territorio Histórico de Álava* v *Commission* [2004] ECR I-10609, paragraphs 44 and 45, and the case-law cited, and *Unicredito Italiano*, cited above, paragraph 104).

149 In the case at hand, the publication on 6 November 2001 of the Commission decision of 11 July 2001 to open the formal procedure as regards the tax measures in favour of captive insurance companies in the Åland Islands informed potential beneficiaries of similar measures in the EEA States of the risk attached to any aid in breach of Article 61(1) EEA, in that recovery might be ordered. After publication, there was clearly a situation of uncertainty as to the legality of the measure. Beneficiaries were made aware of the possibility that the aid might be considered to infringe Article 61(1) EEA and recovery could be sought. In that case, they should either not accept the advantages or make provision for possible subsequent financial consequences in accordance with general accounting practices (see Joined Cases *Fesil and Finnfjord and Others,* paragraph 172).

150 It follows that the plea based on infringement of the principle of protection of legitimate expectations must be rejected.

Legal certainty, homogeneity and equal treatment

Arguments of the parties

151 The Principality of Liechtenstein and Swisscom submit that the recovery of the alleged aid from 6 November 2001 would be in violation of the principles of legal certainty, homogeneity and equal treatment. They contend that the fundamental requirement of legal certainty is to ensure that situations and legal relationships governed by EEA law remain foreseeable. That principle requires that every EEA measure having legal effects must be clear and precise, and must be brought to the notice of the persons concerned in such a way that they can ascertain exactly the time at which the measure comes into being. In the applicants' view, the requirement must be observed all the more strictly in the case of a measure liable to have financial consequences so that those concerned may know precisely the extent of the obligations which it imposes on them.

152 Further, it is argued that in order for an aid to be subject to recovery, the alleged national aid measures have to be identified in advance with a degree of clarity and specificity which is necessary to sufficiently inform private operators. It is the position of the Principality of Liechtenstein and Swisscom that a decision to open a formal State aid investigation in a third country can never serve to identify an alleged national aid measure with sufficient clarity and specificity.

153 On the issue of homogeneity and equal treatment, the Principality of Liechtenstein and Swisscom argue that the Decision breaches these principles because the Commission has not ordered recovery of aid in similar cases. They submit that when the Commission has assessed national intra-group schemes, it has always done so individually and never linked them to decisions initiating formal proceedings in other cases. They contend, moreover, that this approach has been confirmed by the Union Courts.

154 ESA, with the support of the Commission, submits that this part of the plea is unfounded. In the only similar decision dealing with captive insurance (the *Åland Islands* case) the issue of recovery of the incompatible aid was clearly contemplated. Although no recovery was ordered, since no aid had actually been granted after the scheme entered into force, there can be no doubt that the Commission would have ordered recovery if the aid had been granted. Furthermore, ESA contests the substance of the approach described by the applicants as having been confirmed by the Union Courts. In that regard, ESA notes that in the cases referred to, the Commission had indeed made certain explicit statements to the applicants concerned. However, that is not the case in these proceedings.

155 The Commission submits that its practice in other cases cannot affect the legality of the contested Decision. As already indicated, the elimination of unlawful State

aid by means of its recovery is the logical consequence of a finding that it is unlawful. The Commission further contends that ESA enjoys no discretion in ordering recovery.

Findings of the Court

156 Legal certainty is a fundamental principle of EEA law, which may be invoked not only by individuals and economic operators, but also by EEA States (see Joined Cases *Fesil and Finnfjord and Others*, cited above, paragraph 163). In particular, this principle requires rules involving negative consequences for individuals to be clear and precise and their application predictable for those subject to them (see, for comparison, Case C-226/08 *Stadt Papenburg* [2010] ECR I-0000, paragraph 45, and, to the same effect, Cases C-63/93 *Duff and Others* [1996] ECR I-569, paragraph 20, and C-76/06 P *Britannia Alloys & Chemicals* v *Commission* [2007] ECR I-4405, paragraph 79).

157 With respect to the argument of the applicants that ESA infringed the principle of legal certainty by adopting the date of publication of the Commission's decision in the *Åland Islands* case as the date from which the aid was recoverable, the Court finds that the same considerations must apply to the position of the applicants in this regard as was noted in paragraphs 147-149 above concerning the existence of legitimate expectations.

158 Accordingly, neither the EEA State in question nor the recipients involved can plead the principle of legal certainty in these circumstances in order to prevent recovery of the aid, since the risk of recovery was foreseeable.

159 The Principality of Liechtenstein and Swisscom also claim that ESA infringed the principles of equal treatment and homogeneity to the extent that it did not take account of the practice of the Commission in its application of the principle of legitimate expectations. In that regard, the Principality of Liechtenstein submits that the Commission has not ordered the recovery of aid in similar cases.

160 The Court notes that it is clear from settled case-law of the Union Courts that compliance with the principle of equal treatment requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified (see Case C-248/04 *Koninklijke Coöperatie Cosun* [2006] ECR I-10211, paragraph 72, and the case-law cited therein).

161 The applicants in the present case have not established that the situation pertaining to the aid schemes at issue is comparable to the situations pertaining in the decisions to which they make reference, where the Commission considered that recovery of aid should not be ordered.

162 In the decisions referred to by the applicants concerning, inter alia, aid schemes, the non-recovery of aid was justified by circumstances capable of giving rise to a legitimate expectation that the schemes were lawful. That was taken into account

by the Commission, with particular consideration given to the fact that declarations of the absence of aid had been expressly made in other decisions concerning measures analogous to the schemes examined in the decisions in question, and, consequently, that justified non-recovery of the aid.

163 In the case at hand, the situation is different as the applicants could not entertain any legitimate expectations based on decisions by the Commission or ESA concerning measures analogous to the Liechtenstein tax provisions on captive insurance companies. On the contrary, it must be observed that, at the very latest, from 6 November 2001 onwards, when the Commission's decision to open the formal investigation regarding the tax measures in favour of captive insurance companies in the Åland Islands was published in the Official Journal, there was clearly a situation of uncertainty as to the legality of the contested Liechtenstein tax provisions, as was noted in paragraph 149 above.

164 It follows that, with regard to the issue of recovery, the circumstances at issue in the present case are not comparable to those at issue in the decisions referred to by the applicants where the Commission did not order recovery of aid. Consequently, the applicants have not demonstrated any infringement of the principle of equal treatment.

165 In light of the foregoing, the applicants' plea based on infringement of the principle of legal certainty, equal treatment and homogeneity must be rejected.

VIII The fourth main plea, alleging a failure to state adequate reasons under Article 16 of the SCA

Insufficient statement of reasons

Arguments of the parties

166 Finally, the applicants argue that the Decision lacks reasoning on a number of points. The Principality of Liechtenstein and Swisscom argue that the reasoning provided is inadequate on several issues, such as the extent to which there is a commercial market for all captive insurance companies, the selectivity of the contested tax provisions and on the recovery of the alleged State aid. In addition, Reassur argues specifically that the Decision lacks reasoning in support of ESA's assessment that the contested tax provisions were not justified by the nature and general scheme of the Liechtenstein tax system.

167 ESA submits that the Decision contains adequate reasons within the meaning of Article 16 of the SCA. According to settled case-law, the statement of reasons must be appropriate to the act at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question, in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent Court to exercise its power of review.

168 Furthermore, ESA argues that the requirements to be satisfied in that regard depend on the circumstances of each case. In particular, what matters is the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measures, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. In ESA's view, it is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question.

169 In that regard, ESA maintains that it is important to recall that it was assessing a general scheme and, thus, examined the scheme as a whole. To be considered an aid under Article 61 EEA, a measure must fulfil four criteria. First, it must accord an advantage to the beneficiaries. Second, the aid must be granted by the State or through State resources. Third, it must affect competition and trade between EEA States. Finally, the measure must be specific or selective in that it favours certain undertakings or the production of certain goods. ESA submits that all of these criteria are accounted for in its reasoning.

170 The Commission supports ESA's view, adding that the contested Decision discloses in a clear and unequivocal fashion the reasoning followed by ESA in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the Court to exercise its power of review. It further submits that the statement of reasons is fully in line with the case-law on the requirements relating to reasoning.

Findings of the Court

171 In relation to the argument that ESA failed to comply with its obligation under Article 16 of the SCA, the Court notes that the statement of reasons required by the Article must be appropriate to the measure at issue. It must disclose in a clear and unequivocal fashion the reasoning followed by ESA, in such a way as to enable the persons concerned to ascertain the reasons for the measure and thus enable them to defend their rights and enable the Court to exercise its power of review (see Cases E-2/94 *Scottish Salmon Growers* v *ESA* [1994/1995] EFTA Ct. Rep., 59, paragraph 25; *Norway* v *ESA*, cited above, paragraph 68; Joined Cases *Fesil and Finnfjord and Others*, cited above, paragraph 96).

172 The requirements to be satisfied by the statement of reasons depend on the circumstances of each case. In particular, what matters is the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 16 of the SCA must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (compare Case *Commission* v *Ireland and Others*, cited above, paragraph 77, and the case-law cited).

173 In particular, ESA is not obliged to adopt a position on all the arguments relied on by the parties concerned. Instead, it is sufficient if it sets out the facts and the legal considerations having decisive importance in the context of the decision (see, for comparison, Case T-198/01 *Technische Glaswerke Ilmenau* v *Commission* [2004] ECR II-2717, paragraphs 59 and 60, and the case-law cited).

174 In the light of those principles, it is appropriate to consider whether the contested decision contains a sufficient statement of reasons as regards the various aspects raised.

175 First, it must be examined whether the Decision provides sufficient reasons for ESA's conclusions on the extent to which there is a commercial market for all captive insurance companies. Second, the reasoning as regards the selectivity of the contested tax provisions and, third, the reasoning why ESA did not consider the tax provisions justified by the nature and the general scheme of Liechtenstein's tax system will be examined. Finally, the Court will examine the reasoning on the issue of recovery.

The first part of the fourth plea: reasons given for the extent to which there is a commercial market for all captive insurance companies

176 In chapter 1.2.1. of its Decision, ESA stated that providing insurance is a service, which in principle is an economic activity and that captive insurance companies offer insurance services for a premium on a given market. The fact that the clients of captive insurance companies are restricted only to undertakings of the same group to which they belong did not affect this conclusion.

177 ESA then went on to address the arguments submitted in the administrative procedure that captive insurance companies only provide in-house services and are not active on the commercial market. ESA observed that competition in the insurance market is impacted upon by the availability of alternatives to taking out traditional insurance products. ESA also described its view that there were three main alternatives; self-insurance, captive insurance and alternative risk transfer products. In each case, the primary reason for using a substitute for insurance was the potential for reducing costs.

178 In ESA's view, a captive insurance company enabled investment income on the premiums to be retained within the group and potentially allowed for more flexibility in the pattern of premiums. Although these were not necessarily perfect substitutes for insurance, they posed a degree of competitive restraint on the insurance market. Captive insurance companies were, therefore, considered to be an alternative to the third party insurance available in the market.

179 ESA then stated its disagreement with the contention that the services provided by captives are not alternatives to commercial insurance, affirming its conclusion that captive insurance was a service substitutable for commercial insurance. Even if certain risks could not be insured in the market or could not be insured at what the potential purchaser considered to be a reasonable price, it did not follow that

captive insurance companies exclusively provide insurance services that are not available from commercial insurers.

180 Furthermore, ESA rejected the argument that allegedly prohibitive pricing by commercial insurers meant that captive insurance companies were not engaged in economic activities in competition with those insurers. Undertakings belonging to a group had the choice to insure their obligatory and voluntary risks with a commercial insurer or create a captive insurance company. If they chose the latter option, they were, in ESA's view, foreclosing the insurance market as far as their risks were concerned.

181 ESA then concluded that competition with other insurance providers existed, therefore, at the point of formation of the captive and at each point when the client of the captive decided on the extent to which it wished to retain risk within the captive or purchase insurance or reinsurance on the open market.

Findings of the Court

182 The contested Decision contains, in the light of the requirements described in paragraphs 171-173 above, reasoning that is sufficient to support ESA's findings on the extent of the commercial market for all captive insurance companies. Consequently, this part of the applicants' plea must be rejected.

The second part of the fourth plea: the selectivity of the contested tax provisions

183 In relation to ESA's statement of reasons with regard to the selectivity of the contested tax provisions, it must be observed that, in its Decision, ESA set out, first, thereby adopting the approach of the Commission in the *Åland Islands* case, that captive insurance companies benefitting from lower taxation than would normally apply to companies gained a selective advantage because this favoured only captive insurance companies as the prime beneficiaries of the tax relief. ESA asserted that this was, in itself, sufficient to make the measures selective.

184 ESA concluded that the undertakings in the same legal and factual position in this case were those which paid the full income, capital and coupon taxes in Liechtenstein. In comparison to those undertakings, captive insurance companies in Liechtenstein received a selective advantage. ESA went on to note that, unlike many recent complex fiscal aid cases, the objectives of the measures in question were straightforward. While the standard rate taxes generate revenue for the state, the reduction and exemption applicable to captive insurance companies were, on the Liechtenstein authorities' own admission, designed to attract a mobile and tax sensitive service sector to the Principality of Liechtenstein. In turn, captive insurance companies were created and normally located apart from the rest of their group, at least in part, in order to benefit from lower taxation on profits generated by a formalised form of self-insurance.

Findings of the Court

185 In the light of the foregoing, the Court concludes that the contested Decision contains a sufficient statement of reasons for the finding that a selective advantage was conferred on captive insurance companies in Liechtenstein. Therefore, this part of the plea must be rejected.

The third part of the fourth plea: why the contested tax provisions were not considered justified by the nature or general scheme of the Liechtenstein tax system

186 In its Decision, ESA asserted that the Liechtenstein authorities had stated that the tax concession established by the contested provisions was introduced in order to establish and develop the captive insurance sector as a new field of economic activity in Liechtenstein. In ESA's view, that clearly constituted an economic and political purpose not inherent to a revenue tax. Therefore, the measure did not fall within the logic of the tax system.

187 ESA acknowledged that valid reasons might exist to differentiate between captive insurance companies and other insurance companies, for example, in so far as internal market regulatory requirements to ensure retention of a certain level of capital are concerned. However, it failed to see how such requirements could justify a difference in taxation of capital.

Findings of the Court

188 Although the statement of reasons by ESA in the contested Decision is brief on this issue, it does contain the crucial arguments setting out why ESA does not accept that the tax measures in question are justified by the nature and the general scheme of the Liechtenstein tax system, and, in particular, makes appropriate reference to the case-law of the Court and of the Union Courts. In the light of this fact, ESA's statement of reasons must be considered as sufficient on this point.

The fourth part of the fourth plea: the reasoning on recovery

189 In its Decision, ESA set out, first of all, that the fundamental legal principles of legitimate expectations and legal certainty could be invoked by beneficiaries of aid to challenge an order for recovery of unlawfully granted State aid. In its view, however, the principles only applied in exceptional circumstances. An undertaking could normally not entertain legitimate expectations that aid was lawful, unless it had been granted in accordance with the procedure for notifying the aid to ESA or the Commission.

190 In its Decision, ESA accepted that there might have been some degree of confusion regarding taxation of intra-group activities following the Commission's decisions on the Belgian co-ordination centres scheme and as a result of a number of other similar schemes operating in EU Member States. ESA also accepted that there were certain similarities between the case of the

co-ordination centres and that of the taxation of captive insurance companies. Therefore, captive insurance companies in Liechtenstein might have been entitled to expect that taxation of the intra-group insurance service which they provided could be taxed differently without this involving State aid.

191 ESA went on to state its view that, in the wider EEA context, it was possible that beneficiaries in the EFTA States might have relied on the actions of the Commission or on the case-law of the ECJ. It also acknowledged the approach taken by the Commission in the early 2000s on the issue of legitimate expectations when disallowing similar tax measures.

192 Therefore, in view of the Commission's practice and to ensure a uniform approach to this issue across the EEA, ESA concluded that beneficiaries might have had legitimate expectations that the tax measures did not constitute State aid when they were introduced.

193 In its Decision, ESA stated, however, that such expectations could not have continued indefinitely, given the developments in the State aid assessment of tax measures during that period. The Commission opened the formal investigation procedure into tax exemptions in favour of captive insurance companies in Åland, Finland, on 11 July 2001, communicating its doubts that the measures could be regarded as compatible with the State aid rules. That investigation resulted from the notification of the measure by the Finnish authorities on 15 July 1998, some 7 months after implementation of the Liechtenstein measures.

194 Given that the Liechtenstein tax measures were substantively the same as those proposed for captive insurance companies based in the Åland Islands, ESA considered that all beneficiaries should have been aware by the date of publication of the decision to open a formal investigation into the similar tax measures in Åland on 6 November 2001, at the latest, that the measures were likely to involve incompatible State aid. In ESA's view, the clear doubts expressed by the Commission concerning the compatibility of specific tax exemptions in favour of captive insurance companies negated any legitimate expectations captive insurance companies benefitting from the Liechtenstein tax exemptions may have entertained.

Findings of the Court

195 ESA's statement of reasons on the issue of recovery enables the applicants and the Court to ascertain the reasons why ESA reached the conclusion that the recovery of the aid in question was not barred by the principle of legitimate expectations. Consequently, the applicants' argument concerning an alleged failure to state reasons with regard to the recovery of the aid must be dismissed.

196 On all those grounds, the plea that the contested Decision is not sufficiently reasoned must be dismissed as unfounded.

197 As the Court has found all the pleas of law advanced by the applicants unfounded, the applications must be dismissed.

IX Costs

198 Under Article 66(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. ESA has asked for the applicants to be ordered to pay the costs. Since the latter have been unsuccessful in their applications, they must be ordered to do so. The costs incurred by the Kingdom of Norway and the European Commission are not recoverable.

On those grounds,

THE COURT

hereby:

1. **Dismisses the applications.**

2. **Orders the applicants to pay the costs of the proceedings.**

Carl Baudenbacher Thorgeir Örlygsson Per Christiansen

Delivered in open court in Luxembourg on 10 May 2011.

Skúli Magnússon
Registrar

Carl Baudenbacher
President