REPORT FOR THE HEARING
in joined Cases E-4/10, E-6/10, E-7/10

-revised-*

APPLICATION to the Court pursuant to Article 36 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice in the cases between

The Principality of Liechtenstein (Case E-4/10),
Reassur Aktiengesellschaft (Case E-6/10),
Swisscom RE Aktiengesellschaft (Case E-7/10)

and

EFTA Surveillance Authority

seeking the annulment of the EFTA Surveillance Authority's Decision No 97/10/COL of 24 March 2010. In the alternative, the applicants seek the annulment of Articles 3 and 4 of the decision to the extent that they order the recovery of the aid referred to in Article 1 of the decision.

I Introduction

1. In this case, it is at dispute as to 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. It is also disputed to what extent legitimate expectations entertained by the beneficiaries of the alleged State aid prevent the recovery of State aid granted prior to the final decision of the EFTA Surveillance Authority ("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.

II Facts and procedure

2. According to the provisions of the Liechtenstein Tax Act (Gesetz über die Landes- und Gemeindesteuern, "the Tax Act"), insurance companies, which

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* Amendments to paragraphs 1, 12, 46, 53-54, 67, 72 and 73.

engage exclusively in captive insurance under the Insurance Supervision Act (Gesetz vom 6. Dezember 1995 betreffend die Aufsicht über Versicherungsunternehmen (Versicherungsaufsichtsgesetz, "the Insurance Supervision Act"), are subject to special tax provisions.

3. The tax provisions applicable to these insurance companies ("captive insurance companies") were introduced in the Tax Act in 1997 with effect from 1 January 1998 onwards. According to these provisions, captive insurance companies pay a capital tax of 1 ‰ on their own capital. For capital exceeding 50 million CHF the tax rate is reduced to ¾ ‰ and for capital in excess of 100 million to ½ ‰. In addition to paying lower amounts of capital tax, captive insurance companies are also exempt from the duty to pay coupon tax.

4. In general the notion of captive insurance company encompasses a subsidiary company formed to insure or reinsure the risks of its parent or associated group companies (see, for comparison the definition in Article 2(b) of Directive 2005/68/EC of the European Parliament and of the Council of 16 November 2005 on reinsurance and amending Council Directives 73/239/EEC, 92/49/EEC, as well as Directives 98/78/EC and 2002/83/EC)[1].

5. By letter, dated 14 March 2007, ESA sent a request for information to the Liechtenstein authorities, regarding various tax derogations for certain forms of companies under the Tax Act. The Liechtenstein authorities replied by letter, dated 30 May 2007.

6. Following an exchange of correspondence and meetings between ESA and Liechtenstein representatives, ESA decided, on 24 September 2008, to initiate the formal investigation procedure provided for in Article 1(2) in Part I of Protocol 3 to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("SCA") with regard to the taxation of captive insurance companies according to the Tax Act. This decision was published in the Official Journal of the European Union and the EEA Supplement.[2] In the decision, ESA called on interested parties to submit comments and subsequently received such comments from twelve interested parties. By a letter dated 22 July 2009 ESA forwarded these comments to the Liechtenstein authorities, which responded by a letter dated 2 October 2009.

7. By Decision No 97/10/COL of 24 March 2010 ("the Decision"), ESA found that an aid scheme granting a favourable tax regime in favour of captive insurance companies constituted unlawful State aid which is incompatible with the EEA Agreement ("EEA"). ESA also ordered the Principality of Liechtenstein to repeal the measures and to recover the aid already granted.

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1 OJ 2005 L 323/1, point 2 of Annex IX to the EEA Agreement.

2 Decision of the EFTA Surveillance Authority No 620/08/COL of 24 September 2008 was published in 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.

8. In its Decision, ESA declared that the special provisions regarding captive insurance companies implemented by Articles 82a and 88d(3) of the Tax Act constitute State aid within the meaning of Article 61(1) EEA, see Article 1 of the Decision. According to Article 2(1) of the Decision, moreover, Liechtenstein shall repeal these measures so as they do not apply from the fiscal year 2010 (inclusive) onwards and inform ESA of the legislative steps which will be taken to abolish the measures by 30 June 2010, see Article 2(2) of the Decision. Under Article 3(1) of the Decision, Liechtenstein authorities shall take all necessary measures to recover from the beneficiaries the aid unlawfully made available to them from 6 November 2001 to 31 December 2009.

9. According to Article 3(2) of the Decision, the amount of aid to be recovered is to be calculated by assessing the income, capital and coupon tax liabilities that captive insurance companies would have had if specific rules had not applied to them, less the amounts of capital tax already paid by the beneficiaries. Further, 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 (Article 3(3) of the Decision). Pursuant to Article 3(4) the interest shall be calculated on a compound basis in accordance with Article 9 in ESA'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.

10. Article 4 of the Decision states that the Principality of Liechtenstein shall effect the recovery of the aid referred to in Article 1 without delay, and in any event by 30 September 2010. This recovery shall be effected in accordance with the procedures of national law, provided they allow the immediate and effective execution of the decision.

11. Case E-4/10 was registered at the Court on 21 May 2010, pursuant to an application by the Principality of Liechtenstein, bringing an action under Article 36(1) of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("SCA") for full or partial annulment of the contested Decision.

12. Case E-6/10 Reassur Aktiengesellschaft ("Reassur") was registered at the Court on 16 June 2010 and Case E-7/10 Swisscom Re Aktiengesellschaft ("Swisscom") on 9 July 2010, both limited liability companies registered in Vaduz, Liechtenstein, pursuant to applications under Article 36(2) SCA. Reassur is the captive insurance company of the Schindler Group and has been exclusively engaged in insuring certain types of risks of companies belonging to that group. 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.

13. 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.

14. ESA submitted Statements of Defence in Cases E-4/10, E-6/10 and E-7/10, which were registered at the Court on 13 September 2010. 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.

III Form of order sought by the parties

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

(1) 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;

(2) 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

(3) order the EFTA Surveillance Authority to pay the costs of the proceedings

16. The claim of Reassur is identical to points (1) and (3) of the claims filed by the other applicants, cited above. Furthermore, Reassur requests that the Court:

2. in the alternative: annuls 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.

17. ESA contends that the Court should:

(1) dismiss the Applications as unfounded;
(2) order the Applicants to pay the costs.

18. The Commission submits that the applications should be dismissed and the costs of the proceedings be borne by the applicants. The Kingdom of Norway supports the position of the applicants in relation to the recovery period of the alleged State aid, submitting that their legitimate expectations prevented recovery of State aid granted until ESA's final Decision on 24 March 2010, or, alternatively, 24 September 2008, the date on which ESA decided to open its formal investigation procedure.

IV Legal background

EEA law

19. 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.

…

20. Article 62 EEA reads as follows:

1. All existing systems of State aid in the territory of the Contracting Parties, as well as any plans to grant or alter State aid, shall be subject to constant review as to their compatibility with Article 61. This review shall be carried out:

(a) as regards the EC Member States, by the EC Commission according to the rules laid down in Article 93 of the Treaty establishing the European Economic Community;

(b) as regards the EFTA States, by the EFTA Surveillance Authority according to the rules set out in an agreement between the EFTA States establishing the EFTA Surveillance Authority which is entrusted with the powers and functions laid down in Protocol 26.

2. With a view to ensuring a uniform surveillance in the field of State aid throughout the territory covered by this Agreement, the EC Commission and the EFTA Surveillance Authority shall cooperate in accordance with the provisions set out in Protocol 27.

21. Article 5 SCA reads as follows:

1. The EFTA Surveillance Authority shall, in accordance with the provisions of this Agreement and the provisions of the EEA Agreement and in order to ensure the proper functioning of the EEA Agreement:

(a) ensure the fulfilment by the EFTA States of their obligations under the EEA Agreement and this Agreement;

(b) ensure the application of the rules of the EEA Agreement on competition;

(c) monitor the application of the EEA Agreement by the other Contracting Parties to that Agreement.

2. To this end, the EFTA Surveillance Authority shall:

(a) take decisions and other measures in cases provided for in this Agreement and in the EEA Agreement;

(b) formulate recommendations, deliver opinions and issue notices or guidelines on matters dealt with in the EEA Agreement, if that Agreement or the present Agreement expressly so provides or if the EFTA Surveillance Authority considers it necessary;

(c) carry out cooperation, exchange of information and consultations with the Commission of the European Communities as provided for in this Agreement and the EEA Agreement;

(d) carry out the functions which, through the application of Protocol 1 to the EEA Agreement, follow from the acts referred to in the Annexes to that Agreement, as specified in Protocol 1 to the present Agreement.

22. Article 16 SCA reads as follows:

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

23. Article 24 SCA reads as follows:

The EFTA Surveillance Authority shall, in accordance with Articles 49, 61 to 64 and 109 of, and Protocols 14, 26, 27, and Annexes XIII, section I(iv), and XV to, the EEA Agreement, as well as subject to the provisions contained in Protocol 3 to the present Agreement, give effect to the provisions of the EEA Agreement concerning State aid as well as ensure that those provisions are applied by the EFTA States.

In application of Article 5(2)(b), the EFTA Surveillance Authority shall, in particular, upon the entry into force of this Agreement, adopt acts corresponding to those listed in Annex I.

24. The first and second paragraphs of Article 36 SCA read 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.

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

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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.

26. Article 1 in 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;*

…

27. Article 14(1) in 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.

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28. Article 17 in Part II of Protocol 3 reads as follows:

Cooperation pursuant to Article 1(1) in Part I

1. The EFTA Surveillance Authority shall obtain from the EFTA State concerned all necessary information for the review, in cooperation with the EFTA State, of existing aid schemes pursuant to Article 1(1) in Part I.

2. Where the EFTA Surveillance Authority considers that an existing aid scheme is not, or is no longer, compatible with the functioning of the EEA Agreement, it shall inform the EFTA State concerned of its preliminary view and give the EFTA State concerned the opportunity to submit its comments within a period of one month. In duly justified cases, the EFTA Surveillance Authority may extend this period.

29. Article 18 in Part II of Protocol 3 reads as follows:

Proposal for appropriate measures

Where the EFTA Surveillance Authority, in the light of the information submitted by the EFTA State pursuant to Article 17 of this Chapter, concludes that the existing aid scheme is not, or is no longer, compatible with the functioning of the EEA Agreement, it shall issue a recommendation proposing appropriate measures to the EFTA State concerned. The recommendation may propose, in particular:

(a) substantive amendment of the aid scheme,

or

(b) introduction of procedural requirements,

or

(c) abolition of the aid scheme.

30. Article 19 in Part II of Protocol 3 reads as follows:

Legal consequences of a proposal for appropriate measures

1. Where the EFTA State concerned accepts the proposed measures and informs the EFTA Surveillance Authority thereof, the EFTA Surveillance Authority shall record that finding and inform the EFTA State thereof. The EFTA State shall be bound by its acceptance to implement the appropriate measures.

2. Where the EFTA State concerned does not accept the proposed measures and the EFTA Surveillance Authority, having taken into account the arguments of the EFTA State concerned, still considers that those measures are necessary, it shall initiate proceedings pursuant to Article 4(4) of this Chapter. Articles 6, 7 and 9 of this Chapter shall apply mutatis mutandis.

The EU Reinsurance Directive

31. In Article 2(b) of Directive 2005/68/EC, of the European Parliament and of the Council of 16 November 2005 on reinsurance and amending Council Directives 73/239/EEC, 92/49/EEC as well as Directives 98/78/EC and 2002/83/EC, (“the EU Reinsurance Directive”) a “captive reinsurance

undertaking" is defined as "a reinsurance undertaking owned either by a financial undertaking other than an insurance or a reinsurance undertaking or a group of insurance or reinsurance undertakings to which Directive 98/78/EC applies, or by a non-financial undertaking, 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 the captive reinsurance undertaking is a member."

National law[3]

32. The Liechtenstein Tax Act[4] comprises two kinds of taxes relating to legal entities (*Die Gesellschaftssteuern*), a business income tax (*Ertragssteuer*) and a capital tax (*Kapitalsteuer*). The legal entities liable to pay income in Liechtenstein are listed in Article 73, points 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).

33. 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 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.

34. Under Article 76(1) 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, with the tax rate of 2‰, according to Article 79(1) of the Tax Act.

35. Section 5 of the Tax Act contains provisions regarding the so-called 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 equal to securities) issued by "a national". According to Article 88a(2) "national" covers any person who has the place of residence, domicile or statutory seat in Liechtenstein, and undertakings that are registered in the public register of Liechtenstein.

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[3] Translations of national provisions are unofficial and are based on translations contained in the documents of the case.

[4] The case before the Court is based on the Liechtenstein Tax Act of 1961, as amended with effect of 1 January 1998 ("the Tax Act"). In the meantime it has been replaced by the Liechtenstein Tax Act of 23 September 2010, entering into force 1 January 2011.

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

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

38. By virtue of the 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 onward. These Articles are among 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.

39. Article 82a of the Tax Act refers to captive insurance companies. Pursuant to point 1 of that Article, *"[i]nsurance companies under the terms of the definition of the Insurance Supervision Act, which exclusively engage in captive insurance (Eigenversicherung), pay a capital tax of 1‰ on the company's own capital, cf. Article 82a(1) of the Tax Act. For the capital exceeding 50 million the tax rate is reduced to ¾ ‰ and for the capital in excess of 100 million to ½ ‰."*

40. Liechtenstein tax law considers captive insurance not to constitute commercial activity. Accordingly, it is not subject to business income tax. However, under Article 82a(2) of the Tax Act, insurance companies which engage in captive insurance and ordinary insurance activities for third parties, according to sections 73 to 81 of the Tax Act, are nevertheless liable to regular capital and income tax for that part of their activities which concerns third party insurance. By virtue of Article 88d(3) of the Tax Act, shares or parts of captive insurance companies are exempted from payment of the coupon tax.

V Written procedure before the Court

41. Written arguments have been received from the parties:

- the Principality of Liechtenstein, represented by Dr. Andrea Entner-Koch, Director, EEA Coordination Unit, acting as Agent;

- Reassur, represented by Dr Ulrich Soltész and Philipp Melcher, Rechtsanwälte;

- Swisscom, represented by Dr Michael Sánchez Rydelski, Rechtsanwalt;

- ESA, represented by Xavier Lewis, Director, and Bjørnar Alterskjær, Deputy Director, Department of Legal & Executive Affairs, acting as Agents.

42. Pursuant to Article 20 of the Statute of the Court and Article 97 of the Rules of Procedure, written observations have been received from:

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

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

VI Summary of the pleas in law and arguments

43. The Principality of Liechtenstein, Reassur and Swisscom, the applicants in cases E-4/10, E-6/10 and E-7/10, firstly plead that ESA did not apply Article 61(1) EEA correctly against captive insurance companies. They jointly argue that the contested tax provisions do not distort competition by favouring certain undertakings or the protection of certain goods under Article 61(1) EEA. In this regard, it is submitted that captive insurance companies do not qualify as "undertakings" within the meaning of Article 61(1) and that the contested tax measures do not confer a selective advantage. The applicants further argue that the tax measures have no effect on intra-EEA trade and that they do not distort competition under Article 61(1).

44. Secondly, the applicants claim that ESA erred in classifying its measures, in its order for recovery of the aid, as "existing aid" within the meaning of Article 1 (b) (v) Part II of Protocol 3 SCA. They contend that by its Decision, ESA has violated the principles of legitimate expectations, legal certainty and of homogeneity and equal treatment, all general principles of EEA law. It is also contended that the Decision lacks reasoning and does therefore not accord with Article 16 SCA.

Assessment under Article 61(1) EEA

The definition of "undertaking" within the meaning of Article 61(1)

45. In response to the argument that ESA applied Article 61(1) EEA erroneously, the applicants claim that the contested provisions of the Liechtenstein Tax Act do not constitute State aid within the meaning of Article 61(1) EEA.

46. Firstly, the applicants contest ESA's finding that captive insurance companies qualify as undertakings within the meaning of Article 61(1). In this

regard, it is submitted that captive insurance companies are not active on the free insurance market, as they only provide in-house services. The applicants argue that these companies insure risks for which coverage on the free insurance market does not always exist. Swisscom submits that two risk groups it is covering cannot be insured on the open market. To this effect, Swisscom submitted to ESA during the formal investigation a confirmation from Swiss Re. Secondly, only operations which are available on the free and open insurance market can be classified as an economic activity which confers the status of undertaking in the sense of Article 61(1) EEA, captive insurance companies do not qualify as "undertakings" within the meaning of that Article.[5] In this 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.[6]

47. ESA, supported by the Commission, contests that argument. In the view of ESA and the Commission the concept of "undertaking" has been defined in the case-law of the Court of Justice of the European Union ("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."[7] ESA submits that in this respect, "economic activity" is the definitive factor in determining whether an entity is an "undertaking". Further, there is settled case-law, that "economic activity" means "any activity consisting in offering goods and services on a given market",[8] which thus presupposes the assumption of risk for the purpose of remuneration.[9]

48. Concerning the submissions that the insurance services in question are only provided in-house, ESA, with the support of the Commission, contends that there is an important distinction to be made between activities that are truly carried in-house, *i.e.* by a department within company and services which are provided by a separate legal person, even if it is wholly owned by the recipient of the services. In the latter case, the companies concerned have established a formal structure in which risk is transferred to a company within the group,

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5 As to the definition of "undertaking" and "economic activity" the Principality of Liechtenstein and Swisscom refer to Case C-35/96 *Commission* v *Italian Republic* [1998] ECR I-3851 and to Case C-222/04 *Cassa di Risparmio di Firenze and Others* [2006] ECR I-289.

6 Reference is made to EFTA Surveillance Authority Decision No 349/07/COL of 18 July 2007 concerning the Norwegian Road Administration Møre and Romsdal District Office, OJ 2007 C 310/07, p. 30.

7 The EFTA Surveillance Authority and the Commission refer to Case C-41/90 *Klaus Höfner* [1991] ECR I-1979, paragraph 21. The Commission also refers to C-35/96 *Commission* v *Italy,* cited above, paragraph 36.

8 Reference is made to C-35/96 *Commission* v *Italy*, cited above, paragraph 36; Joined Cases C-180/98 to C-184/98 *Pavel Pavlov and Others* [2000] ECR I-6451, *Cassa di Risparmio di Firenze and Others*, cited above, paragraph 108.

9 The EFTA Surveillance Authority refers to Joined Cases C-180/98 to C-184/98 *Pavel Pavlov and Others* [2000] ECR I-6451, and C-475/99 *Ambulanz Glöckner* [2001] ECR I-8089.

which provides insurance services for arm's length remuneration as an alternative to purchasing insurance on the open market. It is maintained that this is in part done in order to ensure that the economic activity concerned and the profit are treated differently for tax purposes and that the captive insurance companies can be located in a different tax jurisdiction and taxed at a lower rate.

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

Selectivity of measures

50. In case the Court concurs with ESA's opinion that captive insurance companies, or part of their activities, have to be classified as "undertakings", the applicants argue that contested tax provisions are not selective measures which favour certain undertakings or the provision of certain goods within the meaning of Article 61(1) EEA. Accordingly, ESA's findings on this issue are erroneous.

51. The Principality of Liechtenstein argues that in order to constitute State aid, a measure must be selective by favouring certain companies.[10] 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.[11] 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.[12] In order to determine whether a measure is selective, it has to be examined, within the context of the particular national system, whether it constitutes an advantage for certain undertakings in comparison with others that are in a comparable legal and factual situation.[13]

52. The applicants claim that since captive insurance companies are in a legally and factually different situation from insurance companies that are unrelated, the Liechtenstein tax scheme is not selective. They also maintain that

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10 The Principality of Liechtenstein refers to Case E-6/98 *Norway* v *ESA* [1999] EFTA Ct. Rep., p. 76, paragraph 33; Joined Cases E-5/04, E-6/04 and E-7/04 *Fesil and Finnfjord and Others* v *ESA* [2005] EFTA Ct. Rep., p. 121, paragraph 77.

11 Swisscom refers to Case C-143/99 *Adria-Wien Pipeline* [2001] ECR I-8365.

12 Swisscom refers to Case C-53/00 *Ferring* [2001] ECR I-9067.

13 Swisscom refers to Cases C-409/00 *Spain* v *Commission* [2003] ECR I-1487; C-88/03 *Portugal* v *Commission* [2006] ECR I-7115; C-487/06 P *British Aggregates* v *Commission* [2008] ECR I-10505, and Joined Cases C-428/06 to C-434/06 *UGT-Rioja and Others* [2008] ECR I-6747.

for these purposes, captive insurance companies have to be distinguished from other companies on account of their intra-group relations.

53. In this regard, the Principality of Liechtenstein argues that the reasoning in the Commission's decisions in the *Groepsrentebox*[14] and *Hungarian Tax Scheme* cases[15] 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 there is a justifiable difference between captive insurances and other undertakings, with regard to the types of risks covered, choice of risks and entities to be insured and the difference in regulatory framework. Such arguments were also submitted by Swisscom.

54. The applicants also submit that the Liechtenstein tax measures apply generally to all undertakings, since any legal entity, irrespective of the sector of activity or size of the operation, can qualify for the tax measures through ownership of a captive insurance company through which it insures its own risks. In this regard, the Liechtenstein tax measures are not materially selective, as they merely reflect the reality of group structures. According to the applicants, the Commission has recognized the "economic reality of group structures" as not being sufficient to declare a tax measure selective.[16] It is also argued that the contested tax provisions differ from the aid scheme implemented by Finland for captive insurance companies in the *Åland Islands* case,[17] as they are not regionally specific; do not require foreign ownership or a minimum level of economic strength nor capitalisation.

55. ESA contends that the measures in question are indeed materially selective. In ESA's view, the undertakings are in the same legal and factual situation as those who pay the full income, capital and coupon taxes in Liechtenstein. In comparison, captive insurance companies in Liechtenstein receive a selective advantage. The Commission supports this position and further submits that when 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 as justifiable elements of difference by the applicants are irrelevant.

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[14] The Principality of Liechtenstein refers to Commission Decision of 8 July 2009 on the Groepsrentebox Scheme which the Netherlands is planning to implement No C4/2007 (ex N 465/2006), OJ 2009 L 288, p. 26.

[15] The Principality of Liechtenstein refers to Commission Decision of 28 October 2009 on state aid No C10/2007 (ex NN13/2007) implemented by Hungary for tax deductions for intra-group interest.

[16] Reference is made to Commission Decision of 22 September 2004, State aid N 354/2004 – Ireland Company Holding Regime, OJ 2005 C 131, p. 10.

[17] Commission Decision of 10 July 2002 on the aid scheme implemented by Finland for Åland Islands captive insurance companies (2002/937/EC), OJ 2002 L 329, p. 22.

56. The Commission also takes the view that the fact that 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 matters is that other types of companies, which are in the same factual and legal situation, cannot benefit from the same tax advantages.

57. ESA also disputes the assertion made by the applicants that creating a captive insurance company is an option that is open to any undertaking.[18] ESA notes that while it was an essential part of the Commission's reasoning in its decisions concerning the *Groepsrentebox*[19] and *Hungarian State aid* cases,[20] 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.

Measures are justified by the nature and general scheme of the Liechtenstein tax system

58. In the event that the Court takes the view that the contested tax provisions at stake are to be classified as materially selective, the applicants submit that they are not State aid since they are justified by the nature and general scheme of the Liechtenstein tax system.

59. On this point, the applicants 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.

60. As regards justification, the applicants also contend that the specific nature of captive insurances is recognised by the secondary EEA and EU law. It is argued that the EU Reinsurance Directive[21] 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.[22] Furthermore, Swisscom submits that the Solvency II Directive provides for specific adaptations for captive insurance companies on minimum capital

[18] See also Commission Decision of 28 October 2009 on state aid implemented by Hungary for tax deductions for intra-group interest, cited above.

[19] Commission Decision of 8 July 2009 on the Groepsrentebox Scheme, cited above.

[20] Commission Decision of 28 October 2009 on state aid implemented by Hungary for tax deductions for intra-group interest, cited above.

[21] Directive 2005/68/EC of the European Parliament and of the Council on reinsurance, cited above.

[22] Reference is made to recital 11 to the EU Reinsurance Directive, cited above.

requirements.[23] Swisscom argues that it can be derived from the definition and treatment of these Directives that captive insurance can be distinguished from the traditional type of insurance business.

61. ESA and the Commission disagree with the applicants on these 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 a measure results directly from the basic or guiding principles of its tax system.[24] As a justification based on these grounds constitutes an exception to the principle that State aid is prohibited, the Commission submits it must be interpreted strictly.[25]

62. ESA further contends that the exemption for captive insurance companies is not in line with the logic of the tax system as presented by the Liechtenstein authorities. In ESA's view, 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 for *insurance* companies or similar companies where a differentation of taxes depending on the purpose of the tax could have been envisaged.

63. 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.[26] In ESA's opinion, these 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 it has already been stated by the Liechtenstein authorities that the tax measures in question were introduced in order to establish and develop the captive insurance sectors 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 authorties to foster this activity in their territory.

Effect on EEA-trade and distortion of competition

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[23] 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.

[24] Reference is made to Case C-88/03 *Portugal* v *Commission* [2006] ECR I-7115, paragraph 81.

[25] Reference is made to Joined Cases T-127/99, T-129/99 and T-148/99 *Diputación Foral de Álava and others* v *Commission* [2002] ECR II-1275, paragraph 250.

[26] Commission Decision of 10 July 2002 on the aid scheme implemented by Finland for Åland Islands captive insurance companies, cited above.

64. Should the Court find that the contested tax provisions bestowed selective advantages on insurance companies, the applicants contend that nevertheless the provisions do not have an effect on EEA-trade or lead to a distortion of competition. It is submitted that since captive insurance companies do not compete for market share on the open insurance market, nor deal with risks that are normally insurable on the open market, as commercial insurers do, they 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 has failed to assess the contested tax provisions in this regard, thereby violating its obligation to fully investigate the facts, committing a manifest error of law and not meeting its obligation arising from Article 16 SCA to state the reasons upon which its Decision is based.

65. ESA argues that it is irrelevant that all captive insurance companies may have an effect on EEA-trade or distort competition. It is submitted that the measures under assessment in ESA's Decision constitute an aid scheme, which, according to the settled case law of the Courts of the European Union, is subject to different form of examination than individual grants of aid. In the case of an aid scheme, it has been established that the Commission may confine itself to examining the general characteristics of the scheme in question without being required to examine each particular case to which it applies.[27]

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

67. 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. They moreover 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 could have relied on this less strict standard of assessment, it would have been obliged to further investigate into and determine the extent to which captives cover otherwise uninsurable risks and, consequently, the extent to which the contested tax measures do not amount to State aid within the meaning of Article 61(1) EEA. In the absence of the required further investigation and determination, ESA, according to the applicants, has not even met the less strict standard of assessment relied upon.

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[27] The EFTA Surveillance Authority refers to Cases 248/84 *Germany* v *Commission* [1987] ECR 4013, paragraph 18; C-75/97 *Belgium* v *Commission* [1999] ECR I-3671, paragraph 48 and C-278/00 *Greece* v *Commission* [2004] ECR I-3997, paragraph 24, and the judgment of the General Court in Case T-171/02 *Regione autonoma della Sardegna* v *Commission* [2005] ECR II-2123, paragraph 102. The Commission refers to Joined Cases T-227/01 to T-229/01, T-265/01, T-266/01 and T-270/01 *Diputación Foral de Álava,* cited above, paragraph 143 and 199.

Existing aid or new aid and recovery

68. In the event that the Court upholds ESA's conclusion that the contested tax provisions do 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 SCA.

69. In this respect, the applicants jointly 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) in Part II of Protocol 3 SCA, is applicable to the disputed provisions, either directly or by analogy. According to that Article, aid is deemed to be an existing aid if it can be established that it did not constitute an 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.

70. The applicants submit that prior to the introduction of the measures in 1998, the Commission had made its view known on numerous occasions that comparable measures relating to intra-group activities did not constitute State aid, such as in the *Belgian Co-ordination Centres* case.[28] The applicants contend that this view started to change in 1998, following the publication of the Council's Code of Conduct for business taxation [29] and the subsequent Commission notice on the application of the State aid rules to measures relating to direct business taxation.[30] However, the Commission did not publicly assert that Belgian co-ordination centres might constitute State aid before June 2002, when its decision to open a formal investigation on that matter was published in the Official Journal.[31]

71. Reassur and Swisscom submit that following the change adopted by the Commission in its interpretation and enforcement of the State aid rules with regard to business taxation, the Commission reconsidered its position on the Belgian co-ordination centres scheme. However, in light of the change to its interpretation, the Commission held that the scheme in question qualified as "existing aid" pursuant to Article 1(b)(v) of the Procedural Regulation,[32] because it could be shown that it was not aid at the time of entry into force, but was

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[28] The applicants refer to the view expressed by the Commission in its answers to the European Parliament (Written Question No 1735/90 (OJ 1991 C 63, p. 37) on the Belgian scheme for co-ordination centres and similar schemes in other Member States.

[29] Resolution on Code of Conduct for business taxation, Annex I to the Council Conclusions of the Ecofin Council meeting on 1 December 1997 concerning taxation policy, OJ 1998 C 2, p. 1.

[30] OJ 1998 C 384, p. 3.

[31] OJ 2002 C 147, p. 2.

[32] 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 089, p.1.

classed as aid at a later stage as a result of developments in the common market.[33] Reassur and Swisscom submit that this approach has subsequently been accepted by the ECJ and followed by the General Court,[34] and that the Commission has also followed this approach ever since its Decision to reconsider its position on the Belgian co-ordination schemes.[35]

72. Furthermore, Reassur specifically argues that there has not been any substantial amendment to the taxation of its business that took place prior to the date the EEA Agreement came into force. In this regard, Reassur submits that it has been engaged in insuring risks of companies belonging to the Schindler group in Liechtenstein since 1989, initially with the legal form of an *Anstalt* (institute) but later that of an *Aktiengesellschaft* (joint stock company). Reassur maintains that it was originally subject to capital tax in the amount of 1‰ in its form as an institute. 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.

73. Based on this, Reassur argues that the rules on taxation of captive insurance were in force before the EEA Agreement came into force in Liechtenstein. Therefore, and since these rules have not been substantially amended ever since, they should be qualified as "existing aid" according to Article 1(b)(i) Part II of Protocol 3 SCA. Reassur submits that amendments to "existing aid" do not *per se* qualify as "alterations of existing aid" which render it "new aid". In this respect, only substantial changes affecting the "core" of the advantage can have this effect.[36] Moreover, changes, which appear *prima facie* to be significant, are not sufficient for a scheme to qualify as "new aid".[37] A mere

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[33] Reference is made to Commission Decision of 17 February 2003 No 2003/755/EC on the aid scheme implemented by Belgium for coordination centres established in Belgium, OJ 2003 L 282, p. 25, paragraph 70.

[34] Reference is made to Joined Cases C-182, and C-217/03 *Belgium and Forum 187 ASBL* v *Commission* [2006] ECR I-5479 and Joined Cases T-50, 56, 60, 62, 69/06 *Ireland et al* v *Commission* [2007] ECR II-172*, paragraphs 55 et seq.

[35] Reference is made to Commission Decision of 28 October 2009 on state aid implemented by Hungary for tax deductions for intra-group interest.

[36] Reassur refers to Case C-44/93 *Namur-Les Assurances du Credit SA* v *Office National du Ducroire and Belgium* [1994] ECR I-3829, paragraph 22 et seq; Opinion of Advocate General Lenz, point 77; Opinion of Advocate General Fenelly in Joined Cases 15/98 and C-105/99 *Italy et al* v *Commission* [2000] ECR I-8855, points 62 et seq., and Joined Cases T-195/01 and T-207/01 *Government of Gibraltar* v *Commission* [2002] ECR II-2309, paragraph 111, and Commission Decision No E 3/2005 of 24 April 2007, Financing of public service broadcasters in Germany, OJ 2007 C 185, p. 1.

[37] Reassur refers to Commission Decision C(2009)9963 final of 15 December 2009, State aid No E 2/2005 and N 642/2009 – the Netherlands Existing and special project aid to housing corporations, paragraph 25 et seq.

change in legal form of the eligible beneficiaries, such as Reassur's from institutes to companies, does not lead to a different conclusion.[38]

74. ESA submits that the contested tax provisions were introduced in December 1997, after the EEA Agreement entered into force. Hence, it is to be classified as new aid, according to Article 1(c), see Article 1(b) of Part II of Protocol 3 SCA.

75. On the argument put forth by the applicants, that the contested tax provisions have only become State aid as a result of the "evolution of the common market", ESA submits that this concept is to 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.[39] The Commission supports this argument.

76. As regards the references the applicants have made to the practice of the Commission, ESA and the Commission submit that they are not relevant regarding the question whether a measure is to be classified as new or existing. In the view of ESA and the Commission, this is a question of the interpretation of Article 61(1) EEA (or, *mutatis mutandis,* Article 107(1) of the Treaty on the Functioning of the European Union, "TFEU"), which is neither subject to ESA's nor the Commission's discretion.[40]

77. ESA also specifically submits that the Commission Decision regarding the *Hungarian Tax Scheme*, referred to by the applicants, is irrelevant, as it only deals with a particular pre-accession context, whereas the measures in Liechtenstein were introduced well after the entry into force of the EEA Agreement. Regarding the arguments submitted by Reassur that the measures must be regarded as existing aid, as Schindler's insurance captive has apparently been active and subject to favourable tax treatment since 1989, ESA is of the opinion that the allegation that a different individual company may have had tax concessions before the enactment of a new aid scheme does not turn the new aid scheme into existing aid.[41] In this regard, ESA contends that the classification of whether a measure is new or existing must be made at the level of the measure and not the level of possible individual beneficiaries under the scheme.

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[38] Reassur refers to Commission Decision 2000/C 146/03, Aid No E 10/2000, State guarantees for public credit institutions in Germany, OJ 2002 C 146, p. 6.

[39] The Commission refers to Joined Cases C-182/03 and C-217/03 *Belgium and Forum 187* v *Commission*, paragraph 71, cited above.

[40] The EFTA Surveillance Authority refers to Case C-295/97 *Piaggio* [1999] ECR I-3753, paragraphs 45 to 48, Joined Cases T-346/99, T-347/99 and T-348/99 *Territorio Histórico de Álava et al* v *Commission* [2002] ECR II-4259, paragraphs 80 and 84, and Joined Cases T-195/01 and T-207/01 *Government of Gibraltar* v *Commission,* cited above, paragraph 121.

[41] The EFTA Surveillance Authority refers to *Adria Wien*, cited above, paragraph 41.

Legitimate expectations

78. The applicants claim that by ordering the recovery of the alleged aid as 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.

79. In this 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 of legitimate expectations for economic operators under the EEA Agreement than applied by the Commission. 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, the Commission has never ordered the recovery of unlawful State aid in cases where it assessed intra-group tax schemes from the day of the opening of the formal investigation, and certainly not, when the opening decision concerned a third unrelated case, as ESA has now done.

80. The Principality of Liechtenstein specifically submits that in all cases concerning intra-group tax scheme, the time for the protection of legitimate expectations included the period until the day of the final decision. Reassur submits that although the Commission has considered legitimate expectations to cease at 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 applicants also argue that the *Åland Islands* case differs so substantially from the present case that it cannot affect the legitimate expectations of the applicants. In this regard, the applicants submit*, inter alia*, that the contested tax measures in these two cases were different, in that the Åland Islands scheme was regionally specific and that a captive insurance company had to be owned by a foreign owner initially in order to benefit from the Finnish scheme.

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

82. ESA submits that according to the case law of the ECJ, 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. [42]

83. ESA argues that information containing such assurances is rare in the field of State aids, and, 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) in Part I of Protocol 3 to the SCA.[43]

84. In ESA's view, an undertaking may exceptionally rely on the principle of the protection of legitimate expectations, despite no specific assurance being given. This applies if any of the beneficiary applicants can reasonably be sufficiently certain, as a result of ESA's or, arguably, the Commission's, behaviour or actions, that the tax exemption they benefited from was not State aid within the meaning of Article 61(1) EEA.

85. However, ESA claims that this does not apply in the context of this particular case. In this respect, it is argued that when the EEA Agreement entered into force in Liechtenstein in 1995, the clear *acquis communautaire* was that exemption from tax that would otherwise be applicable to an undertaking was likely to constitute State aid within the meaning of Article 61(1) EEA. ESA, moreover, maintains that this position was confirmed shortly afterwards by ESA's decisions on tax measures in Finland and Norway, and that the issue of tax competition became highly relevant by the publication of the Commission's notice on State aid and business taxation in 1998.

86. ESA submits that it has given the applicants the benefit of doubt as regards their legitimate expectations on the lawfulness of the contested tax provisions during the period from which they were enacted until publication on 6 November 2001 of the Commission's decision to open a formal investigation into tax measures applicable to captive insurance companies in Finland (the Åland Islands). The decision in question 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.

87. It is further submitted that the meaningful summary of the decision to open the formal investigation procedure into tax exemptions for captive insurance companies was published on 6 November 2001.[44] According to ESA, the summary describes the measure "as a tax advantage when compared to the

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[42] The EFTA Surveillance Authority refers to Case C-537/08 P *Kahla Thüringen Porzellan GmbH,* judgment of 16 December 2010, not yet reported, paragraph 63, and the case law cited therein.

[43] The EFTA Surveillance Authority refers to Case C-5/89 *Commission* v *Germany* [1990] ECR I-3437, paragraph 14.

[44] Reference is made to the Invitation to submit comments pursuant to Article 88(2) of the EC Treaty, concerning measure C 55/2001 (ex NN 98/2000) – Åland Islands captive insurance, OJ 2001 L 309, p. 4.

normal rate of corporation tax" applicable to "captive insurance companies, satisfying certain conditions". The 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.

88. 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 of State aid, its recovery from the beneficiaries would be a likely outcome. ESA further submits that the differences between the Åland Islands scheme, as alleged by the applicants, and the contested tax provisions in the case at hand, are not relevant.

89. The Commission supports ESA's view. Following the adoption of a decision to initiate the procedure under Article 108(2) TFEU, there is at least 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 in the proceedings would not constitute State aid.

90. According to the Norwegian Government, any trader in regard to whom an institution has given rise to justified hopes may rely on the principle of protection of legitimate expectations.[45] It argues that it follows from settled Commission practice,[46] which has implicitly been upheld by the ECJ,[47] 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.

91. The Norwegian Government accepts, in principle, ESA's premise that Commission decisions may negate legitimate expectations concerning the

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[45] Reference is made to Case 265/85 *Van den Bergh and Jurgens* v *Commission* [1987] ECR 1155, paragraph 55.

[46] Reference is made to Commission Decision No 2001/168/ECSC of 31 October 2000 on Spain´s corporation tax laws, OJ 2001 L 60, p. 57 paragraph 27; Commission Decision 2003/81/EC of 22 August on the aid scheme implemented by Spain in favour of coordination centres in Vizcaya C 48/2001 (ex NN 43/2000), OJ 2003 L 31, p. 26; Commission Decision 2003/512/EC of 5 September 2002 on the aid scheme implemented by Germany for control and coordination centres, OJ 2003 L 177, p. 17; Commission Decision 2003/501/EC of 16 October 2002 on the State aid scheme C 49/2001 (ex NN 46/2000) – Coordination Centres – implemented by Luxembourg, OJ 2003 L 170, p. 20; Commission Decision 2003/438/EC of 16 October 2002 on the aid scheme C 50/2001 (ex NN 47/2000) – Finance companies – implemented by Luxembourg, OJ 2003 L 153, p. 40; Commission Decision 2003/883/EC of 11 December 2002 concerning State aid scheme C 46/2001 – Central corporate treasuries (Centrales de trésorerie) implemented by France, OJ 2003 L 330, p. 23; Commission Decision 2003/515/EC of 17 February 2003 on the State aid implemented by the Netherlands for international financing activities, OJ 2003 L 180, p. 52; Commission Decision 2003/601/EC of 17 February 2003 on aid scheme C 54/2001 (ex NN55/2000) Ireland – Foreign Income, OJ 2003 L 204, p. 51.

[47] Reference is made to Case C-519/07 *Commission* v *KFC* [2009] ECR I-8495.

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, it takes the view that this point 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.

92. It is submitted that in cases where the Commission has acknowledged that the beneficiaries have had legitimate expectations based on its practice, the Commission does not consider that the decision to open a formal investigation negates the legitimate expectations held by the beneficiaries.[48] In the view of the Government, it follows *a fortiori* that a decision to open a formal investigation procedure based in another Member State, particularly concerning national rules, may not negate legitimate expectations based on previous practice. Hence, legitimate expectations in the case at hand may at earliest have been interrupted by the Commission's final decision in the *Åland Islands* case*,* on 5 December 2002.

93. Further, the Government of Norway argues that Commission practice also indicates that the relevant date on which legitimate expectations may be deprived under such circumstances is the adoption of the final decision where the scheme to which the beneficiaries belong is classified as unlawful aid. In this respect, the Government refers to the numerous cases opened by the Commission on the same date as the *Åland Islands* case on 11 July 2001,[49] in all of which the Commission found that the relevant beneficiaries entertained legitimate expectations until the final decision in the concrete case, thus barring any recovery of State aid granted until this date.

94. Accordingly, the Government of Norway submits, that in view of the Commission's practice, and to ensure an uniform approach to the issue across the European Economic Area, it seems that the legitimate expectations of the benficiaries prevented recovery of State aid granted until ESA's final decision on 24 March 2010. Nevertheless, the Government does not exclude that legitimate expectations may be negated at an earlier point, such as when the beneficiaries of State aid have been informed that previous practice has been revised. In the alternative, it is therefore submitted that legitimate expectations prevented

[48] Reference is made to Commission Decision No 2001/168/ECSC of 31 October 2000 on Spain´s corporation tax laws, paragraph 27, cited above.

[49] Reference is made to Commission Decision 2003/81/EC of 22 August 2002 on the aid scheme implemented by Spain in favour of coordination centres in Vizcaya; Commission Decision 2003/512/EC of 5 September 2002 on the aid scheme implemented by Germany for control and coordination centres; Commission Decision 2003/501/EC of 16 October 2002 on the State aid scheme C 49/2001 – Coordination Centres – implemented by Luxembourg; Commission Decision 2003/438/EC of 16 October 2002 on the aid scheme C 50/2001 – Finance Companies – implemented by Luxembourg; Commission Decision 2003/883/EC of 11 December 2002 concerning State aid scheme C 46/2011 Central corporate treasuries implemented by France; Commission Decision 2003/515/EC of 17 February 2003 on the State aid implemented by the Netherlands for international financing activities; Commission Decision 2003/601/EC of 17 February 2003 on aid scheme C 54/2001 Ireland – Foreign Income, all cited above.

recovery of State aid granted until 24 September 2008, when ESA decided to open a formal investigation of the contested tax provisions. Finally, the Government of Norway points out that legitimate expectations might not only warrant the abstention of a recovery order, but also the need for a transitional period. In this respect, the Government submits that the Commission has in several cases considered and acknowledged the need for a reasonable transitional period on the basis of legitimate expectations.[50]

Legal certainty, homogeneity and equal treatment

95. The Principality of Liechtenstein and Swisscom also submit that the recovery of the alleged aid as from 6 November 2001 would be in violation of the principles of legal certainty, homogeneity and equal treatment.

96. In relation to legal certainty, the Principality of Liechtenstein and Swisscom contend that the fundamental requirement of legal certainty is to ensure that situations and legal relationships governed by EEA law remain foreseeable.[51] This 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 and starts having legal effects. In the applicants' view, the requirement must be observed all the more strictly in 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.[52]

97. 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.[53] 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 clearly and specifically enough.

98. 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. It is submitted that when the Commission has assessed national intra-group schemes,

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50 Reference is made to Commission Decision 2003/515/EC of 17 February 2003 on the State aid implemented by the Netherlands for international financing activities, cited above and Commission Decision 2003/755/EC of 17 February 2003 on the aid scheme implemented by Belgium for coordination centres established in Belgium, cited above, paragraphs 117 to 120.

51 Reference is made to Case C-63/93 *Duff and Others* [1996] ECR I-569, paragraph 20; Case T-73/95 *Oliveira* v *Commission* [1997] ECR II-381, paragraph 29.

52 Reference is made to Case T-115/94 *Opel Austria* [1997] ECR II-39, paragraph 124.

53 Reference is made to Joined Cases E-5/04, E-6/04 and E-7/04 *Fesil and Finnfjord*, cited above, paragraphs 121 et seq and 163.

it has always done so individually and never linked them to decisions on initiating formal proceedings in others cases. Moreover, it is argued that this approach has been confirmed by the Union Courts.[54]

99. ESA, with the support of the Commission, submits that this part of the plea is unfounded. ESA argues that 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, as no aid had actually been granted since 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 approach the applicants describe as confirmed by the Union Courts. In this regard, ESA argues that in the cases referred to, the Commission had indeed made certain explicit statements to applicants concerned.[55] This is, however, not the case in these proceedings.

100. The Commission submits that its practice in other cases cannot affect the legality of the Decision contested in the case at hand. 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.

Lack of reasoning

101. The applicants finally argue that the Decision lacks reasoning on a number of points. In this respect, the Government of Liechtenstein and Swisscom argue that the reasoning provided is inadequate on several issues, such as to what extent there is a commercial market for all captive insurance companies, 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 on ESA's assessment as to why the contested tax provisions were not considered justified by the nature or general scheme of Liechtenstein's tax system.

102. ESA submits that the Decision contains adequate reasons within the meaning of Article 16 SCA. It contends that 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. Further, the requirements to be satisfied in this regard depend on the circumstances of each case, in particular 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. ESA argues that it is not

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[54] Reference is made to Case T-348/03 *Koninklijke Friesland Foods NV* v *Commission* [2007] ECR II-101; Case C-519/07 P *Commission Friesland Foods NV* [2009] ECR, not yet reported.

[55] Reference is made to *Koninklijke Friesland Foods NV* [2007], cited above, paragraphs 129 to 131.

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.[56]

103. In this regard, ESA maintains that it is important to recall that it was assessing a general scheme and thus assessed the scheme as a whole. To be considered an aid under Article 61 EEA, a measure must fulfil four criteria: it must afford an advantage to the beneficiaries, through the State or State resources, and 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.

104. 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 case-law regarding the requirements on reasoning.

Thorgeir Örlygsson
Judge-Rapporteur

[56] Reference is made to Case T-257/04 *Republic of Poland* v *Commission* [2009] ECR II-1545, paragraphs 214 and 215.