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ORIGINAL

IN THE EFTA COURT

WRITTEN OBSERVATIONS

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

THE EFTA SURVEILLANCE AUTHORITY

represented by
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and Melpo-Menie Joséphidès,
Department of Legal & Executive Affairs,
acting as Agents,

IN CASE E-11/22

RS

v

Steuerverwaltung des Fürstentums Liechtenstein

in which the Administrative Court of the Principality of Liechtenstein (*Verwaltungsgerichtshof des Fürstentums Liechtenstein*) requests the EFTA Court to give an Advisory Opinion under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice on certain questions relating to the interpretation and application of Articles 3, 4 and 28(2) EEA.

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1 INTRODUCTION AND FACTUAL BACKGROUND

1.1 Introduction

1. This request ("**the Request**") for an advisory opinion has been made in proceedings between the applicant, RS, and the *Steuerverwaltung des Fürstentums Liechtenstein* (Fiscal Authority of the Principality of Liechtenstein or "**Tax Authority**"). At the relevant time (the 2019 tax year), RS, a German national, lived in Switzerland and worked as an employee in Liechtenstein. RS, as a non-resident taxpayer, was subject to a surcharge at a higher rate than if he had been resident in Liechtenstein. It is accepted by the Liechtenstein authorities that there was discrimination between resident and non-resident taxpayers in tax years prior to 2021. The relevant law was amended in 2021 to bring it into conformity with the EEA Agreement. The Request therefore raises questions about *remedies* for breach of the EEA Agreement.

2. In essence, the referring court asks whether, exceptionally, the past discrimination might be permitted (and no remedy required). It refers to Case C-64/20 ***UH***[1] and points to the fact that most tax proceedings for 2020 and earlier tax years have already been concluded. It therefore considers that granting a remedy only to the few taxable persons, like RS, whose tax assessments have not yet finally been concluded would be discriminatory, unfair and unjust.

3. As set out in Section 5.2 below, the Authority respectfully submits, in line with settled case-law of the European Courts, that the referring court is under a duty, flowing also from Article 3 EEA, to give full effect to Articles 4 and 28(2) EEA, by granting an effective remedy to the taxpayers whose EEA rights have been infringed. This includes not only those whose tax assessments remain open, but also those whose tax returns are now closed, to the extent that such a course of action remains possible under national procedural law (which law itself must not make the exercise or enjoyment of EEA rights excessively difficult or impossible). The Authority considers that there are no grounds in this case for suspending the effects of Articles 4 and 28(2) EEA in respect of tax years prior to 2020.

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[1] Judgment of 17 March 2021, *UH* v *An tAire Talmhaíochta, Bia agus Mara* ("***UH***"), C-64/20, EU:C:2021:207.

1.2 Factual Background

4. According to the Request, from 2011 to 2013 non-resident taxpayers[2] were subject to a 'municipal surcharge' at the same rate as resident taxpayers, by reference to the municipality in which they worked as an employed person.[3] The municipal surcharge was fixed by each municipality, but could be no lower than 150% and no higher than 250% ('the municipal range').[4] This municipal surcharge was levied as a percentage of the (national) tax charged on earned income.[5]

5. In 2014, the relevant law (Article 23(5)(b) of the Tax Act[6]) was amended so that, for non-residents, a single (national) 'surcharge' of 200% was applied to the tax levied on their earned income. The *municipal* surcharge (and related municipal range of 150-250%) continued to apply to resident taxpayers – thus their surcharge could be at a higher or lower rate.

6. It appears from the Request that, in 2019,[7] in *practice* the municipal surcharges actually fixed and levied on resident taxpayers were between 150 and 180%. The majority of municipalities applied a surcharge of 150%. In practice, non-resident taxpayers were therefore subject to a higher surcharge (200%).

7. Against this background, a non-resident taxpayer[8] sought judicial review of Article 23(5)(b) of the Tax Act before the Liechtenstein State Court (*Staatsgerichtshof*). By judgment of 1 September 2020, the State Court annulled the provision on the ground that it infringed the EEA principle of non-discrimination (Articles 4 and 28(2) EEA), because it discriminated against nationals of other EEA Member States who were subject to limited tax liability in Liechtenstein in respect of income earned from

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[2] Liechtenstein law refers to taxpayers 'with limited tax liability'. Non-resident taxpayers form part of this group. For ease of reference, the Authority refers simply to 'non-resident taxpayers'.

[3] *Gesetz über die Landes- und Gemeindesteuern* of 23 September 2010 ("**the Tax Act**"), *Landesgesetzblatt* (LGBl.) 2010 No 340, with entry into force on 1 January 2011, and Article 23(5)(b) thereof.

[4] Article 75(3) of the Tax Act.

[5] The municipal surcharge also applied to national tax levied on other types of income, but employment (earned) income is the income relevant for the present case.

[6] See the definition and full legislative reference at footnote 3 above.

[7] See p.3 of the Request. The Request is silent on the position for tax years prior to 2019.

[8] In that case (Case StGH 2019/095), an Austrian national, resident in Austria and employed in Liechtenstein.

employment in Liechtenstein. The State Court however deferred the operative date of the annulment by one year, in order that the legislature might have time to rectify the position (during this period, Article 23(5)(b) therefore remained in force).[9] The State Court appears to have wished to avoid undertaxation until the entry into force of a replacement provision, noting that the provision covered income from a range of situations (such as attendance fees and old-age and disability benefits) and not just employed income for non-residents.

8. By legislative amendment entering into force on 20 August 2021,[10] Article 23(5)(b) of the Tax Act was amended so that: (i) by way of transitional provision, a surcharge of 150% would apply for the 2021 tax year; (ii) thereafter, the rate of the surcharge was to be laid down each year in the Finance Act (thus permitting the Liechtenstein Parliament to fix the surcharge by reference to the lowest municipal surcharge applied at the time).

9. Accordingly:

- for the 2019 and 2020 tax years, non-resident taxpayers paid a 200% surcharge (compared with a rate of 150-180% for resident taxpayers);[11]
- for the 2021 tax year, non-resident taxpayers paid a 150% surcharge (*de facto/de jure* the lowest municipal surcharge for resident taxpayers);
- for the 2022 tax year onwards, it is intended that non-resident taxpayers will pay a surcharge at the same rate as the lowest municipal surcharge applied for that tax year.

2 THE QUESTION REFERRED

10. Against this background, the referring court has asked the following question:

> *Must Articles 3, 4 and 28(2) of the EEA Agreement be interpreted as precluding the application of a higher tax rate to the taxation of earnings gained by activity in Liechtenstein as an employed person by nationals of an EEA Member State who are not resident for tax purposes on national territory (Liechtenstein),*

[9] Request, p.3.
[10] Request, p.4.
[11] The Request contains no information on whether discrimination occurred in previous tax years (i.e. in the years going back to 2014).

compared to persons liable to tax who are resident for tax purposes on national territory (Liechtenstein), when assessing taxes in respect of the tax years up to 2020, insofar as they have not yet been finally assessed?

3 EEA LAW

11. Article 3 EEA provides:

> "*The Contracting Parties shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Agreement.*
>
> *They shall abstain from any measure which could jeopardize the attainment of the objectives of this Agreement.*
>
> *Moreover, they shall facilitate cooperation within the framework of this Agreement.*"

12. Article 4 EEA provides:

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

13. Article 28 EEA provides, in relevant part:

> "*1. Freedom of movement of workers shall be secured among EC Member States and EFTA States.*
>
> *2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of EC Member States and EFTA States as regards employment, remuneration and other conditions of work and employment.*"

4 NATIONAL LAW

14. In its original form (at 1 January 2011), the Tax Act[12] provided that:

- Natural persons are subject to property and income tax (Article 6).

[12] The full legislative reference is cited at footnote 3 above. See also the summary of the legislation at p.2 of the Request.

- All taxable persons, including persons with limited tax liability (e.g. non-resident taxpayers), are required to pay both a national tax and a municipal tax (Article 19).
- Municipal tax is levied as a surcharge ('municipal surcharge') on the national tax; the amount of the municipal surcharge is fixed by each of the 11 municipalities in Liechtenstein themselves, while the surcharge may be no lower than 150% and no higher than 250% (Article 75(3)).
- Earnings from an activity as an employed person undertaken in Liechtenstein are subject to the municipal surcharge of the municipality in which the activity is undertaken (Article 23(5)(b)).

15. In 2014, the legislature amended[13] Article 23(5) of the Tax Act so that non-resident taxpayers were no longer subject to the municipal surcharge. Instead, for the assessment of persons with limited tax liability, the scale under Article 19 of the Tax Act (that is to say, the regular national tax) was to be applied and the following surcharge was to be levied:

> "*(a) for earnings from management of land in Liechtenstein used for agriculture and forestry and for earnings from permanent establishments located in Liechtenstein, the municipal surcharge of the municipality in which the land or the permanent establishment is located;*
>
> *(b)* ***in other cases (in particular earnings from activity as an employed person carried on in Liechtenstein), a surcharge of 200%.***"[14]

16. By Act of 11 June 2021, the Liechtenstein Parliament amended[15] the Tax Act, as follows:

> ***"I. Amendment of existing law***
>
> *The Gesetz über die Landes- und Gemeindesteuern of 23 September 2010 (Tax Act), LGBl. 2010 No 340, in the applicable version, shall be amended as follows:*
>
> *Article 23(5)(b)*
>
> *5. For the ordinary assessment, the scale under Article 19 shall be applied and the following surcharge shall be levied:*

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[13] LGBl. 2014 No 344.
[14] Emphasis added.
[15] LGBl. 2021 No 256, with entry into force on 21 August 2021.

(b) in other cases, a surcharge to be laid down each year in the Finance Act.

II. Transitional provision

For the 2021 tax year the surcharge under Article 23(5)(b) shall be 150%.

III. Entry into force

This Act shall enter into force on the day after promulgation and apply for the first time to assessments for the 2021 tax year which are carried out after its entry into force."

5 LEGAL ANALYSIS

5.1 Jurisdiction of the Court and Admissibility of the Question Referred – the Scope of Article 28(2) EEA

17. As a preliminary matter, the Authority observes that the applicant, RS (a German national), was resident during the relevant 2019 tax year in Switzerland, rather than in an EEA State. The Authority submits that this does not affect the jurisdiction of the Court to give an advisory opinion on the question referred.

18. First, the issues raised in the main proceedings do not relate to activities which are confined in all respects within a single EEA State (a purely 'internal' situation). The tax measure in question affects non-resident taxpayers, in this case a German national. RS, as a German national, has made use of his right of free movement to work in Liechtenstein. Whether he were living in Germany or in Switzerland, the same discriminatory effect would arise.[16]

19. Second, as the CJEU has held, the finding of a link with intra-EU/EEA trade will be presumed if the market in question has a certain cross-border interest (which is for the national court to determine).[17] The Request (p.3) refers to the existence of another taxpayer, an Austrian national resident in Austria, who was subject to the same form of indirect fiscal discrimination on grounds of nationality, and brought his case before the Liechtenstein State Court.[18] More generally, the Authority is aware of the cross-

[16] No information is provided in the Request as to whether RS was previously resident in Germany or another EEA State.

[17] See e.g. judgment of 31 January 2008, *Centro Europa 7 Sprl*, C-380/05, EU:C:2008:59 ("***Centro Europa 7***"), para. 67; and judgment 1 June 2010, *Blanco Pérez and Chao Gómez*, Joined Cases C-570/07 and C-571/07, EU:C:2008:138, para. 40.

[18] See also the summary of the case at paragraph 7 above.

border market for employed workers in Liechtenstein who are resident, *inter alia*, in other EEA States.[19]

20. Third, by its Request, the referring court has clearly signalled its intention to apply EEA law, or in any event to apply a solution which is compatible with EEA law, to the case before it. In other words, whether an EEA national taxpayer is resident in Switzerland (like RS) or in Austria (like the case before the State Court), the referring court appears to consider itself bound to apply an 'EEA compliant' solution. The Authority recalls the case-law of the CJEU according to which, even in purely 'internal' cases,[20] the answer of the CJEU will be useful to the referring court if its national law requires it to grant the same rights to its nationals as those of another Member State (i.e. no reverse discrimination). In such cases the CJEU finds that it has jurisdiction to answer the questions referred.[21] Should the Court consider it necessary, such an approach would, by analogy, seem appropriate here (it appears *inter alia* from p.6 of the Request that the referring court is concerned to treat equally all taxpayers who are in a similar position in respect of the relevant national law).

21. Finally, the Authority recalls the presumption of relevance which questions of EEA law referred by a national court enjoy.[22] Nothing in the Request suggests that the question referred is not relevant for the resolution of the national proceedings.

5.2 Substance – the Need for an Effective Remedy

5.2.1 Preliminary remarks and basic principles

22. It is accepted by the Liechtenstein authorities that, prior to the 2021 amendments, Article 23(5)(b) of the Tax Act ("**the National Measure**") infringed the principle of non-

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[19] The Authority recalls the sectoral adaptations to the EEA Agreement in respect of Liechtenstein, by virtue of which the ability of EEA nationals (including workers) to take up residence in Liechtenstein is limited: see Decision of the EEA Joint Committee No 191/1999 of 17 December 1999 amending Annexes VIII (Right of Establishment) and V (Free movement of workers) to the EEA Agreement (OJ L 74, 15.3.2001, p. 29 and EEA Supplement No 14, 15.03.2001, p. 130).

[20] For the avoidance of doubt, the Authority does not consider that the present case is an 'internal' one, or that the dispute is not connected in any way with the situations contemplated in the EEA Agreement. The Authority's observations on this point purely aim to show that, on any view, the Court has jurisdiction to provide the advisory opinion sought.

[21] See e.g. Case C-380/05 *Centro Europa 7*, *supra*, para. 69.

[22] See e.g. Case C-64/20 *UH*, *supra*, para. 28.

discrimination under Articles 4 and 28(2) EEA. The referring court asks whether, notwithstanding this breach of EEA law, the historic discrimination might nevertheless be justified or permitted (meaning that no remedy for the breach would be required). It refers to Case C-64/20 ***UH***, in which the CJEU recalled its sole power, exceptionally and for overriding reasons of legal certainty, to grant a provisional suspension of the effects of a rule of EU law with regard to a national law that is contrary to it.[23]

23. It is unclear to the Authority whether the referring court is asking the Court to, itself, suspend the effects of Articles 4 and 28(2) EEA with regard to the National Measure, or whether it is rather inviting the Court to apply the principles contained in Case C-64/20 ***UH*** by analogy, in order to opine that the referring court need only grant a remedy to taxpayers whose taxes have not yet finally been assessed (or that it is not required to grant a remedy for breach of EEA law at all).

24. Whatever the precise intention of the national court, the Authority recalls the following principles, which are relevant when answering the question referred (and which guide and circumscribe the powers of the national court):

(i) under the principle of cooperation in good faith laid down in Article 3 EEA, EEA States are required to nullify the unlawful consequences of a breach of EEA law. Such an obligation is binding on all the authorities of the EEA State concerned, including, for matters within their jurisdiction, the courts;[24]

(ii) EEA States are therefore required to repay charges levied in breach of EEA law;[25]

(iii) this is in accordance with the principles of effectiveness and effective judicial protection;[26]

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[23] Case C-64/20 *UH*, cited in footnote 1 above, para. 36.

[24] See e.g. judgment of the CJEU of 7 January 2004, *Wells*, C-201/02 EU:C:2004:12, paragraph 64; and Case C-64/20 *UH*, para. 31; and judgment of 2 October 2015 in Case E-3/15, *Liechtensteinische Gesellschaft für Umweltschutz* v Gemeinde Vaduz (“***Liechtensteinische Gesellschaft***”) [2015] EFTA Ct. Rep. 512.

[25] See e.g. judgment of 16 December 2013, Case E-7/13 *Creditinfo Lánstraust hf.* [2013] EFTA Ct. Rep 970, para. 43. In respect of charges levied in breach of EU law, see e.g. judgment of the CJEU of 11 September 2019, *Călin*, C-676/17, EU:C:2019:700, para. 25 and the case-law cited.

[26] See e.g. judgment of 13 June 2013 in Case E-11/12 *Beatrix Koch and Others* (“***Beatrix Koch***”) [2013] EFTA Ct. Rep. 272, para. 117; and judgment of 18 April 2012 in Case E-15/10 *Posten Norge* AS [2012] EFTA Ct. Rep. 246, para. 84.

(iv) while it is for the domestic legal system of each EEA State to lay down the procedural rules governing such repayments, including rules on limitation periods, such national rules must not be less favourable than those governing similar domestic actions (principle of equivalence) and must not render practically impossible or excessively difficult the exercise of rights conferred by EEA law (principle of effectiveness).[27]

25. The Authority, first, applies these principles to the present case and, second, asks whether any exception to the application of such principles may be justified.

5.2.2 Application of principles to the present case

26. Applying the above principles to the case of the applicant, RS, and others like him (whose taxes have not yet finally been assessed) would *preclude* the application of a higher tax rate under the National Measure, in respect of the tax years up to 2020. This means that the referring court must draw all the necessary consequences of the breach of EEA law, and must, within the scope of the powers conferred on it, grant an effective remedy (thus e.g. granting a repayment of tax levied in breach of EEA law, including interest[28]).

27. In respect of non-resident taxpayers whose tax assessments for the years up to 2020 have been concluded, the Request (and question) of the national court seem(s) to assume that no such tax refund will be granted. It is true that those whose tax returns have become final and those whose returns remain open are in different positions from a national procedural perspective, and that this may justify a certain difference in treatment. Nevertheless, to the extent that national Liechtenstein law permits a re-opening of a taxpayer's tax return, and that national limitation periods have not expired, the Tax Authority[29] (or the national court or other State body, as appropriate) *must*

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[27] See e.g. Case E-11/22 *Beatrix Koch*, para. 121; judgment of 30 May 2018 in Case E-6/17 *Fjarskipti hf v Síminn hf* ("***Fjarskipti***") [2018] EFTA Ct. Rep. 78, para. 31; and judgment of 19 September 2018 in Case E-10/17 *Nye Kystlink AS* [2018] EFTA Ct. Rep. 292, para. 110 and, in respect of limitation periods, paras. 112-113.

[28] See e.g. judgments of the CJEU of 19 July 2012, *Littlewoods Retail and Others*, C-591/10, EU:C:2012:478, paras. 24-27, and of 6 October 2015, *Târșia*, C-69/14, EU:C:2015:662, paras. 24-25.

[29] See by analogy the recent judgment of the CJEU of 10 March 2022 in *Grossmania* ("***Grossmania***"), C-177/20, EU:C:2022:175, paras 43, 45 and 46: where national legislation is incompatible with EU law, full effect must be given to EU law, if necessary by disapplying the national provision – which obligation

also, in line with the principles set out at paragraph 24 above, remedy the consequences of the unlawful application of the National Measure in respect of this other category of EEA nationals (thus granting an effective remedy, such as refunding the tax paid in breach of EEA law, together with interest).

5.2.3 Whether any exception applies to the basic principles

28. The Authority submits that, according to settled case-law, there is no basis for exceptionally 'permitting' the historic discrimination in this case, and for therefore failing to grant a remedy to those whose EEA law rights have been infringed.

29. The referring court refers to Case C-64/20 ***UH***, in support of the proposition that a national provision may exceptionally run counter to a provision of EEA law, where this is necessary for appropriate reasons, in particular overriding reasons of legal certainty.[30]

30. The Authority observes, first, that in Case C-64/20 ***UH*** the CJEU held that the power to grant a provisional suspension of the effects of a rule of EU law with regard to contrary national law was reserved for the CJEU alone. Such a power may not therefore be exercised by a national court,[31] save for in extremely limited circumstances, which do not apply here.[32] As held by the CJEU in Case C-379/15 ***Association France Nature Environnement***:

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also applies to national administrative bodies; and Case E-3/15 *Liechtensteinische Gesellschaft, supra*, in particular para. 83. For the circumstances in which national administrative bodies may be required to reopen administrative decisions which have become final, see Case C-177/20 *Grossmania*, para. 52 *et seq*.

[30] Request, p.5.

[31] Case C-64/20 *UH*, *supra*, para. 36

[32] In the field of environmental protection the CJEU has held (see judgment of 28 July 2016, *Association France Nature Environnement*, C-379/15, EU:C:2016:603, para 53), that a national court of final appeal is in principle required to make a reference for a preliminary ruling so that the CJEU may assess whether, exceptionally, provisions of national law held to be contrary to EU law may be provisionally maintained in the light of an overriding consideration linked to environmental protection and in view of the specific circumstances of the case pending before that national court. The national court is relieved of that obligation only when it is convinced, which it must establish in detail, that no reasonable doubt exists as to the interpretation and application of the specific conditions set out in the judgment of 28 February 2012 in *Inter-Environnement Wallonie and Terre wallonne*, C-41/11, EU:C:2012:103. These very specific conditions are not present here. In particular, the Authority observes that one of the '*Inter-Environnement Wallonie*' conditions is that the national measure must have been compliant with the key substantive provisions of EU law on the matter (albeit that it was not compliant with the EU procedural requirement to carry out a prior environmental assessment). In the present case, it is accepted that the National Measure was not compatible with the EEA Agreement.

> *"If national courts had the power to give national provisions primacy in relation to EU law contrary to those national provisions, even provisionally, the uniform application of EU law would be damaged."*[33]

The Authority therefore observes that, having determined that the National Measure was in breach of EEA law, the State Court should have given full effect to Articles 4 and 28(2) EEA in its judgment of 1 September 2020 (Case StGH 2019/095), and should not have deferred the operative date of annulment of the National Measure by one year. It is settled case-law that, in such circumstances, national courts are under a duty to give full effect to provisions of EEA law which are (as here) sufficiently clear, precise and unconditional,[34] if necessary by disapplying or annulling the national provision, and that it is not necessary for national courts to request or await the prior setting aside of such provision by legislative or other constitutional means.[35] The decision of the State Court to suspend the annulment of the National Measure, rather than annulling it with immediate effect, was therefore itself in breach of EEA law.

31. Second, while considerations of legal certainty were mentioned in Case C-64/20 ***UH***, the CJEU found that no such considerations were present in that case. Indeed, the argument of the Irish State that it should not grant a remedy for a historic breach of EU law, essentially because its legislation was now in conformity with EU law, was rejected by the CJEU.[36] As the CJEU held at paragraph 34 of its judgment:

> *"The fact that the Irish legislation is already compatible with Regulation 2019/6, which will apply with effect from 28 January 2022, cannot call into question the finding that that legislation is incompatible with EU law before that date or, a fortiori, justify such incompatibility."*

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[33] Judgment of 28 July 2016, *Association France Nature Environnement*, C-379/15, EU:C:2016:603, para. 33.
[34] See e.g. Case E-6/17 *Fjarskipti*, *supra*, paras. 27-29, and see the cases cited in the footnotes to paragraph 24 above.
[35] Case C-177/20 *Grossmania*, *supra*, para. 43 and the case-law cited.
[36] Case C-64/20 *UH*, *supra*, paras. 17, 20 (for the summary of the arguments) and paras. 34-39 (for the reasoning of the CJEU).

To the extent that any such argument is made in the present case (i.e. that the breach is merely historic, and that the provisions of national law now comply with EEA law), the Authority respectfully submits that such an argument should similarly be rejected.[37]

32. It appears, third, that the reason why the national court is reticent about granting a lower tax rate (by disapplying the National Measure) to RS and similar taxpayers is because it is concerned to ensure *equal treatment* between taxpayers. This is because the national court proceeds on the basis that taxpayers whose tax returns are closed would be unable to benefit from the lower rate.[38] As explained however above at paragraph 27, such taxpayers must also be able to benefit from remedies (such as a lower tax rate) for breach of their EEA rights, to the extent that such remedies remain available to them under national procedural law.[39] No concerns of unfair discrimination should therefore arise. Moreover, permitting all relevant categories of affected taxpayers to seek, in line with national procedural law, a remedy for breach of their rights under Articles 4 and 28(2) EEA would appear to enhance, rather than hinder, the legal certainty and effectiveness of these provisions.

33. In conclusion, the very particular circumstances and conditions referred to in Case C-64/20 ***UH*** are not present in the case at hand. There are therefore, in the Authority's respectful submission, no grounds for provisionally suspending the effects of Articles 4 and 28(2) in respect of the National Measure for the tax years up to 2020.

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[37] pp.5 and 6 of the Request make reference to the principle of legal certainty, but the reason why such a principle might require the suspension of the effects of EEA law in the present case is not articulated. More generally, the Authority observes from para. 3.8 of the judgment of the State Court of 1 September 2020 (Case StGH 2019/095) that no other reasons of an overriding general interest were put forward by the Liechtenstein Government to justify the discrimination (Articles 4 and 28(2) EEA) brought about by the National Measure.

[38] p.6 of the Request states "*it would be discriminatory, unfair and unjust for all those taxable persons whose tax assessments were finally concluded on 20 August 2021 if a lower tax rate for the past years was now applied retrospectively to the few taxable persons, like the applicant, whose tax assessments for past years have not yet been finally concluded.*"

[39] Which law must itself not make the exercise of their rights to an effective remedy excessively difficult – see paragraph 24 above.

6 CONCLUSION

Accordingly, the Authority respectfully submits that the Court should answer the question of the referring court as follows:

> ***Articles 3, 4 and 28(2) of the EEA Agreement must be interpreted as precluding the application of a higher tax rate to the taxation of earnings gained by activity in Liechtenstein as an employed person by nationals of an EEA Member State who are not resident for tax purposes in Liechtenstein, compared to persons liable to tax who are resident for tax purposes in Liechtenstein, when assessing taxes in respect of the tax years up to 2020.***

Claire Simpson Michael Sánchez Rydelski

Melpo-Menie Joséphidès

Agents of the EFTA Surveillance Authority