SPROSTOWANIA

Sprostowanie do zaproszenia do zgłaszania uwag zgodnie z art. 1 ust. 2 w części I protokołu 3 do Porozumienia między państwami EFTA w sprawie ustanowienia Urzędu Nadzoru i Trybunału Sprawiedliwości, dotyczących pomocy państwa w odniesieniu do opodatkowania zależnych zakładów ubezpieczeń w Liechtensteinie

(Niniejszy tekst unieważnia i zastępuje tekst opublikowany w Dzienniku Urzędowym Unii Europejskiej C 72 z dnia 26 marca 2009 r., s. 50)

(2009/C 75/16)

„Zaproszenie do zgłaszania uwag zgodnie z art. 1 ust. 2 w części I protokołu 3 do Porozumienia między państwami EFTA w sprawie ustanowienia Urzędu Nadzoru i Trybunału Sprawiedliwości, dotyczących pomocy państwa w odniesieniu do opodatkowania zależnych zakładów ubezpieczeń w Liechtensteinie

Decyzją nr 620/08/COL z dnia 24 września 2008 r., zamieszczoną w autentycznej wersji językowej na stronach następujących po niniejszym streszczeniu, Urząd Nadzoru EFTA wszczął postępowanie na mocy art. 1 ust. 2 w części I protokołu 3 do Porozumienia między państwami EFTA w sprawie ustanowienia Urzędu Nadzoru i Trybunału Sprawiedliwości (dalej zwanego protokołem 3). Władze Liechtensteinu otrzymały stosowną informację wraz z kopią wyżej wymienionej decyzji.

Urząd Nadzoru EFTA zaprasza niniejszym państwa EFTA, państwa członkowskie UE i zainteresowane strony do zgłaszania uwag w sprawie omawianego środka w ciągu jednego miesiąca od publikacji niniejszego zawiadomienia oraz o kierowanie ich na poniższy adres:

EFTA Surveillance Authority
Registry
Rue Belliard 35
1040 Bruxelles/Brussel
BELGIQUE/BELGIË

Uwagi zostaną przekazane władzom Liechtensteinu. Zainteresowane strony zgłaszające uwagi mogą wystąpić z odpowiednio uzasadnionym pisemnym wnioskiem o objęcie ich tożsamości klauzulą poufności.

STRESZCZENIE

Postępowanie w wyżej wymienionej sprawie zostało wszczęte przez Urząd Nadzoru EFTA, który w dniu 14 marca 2007 r. przesłał władzom Liechtensteinu wniosek o udzielenie informacji.

Na mocy ustawy z dnia 18 grudnia 1997 r., w sprawie zmiany ustawy podatkowej Liechtensteinu ([1]), władze Liechtensteinu wprowadziły szczególne zasady opodatkowania zależnych zakładów ubezpieczeń.

Zgodnie z art. 82a) ust. 1 ustawy podatkowej zależne zakłady ubezpieczeń odprowadzają podatek od kapitału w wysokości 1 ‰ kapitału własnego. Jeżeli kapitał przekracza 50 mln, stawka podatku zostaje zmniejszona do poziomu ¾ ‰, jeżeli natomiast kapitał przekracza 100 mln — do poziomu ½ ‰. Zwykła stawka podatku od kapitału wynosi 2 ‰.

Artykuł 82a w związku z art. 73 ustawy przewiduje, że zależne zakłady ubezpieczeń nie odprowadzają podatku dochodowego.

Ponadto na mocy art. 88d)3) ustawy podatkowej akcje lub udziały zależnych zakładów ubezpieczeń są zwolnione z podatku od dywidend, który zazwyczaj pobierany jest w wysokości 4 %.

We wstępnej opinii Urzędu Nadzoru EFTA zależne zakłady ubezpieczeń są przedsiębiorstwami w rozumieniu art. 61 ust. 1 Porozumienia EOG. Świadczą one usługi dla jednego przedsiębiorstwa lub określonej, zamkniętej grupy przedsiębiorstw. Świadczenie ubezpieczenia jest usługą, która zasadniczo jest działalnością gospodarczą. Ogólnie rzecz biorąc zależny zakład ubezpieczeń uzyskiwałby dochód z tytułu świadczonych przez niego usług. Fakt, że usługi świadczone są jedynie dla jednego klienta lub dla zamkniętej grupy klientów nie oznacza, że świadczenie takich usług nie jest działalnością gospodarczą.

([1]) Ustawa z dnia 18 grudnia 1997 r. w sprawie zmiany ustawy podatkowej Liechtensteinu, Law Gazette 1998 nr 36.

We wstępnej opinii Urzędu Nadzoru EFTA działania w postaci zwolnienia z podatku dochodowego oraz zmniejszenia stopy podatku od kapitału spełniają również pozostałe przesłanki niezbędne do uznania ich za pomoc państwa w rozumieniu art. 6 ust. 1 Porozumienia EOG.

Częściowe lub całkowite zwolnienie z podatku oznacza obciążenie zasobów państwa. Zakłady czerpią określone korzyści, ponieważ są zwolnione z opłat, które w normalnej sytuacji musiałyby pokryć z własnych środków. Zakłady kwalifikujące się do częściowego lub całkowitego zwolnienia z podatku świadczą usługi, które są przedmiotem obrotu między Umawiającymi się Stronami Porozumienia EOG i w związku z tym podlegają konkurencji transgranicznej. Środki mają charakter selektywny, ponieważ mają zastosowanie jedynie do określonej grupy przedsiębiorstw. Zdaniem Urzędu Nadzoru EFTA taka selektywność nie odzwierciedla logiki właściwej dla systemu podatkowego.

Podobne wnioski odnoszą się do podatku od dywidend. Istnieje jednak różnica polegająca na tym, że podatek od dywidend jest podatkiem potrącanym u źródła. Zwolnienie z podatku od dywidend może zatem dawać korzyści właścicielom zależnych zakładów ubezpieczeń. Takimi właścicielami są zazwyczaj (duże) przedsiębiorstwa. Bezpośrednimi beneficjentami tego środka pomocy będą więc właśnie takie przedsiębiorstwa. Można zatem przyjąć, że zależne zakłady ubezpieczeń skorzystają ze zwolnienia z podatku od dywidend w sposób pośredni. Będą one atrakcyjniejsze dla inwestorów; środek ten sprawi więc, że dostęp do kapitału będzie łatwiejszy.

Zasadniczo środki wsparcia wchodzące w zakres art. 61 ust. 1 Porozumienia EOG nie są zgodne z funkcjonowaniem Porozumienia EOG, chyba że kwalifikują się do odstępstwa, o którym mowa w art. 61 ust. 2 lub 3 Porozumienia EOG. Zgodnie ze wstępną opinią Urzędu Nadzoru EFTA żadne z odstępstw przewidzianych w wymienionych postanowieniach prawdopodobnie nie może być zastosowane w odniesieniu do opodatkowania zależnych zakładów ubezpieczeń w Liechtensteinie. Ponieważ działania te zostały wprowadzone w życie, po tym jak Liechtenstein przystąpił do Porozumienia EOG, wszelka pomoc niezgodna z przepisami dotyczącymi pomocy państwa musiałby zostać zwrócona.

Wniosek

W świetle powyższych uwag Urząd podjął decyzję o wszczęciu formalnego postępowania wyjaśniającego zgodnie z art. 1 ust. 2 w części I protokołu 3 do Porozumienia EOG.. Zainteresowane strony wzywa się do nadsyłania uwag w terminie jednego miesiąca od publikacji niniejszej decyzji w *Dzienniku Urzędowym Unii Europejskiej*.

EFTA SURVEILLANCE AUTHORITY DECISION

No 620/08/COL

of 24 September 2008

to initiate the procedure provided for in Article 1(2) in Part I of Protocol 3 to the Surveillance and Court Agreement with regard to the taxation of captive insurance companies according to the Liechtenstein Tax Act

(Liechtenstein)

THE EFTA SURVEILLANCE AUTHORITY ([1]),

Having regard to the Agreement on the European Economic Area ([2]), in particular to Article 61 to 63 and Protocol 26 thereof,

Having regard to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ([3]), in particular to Article 24 thereof,

Having regard to Article 1(2) of Part I and Article 4(4) and 6 of Part II of Protocol 3 to the Surveillance and Court Agreement ([4]),

([1]) Hereinafter referred to as the Authority.
([2]) Hereinafter referred to as "the EEA Agreement".
([3]) Hereinafter referred to as "the Surveillance and Court Agreement".
([4]) Hereinafter referred to as "Protocol 3".

Having regard to the Authority's Guidelines [1] on the application and interpretation of Articles 61 and 62 of the EEA Agreement, and in particular the chapter dealing with the application of State aid rules to measures relating to direct business taxation [2],

Having regard to the Authority's Decision of 14 July 2004 on the implementing provisions referred to under Article 27 of Part II of Protocol 3 [3],

Whereas:

I. FACTS

1. Procedure

By letter dated 14 March 2007 (Event No 393563), the Authority sent a request for information to the Liechtenstein authorities, inquiring about various tax derogations for certain company types under the Liechtenstein Tax Act. The Liechtenstein authorities replied by letter dated 30 May 2007 (Event No 423398).

By letter dated 12 July 2007 (Event No 428102), the Authority requested more information. In this letter the Authority also informed the Liechtenstein authorities that if the Authority found that the preferential taxation in favour of captive insurance companies constituted State aid within the meaning of Article 61(1) of the EEA Agreement, this aid might constitute unlawful aid within the meaning of Article 1(f) in Part II of Protocol 3. The Authority informed the Liechtenstein authorities that unlawful aid might be subject to recovery according to Article 14 in Part II of Protocol 3.

The Liechtenstein authorities provided a response by letter dated 29 August 2007 (Event No 437041). On 31 October 2007, the case was discussed by the Authority and the Liechtenstein authorities. The Liechtenstein authorities submitted further information by letter dated 3 December 2007 (Event No 456325). The Liechtenstein authorities presented further information in another meeting with the Authority on 18 December. The Authority requested further information on 20 December 2007 (Event No 458438). The Liechtenstein authorities responded by letter dated 1 February 2008 (Event No 463410). Further clarifications were submitted by the Liechtenstein authorities by email.

2. Scope of this decision

The current investigation only concerns the treatment of captive insurance companies under the Liechtenstein Tax Act (*Gesetz über die Landes- und Gemeindesteuern*, hereinafter: "the Tax Act") [4]. Other tax measures referred to by the Authority in its letter of 14 March 2007 are not covered by the present procedure.

3. Description of the Liechtenstein taxes on companies

3.1. General provisions

3.1.1. *Income and capital tax*

Part 4, heading A — The company taxes (*"Die Gesellschaftssteuern"*) — Sections 73 to 81 of the Tax Act comprises two taxes relating to companies:

— a business **income tax** (*Ertragssteuer*). According to Section 77 of the Tax Act this tax is assessed on the entire annual net income. Taxable net income is the entire revenues minus company expenditures (including write-offs and other provisions). The income tax rate depends on the ratio of net income to taxable capital and lies between 7,5 % and 15 % [5]. This tax rate may be increased by 1 percentage point to, at most, 5 percentage points depending on the relation between dividends and taxable capital. The maximum income tax is therefore 20 %,

---

[1] Guidelines on the application and interpretation of Articles 61 and 62 of the EEA Agreement and Article 1 of Protocol 3, adopted and issued by the Authority on 19 January 1994, published in the *Official Journal of the European Union* (hereinafter referred to as OJ L 231, 3.9.1994, p. 1) and EEA Supplement No 32 of 3 September 1994, p. 1. Hereinafter referred to as the State Aid Guidelines. The updated version of the State Aid Guidelines is published on the Authority's website:
http://www.eftasurv.int/fieldsofwork/fieldstateaid/guidelines/

[2] This Chapter was introduced with Authority's Decision No 149/99/COL of 30 June 1999, published in OJ L 137, 8.6.2000, p. 26 and EEA Supplement No 26 of 8 June 2000, p. 11.

[3] Decision 195/04/COL of 14 July 2004 published in OJ C 139, 25.5.2006, p. 57 and EEA Supplement No 26 of 25 May 2006, p. 1 as amended by Decision 319/05/COL of 14 December 2005 published in OJ C 286, 23.11.2006, p. 9 and EEA Supplement No 57 of 23 November 2006, p. 31.

[4] Liechtensteinisches Landesgesetzblatt 1961, Nr. 7, with subsequent amendments.

[5] The net profit is set in relation to the taxable capital. The tax rate is then set at half the percentage which the net profit constitutes of the taxable capital. However, there is a minimum level of 7,5 % and a maximum ceiling of 15 %, see Section 79(2) of the Tax Act.

— a **capital tax** (*Kapitalsteuer*). According to Section 76 of the Tax Act the basis for this 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. Taxes are assessed at the end of the company's business year (generally on 31 December). The tax rate for the capital tax is 2 ‰.

Pursuant to Section 73 of the Tax Act, legal persons operating commercial businesses in Liechtenstein pay income and capital taxes. Foreign companies operating a branch in Liechtenstein are also subject to the income and capital tax, see Section 73(e) of the Tax Act.

3.1.2. *Coupon tax*

Part 5 of the Tax Act concerns the so-called **coupon tax**. According to Section 88(a)(1) of the Tax Act, Liechtenstein levies a tax on coupons. Further details are given in Section 88(b)-(e). The coupon tax is levied on the coupons of securities (or documents equal to securities) issued by "a national". This notion covers any person who has the place of residence, domicile or statutory seat in Liechtenstein. It also covers undertakings that are registered in the public register of Liechtenstein.

The coupon tax applies to companies the capital of which is divided into shares, and it is levied at the rate of 4 % on any distribution of dividends or profit shares (including distributions in the form of shares).

The coupon tax is a withholding tax, which falls on the investor as the ultimate tax payer (Steuerträger), but is withheld on the level of the company. According to Section 88(i) of the Tax Act, the person liable to pay for a coupon is liable to pay the tax ([1]). Section 88(k) 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 ([2]). Thus, as the Liechtenstein authorities have confirmed, ultimately it is the investor entitled to payment of the coupon tax the one bearing the financial burden of the tax.

3.2. **Special tax provisions concerning captive insurance companies**

3.2.1. *The introduction of specific legislation on captive insurance companies*

By virtue of Act of 18 December 1997 on the amendment of the Liechtenstein Tax Act ([3]), the Liechtenstein authorities introduced special tax rules applicable to captive insurance companies. Section 82(a) and 88(d)(3) were introduced into the Tax Act with effect from 1998 onward and still apply today. The Liechtenstein authorities have stated that the provision was introduced in order to establish and develop the captive insurance sector as a new field of economic activity in Liechtenstein.

Captive insurance companies are however not defined in the Tax Act. There is a reference in Article 82(a) according to which captive insurance companies are "*[i]nsurance companies in accordance with the definition of the Insurance Supervision Law, which exclusively engage in captive insurance ("Eigenversicherung")*". In general, the notion of a captive insurer describes a subsidiary company formed to insure or reinsure the risks of its parent and or associated group companies. According to Article 2(b) of Directive 2005/68/EC, the so-called Reinsurance Directive ([4]), "*captive reinsurance undertaking means 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.*"

According to the Liechtenstein authorities, approximately 13 captive insurance companies have profited from the specific tax regime. Currently, 11 out of these 13 companies still fall under Section 82(a) of the Tax Act.

3.2.2. *Income and capital tax*

Part 4, heading B of the Tax Act — Special company taxes ("*Besondere Gesellschaftssteuern*") — Sections 82 to 88 of the Tax Act contains special tax provisions for certain company forms such as insurance companies, holding companies, domiciliary companies and investment undertakings. Section 82(a) of the Tax Act refers to captive insurance companies.

([1]) Article 88(i) of the Tax Act reads: "[s]teuerpflichtig ist der Schuldner des Coupons oder der steuerbaren Leistung".
([2]) Article 88(k) of the Tax Act reads: "Der Betrag, mit dem der Coupon eingelöst wird, oder die steuerbare Leistung ist bei der Auszahlung, überweisung, Gutschrift oder Verrechnung ohne Rücksicht auf die Person des Glüabigers um die Steuer zu kürzen."
([3]) By virtue of Act of 18 December 1997 on the amendment of the Liechtenstein Tax Act, Law Gazette 1998, No 36.
([4]) Incorporated into the EEA Agreement by OJ Decision No 59/2006 of 2 June 2006. It entered into force on 1 June 2007.

Pursuant to Article 82(a) paragraph 1 of the Tax Act, *"[i]nsurance companies in accordance with the definition of the Insurance Supervision Law, which exclusively engage in captive insurance ("Eigenversicherung"), pay a capital tax of 1 ‰ on the company's own capital, cf. Section 82(a)(1) of the Tax Act. For the capital exceeding 50 million the tax rate is reduced to 0,75 ‰ and for the capital in excess of 100 million to 0,5 ‰"* ([1]).

In other words, instead of paying the normal 2 ‰ capital tax, captive insurance companies are only obliged to pay 1 ‰ hereof, and this rate is even further reduced for amounts exceeding CHF 50 and CHF 100 million.

By virtue of paragraph 2 of Article 82(a) of the Tax Act, insurance companies which engage in captive insurance and ordinary insurance activities for third parties are nevertheless liable to regular capital and income tax according to Sections 73 to 81 of the Tax Act for that part of their activities which concerns third party insurance.

As Article 82(a) of the Tax Act constitutes a *lex specialis* with respect to Article 73 of the same Act, it can *a contrario* be concluded that captive insurance companies do not pay income tax ([2]).

In conclusion, captive insurance companies only pay a reduced capital tax as described in Section 82(a)(1) of the Tax Act and no income tax.

3.2.3. *Coupon tax*

By virtue of Article 88(d)(3) of the Tax Act, shares or parts of captive insurance companies are exempted from payment of the coupon tax.

4. **Comments by the Liechtenstein authorities**

The Liechtenstein authorities underline that captive insurance companies as such do not profit from the tax exemption. The tax exemptions only apply to those parts of the insurance companies dealing with the captive insurance. In contrast, income and capital tax are fully levied for the part which concerns third party insurance.

From that, the Liechtenstein authorities draw the following conclusions: Firstly, that a captive insurance company is not a financial vehicle designed to generate profits, but is limited to managing internal risks. For that reason, the captive insurance company does not exercise any economic activity and does not constitute an undertaking within the meaning of Article 61(1) of the EEA Agreement. There is no market for captive insurance companies as this kind of activity can only be offered to the respective parent and its group members.

Secondly, no advantage would be involved as the activity is limited to the administration of risks and holding funds. Third, in certain countries — like Germany — the income generated by a captive insurance company is taxed at the level of the parent company. In other words, if the company was also taxed in Liechtenstein, there would be a double taxation problem, so the non-taxation in Liechtenstein does not lead to an advantage. It is further argued that the taxation of captive insurance companies is a result of the nature and general scheme of Liechtenstein taxation. The generation of profits is not the primary objective of captive insurance companies. The Liechtenstein authorities also point to EU Member States which offer a favourable regulatory environment for captive insurance companies.

Fourthly, the tax benefits are not selective as there is no preferential treatment of undertakings which find themselves in a comparable factual and legal situation with others. In the view of the Liechtenstein authorities captive insurance activities cannot be compared to the activities of other insurance companies.

In any event, there would be no distortion of competition as the captive insurance companies do not compete with other insurers for business. Article 5(1) of the EU Merger Regulation establishes that intra group turnover must not be taken into account in assessing whether a transaction reaches a Community dimension. In the opinion of the government, this illustrates that internal transactions do not affect competition.

([1]) Translation made by the services of the Authority.
([2]) See also letter of 30 May 2007 from the Liechtenstein authorities.

II. **ASSESSMENT**

1. **The presence of State aid**

Article 61(1) of the EEA Agreement reads as follows:

"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 Contracting Parties, be incompatible with the functioning of this Agreement."

1.1. **Income and capital tax**

1.1.1. *Presence of State resources*

The aid measures must be granted by the State or through State resources.

Whereas the capital tax rate in Liechtenstein is currently set at 2 ‰, captive insurance companies are subject to a reduced capital tax of 1 ‰ (0,75 ‰ for the capital exceeding CHF 50 million and 0,5 ‰ for the capital in excess of CHF 100 million). Moreover, captive insurance companies are further fully exempted from payment of income tax.

The granting of a full or partial tax exemption involves a loss of tax revenues for the State which is equivalent to consumption of State resources in the form of fiscal (tax) expenditure ([1]). The State in Liechtenstein foregoes revenues corresponding to the non-payment of income tax and the payment of a reduced capital tax rate.

For these reasons, the Authority considers that the special provisions on income and capital tax applicable to captive insurance companies are granted through State resources.

1.1.2. *Favouring certain undertakings or the production of certain goods*

1.1.2.1. Undertaking

According to the European Court of Justice, the notion of an undertaking in the sense of Article 87 EC, which corresponds to Article 61(1) of the EEA Agreement, encompasses "*every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed*" ([2]). Even economic activities without profit motives can constitute economic activities where the entities carrying out the activity are competing with other profit seeking undertakings ([3]).

In general, captive insurance companies provide various kinds of insurance services to a limited and defined group of entities seeking insurance coverage and not to the public at large. They are in this sense "captive". Often there may be a large corporation that establishes such a company to provide it with insurance coverage instead of alternatively requesting insurance on the general market for such services. In addition to provide insurance for the parent company the captive insurer may also provide insurance to other undertakings in the same company group. It may also provide insurance to undertakings which are not in the same ownership group but which are affiliated for example through a vertical relationship. It may also be that various independent undertakings go together and establish a captive insurance company. This could be the case for example for various cooperative undertakings, housing associations or companies in the same branch of industry seeking insurance coverage for certain specific risks.

For their services the captive insurance companies would need to charge premiums, establish an adequate capital base, fulfil solvency requirements and other requirements according to EEA and national legislation. In their business activity they would, as other insurance companies, seek reinsurance or they may themselves be reinsurance undertakings.

([1]) See point 3(3) on the Authority's State Aid Guidelines to Business Taxation.
([2]) Joined Cases C-180/98 to C-184/98 Pavlow [2000] ECR I-6451, paragraph 75.
([3]) Case C-222/04 Cassa di Resparmio di Firenze SpA [2006] ECR I-289 paragraph 123; see also Commission Decision of 16 September 1997 on State aid for Gemeinnützige Abfallverwertung GmbH (OJ L 159, 3.6.1998, p. 58).

In its decision on an aid scheme for captive insurance companies in Åland, the Commission took the view that captive insurance companies were offsetting the risks on the insurance market through internal reinsurance. In that respect, reinsurance of subsidiaries did not constitute a separate insurance market since subsidiaries could normally be insured by other companies operating on the open market. ([1]) Liechtenstein has not pointed to factual differences compared to the situation in Finland, but merely argues that the Commission is wrong in its assessment.

Providing insurance is a service, which in principle is an economic activity. Even in cases where a captive insurance company only offers its insurance services against remuneration to a parent company, in which case the service is not delivered on an open market, the service in question would still be a financial service. A captive insurance company is set up as any other company and would normally charge for the services it provides. A captive insurance company would thus earn an income for services it provides which is an element that indicates that the activity is of an economic nature.

The company deciding to buy its services from a captive insurance company would presumably only do so if that is more economically advantageous than buying the service from other insurance companies. The captive insurance company is therefore subject to competitive pressure from the market in its delivery of its services since, if its prices would increase, the buyer of the service would turn elsewhere for the procurement of the service. The fact that the service may, in many cases, be delivered to only one customer does not remove it from being an economic activity provided on a market. Many companies in different markets have only one buyer of its service, which does not mean that they are not undertakings for the purposes of EEA competition law. Services or goods are provided on the market even if the purchaser may be only one.

Moreover, the Liechtenstein authorities have not claimed that Liechtenstein law prohibits a captive insurer to provide services to several different companies belonging to the same group, being in some way affiliated or being completely independent of each other. Indeed, Liechtenstein law does not seem to limit the captive insurance companies to supply its services to only one buyer, the parent company, or for that matter a group of companies receiving the captive services. As far as the Authority understands, the captives insurance companies are free to offer their services to any other company. The only limitation is that for tax purposes, services offered to other entities will be subject to normal taxation. The captive insurance companies are thus free to offer their services on the market, in addition to providing insurance to its parent company or a closed circle of companies. The aid scheme in question therefore benefits undertakings that perform an economic activity in competition on the market.

Finally, the aid may also potentially benefit the groups to which the captive insurance companies belong. Such groups will normally be undertakings.

For these reasons, in the preliminary view of the Authority, captive insurance companies are undertakings in the meaning of Article 61(1) of the EEA Agreement.

1.1.2.2. Advantage

The measure confers the captive insurances falling under Section 82(a) of the Tax Act an advantage by relieving them of charges (non-payment of income tax and only a reduced payment of a capital tax) that would normally be borne from their budgets.

The payment of taxes is an operating cost related to purchases in the normal course of an undertakings' economic activity, which is normally borne by the undertaking itself. In general, a lower rate of taxation than what normally would be due or an exemption from paying taxes confers an advantage on the eligible companies. They are granted an advantage because the operating costs which those undertakings will have to put up with are reduced in accordance with the amount of exempted tax rate.

The preliminary view of the Authority is therefore that the special tax rules applicable to captive insurance companies which fully or partially exempt them from taxes therefore entail the granting of an economic advantage. The same rules could also constitute an advantage to the groups to which they belong.

1.1.2.3. Selectivity

For a measure to be aid it must be selective in that it favours "*certain undertakings or the production of certain goods*".

([1]) Commission Decision of 10 July 2002 on the aid scheme implemented by Finland for Åland Islands captive insurance companies, OJ 2002, L 329/22, paragraph 45.

Section 82(a) of the Tax Act lists captive insurance companies as eligible to profit from a lower capital tax rate than the generally applicable rate which other undertakings, including third party insurers, are subject to. Similarly, the captive companies benefit from a full exemption from income tax.

As the Tax Act provides for a further tax reduction for those captive companies which have capital exceeding CHF 50 million or CHF 100 million respectively, an additional tax advantage is granted to larger captive companies.

For these reasons, the Authority preliminary considers that the tax rules in favour of captive insurance companies are materially selective.

A specific tax measure can nevertheless be justified by the logic of the tax system if it is consistent with it ([1]). Measures intended partially or wholly to exempt firms in a particular sector from the charges arising from the normal application of the general system may constitute State aid if there is no justification for this exemption on the basis of the nature and logic of the general system ([2]). Therefore, even if being materially selective, the specific tax rules applicable to captive insurance companies will not be selective in the sense of Article 61(1) of the EEA Agreement if the rule is justified by the nature and general scheme of the Liechtenstein tax system.

For this assessment, the Authority must consider whether the special tax rules applicable to captive insurance companies meet the objectives inherent in the tax system itself, or whether it pursues other objectives not enshrined therein. The Authority must analyse the national tax system of Liechtenstein irrespective of whether captive insurance companies enjoy similar tax advantages in other EEA States.

According to constant case law, it is for the EFTA State that has introduced a differentiation between undertakings in relation to charges to show that it is actually justified by the nature and general scheme of the system in question ([3]).

The Liechtenstein authorities have stated that this tax concession was introduced in order to establish and develop the captive insurance sector as a new field of economic activity in Liechtenstein. In the view of the Authority, this is an economic purpose not inherent to taxation which therefore does not fall within the logic of a tax system ([4]).

The Liechtenstein authorities have however argued that taxation of captive insurance companies would lead to double taxation of the same earnings. They quote the example of the profits of captive insurance companies being taxed in Germany, which might lead to a double taxation if the same profits were taxed in Liechtenstein.

The avoidance of double taxation is nowhere reflected in the Liechtenstein Tax Act or in the history of its introduction. To the contrary, in the Authority's view, the following aspects indicate that the logic behind the tax exemptions neither has the effect nor the purpose of avoiding double taxation. First, the reduced tax is not limited to situations where a double taxation would occur. Second, the tax is not reduced to zero where the taxation in another State would exceed the normally applicable tax rate in Liechtenstein. Third, the captive insurance companies are partially exempted from the general capital tax in Liechtenstein simply because they carry out their specific services in the given organisational form. Fourth, the particular capital taxation for captives is digressive in nature as the tax rate decreases when the taxable capital exceeds certain thresholds. In the Authority's view, had the purpose of introducing a differentiated taxation for captive insurance companies been to avoid double taxation, degressivity would not seem to be the appropriate tool to achieve such an objective.

At this stage of the procedure, the Authority cannot see that the various tax exemptions can be considered to be inherent in the nature and general scheme of the Liechtenstein tax system. The preliminary view of the Authority is therefore that these measures are selective in the meaning of Article 61(1) of the EEA Agreement.

([1]) Case E-6/98 Norway v EFTA Surveillance Authority, [1999] EFTA Court Report, p. 76, paragraph 38; Joined Cases E-5/04, E-6/04 and E-7/04 Fesil and Finnfjord, PIL and Others and Norway v EFTA Surveillance Authority, [2005] EFTA Court Report, p. 117, paragraphs 84-85; Joined Cases T-127/99, T-129/99 and T-148/99 Territorio Histórico de Alava et a v Commission [2002] ECR II-1275, paragraph 163, Case C-143/99 Adria-Wien Pipeline [2001] ECR I-8365, paragraph 42; Case T-308/00 Salzgitter v Commission [2004] ECR II-1933 paragraph 42, Case C-172/03 Wolfgang Heiser [2005] ECR I-1627, paragraph 43.

([2]) Case E-6/98 Norway v EFTA Surveillance Authority, cited above, paragraph 38; Joined Cases E-5/04, E-6/04 and E-7/04 Fesil and Finnfjord, PIL and others and Norway v EFTA Surveillance Authority, cited above, paragraphs 76-89; Case 173/73 Italy v Commission [1974] ECR 709, paragraph 16.

([3]) Case E-6/98 Norway v EFTA Surveillance Authority, mentioned above, paragraph 67, Case C-159/01 Netherlands v Commission, ECR [2004] I-4461, paragraph 43.

([4]) See for a similar argumentation, Commission Decision of 17 February 2003 on the State aid implemented by the Netherlands for international financing activities paragraph 95.

1.1.3. *Distortion of competition and effect on trade between Contracting Parties*

In order to fall under Article 61(1) of the EEA Agreement, the measure must distort or threaten to distort competition and affect trade between the Contracting Parties.

For a measure to distort competition it is sufficient that the recipient of the aid competes with other undertakings on markets open to competition and that the measure concerned affects intra-Community trade by financially strengthening the position of an undertaking compared with other undertakings competing in intra-Community trade ([1]).

The grant of a tax reduction to captive insurance companies strengthens and reinforces their position towards other companies offering insurance services in the European Economic Area. As the Commission pointed out in the above mentioned Åland decision, the insurance market is an open market and companies belonging to a group can normally insure their risks with non-affiliated insurers ([2]).

Since the insurance services which the eligible companies carry out are activities which are the subject of trade between the Contracting Parties, intra-EEA trade is equally deemed to be affected ([3]). In addition, trade is deemed to be affected as the measure could also benefits the groups to which the captive insurers belong, which may be active in markets open to cross-border competition.

1.2. **Coupon tax**

1.2.1. *Presence of State resources*

As mentioned above, the aid measures must be granted by the State or through State resources.

The granting of a tax exemption involves a loss of tax revenues for the State which is equivalent to consumption of State resources in the form of fiscal (tax) expenditure ([4]). By exempting shares or parts of captive insurance companies from payment of coupon tax, the State in Liechtenstein foregoes revenues corresponding to the non-payment of coupon taxes.

Thus, the coupon tax exemption is granted through State resources.

1.2.2. *Favouring certain undertakings or the production of certain goods*

First, the aid measure must confer on the beneficiaries advantages that relieve them of charges that are normally borne from their budget. Second, the aid measure must be selective in that it favours "*certain undertakings or the production of certain goods*".

The measure confers the investors in captive insurance companies an advantage by relieving them of charges (non payment of coupon tax) they would normally be subject to. By exempting shares or parts of captive insurance companies from payment of the coupon tax, the Liechtenstein legislation makes it more attractive to invest in captive insurance companies than in other undertakings, where their investments are subject to payment of coupon tax. Therefore, investors in captive insurance companies are granted an advantage. A lower rate of taxation than what normally would be due or an exemption from paying taxes confers an advantage to the undertakings investing in captive insurance companies ([5]).

The preliminary view of the Authority is therefore that the exemption from payment of coupon tax applicable to shares or parts of captive insurance companies entails the granting of an economic advantage to the undertakings owning them.

As mentioned above, this tax exemption also grants an indirect advantage to the captive insurance companies which become more attractive for investors and thus makes capital more easily accessible for the former ([6]).

([1]) Case T-214/95 Het Vlaamse Gewest v Commission [1998] ECR II-717, Case 730/79 Philip Morris v Commission [1980] ECR 2671, paragraph 11.

([2]) Commission Decision of 10 July 2002 on the aid scheme implemented by Finland for Åland Islands captive insurance companies, published on OJ L 329, 5.12.2002, p. 22, paragraphs 44 and 46.

([3]) Commission Decision of 10 July 2002 on the aid scheme implemented by Finland for Åland Islands captive insurance companies, cited above, paragraph 47.

([4]) See point 3(3) on the Authority's State Aid Guidelines to Business Taxation.

([5]) In case of investors which are private persons, the grant of a tax exemption does not constitute State aid within the meaning of Article 61(1) of the EEA Agreement.

([6]) Commission Decision of 21 January 1998 on tax concessions under § 52(8) of the German Income Tax Act, published on OJ L 212, 30.7.1998, p. 50. Case C-156/98 Germany v Commission ECR [2000] I-6857, paragraph 26.

Second, the measure is selective since it only concerns undertakings that have created or invested in a captive insurance company as well as the insurance companies themselves. As the European Commission held in its decision regarding the treatment of captive insurance companies in Åland ([1]), the creation of this type of companies requires an economic strength and is therefore normally undertaken mainly by large companies or groups of companies. Normally, the group needs to be large enough to generate a turnover that will allow the captive insurance company to generate a high enough turnover to cover the fixed costs and obtain a profit. The measure therefore favours larger companies to the detriment of companies which cannot afford the establishment of captive insurance companies.

For these reasons, the Authority preliminary considers that the exemption from coupon tax on dividends and profit shares from captive insurance companies is materially selective.

As mentioned above, a specific tax measure can nevertheless be justified by the logic of the tax system if it is consistent with it ([2]).

The arguments presented above in relation to income and capital tax applies equally to the exemption from coupon tax.

At this stage of the procedure, the Authority is therefore of the preliminary opinion that the exemption from payment the coupon tax is selective in the meaning of Article 61(1) of the EEA Agreement.

1.2.3. *Distortion of competition and effect on trade between Contracting Parties*

In order to fall under Article 61(1) of the EEA Agreement, the measure must distort or threaten to distort competition and affect trade between the Contracting Parties.

For a measure to distort competition it is sufficient that the recipient of the aid competes with other undertakings on markets open to competition and that the measure concerned affects intra-Community trade by financially strengthening the position of an undertaking compared with other undertakings competing in intra-Community trade ([3]).

In addition to the reasons mentioned above under Section II.1.1.3, the Authority notes that the undertakings that own captive insurance companies are normally large companies or groups of companies that naturally compete offering goods and/or services in the European Economic Area.

The Authority's preliminary view is that the exemption from paying a coupon tax distorts competition and has an effect on trade between the Contracting Parties within the meaning of Article 61(1) of the EEA Agreement.

1.3. **Conclusion**

Against the background of the above, the Authority is of the preliminary view that the special tax rules applicable to captive insurance companies in Liechtenstein constitute State aid within the meaning of Article 61(1) of the EEA Agreement.

2. **Procedural requirements**

Pursuant to Article 1(3) of Part I of Protocol 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. […]. The State concerned shall not put its proposed measures into effect until the procedure has resulted in a final decision*".

The special rules regarding the capital, income and coupon taxes applicable to captive insurance undertakings were introduced into the Tax Act in 1998, i.e. after the entry into force of the EEA Agreement. The Liechtenstein authorities did not notify this amendment of the Tax Act to the Authority. The Authority therefore draws the preliminary conclusion that the Liechtenstein authorities have not respected their obligations pursuant to Article 1(3) of Part I of Protocol 3.

([1]) Commission Decision of 10 July 2002 on the aid scheme implemented by Finland for Åland Islands captive insurance companies, published on OJ L 329, 5.12 2002, p. 22.

([2]) Case E-6/98 Norway v EFTA Surveillance Authority, cited above, paragraph 38; Joined Cases E-5/04, E-6/04 and E-7/04 Fesil and Finnfjord, PIL and others and Norway v EFTA Surveillance Authority, cited above, paragraphs 84-85; Joined Cases T-127/99, T-129/99 and T-148/99 Territorio Histórico de Alava et a v Commission [2002] ECR II-1275, paragraph 163, Case C-143/99 Adria-Wien Pipeline [2001] ECR I-8365, paragraph 42; Case T-308/00 Salzgitter v Commission [2004] ECR II-1933 paragraph 42, Case C-172/03 Wolfgang Heiser [2005] ECR I-1627, paragraph 43.

([3]) Case T-214/95 Het Vlaamse Gewest v Commission [1998] ECR II-717, Case 730/79 Philip Morris v Commission [1980] ECR 2671, paragraph 11.

3. **Compatibility of the aid**

Support measures caught by Article 61(1) of the EEA Agreement are generally incompatible with the functioning of the EEA Agreement, unless they qualify for a derogation in Article 61(2) or (3) of the EEA Agreement.

The derogation of Article 61(2) is not applicable to the aid in question, which is not designed to achieve any of the aims listed in this provision. Nor does Article 61(3)(a) or Article 61(3)(b) of the EEA Agreement apply to the case at hand.

The aid in question is not linked to any investment in production capital. It just reduces the costs which companies would normally have to bear in the course of pursuing their day-to-day business activities and is consequently to be classified as operating aid. Operating aid is normally not considered suitable to facilitate the development of certain economic activities or of certain regions as provided for in Article 61(3)(c) of the EEA Agreement. Operating aid is only allowed under special circumstances (e.g. for certain types of environmental or regional aid), when the Authority's Guidelines provide for such an exemption. None of these Guidelines apply to the aid in question.

The Authority therefore doubts that the special tax rules applicable to captive insurance companies can be justified under the State aid provisions of the EEA Agreement.

4. **Conclusion**

Based on the information submitted by the Liechtenstein authorities, the Authority cannot exclude the possibility that the tax rules applicable to captive insurance companies (full exemption from payment of income and coupon tax and partial exemption from payment of capital tax) constitute State aid within the meaning of Article 61(1) of the EEA Agreement.

Furthermore, as stated above, the Authority has doubts that these measures can be regarded as compatible under the State aid provisions of the EEA Agreement, in particular Article 61(3)(c) thereof.

Consequently, and in accordance Article 4(4) of Part II of Protocol 3, the Authority is obliged to open the procedure provided for in Article 1(2) of Part I of Protocol 3. The decision to open proceedings is without prejudice to the final decision of the Authority, which may conclude that the measures in question are compatible with the functioning of the EEA Agreement.

In light of the foregoing considerations, the Authority, acting under the procedure laid down in Article 1(2) of Part I of Protocol 3, invites the Liechtenstein authorities to submit their comments within one month of the date of receipt of this Decision.

The Authority further requests the Liechtenstein authorities to provide all documents, information and data needed for assessment of the compatibility of the above-mentioned aid measure, within the same deadline.

It invites the Liechtenstein authorities to forward a copy of this decision to the potential aid recipients of the aid immediately.

The Authority would like to remind the Liechtenstein authorities that, according to Article 14 in Part II of Protocol 3, any incompatible aid unlawfully put at the disposal of the beneficiaries will have to be recovered, unless this recovery would be contrary to the general principal of law. At this stage of the procedure, the Authority considers that neither Liechtenstein nor the beneficiaries of the aid measure under assessment can validly argue the existence of legitimate expectations. According to the case law of the Court of Justice, a diligent trader should himself be able to verify that new aid has been put into effect in accordance with the applicable procedural rules, notably Article 88 EC, corresponding to Article 1 in Part I of Protocol 3 to the Surveillance and Court Agreement. For that reason, the beneficiary of new aid, granted in contravention of that provision, can only in exceptional circumstances claim that he had legitimate expectations barring the repayment of the aid ([1]).

([1]) Cf. Case C-169/95 Spain v Commission [1997] ECR I-135, paragraph 51; Case C-24/95 Alcan Deutschland [1997] ECR I-1591, paragraph 25; and Case T-55/99 Confederación Española de Transporte de Mercancías (CETM) [2000] ECR II-3207, paragraph 121 to 131.

HAS ADOPTED THIS DECISION:

Article 1

The EFTA Surveillance Authority has decided to open the formal investigation procedure provided for in Article 1(2) of Part I of Protocol 3 against Liechtenstein regarding the tax derogations in favour of captive insurance companies introduced in 1998.

Article 2

The Liechtenstein authorities are invited, pursuant to Article 6(1) of Part II of Protocol 3, to submit their comments on the opening of the formal investigation procedure within one month from the notification of this Decision.

Article 3

This Decision is addressed to the Principality of Liechtenstein.

Article 4

Only the English version is authentic.

Done at Brussels, 24 September 2008.

For the EFTA Surveillance Authority

Per SANDERUD	Kurt JAEGER
President	*College Member*"