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Judgment in Joined Cases E-4/10, E-6/10 and E-7/10 ***Principality of Liechtenstein, Reassur Aktiengesellschaft and Swisscom Re Aktiengesellschaft*** **v** ***EFTA Surveillance Authority***

SPECIAL RULES REGARDING THE TAXATION OF CAPTIVE INSURANCE COMPANIES IN LIECHTENSTEIN CONSTITUTE STATE AID INCOMPATIBLE WITH THE EEA AGREEMENT

In a judgment delivered today, the EFTA Court upheld a decision of the EFTA Surveillance Authority (“ESA”) of 24 March 2010 declaring that the taxation of captive insurance companies in Liechtenstein constituted State aid incompatible with the functioning of the EEA Agreement (“EEA”). The Court also found that ESA did not err in law when it ordered the recovery of the tax benefits from 6 November 2001 to 31 December 2009.

Under the tax rules which ESA assessed in the contested decision, captive insurance companies paid a capital tax of 0.1% on their own capital instead of the regular 0.2% capital tax. For capital exceeding 50 million CHF the tax rate was further reduced to 0.075% and for capital in excess of 100 million to 0.05%. In addition to paying lower amounts of capital tax, captive insurance companies were also exempt from the duty to pay coupon tax. Moreover, Liechtenstein tax law considered captive insurance not to constitute economic activity and accordingly did not subject it to business income tax. The Principality of Liechtenstein filed an application against this decision with the EFTA Court, which was later followed by the applications of Reassur Aktiengesellschaft and Swisscom Re, both captive insurance companies registered in Liechtenstein.

In its judgment, the Court found that captive insurance companies were, at least to some extent, exercising an “economic activity”, thereby qualifying as “undertakings” under Article 61(1) EEA. Moreover, the Court held that the contested measures fulfilled the criteria of selectivity inherent in Article 61(1) EEA as only captive insurance companies benefitted from the tax measures. In the Court’s view, it has not been demonstrated that this selective advantage is justified by the inherent logic of the Liechtenstein tax scheme. The measures had been expressly adopted by the national authorities as a means of attracting certain undertakings to take up activities in Liechtenstein and improve their competitiveness. The Court also found that the aid granted was liable to distort competition and to affect trade between the EEA States and dismissed the applicants’ arguments that the contested measures should, in the alternative, be regarded as “existing aid”.

As to recovery, Reassur and Swisscom argued that they had entertained legitimate expectations that the contested tax provisions did not constitute State aid within the meaning of Article 61(1)

EEA. Accordingly, the principle of the protection of legitimate expectations should bar the recovery of the aid. In its decision, ESA had taken the view that although the beneficiaries might have entertained legitimate expectations, such expectations must have come to an end at the latest on 6 November 2001, when the European Commission published its decision to open a formal investigation into tax measures applicable to captive insurance companies in the *Åland Islands*.

The Court rejected the Applicants' pleas, holding that in light of the mandatory nature of the review of State aid by ESA, undertakings to which aid had been granted might not, in principle, entertain a legitimate expectation that the aid was lawful, unless it had been granted in compliance with the relevant procedure. Moreover, a diligent economic operator should normally be able to determine whether that procedure was followed. In particular, where aid was implemented without the necessary prior notification to ESA, the recipient of the aid could not as a rule have a legitimate expectation that the grant was lawful.

The Court found that the publication on 6 November 2001 of the European Commission's decision of 11 July 2001 to open the formal procedure, as regards the tax measures in favour of captive insurance companies in the *Åland Islands*, informed potential beneficiaries of similar measures in the EEA States of the risk attached to any aid in breach of Article 61(1) EEA, that recovery might be ordered. After the publication, there was clearly a situation of uncertainty as to the legality of the measure. Beneficiaries had been made aware of the possibility that the aid might be considered to infringe Article 61(1) EEA and recovery might be sought.

The Court also dismissed the pleas of the Applicants that ESA had infringed the principles of legal certainty, equal treatment and homogeneity, and the plea alleging that ESA had failed to state adequate reasons for its decision.

The full text of the judgment may be found on the Internet at: www.eftacourt.int.

This press release is not an official document. Please note that the Court may not comment on the case.