EFTA COURT

JUDGMENT OF THE COURT

30 March 2012

(Action for annulment of a decision of the EFTA Surveillance Authority – State aid – Special tax rules applicable to investment companies – Selectivity – Existing aid and new aid – Recovery – Legitimate expectations – Legal certainty – Obligation to state reasons)

In Joined Cases E-17/10 and E-6/11,

Principality of Liechtenstein (Case E-17/10), represented by Dr Andrea Entner-Koch and Frederique Lambrecht, EEA Coordination Unit, Vaduz, Liechtenstein, acting as Agents, and

VTM Fundmanagement AG (Case E-6/11), represented by Dr Michael Sánchez Rydelski, Rechtsanwalt, Vaduz, Liechtenstein,

applicants,

v

EFTA Surveillance Authority, represented by Xavier Lewis, Director, and Fiona M. Cloarec, Officer, Legal and Executive Affairs, acting as Agents, Brussels, Belgium,

defendant,

APPLICATION for the annulment of Decision 416/10/COL of 3 November 2010 on the taxation of investment undertakings under the Liechtenstein Tax Act,

THE COURT,

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

Registrar: Skúli Magnússon,

having regard to the written pleadings of the parties and the written observations of the European Commission ("the Commission"), represented by Richard Lyal, Legal Adviser, and Carlos Urraca Caviedes, member of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

having heard oral argument of the Principality of Liechtenstein, represented by Frederique Lambrecht; VTM Fundmanagement AG ("VTM"), represented by Dr Hans-Michael Pott; the EFTA Surveillance Authority ("ESA"), represented by Fiona Cloarec; and the Commission, represented by Richard Lyal, at the hearing on 1 February 2012,

gives the following

Judgment

I Legal context

1 Article 61(1) EEA provides 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 the Contracting Parties, be incompatible with the functioning of this Agreement.*

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

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

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

> *1. The EFTA Surveillance Authority shall, in cooperation with the EFTA States, keep under constant review all systems of aid existing in those States. It*

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

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

…

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

4 Article 1 of Part II of Protocol 3 SCA 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;

…

5 Article 14(1) of Part II of Protocol 3 SCA 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.

II Facts

6 The main rules on company taxation in Liechtenstein are found in Sections 73 to 81 in Part 4, Heading A, of the Liechtenstein Tax Act (*Gesetz über die Landes- und Gemeindesteuern*). According to those provisions, companies in Liechtenstein are subject to two forms of company taxation: business income tax (*Ertragssteuer*) and capital tax (*Kapitalsteuer*). According to Section 73 of the Tax Act, legal persons operating a commercial business in Liechtenstein pay both income and capital tax.

7 Part 5 of the Tax Act provides for a coupon tax. For limited companies whose capital is divided into shares, the coupon tax is levied on any distributions 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 taxpayer, but which is withheld at the level of the company.

8 Domiciliary companies in Liechtenstein (*Sitzgesellschaften*) are legal entities registered in the public register, which have only their seat or an office in

Liechtenstein, but which do not exercise any commercial or business activity in Liechtenstein. Domiciliary companies in Liechtenstein do not pay any income tax and are subject to a reduced capital tax. These tax derogations pre-date Liechtenstein's entry into the EEA and are not addressed by the contested decision.

9 In 1996, Liechtenstein introduced special tax rules for the collective capital of investment undertakings, including investment funds and investment companies. Through the insertion of Section 84(5) of the Tax Act, investment companies were placed on the same footing as domiciliary companies. As a result, their collective capital was exempt from income tax and subject to a reduced capital tax. Moreover, the coupon tax regarding these companies was abolished.

10 However, after the introduction of the 1996 measures, there was a difference between investment funds and investment companies as regards the taxation of the investment undertaking's own assets. The direction of investment funds remained subject to normal company taxation in Liechtenstein. However, for investment companies, where the own and managed assets were not separated, the 1996 measures resulted in full exemption from income tax and coupon tax and a reduction in capital tax.

11 The measures at issue were repealed in 2006.

12 By a letter dated 14 March 2007, ESA sent a request for information to the Liechtenstein authorities, inquiring about various tax derogations. The letter also referred to the tax rules for investment companies between 1996 and 2006.

13 After various exchanges, by means of Decision No 149/09/COL of 18 March 2009 (OJ 2009 C 236, p. 8 and EEA Supplement 2009 No. 51, p. 1), ESA initiated proceedings pursuant to Article 1(2) of Part I of Protocol 3 SCA. The Liechtenstein authorities were informed by means of a copy of the decision.

14 The observations from interested parties to ESA were forwarded to the Liechtenstein authorities by letter of 26 January 2010. The authorities responded by letter of 17 March 2010.

15 By Decision No 416/10/COL of 3 November 2010 ("the contested decision"), ESA found that the tax on investment companies between 1996 and 2006 constituted State aid incompatible with Article 61(1) EEA.

16 In the contested decision, ESA found that the measures were granted by the State or through State resources since the full or partial tax exemption involved a loss of revenue in the form of fiscal expenditure. The exemption also led to an advantage for investment companies, in comparison with other undertakings subject to ordinary taxation such as investment funds, since they did not pay any income or coupon tax and paid only a reduced capital tax on their own assets.

17 ESA further concluded that the measures were selective, since the aid was granted only to investment undertakings organised in the form of investment companies. ESA considered that the measures could not be justified by the logic of the tax system, since other companies active in Liechtenstein were subject to taxation. The reduction and exemptions were designed to encourage the activities of investment companies in Liechtenstein. ESA also found that the tax concessions distorted or threatened to distort competition and affected trade between the Contracting Parties.

18 As regards the possibility that the measures might constitute existing aid and as such not be subject to recovery, ESA found that the measures had not been notified and, in addition, could not be explained due to the evolution of the EEA. However, in light of the ten-year limitation period, ESA found that recovery could only be ordered for aid granted after 15 March 1997.

19 Finally, ESA concluded that none of the criteria established in Article 61(2) and (3) EEA, by which aid may be considered compatible, applied and that there had been no breach of fundamental principles of EEA law, in particular the principles of legitimate expectations and legal certainty.

20 The operative part of the contested decision reads, in extract, as follows:

Article 1

The aid measures implemented by the Liechtenstein authorities in favour of investment companies, and which were repealed with effect from 30 June 2006, are not compatible with the functioning of the EEA Agreement within the meaning of Article 61(1) of the EEA Agreement.

Article 2

In view of the failure by the Liechtenstein authorities to comply with the requirement to notify the Authority before implementing aid in accordance with Article 1(3) of Part I of Protocol 3, the measures involved unlawful state aid.

Article 3

The Liechtenstein authorities shall take all necessary measures to recover from the investment companies the aid referred to in Article 1 and unlawfully made available to the beneficiaries from 15 March 1997 until the date in which beneficiaries last benefitted from the tax exemptions following their repeal in 2006.

Article 4

Recovery shall be affected without delay, and in any event by 3 March 2011; and in accordance with the procedures of national law provided that they allow the immediate and effective execution of the decision. The aid to be recovered shall include interest and compound interest from the *date on which it was at the disposal of the beneficiaries until the date of its recovery. Interest shall be calculated on the basis of Article 9 of the Implementing Provisions Decision.*

…

III Procedure and forms of order sought

21 By an application lodged at the Registry of the Court on 22 December 2010 as Case E-17/10, the Principality of Liechtenstein brought an action under the first paragraph of Article 36 SCA for annulment of the contested decision.

22 By an application lodged at the Registry of the Court on 10 March 2011 as Case E-6/11, VTM, a limited liability company registered in Vaduz, Liechtenstein, also brought an action for the annulment of the contested decision. VTM is an investment fund management company organised previously, prior to restructuring, in the legal form of an investment company.

23 The Principality of Liechtenstein and VTM (Case E-17/10 and E-6/11, respectively) claim that the Court should:

(i) annul the contested decision;
(ii) in the alternative, declare void Articles 3 and 4 of the contested decision to the extent that they order the recovery of the aid referred to in Article 1 of that decision; and
(iii) order the EFTA Surveillance Authority to pay the costs of the proceedings

24 ESA submitted a defence in Case E-17/10, registered at the Court on 3 March 2011, in which it claims that the Court should:

(i) dismiss the application as unfounded; and
(ii) order the applicant to pay the costs.

25 ESA submitted a defence in Case E-6/11, registered at the Court on 30 May 2011, in which it claims that the Court should:

(i) dismiss the application as unfounded; and
(ii) order the applicant to pay the costs.

26 The reply from the Principality of Liechtenstein in Case E-17/10 was registered at the Court on 4 April 2011. A rejoinder from ESA was registered on 18 April 2011.

27 In Case E-17/10, pursuant to Article 20 of the Statute of the Court and Article 97 of the Rules of Procedure, the Commission submitted written observations, registered on 1 May 2011.

28 VTM submitted a reply in Case E-6/11, registered at the Court on 28 June 2011. The Principality of Liechtenstein submitted written observations in this case on 29 July 2011.

29 In Case E-6/11, pursuant to Article 20 of the Statute of the Court and Article 97 of the Rules of Procedure, the Commission submitted written observations, registered at the Court on 1 August 2011.

30 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 two cases for the purposes of the written and oral procedures.

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

IV Law

32 The applicants submit three pleas. According to the first plea, ESA incorrectly applied Article 61(1) EEA. The second plea alleges that ESA erred in law by ordering the recovery of the alleged aid from 15 March 1997. By their third plea, the applicants allege that in the contested decision ESA failed to provide sufficient reasoning, as required by Article 16 SCA.

The first plea in law alleging incorrect application of Article 61(1) EEA

33 The first plea is divided into two branches. By the first branch of the first plea, the applicants allege that the tax rules applicable to investment companies are non-selective. By the second branch of the first plea, they allege that the tax measures can be justified by the nature and general scheme of the system.

The first branch of the first plea

Arguments of the parties

34 The applicants consider that the tax measures do not confer a selective advantage. They maintain that ESA erroneously considered the capital of investment companies to be in a similar position to the capital of investment funds. As this is not the case, ESA’s findings on this issue are incorrect.

35 The applicants argue that investment companies and the fund direction of investment funds cannot be compared both as a matter of fact and law.

36 Liechtenstein points out that neither domiciliary companies nor assets managed by investment companies are subject to income tax. In its view, investment companies are comparable to domiciliary companies, registered as legal persons in Liechtenstein.

37 Liechtenstein and VTM assert that the income taxation borne by the fund direction is the consequence of the rule of Liechtenstein corporate law which requires an investment fund to be constituted in the legal form of a trust, comprised of two distinct legal persons. Investment funds thus cannot simultaneously hold and manage the fund. The economic activity of the fund direction as trustee is therefore subject to regular income tax and the fund direction does not benefit from the provision for domiciliary companies established in Section 84(1) of the Tax Act as it is established as a public company and, therefore, commercially active in Liechtenstein.

38 VTM observes, first, that investors in investment companies own the capital of the investment company, whereas there is no such participation of investors in the capital of the fund direction of investment funds. The capital of the investors and the capital of an investment company are thus intrinsically linked, whereas the fund direction operates entirely separately from the fund itself, which constitutes the capital of the investors. Second, VTM contends that once an investment fund is established it can administer all types of asset classes (securities, real estate and other assets) at the same time, whereas investment companies are only allowed to offer one class of asset. Investment companies are therefore restricted in their commercial activities.

39 VTM also observes that different tax treatment depending on the form of the investment undertaking is a common feature in certain EU Member States.

40 Liechtenstein submits that the taxation of an investment fund does not confer an advantage on investment companies within the meaning of Article 61(1) EEA. It constitutes a disadvantage for investment funds and not a selective advantage for investment companies, which are treated just like any other domiciliary company. This disadvantage is inherent in the general system of corporate and tax law in Liechtenstein and, in practice, is outweighed by the advantages the investment fund bears for an investor. Liechtenstein observes that differences in taxation have not conferred any appreciable advantage on investment companies. It also claims that the exemption from coupon tax is open to any natural or legal person, regardless of sector or industry.

41 The applicants submit that the exemption from coupon tax does not constitute a selective measure. The coupon tax is a withholding tax. The real beneficiaries of this exemption are the shareholders of investment companies. The fact that anyone can become a shareholder in an investment company should be taken to mean that the coupon tax exemption is a general measure which does not benefit specific undertakings.

42 ESA contends that the measures in question are clearly selective. In ESA’s view, the undertakings in the same legal and factual situation are all those which pay full income, capital and coupon taxes in Liechtenstein. In comparison (particularly with the fund direction of an investment fund), investment companies in Liechtenstein receive a selective advantage.

43 The Commission supports ESA's position and submits further 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 by the applicants as justifiable elements of difference are irrelevant.

44 The Commission disagrees with Liechtenstein's submission that investment companies should be compared to domiciliary companies. In the Commission's view, the advantageous tax treatment granted to investment companies should be compared with the normal treatment under the system of taxation in Liechtenstein, under which companies pay full income, capital and coupon taxes. In this regard, Liechtenstein has not shown that investment companies are not in a comparable legal and factual situation with other companies or entities that are subject to normal taxation on revenues from their business activities. This is particularly clear in relation to investment funds which, unlike investment companies, are subject to normal taxation as regards their own assets (fund direction). No comparison can be made with domiciliary companies, which do not have any business activity in Liechtenstein, since fund management clearly constitutes an economic activity.

45 ESA takes the view that the fact that Liechtenstein corporate law prevents investment funds from both holding and managing a fund is irrelevant for the purposes of assessing selectivity.

46 As regards the reference made by VTM to the effect that differences in tax treatment exist in some EU Member States, ESA and the Commission submit that such differences are not relevant to the question whether different "investment vehicles" are in a comparable situation in the light of the objective of the Liechtenstein capital tax, income tax and coupon tax.

47 ESA, supported by the Commission, contests the submission that the exemption from coupon tax does not constitute a selective measure. Those parties maintain that an undertaking becomes more attractive on the market if the shareholders of that undertaking enjoy a certain benefit, and, therefore, the undertaking itself also benefits from the measure. Furthermore, the Commission submits that, if, for example, shareholders in companies operating in a certain sector of the economy were granted exemption from tax on dividend distribution, those companies would find it easier to raise capital.

48 ESA also submits that the fact that an extensive group of persons could have indirectly profited from the advantage enjoyed by a beneficiary undertaking of a selective aid measure cannot turn that unlawful selective aid measure into a potentially permissible general aid measure.

49 In addition, in ESA's view, the State aid decisions of the Commission in Ireland Company Holding Regime (N 354/2004) and Spain (N 480/2007) are not relevant to the case at hand. Those decisions ruled on whether the undertakings that would benefit from the measure were part of a closed group, and hence the

measure was selective, or whether the measure applied to an unlimited group of undertakings and thus general in nature. In ESA's view, the assessment of selectivity in those decisions does not support the argument that a measure becomes non-selective where a theoretically unlimited group of persons have the potential to indirectly benefit from an advantage enjoyed by a beneficiary of a selective aid measure.

Findings of the Court

50 The Court recalls that the definition of aid is more general than that of a subsidy. The concept of aid not only includes positive benefits, such as subsidies themselves, but also measures which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which, thus, without being subsidies in the strict sense of the word, are similar in character and have the same effect (see Joined Cases E-4/10, E-6/10 and E-7/10 *Liechtenstein and Others* v *ESA* [2011] EFTA Ct. Rep. 22, paragraph 69, and case law cited; and, for comparison, Joined Cases C-106/09 P and C-107/09 P *Commission and Spain* v *Government of Gibraltar and United Kingdom*, judgment of 15 November 2011, not yet reported, paragraph 71, and case law cited).

51 A measure by which the public authorities grant certain undertakings a tax exemption which, although not involving a transfer of State resources, places the persons to whom the tax exemption applies in a more favourable financial situation than other taxpayers constitutes State aid within the meaning of Article 61(1) EEA.

52 The wording of Article 61(1) EEA requires that a measure must favour certain undertakings or the production of certain goods in order to be classified as State aid. The selective application of a measure therefore constitutes one of the criteria inherent in the notion of State aid (see *Liechtenstein and Others* v *ESA*, cited above, paragraph 71, and case law cited).

53 On the other hand, advantages resulting from a general measure applicable without distinction to all economic operators do not constitute State aid within the meaning of Article 61 EEA (see, for comparison, *Commission and Spain* v *Government of Gibraltar and United Kingdom*, cited above, paragraph 73, and case law cited).

54 It is therefore necessary to determine whether the 1996 tax reform is selective, selectivity being a constituent factor in the concept of State aid.

55 As regards appraisal of the condition of selectivity, it is clear from settled case law that Article 61(1) EEA requires assessment of whether, under a particular legal regime, a national measure is such as to favour certain undertakings or the production of certain goods in comparison with others which, in the light of the objective pursued by that regime, are in a comparable factual and legal situation

(see, for comparison, *Commission and Spain* v *Government of Gibraltar and United Kingdom*, cited above, paragraph 75, and case law cited).

56 In this regard, it is common ground that the measures at hand do not apply to all economic operators, but are granted only to undertakings exercising a specific activity in a determined legal form, that is investment companies.

57 Liechtenstein's submission that income tax imposed on the fund direction is a disadvantage for investment funds and not a selective advantage for investment companies which are treated just like any other domiciliary company, cannot be maintained.

58 It is clear from the contested decision that ESA correctly considered the tax measures in question selective because investment companies were accorded a preferential tax treatment in comparison with other fund management undertakings operating in Liechtenstein. Between 1996 and 2006, investment companies were fully exempted from the payment of income and coupon tax, and partially from the payment of capital tax. Therefore, investment companies were subject to preferential tax rates for their own assets in comparison with investment funds, which offer the same kind of services on the Liechtenstein market but are subject to full taxation. Thus, in relation to investment companies, the measures mitigated the tax charges normally included in the budget of an undertaking operating in Liechtenstein.

59 The fact that the coupon tax is a withholding tax is not relevant. Moreover, it should be noted that the applicants contest the decision only insofar as it concludes that the measures were selective. They do not contest the finding that the exemption from coupon tax confers an advantage – even if only indirect – but limit themselves to the argument that the coupon tax should be considered a general measure.

60 It is clear from the case-file that the exemption from coupon tax was accorded to investment companies within the framework of the 1996 measures, since the provisions of the 1961 Tax Act on the coupon taxation of investment companies were repealed on the introduction of the 1996 reforms.

61 Consequently, as they do not apply to all economic operators in Liechtenstein, these measures cannot be considered to be general measures of tax or economic policy (see, for comparison, *inter alia*, Case C-66/02 *Italy* v *Commission* [2005] ECR I-10901, paragraph 99; and Case C-148/04 *Unicredito Italiano* [2005] ECR I-11137, paragraph 49). In this respect, it is irrelevant whether the advantage is direct or indirect. ESA was therefore correct to find that the exemption from coupon tax was selective for the purposes of Article 61(1) EEA.

62 The fact that investment companies and investment funds do not have the same legal form cannot affect this conclusion.

63 It is clear from point II.1.2. of the contested decision that, in order to determine whether the measures in question were selective, ESA made a comparison with "all those who pay the (full) income, capital and coupon taxes in Liechtenstein ...". On this point, it noted, "[m]ore specifically, the investment companies benefit in comparison to the fund direction of undertakings organised as investment funds, which engage in the same activity but are subject to tax like all other undertakings in Liechtenstein." Accordingly, the specific legal form taken by investment companies and investment funds did not play a determining part in ESA's assessment whether the measures in question were selective. Therefore, VTM's argument that ESA failed to account for the differences between investment funds and investment companies in its comparison cannot be upheld.

64 It follows that the exemption from the payment of income and coupon tax, and partial exemption from the payment of capital tax were selective and not general measures. The first branch of the first plea must therefore be rejected.

The second branch of the first plea

Arguments of the parties

65 In the event that the Court takes the view that the contested tax measures are materially selective, the applicants submit that they do not constitute State aid since they are justified by the nature and general scheme of the Liechtenstein tax system.

66 Liechtenstein submits that its tax system for investment undertakings does not have discriminatory effects for any type of investment undertaking. The relevant provisions of Liechtenstein corporate and tax law apply uniformly to all investment companies throughout its territory and are inherent to the logic and objective conditions of the general legal system.

67 On the question of justification, Liechtenstein points out that all economic agents active in the business of managing funds are free to choose either form of investment undertaking (investment company or investment fund). Once a form has been chosen, the investment undertaking has to comply with Liechtenstein's corporate and tax legislation. Since the discrimination associated with a particular legal form applies to all economic activities alike, no issue of State aid arises.

68 VTM argues that the Act of 21 December 1960 on investment companies, investment trusts and investment funds already established a distinction between two legal forms, namely, "investment trusts in the form of a public or limited company" (*Kapitalgesellschaften*), in other words, "investment companies", and "investment trusts in the narrow sense in the form of a trust" (*Anlagefonds*) in other words, "investment funds". Whereas investment companies consisted of a single legal entity, investment funds comprised two legal entities, namely the fund direction (*Fondsleitung*) and the fund capital (*Fondsvermögen*). Under the

Tax Act of 30 January 1961, the fund direction holding own resources of the investment fund was subject to regular income and capital tax.

69 VTM contends that the different tax treatment of fund directions and investment companies stems, as explained above, from the different legal form through which assets are managed and owned. Whereas investors own the capital of the investment company, there is no such participation of investors in the capital of the fund direction. VTM notes that the State Court of the Principality of Liechtenstein (the “State Court”) has ruled on whether the fund capital of an investment fund is independently subject to capital tax. In its reasoning, the State Court recognised the distinct legal structure of the investment fund as a trust and held that the fund capital must be treated in the same manner as the funds of holding companies (Section 83 of the Tax Act) and domiciliary companies (Section 84 of the Tax Act) in accordance with Section 84(2) of the Tax Act and the principles of equality and equity of taxation.

70 According to VTM, the State Court thereby recognised the separate taxation of the fund capital as a legal entity distinct from the fund direction. This case law formed the basis for Liechtenstein practice in connection with the taxation of investment undertakings prior to 1996. Hence, in the view of VTM, it follows from the above that the different tax treatment follows from the logic and general scheme of Liechtenstein tax law.

71 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. However, as justification based on these grounds constitutes an exception to the principle that State aid is prohibited, in the Commission’s view, it must be interpreted strictly.

72 ESA contends further that the tax concessions in favour of the management activities of investment companies do not result directly from the basic or guiding principles of the Liechtenstein tax system. There is nothing particular to Liechtenstein’s general system of taxation that justifies these tax provisions yielding tax concessions for the own assets of investment companies, but full exposure to income, capital and coupon tax for the own assets of investment funds.

73 In addition, according to the Commission, the decision of the Liechtenstein authorities to repeal the tax measures in 2006 “to provide for non-discriminatory taxation of investment companies and investment funds” in effect amounts to an admission that the advantageous treatment granted to investment companies cannot result from the basic or guiding principles of the Liechtenstein tax system.

Findings of the Court

74 A measure which creates an exception to the application of the general national tax system can be justified by the nature and overall structure of the tax system, if the EEA State concerned can demonstrate that it follows directly from the basic or guiding principles of the tax system. In that connection, a distinction must be made between, on the one hand, the objectives attributed to a particular tax scheme which are extrinsic to it and, on the other, the mechanisms inherent in the tax system itself which are necessary for the achievement of such objectives (see *Liechtenstein and Others* v *ESA*, cited above, paragraph 87, and case law cited).

75 It is for the Member State which has introduced such a differentiation to show that it is actually justified by the nature and overall structure of the system in question (see, for comparison, *Commission and Spain* v *Government of Gibraltar and United Kingdom*, cited above, paragraph 146, and case law cited).

76 However, Liechtenstein has not shown that the contested provisions entail an adaptation of a general scheme particular to the nature and overall structure of the tax system. On the contrary, the provisions were adopted by the national authorities as a means of attracting certain undertakings to take up activities in Liechtenstein and improving the competitiveness of such undertakings.

77 Moreover, the tax exemption of investment companies runs contrary to the mechanisms inherent in the tax system. While the applicants argue that the differences in legal form between investment companies and investment funds are capable of justifying different treatment for tax purposes, in fact, this argument cannot lead to a conclusion other than that reached by ESA in the contested decision.

78 Following the 1996 amendments to the Tax Act, investment companies were assimilated to domiciliary companies. The latter do not exercise any economic activities in Liechtenstein. However, investment companies operate in Liechtenstein together with other undertakings all subject to capital tax, income tax and coupon tax to differing degrees.

79 In this regard, it is clear that the exoneration of investment companies, by assimilating them to domiciliary companies which do not have any operations in Liechtenstein, is contrary to the nature and logic of the tax system.

80 Therefore, ESA was correct to state in the contested decision that the measures in question were not justified by the nature and overall structure of the Liechtenstein tax system.

The second main plea alleging an error in law in ordering recovery from 15 March 1997

81 The second plea is divided into two branches. By the first branch, the applicants allege that the tax measures in question constitute existing aid. By the second

branch, they claim that recovery of the aid is incompatible with the general principles of EEA law.

The first branch of the second plea

Arguments of the parties

82 In the event that the Court upholds ESA's conclusion that the contested tax measures constitute State aid within the meaning of Article 61(1) EEA, the applicants contend that the measures qualify as "existing" aid.

83 VTM argues that the tax measures were already in force before the EEA Agreement took effect in Liechtenstein. Therefore, and having regard to the fact that those measures continued to apply after the EEA Agreement entered into force in Liechtenstein, they should be qualified as existing aid.

84 VTM claims that, under the 1961 Tax Act, the fund direction holding own resources of the investment fund were subject to income and capital tax, whereas investment companies were not subject to these taxes.

85 Liechtenstein and VTM claim that Liechtenstein practice concerning the taxation of investment undertakings prior to 1996 followed the 1984 ruling of the State Court, which recognised the separate taxation of the fund capital as a legal entity distinct from the fund direction. In their view, the 1996 amendments to the Tax Act merely codify the different treatment of investment funds and investment companies which had already been established.

86 Given this background, the applicants argue that, if the tax legislation in relation to investment undertakings is regarded as including measures qualifying as State aid, this simply reflects long-standing practice approved by the State Court.

87 The applicants also argue that recovery was ordered in contravention of the ten-year limitation period established in Article 15 of Part II of Protocol 3 SCA.

88 Finally, Liechtenstein submits that the contested tax measures did not constitute State aid when they were introduced, but became aid as a result of the evolution of the EEA. Therefore, Article 1(b)(v) of Part II of Protocol 3 SCA applies to the disputed measures. According to that provision, 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 concerned.

89 Liechtenstein contends that when the tax measures were introduced, taxation of investment companies was not considered to involve State aid. In this regard, Liechtenstein observes that prior to the publication on 6 January 1998 of the Council of the European Union's Code of Conduct for business taxation, and the subsequent Commission Notice of 10 December 1998 on the application of the State aid rules to measures relating to direct business taxation, no Commission

decision had classified a taxation regime for investment companies as involving State aid.

90 ESA submits that the contested tax measures were introduced in 1996, after Liechtenstein had entered the EEA in 1995. Hence, the aid cannot be understood as constituting existing aid within the meaning of Article 1(b) of Part II of Protocol 3 SCA, but must be regarded as new aid within the meaning of Article 1(c) of that provision.

91 As to the argument of the applicants that the contested tax provisions have only become State aid as a result of the evolution of the EEA, ESA contends that the applicants have not shown how the criteria applied by ESA in assessing tax measures have changed since the measures were introduced into Liechtenstein law in 1996.

92 ESA submits further that, even if a change of practice were to be established, the applicants have not shown how such a change of practice may be attributed to the evolution of the EEA, as required by Article 1(b)(v) of Part II of Protocol 3 SCA.

Findings of the Court

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

94 The determination whether a measure constitutes aid and, having regard to the different regimes governing recovery, whether aid is new or existing cannot depend upon a subjective assessment by ESA. The mere fact that for an admittedly long period ESA does not open an investigation into a State measure cannot in itself confer on that measure the objective nature of existing aid, that is, if indeed it constitutes aid (see *Liechtenstein and Others* v *ESA*, cited above, paragraph 118, and case law cited). Any uncertainty which may have existed in that regard may at most be regarded as having given rise to a legitimate expectation on the part of the recipients so as to prevent recovery of the aid granted in the past (see, to that effect, Joined Cases E-5/04, E-6/04 and E-7/04 *Fesil and Finnfjord and Others* [2005] EFTA Ct. Rep. 121, paragraph 148; and *Liechtenstein and Others* v *ESA*, cited above, paragraph 118).

95 Accordingly, the question whether a State measure qualifies as existing aid or as new aid must be resolved without reference to the time which has elapsed since the measure was introduced and independently of any previous administrative practice of ESA (see *Liechtenstein and Others* v *ESA*, cited above, paragraph 119).

96 In the case at hand, the contested provisions on investment companies in Liechtenstein were introduced by the 1996 amendments to the Tax Act. Contrary

to the argument advanced by Liechtenstein and VTM, it is irrelevant whether the State Court declared that investment companies and investment funds were to be treated differently for the purposes of taxation, as the legislation assimilating the investment funds to domiciliary companies was enacted in 1996. This means that it was enacted and entered into force after Liechtenstein's accession to the EEA and consequently the measures should have been notified to ESA. Therefore, the measures cannot be regarded as existing aid within the meaning of Article 1(b)(i) of Part II of Protocol 3 SCA.

97 Therefore the argument that recovery from 15 March 1997 violates the ten-year limitation period established in Article 15 of Part II of Protocol 3 SCA, must be rejected.

98 In any event, contrary to the applicants' claim, the limitation period laid down in Article 15 of Part II of Protocol 3 SCA did not begin until the date on which the unlawful aid was paid out. Therefore, in the case of a tax exemption introduced more than 10 years before the first interruption of the limitation period, the unlawful aid incompatible with the common market granted during the last ten years is subject to recovery (see, for comparison, Case T-254/00 *Hotel Cipriani* [2008] ECR II-3269, paragraph 364; and Joined Cases T-195/01 and T-207/01 *Government of Gibraltar* v *Commission* [2002] ECR II-2309, paragraph 130).

99 In any event, it must be noted that this limitation period was interrupted when ESA sent its request for information to the Liechtenstein authorities on 14 March 2007 (see, for comparison, Case C-276/03 P *Scott* v *Commission* [2005] ECR I-8437, paragraphs 26 to 36).

100 ESA was therefore correct to assert in the contested decision that aid paid after 15 March 1997 was to be recovered. Therefore, this argument must be rejected.

101 As regards Liechtenstein's argument that the measures in question should be considered existing aid due to the evolution of the EEA, it appears from the contested decision that Liechtenstein contended that a change of practice by the Commission in establishing selectivity meant that there had been an evolution of the EEA within the meaning of Article 1(b)(v) of Part II of Protocol 3 SCA.

102 This provision states that a measure which did not constitute aid when it was put into effect is nonetheless to be treated as existing aid in so far as it subsequently became an aid due to the evolution of the European Economic Area. Article 1 of Part I of Protocol 3 SCA, which confers powers on ESA in the area of State aid, does not define the concept of evolution of the European Economic Area.

103 That concept may be understood as a change in the economic and legal framework of the sector concerned by the measure in question, and does not apply in a situation where ESA has only altered its appraisal on the basis of a more rigorous application of the rules in the Agreement on State aid (see, for comparison, *mutatis mutandis*, Joined Cases C-182/03 and C-217/03 *Belgium and Forum 187* v *Commission* [2006] ECR I-5479, paragraph 71). Such a change

can, in particular, be the result of the liberalisation of a market initially closed to competition (see, for comparison, Case T-288/97 *Regione autonoma Friuli-Venezia Giulia* v *Commission* [2001] ECR II-1169, paragraph 89).

104 In that connection, it must be remembered that whether a State measure is existing or new aid cannot depend on a subjective assessment by ESA and must be determined independently of any previous administrative practice which ESA may have had (see *Liechtenstein and Others* v *ESA*, cited above, paragraph 119).

105 The applicants also rely on the 1998 notices on tax aid, prior to which, according to those parties, no authoritative Commission or ESA decisions existed which classified a taxation regime for investment companies as State aid.

106 In the 1998 notices on tax aid, which are substantially based on the case law of the Court of Justice of the European Union ("ECJ") and the General Court and which elucidate the application to tax measures of Articles 61 EEA and Part I of Protocol 3 SCA, ESA did not announce any change to the criteria for the assessment of tax measures in the light of those provisions (see, for comparison, *Diputación Foral de Guipúzcoa and Others* v *Commission* [2002] ECR II-4217, paragraph 79; and *Diputación Foral de Álava and Others* v *Commission* [2002] ECR II-4259, paragraph 83).

107 It follows that the mere finding that there has been a development of State aid policy is not, in itself, sufficient to constitute an evolution of the European Economic Area within the meaning of Article 1(b)(v) of Part II of Protocol 3 SCA, provided that the objective concept of State aid, as defined in Article 61 EEA, is not itself altered.

108 None of the other circumstances put forward by the applicants, such as the evolution of the EEA in the 1990s or the fact that the tax regime predated this evolution, suffices to demonstrate that there was an evolution of the EEA within the meaning of Article 1(b)(v) of Part II of Protocol 3 SCA.

109 Consequently, the measures cannot be regarded as "existing aid" within the meaning of Article 1(b)(v) of Part II of Protocol 3 SCA.

110 It follows, therefore, that the pleas of the applicants asserting that the contested tax provisions constitute existing aid within the meaning of Article 1(b) of Part II of Protocol 3 SCA must be rejected.

The second branch of the second plea

111 Liechtenstein and VTM allege a violation of the principle of legitimate expectations. Liechtenstein also alleges a violation of the principles of legal certainty, homogeneity and equal treatment.

Legitimate expectations

- Arguments of the parties

112 The applicants claim that, by ordering the recovery of the alleged aid from 15 March 1997, ESA has violated the principle of legitimate expectations, which allows the beneficiary of unlawful aid to resist the recovery of the aid concerned on the basis that, due to certain behaviour on the part of public authorities, the beneficiary could not reasonably foresee that such recovery would be envisaged, let alone ordered.

113 In this context, Liechtenstein submits that prior to the Commission's Decision on the Italian scheme for collective investments in transferable securities in 2005, which might be regarded as comparable to the case at hand in certain respects, there were no decisions, whether by the Commission or ESA, which suggested that the taxation of investment companies might imply State aid.

114 VTM observes that in 1998 the Commission adopted a notice on the application of the State aid rules to measures relating to direct business taxation and started to examine the tax schemes of Member States systematically in light of the State aid rules, *inter alia*, by opening simultaneous investigations into 11 schemes in 2001.

115 Although ESA adopted similar guidelines in 1999, VTM notes that it did not begin to assess tax schemes in the EFTA States systematically in relation to the EEA Agreement. Thus, although the EEA Agreement requires ESA and the Commission to cooperate towards the homogeneous and co-ordinated enforcement of EEA law, ESA remained wholly inactive. In VTM's view, ESA's delay in the present case constituted an implicit assurance that the tax measures did not qualify as State aid for the purposes of Article 61(1) EEA.

116 ESA disagrees with these arguments. In ESA's view, it follows from the case law of the Court and of the Union courts that precise assurances must be given by an institution in order to establish legitimate expectations. According to this case law, moreover, the crucial question in determining whether there may have been a breach of the principle of legitimate expectations is whether the aid was granted further to a notification to ESA under Article 1(3) of Part I of Protocol 3 SCA.

117 In light of this, ESA submits that the argument alleging a breach of the principle of legitimate expectations must be dismissed, as the aid measures were not notified to it under Article 1(3) of Part I of Protocol 3 SCA, and it did not give any assurances of any kind to the applicants.

118 Regarding VTM's argument that ESA's delay constituted an implicit assurance, ESA submits that the aid measures were not even notified.

119 ESA also contests the applicants' assertion that it was unclear when the tax measures entered into force that they would constitute State aid. According to

ESA, there is ample evidence to demonstrate that it was foreseeable in 1996 that tax measures such as those introduced could constitute unlawful State aid, as there were already ESA decisions and judgments of the ECJ on that point. In ESA's view, it is also clear from publicly available records that the Liechtenstein authorities were aware at the time of Liechtenstein's entry to the EEA that, in principle, tax reductions constitute State aid within the meaning of Article 61(1) EEA and that, under certain circumstances, it may be necessary to notify Liechtenstein tax measures.

120 In response to VTM's arguments that it would be wrong to expect an assessment of the compatibility of the tax measures with the State aid rules so soon after the entry into force of the EEA Agreement in Liechtenstein in May 1995 and that VTM could not be expected to be informed about State aid, ESA observes that the obligations imposed by the EEA State aid regime entered into force in Liechtenstein on 1 May 1995. After that date, any aid granted was subject to the notification obligation of Article 1(3) of Part I of Protocol 3 SCA. There was no derogation or transitional period in respect of this obligation which may be invoked to justify the non-notification of the 1996 tax measures, or to somehow substantiate a claim of legitimate expectations.

121 Moreover, ignorance of the State aid rules and the complex question of what constitutes State aid, cannot, in ESA's view, be regarded as exceptional circumstances of such a kind as to give rise to a legitimate expectation that the aid was lawful. Further, recipients of aid cannot, on grounds of their size, be relieved of the obligation to keep themselves informed of the rules of EEA law, as the practical effect of EEA law would thus be undermined.

122 The Commission essentially supports the arguments of ESA and adds that, in principle, an EEA State cannot rely on legitimate expectations where aid has not been notified. VTM's reasoning, which is based on the idea that it was only at the end of the 1990s that the Commission started to systematically assess Member States' tax schemes in light of the State aid rules with the adoption in 1998 of the Commission notice, has already been rejected in case law.

- Findings of the Court

123 The Court notes that the disputed measures were introduced without prior notification, contrary to Article 1(3) of Part I of Protocol 3 SCA.

124 An EEA State, whose authorities have granted aid contrary to the procedural rules laid down in Article 1 of Part I of Protocol 3 SCA may not rely on the legitimate expectations of recipients in order to justify a failure to comply with the obligation to take the steps necessary to implement an ESA decision ordering it to recover the aid. If it could do so, Articles 61 EEA and 1 of Part I of Protocol 3 SCA would be set at naught, since national authorities would thus be able to rely on their own unlawful conduct in order to deprive ESA's decisions of their effectiveness (see, for comparison, Case C-5/89 *Commission* v *Germany* [1990] ECR I-3437, paragraphs 16 and 17).

125 As a result, Liechtenstein's argument that legitimate expectations of investment companies in Liechtenstein have been violated is irrelevant and must be rejected.

126 Moreover, in view of the mandatory nature of the review of State aid by ESA provided for by Article 1 of Part I of Protocol 3 SCA, undertakings to which aid has been granted may not, in principle, entertain a legitimate expectation that the aid is lawful unless it has been granted in compliance with the procedure provided for therein. A diligent business operator must normally be in a position to confirm that that procedure has been followed (see *Liechtenstein and Others* v *ESA*, cited above, paragraph 148).

127 In particular, where aid is implemented without prior notification to ESA, with the result that it is unlawful under Article 1(3) of Part I of Protocol 3 SCA, the recipient of the aid cannot have at that time a legitimate expectation that its grant is lawful (see, for comparison, Joined Cases C-183/02 P and C-187/02 P *Demesa and Territorio Histórico de Álava* v *Commission* [2004] ECR I-10609, paragraph 45, and case law cited).

128 However, according to case law, a recipient of aid which is granted unlawfully is not precluded from relying on exceptional circumstances, on the basis of which it legitimately assumed the aid to be lawful, in order to oppose repayment of the aid (see, for comparison, Case C-183/91 *Commission* v *Greece* [1993] ECR I-3131, paragraph 18; *Demesa and Territorio Histórico de Álava* v *Commission*, cited above, paragraph 51; and Joined Cases T-126/96 and T-127/96 *BFM and EFIM* v *Commission* [1998] ECR II-3437, paragraph 69).

129 In any event, none of the circumstances put forward by the applicants can be held to justify annulment of the contested decision.

130 As regards the argument that it was impossible to foresee in 1996 that the tax measures in question might constitute State aid, it is clear from the report to the Liechtenstein Parliament regarding the EEA Agreement that at the time of its accession to the EEA it was discussed whether certain tax measures constituted State aid. Even though the report also notes an absence of action on the part of the Commission, it is clear that the situation in 1996 cannot possibly be considered an exceptional circumstance within the meaning of the case law cited above.

131 Nor can the fact that VTM was not informed of the administrative procedure in 2007 be regarded as an exceptional circumstance capable of giving rise to a legitimate expectation that the aid was lawful (see, for comparison, Case T-109/01 *Fleuren Compost* v *Commission* [2004] ECR II-127, paragraph 141; and Case T-55/99 *CETM* v *Commission* [2000] ECR II-3207, paragraph 127).

132 The submission that the lapse of time between the adoption of the measures in 1996 and ESA's investigation constitutes an implicit assurance that the measures do not fall under Article 61(1) EEA, must be rejected.

133 In any case, it could not be considered an exceptional circumstance in relation to VTM.

134 According to settled case law, the right to rely on the principle of the protection of legitimate expectations extends to any individual who is in a situation in which it is apparent that ESA has led him to entertain such prospects. On the other hand, a person may not plead a breach of the principle of the protection of legitimate expectations unless the administration has given him precise assurances (see, for comparison, Case T-571/93 *Lefebvre and Others* v *Commission* [1995] ECR II-2379, paragraph 72).

135 It is quite clear that the sole basis for the applicants' argument is an allegation of inaction on the part of ESA with respect to certain tax measures adopted in 1996 which they do not even claim were notified to ESA.

136 It would be wrong to take inaction on the part of ESA as being in any way equivalent to its giving a precise assurance that the tax concession addressed by the contested decision does not constitute State aid. In any event, inaction on the part of ESA with regard to similar measures, or with regard to the measures at issue in this case, is incapable of giving rise to a legitimate expectation on the part of the applicants (see, for comparison, *Diputación Foral de Álava and Others* v *Commission*, cited above, paragraph 95).

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

Legal certainty, homogeneity and equal treatment

- Arguments of the parties

138 Liechtenstein argues that recovery of the alleged State aid constitutes a violation of the principles of legal certainty, homogeneity and equal treatment of economic operators. In this regard, Liechtenstein submits that when it joined the EEA in 1995 the *acquis communautaire* in relation to State aid did not qualify the taxation of investment companies as involving State aid. There were no changes or developments between 1995 and 1996 (the year in which the tax measures were introduced) which would have prompted Liechtenstein to reach a different conclusion. Hence, such an assessment was not foreseeable.

139 Moreover, in ordering the recovery of the alleged aid from the investment companies from 15 March 1997, ESA accorded considerably less protection to legitimate expectations than beneficiaries would have enjoyed under identical circumstances in the European Union. Liechtenstein submits that, in creating such an imbalance in the interpretation and application of this general principle of law within the EEA, ESA has violated the homogeneity principle and the principle of equal treatment of economic operators in the EEA.

140 ESA rejects Liechtenstein’s submissions on this point. It submits that the arguments relating to the principle of legal certainty largely repeat those relating to the principle of legitimate expectations and that the principle has been fully respected. Furthermore, Liechtenstein has not explained how the principles of homogeneity and equal treatment of economic operators in the EEA have been violated in this case, which, in any event, ESA denies.

- Findings of the Court

141 Legal certainty is a fundamental principle of EEA law, which may be invoked not only by individuals and economic operators, but also by EEA States (*Fesil and Finnfjord and Others*, cited above, paragraph 163; and *Liechtenstein and Others* v *ESA*, cited above, paragraph 156).

142 The principle of legal certainty requires that rules of EEA law be clear and precise, so that interested parties can ascertain their position in situations and legal relationships governed by EEA law (*Liechtenstein and Others* v *ESA*, cited above, paragraph 156).

143 However, in relation to Liechtenstein’s argument that the order of recovery in the contested decision infringed the principle of legal certainty since the legal situation between 1995 and 1996 was not foreseeable and the measures were abolished in 2006, it suffices to note that Liechtenstein was aware of the possibility that certain tax exemptions might fall under Article 61 EEA and that, where illegal, these could be subject to recovery.

144 Accordingly, that argument must be rejected.

145 Liechtenstein’s argument that ESA’s decision violated the principle of homogeneity, since it accorded considerably less protection to legitimate expectations than beneficiaries would have enjoyed under identical circumstances in the European Union, must be rejected as manifestly unfounded.

146 In its application, Liechtenstein provides no evidence showing how the contested decision might violate the principle of homogeneity but simply reiterates, in general terms, different aspects of this principle.

147 As regards the argument that in the contested decision ESA violated the principle of equal treatment, the Court recalls that compliance with the principle of equal treatment requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified (*Liechtenstein and Others* v *ESA*, cited above, paragraph 160, and case law cited). However, Liechtenstein provides no evidence showing how the contested decision might violate the principle of equality. As a consequence, this argument must be rejected.

148 In light of the foregoing, this plea must be rejected.

The third plea in law alleging a failure to state adequate reasons as required by Article 16 SCA

Arguments of the parties

149 The applicants submit that ESA did not provide adequate reasoning on essential parts of its contested decision as required by Article 16 SCA and that also for that reason the contested decision must be annulled.

150 Liechtenstein contends that this applies in particular to the assessment of selectivity in relation to the various tax measures at stake and the basis on which the recovery order is made. It asserts that ESA only concludes in general terms that the tax measures are selective, on the basis that they were granted only to investment undertakings which adopted the legal form of an investment company. Liechtenstein argues that, in doing so, ESA ignores the fact that the economic activities of investment funds and investment companies are exactly the same and that each undertaking in Liechtenstein carrying out such economic activity is, in principle, free to choose the appropriate legal form.

151 Moreover, Liechtenstein criticises the fact that, in concluding in such general terms that the tax relief is selective, ESA does not assess the characteristics of the various tax measures at stake. For example, one of these measures is a withholding tax (the coupon tax) which falls on the investor as the ultimate taxpayer but which is withheld at the level of the company. As any natural or legal person regardless of sector or industry can be a shareholder in an investment company, the exemption from coupon tax may not be regarded as benefiting certain undertakings.

152 With regard to the basis for the recovery order, Liechtenstein criticises the fact that ESA makes no attempt to explain why the disallowance of fiscal aid measures in Finland and Norway justifies denial of the legitimate expectations that investment undertakings in Liechtenstein held. In this respect, it notes that the contested decision merely states that ESA's decisions in disallowing fiscal aid measures in Finland and Norway shortly before the implementation of the Liechtenstein Tax Act should have made it clear that tax measures favouring certain companies or groups of companies should be notified to ESA.

153 In VTM's view, ESA should have provided reasoning which explains why investment companies are deemed to have received State aid as a result of the coupon tax exemption when the beneficiaries of that exemption are the shareholders in an investment company and not the company itself. VTM argues that ESA has failed to provide any guidance on the calculation of the State aid element that investment companies are alleged to have enjoyed due to the coupon tax exemption and which is now subject to recovery.

154 ESA rejects the submissions of the applicants which maintain that the decision lacks reasoning both as a whole and in respect of the coupon tax exemption. ESA

contends that it assessed the tax measures as a scheme and assessed that scheme as a whole.

155 ESA asserts that, according to well-established case law, it may assess the general features of the scheme to ascertain whether it involves State aid within the meaning of Article 61(1) EEA. It observes that settled case law of the Union courts has established that, in the case of an aid scheme, the Commission may confine itself to examining the general characteristics of the scheme in question without it being required to examine each particular case in which it applies. According to ESA, it analysed, in turn, each of the criteria contained in Article 61 EEA which determine whether or not a measure is compatible with the EEA Agreement.

156 According to ESA, the statement of reasons in the contested decision set out its reasoning in a clear and unequivocal fashion. As a result, the applicants were able to ascertain how ESA applied EEA law to the tax measures and the reasons for its decision. Given that ESA set out the facts and legal considerations that had decisive importance in that context, in its view, the contested decision fully meets the standard of reasoning required by the case law of the Court and the Union courts.

157 Furthermore, ESA takes the view that the argument advanced concerning the lack of reasoning in relation to the coupon tax exemption (that is, how the investment companies were regarded as receiving State aid when the shareholders were the beneficiaries) pertains to the substantive legality of the contested decision. Such a submission raises a question of defective reasoning and must be distinguished from a plea adducing a lack of reasoning. Accordingly, this argument should be dismissed.

158 For completeness, ESA rejects the contention that it insufficiently reasoned its conclusion that the coupon tax constituted State aid. ESA asserts that it set out the characteristics of the coupon tax in Part I, Section 3.1.2 of the contested decision and its reasoning why this tax exemption constitutes a selective advantage is contained in part II, Section 1.2.

159 As to VTM's argument that ESA failed to provide guidance on the calculation of the State aid element that the investment companies allegedly enjoyed due to the coupon tax exemption, ESA contends that this was not required of it. In any event, ESA submits that it would not have been difficult for VTM to calculate the State aid element to be recovered. VTM simply needed to calculate 4% of the value of the profits distributed to its shareholders during the period 1996 to 2006 (that is, the amount that would have been payable by the shareholders as tax had it not been for the coupon tax exemption). In ESA's view, this was not a difficult task, as was proved by the fact that the tax authorities in Liechtenstein, without any apparent difficulty, were able to determine the amount of unlawful State aid that each beneficiary had been granted and secure its repayment. The Commission supports the arguments of ESA in this regard.

Findings of the Court

160 The statement of reasons required by Article 16 SCA must be appropriate to the measure at issue. It must disclose in a clear and unequivocal fashion the reasoning followed by ESA, in such a way as to enable the persons concerned to ascertain the reasons for the measure and thus enable them to defend their rights and enable the Court to exercise its power of review (see *Liechtenstein and Others* v *ESA*, cited above, paragraph 171, and case law cited).

161 The requirements to be satisfied by the statement of reasons 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 measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 16 SCA must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (see *Liechtenstein and Others* v *ESA*, cited above, paragraph 172).

162 In particular, ESA is not obliged to adopt a position on all the arguments relied on by the parties concerned. Instead, it is sufficient if it sets out the facts and the legal considerations having decisive importance in the context of the decision (see *Liechtenstein and Others* v *ESA*, cited above, paragraph 173).

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

164 The argument raised by VTM alleging inadequate reasoning in relation to the coupon tax, concerns the substantive legality of the decision, and merely repeats the submission on which VTM based its first plea.

165 It is necessary to distinguish a plea based on an absence of reasons or inadequacy of the reasons stated from a plea based on an error of fact or law. This last aspect falls under the review of the substantive legality of the contested decision and not the review of an alleged violation of infringement of essential procedural requirements within the meaning of Article 16 SCA (see, for comparison, Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraphs 67 and 72; and Case T-84/96 *Cipeke* v *Commission* [1997] ECR II-2081, paragraph 47).

166 A plea alleging absence of reasons or inadequacy of the reasons stated goes to the issue of infringement of essential procedural requirements within the meaning of Article 16 SCA and, as it involves a matter of public policy, may be raised by the Court on its own motion (Case E-14/10 *Konkurrenten.no* v *ESA* [2011] EFTA Ct. Rep. 268, paragraph 46). By contrast, a plea based on an error of fact or law, which goes to the substantive legality of the contested decision, is concerned

with the infringement of a rule of law relating to the application of the EEA Agreement within the meaning of Article 36 SCA, and can be examined by the Court only if raised by the applicant.

167 As for the argument that ESA failed to explain why the decisions on State aid in Norway and Finland might form the basis for denying legal expectations, it suffices to observe that this part of the plea concerns the substantive legality of the contested decision. In any event, it is clear from the passage quoted in the application that this assessment was sufficiently reasoned in the contested decision.

168 As a consequence, this argument must be rejected.

169 In relation to the argument raised by Liechtenstein that in the contested decision ESA did not sufficiently explain why the measures were selective, the Court refers to the case law cited in paragraph 161 above.

170 Although the applicant does not specify which parts of the contested decision it considers insufficiently reasoned, it is clear that ESA considered the measures selective because they was granted only to investment undertakings organised in the form of investment companies. Subsequently, ESA goes on to reject the argument concerning the freedom for any economic operator to choose the form of undertaking.

171 In any event, it is apparent from the Court's assessment in paragraphs 50 to 64 above that ESA's decision provided sufficient reasoning for the Court to exercise its power of review (see, for comparison, Joined Cases T-268/08 and T-281/08 *Land Burgenland and Austria* v *Commission*, judgment of 28 February 2012, not yet reported, paragraphs 138 to 139).

172 This argument must therefore be rejected.

173 The argument that the coupon tax did not constitute an advantage for all undertakings is an obvious misreading of the contested decision. It is clear that the selective advantage was granted, admittedly indirectly, to investment companies operating in Liechtenstein. The fact that certain shareholders are not subject to coupon tax has no bearing whatsoever on that conclusion. Therefore, this argument must be rejected.

174 In relation to the argument raised by VTM that ESA failed to provide sufficient information to assess the amounts to be recovered, the Court notes that no provision of EEA law requires ESA, when ordering the recovery of aid declared incompatible with the EEA, to fix the exact amount of the aid to be recovered. It is sufficient for ESA's decision to include information enabling the recipient to work out itself, without overmuch difficulty, that amount (see, in particular, Case C-480/98 *Spain* v *Commission* [2000] ECR I-8717, paragraph 25; and Case C-415/03 *Commission* v *Greece* [2005] ECR I-3875, paragraph 39).

175 In the present case, the contested decision lays down in Article 3 that the aid made available to the beneficiaries from 15 March 1997 until the date in which the beneficiaries last benefitted from the tax exemptions following their repeal in 2006 shall be recovered by the Liechtenstein authorities. Any calculation of the taxes paid based on tax returns for this period cannot be considered as presenting overmuch difficulty for the Liechtenstein authorities and the beneficiaries of the aid. Therefore, this argument must be rejected.

176 In the light of all the foregoing, the third plea must be rejected.

177 Consequently, the applications must be dismissed in their entirety.

V Costs

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

On those grounds,

THE COURT

hereby:

1. **Dismisses the applications.**
2. **Orders the applicants to pay the costs of the proceedings.**

Carl Baudenbacher Per Christiansen Páll Hreinsson

Delivered in open court in Luxembourg on 30 March 2012.

Skúli Magnússon
Registrar

Carl Baudenbacher
President