URZĄD NADZORU EFTA

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 przedsiębiorstw inwestycyjnych zgodnie z ustawą podatkową Liechtensteinu.

(2009/C 236/06)

Decyzją nr 149/09/COL z dnia 18 marca 2009 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 pomiędzy państwami EFTA w sprawie ustanowienia Urzędu Nadzoru i Trybunału Sprawiedliwości. Władze Liechtensteinu otrzymały stosowną informację wraz z kopią wyżej wymienionej decyzji.

Urząd Nadzoru EFTA wzywa niniejszym państwa EFTA, państwa członkowskie UE i zainteresowane strony do zgłaszania uwag w sprawie omawianego środka w ciągu jednego miesiąca od publikacji niniejszego zawiadomienia na poniższy adres Urzędu Nadzoru EFTA w Brukseli:

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.

Zgodnie z art. 2 ustawy z dnia 3 maja 1996 r. o przedsiębiorstwach inwestycyjnych (*Gesetz über Investmentunternehmen*, zwaną dalej „IUG") przedsiębiorstwa inwestycyjne to:

> „aktywa pozyskane od obywateli w wyniku ogłoszenia oferty publicznej do celów zbiorowych inwestycji kapitałowych, inwestowane i zarządzane dla zbiorowych rachunków indywidualnych inwestorów, zazwyczaj zgodnie z zasadą podziału ryzyka".

Przedsiębiorstwo inwestycyjne w rozumieniu IUG oznacza fundusz kapitałowy obejmujący kapitał wnoszony przez różnych inwestorów. Aby przedsiębiorstwo inwestycyjne mogło prowadzić działalność na rynku, musi spełnić trzy warunki w rozumieniu IUG:

— musi wybrać uznawaną formę prawną,

— zarząd musi być sprawowany przez organ posiadający osobowość prawną,

— przedsiębiorstwo musi posiadać rachunek depozytowy w banku depozytowym (zob. art. 39 IUG).

Bez względu na formę organizacyjną aktywa wnoszone przez inwestorów (zarządzane aktywa) muszą być wyodrębnione od własnych aktywów spółki zarządzającej.

Do celów podatkowych w przypadku spółek inwestycyjnych nie wprowadzono rozróżnienia między aktywami własnymi spółki zarządzającej a aktywami zarządzanymi, ponieważ zgodnie z art. 85 ust. 2 ustawy podatkowej obie te kategorie podlegały przepisom stosowanym wobec spółek krajowych jako takich. Oznaczało to, iż działalność zarządcza ani zarządzane aktywa nie były objęte podatkiem dochodowym. Podatek kapitałowy był ustalony na poziomie 1 ‰ zamiast 2 ‰ oraz był dodatkowo obniżony dla kapitału przekraczającego 2 mln CHF. Zyski kapitałowe nie były opodatkowane.

Z mocą obowiązującą od 2006 r. w ustawie o przedsiębiorstwach inwestycyjnych wprowadzono nowy artykuł 35 ust. 3. Przepis ten nakłada na spółki inwestycyjne obowiązek ewidencjonowania i prowadzenia osobnych wykazów aktywów własnych i aktywów zarządzanych. Następnie w 2005 r. wprowadzono zmiany w ustawie podatkowej. Uchylono art. 85 ust. 2 tej ustawy, przewidujący podobne opodatkowanie obowiązujące spółki krajowe oraz obniżony podatek kapitałowy od kwot przekraczających 2 mln CHF. W zamian wprowadzono nowy zapis w art. 73 lit. f), zgodnie z którym kierownictwo funduszu inwestycyjnego i spółki inwestycyjne zobowiązane są do płacenia podatku dochodowego i podatku kapitałowego w odniesieniu do swoich aktywów własnych. Ponadto w wyniku tej reformy spółki inwestycyjne objęte zostały również podatkiem od zysków kapitałowych.

Istnienie pomocy państwa

Urząd ocenił, czy ulgi podatkowe, którymi objęte były spółki inwestycyjne w latach 1996–2006, stanowią pomoc państwa w rozumieniu art. 61 ust. 1 Porozumienia EOG.

Przedsiębiorstwo

Według Europejskiego Trybunału Sprawiedliwości pojęcie przedsiębiorstwa w rozumieniu art. 87 Traktatu WE, stanowiącego odpowiednik art. 61 ust. 1 Porozumienia EOG, obejmuje „*każdą jednostkę prowadzącą działalność gospodarczą, niezależnie od jej statusu prawnego i sposobu finansowania*” ([1]).

Zgodnie z prawem Liechtensteinu spółki inwestycyjne przyjmują osobowość prawną, gdyż mają formę spółek akcyjnych lub spółek europejskich (Societas Europea). Prowadzą one działalność w zakresie gromadzenia aktywów różnych inwestorów i zarządzania tymi aktywami, z zamiarem osiągania zysku w formie różnych opłat i prowizji związanych z tymi inwestycjami. W związku z powyższym Urząd uznaje, że spółki inwestycyjne w części spółki dotyczącej zarządzania aktywami są przedsiębiorstwami w rozumieniu art. 61 ust. 1 Porozumienia EOG ([2]).

Korzyść

Spółki inwestycyjne poprzez zwolnienie z podatku dochodowego i podatku od zysków kapitałowych i objęcie jedynie obniżonym podatkiem kapitałowym od aktywów własnych, uzyskały korzyść w stosunku do innych przedsiębiorstw, w szczególności w stosunku do kierownictw funduszy inwestycyjnych, które podlegały zwykłemu opodatkowaniu w zakresie dochodów uzyskiwanych z działalności gospodarczej.

Korzyść jest selektywna, gdyż została przyznana jedynie przedsiębiorstwom inwestycyjnym zorganizowanym w formie spółek inwestycyjnych. We wstępnej opinii Urzędu ulga podatkowa obejmująca aktywa własne spółki zarządzającej nie może być uzasadniona charakterem i ogólną konstrukcją systemu podatkowego Liechtensteinu.

Zaangażowanie środków państwowych

Korzyść musi być przyznana przez państwo lub ze środków publicznych. Utrata wpływów podatkowych jest równoznaczna z konsumpcją środków publicznych w formie wydatków budżetowych ([3]). Państwo Liechtenstein rezygnuje z dochodów w formie podatku dochodowego od spółek inwestycyjnych.

Zakłócenie konkurencji oraz wpływ na wymianę handlową między umawiającymi się stronami

Gdy środek pomocy przyznany przez państwo umacnia pozycję przedsiębiorstwa w stosunku do innych przedsiębiorstw konkurujących w wymianie handlowej EOG, należy uznać, że wywiera ona wpływ na te przedsiębiorstwa. Urząd przyjmuje zatem wstępne stanowisko, iż ulgi podatkowe dotyczące aktywów własnych spółek inwestycyjnych w latach 1996–2005 umocniły pozycję konkurencyjną tych spółek w obrębie EOG, ponieważ ulgi te obniżyły normalne koszty operacyjne tych spółek w porównaniu z innymi przedsiębiorstwami EOG, które mogą prowadzić działalność na rynkach międzynarodowych ([4]).

([1]) Sprawy połączone C-180/98 do C-184/98 *Pavlov* [2000] Zb.Orz. I-6451, pkt 75.
([2]) Sprawa T-445/05 Associazione Italiana del risparmio gestito, e.a. przeciwko Komisji, jeszcze nieopublikowana, pkt 127 ff.
([3]) Zob. pkt 3 ppkt 3 wytycznych Urzędu w sprawie środków związanych z bezpośrednim opodatkowaniem działalności gospodarczej.
([4]) Zob. sprawa T-424/05, cytowana powyżej, pkt 156.

Z wyżej wymienionych powodów Urząd przyjmuje wstępne stanowisko, iż ulgi podatkowe dotyczące aktywów własnych spółek zarządzających stanowią pomoc państwa w rozumieniu art. 61 ust. 1 Porozumienia EOG.

Zgodność pomocy ze wspólnym rynkiem

Urząd ma wątpliwości, czy badane odstępstwa podatkowe są zgodne z Porozumieniem EOG na podstawie któregoś z ustępstw przewidzianych w art. 61 ust. 2 i 3 Porozumienia EOG.

Wniosek

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

EFTA SURVEILLANCE AUTHORITY DECISION

No 149/09/COL

of 18 March 2009

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 investment undertakings according to the Liechtenstein Tax Act

(Liechtenstein)

THE EFTA SURVEILLANCE AUTHORITY [5],

Having regard to the Agreement on the European Economic Area [6], in particular to Articles 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 [7], 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 [8],

Having regard to the Authority's Guidelines [9] 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,

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 [10],

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 provided information by letter dated 30 May 2007 (Event No 423398).

[5] Hereinafter referred to as the Authority.

[6] Hereinafter referred to as 'the EEA Agreement'.

[7] Hereinafter referred to as 'the Surveillance and Court Agreement'.

[8] Hereinafter referred to as 'Protocol 3'.

[9] Guidelines on the application and interpretation of Articles 61 and 62 of the EEA Agreement and Article 1 of Protocol 3 to the Surveillance and Court Agreement, adopted and issued by the EFTA Surveillance 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 the EEA Supplement No 32, 3.9.1994, p. 1. Hereinafter referred to as the State Aid Guidelines, which can be found on http://www.eftasurv.int/fieldsofwork/fieldstateaid/state_aid_guidelines/

[10] Decision No 195/04/COL of 14 July 2004 (published in OJ L 139, 25.5.2006, p. 37 and the EEA Supplement No 26, 25.5.2006, p. 1), as amended. A consolidated version of the decision can be found on www.eftasurv.int

By letter dated 12 July 2007 (Event No 428102), the Authority requested more information. 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 the case 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. By letter dated 6 October 2008, the Liechtenstein authorities submitted an expert study on the legal forms of investment undertakings and the respective taxation they were subject to (Event No 493967) ([11]). By email dated 19 January 2009, the Liechtenstein authorities submitted further information. The case was further discussed with the Liechtenstein authorities in a meeting in Vaduz on 27 January 2009.

2. **Scope of this decision**

The current investigation concerns the treatment of investment undertakings under the Liechtenstein Tax Act (*Gesetz über die Landes-und Gemeindesteuern*, hereinafter: 'the Tax Act') ([12]) between 1996 and 2006.

3. **General description of investment undertakings**

3.1. *Definition of investment undertakings*

In 1996, Act of 3 May 1996 on Investment Undertakings (*Gesetz über Investmentunternehmen*, hereafter the 'IUG') was adopted. Section 2 ([13]) contained a definition of investment undertaking as:

> 'assets raised from the public following public advertising for the purpose of a collective capital investment which are invested and managed for the collective account of the individual investors usually according to the principle of risk-spreading'

Investment undertaking within the meaning of the IUG describes the fund capital placed by different investors. To deal commercially on the market, an investment undertaking needs to fulfil three requirements in terms of the IUG:

— it needs to choose a recognised legal form,

— the management needs to be carried out by a body which has legal personality,

— it needs to have a deposit account in a depot bank.

First condition: Recognised legal form

Regarding the first requirement, the choice of a recognised legal form, two options are available under Liechtenstein law. The investment undertaking may choose the form of a collective trust ([14]) in which case it is called investment fund (*Anlagefonds*). Alternatively, it may opt for the legal form of an investment company (*Anlagegesellschaft*).

Second condition: The management company

The management of both types of investment undertaking is carried out by a management company which is called the fund direction in the case of an investment fund ([15]). The investment undertaking (the fund capital) and the management company (the fund direction) constitute two separate parts.

In the case of an investment company, the management is taken care of by the investment company itself. That company may be organised either as a company limited by shares or a *Societas Europea*. The investment company acts via the board of directors or its management. As opposed to an investment fund, the investment company constitutes one single entity.

([11]) The Liechtenstein authorities clarified that the expert opinion constitutes part of the submission of the Liechtenstein government and is part of their reasoning in this case.
([12]) Liechtensteinisches Landesgesetzblatt 1961, Nr. 7, with subsequent amendments.
([13]) Cf. Section 2(1)(a) IUG.
([14]) See section 4(1) lit a IUG.
([15]) See section 64 IUG. The fund direction has the legal form of either a company limited by shares, a private establishment or a Societas Europea, see section 65 IUG.

In both cases, the entities which are carrying out management functions (management companies) are undertakings operating business activities and carrying out services for a fee.

Third condition: The depot bank

The fund capital, that is the managed assets of both investment companies and investment funds, is held in custody by a depot bank ([16]). The depot bank can be any bank having a licence according to the Act on Banks.

3.2. *Distinction between managed and own assets of investment undertakings*

Regardless of the organisational form, the assets transferred by the investors (the managed assets) must be differentiated from the own assets of the management company (see sections 4.1 and 4.2 below respectively).

3.2.1. The assets placed by investors and managed by the management company

For the establishment of an investment undertaking, the investors transfer their assets to the fund direction of the investment fund or to the management side of the investment company.

The assets raised constitute capital which the original investors have entrusted the management companies to administer for the account and risk of the investors. The fund capital is as such a property object which is subject to taxation.

The management company manages these assets as a separate fund in its own name but on behalf and for the account of the investors. Section 66(4) IUG stipulates that the managed assets of an investment undertaking do not form part of the management company's own assets. According to Liechtenstein bankruptcy law (bankruptcy code of 1973), assets which do not belong to the debtor are subject to the right of separation, i.e. they are transferred to the owner according to the normal principles of civil law.

3.2.2. Own assets of the management company

The notion of 'own' assets (*Eigenmittel*) is used to describe assets owned by the management company (i.e. the assets owned by the fund direction or by the investment company). These assets are used to cover daily expenses (rent, payment of salaries, infrastructure, etc.). They cover the capital stock, the legal and voluntary reserves and the accumulated profit/deficit.

In return for the management, the management company gets a management fee, which becomes part of its own assets. In addition, other fees (performance fees) might be levied ([17]). The Liechtenstein authorities have confirmed that all fees remaining with the management company fall under the notion of 'own assets'. The same applies to all revenues stemming from the management activities.

3.2.3. Separation of managed and own assets within investment undertakings

3.2.3.1. *Investment fund*

According to section 4(1)(a) IUG investment funds are classified as collective trusts, which represent a trust relationship between an appointed trustee and an indefinite number of trustors. According to section 897 of the Persons- and Company Act (PGR), a trust is defined as a transfer of assets from the trustor to the trustee with the obligation that the latter holds, manages and disposes of the assets of, for the benefit of one or more beneficiaries with effect for all other persons. The trustee consequently takes care of the assets in his own name, but on behalf and on the account of the investors.

([16]) Section 31 IUG.

([17]) The Liechtenstein authorities have stated that it is impossible to list these fees exhaustively as a fund direction (or the management side of the investment company) is free to levy fees as its own discretion.

Upon establishment of this trust relationship, the transferred assets form a special fund, the so-called trust property, which is held separately from the trustee's own assets., For investment funds the trusted assets are physically placed in a depot bank ([18]). In bankruptcy proceedings, these assets do not form part of the own assets of the management company, i.e. creditors cannot satisfy their claims against the management from the investors placements ([19]). There is a right of separation under Liechtenstein insolvency law for the trustor, who can claim back his entire investment in the insolvency proceedings. According to section 915 of the PGR, trust property is to be considered as distinct/foreign property ('*Fremdvermögen*') and the creditors of the trustee do not have access to it.

3.2.3.2. *Investment company*

In the setting of an investment company, managed and own assets share one entity (i.e. the investment company). Nevertheless, as for investment funds, there is a strict distinction between the investment company entrusted with the management of the assets and the assets themselves. The latter is not a commercially active entity. As for investment funds, the managed assets are physically held at the depot bank, which keeps them in custody. The managed assets are kept separate from the investment company's own assets ([20]). As for investment funds, the managed assets can profit from a right of separation of the investor in bankruptcy proceedings ([21]). Thus, the managed assets do not belong to the insolvency capital in case of a bankruptcy of the investment company.

The Liechtenstein authorities have explained that the managed assets do not become part of the company's own assets and that the investors do not become shareholders in the investment company. The placement of the investor consequently does not raise the capital of the investment company. The investor who transfers his assets to an investment company acquires a claim against the investment company in relation to the entire assets placed by him.

4. **Tax provisions applicable to investment undertakings in Liechtenstein**

4.1. *General description of the Liechtenstein company taxation*

4.1.1. Income and capital tax

Sections 73 to 81 in Part 4, heading A, The company taxes ('*Die Gesellschaftssteuern*') of the Tax Act comprise two taxes relating to companies ([22]):

— 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 % ([23]). 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 %.

— 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 ‰.

According to section 73 of the Tax Act, legal persons operating commercial businesses in Liechtenstein pay income and capital tax. The same applies to foreign companies operating a branch in Liechtenstein in accordance with section 73(e) of the Tax Act.

([18]) Cf. section 31 IUG.
([19]) Section 24 in conjunction with section 41 of the Liechtenstein Bankruptcy Act.
([20]) Section 35(3) IUG.
([21]) Section 37 IUG.
([22]) Private persons are subject to income tax (Erwerbssteuer) and property tax (Vermögenssteuer), which are not relevant for this investigation.
([23]) 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.

4.1.2. 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. 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, as for example companies limited by shares and companies with limited liability ([24]). 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 (debtor of the tax) ([25]).

4.2. *The taxation of investment undertakings between 1996 and 2006*

In 1996 the rules regarding taxation of investment undertakings were revised ([26]).

4.2.1. The taxation of the assets managed by investment undertakings

In 1996, with the introduction of Section 84(5), investment undertakings — in the meaning of collective capital — were formally put on the same footing as domiciliary companies ('*Sitzgesellschaften*') ([27]).

As domiciliary companies would not pay any *income tax*, the assets managed by investment undertakings would not pay income tax. According to section 84(1) of the Tax Act, only a reduced *capital tax* of 1 ‰ (instead of 2 ‰) was applicable ([28]). This rate was further reduced to 0,4 ‰ for the capital of investment undertakings exceeding 2 million CHF in accordance with Section 85(2) of the Tax Act ([29]).

Moreover, in 1996, the coupon tax on the distribution of profits generated from the fund capital was abolished ([30]).

4.2.2. The taxation of the own assets of investment funds

4.2.2.1. *The taxation of the management side of investment funds*

As any company operating business in Liechtenstein, the fund direction of investment funds (the management side of the fund) would be fully liable to pay income, capital as well as coupon tax for the own income and capital.

The fund direction had also been fully taxed prior to 1996 in accordance with Section 84(2) of the Tax Act 1961.

4.2.2.2. *The taxation of the management side of investment companies*

In the case of investment companies, no distinction was made between the management company's own assets and the managed assets. The investment companies own assets were therefore subject to the rules applying to domiciliary companies, as such, in accordance with Section 84(2) of the Tax Act. That meant that no income tax was levied for the management activities or for the managed assets. The capital tax was fixed at 1 ‰ instead of 2 ‰ and reduced further for any capital exceeding CHF 2 million in accordance with Section 85(2) of the Tax Act. No coupon tax was levied.

([24]) Section 88(d) of the Tax Act.

([25]) Section 88(i) of the Tax Act reads: '*(s)teuerpflichtig ist der Schuldner des Coupons oder der steuerbaren Leistung*'.

([26]) LGBL 1996, Nr. 88.

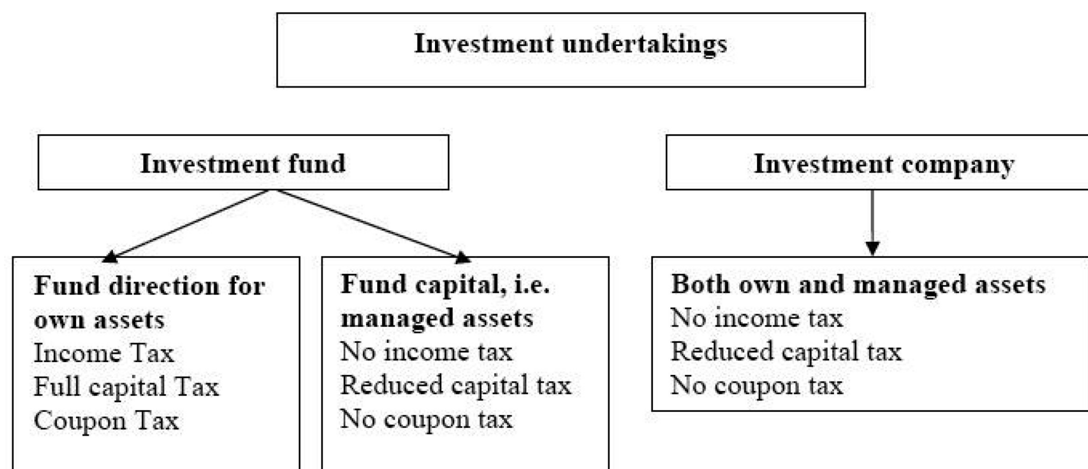
([27]) Cf. the former section 84(5) of the Tax Act. Domiciliary companies are still tax regulated in section 84 of the Tax Act. They are legal entities registered in the public register, which only have their seat or an office in Liechtenstein, but do not exercise any commercial or business activity in Liechtenstein.

([28]) The tax derogation in favour of domiciliary companies pre-dates the entry of Liechtenstein to the EEA Agreement and is therefore not part of this decision, which only deals with tax derogations introduced after 1 May 1995, the date of Liechtenstein's entry to the EEA.

([29]) Cf. section 85(2) of the Tax Act in the form of the 1996 amendment, LGBL 1996 Nr. 88.

([30]) Sections 88(f), 88(g), 88(h)(3), 88(i)(2) of the 1961 Tax Act which dealt with the coupon taxation of investment funds were repealed, see Government Bill No 69/1995, p. 10, in which it was stated that the repeal of the coupon tax on 'their' distributions was a pre-condition for the foundation of investment undertakings. Regarding the entry into force, see Gesetz vom 3. Mai 1996 über die Abänderung des Steuergesetzes, LGBl. Nr. 88 of 10 July 1996.

The tax situation from 1996 to 2006 for investment funds and investment companies can be illustrated as follows:



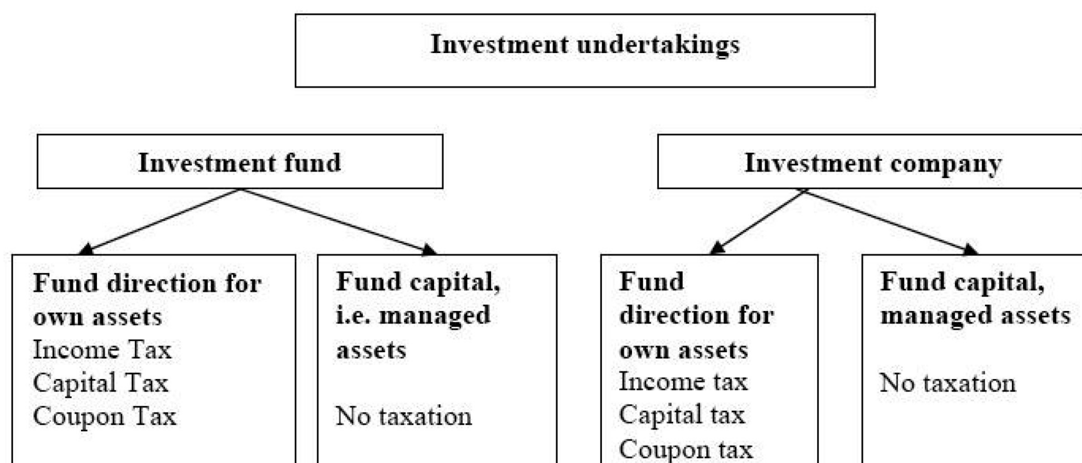
4.3. *The situation from 2006 until today*

By the Act on Investment Undertakings of 19 May 2005, a new section 35(3) was introduced in the Act on investment undertakings. This provision requires also the investment companies to record and hold separately own and managed assets.

Further, the Tax Act was also revised. The result of the revision was that section 84(5) Tax Act was abolished. In accordance with a new section 86(2), the managed assets for both types of investment undertakings, i.e. the investment fund and the investment company, were explicitly exempted from payment of a capital tax [31].

Section 85(2) of the Tax Act, which provided for a reduced capital tax for any amount in excess of CHF 2 million, was repealed. Instead, a new section 73(f) was inserted, which requires the fund direction of an investment fund and investment companies to pay income and capital tax in relation to its own assets.

The tax situation for investment funds and investment companies from 2006 onwards can be illustrated as follows:



[31] See information submitted by the Liechtenstein authorities by letter dated 1 February 2008, paragraphs 48-52.

5. **Comments by the Liechtenstein authorities**

5.1. *No selective advantage*

The Liechtenstein authorities firstly argued that the tax rules applicable to investment undertakings from 1996 to 2006 did not confer any advantage to a specific form of investment undertaking. Rather, there was a uniform tax regime for both investment funds and investment companies as defined by Section 2(1)(a) IUG 1996. They were taxed according to the general level of domiciliary companies. If anything, the taxation imposed on the fund direction of the investment fund which was subject to income tax, full capital tax and coupon tax, was a disadvantage for the fund rather than a selective advantage for the investment company.

The Liechtenstein authorities have stated that, despite the difference in taxation for investment companies compared to the fund direction with regard to own assets, the first investment company was only founded in 2001. In 2006, only 16 investment companies existed in Liechtenstein. By contrast, 192 investment funds were active in Liechtenstein by 2006. According to the Liechtenstein authorities, this shows that there was no incentive for enterprises to organise themselves in the form of an investment company. Hence, there was no advantage for investment companies.

In addition, an advantage within the meaning of the EEA State aid provisions is only selective if it favours the economic activity of certain undertakings or productions of certain goods compared to others. In the present case, the economic activities of the investment funds and the investment companies are identical. The difference in taxation results exclusively from the legal form in which these economic activities are carried out.

Finally, the Liechtenstein authorities argue that all economic agents active in the business of managing funds are free to choose both forms of investment undertakings. Once the form has been chosen, the investment undertaking has to abide by Liechtenstein's corporate and tax laws. As the difference in treatment applies to all economic activities alike, there is no State aid issue.

By letter dated 6 October 2008, the Liechtenstein authorities submitted an expert study on the taxation of investment undertakings. The expert study comes to the conclusion that if investment companies had been established already prior to 1996, they would have been subject to ordinary business taxation until 1996. The study concludes that during the time from 1996 to 2006, in order to be '*consistent with the Liechtenstein tax system the unit within the Anlagegesellschaft that operates the business and therefore, the own assets of the Anlagegesellschaft, should have been subject to the regular capital and profit tax*'. ([32])

The study moreover concludes that while in 1996 section 88(f) of the Tax Act dealing with coupon taxes for investment funds was repealed, section 88(d) dealing with such taxation in respect of capital divided into shares was not removed. Therefore, as for and regarding shares representing own assets, section 88(d) of the Tax Act would still have been applicable.

The Liechtenstein authorities have made the expert opinion part of their submission and reasoning in this case.

5.2. *Comments on the 2006 tax reform*

The Liechtenstein authorities have explained that there were various reasons for the revision. Firstly, it was found that the Liechtenstein Tax Act, by international comparison, was less advantageous as the managed assets of investment undertakings were hitherto subject to capital taxation. This led to double taxation, as both the investment undertaking and the investor were taxed ([33]). Other countries, such as Switzerland, Germany and Austria, did not tax the managed assets of investment funds. In order to improve the conditions for attracting fund investments to Liechtenstein, a revision was considered necessary.

([32]) Expert opinion DII,b.ii.3. The word profit tax used by the expert refers to what is described in this decision as the income tax.

([33]) The Liechtenstein authorities explained that the investor would be tax liable for the investment in Liechtenstein or in other countries.

Further, to avoid any unintentional double taxation of invested funds, uniform accounting standards were adopted which allowed for a more balanced taxation of both forms of investment undertakings without changing the structural difference required by Liechtenstein's corporate law ([34]).

Moreover, the tax distinction between the management side of investment funds and investment companies could lead to an increase in demand for products run by investment companies. To avoid a tax-motivated shift to investment companies, investment funds and investment companies were put on the same footing. The 2005/2006 reform should result in a uniform taxation of both forms of investment undertakings despite their structural differences.

II. **ASSESSMENT**

1. **The presence of State aid**

The Authority will investigate below whether the fact that investment companies did not pay any income and coupon tax and only a reduced capital tax on their own assets until the 2006 reform constitutes State aid within the meaning of Article 61(1) of the EEA Agreement. 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. *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*' ([35]).

As can be seen from the structure of investment undertakings, the pooled assets of the investors are managed either by a separate management company acting as a trustee in case of an investment fund (fund direction) or by the investment company itself.

In BBL ([36]), the Court of Justice of the European Communities dealt with the activity of investment companies (SICAVs under Belgian law) which consist of the collective investment in transferable securities of capital raised from the public and which aim to produce income on a continuing basis. With the capital provided by subscribers when they purchase shares, SICAVs assemble and manage, on behalf of the subscribers and for a fee, portfolios consisting of transferable securities. The Court held that this constitutes an economic activity within the meaning of Article 4(2) of the Sixth VAT Directive.

The Authority finds, in line with the Commission's case practice in this area ([37]), that this jurisprudence can also be applied when assessing the existence of an economic activity under the State aid provisions of the EEA Agreement. Investment companies and the fund direction for an investment fund under Liechtenstein law take corporate form as they are organised as companies limited by shares or Societas Europea. They are active in assembling and managing the assets of various investors with the intention of making profits via various fees related to the placements. The Authority consequently finds that investment companies, for the part of the company carrying out the asset management, are undertakings within the meaning of Article 61(1) of the EEA Agreement ([38]).

1.2. *Advantage*

By not being obliged to pay any income or coupon tax and only a reduced capital tax on their own assets, investment companies receive an advantage in relation to other undertakings, in particular towards the fund direction of investment funds who were subject to ordinary taxation on revenues from their business activities.

([34]) The Liechtenstein authorities explained the 2005/2006 tax reform in their letter of 3 December 2007.

([35]) Joined Cases C-180/98 to C-184/98 *Pavlov* [2000] ECR I-6451, paragraph 75.

([36]) Case C-8/03, *Banque Bruxelles Lambert SA (BBL)* v *Belgian State* [2004] ECR. I-10157, paragraphs 42 and 43. The judgment was given in the area of taxation, however the Authority considers that the problem in question is the same under the State aid rules. See also Commission Decision of 6 September 2005 on the Italian scheme for collective investments in transferable securities, OJ L 268, 27.9.2006, p. 1 (hereafter Italian collective investment scheme).

([37]) See Italian collective investment scheme, paragraph 38.

([38]) Case T-445/05 *Associazione Italiana del risparmio gestito, e.a.* v *Commission*, not yet published, paragraph 127 ff.

The advantage is selective as it was granted only to investment undertakings organised in the form of investment companies. The Authority does not subscribe to the relevance of the argument forwarded by the Liechtenstein authorities that each undertaking in Liechtenstein carrying out such an economic activity is in principle free to choose the appropriate legal form and consequently profit from the tax concessions. A state measure which is limited to a specified group of undertakings cannot be attributed a general character just because it could be used by any interested undertaking if this undertaking was organising itself in a certain manner to fulfil the specified criteria and benefit from tax concessions ([39]).

A specific tax measure can nevertheless be justified by the logic of the tax system. The specific tax rules applicable to investment 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 ([40]).

In the Authority's preliminary view, the tax relief on the management company's own assets cannot be justified by the nature and overall scheme of the Liechtenstein taxation system.

The general scheme for taxing companies engaged in commercial business activities is laid down in sections 76 and 77 of the Liechtenstein Tax Act. Moreover, Section 73 of the Liechtenstein Tax Act ([41]) stipulates that legal entities that operate a business in Liechtenstein should pay income taxes on their entire revenues and a capital tax on the capital held as the company's own equity.

In the case of a company divided into shares, a coupon tax on the dividends is due in accordance with section 88(d) of the Tax Act. Investment companies are legal entities incorporated under Liechtenstein law in the form of companies limited by shares which gain revenues from the management of placements by investors and dispose of capital. They should therefore be subject to payment of coupon tax whenever their capital is divided into shares ([42]).

The tax relief for the management's own assets falls neither within the logic of the general tax system in Liechtenstein, nor within the logic of the taxation of investment undertakings as such. The Liechtenstein taxation rules and taxation practice shows that the logic behind the special taxation of investment undertakings applies to the fund capital, but not to the management companies own assets. Indeed, the fund direction of the investment funds has always been subject to ordinary business taxation for its own revenues and own capital.

In the view of the Authority, there is nothing in the organisational form of investment companies which would justify a special tax derogation in favour of the management activities of an investment company compared to the management activities of an investment fund. Both types of investment undertakings must keep the company's own assets separated from the managed assets of the investors, put at the custody of the depot bank. In bankruptcy proceedings, the own assets are at the disposal of the creditors for both investment funds and investment companies.

In 2006, the legislation was changed and investment companies were subject thereafter to ordinary business taxation as the fund direction of investment funds and any other legal entity operating a business in Liechtenstein. In view of the Liechtenstein authorities this eliminated the '*inconsistency*' ([43]) of not levying any taxes on the own assets before.

For these reasons, the Authority takes the preliminary view that investment companies were granted a selective advantage.

([39]) The Court of First Instance has e.g. recognised that a fiscal measure does not loose its character as a being selective just because it is based on objective criteria, see judgment of the CFI of 6 March 2002, T-127/99, T-129/99 and T-148/99, *Diputación Foral de Álava e.a.* v *Commission*, [2002] ECR II-1275.

([40]) Joined Cases E-5/04 — E-7/04 *Fesil and other* v *the Authority*, cited above, paragraphs 82 *et seq*.

([41]) According to section 73 a, companies limited by shares are obliged to pay capital and income tax.

([42]) See Section 4.1.2 above in this decision.

([43]) Expert opinion DII, b.ii.3.

1.3. *Presence of state resources*

The advantage must be granted by the State or through state resources. A loss of tax revenue is equivalent to consumption of state resources in the form of fiscal expenditure [44]. The Liechtenstein State foregoes revenues in the form of tax income from the investment companies. Therefore, the Authority considers that there were state resources involved.

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

When a support measure granted by the State strengthens the position of an undertaking vis-à-vis other undertakings competing in EEA trade, the latter must be regarded as affected by that aid.

According to well established case law [45], the prohibition of Article 61(1) of the EEA Agreement is applicable to any aid which distorts or threatens to distort competition, irrespective of the amount, in so far as it affects trade between Member States. The Commission has also considered that investment vehicles can operate in international markets and pursue commercial and other economic activities in markets where competition is intense [46].

Therefore, the Authority takes the preliminary view that the tax concessions for the own assets of investment companies from 1996 to 2006 strengthened the competitive position of the investment companies within the EEA, as these tax concessions reduced the ordinary operational costs of these companies compared to other EEA companies which can operate in international markets [47].

Investment companies compete with other financial undertakings and operate in an open market characterised by substantial intra-EEA trade. Thus, trade between the Contracting Parties is affected. In line with the case law [48], the Authority does not have to demonstrate that all investment companies operate in international markets. It is sufficient in the assessment of aid schemes to assess its general characteristics without examining each individual application.

The Authority is therefore of the preliminary view that the tax concessions distort or threaten to distort competition and affect trade between the Contracting Parties.

1.5. *Conclusion*

For the above-mentioned reasons, the Authority takes the preliminary view that the tax relief on the management companies own assets constitutes state aid with the meaning of Article 61(1) of the EEA Agreement.

2. **Classification of the measures under assessment as new aid**

According to Article 1(c) in Part II of Protocol 3, new aid means aid that is not existing aid. Pursuant to Article 1(b) of the Protocol 3, 'existing aid' shall mean (*inter alia*):

> '(i)…, all aid which existed prior to the entry into force of the Treaty in the respective Member 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 Treaty;…'.

Section 84(5) of the Tax Act, which provides for the tax relief of the own assets of investment companies, was introduced in 1996. Previously, no investment company existed, as the first company was only founded in 2001.

(44) See point 3(3) of the Authority's Guidelines on measures relating to direct business taxation.
(45) Case T-214/95 *Vlaamse Gewest* v *Commission*, ECR [1998] II-717, paragraph 46. Case T-424/05, *Italy* v *Commission*, judgement of 4 March 2009, not yet published, paragraph 154 ff.
(46) See Italian collective investment scheme, paragraph 45. Recently upheld by the Court of First Instance in Case T-445/05 *Associazione italiana del risparmio gestito* v *Commission cited above*, and T-424/05 *Italy* v *Commission* not yet published.
(47) See footnote 4.
(48) See Case T-424/05, cited above, paragraph 160.

The expert opinion forwarded by Liechtenstein comes to the conclusion that the own assets of investment companies would have been subject to ordinary business taxation if such companies had existed before 1996. The Authority concurs with this view.

For these reasons, the Authority finds that the non-taxation of the investment company's own assets constitutes new aid.

3. **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 Liechtenstein authorities did not notify the tax relief for the own assets of investment companies to the Authority before they were put into effect. The Authority concludes that the Liechtenstein authorities have not respected their obligations pursuant to Article 1(3) of Part I of Protocol 3.

4. **Compatibility of the aid**

As the measure constitutes state aid within the meaning of Article 61(1) of the EEA Agreement, its compatibility with the functioning of the EEA Agreement must be assessed in the light of the derogations provided for in Article 61(2) and (3) of the EEA Agreement.

The aid in question is not linked to any investment in production capital. It 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 tax derogations under assessment are compatible with the EEA Agreement.

5. **Conclusion**

Based on the information submitted by the Liechtenstein authorities, the Authority finds that the tax concessions granted for the own assets of the investment companies between 1996 and 2006 constitute aid within the meaning of Article 61(1) of the EEA Agreement.

The Authority finds that the tax relief on the own assets of the investment company constitutes new aid.

The Authority has doubts that these measures are compatible with 61(3)(c) of the EEA Agreement. The Authority thus doubts that the above-mentioned measures are compatible with the functioning of the EEA Agreement.

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 of the Surveillance and Court Agreement. The decision to open proceedings is without prejudice to the final decision of the Authority, which may conclude that the measures in question do not constitute state aid or that they are compatible with the functioning of the EEA Agreement. The Authority would like to point out, however, that if new aid was not found to be compatible with the functioning of the EEA Agreement, it would constitute unlawful aid within the meaning of Article 1(f) in Part II of Protocol 3. Unlawful aid and incompatible aid is normally recovered from the aid beneficiaries according to Article 14 in Part II of Protocol 3. 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.

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

Moreover, the Authority requires that, within one month of receipt of this decision, the Liechtenstein authorities provide all documents, information and data needed for assessment of the compatibility of the tax derogations in favour of investment companies. It invites the Liechtenstein authorities to forward a copy of this decision to the potential aid recipients of the aid immediately,

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 non-levy of income tax and coupon tax on the management side of investment companies (own assets) from 1996 to 2006. Likewise it opens the formal investigation on the levy of a reduced capital tax on the own assets of investment companies from 1996 to 2006. This includes the further reduction of the capital tax for investment companies whose capital exceeds 2 million CHF.

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

The Liechtenstein authorities are requested to provide within one month from notification of this decision, all documents, information and data needed for assessment of the compatibility of the aid measure.

Article 4

This Decision is addressed to the Principality of Liechtenstein.

Article 5

Only the English version is authentic.

Done at Brussels, 18 March 2009.

For the EFTA Surveillance Authority

Per SANDERUD	Kurt JAEGER
President	*College Member*