

Case No: 71725  
Event No: 651592  
Dec. No.: 480/12/COL

## EFTA SURVEILLANCE AUTHORITY DECISION

of 12 December 2012

on Article 55 of the Liechtenstein tax act

(Liechtenstein)

The EFTA Surveillance Authority (“the Authority”),

HAVING REGARD to the Agreement on the European Economic Area (“the EEA Agreement”), in particular to Articles 61(1),

HAVING REGARD to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (“the Surveillance and Court Agreement”), in particular to Article 24,

HAVING REGARD to Protocol 3 to the Surveillance and Court Agreement (“Protocol 3”), in particular to Article 1(3) of Part I and Article 4(2) of Part II,

Whereas:

### I. FACTS

#### 1. Procedure

- (1) By letter dated 12 April 2012 the Liechtenstein Authorities notified the present scheme (Event Number 630875). By letter dated 11 May 2012 the Authority requested additional information (Event Number 633457), which the Liechtenstein authorities provided by letter dated 25 May 2012 (Event Number 635929). By letter dated 26 June 2012 the Authority sent a second request for information, to which the Liechtenstein Authorities replied by letters dated 19 July 2012 (Event Number 642340) and 9 October 2012 (Event Number 649134). By letter dated 23 November 2012 (Event Number 654529) Liechtenstein submitted an amendment of the notified measure.

## 2. Description of the proposed measure

- (2) The Liechtenstein authorities intend to extend to revenues from software and scientific and technical databases the same reduction of the corporate tax burden for revenues that is currently granted to revenues from patent rights, trademarks and designs only. The purpose of the measure is to promote research, development and innovation (hereafter: R&D). The measure takes the form of an amendment to Article 55 of the Liechtenstein Tax Act (Steuergesetz) which had been the subject of a decision the Authority of 1 June 2011 (Decision 177/11/COL) finding that the measure as it stood then did not constitute State aid.

### Objective

- (3) The Liechtenstein authorities note that the promotion of R&D is at the heart of Europe's strategy for growth.
- (4) According to the Commission Communication on the Europe 2020 Strategy Member States should in particular improve for the conditions of private investments. In that regard, the Europe 2020 Strategy explicitly identified the use of tax incentives as a concrete measure to promote private investments in R&D.<sup>1</sup> The Europe 2020 Flagship Initiative reiterates these goals. It sets an agenda for concrete goals, one of which is the enhancement of cooperation between the worlds of science and the world of business and encourages national initiatives to stimulate private investments into R&D through tax incentives.<sup>2</sup>
- (5) According to the Liechtenstein authorities, the notified measure will improve the conditions for private investments into R&D through tax incentives. The Liechtenstein authorities note that a number of other European countries have introduced similar tax incentives for the same purpose.

### Background

- (6) According to Article 61 of the Liechtenstein Tax Act income derived from intellectual property rights is subject to income tax at a rate of 12.5% of the taxable net income.
- (7) In 2011, the Liechtenstein authorities introduced a preferential tax treatment for income derived from patents, trademarks and designs. Liechtenstein intended to introduce this measure partly through Article 55 of the Tax Act and partly through Article 33 of the Tax Ordinance (Steuerverordnung). The relevant provisions were drafted as follows:<sup>3</sup>

#### *Article 55 Tax Act*

##### *Deduction for the Income from Intellectual Property Rights*

*An amount of 80% of the sum of the positive income from intellectual property rights can be claimed as a commercially justified expense.*

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<sup>1</sup> Communication from the Commission of 3.3.2010, *Europe 2020 – A strategy for smart, sustainable and inclusive growth*, COM(2010) 2020 final, p.13.

<sup>2</sup> Communication from the Commission of 6.10.2010, *Europe 2020 Flagship Initiative Innovation Union*, COM(2010) 546 final, p.32 et seq.

<sup>3</sup> Unofficial translation by the Authority.

### **Article 33 Tax Ordinance**

#### *Deduction for the Income from Intellectual Property Rights*

*1) Patent rights, trademarks and designs shall be considered as intellectual property rights, provided that they are protected by means of entry in a national, foreign or international register. [...]*

*5) Article 55 Tax Act shall apply exclusively to intellectual property rights which were created or acquired with effect from 1 January 2011.*

- (8) Through these measures, the Liechtenstein authorities reduced the tax base (i.e. the taxable income), on which profits from intellectual property rights is taxed, by 80%.<sup>4</sup> If the income exceeds the usual market compensation, the 80% deduction shall be calculated on the basis of the usual market price.
- (9) On 23 December 2010, the Liechtenstein authorities notified the measure to the Authority which decided on 1 June 2011 that it did not constitute State aid (Decision 177/11/COL).

#### **Notified Amendments**

- (10) On 1 July 2011, the Liechtenstein Constitutional Court found that the tax measure was unconstitutional. Essentially, part of the tax measure had been introduced by the Liechtenstein Government in the form of a tax ordinance rather than by the Liechtenstein Parliament in the form of a law.
- (11) Subsequently, the Liechtenstein authorities included the provisions of the tax ordinance into a new Article 55 of the tax act. The scope of the provision was moreover extended to cover income from software and scientific, technical and medical data bases. The Liechtenstein authorities notified the revised Article 55 of the Liechtenstein Tax Act to the Authority on 12 April 2012. During the notification process, the Liechtenstein authorities amended the notified measure by taking out the reference to medical data bases. The notified measure reads as follows:<sup>5</sup>

### **Article 55**

#### *Deduction for the Income from Intellectual Property Rights*

*1) An amount of 80% of the sum of the positive income from intellectual property rights can be claimed as a commercially justified expense. The following intellectual property rights, which were created or acquired with effect from 1 January 2011, shall be considered as intellectual property rights:*

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<sup>4</sup> For example, without the tax measure, a company generating net profits of 100 000 CHF from the sale of an intellectual property right would have to pay 12.5% corporate tax on the entire net profit resulting in a tax burden of 12 500 CHF. However, under the tax measure the company can reduce its tax base by 80% (or 80 000 CHF) to 20 000 CHF. This amount is then taxed at 12.5%, which reduces the company's tax burden to 2.500 CHF (compared to 12 500 CHF without the tax measure).

<sup>5</sup> Unofficial translation by the Authority.

*a) Patent rights, trademarks and designs, provided that they are protected by means of entry in a national, foreign or international register; and*

*b) Software as well as technical and scientific databases.*

- (12) The Liechtenstein authorities confirm that the general mechanism of the measure (i.e. the calculation of the reduction, the market price, etc.) remains unchanged. In that regard, the explanations given in the course of the previous notification also apply to the current notification.<sup>6</sup>
- (13) The Liechtenstein authorities stress that strengthening the scientific and technological basis of European industry is a common objective of all EEA States.<sup>7</sup> The Liechtenstein authorities further note that the Commission Communication on Europe 2020 Strategy explicitly invites Member States to make use of tax incentives as a concrete measure to promote R&D investments.<sup>8</sup>
- (14) In their submissions, the Liechtenstein authorities indicate that the tax authorities have little or no discretion in granting the tax reduction on profits from software or databases.
- (15) The term “*software*” is based on the term “*computer program*” as described in Article 2 (3) of the Liechtenstein Copyright Act (Urheberrechtsgesetz), which in turn relies on the definition in the Directive 2009/24/EC.<sup>9</sup> Accordingly, software is a “*...computer program in any form, including those which are incorporated into hardware*”.
- (16) Similarly, the notion of “*database*” is based on the term used in Article 4 (3) of the Liechtenstein Copyright Act (Urheberrechtsgesetz), which in turn relies on the definition in Article 1 (2) of Directive 96/9/EC.<sup>10</sup> Accordingly, a database is a “*...collection of independent works, data or other materials arranged in a systematic or methodical way and individually accessible by electronic or other means*”.
- (17) The tax authorities are bound to accept the tax deduction, if the conditions set out in the law are met. If the tax authorities do not accept the deduction, tax payers may appeal the decision before the National Tax Commission (Landessteuerkommission).<sup>11</sup> Furthermore, tax payers may appeal a decision of the

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<sup>6</sup> Notification with the Case No. 39131, which led to Decision 177/11/COL of 1.6.2011.

<sup>7</sup> See Preamble to EEA Agreement.

<sup>8</sup> Communication from the Commission, *Europe 2020 – A strategy for smart, sustainable and inclusive growth*, COM(2010) 2020 final, p.13.

<sup>9</sup> Directive 2009/24/EC of 23.4.2009 on the legal protection of computer programs, OJ L 111, 5.5.2009, p.16, preamble 7. The Directive replaced Directive Directive 91/250/EEC of 14.5.1991 on the legal protection of computer programs, OJ L122, 17.5.1991, p.42 and has been incorporated into the EEA Agreement in point 5 of Annex XVII.

<sup>10</sup> Directive 96/9/EC 91/250/EEC of 11.3.1996 on the legal protection of databases, OJ L77, 27.3.1996, p.20. The Directive has been incorporated into the EEA Agreement in point 9(a) of Annex XVII..

<sup>11</sup> Articles 81 and 117 of the Liechtenstein Tax Act.

National Tax Commission before the Administrative Court (Verwaltungsgerichtshof).<sup>12</sup>

## II. ASSESSMENT

### 1. The Presence of State Aid

- (18) Article 61(1) of the EEA stipulates that “[s]ave 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.”
- (19) It follows that a measure constitutes State aid under Article 61(1) of the EEA, if it fulfils four conditions. Firstly, the measure is funded by the State or through State resources. Secondly, the measure confers an advantage to the recipients. Thirdly, the measure favours selected undertakings or economic activities. And fourthly, the measure affects trade between the Contracting parties and distorts or threatens to distort competition in the EEA.

#### 1.1. Economic Advantage

- (20) It is established case law that a measure confers an economic advantage, if it relieves undertakings from a charge which is normally included in the budget of an undertaking.<sup>13</sup> According to the State Aid Guidelines on Direct Business Taxation,<sup>14</sup> one of the ways in which tax measures confer advantages is by reducing the tax base. In the case at hand, the new tax regime reduces the revenues from software and scientific and technical databases by 80%. The reduction of the tax base relieves undertakings of part of their income tax. Consequently, the measure confers an economic advantage.

#### 1.2. State Resources

- (21) A measure is financed by the State, if it results in a burden on the budget of any public authority.<sup>15</sup> According to the State Aid Guidelines on Direct Business Taxation, the loss of tax revenue is equivalent to consumption of State resources in

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<sup>12</sup> Article 118 of the Liechtenstein Tax Act.

<sup>13</sup> Case 30/59 *De Gezamenlijke Steenkolenmijnen v High Authority*, [1961] ECR 50, p.19 et seq.; Joined Cases E-4/10, E-6/10 and E-7/10 *Liechtenstein and Others v EFTA Surveillance Authority*, EFTA Court Report 2011, p.16, para. 69; Joined Cases E-17/10 and E-6/11 *Liechtenstein and VTM v EFTA Surveillance Authority*, not yet published, para. 50.

<sup>14</sup> Section 3.3 of the State Aid Guidelines on the application of state aid rules to measures relating to business taxation, para. 9.

<sup>15</sup> Case C-248/84 *Germany v Commission*, [1987] ECR 4013, para.17; Case E-6/98 *Norway v EFTA Surveillance Authority*, EFTA Court Report 1999, p.74.

the form of fiscal expenditure.<sup>16</sup> Both types of measures impose a burden on the budget of the granting public authority. In the present case the reduction of the tax base directly results in a loss of tax revenue for the Principality of Liechtenstein. The measure is therefore financed by the State.

### 1.3. Selectivity

- (22) A measure is selective, if it does not equally benefit all undertakings which are in a legal and factual situation that is comparable in the light of the objective pursued by the measure in question.<sup>17</sup> By contrast, tax measures which are open to all economic agents operating with an EFTA State are in principle general measures.<sup>18</sup>
- (23) The Authority notes that the measure is de lege open to all undertakings operating in Liechtenstein. Furthermore, the Liechtenstein authorities provided examples demonstrating that undertakings from all sectors could benefit from the measure.
- (24) Moreover, according to the State Aid Guidelines on Direct Business Taxation, measures are considered to apply to all economic agents in an EFTA State if they pursue a general economic policy objective through a reduction of the tax burden related to R&D.<sup>19</sup> The information submitted by the Liechtenstein authorities demonstrates that the measure aims at promoting R&D activities in Liechtenstein. In particular, the measure will promote the development of software as well as the cooperation between undertakings and research institutions through the exchange of technical and scientific data. It follows that the measure pursues a general economic policy objective.
- (25) At the same time, the Authority cannot exclude that the measure might de facto benefit certain sectors more than other sectors of the Liechtenstein economy. Since the measure is novel, the Liechtenstein authorities lack data on the extent to which undertakings generate revenue with software and databases. However, the fact that some firms or some sectors benefit more than others from certain tax measures does not necessarily mean that they are caught by the competition rules governing State aid. It is in the nature of tax incentives for R&D that they favour only firms which undertake such investments, but that does not result in State aid, if the difference in treatment does not go beyond what is justified by the nature and general scheme of the system. As indicated above, it is recognised that the income tax not only serves to finance the public budget, but may also provide tax incentives to promote general

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<sup>16</sup> Section 3.3 of the State Aid Guidelines on the application of state aid rules to measures relating to business taxation, para. 10.

<sup>17</sup> Joined Cases E-4/10, E-6/10 and E-7/10 *Liechtenstein and Others v EFTA Surveillance Authority*, EFTA Court Report 2011, p.16, para. 74; Joined Cases C-106/09 P and C-107/09 P *Commission v Gibraltar*, judgment of 15 November 2011, unreported, paragraph 75; Case C-143/99 *Adria-Wien Pipeline* [2001] I-8365, para. 41;

<sup>18</sup> Section 3.3 of the State Aid Guidelines on the application of state aid rules to measures relating to business taxation, para. 10.

<sup>19</sup> Section 3.3 of the State Aid Guidelines on the application of state aid rules to measures relating to business taxation, para. 13. This is also in line with the Europe 2020 Strategy, which explicitly identifies the use of tax incentives as a concrete measure to promote R&D investments (see Communication from the Commission, *Europe 2020 – A strategy for smart, sustainable and inclusive growth*, COM(2010) 2020 final, p.13).



economic policy objectives such as R&D.<sup>20</sup> In the case at hand, the measure determines the circle of recipients solely on the basis of their R&D activities without providing for additional criteria unrelated to or going beyond the objective of promoting certain R&D activities.<sup>21</sup> Consequently, the fact that some undertakings might benefit more than other undertakings from the tax regime is justified by the nature and the scheme of the system.

- (26) Finally, the Authority notes that measures granting financial assistance to undertakings, including tax measures, are considered to be selective if they give the authorities granting the assistance a margin of discretion to determine the amount of assistance and the conditions relating to it.<sup>22</sup> However, no such concerns should arise, where the authorities exercise a discretionary power that does not go beyond the simple management of tax revenues by reference to objective criteria.<sup>23</sup> In the case at hand, the tax authorities are bound to accept the tax deduction, if the conditions set out in the law are met. If they do not accept the tax deduction, the tax payers may appeal such a decision before the National Tax Commission, whose decision in turn may be challenged before the Administrative Court. Also, the Liechtenstein tax authorities are bound to grant a reduction of 80% as set out in the legislation and cannot alter the amount of the reduction. It follows, therefore, that the tax regime does not provide for discretionary practices on the part of the tax authorities to an extent that it would give rise to State aid concerns.
- (27) On the basis of the above, the Authority considers that the draft Article 55 of the Liechtenstein Tax Act is not selective.

## 2. Conclusion

- (28) The Authority concludes that one of the cumulative conditions required to be met in order for state aid to be present is not met. Accordingly, the draft Article 55 of the Liechtenstein Tax Act does not involve state aid within the meaning of Article 61(1) of the EEA Agreement.

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<sup>20</sup> Communication from the Commission, *Europe 2020 – A strategy for smart, sustainable and inclusive growth*, COM(2010) 2020 final, p.13.

<sup>21</sup> This criterion was not met, for example, in Case C-143/99 *Adria-Wien Pipeline* [2001] ECR I-8365, where the ECJ noted that “...the ecological considerations underlying the national legislation at issue do not justify treating the consumption of gas or electricity by undertakings supplying services differently than the consumption of such energy by undertakings manufacturing goods. Energy consumption by each of those sectors is equally damaging to the environment.” On a similar note, in Case C-279/08 P *Commission v Netherlands (Nox Scheme)* [2011] n.y.r., the ECJ noted that “...a differentiation between undertakings based on a quantitative criterion, that is to say total installed thermal capacity of more than 20 MWth, cannot be regarded as inherent to a scheme intended to reduce industrial pollution and, therefore, justified only on environmental grounds.”

<sup>22</sup> Case C-241/94 *France v Commission (Kimberly Clark)* [1996] ECR I-4551, para. 23.

<sup>23</sup> Section 3.3 of the State Aid Guidelines on the application of state aid rules to measures relating to business taxation, para. 21.

HAS ADOPTED THIS DECISION:

*Article 1*

The draft Article 55 of the Liechtenstein Tax Act, allowing for a tax deduction in respect of income derived from intellectual property rights, software and scientific and technical databases, does not involve state aid within the meaning of Article 61(1) of the EEA Agreement.

*Article 2*

This Decision is addressed to the Principality of Liechtenstein

*Article 3*

Only the English language version of this Decision is authentic.

Decision made in Brussels, on 12 December 2012.

*For the EFTA Surveillance Authority*

Oda Helen Sletnes  
*President*

Sverrir Haukur Gunnlaugsson  
*College Member*