JUDGMENT OF THE COURT

5 February 2025*

(*Directive 2009/138/EC (Solvency II) – Article 268(1)(g) – Article 275(1) – Insurance claims – Privileged status – National insolvency proceedings*)

In Case E-17/24,

REQUEST to the Court under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice by the Princely Court of Appeal (*Fürstliches Obergericht*), in the case between

Söderberg & Partners AS

and

Gable Insurance AG in Konkurs,

THE COURT,

composed of: Páll Hreinsson, President, Bernd Hammermann and Michael Reiertsen (Judge-Rapporteur), Judges,

Registrar: Ólafur Jóhannes Einarsson,

having considered the written observations submitted on behalf of:

- Söderberg & Partners AS ("the applicant"), represented by Helene Rebholz, advocate;

- Gable Insurance AG in Konkurs ("the defendant"), represented by Hansjörg Lingg and Marion Malin, advocates;

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* Language of the request: German. Translations of national provisions are unofficial and based on those contained in the documents of the case.

- the Liechtenstein Government, represented by Dr Andrea Entner-Koch, Romina Schobel and Dr Claudia Bösch, acting as Agents;

- the EFTA Surveillance Authority ("ESA"), represented by Claire Simpson, Daniel Vasbeck and Melpo-Menie Joséphidès, acting as Agents; and

- the European Commission ("the Commission"), represented by Gaëtane Goddin, Bruno Stromsky and Nicola Yerrell, acting as Agents,

having regard to the Report for the Hearing,

having heard oral argument on behalf of Söderberg & Partners AS, represented by Helene Rebholz; Gable Insurance AG in Konkurs, represented by Hansjörg Lingg; the Liechtenstein Government, represented by Dr Claudia Bösch; ESA, represented by Daniel Vasbeck; and the Commission, represented by Nicola Yerrell, at the hearing on 21 November 2024,

gives the following

JUDGMENT

I INTRODUCTION

1 This request for an advisory opinion concerns the interpretation of Articles 268(1)(g) and 275 of Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) (OJ 2009 L 335, p. 1) ("the Directive"). More specifically, it concerns whether an insurance claim loses its status as a privileged claim within national insolvency proceedings if it has been assigned to a third party by way of legal transaction.

2 The request has been made in proceedings between the applicant and the defendant, in which the applicant seeks a declaration that its claim constitutes a privileged insurance claim in insolvency proceedings.

II LEGAL BACKGROUND

EEA law

3 The Directive was incorporated into the Agreement on the European Economic Area ("EEA Agreement" or "EEA") by Decision of the EEA Joint Committee No 78/2011 ("JCD No 78/2011") of 1 July 2011 (OJ 2011 L 262, p. 45) and is referred to at point 1 of Annex IX (Financial services) to the EEA Agreement. Constitutional requirements were

indicated by the EFTA States and fulfilled on 23 October 2012. JCD No 78/2011 entered into force on 1 December 2012.

4 Recitals 11, 16, 17, 117 and 127 of the Directive read:

> *(11) Since this Directive constitutes an essential instrument for the achievement of the internal market, insurance and reinsurance undertakings authorised in their home Member States should be allowed to pursue, throughout the Community, any or all of their activities by establishing branches or by providing services. It is therefore appropriate to bring about such harmonisation as is necessary and sufficient to achieve the mutual recognition of authorisations and supervisory systems, and thus a single authorisation which is valid throughout the Community and which allows the supervision of an undertaking to be carried out by the home Member State.*
>
> *(16) The main objective of insurance and reinsurance regulation and supervision is the adequate protection of policy holders and beneficiaries. The term beneficiary is intended to cover any natural or legal person who is entitled to a right under an insurance contract. Financial stability and fair and stable markets are other objectives of insurance and reinsurance regulation and supervision which should also be taken into account but should not undermine the main objective.*
>
> *(17) The solvency regime laid down in this Directive is expected to result in even better protection for policy holders. It will require Member States to provide supervisory authorities with the resources to fulfil their obligations as set out in this Directive. This encompasses all necessary capacities, including financial and human resources.*
>
> *(117) Since national legislation concerning reorganisation measures and winding-up proceedings is not harmonised, it is appropriate, in the framework of the internal market, to ensure the mutual recognition of reorganisation measures and winding-up legislation of the Member States concerning insurance undertakings, as well as the necessary cooperation, taking into account the need for unity, universality, coordination and publicity for such measures and the equivalent treatment and protection of insurance creditors.*
>
> *(127) It is of utmost importance that insured persons, policy holders, beneficiaries and any injured party having a direct right of action against the insurance undertaking on a claim arising from insurance operations be protected in winding-up proceedings, it being understood that such protection does not include claims which arise not from obligations under insurance contracts or insurance operations but from civil liability caused by an agent in negotiations for which, according to the law applicable to the insurance contract or operation, the agent is not responsible under such insurance contract or operation. In order to achieve that*

objective, Member States should be provided with a choice between equivalent methods to ensure special treatment for insurance creditors, none of those methods impeding a Member State from establishing a ranking between different categories of insurance claim. Furthermore, an appropriate balance should be ensured between the protection of insurance creditors and other privileged creditors protected under the legislation of the Member State concerned.

5 Article 267 of the Directive, entitled "Scope of this Title", reads:

This Title shall apply to reorganisation measures and winding-up proceedings concerning the following:

(a) insurance undertakings;

(b) branches situated in the territory of the Community of third-country insurance undertakings.

6 Article 268(1)(g) of the Directive, entitled "Definitions", reads:

1. For the purpose of this Title the following definitions shall apply:

…

(g) 'insurance claim' means an amount which is owed by an insurance undertaking to insured persons, policy holders, beneficiaries or to any injured party having direct right of action against the insurance undertaking and which arises from an insurance contract or from any operation provided for in Article 2(3)(b) and (c) in direct insurance business, including an amount set aside for those persons, when some elements of the debt are not yet known.

7 Article 275 of the Directive, entitled "Treatment of insurance claims", reads:

1. Member States shall ensure that insurance claims take precedence over other claims against the insurance undertaking in one or both of the following ways:

(a) with regard to assets representing the technical provisions, insurance claims shall take absolute precedence over any other claim on the insurance undertaking; or

(b) with regard to the whole of the assets of the insurance undertaking, insurance claims shall take precedence over any other claim on the insurance undertaking with the only possible exception of the following:

(i) claims by employees arising from employment contracts and employment relationships;

(ii) claims by public bodies on taxes;

(iii) claims by social security systems;

(iv) claims on assets subject to rights in rem.

2. Without prejudice to paragraph 1, Member States may provide that the whole or part of the expenses arising from the winding-up procedure, as determined by their national law, shall take precedence over insurance claims.

3. Member States which have chosen the option provided for in paragraph 1(a) shall require insurance undertakings to establish and keep up to date a special register in accordance with Article 276.

8 Article 277 of the Directive, entitled "Subrogation to a guarantee scheme", reads:

The home Member State may provide that, where the rights of insurance creditors have been subrogated to a guarantee scheme established in that Member State, claims by that scheme shall not benefit from the provisions of Article 275(1).

National law

9 According to the request, the Directive was transposed into national law in the Principality of Liechtenstein by the Act of 12 June 2015 on the Supervision of Insurance Undertakings (*Versicherungsaufsichtsgesetz*) (LGBl. 2015 No 231) ("the Insurance Supervision Act").

10 Article 10 of the Insurance Supervision Act, entitled "Definitions and terminology", reads, in extract:

1) For the purposes of this Act:

...

52. "insurance claim" means any amount which is owed by a direct insurance undertaking to policy holders, insured persons, beneficiaries or to any injured party having direct right of action against the insurance undertaking and which arises from an insurance contract or from any operation to which this Act applies in direct insurance business. This includes amounts set aside for those persons, when some elements of the debt are not yet known, as well as premiums which an insurance undertaking has to repay because a legal transaction was not concluded or was cancelled under the law applicable to it before the opening of bankruptcy or winding-up proceedings;

11 Article 161 of the Insurance Supervision Act, entitled “Satisfaction of insurance claims”, reads:

> *1) The assets covering technical provisions shall constitute a separate estate in bankruptcy proceedings in accordance with Article 45 of the Insolvency Code to satisfy insurance claims. The court shall order that the register of assets allocated to the separate estate be established immediately and submitted to the FMA. The FMA shall determine the separate estate for the time when bankruptcy proceedings are opened. Reflows and income from the assets dedicated to the separate estate and premiums for the insurance contracts included in the separate estate that are received after bankruptcy proceedings have been opened shall fall into this separate estate.*
>
> 2) *The list submitted pursuant to paragraph 1 may no longer be changed once bankruptcy proceedings have been opened. The insolvency estate administrator may make technical corrections to the listed asset values with the approval of the Court of Justice.*
>
> 3) *If the proceeds from the realisation of the assets are lower than their valuation in the list submitted pursuant to paragraph 1, then the insolvency estate administrator must communicate this to the Court of Justice and justify the variation.*
>
> *4) Repealed*
>
> *5) The insurance claims to be found in the account books of the insurance undertaking shall be deemed lodged. The right of the creditor to lodge these claims as well shall not be affected. The lodgement of claims need not include an indication of ranking.*

12 Article 161a of the Insurance Supervision Act, entitled “Hierarchy of claims”, reads:

> *1) Insurance claims shall take precedence over other bankruptcy claims. This shall be without prejudice to Article 161(1).*
>
> 2) *Claims to insurance compensation take precedence over all other insurance claims. Within the same rank, the claims shall be satisfied in proportion to their amounts.*
>
> *3) In derogation from Article 62(1) of the Insolvency Code, the lodgement of claims need not include an indication of ranking.*

13 According to the request, certain provisions of the Act of 17 July 1973 on Bankruptcy Proceedings (*Gesetz vom 17.07.1973 über das Konkursverfahren (Konkursordnung)*) (applicable in the version before the amendment effected by LGBl. 2020 No 365) ("the Bankruptcy Code") are also relevant.

14 Articles 45 and 46 of the Bankruptcy Code are entitled "Rights to separation". Article 45 of the Bankruptcy Code reads:

> *1) Creditors entitled to separate satisfaction from specific assets of the debtor (creditors entitled to separate satisfaction) shall exclude, to the extent of their claims, the payment of insolvency creditors from these assets (special class of assets).*
>
> *2) What remains of the special class of assets following the satisfaction of the creditors entitled to separate satisfaction shall accrue to the common insolvency estate. If the claim at issue is secured by several assets, then the proceeds therefrom shall be used in proportion to their amounts to cover the claim.*
>
> *3) Creditors entitled to separate satisfaction who also have a personal right against the debtor may also assert their claim as an insolvency creditor.*

15 Article 47 of the Bankruptcy Code, entitled "Hierarchy of claims", reads:

> *To the extent that the insolvency assets are not used to satisfy the claims of the insolvency estate and the rights of the creditors entitled to separate satisfaction (Article 45), they constitute the common insolvency estate from which the insolvency claims within the same category shall be satisfied in proportion to their amounts.*

16 Articles 48 to 51 of the Bankruptcy Code specify the claims which belong to each category.

17 The referring court notes that the Civil Code (*Allgemeines bürgerliches Gesetzbuch*) of 1 June 1811 (ABGB; LR No 210.0) is also relevant.

18 Sections 1392 to 1399 of the Civil Code are entitled "Cession". Section 1392 of the Civil Code reads:

> *If a claim is transferred from one person to another and the latter accepts this, then the transformation of the right results with the entry of a new creditor. Such an action shall be known as assignment (cession) and may be effected with or without remuneration.*

19 Section 1393 of the Civil Code, entitled "Subject-matter of the cession", reads:

All alienable rights shall constitute the subject-matter of an assignment. Rights adhering to the person, consequently extinguished with the person, may not be assigned. Debt certificates issued to the bearer are assigned simply by way of the transfer and do not require in addition to possession any other proof of the assignment.

20 Sections 1394 to Section 1396 are entitled “Effect”. Section 1394 of the Civil Code reads:

The rights of the transferee shall be precisely the same as the rights of the transferor with respect to the ceded claim.

21 Section 1395 of the Civil Code reads:

As a result of the contract of assignment a new obligation shall arise only between the transferor (cedens) and the transferee of the claim (cessionarius) and not between the latter and the debtor of the claim thereby transferred (cessus). Therefore, as long as he has no knowledge of the transferee, the debtor shall be authorised to pay the first creditor or to settle the matter in another manner with him.

III FACTS AND PROCEDURE

22 The applicant is an insurance intermediary and a joint-stock company under Norwegian law with a registered office in Lysaker, Norway.

23 The defendant is a joint-stock company under Liechtenstein law with a registered office in Vaduz, Liechtenstein. It had been issued with an authorisation as a direct insurance undertaking by the competent Liechtenstein supervisory authority, the Financial Market Authority (*Finanzmarktaufsicht*) (FMA).

24 On 17 November 2016, by order of the Princely Court, sitting as an insolvency court, insolvency proceedings were opened concerning the defendant. Legal disputes in connection with the defendant led to references from Liechtenstein courts to the EFTA Court seeking advisory opinions pursuant to Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (“SCA”), which were dealt with in the judgments of 10 March 2020 in *Gable Insurance AG in Konkurs (“Gable I”)*, E-3/19, and of 25 February 2021 in *SMA SA and Société Mutuelle d’Assurance du Bâtiment et des Travaux Publics* v *Finanzmarktaufsicht (“Gable II”)*, E-5/20.

25 An insurance contract relationship existed between policy holders and the defendant. Subsequently, by way of legal transaction, policy holders assigned to the applicant their claims against the defendant arising from those insurance contracts, including the claims

for the repayment of premiums for the remaining periods of insurance. The applicant made payments to the defendant's policy holders on the basis of the policies mentioned amounting in total to NOK 623 600 (= CHF 73 267).

26 The applicant lodged these assigned claims in the insolvency proceedings concerning the defendant before the Princely Court as an insurance claim, to which precedence was to be given, and requested that it be entered as a privileged claim. The defendant represented by the insolvency estate administrator contested the claim in full, in terms of the amount, and also in relation to the category claimed "1/Right to separation".

27 The applicant then brought an action against the defendant before the Princely Court, seeking a declaration that, in the defendant's insolvency, the applicant is entitled to an insolvency claim amounting to NOK 623 600 (= CHF 73 267) and, in that regard, that the claim constitutes a claim in the first category, that is to say, a privileged insurance claim within the meaning of Article 161 of the Insurance Supervision Act. This was denied by the defendant and a dismissal of the action was requested.

28 By judgment of the Princely Court of 14 March 2024, it was declared that the applicant's claim in the present case, the quantum of which remains to be determined, constitutes a privileged insurance claim under Article 161 of the Insurance Supervision Act in the defendant's insolvency.

29 The defendant brought an appeal against that judgment requesting that the contested judgment be amended so as to declare that the applicant's claim does not constitute an insurance claim in the defendant's insolvency.

30 According to the request, the rights of the transferee are precisely the same as the rights of the transferor with respect to ceded claims under Liechtenstein law. The referring court observes, however, that since the applicant is neither an insured person nor a policy holder, beneficiary or an injured party having a direct right of action against the insurance undertaking, it is possible that the claim does not constitute an "insurance claim" within the meaning of the Directive.

31 Against this background, the Princely Court of Appeal decided to stay the proceedings and by letter of 12 July 2024, registered at the Court on 12 July 2024, referred the following question to the Court:

> *Is an insurance claim within the meaning of Article 268(1)(g) of Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II), OJ 2009 L 335, p. 1, incorporated in the EEA Agreement by Decision of the EEA Joint Committee No 78/2011 of 1 July 2011, LGBl 2012/384, to be given precedence in accordance with Article 275(1) of that directive even where the claim was*

assigned to a third party by way of a legal transaction and, under national law, assignment of the claim entails no change in the content of the claim?

32 Reference is made to the Report for the Hearing for a fuller account of the legal framework, the facts, the procedure and the proposed answers submitted to the Court. Arguments of the parties are mentioned or discussed hereinafter only insofar as is necessary for the reasoning of the Court.

IV ANSWER OF THE COURT

33 The referring court asks, in essence, whether an insurance claim within the meaning of Article 268(1)(g) of the Directive must be given precedence under Article 275(1) if it has been assigned by contract to a third party.

34 The Directive, as is apparent from its recital 11, brings about harmonisation to the degree necessary and sufficient to achieve mutual recognition of authorisations and supervisory systems, resulting in a single authorisation that is valid throughout the EEA and which allows the supervision of an undertaking to be carried out by the home EEA State. Further, as is apparent from, inter alia, recital 117 of the Directive, since national legislation on winding-up proceedings in the EEA States is not harmonised, the Directive is intended to ensure the mutual recognition of reorganisation measures and winding-up legislation concerning insurance undertakings and the necessary cooperation, taking into account the need for unity, universality, coordination and publicity for such measures and the equivalent treatment and protection of insurance creditors (see *Gable I*, E-3/19, cited above, paragraph 34).

35 Article 275(1) of the Directive lays down the general rule that EEA States shall ensure that in winding-up proceedings insurance claims take precedence over other claims against the insurance undertaking, but provides EEA States with specific alternatives as to how to fulfil this obligation.

36 An “insurance claim” for the purpose of Title IV, i.e. the reorganisation and winding-up of insurance undertakings, is defined in Article 268(1)(g) of the Directive by four cumulative requirements: (1) an amount that is owed; (2) by an insurance undertaking; (3) to insured persons, policy holders, beneficiaries or an injured party having a direct right of action against the insurance undertaking; (4) on the basis of an insurance contract (see *Gable I*, E-3/19, cited above, paragraph 38).

37 It is common ground between the parties that the claims assigned to the applicant initially qualified as “insurance claims” within the meaning of Article 275(1) of the Directive. The parties disagree whether the third requirement under Article 268(1)(g) is fulfilled after the assignments to the applicant.

38 The defendant and the Liechtenstein Government argue, in essence, that Article 268(1)(g) of the Directive must be interpreted strictly so that an insurance claim, once assigned to a third party, is no longer owed "to insured persons, policy holders, beneficiaries, or an injured party having a direct right of action against the insurance undertaking".

39 The applicant, ESA and the Commission, on the other hand, argue that there is nothing in the wording of Article 268(1)(g) of the Directive that excludes an assigned claim from the notion of an "insurance claim" and, accordingly, from the privileged status under Article 275(1).

40 The Court recalls that the interpretation of a provision of EEA law requires account to be taken not only of its wording, but of its context and the objectives and purpose pursued by the act of which it forms part. The legislative history of a provision of EEA law may also reveal elements that are relevant to its interpretation. Moreover, where a provision of EEA law is open to several interpretations, preference must be given to the interpretation which ensures that the provision retains its effectiveness (see the judgment of 9 August 2024 in *X* v *Finanzmarktaufsicht*, E-10/23, paragraph 52 and case law cited).

41 The Court observes that a strict literal reading of Article 268(1)(g) of the Directive could imply that an assigned claim no longer qualifies as an "insurance claim" because the claim is no longer directly owed to one of the categories of persons to which the provision in question refers. However, the legal consequences of assigning a claim that initially met all the criteria to be classified as an insurance claim to another party are not specified in Article 268. Accordingly, a literal interpretation of Article 268(1)(g) does not provide any definitive guidance as to how that provision is to be understood with regard to the question in the case at hand.

42 It follows, however, from Article 277 of the Directive that the home EEA State may provide, where the rights of insurance creditors have been subrogated to a guarantee scheme established in that EEA State, that claims by that scheme shall not benefit from the provisions of Article 275(1). This implies that the protection under Article 275 relates to the claim rather than the person.

43 Moreover, the existence of a specific derogation pertaining only to guarantee schemes suggests that the Directive requires that the claim must benefit from the precedence granted under Article 275(1) thereof in all other situations where an insurance claim is assigned to a third party. If the legislature had intended to leave it to the EEA States to determine whether assigned insurance claims should benefit from that privileged status, Article 277 would be devoid of purpose. Therefore, Article 277 must be interpreted as providing that legal successors must benefit from the precedence under Article 275(1), unless the specific circumstances permitting the derogation – namely subrogation to a guarantee scheme – are present.

44 This contextual interpretation is supported by the objectives pursued by the Directive which, as is apparent from recitals 16 and 17 thereof, above all seek the adequate protection of policy holders and beneficiaries. Recital 127 further emphasises that it is of utmost importance that insured persons, policy holders, beneficiaries and any injured party having a direct right of action against the insurance undertaking on a claim arising from insurance operations be protected in winding-up proceedings.

45 As argued by ESA and the Commission, allowing assigned insurance claims to benefit from the precedence under Article 275(1) of the Directive would enable policy holders and beneficiaries to receive immediate compensation from a third party rather than pursuing claims individually. The possibility to assign insurance claims may be particularly helpful in circumstances where it is complicated and challenging to pursue insurance claims individually. Such difficulties are illustrated in the present case, where insolvency proceedings were initiated in 2016 and are still not concluded.

46 Conversely, if assigned insurance claims could not benefit from the precedence granted under Article 275(1) of the Directive, this could ultimately make it more difficult for policy holders and beneficiaries to recover their claims, thereby rendering the protection afforded by the Directive less effective. As noted by ESA, such a situation is liable to particularly affect holders of insurance claims not domiciled in the home EEA State. In this regard, the Court recalls that equal treatment is an underlying principle of the Directive (see *Gable I*, E-3/19, cited above, paragraph 35 and case law cited).

47 The defendant and the Liechtenstein Government argue, however, that the imbalance of bargaining power between economic operators and policy holders and beneficiaries could result in purchase prices below the actual values of the claims, thus harming policy holders and beneficiaries and undermining the objective pursued by the Directive. The Court does not consider this concern to be decisive as policy holders and beneficiaries still have the option to pursue their claims individually.

48 Finally, the Court notes that the judgment in *Gable II*, E-5/20, cited above, to which the defendant and the Liechtenstein Government have referred, cannot put in question the foregoing interpretation of the Directive. As noted by the applicant, ESA and the Commission, that judgment covered a different question of interpretation, namely whether the Directive confers rights on economic operators that can be the basis for claims against a supervisory authority on the basis of the principle of State liability. Moreover, the specific context of that judgment differs from that of the main proceedings in the case at hand, in particular because the applicants' claim in *Gable II*, according to the referring court's request, did not arise from an insurance contract concluded with Gable Insurance (see *Gable II*, E-5/20, cited above, paragraphs 24 and 43). Accordingly, that judgment cannot serve as a basis for depriving an assigned insurance claim of its privileged status under Article 275(1) of the Directive.

49 In light of the foregoing, the answer to the question referred must be that an insurance claim within the meaning of Article 268(1)(g) of the Directive is to be given precedence in accordance with Article 275(1), in circumstances such as the present, where the claim has been assigned to a third party by way of a legal transaction.

V COSTS

50 Since these proceedings are a step in the proceedings pending before the national court, any decision on costs for the parties to those proceedings is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds,

THE COURT

in answer to the question referred to it by the Princely Court of Appeal hereby gives the following Advisory Opinion:

> **An insurance claim within the meaning of Article 268(1)(g) of Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) is to be given precedence in accordance with Article 275(1) of that directive, in circumstances such as those of the main proceedings, where the claim has been assigned to a third party by way of a legal transaction.**

Páll Hreinsson   Bernd Hammermann   Michael Reiertsen

Delivered in open court in Luxembourg on 5 February 2025.

Ólafur Jóhannes Einarsson
Registrar

Páll Hreinsson
President