# JUDGMENT OF THE COURT

10 March 2020

(*Directive 2009/138/EC – insolvency – winding-up proceedings – insurance claim – judicial composition – differential treatment of insurance claims*)

In Case E-3/19,

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 Liechtenstein (*Fürstliches Landgericht*), in the case of

**Gable Insurance AG in Konkurs**

concerning the interpretation 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), as adapted to the Agreement on the European Economic Area,

THE COURT,

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

Registrar: Ólafur Jóhannes Einarsson,

having considered the written observations submitted on behalf of:

- Gable Insurance AG in Konkurs ("Gable Insurance"), represented by Martin Batliner and Hansjörg Lingg, Advocates, of the insolvency administrator Batliner Wanger Batliner Rechtsanwälte AG;

- the Government of Liechtenstein, represented by Dr. Andrea Entner-Koch, Director, and Dr. Christina Neier, Legal Officer, members of the EEA Coordination Unit, acting as Agents;

- the EFTA Surveillance Authority ("ESA"), represented by Michael Sánchez Rydelski, Ingibjörg-Ólöf Vilhjálmsdóttir and Carsten Zatschler, members of its Department of Legal & Executive Affairs, acting as Agents; and

– the European Commission ("the Commission"), represented by Hélène Tserepa-Lacombe, Legal Adviser to the Commission and Nicola Yerrell, a member of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

having heard oral argument of Gable Insurance AG in Konkurs, represented by Martin Batliner and Hansjörg Lingg; the Government of Liechtenstein, represented by Dr. Andrea Entner-Koch and Dr. Christina Neier; ESA, represented by Michael Sánchez Rydelski and Ingibjörg-Ólöf Vilhjálmsdóttir; and the Commission, represented by Nicola Yerrell; at the hearing on 1 October 2019,

gives the following

## Judgment

## I Legal background

*EEA law*

1 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) ("the Directive") was incorporated in the Agreement on the European Economic Area ("the EEA Agreement" or "EEA") by Joint Committee Decision No 78/2011 of 1 July 2011 (OJ 2011 L 262, p. 45), which added it as point 1 of Annex IX (Financial services). The Decision entered into force on 1 December 2012.

2 Recital 105 of the Directive reads:

> *All policy holders and beneficiaries should receive equal treatment regardless of their nationality or place of residence. For this purpose, each Member State should ensure that all measures taken by a supervisory authority on the basis of that supervisory authority's national mandate are not regarded as contrary to the interests of that Member State or of policy holders and beneficiaries in that Member State. In all situations of settling of claims and winding-up, assets should be distributed on an equitable basis to all relevant policy holders, regardless of their nationality or place of residence.*

3 Recital 117 of the Directive reads:

> *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.*

4 Recital 125 of the Directive reads:

*All the conditions for the opening, conduct and closure of winding-up proceedings should be governed by the law of the home Member State.*

5 Recital 127 of the Directive reads:

*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.*

6 Recital 129 of the Directive reads:

*Creditors should have the right to lodge claims or to submit written observations in winding-up proceedings. Claims by creditors resident in a Member State other than the home Member State should be treated in the same way as equivalent claims in the home Member State without discrimination on grounds of nationality or residence.*

7 Article 76(1) of the Directive entitled "General provisions" reads:

1. *Member States shall ensure that insurance and reinsurance undertakings establish technical provisions with respect to all of their insurance and reinsurance obligations towards policy holders and beneficiaries of insurance or reinsurance contracts.*

8 Article 268(1) of the Directive entitled "Definitions" reads:

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

*[...]*

*(d) 'winding-up proceedings' means collective proceedings involving the realisation of the assets of an insurance undertaking and the distribution of the proceeds among the creditors, shareholders or members as appropriate, which necessarily involve any intervention by the competent authorities, including where the collective proceedings are terminated by a composition or other analogous measure, whether or not they are founded on insolvency or are voluntary or compulsory;*

*[…]*

*(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.*

*The premium owed by an insurance undertaking as a result of the non-conclusion or cancellation of an insurance contract or operation referred to in point (g) of the first subparagraph in accordance with the law applicable to such a contract or operation before the opening of the winding-up proceedings shall also be considered an insurance claim.*

9 Article 274 of the Directive entitled "Applicable law" reads:

*1. The decision to open winding-up proceedings with regard to an insurance undertaking, the winding-up proceedings and their effects shall be governed by the law applicable in the home Member State unless otherwise provided in Articles 285 to 292.*

*2. The law of the home Member State shall determine at least the following:*

*(a) the assets which form part of the estate and the treatment of assets acquired by, or devolving to, the insurance undertaking after the opening of the winding-up proceedings;*

*(b) the respective powers of the insurance undertaking and the liquidator;*

*(c) the conditions under which set-off may be invoked;*

*(d) the effects of the winding-up proceedings on current contracts to which the insurance undertaking is party;*

*(e) the effects of the winding-up proceedings on proceedings brought by individual creditors, with the exception of lawsuits pending referred to in Article 292;*

*(f) the claims which are to be lodged against the estate of the insurance undertaking and the treatment of claims arising after the opening of winding-up proceedings;*

*(g) the rules governing the lodging, verification and admission of claims;*

*(h) the rules governing the distribution of proceeds from the realisation of assets, the ranking of claims, and the rights of creditors who have obtained partial satisfaction after the opening of winding-up proceedings by virtue of a right in rem or through a set-off;*

*(i) the conditions for and the effects of closure of winding-up proceedings, in particular by composition;*

*(j) rights of the creditors after the closure of winding-up proceedings;*

*(k) the party who is to bear the cost and expenses incurred in the winding-up proceedings; and*

*(l) the rules relating to the nullity, voidability or unenforceability of legal acts detrimental to all the creditors.*

10 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.*

11 Article 282 of the Directive entitled "Right to lodge claims" reads:

1. *Any creditor, including public authorities of Member States, whose habitual residence, domicile or head office is situated in a Member State other than the home Member State shall have the right to lodge claims or to submit written observations relating to claims.*

2. *The claims of all creditors referred to in paragraph 1 shall be treated in the same way and given the same ranking as claims of an equivalent nature which may be lodged by creditors whose habitual residence, domicile or head office is situated in the home Member State. Competent authorities shall therefore operate without discrimination at Community level.*

*[…]*

*National law*

12 According to Article 161(1), first sentence, of the Insurance Supervisory Act of 12 June 2015 (*Versicherungsaufsichtsgesetz*, "Insurance Supervisory Act"), assets representing the technical provisions shall constitute a special estate, in accordance with Article 45 of the Insolvency Code of 17 July 1973 (*Konkursordnung*, "Insolvency Code"), in order to satisfy insurance claims. According to Article 161(1), third sentence, the Liechtenstein Financial Market Authority (*Finanzmarktaufsicht*, "FMA") shall determine the special estate at the date on which the insolvency proceedings were opened.

13 Under Article 156(1) of the Insurance Supervisory Act, creditors of an insurance undertaking must, when lodging their claim, state the nature and amount of the claim, the date on which it arose and any preferential right claimed. According to Article 156(3), the precedence accorded to insurance claims by virtue of Article 161 of the Insurance Supervisory Act and the rank of such claims do not have to be stated when lodged.

14 According to Article 161(5) of the Insurance Supervisory Act, it is not necessary to lodge a claim if the insurance claim is apparent from the books of the insurance undertaking. In that case, it shall be regarded as having been lodged. The Insurance

Supervision Act does not contain any provisions on the verification and admission of claims or on the further procedure to be followed.

15 Article 31(1) of the Insurance Contracts Act of 16 May 2001 (*Versicherungsvertragsgesetz*, "Insurance Contracts Act"), entitled "Insolvency of the insurance undertaking", states that if insolvency proceedings are opened in relation to an insurance undertaking, the contract shall cease on the expiry of a period of four weeks calculated from the date on which the opening of the insolvency proceedings is published.

16 According to Article 11(1) of the Insolvency Code, the opening of bankruptcy proceedings shall be made public by edict, which shall be published in the Official Journal on the day of the opening of bankruptcy proceedings. Under Article 11(2)(d) of the Insolvency Code, the edict must, inter alia, contain a request to insolvency creditors to submit their claims and the legal grounds for these claims within a certain period of time as well as a brief instruction on the consequences of failure to comply. Under Article 11(3) of the Insolvency Code, the deadline for submitting claims shall be set, in general, at between 30 and 90 days after the date on which insolvency proceedings are opened.

17 The first paragraph of Article 45 of the Insolvency Code, entitled "Rights to separation" (*Absonderungsansprüche*), provides that creditors entitled to separate satisfaction from a special class of the debtor's assets (*Absonderungsgläubiger*), may exclude other creditors from satisfaction from those special class assets (*Sondermasse*) to the extent of the claims of the creditors entitled to separate satisfaction.

18 According to Article 46(2) of the Insolvency Code, the provisions on enforcement provided for in the Enforcement Code of 24 November 1971 (*Exekutionsordnung*, "Enforcement Code") apply when determining the hierarchy of claims to be satisfied from the special estate.

19 Article 63(8) of the Insolvency Code stipulates that claims submitted after the expiry of the submission deadline shall, where possible, be included in the proceedings.

## II Facts and procedure

20 According to the referring court, Gable Insurance was a Liechtenstein direct insurance undertaking and operated under a licence from the FMA. The licence entitled Gable Insurance to market non-life insurance products. Gable Insurance pursued its business in several European countries and marketed approximately 50 different non-life insurance products. In November 2016, Gable Insurance had approximately 130 000 insurance contracts in force. By order of 17 November 2016, the referring court opened insolvency proceedings concerning Gable Insurance.

21 Former policy holders and other creditors with insurance claims constitute the largest group of Gable Insurance's creditors. On the date the insolvency proceedings were

opened, the FMA determined the special estate, consisting of assets representing the technical provisions in accordance with Article 161(1) of the Insurance Supervisory Act, at approximately CHF 179 million. The special estate comprises nearly all existing or recoverable assets. However, according to the referring court, it will not be sufficient to cover all of the insurance claims, and the insurance creditors will have to be satisfied on a pro rata basis.

22 The referring court states that new insurance claims continued to be notified despite the cancellation of all of Gable Insurance's insurance contracts four weeks after the opening of the insolvency proceedings. These include claims where the insured events took place before the opening of the insolvency proceedings, but where the loss or damage is not yet known. . According to the referring court, if new insurance claims may be submitted after the opening of the insolvency proceedings, and in the absence of a final cut-off date, this leads to a situation where the drawing up of a final account and distribution to the creditors is prevented.

23 Further, the referring court considers that the parallel existence of the Insurance Supervisory Act and the Insolvency Code raises various questions of a procedural nature. The protective provisions of the Insurance Supervisory Act, and the Directive, appear to contradict the general insolvency rules concerning rights to separation. An isolated examination of the Insolvency Code on the right to separation shows that the reference inserted in Article 161(1) of the Insurance Supervisory Act to Article 45 of the Insolvency Code could lead to unanticipated or undesired results. According to the referring court, if the provisions of the Enforcement Code were to apply to the realisation of the rights to separation, the bar on execution, at the very least, would not be effective. Instead, the priority principle would apply, so that, in accordance with the date on which claims were asserted, the creditors of insurance claims could enforce priority satisfaction. As a result, other creditors who are also privileged would, in the insolvency proceedings concerned, receive nothing from the special estate provided for in Article 161 of the Insurance Supervisory Act, as in all probability it will not be sufficient to cover all the insurance claims, or the liquidator would be forced to take time-consuming and costly defensive measures against creditors, who press ahead, in order to protect the other creditors.

24 The referring court further outlined that insolvency proceedings under national law are also governed by the principle of equal treatment of creditors (principle of parity). If the debtor's financial situation does not allow all creditors to be satisfied in full, individual enforcement is overridden by insolvency law. This provides for collective enforcement supervised by the courts, in that the creditor may lodge his claim in the insolvency proceedings and participate in those proceedings. This collective enforcement is intended to ensure a pro rata satisfaction of the (unsecured) creditors. In such a situation, individual creditors should not be able to profit if they, by chance, are quicker off the mark. That is ultimately also the aim of the insolvency procedure, according to which claims have to be lodged within a deadline and verified and admitted at the verification hearing. On the other hand, if rights to separation are realised in accordance with the law on enforcement, there is, according to the referring court, no provision for the lodging of claims or a deadline for such. Instead, claims must be

lodged, at the latest, at the distribution hearing to which all creditors entitled to separation must be invited. The possibility of lodging claims at a later date is excluded.

25 According to the referring court, in the case of rights to separation, the insolvency law principle of parity is overridden by the principle of priority. In other words, each creditor acts for himself and the priority accorded under property law and/or the date of the enforcement of the claim are decisive. The opening of insolvency proceedings does not affect rights to separation and, as a result, the relevant creditors can enforce the realisation of the encumbered assets in order to satisfy their claim using the proceeds. In insolvency proceedings, no formal procedure exists for the lodging and verification of rights to separation.

26 Consequently, it appears to the referring court that there is a conflict of objectives. The Insurance Supervisory Act and the Directive seek to ensure special protection of the policy holders of an insurance undertaking in liquidation by according insurance claims priority satisfaction over "ordinary" insolvency claims. However, there is no provision setting out the hierarchy according to which individual creditors with insurance claims are to be satisfied. Thus, it must probably be presumed, adopting an interpretation in conformity with the Directive, that all insurance claims are of equal rank. If, however, in insolvency proceedings, insurance claims were to be treated, by reason of the reference to Article 45 of the Insolvency Code, as rights to separation, equal treatment of insurance claims may be prevented. Policy holders and/or the creditors of insurance claims would have to enforce their rights by way of individual enforcement as if no insolvency proceedings existed.

27 On 22 March 2019 the referring court decided to request an advisory opinion from the Court. The referring court's letter of 29 March 2019 was registered at the Court on the same date.

28 The Princely Court referred the following questions to the Court:

1. *The first question concerns the interpretation of the term 'insurance claim' provided for in Article 268(1)(g) of Directive 2009/138/EC.*

   a) *What criteria are to be applied in order to determine whether some elements of the debt are not yet known?*

   b) *Must a claim, at least in principle, have arisen, been admitted and/or lodged before the opening of insolvency proceedings (or, alternatively, before the cancellation of the insurance contracts as a result of the opening of winding-up proceedings) in order to be treated as an insurance claim? If not, the following question arises:*

   c) *Does Directive 2009/138/EC provide for a temporal limit on the possibility for insurance claims to arise after the opening of insolvency proceedings in order to prevent the continued postponement of the drawing up of the final account and distribution*

*to the creditors by a reason of a constant lodging of new claims, or, alternatively, how does Directive 2009/138/EC deal with indeterminate debts of that kind?*

d) *Does the phrase '... or cancellation ...' mean that only those premiums owed [by an insurance undertaking] as a result of the cancellation of a contract before the opening of the winding-up proceedings shall be regarded as insurance claims or does it also constitute an insurance claim where the premium is owed by the insurance undertaking as a result of the cancellation of a contract after the opening of the winding-up proceedings?*

2. *The second question concerns the interpretation of the term 'winding-up proceedings' provided for in Article 268(1)(d) of Directive 2009/138/EC.*

*Must this provision be interpreted as meaning that a judicial composition in relation to (individual) insurance claims is possible also independently of, or contrary to, national procedural rules governing winding-up proceedings and, if so, what requirements specific to the Directive must be satisfied for a composition to be reached?*

3. *The third question concerns the relationship between Article 275(1)(a) and Article 274(2)(g) of Directive 2009/138/EC.*

*Does Article 275(1)(a) preclude a national rule implementing Article 274(2)(g), in other words, on the lodging, verification and admission of claims, that results in insurance creditors being treated unequally?*

29 In its letter of 29 March 2019, the referring court requested the Court to apply an accelerated procedure pursuant to Article 97a of the Rules of Procedure. That request was denied by an order of the President of the Court of 12 April 2019.

30 Reference is made to the Report for the Hearing for a fuller account of the legal framework, the facts, the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only insofar as is necessary for the reasoning of the Court.

## III Admissibility

31 The Commission has expressed certain doubts as to whether the referring court is actually called upon to give judgment in proceedings intended to lead to a decision of a judicial nature, as required by Article 34 SCA. The Liechtenstein Government addressed the question of admissibility at the oral hearing and submitted that, in line with the Court's judgment in Case E-23/13 *Hellenic Capital Market Commission (HCMC)* [2014] EFTA Ct. Rep. 88, the referring court in the present case is not acting

as an administrative body. Moreover, in other EEA States, such as Austria, the conduct of an insolvency proceeding is entrusted to courts and not to administrative bodies.

32 The purpose of Article 34 SCA is to establish cooperation between the Court and the national courts and tribunals in order to ensure a homogenous interpretation of EEA law by assisting the courts and tribunals in the EFTA States when they have to apply provisions of EEA law in the cases before them (see Case E-21/16 *Pascal Nobile* v *DAS Rechtsschutz-Versicherungs AG* [2017] EFTA Ct. Rep. 554, paragraph 23 and case law cited). Accordingly, the purpose of this procedure does not require a strict interpretation. This also applies to the question of whether a court or tribunal in a specific case exercises a judicial or an administrative function (see Case E-23/13 *Hellenic Capital Market Commission (HCMC)*, cited above, paragraph 34). In this case the referring court conducts insolvency proceedings, which includes making a final decision on creditors' claims based on, inter alia, interpretation of EEA law. Accordingly, the Court finds the request from the national court admissible.

## IV Answers of the Court

*General remarks*

33 By its questions, the referring court in essence raises the issue of the interpretation of the term "insurance claim" in Title IV of the Directive in the context of the winding-up proceedings of an insurance undertaking, as well as the requirements relating to composition within winding-up proceedings and whether the Directive provides any guidance or requirements in respect of the equal treatment of such claims.

34 The Directive harmonises to the degree that is necessary and sufficient to achieve the mutual recognition of authorisations and supervisory systems, resulting in a single authorisation that is valid throughout the EEA and allows the supervision of an undertaking to be carried out by the home Member State (compare recital 11). Further, since national legislation in the EEA States on winding-up proceedings 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 (compare, inter alia, recital 117 of the Directive).

35 The equal treatment of creditors is an underlying principle of the Directive. This entails, in particular, that the claims of insurance creditors with habitual residence in EEA States other than the State where insolvency proceedings are conducted (the home EEA State) shall be treated in the same way as insurance creditors domiciled in the home EEA State, and not discriminated against based of their nationality or place of residence (see Case E-18/11 *Irish Bank Resolution Corporation Ltd.* v *Kaupþing hf* [2012] EFTA Ct. Rep. 592, paragraphs 92 and 93; compare the judgment in *LBI hf* v *Kepler Capital Markets SA and Frédéric Giraux*, C-85/12, EU:C:2013:697, paragraph 41. Compare also, inter alia, recitals 105 and 129 of the Directive).

36 Article 275(1) of the Directive provides EEA States with a choice as to how to ensure the precedence of insurance claims over other insolvency claims. Liechtenstein has chosen in Article 161(1) of the Insurance Supervisory Act to provide protection by establishing technical provisions in line with Articles 275(1)(a) and 76(1) of the Directive.

*The first question*

37 Questions 1(a) to (d), in essence, concern the interpretation of the term "insurance claim" within the framework of Title IV of the Directive in situations where the insured event occurs while the insurance contract is in effect, but the damage cannot be determined until a later point in time and the claim therefore is admitted or lodged after the opening of the winding-up proceedings.

38 The Court notes that in Article 268(1)(g) of the Directive an insurance claim is defined by four cumulative requirements: (i) an amount that is owed; (ii) by an insurance undertaking; (iii) to insured persons, policy holders, beneficiaries or an injured party having a direct right of action against the insurance undertaking; (iv) on the basis of an insurance contract. It follows from this wording that an amount must be "owed" under an insurance contract. The wording implies that the insured event must have occurred while the insurance contract existed in order for an insurance claim to arise.

39 Whilst Article 275(1) of the Directive provides that the EEA States shall ensure the precedence of insurance claims over other claims in winding-up proceedings, Article 274(2), read in conjunction with recital 125, makes clear that the law applicable in the home EEA State will govern the conditions for the opening, conduct and closure of winding-up proceedings. Accordingly, EEA States are at liberty to lay down the specific conditions for winding-up proceedings listed in Article 274(2), subject to ensuring an appropriate balance between the protection of insurance creditors and other privileged creditors (compare recital 127 and the judgment in *Epikouriko Kefalaio* v *Ipourgos Anaptixis*, C-28/03, EU:C:2004:540, paragraph 27).

40 Regarding question 1(a) on the criteria for determining whether some elements of the debt are not yet known, it is for national law to set out the conditions for determining any elements of debt that are not yet known. This applies provided that insurance claims are given absolute precedence over any other claims in accordance with Article 275(1)(a).

41 Concerning question 1(b), regarding claims that arise before the opening of winding-up proceedings or the cancellation of the insurance contract, it follows from the wording of Article 268(1)(g) of the Directive that an amount must be "owed" under an insurance contract, implying that the insured event must have occurred while the insurance contract was in effect in order for an insurance claim to arise. Pursuant to Article 274(2)(d) of the Directive, the effects of winding-up proceedings on contracts to which the insurance undertaking is part, is a matter to be determined by the law of the home EEA State. This includes whether, and in what manner, winding-up proceedings may lead to the cancellation of contracts. Consequently, an "insurance claim", within the

meaning of Article 268(1)(g) of the Directive, must have arisen before the cancellation of an insurance contract, which may be the result of the opening of winding-up proceedings in accordance with the law of the home EEA State.

42 Question 1(c) concerns temporal limits for insurance claims that might arise after the opening of winding-up proceedings. An insurance claim must have arisen before the cancellation of the insurance contract. It follows from Article 274(2)(g) of the Directive that the admissibility of claims in winding-up proceedings is a matter for national law. The Directive does not lay down any explicit rules on temporal limits in that respect. Accordingly, it is for national law to set out such limits, subject to the absolute precedence of insurance claims over any other claim under Article 275(1)(a).

43 The answer to questions 1(a) to 1(c) is therefore that an insurance claim must be based on an insured event occurring before the cancellation of an insurance contract for it to be considered an insurance claim within the meaning of Article 268(1)(g). However, the scope of an insurance claim cannot be limited to claims that have arisen, been lodged or admitted before the opening of the winding-up procedure if the claim cannot yet be fully determined. In accordance with Article 274(2)(g) of the Directive, it is for national law to set the specific rules and conditions concerning lodging, verification and admission of claims, including temporal limits for the lodging of claims and the final determination of the amount of insurance claims in cases where some elements of the debt are not yet known, provided that insurance claims are given absolute precedence over other claims in accordance with Article 275(1)(a).

44 Question 1(d) concerns premiums owed following cancellations of contracts after the opening of winding-up proceedings. The second subparagraph of Article 268(1) of the Directive clarifies the definition of Article 268(1)(g) to the extent that the "premium owed by an insurance undertaking as a result of the … cancellation of an insurance contract … before the opening of the winding-up proceedings shall also be considered an insurance claim". One prerequisite of an "insurance claim" is the existence of an insurance contract. Accordingly, the definition of "insurance claim" for the purposes of Title IV of the Directive also encompasses premiums owed under insurance contracts that were cancelled before the opening of the winding-up proceedings. Conversely, the second subparagraph of Article 268(1) does not define claims that arise from cancellations that occur after the opening of winding-up proceedings as "insurance claims".

45 A claim for owed premium following the cancellation of a contract after the opening of winding-up proceedings does not constitute an insurance claim according to the wording of the second subparagraph of Article 268(1)(g). Including such claims as insurance claims would run contrary to the Directive's purpose of harmonising protection of claims based on the occurrence of an insured event covered by an insurance contract.

46 The effects of winding-up proceedings on current contracts and on claims arising from the cancellation of contracts after the opening of such proceedings are for the law of the home EEA State to determine as stated in Article 274(2)(d) of the Directive, provided

that insurance claims are given absolute precedence over any other claims in accordance with Article 275(1)(a).

47 It follows that the answer to question 1(d) is that a claim for owed premium arising from the cancellation of an insurance contract after the opening of the winding-up proceedings does not constitute an insurance claim within the meaning of Article 268(1)(g).

*The second question*

48 Article 268(1)(d) of the Directive defines "winding-up proceedings" as collective proceedings "including where the collective proceedings are terminated by a composition or other analogous measure, whether or not they are founded on insolvency or are voluntary or compulsory." The wording of this article clarifies that judicial compositions are not to be excluded from the definition of "winding-up proceedings" within the meaning of Title IV. Additionally, Article 274(2)(i) of the Directive provides that it is for the law of the EEA State to determine "the conditions for and the effects of closure of winding-up proceedings, in particular by composition". The words "in particular" indicate that there are various ways to validly close winding-up proceedings, and a composition is one such possibility.

49 Therefore, Articles 268(1)(d) and 274(2)(i) of the Directive, when read together, neither oblige the EEA States to nor preclude them from providing for the possibility of terminating winding-up proceedings by composition. However, if national law provides for the possibility of closing winding-up proceedings by composition, the principle of equal treatment and non-discrimination of creditors, regardless of their nationality or residence, must be respected.

50 The Court notes that in its question the referring court raises the possibility of judicial composition of individual insurance claims. "[W]inding-up proceedings" in Article 268(1)(d), refers to collective proceedings of realising assets and distribution of the proceeds to creditors on an equitable basis (compare also, inter alia, recital 105 of the Directive), which includes composition. Accordingly, the wording "a composition or other analogous measure" refers to an agreement that is collective in nature, as opposed to a composition of the individual claims of individual creditors. A contrary interpretation of the term could violate the equal treatment of creditors. Individual settlements would reduce the assets available for paying unsettled claims, and potentially entail discrimination against insurance creditors not residing in the home EEA State and undermine the principle of universality of the proceedings (compare the judgment in *LBI hf* v *Kepler Capital Markets SA and Frédéric Giraux*, cited above, paragraphs 41 and 55).

51 The answer to the second question is therefore that Article 268(1)(d) and Article 274(2)(i) of the Directive neither oblige EEA States to provide nor preclude them from providing, for composition in the termination of winding-up proceedings. It is for national law to determine the requirements to close winding-up proceedings, subject to respecting the principle of equal treatment of insurance creditors.

*The third question*

52 The question concerns whether Article 275(1)(a) of the Directive precludes a national rule implementing Article 274(2)(g) on lodging, verification and admission of claims if that rule would result in insurance creditors being treated unequally.

53 At the oral hearing Gable Insurance replied to the Commission's written submission regarding the principle of equal treatment and emphasised the principle of equal treatment mentioned in recital 117 of the Directive as a principle of liquidation proceedings. In addition, the Liechtenstein Government explained that Liechtenstein law guarantees the equal treatment of insurance creditors.

54 Article 275(1) of the Directive guarantees protection for policy holders and beneficiaries by ensuring the precedence of insurance claims over other claims against the insurance undertaking in a winding-up procedure. However, the provision does not distinguish between categories of insurance claims, nor does it preclude a provision of national law separating of such claims into different categories. As stated in Article 274(2)(h), it is for the home EEA State to determine the "rules governing the distribution of proceeds from the realisation of assets, the ranking of claims and the rights of creditors who have obtained partial satisfaction after the opening of winding-up proceedings by virtue of a right in rem or through a set-off". While the Directive provides an EEA State with a choice between methods to ensure precedence of insurance creditors over other creditors, none of those methods prevent an EEA State "from establishing a ranking between different categories of insurance claim" (compare also recital 127 of the Directive).

55 It follows that Article 275(1) of the Directive does not, as such, preclude the application of national rules on the lodging, verification and admissibility of insurance claims that result in different treatment between creditors holding such claims based on the categorisation and ranking of claims, provided that those rules ensure that insurance claims take precedence over other claims.

56 National law must nevertheless respect the principle of equal treatment of creditors and the prohibition of discrimination. This follows, inter alia, from Article 282(1) and (2) of the Directive. Article 282(2) requires that claims of creditors whose habitual residence, domicile or head office is situated outside the home EEA State must be treated in the same way and given the same ranking as claims of an equivalent nature lodged by creditors in the home EEA State. Accordingly, although national law on the lodging, verification and admission of claims, implementing Article 274(2)(g) of the Directive, may result in insurance claims being categorised and ranked differently in accordance with Article 274(2)(h), insurance claim creditors must be subject to the same treatment in terms of the process of lodging, verifying and admitting claims.

57 The answer to the third question is therefore that Article 275(1)(a) of the Directive does not preclude national rules on the lodging, verification and admissibility of insurance claims that result in different categorisation and ranking of insurance claims, provided those rules ensure that insurance claims take precedence over other claims and that

insurance creditors are treated equally as regards the lodging, verification and admission of claims.

## IV Costs

58 The costs incurred by the Government of Liechtenstein, ESA, and the Commission, which have submitted observations to the Court, are not recoverable. 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.

On those grounds,

THE COURT

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

1. **An insurance claim must be based on an insured event occurring before the cancellation of an insurance contract for it to be considered an insurance claim within the meaning of Article 268(1)(g) of Directive 2009/138/EC. However, the scope of an insurance claim cannot be limited to claims that have arisen, been lodged or admitted before the opening of the winding-up procedure if the claim cannot yet be fully determined. In accordance with Article 274(2)(g) of Directive 2009/138/EC, it is for national law to set the specific rules and conditions concerning the lodging, verification and admission of claims, including temporal limits for the lodging of claims and the final determination of the amount of insurance claims in cases where elements of the debt are not yet known, provided that insurance claims are given absolute precedence over other claims in accordance with Article 275(1)(a) of Directive 2009/138/EC.**

   **A claim for owed premium arising from the cancellation of an insurance contract after the opening of the winding-up proceedings does not constitute an insurance claim within the meaning of Article 268(1)(g) of Directive 2009/138/EC.**

2. **Article 268(1)(d) and Article 274(2)(i) of Directive 2009/138/EC neither oblige EEA States to provide, nor preclude them from providing, for composition in the termination of winding-up proceedings. It is for national law to determine the requirements to close winding-up proceedings, subject to respecting the principle of equal treatment of insurance creditors.**

3. **Article 275(1)(a) of Directive 2009/138/EC does not preclude national rules on the lodging, verification and admissibility of insurance claims that result in different categorisation and ranking of insurance claims, provided those rules ensure that insurance claims take precedence over other claims and that insurance creditors are treated equally as regards the lodging, verification and admission of claims.**

Páll Hreinsson Per Christiansen Bernd Hammermann

Delivered in open court in Luxembourg on 10 March 2020.

Ólafur Jóhannes Einarsson
Registrar

Páll Hreinsson
President