E-3/19-19

REPORT FOR THE HEARING
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 insolvency)

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.

I Introduction

1. By a letter of 22 March 2019, registered at the Court on 29 March 2019, the Princely Court of Liechtenstein (*Fürstliches Landgericht*) made a request for an advisory opinion in a case pending before it concerning insolvency proceedings regarding Gable Insurance AG ("Gable").

2. The case before the referring court concerns 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) (OJ 2009 L 335, p. 1) (the "Directive").

II Legal background

EEA law

3. 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 Directive repeals several directives previously included in Annex IX to the EEA Agreement. The date of repeal, originally set to 1 November 2012, was postponed twice. Most recently, Directive 2013/58/EU (OJ 2013 L 341, p. 1), which was incorporated to the EEA Agreement by Joint Committee Decision No 128/2014 of 27 June 2014 (OJ 2014 L 342, p. 27), set the date of repeal to 1 January 2016. Consequently, Council Directive 87/344/EEC of 22 June 1987 on the coordination of laws, regulations and administrative

provisions relating to legal expenses insurance (OJ 1987 L 185, p. 77) was repealed with effect from 1 January 2016.

4. 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.

5. Recital 123 of the Directive reads:

Only the competent authorities of the home Member State should be empowered to take decisions on winding-up proceedings concerning insurance undertakings. The decisions should produce their effects throughout the Community and should be recognised by all Member States. The decisions should be published in accordance with the procedures of the home Member State and in the Official Journal of the European Union. Information should also be made available to known creditors who are resident in the Community, who should have the right to lodge claims and submit observations.

6. 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.

7. Recital 126 of the Directive reads:

In order to ensure coordinated action amongst the Member States the supervisory authorities of the home Member State and those of all the other Member States should be informed as a matter of urgency of the opening of winding-up proceedings.

8. 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.

9. Article 76(1) of the Directive reads:

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.

10. Article 268(1)(d) of the Directive reads:

'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.

11. Article 268(1)(g) of the Directive reads:

'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.

12. The second subparagraph of Article 268(1) reads:

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.

13. Article 273 of the Directive reads:

1. Only the competent authorities of the home Member State shall be entitled to take a decision concerning the opening of winding-up proceedings with regard to an insurance undertaking, including its branches in other Member States. This decision may be taken in the absence, or following the adoption, of reorganisation measures.

2. A decision concerning the opening of winding-up proceedings of an insurance undertaking, including its branches in other Member States, adopted in accordance with the legislation of the home Member State shall be recognised without further formality throughout the Community and shall be effective there as soon as the decision is effective in the Member State in which the proceedings are opened.

3. The competent authorities of the home Member State shall inform as a matter of urgency the supervisory authorities of that Member State of the decision to open winding-up proceedings, where possible before the proceedings are opened and failing that immediately thereafter.

The supervisory authorities of the home Member State shall inform as a matter of urgency the supervisory authorities of all other Member States of the decision to open winding-up proceedings including the possible practical effects of such proceedings.

14. Article 274(1) of the Directive reads:

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.

15. Article 274(2) of the Directive, inter alia, reads:

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;

[…]

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

[…]

(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; […]

16. Article 275(1) of the Directive 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.

17. Article 280(1) of the Directive reads:

1. The competent authority, the liquidator or any person appointed for that purpose by the competent authority shall publish the decision to open winding-up proceedings in accordance with the publication procedures provided for in the home Member State and also publish an extract from the winding-up decision in the Official Journal of the European Union.

The supervisory authorities of all other Member States which have been informed of the decision to open winding-up proceedings in accordance with Article 273(3) may ensure the publication of such decision within their territories in the manner they consider appropriate.

18. Article 281 of the Directive reads:

Information to known creditors

1. When winding-up proceedings are opened, the competent authorities of the home Member State, the liquidator or any person appointed for that purpose by the competent authorities shall without delay individually inform by written notice each known creditor whose habitual residence, domicile or head office is situated in another Member State.

2. The notice referred to in paragraph 1 shall cover time-limits, the sanctions laid down with regard to those time-limits, the body or authority empowered to accept the lodging of claims or observations relating to claims and any other measures.

The notice shall also indicate whether creditors whose claims are preferential or secured in rem need to lodge their claims.

In the case of insurance claims, the notice shall further indicate the general effects of the winding-up proceedings on the insurance contracts, in particular, the date on which the insurance contracts or the operations will cease to produce effects and the rights and duties of insured persons with regard to the contract or operation.

19. Article 283(1) of the Directive reads:

Languages and form

1. The information in the notice referred to in Article 281(1) shall be provided in the official language or one of the official languages of the home Member State.

For that purpose a form shall be used bearing either of the following headings in all the official languages of the European Union:

(a) 'Invitation to lodge a claim; time-limits to be observed'; or

(b) where the law of the home Member State provides for the submission of observations relating to claims, 'Invitation to submit observations relating to a claim; time-limits to be observed'.

However, where a known creditor is the holder of an insurance claim, the information in the notice referred to in Article 281(1) shall be provided in the official language or one of the official languages of the Member State in which the habitual residence, domicile or head office of the creditor is situated.

National law

20. According to Article 161(1), first sentence, of the Insurance Supervisory Act of 12 June 2015 (*Versicherungsaufsichtsgesetz*, "VersAG"),[1] assets representing the technical provisions shall constitute a special estate, in accordance with Article 45 of the Insolvency Code of 17 July 1973 (*Konkursordnung*, "KO"),[2] in order to satisfy insurance claims.[3] According to Article 161(1), third sentence, VersAG, the Liechtenstein Financial Market Authority (*Finanzmarktaufsicht*, "FMA") shall determine the special estate at the date on which the insolvency proceedings were opened.

21. Pursuant to Article 156(1) VersAG, creditors of an insurance undertaking in liquidation must, when lodging their claim, state the nature and amount of the claim, the date on which it arose and any preference claimed. The preference accorded to insurance claims by virtue of Article 161 VersAG and the rank of such claims do not have to be stated when lodged (Article 156(3) VersAG).

22. 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 (Article 161(5) VersAG). The VersAG does not contain any provisions on the verification and admission of claims nor on any further procedure(s) to be followed.

23. Article 31(1) of the Insurance Contracts Act of 16 May 2001 (*Versicherungsvertragsgesetz*, "VersVG"),[4] entitled "Liquidation of the insurance undertaking", states:

> *If liquidation 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 liquidation proceedings is published.*

24. According to Article 11(1) KO, 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. The edict must, *inter alia*, contain an invitation to bankruptcy 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 do so (Article 11(2)(d) KO). The deadline for submitting claims is usually between 30 and 90 days after the date on which bankruptcy proceedings were opened (Article 11(3) KO).

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[1] VersAG, LR 961.01.

[2] KO, LR 282.0.

[3] The definition of an "insurance claim" is laid down in Article 10(1)(52) VersAG.

[4] VersVG, LR 215.229.1.

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

25. Article 45 KO, entitled "Rights to separation" (*Absonderungsansprüche*), provides in its first paragraph that creditors entitled to separation have, in the event of insolvency, an insolvency-remote right to separate satisfaction from particular assets of the insolvency debtor. Creditors entitled to separation may preclude the other creditors (insolvency creditors in categories 1 to 4) from obtaining payment from those assets (special estate). Although the assets encumbered with a right to separation form part of the insolvency estate, their purpose is to satisfy the creditors entitled to separation. Any part of the special estate that remains after satisfying the creditors entitled to separation then becomes part of the general insolvency estate to satisfy the other creditors. To determine the hierarchy of claims to be satisfied from the special estate, the provisions on enforcement provided for in the Enforcement Code of 24 November 1971 (*Exekutionsordnung, "EO"*)[5] apply (Article 46(2) KO).

III Facts and procedure

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

27. The former policy holders of Gable and other creditors with insurance claims constitute the largest group of creditors. At the date on which insolvency proceedings were opened, the FMA determined the special estate at approximately CHF 179 million. The special estate is composed of liquid assets (credit balances held with banks), securities and claims resulting from the business of direct insurance (claims against insurance intermediaries that received insurance premiums from policy holders on behalf of Gable). The special estate comprises nearly all existing or recoverable assets. According to the referring Court, the special estate 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.

28. The referring Court states that despite the cancellation of all of Gable's insurance contracts four weeks after opening the insolvency proceedings, new insurance claims were notified, as the events giving rise to the loss or damage took place before the opening of the insolvency proceedings, but the loss or damage did not occur until after the insolvency proceedings had been opened. According to the referring Court, this leads to a situation where the drawing up of a final account and distribution to the creditors is prevented, since

[5] EO, L.R. 281.0.

new insurance claims may be submitted after the opening of the insolvency proceedings, in the absence of a “final cut-off date”.

29. Further, the referring Court considers that the existence in parallel of the VersAG and the KO raises various questions of a procedural nature. The protective provisions of the VersAG (and the Directive), which are intended to privilege insurance claims, appear to contradict the general insolvency rules concerning rights to separation. An isolated examination of the KO on the right to separation shows that the reference inserted in the VersAG to Article 45 KO could, in practice, lead to problems or unanticipated results, which are probably not desired, in particular by the Directive. According to the referring Court, if the provisions of the EO 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 they asserted their claim, 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 VersAG, 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.

30. 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 uniform (*pro rata*) satisfaction of the (unsecured) creditors. In a situation of that kind, individual creditors who, by chance, are quicker off the mark should not be able to profit. That is ultimately also the aim of the insolvency procedure, according to which claims have to be lodged within the deadline for lodging claims, these are then 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 no provision for the lodging of claims or a deadline for such, rather any claim 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.

31. According to the referring Court, in 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, in this regard, 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

the framework of insolvency proceedings no formal procedure exists for the lodging and verification of rights to separation.

32. Consequently, it appears to the referring Court that there is a conflict of objectives. The VersAG 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, although, in this connection, a provision setting out the hierarchy, according to which individual creditors with insurance claims are to be satisfied, is absent and, for that reason, 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 KO, as rights to separation, the 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.

33. By letter of 22 March 2019 the referring Court requested the Court to give an advisory opinion and to apply the accelerated procedure provided for in Article 97a of the Rules of Procedure ("RoP"). The following questions were referred:

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[6] 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

[6] Article 31 VersVG.

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?

34. By an order of 12 April 2019, the President of the Court held that the case was not a matter of exceptional urgency and therefore denied the referring court's request to apply the accelerated advisory opinion procedure.

IV Written observations

35. In accordance with Article 20 of the Statute of the Court and Article 97 RoP, written observations have been received from:

- Gable, represented by the insolvency administrator BWB Rechtsanwälte AG Attorneys at Law Ltd;

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

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

- the European Commission ("the Commission"), represented by Hélène Tserepa-Lacombe and Nicola Yerrell, acting as Agents.

V Summary of the arguments submitted

Gable

36. With regard to Question 1(a), Gable submits that the referring court seeks to raise the issue of contingent claims in cases of insolvency. In insolvency proceedings, the insolvency administrator is confronted with the issue of how to deal with contingent claims that are lodged. A contingent claim involves the assertion of future loss or damage which may (or may not) materialise. The occurrence of damage is not known. Establishing legal grounds for the claim cannot be successful as it is unclear whether loss or damage even exists. Furthermore, the loss and damage and hence the amount of the claim cannot be quantified, in particular, for insurance policies that do not include any upper limits on liability. Thus, the lodging of such contingent claims must be denied as there are no indications of any actual loss or damage.

37. Gable notes that contingent claims must be distinguished first from deferred claims, which are claims that are not yet due but are treated as due in the event of insolvency. Contingent claims must also be distinguished from indeterminate claims. These (non-contingent) claims are definite except for the amount involved. The liability, which is still anticipated, has in principle already arisen, its amount simply cannot yet be determined. In insolvency, indeterminate claims must be lodged with their estimated value.

38. Gable considers that the wording “some elements of the debt are not yet known” in Article 268(1)(g) of the Directive does not refer to contingent claims of the kind described above. Rather the purpose of that phrase is to prevent a claim losing its status as a privileged insurance claim merely because some elements are not known, for example, the amount of the loss and damage in the case of an indeterminate claim. However, if the occurrence of damage itself is not yet known, any claim lacks legal grounds. In that case it is not only some elements of the debt that are not known. Rather, it is not known, even in principle, whether or not a claim exists. Contingent claims of that kind are not sufficiently determinate or determinable. If the condition has materialised, but some additional elements are, however, not known, the claim must nonetheless be treated as a (privileged) insurance claim.

39. Regarding Question 1(b), Gable notes that, in accordance with Article 31(1) VersVG, in the case of an insurance undertaking’s liquidation, by operation of law, all insurance contracts shall cease to apply on the expiry of a period of four weeks calculated from the date on which the opening of the liquidation proceedings is published. Consequently, at the latest on 16 December 2016, all insurance contracts with Gable were cancelled.

40. Gable contends that, as Article 268(1)(g) of the Directive does not contain any rules on how claims arise, are determined and lodged, the question of whether, in the framework of insolvency proceedings, a claim must in principle have arisen, been determined and/or

admitted by a certain date, in order to qualify as a (privileged) insurance claim cannot be answered on the basis of the Directive. However, a claim must have arisen, at least in principle, by the date on which the insolvency proceedings are opened and/or the relevant insurance contract is cancelled. If this is not the case, insurance cover is entirely absent.

41. Consequently, Gable submits that the answer to the question of whether, in addition to the claim in principle arising, the claim must also be determined or even admitted in order to qualify as an insurance claim entitling its holder to payment of an insurance benefit, depends on the terms of the relevant insurance contract and/or on the national law governing the contract. This is for the insolvency administrator to determine, who must verify the claims that have been lodged.

42. With regard to Question 1(c), Gable observes that the Directive is silent on the temporal extent of insurance policies in the event of insolvency. Correspondingly, it does not provide for any temporal limitation on the possibility for insurance claims to arise after the opening of insolvency proceedings. In this respect, Gable repeats its previous contention, that the insurance claim must have arisen and/or the underlying loss or damage must have occurred, at least in principle, before the insolvency proceedings were opened and/or the insurance contract was cancelled. Such claims must be regarded as privileged insurance claims, even after the opening of insolvency proceedings and/or the cancellation of the insurance contract, subject to the loss and damage and hence the claim in principle having arisen before the date mentioned. Discovery and finally lodging does not, however, take place until after such date.

43. As to Question 1(d), Gable argues that the repayment of premiums owed by an insurance undertaking because an insurance contract was cancelled after the opening of insolvency proceedings are, in principle, justified (subject to review in an individual case) and should thus qualify as insurance claims. Article 268(1)(g) of the Directive expressly sets out that such claims enjoy a privileged status as insurance claims. In other words, the notion of the cancellation of the contract does not refer (simply) to a date before the opening of insolvency proceedings but also to cases where by force of legislation insurance contracts are cancelled because insolvency proceedings have been opened.

44. Turning to the second question referred, Gable contends that the Directive does not contain any prohibition or limitation of a national procedural rule (in insolvency situations) that allows for a judicial composition in relation to individual insurance claims. Consequently, a national rule or approach of that kind must be permissible under European law, provided that the requirements of the Directive are observed. For example, a judicial composition may not curtail the privileging of insurance claims.

45. Finally, as regards the third question referred, Gable considers that the question concerns core principles of substantive and procedural insolvency law.

46. Gable argues that the reference in Article 161 VersAG to a special estate provided for in Article 45 KO must be understood, with a view to achieving an interpretation in conformity with the Directive, as meaning that the assets intended to cover the technical provisions, as a new category in the insolvency, simply constitute an estate for satisfying claims from which the insurance claims are satisfied on a pro rata basis. Only on that basis is the requirement of priority satisfaction for insurance claims ensured. Having regard to national and European requirements, this cannot mean, however, that core principles of the insolvency procedure, which also aim to protect insurance creditors, are overruled. This includes, in particular, the principle of equal treatment.

47. Gable submits that, viewed in isolation, the reference to Article 45 KO could in practice lead to problems or unanticipated results, intended neither by the Directive nor by the Liechtenstein legislature on adopting the VersAG. If the provisions of the EO were to apply to the ranking of the claims that must be satisfied from the special estate provided for in Article 161 VersAG, the effects of the opening of the insolvency proceedings provided for in Article 15 et seq. KO would not apply in relation to insurance claims. Rather, the principle of priority would apply, so that, in accordance with the date on which they asserted their claim, individual creditors of insurance claims could enforce priority satisfaction to the detriment of other creditors of insurance claims despite the fact that insolvency proceedings are governed by the principle of equal treatment of creditors.

48. Gable interprets the reference to Article 45 KO, inserted in the VersAG as a result of the implementation of the Directive, to mean that the insurance claims are secured with a right to priority and, hence, must be satisfied as a priority from the special estate. The individual insurance creditors must be treated equally among themselves. The privileging of the insurance creditors operates “only” in relation to the lower-ranked insolvency creditors (who may only participate in the special estate if anything of the special estate remains once the privileged insurance creditors have been satisfied), whereas within the group of privileged insurance creditors the insolvency law principle of equal treatment must be observed also in relation to the special estate.

49. The adoption of any other perspective would lead to undesired and impracticable results. Were the effects of opening the insolvency proceedings under Article 15 et seq. KO not to apply to insurance claims, insurance creditors could enforce their claims according to the rules of the EO (principle of priority) such that, depending on the date on which they asserted their claim, they could enforce early satisfaction. Other privileged creditors could be left empty-handed because the special estate has been exhausted. That would result in an unequal treatment of insurance creditors holding equally-ranked insurance claims. The protection of the creditors of insurance claims would be influenced by precisely such criteria as the law seeks to prevent.

50. Gable proposes that the Court should answer the questions referred as follows:

> *[1](a) The decisive criterion (for assessing whether some elements of the debt are not yet known) lies in the determination of whether or not the conditions for the payment of an insurance benefit are satisfied, subject to the proviso that the loss or damage must have occurred and hence the claim must in principle have arisen.*
>
> *[1](b The answer depends on the provisions of the specific insurance contracts at issue, subject to the proviso that the loss or damage must have occurred and hence the claim must in principle have arisen by the date on which the insolvency proceedings were opened and/or the date on which the insurance contracts were cancelled.*
>
> *[1](c) The question must be answered in the negative.*
>
> *[1](d) Under Article 268(1)(g) second subparagraph of the Directive also the premium owed by an insurance undertaking because an insurance contract was cancelled after the opening of insolvency proceedings qualifies as an insurance claim.*
>
> *[2] Article 268(1)(d) of the Directive does not preclude a national procedural provision that allows for a judicial composition in relation to individual insurance claims.*
>
> *[3] Article 275(1)(a) of the Directive precludes a national rule on the lodging, verification and admission of claims in insolvency that results in insurance creditors being treated unequally.*

The Liechtenstein Government

51. With regard to Question 1(a), the Liechtenstein Government submits, that it follows from the wording of Article 268(1)(g) of the Directive that an insurance claim is a claim against the insurance undertaking for insurance money which is owed following the occurrence of an insured event. Hence, a claim arises in principle when the insured event has occurred. It is the insurance contract that defines the insured event triggering liability under the policy in so-called insuring clauses. Whether and to what extent an insurance undertaking owes insurance money must therefore be determined in accordance with the insurance contract.

52. The Liechtenstein Government contends, that pursuant to Title IV of the Directive it is clear that the term “insurance claim” according to Article 268(1)(g) only covers insurance money owed by an insurance undertaking for an insured event which has

occurred before the automatic termination of the insurance contract after the opening of the insolvency proceeding in accordance with the applicable national law.

53. Regarding Question 1(b), the Liechtenstein Government submits that the definition in Article 268(1)(g) of the Directive does not distinguish between events that were reported and those that were not. Insurance money is owed by the insurance undertaking irrespective of whether the insured event which occurred has been reported by the claimant to the insurance undertaking or not. Thus, amounts owed by the insurance undertaking for events that have occurred but not yet been reported are insurance claims within the meaning of Article 268(1)(g) of the Directive. Further, Article 268(1)(g) of the Directive does not distinguish between insurance claims admitted by the insurance undertaking or not. Hence, amounts owed by the insurance undertaking for events that have occurred but not yet been admitted by the insurance undertaking are insurance claims within the meaning of Article 268(1) of the Directive. Finally, Article 268(1)(g) of the Directive does not distinguish between claims lodged with the insolvency court or not. However, if claimants fail to lodge their claims with the insolvency court, the applicable insolvency law may provide for preclusion of the claims (see Article 272 of the Directive). This issue is subject to the relevant national law and not regulated by the Directive (see Article 274(2)(f) and (g) of the Directive). With regard to Liechtenstein, the requirement to lodge a claim with the insolvency court is laid down in Article 156 and Article 161(5) VersAG.

54. With regard to Question 1(c), the Liechtenstein Government notes that Article 31(1) of the VersVG provides for automatic termination of the insurance contract four weeks after the opening of the insolvency proceeding has been published. It follows that policyholders owe premiums for this additional insurance period, that insured events occurring during this period are covered under the insurance contract and that insurance undertakings must make technical provisions for this final insurance period. Therefore, the Liechtenstein Government submits that it appears reasonable and fair to treat claims for insurance money arising from the insurance contract after the opening of the insolvency proceeding but before the automatic termination of the insurance contract in accordance with the applicable national law as privileged insurance claims within the meaning of the Directive.

55. As to Question 1(d), the Liechtenstein Government submits that Article 268(1)(g) second subparagraph of the Directive explicitly requires that the non-conclusion or cancellation of the insurance contract takes place before the opening of the winding-up proceeding. Thus, claims for repayment of premiums due to a termination of an insurance contract which takes place after the opening of the winding-up procedure will not be considered as privileged insurance claims under the Directive.

56. However, the Liechtenstein Government notes that the VersVG provides for automatic termination of the insurance contract four weeks after the opening of the insolvency proceeding has been published, and as policy holders owe premiums for this

additional insurance period, it appears reasonable and fair to treat claims for the repayment of premiums in relation to this additional period (from the opening of the insolvency proceeding until the automatic termination of the insurance contract in accordance with the applicable national law) as privileged insurance claims within the meaning of the Directive.

57. Turning to the second question referred, the Liechtenstein Government notes that the term "winding-up proceedings" as defined in Article 268(1)(d) of the Directive includes proceedings which are "terminated by a composition or other analogous measure". As a consequence, such proceedings are considered "winding-up proceedings" and are subject to Title IV of the Directive. As a result, the definition provided in Article 268(1)(d) of the Directive determines the substantial scope of Title IV (reorganisation and winding-up of insurance undertakings) of the Directive, i.e. which national proceedings will be submitted to it and which will not.

58. However, the Liechtenstein Government argues that, in giving a definition only, Article 268(1)(d) of the Directive by no means prescribes that a judicial composition in relation to (individual) insurance claims is also possible independently of, or contrary to, national procedural rules governing winding-up proceedings. This conclusion also follows from Article 274(2)(i) of the Directive according to which the conditions for and the effects of closure of winding-up proceedings, in particular composition, is determined by the law of the home Member State. In this context it should also be pointed out that recital 122 of the Directive states that winding-up proceedings may terminate with composition or other analogous measures.

59. Further, the Liechtenstein Government contends that the term "winding-up proceedings", as defined in Article 268(1)(d) of the Directive, is very broad in order to cover various proceedings with specific characteristics provided for in the national law of the Member States. However, and in conclusion, the Directive does not require the Member States to provide judicial composition in relation to (individual) insurance claims. As a consequence, the Directive does not provide any requirements for such composition.

60. As regards the third question referred, the Liechtenstein Government submits that the question is based on the assumption that the application of Article 161 VersAG by referring to Article 45 KO may lead to an unequal treatment of insurance creditors. The Liechtenstein Government maintains that this concern regarding an unequal treatment of insurance creditors is, however, unfounded as insurance creditors do not have the legal status of a separation creditor but rather of an insolvency creditor.

61. The Liechtenstein Government argues that the legal basis for the satisfaction of insurance claims in insolvency proceedings is Article 161 VersAG, which implements in particular Article 275 of the Directive. The KO applies in a subsidiary manner (see Article 1(7) KO).

62. According to Article 161(1) VersAG, insurance creditors are granted a "Superclass" which proceeds the first, second, third and fourth insolvency classes as laid down in Articles 48-51 KO. The "Superclass" is restricted to a special pool of insolvency assets ("Sondermasse") which consists of assets representing the technical provisions. The "Superclass" insurance claims take absolute precedence over any other claim on the insurance undertaking with regard to the assets representing the technical provisions as a special pool of insolvency assets. Hence, Article 161(1) VersAG ensures the preferential treatment of insurance creditors as required in Article 275(1) of the Directive. If the claims of the insurance creditors cannot be fully covered by this pool of insolvency assets, the rest of the claims become part of the first class claims according to Article 161(4) VersAG.

63. The reference to Article 45 KO in Article 161 VersAG and herewith the reservation of a special pool of insolvency assets for the insurance creditors does not lead to the conclusion that the insurance creditors become separation creditors within the meaning of the KO. In fact, insurance creditors are insolvency creditors ("Konkursgläubiger") rather than separation creditors.

64. Article 161 VersAG (only) grants a preferential claim to insurance creditors with regard to a special pool of insolvency assets. This preferential treatment does not aim to classify insurance creditors as separation creditors rather than insolvency creditors.

65. Whereas a pool of special insolvency assets is divided to separation creditors according to the principle of priority pursuant to the EO (see Article 46(2) KO), insurance creditors as insolvency creditors are satisfied proportionally according to Article 47 KO. This means that insurance creditors are treated equally in the insolvency proceeding of an insurance undertaking. A pro rata satisfaction of the insurance creditors is guaranteed.

66. In conclusion, Article 161 VersAG in conjunction with Article 45 KO must be interpreted as meaning that insurance creditors are insolvency creditors whose claims are satisfied preferentially by a special pool of insolvency assets. The insurance creditors as insolvency creditors are satisfied proportionately. Hence, equal treatment of the insurance creditors is guaranteed by the applicable national law.

67. The Liechtenstein Government proposes that the Court should answer the questions referred as follows:

> *[1](a) Article 268(1)(g) of the Directive is to be interpreted as meaning that "insurance claim" includes "an amount set aside for those persons, when some elements of the debt are not yet known", in so far as an insured event occurred and herewith an insurance claim has arisen in principle before automatic termination of the insurance contract after the opening of the insolvency proceeding in accordance with the applicable national law, irrespective whether some elements of the debt like the amount of the claim is not yet known. It is up for the national court to decide with a view to the respective insurance contract whether a claim has*

arisen in principle before automatic termination of the insurance contract after the opening of the insolvency proceeding in accordance with the applicable national law, and is therefore an insurance claim within the meaning of the Directive.

[1](b) Article 268(1)(g) of the Directive is to be interpreted as meaning that an insurance claim is an amount which is owed by an insurance undertaking following the occurance of an insured event before automatic termination of the insurance contract after the opening of the insolvency proceeding in accordance with the applicable national law, irrespective whether (a) the insured event was reported by the claimant to the insurance undertaking, (b) the insurance claim has been admitted by the insurance undertaking or (c) the insurance claim has been lodged with the insolvency court. National law may provide for a preclusion of claims not lodged with the insolvency court. However, insurance claims evidenced in the books of the insurance undertaking are deemed lodged pursuant to Article 161(5) VersAG.

[1](c) Since subquestion b) of the first question has been answered to the affirmative, subquestion c) does not need to be answered.

[1](d) According to the second subparagraph of Article 268(1)(g) of the Directive, not only 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 be considered an insurance claim within the meaning of the Directive, but also the premium owed by an insurance undertaking arising from an insurance contract after the opening of the insolvency proceeding but before the automatic termination of the insurance contract in accordance with the applicable national law.

[2] Article 268(1)(d) of the Directive cannot 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. As a consequence, the Directive does not provide any requirements for such composition.

[3] Article 275(1)(a) and Article 274(2)(g) of the Directive must be interpreted as not precluding a national provision which guarantees the equal treatment of insurance creditors in a winding-up proceeding of an insurance undertaking.

ESA

68. ESA understands that with its three separate sets of questions the referring Court is in essence seeking to ascertain the following two issues: First, do insurance claims enjoy precedence over other claims in insolvency proceedings, in particular over other "rights to separation"? Second, at what stage of insolvency proceedings do insurance claims have to be submitted and does the Directive provide for any time-limits or guidance in that regard?

69. As regards the first question, ESA notes that the Directive stresses that it is of the 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 are protected in winding-up proceedings. In order to achieve that objective, EEA States are provided with a choice between equivalent methods, described in Article 275(1)(a) and (b) of the Directive, to ensure special treatment for insurance claims.

70. ESA submits that Liechtenstein implemented the option provided for in Article 275(1)(a) of the Directive, which is unequivocal in that it requires that with regard to assets representing technical provisions, insurance claims must take *absolute precedence* over *any other claim* on the insurance undertaking. According to ESA, this absolute precedence over any other claim on the insurance undertaking also includes other rights to separation.

71. Concerning insurance premiums, ESA notes that Article 268(1)(g), second subparagraph, of the Directive clarifies that premiums owed by an insurance undertaking, as a result of the cancellation of an insurance contract, before the opening of the insolvency proceedings, shall also be considered as insurance claims. Thus, according to ESA, premiums owed by Gable before the opening of the insolvency proceedings can be considered as insurance claims and, consequently, enjoy precedence over other claims.

72. ESA observes that the Directive clarifies that regardless of the choice between equivalent methods to ensure special treatment for insurance creditors, none of those methods prevent EEA States from establishing a ranking between different categories of insurance claims. Thus, ESA asserts, Liechtenstein law can establish a ranking between the different categories of insurance claims.

73. Further, ESA submits that the Directive mentions that an appropriate balance should be ensured between the protection of insurance creditors and other privileged creditors protected under the legislation of the EEA State concerned. However, ESA asserts that the Directive does not further specify how this appropriate balance should be achieved. Therefore, EEA States enjoy a certain margin of discretion in laying down the specific conditions for achieving an appropriate balance between the protection of insurance creditors and other privileged creditors.

74. Therefore, ESA submits that Article 275(1)(a) of the Directive must be interpreted to the effect that concerning assets representing technical provisions, insurance claims take absolute precedence over any other claims on the insurance undertaking.

75. Turning to the second question, ESA submits that the Directive clarifies that all conditions for the opening, conduct and closure of insolvency proceedings are governed by the law of the home EEA State of the insurance undertaking.

76. ESA observes that it follows from Article 273(1) of the Directive that only the competent authorities of the home EEA State are entitled to take a decision concerning the opening of insolvency proceedings with regard to an insurance undertaking including its branches in other EEA States. Further, Article 274(1) of the Directive reiterates that the decision to open insolvency proceedings with regard to an insurance undertaking, the insolvency proceedings and their effects are governed by the law applicable in the home EEA State. Consequently, it is ESA's view that the insolvency proceedings and their effects concerning Gable are governed by Liechtenstein law.

77. ESA contends that Article 274(2) of the Directive only requires that some essential elements of the insolvency proceedings are laid down in national law. However, the Directive does not further specify how these conditions are to be applied. Consequently, in ESA's view, EEA States enjoy a certain margin of discretion in laying down the specific conditions concerning the *effects of the insolvency proceedings on current contracts* and the *rules governing the lodging* of claims.

78. In addition, ESA continues, Article 281(2) of the Directive requires that for insurance claims, the notice to the insurance holders must also indicate the general effects of the insolvency proceedings on the insurance contracts, in particular, the date on which the insurance contracts or the operations will cease to produce effects and the rights and duties of insured persons with regard to the contract or operation. However, the Directive does not provide any specific time-limits by which insurance contracts will cease to produce effects. Consequently, it is up to the EEA States to lay down in national law these specific aspects.

79. As already outlined above, it is for national law to determine the *effects of the insolvency proceedings on current contracts*. The same applies to the criteria concerning the existence of events which determine whether an insurance claim exists at all. The Directive does not provide for any guidance in that respect. Consequently, EEA States enjoy a certain margin of discretion in laying down the specific conditions concerning the effects of the insolvency proceedings on current contracts and whether it is sufficient that the events giving rise to the loss or damage took place before the opening of the insolvency proceedings, in order to have an insurance claim which needs to be considered in insolvency proceedings, as long as these specific conditions do not undermine the effective application of the Directive.

80. In that regard, ESA observes that the cessation of insurance contracts on the expiry of a period of four weeks from the date on which the opening of the liquidation proceedings was published, should not imply that insurance claims can no longer be submitted after that deadline. Otherwise insurance claims, which take precedence over other claims, would be in a worse position compared to other claims, which can be submitted between 30 and 90 days after the date on which bankruptcy proceedings have been opened and even after that initial deadline. In other words, the cessation of insurance contracts should not have any *ex ante* effect on the insurance claims.

81. ESA also observes that the objective of the Directive to prioritise insurance claims over all other claims, with regard to technical provisions, may endorse an approach whereby it would be sufficient that the events, giving rise to the loss or damage, took place before the opening of the insolvency proceedings. Bearing in mind that the technical provisions have been built-up to cover potential liabilities arising from these insurance contracts. In addition, requiring that the loss or damage should also have occurred within a period of four weeks from the date on which the opening of the liquidation proceedings was published, seems rather short and may thereby favour other claims over insurance claims, which would run counter to the objective of the Directive to give precedence to insurance claims.

82. ESA further observes that within insurance law, the term "insured event" is typically understood as an event by which insurance benefits are triggered. The "insured event" is therefore the event whose risk the object of the insurance contract is secured against. According to ESA, this definition supports the view that it would be sufficient that the events, giving rise to the loss or damage, took place within a period of four weeks calculated from the date on which the opening of the liquidation proceedings was published.

83. Finally, ESA submits that the Directive provides that other EEA States affected by the insolvency proceedings, as well as known creditors and holders of insurance claims have to be sufficiently informed about the opening and consequences of pending insolvency proceedings. This, according to ESA, follows in particular from Articles 273(3), 280(1), 281 and 283(1) of the Directive. In ESA's view, the referring court has not indicated whether these important formalities and publication requirements have been observed. It is therefore for the referring Court to determine whether the formal requirements stemming from these provisions of the Directive have been respected.

84. Consequently, ESA submits that the second question should be answered to the effect that the Directive does not provide any time-limits or guidance on when insurance claims have to be submitted during insolvency proceedings and it is consequently for the national law to provide such time-limits, as long as they do not undermine the effective application of the Directive.

85. ESA proposes that the Court should answer the questions as follows:

> *1. Article 275(1)(a) of the Directive must be interpreted to the effect that concerning assets representing technical provisions, insurance claims take absolute precedence over any other claims on the insurance undertaking.*
>
> *2. The Directive does not provide any time-limits or guidance on when insurance claims have to be submitted during insolvency proceedings and it is consequently for the national law to provide such time-limits, as long as they do not undermine the effective application of the Directive.*

The Commission

86. At the outset, the Commission expresses certain doubts, in the light of Article 34 of the Surveillance and Court Agreement ("SCA"), as to whether the Court is "called upon to give judgment in proceedings intended to lead to a decision of a judicial nature".[7] In particular, it argues that it is not clear whether there is a legal dispute to be decided, and that the national court can be regarded as exercising a judicial function.[8] However, as the Princely Court has also emphasised in its request, the purpose of Article 34 SCA is to establish cooperation between the EFTA Court and national courts and tribunals, in order to provide assistance and to ensure the homogeneous interpretation of EEA law. It follows that a strict interpretation should not be applied to the question of whether a requesting body in a specific case exercises a judicial or an administrative function.[9]

87. As regards the first question, the Commission submits that according to the express definition contained in Article 268(1)(g) of the Directive, there are four cumulative conditions for an "insurance claim" to exist, namely: 1) an amount must be 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; and 4) on the basis of an insurance contract or an operation assimilated to an insurance contract. No mention is made of any form of time-limit or other temporal restriction.

88. The Commission submits that the conditions for the opening, conduct and closure of winding-up proceedings are governed by the national law applicable in the home State. Indeed, this is stated in Article 274(1) and the corresponding point 125 of the recital of the Directive, and further evidenced in the terms of Article 274(2) of the Directive which

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[7] Reference is made inter alia to the judgment in *Epitropos tou Elegktikou Sinedriou*, C-363/11, EU:C:2012:825, paragraph 19.

[8] Reference is made to the judgment in *Job Centre*, C-111/94, EU:C:1995:340, paragraph 11.

[9] Reference is made to Case E-23/13, *Hellenic Capital Market Commission* [2014] EFTA Ct. Rep. 88, paragraphs 33-35.

contains a detailed list of matters to be determined by the law of the home State. This list expressly includes under point (f) “the treatment of claims arising after the opening of winding-up proceedings”. It follows that such claims are included within the scope of the Directive, and the notion of an "insurance claim" cannot be limited to claims that have arisen, been admitted or lodged before the opening of winding-up proceedings.

89. With regard to the second question, the Commission submits that it is clear from the plain wording of Article 268(1)(d) of the Directive that a central condition for the existence of “winding-up proceedings” is that proceedings to realise the assets of the insurance undertaking and distribute the proceeds "necessarily involve any intervention by the competent authorities". The subsequent phrase (and the express use of the term “including”) merely clarifies that this condition will also be satisfied where the proceedings are terminated by a composition or other analogous measure.

90. Further, the Commission reiterates that the conditions for the opening, conduct and closure of winding-up proceedings are governed by the national law applicable in the home State. It is accordingly a matter for national law whether (or not) a judicial composition procedure should be offered in winding-up proceedings relating to insurance claims within the meaning of the Directive. This conclusion is further reinforced by the terms of Article 274(2)(i) of the Directive.

91. As to the third question submitted, the Commission argues that Article 275 of the Directive is intended to guarantee the protection of policyholders and beneficiaries by ensuring the precedence of insurance claims over other claims against the insurance undertaking. However, the Article does not address the additional question of the relationship between different creditors with insurance claims, but is limited to the relationship between creditors of insurance claims and other claims.

92. The Commission proposes that the Court should answer the questions as follows:

> *1. The definition of an “insurance claim” in Article 268(1)(g) of Directive 2009/138/EC should be interpreted as not requiring such a claim to have arisen, been admitted or lodged before the opening of the winding-up proceedings, nor as setting a time-limit from the opening of those proceedings for such a claim to arise. In accordance with Article 274(2)(f) of Directive 2009/138/EC, EEA States are required to determine the treatment of claims arising after the opening of winding-up proceedings as a matter of national law.*
>
> *2. According to the definition of “winding-up proceedings” in Article 268(1)(d) of Directive 2009/138/EC, it remains a matter for EEA States to decide whether or not to provide for the option of a judicial composition in relation to insurance claims in winding-up proceedings.*

3. Article 275(1)(a) of Directive 2009/138/EC does not preclude the application of national rules on the lodging, verification and admissibility of insurance claims which result in differences of treatment between creditors holding such claims, provided that those rules ensure that insurance claims take precedence over other claims and comply with the requirements of Article 282 of Directive 2009/138/EC.

Páll Hreinsson

Judge Rapporteur