JUDGMENT OF THE COURT

25 February 2021*

(*State liability – Directive 2009/138/EC – Supervisory obligations – Insurance claims – Policy holders and beneficiaries*)

In Case E-5/20,

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 Supreme Court of the Principality of Liechtenstein (*Fürstlicher Oberster Gerichtshof*), in the case between

SMA SA and Société Mutuelle d'Assurance du Bâtiment et des Travaux Publics

and

Finanzmarktaufsicht Liechtenstein,

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), in particular Articles 27 and 28, and its predecessors Directive 73/239/EEC, Directive 88/357/EEC and Directive 92/49/EEC,

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:

– SMA SA and Société Mutuelle d'Assurance du Bâtiment et des Travaux Publics ("the Applicants"), represented by Dr Karl Mumelter, Advocate;

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

– Finanzmarktaufsicht Liechtenstein ("the FMA"), represented by Nicolas Reithner and Dr Fabian Rischka, lawyers;

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

– the EFTA Surveillance Authority ("ESA"), represented by Romina Schobel, Ingibjörg-Ólöf Vilhjálmsdóttir, Michael Sánchez Rydelski and Carsten Zatschler, acting as Agents; and

– the European Commission ("the Commission"), represented by Hélène Tserepa-Lacombe and Joan Rius Riu, acting as Agents,

having regard to the Report for the Hearing,

having heard oral argument of the Applicants, represented by Dr Karl Mumelter and Thomas Perroud; the FMA, represented by Nicolas Reithner; the Liechtenstein Government, represented by Dr Andrea Entner-Koch; ESA, represented by Romina Schobel; and the Commission, represented by Joan Rius Riu; at the remote hearing on 24 November 2020,

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") (OJ 2009 L 335, p. 1) was incorporated into the Agreement on the European Economic Area ("the EEA Agreement" or "EEA") by Decision of the EEA Joint Committee No 78/2011 of 1 July 2011 (OJ 2011 L 262, p. 45), which added it as point 1 of Annex IX (Financial Services) to the EEA Agreement. Constitutional requirements were indicated by Norway, Iceland and Liechtenstein. The requirements were fulfilled by 23 October 2012 and the decision entered into force on 1 December 2012.

2 Recital 16 of the Directive reads:

> *The main objective of insurance and reinsurance regulation and supervision is the adequate protection of policy holders and beneficiaries. The term beneficiary is intended to cover any natural or legal person who is entitled to a right under an*

insurance contract. Financial stability and fair and stable markets are other objectives of insurance and reinsurance regulation and supervision which should also be taken into account but should not undermine the main objective.

3 Recital 17 of the Directive reads:

The solvency regime laid down in this Directive is expected to result in even better protection for policy holders. It will require Member States to provide supervisory authorities with the resources to fulfil their obligations as set out in this Directive. This encompasses all necessary capacities, including financial and human resources.

4 Article 27 of the Directive, entitled "Main objective of supervision", reads:

Member States shall ensure that the supervisory authorities are provided with the necessary means, and have the relevant expertise, capacity, and mandate to achieve the main objective of supervision, namely the protection of policy holders and beneficiaries.

5 Article 28 of the Directive, entitled "Financial stability and pro-cyclicality", reads:

Without prejudice to the main objective of supervision as set out in Article 27, Member States shall ensure that, in the exercise of their general duties, supervisory authorities shall duly consider the potential impact of their decisions on the stability of the financial systems concerned in the European Union, in particular in emergency situations, taking into account the information available at the relevant time.

In times of exceptional movements in the financial markets, supervisory authorities shall take into account the potential pro-cyclical effects of their actions.

6 Article 29(1) of the Directive, entitled "General principles of supervision", reads:

Supervision shall be based on a prospective and risk-based approach. It shall include the verification on a continuous basis of the proper operation of the insurance or reinsurance business and of the compliance with supervisory provisions by insurance and reinsurance undertakings.

7 First Council Directive 73/239/EEC of 24 July 1973 on the coordination of laws, regulations and administrative provisions relating to the taking-up and pursuit of the business of direct insurance other than life assurance ("the First Non-Life Insurance Directive") (OJ 1973 L 228, p. 3) was included in Annex IX to the EEA Agreement from the entry into force of the EEA Agreement. The First Non-Life Insurance Directive was repealed from 1 January 2016.

8 The second recital of the First Non-Life Insurance Directive read:

> *Whereas in order to facilitate the taking-up and pursuit of the business of insurance, it is essential to eliminate certain divergencies which exist between national supervisory legislation; whereas in order to achieve this objective, and at the same time ensure adequate protection for insured and third parties in all the Member States, it is desirable to coordinate, in particular, the provisions relating to the financial guarantees required of insurance undertakings;*

9 Second Council Directive 88/357/EEC of 22 June 1988 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance and laying down provisions to facilitate the effective exercise of freedom to provide services and amending Directive 73/239/EEC ("the Second Non-Life Insurance Directive") (OJ 1988 L 172, p. 1) was included in Annex IX to the EEA Agreement from the entry into force of the EEA Agreement. The Second Non-Life Insurance Directive was repealed from 1 January 2016.

10 Council Directive 92/49/EEC of 18 June 1992 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance and amending Directives 73/239/EEC and 88/357/EEC ("the Third Non-Life Insurance Directive") (OJ 1992 L 228, p. 1) was incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 7/1994 of 21 March 1994 (OJ 1994 L 160, p. 1), which added it as point 7a of Annex IX to the EEA Agreement. The Third Non-Life Insurance Directive was repealed from 1 January 2016.

11 Recital 17 of the Third Non-Life Insurance Directive read:

> *Whereas within the framework of an integrated insurance market policyholders who, by virtue of their status, their size or the nature of the risks to be insured, do not require special protection in the Member State in which a risk is situated should be granted complete freedom to choose the law applicable to their insurance contracts;*

12 Recital 19 of the Third Non-Life Insurance Directive read, in extract:

> *Whereas within the framework of an internal market it is in the policyholder's interest that he should have access to the widest possible range of insurance products available in the Community so that he can choose that which is best suited to his needs; ...*

13 Recital 21 of the Third Non-Life Insurance Directive read:

> *Whereas if a policyholder is a natural person, he should be informed by the insurance undertaking of the law which will apply to the contract and of the arrangements for handling policyholders' complaints concerning contracts;*

National law

14 Article 1(2) of the Insurance Supervision Act of 12 June 2015 (*Versicherungs-aufsichtsgesetz, VersAG neu*) reads:

> *Its purpose is, in particular, to protect insured persons against the insolvency risks of insurance undertakings and against abuses as well as to ensure confidence in the Liechtenstein insurance and finance centre.*

15 Article 1 of the Insurance Supervision Act of 6 December 1995 *(Versicherungs-aufsichtsgesetz, VersAG alt*) reads:

> *This Act describes the organisation and content of insurance supervision and has the purpose, in particular, of protecting insured persons as well as confidence in the Liechtenstein insurance and finance system.*

16 Article 4 of the Act of 18 June 2004 on the Financial Market Authority (*Finanzmarktaufsichtsgesetz*) ("the Financial Market Authority Act") reads:

> *The FMA ensures the stability of the Liechtenstein financial market, the protection of customers, the prevention of abuses, as well as the implementation of and compliance with recognised international standards.*

17 Under point (o) of Article 5(1) of the Financial Market Authority Act, the FMA is responsible, inter alia, for the oversight and the implementation of the Insurance Supervision Acts.

II Facts and procedure

18 The Applicants are insurance companies established under French law and provide insurance under the "Décennale system" in France.

19 Gable Insurance AG ("Gable Insurance") was an insurance company established under Liechtenstein law having its seat in Liechtenstein from 23 December 2005. The Court of Justice of the Principality of Liechtenstein (*Fürstliches Landgericht*) opened insolvency proceedings in relation to Gable Insurance on 17 November 2016. These proceedings are still pending.

20 According to the request, the Applicants are, and Gable Insurance was, active as insurers in France under the Décennale system. This system provides for the protection of the constructor in the case of construction works with several service providers. Under French law (Article 1792 et seq. of the French Civil Code), entrepreneurs involved in a construction project (construction firms, architects, etc.) are liable to the client, or purchaser, for damage and defects that may arise in the course of the construction work. This liability becomes statute-barred ten years after the acceptance of the construction works.

21 Under the Décennale system, the client takes out construction insurance. Depending on the case, a construction insurer must pay compensation to his client within 60 days, or 90 days, in an extrajudicial expedited procedure and independently of the final clarification of the actual person liable. The construction insurer pre-finances this compensation after which he has the right of recourse against the entrepreneur who is actually responsible (or his liability insurer) within the limits of the compensation paid. The construction entrepreneur (construction firm, architect, etc.) must take out liability insurance which covers his responsibility for damage and defects, which may occur during construction. Multiple entrepreneurs involved in the construction are jointly liable to the client.

22 The present case concerns proceedings brought by the Applicants before Liechtenstein courts against the FMA. The Applicants allege that the FMA failed to fulfil its supervisory obligations under the Insurance Supervisory Act with regard to Gable Insurance and is therefore ultimately responsible for losses incurred as a result of the insolvency of Gable Insurance. The Applicants also seek a declaration in relation to losses not yet quantifiable.

23 The Applicants claim to be creditors of Gable Insurance in three different capacities relating to the Décennale system. First, the claims of the Applicants result from their capacity as construction insurers who have recourse to Gable Insurance as the insurer of a person responsible for a construction work. Second, the Applicants, in their capacity as insurers of a person responsible for a construction work, have recourse to Gable Insurance, in its capacity as insurer of another person responsible for the construction work, by reason of joint and several liability. Third, the Applicants, in their capacity as insurers of a person responsible for a construction work, have recourse to Gable Insurance in its capacity as insurer of a subcontractor.

24 According to the request, it is common ground that the Applicants have not concluded an insurance contract with Gable Insurance to the extent relevant for the proceedings before the referring court. The Applicants are also not insured persons under an insurance contract concluded by a third party as policy holder with Gable Insurance. This excludes any possible reinsurance contracts, which are not the subject-matter of the proceedings before the referring court.

25 By judgment of 20 November 2019, the Princely Court of Appeal (*Fürstliches Obergericht)* rejected all claims brought by the Applicants without taking evidence. The Princely Court of Appeal concluded that the Applicants were not covered by the protective purpose of the Insurance Supervisory Act or of the Directive.

26 The Supreme Court of the Principality of Liechtenstein has to decide on the appeal brought by the Applicants against the judgment of the Princely Court of Appeal and decided to stay proceedings and make a request to the Court for an advisory opinion pursuant to Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice. The request, dated 8 May 2020, was registered at the Court on 20 May 2020.

27 Against this background, the Supreme Court of the Principality of Liechtenstein has referred the following questions to the Court:

> *1. Must 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) (Collection of EEA law (EWR-Rechtssammlung): Annex IX - 1.01), in particular Articles 27 and 28 thereof, and*
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> *Council Directive 92/49/EEC of 18 June 1992 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance and amending Directives 73/239/EEC and 88/357/EEC (third non-life insurance Directive), and the*
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> *Second Council Directive of 22 June 1988 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance and laying down provisions to facilitate the effective exercise of freedom to provide services and amending Directive 73/239/EEC (88/357/EEC), in particular Article 1(b), Article 7(1)(a) to (c), Article 10, Article 11(7) and Article 21 thereof, and the*
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> *First Council Directive of 24 July 1973 on the coordination of laws, Regulations and administrative provisions relating to the taking-up and pursuit of the business of direct insurance other than life assurance (73/239/EEC), in particular Articles 13 and 14 thereof,*
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> *be interpreted as meaning that these grant rights to creditors of a supervised direct insurance undertaking who are not policy holders, insured persons or beneficiaries of this insurance undertaking or other party to an insurance contract concluded with this insurance undertaking and to whom as injured third party also otherwise no direct right of action against this insurance undertaking as a result of an insurance law relationship is directly conferred and whose claims are owed not by reason of an insurance contract or another activity to which these legal bases are applicable in the framework of direct insurance but whose claims, such as those of the applicants as insurers of third party policy*

holders, are asserted as recourse claims, in the widest sense, directly against the supervised direct insurance undertaking, in the sense that the competent authority, such as, here, the defendant, has to exercise supervisory measures, which it must carry out under the directives cited, also in the interests of these creditors and on infringement of the corresponding obligations it is liable to the creditors for resulting losses.

2. Does the national implementation of the provisions of EEA law cited in Question 1 [corrected from the original: Question 4] by the national provisions of Article 1 of the Act of 6 December 1995 on the Supervision of Insurance Undertakings (Insurance Supervisory Act 1995 (Versicherungsaufsichtsgesetz; VersAG alt)), Article 1(2) of the Act of 12 June 2015 on the Supervision of Insurance Undertakings (Insurance Supervisory Act 2015 (Versicherungsaufsichtsgesetz; VersAG neu)) and Article 4 of the Act of 18 June 2004 on the Financial Market Authority (Financial Market Authority Act (Finanzmarktaufsichtsgesetz; FMAG)) fulfil the requirements for implementation and thus for its application and interpretation by national courts in the sense of such legal bases referred to in the case-law of the EFTA Court such as those required, inter alia, in Case E-3/15 Liechtensteinische Gesellschaft für Umweltschutz, paragraphs 33 et seq. and 74?

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

III Answer of the Court

29 By its first question, the referring court asks in essence whether the Directive and its predecessors confer rights on economic operators, such as the Applicants, that can be the basis for liability claims towards a competent supervisory authority, such as the FMA in the present case.

30 Liability of a supervisory authority for failure to fulfil its EEA law obligations must be assessed on the basis of the principle of State liability. According to the principle of State liability, an EEA State may be held responsible for breaches of its obligations under EEA law when three conditions are met: first, the rule of law infringed must be intended to confer rights on individuals and economic operators; second, the breach must be sufficiently serious; and, third, there must be a direct causal link between the breach of the obligation resting on the State and the damage sustained by the injured party (see Case E-7/18, judgment of 1 August 2019, *Fosen-Linjen*, paragraph 117 and case law cited).

31 Prior to the entry into force of the Directive, the First, Second and Third Non-Life Insurance Directives ("the predecessor directives") laid down harmonised rules for the insurance market. According to the request, Gable Insurance was granted authorisation to pursue non-life insurance activities on 23 December 2005 until insolvency proceedings in relation to Gable Insurance were opened on 17 November 2016. Consequently, the predecessor directives are relevant for this period in assessing whether EEA law conferred rights on economic operators such as the Applicants.

32 None of the predecessor directives provided for an express rule to the effect that economic operators such as the Applicants should benefit from particular protection under supervisory obligations.

33 Recital 2 of the First Non-Life Insurance Directive does mention protection for insured persons and "third parties". However, neither the Second nor the Third Non-Life Insurance Directives provided for any specific rights to such parties. Furthermore, recitals 17, 19 and 21 of the Third Non-Life Insurance Directive indicate that the predecessor directives were mainly intended to protect policy holders and insured persons, in addition to seeking harmonisation in the field of insurance.

34 It is against this background that the Court will proceed to consider the questions referred on the basis of Articles 27 and 28 of the Directive.

35 The first requirement for State liability provides that the rule of law infringed must be intended to confer rights on individuals and economic operators. It follows from Article 27 of the Directive that EEA States shall ensure that supervisory authorities are provided with the necessary means, and have the relevant expertise, capacity, and mandate to achieve the main objective of supervision, namely the protection of policy holders and beneficiaries. As also stated in recital 16 of the Directive, financial stability and fair and stable markets are other objectives which should also be taken into account but should not undermine the main objective. Recital 17 notes that the Directive's solvency regime is expected to result in even better protection for policy holders.

36 According to Article 28 of the Directive, supervisory authorities shall, in the exercise of their general duties, duly consider the potential impact of their decisions on the stability of the financial systems concerned in the EEA.

37 In the case before the referring court, the Applicants have argued that the FMA must ultimately be responsible for their losses incurred as a result of Gable Insurance's insolvency. In their written observations to the Court, the Applicants have claimed that the FMA failed sufficiently to monitor Gable Insurance's solvency as regards Gable Insurance's minimum capital, solvency margins and actuarial provisions. Furthermore, the Applicants have alleged that the FMA failed to inform the French supervisory authorities of these issues, thus preventing the French supervisory authorities from taking measures in cooperation with the FMA to limit losses. The FMA allegedly allowed organisational and

governance deficiencies at Gable Insurance as well as excessive outsourcing of functions so that Gable Insurance was effectively managed outside Liechtenstein, allowed impermissible non-insurance business and failed to examine sufficiently the sole owner of Gable Insurance.

38 The FMA has in its written observations rejected the Applicants' allegations as unfounded. According to the request, the first instance court rejected the claims brought by the Applicants without taking evidence. However, these issues are for the referring court to examine and adjudicate on.

39 The Court finds it appropriate to recall that the internal market for insurance is based on a single licence and the principle of home State control. On this basis, the single licence entails that an insurance undertaking supervised in one EEA State may offer its services within the entire EEA insurance market. Moreover, EEA States are obliged under the Directive to cooperate with each other for the purpose of facilitating the supervision of insurance and reinsurance within the EEA.

40 This system requires compliance with EEA law in order to function properly. In accordance with Article 29(1) of the Directive, supervision shall include the verification on a continuous basis of the proper operation of the insurance or reinsurance business and of the compliance with supervisory provisions by insurance and reinsurance undertakings. This makes it possible for the general public, consumers, policy holders, insured persons, beneficiaries and other economic operators to be assured that undertakings offering insurance products are under adequate supervision according to common rules.

41 However, it does not necessarily follow from the fact that a directive imposes surveillance obligations on certain bodies that that directive seeks to confer rights on parties in the event that those bodies fail to fulfil their obligations (compare the judgment in *Schmitt*, C-219/15, EU:C:2017:128, paragraph 55).

42 In its judgment in *Paul and Others*, the Court of Justice of the European Union ("the ECJ") found that the directives at issue in that case did not confer rights on the claimants as those directives did not contain any express rule granting such parties the rights claimed and the conferral of such rights was not necessary to give effect to the intended harmonisation. Furthermore, the ECJ observed that national rules precluding liability in the event of defective supervision were based on considerations related to the complexity of banking supervision, in the context of which the authorities are under an obligation to protect a plurality of interests, including, more specifically, the stability of the financial system (compare the judgment in *Paul and Others*, C-222/02, EU:C:2004:606, paragraphs 41 to 44). The ECJ found that the directives at issue in *Paul and Others* did not preclude a national rule to the effect that the functions of the national authority responsible for supervising credit institutions are to be fulfilled only in the public interest, which under national law precludes individuals from claiming compensation for damage resulting from

defective supervision on the part of that authority (compare *Paul and Others*, cited above, paragraph 47).

43 The Directive does not lay down any express rule granting rights to economic operators such as the Applicants, in circumstances such as those of the main proceedings. Articles 27 and 28 of the Directive confer discretion on EEA States as to how supervisory authorities should ensure the protection of policy holders and beneficiaries, as well as the stability in general of the financial systems concerned. The Applicants in the present case are economic operators operating on the EEA insurance market. According to the request, the Applicants are neither parties to nor beneficiaries under any insurance contract concluded with Gable Insurance. Such economic operators cannot, in circumstances such as those of the main proceedings, be considered policy holders or beneficiaries within the meaning of the Directive.

44 As the Court held in its judgment in *Gable Insurance AG in Konkurs*, 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; and (iv) on the basis of an insurance contract (see Case E-3/19, judgment of 10 March 2020, *Gable Insurance AG in Konkurs*, paragraph 38). However, the Applicants in the present case do not have an insurance claim against Gable Insurance, as their alleged claims are not on the basis of an insurance contract.

45 Certain provisions of the Directive are intended to ensure orderly and effective insolvency, as well as winding-up proceedings, including giving priority to policy holders and beneficiaries. Thus, the Directive is not intended to guarantee against insolvency or the winding-up of insurance undertakings, and economic operators are not protected from losses incurred from the insolvency of insurance undertakings.

46 Article 28 of the Directive requires supervisory authorities to ensure that supervised entities act in a responsible way in order to safeguard the stability of the financial systems. The obligations placed on supervisory authorities under Article 28 are thus to protect the stability of the financial system. That purpose is in the general interest of all economic operators in the financial system. The purpose of supervision, in this context, is not for the protection of individual economic operators, but the public interest in general.

47 Moreover, special protection of economic operators such as the Applicants is not necessary to secure the objectives of the Directive, namely the protection of policy holders and beneficiaries and general financial stability.

48 In the light of the foregoing, the answer to the first question must be that Articles 27 and 28 of the Directive and the predecessor directives do not confer any express rights on economic operators such as the Applicants that claim to be creditors of an insurance

undertaking in circumstances such as those of the main proceedings and cannot give rise to any liability claim against a supervisory authority under the principle of State liability.

49 As the Directive does not confer rights on economic operators such as the Applicants in the circumstances of the case, there is no need to answer the second question.

IV Costs

50 The costs incurred by the Liechtenstein Government, 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 Supreme Court of the Principality of Liechtenstein, gives the following Advisory Opinion:

Articles 27 and 28 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), Directive 73/239/EEC, Directive 88/357/EEC and Directive 92/49/EEC do not confer any express rights on economic operators that claim to be creditors of an insurance undertaking in circumstances such as those of the main proceedings and cannot give rise to any liability claim against a supervisory authority under the principle of State liability.

Páll Hreinsson Per Christiansen Bernd Hammermann

Delivered in open court in Luxembourg on 25 February 2021.

Ólafur Jóhannes Einarsson
Registrar

Páll Hreinsson
President