EFTA COURT

Request for an Advisory Opinion from the EFTA Court by Fürstlicher Oberster Gerichtshof dated 8 May 2020 in the case of SMA SA and Société Mutuelle d'Assurance du Batiment et des Travaux Publics v Finanzmarktaufsicht

(Case E-5/20)

A request has been made to the EFTA Court dated 8 May 2020 from Fürstlicher Oberster Gerichtshof (the Princely Supreme Court), which was received at the Court Registry on 20 May 2020, for an Advisory Opinion in the case of SMA SA and Société Mutuelle d'Assurance du Batiment et des Travaux Publics v Finanzmarktaufsicht on the following questions:

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**

   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

   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

   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,

   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?**