E-5/20-19

REPORT FOR THE HEARING

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 Princely Supreme Court (*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), and in particular Articles 27 and 28.

I Introduction

1. By letter of 12 May 2020, registered at the Court as Case E-5/20 on 20 May 2020, the Princely Supreme Court (*Fürstlicher Oberster Gerichtshof*) requested an Advisory Opinion in the case pending before it between SMA SA and Société Mutuelle d'Assurance du Bâtiment et des Travaux Publics and Finanzmarktaufsicht Liechtenstein.

2. The case concerns claims for compensation for actual and potential losses of two French insurance companies incurred as a result of the alleged failure of the Liechtenstein Financial Market Authority (*Finanzmarktaufsicht Liechtenstein*) ("FMA") to fulfil its supervisory obligations under the Liechtenstein Act on the Supervision of Insurance Undertakings (*Versicherungsaufsichtsgesetz*) towards a Liechtenstein insurance company.

II Legal background

EEA law

3. 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 in 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). Constitutional requirements were indicated by Norway, Iceland and Liechtenstein. The requirements were fulfilled on 23 October 2012 and the decision entered into force on 1 December 2012.

4. 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.*

5. 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.*

6. 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.*

7. 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.

8. 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 ("First Non-Life Insurance Directive") (OJ 1973 L 228, p. 3) was incorporated into the EEA Agreement by virtue of the entry into force of the EEA Agreement. The First Non-Life Insurance Directive is no longer in force in the EEA.

9. Recital 2 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;

10. Article 13 of the First Non-Life Insurance Directive read:

Member States shall collaborate closely with one another in supervising the financial position of authorized undertakings.

11. Article 14 of the First Non-Life Insurance Directive read:

The supervisory authority of the Member State in whose territory the head office of the undertaking is situated must verify the state of solvency of the undertaking with respect to its entire business. The supervisory authorities of the other Member States shall provide the former with all the information necessary to enable such verification to be effected.

12. 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 (Second Non-Life Insurance Directive) (OJ 1988 L 172, p. 1) was incorporated into the EEA Agreement by virtue of the entry into force of the EEA Agreement. The Second Non-Life Insurance Directive is no longer in force in the EEA.

13. Article 10 of the Second Non-Life Insurance Directive read:

The following paragraph is added to Article 19 of the first Directive:

'3. Each Member State shall take all steps necessary to ensure that the authorities responsible for supervising insurance undertakings have the powers and means necessary for supervision of the activities of insurance undertakings established within their territory, including activities engaged in outside that territory, in accordance with the Council Directives governing those activities and for the purpose of seeing that they are implemented.

Those powers and means must, in particular, enable the supervisory authorities to:

- *make detailed inquiries about the undertaking's situation and the whole of its business,* inter alia *by:*
  - *gathering information or requiring the submission of documents concerning insurance business,*
  - *carrying out on-the-spot investigations at the undertaking's premises,*
- *take any measures with regard to the undertaking which are appropriate and necessary to ensure that the activities of the undertaking remain in conformity with the laws, regulations and administrative provisions with which the undertaking has to comply in each Member State and in particular with the scheme of operations in so far as it remains mandatory, and to prevent, or remove any irregularities prejudicial to the interests of policy-holders,*
- *ensure that measures required by the supervisory authorities are carried out, if need be by enforcement, where appropriate through judicial channels.*

Member States may also make provision for the supervisory authorities to obtain any information regarding contracts which are held by intermediaries.'

14. 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") (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 (Financial services). Constitutional requirements were indicated by Norway and Iceland. The requirements were fulfilled on 22 and 23 June 1994 and the decision entered into force on 1 July 1994. The Third Non-Life Insurance Directive is no longer in force in the EEA.

National law

15. Article 1 of the Act of 6 December 1995 on the Supervision of Insurance Undertakings (Insurance Supervisory Act 1995) (*Versicherungsaufsichtsgesetz – 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 1(2) of the Act of 12 June 2015 on the Supervision of Insurance Undertakings (Insurance Supervisory Act 2015) (*Versicherungsaufsichtsgesetz – 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.*

17. Article 4 of the Act of 18 June 2004 on the Financial Market Authority (Financial Market Authority Act) (*Finanzmarktaufsichtsgesetz*) 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.*

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

III Facts and procedure

19. SMA SA and Société Mutuelle d'Assurance du Bâtiment et des Travaux Publics (jointly "the Applicants") are insurance companies established in France under French law and which provide construction insurance in France.

20. Gable Insurance AG ("Gable") was an insurance company established under Liechtenstein law with its seat in Liechtenstein. The Court of Justice of Liechtenstein opened insolvency proceedings in relation to Gable on 17 November 2016, which remain pending.

21. Gable and the Applicants were active in the construction insurance system in France, known as the decennial system. This is a two-fold compulsory insurance system. The client of construction work must take out construction insurance and the construction entrepreneurs must take out liability insurance. In cases of damage, the construction insurer

must pay compensation to the client in an expedited procedure, and then obtain recourse from the entrepreneur who is responsible (or this entrepreneur's liability insurer). Multiple entrepreneurs may be jointly liable.

22. The Applicants have brought proceedings before the Liechtenstein courts against the FMA. The Applicants allege that the FMA failed to fulfil its supervisory obligations under the Insurance Supervisory Act towards Gable, and therefore is ultimately responsible for losses incurred as a result of the insolvency of Gable.

23. The Applicants claim to be creditors of Gable in three different capacities relating to the insurance system. First, as construction insurers seeking recourse from Gable as liability insurer. Second, as liability insurers seeking recourse from Gable as another liability insurer. Third, as liability insurers seeking recourse from Gable as the insurer of a subcontractor. None of the claims result from an insurance contract concluded between the Applicants and Gable.

24. By judgment of 20 November 2019, the Princely Court of Appeal rejected all claims brought by the Applicants without taking evidence. The Princely Court of Appeal concluded that the Applicants were covered neither by the protective purpose of the Insurance Supervisory Act or the Directive.

25. The Princely Supreme Court has to decide on the appeal brought by the Applicants against the judgment of 20 November 2019, and has 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 ("SCA"). The Princely Supreme Court 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**

   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?**

IV Written observations

26. Pursuant to Article 20 of the Statute of the Court and Article 97 of the Rules of Procedure, written observations have been received from:

— SMA SA and Société Mutuelle d'Assurance du Bâtiment et des Travaux Publics, represented by Dr Karl Mumelter, Advocate;

— FMA, represented by Nicolas Reithner and Dr Fabian Rischka, lawyers;

— the Government of Liechtenstein, 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.

27. The written observations received have been distributed to all those entitled to submit written observations pursuant to Article 20 of the Statute of the Court and Article 97 of the Rules of Procedure.

V Proposed answers submitted

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

28. SMA SA and Société Mutuelle d'Assurance du Bâtiment et des Travaux Publics request that the EFTA Court also answer the following questions:

3. a) Are the directives referred to in Question no 1 and its recitals to be interpreted as meaning that their protective purposes include the protection of creditors of supervised insurance undertakings and/or the protection of third parties if same themselves participate in the insurance system as insurers, namely specifically in the French Décennale system as building damage insurers and/or liability insurers?

3. b) Are the directives referred to in Question no 1 and its recitals to be interpreted as meaning that their protective purposes include the protection of creditors of supervised insurance undertakings and/or the protection of third parties if the same themselves participate in the insurance system as insurers, specifically in the French Décennale system as building damage and/or liability insurers, specifically in relation to the following claims/damages:

(i) claims/damages of an insurance undertaking in its capacity as building damage insurer resulting from the fact that it does not recover its compensation payments pre-financed under the Décennale system from the liability insurer of the actually responsible entrepreneur because the liability insurer is no longer able to provide services due to insolvency;

(ii) claims/damages of an insurance undertaking in its capacity as liability insurer resulting from the fact that it is held liable under the Décennale system on the basis of the joint and several liability of all parties involved in the construction for the entire amount of the damage, but is no longer able to recover by way of recourse that part of the damage caused by another party involved in the construction and to be blamed for said damage due to the failure of its liability insurer because that liability insurer is no longer able to provide services as a result of insolvency?

29. Further, SMA SA and Société Mutuelle d'Assurance du Bâtiment et des Travaux Publics respectfully submit the following proposals for answers to the questions referred:

The directives and its recitals referred to in Question no 1 of the Liechtenstein Supreme Court's request for an advisory opinion dated 8.5.2020 are to be interpreted as meaning that

- *their protective purposes includes in any event (also) the protection of creditors of supervised insurance undertakings and/or the protection of third parties if same themselves participate in the insurance system as insurers, namely specifically in the French Décennale system as building damage insurers and/or liability insurers,*

- *and, more specifically, that their protective purposes include the protection of creditors of supervised insurance undertakings and/or the protection of third parties if same themselves participate in the insurance system as insurers, specifically in the French Décennale system as building damage and/or liability insurers, specifically in relation to the following claims/damages:*

  (i) claims/damages of an insurance undertaking in its capacity as building damage insurer resulting from the fact that it does not recover its compensation payments pre-financed under the Décennale system from the liability insurer of the actually responsible entrepreneur because the liability insurer is no longer able to provide services due to insolvency;

  (ii) Claims/damages of an insurance undertaking in its capacity as liability insurer resulting from the fact that it is held liable under the Décennale system on the basis of the joint and several liability of all parties involved in the construction for the entire amount of the damage, but is no longer able to recover by way of recourse that part of the damage caused by another party involved in the construction and to be blamed for said damage due to the failure of its liability insurer because that liability insurer is no longer able to provide services as a result of insolvency

- *and, more generally, that the directives and its recitals referred to in Question no 1 of the Liechtenstein Supreme Court's request for an advisory opinion dated 8.5.2020 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, but to whom as injured third party a direct right of action against this insurance undertaking as a result of an insurance law relationship and/or arising from insurance operations is directly conferred, and whose claims are owed not directly by reason of an insurance contract concluded between the injured third party and the supervised direct insurance undertaking, but by reason of another activity (such as the participation of the injured third party as insurance undertaking in the French Décennale system) to which these legal bases are applicable in the framework of direct insurance, such as those of the Claimants as insurers of third party policy holders being recourse claims asserted directly against the supervised direct insurance undertaking,*

in the sense that the competent authority, such as, here, the defendant (FMA), 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.

FMA

30. The FMA respectfully proposes that the Court should answer the first question in the negative, and the second question in the affirmative.

The Government of Liechtenstein

31. The Government of Liechtenstein proposes that the Court may answer the questions as follows:

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) (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, must be interpreted as meaning that these do not 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. *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)) fulfils 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 fur Umweltschutz, paragraphs 33 et seq. and 74.*

ESA

32. ESA submits that the questions referred by the Princely Supreme Court should be answered as follows:

3. *Articles 13 and 14 of 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, Article 10 of the 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 and 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) cannot be interpreted as conferring rights on undertakings such as the ones in issue in the proceedings pending before the referring court as resulting in the liability of national supervisory authorities in the event of defective supervision. This does not preclude the possibility of such undertakings bringing an action for state liability, subject to the three conditions set out to this end in the case law of the Court: the rule of law infringed must be intended to confer rights on individuals and economic operators; the breach must be sufficiently serious; 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.

4. *It is for the referring court to determine whether the implementation of the Directives into the national legislation fulfils the requirements of the case law of the Court.*

The Commission

33. The Commission respectfully proposes that the questions be answered as follows:

Articles 27 and 28 of Directive 2009/138/EC should be interpreted as meaning that they do not establish rights in favour of creditors of an insurance undertaking, such as the applicants in the main proceedings, which, if breached, could form the basis for a claim for damages based on the liability of the supervisory authority of that insurance undertaking for not having fulfilled its duties to protect those rights.

Per Christiansen
Judge-Rapporteur