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Judgment in Case E-5/20 *SMA SA and Société Mutuelle d'Assurance du Bâtiment et des Travaux Publics v Finanzmarktaufsicht Liechtenstein*

SOLVENCY II AND ITS PREDECESSORS DO NOT GIVE RISE TO ANY STATE LIABILITY CLAIM AGAINST A SUPERVISORY AUTHORITY

In a judgment delivered today, the Court answered questions referred by the Supreme Court of the Principality of Liechtenstein (*Fürstlicher Oberster Gerichtshof*) regarding the interpretation of Directive 2009/138/EC (“Solvency II”) and its predecessors – Directive 73/239/EEC, Directive 88/357/EEC and Directive 92/49/EEC.

The case concerned an action brought by two insurance companies, SMA SA and Société Mutuelle d'Assurance du Bâtiment et des Travaux Publics, against the Liechtenstein Financial Supervisory Authority (*Finanzmarktaufsicht Liechtenstein*) (“the FMA”). The applicants in the main proceedings allege that the FMA failed to fulfil its supervisory obligations towards a Liechtenstein insurance company, Gable Insurance AG, and that the FMA is ultimately responsible for losses incurred by the applicants as a result of the insolvency of Gable Insurance AG.

Two questions were referred to the Court. The first question concerned whether Solvency II, in particular Articles 27 and 28, and the predecessor directives confer rights on economic operators such as the applicants, that can be the basis for liability claims against a supervisory authority such as the FMA. The second question concerned the national implementation of relevant EEA law.

The Court held that liability of a supervisory authority for failure to fulfil its obligations under EEA law must be assessed on the basis of the principle of State liability.

The Court found that Solvency II 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. The Court also found that neither Solvency II nor its predecessor directives confer any express rights on economic operators such as the applicants in the circumstances of the main proceedings. Therefore, the directives do not give rise to any State liability claim against a supervisory authority.

In light of its answer to the first question referred, the Court found that there was no need to answer the second question.

The full text of the judgment may be found on the Court’s website: www.eftacourt.int.

This press release is an unofficial document and is not binding upon the Court.