Registered at the EFTA Court under NºE-17/24-04 on 7 day of October 2024.

EFTA Court
1, rue du Fort Thüngen
L-1499 Luxembourg

E-17/24

Claimant:

Söderberg & Partners AS
Lysaker torg 15
NO - 1326 Lysaker

represented by:

Paragraph 7 Rechtsanwälte
Landstrasse 60
9490 Vaduz

Defendant:

Gable Insurance AG in Konkurs
Pflugstrasse 20
9490 Vaduz

represented by the trustee in bankruptcy:

BWB LEGAL

concerning:

Request for an advisory opinion from the Princely Court of Appeal (*Fürstliches Obergericht*), Vaduz, Liechtenstein, in accordance with Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("SCA") (national proceedings no. 17 CG.2023.219 – document number 28)

WRITTEN OBSERVATIONS
submitted by the trustee in bankruptcy

five copies

In the national proceedings pending under case number 17 CG.2023.219, the Princely Court of Appeal (*Fürstliches Obergericht*) requests the EFTA Court to give an Advisory Opinion pursuant to Art. 34 of the SCA on 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). By letter dated 8 August 2024, the EFTA Court notified the trustee in bankruptcy that the parties to the national dispute are entitled to submit to the Court written observations on the questions referred for an Advisory Opinion.

Within the time limit of two months, the trustee in bankruptcy hereby submits the following

WRITTEN OBERVATIONS

to the EFTA Court.

In detail, the trustee in bankruptcy wishes to observe as follows:

I. Executive Summary

1 The present request for an Advisory Opinion (**"the Request"**) concerns the interpretation of Directive 2009/138/EC (**"Solvency II"**).[1] The Request has been made in national proceedings pending before the Princely Court of Appeal (*Fürstliches Obergericht*) (**"the referring Court"**) in Vaduz, Liechtenstein, between the insurance broker Söderberg & Partners AS (**"S & P"**) and the insurance undertaking Gable Insurance AG (in insolvency) (**"Gable"**).

2 The case pending before the referring Court essentially revolves around the preferential treatment of insurance claims according to Article 275(1) of Solvency II. The parties are of different opinions regarding the definition of the term "insurance claim" in Article 268(1)(g) of Solvency II. The main question is the following: Does a claim which originally qualifies as an "insurance claim" lose its privileged status if its original holder (i.e. an insured person, a policy holder, a beneficiary or an injured party having a direct right of action against the insurance undertaking) assigns it to an economic operator by way of a contractual agreement?

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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).

3 In reply to this question, the trustee in bankruptcy proposes the following answer: The preferential treatment of insurance claims granted by Article 275(1) in conjunction with Article 268(1)(g) of Solvency II aims at the protection of specific persons (i.e. insured persons, policy holders, beneficiaries or injured parties having a direct right of action against the insurance undertaking). Economic operators, on the other hand, are not protected. Therefore, if a claim originally qualifying as an "insurance claim" is voluntarily assigned to an economic operator, the latter does not benefit from the preferential treatment granted by Solvency II.

II. Legal Background

A. EEA Law

4 By way of EEA Joint Committee Decision No 78/2011 of 1 July 2011,[2] Solvency II was incorporated into point 1 of Annex IX to the EEA Agreement.

5 Recital 127 of Solvency II states:

> *"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."*

6 Article 268(1)(g) of Solvency II defines the term "insurance claim" as follows:

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2 OJ L 262, 6.10.2011, p. 45.

"'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.

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."

7 Article 275(1) of Solvency II provides:

"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."

8 Article 277 of Solvency II provides:

"The home Member State may provide that, where the rights of insurance creditors have been subrogated to a guarantee scheme established in that Member State, claims by that scheme shall not benefit from the provisions of Article 275(1)."

B. National Law

9 Article 10(1)(52) of the Insurance Supervisory Act (*Versicherungsaufsichtsgesetz*) (**"VersAG"**)[3] defines the term "insurance claim" as follows:

> German original: *"'Versicherungsforderung': jeder Betrag, den ein Direktversicherungsunternehmen Versicherungsnehmern, Versicherten, Begünstigten oder geschädigten Dritten, die ein direktes Klagerecht gegen das Versicherungsunternehmen haben, aufgrund eines Versicherungsvertrages oder einer anderen Tätigkeit, auf welche dieses Gesetz anwendbar ist, im Rahmen der Direktversicherung schuldet. Dazu gehören auch für diese Personen zurückgestellte Beträge, wenn einzelne Elemente der Forderung noch ungewiss sind, sowie Prämien, die ein Versicherungsunternehmen zurückzuzahlen hat, weil ein Rechtsgeschäft nach dem für dieses massgeblichen Recht vor Eröffnung des Konkurs- oder Liquidationsverfahrens nicht zustande gekommen ist oder aufgehoben wurde;"*
>
> Translation provided by the Liechtenstein Government:[4] *"'insurance claim' means any amount which is owed by a direct insurance undertaking to policy holders, insured persons, 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 to which this Act applies in direct insurance business. This includes amounts set aside for those persons, when some elements of the debt are not yet known, as well as premiums which an insurance undertaking has to repay because a legal transaction was not concluded or was cancelled under the law applicable to it before the opening of bankruptcy or winding-up proceeding."*

10 Article 161(1), first sentence, of the VersAG provides:

> German original: *"Die Vermögenswerte zur Bedeckung der versicherungstechnischen Rückstellungen bilden im Konkursverfahren eine Sondermasse nach Art. 45 der Insolvenzordnung zur Befriedigung der Versicherungsforderungen."*

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3 Gesetz vom 12. Juni 2015 betreffend die Aufsicht über Versicherungsunternehmen (Versicherungsaufsichtsgesetz; VersAG) (LR 961.01).

4 The Liechtenstein Government provides English translations for certain Liechtenstein Acts on <https://regierung.li/text/16318/law> (last visited on 26 September 2024).

Translation provided by the Liechtenstein Government: *"The assets covering technical provisions shall constitute a separate estate in bankruptcy proceedings in accordance with Article 45 of the Insolvency Act to satisfy insurance claims."*

III. Facts and Procedure

11 Gable is a Liechtenstein direct insurance undertaking that marketed non-life insurance products in several European countries, amongst which Norway. By order of 17 November 2016, insolvency proceedings were opened against Gable.

12 S & P is a Norwegian insurance broker that made payments to some of Gable's Norwegian policy holders based on the insurance contracts those policy holders had with Gable. In return for the payments, the policy holders (allegedly)[5] assigned their (purported)[6] claims arising from the insurance contracts to S & P.

13 S & P lodged several claims in Gable's insolvency proceedings and requested them to be qualified as privileged insurance claims. The subject-matter of the national proceedings are eight individual claims, which were asserted by S & P as one in its action.[7] The trustee in bankruptcy contested the claim in full, in terms of the amount, and also in relation to the requested qualification as a privileged insurance claim. Thereupon, S & P brought an action against Gable before the Princely Court of Justice (*Fürstliches Landgericht*) in Vaduz, Liechtenstein, seeking a declaration that, in Gable's insolvency proceedings, S & P is entitled to an insolvency claim amounting to CHF 73'267.00 and qualifying as a privileged insurance claim within the meaning of Article 161 of the VersAG.

14 For the time being, the Princely Court of Justice has limited the proceedings to the latter question, i.e. the qualification of the (alleged) claim as an insurance claim. By judgment of 14 March 2024, it decided that the claim constituted a privileged insurance claim under Article 161 of the VersAG.

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5 The Liechtenstein Courts have not yet handed down a final judgment on whether S & P is in fact entitled to the claim it asserted. For the time being, the national proceedings have been limited to the question of whether S & P's claim, should it be justified, qualifies as an insurance claim within the meaning of Solvency II. Therefore, any discussion of the qualification of the (alleged) claim in the present Written Observations is without recognition of its existence and amount; the trustee in bankruptcy continues to dispute it.

6 See previous footnote.

7 Therefore, for the sake of convenience, the trustee in bankruptcy refers hereinafter to one claim (in the singular) and not to several claims (in the plural).

15 Gable then brought an appeal against the mentioned judgment requesting that the referring Court declare that S & P's (alleged) claim does not constitute a privileged insurance claim.

16 Against this background, the referring Court stayed the appeal proceedings and requested the EFTA Court to give an Advisory Opinion on the following question:

> *"Is an insurance claim within the meaning of Article 268(1)(g) 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, incorporated in the EEA Agreement by Decision of the EEA Joint Committee No 78/2011 of 1 July 2011, LGBl 2012/384, to be given precedence in accordance with Article 275(1) of that directive even where the claim was assigned to a third party by way of a legal transaction and, under national law, assignment of the claim entails no change in the content of the claim?"*

IV. Legal Assessment

A. Introduction

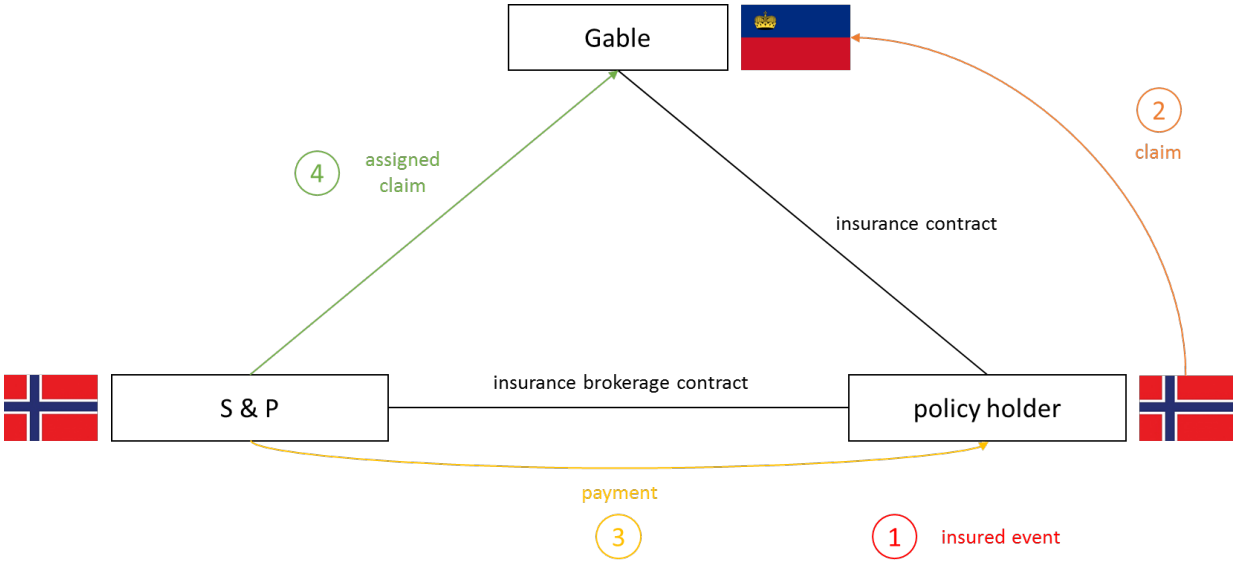
17 According to Article 161(1) of the VersAG, assets representing the technical provisions shall constitute a special estate in order to satisfy insurance claims. With regard to this special estate, insurance claims take absolute precedence over any other claim against the insurance undertaking. If the special estate is sufficient, the insurance claims are satisfied in full. Any surplus is then transferred to the general bankruptcy estate in order to satisfy the other creditors. If, on the other hand, the special estate is insufficient, the insurance claims are satisfied on a pro rata basis, while the other creditors remain unsatisfied. It is therefore of the utmost importance whether or not a certain claim qualifies as an insurance claim.

18 Article 268(1)(g) of Solvency II defines the term "insurance claim" as *"an amount which is owed by an insurance undertaking <u>to insured persons, policy holders, beneficiaries or to any injured party having direct right of action against the insurance undertaking</u> 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".*

19 In its judgment in Case E-3/19 *Gable Insurance AG in Konkurs* [2020], paragraph 38, the EFTA Court ruled that 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;
(iv) on the basis of an insurance contract.

20 In light of this definition, the following issue arises: S & P is not an insured person, not a policy holder, not a beneficiary and not an injured party having a direct right of action against Gable. Rather, as the broker of the insurance contracts between Gable and its Norwegian policy holders, S & P voluntarily decided to make payments to these policy holders and in return had their claims against Gable (allegedly) assigned to it. The process can thus be schematised as follows:



21 Provided that the individual claims of the policy holders turn out to be justified (which remains to be assessed in the national proceedings), three of the four conditions of an "insurance claim" are met: Gable as an insurance undertaking owes an amount based on an insurance contract. However, Gable does not (any more) owe that amount to a protected person (i.e. an insured person, a policy holder, a beneficiary or an injured party having a direct right of action against the insurance undertaking), but to an economic operator (i.e. S & P). The question therefore arises as to whether the third condition of an "insurance claim" is fulfilled despite the assignment. In other words, it is questionable whether the assignment of the policy

holders' claims to S & P has left the preferential treatment of those claims unaffected. In order to answer this question in the affirmative, it would be necessary for S & P to be treated as a protected person despite its lack of such status under Article 268(1)(g) of Solvency II, because it is asserting an assigned claim that originally fulfilled all the criteria for a privileged insurance claim. In short, the question is whether the preferential treatment of insurance claims grants personal protection or claim-related protection.

22 The trustee in bankruptcy holds that the former alternative is true. Solvency II aims at the protection of specific persons (i.e. insured persons, policy holders, beneficiaries or injured parties having a direct right of action against the insurance undertaking), while it does not aim at the protection of economic operators. In the trustee in bankruptcy's view, this follows in particular from Case E-5/20 *SMA SA and Société Mutuelle d'Assurance du Bâtiment et des Travaux Publics and Finanzmarktaufsicht Liechtenstein* [2021].

23 Before discussing this judgment and its significance for the present case in more detail, the trustee in bankruptcy would like to make two additional preliminary remarks:

24 First, in its Request, the referring Court draws attention to the general provisions on assignments in the Liechtenstein Civil Code (*Allgemeines bürgerliches Gesetzbuch*) ("**ABGB**"). The trustee in bankruptcy agrees with the referring Court that, under the ABGB, the assignment of a claim does not entail any change in the content of that claim. However, the transfer of a claim *as such* is not the issue in the present case.[8] Rather, the question is whether or not, from the perspective of insurance insolvency law, the qualification as an insurance claim is retained despite the assignment to an economic operator, in other words, whether the preferential treatment of insurance claims offers personal protection or claim-related protection. And *this* question cannot be resolved on the basis of the ABGB, but only on the basis of Solvency II and its interpretation by the EFTA Court.

25 Second, the referring Court also cites an Austrian commentary on § 308 of the Austrian Insurance Supervisory Act – the Austrian equivalent of Article 10(1)(52) of the VersAG. Indeed, the authors of this commentary take the view that the group of persons benefiting from preferential treatment should be broad. According to them, the legal successors of the holders of insurance claims are also to be included,

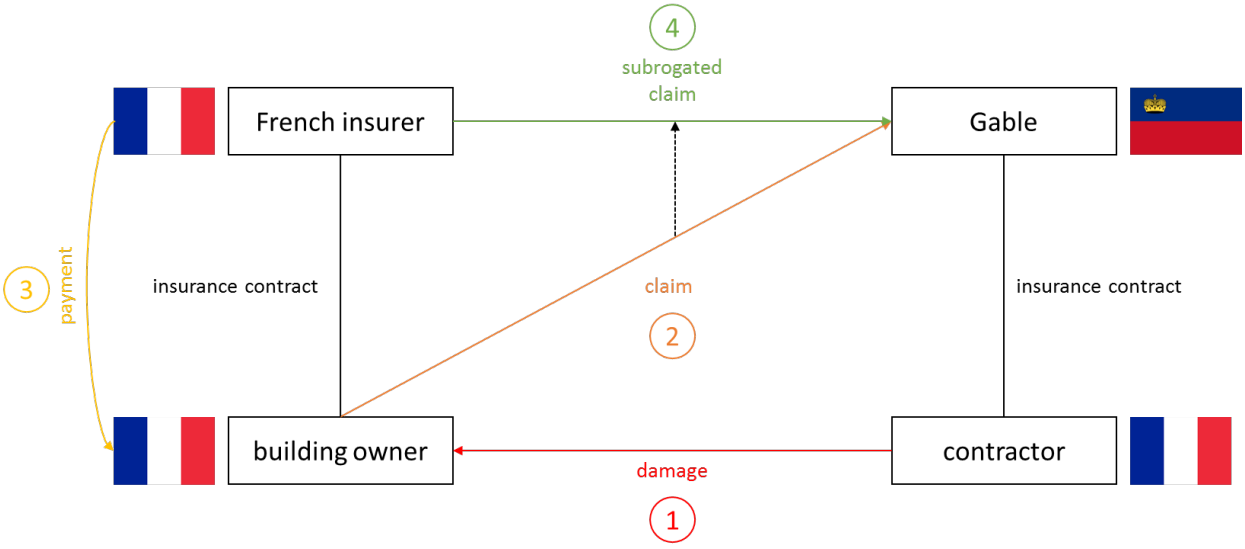
8 In any case, the question whether the Norwegian policy holders validly assigned their claims to S & P is a matter of Norwegian law.

provided that the latter had a direct right of action against the insurance company. Therefore, in principle, the reference provided in the Request proves to be correct. However, the decisive factor is that the aforementioned Austrian commentary dates from 1 August 2018, which is why it was made obsolete by the EFTA Court's judgment of 25 February 2021 in Case E-5/20.

B. Judgment of the EFTA Court in Case E-5/20 and its significance for the present case

1. Judgment of the EFTA Court in Case E-5/20

26 Case E-5/20 had a similar background to the one at hand. It concerned French insurance companies that filed claims in the insolvency proceedings against Gable. Like S & P, the French insurance companies demanded for their claims to be qualified as insurance claims, although they themselves did not belong to the group of protected persons (i.e. insured persons, policy holders, beneficiaries and injured parties having a direct right of action against the insurance undertaking). Rather, like S & P, they derived their claims from such protected persons. Schematically – the explanation follows immediately in the text – the initial situation was as follows:



27 A contractor covered by Gable's liability insurance caused damage (**step 1**). According to the national insurance legislation in France, the building owner had a direct right of action against Gable as an injured party, based on the liability insurance contract between the contractor and Gable (**step 2**). At the same time, the building owner also had his own (compulsory) construction insurance with a French insurance company. Based on this insurance contract, the French insurance company had to compensate the building owner for the damage (**step 3**). In return, by French

law, the French insurance company entered into the rights of the building owner vis-à-vis Gable (**step 4**).

28 The claims filed by the French insurance companies in Gable's insolvency proceedings were therefore claims that those French insurance companies had received from injured parties having a direct right of action against Gable by way of subrogation. With regard to these French insurance companies, the EFTA Court explicitly stated that their claims did not qualify as insurance claims:

> *"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."*[9]

29 The EFTA Court thus explicitly denied the claims filed by the French insurance companies the quality of privileged insurance claims, although those claims derived from injured parties having a direct right of action against Gable. In other words: The injured parties (building owners) had privileged insurance claims against Gable. These privileged insurance claims were transferred to the French insurance companies by way of subrogation, since the latter had to compensate the injured parties by virtue of (French) law. Nevertheless, the EFTA Court explicitly did not classify the claims asserted by the French insurance companies as insurance claims. It justified this as follows:

> *"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."*[10]

30 These findings of the EFTA Court also apply to S & P's claim. The minor differences in the circumstances do not outweigh the considerable similarities.

2. Significance of the findings of the EFTA Court for the present case

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9 Case E-5/20, judgment of 25 February 2021, *SMA SA and Société Mutuelle d'Assurance du Bâtiment et des Travaux Publics and Finanzmarktaufsicht Liechtenstein*, paragraph 44.

10 Case E-5/20, judgment of 25 February 2021, *SMA SA and Société Mutuelle d'Assurance du Bâtiment et des Travaux Publics and Finanzmarktaufsicht Liechtenstein*, paragraph 45.

31 There are two minor differences between Case E-5/20 and the situation at hand: Firstly, S & P derives its claim from some of Gable's policy holders, whereas the French insurance companies received theirs from injured parties having a direct right of action against Gable. Secondly, S & P became the holder of the claim by virtue of a contractual assignment, while the French insurance companies obtained their claims by way of subrogation.

32 However, neither difference is legally significant. Firstly, both S & P and the French insurance companies received their claims from protected persons within the meaning of Article 268(1)(g) of Solvency II. Secondly, if the preferential treatment of an originally privileged claim is lost in case of a subrogation (i.e. a mandatory assignment), this must apply *a fortiori* to voluntarily assigned claims. In more detail, the trustee in bankruptcy submits the following:

a. Assignment of an originally privileged claim to an economic operator

33 Both policy holders and injured parties having a direct right of action against the insurance undertaking are entitled to have their claims categorised as privileged insurance claims. When it comes to the preferential treatment under Article 275(1) in conjunction with Article 268(1)(g) of Solvency II, it makes no difference whether the amount is owed to an insured person, a policy holder, a beneficiary or an injured party having a direct right of action against the insurance company. Neither Solvency II nor the VersAG differentiates between the four groups of protected persons. Hence, it is also irrelevant whether the insurance claim, like that of the policy holder, is based on the creditor's *own* insurance contract with the insurance company, or whether it is based, like that of the injured party having a direct right of action, on the (liability) insurance contract between the person causing the damage and the insurance company. In both cases, the claim is based on an insurance contract. In both cases, the claim is a privileged insurance claim.

34 Thus, when it comes to the consequences of an assignment of an originally privileged insurance claim to an economic operator, it makes no difference that S & P derives its claim from some of Gable's policy holders, while the French insurance companies in Case E-5/20 received theirs from injured parties having a direct right of action against Gable. Both S & P and the French insurance companies are economic operators that were assigned claims of protected persons within the meaning of Article 268(1)(g) of Solvency II. If, as the EFTA Court stated in Case E-5/20, the claims of the French insurance companies do not qualify as insurance claims, the same must hold true for S & P's claim.

35 As the EFTA Court ruled in Case E-5/20, economic operators are not protected from losses incurred from the insolvency of insurance undertakings, even if they are asserting claims that originally qualified as insurance claims.[11] Rather, protection is granted only to those persons whom Solvency II explicitly designates as deserving protection (i.e. insured persons, policy holders, beneficiaries and injured parties having a direct right of action against the insurance undertaking).

36 This interpretation is supported by Recital 127 of Solvency II. By emphasising the protection of *explicitly* mentioned groups of persons, Recital 127 of Solvency II makes it clear that *other* persons, in particular economic operators, do not fall within the scope of protection. The privilege is thus not attached to the claim, but to the person designated as deserving protection; it is *related to the person, not to the claim*. Therefore, if an originally privileged insurance claim is assigned to an economic operator, the latter no longer benefits from the preferential treatment provided by Article 275(1) in conjunction with Article 268(1)(g) of Solvency II, regardless of whether the claim was transferred by way of subrogation or contractual assignment.

b. Subrogation vs. contractual assignment

37 As explained, unlike the French insurance companies in Case E-5/20, S & P did not receive its claims by way of subrogation, but by way of contractual assignment. However, this difference is not legally significant. On the contrary: If, as follows from Case E-5/20, a subrogation of an originally privileged insurance claim to an economic operator leads to the loss of the privilege, this must apply *a fortiori* to an economic operator who receives its claim by way of a contractual assignment.

38 S & P compensated its customers (the policy holders it brokered for Gable) voluntarily, i.e. based on a business decision, for which there was no obligation. In Case E-5/20, on the other hand, the French insurance companies were legally obliged to compensate injured parties having a direct right of action against Gable, whereupon they entered into the claims of those injured parties against Gable by virtue of French law. If, as the EFTA Court ruled, those French insurance companies did not hold insurance claims, this must be even more the case for S & P, since, as explained, the latter voluntarily made the business decision to "buy" claims of some of Gable's policy holders.

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11 Cf. Case E-5/20, judgment of 25 February 2021, *SMA SA and Société Mutuelle d'Assurance du Bâtiment et des Travaux Publics and Finanzmarktaufsicht Liechtenstein*, paragraph 45.

C. Significance of Article 277 of Solvency II

39 In its Request, the referring Court also draws attention to Art. 277 of Solvency II, indicating the special status of guarantee schemes, whose assigned claims (in principle) retain the privilege granted by Article 275(1) of Solvency II. With this remark, the referring Court takes up one of S & P's arguments, who claimed in the national proceedings to have voluntarily assumed the role of a guarantee scheme, which is why it ought to be given the same preferential treatment.

40 The trustee in bankruptcy cannot agree with this view. Firstly, it is important to remember that S & P is not a (state or state-imposed) guarantee scheme. In fact, S & P's decision to compensate its customers was motivated by economic considerations only; there was no legal obligation for S & P to proceed the way it did. Because of this, S & P was able to determine the conditions of both the compensation of its customers and the assignment of their claims. A guarantee scheme does not have such discretion; it has no choice but to compensate persons fulfilling the requirements set up by the respective Member State. If the conditions are met, the guarantee scheme *must* pay. In contrast, S & P acted autonomously on the basis of a business decision under private law. It may therefore very well be true that S & P – up to a certain extent – assumed a role similar to that of a guarantee scheme. However, as explained, it did so voluntarily and under the conditions determined by itself.

41 The foregoing also highlights the special position of guarantee schemes. By law, they assume the default risk of the protected persons (insured persons, policy holders, beneficiaries and injured parties having a direct right of action against the insurance undertaking). If one of these protected persons fulfils the conditions for compensation by the guarantee scheme, the latter is *obliged* to pay benefits in return for the assignment of that person's claim. Thus, if a Member State decides to set up a guarantee scheme, it will usually want to ensure that the claims assigned to such (state or state-imposed) guarantee scheme retain their privilege. It is precisely this principle that is (implicitly) laid down in Art. 277 of Solvency II.

42 However, from a financial market policy perspective, it is essential that economic operators such as S & P who "buy" insurance claims from protected persons do not benefit from the same privilege as (state or state-imposed) guarantee schemes. Unlike guarantee schemes, economic operators are able to determine the conditions of such transactions themselves. If they retained the privilege granted to the origi-

nal holder of the claim, economic operators would be incentivised to acquire insurance claims on a large scale and at an inappropriately low price in order to benefit from preferential treatment in the insolvency proceedings. Against this background, it is appropriate to treat economic operators differently from (state or state-imposed) guarantee schemes, which have no discretion or room for negotiation when satisfying insurance claims. Hence, while (state or state-imposed) guarantee schemes (in principle) retain the privilege granted to the original holder of the claim, economic operators who voluntarily compensate protected persons and in return have the latter's claims assigned to them do not benefit from preferential treatment. In this sense, the personal character of the privilege granted by Article 275(1) in conjunction with Article 268(1)(g) of Solvency II ensures that the protected persons are not taken advantage of by economic operators.

V. Conclusion

43 The facts of the case at hand are of course different from those of Case E-5/20. However, it is not the differences but the similarities that are decisive for the legal question at hand. Both cases concern the assignment of an originally privileged insurance claim to an economic operator. While Case E-5/20 concerned insurance claims of injured parties having a direct right of action against Gable, the present case concerns insurance claims of some of Gable's policy holders. Both claims are therefore based on an insurance contract with Gable, both are privileged in an identical manner, both have been assigned to an economic operator, one by way of subrogation, one by way of contractual assignment. What the EFTA Court decided for the subrogation of an originally privileged insurance claim, namely that the economic operator holding the claim after the subrogation does not benefit from preferential treatment, must apply all the more to the contractual and thus voluntary assignment of such a claim to an economic operator.

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44 On all these grounds, the trustee in bankruptcy therefore respectfully proposes that the Court respond to the Request as follows:

> ***Article 275(1) in conjunction with Article 268(1)(g) 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) must be interpreted to the effect that a claim originally qualifying as an insurance claim within the meaning of Article 268(1)(g) is no longer to be given precedence in accordance with Article 275(1) if it is assigned to an economic operator.***

Vaduz, 7 October 2024 LIH/EBS/GUM

Gable Insurance AG in Konkurs