EUROPEAN COMMISSION

Brussels, 7th October 2024
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TO THE PRESIDENT AND MEMBERS OF THE EFTA COURT

WRITTEN OBSERVATIONS

Submitted pursuant to Article 20 of the Statute of the EFTA Court by the European Commission, represented by Gaëtane Goddin, Bruno Stromsky and Nicola Yerrell, members of its Legal Service, with a postal address for service in Brussels at the Legal Service, *Greffe Contentieux*, BERL 1/169, 200 Rue de la Loi B-1049 Brussels.

In Case **E-17/24,**

concerning an application submitted pursuant to Article 34 of the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice by the Princely Court of Appeal, Liechtenstein, in the case of:

Söderberg & Partners AS

Applicant

vs

Gable Insurance AG in Konkurs

Defendant

requesting an advisory opinion regarding the interpretation of the act referred to in Point 1 of Annex IX to the EEA Agreement, namely 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).

Rue de la Loi 200, B-1049 Bruxelles/Wetstraat 200, B-1049 Brussel - Belgium
Telephone: exchange 299.11.11

The Commission has the honour to submit the following written observations:

I. FACTS AND PROCEDURE

1. The present request for an advisory opinion originates in the insolvency proceedings opened on 17th November 2016 by the Princely Court of Liechtenstein in relation to Gable Insurance AG ("Gable Insurance"). Those proceedings have already given rise to two previous requests for advisory opinions, in cases E-3/19 and E-5/20.

2. Gable Insurance is a joint-stock company registered in Liechtenstein, and had been granted an authorisation by the Lichtenstein Financial Market Authority to operate as a direct insurance undertaking.

3. Following the opening of the insolvency proceedings, insurance policy holders with Gable Insurance assigned their claims arising from the insurance contracts (including claims for the repayment of premiums for any remaining periods of insurance) to the Applicant, Söderberg & Partners AS - a Norwegian-registered joint-stock company operating as an insurance intermediary. The Applicant made payments to the policy holders in accordance with those policies amounting to a total of 623,600.00 NOK, which corresponds to 73,267.00 CHF.

4. As is explained in the request for an advisory opinion, the Applicant then lodged a claim for this amount in the insolvency proceedings and requested that it be entered as a privileged insurance claim. This was contested by the insolvency estate administrator.

5. As a result, the Applicant brought an action before the Princely Court seeking a declaration that it was entitled to an insolvency claim in the insolvency proceedings amounting to 623,600.00 NOK (73,267.00 CHF) and that this constituted a privileged insurance claim within the meaning of Article 161 of the Insurance Supervision Act. This was confirmed in a judgment dated 14th March 2024.

6. The Defendant subsequently brought an appeal against that judgment. As is noted in the request for an advisory opinion, it appears that the sole legal issue underlying the appeal is whether the Applicant's claim can properly be classified as a privileged insurance claim, or not. The national court further explains in Section 4 of the request that as a matter of national law, a legal assignment of a claim does not affect its nature, but considers that the impact of EEA law is unclear in this regard, with particular reference to the interpretation of, and inter-relationship between, Articles 268 and 277 of Directive 2009/138/EC (Solvency II).

7. In these circumstances, the Princely Court of Appeal of Liechtenstein decided that it was necessary to make a request to the EFTA Court for an advisory opinion.

II. THE QUESTIONS

8. The question referred to the EFTA Court by the Princely Court of Appeal of Liechtenstein is as follows:

> *"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, LGBI 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?"*

III. THE APPLICABLE LAW

Liechtenstein Law

The Insurance Supervision Act

9. Specific rules governing the supervision of insurance undertakings are laid down in the Insurance Supervision Act of 12th June 2015 (Versicherungsaufsichtsgesetz, LR

961.01). As is explained in its Article 1, the Act is intended *inter alia* to protect against the risk of insolvency for insurance undertakings and to ensure confidence in the Liechtenstein insurance market (Article 1(2)), and to implement Directive 2009/138 (Solvency II) into national law (Article 1(3)).

Article 10 is entitled “Definitions and terminology”, and its point 52 defines an “insurance claim” as “*any amount which is owed by a direct insurance undertaking to policyholders, 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 proceedings.”*

Title VII of the Act is entitled "Reorganisation and Winding-up", and its Part C deals with insolvency. Article 161 is entitled "Satisfaction of insurance claims" and states that the assets of the insurance undertaking representing the technical provisions (essentially an amount calculated by reference to the sum the undertaking would have to pay if its insurance obligations were transferred to another undertaking) shall constitute a "special estate" for the purposes of Article 45 of the Insolvency Code in order to satisfy insurance claims (Article 161(1)). The value of the special estate is to be determined by the Liechtenstein Financial Market Authority as at the date on which the insolvency proceedings are opened.

Article 161a goes on to address the hierarchy of claims, and reads as follows:

> *“(1) Insurance claims shall take precedence over other bankruptcy claims. This shall be without prejudice to Article 161(1).*

(2) Claims to insurance compensation take precedence over all other insurance claims. Within the same rank, the claims shall be satisfied in proportion to their amounts.

(3) In derogation from Article 62(1) of the Insolvency Code, the lodgement of claims need not include an indication of ranking."

The Insolvency Code

The general rules relating to insolvency proceedings are set out in the Insolvency Code of 17th July 1973 (Konkursordnung, LR 282.0).

Title III of the Code is entitled "Insolvency Claims". Article 45(1) states that in the event of insolvency, a creditor entitled to separate satisfaction from specific assets of the debtor shall exclude, to the extent of their claims, the payment of insolvency creditors from these assets ("special class of assets"). Only if excess funds are left in the special class of assets after satisfaction of these claims does it become part of the common insolvency estate available to other creditors (Article 45(2)). (In other words, creditors entitled to separate satisfaction have priority over the assets in the special estate vis-à-vis "normal" creditors in classes 1-4, as further described in Articles 48-51 of the Code).

Article 47 of the Code further states that:

"To the extent that the insolvency assets are not used to satisfy the claims of the insolvency estate and the rights of the creditors entitled to separate satisfaction (Article 45), they constitute the common insolvency estate from which the insolvency claims within the same category shall be satisfied in proportion to their amounts."

The Civil Code

Finally, Sections 1392-1394 of the general Civil Code of 1st June 1811 govern the assignment (or cession) of claims. Section 1392 provides that:

"*If a claim is transferred from one person to another and the latter accepts this, then the transformation of the right results with the entry of a new creditor. Such an action shall be known as assignment (cession) and may be effected with or without remuneration."*

Section 1393 clarifies that "*all alienable rights shall constitute the subject-matter of an assignment".* However, rights adhering to the person (and extinguished concomitantly) may not be assigned. Debt certificates issued to the bearer are assigned "simply by way of transfer" and do not require any other proof of assignment than possession. As for Section 1394, this states that:

"*The rights of the transferee shall be* ***precisely the same*** *as the rights of the transferor with respect to the ceded claim."* (Commission's emphasis).

EEA and Union Law

10. Article 36(1) of the EEA Agreement lays down the general principle that there shall be no restriction on the freedom to provide services, whilst Annexes IX to XI contain "specific provisions" on this (Article 36(2)).

In particular, Annex IX to the EEA Agreement is entitled "Financial Services", and includes under Point 1 a reference to Directive 2009/138/EC on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) (inserted by Joint Committee Decision No 78/2011 of 1st July 2011[1]). The date of transposition and application of Solvency II was amended and further extended to 1st January 2016 by

1 OJ L 262, 6.10.2011 at page 45, entry into force 1st December 2012.

Directive 2013/58, which was incorporated into Point 1 by Joint Committee Decision No 128/2014 of 27th June 2014[2].

Directive 2009/138 (Solvency II) ("the Directive")

As is set out in Article 1, the Directive lays down a comprehensive set of rules for (1) the taking up and pursuit of the activities of direct insurance and reinsurance, (2) the supervision of insurance and reinsurance groups and (3) the reorganisation and winding-up of direct insurance undertakings. This third aspect is dealt with in its Title IV, which essentially sets out the principle of mutual recognition of national reorganisation measures and winding-up proceedings, together with a minimum harmonisation of certain core aspects of national rules on the reorganisation and winding-up of insurance undertakings.

According to Article 267(a), Title IV applies to "*reorganisation measures and winding-up proceedings"* in relation to insurance undertakings.

Chapter 3 focuses on winding-up proceedings which are defined in Article 268(1)(d) as "*collective proceedings involving the realisation of the assets of an insurance undertaking and the distribution of the proceeds among the creditors, shareholders or members as appropriate, which necessarily involve any intervention by the competent authorities, including where the collective proceedings are terminated by a composition or other analogous measure, whether or not they are founded on insolvency or are voluntary or compulsory."*

Article 273 addresses the opening of winding-up proceedings, and the information which must be provided to supervisory authorities, as follows:

> *"1. Only the competent authorities of the home Member State shall be entitled to take a decision concerning the opening of winding-up proceedings with regard to an insurance undertaking, including its branches in other Member States. This*

2 OJ L 342, 27.11.2014 at page 27, entry into force 28th June 2014.

decision may be taken in the absence, or following the adoption, of reorganisation measures.

2. A decision concerning the opening of winding-up proceedings of an insurance undertaking, including its branches in other Member States, adopted in accordance with the legislation of the home Member State shall be recognised without further formality throughout the Community and shall be effective there as soon as the decision is effective in the Member State in which the proceedings are opened.

3. The competent authorities of the home Member State shall inform as a matter of urgency the supervisory authorities of that Member State of the decision to open winding-up proceedings, where possible before the proceedings are opened and failing that immediately thereafter.

The supervisory authorities of the home Member State shall inform as a matter of urgency the supervisory authorities of all other Member States of the decision to open winding-up proceedings including the possible practical effects of such proceedings."

(As was expressly noted in the 117th recital to the Directive, national legislation on winding-up proceedings is not harmonised, hence the need to ensure mutual recognition, cf. Article 273(2) above).

Article 274 of the Directive governs the applicable law in relation to winding-up proceedings, and states that:

"1. The decision to open winding-up proceedings with regard to an insurance undertaking, the winding-up proceedings and their effects ***shall be governed by the law applicable in the home Member State*** *unless otherwise provided in Articles 285 to 292."* (Commission's emphasis).

This is further reinforced by the 125th recital to the Directive, which states that "*all the conditions for the opening, conduct and closure of winding-up proceedings should be governed by the law of the home Member State*".

Article 274(2) goes on to list the matters to be determined by the law of the home Member State. This includes the assets which form part of the estate (point a), the claims which are to be lodged against the estate of the insurance undertaking and the treatment of claims arising after the opening of winding-up proceedings (point f), the rules governing the lodging, verification and admission of claims (point g), the rules governing the distribution of assets and the ranking of claims (point h) and the conditions for and the effects of closure of winding-up proceedings (point i).

Of particular importance in the present proceedings, Article 275 lays down the key principle that insurance claims shall have a privileged status in winding-up proceedings:

> "*1. 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.*
> *...".*

(As explained in Article 76(1) of the Directive, "technical provisions" must be established by insurance undertakings with respect to "*all their insurance and*

reinsurance obligations towards policy holders and beneficiaries of insurance or reinsurance contracts").

As for an "insurance claim" this is in turn defined in Article 268(1)(g) as:

> *"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.*"

Finally, Article 277 is entitled "Subrogation to a guarantee scheme", and reads as follows:

> "*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)".*

IV. OBSERVATIONS

11. The question referred by the Princely Court of Appeal focuses on the effects of a legal assignment of an insurance claim, and more specifically whether this alters its privileged status in insolvency proceedings. As is emphasised in Section 4 of the request for an advisory opinion, a legal assignment under Section 1392 of the Liechtenstein Civil Code in no way alters the substance of the assigned claim, and

the rights of the transferee are "*precisely the same"* as those of the transferor (Section 1394).

12. By way of preliminary remark, the Commission would emphasise that the principle that insurance claims take precedence in insolvency proceedings involving an insurance undertaking is a central feature of Title IV of the Directive, and its Article 275(1) in particular. As was noted at e.g. paragraph 54 of the judgment in case E-3/19, Gable Insurance, it is designed to guarantee that policy holders and beneficiaries are protected as far as possible in these circumstances. The 127th recital to the Directive further emphasises that the legislator considered the protection of insured persons and policy holders in insolvency proceedings to be of the "***utmost importance"***.

13. According to the definition contained in Article 268(1)(g) of the Directive, there are four cumulative conditions for an "insurance claim" to exist, namely: 1) an amount must be owed 2) by an insurance undertaking 3) to insured persons, policy holders, beneficiaries or an injured party having a direct right of action against the insurance undertaking 4) on the basis of an insurance contract or an operation assimilated to an insurance contract[3]. No mention is made of legal assignment, and there is no indication that the legislator intended to *exclude* an assigned claim from the notion of an "insurance claim", nor from the corresponding privileged status under Article 275(1).

14. At the same time, the conditions for the opening, conduct and closure of winding-up proceedings are governed by the *national law* applicable in the home State. Indeed, this is plainly stated in Article 274(1) of the Directive (and the corresponding 125th recital), and further evidenced in the terms of Article 274(2) which contains a detailed (minimum) list of matters to be determined by the law of the home State.

15. In the Commission's view, it follows that, in the context of the winding-up of insurance undertakings, there is nothing in the Directive to preclude an EEA State

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3 See also paragraph 38 of the judgment in Case E-/19, Gable Insurance.

from making provision under its national law for the legal assignment of insurance claims.

16. However, in light of the wording of Article 268(1)(g) and the overall objective of Title IV of the Directive of protecting policyholders, the Commission considers that such claims should continue to benefit from the privileged treatment laid down by its Article 275(1).

17. This conclusion is further reinforced by the terms of Article 277 of the Directive, which addresses the situation in which the rights of insurance creditors have been subrogated to a guarantee scheme. In this scenario, the Directive states that the home Member State (in which the guarantee scheme is established) may provide that claims by the guarantee scheme do not benefit from the privileged status laid down by Article 275(1).

18. In other words, **in this specific case,** the EEA States are given the option of excluding the preferential treatment of insurance claims. However, no other type of claims by third parties are mentioned, and the plain wording of the article clearly excludes any broader option for the home Member State to remove the privileged status of insurance claims.

19. Finally, the Commission would add by way of general remark that the legal assignment of an insurance claim to a third party (such as the Applicant in the present proceedings) may further support the aim of protecting policy holders by allowing them to monetise their claims under favourable conditions without being required to participate in potentially very lengthy winding-up proceedings.

V. CONCLUSION

20. For the reasons discussed above, the Commission considers that the question from the Princely Court of Appeal of Liechtenstein should be answered in the following sense:

> "In the case of a legal assignment, under national law, of an insurance claim within the meaning 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), Articles 268(1)(g), 275(1) and 277 of that Directive should be interpreted as precluding the removal of the privileged status of that claim , unless the circumstances set out in Article 277 apply".

Gaëtane GODDIN Bruno STROMSKY Nicola YERRELL

Agents of the Commission