EFTA Court

1 rue du Fort Thüngen

L-1499 Luxembourg

Vaduz, 8 October 2024

To the President and Members of the EFTA Court

Written Observations

submitted, pursuant to Article 20 of the Statute and Article 97 of the Rules of Procedure of the EFTA Court, by the

Government of the Principality of Liechtenstein

represented by Dr. Andrea Entner-Koch, Director of the EEA Coordination Unit (*Leiterin der Stabsstelle EWR der Regierung des Fürstentums Liechtenstein*), Romina Schobel, Deputy Director of the EEA Coordination Unit *(Stellvertretende Leiterin der Stabsstelle EWR der Regierung des Fürstentums Liechtenstein)* and Dr. Claudia Bösch, Legal Officer of the EEA Coordination Unit *(Juristische Mitarbeiterin der Stabsstelle EWR der Regierung des Fürstentums Liechtenstein)*, acting as agents of the Government of the Principality of Liechtenstein,

in Case E-17/24

Söderberg & Partners AS v Gable Insurance AG in Konkurs

in which the Princely Court of Appeal has requested the EFTA Court to give 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.

The Government of the Principality of Liechtenstein (hereinafter referred to as the 'Liechtenstein Government') has the honour to submit the following observations:

I. Question referred to the EFTA Court

The Princely Court of Appeal has stayed its proceedings in order to refer the following question to the EFTA Court:

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?

II. Factual background of the case

1. With regard to the facts of the present case, the Liechtenstein Government would like to refer to the summary of the facts provided by the Princely Court of Appeal in its request for an advisory opinion.

III. Legal framework

Directive 2009/138/EC

2. The case at hand concerns 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 (hereinafter referred to as 'Solvency II')[1].

3. Directive 2009/138/EC was incorporated into the EEA Agreement with Decision of the EEA Joint Committee No 78/2011 of 1 July 2011 amending Annex IX (Financial services) to the EEA Agreement[2] and entered into force for the EEA EFTA States on 1 December 2012.

4. Relevant for the case at hand are Articles 27, 268, 275 and 277 and Recitals 16, 17, 117 and 127 Solvency II.

National legislation

5. In Liechtenstein, Directive 2009/138/EC was implemented, *inter alia*, by the Insurance Supervision Act ('Versicherungsaufsichtsgesetz'; VersAG)[3].

6. Furthermore, the Applicant refers to the Liechtenstein Civil Code[4], specifically Section 1394 of the Civil Code.

[1] OJ. L 335, 17.12.2009, p. 1.
[2] OJ L 262, 6.10.2011, p. 45.
[3] Gesetz vom 12. Juni 2015 betreffend die Aufsicht über Versicherungsunternehmen (Versicherungsaufsichtsgesetz; VersAG), LR 961.01.
[4] Allgemeines bürgerliches Gesetzbuch vom 1. Juni 1811 (ABGB), LR 210.0.

IV. Legal analysis

Preliminary Remarks

7. With its question referred to the EFTA Court, the Princely Court of Appeal enquires whether a claim which was assigned to a third party by way of a privately negotiated legal transaction (hereinafter referred to as 'assignment') is still to be considered an 'insurance claim' within the meaning of Article 268(1)(g) Solvency II, or whether the assignment results in the claim losing its character as a privileged 'insurance claim'.

8. This question is of relevance for the national case, as Article 275(1) Solvency II obliges EEA States to give precedence to 'insurance claims' over other claims against an insurance undertaking in winding-up proceedings.

9. 'Insurance claim' is a term defined in Article 268(1)(g) Solvency II. According to this definition, 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.[5]

10. For the purpose of these Written Observations, the Liechtenstein Government presumes that the claims which were assigned to *Söderberg & Partners AS* (hereinafter referred to as 'the Applicant') fulfilled all criteria to qualify as an insurance claim within the meaning of Article 268(1)(g) Solvency II before the assignment.

[5] See the Written Observations by the European Commission in *Gable Insurance AG in Konkurs,* Case E-3/19, recital 16. In its Judgment of 10 March 2020, *Gable Insurance AG in Konkurs*, Case E-3/19, the EFTA Court concluded that an amount must be 'owed' under an insurance contract and that the insured event must have occurred while the insurance contract existed in order for an insurance claim to arise (see recital 38).

11. First, it needs to be stated that following the assignment of the claims to the Applicant, one of the criteria mentioned in Article 268(1)(g) Solvency II is obviously not fulfilled anymore, as the Applicant is neither an insured person, nor a policy holder, a beneficiary or an injured party having a direct right of action against the insurance undertaking.

12. The relevant question for the case at hand is hence, whether, for the privilege under Article 275(1) Solvency II to apply, it is necessary that an 'insurance claim' under Article 268(1)(g) Solvency II is held and pursued by an insured person, a policy holder, a beneficiary or an injured party having a direct right of action against the insurance undertaking.

Reference to Section 1394 of the Liechtenstein Civil Code

13. Pursuant to Section 1394 of the Liechtenstein Civil Code, the rights of the transferee shall be precisely the same as the rights of the transferor with respect to the ceded claim.

14. By reference to Section 1394 of the Liechtenstein Civil Code, the Applicant concludes that they should profit from the privilege under Article 275(1) Solvency II[6] despite the fact that they do not qualify as an insured person, a policy holder, a beneficiary or an injured party having a direct right of action against the insurance undertaking.

15. The Liechtenstein Government notes, however, that it is a general rule that from the moment a winding-up proceeding is opened, the legislation concerning winding-up proceedings takes precedence over civil law. This becomes evident when considering the insolvency law principle of parity. Even though a creditor could claim an amount of money under civil law, they will only receive a 'quota' of that amount in a winding-up proceeding.

[6] See the request for an Advisory Opinion, page 13.

16. Despite the fact that it is clearly expressed in Recital 117 of Solvency II that national legislation concerning winding-up proceedings is not harmonized, Article 275(1) Solvency II establishes that the insolvency law principle of parity shall be overridden by the principle of priority for the benefit of 'insurance claims' as established in Solvency II.

17. It follows that Article 275(1) Solvency II, being an important cornerstone of insurance supervision law and contributing to the protection of policy holders and beneficiaries as the main objective of Solvency II, which will be further explained below, must be considered a *lex specialis* in relation to winding-up proceedings of an insurance undertaking and also a *lex specialis* in relation to civil law rules generally applicable to common claims.

18. The interpretation of the privilege for insurance claims established in Solvency II and hence the question referred to the EFTA Court must thus be assessed under Solvency II and not under the Liechtenstein Civil Law – or any other statute.

Legal Analysis of the question referred to the EFTA Court

19. When answering the concrete question referred, 1) the wording of Solvency II, 2) its aim and purpose and 3) the previous jurisprudence of the EFTA Court on the interpretation of the term 'insurance claim'[7] must be taken into account.

20. According to Article 275(1) of Solvency II insurance claims shall have absolute precedence over any other claim against the insurance undertaking. An insurance claim is further defined in Article 268(1)(g) of Solvency II as any amount owed by an insurance undertaking to insured persons, policy holders, beneficiaries or any injured party having direct right of action against the insurance undertaking.

[7] In this regard, the Liechtenstein Government will refer to the Judgment of the EFTA Court of 10 March 2020, *Gable Insurance AG in Konkurs*, Case E-3/19, and the Judgment of the EFTA Court of 25 February 2021, *SMA SA and Société Mutuelle d'Assurance du Batiment et des Travaux Publics v Finanzmarktaufsicht Liechtenstein*, Case E-5/20.

21. Is results from the wording of Article 275(1), in particular from the reference to Article 268(1)(g) of Solvency II, which only pertains to insured persons, policy holders, beneficiaries or injured third parties with a direct claim against the insurance undertaking, that only the claims of those categories of persons shall have absolute precedence over any other claim against the insurance undertaking.

22. The main objective of insurance supervision under Solvency II, namely the protection of policy holders and beneficiaries[8], is established in Article 27 as well as in Recitals 16 and 17.[9]

23. Recital 127 Solvency II refers to the protection of insured persons, policy holders, beneficiaries and any other party having a direct right of action against the insurance undertaking on a claim arising from insurance operations in winding-up proceedings.

24. It results from this that with Solvency II, in particular with the provisions applying in winding-up proceedings, the European Legislator intended to ensure that policy holders and beneficiaries are sufficiently protected. There is no indication in relation to the protection of a third party such as the Applicant in the entire text of Solvency II.

25. The Liechtenstein Government observes that pursuant to Article 277 Solvency II, an EEA State may provide that, where the rights of insurance creditors have been subrogated to a guarantee scheme established in that EEA State, claims by that scheme shall not benefit from the privilege under Article 275(1). One could conclude from this that, in case an EEA State does not make use of this possibility, guarantee schemes shall always benefit from the privilege under Article 275(1).

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[8] Pursuant to Recital 16 Solvency II, the term 'beneficiary' is intended to cover any natural or legal person who is entitled to a right under an insurance contract. It is therefore evident that the term 'beneficiary' implies the existence of an insurance contract directly conferring rights against the insurance undertaking upon the beneficiary.

[9] This has been further highlighted by the EFTA Court in Case E-5/20, recital 43. See also Article 28 Solvency II: '*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*'. The purpose of protecting policy holders and beneficiaries was already emphasized in the Commission Proposal for Solvency II (Amended Proposal for a Directive of the European Parliament and of the Council on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) (recast), COM (2008) 119 final, p. 5).

26. When considering the overall objective of Solvency II, however, one comes to a different conclusion. Article 277 Solvency II covers public guarantee schemes. In contrast to economic operators, i.e. private profit-oriented market participants such as the Applicant, guarantee schemes are not aiming at achieving a profit, but rather pursue an objective in a public interest, namely the protection of policy holders and beneficiaries.

27. They shall step in if an insurance undertaking cannot fulfill its obligations anymore to ensure that policy holders and beneficiaries do not suffer any losses.

28. Against this background, it seems reasonable that the European Legislator has drawn an explicit distinction between public guarantee schemes and economic operators, i.e. private profit-oriented market participants.

29. The Liechtenstein Government notes that if an economic operator such as the Applicant, who, as a private profit-oriented market participant, primarily pursues its economic objectives, was able to profit from the privilege under Article 275(1) Solvency II, the interests of policy holders and beneficiaries would be jeopardized.

30. Economic operators, i.e. private and profit-oriented market participants such as the Applicant, are, due to their superior market information, know-how, legal expertise and financial capacity, generally better able to assess the value of a claim against an insurance undertaking in winding-up proceedings. This is particularly true in a complex cross-border scenario such as the case at hand. This imbalance in bargaining power would inevitably lead to privately negotiated legal transactions, i.e. assignments of claims, at purchase prices below the actual values of the claims and, therefore, to the detriment of the policy holders.

31. The Liechtenstein Legislator has acknowledged the need to support insured persons, policy holders and beneficiaries (the creditors of insurance claims) in the winding-up of their insurer by stating in Article 161 (5) VersAG that '*insurance claims to be found in the account books of the insurance undertaking shall be deemed lodged'.* This means that insurance claims must not even be lodged individually by the insured persons, policy holders or beneficiaries. A corresponding provision can be found in the Austrian Insurance Supervision Act.[10]

32. An interpretation of Article 275(1) Solvency II to the effect that economic operators such as the Applicant were able to benefit from the privilege granted exclusively to the insurance claims of insured persons, policy holders and beneficiaries could result in a significant harm to the persons explicitly protected under Solvency II and would hence contradict the aim and purpose of Solvency II.

33. It thus follows from the wording as well as the aim and purpose of Solvency II that an 'insurance claim' under Article 268(1)(g) Solvency II must necessarily be held and pursued by a person the European Legislator considered worth protecting, namely a policy holder, a beneficiary or any other party having a direct right of action against the insurance undertaking.

34. This interpretation is further supported by the previous interpretation of Article 275(1) Solvency II of the EFTA Court in Cases E-3/19 and E-5/20.[11] In the view of the Liechtenstein Government, in particular the underlying circumstances in Case E-5/20 are comparable to those in the case at hand:

[10] § 313 VAG.

[11] See the Judgment of the EFTA Court in Case E-3/19, recital 38 and E-5/20, recital 44. It has also been acknowledged by the EFTA Surveillance Authority and the European Commission in their Written Observations in Case E-5/20 that the protection of policy holders and beneficiaries is the main objective of supervision under the Solvency regime and that the latter is expected to result in better protection of policy holders (see the Written Observations by the EFTA Surveillance Authority in Case E-5/20, recital 37 and by the European Commission in Case E-5/20, recital 24).

35. In Case E-5/20, insurance companies established under French Law (hereinafter referred to as 'the E-5/20 Applicants') alleged that the Liechtenstein Financial Market Authority ('FMA') had not fulfilled its supervisory obligations and that consequently, the FMA should be responsible for losses incurred as a result of the insolvency of Gable Insurance AG.

36. The E-5/20 Applicants derived their claims from insurance contracts concluded between the insured persons and Gable Insurance AG. By way of a subrogation ('*cessio legis*') established under French Law, the claims were transferred to them.

37. The EFTA Court did not qualify the E-5/20 Applicants as policy holders, beneficiaries or other parties having a direct right of action against the insurance undertaking.[12] Rather, the EFTA Court merely referred to them as '*economic operators*'.[13]

38. As in Case E-5/20, the Applicant in the present case must be considered an '*economic operator*' and cannot qualify as a policy holder, a beneficiary or another party having a direct right of action within the meaning of Solvency II.[14]

39. In its Judgment, the EFTA Court acknowledged the aim and purpose of protecting policy holders and beneficiaries in winding-up proceedings: '*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'*. With that, the EFTA Court strengthened its interpretation of Article 275(1) Solvency II in Case E-3/1, according to which '*Article 275(1) of the Directive guarantees protection for policy holders and beneficiaries by ensuring the precedence of insurance claims over other claims against the insurance undertaking in a winding-up procedure'.*[15]

[12] See the considerations of the EFTA Court in Case E-5/20, recitals 18-24.
[13] See the Judgment of the EFTA Court in Case E-5/20, *inter alia* recital 29.
[14] See the Judgment of the EFTA Court in Case E-5/20, recital 43. See also the request for an Advisory Opinion, page 13.
[15] See the Judgment of the EFTA Court in Case E-3/19, recital 54. See also the Written Observations of the European Commission in Case E-3/19, recital 18: This is further reinforced by the overall objectives of Title IV - as is

40. In relation to economic operators such as the Applicants, the EFTA Court noted in Case E-5/20 that '*economic operators are not protected from losses incurred from the insolvency of insurance undertakings*'[16] and that Solvency II '*does not lay down any express rule granting rights to economic operator such as the Applicants*'.[17]

41. Moreover, the EFTA Court held that '*special protection of economic operators such as the Applicants is not necessary to secure the objectives of the Directive, namely the protection of policy holders and beneficiaries and general financial stability*'[18].

42. Hence, in line with the wording and the aim and purpose of Solvency II, the EFTA Court concluded that the privilege for 'insurance claims' in winding-up proceedings under Article 275(1) Solvency II shall only be granted to those persons who the European Legislator considered worth protecting, namely policy holders, beneficiaries or any other party having a direct right of action against the insurance undertaking, but not to economic operators acquiring such claims by way of a subrogation (*cessio legis*). For the reasons stated above, this has to apply all the more to economic operators such as the Applicant, a private profit-oriented market participant, who has acquired the claims by way of privately negotiated legal transactions (assignments).

43. In light of the above, the Liechtenstein Government concludes that the determining factor in order to fall within the meaning of an 'insurance claim' in accordance with Article 268(1)(g) of Solvency II is the fact that the claim is held and pursed by a policy holder, a beneficiary or any other party having a direct right of action against the insurance undertaking.

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emphasized in the 127th recital, it was considered of the "utmost importance" that insured persons and policy holders be protected in winding-up proceedings.

[16] See the Judgment of the EFTA Court in Case E-5/20, recital 45.

[17] See the Judgment of the EFTA Court in Case E-5/20, recital 43.

[18] See the Judgment of the EFTA Court in Case E-5/20, recital 47.

V. Conclusion

Following the above observations, the Liechtenstein Government considers that the question referred to the EFTA Court for an advisory opinion should be answered as follows:

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, is not to be given precedence in accordance with Article 275(1) of that directive where the claim was assigned to a third party by way of a legal transaction even though, under national law, assignment of the claim entails no change in the content of the claim.

FÜRSTENTUM LIECHTENSTEIN Stabsstelle EWR LANDESVERWALTUNG

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