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ORIGINAL

IN THE EFTA COURT

WRITTEN OBSERVATIONS

submitted, pursuant to Article 20 of the Statute of the EFTA Court, by

THE EFTA SURVEILLANCE AUTHORITY

represented by
Claire Simpson, Daniel Vasbeck and Melpo-Menie Joséphidès,
Department of Legal & Executive Affairs,
acting as Agents, in

CASE E-17/24

Söderberg & Partners AS

v

Gable Insurance AG in Konkurs

in which the Princely Court of Appeal of the Principality of Liechtenstein (*Fürstliches Obergericht*) requests 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, 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).

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1 INTRODUCTION / THE FACTS OF THE CASE

1. The EFTA Surveillance Authority ("**the Authority**") refers to the Request for an advisory opinion ("**the Request**") from the Princely Court of Appeal of the Principality of Liechtenstein ("**the Referring Court**") for the more detailed factual background. The present case concerns provisions 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**").[1] Under these provisions, "*insurance claims*" must be given precedence over certain other claims in insolvency proceedings (or other winding-up proceedings). In essence, the Referring Court asks whether this precedence also applies where the insurance claim has been *contractually assigned* to a third party.

2. This question arises in the context of national insolvency proceedings concerning Gable Insurance AG in Konkurs ("**Gable**"), a company which previously operated as a direct insurance undertaking in Liechtenstein.[2]

3. Certain of Gable's insurance policy holders assigned to Söderberg & Partners AS ("**the applicant**"), a Norwegian insurance intermediary, their claims against Gable arising under their insurance contracts, including claims for the repayment of premiums.[3] The applicant made payments to these policy holders on the basis of the insurance contracts, amounting in total to NOK 623,600.00 (CHF 73,267.00). The applicant subsequently sought to recover this amount in the insolvency proceedings concerning Gable. It contends that its claim constitutes a privileged insurance claim, which takes precedence over other insolvency claims. Gable's insolvency estate administrator contests the privileged nature of the applicant's claim.[4]

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[1] OJ L 335, 17.12.2009, p. 1.

[2] The Court has previously addressed questions relating to these insolvency proceedings in its judgments of 10 March 2020 in Case E-3/19 *Gable Insurance AG in Konkurs* ("***Gable I***") and 25 February 2021 in Case E-5/20 *SMA SA and Société Mutuelle d'Assurance du Bâtiment et des Travaux Publics* v *Finanzmarktaufsicht* ("***Gable II***").

[3] Request, page 3. The Request does not provide further detail on these policy holders, such as their number and whether they are natural and/or legal persons.

[4] Request, pages 3-4.

4. In essence, the case before the Referring Court revolves around the question whether an insurance claim within the meaning of Article 268(1)(g) of Solvency II is to be given precedence, in accordance with Article 275(1) of Solvency II, in circumstances where the claim was assigned to a third party by way of legal transaction (i.e. contractually) and where, under the applicable national law, the assignment of the claim entails no change in the content[5] of the claim (i.e. the rights of the assignee are the same as those of the assignor).

5. For the reasons given below, the Authority submits that, on balance, this question is to be answered in the affirmative.

2 EEA LAW

6. By way of EEA Joint Committee Decision No 78/2011 of 1 July 2011,[6] Solvency II was incorporated, with some adaptations,[7] into point 1 of Annex IX to the EEA Agreement.[8]

7. Recital 16 of Solvency II states:

> *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.*[9]

[5] The Request and question of the Referring Court state that, under national law, assignment of the claim entails "*no change in the content*" of the claim. The Authority understands the reference to the lack of change in the "content" as shorthand for the position under Section 1394 of the Liechtenstein Civil Code, which provides that the rights of assignees are "*precisely the same*" as the rights of the assignor (see paragraph 22 below).
[6] OJ 2011 L 262, p. 45.
[7] The adaptations do not affect the Articles that are under consideration in this case.
[8] With entry into force in the EEA on 1 December 2012.
[9] Emphasis added.

8. Recital 105 of Solvency II states:

> *All policy holders and beneficiaries should receive equal treatment regardless of their nationality or place of residence. For this purpose, each Member State should ensure that all measures taken by a supervisory authority on the basis of that supervisory authority's national mandate are not regarded as contrary to the interests of that Member State or of policy holders and beneficiaries in that Member State.* ***In all situations of*** *settling of claims and* ***winding-up, assets should be distributed on an equitable basis to all relevant policy holders, regardless of their nationality or place of residence****.*[10]

9. 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.*[11]

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[10] Emphasis added.
[11] Emphasis added.

10. Article 268(1) of Solvency II provides, *inter alia*, the following definition:

> *For the purpose of this Title the following definitions shall apply:*
> […]
> *(g)* ***'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****.*[12]

11. Article 275 of Solvency II, entitled "Treatment of insurance claims", reads:

> *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:*

[12] Emphasis added.

> *(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.*

2. Without prejudice to paragraph 1, Member States may provide that the whole or part of the expenses arising from the winding-up procedure, as determined by their national law, shall take precedence over insurance claims.

3. Member States which have chosen the option provided for in paragraph 1(a) shall require insurance undertakings to establish and keep up to date a special register in accordance with Article 276.[13]

12. Article 277 of Solvency II, entitled "Subrogation to a guarantee scheme", 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)****.*[14]

13. Articles 268(1)(g), 275 and 277 of Solvency II originate, in substance, from Articles 2(k), 10 and 11 of Directive 2001/17/EC of the European Parliament and of the Council of 19 March 2001 on the reorganisation and winding-up of insurance undertakings ("**Directive 2001/17/EC**").[15] The legislative history of the latter Directive is therefore also instructive, as it may shed light on the intended purpose of the provisions at issue in the present case. On that basis, the Authority reproduces below extracts from statements issued by EU institutions in the context of the legislative

[13] Emphasis added.
[14] Emphasis added. See also Recital 121 of Solvency II (subrogation of claims of employees of an insurance undertaking to a national wage guarantee scheme).
[15] OJ L 110, 20.4.2001, p. 28. Directive 2001/17/EC was incorporated into the EEA Agreement, but has been repealed by Solvency II and is therefore no longer in force in the EU or the EEA.

procedure leading to the adoption of Directive 2001/17/EC (which lasted from 1987 to 2001).

14. In the explanatory memorandum to its modified legislative proposal of 12 September 1989, the European Commission observed, *inter alia*, the following:

> *1. On 23 January 1987 the Commission presented to the Council a proposal for a Directive on the coordination of laws, regulations and administrative provisions relating to the compulsory winding up of direct insurance undertakings. That Directive, referred to in the White Paper as a measure necessary for the completion of the internal market, aims to supplement the Council's First Directives on direct non-life insurance and direct life assurance respectively.*
>
> *It lays down **rules and procedures** governing the compulsory winding up of direct insurance undertakings, **which safeguard the rights of policyholders and the insured so as to prevent discrimination on the grounds of nationality, and consequently facilitate the creation of an internal market in insurance**.*[16]

15. In a report from the Working Party on Insurance to the Permanent Representatives Committee dated 10 April 2000, the Council of the European Union noted, *inter alia*, the following in relation to the objectives pursued by Directive 2001/17/EC:

> *The **main goals of the Directive are introducing provisions aiming at protecting the creditors that have their domiciles in another Member State than the Home Member State**, establishing information procedures between the authorities in the relevant Member States and making clear which law will be applicable in certain specific cases, e.g., concerning effects on certain contracts and rights, third parties' rights in rem, set-off or reservation of title.*

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[16] European Commission, Amended Proposal for a Council Directive on the coordination of laws, regulations and administrative provisions relating to the compulsory winding up of direct insurance undertakings, 12 September 1989, COM(89) 394 final, OJ C 253, 6.10.1989, p. 3, available at eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:51989PC0394 (emphasis added).

These goals are achieved through *the principles of unity, universally* [sic]*, co-ordination, publicity and equivalent treatment* ***and protection of insurance creditors****.*"[17]

16. Article 277 of Solvency II originates from Article 11 of Directive 2001/17/EC. In the context of the procedure leading up to the adoption of Directive 2001/17/EC, the Council of the European Union made the following statement:

Article 11 gives the home Member State an ***opportunity to deny the claims presented by guarantee schemes****, which are established in the home Member State and to which insurance claims have been subrogated,* ***the possibility to enjoy of a preferential treatment*** *for insurance claims that is provided for in Article 10(1).*[18]

17. Article 268(1)(g) of Solvency II originates from Article 2(k) of Directive 2001/17/EC. In the context of the procedure leading up to the adoption of Directive 2001/17/EC, the European Commission issued, after the Council had adopted its common position, a communication which stated, *inter alia*, the following:

3.3.3. Appropriate balance between the rights of insurance creditors and those of other creditors: treatment of insurance claims (Articles 10 and 12 and Annex)
[…]
It should also be noted that ***the broad definition of "insurance claims"*** *in the common position [Article 2 (k)]* ***should have a positive impact on the protection of insurance creditors*** *since such a definition determines the*

[17] Council of the European Union, Report from the Working Party on Insurance to the Permanent Representatives Committee, 10 April 2000, Interinstitutional file 1986/0080 (COD), ST 7642 2000 INIT – REPORT, available at https://data.consilium.europa.eu/doc/document/ST-7642-2000-INIT/en/pdf (emphasis added).
[18] Council of the European Union, Common position adopted by the Council with a view to the adoption of a Directive of the European Parliament and of the Council on the reorganisation and winding-up of insurance undertaking, draft statement of reasons, 20 September 2000, Interinstitutional file 1986/0080 (COD), ST 8975 2000 ADD 1, available at https://data.consilium.europa.eu/doc/document/ST-8975-2000-ADD-1/en/pdf (emphasis added).

scope of application of the two optional methods. Indeed an important effort has been made in the common position to specify the insurance claims to be covered. All amounts owed by the insurance undertaking arisen from an insurance operation have been included in the definition. Besides claims held by insured persons, policy holders and beneficiaries, claims held by insured persons having direct right of action against the insurance undertaking have also been considered as insurance claims. Moreover, the definition includes the premium owed by the insurance undertaking as a result of the non-conclusion or cancellation of an insurance operation.

In any case the optional dual system for the treatment of insurance claims is ***a major advance for the protection of policyholders*** *compared with the current situation. At present, policyholders in some Member States do not benefit of any privilege in the case of winding-up.* ***Moreover, the possibility of territorial winding-up proceedings and the cost of legal disputes would considerably reduce the reimbursement of their claims.***[19]

3 NATIONAL LAW

18. Solvency II was transposed into Liechtenstein law by the Act of 12 June 2015 on the Supervision of Insurance Undertakings.[20] The relevant provisions of the Act (set out in the Request) are Article 10 (definition of insurance claim), Article 161 (satisfaction of insurance claims in bankruptcy) and Article 161a (hierarchy of claims).[21]

[19] European Commission, Communication from the Commission to the European Parliament pursuant to the second subparagraph of Article 251 (2) of the EC-Treaty concerning the common position of the Council on the adoption of a European Parliament and Council Directive on the reorganisation and winding-up of insurance undertakings, 19 October 2000, SEC/2000/1714 final - COD 86/0080, available at https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52000SC1714.

[20] "**Insurance Supervision Act**" (*Versicherungsaufsichtsgesetz*; VersAG; available at www.gesetze.li), LGBl 2015/231. See Request, page 7 *et seq*.

[21] Request, pages 7-9.

19. Article 45 (separate satisfaction in insolvency) and Articles 47-51 (hierarchy of claims) of the Act of 17 July 1973 on Bankruptcy Proceedings[22] are also relevant.[23]

20. Finally, Sections 1392 to 1394 of the Liechtenstein Civil Code,[24] governing the assignment (or cession) of claims are relevant.[25]

21. Section 1392 of the Civil Code provides:

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.

22. Section 1394 of the Civil Code provides:

The rights of the transferee shall be precisely the same as the rights of the transferor with respect to the ceded claim.

4 THE QUESTION REFERRED

23. Against this background, the Referring Court has asked 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

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[22] Act of 17 July 1973 on Bankruptcy Proceedings (Bankruptcy Code) (*Gesetz vom 17.07.1973 über das Konkursverfahren* (*Konkursordnung*)), applicable in the version before the amendment effected by LGBl 2020/365. While this is not explicitly stated in the Request, the Authority assumes that this version is applicable *ratione temporis* because the insolvency proceedings were opened on 17 November 2016 (Request, page 3).

[23] Request, pages 10-11.

[24] *Allgemeines bürgerliches Gesetzbuch* of 1 June 1811 (ABGB; LR Nr. 210.0).

[25] Request, pages 11-12.

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?

5 LEGAL ANALYSIS

5.1 Preliminary remarks

24. By its question, the Referring Court raises the issue of the interpretation of the term "*insurance claim*" in Title IV of Solvency II, and of the associated precedence that is granted to such claims in the context of winding-up proceedings of an insurance undertaking, in the scenario where an insurance claim has been contractually assigned to a third party.

25. As the Court has held, Solvency II brings about harmonisation to the degree that is necessary and sufficient to achieve the mutual recognition of authorisations and supervisory systems, resulting in a single authorisation that is valid throughout the EEA and which allows the supervision of an insurance undertaking to be carried out by the home Member State.[26]

26. National legislation in the EEA States on winding-up proceedings is not harmonised. Accordingly, Solvency II is intended to ensure the mutual recognition of reorganisation measures and winding-up legislation concerning insurance undertakings and the necessary cooperation, taking into account the need for unity, universality, coordination and publicity for such measures and the equivalent treatment and protection of insurance creditors.[27]

27. The equal treatment of creditors is an underlying principle of Solvency II. This entails, in particular, that the claims of insurance creditors with habitual residence in EEA

[26] Case E-3/19 ***Gable I***, paragraph 34; compare Recital 11 of Solvency II.
[27] Case E-3/19 ***Gable I,*** paragraph 34; compare Recital 117 of Solvency II.

States other than the State where insolvency proceedings are conducted (the home EEA State) are to be treated in the same way as insurance creditors domiciled in the home EEA State, and not discriminated against based on their nationality or place of residence.[28]

28. Article 275(1) of Solvency II provides EEA States with a choice as to how to ensure the precedence of insurance claims over other insolvency claims. Liechtenstein has chosen in Article 161(1) of the Insurance Supervision Act to provide protection by establishing technical provisions in line with Articles 275(1)(a) and 76(1) of Solvency II.[29]

5.2 The approach of the Referring Court

29. The Referring Court asks whether a claim such as that of the applicant constitutes an "*insurance claim*" within the meaning of Solvency II which is to be given precedence over other insolvency claims – notwithstanding that it was contractually assigned to the applicant by the original policy holders.

30. As the Court has observed, Article 268(1)(g) of Solvency II defines an insurance claim by reference to 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;[30] (iv) on the basis of an insurance contract. The Court has concluded that it follows from this wording 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.[31]

[28] Case E-3/19 ***Gable I***, paragraph 35 and the case-law cited; compare Recitals 105 and 129 of Solvency II.

[29] Case E-3/19, ***Gable I***, paragraph 36. Article 76(1) of Solvency II provides: "*Member States shall ensure that insurance and reinsurance undertakings establish technical provisions with respect to all of their insurance and reinsurance obligations towards policy holders and beneficiaries of insurance or reinsurance contracts*."

[30] To avoid repetition, these will sometimes be referred to as "the four categories of persons" or "the insurance creditors" within the meaning of Article 268(1)(g) of Solvency II.

[31] Case E-3/19, ***Gable I,*** paragraph 38.

31. The Referring Court appears to take the view that the applicant, to which the insurance claims were assigned, is neither an insured person nor a policy holder, beneficiary or an injured party having a direct right of action against the insurance undertaking.[32]

32. The Referring Court therefore considers that if a "*strict*" literal interpretation of Article 268(1)(g) of Solvency II were to be applied, the assignment would deprive a claim of its character as an "*insurance claim*".[33] While the Referring Court does not expressly state this, the reason would appear to be that condition (iii), referred to in paragraph 30 above, would no longer be met as the applicant (according to the Request) would not fall within any of the four categories of persons listed in Article 268(1)(g) of Solvency II.

33. Having set out what it believes would amount to a "*strict interpretation*", the Referring Court goes on to consider that the EFTA Court "*also ruled to this effect*" in Case E-3/19 ***Gable I***[34] and in Case E-5/20 ***Gable II***,[35] albeit recognising that those cases did not concern insurance claims assigned by way of contract.[36]

34. In the Authority's submission, these judgments do not support a 'strict' literal interpretation of Article 268(1)(g) of Solvency II, and, while they may provide general useful guidance, they do not address the question at issue in the present case.

35. In Case E-3/19 ***Gable I***, the EFTA Court, *inter alia*, inferred from two of the conditions referred to in paragraph 30 above, namely conditions (i) ("*an amount that is owed*") and (iv) ("*on the basis of an insurance contract*") that the insured event must have occurred while the insurance contract existed in order for an "*insurance claim*" to arise. In the present case however, it is not in dispute whether the insured events occurred while the insurance contract entered into by the policy holders and Gable was in effect.

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[32] Request, page 13. This conclusion is not further explained by the Referring Court.
[33] Request, page 13.
[34] The Referring Court refers to paragraph 38 of the judgment in ***Gable I***.
[35] The Referring Court refers to paragraph 44 of the judgment in ***Gable II***.
[36] Request, page 13.

36. In Case E-5/20 ***Gable II***, the Court took the view that economic operators that were neither parties to nor beneficiaries under any insurance contract concluded with Gable were not (in the circumstances of that case) policy holders or beneficiaries within the meaning of Article 268(1)(g) of Solvency II. The Court concluded that such economic operators did not have an insurance claim against Gable, as their claims were not on the basis of an insurance contract, which meant that condition (iv) referred to in paragraph 30 above ("*on the basis of an insurance contract*") was not met. However, the economic operators in ***Gable II*** were insurance companies asserting recourse claims against Gable, rather than assignees of an insurance claim, as in the present case.

5.3 Solvency II requires precedence of assigned insurance claims

37. In the Authority's view, there are a number of reasons why, on balance, Solvency II must be interpreted as requiring EEA States to give assigned insurance claims precedence over other insolvency claims. These reasons apply independently of the treatment of the assigned claim under national law (e.g. whether or not assignment changes the content of the claim).

38. These reasons are, in line with settled case-law, based on the wording of the relevant provisions, their legislative context and history, and the objectives and purpose of the act of which they form part (Solvency II).[37] They are further developed below, and may be summarised as follows:

- **First**, the wording of Article 268(1)(g) of Solvency II does not exclude assignees.

- **Second**, it follows from the interpretation of and relationship between Articles 275(1) and 277 of Solvency II that assigned insurance claims must be given precedence, save in the case of a specific derogation (which does not apply here).

[37] See judgment of 25 January 2024 in Case E-2/23 *A Ltd*, paragraph 43 and the case-law cited.

- **Third**, it would run counter to the key objective of the protection of policy holders and beneficiaries to deny contractually assigned claims the precedence otherwise afforded to insurance claims under Solvency II.

39. **First**, the Authority observes that the wording of Article 268(1)(g) of Solvency II does not exclude assignees from the benefit of the treatment given to insurance claims. The four categories of persons referred to therein could therefore also encompass an assignee that 'steps into the shoes' of the original holder of the claim.

40. **Second**, the interpretation of and relationship between Articles 275(1) and 277 of Solvency II supports the view that, as a rule, assigned insurance claims must retain their precedence, *except* in the specific scenario of their subrogation to a guarantee scheme, where EEA States may derogate from this requirement.

41. Article 277 of Solvency II permits – but does not require – the home EEA State to derogate from Article 275(1) where the rights of insurance creditors have been subrogated to a guarantee scheme established in that home EEA State. Thus, in this specific instance, the home Member State *may* provide that claims by that guarantee scheme shall not benefit from the precedence normally granted to insurance claims under Article 275(1) of Solvency II.

42. The existence of this specific derogation[38] tends to suggest that *in all other situations where insurance claims are assigned* (i.e. those which do not concern subrogation to a guarantee scheme), Solvency II **requires** that legal successors to an insurance claim also benefit from the precedence granted under Article 275(1) of Solvency II. In other words, the wording of Article 277 of Solvency II reveals the principle that legal successors must also benefit from precedence, unless the specific circumstances permitting the derogation are present. A different interpretation could be seen as

[38] The legislative history tends to confirm that Article 277 of Solvency II was intended as a special derogation, which provides Member States with "*an **opportunity to deny** the claims presented by guarantee schemes* […] *a **preferential treatment***" (emphasis added; see paragraph 16 above).

depriving Article 277 of Solvency II of its purpose and usefulness. This reasoning is also supported by the literature cited by the Referring Court.[39]

43. An interpretation which preserves the precedence of an assigned insurance claim would therefore be consistent with the scheme and wording of the relevant provisions of Solvency II, read together.

44. **Third**, such an interpretation would also be in line with the main objective of Solvency II, that of the protection of policy holders and beneficiaries.[40]

45. This objective is reflected, in particular, in Recitals 16 and 127 of Solvency II, as well as in the legislative history leading up to the adoption of Directive 2001/17/EC.[41]

46. The objective of protecting insured persons, policy holders, beneficiaries or any injured party having a direct right of action against the insurance undertaking is advanced when such natural or legal persons also have the option of receiving payment through an insurance intermediary.[42] The intermediary, in turn, assumes the responsibility of recovering the corresponding amounts from the insurance undertaking.

47. This option of assigning an insurance claim may be particularly helpful in circumstances where it is cumbersome and challenging to pursue insurance claims individually in the event of winding-up of the insurance undertaking – even more so where the original insurance creditors within the meaning of Article 268(1)(g) of Solvency II are not domiciled in the home EEA State.

[39] Request, pages 13-14.
[40] Case E-5/20 ***Gable II***, paragraph 35; compare Recital 16 of Solvency II.
[41] Reference is made to paragraphs 7-9 and 13-15 above. In particular, Recital 127 of Solvency II states that 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* […]".
[42] At the very least, interpreting Solvency II as meaning that the original insurance creditors within the meaning of Article 268(1)(g) of Solvency II have the *option* of seeking recovery in this way is not inconsistent with the goal of protecting such creditors.

48. Thus, assigning claims to third parties can provide effective and efficient relief to creditors of insurance claims by providing them with immediate compensation.[43] This option is consistent with the objectives of Solvency II of protecting in particular creditors that are domiciled in another Member State than the home Member State and facilitating the creation of an internal market in insurance.[44]

49. If the assignee were to be relegated to the position of a general creditor (i.e. without precedence), this could result in reduced protection and lower rates of recovery. This is because insurance intermediaries would be more at risk of not recovering the assigned claims if such claims were not given the precedence conferred by Article 275(1) of Solvency II.

50. As a consequence, insurance intermediaries might be less likely to accept assignments of insurance claims, or only under more onerous financial conditions, which might ultimately make it more costly and/or more difficult for the original insurance creditors within the meaning of Article 268(1)(g) of Solvency II to recover their claims against an insurance undertaking.[45] This may particularly affect insurance creditors that are not domiciled in the home EEA State, which may indirectly run counter to the desired equal treatment of creditors.[46]

[43] Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC recognises the benefit of collective actions, as reflected, for example, in Recital 9: "*A representative action should offer an effective and efficient way of protecting the collective interests of consumers. It should allow qualified entities to act with the aim of ensuring that traders comply with relevant provisions of Union law and to overcome the obstacles faced by consumers in individual actions, such as those relating to uncertainty about their rights and about which procedural mechanisms are available, psychological reluctance to take action and the negative balance of the expected costs relative to the benefits of the individual action.*" While this Directive is not (yet) incorporated into the EEA Agreement, it in the Authority's view signals recognition that collective mechanisms of redress can play an important role in ensuring effective and efficient consumer protection.
[44] See paragraphs 14-15 above.
[45] For example, insurance creditors might either (i) decide to still assign their claims while having to accept to forego part (or a larger part) of their value (which part would accrue instead to the assignee); or (ii) abandon the option of assigning their claims altogether and attempt to pursue their claims directly and on an individual basis, which may be challenging on account, in particular, of the time, costs and complexity that may be associated with pursuing claims in connection with insolvency procedures (the proceedings concerning Gable may be a case in point, where insolvency proceedings were opened already in 2016, which have given rise to three requests for an advisory opinion).
[46] Case E-3/19, ***Gable I***, paragraph 35; compare Recital 105 of Solvency II.

5.4 On any view, Solvency II permits the precedence of assigned insurance claims

51. In the event that the Court takes the view that Solvency II cannot be interpreted as *requiring* EEA States to give precedence to insurance claims that have been contractually assigned, the Authority submits that, in the absence of anything to the contrary in the wording of Solvency II, such treatment is, at the very least, *permitted*. In this case, Liechtenstein law provides: "*[t]he rights of the transferee shall be precisely the same as the rights of the transferor with respect to the ceded claim.*"[47] Therefore, it appears that, as a matter of Liechtenstein national law, assigned insurance claims benefit in any event from the same protection as that of the original claims.

52. The Authority submits that, at the very least in such a situation, the assigned insurance claim remains, in the absence of indications to the contrary in Solvency II itself, within the definition of an "*insurance claim*". In other words, despite the assignment, the claim still fulfils the conditions of Article 268(1)(g) of Solvency II, except that the amount owed by the insurance undertaking is no longer to the original insurance creditor (for example, the policy holder), but to the assignee (here: the applicant). However, as long as (i) an amount is "*owed*" under an insurance contract, (ii) it was at least *originally* owed to one of the four categories of persons listed (where the assignee itself does not fall within any of those categories), and (iii) the insured event occurred while the insurance contract existed, a subsequent assignment does not, in the Authority's view, disqualify a claim from being treated as an "*insurance claim*".

6 CONCLUSION

53. In light of the above, the Authority respectfully submits that an insurance claim within the meaning of Article 268(1)(g) of Solvency II is to be given precedence in accordance with Article 275(1) of Solvency II in circumstances where the claim was assigned to a third party by way of contract. The fact that, under national law, assignment of the claim entails no change in the content of the claim, is not determinative in this regard.

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[47] See s.1394 of the Liechtenstein Civil Code, paragraphs 20 to 22 above and Request, page 12.

Accordingly, the Authority respectfully requests the Court to answer the question referred 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) is to be given precedence in accordance with Article 275(1) of that directive, in circumstances where the claim was assigned to a third party by way of a legal transaction. The fact that, under national law, assignment of the claim entails no change in the content of the claim, is not determinative in this regard.***

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