EFTA Court

1 rue du Fort Thüngen

L-1499 Luxembourg

Vaduz, 24 July 2025

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*) and Dr. Claudia Bösch, Deputy Director of the EEA Coordination Unit *(Stellvertretende Leiterin der Stabsstelle EWR der Regierung des Fürstentums Liechtenstein)* acting as agents of the Government of the Principality of Liechtenstein,

in Case E-8/25

Dommages Aréas v Gable Insurance AG in Konkurs

in which the Liechtenstein Princely Court of Appeal (*Fürstliches Obergericht*; hereinafter referred to as '*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. Questions 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:

1. 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, still to be given precedence in accordance with Article 275(1) of that directive even where the claim at issue is the claim of an injured party having a direct right of action against the insurance undertaking which, by way of statutory subrogation, has been subrogated to a fourth party?

2. If the answer to the Question 1 is in the affirmative: Must legal costs incurred in the assertion of an insurance claim be regarded as an insurance claim within the meaning of Article 268(1)(g) of Directive 2009/138/EC and thus also be given precedence in accordance with Article 275(1) of that directive?

II. Factual background of the case

1. As regards the factual background of the present case, the Liechtenstein Government refers to the request for an advisory opinion and for the sake of clarity, outlines the following:

2. Both *Dommages Aréas* (hereinafter referred to as the '*applicant*') and *Gable Insurance AG* (hereinafter referred to as the '*defendant*') [1], were active as insurers in France under the French *Décennale System*, which provides for the protection of constructors in the case of construction works with several service providers. The EFTA Court already ruled on the French *Décennale System* in Case E-5/20, *SMA SA and Société Mutuelle d'Assurance du Bâtiment et des Travaux Publics v Finanzmarktaufsicht Liechtenstein*, concluding *inter alia* that claims between insurers under that system are not insurance claims within the meaning of Article 268(1)(g) Solvency II, as they are not claims on the basis of an insurance contract.[2]

3. The applicant is an insurance company established under French Law. The defendant was the liability insurer of *Net Etancheite*, a French construction company.

4. In the course of its construction works, *Net Etancheite* caused a fire in a building that was covered by a construction insurance policy issued by the applicant.[3] Pursuant to this construction insurance policy, the applicant compensated the owner of the building.

5. In order to seek recourse, the applicant filed an action against *Net Etancheite* before a French Court. However, *Net Etancheite* was meanwhile liquidated without any assets.

6. In further consequence, the applicant brought legal proceedings against the defendant

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[1] Gable Insurance AG ("Gable Insurance") was an insurance company established under Liechtenstein law having its seat in Liechtenstein from 23 December 2005. The Court of Justice of the Principality of Liechtenstein opened insolvency proceedings in relation to Gable Insurance on 17 November 2016. These proceedings are still pending. This is the fourth case brought before the Court concerning the insolvency proceedings relating to Gable Insurance AG (see the Judgements of 10 March 2020 in *Gable Insurance AG in Konkurs* ("Gable I"), E-3/19; of 25 February 2021 in *SMA SA and Société Mutuelle d'Assurance du Bâtiment et des Travaux Publics v Finanzmarktaufsicht* ("Gable II"), E-5/20; of 5 February 2025 *Söderberg & Partners AS v Gable Insurance AG in Konkurs* ("Gable III"), E-17/24).

[2] Judgement of the EFTA Court in Case E-5/20, *SMA SA and Société Mutuelle d'Assurance du Bâtiment et des Travaux Publics v Finanzmarktaufsicht Liechtenstein*, recitals 18-24 and, in particular, 44.

[3] Under the *Décennale system*, the client takes out construction insurance. Depending on the case, a construction insurer must pay compensation to his client within 60 days, or 90 days, in an extrajudicial expedited procedure and independently of the final clarification of the actual person liable (see the facts and procedure in the Judgement of the EFTA Court in Case Case E-5/20, *SMA SA and Société Mutuelle d'Assurance du Bâtiment et des Travaux Publics v Finanzmarktaufsicht Liechtenstein*, recital 21).

before a French Court, which ruled that the defendant owes the applicant an amount of EUR 562'682.40 and in addition, the applicant is entitled to receive compensation of its costs, which consist of EUR 3'000.

7. The applicant lodged their claims in the insolvency proceedings related to the defendant, pending before the Princely Court of Justice of the Principality of Liechtenstein (*Fürstliches Landgericht*), and requested that they shall be entered as privileged insurance claims.

III. Legal framework

8. As regards the legal framework relevant for the case at hand, the Liechtenstein Government refers to the legal background summarized in the Judgement of the EFTA Court in Case E-5/20, *SMA SA and Société Mutuelle d'Assurance du Bâtiment et des Travaux Publics v Finanzmarktaufsicht Liechtenstein*.[4] The legal framework presented therein is equally relevant for the following written observations.

IV. Preliminary Remarks

Definition of the term '*insurance claim*' under Article 268(1)(g) Solvency II

9. With its questions referred to the EFTA Court, the Princely Court of Appeal enquires whether a subrogated claim brought by an injured third party – now exercised by a fourth party through statutory subrogation under the French *Décennale System* – constitutes an '*insurance claim*' within the meaning of Article 268(1)(g) Solvency II, and whether the legal costs associated with asserting such a claim benefit from the same privileged treatment.

10. '*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,

[4] Judgement of the EFTA Court in Case E-5/20, *SMA SA and Société Mutuelle d'Assurance du Bâtiment et des Travaux Publics v Finanzmarktaufsicht Liechtenstein*, recitals 1-17.

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]

11. At least the third criteria and the fourth criteria mentioned in Article 268(1)(g) Solvency II are not fulfilled in the present case, 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, and the applicant's claim under the French *Décennale System* is not a claim on the basis of an insurance contract.

12. The EFTA Court has already interpreted the term '*insurance claim*' in its Judgements in Cases E-3/19 ('Gable I'), E-5/20 ('Gable II') and E-17/24 ('Gable III').[6]

13. The Liechtenstein Government is convinced that the Judgement of the EFTA Court in Case E-5/20 is of direct relevance to the case at hand:

Grounds for dismissing the request for an advisory opinion - relevance of the Judgement of the EFTA Court in Case E-5/20

14. Pursuant to the settled case law of the EFTA Court, questions on the interpretation of EEA Law may be referred to the Court if the legal situation lacks clarity. Thereby unnecessary mistakes in the interpretation and application of EEA law can be avoided.[7]

15. In the view of the Liechtenstein Government, this condition is not met in the present case, since the findings of the EFTA Court in its Judgement in Case E-5/20 are of direct relevance to the present case.

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[5] See the EFTA Court in Case E-3/19, recital 38 and in Case E-17/24, recital 36.

[6] E-3/19, *Gable Insurance AG in Konkurs* ("Gable I"); E-5/20, *SMA SA and Société Mutuelle d'Assurance du Bâtiment et des Travaux Publics v Finanzmarktaufsicht* ("Gable II"); E-17/24, *Söderberg & Partners AS v Gable Insurance AG in Konkurs*.

[7] See for instance the Judgements of the EFTA Court in E-3/12, *Norwegian State, represented by the Ministry of Labour, v Stig Arne Jonsson*, recital 60 and E-10/23, *X v Finanzmarktaufsicht*, recital 44.

16. The applicants in Case E-5/20 derived their claims against *Gable Insurance AG* under the specific French *Décennale System*.

17. The Liechtenstein Government notes that in its Judgement in Case E-5/20, the EFTA Court already held that claims of an insurance company, which derives their claims from the French *Décennale System*, do not constitute '*insurance claims*' within the meaning of Article 268(1)(g) Solvency II, as they are not claims on the basis of an insurance contract.

18. Consequently, the interpretation of the term '*insurance claim*' in the context of the French *Décennale System* was already addressed and conclusively resolved by the EFTA Court in Case E-5/20. Accordingly, there is no need for a further advisory opinion of the EFTA Court, as the matter is sufficiently clarified by the existing case law.

19. In light of the above considerations, the Liechtenstein Government respectfully submits that the request for an advisory opinion is to be dismissed by the EFTA Court on the grounds that the relevant questions were already sufficiently clarified by the EFTA Court in its Judgement in Case E-5/20.

20. In the event that the EFTA Court reaches a different conclusion, the Government submits the following considerations:

V. Legal Analysis of the questions referred to the EFTA Court

21. In accordance with the established case law of the EFTA Court, the interpretation of a provision of EEA law requires account to be taken of its wording, of its context and the objectives and purpose pursued by the act of which it forms part.[8]

22. It results clearly from the wording of Solvency II that the overall-objective of insurance supervision under Solvency II is the adequate protection of policy holders and

[8] See the Judgement of the EFTA Court in Case E-17/24, *Söderberg & Partners AS v Gable Insurance AG in Konkurs*, recital 40.

beneficiaries.[9]

23. This was confirmed by the EFTA Court in Cases E-3/19 ('Gable I'), E-5/20 ('Gable II') and E-17/24 ('Gable III').[10]

24. In its Judgement in Case E-5/20, the EFTA Court used the term '*economic operator*' for parties such as the applicant in the present case, i.e. insurers participating in, and acquiring claims under the French *Décennale System*. The term '*economic operator*' encompasses all companies who operate on the EEA Insurance Market, but who do not qualify as parties to or as beneficiaries under any insurance contract within the meaning of Solvency II.[11]

25. The EFTA Court further held that neither the wording of Solvency II nor of any of its predecessor directives grants protection to such economic operators.[12]

26. Also, the EFTA-Court explicitly stated, that the applicants in Case E-5/20 did "not have an insurance claim against Gable Insurance, as their alleged claims are not on the basis of an insurance contract".[13]

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[9] See Article 27 and Recitals 16 and 17 of Solvency II. 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).

[10] See the Judgement of the EFTA Court in Case E-17/24, recital 40; Judgement 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 emphasized in the 127th recital, it was considered of the "utmost importance" that insured persons and policy holders be protected in winding-up proceedings*.'

[11] See the Judgement of the EFTA Court in Case E-5/20, S*MA SA and Société Mutuelle d'Assurance du Bâtiment et des Travaux Publics v Finanzmarktaufsicht Liechtenstei*n, recital 43.

[12] Judgement of the EFTA Court in Case E-5/20, recital 32: '*None of the predecessor directives provided for an express rule to the effect that economic operators such as the Applicants should benefit from particular protection under supervisory obligations'* and recital 43: *'The Directive does not lay down any express rule granting rights to economic operators such as the Applicants, in circumstances such as those of the main proceedings'*.

[13] Judgement of the EFTA Court in Case E-5/20, S*MA SA and Société Mutuelle d'Assurance du Bâtiment et des Travaux Publics v Finanzmarktaufsicht Liechtenstei*n, recital 44.

27. Moreover, the EFTA Court found that special protection of economic operators is not necessary to secure the overall-objective of Solvency II, namely the protection of policy holders and beneficiaries.[14]

28. The Liechtenstein Government sees no justification for departing from this explicit wording of Solvency II and the pertinent case law of the EFTA Court by assuming that the claim of the applicant in the present case, which also asserts from a statutory subrogation under the French *Décennale System*, constitutes an '*insurance claim*' within the meaning of Article 268(1)(g) Solvency II.

29. For the sake of completeness, the Liechtenstein Government notes that the judgement of the EFTA Court in Case E-17/24 does not warrant a different assessment in the present case:

30. In Case E-17/24, numerous policy holders contractually assigned their insurance claims to the Norwegian insurance intermediary *Söderberg & Partners AS,* following the bankruptcy of *Gable Insurance AG*. *Söderberg & Partners AS* subsequently lodged these contractually assigned claims as privileged insurance claims in the insolvency proceedings.

31. The question in Case E-17/24 was hence whether insurance intermediaries acquire insurance claims with priority in national insolvency proceedings, enabling them to provide immediate compensation to policy holders in the event of an insurance company's bankruptcy.

32. In its Judgement in Case E-17/24, the EFTA Court observed that the wording of Article 268(1)(g) Solvency II implies that a claim which was assigned to an insurance intermediary does not qualify as an '*insurance claim*' anymore, as the claim is no longer owed to an insured person, policy holder, beneficiary or an injured party having a direct right of action against the insurance undertaking.

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[14] See the Judgement of the EFTA Court in Case E-5/20, *SMA SA and Société Mutuelle d'Assurance du Bâtiment et des Travaux Publics v Finanzmarktaufsicht Liechtenstein*, recital 47.

33. However, the EFTA Court concluded that the overall-objective of Solvency II, namely the protection of policy holders and beneficiaries, requires a different interpretation:

'*The Court considered the broader context and purpose of the priority rule and observed that the possibility to assign insurance claims enables policy holders and beneficiaries to receive immediate compensation, thereby reinforcing the Directive's objective*'.[15]

34. The EFTA Court thus held that '*insurance claims retain their precedence even when assigned to a third party by way of a legal transaction*'.

35. Hence, in Case E-17/24, the EFTA Court decided that an insurance claim, which is assigned to an insurance intermediary by way of a legal transaction, shall still constitute an '*insurance claim*' within the meaning of Article 268(1)(g) Solvency II, since the EFTA Court considers that the overall-objective of Solvency II, namely the protection of policy holders and beneficiaries, requires so.

36. Clearly, this line of reasoning does not apply to the present case:

37. First of all, the EFTA Court based its broad interpretation of the term '*insurance claim*' in its Judgement in Case E-17/24 on the overall-objective of Solvency II, namely the protection of policyholders and beneficiaries. The EFTA Court found that the assignment by way of a legal transaction justifies maintaining the privileged status of insurance claims in order to ensure immediate compensation to policyholders and beneficiaries.

38. In contrast, in the present case, the applicant's claim derives from the French *Décennale System*. As the applicants in Case E-5/20, the applicant in the present case does not hold rights as policyholders or beneficiaries under an insurance contract. Rather, their status and the nature of their claim fall outside of the protective scope of Solvency II,

[15] See the Press Release of the EFTA Court in Case E-17/24 and the Judgement of the EFTA Court in Case E-17/24, recital 46: '*If assigned insurance claims could not benefit from the precedence granted under Article 275(1) of the Directive, this could ultimately make it more difficult for policy holders and beneficiaries to recover their claims, thereby rendering the protection afforded by the Directive less effective'*.

as they are sole economic operators, whose claims do not qualify as '*insurance claims*' within the meaning of Article 268(1)(g) Solvency II, as clarified in Case E-5/20.

39. The EFTA Court further based its decision in Case E-17/24 on Article 277 Solvency II, a provision which is not applicable to the case at hand, as it solely concerns the subrogation of an insurance claim to a guarantee scheme established in an EEA State.[16]

40. In light of the above, the Liechtenstein Government is of the view that the first question referred to the EFTA Court must be answered in the negative.

41. Due to the fact that the first question referred to the EFTA Court must be answered in the negative, there is no need to answer the second question.

[16] According to Article 277 of the Directive, the home EEA State may provide, where the rights of insurance creditors have been subrogated to a guarantee scheme established in that EEA State, that claims by that scheme shall not benefit from the provisions of Article 275(1).

VI. Conclusion

In light of the foregoing, the Liechtenstein Government is of the view that the request for an advisory opinion is to be dismissed, as the legal status of claims, which were by way of a statutory subrogation, subrogated pursuant to the French *Décennale System*, has already been conclusively clarified by the EFTA Court in its Judgement in Case E-5/20, rendering further interpretation unnecessary.

In eventu, the Liechtenstein Government considers that the EFTA Court shall answer the questions referred for an advisory opinion as follows:

1. *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 at issue is the claim of an injured party having a direct right of action against the insurance undertaking has by way of statutory subrogation, been subrogated to a fourth party.*

2. *Considering the proposed answer to the previous question, it is not necessary for the EFTA Court to answer this question.*

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