EUROPEAN COMMISSION

Brussels, 5th August 2025
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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-8/25,**

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:

Dommages Aréas

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).

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 three previous requests for advisory opinions, in cases E-3/19, E-5/20 and E-17/24.

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. In the present case, it was the liability insurer of a French company NET ETANCHEITE which had a registered office in Montpellier, France.

3. As is described on page 3 of the request for an advisory opinion, NET ETANCHEITE was engaged to carry out works on the building of the *Direction Départementale d'Incendie et de Secours ("SDIS") du Département Hérault* situated in Vailhauques, France. On 8th August 2011, in the course of these works, the company caused a fire to break out and as a result the SDIS building was damaged. However, it was covered by construction insurance taken out with the Applicant, Dommages Aréas, which paid compensation to SDIS amounting to 934 170,46€.

4. The Applicant subsequently brought an action against NET ETANCHEITE in the Montpellier Administrative Court to recover the cost of the damage caused by the fire, but despite a judgment in its favour, it received no payment since the company had in the meantime been liquidated without assets.

5. The Applicant accordingly brought legal proceedings against the Defendant, Gable Insurance, as the liability insurer of NET ETANCHEITE. In its judgment of 12th

September 2019, the *Tribunal de Grande Instance de Paris* held that the Applicant had a claim against Gable Insurance for the sum of 562 682,40€, and in addition was entitled to costs of 3 000€. (Under French law, the injured party – SDIS – has a direct right of action against the insurer guaranteeing the civil liability of the responsible party (i.e. the insurer of NET ETANCHEITE) – but this was subrogated in accordance with the French Insurance Code to the Applicant by reason of its payment of the insurance compensation).

6. The Applicant then lodged these claims in the insolvency proceedings and requested that they be entered as privileged insurance claims. This was contested by the insolvency estate administrator, on the grounds that i) the claim for 562 682,40€ was not an *insurance* claim, and therefore not a privileged claim falling within the first category of claims, and ii) the claim for 3000€ relating to legal costs was similarly not an *insurance* claim, and in any event the amount thereof was disputed.

7. As a result, the Applicant brought an action before the Princely Court seeking a declaration that the claims for 562 682,40€ and 3000€ constituted privileged insurance claims within the meaning of Article 161 of the Insurance Supervision Act for the purposes of the insolvency proceedings.

8. In a judgment dated 7th August 2024, the action was dismissed.

9. The Applicant 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 claims can properly be classified as privileged insurance claims, or not.

10. The national court further explains in Section 3 of the request that although the judgment in E-17/24 Söderberg[1] clarified that an insurance claim within the meaning of Article 268(1)(g) of Directive 2009/138/EC (Solvency II) is to be given precedence in accordance with Article 275(1) of that Directive even if it has been

[1] Judgment of 5th February 2025.

assigned to a third party by way of a legal transaction, the present case instead involves a statutory subrogation under Article L121-12 of the French Insurance Code and in relation to which the impact of EEA law remains unclear. In this regard, it also considers that the judgment in Case E-5/20[2] did not expressly address the issue of statutory subrogation. Further, the question of whether legal costs can constitute a privileged "insurance claim" has not been examined and is the subject of varying views in legal literature.

11. 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

12. The questions referred to the EFTA Court by the Princely Court of Appeal of Liechtenstein are as follows:

> "*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, LGBI 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 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?"*

[2] Judgment of 25th February 2021.

III. THE APPLICABLE LAW

Liechtenstein Law

The Insurance Supervision Act

13. 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."

French Law

14. Title II of Book 1 of the French Insurance Code is entitled "Rules on the Insurance of Damage" (*Règles relatives aux assurances de dommages)*[3]. Its Chapter I contains general provisions, including Article L121-12 which states that an insurer which has paid insurance compensation shall be subrogated, within the amount of that compensation, **to the rights and actions of the insured party against any third parties who, by their conduct, have caused the damage which has given rise to the insurer's liability** (Commission's emphasis).

Chapter IV goes on to set out further rules on liability insurance. According to Article L124-3, an injured party shall have a direct right of action against the insurer which guarantees the civil liability of the person responsible.

EEA and Union Law

15. 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[4]). The date of transposition and application of Solvency II was amended and further extended to 1st January 2016 by

[3] See www.legifrance.gouv.fr.

[4] 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[5].

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."*

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:

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

"*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

Question 1

16. The first question referred by the Princely Court of Appeal focuses on the effects of the transfer of an insurance claim to another party (in this case the construction insurer Dommages Aréas which had compensated its policyholder SDIS for damages) by way of statutory subrogation, and more specifically whether this subrogation alters its privileged status in insolvency proceedings.

17. By way of preliminary remark, the Commission understands it to be undisputed that the injured party, SDIS, had a direct right of action by virtue of Article L124-3 of the French Insurance Code against Gable Insurance as the civil liability insurer of NET ETANCHEITE, for the sum of 562 682.40€ (see page 4 of the request for an advisory opinion). As required by the definition of an "insurance claim" for the purposes of Article 268(1)(g) of the Directive, there was accordingly i) an amount owed 2) by an insurance undertaking 3) to an injured party having a direct right of action against the insurance undertaking 4) on the basis of an insurance contract[6].

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

This is also implicit in the wording of the first question itself, which queries whether the *insurance claim* is "still to be given precedence" in accordance with Article 275(1) of the Directive even if it has been subrogated to another party.

18. As is noted in Section 3 of the request for an advisory opinion, the judgment in Case E-17/24 Söderberg clarified that an insurance claim within the meaning of Article 268(1)(g) of the Directive is to be given precedence even if it has been assigned to a third party by way of a legal transaction. The central question arising in the present case is whether an "assignment" by means of statutory subrogation should be treated differently.

19. According to the Oxford Dictionary of Law, "subrogation" means "*the* ***substitution*** *of one person for another so that the person substituted* ***succeeds to the rights of the other***" (Commission's emphasis).

20. In accordance with Article L121-12 of the French Insurance Code, an insurer which has paid insurance compensation shall be subrogated, within the amount of that compensation, to the rights and actions of the insured party against any third parties who, by their conduct, have caused the damage which has given rise to the insurer's liability. In other words, the insurer who has paid insurance compensation is legally substituted for (or "steps into the shoes" of) the insured party and thereby "takes over" the insurance claim against a third party responsible for the damage and, by virtue of Article L124-3 of the French Insurance Code, also against the civil liability insurer. Just as in the case of an assignment by legal transaction (such as that in issue in Case E-17/24), the rights of the "transferee" are identical to those of the "transferor".

21. In the Commission's view, there can therefore be no basis for distinguishing the present case, and the reasoning set out by the EFTA Court in its judgment in Case E-17/24 should similarly apply.

22. As noted at paragraphs 41-43 of the judgment, even if Article 268(1)(g) of the Directive is silent as to the legal consequences of assigning an insurance claim,

Article 277 of the Directive implies that the protection under Article 275 relates to the claim, and not to the person. Further, and of particular importance, the existence of this **specific derogation** applying only to guarantee schemes "*suggests that the Directive requires that the claim must benefit from the precedence granted under Article 275(1) thereof* ***in all other situations where an insurance claim is assigned to a third party***" (Commission's emphasis). Legal successors must accordingly benefit from the precedence under Article 275(1) unless the specific circumstances of Article 277 apply – namely subrogation to a guarantee scheme.

23. In the Commission's view, it follows clearly that a claim transferred by means of statutory subrogation should similarly retain its privileged status. (As is evident from the express wording of the derogation, the Commission would add that it obviously excludes only subrogation *to a guarantee scheme* – and not subrogation of claims in general).

24. This conclusion is further reinforced by the overall objectives of the Directive of providing effective protection for policyholders and beneficiaries in winding-up proceedings (cf also its 127th recital which refers to this as being of the "***utmost importance"***.). As was emphasised at paragraphs 45 and 46 of the judgment in Case E-17/24, the assignment of claims can play a part in this by enabling policyholders and beneficiaries to receive immediate compensation from a third party rather than pursuing their claims individually.

25. It seems to the Commission that such considerations can be fully transposed to a situation such as that underlying the present case, in which an insurance claim is transferred to the construction insurer by means of statutory subrogation, following the payment of compensation to the injured policyholder under the construction insurance: indeed, the key purpose of construction insurance is to enable policyholders to receive compensation swiftly and easily in case of damage, rather than being required to pursue a claim against a construction firm or its liability insurer. Denying precedence to an insurance claim subrogated to a construction insurer could also indirectly risk making it more difficult and expensive for consumers to obtain construction insurance coverage in the first instance.

26. Finally, the national court mentions that the Defendant has sought to rely upon the judgment in Case E-5/20 (Gable II*)* to support its argument that the Applicant's claim does not constitute an "insurance claim" for the purposes of the Directive.

27. On this point, the Commission entirely shares the doubts of the referring court. As was underlined at paragraph 48 of the judgment in Case E-17/24, Söderberg, the earlier Gable II case covered an entirely different question of interpretation, namely whether the Directive confers rights on economic operators which can form the basis of a *liability* claim against the supervisory authority. The judgment went on to conclude that it could not therefore "*serve as a basis for depriving an assigned insurance claim of its privileged status under Article 275(1) of the Directive".* In the Commission's opinion, identical reasoning should apply in the circumstances of the present case.

28. For all of the above reasons, the Commission considers that the transfer of an insurance claim to another party by way of statutory subrogation in circumstances such as those at issue in the national proceedings cannot alter its privileged status in insolvency proceedings.

Question 2

29. The second question from the national court centres on the legal/procedural costs awarded to the Applicant by the *Tribunal de Grande Instance de Paris* (a sum of 3000€) arising out of its legal proceedings brought against the Defendant, Gable Insurance, as liability insurer. More specifically, the national court queries whether legal costs incurred in the assertion of an insurance claim are to be regarded as an "insurance claim" within the meaning of Article 268(1)(g) of the Directive, and accordingly given precedence under its Article 275(1).

30. As described in Section III above, there are four cumulative conditions for an "insurance claim" within the meaning of Article 268(1)(g) of the Directive 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.

31. In the case of legal/procedural costs arising from the assertion of an insurance claim, these are clearly *linked to* the insurance contract, in the sense that they arise as a result of the claim under the contract being asserted. However, in the Commission's view, they do not arise "on the basis of the contract" and should therefore rather be considered as constituting a separate claim which falls outside the definition of an "insurance claim" within the meaning of Article 268(1)(g) of the Directive.

32. Of course, it is true that qualifying such costs as a privileged insurance claim could in principle assist policyholders and beneficiaries. However, the Commission would also note that in the case of winding-up proceedings, the available assets are limited and an extension of an "insurance claim" to include ancillary costs as well as the "core" insurance claim could rather *undermine* the effectiveness of the protection offered by the principle of precedence.

33. Finally, Article 275(2) of the Directive expressly states that Member States may choose to provide that the costs of the winding-up procedure itself are *"given precedence over insurance claims"* (Commission's underlining). In other words, whilst the legislator chose to permit a limited exception to the precedence of insurance claims, this provision further serves to underline that legal costs/procedural expenses are to be distinguished from the notion of an "insurance claim".

34. The Commission would accordingly conclude that a claim for legal/procedural costs cannot constitute an "insurance claim" for the purposes of the Directive.

V. CONCLUSION

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

"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) should be given precedence in accordance with Article 275(1) of that Directive in circumstances such as those at issue in the present proceedings where the claim has been transferred by way of statutory subrogation to another insurance undertaking which has compensated the injured party under an indemnity insurance contract.

2. A claim for legal costs incurred in the assertion of an insurance claim does not constitute 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), and should not therefore be given precedence in accordance with Article 275(1) of that Directive".

Gaëtane GODDIN Bruno STROMSKY Nicola YERRELL

Agents of the Commission