ESA | EFTA Surveillance Authority

Brussels, 5 August 2025
Case No: 94127
Document No: 1543841

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
Daniel Vasbeck, Sigurbjörn Bernharð Edvardsson, and
Melpo-Menie Josephides,
Department of Legal & Executive Affairs,
acting as Agents, in

CASE E-8/25

Dommages Aréas

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

1. The present written observations were prepared with support from Marta Margrét Rúnarsdóttir and Valdimar Hjartarson, Legal Officers of the Internal Market Affairs Directorate of the EFTA Surveillance Authority ("**the Authority**").

2. The Authority refers to the Request for an advisory opinion ("**the Request**") submitted by the Princely Court of Appeal of the Principality of Liechtenstein ("**the Referring Court**") for a detailed account of the factual background. The present case 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 ("**Solvency II**" or "**the Directive**").[1] Under Solvency II, "*insurance claims*" are to be given priority over certain other claims in insolvency or winding-up proceedings. The Referring Court essentially seeks to clarify whether this priority also applies when an insurance claim has been transferred through statutory subrogation to another party (referred to as a "*fourth party*" in the Request).[2] If so, it further asks whether the same priority extends to legal costs incurred in asserting such a claim.

3. The questions, like those giving rise to the judgments of 10 March 2020 in Case E-3/19 *Gable Insurance AG in Konkurs* ("***Gable I***"), of 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***") and of 5 February 2025 in Case E-17/24 *Söderberg & Partners AS* v *Gable Insurance AG in Konkurs* ("***Gable III***"), arise in the context of national insolvency proceedings involving Gable Insurance AG in Konkurs ("**Gable**"), a former direct insurance undertaking based in Liechtenstein.

[1] OJ L 335, 17.12.2009, p. 1.
[2] Request, page 2.

4. In the context of the present case, Gable had provided liability insurance to NET ETANCHEITE ("**NET**"), a company based in Montpellier, France. On 8 August 2011, during construction works carried out on a building of the Service Départemental d'Incendie et de Secours du Département Hérault ("**SDIS**") in Vailhauquès, France, NET caused a fire, as a result of which the building was damaged.[3]

5. SDIS was insured under a construction policy issued by Dommages Aréas ("**Dommages**"), which paid SDIS EUR 934 170.46 under the insurance policy in compensation for the damage caused by the insured event. Dommages then initiated proceedings against NET before the Montpellier Administrative Court, which, by a judgment of 8 February 2018, ordered NET to pay Dommages the same amount. However, Dommages did not receive any payment from NET, which was liquidated without assets.[4]

6. Dommages subsequently brought proceedings against Gable before the Tribunal de Grande Instance de Paris. By judgment of 12 September 2019, that court found that Dommages had a primary claim against Gable in the amount of EUR 562 682.40, and a claim in the amount of EUR 3 000 in legal costs. It is not clear from the Request why the amount of the primary claim (EUR 562 682.40) was significantly lower than the original compensation paid by Dommages to SDIS (EUR 934 170.46).[5]

7. Dommages filed both these claims in Gable's insolvency proceedings[6] before the Princely Court in Liechtenstein, seeking their recognition as privileged insurance claims. The insolvency administrator rejected the classification of the EUR 562 682.40 claim as an insurance claim and disputed the EUR 3 000 claim for legal costs both as regards its substance and its amount.[7]

[3] Request, page 3.
[4] Request, pages 3-4.
[5] Request, page 4.
[6] Insolvency proceedings were opened concerning Gable on 17 November 2016, see Case E-17/24 *Gable III*, para. 24.
[7] Request, page 4.

8. Dommages then brought an action before the Princely Court (Fürstliches Landgericht) in Vaduz, seeking a declaration that the two claims lodged for EUR 562 682.40 and EUR 3 000 constitute privileged insurance claims. By judgment of 7 August 2024, the Princely Court dismissed the action. Dommages then appealed to the Referring Court.[8]

2 LAW

2.1 EEA law

9. By way of EEA Joint Committee Decision No 78/2011 of 1 July 2011,[9] Solvency II was incorporated, with some adaptations,[10] into point 1 of Annex IX to the EEA Agreement.[11]

10. Recital 16 of Solvency II reads:

> *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.*[12]

11. Recital 105 of Solvency II reads:

> *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*

[8] Request, pages 4-5.
[9] OJ L 262, 6.10.2011, p. 45.
[10] The adaptations do not affect the Articles that are under consideration in this case.
[11] With entry into force in the EEA on 1 December 2012.
[12] Emphasis added.

> *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****.*[13]

12. Recital 127 of Solvency II reads:

> ***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.*[14]

13. 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*

[13] Emphasis added.
[14] Emphasis added.

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.[15]

14. 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:

(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.

[15] Emphasis added.

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.[16]

15. 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)****.*[17]

16. 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**").[18] The legislative history of that 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 procedure leading to the adoption of Directive 2001/17/EC.

[16] Emphasis added.
[17] Emphasis added.
[18] OJ L 110, 20.4.2001, p. 28. Directive 2001/17/EC was incorporated into the EEA Agreement but was repealed by EEA Joint Committee Decision No 78/2011 of 1 July 2011 incorporating Solvency II and is therefore no longer in force in the EU or the EEA.

17. 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**.*[19]

18. In a report from the Working Party on Insurance to the Permanent Representatives Committee dated 10 April 2000, the following was, *inter alia*, noted 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.*

[19] 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****.*"[20]

19. 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).*[21]

20. 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 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*

[20] 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).

[21] 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).

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.***[22]

2.2 National law

2.2.1 Liechtenstein law

21. According to the Request, the relevant Liechtenstein law provisions applicable in the present case correspond precisely with those that were applicable in *Gable III*.[23] Consequently, for completeness, the Authority refers below to the same provisions of Liechtenstein law as in its written observations in *Gable III*, which were based on the Request for an advisory opinion in *Gable III* ("**the Request in *Gable III***"), as well as to the relevant part of the Court's judgment in *Gable III*.[24]

[22] 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.
[23] Request, page 5.
[24] Case E-17/24 *Gable III*, paras. 9-21.

22. Solvency II was transposed into Liechtenstein law by the Act of 12 June 2015 on the Supervision of Insurance Undertakings.[25] The relevant provisions of the Act are Article 10 (definition of insurance claim), Article 161 (satisfaction of insurance claims in bankruptcy) and Article 161a (hierarchy of claims).[26]

23. Article 45 (separate satisfaction in insolvency) and Articles 47-51 (hierarchy of claims) of the Act of 17 July 1973 on Bankruptcy Proceedings[27] are also relevant.[28]

24. Finally, Sections 1392 to 1394 of the Liechtenstein Civil Code,[29] governing the assignment (or cession) of claims are relevant.[30]

25. 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.*

26. 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.*

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[25] "**Insurance Supervision Act**" (*Versicherungsaufsichtsgesetz*; VersAG; available at www.gesetze.li), LGBl 2015/231. See Request in *Gable III*, page 7 *et seq*.
[26] Request in *Gable III*, pages 7-9.
[27] 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 in *Gable III*, the Authority assumes that this version is applicable *ratione temporis* because the insolvency proceedings were opened on 17 November 2016 (Request in *Gable III*, page 3).
[28] Request in *Gable III*, pages 10-11.
[29] *Allgemeines bürgerliches Gesetzbuch* of 1 June 1811 (ABGB; LR Nr. 210.0).
[30] Request in *Gable III*, pages 11-12.

2.2.2 French law

27. The Request also indicates that the following provisions of French law are relevant, noting that these provisions are referred to in the judgment of 12 September 2019 of the Tribunal de Grande Instance de Paris (see paragraph 6 above) and are not in dispute in the present case.[31]

28. Article L. 121-12, first paragraph, of the French Insurance Code provides:

> *An insurer who has paid insurance compensation shall be subrogated, within the amount of this compensation, to the rights and actions of the insured against any third parties which, by their conduct, have caused the damage which has given rise to the insurer's liability.*

29. Article L. 124-3, first paragraph, of the French Insurance Code provides:

> *An injured party shall have a direct right of action against the insurer who guarantees the civil liability of the person responsible.*

3 THE QUESTIONS REFERRED

30. The Referring Court has asked the EFTA Court the following questions:

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?*

[31] Request, page 5.

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?*"

4 LEGAL ANALYSIS

4.1 Preliminary remarks

31. As a preliminary observation, the Authority notes that certain facts described in the Request, in particular the insured event, i.e. the construction works which caused the fire, occurred prior to the entry into force on 1 December 2012 of EEA Joint Committee Decision No 78/2011 of 1 July 2011 incorporating Solvency II into the EEA Agreement (see paragraphs 4 and 9 above). Accordingly, there could potentially be doubts as to the applicability *ratione temporis* of Solvency II in the present case. However, the Authority submits that this issue, which is not addressed in the Request, does not affect the answer to the questions referred to the Court. As noted in paragraph 16 above, the provisions of Solvency II which are relevant in the present case originate, in substance, from Directive 2001/17/EC, which was incorporated into the EEA Agreement until its repeal as a consequence of the incorporation of Solvency II. Therefore, in the event that Solvency II is found not to be applicable *ratione temporis*, the corresponding and substantially identical provisions of its predecessor Directive 2001/17/EC would nevertheless apply.

32. By its questions, the Referring Court seeks clarification on the interpretation of the term "*insurance claim*" under Title IV of Solvency II, specifically regarding the priority afforded to such claims in the winding-up of an insurance undertaking, where the claim has been transferred to a "*fourth party*" by way of statutory subrogation. In the event that the first question is answered affirmatively, the second question seeks to clarify whether that priority also extends to legal costs incurred in asserting such a claim.

33. The Authority's analysis begins with a summary of the relevant parts of the Court's judgments in ***Gable II*** and ***Gable III***, which assists in the assessment of the first question referred by setting out (i) why ***Gable II*** needs to be distinguished from the present case, and (ii) why, in contrast, ***Gable III*** serves as a relevant precedent. Relevant parts of the Court's judgment in ***Gable I*** will also be referred to and relied upon, where appropriate, in the assessment of both of the questions referred.

4.2 *Gable II* and *Gable III*

4.2.1 Gable II

34. The Authority emphasises at the outset that in ***Gable II***, the Court answered a question on whether Solvency II could constitute the basis for liability claims against a supervisory authority under the principle of State liability, based on the specific facts presented to the Court in a request for an advisory opinion ("**the Request in *Gable II***").[32] The applicants in ***Gable II*** were French insurance companies operating under the French *décennale* system. This system imposes liability on construction professionals for defects in construction works for a period of ten years following acceptance of the construction works.

35. Under the *décennale* system, the client takes out construction insurance. A construction insurer must pay compensation to its client within 60 or 90 days in an extrajudicial procedure and independently of the final clarification of the person actually liable. The construction insurer pre-finances this compensation after which it has the right of recourse against the entrepreneur that is actually responsible (or its liability insurer) within the limits of the compensation paid. The construction entrepreneur (construction firm, architect, etc.) must take out liability insurance which covers its liability for damage and defects, which may occur during construction. Multiple entrepreneurs involved in the construction are jointly liable to the client.[33]

[32] Case E-5/20 *Gable II,* paras. 29-30.
[33] Case E-5/20 *Gable II,* para. 21.

36. Gable had issued liability policies to professionals involved in construction projects covered by the *décennale* regime. Following Gable's insolvency in 2016, the French construction insurers sought to recover the amounts they had paid out under the system, due to certain insured events. Importantly, the French construction insurers which were the applicants in ***Gable II*** proceeded not by filing claims in Gable's insolvency proceedings, but by bringing a State liability action in Liechtenstein against the Financial Market Authority ("**FMA**") for its alleged failures in supervising Gable.[34] This circumstance clearly sets ***Gable II*** apart from both ***Gable III*** and the present case, which concern claims filed in Gable's insolvency proceedings and the question whether these claims constitute privileged insurance claims within the meaning of Solvency II.

37. In support of their claims for compensation from the FMA, the applicants in *Gable II* maintained that they were creditors of Gable in three capacities. They were asserting recourse claims as (i) construction insurers, (ii) insurers of a person responsible for construction work by reason of joint and several liability, and (iii) insurers of a person responsible for construction work acting against the insurer of a subcontractor.[35]

38. It was not stated in the Request in ***Gable II*** whether the claims of the applicants in that case were based on statutory subrogation. The facts presented in the Request in ***Gable II*** indicated that the applicants had no insurance relationship with Gable: They had neither concluded an insurance contract with Gable to the extent the subject matter of the case was concerned, nor were they insured persons under an insurance contract concluded by a third party as the policy holder with Gable.[36] According to the Request in ***Gable II***, the applicants, however, alleged that they had "*recourse*" claims against Gable (see paragraph 37 above).[37] Crucially, the question put before the Court in ***Gable II*** was not whether the claims asserted by the applicants in that case originally qualified as insurance claims and, if so, whether those insurance claims had preserved their nature when the applicants asserted their recourse claims. Instead, the question solely concerned the issue of State liability.

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[34] Case E-5/20 *Gable II*, para. 22.
[35] Request in *Gable II*, pages 5-6 and Case E-5/20 *Gable II*, para. 23.
[36] Case E-5/20 *Gable II*, paras. 24, 27 and 43.
[37] Ibid., paras. 21 and 23 and Request in *Gable II*, pages 5-6.

39. The Court held in ***Gable II*** that Solvency II does not expressly confer rights on economic operators such as the applicants in that case that could give rise to a State liability claim.[38] Moreover, relying on the specific facts presented by the referring court, the Court simply stated that the applicants in ***Gable II*** did not have an "*insurance claim*" against Gable, noting that the applicants were neither parties to nor beneficiaries under any insurance contract concluded with Gable. Thus, their alleged claims were not based on an insurance contract. Furthermore, the Court clarified that special protection for economic operators such as the applicants in ***Gable II*** was not necessary to secure the objectives of the Directive, namely, to protect policy holders, insured persons, and beneficiaries, and to maintain financial stability.[39]

40. In summary, ***Gable II*** concerned a legal question which is different from the one at issue in both ***Gable III*** and the present case, namely whether economic operators could derive rights from Solvency II to assert claims against a supervisory authority based on the principle of State liability. This distinctive feature of ***Gable II*** was explicitly highlighted by the Court in ***Gable III***[40] (on this point, see also paragraph 49 below) and is further supported by the fact that the operative part of the judgment in ***Gable II*** does not even refer to Article 268(1)(g) of Solvency II, but solely refers to Articles 27 and 28 of Solvency II. Further, the Court did not specifically consider whether claims transferred by statutory subrogation from a person with a direct right of action under an insurance contract constitute an "*insurance claim*" within the meaning of the Directive, as such a scenario was not raised in the request before it. The Court's finding in ***Gable II*** that the claims of the applicants in that case did not arise from rights under an insurance contract and therefore did not meet the definition of an "*insurance claim*" within the meaning of the Directive was based on the specific facts provided in the Request in ***Gable II***. The present case therefore differs from ***Gable II*** both in terms of the legal question to be answered and in the way the relevant facts have been presented and delineated by the Referring Court.

[38] Case E-5/20 *Gable II*, paras. 41-47.
[39] Ibid., paras. 43-48.
[40] Case E-17/24 *Gable III*, para. 48.

4.2.2 Gable III

41. In ***Gable III***, the Court was asked to determine whether an assigned insurance claim retains its privileged status under Articles 268(1)(g) and 275(1) of Solvency II. The Authority submits that the affirmative answer provided by the Court serves as a precedent for the present case. The applicant, Söderberg & Partners AS, an insurance intermediary, had received assigned claims from policy holders arising from insurance contracts with Gable.

42. It was uncontested that the claims assigned to Söderberg & Partners AS initially qualified as "*insurance claims*" within the meaning of Article 268(1)(g) of the Directive. However, the parties disagreed whether, after assignment, the third criterion under Article 268(1)(g) of Solvency II remained fulfilled, that is, whether the claim was "*owed to insured persons, policy holders, beneficiaries or an injured party having a direct right of action against the insurance undertaking*".[41]

43. The Court observed that a strict literal reading of Article 268(1)(g) of Solvency II could imply that an assigned claim no longer qualifies as an "*insurance claim*" because the claim was no longer directly owed to one of the categories of persons to which the provision refers.[42]

44. However, the Court noted that the legal consequences of assigning a claim that initially met all the criteria to be classified as an insurance claim to another party are not specified in Article 268 of Solvency II. Therefore, a literal interpretation did not provide any definitive guidance as to how that provision was to be understood with regard to the question at hand.[43]

[41] Case E-17/24 *Gable III*, paras. 36-37.
[42] Ibid., para. 41
[43] Ibid., para. 41.

45. The Court ultimately held that the assignment of a claim does not affect its classification as an "*insurance claim*".[44] Central to the Court's reasoning was Article 277 of the Directive, which allows EEA States to deny priority for insurance claims **only** where such claims have been subrogated to national guarantee schemes.[45] The Court reasoned that this narrow exception implies that the protection under Article 275 of Solvency II relates to the claim rather than the person holding it.[46]

46. Furthermore, the Court clarified that the existence of a specific derogation pertaining only to guarantee schemes suggests that the Directive requires that the claim must benefit from the precedence granted under Article 275(1) of Solvency II in "*all other situations where an insurance claim is assigned to a third party*".[47] If the legislature had intended to permit EEA States to withhold priority from other categories of legal successors, such as assignees, that would render Article 277 of Solvency II superfluous. Therefore, the Court held that Article 277 of Solvency II must be interpreted as providing that "*legal successors must benefit from the precedence under Article 275(1), unless the specific circumstances permitting the derogation - namely subrogation to a guarantee scheme - are present*".[48]

47. The Court further held that this contextual reading was supported by the Directive's objective of protecting insurance creditors in insolvency proceedings, as set out in Recitals 16, 17 and 127.[49] In this regard, the Court highlighted that recognising assigned insurance claims as privileged would benefit policy holders and beneficiaries. It allows them to receive immediate compensation from a third party, who then takes over the claim. The Court emphasised that this is particularly valuable in complex cases, such as the one at hand, where insolvency proceedings may carry on for years, making it challenging for individuals to pursue their claims independently.[50]

[44] Ibid., para. 49.
[45] Ibid., para. 43.
[46] Ibid., para. 42.
[47] Ibid., para. 43.
[48] Ibid., para. 43.
[49] Ibid., paras. 44-46.
[50] Ibid., paras. 45-46.

48. Conversely, denying priority to assigned claims would make it harder for policy holders and beneficiaries to recover what they are owed, undermining the Directive's protective function. The Court further noted that such negative effects would be particularly liable to affect holders of insurance claims domiciled outside the home EEA State, and reaffirmed that equal treatment across the EEA is an underlying principle of Solvency II.[51]

49. Importantly, the Court explicitly distinguished ***Gable III*** from ***Gable II***. In paragraph 48 of the judgment, the Court clarified that ***Gable II*** concerned a different legal question, namely whether Solvency II conferred individual rights for the purposes of State liability. Moreover, the Court referred to paragraphs 24 and 43 of ***Gable II*** and noted that according to the Request in ***Gable II***, the applicants' claims in that case did not arise from an insurance contract with Gable. Accordingly, the Court concluded that ***Gable II*** cannot serve as a basis for excluding assigned claims from the scope of Article 275(1) of Solvency II.[52]

4.3 The first question referred

50. Turning to the first question referred, the Authority recalls that, under Article 268(1)(g) of Solvency II, an "*insurance claim*" is defined 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*" arising from an insurance contract.[53]

51. In order to determine whether a subrogated claim such as the one asserted by Dommages retains the status of an "*insurance claim*" under Solvency II, it must, first, be assessed whether the original claim (held in this case by SDIS) falls under the definition of "*insurance claim*". Second, it must be assessed whether a transfer by way of statutory subrogation alters the classification of the claim under the Directive.

[51] Ibid., para. 46.
[52] Ibid., para. 48.
[53] As highlighted by the Court in Case E-3/19 *Gable I*, para. 38 and Case E-17/24 *Gable III*, para. 36, the conditions enumerated in Article 268(1)(g) of Solvency II are cumulative, meaning that each of them must be satisfied for a claim to fall within the scope of the provision.

52. In line with settled case-law, the interpretation of provisions of EEA law is to be 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).[54]

4.3.1 Whether the initial claim falls under Article 268(1)(g) of Solvency II

53. According to the Request, Dommages' claim for EUR 562 652.40 "*would constitute an insurance claim if, as a result of the statutory subrogation,* ***nothing has changed*** *with regard to its legal nature as an insurance claim*."[55] This implies that, in the opinion of the Referring Court, the claim initially satisfied the definition set out in Article 268(1)(g) of Solvency II.

54. Nevertheless, for completeness, the Authority will address the question whether the claim originally held by SDIS initially met the conditions of an "*insurance claim*" under Article 268(1)(g) of Solvency II. While the Authority offers its interpretation based on the facts set out in the Request, it is ultimately for the Referring Court to assess, in light of all the relevant facts, whether those conditions are satisfied in the present case.

55. The Authority observes that the Court in ***Gable I*** highlighted that a prerequisite of an "*insurance claim*" is the existence of an insurance contract.[56] Article L.124-3 of the French Insurance Code grants third-party claimants, whose property has been damaged by the actions of an insured party, a direct right of action against the liability insurer (see paragraph 29 above). This right is contingent upon the existence of an insurance contract between the insurer and the liable party. In the absence of such a contract, Article L.124-3 of the Insurance Code would not confer any enforceable right on the third party against the insurer. The resulting obligation, therefore, does not arise solely by operation of law but flows from the insurer's contractual commitment to cover the civil liability of the insured.

[54] Case E-2/23 *A Ltd*, para. 43 and the case-law cited.
[55] Request, page 6 (emphasis added).
[56] Case E-3/19 *Gable I*, para. 44.

56. Article 268(1)(g) of Solvency II does not itself create direct-action rights but relies on national law to determine which persons may qualify as an entitled claimant. Therefore, the Authority submits that where national law grants a direct right of action to a third party injured by the conduct of the insured, despite the third party not being a party to the liability insurance contract, that right must be recognised under Article 268(1)(g) of Solvency II.

57. The Authority thus submits that based on the information provided in the Request, the original claim held by SDIS appears to satisfy the requirements of Article 268(1)(g) of Solvency II. SDIS, as the party whose property was damaged, appears to qualify as "*any injured party having direct right of action against the insurance undertaking*" within the meaning of that provision. It had a direct statutory right of action against Gable under Article L.124-3 of the French Insurance Code, by virtue of Gable's liability insurance covering the contractor responsible for the damage (NET).

58. In the present case, the claim thus arises from a liability insurance contract between Gable and NET and was initially held by SDIS as an injured third party with a direct right of action against Gable. The statutory subrogation of SDIS's claim to Dommages merely transferred an existing insurance right arising from Gable's contractual commitment. In light of the foregoing, the Authority submits that a claim of an injured party having a direct right of action against the insurance undertaking such as the claim initially held by SDIS constitutes an "*insurance claim*" within the meaning of Article 268(1)(g) of Solvency II, which is nevertheless for the Referring Court to verify based on the relevant facts.

4.3.2 Whether the transfer by statutory subrogation alters the classification

59. Turning to the assessment of whether the subrogation of the claim deprived it of its privileged status under Article 275(1) of Solvency II, the Authority recalls that the Court in ***Gable III*** focused on the assignment of claims to a "*third party*",[57] whereas in the present case, Dommages, as subrogated insurer, may be considered a further step removed, that is, a so-called "*fourth party"*.[58] However, the Authority observes that the Court in ***Gable III*** did not limit its reasoning to third-party assignees. Instead, it referred

[57] Case E-17/24 *Gable III*, para. 43.
[58] The first question refers to the subrogation to a fourth party.

more broadly to "*legal successors"*,[59] which could be taken to encompass all forms of transfer, including those arising by operation of law, such as subrogation.[60]

60. The Authority further notes that, as in ***Gable III***, there is nothing in the wording of Article 268(1)(g) of Solvency II to suggest that a claim loses its character as an "*insurance claim*", and consequently its entitlement to privileged status under Article 275(1) of Solvency II merely because it has been transferred, whether by assignment or by statutory subrogation. A literal reading of Article 268(1)(g) of Solvency II, therefore, offers no conclusive guidance as to whether the subrogated claim at issue in the present case should be excluded from the definition.

61. As the Court observed in ***Gable III***, Article 277 of Solvency II provides that the home EEA State may, where the rights of insurance creditors have been subrogated to a guarantee scheme, stipulate that such claims shall not benefit from the priority set out in Article 275(1) of Solvency II. The Court interpreted this as confirming that the protection under Article 275(1) of Solvency II attaches to the claim itself, not to the identity of the claimant.[61]

62. In other words, Article 277 of Solvency II draws a distinction between the origin of the claim and the party enforcing it.[62] The Court's reasoning in ***Gable III*** implies that the fact that the Directive expressly permits exclusion only for claims subrogated to guarantee schemes indicates that all other forms of legal succession, whether by assignment or subrogation, and regardless of whether the enforcing party is a third or fourth party, preserve the claim's privileged status. If the view were taken that the legislature intended to make priority contingent more broadly on the identity of the enforcing party, that would risk rendering Article 277 of Solvency II superfluous.

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[59] Case E-17/24 *Gable III*, para. 43.
[60] See para. 56 above. Article 268(1)(g) of Solvency II does not itself create direct-action rights but relies on national law to determine which persons may assert such claims. By the same token, it does not appear to preclude national rules on subrogation or other forms of legal succession from operating to transfer those rights.
[61] Case E-17/24 *Gable III*, para. 42.
[62] Ibid., paras. 42-43.

63. Turning to teleological arguments, the facilitation of prompt compensation, as referenced by the Court in ***Gable III***, arises from the mechanism by which a person or undertaking not party to the original insurance contract acquires the claim, in that case by way of contractual assignment, and then enforces it in its own name. This arrangement allows the original claimant to receive compensation without having to pursue complex or prolonged insolvency proceedings, thereby enhancing access to timely redress and maintaining the effectiveness of the Directive's protective purpose.

64. In the present case, SDIS, as the injured party, had a direct statutory right of action against the liability insurer of the responsible contractor (see paragraphs 55-58 above). After compensating SDIS, Dommages was subrogated to that right under Article L. 121-12 of the French Insurance Code (see paragraph 28 above). While a negative answer to the first question would not undermine the policy holder's (here, SDIS) entitlement to compensation under its own policy, it could weaken the financial position of the compensating insurer (here, Dommages) in cases where the liable party's insurer (here, Gable) is insolvent.

65. In turn, this could adversely impact the availability or pricing of such construction insurance products, thereby undermining the effectiveness of the broader statutory scheme. The principle affirmed in ***Gable III***, that the protective purpose of the Directive attaches to the claim itself and accompanies it in the event of a transfer, appears to remain applicable regardless of whether such transfer occurs voluntarily or by operation of law.

66. This line of reasoning does not conflict with paragraph 45 of ***Gable II***, where the Court emphasised that Solvency II does not provide protection to economic operators from losses incurred from the insolvency of insurance undertakings. An affirmative answer to the first question in the present case would not entail a broader protection for economic operators as such but rather ensure continuity of the claim's legal status under Solvency II after subrogation, consistent with the Directive's focus on the nature of the claim rather than the identity of the enforcing party.

67. In this regard, the Authority also notes that denying priority to a subrogated insurer might create an anomalous outcome. A voluntary assignee (as in ***Gable III***) would be entitled to privileged treatment while an insurer that acts on its right under statutory subrogation would be placed in a materially worse position, despite enforcing a substantively identical claim. Again, the Authority observes that such a distinction would be difficult to reconcile with the structure of the Directive, which attaches protection under Article 275(1) of Solvency II to the claim itself, rather than the identity of the enforcing party, except where Article 277 of Solvency II expressly provides otherwise.

68. In light of the foregoing, the Authority submits that where a claim initially meets the requirements of Article 268(1)(g) of Solvency II (or the corresponding provision of the predecessor directive, Article 2(k) of Directive 2001/17/EC), and thus qualifies for the protective status under Article 275(1) of Solvency II (or the corresponding provision of the predecessor directive, Article 10 of Directive 2001/17/EC), it does not lose that status merely because it has been transferred by way of statutory subrogation from an injured party having a direct right of action against the liability insurer, to the insurer of that injured party.

4.4 The second question referred

69. The second question concerns whether an affirmative answer to the first question requires that legal costs incurred in asserting an insurance claim within the meaning of Article 268(1)(g) of Solvency II must also be regarded as constituting an insurance claim and thus benefit from priority under Article 275(1) of the Directive. According to the Request, the legal costs in the present case arise from a judgment of 12 September 2019 by the Tribunal de Grande instance de Paris, which held that Dommages had a primary claim against Gable in the amount of EUR 562 682.40 in compensation and an additional claim in the amount of EUR 3 000 in legal costs (see paragraphs 6-8 above).

70. As mentioned, an "*insurance claim*" under Article 268(1)(g) of Solvency II must arise from an insurance contract. The provision lays down a harmonised definition applicable across the EEA. While national law or an insurance contract may create an obligation to cover legal costs, the Authority submits that this cannot, by itself, extend the scope of what constitutes an "*insurance claim*" under Solvency II.

71. Accordingly, the Authority takes the view that legal costs incurred in asserting an insurance claim do not constitute "*insurance claims*" within the meaning of Article 268(1)(g) of Solvency II, unless the obligation to cover such costs arises under the insurance contract and the other conditions in the provision are fulfilled.[63] Claims for legal costs, therefore, do not automatically benefit from the priority conferred by Article 275(1) of Solvency II.

72. That said, EEA States retain discretion to determine how such claims (i.e. claims for legal costs) are treated in domestic insolvency proceedings, provided that insurance claims under Article 268(1)(g) of Solvency II retain priority under Article 275(1) of Solvency II.[64]

73. For completeness, the Authority highlights that Article 275(2) of Solvency II allows EEA States to prioritise certain expenses arising from the winding-up procedure itself. However, the Authority submits that this provision does not extend to legal costs awarded to a claimant in prior legal proceedings instituted to assert a claim against an entity which is or becomes the subject of winding-up proceedings. Similarly, Recital 127 of the Directive mentions that EEA States may rank different categories of insurance claims, but only within the scope of Article 268(1)(g) of Solvency II. It does not empower EEA States to unilaterally expand the harmonised definition by reclassifying claims unrelated to the insured risk as insurance claims.

[63] Here, the Authority notes that even if legal costs were considered to constitute an insurance claim, they must relate to claims arising during the period in which the underlying insurance contract remained in force, as confirmed by the Court in Case E-3/19 *Gable I,* paras. 41-47.
[64] Case E-3/19 *Gable I*, para. 46.

5 CONCLUSIONS

Accordingly, the Authority respectfully requests the Court to answer the questions referred 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 (or within the meaning of the corresponding provision of the predecessor directive, Article 2(k) of Directive 2001/17/EC), such as a claim initially held by an injured third party with a direct right of action against a liability insurer, retains its classification and is to be given precedence in accordance with Article 275(1) of that Directive (or in accordance with the corresponding provision of the predecessor directive, Article 10 of Directive 2001/17/EC) where the claim has been transferred by way of statutory subrogation to another party, such as the insurer of the injured party.

2. Legal costs incurred in asserting an insurance claim do not, in themselves, constitute an insurance claim within the meaning of Article 268(1)(g) of Directive 2009/138/EC (or within the meaning of the corresponding provision of the predecessor directive, Article 2(k) of Directive 2001/17/EC) and therefore do not benefit from the priority set out in Article 275(1) of that Directive (or in the corresponding provision of the predecessor directive, Article 10 of Directive 2001/17/EC), unless the obligation to cover such costs arises from an insurance contract and the other conditions of Article 268(1)(g) of Directive 2009/138/EC (or Article 2(k) of Directive 2001/17/EC) are fulfilled.

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