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To the
EFTA Court
1, Rue du Fort Thüngen
1499 Luxemburg

Via e-EFTACourt Portal
Via Email: registry@eftacourt.int

E-8/25

Applicant in the main proceedings:

Aréas Dommages
47 – 49 rue de Miromesnil
75380 Paris Cedex 08
France

represented by:

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Landstrasse 60
9490 Vaduz
Liechtenstein

(Power of attorney granted (Art. 8(2) RAG) as in initial proceedings)

Defendant in the main proceedings:

(Insolvency estate of)
Gable Insurance AG in bankruptcy
(FL-0002.161.375-6)
Alvierweg 2, 9490 Vaduz
Liechtenstein

Represented by the Trustee in Bankruptcy:
Batliner Wanger Batliner Rechtsanwälte AG
Am Schrägen Weg 2
9490 Vaduz

concerning:	Determination of an insolvency claim (value of the action for costs purposes: EUR 565'682.40 s.A. = CHF 548'712.00; GGG: CHF 3'000.00 [Art. 20(g) GGG])
Referring Court:	Fürstliches Obergericht Liechtenstein (Liechtenstein Princely Court of Appeal)

WRITTEN OBSERVATIONS

Original

In accordance with the request of the EFTA Court of 6 June 2025, Case E-8/25, and in accordance with Art. 20 of the statute and Art. 97 of the Rules of Procedure of the EFTA Court, the applicant submits the following

WRITTEN OBSERVATIONS

to the EFTA Court.

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1 THE INITIAL PROCEEDINGS

1.1 The parties

1. The applicant is an insurance company incorporated under French law with its registered office in France, 47 – 49 rue de Miromesnil 75380 Paris Cedex 08, France.

2. Gable Insurance AG, the defendant in these proceedings, is an insurance company incorporated under Liechtenstein law with its (former) registered office in 9490 Vaduz, Liechtenstein. Gable Insurance AG was entered in the Liechtenstein Commercial Register on 6 October 2005 under No. FL-0002.161.375-6 as a company limited by shares with a share capital of CHF 26 million. On 23 December 2005, Gable Insurance AG was granted a licence by the Liechtenstein Financial Market Authority (FMA) to conduct business in the field of non-life insurance in classes 1, 2, 3, 7 to 10, 13 and 15 to 17 in accordance with Annex 1 of the Insurance Supervision Act[1] (VersAG).

   By order of the Princely Court of Justice on 17 November 2016, bankruptcy proceedings were opened against the assets of Gable Insurance AG at the request of PricewaterhouseCoopers AG, Zurich, as special representative of Gable Insurance AG. The bankruptcy proceedings are currently pending before the Princely Court of Justice under case number 05 KO.2016.672.

3. Gable Insurance AG sold, among other things, so-called "*Décennale*" insurance products in France, including professional liability insurance for craftsmen and construction professionals.

4. In connection with the bankruptcy proceedings of Gable Insurance AG, there have already been several legal disputes, which have also been submitted to the EFTA Court with a request for an opinion pursuant to Art. 34 of the of the

[1] Law on the Supervision of Insurance Companies (Insurance Supervision Act; VersAG) of 12 June 2015, Liechtenstein law gazette ("LGBl") No. 2015.231, as amended and currently in force.

Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice[2] (SCA):

- E-3/19 Gable Insurance AG in bankruptcy ("*Gable I*")
- E-5/20 SMA SA and Société Mutuelle du Batiment et des Travaux Publics v Finanzmarktaufsicht ("*Gable II*")
- E-17/24 Söderberg & Partners v Gable Insurance in bankruptcy ("*Gable III*")

1.2 The claim in question

5. The insurance claim in the case at hand occurred on 8 August 2011 when a fire broke out during work to waterproof and insulate part of the roof of the offices of the Direction Départementale d'Incedie et de Secours ("SDIS") du Département Hérault. This work was carried out by Net Etancheite, 11 Rue Claude Francois, Parc 2000, B-P 7273, 34080 Montpellier, who was insured by the defendant in its capacity as professional liability insurer. The SDIS buildings affected were in turn insured by the applicant under a property and building insurance policy no. 0R.201.429 D.

6. In accordance with the property and building insurance contract concluded by SDIS with the applicant, the applicant paid in its capacity as insurance undertaking the amount of EUR 281'149.48. The applicant was also ordered by a French court to pay, in its capacity as insurance undertaking, additional insurance benefits of EUR 653'020.98 to the SDIS, which was done in January 2016. Thus, the applicant paid a total of insurance benefits of EUR 934'170.46 to the SDIS.

7. In subsequent proceedings brought by the applicant against Net Etancheite, a final and binding judgment was issued on 8 February 2018, ref. no. 1602640 establishing that Net Etancheite had caused the fire and subsequent damage to the SDIS building, for which reason it was ordered to pay EUR 934'170.46

[2] LGBl 1995/72.

(to cover the damage caused by the fire on 8 August 2011) and EUR 1'500.00 to cover pre-trial costs. However, as Net Etancheite had been wound up without assets in the meantime, the **applicant did not receive any compensation from Net Etancheite.**

8. Subsequently, by judgment of 12 September 2019, RG No. 15/13071 – No. Portalis 352J-W-B67-CGCZQ of the Tribunal De Grande Instance De Paris, it was finally and binding established that the applicant is entitled to a claim against the defendant in the amount of EUR 562,682.40 plus EUR 3,000.00 in reimbursement of costs arising from the above-mentioned case of damage. In this regard, the Tribunal De Grande Instance De Paris stated, among other things:

> *"According to Article L 121-12 of the Insurance Act, the insurer who has paid the insurance benefit shall be subrogated to the rights and claims of the insured against third parties whose actions caused the damage giving rise to the insurer's liability, up to the amount of the benefit paid."*
>
> *Pursuant to Article L 124-3 of the same Act,* ***the injured third party*** *has* ***a direct right of action against the insurer who guarantees the civil liability of the person liable.***
>
> *In the present case, AREAS DOMMAGES proves that, in accordance with the insurance contract between them, it paid its insured party, SDIS, the provisional sum of € 262'160.50 for the building damage guarantee claimed as a result of the fire at its offices in 2011, € 18'988.98 for expert's fees and, finally, € 653'020.98 for the decision of the Montpellier Administrative Court of 8 July 2015, i.e. a total of € 934'170.46.*
>
> *However, the expert report of 20 April 2012 shows that NET ETANCHEITE, which was insured by GABLE INSURANCE AG, did not remove the cladding during the welding of the bitumen coating, with the*

result that its worker set fire to the purlins and wooden panels of the cladding structure with his cutting torch.

The fire, which prompted AREAS DOMMAGES to compensate its insured party, SDIS, in the amount of € 934'170.46, was therefore caused by a fault on the part of NET ETANCHEITE, as the Montpellier Administrative Court had already established in its decision of 8 February 2018, in which it ordered NET ETANCHEITE to pay AREAS DOMMAGES the sum of € 934'170.46.

The company NET ETANCHEITE had concluded a craftsmen's liability insurance policy with GABLE INSURANCE AG.

According to the special conditions attached as Annexes 1 and 2 to the statement of defence, the declared activities included "waterproofing work on roof terraces or sloping roofs using standard techniques", "wall and floor coverings made of hard materials (tiles, stone, marble), interior plastering, drywall construction, double cladding, suspended ceilings, painting, wallpaper, soft floor and wall coverings (carpets, thermoplastic tiles)", professional liability for damage to the building after acceptance, liability for damage outside the building, ten-year liability and damage to the company's materials.

The expert report shows that NET ETANCHEITE carried out the waterproofing work under the facade cladding without removing it and that when the vapour barrier was heated, the burner flame set fire to the purlins and wooden panels.

The fire therefore broke out during the waterproofing work, which was part of the activities reported by GABLE INSURANCE AG and thus covered by its guarantee, causing damage to the buildings belonging to the SDIS.

GABLE INSURANCE AG is therefore obliged to meet its guarantee obligations to its insured party, NET ETANCHEITE, but within the limits of the insurance contract between them, which is enforceable against AREAS DOMMAGES.

However, the special conditions attached as Annex 1 and signed by NET ETANCHEITE stipulate that the liability guarantee for damage outside the building is capped at € 500'000.00 for property damage and € 80'000.00 for non-material damage.

Of the sum of € 934'170.46 paid by AREAS DOMMAGES to SDIS, the sum of € 18'988.98 corresponds to the costs of the expert opinion.

However, BATLINER fails to prove that these expert costs are either excluded from liability for damage outside the building or are included in the material damage subject to the € 500'000.00 limit, as it has not submitted the general terms and conditions of the insurance contract, which define the terms 'material damage' and 'immaterial damage' and specify in more detail what is covered by liability for damage outside the building and what is not.

Consequently, this amount of €18,988.98 is taken into account in the calculation of the claim owed by GABLE INSURANCE AG.

In addition, Article 4-7 of the Special Conditions of the insurance contract concluded by SDIS with AREAS DOMMAGES provides for the payment of compensation which "shall be increased by a flat rate of 5% for indirect losses, without the insured party having to provide any proof".

Thus, of the sum of € 934'170.46, the sum of € 45'759.07 (5 % of € 915'181.48) was paid as indirect losses and therefore falls into the category of intangible damages, which are subject to a ceiling of € 80'000.00.

The sum of € 43'693.42 is therefore taken into account in the calculation of GABLE INSURANCE AG's claim when it comes to the sum claimed by AREAS DOMMAGES (corresponding to 5 % of € 262'160.50 + € 611'707.86).

Since € 869'422.41 was ultimately paid for material damage and the maximum amount for this damage is limited to € 500'000.00, the sum of € 500'000.00 is retained as the guarantee owed by GABLE INSURANCE AG for property damage.

*Consequently, a **claim in favour of AREAS DOMMAGES in the amount of € 562'682.40 is recognised** as a liability of GABLE INSURANCE AG.*

[...]

*BATLINER, in its capacity as liquidator of **the defeated company GABLE INSURANCE AG**, **is** ordered **to bear all the costs** of the present proceedings and to pay compensation to AREAS DOMMAGES for the costs incurred and not included in the costs, which are to be set at the following amounts at the court's discretion: **€ 3'000.00**.*

9. In accordance with **the decision** of the Tribunal De Grande Instance De Paris, **the applicant** has therefore a final and binding **claim (based on the title of a court judgment) against the defendant** in the amount of EUR 562'682.40 plus EUR 3'000.00 in costs.

1.3 Registration of the current insurance claim and its refusal by the defendant

10. By submission dated 24 July 2018, the applicant duly registered the above mentioned claim of EUR 935'670.46 against the defendant in the defendant's

bankruptcy proceedings as a privileged insurance claim pursuant to Art. 161 of the Liechtenstein Insurance Contract Act (VersAG), as an insurance benefit and as a right of separation. The defendant acknowledged the claim in the amount of EUR 562'682.40, however only in class 4. The defendant therefore **acknowleged the amount of the claim** (with the exception of EUR 3'000.00), however, **disputed that the registered claim of EUR 562'682.40 qualifies as a privileged insurance claim pursuant to Art. 161 of the Liechtenstein Insurance Contract Act (VersAG)** and as a right of separation.

11. The applicant then filed a lawsuit against the defendant at the Princely Court of Justice and requested a declaratory judgment stating that the registered claim of the applicant in the amount of of EUR 562'682.40 (the claim was limited to this amount by the applicant) and EUR 3'000.00 qualify as privileged insurance claims within the meaning of Art. 161 VersAG.

12. The Princely Court of Justice dismissed the case at first instance. Following an appeal by the applicant, the Princely Court of Appeal decided to stay the appeal proceedings and request an advisory opinion from the EFTA Court pursuant to Art. 34 of the SCA.

2 QUESTIONS REFERRED BY THE PRINCELY SUPREME COURT

13. The Princely Court of Appeal requested the EFTA Court to give an advisory opinion on the following two 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, 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?

3 QUALIFICATION OF THE CLAIM IN DISPUTE

3.1 Opinion on question 1

3.1.1 Qualification and legal nature of the original claim of SDIS

14. In a nutshell, the question referred by the Princely Court of Appeal seeks to determine whether the claim in question brought by the applicant constitutes a privileged insurance claim within the meaning of Art. 275(1) of Directive 2009/138/EC (hereinafter referred to as the "Directive" or "Solvency II Directive") and thus a claim that is to be given preferential treatment in bankruptcy proceedings. For this to be assumed, the applicant's claim must be subsumed under the legal definition in Art. 268(1) of the Solvency II Directive. The defendant disputes this legal nature, in particular alleging that the applicant would not be the policyholder of the defendant, but would have "rather" acquired the claim by way of statutory subrogation (assignment).

15. The applicant's claim is based on a statutory subrogation (assignment) pursuant to Art. L121-12 of the French Insurance Code. As the French courts have issued a final and binding ruling, Net Etanchéité has been held liable for the fire damage to the SDIS building. Accordingly, SDIS, as the injured party, may assert claims not only against Net Etanchéité, the party responsible for

the damage, but also **directly against the defendant** pursuant to Art. L124-3 of the French Insurance Code (**direct right of action**), particularly as the defendant, in its capacity as Net Etanchéité's professional liability insurer, is obliged to cover damage caused by Net Etanchéité in the course of its professional activities.

However, since SDIS directed its claim for compensation directly against its own property insurer — the applicant — and the applicant paid out the corresponding insurance benefit, SDIS's direct claim against the defendant was transferred (assigned) to the applicant by operation of law pursuant to Art. L121-12 of the French Insurance Code. Accordingly, the **applicant** — as confirmed by the Supreme Court in Paris — **holds a direct claim against the defendant**, derived from the position of the originally injured party, namely SDIS.

16. It must therefore first be determined whether, in the absence of the aforementioned statutory subrogation (assignment), SDIS's claim would qualify as a privileged insurance claim within the meaning of Art. 268(1)(g) of the Solvency II Directive.

17. Article 268(1)(g) of the Solvency II Directive defines an insurance claim as follows:

> *(1) "For the purposes of this Title, the following definitions shall apply:*
>
> g) *'insurance claim' means an amount which is owed by an insurance undertaking to insured persons, policy holders, beneficiaries or to any injured party having direct right of action against the insurance undertaking and which arises from an insurance contract or from any operation provided for in Article 2(3)(b) and (c) in direct insurance business, including an amount set aside for those persons, when some elements of the debt are not yet known."*

18. In order for a claim to constitute a privileged insurance claim within the meaning of the Solvency II Directive, the following conditions must be met, as also stated by the EFTA Court in E-3/19[3] :

(1) An amount is owed;
(2) by an insurance undertaking;
(3) to insured persons, policy holders, beneficiaries or **injured (third) parties** having a direct right for action against the insurance undertaking;
(4) on the basis of an insurance contract.

19. The claim of SDIS, which was subsequently transferred to the applicant by way of statutory subrogation (assignement), results from damage caused by the company Net Etancheite. SDIS has a claim against Net Etancheite as the party responsible for the damage, which it could also have asserted against the defendant, especially since the latter provided Net Etancheite with a craftsman's liability insurance policy. Pursuant to Art. L124-3 of the French Insurance Code, the **injured party** (in this case SDIS) has a **direct right of action against the insurer** who guarantees the civil liability of the liable party (in this case the defendant).

20. Consequently, **SDIS's claim** is **directly** based **on an insurance contract** (professional liability insurance) between Net Etancheite (as the policyholder) and the defendant (as the insurer). The claim was **directly enforceable under this insurance contract** between the defendant and Net Etancheite as the policyholder. In this context, the SDIS is to be regarded as an injured third party (from the perspective of the defendant).

21. The claim of SIDS therefore meets the requirements of Art. 268(1)(g) of the Solvency II Directive. Ultimately, (1) a sum of money (2) is owed by the

[3] EFTA Court, Case E-3/19, Judgment of 10 March 2020, *Gable Insurance AG in bankruptcy,* mn. 38.

defendant as an insurance undertaking (3) to SDIS as an injured third party, with a direct right of action against the defendant, (4) on the basis of the insurance contract concluded between the defendant and Net Etancheite.

22. Since SDIS's claim qualifies as an "insurance claim" pursuant to Art. 268(1)(g) of the Solvency II Directive (Art. 10(1)(52) VersAG), it must be treated as privileged within the meaning of Art. 161 VersAG in the event of the insurer's insolvency. Such claims are therefore considered Class 1 claims in Liechtenstein bankruptcy proceedings and must be satisfied exclusively from the special pool of the insurer's actuarial reserves; also, such privileged claims constitute separation rights and take precedence over other Class 1 claims. The provisions on the preferential treatment of such insurance claims are set out in Art. 161 et seq. VersAG, which incorporates the provision of Art. 275(1) of Directive 2009/138/EC.

23. The latter provision stipulates in paragraph 1 that Member States shall ensure the preferential treatment of insurance claims. At the discretion of the Member State this may include, inter alia, allowing "*insurance claims to take absolute precedence over any other claim on the insurance undertaking with regard to assets representing the technical provisions* [...]"[4].

24. Accordingly, **Art. 161(1) of VersAG** provides:

> "*The assets covering technical provisions shall constitute a separate estate in bankruptcy proceedings in accordance with Article 45 of the Insolvency Act to satisfy insurance claims. [...]*"[5] .

25. The SDIS's claim is therefore undoubtedly to be classified as an insurance claim within the meaning of Art. 10(52) in conjunction with Art. 161 VersAG (in accordance with Art. 268(1)(g) in conjunction with Art. 275 of the Solvency II Directive).

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[4] Art. 275(1)(a) of Directive 2009/138/EC.

26. The only remaining point of contention is whether the statutory subrogation (assignment) provided for in Art. L121-12 of the French Insurance Code alters the legal nature of the claim. As will be demonstrated below, such statutory subrogation has no effect on the classification and legal nature of the claim as a privileged insurance claim within the meaning of Art. 268(1)(g) of the Solvency II Directive; any other interpretation would be incompatible with the purpose and structure of the directive.

3.1.2 Qualification of the claim after statutory subrogation

3.1.2.1 Interpretation of Article 268(1)(g) of the Solvency II Directive

27. According to the case law of the EFTA Court, when interpreting a provision of EEA law, not only the wording but also the context in which it appears and the objectives pursued by the provision must be taken into account. Therefore, the legislative history of a provision of EEA law may also provide relevant guidance for its interpretation.[6]

28. Reference must first be made to the judgment of the EFTA Court in Case E-17/24. In that case, the referring court submitted the following question:

> *"Is an insurance claim within the meaning of Article 268(1)(g) of Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II), OJ 2009 L 335, p. 1, incorporated in the EEA Agreement by Decision of the EEA Joint Committee No 78/2011 of 1 July 2011, LGBl 2012/384, to be given precedence in accordance with Article 275(1) of that directive even where the claim was assigned to a third party by way*

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[5] Art. 161(1) VersAG.
[6] EFTA Court, Case E-17/24, Judgment of 5 February 2025, *Södersberg & Partners; Partners and Gable Insurance AG in bankruptcy,* mn. 40.

of a legal transaction and, under national law, assignment of the claim entails no change in the content of the claim?"

29. This decision of the EFTA Court thus concerned a very similar set of facts, with the legal question at issue being essentially the same. The only difference to the present case is that the applicant in Case E-17/24 did not obtain the claim asserted by way of statutory subrogation but acquired by way of a contractual assignment.

30. In this case, the EFTA Court held that an insurance claim within the meaning of Art. 268(1)(g) of the Solvency II Directive must be treated as privileged under Art. 275(1) of the Directive, **even if the claim has been assigned to a third party by contract and that third party asserts the claim in the insolvency proceedings against the insolvent insurer.**[7] The Court based its reasoning, inter alia, on the fact that the Solvency II Directive refers to the nature of the claim itself, not to the identity of the person asserting it.

31. Furthermore, according to recital 127 of the Solvency II Directive, *"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*".

As already explained in chapter 3.1.1 of this written observation, the claim originally held by SDIS and subsequently transferred to the applicant by way of statutory subrogation constitutes a claim as described in recital 127: SDIS, as an injured third party, had a direct claim – a direct right of action – against Net Etancheite's professional liability insurance, namely the defendant, based

on the insurance contract concluded between Net Etancheite and the defendant. The statutory subrogation does not alter the legal nature of the claim, particularly since, even after the transfer, the claim continues to originate from an insurance transaction and remains enforceable by way of a direct action against the insurance undertaking. According to recital 127 of the Solvency II Directive, only claims that do **not** arise **from obligations under insurance contracts** or other insurance transactions are to be excluded from preferential treatment in liquidation proceedings.

However, in the present case, the claim in question exists solely on the basis of the defendant's obligation to provide insurance coverage – first to SDIS, and, by virtue of statutory subrogation, subsequently to the applicant.

32. This is also expressly confirmed by the EFTA Court in Case E-17/24 with reference to **Art. 277 of the Solvency II Directive**, as it is clear from this provision that **legal successors of insurance creditors are always considered to be holders of insurance claims**. This is because the Solvency II Directive only allows Member States to exclude from the safeguards under Art. 275 those legal successors who have acquired that position as a result of the entry into force of a security system. This means that **all other legal successors have the same privileged claim as their legal predecessors, insofar as the legal predecessors had a direct right of action against the insurance company.**[8]

33. Consequently, all legal successors of holders of insurance claims (e.g. inheritance, assignment, merger) are also covered by Art. 275 of the Solvency II Directive and thus by Art. 161 et seq. VersAG.[9] This follows in particular from the fact that the provision refers solely to the nature of the claim, not to the identity of the person asserting it.

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[7] EFTA Court, Case E-17/24, Judgment of 5 February 2025, *Södersberg & Partners and Gable Insurance AG in bankruptcy*, mn. 49.
[8] EFTA Court, Case E-17/24, Judgment of 5 February 2025, *Södersberg & Partners and Gable Insurance AG in bankruptcy*, mn. 46 et seq.; also undisputed in Austria: *Korinek/Reiner* in *Korinek/G. Saria/S. Saria*, VAG, 29th edition, § 308 VAG mn. 7 et seq.
[9] *Korinek/Reiner* in *Korinek/G. Saria/S. Saria*, VAG, 29th edition, § 308 VAG, mn. 7 et seq.

34. Last but not least, it should be noted that Art. 268(1)(g) of the Solvency II Directive does not contain any indication that a claim transferred by way of statutory subrogation is no longer considered an "insurance claim" and is therefore excluded from the preferential status under Art. 275(1) of the Solvency II Directive.[10] This view was also supported by the EFTA Surveillance Authority and the European Commission in Case E-17/24, which concerned a contractually agreed assignment. For this reason, in the absence of a provision in the Directive stating that an insurance claim loses its privileged status as a result of a statutory subrogation, it must be assumed that statutory subrogation is permissible in any case and that the transferred claim continues to enjoy privileged status.[11]

35. This would also be in line with **the "rule of doubt"** established by the EFTA Court, according to which, in cases of multiple possible interpretation of an EEA law provision, **preference should be given to the interpretation that is most conducive to the practical effectiveness of the provision.**[12] The interpretation supported in this written observation – namely, that a statutory subrogation does not alter does not alter the legal nature of the insurance claim – ensures the primary objective set out in recital 16 of the Solvency II Directive: to provide adequate protection for policyholders and beneficiaries[13].

36. A rejection of this interpretation could have the effect that insurance undertakings — and indeed any other parties — would in future be discouraged from voluntarily providing prompt compensation in the interest of insured persons, and from subsequently assuming (privileged) insurance claims by way of subrogation or assignment, if doing so would risk a total loss of the claim. In any case, it is to be expected that insurers, like the applicant,

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[10] See in this regard EFTA Court, Case E-17/24, Judgment of 5 February 2025, *Södersberg & Partners and Gable Insurance AG in bankruptcy,* mn. 41.
[11] EFTA Surveillance Authority, Case E-17/24, Written Observations of 8 October 2024, *Södersberg & Partners and Gable Insurance AG in bankruptcy,* mn. 51.
[12] EFTA Court, Case E-17/24, Judgment of 5 February 2025, *Södersberg & Partners and Gable Insurance AG in bankruptcy,* mn.40 with reference to EFTA Court, Case E-10/23, Judgment of 9 August 2024, X *v. Financial Market Authority,* E-10/23, mn. 52.
[13] Recital 16 of Directive 2009/138/EC.

will put up stronger resistance before paying insurance benefits to the policyholder. As a result, policyholders would be left in a position where they must pursue their claims themselves — with the risk of losing them entirely or at the very least being forced to wait a considerable time for payment.[14] This would significantly weaken the protection afforded to policyholders and would therefore run counter to the objectives set out in the recitals of the Solvency II Directive — in particular recitals 16, 17 and 127. This is all the more relevant given that, according to the EFTA Court, both the legislative history and the recitals of an EEA act must be taken into account when interpreting EEA provisions.

37. This interpretation submitted by the applicant in the present case thus ensures the full effectiveness of the Solvency II Directive, which is why it should be confirmed (at least) in case of doubt.

3.1.2.2 The effect of a statutory subrogation under French and Liechtenstein law

38. Now that it has been established that Art. 268(1)(g) of the Solvency II Directive also covers claims transferred by statutory subrogation, it will be demonstrated below that statutory subrogation also has no effect on the legal nature or quality of an (insurance) claim under either French or Liechtenstein law.

There is no understandable reason why a statutory subrogation should be treated differently from a contractual assignment. After all, the only difference between these legal instruments lies in their legal basis: in the case of a statutory subrogation, the basis is the law itself, whereas in the case of a contractual assignment, it is a contract between the parties.

[14] EFTA Court, Case E-17/24, judgment of 5 February 2025, *Södersberg & Partners and Gable Insurance AG in bankruptcy*, mn. 46.

39. This interpretation is in line with both French and Liechtenstein (civil) law. In the French legal system, statutory subrogation is governed by Art. 1346 of the French Civil Code[15]:

> *"Subrogation is effected by operation of law in favor of the person who, having a legitimate interest, pays when his payment discharges the creditor from responsibility for all or part of the debt."*

40. Contractual assignment is governed in paragraph 1 of the same Article.:

> *"Conventional subrogation occurs at the creditor's initiative when the creditor, receiving payment from a third party, subrogates that third party's rights against the debtor."*

41. The very structure of the provision, which regulates both legal and conventional subrogation within the same Article, already highlights their substantive similarity. The only distinction between legal and contractual subrogation under French law lies in their legal basis, as clarified in paragraph 4 of Art. 1346 of the French Civil Code:

> "*Subrogation transmits to its beneficiary, within the limit of what he has paid, the claim and its accessories, with the exception of rights exclusively attached to the person of the creditor.*"

42. This provision applies to both statutory subrogation and contractual assignment, establishing that **both legal instruments have the identic legal effect.** Moreover, it shows that the **legal nature of the claim remains unchanged** as a result of subrogation - whether statutory or contractual. This position was also confirmed by the French Cour de cassation in its 20 June 2024 decision, no. 22-15.628:

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[15] French "Code civil", as amended and currently in force.

"According to established case law, a debtor who pays a personal debt may nevertheless claim to benefit from subrogation, whether legal or contractual, if he has, by his payment, discharged the joint creditor, on whom the final burden of the debt is to fall."

43. Liechtenstein law also recognises statutory subrogation as a legal instrument, with § 1358 of the Liechtenstein General Civil Code[16] (ABGB) being the best-known example:

"Whoever pays a debt of someone else, for which he is personally liable or with certain assets, assumes the rights of the creditor and is entitled to request the reimbursement of the paid debt from the debtor. The satisfied creditor is obliged in this regard to transfer all applicable remedies and securities to the payer."

44. This provision, which was adopted from Austria, has the consequence that upon payment, the claim is automatically (*ipso iure*) transferred from the creditor to the payer. Therefore, the payment does not extinguish the claim; rather, the claim now belongs to the payer towards the debtor. The payer **assumes the rights of the creditor,** meaning that the **claim held by the satisfied creditor** retains the same characteristics as it had before. Its **legal nature**, privileges, ancillary rights, and defenses remain **unchanged**.[17]

45. Taking into consideration § 1394 of the ABGB, which deals with the effect of statutory subrogation, it is clear that the two types of assignment differ only in their legal basis, but not in their effect:

"The rights of the assignee are the same as the rights of the assignor with respect to the assigned claim."

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[16] General Civil Code of 1 June 1811, LGBl No. 1003.001, as amended and currently in force.
[17] *Bydlinski* in *Bydlinski/Perner/Spitzer* (eds), Commentary on the ABGB[7] (2023) on § 1358 ABGB mn. 1; *Ofner* in *Schwimann/Neumayr* (eds), ABGB Pocket Commentary[6] (2023) § 1358 ABGB mn. 1; *Kogler* in *Rummel/Lukas/Geroldinger,* ABGB[4] volume §§ 1342 – 1410, § 1358 ABGB mn.17.

46. It follows that, under Liechtenstein law, statutory subrogation has the same effect as a contractual assignment, which in turn means that the legal nature of the claim in question is not altered by the statutory subrogation.[18]

47. Liechtenstein insurance law also recognises a statutory subrogation, which is comparable to the assignment stipulated in Art. L121-12 of the French Insurance Code. Article 53(1) of the Liechtenstein Insurance Contract Act[19] (VersVG) reads as follows:

> "*To the extent that the insurance company has paid compensation, the claim for compensation to which the beneficiary is entitled against third parties shall pass to the insurance company.*"

48. Since this provision only regulates the statutory subrogation itself, the nature and effect of the statutory subrogation are governed by the civil law provisions set out above. This means that the effects are identical to those of a statutory subrogation and do not alter the legal nature of the assigned claim, which is why, for example, the debtor can also assert against the insurance company all objections to which he is entitled towards the beneficiary. Austrian law, which served as the model for the Liechtenstein ABGB, also similarly clarifies that the effect of the transfer of claims under the Insurance Contract Act corresponds to that of an assignment of claims under general civil law.[20]

3.2 Opinion on question 2

49. If question 1 is answered in the affirmative, the Princely Court of Appeal has requested the EFTA Court to clarify whether a claim for reimbursement of costs incurred in connection with the enforcement of an insurance claim can also constitute an insurance claim within the meaning of Art. 268(1)(g) of the Solvency II Directive.

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[18] Liechtenstein Supreme Court OGH 07 C 333/87-29 LES 1990, 147.
[19] Law of 16 May 2001 on insurance contracts (Insurance Contract Act, VersVG), LGBl-Nr 2001.128, as amended and currently in force.

50. Since the aforementioned provision itself does not contain any direct reference to this question, the provision must be interpreted, with particular reference to the recitals of the Solvency II Directive.

51. As already explained, the primary objective of the Solvency II Directive is to ensure a high level of protection for policyholders and beneficiaries. Furthermore, it aims to ensure a fair and stable market.[21]

52. Recital 127 of the Solvency II Directive also expressly states that claims arising from insurance or other insurance business should be protected. In the present case, there is no obligation which, according to this recital, should not be covered by the protection of the Solvency II Directive, as it results from an insurance benefit.

53. In the present case, the claim for reimbursement of costs is **directly connected to the insurance claim** of the applicant and, in fact, arises from it. This is because, without the insurance claim, the claim for costs would generally not exist. The applicant was obliged to assert its claim against the defendant — which was transferred by way of statutory subrogation from SDIS to the applicant — before the French courts, which is why court costs were incurred. Had the defendant already acknowledged the applicant's claim in the French proceedings, no claim for reimbursement of costs would have occurred. The court costs were indispensable to asserting the insurance claim and are inseparably linked thereto.

54. A review of § 1333(3) of the ABGB clarifies the direct connection between the insurance claim and the claim for reimbursement of costs.[22]

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[20] See also Austrian law: *Burtscher/Ertl* in *Fenyves/Perner/Riedler* (eds), VersVG (7th edition 2021) § 67 mn. 3 et seq.; *Kogler* in *Rummel/Lukas/Geroldinger,* ABGB[4] Part §§ 1342 – 1410, § 1358 ABGB mn. 5.

[21] Recitals 16 and 17 of Directive 2009/138/EC.

[22] *Korinek/Reiner* in *Korinek/G. Saria/S. Saria,* VAG, 29th edition, § 308 VAG, m. 11.

"*The creditor can* ***claim, in addition to the legal interest, also compensation for other damages incurred by him and caused by the debtor****, in particular the* ***required costs*** *for appropriate out of court enforcement or debt collection measures to the extent these are reasonable in relation to the enforced claim.*"

55. § 41(1) of the Liechtenstein Civil Procedure Code[23] (ZPO) also supports this interpretation[24]:

"*The party that is completely unsuccessful in the legal dispute* ***shall reimburse*** *its opponent and any intervening parties that have joined the proceedings* ***for all costs incurred in the conduct of the proceedings that were necessary for the appropriate pursuit or defence of their rights****. The court shall determine which costs are to be regarded as necessary when determining the amount of costs without allowing evidence to be taken, at its discretion after careful consideration of all circumstances.*"

56. It should also be noted that the primary objective of the Solvency II Directive is to ensure the settlement of insurance claims when they fall due.[25] This is particularly relevant if an insurance company fails to satisfy an insurance claim and the policyholder or beneficiary is therefore forced to initiate legal proceedings to enforce their direct claim. If the beneficiary is at risk of receiving only subordinate compensation for the legal costs incurred as a result of the insurance company's breach of duty in the event of bankruptcy, this would constitute a significant deterioration in the protection of the beneficiaries. An interpretation according to which costs incurred in connection with the enforcement of insurance claims within the meaning of Art. 268 of the Solvency II Directive are not covered by the privilege of Art.

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[23] Law of 10 December 1912 on court proceedings in civil disputes (Code of Civil Procedure), LGBl No. 1912.009.001, as amended and currently in force.
[24] Korinek/Reiner in Korinek/G. Saria/S. Saria, VAG, 29th edition, § 308 VAG, m. 11.
[25] Recitals 16 and 17 of Directive 2009/138/EC.

275 of the Solvency II Directive entails the risk that insurance companies will systematically fail to meet due insurance claims.[26]

4 ADDITIONAL REASONS CONFIRMING THE POSITION OF THE APPLICANT

4.1 Liechtenstein adopted Recital 127 of the Directive

57. As already explained in chapter 3.1.2, the recitals of European legal texts are of immense importance for their interpretation. According to Art. 296(2) TFEU, the legislative recitals ("*recitals*") are an integral part of legislative documents and, particularly in the more recent generation of legislative acts, have taken on **a function similar to that of commentaries.**[27] In this sense, according to European methodology, the significance of recitals goes beyond that of simple legislative materials. [28]

58. In this context, it should be emphasised that the recitals constitute the "primary *policy statement* of the directive legislator and, as such, the **guiding principle for any teleological** interpretation"[29]. Moreover, since the CJEU has expressly stated that the operative part of a legal act is inseparably linked to its reasoning,[30] the relevant provision must, in case of doubt, be interpreted in accordance with the corresponding recital.[31]

59. The legal definition of insurance claims must therefore be interpreted in accordance with recital 127 of the Solvency II Directive.

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[26] See, inter alia, the Austrian doctrine in *Korinek/Reiner* in *Korinek/G. Saria/S. Saria,* VAG, 29th edition, § 308 VAG, mn. 11.
[27] See, for example, EFTA Court, Case E-17/24, judgment of 5 February 2025, *Södersberg & Partners and Gable Insurance AG in bankruptcy,* mn. 40; also *Köndgen/Mörsdorf,* Die Rechtsquellen des Europäischen Privatrechts, in Riesenhuber (ed.), Europäische Methodenlehre[4] (2021) mn. 75.
[28] *Köndgen/Mörsdorf,* loc. cit., mn. 76, with reference to ECJ Case C-236/09 (*Test-Achats),* according to which this is ruled in particular by the Court of Justice in that it cites the relevant articles of the directive under the heading "Legal framework" in its reasoning.
[29] *Köndgen/Mörsdorf,* loc. cit., mn. 78; emphasis not in the original.
[30] In this sense, see, among many others, ECJ C-402/07 and C-432/07 (*Sturgeon),* mn. 41 – 44; C-463/06 (FBTO Schadeverzekeringen) mn. 28 et seq.; ECJ C-236/09 (*Test-Achats)* mn. 30.
[31] *Köndgen/Mörsdorf,* loc. cit., mn. 78.

60. This was already stated in the recitals when Directive 2001/17/EC was adopted and reiterated in **recital 127** of the Solvency II Directive, namely that the protection of claims of insured persons, policyholders, beneficiaries and injured third parties who have a direct claim against the insurance undertaking is extremely important.[32] This was also reiterated by the EFTA Court in its decision E-17/24.[33]

61. The intention of the European legislator was thus to break through classless insolvency in favour of claims against the insurance company which, on the one hand, result from obligations arising from insurance contracts and, on the other hand, exist on the basis of other insurance transactions. Such claims should therefore be subject to special protection in the event of the insurance company's insolvency, whereby the European legislator (by way of **the double negation** highlighted above in margin number 60, **including "or") clearly did not intend to limit hits protection solely to claims from insurance contracts, but clearly intended to include also obligations arising from other insurance transactions.**

62. In line with these considerations, only "non-insurance" claims that may happen to exist on another legal basis (such as a rental agreement) should be excluded from this privilege.[34]

4.2 Interpretation of the term "insurance claim" in light of Recital 127

63. In accordance with an interpretation consistent with the explanatory memorandum, Art. 268(1)(g) of the Solvency II Directive must be subject to a **teleological extension**[35] due to its overly narrow definition.

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[32] Recital 13 of Directive 2001/17/EC; Recital 127 of the Solvency II Directive.
[33] EFTA Court, Case E-17/24, Judgment of 5 February 2025, *Södersberg & Partners and Gable Insurance AG in bankruptcy,* mn. 4, 45 et seq.
[34] See *Bähr* in Kaulbach/Bähr/Pohlmann, VAG[6] (2019) § 315, mn. 3.
[35] On methodology, see F. *Bydlinski,* Juristische Methodenlehre und Rechtsbegriff (1982) 475 ff; *Köndgen/Mörsdorf,* loc. cit., mn. 78; *Roth/Jopen,* Die richtlinienkonforme Auslegung (Interpretation in accordance with directives) in Riesenhuber (ed.), Europäische Methodenlehre (European Methodology), mn. 26; on interpretation in accordance with directives in Liechtenstein, see *Bussjäger,* Rechtsfragen des Vorrangs und der Anwendbarkeit von EWR-Recht in Liechtenstein (Legal issues concerning the primacy and applicability of EEA law in Liechtenstein), LJZ 2006, 140.

64. Pursuant to the expressly established objective of recital 127 of the Solvency II Directive as well as recital 13 of Directive 2001/17/EC, Art. 268(1)(g) of the Solvency II Directive must be interpreted as meaning that the definition of "insurance claims" does not only include direct claims against the insurance undertaking arising from an insurance contract, but also includes claims arising **from other insurance transactions** ("*or any other activity to which this Directive applies*").

65. According to an interpretation in conformity with the directive, the claim asserted by the applicant must therefore be classified as an insurance claim, - in any event and even if a qualification as a privileged insurance claim should be denied irrespective of the reasons given above - since **obligations arising from other insurance transactions** should **also** be considered insurance claims and, as a result, must be given preferential treatment.

66. With reference to the explanations in chapter 1.3, the applicant is entitled to a claim based on the existing insurance contract between the defendant and NET ETANCHEITE and the property and building insurance contract concluded with the applicant for the SDIS buildings damaged by fire. The insured event – the damage incurred on 8 August 2011 – also occurred during the term of the aforementioned insurance contracts. Gable Insurance AG was required to set aside assets to cover the technical provisions for the aforementioned claim.

67. The claim asserted is owed by the defendant as a direct insurance company to the applicant; with regard to the facts of the case, the defendant was an undertaking subject to the VersAG pursuant to Art. 2(1)(a) which carried on direct insurance business in the Principality of Liechtenstein or from the Principality of Liechtenstein. In any case, both the applicant and the defendant have engaged in activities to which the VersAG applies; these activities were therefore precisely and, in any event, and irrespective of the reasons given above an "obligation arising from other insurance transactions". As explained,

the applicant also holds a direct right of action against the defendant. In any case, the amount claimed is due to the applicant as an injured third party (which has not been disputed).

4.3 The Liechtenstein legal definition expressly adopted Recital 127

68. Under Liechtenstein law, the term "insurance claim" is **legally defined** in Art. 10(1)(52) VersAG. According to this provision, this means any amount that a direct insurance company owes to policyholders, insured persons, beneficiaries or injured third parties who have a direct right of action against the insurance company on the basis of an insurance contract **or other activity to which this law applies** in the context of direct insurance. According to the illustrative list in the legal definition, this also includes amounts set aside for these persons if individual elements of the claim are still uncertain, as well as premiums that an insurance company has to repay because a legal transaction did not come about or was cancelled under the law applicable to it before the opening of bankruptcy or liquidation proceedings.

69. The **Liechtenstein legislature has thus complied with the requirements of the recitals** (in particular recital 127 of the Solvency II Directive) and implemented the wording "whereby this protection should **not**, however, extend to claims **which do not** arise from **obligations** under insurance contracts or **other insurance transactions**" in the VersAG. The Liechtenstein legislature has therefore inserted the wording "**or any other activity to which this law applies**" so that claims arising from other insurance activities are also subject to special protection.

70. This means that even if the privileged status were to be denied on the basis of a legal assignment (see above, Chapter 3.1.2), privileged status would nonetheless apply because Liechtenstein national law, in conformity with EEA law—specifically Recital 127 of the Solvency II Directive—has adopted a broad definition of the term "insurance claim." Accordingly, under EEA-

compliant Liechtenstein law, it is sufficient for the recognition of a privileged insurance claim that the claim is based on an activity to which the VersVG applies. This requirement is met in the present case in any event.

5 CONCLUSION

5.1 Question 1

71. In summary, the request for an advisory opinion concerns an insurance claim originally held by an injured third party (SDIS) with a direct right of action arising from an insurance contract between the insured party and the now insolvent insurance company (the defendant). Accordingly, this claim is to be regarded as a privileged insurance claim within the meaning of Art. 268(1)(g) and Art. 275(1) of the Solvency II Directive (Art. 10(1)(52) in conjunction with Art. 161(1) VersAG).

72. This privileged insurance claim was subsequently transferred to the applicant pursuant to Art. L121-12 of French insurance law on the basis of a statutory subrogation. The interpretation of the Solvency II Directive and the legal nature of the statutory subrogation clearly demonstrate that the statutory subrogation has the same effect as a contractual assignment and therefore does not alter the nature, quality or legal basis of the insurance claim. Consequently, the claim remains a privileged claim within the meaning of Art. 268(1)(g) and Art. 275(1) of the Solvency II Directive even after the transfer.

73. This is clearly in line with the recitals of the Solvency II Directive, which are primarily aimed at providing good protection for policyholders and beneficiaries.

74. Against this background, the question raised by the Princely Court of Appeal must be answered as follows:

> ***An insurance claim within the meaning of Article 268(1)(g) of Directive 2009/138/EC of the European Parliament and of the***

Council of 25 November 2009 on the taking-up and pursuit of the business of insurance and reinsurance (Solvency II), OJ L 335 of 17 December 2009, p. 1, incorporated into the EEA by Decision No 78/2011 of the EEA Joint Committee of 1 July 2011, LGBl 2012/384, shall also be given priority treatment in accordance with Article 275(1) of this Directive if it is a claim of an injured third party who has a direct claim against the insurance undertaking which has been transferred by statutory subrogation to a fourth party.

5.2 Question 2

75. Due to the direct connection between the insurance claim at issue and the applicant's claim for reimbursement of costs against the defendant, as well as the fact that these costs were incurred solely because the defendant refused to fulfil its insurance obligation, it must be assumed that this claim for reimbursement likewise qualifies as an insurance claim within the meaning of Art. 268(1)(g) and Art. 275(1) of the Solvency II Directive (Art. 10(1)(52) in conjunction with Art. 161(1) VersAG) and must therefore be given preferential treatment.

76. This interpretation is also necessary due to the clear objective of the Solvency II Directive, in particular recitals 16 and 17, in order to ensure adequate protection for policyholders and beneficiaries.

77. Against this background, the question raised by the Princely Court of Appeal must be answered as follows:

Legal costs incurred in the assertion of an insurance claim must be regarded as an insurance claim within the meaning of Article 268(1)(g) of Directive 2009/138/EC and are thus to be given precedence in accordance with Article 275(1) of that directive.

Vaduz, on 6 August 2025

Aréas Dommages