JUDGMENT OF THE COURT

28 November 2025*

(*Directive 2009/138/EC (Solvency II) – Article 268(1)(g) – Article 275(1) – Insurance claims – Privileged status – Statutory subrogation – National insolvency proceedings*)

In Case E-8/25,

REQUEST to the Court under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice by the Princely Court of Appeal (*Fürstliches Obergericht*), in the case between

Aréas Dommages

and

Gable Insurance AG in Konkurs,

THE COURT,

composed of: Páll Hreinsson, President (Judge-Rapporteur), Bernd Hammermann and Michael Reiertsen, Judges,

Registrar: Ólafur Jóhannes Einarsson,

having considered the written observations submitted on behalf of:

* Language of the request: German. Translations of national provisions are unofficial and based on those contained in the documents of the case.

- Aréas Dommages, ("the applicant"), represented by Dr Karl Mumelter and Dr Philipp Benda, advocates;

- Gable Insurance AG in Konkurs ("the defendant"), represented by Hansjörg Lingg, advocate;

- the Liechtenstein Government, represented by Dr Andrea Entner-Koch and Dr Claudia Bösch, acting as Agents;

- the EFTA Surveillance Authority ("ESA"), represented by Daniel Vasbeck, Sigurbjörn Bernharð Edvardsson and Melpo-Menie Joséphidès, acting as Agents; and

- the European Commission ("the Commission"), represented by Gaëtane Goddin, Bruno Stromsky and Nicola Yerrell, acting as Agents,

gives the following

J U D G M E N T

I INTRODUCTION

1 This request for an advisory opinion concerns the interpretation of Articles 268(1)(g) and 275(1) 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) ("the Directive"). More specifically, it concerns, first, whether an insurance claim loses its status as a privileged claim within national insolvency proceedings if it has been assigned to another party by way of statutory subrogation and, second, whether legal costs incurred in the assertion of an insurance claim are to be regarded as an "insurance claim" within the meaning of Article 268(1)(g) of the Directive, and accordingly given precedence in accordance with Article 275(1) of the Directive.

II LEGAL BACKGROUND

EEA law

2 The Directive was incorporated into the Agreement on the European Economic Area ("EEA Agreement" or "EEA") by Decision of the EEA Joint Committee No 78/2011 ("JCD No 78/2011") of 1 July 2011 (OJ 2011 L 262, p. 45) and is referred to at point 1 of Annex IX (Financial services) to the EEA Agreement. Constitutional requirements were indicated by Iceland, Liechtenstein and Norway and were fulfilled on 23 October 2012. JCD No 78/2011 entered into force on 1 December 2012.

3 Recital 127 of the Directive 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.*

4 Article 268(1)(g) of the Directive, entitled "Definitions", reads:

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

5 Article 275 of the Directive, 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.

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.

6 Article 277 of the Directive, entitled "Subrogation to a guarantee scheme", reads:

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).

National law

7 The Directive was transposed into national law in Liechtenstein by the Act of 12 June 2015 on the Supervision of Insurance Undertakings (*Versicherungsaufsichtsgesetz*) (LGBl. 2015 No 231) ("the Insurance Supervision Act").

8 Article 10 of the Insurance Supervision Act, entitled "Definitions and terminology", reads, in extract:

1) For the purposes of this Act:
...

52. "insurance claim" means any amount which is owed by a direct insurance undertaking to policy holders, insured persons, beneficiaries or to any injured party having direct right of action against the insurance undertaking and which arises from an insurance contract or from any operation to which this Act applies in direct insurance business. This includes amounts set aside for those persons, when some elements of the debt are not yet known, as well as premiums which an insurance undertaking has to repay because a legal transaction was not concluded or was cancelled under the law applicable to it before the opening of bankruptcy or winding-up proceedings;

9 Article 161 of the Insurance Supervision Act, entitled “Satisfaction of insurance claims”, reads:

> *1) The assets covering technical provisions shall constitute a separate estate in bankruptcy proceedings in accordance with Article 45 of the Insolvency Code to satisfy insurance claims. The court shall order that the register of assets allocated to the separate estate be established immediately and submitted to the FMA. The FMA shall determine the separate estate for the time when bankruptcy proceedings are opened. Reflows and income from the assets dedicated to the separate estate and premiums for the insurance contracts included in the separate estate that are received after bankruptcy proceedings have been opened shall fall into this separate estate.*
>
> 2) *The list submitted pursuant to paragraph 1 may no longer be changed once bankruptcy proceedings have been opened. The insolvency estate administrator may make technical corrections to the listed asset values with the approval of the Court of Justice.*
>
> 3) *If the proceeds from the realisation of the assets are lower than their valuation in the list submitted pursuant to paragraph 1, then the insolvency estate administrator must communicate this to the Court of Justice and justify the variation.*
>
> *4) Repealed*
>
> *5) The insurance claims to be found in the account books of the insurance undertaking shall be deemed lodged. The right of the creditor to lodge these claims as well shall not be affected. The lodgement of claims need not include an indication of ranking.*

10 Article 161a of the Insurance Supervision Act, entitled “Hierarchy of claims”, reads:

> *1) Insurance claims shall take precedence over other bankruptcy claims. This shall be without prejudice to Article 161(1).*
>
> 2) *Claims to insurance compensation take precedence over all other insurance claims. Within the same rank, the claims shall be satisfied in proportion to their amounts.*
>
> *3) In derogation from Article 62(1) of the Insolvency Code, the lodgement of claims need not include an indication of ranking.*

11 Certain provisions of the Act of 17 July 1973 on Bankruptcy Proceedings (*Gesetz vom 17.07.1973 über das Konkursverfahren* (*Konkursordnung*)) (applicable in the version before the amendment effected by LGBl. 2020 No 365) ("the Bankruptcy Code") are also relevant.

12 Articles 45 and 46 of the Bankruptcy Code are entitled "Rights to separation". Article 45 of the Bankruptcy Code reads reads:

> *1) Creditors entitled to separate satisfaction from specific assets of the debtor (creditors entitled to separate satisfaction) shall exclude, to the extent of their claims, the payment of insolvency creditors from these assets (special class of assets).*
>
> *2) What remains of the special class of assets following the satisfaction of the creditors entitled to separate satisfaction shall accrue to the common insolvency estate. If the claim at issue is secured by several assets, then the proceeds therefrom shall be used in proportion to their amounts to cover the claim.*
>
> *3) Creditors entitled to separate satisfaction who also have a personal right against the debtor may also assert their claim as an insolvency creditor.*

13 Article 47 of the Bankruptcy Code, entitled "Hierarchy of claims", reads:

> *To the extent that the insolvency assets are not used to satisfy the claims of the insolvency estate and the rights of the creditors entitled to separate satisfaction (Article 45), they constitute the common insolvency estate from which the insolvency claims within the same category shall be satisfied in proportion to their amounts.*

14 Articles 48 to 51 of the Bankruptcy Code specify the claims which belong to each category.

15 The Civil Code (*Allgemeines bürgerliches Gesetzbuch*) of 1 June 1811 (ABGB; LR No 210.0) is also relevant.

16 Sections 1392 to 1399 of the Civil Code are entitled "Cession". Section 1392 of the Civil Code reads:

> *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.*

17 Section 1393 of the Civil Code, entitled "Subject-matter of the cession", reads:

All alienable rights shall constitute the subject-matter of an assignment. Rights adhering to the person, consequently extinguished with the person, may not be assigned. Debt certificates issued to the bearer are assigned simply by way of the transfer and do not require in addition to possession any other proof of the assignment.

18 Sections 1394 to 1396 of the Civil Code are entitled "Effect". Section 1394 of the Civil Code reads:

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

19 Section 1395 of the Civil Code reads:

As a result of the contract of assignment a new obligation shall arise only between the transferor (cedens) and the transferee of the claim (cessionarius) and not between the latter and the debtor of the claim thereby transferred (cessus). Therefore, as long as he has no knowledge of the transferee, the debtor shall be authorised to pay the first creditor or to settle the matter in another manner with him.

III FACTS AND PROCEDURE

20 The applicant is an insurance company incorporated under French law with its registered office in France.

21 The defendant is a joint-stock company under Liechtenstein law with a registered office in Vaduz, Liechtenstein, which had been issued with an authorisation as a direct insurance undertaking by the competent Liechtenstein supervisory authority, the Financial Market Authority (*Finanzmarktaufsicht*) ("FMA").

22 In the context of the present case, the defendant had provided liability insurance to a French company NET ETANCHEITE ("NET"), which had a registered office in Montpellier, France. On 8 August 2011, during construction works carried out on a building of the *Service Départementale 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.

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

24 The applicant accordingly brought legal proceedings against the defendant as the liability insurer of NET. In its judgment of 12 September 2019, the *Tribunal de Grande Instance de Paris* held that the applicant had a claim against the defendant for the sum of EUR 562 682.40, and in addition was entitled to costs of EUR 3 000.

25 The applicant then lodged these claims in the insolvency proceedings and requested that they be entered as privileged insurance claims. This was contested by the insolvency estate administrator, on the grounds that (i) the claim for EUR 562 682.40 was not an insurance claim, and therefore not a privileged claim falling within the first category of claims, and (ii) the claim for EUR 3 000 relating to legal costs was similarly not an insurance claim, and in any event the amount thereof was disputed.

26 As a result, the applicant brought an action before the Princely Court seeking a declaration that the claims for EUR 562 682.40 and EUR 3 000 constituted privileged insurance claims within the meaning of Article 161 of the Insurance Supervision Act for the purposes of the insolvency proceedings. In a judgment dated 7 August 2024, the action was dismissed by the Princely Court. The applicant subsequently brough an appeal against that judgment.

27 The Princely Court of Appeal decided that it was necessary to make a request to the EFTA Court for an advisory opinion. According to the request, the rights of the transferee are precisely the same as the rights of the transferor with respect to ceded claims under Liechtenstein law. The referring court observes, however, that since the applicant is neither an insured person nor a policy holder, beneficiary or an injured party having a direct right of action against the insurance undertaking, it is possible that the claim does not constitute an "insurance claim" within the meaning of the Directive.

28 Against this background, the Princely Court of Appeal decided to stay the proceedings and by letter of 6 May 2025, registered at the Court on 6 May 2025, referred the following questions to the Court:

1. *Is an insurance claim within the meaning of Article 268(1)(g) of Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II), OJ 2009 L 335, p. 1, incorporated in the EEA Agreement by Decision of the EEA Joint Committee No 78/2011 of 1 July 2011, LGBl 2012/384, 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?

29 Acting on a report from the Judge-Rapporteur, the Court decided to dispense with the oral part of the procedure, after having received the consent of the parties, pursuant to Article 70 of the Rules of Procedure.

30 Reference is made to the written observations published on the Court's website for a fuller account of the arguments and proposed answers submitted to the Court. Arguments of the parties are mentioned or discussed hereinafter only insofar as is necessary for the reasoning of the Court.

IV ANSWER OF THE COURT

Question 1

31 By its first question, the referring court essentially seeks guidance as to whether transfer to another party by way of statutory subrogation affects the status of an insurance claim within the meaning of Article 275(1) of the Directive, specifically in circumstances in which the claim in question is privileged.

32 As a preliminary point, in order to determine whether a claim such as that asserted by the applicant retains the status of an "insurance claim" under the Directive, the question arises whether the original claim (held in this case by SDIS) falls under the definition of "insurance claim".

33 At the outset, it should be recalled that the concept of "insurance claim" for the purpose of Title IV of the Directive, i.e. the reorganisation and winding-up of insurance undertakings, is defined in Article 268(1)(g) thereof by four cumulative requirements: (1) an amount that is owed; (2) by an insurance undertaking; (3) to insured persons, policy holders, beneficiaries or an injured party having a direct right of action against the insurance undertaking; (4) on the basis of an insurance contract (see the judgment of 5 February 2025 in *Söderberg*, E-17/24, paragraph 36 and case law cited).

34 The defendant and the Liechtenstein Government have argued that the claim asserted by the applicant in the present case does not satisfy the definition of an insurance claim set out in Article 268(1)(g) of the Directive, ostensibly on the basis that the injured party did not enjoy a direct right of action against the insurance undertaking, and that this right of action did not arise on the basis of an insurance contract.

35 The Court observes, as noted by ESA, that Article 268(1)(g) of the Directive does not itself create direct rights of action, but leaves it to the national law of EEA States to determine which parties may qualify as entitled claimants. This entails that, in circumstances in which

national law grants a direct right of action to a third party who has suffered injury due to the conduct of the insured party, although that third party is not a party to the liability insurance contract in question, that right must be recognised under Article 268(1)(g) of the Directive.

36 In the present case, it follows from the request, subject to verification by the referring court, that the injured party, SDIS, had a direct right of action against the insurer, the defendant, as NET's civil liability insurer, by virtue of the applicable national law. More specifically, Article L.124-3 of the French *Code des Assurances* (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. Such a right is contingent upon the existence of an insurance contract between the liability insurer and the insured party. Absent such a contract, the same provision would not confer any rights to a third party against the insurer. As such, it may be observed that the claim in question did not arise solely by operation of tortious liability, but rather came about due to the insurer's contractual commitment to cover the insured party for the purposes of civil liability.

37 On the basis of the foregoing, and subject to the verification of the referring court, it follows that a claim such as that held in the present case by SDIS falls under the definition of an "insurance claim" under Article 268(1)(g) of the Directive.

38 As regards whether such an insurance claim loses its priority in national insolvency proceedings once subrogated, the Court recalls that it has already held that an insurance claim within the meaning of Article 268(1)(g) of the Directive is to be given precedence in accordance with Article 275(1) in circumstances in which the claim has been assigned to a third party by way of a legal transaction (see the judgment in *Söderberg*, E-17/24, cited above, paragraph 49).

39 In this context, the first question referred concerns whether this precedence in accordance with Article 275(1) of the Directive also applies when an insurance claim has been transferred through statutory subrogation to another party, referred to as a "fourth party" in the request. As noted by the Commission, the distinction between a third party and a fourth party in this context essentially amounts to determining whether assignment of a claim to another (third) party by a legal transaction, as was the case in *Söderberg,* should be treated differently from assignment by means of statutory subrogation to a (fourth) party, as is the case in the present proceedings.

40 The Court notes that the legal consequences of the assignment of an "insurance claim" to another party by means of statutory subrogation are not explicitly specified in either Article 268 or 275 of the Directive.

41 In this context, the Court recalls that the interpretation of a provision of EEA law requires account to be taken not only of its wording, but of its context and the objectives and purpose pursued by the act of which it forms part. The legislative history of a provision of EEA law

may also reveal elements that are relevant to its interpretation. Moreover, where a provision of EEA law is open to several interpretations, preference must be given to the interpretation which ensures that the provision retains its effectiveness (see the judgment in *Söderberg*, E-17/24, cited above, paragraph 40 and case law cited).

42 Article 275(1) of the Directive lays down the general rule that EEA States shall ensure that in winding-up proceedings insurance claims take precedence over other claims against the insurance undertaking, but provides EEA States with specific alternatives as to how to fulfil this obligation (see the judgment in *Söderberg,* cited above, E-17/24, paragraph 35).

43 The precedence accorded to consumers by Article 275 of the Directive reflects the fact that one of the Directive's key principles is the protection of consumers of insurance services, and the consumer-orientated objectives of European financial services legislation. This is further reflected in recital 127, which emphasises that it is of utmost importance that insured persons, policy holders, beneficiaries and any injured party having a direct right of action against the insurance undertaking on a claim arising from insurance operations be protected in winding-up proceedings (see the judgment in *Söderberg*, E-17/24, cited above, paragraph 44). As noted by the Commission, these considerations can be transposed to a situation in which an insurance claim is transferred to the construction insurer by means of statutory subrogation, following compensation paid to the injured policyholder in accordance with construction insurance. The purpose of such insurance being to enable injured parties to receive compensation swiftly and easily in case of damage, rather than being required to pursue a claim against a construction firm or its liability insurer.

44 Moreover, it follows from Article 277 of the Directive that the home State may provide, where the rights of insurance creditors have been subrogated to a guarantee scheme established in that EEA State, that claims by that scheme shall not benefit from the provisions of Article 275(1). As the Court has held previously, this implies that the protection under Article 275 relates to the claim rather than to the person (see the judgment in *Söderberg*, E-17/24, cited above, paragraph 42). As noted by ESA, this entails that Article 277 draws a distinction between the origin of the claim and the party enforcing it.

45 Furthermore, as the Court has previously observed, the existence of a specific derogation pertaining to subrogation to guarantee schemes alone suggests that the Directive requires that the claim must benefit from the precedence granted under Article 275(1) thereof in all other situations where an insurance claim is assigned – or indeed, subrogated – to another party. Article 277 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 (see the judgment in *Söderberg*, E-17/24, cited above, paragraph 43).

46 This logic is equally applicable in situations in which an insurance claim, such as that at issue in the present proceedings, is transferred to another "fourth" party by way of statutory

subrogation. It thus follows that a claim transferred by means of statutory subrogation should similarly retain its privileged status.

47 Thus, the answer to the first question must be that Article 275(1) of the Directive must be interpreted such that the transfer of an insurance claim within the meaning of Article 268(1)(g) to another party by way of statutory subrogation in circumstances such as those at issue in the national proceedings cannot alter its privileged status in insolvency proceedings.

Question 2

48 By its second question, the referring court asks whether legal costs incurred in the assertion of an insurance claim are to be regarded as an "insurance claim" within the meaning of Article 268(1)(g) of the Directive and, accordingly, given precedence under Article 275(1) thereof.

49 As set out above, four cumulative conditions are required for an "insurance claim" within the meaning of Article 268(1)(g) of the Directive to exist. The fourth of these being that the claim must arise on the basis of an insurance contract. In the case of legal costs arising from the assertion of an insurance claim, these are clearly linked to the insurance contract, in the sense that they arise as a result of the claim under the contract being asserted. However, insofar as the right to recover such legal costs does not arise directly on the basis of the insurance contract, they constitute a separate claim which falls outside the definition of an "insurance claim" within the meaning of Article 268(1)(g) of the Directive.

50 Further, as the Court has observed above, the interpretation of a provision of EEA law requires account to be taken not only of its wording, but of its context and the objectives and purpose pursued by the act of which it forms part. In this context, it is relevant to observe, as noted by the Commission, that qualifying legal costs as a privileged insurance claim could, in some circumstances, potentially assist policyholders and beneficiaries. However, in the case of winding-up proceedings, the available assets are necessarily finite and extending the definition of an "insurance claim" to include ancillary costs including legal costs that do not have their legal basis in the insurance contract would risk undermining the effectiveness of the protection offered by the principle of precedence.

51 In the light of the foregoing, the answer to the second question referred must be that legal costs incurred in the assertion of an "insurance claim" constitute a separate claim which falls outside the definition of an "insurance claim" within the meaning of Article 268(1)(g) of the Directive insofar as the right to recover such legal costs does not arise directly on the basis of an insurance contract.

V COSTS

52 Since these proceedings are a step in the proceedings pending before the national court, any decision on costs for the parties to those proceedings is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds,

THE COURT

in answer to the questions referred to it by the Princely Court of Appeal hereby gives the following Advisory Opinion:

1. **Article 275(1) 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) must be interpreted such that the transfer of an insurance claim within the meaning of Article 268(1)(g) to another party by way of statutory subrogation in circumstances such as those at issue in the national proceedings cannot alter its privileged status in insolvency proceedings.**

2. **Legal costs incurred in the assertion of an "insurance claim" constitute a separate claim which falls outside the definition of an "insurance claim" within the meaning of Article 268(1)(g) of the Directive insofar as the right to recover such legal costs does not arise directly on the basis of an insurance contract.**

Páll Hreinsson Bernd Hammermann Michael Reiertsen

Delivered in open court in Luxembourg on 28 November 2025.

Ólafur Jóhannes Einarsson
Registrar

Páll Hreinsson
President