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Gable Insurance AG in liquidation

Interim Report of the Trustee in Bankruptcy as at 31 December 2019

Version as of: 05 May 2020

Table of Contents

1 Introduction ... 3

2 Assets ... 5

2.1 Cash at banks and securities ... 5

2.2 Outstanding claims arising from the insurance business ... 5

2.2.1 Claims against coverholders ... 5

2.2.2 Claims against reinsurance undertakings ... 6

3 Liabilities ... 7

3.1 Privileged insurance claims ... 7

3.1.1 Filings of claims arising from an insurance benefit ... 7

3.1.2 Filings of claims by national guarantee schemes ... 7

3.2 Bankruptcy claims ... 8

4 Current state of the bankruptcy proceedings – Liquidation of the insurance business ... 9

4.1 Policyholders ... 9

4.2 Coverholders and claims handlers ... 9

4.3 Reinsurers ... 9

4.4 Guarantee schemes ... 10

4.5 Regulators ... 10

4.6 Pending legal disputes ... 10

4.7 Legal challenges ... 11

4.7.1 "Everlasting" bankruptcy proceedings ... 11

4.7.2 EFTA Court judgement ... 12

4.7.3 Classification of premium refund claims ... 13

4.7.4 Procedural treatment of insurance claims ... 14

1 Introduction

The present 4th interim report of the Trustee in Bankruptcy relates to the 2019 calendar year (reporting period). The focus of the Trustee in Bankruptcy's activity has undergone significant changes since the opening of bankruptcy proceedings in respect of the bankrupt company's estate. At the beginning of the bankruptcy proceedings, the main emphasis was on efforts to take the right steps and to put the necessary processes in place in order to restart the claims handling activity which had been neglected in the months preceding the opening of bankruptcy proceedings and to take up communication with the policyholders again. By now the claims handling activity has become routine and follows the protocol that is binding on all claims managers. A great number of routine cases have been handled which is why an increasing number of complex legal issues arise which result from individual claims. While the number of claims decrease, the complexity of the remaining claims increases. This becomes evident not only from the management of claims but also from the assessment of the filed claims. There is a great number of insurance product categories for which the right solution must be found, often with the help of foreign legal expertise. In addition, as regards the individual claims, there are very diverse problems that require an individual response tailored to each individual case. This is what makes the claims assessment process challenging and time-consuming.

The focus of the Trustee in Bankruptcy is increasingly placed on strategic aspects. It is the clear goal of the Trustee in Bankruptcy to bring the bankruptcy proceedings to an end within a reasonable period of time. On the one hand, this requires continuous efforts to fully process the still great number of outstanding claims and to subject them to the verification process as assessable claims. The significant claims, in terms of value, require special attention because their assessment will have a considerable impact on the dividend in bankruptcy. On the other hand, one of the big challenges that the Trustee in Bankruptcy will face is to make sure that the not yet realised assets of the bankrupt company will be secured and made collectible. This mainly concerns reinsurance benefits, whereas no significant returns from the outstanding claims against coverholders are to be expected. Unfortunately, a large number of what is called *"trapped funds"*, which were originally valued in the bankrupt company's accounts at approximately CHF 85 million, prove to be without any value. With the exception of currently approximately CHF 5 million, it will not be possible to realise these values and, as a result, they will have to be written off. To a lesser degree, this also relates to claims (if any) resulting from the responsibility of the former governing bodies of the bankrupt company. It is still an unresolved question as to whether any such claims exist.

By contrast, the liquid assets and investments of the bankrupt company have developed quite nicely. **As of 31 December 2019**, they are currently as follows:

Investment class	31/12/2019	31/12/2018	Δ in currency	Δ in %
Liquidity	CHF 6,745,659.99	CHF 10,875,009.89	CHF -4,129,350.89	-38.0%
Investments	CHF 81,404,010.99	CHF 77,957,627.82	CHF 3,446,383.17	4.4%
Total	CHF 88,149,669.99	CHF 88,832,637.71	CHF -682,967.72	-0.8%

Since the previous interim report the question of the correct procedural treatment of insurance claims has been resolved. The EFTA Court judgement published on 10 March 2020 has resolved the interpretation of the term "insurance claim" and the question of the proper qualification of premium refund claims. It has now also been established that insurance claims are also subject to the lodging, verification and admissibility rules of the Liechtenstein Bankruptcy Code. This has thus cleared the path for the continuation of the General Review Hearing postponed on 12 December 2018.

2 Assets

The assets of the bankrupt company are composed of cash at bank and securities, of outstanding claims arising from the insurance business, in particular reinsurance benefits, and responsibility claims (if any). The first two will be described below. The further course of action in connection with the liability that former governing bodies might have has not yet been decided.

2.1 Cash at banks and securities

The bankrupt company continues to be the holder of cash and securities accounts in Liechtenstein. In the reporting period the Trustee in Bankruptcy had no reason to change the investment strategy adjusted in 2017.

In light of the advantageous development of almost all investment classes, it was possible to generate a net surplus of approximately CHF 2.3 million in 2019, which corresponds to a performance of roughly 2.8%, if the British pound, the reference currency of the bankrupt company's bookkeeping, is taken as the basis. The period from 1 September 2017 (implementation of the adjusted investment strategy) to 31 December 2019 saw the generation of a yield of approximately CHF 3.8 million (after adjustment for technical currency effects). This translates into a performance of roughly 4.7% during this period (again calculated on the basis of the British pound).

2.2 Outstanding claims arising from the insurance business

The outstanding claims arising from the insurance business are composed, on the one hand, of the insurance premiums which have already been received by the coverholders, but have not yet been passed on to the bankrupt company and, on the other hand, of the claims against reinsurance undertakings.

2.2.1 <u>Claims against coverholders</u>

In the previous interim report, it was assumed that mainly the claims against coverholders which amount to a large sum had no value. This assumption turned out to be true. In 2019, the additional returns from insurance premiums collected by the coverholders but not yet passed on to the bankrupt company (*"trapped funds"*). were low. These totalled about GBP 0.2 million and were collected from some smaller English coverholders after time-consuming reconciliation efforts. This means that of the roughly CHF 85 million of claims mentioned in the interim balance sheet as at 30 June 2016 on a going concern basis and at liquidation values, a mere total of about CHF 5.0 million could be collected.

2.2.2 Claims against reinsurance undertakings

As of 31 December 2019, the bankrupt company received a total of approximately GBP 13 million in reinsurance benefits from the five reinsurance programmes that it had concluded. In terms of their amount, the claims of the bankrupt company against its reinsurers represent a large and important asset. At the moment, reinsurance benefits in the total amount of GBP 56 million have been reserved.

In consideration of the size and importance of these valuable claims against the reinsurance undertakings, the Trustee in Bankruptcy has analysed and evaluated possible strategies to secure and accelerate the collection of these assets. These strategies are described in item 4.3.

3 Liabilities

The number of claims filed is still around 14,000. This number contains one claim each from the English guarantee fund (Financial Services Compensation Scheme, FSCS) and from the Danish guarantee fund (Garantifonden for skadesforsikringsselskaber, DGF) which include around 50,000 claims. There is also a claim from the Norwegian coverholder Norwegian Broker (NBAS) that also contains around 50,000 individual claims.

The approximately 14,000 filed claims might, after all, represent bankruptcy claims to a very large degree, given that pursuant to the EFTA Court judgement, almost all of the premium refund claims must be classified as non-privileged bankruptcy claims. Of approximately 14,000 claims filed, the Trustee in Bankruptcy has hitherto assessed around 7,500. It will be able to make a declaration in their respect at the continued General Review Hearing. Around 6,500 claims filed have not yet been verified.

At the moment (**as of 31 March 2020**), the claims filed add up to a total claim amount of approximately CHF 392 million.

The General Review Hearing of 12 December 2018 has been postponed indefinitely. The reason for this was the request for a preliminary ruling addressed by the Bankruptcy Court to the EFTA Court. The Trustee in Bankruptcy has applied to the Bankruptcy Court for the continuation of the General Review Hearing.

3.1 Privileged insurance claims

3.1.1 Filings of claims arising from an insurance benefit

Of the around 14,000 claims filed, approximately 5,000 claims are privileged insurance claims. Their amount accounts for at least 90% of the claim sum filed overall.

At the moment (**as of 31 December 2019**), around 5,000 damage claims are in the process of being handled across all countries, coverholders and insurance products. At the end of 2017, this number was 12,700. At the end of 2018, it was 5,650. 3,157 of the roughly 5,000 unsettled damage claims are from France.

3.1.2 Filings of claims by national guarantee schemes

In England, Denmark and Italy, the competent national guarantee schemes have already paid a great number of benefits to the policyholders. These guarantee schemes take the place of the policyholders or other groups with claims and they make them assign their claims to them in return for the provision

of benefits. The FSCS and the DGF turn out to be the two most important creditors in the bankruptcy proceedings.

The FSCS pays legitimate claims resulting from existing claims and also refunds unearned premiums. To date (**as of 31 January 2020**), the FSCS has made payments for damage claims in the approximate amount of GBP 40.8 million and refunded premiums in the approximate amount of GBP 12.0 million. In addition, the FSCS has reserved an additional amount of roughly GBP 76.2 million (which is roughly CHF 91.3 million) for damage claims already filed but not yet (fully) assessed.

The DGF pays the damage claims of Danish policyholders that filed their claims by 31 March 2017. There is no coverage for the refund of unearned premiums. To date (**as of 31 December 2019**), the DGF has made payments for damage claims in the approximate amount of DKK 131.6 million (which is roughly CHF 18.8 million). These payments relate to 3,121 settled damage claims. The damage claim reserve for hitherto unsettled 135 damage claims is roughly another DKK 36.6 million (which is roughly CHF 5.2 million). In total, the DGF has filed an overall claim in the amount of DKK 236.6 million (which is roughly CHF 33.3 million).

3.2 Bankruptcy claims

The number of bankruptcy claims is going to increase sharply because the premium refund claims will almost exclusively have to be classified as non-privileged bankruptcy claims. The reason for this is described in item 4.7. Of the around 14,000 claims filed, approximately 9,000 claims account for non-privileged premium refund claims. Their amount accounts for less than 10% of the claim sum filed overall.

4 Current state of the bankruptcy proceedings – Liquidation of the insurance business

Due to the smooth claims handling process, routines that have proven to be good practices in the daily business have become established routines. The focus of the Trustee in Bankruptcy's activity has shifted: The main challenge is no longer the processing of the multitude of claims and the questions asked by policyholders or other groups with claims. Rather, the more complex individual cases require a more thorough verification now. Fewer claims are in the process of being handled, but they are characterised by a higher degree of complexity.

4.1 Policyholders

As expected, the claims filed also decreased in 2019. By now, these almost exclusively relate to claims resulting from long-term warranty and indemnity insurance in France. Apart from France, the number of still outstanding claims has decreased in all countries.

4.2 Coverholders and claims handlers

The Trustee in Bankruptcy described the activity of the individual coverholders and claims handlers across the various jurisdictions in the previous interim report which is why the information provided therein will not be repeated in this report. The focus of the claims handling activity has now shifted to France where the number of claims that are unsettled and in the process of being handled is the greatest.

4.3 Reinsurers

The Trustee in Bankruptcy has evaluated possible strategies to secure and accelerate the collection of outstanding reinsurance benefits. The starting point is the legitimate expectation that, apart from the largest individual case, all outstanding claims with reinsurance coverage can be brought to a proper end in around 18 to 24 months from now.

After weighing the risks, the Trustee in Bankruptcy has decided in all cases to refrain both from engaging in commutation negotiations for the early cancellation of the reinsurance contracts against appropriate compensation and from making any efforts for a sale of the claims against reinsurance undertakings. Both options have significant disadvantages to them. A special solution will be required for the largest individual claim that is currently estimated at around GBP 22.5 million. The English guarantee scheme FSCS pays 100% of the insurance benefits (of course the claims against the bankrupt company will be assigned to the FSCS in return). It is foreseeable that this case will take quite some years to be concluded. The completion of the present bankruptcy proceedings within a reasonable

period of time will be possible only if, with regard to the reinsurance benefit resulting from this claim, a suitable solution can be found. The Trustee in Bankruptcy is evaluating the available options.

4.4 Guarantee schemes

The English guarantee scheme (FSCS) is still closely involved in the claims handling processes. The cooperation is running very smoothly.

Due to a European Convention in the area of motor vehicle liability insurance, the Italian guarantee scheme named CONSAP issues an invoice to the Swiss National Guarantee Fund (NGF) for the compensation payments. In the end, the NGF will be a creditor of the bankrupt company. The NGF and the Trustee in Bankruptcy have access to updated claims data from Italy at very irregular intervals.

The Danish guarantee scheme (DGF) has the covered cases assessed by a claims manager hired by it. The bankrupt company is not involved in the claims handling process.

4.5 Regulators

The constructive cooperation with the Liechtenstein supervision authority (FMA) was continued in the reporting period. Reports to the FMA are made at regular intervals both orally during meetings and in writing. As in the previous year there has been no direct contact with the various foreign regulators in 2019.

4.6 Pending legal disputes

In 2019, the Trustee in Bankruptcy was involved in two legal disputes in courts in Liechtenstein. In both cases the bankrupt company was the defendant. Both cases were dismissed with res judicata effect and the proceedings have come to an end. For the sake of completeness, it is worth mentioning that, following the General Review Hearing held on 12 December 2018, no order action (“Anordnungsklage”) has yet been brought. Furthermore, there are no handing over requests (“Aussonderungsbegehren”) that the Trustee in Bankruptcy is faced with at the moment.

Outside of Liechtenstein, the bankrupt company is involved in roughly 300 legal matters pending in court. These court proceedings are related to insurance damage claims and, as a result, to the regular liquidation of the bankrupt company’s insurance business.

The action brought against the bankrupt company and the reinsurance undertaking Barbican Re (and others) by the Danish guarantee scheme (DGF) in Denmark in December 2017 is still pending in court. The bankrupt company and Barbican Re inter alia contested the jurisdiction of the Danish courts. The

oral hearing on the jurisdiction issue in the Danish court, which is competent to decide the issue, was scheduled to take place in March 2020, but due to the corona emergency it had to be postponed indefinitely.

4.7 Legal challenges

In 2019 too, the Trustee in Bankruptcy was faced with various legal challenges that were described extensively in the previous interim reports. There have been the following new developments and insights:

4.7.1 “Everlasting” bankruptcy proceedings

The Trustee in Bankruptcy is seeking to find pragmatic solutions in order to avoid that bankruptcy proceedings go on and on with no end in sight. After the failure of the planned assumption of the Norwegian policy portfolio there were no further negotiations in this regard in 2019. The main reason for this was the EFTA Court preliminary ruling proceedings initiated by the Bankruptcy Court by order of 29 March 2019.

Challenges with regard to time also appear in another context. The difficulty to liquidate a bankrupt non-life insurance undertaking in bankruptcy proceedings within a reasonable period of time is evident not only regarding insurance products for which claims can possibly be lodged or admitted only in the future. It is perfectly possible that even claims, which are already known and have already been lodged, cannot be settled in the near future. One example would be the largest individual claim. It is a motor vehicle liability insurance case in which a policyholder of the bankrupt company caused a traffic accident with very serious health consequences for the two injured parties (a girl who was around 4 at the time of the accident and who is 8 now, and a family father). The handling of the claim will presumably take years. For, under English law, which is applicable to this claim, the time period for lodging the claims resulting from this traffic accident does not start to run until the injured girl has reached full age. As a result, it will be impossible to bring this claim to a conclusion within a reasonable period of time, subject to changes to the estimated life expectancy (the injured girl’s life expectancy has now been reduced from 37 years to 17 years).

This difficulty can be resolved with regard to the injured parties’ claims that the bankrupt company will face by means of an estimation of the amount of the damage and the resulting claim amount pursuant to Art. 27 (1) of the Bankruptcy Code (the insured event has occurred, but the amount of the claim cannot yet be fully determined). Given that there is reinsurance coverage for the claim mentioned above, any damage payment triggers reinsurance benefits. However, reinsurance benefits do not become due until the payments by the primary insurer have been made. As a result, no

estimation of the indeterminate claim can guarantee that the reinsurance benefits can be made collectible. The entitlement to reinsurance benefits represents by far the bankrupt company's largest asset that still needs to be made collectible. Accordingly, this subject is one of the central challenges for the Trustee in Bankruptcy during the remaining bankruptcy proceedings.

4.7.2 EFTA Court judgement

By order dated 29 March 2019, the Bankruptcy Court submitted to the EFTA Court a request for an advisory opinion on specific questions of interpretation regarding Directive 2009/138/EC. The main request by the Bankruptcy Court was to interpret the term "insurance claim" in the context of the liquidation proceedings of an insurance undertaking. Another question of particular interest was to determine the point in time from which an insurance claim is regarded as having arisen and whether premium refund claims also represent insurance claims within the meaning of the Directive mentioned above.

The EFTA Court judgement was rendered on 10 March 2020. It has been published on the Court's website (eftacourt.int/cases/e-03-19) in German and in English.

The answers of the EFTA Court to the questions raised by the Bankruptcy Court are as follows:

As regards the definition of the term "insurance claim", the EFTA Court noted that the insured event must have occurred while the insurance contract existed in order for an insurance claim to arise. In other words, an insurance claim must have arisen before the cancellation of an insurance contract. The cancellation of an insurance contract may be the result of the opening of winding-up proceedings in accordance with the law of the home EEA State, as provided for in Liechtenstein in Art. 31 (1) of the Insurance Contract Act (VersVG) (expiration of the insurance contracts by operation of the law four weeks from the day on which the opening of bankruptcy is announced). The EFTA Court also held that the Directive does not lay down any explicit rules on temporal limits. The Court also noted that it does not follow from the Directive that a claim must have been lodged or admitted prior to the opening of the winding-up proceedings, in order to be regarded as an insurance claim within the framework of the Directive mentioned above. It is for national law to set out the conditions concerning the lodging, verification and admission of claims, which also applies to claims in which some elements of the claim (e.g. its amount) are not yet known. However, national law must ensure that insurance claims are given absolute precedence over all other claims.

As regards the question as to whether the premiums owed by an insurance undertaking also represent (privileged) insurance claims, the EFTA Court first made reference to the text of the Directive

mentioned above. Accordingly, premiums owed by an insurance undertaking as a result of the cancellation of an insurance contract prior to the opening of the winding-up proceedings must also be classified as an insurance claim. Therefore, one condition for the existence of an insurance claim is the existence of an insurance contract. The opposite conclusion is that premiums owed by an insurance undertaking as a result of the cancellation of an insurance contract after the opening of the winding-up proceedings may not be classified as an insurance claim. Including such claims as insurance claims would run contrary to the Directive's purpose of harmonising protection of claims based on the occurrence of an insured event covered by an insurance contract.

As regards the question of equal treatment of the insurance creditors, the EFTA Court pointed out that the Directive does not distinguish between categories of insurance claims, nor does it preclude a provision of national law separating such insurance claims into different categories. There is nothing to prevent national law from establishing a "ranking" between different categories of insurance claims. However, it must be ensured that insurance claims take precedence over other claims and that the principle of equal treatment of creditors and the prohibition of discrimination are respected.

As regards the question of the interpretation of the term "winding-up proceedings", the EFTA Court held that the Directive contains neither an obligation nor a prohibition to provide for the possibility of terminating winding-up proceedings by composition. It is for national law to lay down the requirements for the closing of winding-up proceedings. In this context, the principles of equal treatment and non-discrimination of creditors, regardless of their nationality or residence, must be respected. In addition, the EFTA Court recalled that the term "winding up proceedings" refers to collective proceedings of realising assets and distribution of the proceeds to creditors on an equitable basis. The term "composition" mentioned in the Directive refers to an agreement that is collective in nature, as opposed to a composition of the individual claims of individual creditors. Winding-up proceedings as collective proceedings that are collective in nature may therefore, provided that the national law so provides, be closed by means of a composition or other analogous measure. The term "composition" does therefore not refer to individual settlements that would potentially entail discrimination against insurance creditors and undermine the principle of universality of the proceedings.

4.7.3 <u>Classification of premium refund claims</u>

Do premium refund claims represent insurance claims?

The response given by the EFTA Court in this regard is clear. As regards the qualification or classification of premium refund claims, the EFTA Court held in its judgement that claims for owed premium do not

represent an insurance claim, unless the insurance contract has been cancelled prior to the opening of the winding-up proceedings. Pursuant to the EFTA Court, claims for the refund of unearned premiums that have arisen as a result of the opening of the winding-up proceedings and, thus, at this time or after this time do expressly not represent privileged insurance claims.

The reasons given by the EFTA Court for this position refer to the purpose of the Directive. The purpose of the Directive is to harmonise the protection of claims based on the occurrence of an insured event covered by an insurance contract. It regards premium refund claims as privileged insurance claims only if the contract has been cancelled prior to the opening of insolvency proceedings.

The Trustee in Bankruptcy is bound by the outcome of the EFTA court proceedings. The response given by the EFTA Court to the question submitted to it is authoritative and binding. As a consequence, the Trustee in Bankruptcy is required to verify the premium refund claims with regard to the question as to whether the underlying insurance contract was dissolved before 17 November 2016 (date of the opening of the insolvency proceedings). An initial verification shows that only in few cases the insurance contract was cancelled prior to the opening of the present bankruptcy proceedings. In all other cases, the cancellation of the contract is a direct result of the opening of the insolvency proceedings and, thus, of Art. 31 (1) of the Insurance Contract Act which provides for a dissolution of the insurance contracts by operation of the law four weeks after the opening of the insolvency proceedings.

The consequence is that the Trustee in Bankruptcy cannot treat the premium refund claims as claims with a preferential right to privileged satisfaction out of the estate. The legitimate premium refund claims will rather have to be classified as ordinary insolvency claims in the fourth insolvency class (Art. 51 of the Bankruptcy Code). This will in particular have effects on the lodging of claims by the English guarantee scheme which has satisfied GBP 12.0 million in premium refund claims by English policyholders of the bankrupt company. This claim amount, which is legitimate both in terms of its ground and in terms of its amount, will have to be admitted as an insolvency claim of the fourth class and not as a privileged insurance claim. The same applies to the roughly 8,000 claims in a total amount of about EUR 500,000.00 which were lodged by German policyholders, and to Norwegian claims in the total amount of about CHF 6.2 million.

4.7.4 Procedural treatment of insurance claims

In the previous interim report, the Trustee in Bankruptcy described the relationship between the provisions laid down in the Bankruptcy Code (KO) on the one hand and those laid down in the Insurance Supervision Act (VersAG) on the other hand and the resulting uncertainties with regard to the correct

procedural treatment of the privileged insurance claims. The Bankruptcy Court had hoped that the initiation of preliminary ruling proceedings would result in a resolution of this question by the EFTA Court.

In its judgement, the EFTA Court did not include any direct information on the correct type of proceedings. However, it has underlined that the equal treatment of creditors represents a core principle of the Directive. The equal treatment of creditors means first and foremost that no distinction along the lines of nationality or residence is permissible. The principle of prohibition of discrimination precludes this. In addition, the EFTA Court has underlined on numerous occasions that the insurance claims are given absolute precedence over any other claims. They have a preferential right to separate satisfaction out of the special satisfaction estate (special estate).

In addition, the EFTA Court has pointed out that the privileged insurance claims may indeed be separated into different categories under national law. As a result, it allows that a difference in ranking between different categories of insurance claims is made as long as no difference is made along the lines of nationality or residence and provided that the preferential right with regard to other (non-privileged) claims is guaranteed. In this context, with regard to Liechtenstein law, it can be noted that neither the Bankruptcy Code nor the Insurance Supervision Act separate the privileged insurance claims into different categories. Both the Bankruptcy Act and the Insurance Supervision Act are based on the principle of equal treatment of creditors. In other words, the creditors of privileged insurance claims must be treated equally among them.

In the end, this principle, which is thus also rooted in European law, makes it possible to find an answer to the question of the correct procedural treatment of insurance claims. The equal treatment of creditors is guaranteed only if the procedural provisions laid down in the Bankruptcy Code apply. By contrast, the application of the provisions laid down in the Enforcement Code (EO) does not guarantee any such equal treatment at all.

As a result, it is established that insurance claims must be lodged in bankruptcy proceedings and handled in the ordinary assessment process. The creditors of insurance claims are bankruptcy creditors and are subject both to the litigation ban and to the enforcement ban. To the extent that there is no full coverage for the insurance claims, the principle of quotas or principle of equal treatment will apply. The Trustee in Bankruptcy concludes from this that the present proceedings, including to the extent that privileged insurance claims are concerned, will have to be conducted in accordance with the procedural provisions laid down in the Bankruptcy Code. The Trustee in Bankruptcy is in the process of assessing the lodged claims. The assessment process leads to a General Review Hearing pursuant to

Art. 63 of the Bankruptcy Code (and, if need be, in order proceedings pursuant to Art. 67 of the Bankruptcy Code).

For all these reasons, the Trustee in Bankruptcy deemed that it was necessary to apply to the Bankruptcy Court for the continuation of the General Review Hearing that had been postponed indefinitely on 12 December 2018. No specific date for the hearing has hitherto been scheduled.

Vaduz, 05 May 2020

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