



REPORT FOR THE HEARING

in Case E-14/22

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

The Liechtenstein Chamber of Lawyers

and

Alexander Amann,

concerning the interpretation of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market.

I Introduction

1. By a letter of 25 October 2022, registered at the Court on 16 November 2022, the Princely Court of Appeal requested an Advisory Opinion in the case pending before it between the Liechtenstein Chamber of Lawyers (*Liechtensteinische Rechtsanwaltskammer*) (“the Chamber of Lawyers”) and Alexander Amann.

2. The case before the referring court concerns disciplinary proceedings initiated by the Chamber of Lawyers against Alexander Amann, a lawyer registered with the Chamber of Lawyers. The Chamber of Lawyers contends before the referring court that Mr Amann has committed a disciplinary offence by infringing the provisions in the Professional Guidelines of the Chamber of Lawyers laying down certain prohibitions on advertising for lawyers.

3. During the proceedings before the referring court, the question has arisen whether the prohibitions on advertising are compatible with the provisions of Directive 2006/123/EC.

II Legal background

EEA law

4. Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (OJ 2006 L 376, p. 36) (“the Services Directive”) was incorporated with certain adaptations in Annex X (Services in general) to the EEA Agreement at point 1 by Decision of the EEA Joint Committee No 45/2009 of 9 June 2009 (OJ 2009 L 162, p. 23). Constitutional requirements were indicated by Iceland and Liechtenstein. The requirements were fulfilled by 31 March 2010 and the decision entered into force on 1 May 2010.

5. Recitals 2, 5 and 100 of the Services Directive read:

(2) A competitive market in services is essential in order to promote economic growth and create jobs in the European Union. At present numerous barriers within the internal market prevent providers, particularly small and medium-sized enterprises (SMEs), from extending their operations beyond their national borders and from taking full advantage of the internal market. This weakens the worldwide competitiveness of European Union providers. A free market which compels the Member States to eliminate restrictions on cross-border provision of services while at the same time increasing transparency and information for consumers would give consumers wider choice and better services at lower prices.

(5) It is therefore necessary to remove barriers to the freedom of establishment for providers in Member States and barriers to the free movement of services between Member States and to guarantee recipients and providers the legal certainty necessary for the exercise in practise of those two fundamental freedoms of the Treaty. Since the barriers in the internal market for services affect operators who wish to become established in other Member States as well as those who provide a service in another Member State without being established there, it is necessary to enable providers to develop their service activities within the internal market either by becoming established in a Member State or by making use of the free movement of services. Providers should be able to choose between those two freedoms, depending on their strategy for growth in each Member State.

(100) It is necessary to put an end to total prohibitions on commercial communications by the regulated professions, not by removing bans on the content of a commercial communication but rather by removing those bans which, in a general way and for a given profession, forbid one or more forms of commercial communication, such as a ban on all advertising in one or more given media. As regards the content and methods of commercial communication, it is necessary to encourage professionals to draw up, in accordance with Community law, codes of conduct at Community level.

6. Under Chapter I (General Provisions), Article 4(12) of the Services Directive reads:

12) “commercial communication” means any form of communication designed to promote, directly or indirectly, the goods, services or image of an undertaking, organisation or person engaged in commercial, industrial or craft activity or practising a regulated profession. The following do not in themselves constitute commercial communications:

(a) information enabling direct access to the activity of the undertaking, organisation or person, including in particular a domain name or an electronic-mailing address;

(b) communications relating to the goods, services or image of the undertaking, organisation or person, compiled in an independent manner, particularly when provided for no financial consideration.

7. Under Chapter V (Quality of Services), Article 24 of the Services Directive reads:

1. Member States shall remove all total prohibitions on commercial communications by the regulated professions.

2. Member States shall ensure that commercial communications by the regulated professions comply with professional rules, in conformity with Community law, which relate, in particular, to the independence, dignity and integrity of the profession, as well as to professional secrecy, in a manner consistent with the specific nature of each profession. Professional rules on commercial communications shall be non-discriminatory, justified by an overriding reason relating to the public interest and proportionate.

8. Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications (OJ 2005 L 255, p. 22) (“the Professional Qualifications Directive”) was incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 142/2007 of 26 October 2007 (OJ 2008 L 100, p. 70), which amended Annex VII (Recognition of professional qualifications) and inserted the Directive as point 1 of that Annex. Constitutional requirements were indicated by Iceland, Liechtenstein and Norway. The requirements were fulfilled by 14 May 2009 and the Decision entered into force on 1 July 2009.

9. Article 3(1)(a) of the Professional Qualifications Directive reads, in extract:

1. For the purposes of this Directive, the following definitions apply:

(a) “regulated profession”: a professional activity or group of professional activities, access to which, the pursuit of which, or one of the modes of pursuit of which is subject, directly or indirectly, by virtue of legislative, regulatory or administrative provisions to the possession of specific professional

qualifications; in particular, the use of a professional title limited by legislative, regulatory or administrative provisions to holders of a given professional qualification shall constitute a mode of pursuit. ...

National law

10. Article 27 of the Lawyers Act (*Rechtsanwaltsgesetz*) of 8 November 2013 (LGBl. No 415/2013) (“the Lawyers Act”) reads:

(1) Lawyers may provide information about their services and their person provided that the statements are factually accurate, directly related to the profession and justified by an interest of the persons seeking legal assistance. They may not advertise their services or themselves in an overly commercial manner.

(2) Lawyers may neither cause nor tolerate any third party to engage in any advertisement for them that they are themselves not allowed to engage in.

11. Article 46 of the Lawyers Act reads:

(1) Any lawyer who is at fault in violating the duties of his or her profession, or who, as a result of his or her professional conduct, tarnishes the honour and reputation of the legal profession shall commit a disciplinary offence.

(2) A lawyer shall commit a disciplinary offence on account of his or her extra-professional conduct if such conduct is capable of substantially affecting his or her trustworthiness.

12. Article 48 of the Lawyers Act reads, in extract:

(1) The following disciplinary penalties shall be applied:

(a) written reprimand;

(b) fines up to the amount of CHF 50 000.00;

(c) prohibition of the practice of the lawyer’s profession for up to one year;

(d) deletion from the register of lawyers.

...

13. Article 49 of the Lawyers Act reads, in extract:

(1) The disciplinary power over lawyers shall be exercised by the Court of Appeal as a disciplinary court.

...

14. On the basis of Article 93(1)(g) of the Lawyers Act, which allows the Plenary Assembly of the Liechtenstein Chamber of Lawyers to adopt professional guidelines, and Paragraph 6(g) of its bylaws, the Liechtenstein Chamber of Lawyers drew up Professional Guidelines of 24 March 2014 (“the Professional Guidelines”).

15. Paragraph 34 of the Professional Guidelines reads, in extract:

1. Lawyers shall advertise principally through the quality of their legal services.

2. Lawyers may provide information about their services and their person provided that the statements are factually accurate, directly related to the profession and justified by an interest of the person seeking legal assistance. ...

16. Paragraph 35(1) of the Professional Guidelines reads, in extract:

1. Lawyers shall refrain from advertising which is not truthful, factual or compatible with the honour and reputation of the profession, professional duties and the function of the lawyer in the administration of justice. Such advertising occurs in particular in the case of:

...

(c) offering professional services to specific categories of possible clients,

...

17. Paragraph 47 of the Professional Guidelines reads:

Infringements of these Professional Guidelines shall constitute a breach of the professional duties of the lawyer (Article 46 of the Lawyers Act) and shall be penalised by the Princely Court of Appeal as the disciplinary court for lawyers in accordance with Article 46 et seq. of the Lawyers Act.

III Facts and procedure

18. Mr Amann is a lawyer registered with the Chamber of Lawyers on the list of Liechtenstein lawyers. As such, he is subject to the Professional Guidelines.

19. In light of criminal investigations into the activities of X AG (anonymised by the referring court), a Liechtenstein joint stock company, Mr Amann wrote unsolicited letters to shareholders in X AG. In the letters, Mr Amann brought to the attention of the shareholders the possibility of joining a (class) action against X AG in connection with the pursuit of a civil claim for damages.

20. On 15 July 2021, the Chamber of Lawyers initiated disciplinary proceedings, contending that Mr Amann had, by way of sending the letters to the shareholders in X AG, committed an infringement of the provisions in the Professional Guidelines laying down prohibitions on advertising for lawyers, namely an infringement of Paragraph 35(1)(c) of the Professional Guidelines.

21. On 29 March 2022, the referring court, as the court having jurisdiction in disciplinary matters pursuant to the Lawyers Act, stayed the proceedings in order to request a ruling from the Constitutional Court (*Staatsgerichtshof des Fürstentums Liechtenstein*), as the court having jurisdiction to review the legality, and in the alternative the constitutionality, of Paragraph 35(1)(c) of the Professional Guidelines.

22. In a judgment of 28 June 2022, the Constitutional Court found that the contested provision in Paragraph 35(1)(c) of the Professional Guidelines is neither unlawful nor unconstitutional. The Constitutional Court further held in that decision that:

The provision prohibits only proactive advertising by lawyers where they offer their services in certain situations to selected (groups of) people who have not themselves expressed an interest in those services.

23. On the basis of the judgment of the Constitutional Court, the disciplinary proceedings were continued. At a hearing on 25 October 2022, Mr Amann invoked the Services Directive, which is applicable to him as a lawyer, and requested that the matter be referred to the Court. The Chamber of Lawyers opposed the request.

24. The referring court notes that the European Court of Justice (“ECJ”), in its judgment of 5 April 2011 in *Société fiduciaire nationale d’expertise comptable*, C-119/09, EU:C:2011:208, concerning prohibitions on advertising for qualified accountants, interpreted Article 24 of the Services Directive to the effect that the legislative intention was not only to put an end to total prohibitions, on the members of a regulated profession, from engaging in commercial communications whatever their form, but also to remove bans on one or more forms of commercial communication within the meaning of Article 4(12) of the Services Directive, such as advertising, direct marketing and sponsorship.

25. In that case, the contested code of professional conduct and ethics for qualified accountants laid down a prohibition on (direct) canvassing under which any canvassing, whatever its form, content or means employed was prohibited. Unsolicited contact by qualified accountants with third parties with a view to offering them their services was to be regarded as canvassing. Such a prohibition was considered by the ECJ to be a total prohibition on commercial communications pursuant to Article 24(1) of the Services Directive.

26. The referring court decided to stay the proceedings and by letter of 25 October 2022 referred the following questions to the Court:

1. Does Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market preclude a provision such as Paragraph 35(1)(c) of the Professional Guidelines of the Liechtenstein Chamber of Lawyers which prohibits lawyers from offering professional services to specific categories of potential clients and which is to be construed, in accordance with the interpretation adopted by the Liechtenstein Staatsgerichtshof (Constitutional Court), as “prohibiting proactive advertising by lawyers where they offer their services in certain situations to selected (groups of) people who have not themselves expressed an interest in those services”?

2. Must Article 24(1) of Directive 2006/123/EC be interpreted as meaning that a national provision may not, in general, prohibit lawyers from, on their own initiative, contacting by letter potential clients who were not previously their customers, after ascertaining their personal addresses, and from offering them their services, in particular by bringing an action for damages in a case of damage affecting them as best only as investors?

IV Written observations

27. Pursuant to Article 20 of the Statute of the Court and Article 90(1) of the Rules of Procedure, written observations have been received from:

- Alexander Amann;
- the Liechtenstein Government, represented by Andrea Entner-Koch, Romina Schobel and Claudia Bösch, acting as Agents;
- the Netherlands Government, represented by Mielle Bulterman and Joost Hoogveld, acting as Agents;
- the Polish Government, represented by Bogusław Majczyna, acting as Agent;
- the EFTA Surveillance Authority (“ESA”), represented by Kyrre Isaksen, Hildur Hjörvar and Michael Sánchez Rydelski, acting as Agents; and
- the European Commission (“the Commission”), represented by Lorna Armati and Mislav Mataija, acting as Agents.

V Proposed answers submitted

Alexander Amann

28. Mr Amann submits that the questions referred should be answered as follows:

1. Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market precludes a provision such as Paragraph 35(1)(c) of the Professional Guidelines of the Liechtenstein Bar

Association which prohibits lawyers from offering professional services to specific categories of potential clients and which is to be construed, in accordance with the interpretation adopted by the Liechtenstein Staatsgerichtshof (Constitutional Court), as “prohibiting proactive advertising by lawyers where they offer their services in certain situations to selected (groups of) people who have not themselves expressed an interest in those services”.

2. Article 24(1) of Directive 2006/123/EC precludes a national provision that prohibits lawyers from, on their own initiative, contacting by letter potential clients who were not previously their customers, after ascertaining their personal addresses, and from offering them their services, in particular, by bringing an action for damages in a case of damage affecting them as best only as investors.

The Liechtenstein Government

29. The Liechtenstein Government submits that the questions referred should be answered as follows:

1. Directive 2006/123/EC on services in the internal market does not preclude a provision such as §35(1)(c) of the Code of Conduct of the Liechtenstein Chamber of Lawyers.

2. Article 24(1) of Directive 2006/123/EC does not exclude a provision prohibiting lawyers from, on their own initiative, contacting by letter potential clients who were not previously their customers, after ascertaining their personal addresses, and from offering them their services, in particular by bringing an action for damages in a case of damage affecting them as best only as investors, if such a provision does not result in an indistinct and general prohibition of commercial communication.

The Netherlands Government

30. The Netherlands Government submits that the questions referred should be answered together as follows:

Article 24(1) of Directive 2006/123 must be interpreted as precluding national legislation which totally prohibits lawyers from contacting and offering professional services on their own initiative to specific categories of potential clients who have not themselves expressed an interest in those services.

The Polish Government

31. The Polish Government submits that the questions referred should be answered together as follows:

Article 24(1) of Directive 2006/123/EC should be interpreted as not precluding a national provision that prohibits lawyers from, on their own initiative, contacting by letter potential clients who were not previously their customers,

after ascertaining their personal address, and offering them their services, in particular by bringing an action for damages in a case of damage affecting them as best only as investors.

ESA

32. ESA submits that the questions referred should be answered as follows:

1. Directive 2006/123/EC, in particular its Article 24(1), must be interpreted as precluding a provision such as Paragraph 35(1)(c) of the Professional Guidelines of the Liechtenstein Chamber of Lawyers which prohibits lawyers from offering professional services to specific categories of potential clients and which is to be construed, in accordance with the Liechtenstein Staatsgerichtshof (Constitutional Court), as “prohibiting proactive advertising by lawyers where they offer their services in certain situations to selected (groups of) people who have not themselves expressed an interest in those services”.

2. Article 24(2) of Directive 2006/123/EC must be interpreted so that EEA States retain the right to lay down prohibitions relating to the content or methods of commercial communication as regards lawyers, provided that the rules are non-discriminatory, justified and proportionate for the purposes of ensuring, in particular, the independence, dignity and integrity of the profession.

The Commission

33. The Commission submits that the questions referred should be answered together as follows:

Articles 24(1) and 24(2) of Directive 2006/123/EC of the European Parliament and the Council of 12 December 2006 on services in the internal market must be interpreted as meaning that a national provision may not, in general, prohibit lawyers from, on their own initiative, contacting potential clients who were not previously their customers and from offering them their services.

Páll Hreinsson
Judge-Rapporteur