

PRINCIPALITY OF LIECHTENSTEIN
FÜRSTLICHES OBERGERICHT
(PRINCELY COURT OF APPEAL)

Please include the case number in all communications

DO.2021.10

ON 20

ORDER

The Second Chamber of the Princely Court of Appeal, composed of Deputy Presiding Judge Dr Dietmar Baur, Associate Judge Dr Thomas Schmid and Senior Judge Dr Josef Fehr, in the

Disciplinary matter

Person subject to the disciplinary complaint: Dr Alexander Amann LL.M., lawyer,
Industriestrasse 16, 9487 Gamprin-Bendern

concerning: suspicion of a disciplinary offence

following the hearing held on **25 October 2022** in the presence of Court Clerk Carmen Semmler

has made the following

Order:

The following questions are referred to the EFTA Court with a request for an Advisory Opinion:

- 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. Is Article 24(1) of Directive 2006/123/EC to 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?

The disciplinary proceedings pending before the Princely Court of Appeal under DO.2021.10 are stayed pending the advisory opinion requested from the EFTA Court and will be subsequently resumed of the court's own motion.

Grounds:

1. Facts:

Disciplinary proceedings are pending before the Princely Court of Appeal in Vaduz against the accused, a lawyer registered with the Liechtenstein Chamber of Lawyers on the list of Liechtenstein lawyers, on the basis of a disciplinary complaint made by the Liechtenstein Chamber of Lawyers on 15 July 2021, by which the

accused is alleged to have committed a disciplinary offence by infringing the provisions laying down prohibitions on advertising for lawyers in the Professional Guidelines of the Liechtenstein Chamber of Lawyers, specifically an infringement of Paragraph 35(1)(c) of the Professional Guidelines. It should be stated at the outset that, on the basis of complaints of criminal offences made by shareholders of **X AG (anonymised by the referring court)**, a Liechtenstein joint stock company having its registered office in XXX, criminal investigations were conducted both in Liechtenstein (at the request of the Liechtenstein Public Prosecutor's Office) and in Austria (by the Central Public Prosecutor's Office for Combating Economic Crimes and Corruption in Vienna) against the members of the board of directors of that company on suspicion of serious fraud and breach of trust, where the complainants were represented by the accused. The complainants considered that, as investors in the abovementioned company, they had suffered damage to their assets. The criminal investigation procedures were discontinued both in Liechtenstein and Vienna.

Subsequently, **X AG** filed a complaint against the accused with the Liechtenstein Chamber of Lawyers in which it is alleged, in summary, that the accused wrote unsolicited letters to shareholders of **X AG** in order to attract them to a (class) action in connection with the 'pursuit of a claim for **X AG** investors'. In the letter of the law office of the accused, dated 22 February 2021, the shareholders were informed that a litigation funder was already interested in the matter and would assume the costs and risks of the action in exchange for a share of the proceeds of successful proceedings, which meant that it would be largely risk-free for the investors to take action. Such conduct, where lawyers write unsolicited letters to third parties in a manner akin to 'cold calling' in order to attract them to bringing an action, was not compatible with the Professional Guidelines of the Liechtenstein Chamber of Lawyers. Furthermore, it is claimed that the abovementioned letter

of 22 February 2021 contained misleading content. That letter of 22 February 2021 from the accused to shareholders of **X AG**, whose addresses he had himself elicited from the investigation file of the Public Prosecutor's Office, reads – verbatim – as follows:

'Dear Mr ...

In the **X AG** case we initiated criminal investigations on behalf of a number of investors. These have now brought to light comprehensive investigation findings and have helped to clarify the facts surrounding **X AG** investment.

The investigations have revealed, for example, that significant proportions of investors' funds (often between 30 and 40%, and sometimes even 100% of the investment sum) did not even reach **X AG** in the first place, but were diverted via offshore companies. Of the investors' funds that made it to **X AG**, further significant proportions were deducted as management fees. According to the findings made so far, approximately EUR 36.6 million in investor funds went to the sales department and initiators through the sales "premium" and management fees. This significantly reduced the prospects of profit from the X investment from the outset.

It can be inferred from the available documentary evidence that substantial sums were also diverted from your investment.

X AG investors may be entitled to civil claims on the basis of the facts established. We are currently preparing the civil action. A litigation funder has already expressed interest in funding the case. The funder would assume the costs and risks of the action in exchange for a share of the proceeds of successful litigation. With litigation funding there is no charge and it is largely risk-free for investors to take action, yet there is an opportunity to recover at least some of the investment. It is in any case advisable for **X AG** investors to pursue the claims with cover from litigation funding, rather than having to write off the investment completely.

If you wish to join the civil action and/or would like further information, please do not hesitate to contact me.'

A further letter dated 6 April 2021 to shareholders of **X AG**, following the conclusion of the settlement as part of court proceedings initiated by the members of the board of directors of **X AG** on grounds of unfair competition, reads (verbatim) as follows:

'Pursuit of the claim for **X AG** investors

Dear Mr ...

In the abovementioned matter, we refer to our letter of 22 February 2021 concerning the pursuit of potential civil claims for **X AG** investors.

X AG and **XY (again anonymised by the referring court)** considered that their personal rights had been violated by that letter and requested removal and discontinuance of the interference. Regardless of whether there is a violation of personal rights, I am happy to comply with the request and we have therefore agreed in a settlement of 26 March 2021 that I will send you the communication in the attachment. The sole aim is to inform you, as investors in **X AG**, about potential civil claims and to give you the opportunity to assert those claims.

As to the matter itself, I am able to inform you that **X AG** investors with potential civil claims in excess of CHF 20 million have already expressed an interest in bringing an action with the support of a litigation funder. With litigation funding there is no charge and it is largely risk-free for investors to take action and there is an opportunity to recover some of the investment.

If you have not yet registered for the civil action but wish to do so and/or would like further information, please do not hesitate to contact me.'

The accused defended himself, in summary, as follows:

The manner in which he provided information to affected investors was completely normal. Such information is provided through all possible channels – websites, newsletters/letters, press releases,

press conferences, media interviews. The fact that companies are exposed to civil and criminal proceedings and the associated legal risks is inherent in free economic competition. Larger companies, in particular those listed on a stock exchange, are also subject to comprehensive disclosure requirements with regard to their pending proceedings, potential claims and legal risks. The average market participant therefore perceives such information as commonplace and normal. **X AG** itself shows provisions for, among other things, litigation costs amounting to EUR 14 million in its accounts.

The possibility of providing information to affected investors is not only normal, but also necessary. Otherwise, those affected would not even be aware that they might have claims. The information provided is factual, aimed at the litigation of those potential civil claims and therefore directly related to the profession.

It also serves to protect investors and thus to increase investor confidence in a functioning, lawful and fair capital market. It is of key importance to Liechtenstein that (foreign) investors have precisely such confidence in the Liechtenstein financial centre and the functioning of the administration of justice in the event of damage suffered by investors.

The action taken by the representatives of **X AG** primarily pursues the aim of torpedoing, as far as possible, the provision of information to investors about their potential claims in order to minimise their own liability risk at the outset and to be able to retain any profit gained by the infringing party.

A prohibition of such provision of information would mean that wrongdoers would not be held accountable for their unlawful actions and potentially injured parties would lose confidence in the functioning of the administration of justice. The more investors

join a civil action, the greater the prospects of litigation funding. This is often the only way that claims can be pursued.

*It is also in the interest of investors already represented by the accused to provide information to other potential injured parties. Ultimately, the accused earns money from legal representation. A prohibition would impair his economic freedom, his freedom to provide services and his freedom of expression. In the case at issue, investor funds of between EUR 40 million and EUR 80 million have been raised. The potential liability of the members of the board of directors of **X AG** also extends to this amount. In proceedings of this magnitude, the accused could expect legal fees of around CHF 200 000, of which he would be deprived in the event of a prohibition by the court.*

*In summary, it is not possible to find fault with the provision of information to investors of **X AG** regarding historical facts from which civil claims can be derived either under Articles 12 and 14 of the Lawyers Act or under Paragraph 35(1)(c) of the Professional Guidelines of the Chamber of Lawyers. Rather, it is normal practice by the accused, which serves to increase confidence in the financial centre and the administration of justice, in particular if such business practices are exposed and potentially injured parties are notified such that they are in a position to assess their rights on the basis of more comprehensive information.*

The representative of the Chamber of Lawyers contends (verbatim):

'It is now necessary to examine, on the basis those circulars, an infringement of Paragraphs 34, 35 and 47 of the Professional Guidelines in conjunction with Article 46 of the Lawyers Act on grounds of a breach of professional duties and a violation of the honour and reputation of the legal profession.

On the basis of the wording of the prohibition on advertising in Paragraph 35(1)(c) of the Professional Guidelines, the action taken by Dr Amann with his circulars of 22 February 2021 and 6 April 2021 and the further letter of 8 April 2021 is prohibited, whatever the content of the letter and the approach he chose to adopt proactively. Paragraph 35(1)(c) of the Professional Guidelines constitutes applicable law and must therefore be applied in all cases. The Chamber of Lawyers still considers this provision to be correct and important, as it would not seem to be compatible with the professional duties and the honour and reputation of the legal profession for lawyers proactively (without the involvement of the recipients) to write to a specific group of people and to encourage them to bring proceedings in a specific case. The decision to bring proceedings should be taken by the clients themselves without outside influence and they themselves should take an active part in contacting a legal representative. By the circular at issue, Dr Amann proactively canvassed for new clients in a specific case and targeted a specific group, namely the shareholders of **X AG**. This constitutes mass solicitation of clients. In accordance with Paragraph 35(1)(c) of the Professional Guidelines in conjunction with Paragraph 47 of the Professional Guidelines, Dr Amann has committed a breach of professional duties and thus a disciplinary offence. Paragraph 47 of the Professional Guidelines expressly states that infringements of the Professional Guidelines constitute a breach of the professional duties of the lawyer (Article 46 of the Lawyers Act).¹

2. Procedure to date:

At the hearing on 29 March 2022, the Princely Court of Appeal, as the disciplinary court having jurisdiction under the Lawyers Act, first stayed the proceedings in the disciplinary matter pursuant to Article 20(1)(a) of the Constitutional Court Act in order to make an application to the Constitutional Court, as the constitutional court having jurisdiction to examine the lawfulness, and in the alternative the constitutionality, of Paragraph 35(1)(c) of the Professional Guidelines of the Liechtenstein Chamber of Lawyers. The grounds for the application to the Constitutional Court were – in part – as follows:

'Paragraphs 34 and 35 of the Professional Guidelines of the Liechtenstein Chamber of Lawyers, which are relevant in this case, read – verbatim – as follows:

Paragraph 34

Advertising

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

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

..."

Paragraph 35

Prohibited advertising

"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:

(a) self-promotion by showcasing their person or their services in an overly commercial manner,

(b) ...

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

..."

On the basis of the wording of the prohibition on advertising in Paragraph 35(1)(c), the action taken by the accused in his circular to the limited category of shareholders of **X AG** appears to be prohibited by

Paragraph 35(1)(c), whatever the content of the letter and the approach he chose to adopt proactively, such that he has committed a disciplinary offence on the basis of Paragraph 47 of the Professional Guidelines. Paragraph 35(1)(c) must be construed as meaning that lawyers may offer their services only to the public at large and not to a particular group of potential clients selected by them.

It must therefore be examined whether to this extent the prohibition on advertising unlawfully infringes the lawyer's right to economic activity and the associated right to freedom of expression.

From the point of view of fundamental rights, prohibitions on advertising for the self-employed activities of a lawyer are, as has been explained above, in tension with freedom of expression (Article 10 of the ECHR) and freedom to economic activity. In the view of the Austrian Constitutional Court (in an earlier judgment), a difference in treatment of members of the liberal professions and the (simple) "commercial sector", in which, as we know, there is freedom in advertising with the exception of unfair advertising measures (Paragraph 1 of the Act Against Unfair Competition), is justified in principle (see judgment of the Austrian Constitutional Court in VfSlg. 10.718/1985). Accordingly, advertising may be restricted significantly for members of the liberal professions on "historically justified grounds of professional ethics", as members of those professions are subject to disciplinary rules enforced by their peers, even in the case of an infringement of the prohibition on advertising. According to conventional understanding, the situation for other traders is such that there is generally freedom in advertising for those professions provided that unfair competition is not pursued.

The Austrian Constitutional Court has held (in its judgment of 27 September 1990, V 95, 96/90, in which it reviewed the conformity of Paragraph 45 of the Austrian Professional Guidelines (RL-BA 1977) with statutory law and the constitution), that "commercial advertising" also falls within the scope of the protection offered by Article 10 of the ECHR, while restrictions on advertising for the liberal professions are permitted in respect of fundamental rights on the basis of the reservation under Article 10(2) of the ECHR. Consequently, the legislature (and also the

issuer of the regulation if there is a corresponding power to issue regulations) may provide for such restrictions on advertising for lawyers "as are necessary in a democratic society in the interest of ...", for the protection of the reputation and the rights of others and in order to "guarantee the reputation and impartiality of the judicial system". According to the Austrian Constitutional Court, the image of lawyers is still shaped significantly by their forensic work, which is why the issuer of the regulation is able to introduce restrictions on advertising for the legal profession as a whole in order to guarantee the reputation of the judicial system, because it would be detrimental to the reputation of the judicial system "if, as result of advertising measures by individual members, even if the individual members do not perform forensic work, the profession as a whole appears dubious, such as in the case of blatant advertising measures or, generally, advertising which is not based on factual information about the lawyers' activities, their specific expertise and knowledge, their specific experience or the like".

According to that judgment, a restriction on advertising is thus permitted at least if the personage of the lawyer is emphasised in the advertising and the person is not mentioned only in connection with factual information about the professional activities of the lawyer. In a further judgment, however, the Austrian Constitutional Court considered it to be permitted if a lawyer gave a detailed explanation in a circular of the right to pension insurance enjoyed by a specific group of people and referred to his 30 years of professional experience in such matters. In another order, the Austrian Constitutional Court described as questionable a similar case in which a lawyer used circulars containing wholly factual information to offer his services for debt recovery (in general) and was subject to a disciplinary penalty for doing so. As a result, the Professional Guidelines in Austria (and subsequently also in Liechtenstein) were drafted in increasingly liberal terms with regard to permitted advertising measures.

On the basis of the apparent case-law in Austria, it can be stated that at least advertising measures where the personage of the lawyer in question is emphasised, in particular in a blatant manner, may be prohibited from the point of view of fundamental rights. The requirements of factual objectivity and compatibility with the honour and reputation of the profession by reason of the

position of lawyers in the administration of justice follow from the special responsibility emanating from this function, which, in principle, permits a restriction of full freedom of expression within the meaning of Article 10 of the ECHR (Feil/Wennig⁸ 690; ECHR 7 March 1991, 14622/89).

Advertising measures which generally emphasise factual information, including information about the person of the lawyer (specialist knowledge, experience, professional background) and about legal work may not be prohibited if they are otherwise unconstitutional.

Lawyers may in principle provide information about their services and their person provided the statements are factual, truthful and related to the profession. Targeted advertising for new clientele and consequent overly commercial self-promotion are questionable. Limitations of advertising freedom are necessary where the legal profession as such is to be protected from giving an impression of dubiousness. Against this background, it is unclear to the Chamber how offering professional services to specific categories of possible clients might impair the honour and propriety of the legal profession.

It must in any case be considered permissible, under the rules on professional ethics, for lawyers to have an internet presence in the form of their own websites and not only homepages. The restrictions under Paragraphs 34 and 35 of the Professional Guidelines and Paragraph 1(f) of the Act Against Unfair Competition likewise apply to the content presented. Lawyers must avoid any appearance of blatant or other non-factual promotion of their services, as personal integrity is of crucial importance to the legal profession. In the real world and online, lawyers must advertise principally through the quality of their legal services, which they are not prohibited from doing either by the rules on competition or by the rules on professional ethics. Here too, under the current Professional Guidelines (Paragraph 35(1)(c)), there is a prohibition on offering professional services to specific categories of possible clients.

In the present case, the group of **X AG** investors contacted by the accused both via the internet and via circulars constitute one such specific category and, for that reason alone, he has committed a disciplinary offence under

Paragraph 35(1)(c) in conjunction with Paragraph 47 of the Professional Guidelines and Article 46 of the Lawyers Act.

Paragraph 35(1)(c) in conjunction with Paragraph 47 of the Professional Guidelines thus predetermines the decision in the present disciplinary proceedings.

On the basis of the case-law cited above, however, the Court of Appeal has reservations that Paragraph 35(1)(c) may interfere in an overly far reaching manner with the freedom to economic activity and furthermore may be inconsistent with the statutory provisions of the Lawyers Act, which are deemed to be in conformity with the Constitution. It should be noted that the equivalent guidelines of the Austrian Chamber of Lawyers do not provide for a prohibition similar to Paragraph 35(1)(c).

According to the Lawyers Act, Lawyers are permitted to engage in advertising insofar as it provides truthful and factual information about their professional activities and is consistent with their professional duties.

Article 12 of the Lawyers Act reads as follows:

"Lawyers shall be obliged to preserve the honour and reputation of the legal profession by acting truthfully and honourably."

Article 27 of the Lawyers Act reads as follows:

"(1) Lawyers shall be allowed to inform about their services and about them insofar as the information provided is objectively true, 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 that any third parties engage in any advertisement for them that they are themselves not allowed to engage in. ."

Paragraph 35(1)(c) of the Professional Guidelines therefore appears to run counter to an interpretation of Articles 12 and 27 of the Lawyers Act in conformity with the Constitution insofar as that provision prohibits lawyers from engaging in advertising measures by which they offer their services in particular to an affected potential group of clients by reference to their special legal and factual knowledge in certain fields of law and/or with regard to certain factual situations and legal matters (such as bringing (class) actions for the category of injured parties in the VW emissions scandal or, in this instance, offering services for the limited group of possible injured parties of the **X AG**). Articles 12 and 27 of the Lawyers Act do not provide for such a restriction as long as the offer of services is factually accurate, directly related to the profession and justified by an interest of the persons seeking legal assistance and lawyers do not showcase their services or their person in an overly commercial manner.

Article 93(1)(g) of the Lawyers Act empowers the Plenary Assembly of the Chamber of Lawyers to adopt professional guidelines. In the present context, the Professional Guidelines are thus adopted and amended autonomously by the Chamber of Lawyers. Compliance with the professional ethical rules adopted by the Chamber of Lawyers is declared by statute to be a professional duty (Article 46 of the Lawyers Act), although those rules may not be contrary to the statutory provisions of the Lawyers Act, especially since they are below statutes in the hierarchy of the legal order. Since, in the view of the Court of Appeal, Article 35(1)(c) of the Professional Guidelines appears to be contrary to the abovementioned provisions of the Lawyers Act in any event, that provision should be repealed as unlawful, and possibly as unconstitutional in the light of the abovementioned fundamental rights to economic activity and freedom of expression.

It is for the Constitutional Court to assess whether, as the Liechtenstein Chamber of Lawyers asserts, that provision can possibly be given a stricter interpretation in conformity with the Constitution to the effect that it is unlawful to proactively contact a specific group of people without instigation by the targeted clients, for example – as in this case – by seeking out specific injured parties and making contact by personal letter with an invitation to join legal proceedings being brought by the lawyer.¹

In its judgment of 28 June 2022, the Constitutional Court found that the contested provision in Paragraph 35(1)(c) of the Professional Guidelines of the Liechtenstein Chamber of Lawyers is neither unlawful nor unconstitutional.

In so far as is relevant, the Constitutional Court held – verbatim – as follows:

'2.1 Article 12 of the Lawyers Act provides that lawyers are obliged to preserve the honour and reputation of the legal profession by acting truthfully and honourably. In addition, Article 27(1) of the Lawyers Act stipulates: *"Lawyers shall be allowed to inform about their services and about them insofar as the information provided is objectively true, 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."*

2.2 ...

2.3.2 The advertising emphasises the quality of the legal services, which speak for themselves and, to a certain extent, inherently have the nature of advertising. In addition, advertising must be truthful and factually accurate, directly related to the profession and justified by an interest of the persons seeking legal assistance. It may not be untruthful or non-factual and must be compatible with the honour and reputation of the profession, professional duties and the function of the lawyer in the administration of justice. The specific prohibitions on advertising, including Paragraph 35(1)(c) of the Professional Guidelines, should be interpreted in the light of these general prerequisites for unlawful advertising. It certainly cannot be inferred from that prohibition on advertising that it might constitute a blanket prohibition on advertising under which all forms of advertising by lawyers are unlawful. Rather, the expressions "specific categories" and "possible clients" make clear that the prohibition on advertising applies only to certain groups of people in certain contexts in

which it is actually possible for a contract to be awarded. Therefore, it is not a matter of abstract advertising for professional services offered to the public at large or abstract groups of people, but of offering of professional services to specific categories of possible clients in specific legal contexts in which it actually seems possible for a contract to be awarded. To this end, there must be, first, a specific legal context in which it actually seems “possible” for a contract to be awarded and on the basis of which “specific categories” of clients can be identified. Second, there must be an “offering of professional services”, which requires proactive advertising measures by the lawyer concerned, aimed at those specific categories of possible clients. It is not therefore a question of advertising where lawyers merely provide abstract information about their professional services or, in accordance with Article 27(1) of the Lawyers Act, meet an “interest of the persons seeking legal assistance” which has been brought to them. Rather, by “offering of professional services to specific categories of possible clients”, lawyers themselves proactively approach people who are possible clients but do not necessarily represent an actual “interest of the persons seeking legal assistance”. The restriction to “specific categories” of possible clients also suggests that the persons specifically targeted by that advertising are selected in such a manner that the lawyers expect them to accept the offer.

2.3.3 On the basis of this understanding, which is also shared by the Government and by the Liechtenstein Chamber of Lawyers, Paragraph 35(1)(c) is wholly consistent with Article 12 and Article 27(1) of the Lawyers Act, as under those provisions lawyers are obliged, on the one hand, to preserve the honour and reputation of the legal profession by acting truthfully and honourably and, on the other, to provide information about themselves and their services only in the manner set out in Article 27(1) of the Lawyers Act, without showcasing their services or their person in an overly commercial manner. A provision like Paragraph 35(1)(c) of the Professional Guidelines is compatible if it seeks to realise those values by stipulating that lawyers should not, on their own initiative, approach specific (groups of) people and offer them professional services ensuing from specific situations in which it is actually

possible for a contract to be awarded, without those specific (groups of) people having expressed an interest as persons seeking legal assistance, which is a justification under Article 27(1) of the Lawyers Act but may not even exist. Therefore, Paragraph 35(1)(c) of the Professional Guidelines is not unlawful, but is in fact compatible with Articles 12 and 27 of the Lawyers Act.

...

2.4 Similarly, Paragraph 35(1)(c) is consistent with the constitutional rights of freedom of trade and industry (Article 36 of the Constitution) and freedom of expression (Article 40 of the Constitution in conjunction with Article 10 of the ECHR). In this connection, the Constitutional Court largely concurs with the arguments put forward by the Government with regard to freedom of trade and industry and by the Liechtenstein Chamber of Lawyers with regard to both fundamental rights:

2.4.1 As for a possible violation of the right to freedom of trade and industry under Article 36 of the Constitution, freedom of trade and industry under Article 36 of the Constitution protects freedom to choose, access and exercise a profession, a commercial trade and an industry and thus a business in general (see also Nicolas Raschauer, Online-Kommentar zur liechtensteinischen Verfassung [verfassung.li; as at: 12 January 2021], Article 36 of the Constitution, paragraph 22 et seq.). The authors of the Constitution envisage an economic order essentially based on private autonomy (StGH 2013/042, ground 3.1 [www.gerichtsentscheide.li]; StGH 2006/044, LES 2008, 11 [15 et seq., ground 2]; see also Klaus A. Vallender, Handels- und Gewerbefreiheit, in: Kley/Vallender [ed.], Grundrechtspraxis in Liechtenstein, LPS Vol. 52, Schaan 2012, 726 et seq., paragraph 3 et seq. with further references). Freedom of trade and industry includes freedom to choose and exercise a profession. The legislature may encroach upon freedom of trade and industry only if this is provided for sufficiently clearly in a formal statute, is in the public interest or is necessary in order to protect the fundamental rights of others and is consistent with the principle of proportionality. Furthermore, the essence of the fundamental right must

remain unaffected (StGH 2015/011, ground 3.1; StGH 2013/117, ground 3.2 et seq.; StGH 2013/042, ground 3.1 [all www.gerichtsentseide.li], and Klaus A. Vallender, *Handels- und Gewerbefreiheit*, loc. cit., 739, paragraph 29).

...

2.4.3 Paragraph 35(1)(c) of the Professional Guidelines represents an encroachment upon the freedom of trade and industry under Article 36 of the Constitution as it prohibits a certain kind of professional advertising which falls within the scope of the protection offered by the freedom of trade and industry (for the case-law of the Swiss Federal Supreme Court, according to which the freedom of trade and industry does not permit a total prohibition on advertising by lawyers, but allows certain constraints to be placed on advertising activities by lawyers, see, for example, BGE 139 II 173, ground 4.3, p. 178 with further references). As mentioned, that interference has its legal basis in Article 12 and Article 27(1) of the Lawyers Act.

The encroachment is in the public interest as it serves to safeguard the honour and reputation of the legal profession as an important profession in the administration of justice in Liechtenstein (see also VfSlg 10.718/1985; with regard to the honour and dignity of the profession as a guarantee of the reputation of the judicial system, see VfSlg 12.467/1990, 16.555/2002, 17.195/2004, 17.290/2004, 18.290/2007, 19.348/2011). The honour and reputation of the legal profession is not merely an end in itself but, in the words of the Swiss Federal Supreme Court, realise the "public ... interest in orderly, high-quality" professional practice (BGE 139 II 173 E. 5, 6.2.1, p. 179 et seq.), which is in turn of great importance for the administration of justice in Liechtenstein in general, but also for public confidence in it.

2.4.4 The prohibition on lawyers approaching specific categories of potential clients on their own initiation in specific situations in order to present an offer to them is suitable for serving that public interest as this prevents (possibly even unwanted) self-promotion and the proactive making of

offers to people who they regard as possible clients. It cannot be assumed that the provision prevents potentially injured parties actually becoming aware of damage or being able to safeguard their legal interests, or infringing parties being held to account, as the accused asserts. 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. This does not prevent the legal prosecution of unlawful acts, the provision of information or the opportunity for those people to safeguard their legal interests, including with the assistance of a lawyer. Lawyers are free to provide factual information about the opportunity to assert such claims via the media or on their own websites, thereby reaching potentially injured parties without contacting them directly on their own initiative.

...

2.4.6 However, this state of affairs means that it cannot be left to the lawyers themselves whether they proactively present offers that are unsolicited and possibly even unwanted. It should be borne in mind that, as has been explained, by departing from a total prohibition on advertising for lawyers in 1993 and replacing it with a system of selective prohibitions on advertising which is detailed in the Professional Guidelines, the Liechtenstein legislature did in any case endeavour to accommodate, as far as possible, the interests of the legal profession while at the same time liberalising the existing more stringent prohibitions.

2.4.7 Lastly, Paragraph 35(1)(c) of the Professional Guidelines is proportionate to the restricted fundamental rights position of lawyers who are subject to the prohibition on advertising laid down therein, on the one hand, and the public interest in the honour and reputation of the legal profession as an important profession for the administration of justice in Liechtenstein, on the other, especially since lawyers remain free to engage in advertising for their professional services in other ways which are laid down in further detail by the Lawyers Act and the Professional Guidelines.

2.4.8 Furthermore, the essence of the freedom of trade and industry remains unaffected by the prohibition. It does not prevent lawyers from choosing or exercising their profession. Lawyers also remain free to engage in general advertising for their professional services which does not come under any of the prohibitions laid down in the Professional Guidelines and complies with the principles of honour and reputation of the legal profession.

...

2.5.4 Even though, as explained, in general stricter requirements apply when limiting a non-economic fundamental right such as the freedom of expression rather than the freedom of trade and industry, commercial advertising may be made subject to stricter limitations than other forms of expression. Accordingly, as a rule, the review of the constitutionality of commercial advertising in the light of both, the freedom of trade and industry and the freedom of expression, leads to the same conclusion. The Constitutional Court can see no reason to differentiate between the two fundamental rights in addressing the criteria governing encroachments on fundamental rights. Consequently, for the reasons set out above with regard to the question of an infringement of the freedom of trade and industry, an infringement of the freedom of expression should also be rejected by analogy. The encroachment likewise has a sufficiently clear legal basis, is in the public interest, is proportionate and does not affect the essence of the freedom of expression

...

3. Paragraph 35(1)(c) of the Professional Guidelines can thus be interpreted in conformity both with the statutes and with the Constitution in the light of Articles 12 and 27 of the Lawyers Act, which must in turn be interpreted in the light of the Constitution, in particular Articles 36 and 40 thereof, and Article 10 of the ECHR. This possibility of an interpretation in conformity with the Constitution, which is also suggested by the Court of Appeal, is supported by a teleological and schematic interpretation of that

provision. The Constitutional Court points out, in conclusion, that the necessary interpretation of the provision in conformity with the Constitution in any case rules out an excessively broad interpretation to the effect that the presentation of factual information about professional services provided by a lawyer to an abstract target group, in which there is no self-promotion, is to be considered to come under that prohibition because it would make Paragraph 35(1)(c) of the Professional Guidelines subject to an interpretation contrary to the statutes and the Constitution.'

3. Legal bases and reasons for the reference:

3.1 Legal bases (extracts):

Paragraphs 34 and 35 of the Professional Guidelines of the Liechtenstein Chamber of Lawyers of 24 March 2014 read as follows (emphasis added to the contested provision):

'Paragraph 34 Advertising

1. *Lawyers shall advertise principally through the quality of their legal services.*
2. *Lawyers may provide information about their services and their person provided the statements are factually accurate, directly related to the profession and justified by an interest of the persons seeking legal assistance.*

Paragraph 35 Prohibited advertising

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:*
 - (a) self-promotion by showcasing their person or their services in an overly commercial manner,*
 - (b) comparative reference to members of the profession,*
 - (c) offering of professional services to specific categories of possible clients,*
 - (d) creation of objectively false expectations,*

- (e) offering of unlawful advantages with regard to fees,*
 - (f) naming of clients as references without their consent,*
 - (g) canvassing by exploiting a situation of duress,*
 - (h) handing over of power of attorney forms to third parties to be passed on to an undefined group of people,*
 - (i) offering or granting of advantages for authorisations to act,*
 - (j) references to sales or turnover figures.*
- ...'

...

Paragraph 46 of the Lawyers Act of 8 November 2013 (LGBl. No 415/2013) reads as follows:

- '(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 commits a disciplinary offence on account of his or her extra-professional conduct if such conduct is capable of substantially affecting his or her trustworthiness.'*

Article 48 of the Lawyers Act provides:

- '(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. ...'*

Article 49 of the Lawyers Act provides:

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

...'

Article 12 of the Lawyers Act provides:

'Lawyers shall be obliged to preserve the honour and reputation of the legal profession by acting truthfully and honourably.'

Article 27 of the Lawyers Act provides:

'(1) Lawyers shall be allowed to inform about their services and about them insofar as the information provided is objectively true, 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 that any third parties engage in any advertising for them that they are themselves not allowed to engage in.'

Paragraph 47 of the Professional Guidelines reads as follows:

'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. The Professional Guidelines are based on Article 93(1)(g) of the Lawyers Act (RAG) of 8 November 2013, LGBl. 2013 No 415, and on Paragraph 6(g) of the Bylaws of the Liechtenstein Chamber of Lawyers of 24 March 2014.'

3.2 Reasons for the reference:

3.2.1 On the basis of the decision of the Constitutional Court, the disciplinary proceedings were continued and, at the hearing on 25 October 2022, the accused invoked Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006, which is applicable to him as a lawyer. In its judgment of 5 April 2011 in Case C-119/09 concerning prohibitions on advertising for qualified accountants, the Court of Justice of the European Union interpreted Article 24 of Directive 2006/123 to the effect that the 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 directive, such as advertising, direct marketing and sponsorship. In the main proceedings 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 of commercial communication under Article 24(1) of Directive 2006/123.

That case is comparable with the prohibition at issue under Paragraph 35(1)(c) of the Professional Guidelines of the Liechtenstein Chamber of Lawyers, even when applying the restrictive interpretation of the Constitutional Court. On that basis, the accused requested that the matter be referred to the EFTA Court.

3.2.2 The Liechtenstein Chamber of Lawyers contended – reproduced, in part, verbatim – as follows:

1. *'By the judgment of the Constitutional Court, it was found that Paragraph 35(1)(c) of the Professional Guidelines of the Liechtenstein Chamber of Lawyers is neither contrary to the statutes nor the constitution and is therefore valid and applicable law. The letters from the accused to the X AG shareholders/investors were therefore unlawful and constitute a breach of professional duties and a violation of the honour and reputation of the legal profession.*

2.
Paragraphs 34 and 35 of the Professional Guidelines do not constitute a blanket prohibition on advertising. The prohibition on offering professional services to specific categories of possible clients concerns proactive conduct by lawyers where they approach people who are possible clients but do not necessarily represent an actual interest of the persons seeking legal assistance. The possible clients are selected in such a manner that the lawyers expect them to accept the offer.

By Paragraph 35(1)(c) of the Professional Guidelines of the Liechtenstein Chamber of Lawyers, it is intended to ensure that lawyers do not, on their own initiative, approach specific groups of people and offer them professional services ensuing from specific situations in which it is actually possible for a contract to be awarded, without those specific groups of people having expressed an interest as persons seeking legal assistance. The decision to bring proceedings should be taken by the clients themselves without outside influence and they themselves should take an active part in contacting a legal representative.

.....

3. *In the most recent statement by the accused it is now argued that Paragraph 35(1)(c) of the Professional Guidelines is contrary to European law, especially since it infringes Article 24 of the Services Directive 2006/123/EC and Article 36 of the EEA Agreement.*

That view is not shared by the Chamber of Lawyers. The provision is consistent with European law.

The Services Directive provides only that it is necessary to put an end to total prohibitions by regulated professions. Restrictions on content and restrictions in relation to the manner in which contact is made (proactively, without an interest on the part of the persons seeking legal assistance) are not excluded.

....

Under Article 24(2) of Directive 2006/123/EC, Member States must 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 must be non-discriminatory, justified by an overriding reason relating to the public interest and proportionate. The review of the legal basis, public interest and proportionality has already been conducted by the Constitutional Court and an infringement of fundamental rights has been rejected.

*As is clear from Article 24(2) of Directive 2006/123/EC ("in particular"), the protected interests the impairment of which may justify a restriction of commercial communication are not limited to the aspects expressly mentioned, namely the independence, dignity and integrity of the legal profession as well as professional secrecy. Regard must also be had in the interpretation to the legislative regulatory context of Article 24 of Directive 2006/123/EC and thus to the interests of consumers (ECJ, EuZW 2011, 681 paragraph 28 – *Société fiduciaire national d'expertise comptable*). It follows that a prohibition on advertising can be justified in order to protect potential clients against an impairment of their freedom of choice through harassment, coercion and being taken by surprise.'*

3.2.3 It must be stated that, even on the basis of the teleologically restrictive interpretation adopted by the Constitutional Court, the letter sent by the accused to the shareholders of **X AG** falls within the scope of Paragraph 35(1)(c) of the Professional Guidelines such that, irrespective of any examination of the content of the letter and of the approach taken in the specific case at issue, the definition of an unlawful prohibition on advertising would be satisfied.

It should also be made clear that the question whether the prohibition on advertising is consistent with Services Directive has not been addressed in the proceedings thus far or therefore in the reference to the Constitutional Court. It was a new issue arising only after the decision of the Constitutional Court. Thus, as far as can be seen from the content of its decision, the Constitutional Court also did not examine the scope of Directive 2006/123/EC, which was incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 45/2009 of 9 June 2009 (promulgation in Liechtenstein on 16 April 2010, LGBI. No 96/2010).

Consequently, the Chamber considers that it is entitled and has good cause to obtain an advisory opinion from the EFTA Court because the Court of Appeal cannot be bound by the decision of the Constitutional Court according to which Paragraph 35(1)(c) of the Professional Guidelines is both legal and constitutional, especially since the issue of consistency with the rules of European law was not addressed in the reference to the Constitutional Court. Therefore, the questions which formed the basis for the ruling by the ECJ in Case C-430/21 concerning Romania do not arise either.

3.2.4 According to the legal opinion of the Constitutional Court, advertising by lawyers for contracts would have to be regarded as unlawful if the persons targeted in a specific case potentially require advice or representation and advertisers, in full knowledge of the circumstances, take this opportunity to advertise their

services without having previously been contacted by the persons targeted.

The German Federal Court of Justice has, in isolated rulings in the past, taken a similar view to the effect that advertising for contracts was considered unlawful if the persons targeted in a specific case require advice or representation and advertisers, in full knowledge of the circumstances, take this opportunity to advertise their services. Such advertising seeks, in a manner often perceived as intrusive, to exploit the fact that the persons targeted are, for example, in a situation where they are reliant on assistance and may be unable freely to choose a lawyer (see BGHZ 147, 71, 80 – Advertising by lawyers II; BGH, judgment of 15 March 2001 – I ZR 337/98, WRP 2002, 71, 74 – Circulars from lawyers).

The Federal Court of Justice has, however, clearly departed from this case-law in the light of Directive 2006/123/EC. Accordingly, the fact that a potential client is proactively approached by a lawyer, in full knowledge of the specific need for advice, is not sufficient for a prohibition on advertising. Rather, a prohibition on advertising can be justified only in order to protect potential clients against an impairment of their freedom of choice through harassment, coercion and being taken by surprise, in which regard it is necessary to balance the interests at stake in the individual case (see BGH of 10 July 2014 – I ZR 188/12).

- 3.2.5** Paragraph 35(1)(c) of the Professional Guidelines governs the professional limits within which lawyers may advertise their services. The provision thus constitutes a professional rule on commercial communication within the meaning of Article 4(12) of Directive 2006/123/EC which concerns the legal profession and thus a regulated profession within the meaning of Article 4(11) of Directive 2006/123/EC in conjunction with Article 3(1)(a) of Directive 2005/36/EC on the recognition of professional qualifications.

3.2.6 Article 24(1) of Directive 2006/123/EC provides that total prohibitions on commercial communications by the regulated professions are not permitted. According to recital 100 of Directive 2006/123/EC, total prohibitions means not only bans on the content of a commercial communication, but (also) 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.

The Court of Justice of the European Union has ruled that a total prohibition within the meaning of Article 24(1) of Directive 2006/123/EC is considered to exist where a national provision prohibits a commercial communication whatever its form, content or means employed ECJ, judgment of 5 April 2011, C-119/09, [2011] ECR I-2551 = EuZW 2011, 681 paragraph 41 et seq.). It follows that a prohibition on advertising can be envisaged only if a ground for prohibition stems from the form, content or means employed for the advertising in the individual case. The fact that potential clients are proactively approached, in full knowledge of their possible, even if only presumed, specific need for advice clearly does not in itself satisfy these requirements.

3.2.7 Under Article 24(2) of Directive 2006/123/EC, Member States must 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 must be non-discriminatory, justified by an overriding reason relating to the public interest and proportionate.

3.2.8 On the basis of the wording of the prohibition on advertising in Paragraph 35(1)(c) of the Professional Guidelines, the action taken

by the accused by his circular of 22 February 2021 appears to be prohibited, having regard also to the interpretation adopted by the Constitutional Court, whatever the content of the letter and precisely because of the approach proactively chosen by him in ascertaining addresses and approaching the persons targeted personally without them having previously had contact with him. Under Paragraph 47 of the Professional Guidelines, any infringement of the Professional Guidelines is also a breach of the professional duties of the lawyer and is to be penalised by the Court of Appeal as a disciplinary offence.

It is therefore necessary to interpret the abovementioned legal bases in order to answer the question whether the prohibition on a lawyer advertising his services on his own initiative in specific situations in letters to selected (groups of) people who have not previously communicated to him their addresses, which were also not known from pre-existing customer contacts, and who have also not previously expressed an interest in the offer of services by the lawyer, is compatible with the provisions of Directive 2006/123/EC. In particular, it is necessary to interpret the scope of Article 24 of that directive in the light of the situation and the legal bases to be applied by the Court of Appeal.

Accordingly, it is necessary to obtain an advisory opinion from the EFTA Court.

4. The order staying the proceedings is founded on Article 62(1) of the Court Organisation Act.

PRINCELY COURT OF APPEAL, Second Chamber

Vaduz, 25 October 2022

Deputy Presiding Judge:

Dr Dietmar Baur



The accuracy of this copy is confirmed by

Carmen Semmler

Notice concerning rights of appeal

No appeal may be brought against this order.

Distribution list

1. Dr Amann
2. Chamber of Lawyers
3. EFTA Court with covering letter

Vaduz, 8 November 2022

Dr Dietmar Baur
Deputy Presiding Judge