



JUDGMENT OF THE COURT

19 October 2023*

(Freedom to provide services – Directive 2006/123/EC – Article 24 – Prohibition of total prohibitions on commercial communications by the regulated professions – Prohibition on targeted proactive advertising by lawyers)

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

Dr 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,

THE COURT,

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

Registrar: Ólafur Jóhannes Einarsson,

having considered the written observations submitted on behalf of:

- Dr Alexander Amann; attorney, represented by himself;

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

- the Liechtenstein Government, represented by Dr Andrea Entner-Koch, Romina Schobel and Dr 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;

having regard to the Report for the Hearing,

having heard the oral arguments of Dr Alexander Amann; the Liechtenstein Government, represented by Romina Schobel; ESA, represented by Kyrre Isaksen and Hildur Hjörvar; and the Commission, represented by Mislav Mataija, at the hearing on 4 July 2023,

gives the following

Judgment

I Legal background

EEA law

1 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.

2 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 as between Member States and to guarantee recipients and providers the legal certainty necessary for the exercise in practice 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.

3 Article 4(11) and (12) of the Services Directive, entitled “Definitions”, reads:

11) “regulated profession” means a professional activity or a group of professional activities as referred to in Article 3(1)(a) of Directive 2005/36/EC;

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.

4 Article 24 of the Services Directive, entitled “Commercial communications by the regulated professions” 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.

National law

5 Article 27 of the Lawyers Act (*Rechtsanwaltsgesetz*) of 8 November 2013 (LGBI. 2013 No 415) (“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.

6 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”).

7 Paragraph 34 of the Professional Guidelines, entitled “Advertising”, 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. ...

8 Paragraph 35(1) of the Professional Guidelines, entitled “Prohibited Advertising”, 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,

...

9 Paragraph 35(1)(c) of the Professional Guidelines, as interpreted by the Constitutional Court of the Principality of Liechtenstein (*Staatsgerichtshof des Fürstentums Liechtenstein*) in its judgment of 28 June 2022, prohibits “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”.

10 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.

II Facts and procedure

11 Dr 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.

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

13 On 15 July 2021, the Chamber of Lawyers initiated disciplinary proceedings against Dr Amann, contending that he had, by 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.

14 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, as the court having jurisdiction to review the legality, and in the alternative the constitutionality, of Paragraph 35(1)(c) of the Professional Guidelines.

15 In a judgment of 28 June 2022, the Constitutional Court found the contested provision in Paragraph 35(1)(c) of the Professional Guidelines to be neither unlawful nor unconstitutional.

16 On the basis of the judgment of the Constitutional Court, the disciplinary proceedings were continued. At a hearing on 25 October 2022, Dr Amann invoked the Services Directive, and requested that the matter be referred to the Court. The Chamber of Lawyers opposed the request.

17 Against this background, the Princely Court of Appeal decided to stay the proceedings and request an Advisory Opinion from the Court. The request, dated 25 October 2022, was registered at the Court on 16 November 2022. The request makes particular reference to the judgment of the European Court of Justice (“ECJ”), in *Société fiduciaire nationale d’expertise comptable*, C-119/09, EU:C:2011:208, and has 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?*

18 Reference is made to the Report for the Hearing for a fuller account of the legal framework, the facts, the procedure and the proposed answers submitted to the Court. Arguments of the parties are mentioned or discussed hereinafter only insofar as is necessary for the reasoning of the Court.

III Answer of the Court

19 By its questions, the referring court asks, in essence, whether the Services Directive should be interpreted as precluding a provision such as Paragraph 35(1)(c) of the Professional Guidelines, which, as interpreted by the Constitutional Court, prohibits “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”.

20 According to the request, Paragraph 35(1) of the Professional Guidelines, entitled “Prohibited advertising”, provides that lawyers are to refrain from advertising that 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. Article 35(1)(c) provides that such prohibitions apply in the case of offering of professional services to specific categories of possible clients. The referring court considers that this provision, as interpreted by the Constitutional Court, prohibits

“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.” The Court observes that the interpretation of the national provision by the referring court is not disputed.

- 21 Under the procedure laid down in Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, which is based on a clear separation of functions between the national courts and the Court, the latter has no jurisdiction to interpret national law and that only the national courts may determine the exact scope of national laws, regulations or administrative provisions (see Case E-15/20 *Criminal proceedings against P*, judgment of 30 June 2021, paragraph 42 and case law cited). Accordingly, the Court will base its understanding of Paragraph 35 of the Professional Guidelines on the interpretation given by the Constitutional Court.
- 22 Article 24 of the Services Directive imposes two obligations on EEA States. First, Article 24(1) requires EEA States to remove all total prohibitions on commercial communications by the regulated professions. Second, Article 24(2) obliges EEA States to ensure that commercial communications by the regulated professions comply with professional rules, in conformity with EEA 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. Those professional rules must be non-discriminatory, justified by an overriding reason relating to the public interest and proportionate.
- 23 In order to determine whether Article 24 of the Services Directive, and particularly Article 24(1), proscribes a prohibition on targeted proactive advertising by lawyers such as that laid down by the national legislation at issue in the main proceedings, it is necessary to interpret that provision by reference not only to its wording but also to its purpose and context and the objective pursued by the legislation in question (compare the judgment in *Société fiduciaire nationale d’expertise comptable*, cited above, paragraph 25).
- 24 The objective of the Services Directive, as is clear from recitals 2 and 5 of the preamble, is to remove restrictions on the freedom of establishment for providers in the EEA States and on the free movement of services between EEA States, in order to contribute to the completion of a free and competitive internal market (compare the judgment in *Commission v Hungary*, C-179/14, EU:C:2016:108, paragraph 63, and the judgment in *Société fiduciaire nationale d’expertise comptable*, cited above, paragraph 26).
- 25 The specific purpose of Article 24(1) of the Services Directive is stated in the first sentence of recital 100, according to which it is necessary to put an end to total prohibitions on commercial communications by the regulated professions, prohibitions 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 (compare the judgment in *Société fiduciaire nationale d’expertise comptable*, cited above, paragraph 27). The specific purpose of Article 24(2) of the Services Directive is

reflected in the second sentence of recital 100, which encourages professionals, as regards the content and methods of commercial communication, to draw up, in accordance with Community law, codes of conduct at Community level.

- 26 With respect to the context of Article 24 of the Services Directive, the article in question is contained in Chapter V of that directive, entitled ‘Quality of services’. That chapter, in general, and Article 24, in particular, are intended to safeguard the interests of consumers by improving the quality of the services of the regulated professions in the internal market (compare the judgment in *Société fiduciaire nationale d’expertise comptable*, cited above, paragraph 28).
- 27 It follows from both the purpose and the context of Article 24 of the Services Directive that the intention of the EEA legislature was not only to put an end to total prohibitions, but also to remove bans on one or more forms of commercial communication within the meaning of Article 4(12) of that directive, such as, for example, advertising, direct marketing or sponsorship. Having regard to the examples in recital 100, professional rules forbidding the communication, in one or more given media, of information on providers or their activities must also be regarded as total prohibitions proscribed by Article 24(1) (compare the judgment in *Société fiduciaire nationale d’expertise comptable*, cited above, paragraph 29).
- 28 However, as already indicated above, pursuant to Article 24(2) of the Services Directive, read in the light of the second sentence of recital 100, EEA States retain the right to maintain prohibitions relating to the content or methods of commercial communications as regards regulated professions, provided that the rules laid down in this regard are justified and proportionate for the purposes of ensuring, in particular, the independence, dignity and integrity of the profession, as well as the professional secrecy necessary in its practice (compare the judgment in *Société fiduciaire nationale d’expertise comptable*, cited above, paragraph 30).
- 29 In order for the national legislation at issue to fall within the scope of Article 24 of the Services Directive, targeted proactive advertising by lawyers must constitute commercial communication.
- 30 The concept of commercial communication is defined in Article 4(12) of the Services Directive as encompassing 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 (compare the judgment in *Société fiduciaire nationale d’expertise comptable*, cited above, paragraph 32).
- 31 Thus, the Court observes that commercial communication covers not only traditional advertising, but also other forms of advertising and communications of information intended to obtain new clients (compare the judgment in *Verband Sozialer Wettbewerb*, C-19/15, EU:C:2016:563, paragraph 27, and case law cited). Moreover, the practice of targeting advertising at a particular group will not affect its classification as commercial communication.

- 32 The Court observes that targeted proactive advertising is closely related to the concept of canvassing, as canvassing constitutes a form of communication of information intended to seek new clients, and involves personal contact between the provider and potential clients, in order to offer the latter services. Both acts/actions involve unsolicited contact by members of regulated professions with potential new clients with a view to offering their services and are proactive by their nature. The ECJ has held that the notion of canvassing comes within the concept of commercial communication, within the meaning of Articles 4(12) and 24 of the Services Directive (compare the judgment in *Société fiduciaire nationale d'expertise comptable*, cited above, paragraph 38).
- 33 In such circumstances, the concept of a commercial communication within the meaning of Article 24 of the Services Directive, must be understood as including targeted proactive advertising and the offering of specific services by lawyers, such as that undertaken by the applicant in the main proceedings.
- 34 As already established above, a distinction must be drawn between a total prohibition of commercial communication based on the form of the said communication, and a prohibition based on the content or method employed. The former is unconditionally precluded by Article 24(1) of the Services Directive, whereas the latter may be acceptable, subject to certain conditions being satisfied, pursuant to Article 24(2). Therefore, the Court will examine whether a provision such as the provision at issue can be regarded as a total prohibition on commercial communications within the meaning of Article 24(1).
- 35 As stated above, Paragraph 35 of the Professional Guidelines, entitled “Prohibited Advertising”, provides that lawyers are to refrain from advertising that 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. According to the request, Article 35(1)(c) provides that such advertising occurs in particular in the case of offering professional services to specific categories of possible clients. Thus, the Professional Guidelines refer to such conduct as an example of prohibited advertising.
- 36 As noted in the request, the referring court considers that this provision, as interpreted by the Constitutional Court, prohibits “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.”
- 37 EEA States may lay down prohibitions relating to the content or methods of commercial communications as regards regulated professions (including lawyers), provided that the rules laid down are justified and proportionate for the purposes of ensuring, in particular, the independence, dignity and integrity of the profession, as well as the professional secrecy necessary in its practice (compare the judgment in *Société fiduciaire nationale d'expertise comptable*, cited above, paragraph 30).
- 38 The Court notes that as described by the referring court, under the provision in question, it is irrelevant whether the communication in question is truthful, factual or otherwise,

as any targeted proactive advertising by lawyers, irrespective of the content thereof or the method of dissemination employed, would be considered to constitute a breach of the honour and reputation of the profession. Further, there seems to be no individual assessment of the “specific categories of possible clients” and the situations that are covered by the provision and, if so, the reasons as to why. Consequently, any group, big or small, would be considered a specific category of possible clients.

- 39 On the basis of what has been presented to the Court, the mere fact that a lawyer engages in targeted proactive advertising in circumstances in which this has not been solicited would place him or her in breach of Paragraph 35(1)(c) of the Professional Guidelines. This is, in reality, a ban of a similar type as the one found to constitute a total prohibition in *Société fiduciaire nationale d’expertise comptable*, cited above. Such a ban would thus constitute a prohibition of all means of communication that might be used to carry out that commercial communication. Therefore, a measure such as that in the main proceedings would constitute a total prohibition of a form of commercial communication.
- 40 On that basis, the Court must conclude that a prohibition on targeted proactive advertising by lawyers such as that laid down by the national legislation at issue in the main proceedings, must be regarded as a total prohibition of commercial communications and therefore in breach of Article 24(1) of the Services Directive. It is therefore incompatible with that directive and cannot be justified under Article 24(2).
- 41 This conclusion is consistent with the objective of the Services Directive, which, as noted above, is, the removal of restrictions on the free movement of services between EEA States. Indeed, it should be observed that the national measure in question may be liable to disproportionately affect lawyers from other EEA States, by depriving them of an effective means of entering the national market in question (compare the judgment in *Société fiduciaire nationale d’expertise comptable*, cited above, paragraph 43 and case law cited).
- 42 The Court underlines that this conclusion does not necessarily entail that other forms of regulation concerning targeted proactive advertising by lawyers will constitute a total prohibition under the Services Directive Article 24(1). To the extent that the national regulation of such targeted proactive advertising does not constitute a total prohibition under Article 24(1), the rules governing such advertising would have to be non-discriminatory, justified by an overriding reason relating to the public interest and proportionate as stipulated in Article 24(2).
- 43 In the light of the foregoing, the answer to the questions referred must be that Article 24(1) of the Services Directive must be interpreted as precluding national legislation which in general prohibits the members of a regulated profession, such as the profession of lawyers, from engaging in proactive advertising, where they offer their services to selected (groups of) people who have not themselves expressed an interest in those services.

IV Costs

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

On those grounds,

THE COURT

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

Article 24(1) of Directive 2006/123/EC of 12 December 2006 on services in the internal market must be interpreted as precluding national legislation, such as in the main proceedings, which in general prohibits the members of a regulated profession, such as the profession of lawyers, from engaging in proactive advertising, where they offer their services to selected (groups of) people who have not themselves expressed an interest in those services.

Páll Hreinsson

Bernd Hammermann

Michael Reiertsen

Delivered in open court in Luxembourg on 19 October 2023.

Ólafur Jóhannes Einarsson
Registrar

Páll Hreinsson
President