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ORIGINAL

IN THE EFTA COURT

WRITTEN OBSERVATIONS

submitted, pursuant to Article 20 of the Statute of the EFTA Court, by the

EFTA SURVEILLANCE AUTHORITY

represented by Kyrre Isaksen, Hildur Hjörvar and Michael Sánchez Rydelski, Members of the Legal & Executive Affairs Department, acting as Agents, in

CASE E-14/22

Alexander Amann

in which the Princely Court of Appeal (*Fürstliches Obergericht*) requests the EFTA Court to give an Advisory Opinion pursuant to Article 34 of the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice concerning Article 24 of Directive 2006/123/EC.

Table of Contents

1 INTRODUCTION AND THE FACTS OF THE CASE

1. The present case is a disciplinary case pending before the Princely Court of Appeal against a lawyer, which raises questions concerning the interpretation of Directive 2006/123/EC, especially its Article 24(1), setting out an obligation on EEA States to remove all total prohibitions on commercial communications by regulated professions.

2. The accused, Dr Alexander Amann, is a lawyer registered with the Liechtenstein Chamber of Lawyers on the list of Liechtenstein Lawyers. Dr Amann's nationality is not mentioned in the facts of the case. His address, or the address of his office, is in Gamprin-Bendern, Liechtenstein.

3. Following criminal investigations against a Liechtenstein joint stock company, Dr Amann wrote unsolicited letters to shareholders of the company, informing them about the possibility to file a class action and offering his services in that context. After the discontinuation of the criminal investigations, the company complained to the Liechtenstein Chamber of Lawyers about Dr Amann's communication with the shareholders, triggering the Chamber of Lawyers to submit a disciplinary complaint. By offering his services through such targeted unsolicited advertising, the Liechtenstein Chamber of Lawyers alleges that Dr Amann has committed a disciplinary offence by infringing the provisions laying down prohibitions on advertising for lawyers in their Professional Guidelines. More specifically the complaint concerned a breach of Paragraph 35(1)(c) of the Professional Guidelines (**"the contested provision"**), which governs the professional limits within which lawyers may advertise their services.

4. The Liechtenstein Chamber of Lawyers initiated the disciplinary proceedings on 15 July 2021.

5. Before lodging the present request for an Advisory Opinion to the EFTA Court on 25 October 2022 (**"the Request"**), the Princely Court of Appeal lodged an application with the Constitutional Court for a review of the lawfulness of the contested provision. The latter held that the contested provision was neither unlawful nor unconstitutional, and that it constituted a ban on "proactive advertising by lawyers where they offered their services in certain situations to selected (groups of) people who had not themselves expressed an interest in

those services".[1] For further information about the facts and the procedure before the courts in Liechtenstein, reference is made to the Request.

2 EEA LAW

6. Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market ("**the Services Directive**") was incorporated into the EEA Agreement by Decision No 45/2009 of the EEA Joint Committee of 9 June 2009, which entered into force on 1 May 2010.[2]

7. Recitals 2, 5 and 100 in the preamble to the Services Directive read as follows, insofar as relevant:

> *"(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.* […]
>
> *(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*

[1] As translated from German to English in the Request.
[2] OJ L 162, 25.6.2009, p. 23.

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."

8. Article 4(12) of the Services Directive provides that for the purposes of the Directive:

"'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 e-mail 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."

9. Article 24 of the Services Directive, entitled "Commercial communications by the regulated professions", reads as follows:

"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."

10. Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications (**"the Professional Qualifications Directive"**) was incorporated into the EEA Agreement by Decision No 142/2007 of the EEA Joint Committee of 26 October 2007, which entered into force on 1 July 2009.[3]

11. Article 3(1)(a) of the Professional Qualifications Directive reads as follows, insofar as relevant:

"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. […]*"*

3 NATIONAL LAW

12. Article 46 of the Lawyers Act (*Rechtsanwaltsgesetz* (RAG)) of 8 November 2013 (LGBl. No 415/2013) reads as follows:[4]

"(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.

[3] OJ L 100, 10.4.2008, p. 70.
[4] As translated from German to English in the Request.

(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."

13. Article 93(1) of the Lawyers Act, insofar as relevant, reads as follows:[5]

"The following matters are assigned to the Plenary Assembly [of the Chamber of Lawyers]:
[…]
(g) the issuance of guidelines of professional conduct;
[…]*"*

14. Paragraph 34 of the Professional Guidelines of the Liechtenstein Chamber of Lawyers of 24 March 2014 ("**the Professional Guidelines**"), entitled "Advertising", reads as follows, insofar as relevant:[6]

"(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. […]*"*

15. Paragraph 35 of the Professional Guidelines, entitled "Prohibited advertising" reads as follows, insofar as relevant:[7]

"(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:
[…]

[5] As translated from German to English by ESA.
[6] As translated from German to English in the Request.
[7] As translated from German to English in the Request.

(c) offering of professional services to specific categories of possible clients, […]*"*

4 THE QUESTIONS REFERRED

16. The referring court has asked the EFTA Court the following questions:

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?

5 LEGAL ANALYSIS

5.1 Preliminary remarks

17. By its first question, the referring court asks, in essence, whether the Services Directive (as a whole or any of its provisions) must be interpreted as precluding national provisions which prohibit "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" (for simplicity, hereafter referred to as **"targeted unsolicited advertising by lawyers"**). The legal basis for this prohibition of targeted unsolicited advertising by lawyers can be found in

Paragraph 35(1)(c) of the Professional Guidelines, which are issued on the basis of Article 93(1)(g) of the Lawyers Act.

18. By its second question, the referring court asks, in ESA's view, whether specifically Article 24 of the Services Directive must be interpreted as precluding the prohibition in general of the conduct of Dr Amann in the present case. In this regard, ESA notes that no national provision in Liechtenstein explicitly addresses and "prohibits in general" the specific, detailed situation described in the question. Hence, the second question concerns, in ESA's view, an interpretation of Article 24 of the Services Directive in the abstract.

19. The first question from the referring court seems to aim at addressing all potentially relevant provisions of the Services Directive to ensure that the EFTA Court assesses the national Liechtenstein law comprehensively under the Directive. The second question singles out Article 24 as the most relevant provision in the Services Directive to the issue at stake. Since ESA considers that no provision of the Services Directive other than Article 24 is relevant and necessary to address the issue in a comprehensive manner, ESA will assess both questions jointly. Before assessing the questions' merits, a few preliminary points should be noted.

20. First, in ESA's view, Article 24(1) of the Services Directive sets out a general obligation on EEA States and must be interpreted as also applying in purely internal situations, as there is no indication in the wording or otherwise that it only covers the situation of a services provider established in another EEA State.[8]

21. Second, it must be borne in mind that the EFTA Court is to assess the scope of national laws, regulations or administrative practices as applied in practice, in the light of the interpretation given to them by national courts. Hence, the contested provision must be assessed with consideration for the meaning which that provision has been given in the interpretation of national courts, namely in the Constitutional Court's judgment (see paragraph 5 above).[9]

22. Third, ESA recognizes the special status and responsibility of lawyers. As observed by the CJEU, the position of and status as an independent lawyer is

[8] See Joined Cases C-360/15 and C-31/16, *Visser*, EU:C:2018:44, paragraph 102.

[9] See, among many authorities, Case C-522/12, *Tevfik Isbir*, EU:C:2013:711, paragraph 37; Case C-185/00, *Commission v Republic of Finland*, EU:C:2003:639, paragraph 109; Case C-591/17, *Republic of Austria v Federal Republic of Germany*, EU:C:2019:99, Opinion of AG Wahl, paragraph 104; and Case C-308/19, *Consiliul Concurenţei*, EU:C:2021:47, paragraph 65.

based on a conception of the lawyer's role as collaborating in the administration of justice and being required to provide, in full independence and in the overriding interest of that cause, such legal assistance as the client needs. Furthermore, the counterpart to that protection lies in the rules of professional ethics and discipline which are laid down and enforced in the general interest. Such a conception reflects the legal traditions common to the EU Member States and the EU legal order,[10] and likewise, in ESA's opinion, the legal order of the EEA.

23. In that context, ESA also notes that Dr Amann's general right to exercise his profession and his general obligation to observe the applicable rules of professional conduct, cf. Recital 88 and Article 17(3) of the Services Directive and Article 4(2) of Council Directive 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services, are not disputed in the present case and do not have direct bearing on the assessment of the questions posed by the referring court.

24. Fourth, ESA notes that the contested provision must, as any prohibition of or restriction on expression, be assessed against the background of the underlying fundamental rights to freedom to conduct business[11] and freedom of expression. The scope and content of the latter right in the EEA context is determined, *inter alia*, by Article 10 of the European Convention on Human Rights, as interpreted by the European Court of Human Rights.[12] Consequently, in addition to ensuring its national law's consistency with EEA law, the national courts of EEA States are under an obligation to interpret EEA derived legislation in accordance with fundamental rights.[13] In the present case, the freedom of expression requires that any interference with expression, including commercial communication, be clearly prescribed by law, that it be imposed in pursuit of a legitimate aim, and that it be necessary in a democratic society.[14] In determining the necessity of such an interference, in the context of commercial communication, the European Court of

[10] See Case C-155/79, *AM & S v Commission*, EU:C:1982:157, paragraph 24; and Case C-550/07 P, *Akzo Nobel Chemicals and Akcros Chemicals v Commission*, EU:C:2010:512, paragraph 42.
[11] Case E-10/14, *Enes Deveci and Others*, paragraph 64.
[12] See, *mutatis mutandis*, Case E-14/15, *Holship*, paragraph 123; Case E-1/20, *Kerim*, paragraph 43; and Case E-15/10, *Posten Norge*, paragraphs 85-86.
[13] *Idem*.
[14] See, for example, ECtHR, *Markt intern Verlag GmbH and Klaus Beermann v. Germany*, app. no. 10572/83, paragraphs 26-27, 20 November 1989; and ECtHR, *Sekmadienis Ltd. v. Lithuania*, app. no. 69317/14, paragraphs 62-65 and 69-74, 30 January 2018.

Human Rights affords a relatively broad margin of appreciation to national authorities.[15]

25. Fifth, ESA notes that the advisory opinion procedure provided for in Article 34 SCA is an instrument of cooperation between the EFTA Court and the national courts.[16] In accordance with settled case-law, Article 34 SCA is intended to be a means of ensuring a homogenous interpretation of EEA law and to provide assistance to the courts in cases in which they have to apply provisions of EEA law.[17] To that end, that article makes available to national judges a means of eliminating difficulties which may be occasioned by the requirements of giving implemented EEA law its full effect within the framework of the judicial system of the EEA EFTA State. Consequently, ESA submits that in order to preserve the effectiveness of the cooperation between the EFTA Court and the national courts established by Article 34 SCA, the outcome of a plea of unconstitutionality before the constitutional court of an EEA EFTA State cannot have the effect of deterring a national court from exercising the discretion under Article 34 SCA, to refer to the EFTA Court questions concerning the interpretation of EEA law in order to enable it to decide whether or not a provision of national law is compatible with EEA law.[18] For these reasons, ESA agrees with the referring court that it is entitled to and has good cause to obtain an advisory opinion from the EFTA Court.

26. Finally, for the sake of completeness, it can be noted that ESA in its Decision 053/18/COL[19] ("**the 2018 Decision**"), based on a complaint, assessed whether the Professional Guidelines were in breach of Article 24 of the Services Directive. There, ESA concluded that the Liechtenstein legislation did not contain a ban on commercial communication by lawyers and was, therefore, not in breach of Article 24(1) of the Services Directive. Although the Professional Guidelines remain unchanged on that point, that Decision is nevertheless not determinative for the present case for two reasons. First, ESA's assessment in the 2018 Decision only concerned the general question of whether the Liechtenstein legislation prohibited

[15] See *Markt intern Verlag GmbH and Klaus Beermann v. Germany*, paragraph 33; and *Sekmadienis Ltd. v. Lithuania*, paragraphs 71 and 73.
[16] Case E-14/15, *Holship*, paragraph 37.
[17] Case E-1/94, *Restamark*, paragraph 25; Joined Cases E-26/15 and E-27/15, *Criminal Proceedings against B*, paragraph 52; and Case E-19/16, *Thue*, paragraph 25.
[18] Case C-430/21, *RS*, EU:C:2022:99, paragraphs 64 and 65.
[19] EFTA Surveillance Authority Decision of 15 May 2018, 053/18/COL, closing a complaint case arising from an alleged failure by Liechtenstein to comply with Article 31 of the EEA Agreement by adopting/maintaining in force the Professional Guidelines of the Liechtenstein Chamber of Lawyers.

in an absolute manner any commercial communication by lawyers and found that the Professional Guidelines were based on a presumption of permissibility of commercial communication. It did not assess the more specific issue in this case; that is whether targeted unsolicited advertising by lawyers is a form of commercial communication pursuant to Article 24(1) of the Services Directive, and whether that form of commercial communication is subjected to a total prohibition. Second, and more importantly, the legal situation in Liechtenstein has since 2018 been clarified by the Constitutional Court's judgment of 28 June 2022, making it clear that Paragraph 35(1)(c) of the Professional Guidelines actually is to be interpreted as prohibiting targeted unsolicited advertising by lawyers. As noted above, the issue in the present case is the assessment of the contested provision as it has been interpreted by the national courts. Consequently, ESA considers that the 2018 Decision is not determinative for the present case.

5.2 Article 24 of the Services Directive

27. Article 24(1) of the Services Directive obliges EEA States to remove all total prohibitions on commercial communication by the regulated professions. Hence, for the national provisions in this case to come within the scope of Article 24(1), it should be assessed whether the contested provision concerns a *regulated profession*, whether it regulates *commercial communication*, and whether it constitutes a *total prohibition*.

28. Under Article 4(11) of the Services Directive, regulated professions are defined by reference to Article 3(1)(a) of Directive 2005/36/EC on Professional Qualifications. It is undisputed that lawyers are covered by that definition.

29. As regards the question of whether the national provisions concern a total prohibition on commercial communication, ESA is of the view that the present case has significant similarities with Case C-119/09, where the CJEU found that Article 24(1) of the Services Directive must be interpreted as precluding national legislation which totally prohibits the members of a regulated profession (in that case qualified accountants) from engaging in canvassing.[20]

30. Article 24(1) of the Services Directive applies equally to all regulated professions. Hence, in this context, ESA considers accountants and lawyers to be in a

[20] Case C-119/09, *Société fiduciaire nationale d'expertise comptable,* EU:C:2011:208. 'Kundenakquise' in the German language version of the judgment, and 'démarchage' in the French language version of the judgment and language of the case.

comparable situation; although the Services Directive makes some special considerations for lawyers (see paragraph 23 above), those special considerations do not seem to be of relevance for Article 24(1).

31. In Case C-119/09 the CJEU followed a three-step approach when determining whether the national provisions were in breach of Article 24(1) of the Services Directive.

32. As the first step, the CJEU set out that it was necessary to interpret Article 24(1) of the Services Directive by reference not only to its wording but also to its purpose and context and the objective pursued by the legislation in question. Second, based on this, the Court interpreted whether the national provision in question concerned "commercial communication". And third, the Court assessed whether the national provisions in question could be regarded as a "total prohibition" on commercial communication.

33. Following the same three-step approach as the CJEU, it should first be noted that, as set out in Case C-119/09, it is clear from Recitals 2 and 5 that the Services Directive is intended to remove restrictions on the freedom of establishment for providers in Member States and on the free movement of services between Member States, in order to contribute to the completion of a free and competitive internal market.[21] Furthermore, the purpose of Article 24 of the Services Directive, as stated in Recital 100, is 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.[22]

34. As regards the context, Article 24 of the Services Directive is contained in Chapter V, 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.[23]

35. It follows from both the purpose and the context of Article 24 of the Services Directive that the aim of the legislation 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

[21] Case C-119/09, paragraph 26.
[22] *Ibid*, paragraph 27.
[23] *Ibid*, paragraph 28.

or more forms of commercial communication" within the meaning of Article 4(12) of the Services Directive, such as, for example, advertising, direct marketing, or sponsorship. Having regard to the examples in Recital 100 of the Services Directive, 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) of the Services Directive.[24]

36. As to the second step of the present assessment, in order to establish whether the national provisions at issue fall within the scope of Article 24(1) of the Services Directive, it must be determined whether targeted unsolicited advertising by lawyers constitutes "commercial communication" within the meaning of that provision.[25]

37. The concept of "commercial communication" is defined in Article 4(12) of the Services Directive as including any form of communication designed to promote, directly or indirectly, the goods, services or image of an undertaking, organization or person engaged in commercial, industrial or craft activity or practicing a regulated profession.[26] Commercial communication covers not only traditional advertising, but also other forms of advertising and communications of information intended to obtain new clients.[27] It should be noted that the practice of aiming advertising at a particular group (i.e. the advertising being "targeted") does not prevent that advertising from qualifying as "commercial communication".[28]

38. In Case C-119/09 the national provisions at issue concerned a ban on "canvassing", which under the national rules was described as unsolicited contact by the regulated profession (in that case qualified accountants) with third parties with a view of offering them their services. In this context, the CJEU pointed out that the concept of canvassing was not defined in neither the Services Directive nor any other measure of EU law, and in addition, that the concept could vary in the legal systems of the different Member States.[29] The CJEU concluded that canvassing constituted a form of communication of information intended to seek new clients and involved personal contact between the provider and a potential

[24] Case C-119/09, paragraph 29.
[25] *Ibid*, paragraph 31.
[26] *Ibid*, paragraph 32
[27] *Ibid*, paragraph 33.
[28] Case C-19/15, *Verband Sozialer Wettbewerb eV*, EU:C:2016:563, paragraphs 4, 22, 35-37, 48, and 54.
[29] Case C-119/09, paragraphs 34 and 35.

client, in order to offer the latter services. It could therefore according to the CJEU be classified as direct marketing and came within the concept of "commercial communication" within the meaning of Articles 4(12) and 24 of the Services Directive.[30]

39. When comparing Case C-119/09 with the present case, ESA is of the opinion that "targeted unsolicited advertising by lawyers" should be regarded as a form of commercial communication comparable, for all intents and purposes, to canvassing. As in Case C-119/09, the present case concerns unsolicited contact by a regulated profession with specific third parties with a view to offering their services. Therefore, ESA submits that the targeted unsolicited advertising at issue in the present case also comes within the concept of "commercial communication" within the meaning of Articles 4(12) and 24(1) of the Services Directive.

40. The third and last step, following the approach set out in Case C-119/09, is to determine whether the ban on targeted unsolicited advertising at issue can be regarded as a "total prohibition" on commercial communications within the meaning of Article 24(1) of the Services Directive.[31]

41. Paragraph 35 of the Professional Guidelines is entitled "Prohibited advertising".[32] The provision sets out that lawyers are to 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. Furthermore, pursuant to Paragraph 35(1)(c) of the Professional Guidelines, such advertising occurs in particular in the case of offering of professional services to specific categories of possible clients. The Constitutional Court of Liechtenstein has interpreted this provision 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".[33]

42. It should be clearly noted that ESA does not contest the permissibility of imposing high standards of conduct on lawyers, including as regards their communications with their clients, potential clients, and the public at large, which arise out of their professional obligations and their status as a regulated profession. Indeed, EEA States retain the right to lay down prohibitions relating to the content or methods

[30] Case C-119/09, paragraph 38.
[31] *Ibid*, paragraph 39.
[32] "Verbotene Werbung" in German.
[33] Request, p. 15.

of commercial communications as regards regulated professions, 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.[34]

43. However, for the purposes of the contested provision, as interpreted by the Constitutional Court, it is apparently not relevant whether the communication in question is truthful or factual, because any targeted unsolicited advertising by lawyers, regardless of its content or method, would be considered to be in breach of the honour and reputation of the profession. Thus, Paragraph 35(1)(c) of the Professional Guidelines, as interpreted by the Constitutional Court, prohibits in ESA's view any targeted unsolicited advertising by lawyers, whatever its content or means employed.

44. The distinction between a total prohibition of a commercial communication based on its *form* on the one hand, and a prohibition based on its *content or method* on the other hand, is an important one for the purposes of Article 24 of the Services Directive; the former is unconditionally excluded by Article 24(1) while the latter can be accepted under certain conditions pursuant to Article 24(2).[35]

45. ESA submits that the present case concerns a total prohibition on a *form* of commercial communication because the contested provision, as interpreted by the Constitutional Court, apparently does not require an individualised assessment of the circumstances or content of the communication in each case to take place; the mere fact that a lawyer employs targeted unsolicited advertising renders them in violation of the prohibition. Thus, that ban includes a prohibition of all means of communication enabling the carrying out of that form of commercial communication.[36]

46. Indeed, the CJEU has previously held *targeted* unsolicited advertising to constitute a form of commercial communication: In Case C-19/15, which concerned a communication about a nutritional supplement which was addressed to individual named doctors, the CJEU first noted that the definition of "commercial communication" in the Regulation applicable in the case was similar to that used in the Services Directive.[37] Furthermore, the CJEU held that a commercial communication could "take the form of an advertising document"

[34] Case C-119/09, paragraph 30.
[35] *Ibid*, paragraph 45.
[36] *Ibid*, paragraph 41.
[37] Case C-19/15, paragraph 4.

which was “addressed to health professionals”. Thus, the CJEU held that the disputed communication had constituted a “form of commercial communication”, in circumstances where it had been directly addressed to people who had not themselves expressed an interest in those services.

47. In light of the above, ESA submits that that Paragraph 35(1)(c) of the Professional Guidelines in the latest interpretation given to it by the Constitutional Court must be regarded as a total prohibition of commercial communications and therefore in breach of Article 24(1) of the Services Directive.

48. As in Case C-119/09, ESA submits that this conclusion is consistent with the Services Directive’s objective, which is the removal of restrictions on the free movement of services between EEA States. ESA furthermore notes that, as in Case C-119/09, the national provisions are liable to disproportionately affect lawyers from other EEA States more, by depriving them of an effective means of penetrating the national market in question. Such a prohibition therefore additionally constitutes a restriction on the freedom to provide cross-border services, cf. Article 36 of the EEA Agreement.[38]

49. It should be added that, in ESA’s view, the manner in which a lawyer has obtained addresses and the purpose of the commercial communication is not of relevance to an assessment under Article 24(1) of the Services Directive. ESA is hereby not expressing a view on the lawfulness of the obtaining of information in the present case and does not deny that using unlawfully obtained information to target the addressees of a commercial communication can be prohibited. Such a prohibition would simply have to pass the test of Article 24(2) and would need to be justified with reference to the individual and particular facts of each case. The crux of the matter presently brought before the EFTA Court is, in ESA's opinion, precisely the fact that the contested provision, as interpreted by the Constitutional Court, does not engage the domestic authorities in an individualised assessment of the facts of each case with reference to the content and methods of advertising, but rather imposes a blanket ban on targeted unsolicited advertising by lawyers.

50. In the alternative, if the EFTA Court should reach the conclusion that the contested provision cannot be considered a total prohibition on commercial communications that comes within the scope of Article 24(1) of the Services

[38] Case C-119/09, paragraph 43.

Directive, it would necessarily constitute professional rules within the meaning of Article 24(2).[39] As such, it would need to be assessed whether the provision is non-discriminatory, justified by an overriding reason related to the public interest, and proportionate.[40]

51. In that eventuality, ESA notes that the contested provision, as interpreted by the Constitutional Court, constitutes a broadly construed limitation on the permitted commercial communications of lawyers, whose proportionality to the aim pursued is difficult to discern, particularly in the absence of a room for individualised assessment in each case involving targeted unsolicited advertising. Moreover, as noted above, the contested provision is liable to disproportionately affect lawyers from other EEA States. Should the Court deem it appropriate to perform an assessment of the contested provision under Article 24(2), ESA therefore submits that the ban cannot be justified pursuant to that provision.

6 CONCLUSION

Accordingly, ESA respectfully requests the Court to deliver the following Advisory Opinion:

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 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(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

[39] C-119/09, paragraphs 24 and 29.
[40] *Ibid*, paragraphs 24 and 30.

purposes of ensuring, in particular, the independence, dignity and integrity of the profession.

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