



Warsaw, 10 March 2023
DPUE.9313.10.2023.AJK(3)(DL)

**TO THE PRESIDENT AND MEMBERS
OF THE EFTA COURT**

**WRITTEN OBSERVATIONS
SUBMITTED BY
THE REPUBLIC OF POLAND**

in accordance with Article 20 of the Statute
and Article 90(1) of the Rules of Procedure of the EFTA Court

in Case No E-14/22
Amann
(Request from the Princely Court of Appeal – Lichtenstein)

Agent of the Republic of Poland:

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I. FACTS OF THE CASE AND QUESTIONS SUBMITTED BY THE NATIONAL COURT

1. The Princely Court of Appeal made a Request for an Advisory Opinion on the interpretation of Article 24(1) of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market¹.
2. As explained in the Request, disciplinary proceedings are pending before the Princely Court of Appeal in Vaduz against the accused who is a registered lawyer practicing in Lichtenstein.
3. The complaint in the disciplinary proceedings was made by the Liechtenstein Chamber of Lawyers and concerns the alleged infringement of paragraph 35(1)(c) of the Professional Guidelines of the Liechtenstein Chamber of Lawyers regulating prohibited advertising. According to this provision:

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

(...)

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

4. On the basis of complaints made by shareholders of X AG, criminal investigations were conducted 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. After the criminal investigation procedures were discontinued, X AG filed a complaint against the accused with the Liechtenstein Chamber of Lawyers claiming 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, 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.

¹ OJ L 376 of 27.12.2006, p. 36.

5. Such conduct was found incompatible with the Professional Guidelines of the Liechtenstein Chamber of Lawyers and this assessment was confirmed by the referring court².
6. However, during the hearing the accused argued that paragraph 35(1)(c) of the Professional Guidelines of the Liechtenstein Chamber of Lawyers is incompatible with Directive 2006/123/EC.
7. While analysing the case, the Princely Court of Appeal found that the interpretation of Directive 2006/123/EC is necessary to enable it to deliver a judgment and therefore referred the following questions to the EFTA 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) *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?*

² Point 3.2.8 of the Request.

II. LEGAL ARGUMENTS

8. The referring court asks, in essence, whether Article 24(1) of Directive 2006/123/EC (hereinafter referred to as “the Directive”) must be interpreted as precluding national legislation which prohibits lawyers from offering their services to a particular group of potential clients selected by them.
9. According to Article 24 of the Directive:
 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. Commercial communications are defined in Article 4(12) of the Directive as 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.
11. It follows that the action taken by the accused fall within the concept of commercial communication and therefore it should be established whether the contested national provision constitutes the total prohibition referred to in Article 24(1) of the Directive.
12. An answer to this question is crucial to the case at issue, for such a prohibition is incompatible with the Directive and cannot be justified under Article 24(2) thereof, even if it is non-discriminatory, based on an overriding reason relating to the public interest and proportionate³.
13. In order to understand the meaning of the notion of the ‘total prohibition’ one should first of all refer to Recital (100) in the preamble to the Directive. It explains that it is necessary to put an end to total prohibitions on commercial communications by the regulated

³ Judgment of the Court of Justice of 5 April 2011, *Société fiduciaire nationale d'expertise comptable*, C-119/09, EU:C:2011:208, point 45.

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.

14. In Case *Société fiduciaire nationale d'expertise comptable* the Court of Justice elaborated that the intention of the EU legislature 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, such as, for example, advertising, direct marketing or sponsorship⁴.
15. Subsequently the Court of Justice analysed the prohibition on carrying out any unsolicited canvassing with a view to offering services to third parties, imposed by the French Code of professional conduct and ethics of qualified accountants. The Court noted that the ban on canvassing, as laid down in the Code⁵, was of broad conception, in that it prohibited any canvassing, whatever its form, content or means employed. Thus, that ban included a prohibition of all means of communication enabling the carrying out of that form of commercial communication and had to be regarded as a total prohibition of commercial communications prohibited by Article 24(1) of the Directive⁶.
16. In point 3.2.1. of its Request, the referring court notes that the described case is comparable with the prohibition at issue under Paragraph 35(1)(c) of the Professional Guidelines of the Liechtenstein Chamber of Lawyers. This may suggest that this provision is also incompatible with the Directive. However, it should be pointed out that

⁴ Judgment of the Court of Justice of 5 April 2011, *Société fiduciaire nationale d'expertise comptable*, C-119/09, EU:C:2011:208, point 29.

⁵ The relevant Article 12 of the Code states:

I. The persons referred to in Article 1 are prohibited from carrying out any unsolicited canvassing with a view to offering their services to third parties.

Their participation in symposiums, seminars or other academic or scientific events is authorised in so far as they do not, on that occasion, carry out acts comparable to canvassing.

II. The persons referred to in Article 1 are permitted to carry out promotional activities in so far as those activities provide the public with useful information. The methods used for that purpose shall be exercised with discretion, so as not to prejudice the independence, dignity and honour of the profession, professional secrecy and fairness towards clients and other members of the profession.

When they present their professional activity to third parties, by whatever means, the persons referred to in Article 1 shall not adopt any form of expression liable to undermine the dignity of their role or the reputation of their profession.

Those modes of communication and any others are allowed subject to being practised in a restrained and respectable manner, and on condition that their content does not contain inaccuracies, is not liable to mislead the public, and does not contain any comparative element.

⁶ Judgment of the Court of Justice of 5 April 2011, *Société fiduciaire nationale d'expertise comptable*, C-119/09, EU:C:2011:208, point 35-42.

while the ban on canvassing concerned all cases of unsolicited offering of services to third parties, the prohibition at issue is less restrictive.

17. While interpreting the challenged provision of the Professional Guidelines, the Constitutional Court of Lichtenstein held that 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.⁷
18. It follows that the prohibition does not cover all cases of unsolicited offers, as in Case *Société fiduciaire nationale d'expertise comptable*, but rather unsolicited offers targeted at a specific group of people who find themselves in a situation that makes them susceptible to this offer. Therefore, it cannot be compared to the total prohibition of canvassing, as its application depends on the facts of the case, namely the situation of the recipients of the offer (commercial communication) and the professional who must be in a position justifying the expectation that the offer will be accepted.
19. As a result, such a prohibition does not exclude one of the forms of commercial communication and is not covered by the prohibition provided for in Article 24(1) of the Directive, but rather constitutes a professional rule that is permissible under paragraph 2 of this Article.

⁷ Point 2.3.2 of the request.

**III. PROPOSAL FOR AN ANSWER
TO BE GIVEN BY THE EFTA COURT**

20. The Republic of Poland suggests that the EFTA Court give the following answer to the questions referred by the Princely Court of Appeal:

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

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