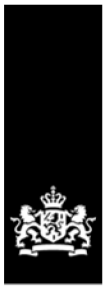

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Written Observations of the Government of the Netherlands

submitted in accordance with Article 20 of the Statute of the EFTA Court, in the case of

E-14/22, Alexander Amann v. the Liechtenstein Chamber of Lawyers

The Government of the Netherlands, represented by Mielle Bulterman and Joost Hoogveld, head and staff member, respectively, of the European Law Division of the Legal Affairs Department of the Ministry of Foreign Affairs, has the honour to bring the following observations to the Court's attention in this case.

I. Introduction

1. By decision of 25 October 2022 the *Furstliche Obergericht* (Princely Court of Appeal of Liechtenstein, hereinafter: the referring court) requested an advisory opinion from the EFTA Court pursuant to Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice.

2. This request contains two questions 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 (hereinafter: Directive 2006/123), as incorporated into the Agreement on the European Economic Area (hereinafter: the EEA Agreement) by Decision of the EEA Joint Committee No 45/2009, in connection with Article 36 of the EEA Agreement.

3. These questions were raised in disciplinary proceedings pending between Dr Alexander Amann (hereinafter: the accused) and the Liechtenstein Chamber of Lawyers. The accused is a lawyer registered in Liechtenstein and is alleged to have committed a disciplinary offence.

4. The disciplinary proceedings are based on a complaint made by shareholders of X AG alleging that the accused infringed the provisions laying down prohibitions on advertising for lawyers in the Professional Guidelines of the Liechtenstein Chamber of Lawyers (hereinafter: the Guidelines). X AG claims, in summary, that the accused wrote unsolicited letters to its shareholders in order to attract them to a (class) action in connection with the "*pursuit of a claim for X AG investors*". The shareholders were informed by the accused that a litigation funder was already interested in the matter and that it would be largely risk-free for the investors to take action. Such conduct is not allowed under Paragraph 35(1)(c) of the Guidelines.

5. The referring court first stayed the proceedings to make an application to the Constitutional Court, which has the jurisdiction to examine the lawfulness of Paragraph 35(1)(c) of the Guidelines. The Constitutional Court ruled that Paragraph 35(1)(c) is neither unlawful nor unconstitutional. The referring court then continued the proceedings. At that point, the accused invoked Directive 2006/123.

6. Against this background, the referring court seeks guidance from the EFTA Court. For the further facts and legal background to the proceedings, the Government of the Netherlands would refer to the request for an advisory opinion, submitted by the referring court.

II. The questions referred

7. The Government of the Netherlands considers it appropriate to examine the two questions of the referring court together. The referring court asks, in essence, whether Article 24 of Directive 2006/123 precludes national legislation which prohibits lawyers from contacting and offering professional services to specific categories of potential clients who have not themselves expressed an interest in those services. This conduct is also known as "*cold calling*" or "*canvassing"*.

8. In the opinion of the Government of the Netherlands, Article 24 of Directive 2006/123 precludes such national legislation. Its reasons for this opinion are as follows.

9. First of all, the Government of the Netherlands would emphasise that Directive 2006/123 does not preclude the use of professional guidelines. On the contrary, such guidelines can ensure quality of services and protection of consumers of those services, and in that way, play a part in the removal of barriers to the free movement of services between the Member States, in order to contribute to the completion of a free and competitive internal market (the aim of Directive 2006/123).

10. For that reason, Directive 2006/123 and more specifically Chapter V thereof, entitled "*Quality of Services*", provides a certain framework with which the professional guidelines should comply in order to safeguard the interests of consumers by improving the quality of the services of the regulated professions in the internal market (see, to that effect, the Judgement of the Court of Justice of the European Union (hereafter: the Court of Justice) of 5 April 2011, C-119/09, *Société fiduciaire nationale d'expertise comptable*, EU:C:2011:208, paragraph 28).

11. As the referring court mentioned (see paragraph 3.2.1 of the request for an advisory opinion), the current case is comparable to the case which led to the *Société* judgement. Lawyers are, just as qualified accountants, a regulated profession (see Article 4(11) of Directive 2006/123 in

conjunction with Article 3(1)(a) of Directive 2005/36[1]). In the opinion of the Government of the Netherlands, the conclusions drawn in that judgement should also be applied to this case.

12. Article 24 of Directive 2006/123 is contained in Chapter V and imposes two obligations on the Member States. Firstly, Article 24(1) requires Member States to remove all total prohibitions on commercial communications by the regulated professions. Secondly, Article 24(2) obliges them to ensure that commercial communications by the regulated professions comply with professional rules, in conformity with EU 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 (see also paragraph 24 of the *Société* judgement).

13. According to the Court of Justice, it follows from the purpose and context of Article 24 of Directive 2006/123 that the intention is 1) to put an end to total prohibitions on commercial communications by the regulated professions and 2) to remove bans on one or more forms of commercial communication within the meaning of Article 4(12) of Directive 2006/123. 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, should be removed (emphasis added, see Recital 100 in the preamble to Directive 2006/123 and the *Société* judgement, paragraphs 27 and 29).

14. As the Court of Justice stated in paragraph 33 of the *Société* judgement, commercial communication covers not only traditional advertising but also other forms of advertising and communications of information intended to obtain new clients.

15. Canvassing constitutes a form of communication of information intended to seek new clients. In the opinion of the Government of the Netherlands, it can therefore be classified as direct marketing. Consequently, canvassing comes within the concept of "*commercial*

[1] Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications.

communication", within the meaning of Articles 4(12) and 24 of Directive 2006/123 (see also the *Société* judgement, paragraph 38).

16. The Government of the Netherlands would further point out that the Court of Justice ruled that a national ban on canvassing which includes a prohibition of all means of communication enabling the carrying out of that form of commercial communication must be regarded as a total prohibition of commercial communications prohibited by Article 24(1) of Directive 2006/123 (see paragraphs 41 and 42 of the *Société* judgement). The Court of Justice then considered as follows in paragraph 43:

"43 That conclusion is consistent with that directive objective's [sic] *which is, as noted in paragraph 26 of the present judgment, the removal of restrictions on the free movement of services between Member States. Indeed, legislation of a Member State forbidding qualified accountants from any canvassing could affect professionals from other Member States more, by depriving them of an effective means of penetrating the national market in question. Such a prohibition constitutes, therefore, a restriction on the freedom to provide cross-border services (see, by analogy, Case C-384/93 Alpine Investments [1995] ECR I-1141, paragraphs 28 and 38)."*

17. Therefore, the Government of the Netherlands would note that if the referring court, according to this reasoning, classifies Paragraph 35(1)(c) of the Guidelines – which requires lawyers to refrain from advertising by offering professional services to *specific* categories of possible clients – as covering a form of canvassing, then that provision does prohibit advertising to a specific category of possible clients. By doing so, it totally prohibits a form of communication of information intended to seek new clients. As the Court of Justice concludes in paragraph 45 of the *Société* judgement, such a national prohibition falls within the scope of Article 24 of the Directive.

III. Conclusion

18. For the reasons set out above, the Government of the Netherlands proposes the following answer to the questions of the referring court:

Questions 1 and 2:

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

Mielle Bulterman Joost Hoogveld

Agents of the Government of the Netherlands

The Hague, 10 March 2023