PUBLIC

AMANN PARTNERS
rechtsanwälte - attorneys at law

TO THE PRESIDENT AND MEMBERS OF THE EFTA COURT

WRITTEN OBSERVATIONS

Submitted pursuant to Article 20 of the Statute of the EFTA Court by

Dr. Alexander Amann LL.M. (UCLA), Attorney-at-Law

Represented by Amann Partners Rechtsanwälte
Industriestrasse 16, FL-9487 Gamprin-Bendern

in Case E-14/22

concerning an application submitted pursuant to Article 34 of the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice by the Fürstliches Obergericht (hereinafter referred as "Princely Court of Appeal"), in the case:

Dr. Alexander Amann LL.M. (UCLA), Attorney-at-Law

Defendant

requesting an advisory opinion regarding the interpretation of Art 24 (1) Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market.

Industriestrasse 16 | P.O. Box 2045 | 9487 Gamprin-Bendern | Fürstentum Liechtenstein
T +423 320 320 0 | office@amannpartners.law | www.amannpartners.law

CONTENTS

1. Introduction

1 The request for advisory opinion concerns the restriction of the freedom of lawyers to offer legal services to affected persons of a specific case through § 35(1)(c) of the Professional Guidelines of the Liechtenstein Bar Association.

2. Law

2.1. EEA Law and the CCBE Model Code of Conduct

2 Art 36 (1) of the EEA Agreement reads as follows:

> « Within the framework of the provisions of this Agreement, there shall be no restrictions on freedom to provide services within the territory of the Contracting Parties in respect of nationals of EC Member States and EFTA States who are established in an EC Member State or an EFTA State other than that of the person for whom the services. »

3 Art 24 Directive 2006/123/EC 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.** »

4 Recital 2, 5 and 100 Directive 2006/123/EC read as follows:

> «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**. »

5 The CJEU in its judgment of 05.04.2011 C-119/09 concerning advertising bans for auditors states the following:

« 8 Until the adoption of Regulation No 2004-279 of 25 March 2004 simplifying and adapting the requirements for the practice of certain professional activities (ordonnance n° 2004-279, du 25 mars 2004, portant simplification et adaptation des conditions d'exercice de certaines activités professionnelles; JORF of 27 March 2004, p. 5888), qualified accountants were forbidden to engage in any personal advertising. Decree No 97-586 of 30 May 1997 on the functioning of the authorities of the Order of qualified accountants (décret n° 97-586, du 30 mai 1997, relatif au fonctionnement des instances ordinales des experts-comptables; JORF of 31 May 1997, p. 8510), which sets forth the conditions under which qualified accountants

might thenceforth engage in promotional activities, provides, in Article 7, that those conditions are to be the object of a code of professional duties the provisions of which are to be enacted in the form of a decree by the Conseil d'État.

9 Thus, Decree No 2007-1387 was adopted on the basis of Article 23 of Regulation No 45-2138 and Article 7 of Decree No 97-586.

10 Article 1 of Decree No 2007-1387 is in the following terms:

'The rules of conduct and ethics applicable to qualified accountants are prescribed by the Code of Ethics annexed to this decree'.

11 Article 1 of the Code of professional conduct and ethics of qualified accountants ('the Code') provides:

'The provisions of this Code shall apply to qualified accountants, regardless of their mode of practising the profession, and, where appropriate, to trainee qualified accountants and employees referred to in Article 83b and Article 83c respectively of Regulation No 45-2138 of 19 September 1945 on the establishment of the Order of qualified accountants and the regulation of the qualification and profession of qualified accountant.

Except for those which are applicable only to natural persons, they shall also apply to accountancy firms and management and accountancy associations.'

12 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.**

[...]

23 By its question, the referring court asks, in essence, whether Article 24 of Directive 2006/123 must be interpreted as precluding national legislation which prohibits the members of a regulated profession, such as the profession of qualified accountant, from engaging in canvassing.

24 As a preliminary point, Article 24 of Directive 2006/123, entitled 'Commercial communications by the regulated professions', imposes two obligations on the Member States. First, Article 24(1) requires the Member States to remove all total prohibitions on

commercial communications by the regulated professions. Second, Article 24(2) obliges the Member States 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.

25 To establish whether Article 24 of Directive 2006/123, and particularly Article 24(1), proscribes a prohibition on canvassing 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.

26 In that regard, it is clear from Recitals 2 and 5 in its preamble that Directive 2006/123 is intended to remove restrictions on the freedom of establishment for providers in Member States and on the free movement of services between the Member States, in order to contribute to the completion of a free and competitive internal market.

27 **The purpose of Article 24 of that directive is stated in Recital 100 in its preamble, 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.**

28 As regards the context of Article 24 of Directive 2006/123, it is contained in Chapter V thereof, entitled 'Quality of services'. However, as the Advocate General noted in point 31 of his Opinion, 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.

29 It follows from both the purpose and the context of Article 24 that, as the European Commission correctly submits, **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 within the meaning of Article 4(12) of**

Directive 2006/123, such as, for example, advertising, direct marketing or sponsorship. Having regard to the examples in Recital 100 of that 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 that directive.

[...]

35 Under Article 12-I of the Code, unsolicited contact by qualified accountants with third parties with a view to offering them their services is to be regarded as canvassing.

[...]

41 The ban on canvassing, as laid down by the said Article 12-I, is of broad conception, in that it prohibits any canvassing, whatever its form, content or means employed. Thus, that ban includes a prohibition of all means of communication enabling the carrying out of that form of commercial communication.

42 It follows that such a ban must be regarded as a total prohibition of commercial communications prohibited by Article 24(1) of Directive 2006/123. »

6 Art 2.6 CCBE Charter of Fundamental Principles of the European Legal Profession and Rules of Professional Conduct of European Lawyers[1] reads as follows:

« 2.6 Personal advertising

2.6.1 The **lawyer may inform the public about his services** provided that the information is correct and not misleading provided that the information is accurate and not misleading and that the duty of confidentiality and other confidentiality and other fundamental values of the legal profession are respected.

2.6.2 Personal advertising by the lawyer **through any type of media** such as press, radio, television, by means of electronic commercial communication **or in any other communication or by other means is permitted** to the extent that it meets the requirements set forth in 2.6.1. comply with.»

[1] https://www.rak.li/application/files/6116/1883/6650/CCBE_Standesregeln.pdf.

2.2. National Law in Liechtenstein

7 § 35(1)(c) of the Professional Guidelines of the Liechtenstein Bar Association reads as follows:

> «§ 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:
>
> [...]
>
> **(c) offering of professional services to specific categories of possible clients, »**

8 The Liechtenstein Constitutional Court in its verdict dated 28.06.2022, StGH 2022/030, construes § 35 Professional Guidelines of the Liechtenstein Bar Association, in summary, as « prohibiting lawyers **from approaching certain categories of potential clients on their own initiative in specific occasions** in order to make them an offer ». « The provision merely **prohibits proactive advertising by lawyers to the effect that they offer their services in specific occasions to selected persons (groups) who had not articulated an interest in doing so on their own initiative** » (Ruling para. 2.4.4).

9 The Liechtenstein Constitutional Court therefore ruled that lawyers should not approach potential claimants directly in a damages case if the latter had not previously expressed an interest of their own accord.

2.3. National Law in Germany – Settled Case Law since 2013

10 § 43b Federal Lawyer's Code states the following:

> «Advertising is only allowed for the lawyer as far as it informs about the professional activity in form and content factually **and is not directed to the placing of an order in an individual case**. »

11 Already back in 2013, the German Federal Court of Justice held in a verdict dated 13.11.2013 I ZR 15/12 regarding the interpretation of the provision above in light of Art 24 Directive 2006/123/EC

that a **lawyer is not precluded from directly contacting harmed investors in an investors damages case merely because a specific person is affected by a case.**

12 The Federal Court of Justice argued as follows:

> « [1] Facts of the case: As attorneys-at-law, the parties represent investors of the insolvent investment company "G. KG" (hereinafter: investment company). The limited partners of the fund company are being sued by the insolvency administrator for repayment of distributions, some of which have already been filed.
>
> [2] In September 2010, the defendant sent to numerous limited partners of the fund company who were not represented by the defendant's attorneys a letter addressed personally to the respective recipient, excerpts of which are reproduced below:
>
> "In the above-mentioned matter, we indicate that we represent several limited partners who are being sued by the insolvency administrator of G. KG before the District Court of D. on the grounds of limited partner liability.
>
> We consider a defense against the claims to be promising at least insofar as and to the extent that the limited partners were not directly involved in G. KG, but only indirectly, namely as trustors via the trustor, M.. There are also a number of other promising starting points, such as a possible statute of limitations for the claims.
>
> From the documents available to us ... it also emerges that the insolvency administrator is in settlement talks with two larger groups of investors.
>
> We would be pleased to discuss these various aspects of the matter with you in detail by telephone or in a personal meeting.
>
> In particular, we would like to point out that it may make sense for limited partners who are already being sued or for whom this is still imminent to join forces for the purpose of joint representation of interests in order to build up a stronger negotiating position vis-à-vis the insolvency administrator.
>
> We are also interested in exchanging experiences and ideas with fellow attorneys who may already be representing you in this matter."
>
> [3] The letter also reached clients of the plaintiff.

[4] The plaintiff is of the opinion that the letter is an inadmissible advertisement for the award of a contract in an individual case pursuant to §§ 3, 4 No. 11 UWG in conjunction with § 43b BRAO. He has requested that the defendant be ordered to refrain from advertising to the limited partners of G. KG, who are not represented by the defendant, in a letter addressed personally to these limited partners, for the award of a mandate to defend against the action for repayment of the distributions brought by the insolvency administrator against the limited partners as follows (the letter reproduced above follows).

[...]

[11] aa) According to the case law of the Senate, a restriction of the possibility of advertising can only be considered admissible in a constitutional interpretation of Section 43b BRAO **if it is justified in the individual case by sufficient reasons in the public interest and complies with the principle of proportionality** (BGH, judgment of 1 March 2001 - IR 300/98, BGHZ 147, 71, 74 et seq. March 2001 - I ZR 300/98, BGHZ 147, 71, 74 f. - Anwaltswerbung II; judgment of January 27, 2005 - I ZR 202/02, GRUR 2005, 520, 521 = WRP 2005, 738 - Optimale Interessenvertretung; cf. on the provision of Section 57a StBerG with the same content BGH, judgment of July 29, 2009 - I ZR 77/07, GRUR 2010, 349 marginal no. 22 - EKW-Steuerberater).

[...]

[14] The requirement of a concrete threat to the protected interests of Section 43b BRAO is justified by the fact that **it does not make a form of advertising per se inadmissible that a person being advertised to has a concrete need for advice. If someone is in a situation in which he is dependent on legal advice, factual advertising geared to his needs will regularly be able to bring him benefits.** Only in cases in which a lawyer imposes himself in an obtrusive manner or overhypes a consumer would clear boundaries have to be drawn, for example in the case of exploitation of an accident.

[15] **If, on the other hand, a fund investor is offered legal advice in a factual manner, it cannot be assumed without further ado that the person being solicited is not in a position to decide whether to contact the lawyer, not to become active at all or to consult another lawyer he trusts** (cf. Kleine-Cosack loc.cit. § 43b marginal no. 24 et seq.; Hellwig, NJW 2005, 1217, 1219; Dahns, NJW-Spezial 2010, 702, 703).

[16] cc) This view is at least preferable **since December 28, 2009. Since that date, Section 43b BRAO has to be interpreted in conformity with the Directive 2006/123/EC of December 12, 2006 on services in the internal market on the basis of the standard of Article 24 of the Directive**; a ban on advertising is thus only justified in the event of a concrete threat to the interests protected under Union law, to be determined by weighing the circumstances of the individual case.

[17] (1) The provision of § 43b BRAO regulates the professional limits within which lawyers may advertise their services. The provision thus constitutes a professional regulation on commercial communication within the meaning of Article 4 No. 12 of Directive 2006/123/EC, which concerns the legal profession and thus a regulated profession within the meaning of Article 4 No. 11 of Directive 2006/123/EC in conjunction with Article 3(1)(a) of Directive 2005/36/EC on the recognition of professional qualifications and in conjunction with Section 4 BRAO.

[18] (2) Pursuant to Article 44(1) of Directive 2006/123/EC, Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with the Directive by 28 December 2009. Since that date, Section 43b BRAO must be interpreted in light of the wording and purpose of Article 24 of Directive 2006/123/EC (see ECJ, Judgment of July 4, 2006 - C-212/04, [2006] ECR I-6057 = NJW 2006, 2465, paras. 108, 124 - AdenelerELOG).

[19] (3) According to Art. 24(1) of Directive 2006/123/EC, absolute prohibitions on commercial communications are prohibited for regulated professions.

[20] **According to recital 100 of Directive 2006/123/EC, absolute prohibitions do not mean those that relate to the content of commercial communications, but those that prohibit them generally and for entire professions in one or more forms, such as a prohibition on advertising in a particular medium or in a range of media. The Court of Justice of the European Union has ruled that an absolute prohibition within the meaning of Article 24(1) of Directive 2006/123/EC must be assumed if a national provision prohibits a commercial communication irrespective of its form, content or the means used** (ECJ, judgment of 5 April 2011 - C-119/09, [2011] ECR I-2551 = EuZW 2011, 681, para. 41 f. - Société fiduciaire nationale d'expertise comptable).

[21] It **follows from this that a prohibition of advertising can only be considered admissible if a reason for prohibition arises in the individual case from the form, from the content or from the means used for the advertising. The mere fact that a potential client is addressed in the knowledge of his concrete need for advice does not satisfy these requirements.**

[22] (4) Pursuant to Art. 24(2) of Directive 2006/123/EC, Member States shall ensure that commercial communications by members of regulated professions comply with the requirements of professional rules which, depending on the profession, are intended to guarantee in particular the independence, dignity and integrity of the profession and the maintenance of professional secrecy, in conformity with Community law. Professional rules on commercial communications may not be discriminatory and must be justified by an overriding reason relating to the public interest and be proportionate.

[23] As is clear from this provision ("in particular"), the objects of protection, the impairment of which may justify a restriction on commercial communications, are not limited to the aspects expressly mentioned in the first sentence of Article 24(2) of Directive 2006/123/EC, i.e. the independence, dignity and integrity of the legal profession and the maintenance of professional secrecy. Rather, the systematic regulatory context of Article 24 of Directive 2006/123/EC and thus the interests of consumers must also be taken into account in the interpretation (ECJ, EuZW 2011, 681 marginal no. 28 - Société fiduciaire nationale d'expertise comptable).

[24] It follows that a **ban on advertising may be justified in order to protect the potential client from an impairment of his freedom of decision by harassment, coercion and being taken by surprise**. It also follows from the statutory requirement of a proportionality test that a weighing of interests must be carried out in each individual case. In addition to the impairment of the independence, dignity or integrity of the legal profession, the type and degree of the impairment of the consumer's freedom of choice due to the form, content or the means of advertising used must also be taken into account. In addition, it depends on whether and to what extent the interests of the consumer are not impaired because he is in a situation in which he is dependent on legal advice and can benefit from factual advertising geared to his needs.

[25] b) According to these principles, the advertising letter of the defendant is not objectionable. »

3. Facts of the Case

3.1. Underlying Investor's Damages Case

13 [...]

14 [...]

15 [...]

16 [...]

17 [...]

18 [...]

19 [...]

20 [...]

21 [...]

22 [...]

3.2. Organising Litigation Funding in the present Case following the Client's Instruction - Bookbuilding

23 [...]

24 [...]

25 Litigation funding is a crucial and nowadays widely accepted instrument in the legal market, especially in the private enforcement of investor's and consumer's rights and in cartel damages cases. A litigation funder's case assessment encompasses a rigorous due diligence on the merits of the case but also an assessment the total risk exposure and the balance between cost risks and potential outcome. Therefore both the availability of litigation funding as well as the price of funding

in a specific case is heavily dependent on the efficiency of and the cost risks in the jurisdiction where the claims are to be pursued.

26 [...]

27 [...] Defendant has consequently sent a **hard copy** letter[7] dated 22.02.2021 to several [...] investors. The letter dated 06.04.2021 was sent due to criticism of the [...] directors that it was not mentioned in the original letter that two criminal investigations were suspended (because other proceedings were still pending and this fact was immaterial to the existence of damages claims under the envisaged substantive civil law provisions).

4. Questions Asked

28 The questions referred to the EFTA Court by the Princely Court of Appeals are the following:

> 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 Bar Association 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?

[7] Hard Copy letters cannot be compared with Cold Calling; see e.g. Art 10 Directive 2002/65/EC regarding Cold Calling for financial services.

5. Legal Analysis

5.1. Restriction violates Art 24 (1) Directive 2006/123/EC

29 The Liechtenstein Constitutional Court in its verdict dated 28.06.2022, StGH 2022/030, construes § 35 Professional Guidelines of the Liechtenstein Bar Association as « prohibiting lawyers **from approaching certain categories of potential clients on their own initiative in specific occasions** in order to make them an offer ». « The provision merely **prohibits proactive advertising by lawyers to the effect that they offer their services in specific occasions to selected persons (groups) who had not articulated an interest in doing so on their own initiative** » (Ruling para. 2.4.4).

30 As was stated by the CJEU in its judgment of 05.04.2011 C-119/09 no 29, it follows from both the purpose and the context of Art 24 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 within the meaning of Article 4(12) of Directive 2006/123, such as, for example, advertising, direct marketing or sponsorship. 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 that directive. **Consequently, the complete prohibition to inform potential clients directly about relevant investigations in a certain case and potential claims arising from such investigations must be considered a violation of Art 24(1) Directive 2006/123/EC.**

31 In accordance with recital 100 Directive 2006/123/EC, the CCBE has put in place a code of conduct for European lawyers. **Art 2.6 CCBE Charter** of Fundamental Principles of the European Legal Profession and Rules of Professional Conduct of European Lawyers[3] in conformity with Art 24 Directive 2006/123/EC **specifically allows a lawyer to inform the public about his services through any type of media by means of electronic commercial communication or in any other communication or by other means.** Paragraph 35 Professional Guidelines of the Liechtenstein Bar Association in the interpretation of the Liechtenstein Constitutional Court directly contradicts this freedom stipulated by Art 2.6 CCBE Charter of Fundamental Principles of the European Legal Profession and Rules of Professional Conduct of European Lawyers.

[3] https://www.rak.li/application/files/6116/1883/6650/CCBE_Standesregeln.pdf.

32 Lastly, the German Federal Court of Justice in its verdict dated 13.11.2013 I ZR 15/12 no 21 on the basis of Art 24(1) Directive 2006/123/EC clearly held **that a prohibition of advertising can only be considered admissible if a reason for prohibition arises in the individual case from the form, from the content or from the means used for the advertising.** **The mere fact that a potential client is addressed in the knowledge of his concrete need for advice does not satisfy these requirements.**

33 For all these reasons, § 35 Professional Guidelines of the Liechtenstein Bar Association as interpreted by the Liechtenstein Constitutional Court violates Art 24 (1) Directive 2006/123/EC.

5.2. Restriction is Disproportionate - Private Enforcement of Investor's Rights is in the Private and Public Interest to Increase the Trust in Financial Markets

5.2.1. Investor's Protection is a key Purpose in relevant EU Directives

34 Art 24(2) Directive 2006/123/EC stipulates that « [p]rofessional rules on commercial communications shall be non-discriminatory, justified by an overriding reason relating to the public interest and proportionate. »

35 The prohibition in § 35 (1) lit c of the Code of Conduct of the Liechtenstein Bar Association is not justified by an overriding reason but **contrary to private and public interest** and **disproportioinate**.

36 The European Surveillance Authority has argued in the oral hearing in the EFTA Court case E-14/20 that the private enforcement of customer's rights is in the public interest. This is correct. The efficient enforcement of substantive law increases the confidence and trust of a customer in a specific (foreign) market which is key to the integration of the common market.

37 It is no suprise that all EU directives relevant in the underlying case stress the importance and the purpose of these legal acts to protect investors, see recitals 7, 11, 12 und 16 RL 2001/108/EG and 10, 12, 16, 18, 20, 21, 27, 29 RL 2003/71/EG.

38 In conformity with the purpose of investor's protection in the relevant EU directives, Liechtenstein substantive law implementing EEA law expressly affirm the importance of investor's protection and confidence in the Liechtenstein financial market, see for instance Art 1 (1) WPPG 2007 :

« This Act regulates the preparation, approval and dissemination of the prospectus to be public offerings of securities or their admission to trading, and **aims to protect investors and to ensure confidence in the Liechtenstein financial market**. »

39 However, a law that is not properly enforced is not a law.

5.2.2. Inefficiencies in the Private Enforcement of Investor and Consumer Rights

40 One of the Defendant's areas of specialisation is private enforcement of investor and consumer rights.

41 For instance, the Defendant is / was involved in investors damages cases regarding defective life insurance policies (these led to the EFTA Court cases E-11/12, E-15/15 and E15/16 - the Defendant was pleading before this Court in the latter two cases), in retrocessions cases (which led to the EFTA Court case E-14/20 - the Defendant was attorney on record for the plaintiff, a legal tech service provider and litigation funder), in the Sharewood investor's damages case with thousands of aggrieved investors and in the Dieselgate case in Austria and Switzerland with millions of deceived car holders.

42 These type of cases typically involve a high number of victims with sometimes relatively low individual damages amounts (« Massen- und Streuschadensfälle » - « mass and scattered damages cases »). In such mass and scattered damages cases, while the aggregated damages amount of all affected persons might be incredibly high, the individual damages amount is often relatively small and there is an imbalance between the amount of the individual claim and the personal and financial efforts to enforce the claims.[4] Therefore, in mass and scatter damages cases often less than 10% of all victims enforce even the most meritious of claims (« rationale Apathie »[5] - «rational apathy»).

---

[4] As an example might serve the Dieselgate case: According to the Indictment of the Prosecution of the German Federal State of Braunschweig against several former VW managers, the total fraudulent sales prodeeds amount to more than EUR 180 billion, while the individual economic loss of the 11 million harmed car holders are in a range of approximately EUR 2'000 to EUR 15'000.

[5] „Rationale Apathie" describes the phenomenon that a victim does not assert even very merituous claims due to the personal and financial efforts to enforce the claims (complecity of case, status and financial strength of defendant, prepayment of lawyer's fees, personal time spent on the case, absence of efficient collective redress mechanisms, imbalance between the potentially low claim amount and the associated cost risks for enforcing the claim); see Swiss Federal Council - Kollektiver Rechtsschutz in der Schweiz – Bestandesaufnahme und

43 This issue is even more pronounced in jurisdictions that rely primarily on the individual enforcement of civil claims (one claimant against one defendant) and have little or no effective systems of collective redress. The German speaking jurisdictions (Germany, Austria, Switzerland, Liechtenstein) are well known examples of such jurisdictions where collective redress mechanisms are very limited or almost completely absent. The situation is only slowly changing in Germany and Austria in light of the Directive 2014/104/EU on private enforcement of cartel damages and Directive 2020/1828/EU on collective redress in consumer cases.

44 However, it is important to remember and crucial for the present case that **none** of the abovementioned jurisdictions provide effective collective redress mechanisms based on an opt-out system, whereby all injured persons of a certain case receive compensation automatically unless they actively opt out and declare that they want to pursue their rights individually. **Rather, even if such mechanisms exist, they are always based on opt-in systems, whereby a victim has to register or take other active measures to be part of such a proceeding, even when it pertains to the tiniest of claims.** This leads to three conclusions : First, such opt-in collective redress systems are rarely capable of increasing the low percentage of victims receiving compensation (less than 10%) ; second, such opt-in collective redress systems are completely ineffective in scattered damages cases because they cannot overcome the rational apathy cause when very small individual damages amounts are at stake ; and **third, a victim necessarily needs to be informed about a case otherwise he/she is not able to assert claims in the first place.**

45 The unpleasant consequence of inefficient enforcement mechanisms is that a person or company engaging in unlawful activity and unfair competition is nevertheless able to keep the illegal profits - not because of a flaw in substantive law but mainly due to the inefficiencies in the procedural law and enforcement mechanisms in a respective jurisdiction. The result is not only the obvious lack of a fair compensation for the direct victims, but also the unfair disadvantage and discrimination against law abiding competitors. One could ask, if such a situation is in compliance with the generally accepted principle of effectiveness in EEA/EU-law.[6]

Handlungsmöglichkeiten 2013; https://www.bj.admin.ch/bj/de/home/publiservice/publikationen/berichte-gutachten/2013-7a.html.

[6] See e.g. CJEU C-71/14 East Sussex County Council, para. 54-55; C-416/10 Križan, para. 106 : The principle of effectiveness also means that the detailed procedural rules governing actions for safeguarding rights which individuals derive from EU law must not make it in practice impossible or excessively difficult to exercise these rights.

5.2.3. Obstacles in Private Enforcement under Liechtenstein Civil Procedural Law

46 Pursuant to the principles of the Liechtenstein Code of Civil Procedure, there are typically two parties to the proceeding – the claimant and the defendant (two-party system). Collective redress mechanisms – wether opt-out or opt-in – are absent. **Each injured party has take active steps to pursue his/her individual rights.** It is possible but rather uncommon to have a large number of claimants in one proceeding. And even if this is the case, each situation, each claim needs to be pleaded and established individually.

47 **However, the necessary precondition to an injured party taking active steps to pursue his/her individual rights is that the victim knows about a case and facts giving rise to potential claims.** If specialised attorneys or other legal services providers (for instance a legal tech company) have an in-depth knowledge of the facts and/or law in a specific case, it can only be an advantage for an affected and therefore interested party to receive such high quality information about the case. A provision such as § 35 Professional Guidelines of the Liechtenstein Bar Association hinders the possibilty of a victim to be speficially informed about a case by a lawyer that is already involved in and therefore has in-depth knowledge about the case. There is no justification whatsoever that in such a specific situation a clearly affected person must be protected from being informed by a specialised lawyer – one would assume that the exact opposite is the case. For this reason alone, § 35 Professional Guidelines of the Liechtenstein Bar Association as interpreted by the Liechtenstein Constitutional Court directly contradicts the private interests of potential victims of a damages case and it directly contradicts the purpose (public interest) of investors protection as is underscored in numerous recitals in the abovementioned EU directives and in Liechtenstein substantive law.

48 What is more, in Liechtenstein civil court cases, the cost risks are relatively high as compared to other jurisdictions. In cases with a low amount in dispute, costs are often vastly out of proportion to the respective main claims, even more so in cases with increased complexity and therefore longer duration of the proceeding. High security deposits[7] to be paid at the outset of a proceeding render the enforcement of claims even more difficult.

49 Litigation funding easens the financial burdens for a victim in the sense that the funder assumes the ongoing costs and the costs risks of often long and expensive civil proceedings. In many mass and scatter damages cases, litigation funding is the only practically feasible way of funding a case.

[7] See EFTA-Court E-5/10.

Many times, it is a necessity (conditio sine qua non) that aggrieved investors and/or customers even have the chance on access to justice. § 35 Professional Guidelines of the Liechtenstein Bar Association impedes the bookbuilding process necessary in many of these mass and scattered damages cases and therefore decreases the likelihood to obtain litigation funding in the first place and/or worsens the conditions a litigation funder can offer to the victims in such damages cases. This creates another unjustified and unnecessary obstacle to an injured party's access to justice.

6. Conclusion

50 In the light of the foregoing, the Defendant considers that the questions referred to the EFTA Court for an advisory opinion by the Princely Court of Appeals should be answered as follows:

1. **Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market precludes a provision such as Paragraph 35(1)(c) of the Professional Guidelines of the Liechtenstein Bar Association 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(1) of Directive 2006/123/EC precludes 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 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.**

Gamprin-Bendern, 13.03.2023
AMA

Dr. Alexander Amann LL.M.