EUROPEAN COMMISSION

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TO THE PRESIDENT AND MEMBERS OF THE EFTA COURT

OBSERVATIONS

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

EUROPEAN COMMISSION

represented by: Lorna ARMATI and Mislav MATAIJA, Members of the Legal Service acting as agents, with an address for service at: *Service Juridique, Greffe contentieux, BERL 1/093, 1049 Bruxelles* and consenting to service by e-EFTA,

in Case E-14/22

Alexander Ammann

in which the *Fürstliches Obergericht* (Princely Court of Appeal, Vaduz), Liechtenstein, has requested 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 the interpretation of Directive 2006/123/EC of the European Parliament and the Council of 12 December 2006 on services in the internal market (OJ L 376 of 27.12.2006, p. 36), incorporated into the EEA Agreement by Decision No 45/2009 of the EEA Joint Committee (OJ L 162 of 25.6.2009, p. 23 and EEA Supplement No 33 of 25.6.2009, p. 8).

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I. INTRODUCTION

1. This request for an advisory opinion of the EFTA Court concerns the interpretation of the rules concerning commercial communications by the regulated professions contained in Directive 2006/123/EC of the European Parliament and the Council of 12 December 2006 on services in the internal market (the "Services Directive", OJ L 376 of 27.12.2006, p. 36), incorporated into the EEA Agreement by Decision No 45/2009 of the EEA Joint Committee (OJ L 162 of 25.6.2009, p. 23 and EEA Supplement No 33 of 25.6.2009, p. 8).

2. The request is made in the course of disciplinary proceedings brought by the Liechtenstein Chamber of Lawyers against Dr Ammann, a lawyer registered on the list of Lichtenstein lawyers, for breach of the Professional Guidelines of that Chamber. Dr Ammann informed a number of shareholders of company X that he was preparing a civil action in relation to a possible civil claim for damages against that company due as a result of the management of their investment, and indicated that they may wish to join that action.

3. By way of background, the Commission notes the existence of Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC (OJ L 409 of 4.12.2020, p. 1). ([1]) While there is no suggestion that that act applies in the present case, the Commission would like simply to draw the attention of the EFTA Court to the importance of representative actions in the effective enforcement of consumer protection law, including in the field of financial and investment services, and the need, in that context, to ensure appropriate access to and dissemination of information about such actions. Indeed, to be effective, the information about ongoing representative actions and concluded representative actions should be adequate and proportionate to the circumstances of

([1]) Directive 2009/22 of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests (OJ L 110 of 1.5.2009, p. 30) was incorporated into the EEA Agreement by Decision No 35/2010 of the EEA Joint Committee (OJ L 143, 10.6.2010, p. 30 and EEA Supplement No 30, 10.6.2010, p. 38). Several amendments to that act were also incorporated into the EEA Agreement (see point 7d of Annex XIX to the EEA Agreement). Directive 2020/1828 has been marked as a text with EEA relevance but has not yet been incorporated into the EEA Agreement.

the case. ([2]) Such information could be provided, for example, on the qualified entity's or the trader's website, in national electronic databases, on social media, on online marketplaces, or in popular newspapers, including newspapers that are published exclusively by electronic means of communication. Where possible and appropriate, consumers should be informed individually by letter transmitted electronically or in paper form. ([3])

4. The Commission would also like to recall, at the outset and in order to frame the observations that follow, that the rules in the Services Directive relating to commercial communications apply only to communications by the regulated professions. In other words, the Directive places limitations on what a Member State can do only in relation to activities, access to or pursuit of which is subject to the possession of specific professional qualifications.

II. LAW

II.1. Union law

5. The Services Directive establishes general provisions facilitating the exercise of the freedom of establishment for service providers and the free movement of services, while maintaining a high quality of services (Article 1(1)). As part of Chapter V, on the quality of services, the Directive contains rules on commercial communications. Article 24 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

([2]) See Annex to the Directive, which includes a reference to a number of acts of secondary law in the field of financial services, investment and insurance.

([3]) Recitals 58 to 61.

communications shall be non-discriminatory, justified by an overriding reason relating to the public interest and proportionate."

6. Recital 100 provides the context for that provision, and indicates that "[i]t 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".

II.2. National law

7. The exercise of the profession of lawyer is regulated in the Lawyers Act of 8 November 2013 (LGBl. 2013, No 415). Article 27 of that act provides:

> "(1) Lawyers shall be allowed to inform about their services and about them insofar as the information provided is objectively true, directly related to the profession and justified by an interest of the persons seeking legal assistance. They may not advertise their services or themselves in an overly commercial manner."

8. On the basis of Article 93(1)(g) of that act, and Paragraph 6(g) of its bylaws, the Lichtenstein Chamber of Lawyers drew up Professional Guidelines of 24 March 2014 (the "Professional Guidelines").

9. Those Guidelines stipulate, at Paragraph 47, that infringement of the guidelines shall constitute a breach of the professional duties of the lawyer.

10. Paragraph 34(1) of the Guidelines reads as follows:

> "Lawyers shall advertise principally through the quality of their legal services."

11. Paragraph 34(2) of the Guidelines corresponds, in essence, to Article 27(1) of the Lawyers Act.

12. Paragraph 35 of the Guidelines, entitled 'Prohibited advertising', limits the possibility of lawyers to advertise their services by requiring them 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*". It lists a number of specific situations in which this is the case and advertising is therefore prohibited:

> "(a) self-promotion by showcasing their person or their services in an overly commercial manner,
> (b) comparative reference to members of the profession,
> (c) offering of professional services to specific categories of possible clients,
> (d) creation of objectively false expectations,
> (e) offering of unlawful advantages with regard to fees,
> (f) naming of clients as references without their consent,
> (g) canvassing by exploiting a situation of duress,
> (h) handing over of power of attorney forms to third parties to be passed on to an undefined group of people,
> (i) offering or granting of advantages for authorisations to act,
> (j) references to sales or turnover figures."

III. FACTS AND THE QUESTIONS ASKED

13. The facts have been set out by the national court. The following elements appear particularly relevant in order to answer the questions asked.

14. Dr Ammann wrote unsolicited letters to a certain number of persons. It is not disputed that those persons were targeted as recipients of a letter on the basis of a particular criterion, i.e. they were shareholders in company X. The Commission notes that the actual content of the letters is of no particular consequence for the purposes of answering the questions asked and will not be reproduced here.

15. The Liechtenstein Chamber of Lawyers considered that this conduct, "where lawyers write unsolicited letters to third parties in a manner akin to 'cold calling' in order to attract them to bringing an action", was in breach of Paragraph 35(1)(c) of the Professional Guidelines. In bringing disciplinary proceedings, that body –

referring to the letters as 'circulars' – notes that they are "prohibited, whatever the content of the letter and the approach [Dr Ammann] chose to adopt proactively". ([4])

16. The matter was referred to the *Staatsgerichtshof* (Constitutional Court of Liechtenstein). That instance handed down its ruling on 28 June 2022, the following elements of which appear to deserve mention in the present context.

17. According to the *Staatsgerichtshof*, the rule in question is not a blanket prohibition under which all forms of advertising by lawyers is unlawful. Moreover, the scenario caught by the rule 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 (indeed, the *Staatsgerichtshof* attaches particular importance to the fact that the persons are selected in such a manner that the lawyer expects them to accept the offer). The *Staatsgerichtshof* concludes that Paragraph 35(1)(c) is compatible with the Lawyers Act if it seeks to realise the values set out therein by stipulating that lawyers should not, on their own initiative, approach specific (groups of) people and offer them professional services ensuing from specific situations in which it is actually possible for a contract the be awarded, without those people having expressed an interest.

18. Upon resuming the disciplinary proceedings pending before it, the national court heard argument concerning the Services Directive and was referred to the judgment of the CJEU in *Société fiduciaire nationale d'expertise comptable* . ([5]) It finds that case comparable to the circumstances of the present case.

19. The *Fürstliches Obergericht* therefore refers the following questions to the EFTA Court:

> 1. Does Directive 2006/123/EC of the European Parliament and 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

([4]) See English translation of the Request for an Advisory Opinion, top of p.8.

([5]) Judgment of 5 April 2011 in *Société fiduciaire nationale d'expertise comptable*, C-119/09, EU:C:2011:208.

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?

IV. ANALYSIS

20. By its questions, which can be described together, the national court asks, in essence, whether the rules on commercial communications contained in the Services Directive, and in particular the requirement to remove all total prohibitions in Article 24(1) of that act, must be interpreted as precluding a rule such as the one contained in Paragraph 35(1)(c) of the Professional Guidelines, according to which lawyers must refrain from offering their professional services to specific categories of possible clients.

21. The first question concerns the Services Directive in general, whereas the second inquires specifically as to the scope of the first paragraph of Article 24. On the basis that a measure that is caught by the unqualified obligation to remove all total prohibitions on commercial communications must, quite simply, be abolished, the Commission will begin by addressing the second question (section IV.1), before turning to consider the other relevant provision, namely Article 24(2), which describes the conditions that must be fulfilled if commercial communications are to be compatible with the internal market (section IV.2).

IV.1. Second question: Article 24(1)

22. Article 24 of the Services Directive requires two separate things of the Member States. In the first place, it obliges them to abolish all "total prohibitions" on commercial communications by the regulated professions (paragraph 1). In the second place, it provides that any regulation of those communications must be non-discriminatory, justified by an over-riding reason relating to the public interest and proportionate, while ensuring that those communications comply with professional rules (paragraph 2).

23. In other words, a total prohibition on advertising cannot be justified and must be removed, whereas other rules regulating promotional activities by the regulated professions must ensure, in particular, the independence, dignity and integrity of the profession and must satisfy the classic proportionality test. It is therefore of pivotal importance to identify where the line between "total prohibition" and other rules is to be drawn.

24. The CJEU has had the opportunity to rule on the meaning of the former. In *Société fiduciaire nationale d'expertise comptable*, the Grand Chamber considered the meaning of Article 24(1) in relation to the French Code of professional conduct and ethics of qualified accountants in so far as it prohibited canvassing.

25. The CJEU began by recalling that it is necessary to interpret provisions such as Article 24(1) of the Services Directive by reference not only to their wording but also to their purpose and context and the objective pursued by the legislation in question. ([6]) It went on to note that "*[t]he 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*". ([7]) On that basis, the CJEU held that "the intention of the EU legislature was […] also to remove bans on one or more forms of commercial communication within the meaning of Article 4(12) of Directive

([6]) *Ibid.* para 25.

([7]) *Ibid.* para 27.

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". ([8])

26. The CJEU thereby appeared to draw a distinction between rules prohibiting certain forms of communication, on the one hand, and rules relating to the content or method of communication, on the other. The former fall within the first paragraph of Article 24 of the Services Directive – and must be abolished – whereas the latter are not contrary to Union law to the extent that they are justified and proportionate for the purposes of ensuring, in particular, the independence, dignity and integrity of the profession, as well as the professional secrecy necessary in its practice, i.e. to the extent that they comply with the second paragraph of that provision.

27. Having considered a number of arguments put before it in relation to the meaning of 'canvassing', and in particular, what it covers, the CJEU – without concluding on the precise scope of the term – held that the ban on canvassing at issue was of broad conception, in that it prohibited any canvassing, whatever its form, content or means employed, and therefore that it must be regarded as a total prohibition of commercial communications prohibited by Article 24(1) of Directive 2006/123. ([9])

28. It follows from the preceding sections of the judgment that a rule that targets certain types of content, or certain methods of communication falls within the second paragraph of that provision. A rule that pays no heed to content or method of communication is therefore directed in essence at the form of the communication. In line with recital 100, as noted above, the prohibition contained in paragraph 1 of Article 24 is intended precisely to catch bans which forbid one or more forms of communication.

29. In that respect, the Commission considers that the approach in Article 24 of the Services Directive leads to similar results in practice as the CJEU's case law on advertising restrictions under the Treaty fundamental freedoms. In

([8]) *Ibid.* para 29.

([9]) *Ibid.* paras 30 and 31.

Vanderborght ([10]) and *A v Daniel B and Others* ([11]), the CJEU accepted that restrictions on advertising practice can be justified by legitimate objectives, including the dignity of and trust in a profession. Nevertheless, such restrictions must be appropriate and necessary. As a rule, "*general and absolute prohibitions*" of advertising exceed what is necessary to achieve a legitimate objective, because they fail to take account of whether particular advertising messages "*are, in themselves, likely to produce effects*" that are contrary to those objectives. ([12]) By contrast, a justifiable measure would be one that supervises "*the form and manner*" which certain communication tools "*may legitimately have*" ([13]), or one that assesses whether the content of advertising is contrary to professional ethics. ([14])

30. While the analysis in *Vanderborght* and *A v Daniel B and Others* takes place within the four corners of a proportionality assessment (unlike what is foreseen in Article 24(1) of the Services Directive), those judgments contain a strong indication that "absolute" or "total" prohibitions on advertising, which are incapable of taking into account the characteristics, and especially the content, of specific advertising practices, can never be justified. Thus, Article 24 of the Services Directive reflects what has been the approach of the CJEU thus far in cases assessed under the Treaty.

31. The rule under examination in the present case pays no attention to content – it applies without any consideration as to the message contained in the commercial communication. It prohibits, in general, "*offering of professional services to specific categories of possible clients*", i.e. canvassing. It would therefore appear, like in *Société fiduciaire nationale d'expertise comptable*, to include a prohibition of all means of communication (i.e. whether by phone, letter, email or in person) enabling the carrying out of that form of commercial communication.

32. Indeed, if canvassing constitutes a form of communication of information intended to seek new clients which, as a form of direct marketing, involves personal contact

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([10]) Judgment of 4 May 2017 in *Vanderborght*, C-339/15, EU:C:2017:335, para 69.

([11]) Judgment of 1 October 2020 in *A v Daniel B and Others*, C-649/18, EU:C:2020:764, paras 69-70.

([12]) Judgment of 4 May 2017 in *Vanderborght*, C-339/15, cited above, para 73.

([13]) Judgment of 4 May 2017 in *Vanderborght*, C-339/15, cited above, para 75.

([14]) Judgment of 12 September 2013 in *Konstantinides*, C-475/11, EU:C:2013:542, para 57

between the provider and a potential client, in order to offer the latter services, it is difficult to see how the proviso in Paragraph 35(1)(c) of the Professional Guidelines (that the offer is to "specific categories of possible clients") can have any effect on the conclusion that lawyers are prevented from engaging in that form of communication. In other words, in this context, any type of canvassing could be described as directed at "specific categories of possible clients", because it will inevitably be based on some sort of conscious choice of the persons to target. That position is supported by the judgment of the *Staatsgerichtshof*, as cited in the request for an Advisory Opinion: "*it is not a matter of abstract advertising for professional services offered to the public at large or abstract groups of people*". ([15]) It would appear from the passage cited that the relevant distinction is 'abstract advertising' (permitted), as compared to 'direct marketing in the form of canvassing' (prohibited), as was the case in *Société fiduciaire nationale d'expertise comptable*. Indeed, the focus of the rule as interpreted by the *Staatsgerichtshof* seems to be the proactive offering of services, rather than the fact of choosing certain categories of persons to which that offering is made.

33. According to the Liechtenstein Chamber of Lawyers, as reported in the request for an Advisory Opinion, the rule in question "*is intended to ensure that lawyers do not, on their own initiative, approach specific groups of people and offer them their professional services*" when those groups of people have been chosen in such a way as to make it likely that those services are useful and without them having expressed an interest in legal assistance. That body is of the view that the decision to bring proceedings should be taken without proactive contact by a lawyer. On that basis, the Liechtenstein Chamber of Lawyers considers that the Services Directive requires only that total prohibitions on advertising are abolished but that restrictions on content and restrictions in relation to the manner in which contact is made (in this case, proactively, without a prior interest having been expressed) can be maintained, under the conditions set out in paragraph 2 of Article 24 of the Service Directive.

34. As noted above, the Commission is of the view that the qualifiers included in the rule in question do not alter the conclusion that the rule in essence prohibits canvassing. Indeed, proactive contact is inherent to the very nature of canvassing:

([15]) See English translation of the Request for an Advisory Opinion, point 2.3.2.

responding to an inquiry by a potential client is no longer canvassing. The Commission therefore does not share the analysis, put forward by the Liechtenstein Chamber of Lawyers and set out in the request for an Advisory Opinion, that the rule in question is a "*restriction in relation to the manner in which contact is made*". The Commission notes that the Chamber appears, in that passage, to equate "the manner in which contact is made" with the adverb "proactively"; for the avoidance of doubt, the matter of careful selection of the targets of direct marketing activities, thus maximising the likelihood of success of those activities, once again relates more to the nature of the promotional activities themselves rather than the manner in which they are carried out. ([16])

35. For these reasons, in the Commission's view, the answer to the second question should be that Article 24(1) of the Services Directive must be interpreted as meaning that a national provision may not, in general, prohibit lawyers from, on their own initiative, contacting potential clients who were not previously their customers and from offering them their services.

IV.2. First question: Article 24(2)

36. However, the national court also inquires as to the Services Directive in general, and it therefore seems useful to consider what the position might be if it were to be found that the rule in question is not caught by the prohibition in Article 24(1) of that act.

37. In those circumstances, the applicable provision would be Article 24(2), which requires, in its relevant part, rules on commercial communications to be "*justified by an overriding reason relating to the public interest and proportionate*".

38. The Commission's position on that question clearly follows from what was already explained.

39. The measure at issue is a prohibition of canvassing, or at least of most real-world instances of canvassing, which is a form of commercial communications commonly

([16]) See the Opinion of AG Mazak in *Société fiduciaire nationale d'expertise comptable*, C-119/09, EU:C:2010:276, para 45, pointing out that one of the defining features of canvassing is "the individualisation of the recipient of the commercial message".

used by lawyers and other regulated professions. As clearly explained in the Request for an advisory opinion, the prohibition is unconnected to any consideration of the content of the messages, or of any risks or benefits they are liable to create for their addressees, or of the manner in which the message is transmitted to them.

40. One could, of course, imagine canvassing practices that are problematic from the point of view of the dignity of and the public trust in the legal profession. The rule in question is, however, incapable of distinguishing between such practices and legitimate commercial communications in which a lawyer proactively contacts possible clients. As the CJEU put it, this rule does not take into account the "*form and manner*" of particular communications, or whether they are "*likely to produce effects*" contrary to the regulatory objective, such as to put into question professional ethics.([17])

41. In that sense, it goes further than is necessary to achieve a legitimate objective. This conclusion is further supported by the fact that other, less restrictive provisions of the Professional Guidelines could be relied upon to address any adverse impact of certain commercial communications on the independence, dignity and integrity of the legal profession or on the interests of potential clients. Article 34(2) prohibits communications that are factually inaccurate, unrelated to the profession or not justified by an interest of the persons seeking legal assistance. Article 35(1) prohibits in general advertising that is "*not truthful, factual or compatible with the honour and reputation of the profession, professional duties and the function of the lawyer in the administration of justice*", and more specifically the creation of false expectations (point (d)), granting unlawful advantages with regards to fees (point (e)), and canvassing by exploiting a situation of duress (point (g)), among others.

42. The proportionality of the rule in question is additionally questionable from the point of view of the need to safeguard the interests of potential clients, which is

([17]) Judgments of 4 May 2017 in *Vanderborght*, C-339/15, cited above, para 73 and 75; and of 12 September 2013 in *Konstantinides*, C-475/11, cited above, para 57.

central to Article 24 of the Services Directive. ([18]) It is not clear how that objective is well-served by a measure that prevents potential clients from being informed of the possibility of seeking legal redress.

43. Based on the foregoing, the Commission considers that the answer, to the extent that one is necessary, to the first question should be that the Services Directive, and in particular Article 24(2) thereof, precludes a provision such as Paragraph 35(1)(c) of the Professional Guidelines, 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 *Staatsgerichtshof*, 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".

V. CONCLUSION

44. In the light of the foregoing, the Commission considers that the questions referred to the EFTA Court by the *Fürstliches Obergericht* (Princely Court of Appeal, Vaduz), Liechtenstein, should be answered as follows:

> Articles 24(1) and 24(2) of Directive 2006/123/EC of the European Parliament and the Council of 12 December 2006 on services in the internal market must be interpreted as meaning that a national provision may not, in general, prohibit lawyers from, on their own initiative, contacting potential clients who were not previously their customers and from offering them their services.

Lorna ARMATI Mislav MATAIJA

Agents for the Commission

([18]) Opinion of AG Mazak in *Société fiduciaire nationale d'expertise comptable*, C-119/09, cited above, para 31.