COMPETITION LAW IN THE EUROPEAN COMMUNITIES

April, 2001

Volume 24, Issue 4

FRANKLIN PIERCE
LAW CENTER LIBRARY
CONCORD, N. H.
MAY 25 2001

FAIRFORD PRESS *Publisher and Editor: Bryan Harris*	**Fairford Review : EU Reports : EU Services : Competition Law in the European Communities**
58 Ashcroft Road, Cirencester GL7 1QX, UK P O Box 323, Eliot ME 03903-0323, USA www.fairfordpress.com	Tel & Fax (44) (0) 1451 861 464 Tel & Fax (1) (207) 439 5932 Email: anharr@cybertours.com

April, 2001

Volume 24 Issue 4

COMPETITION LAW IN THE EUROPEAN COMMUNITIES

Copyright © 2001 Bryan Harris
ISSN 0141-769X

CONTENTS

76 COMMENT

Global Competition

77 ABUSE OF DOMINANT POSITION (PARCELS)

The Deutsche Post Case

81 COMPLAINTS (TELEVISION)

The Metropole Case

90 PROFESSIONAL RULES (PATENT AGENTS)

The EPI Case

MISCELLANEOUS

The Microsoft (IV) Case *100*

Global competition

In Washington, DC, on 29th March of this year, there was a Global Competition Forum, at which the European Commissioner for Competition Policy, Mario Monti, presented a characteristically thoughtful paper on trends in world-wide competition policies. He pointed to the rapid progress towards a market economy, especially in developing countries and former Communist countries; to the reduction in trade barriers and the dramatic increase in the volume of cross-border trade; and to the remarkable technological advances resulting in a marked inter-dependence between economies worldwide. Globalisation presents major challenges for competition authorities around the world, and has highlighted the need to ensure a maximum of convergence between the growing number of competition enforcement systems.

Two separate responses have been made to these major challenges. There are bilateral arrangements in operation, of which the US-EU agreement is not only the principal example but also perhaps a model for similar arrangements elsewhere. Then there is the proposal that the World Trade Organisation should conclude a world-wide agreement among the Organisation's members on the enforcement of competition rules and that a global competition forum should be created.

In the Commissioner's view, the bilateral agreements between the United States and the European Union have been a "marked success" substantially reduced the risk of divergent rulings. Inter-agency discussions tend to focus on issues such as the definition of markets, the likely competitive impact of a transaction on those markets, and the viability of any remedies suggested by the merging parties. Merger invest-igations involving close transatlantic cooperation included the Alcoa/ Reynolds, MCI WorldCom/ Sprint, Novartis/ AstraZeneca, Boeing/ Hughes and AOL/ Time Warner cases, as well as the ongoing case General Electric/ Honeywell.

But, as the EU and its Member States have recognised for some time, bilateralism has its limitations: it is time to intensify, with the new US administration's support, the pursuit of multilateral solutions. The more individual jurisdictions develop their own competition rules, the more expensive it is going to be for companies operating in a number of different countries to comply with all the different legal requirements. Moreover, the introduction of competition policy is an essential part of efforts by developing countries and countries in transition to restructure their economies and integrate them fully to the world economy in order to be able to exploit new opportunities to compete. These are among the many reasons for giving further momentum to the process of establishing international rules. ■

ABUSE OF DOMINANT POSITION (PARCELS) THE DEUTSCHE POST CASE

Subject: Abuse of dominant position
Predatory pricing
Rebates
Fines

Industry: Parcel services
Postal services
(Some implications for other industries)

Party: Deutsche Post AG (the German Post Office)

Source: Commission Statement IP/01/419, dated 20 March 2001

(Note. Postal services are financed on the principle of cross-subsidisation; but there is a limit to the extent to which post offices may cross-subsidise services which are of a more commercial character, such as business parcel services, and thereby threaten competitors in that market. The interest of this case lies in the way in which the Commission has said that the line must not be crossed and in the economic considerations supporting its conclusions.)

Commission Decision

The Commission has concluded its antitrust investigation into Deutsche Post AG (DPAG) with a decision finding that the German postal operator has abused its dominant position by granting fidelity rebates and engaging in predatory pricing in the market for business parcel services. As a result of the investigation, DPAG will create a separate legal entity for business parcel services. The system of transparent and market-based pricing between DPAG and the new entity for products and services they might provide to one another is a suitable safeguard for DPAG's competitors in business parcel deliveries that revenues from the monopoly in the letter market will not be used to finance such services. Furthermore, in the light of the foreclosure that resulted from a long-standing scheme of fidelity rebates granted by DPAG to all major customers in the mail-order business, the Commission has imposed a fine of €24m. This is the first formal Commission decision in the postal sector under Article 82 of the EC Treaty, which prohibits abuses of a dominant position.

Competition Commissioner Mario Monti commented: "Today's decision establishes clear rules on the issue of cross-subsidies which postal monopolies who are also engaged in activities open to competition must respect. The winner clearly is the public at large: pricing below cost must be paid by somebody and that 'somebody' usually is the monopoly's customers. Moreover, pricing below cost forecloses market entry by efficient competitors and therefore prevents a wider offer at better prices and service conditions. I am particularly pleased that in this case we have not simply sanctioned anti-competitive practices but achieved

a forward-looking result, in the form of Deutsche Post's commitments in the parcel delivery market which are of great importance to the development of electronic commerce."

In 1994 United Parcel Service (UPS), a private operator in the business parcel sector active in Germany lodged a complaint with the Commission, alleging that Deutsche Post was using revenues from its profitable letter-mail monopoly to finance a strategy of below-cost selling in business parcel services, which are open to competition. Without the cross-subsidies from the monopoly, UPS alleged, DPAG would not have been able to finance and survive these below-cost prices for a very long time. UPS therefore called on the Commission to prohibit DPAG's below-cost selling in the business parcel sector and impose a structural separation of the reserved area and commercial parcel services.

For the first time in the postal sector, the Commission's decision sets forth a standard for measuring those cross-subsidies between the monopoly area and competitive activities which result in predatory prices in the latter: any service provided by the beneficiary of a monopoly in open competition has to cover at least the additional or incremental cost incurred in branching out into the competitive sector. The Commission considers that any cost coverage below this level is predatory pricing which falls foul of Article 82 of the EC Treaty. The investigation has revealed that DPAG, for a period of five years, did not cover the costs incremental to providing the mail-order delivery service. No fine was imposed for this infringement because the economic cost concepts used to identify predation were not sufficiently developed at the time the abuse occurred; in addition, DPAG has now tackled the issue in a satisfactory way.

Transparency of financial relations between the monopoly and parcels services which are open to competition is indispensable to guarantee that revenue of competitive services covers the incremental cost of producing that service. To ensure the requisite level of transparency of financial relations between its monopoly and business parcel services, DPAG has given an undertaking to the Commission that it will create a separate company (Newco) to supply business parcel services. Newco will be free to procure the inputs necessary for its services (these inputs include, for example, sorting, transport and delivery services) either from DPAG or from third parties or produce these inputs itself. Should Newco choose to purchase the inputs from DPAG, the latter will have to provide to Newco all goods and services at market prices. In addition DPAG has undertaken that all inputs it supplies to Newco will be supplied to Newco's competitors at the same price and on the same conditions. Thus, DPAG, in the future, will have no incentive to charge prices below market prices when selling inputs to Newco.

Effect of Decision

This formal decision under Article 82 of the Treaty clarifies the Commission's position on the costs to be covered by a multi-product monopoly operator that offers an additional line of products in markets open to competition. It also provides competitors active in mail-order parcel delivery services with the ensuing

legal security. This is particularly important should electronic commerce create additional mail-order delivery volume in Germany.

In its decision the Commission also condemns DPAG's long-standing scheme of fidelity rebates in mail order parcel deliveries. The Commission's investigation revealed that, from 1974 through October 2000, DPAG gave substantial discounts to its large mail order customers on condition that the customer sent its entire mail-order parcel business or at least a sizeable proportion thereof by DPAG. Such a system of fidelity rebates forecloses competition. The fidelity rebate scheme has essentially precluded any private competitor from reaching the critical mass (estimated at an annual turnover of 100 million parcels) to enter successfully the German mail-order delivery market. This is borne out by the fact that between 1990 and 1999 DPAG had a stable volume-based share of the mail-order parcel market exceeding 85%.
In the light of the fact that fidelity rebates given by an undertaking in a dominant position have repeatedly been condemned by the Community courts, and given the long duration of the scheme in the case at issue, the Commission considers that a fine of €24m is appropriate for this abuse.

Economic aspects of Decision

Mail-order parcel services (definition)

By reason of their characteristics, costs and uses, mail-order parcel services form a relevant product market. They are distinct from over-the-counter parcels on the one hand and business-to-business (B-to-B) parcels on the other. Mail order parcels are not processed through the postal counter system but are collected by DPAG directly at the customers' premises; and DPAG only offers special prices to customers who do not use the postal counter. Although they share the infrastructure at the sorting and transport stages, final delivery to private addressees makes much greater use of vehicles and postal delivery staff than do B-to-B services. In the case of mail-order services the dispersed addressee structure produces a very low stop factor (that is, the number of parcels delivered per delivery vehicle stop), one parcel per stop being the rule. In the case of parcel services between business customers, the stop factor is much higher, as here several parcels are normally delivered whenever the delivery vehicle stops.

Mail-order parcels (cost coverage)

During the investigation, it emerged that parcel services which DPAG provides to mail-order firms have the lowest percentage of cost coverage. Cost coverage in mail order parcel deliveries was significantly lower than that achieved in B-to-B deliveries. In Germany, there is competition in B-to-B deliveries.

Mail order parcel services (legal framework)

All parcel services, including mail-order parcel services, are open to competition in Germany. Nevertheless, only B-to-B deliveries are marked by actual competition.

Mail order parcel services (geographic market)

The relevant geographic market in mail-order parcel services is Germany. All the services provided by DPAG on the relevant product market are provided in Germany, using the nation-wide parcel infrastructure.

DPAG's dominant position in mail order parcels

DPAG is the only significant provider in Germany of nation-wide parcel and catalogue delivery services which meet the specific requirements of the mail-order trade. Neither UPS nor the other competitors providing B-to-B services, namely, Deutscher Paket Dienst and German Parcel, provide mail-order parcel services to any appreciable extent. Until 1999 inclusive, Hermes Versand Service (Hermes) delivered only parcels for Otto Versand. Apart from Hermes, there is no alternative nation-wide infrastructure for the mail-order trade. Between 1990 and 1999 DPAG had a stable volume-based share of the mail-order parcel market exceeding 85%.

Competitors of DPAG in the parcel sector

Since about 1976 there have been competitors in Germany who have been supplying parcel services, mainly between business customers (B-to-B services). But none of the competitors who have been successful in the B-to-B sector have been able to carry their success over into mail-order parcel services.

The standard based on additional or "incremental" costs

To establish predatory prices the decision proposes to distinguish between costs for network capacity and network usage. The Commission considers the costs incurred for providing network capacity to give everyone an option to ship parcels at a uniform rate as part of DPAG's universal service obligation. Economists refer to this kind of universal service obligation as the obligation to serve as the carrier of last resort. Requiring a firm to serve as a carrier of last resort forces this firm to hold capacity in reserve in order to meet demand at peak load. These costs are appropriately treated as common fixed costs for DPAG. On the other hand, the Commission proposes to hold that the costs for actual usage of the network for offering product X are long-term variable or incremental costs. If prices for a particular product or service are not to be deemed predatory, they must cover at least the incremental costs of producing that service.

Incremental costs and the universal service

Prices below the incremental costs cannot be justified as necessary to fulfil DPAG's universal service obligation. This is because the additional sales at this price make no contribution to maintaining the network capacity necessary for DPAG to perform its universal service obligation. On the contrary, such prices actually endanger the financial equilibrium necessary to fulfil the universal service.

COMPLAINTS (TELEVISION): THE METROPOLE CASE

Subject: Complaints
Annulment (of Commission Decision)
Trade associations

Industry: Television; broadcasting
(Implications for other industries)

Parties: Métropole Télévision SA
Commission of the European Communities

Source: Judgment of the Court of First Instance, dated 21 March 2001 in Case
T-206/99 (*Métropole Télévision SA v Commission of the European Communities*)

(Note. This case adds to the body of case-law on the Commission's handling of complaints by parties aggrieved by what they regard as anti-competitive behaviour, in this case the alleged refusal of the European Broadcasting Union to admit the complainant to its membership. When the Commission rejects a complaint, it need not set out all the facts leading to its Decision; but it must state its reasoning clearly enough for the Court to be able to judge, if called on to do so, the merits of the Commission's case. In the present case, the Commission had already reached an opinion on the merits five years previously and had had its Decision annulled. This did not prevent the Commission from reverting to the position before that annulment and, if it thought fit, taking a different view of the circumstances; but, whatever it decides, it must state its reasons for its revised opinion. The present case, by the way, contains some interesting views on the need for trade association rules to be clear and non-discriminatory.)

Judgment

1. The European Broadcasting Union (EBU) is a non-profit-making trade association of radio and television organisations set up in 1950 with headquarters in Geneva (Switzerland). According to Article 2 of its Statutes, as amended on 3 July 1992, its objectives are to represent its members' interests in the field of programmes and in the legal, technical and other spheres and in particular to promote radio and television programme exchanges by all possible means - for example, Eurovision and Euroradio - and any other form of cooperation among its members and with other broadcasting organisations or groups of such organisations, and also to assist its active members in negotiations of all kinds and, when asked, to negotiate on their behalf.

2. The Statutes of the EBU had already been amended on 9 February 1988, to limit the number of members of Eurovision in accordance with its objectives and

its method of operation, those members being defined as a particular group of broadcasters.

3. Article 3 of the Statutes, in the version of 3 July 1992, reads as follows:

> 1 There are two categories of EBU members:
> - active members
> - associate members.
>
> ...
>
> 3Active membership of the EBU is open to broadcasting organisations or groups of such organisations from a member country of the International Telecommunication Union (ITU) situated in the European Broadcasting Area as defined by the Radio Regulations annexed to the International Telecommunication Convention, which provide in that country, with the authorisation of the competent authorities, a broadcasting service of national character and national importance, and which furthermore prove that they fulfil all the conditions set out below:
> (a) they are under an obligation to cover the entire national population and in fact already cover at least a substantial part thereof, while using their best endeavours to achieve full coverage in due course;
> (b) they are under an obligation to, and actually do, provide varied and balanced programming for all sections of the population, including a fair share of programmes catering for special/minority interests of various sections of the public, irrespective of the ratio of programme cost to audience;
> (c) they actually produce and/or commission under their own editorial control a substantial proportion of the programmes broadcast.

4. Article 6 of the Statutes, in the version of 3 July 1992, reads as follows:

> 1 Any member no longer fulfilling the conditions described in Article 3 shall cease to be a member of the EBU by decision of the Administrative Council, which will have immediate effect, subject to a ratifying decision by the following General Assembly taken by a majority of at least three-quarters of the votes that may be cast by those present, if members holding together at least three-quarters of the totality of EBU votes are present or represented. However, this shall not apply to members which on 1 March 1988 did not meet all the requirements laid down in Article 3[3] (as entered into force that day). For such members, the membership conditions laid down in the previous version of Article 3 continue to be applicable.

5. Eurovision constitutes the main framework for the exchange of programmes among the active members of the EBU. It has been in existence since 1954 and is one of the main objectives of the EBU. According to Article 3(6) of the Statutes, in the version of 3 July 1992, Eurovision is a television programme exchange system organised and coordinated by the EBU, based on the understanding that members offer to the other members, on the basis of reciprocity, ... their coverage of sports and cultural events taking place in their countries and of potential interest to other members, thereby enabling each other to provide a high quality service in these fields to their respective national audiences. Eurovision members

are active members of the EBU as well as consortia of such members. All active members of the EBU may participate in a system of joint acquisition and sharing of television rights (and of the costs relating thereto) to international sports events, which are referred to as Eurovision rights.

6. Until 1 March 1988, the benefit of the services of the EBU and Eurovision was exclusively reserved to their members. However, when the Statutes were amended in 1988, a new paragraph (paragraph 6) was added to Article 3 providing that contractual access to Eurovision may be granted to associate members and non-members of the EBU.

7. Following a complaint of 17 December 1987 from the television channel Screensport, the Commission investigated the compatibility of the rules governing that system of joint acquisition and sharing of television rights to sports events with Article 85 of the EC Treaty (now Article 81 EC). The complaint related in particular to the refusal of the EBU and its members to grant it sub-licences for the retransmission of sports events. On 12 December 1988, the Commission sent the EBU a statement of objections concerning the rules governing the acquisition and use of television rights to sports events within the framework of the Eurovision System, which are generally exclusive in nature. The Commission declared itself willing to envisage an exemption in favour of those rules on condition that the EBU and its members accepted an obligation to grant non-members sub-licences for a substantial part of the rights in question and on reasonable terms.

8. On 3 April 1989, the EBU notified the Commission of its Statutes and other rules on the acquisition of television rights to sports events, the exchange of sports broadcasts in the context of Eurovision and contractual access of third parties to such broadcasts, with a view to obtaining negative clearance or, failing that, an exemption under Article 85(3) of the Treaty.

9. After EBU had agreed to relax the rules for obtaining sub-licences for the broadcasts in question, the Commission adopted Decision 93/403/EEC of 11 June 1993 relating to a proceeding pursuant to Article 85 of the EEC Treaty (OJ 1993 L 179, p. 23), whereby it granted an exemption under Article 85(3) ('the exemption decision).

10. That decision was annulled by the judgment of the Court of First Instance in Joined Cases T-528/93, T-542/93, T-543/93 and T-546/93, *Métropole Télévision and Others v Commission* (the judgment of 11 July 1996).

11. Since 1987, Métropole Télévision (M6) has lodged an application to join the EBU six times. Each time, its application has been rejected on the ground that it did not fulfil the membership conditions laid down by the EBU's Statutes. Following the last refusal of the EBU, on 2 June 1997, M6 filed a complaint with the Commission, complaining of EBU's practices towards it, and in particular of the systematic *a priori* refusal of its applications for admission.

12. By decision of 29 June 1999 (the contested decision), the Commission dismissed the applicant's complaint.

[Paragraphs 13 to 17 concern the forms of order sought by the parties.]

Law

18. In its complaint, the applicant made essentially two claims. In the first, it complained of the fact that the EBU continued to invoke against it the former admission criteria under its Statutes in breach of the judgment of 11 July 1996 annulling the exemption decision. Taking the view that those admission criteria could no longer be applied, the applicant requested the Commission to take all necessary steps to put an end to the EBU's practices, and in particular to order the latter to give it access to the television rights to sports events acquired by the EBU on behalf of its members within the Eurovision framework, and to give it access to news pictures within the framework of the system for exchanging such pictures called News Access/EBU, on the same conditions as those enjoyed by rival undertakings, namely live retransmission.

19. In its second claim, the applicant complained of the 'acquired rights clause laid down in Article 6 of the EBU Statutes (see paragraph 4 above), allowing that association to impose on the applicant conditions for joining that its members did not fulfil. In that respect, M6 complained, in particular, of the situation of CANAL+ and certain subsidiaries of television channels which were members of the EBU, such as Eurosport and LCI, which benefited from the EBU's system of joint acquisition without fulfilling the criteria which the EBU imposed on the applicant for joining.

20. In the contested decision, the Commission rejected the complaint because, first, it considered that it did not have the necessary legal powers to order the EBU to grant M6 live access to television rights for sporting events acquired by the association on behalf of its members, and, secondly, it did not share the opinion of M6 as to the scope of the judgment of 11 July 1996. In that respect, the Commission stated:

> The Court of First Instance did not as such express a view as to the applicability of [Article 81(1) EC] to the membership rules, any more than did the Commission, as is proved by the wording of Article 1 of the exemption decision of 11 June 1993, which is limited to granting exemption for the system of acquiring television rights for sporting events; to the exchange of sports broadcasts in the context of Eurovision and contractual access of third parties to such broadcasts. That Article 1 does not at any time refer to the membership rules, which are therefore not at issue. The Commission considers that the former membership rules of the EBU do not fall within the scope of [Article 81(1) EC]; that is to say the criteria are not in themselves restrictions on competition. (Point 5.1.)

21. Thirdly, concerning the applicant's second claim, the Commission made the following observation:

It should be noted that CANAL+ does not participate in the EBU's joint acquisition group for sports rights. (Point 6.)

22. The applicant makes two pleas in law in support of its action. The first, its main argument, alleges infringement of the Treaty and of the rules concerning its application. The second, in the alternative, alleges misuse of powers.

The plea alleging infringement of the Treaty and of the rules concerning its application

[Paragraphs 23 to 34 set out the parties' arguments.]

Findings of the Court

35. It should be noted as a preliminary observation that, when the Court of First Instance annuls an act of an institution, that institution is required, under Article 233 EC, to take the measures necessary to comply with the Court's judgment. In that connection, both Community courts have held that, in order to comply with their judgments and to implement them fully, the institution is required to observe not only the operative part of the judgment but also the grounds which led to the judgment and constitute its essential basis, inasmuch as they are necessary to determine the exact meaning of what is stated in the operative part. It is those grounds which, on the one hand, identify the precise provision held to be illegal and, on the other, indicate the specific reasons which underlie the finding of illegality contained in the operative part and which the institution concerned must take into account when replacing the annulled measure (Joined Cases 97/86, 99/86,193/86 and 215/86, *Asteris v Commission*, paragraph 27; Case T-224/95, *Tremblay v Commission*, paragraph 72).

36. As regards the interpretation of the judgment of 11 July 1996, it should be noted that, at paragraph 94, the Court held: "... according to point 50 of the [exemption] decision, competition vis-à-vis purely commercial channels, which are not admitted as members, is to some extent distorted by the EBU's membership rules, since those channels cannot participate in the rationalisation and cost savings achieved by the Eurovision System. According to point 72 et seq., the restrictions of competition caused by those membership rules are nevertheless indispensable within the meaning of Article 85(3)(a) of the Treaty."

37. To assess whether the conditions set out in Article 85(3) of the Treaty were fulfilled, the Court first examined the three conditions imposed on channels wishing to join the EBU: the obligation to cover the entire national population, the obligation to provide varied and balanced programming for all sections of the population, and the obligation to produce a substantial proportion of the programmes broadcast themselves. It then stated that, in accordance with settled case-law, the Commission had to examine whether those membership rules were 'objective and sufficiently determinate so as to enable them to be applied uniformly and in a non-discriminatory manner vis-à-vis all potential active members (see, for example, Case 26/76, *Metro v Commission*, paragraph 20). The Court added: "The indispensable nature of the restrictions of competition

resulting from those rules cannot be correctly assessed unless that prior condition is fulfilled" (paragraph 95 of the judgment of 11 July 1996).

38. It then held that: "the content of the three conditions laid down by Article 3(3) of the EBU's Statutes relating to coverage of the population, to programming and to the production of the programmes broadcast is not sufficiently determinate. Since they refer essentially to unquantified quantitative criteria, they are vague and imprecise. Consequently, in the absence of further specification, they cannot form the basis for uniform, non-discriminatory application" (paragraph 97 of the judgment of 11 July 1996).

39. The Court of First Instance concluded that the Commission was wrong to refrain from carrying out an examination of the application of the three membership criteria in the case in question and held that the Commission should have concluded that it was not even in a position to assess whether the corresponding restrictions were indispensable within the meaning of Article 85(3)(a) of the Treaty. Consequently, it was not entitled to exempt them on that ground (paragraph 99 of the judgment of 11 July 1996).

40. It therefore follows from the judgment of 11 July 1996 that, as the EBU's membership rules were not sufficiently determinate in content, they were not capable of being applied uniformly and without discrimination and could not therefore benefit from an exemption under Article 81(3) EC.

41. However, contrary to what the applicant maintains, the Court did not rule on the application of Article 81(1) EC to the membership criteria. In paragraph 94 of the judgment of 11 July 1996, the Court merely found that the Commission had held in the exemption decision that the membership rules restricted competition, but did not give a ruling on that qualification. In the action for annulment brought against the exemption decision, the application of Article 81(1) EC to the membership rules was not raised by the applicants. Since that is a plea which goes to the substantive legality of a decision, it was not for the Court to raise it of its own motion in an action for annulment brought pursuant to Article 230 EC (see, to that effect, Case C-367/95 P, *Commission v Sytraval and Brink's France*, paragraph 67).

42. In those circumstances, the judgment of 11 July 1996 cannot have the effect of preventing the Commission from going back on its position concerning the application of Article 81(1) EC to the EBU's membership rules. Such a change of position did, however, require a statement of reasons.

43. In that respect, and in so far as the insufficiency or lack of reasoning constitutes an infringement of essential procedural requirements within the meaning of Article 230 EC and is a plea of public policy which the Community judicature must raise of its own motion (*Sytraval*, paragraph 67), it needs to be examined whether sufficient reasons are stated for such an adoption of position.

44. For that purpose, it should be recalled that, according to consistent case-law, the statement of reasons on which a decision adversely affecting a person is based

must, first, be such as to enable the person concerned to ascertain the matters justifying the measure adopted so that, if necessary, he can defend his rights and verify whether the decision is well founded and, secondly, enable the Community judicature to exercise its power of review as to the legality of the decision. In that connection, the Commission is not obliged, in stating the reasons for the decisions which it takes to ensure the application of the competition rules, to adopt a position on all the arguments relied on by the persons concerned but need only set out the facts and legal considerations which are of decisive importance in the context of the decision (see, for example, Case T-5/93, *Tremblay v Commission*, paragraph 29).

[Paragraphs 45 to 50 refer to the Commission's decision.]

51. It therefore follows from a reading of the exemption decision as a whole that, contrary to what it claims, the Commission considered in 1993 that the EBU's membership rules were restrictive of competition and that they could be exempted from the application of Article 85(1) of the Treaty.

52. Moreover, none of the arguments raised by the Commission is capable of calling that conclusion into question. Even if the heading of a decision were relevant in determining its scope, it is sufficient to note that the heading of the exemption decision contains the words 'EBU/Eurovision system and not, as the Commission claims, merely the words 'Eurovision system. Furthermore, concerning the subject-matter of the application for negative clearance or exemption submitted by the EBU and on the basis of which the Commission adopted the exemption decision, it is also sufficient to note that the membership rules were notified in point I of Title III of that application.

53. In those circumstances, the dismissal of the applicant's complaint on the ground that the former membership rules of the EBU do not fall within the scope of [Article 81(1) EC], that is to say, the criteria are not in themselves restrictions on competition, constitutes a substantial change in the Commission's position which it has not in any way justified. It follows that the statement of reasons for the contested decision does not allow the applicant to ascertain the grounds on which its complaint was dismissed and that the Commission has not therefore complied with its obligation under Article 253 EC.

54. That lack of reasoning is all the more serious if the contested decision is placed in its context and, in particular, if it is interpreted in the light of the correspondence exchanged between the EBU and the applicant concerning the latter's application for membership. It emerges from that correspondence, and in particular from the letters of 20 December 1996 and 8 May and 3 June 1997, that the EBU's membership rules and, more particularly, the consequences of the annulment by the Court of First Instance of the exemption which those rules previously enjoyed, are at the heart of the difference between the applicant and the EBU, in relation to which the Commission was led to take a position. Therefore, the Commission could not remove the EBU's membership conditions from the argument without putting forward grounds enabling the applicant to understand such a decision.

55. It follows that the contested decision must be annulled for insufficient statement of reasons.

56. In its second claim, the applicant argues that the Commission did not reply to the part of the complaint concerning the discrimination which it suffered from the EBU vis-à-vis some of its members.

57. It should be noted that, according to consistent case-law, where the Commission has a power of appraisal in order to carry out its duties, respect for the rights guaranteed by the Community legal order in administrative procedures is all the more fundamental. Those guarantees include, in particular, the duty of the competent institution to examine carefully and impartially all the relevant aspects of the individual case (Case C-269/90, *Technische Universität München*, paragraph 14; and Case T-44/90, *La Cinq v Commission*, paragraph 86).

58. Thus, in the context of investigating applications submitted to the Commission pursuant to Article 3 of Regulation No 17, the Court of First Instance has held that 'although the Commission cannot be compelled to conduct an investigation, the procedural safeguards provided for by Article 6 of Regulation No 99/63 oblige it nevertheless to examine carefully the factual and legal particulars brought to its notice by the complainant in order to decide whether they disclose conduct of such a kind as to distort competition in the common market and affect trade between the Member States (see Case T-7/92, *Asia Motor France v Commission*, paragraph 35, and the judgments referred to therein).

59. Lastly, although in accordance with the case-law of the Court of First Instance cited above the Commission is not obliged to investigate each of the complaints lodged with it, in contrast, once it decides to proceed with an investigation, it must, in the absence of a duly substantiated statement of reasons, conduct it with the requisite care, seriousness and diligence so as to be able to assess with full knowledge of the case the factual and legal particulars submitted for its appraisal by the complainants (*Asia Motor France v Commission*, cited above, paragraph 36).

60. It is in the light of those considerations that it needs to be assessed whether the contested decision contains an appropriate examination of the factual and legal particulars submitted for the Commission's appraisal.

61. In point 5 of the complaint, the applicant states that Article 5 of the EBU's Statutes expressly provided, in the 1988 version, that any member which did not fulfil the conditions imposed in order to become an active member of the EBU ceased to belong to that association. However, to take account of the rights acquired by former members, Article 21 of the Statutes provided that Article 3(2) (now Article 3(3) in the 1992 version) of the Statutes would not be applicable to bodies which, at the time of its entry into force on 1 March 1988, were already active members and did not fulfil all the membership conditions laid down by that

latter provision. The applicant states that, in the 1992 version of the EBU's Statutes, the content of Article 21, cited above, appears in Article 6.

62. It then states that a company which was a member of the EBU before 1 March 1988 could retain that capacity even if it had never satisfied the membership conditions notified to the Commission. The applicant thus points out in its complaint that 'thanks to that article, CANAL+ remained an active member of theEBU even though that channel never fulfilled the membership criteria before they were annulled by the Court of First Instance, in particular as to the coverage of national territory, which does not exceed 72%. According to the applicant, the situation of CANAL+ was the most striking example of the competitive disadvantage which it suffered, especially 'if one bears in mind that the EBU's main complaint against [the applicant] was always that it did not offer sufficient coverage of the national population.

63. At the hearing, the Commission stated that CANAL+ no longer formed part of the Eurovision system but that it continued to enjoy rights previously acquired.

64. It should be remembered that, when examining complaints, the Commission is required to assess in each case how serious the alleged interferences with competition are and how persistent their consequences are. That obligation means in particular that it must take into account the duration and extent of the infringements complained of and their effect on the competition situation in the Community.

65. In deciding to dismiss a complaint of practices allegedly contrary to the Treaty, the Commission cannot therefore rely solely on the fact that those practices have ceased, without having ascertained whether anti-competitive effects still continue (see, to that effect, Case C-119/97 P, *UFEX v Commission*, paragraphs 92 to 96).

66. In this case, the Commission refused to examine the part of the complaint concerning the EBU's treatment of CANAL+, giving as its reason the mere fact that the practices allegedly contrary to the Treaty had ceased in that CANAL+ no longer formed part of the Eurovision system, thereby omitting in this case to assess the possible persistence of anti-competitive effects and their impact on the market in question, consequently infringing the obligations upon it when examining a complaint for infringement of Article 81 EC.

67. It follows from the whole of the above that the contested decision must be annulled on the grounds that, first, the Commission infringed its obligation to state reasons under Article 253 EC, and, second, it infringed the obligations which it has when dealing with complaints of infringements of competition law.

[The Court annulled the Commission's decision of 29 June 1999, which had rejected the complaint submitted by Métropole Télévision SA, and ordered the Commission to pay the costs.] ■

PROFESSIONAL RULES (PATENT AGENTS): THE EPI CASE

Subject: Professional rules
Advertising restrictions
Supply of services
Exemption

Industry: Professional Representatives before the European Patent Office
(Implications for other professional bodies)

Parties: Institute of Professional Representatives before the European Patent Office
Commission of the European Communities

Source: Judgment of the Court of First Instance, dated 28 March 2001, in Case T-144/99 (*Institute of Professional Representatives before the European Patent Office v Commission of the European Communities*)

(Note. This case is interesting for a number of separate reasons:

- *the application of the rules on competition to codes of professional conduct;*
- *the relationship between the rules on competition and a Directive allowing some restrictions in commercial conduct;*
- *the extent to which rules governing professional conduct are "indispensable" to the profession;*
- *the right of a party who has been granted exemption to challenge that exemption;*
- *the rules applying to the date on which an exemption, granted for a fixed period, should expire;*
- *the rules applying to the right of a party to seek renewal of an exemption which has been granted for a fixed period; and*
- *the rule prohibiting reliance on evidence which cannot be brought before the Court.*

As previous case-law has established, the rules on competition apply to the liberal professions; but some rules, if expressed correctly, are indispensable to the way in which the profession functions. As to the rules governing comparative advertising and the consultations with other professional firms' clients, the Directive on Comparative Advertising lays down general principles, to which there may be reasonable exceptions; and in any case the Directive cannot overrule the competition provisions of the Treaty.

It may be questioned why a party who has been granted exemption should seek to challenge it. The reason is that the party concerned may, even after the event, wish to challenge the finding that the exempted rule or practice constituted an infringement in the first place. This is the party's right, according to the Court.

Whether it is wisely exercised is another matter altogether. Likewise, the party may challenge the date on which a fixed period exemption expires; but, if the Commission has clearly stated the reason for the choice of date, and the reason is fair, the Court will not uphold the challenge. Moreover, the party may seek renewal.

In this case, the Commission, as defendant, sought to rely on evidence contained in the opinion of the Advisory Committee on Cartels and Monopolies; but, since these opinions are not available to the applicants to the Court, it would be improper to rely on their contents.)

Judgment

1. The Convention on the Grant of European Patents (hereinafter the Convention) signed in Munich on 5 October 1973 establishes a system of law, common to the Contracting States, for the grant of patents for invention.

2. That Convention established the European Patent Organisation, which is responsible for granting European patents.

3. The bodies of that organisation are the European Patent Office (hereinafter 'the EPO) and the Administrative Council. The EPO grants patents under the supervision of the Administrative Council.

4. Article 134 of the Convention provides that professional representation of natural or legal persons in proceedings established by the Convention may be undertaken only by professional representatives whose names appear on a list maintained for that purpose by the EPO.

5. On 21 October 1977, the Administrative Council of the European Patents Organisation adopted two regulations:
- the first, adopted pursuant to Article 134(8)(b) of the Convention, set up an Institute of Professional Representatives before the EPO (hereinafter 'the EPI);
- the second, adopted pursuant to Article 134(8)(c) of the Convention, concerned the disciplinary power to be exercised by the EPI over professional representatives.

6. The EPI is a non-profit making organisation whose expenditure is covered by its own resources, derived in particular from the subscriptions paid by its members. Its objects are, *inter alia*, to collaborate with the European Patent Organisation on matters relating to the profession of professional representative, in particular on disciplinary matters and on the European Qualifying Examination, and to ensure compliance by its members with the Rules of Professional Conduct, notably by way of recommendations.

7. All persons on the list of professional representatives are members of the EPI.

8. The members of the EPI elect a Council from among their numbers. The Council may, within the terms of the Regulation on Discipline for Professional

Representatives, make recommendations on conduct (Article 9(3) of the Regulation on the Establishment of the EPI).

9. Thus the Council of the EPI established a Code of Professional Conduct (hereinafter the Code of Conduct).

10. Council Directive 84/450/EEC of 10 September 1984 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising, as amended by Directive 97/55/EC of the European Parliament and of the Council of 6 October 1997, so as to include comparative advertising (hereinafter the Directive), provides in Article 3a that comparative advertising is to be permitted on condition, inter alia, that it is not misleading.

11. Article 7(5) of the Directive provides:

> Nothing in this Directive shall prevent Member States from, in compliance with the provisions of the Treaty, maintaining or introducing bans or limitations on the use of comparisons in the advertising of professional services, whether imposed directly or by a body or organisation responsible, under the law of the Member States, for regulating the exercise of a professional activity.

12. The period within which Member States were required to comply with the Directive was stated therein to expire on 23 April 2000.

Facts and procedure

13. On 17 July 1996, the EPI notified the Code of Conduct, as last amended on 7 May 1996, with a view to obtaining negative clearance or, failing that, an exemption, in accordance with Articles 2 and 4 of Regulation 17 of 1962.

14. That notification was in reply to the statement of objections sent to EPI by the Commission on 18 November 1995 following a complaint lodged on 8 June 1992 by a patent agent established in the United Kingdom.

15. On 18 December 1996, the Commission sent a letter of warning to the EPI stating inter alia that an exemption could not be granted either in respect of the provisions of the code of conduct prohibiting advertising, based as they were on vague and imprecise notions, or with regard to the requirement that members charge reasonable fees.

16. On 3 April 1997, the EPI transmitted a new version of the code of Conduct to the Commission, but this was not judged satisfactory. On 14 October 1997, following discussions with the Commission, the EPI submitted a version of the Code of Conduct as last amended on 30 September and 3 October 1997.

17. This latest version of the Code of Conduct contains, in particular, the following provisions:

Article 2 - Advertising

(a) Advertising is generally permitted provided that it is true and objective and conforms with basic principles such as integrity and compliance with professional secrecy.

(b) The following are exceptions to permitted advertising:

(1) comparison of the professional services of one member with those of another;

(2) ...

(3) the mention of the name of another professional entity unless there is a written cooperation agreement between the member and that entity; ...

...

Article 5 - Relationship with other Members

...

(c)A member must avoid any exchange of views about a specific case which he knows or suspects is being handled by another member with the client of the case, unless the client declares his wish to have an independent view or to change his representative. The member may inform the other member only if the client agrees.

....

18. On 7 April 1999, the Commission adopted Decision 1999/267/EC relating to a proceeding pursuant to Article 85 of the EC Treaty.

19. Article 1 of that Decision is worded as follows:

> Article 85(1) of the EC Treaty and Article 53(1) of the EEA Agreement are, pursuant to Article 85(3) of the EC Treaty and Article 53(3) of the EEA Agreement respectively, hereby declared inapplicable to the provisions of the [Code of Conduct], in the version as adopted on 30 September and 3 October 1997, prohibiting members from carrying out comparative advertising (Article 2(b)(1) and (3)) and, in so far as it is liable to make it more difficult to supply services to users which have already been clients of other representatives in a specific case, to Article 5(c) thereof. This exemption shall be granted from 14 October 1997 to 23 April 2000.

20. By document lodged at the Court Registry on 14 June 1999, the applicant brought the present action for annulment.

21. By fax received by the Court Registry on 7 October 1999, the applicant requested production of a document, namely the Opinion of 17 November 1998 of the Advisory Committee on Restrictive Practices and Dominant Positions, referred to in the defence.

22. By letter of 25 October 1999, the Commission, relying on Article 10(6) of Regulation No 17, informed the applicant that it did not have the power to communicate that opinion to it.

23. By application lodged at the Court Registry on 27 December 1999, the Ordre Français des Avocats au Barreau de Bruxelles sought leave to intervene in the

proceedings. That application was dismissed by order of the President of the Second Chamber of the Court of First Instance of 22 February 2000 (not published in the ECR).

24. By a separate document lodged at the Court Registry on 6 March 2000, the applicant lodged an application for interim measures, seeking suspension of implementation of Article 1 of the Decision from 23 April 2000. By order of 14 April 2000 in Case T-144/99 R, *Institute of Professional Representatives v Commission*, the President of the Court of First Instance dismissed that application and ordered that costs be reserved.

25. Upon hearing the report of the Judge Rapporteur, the Court (Second Chamber) decided to open the oral procedure. By way of measures of organisation of procedure, it asked the parties to reply to a question at the hearing.

26. The parties presented oral argument and gave their replies to the Court's questions at the hearing on 9 November 2000.

Forms of order sought by the parties

27. The applicant claims that the Court should:

- annul the Decision in so far as it relates to Article 2(b)(1) and (3) and Article 5(c) of the Code of Conduct;
- preclude from discussion the reference to the opinion of the Advisory Committee on Restrictive Practices and Dominant Positions of 17 November 1998 and also the argument deriving therefrom on the justification for the limited exemption period and, by implication, the application of Article 85(1) of the EC Treaty (now Article 81(1) EC);
- in the alternative, annul the Decision in that it confers only a temporary exemption on Article 2(b)(1) and (3) and Article 5(c) of the Code of Conduct;
- order the defendant to pay the costs.

28. The defendant contends that the Court should:

- dismiss the action;
- order the applicant to pay the costs.

[The applicant offered three pleas at this stage. The first, in paragraphs 29 to 44, was based on the proposition that the Commission had failed to state its reasons fully. The Court disagreed; and the plea was rejected. The second plea, which was discussed in paragraphs 45 to 55, was based on the supposed conflict between the Directive and the rules on competition. The Court again disagreed and added (in paragraph 54): "even supposing that Article 81 EC prevents Member States from making use of the possibility offered by the Directive, it cannot be accepted that the Directive permits a derogation from a Treaty rule".]

Third plea in law, alleging infringement of Article 81 EC

[This plea was more substantial. The arguments of the parties are set out in paragraphs 56 to 60. Essentially, the applicant was claiming that professional codes of conduct pursued an aim in the general interest and that it was therefore necessary to accept, by application of the rule of reason, that they were indispensable and could not therefore fall within the scope of Article 81(1) EC.]

Findings of the Court

62. It should be noted, first of all, that the applicant does not dispute the determination of the relevant market, or the effect on trade between Member States, or its classification as an association of undertakings within the meaning of Article 81(1) EC or the classification of the Code of Conduct as a decision of an association of undertakings for the purposes of that provision.

63. What is at issue in the present action is therefore only whether the provisions in question of Article 2 of the Code of Conduct, by prohibiting advertising comparing professional representatives, constitute restrictions of competition for the purposes of Article 81 EC.

64. In that regard, it cannot be accepted that rules which organise the exercise of a profession fall as a matter of principle outside the scope of Article 81(1) EC merely because they are classified as rules of professional conduct by the competent bodies.

65. Only an examination on a case-by-case basis permits an assessment of the validity of such a rule under Article 81(1) EC, in particular by taking account of its impact on the freedom of action of the members of the profession and on its organisation and also on the recipients of the services in question.

66. Furthermore, the case-law which the applicant cites in support of its argument is irrelevant. The judgments in question relate to the principles of freedom of establishment and freedom to provide services. It follows that rules of professional conduct in force in one Member State which pursue an aim in the general interest apply to professionals who come to practise on the territory of that State without infringing those principles. However, no conclusion can be drawn from that case-law as concerns the applicability of Article 81 EC in the present case.

67. Furthermore, when those drafting the EC Treaty intended to remove certain activities from the ambit of the competition rules or to apply a specific regime to them, they did so expressly. That is what they did in the case of the production of and trade in agricultural products (Article 36 EC) (Joined Cases 209/84 to 213/84, *Asjes*, paragraph 40) or the production of and trade in arms and war material (Article 296 EC).

68. In those circumstances, it is necessary to consider whether the Commission was right to conclude that the provisions of Article 2 of the Code of Conduct

called into question in the Decision constitute restrictions of competition within the meaning of Article 81(1) EC.

69. As is clear, in particular, from recitals 43 and 46 to the Decision, and from Article 1 of the operative part thereof, Article 2(b) of the Code of Conduct prohibits advertising comparing professional representatives in both subparagraphs 1 and 3.

70. However, Article 2(b)(3) does not refer either to comparative advertising or to relations between members of the EPI, but only to the mention of the name of another professional entity unless there is a written cooperation agreement between the member and that entity. That provision thus seeks to ensure that a professional representative does not rely unduly on professional relationships.

71. The Commission was therefore wrong to find that that subparagraph constituted a restriction of competition and was therefore incompatible with Article 85 of the Treaty, in so far as it prohibited advertising comparing professional representatives. Article 1 of the Decision must therefore be annulled to that extent.

72. As regards the prohibition in the strict sense of comparative advertising provided for in Article 2(b)(1) of the Code of Conduct, it should be noted, first of all, that advertising is an important element of the competitive situation on any given market, since it provides a better picture of the merits of each of the operators, the quality of their services and their fees.

73. Furthermore, when it is fair and in accordance with the appropriate rules, comparative advertising makes it possible in particular to provide more information to users and thus help them choose a professional representative in the Community as a whole whom they may approach.

74. Consequently, a simple prohibition of comparative advertising restricts the ability of more efficient professional representatives to develop their services, with the consequence, *inter alia*, that the clientele of each professional representative is crystallised within a national market.

75. The Commission is therefore quite right, in the Decision, to identify the favourable effects which fair and appropriate comparative advertising has on competition (recital 41) and, on the other hand, the restrictions on competition which the prohibition of any form of that method of advertising entails (recital 43).

76. The applicant's argument that success must depend much more on merit than on the pull of advertising, which favours representatives with the greatest financial means, cannot be accepted. It is sufficient to note that that argument would haves the effect of excluding any form of advertising, since advertising favours professional representatives with significant financial resources. On the contrary, it follows from the Code of Conduct itself, in Article 2(a), that professional representatives are generally permitted to advertise.

77. Furthermore, the applicant has maintained that the prohibition of comparative advertising was based on the discretion, dignity and necessary courtesy that must prevail within a profession such as that of professional representative.

78. However, where it is not shown that the absolute prohibition of comparative advertising is objectively necessary in order to preserve the dignity and rules of conduct of the profession concerned, the applicant's argument is not capable of affecting the lawfulness of the Decision.

79. Thus, it has not been demonstrated that the Commission erred in concluding that an outright prohibition of advertising comparing professional representatives fell within the scope of Article 85(1) of the Treaty.

80. The application for annulment of Article 1 of the Decision must therefore be dismissed in so far as it relates to Article 2(b)(1) of the Code of Conduct.

[Paragraphs 81 to 88 set out the applicant's claim that Article 5(c) of the Code of Conduct should not have been treated as an infringement. The Court made two preliminary points in paragraphs 89 and 90 and then went on to discuss the substance of the argument as follows.]

91. First of all, contrary to the first sentence of recital 37 to the Decision, Article 5(c) of the Code of Conduct does not prohibit a representative from approaching a client of another representative ... when the other representative has finished handling a case involving the client.

92. In reality, as may be seen from its actual wording, Article 5(c) of the Code of Conduct only prohibits a representative, when he offers his services to a client of another representative, from having an exchange of views with that client about a case which has been terminated and, a fortiori, from using that case in order to establish contact with the client.

93. However, the Commission has specified the nature of its objections in the second paragraph of recital 37 to the Decision, where it states that 'if a representative is not allowed to exchange views with a potential client on a specific case which has already been handled by another representative, it will be difficult for him to offer to handle new cases which would be linked to the specific case and he will even have difficulties in establishing any professional contact with that client. It is to that extent that the Commission finds in Article 1 of the Decision that Article 5(c) of the Code of Conduct is incompatible with Article 85 of the Treaty.

94. That assessment cannot be accepted, since Article 5(c) of the Code of Conduct does not have the scope which the Commission ascribes to it.

95. As stated above, Article 5(c) does not prohibit the offer of services. Furthermore, it does not prohibit a representative, when approaching the client of

another representative, from providing any information relating, in particular, to his experience, his skills, his training or his fees. Nor does it prevent an exchange of views, even on a specific case, if the client declares his wish to have an independent opinion or expresses his intention to change representatives.

96. Article 5(c) of the Code of Conduct only prohibits an exchange of views with a client on the initiative of a representative about a specific case which has been terminated and which was handled by another representative, and that prohibition can be lifted by the client.

97. In those circumstances, the Commission erred in stating that, owing in particular to that provision, representatives' possibilities of offering their services to (domestic or foreign) potential clients who have already been clients of another representative in a specific case are considerably reduced (recital 43 to the Decision).

98. In reality, the objective pursued by Article 5(c) of the Code of Conduct, as it emerges from that article as a whole, is to prevent a representative, when offering services to a client, from discrediting a fellow professional by questioning his conduct of a case which has been terminated.

99. Having regard to all those factors, it must be concluded that it was on the basis of an incorrect analysis of Article 5(c) of the Code of Conduct that the Commission came to the conclusion that that measure constituted a restriction of competition within the meaning of Article 85(1) of the Treaty.

100. In those circumstances, Article 1 of the Decision must be annulled in so far as it relates to Article 5(c) of the Code of Conduct.

[In paragraphs 101 to 106, the Court considers and rejects the applicant's argument that the Commission had not given sufficient reasons for its choice of a date for the end of the period of exemption: the Commission had said clearly that the date was based on the coming into force of the Directive. In paragraphs 107 to 124, further arguments by the parties are set out on issues dealt with by the Court as follows.]

Findings of the Court

125. It is clear from Article 1 of the Decision that the provisions of Article 85(1) of the Treaty were, pursuant to article 85(3) of the Treaty, declared inapplicable to Article 2(b)(1) of the Code of Conduct.

126. That exemption was granted until 23 April 2000.

127. The applicant's argument seeks to establish that Article 2(b)(1) of the Code of Conduct fulfils the conditions for the grant of an exemption.

128. Since the Commission Decision makes a finding to that effect, however, such an argument is ineffective. The applicant's objection can relate only to the duration of the exemption.

129. In that regard, it should be borne in mind that the duration of an exemption must be sufficient to enable the beneficiaries to achieve the benefits justifying such exemption (Joined Cases T-374/94, T-375/94, T-375/94, T-384/94, T-388/94 *European Night Services and Others v Commission*, paragraph 230).

130. In the present case, the main benefit identified in the Decision consists in providing for a transitional stage under reasonable conditions. To that end, 23 April 2000, which corresponds to the expiry of the period within which the Directive was to be transposed, was chosen.

131. The applicant has put forward no specific argument to show that, in choosing that date, which is more than one year after the decision was adopted, the Commission made a manifest error of assessment.

132. The plea must therefore be rejected.

133. Furthermore, in its defence the Commission based an argument on a document which it knew could not be disclosed to the applicant. Although the failure to disclose the opinion delivered by the Advisory Committee on Restrictive Practices and Dominant Positions is not contrary to the principle of the right to a fair hearing in the administrative stage of a proceeding pursuant to Article 81 EC (Joined Cases 100/80, 101/80, 102/80, 103/80, *Musique Diffusion Française v Commission*, paragraph 36), nevertheless, except in exceptional circumstances, parties to judicial proceedings cannot, without infringing the adversarial principle, base their claims on documents which they cannot adduce as evidence.

134. However, it follows from the foregoing considerations that, since that document is not essential to the outcome of the present case, no conclusion can be drawn from that finding.

135. The applicant maintains that the Commission has infringed Article 8 of Regulation No 17. Although the Commission expressly found that the conditions of Article 85(3) of the Treaty were satisfied, it granted an exemption only on a temporary basis, without making any provision for renewing it.

136. Article 8(1) and (2) of Regulation No 17 provide that an exemption decision is to be issued for [only] a specified period and may on application be renewed if the requirements of Article 85(3) of the Treaty continue to be satisfied.

137.In the present case the exemption was granted until 23 April 2000 and there was nothing to prevent the applicant from requesting the Commission to renew it.

138. The plea must therefore be rejected.

Costs

139. Under the first subparagraph of Article 87(3) of the Rules of Procedure, the Court may order that the costs be shared where each party succeeds on some and fails on other heads.

140. In the present case, the Court considers that each party must be ordered to bear its own costs, including those incurred in the interlocutory procedure.

Court's Ruling

The Court hereby:

1. Annuls Article 1 of Commission Decision 1999/267/EC of 7 April 1999 relating to a proceeding pursuant to Article 85 of the EC Treaty (IV/36147 EPI Code of Conduct) in so far as it concerns Article 2(b)(3) and Article 5(c) of the Code of Conduct of the Institute of Professional Representatives before the European Patent Office;

2. Dismisses the remainder of the application;

3. Orders the parties to bear their own costs, including those incurred in the interlocutory procedure. ■

The Microsoft Case (IV)

The Commission has carried out an investigation into the investments of Microsoft Corporation in the European digital cable television industry. This is to ensure that the technology decisions of cable operators are made on merit and that suppliers of set-top box technology can compete with Microsoft on equal terms. The investigation is being closed now that Microsoft and its strategic allies have agreed to abolish or change their so-called "Technology Boards" so that the latter's recommendations are no longer binding. Following the investigation, Microsoft has agreed to modify its relationship with two partner companies, to avoid the exercise of undue influence over their choice of set-top box technology. Last year, Microsoft had already agreed to reduce its joint controlling position in UK cable TV operator Telewest to a simple minority interest. After the Telewest case, the Commission decided to examine Microsoft's strategic investments in other leading European broadband cable operators: Dutch-based UPC, NTL of Britain and TV Cabo of Portugal. In two of these companies (UPC and NTL), the investment was accompanied by the setting up of a joint Technology Board which made binding recommendations on the technology decisions of the cable company. (Source: Commission Statement IP/01/569, dated 18 April 2001)