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)