

ORDER OF THE PRESIDENT OF THE COURT OF FIRST INSTANCE  
14 April 2000 \*

In Case T-144/99 R,

**Institute of Professional Representatives before the European Patent Office**, established in Munich (Germany), represented by R. Collin and M.-C. Mitchell, of the Paris Bar, with an address for service in Luxembourg at the Chambers of Decker and Braun, 16 Avenue Marie-Thérèse,

applicant,

v

**Commission of the European Communities**, represented by E. Gippini Fournier, of its Legal Service, acting as Agent, with an address for service in Luxembourg at the office of C. Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for suspension of operation, as from 23 April 2000, of 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] (OJ 1999 L 106, p. 14),

\* Language of the case: French.

THE PRESIDENT OF THE COURT OF FIRST INSTANCE  
OF THE EUROPEAN COMMUNITIES

makes the following

**Order**

**Legal framework**

- 1 The Regulation on the establishment of an Institute of Professional Representatives before the European Patent Office was adopted by the Administrative Council of the European Patent Organisation ('the EPO') pursuant to Article 134(8)(b) of the Convention on the Grant of European Patents signed in Munich on 5 October 1973 ('the Convention').
  
- 2 The object of the Institute of Professional Representatives before the EPO ('the EPI') is to collaborate with the EPO on matters relating to the profession of professional representative, which include disciplinary matters and the European Qualifying Examination, and to promote compliance by its members with the rules of professional conduct, *inter alia* through the formulation of recommendations. All persons on the list of professional representatives before the EPO are members of the EPI. The EPO is required to inform the EPI of any changes in the list.

3 The profession of professional representative before the EPO is therefore organised and integrated within the EPI. No distinction is made in the Convention between self-employed patent representatives and those employed in the patents department of a firm.

4 Pursuant to Article 134(8)(c) of the Convention, the Administrative Council of the EPO, considering it appropriate to adopt provisions governing the disciplinary powers of the EPI and the EPO in respect of professional representatives, adopted the Regulation on discipline for professional representatives of 21 October 1977 ('the Regulation'). Part I of the Regulation lays down 'Rules of professional conduct', Article 1 of which, entitled 'General professional obligations', provides that, in the performance of his duties, a professional representative is required:

- to exercise his profession conscientiously and in a manner appropriate to its dignity and, in particular, not knowingly to make any false or misleading statement (paragraph 1);
- to conduct himself in such a manner as not to prejudice the necessary confidence in his profession (paragraph 2).

5 A professional representative who fails to comply with the Rules of professional conduct may incur one of the following penalties: a warning, a reprimand, a fine or deletion from the list of professional representatives, either temporarily or for an indefinite period (Article 4 of the Regulation).

6 Infringements of the Rules of professional conduct may be referred to the EPI Disciplinary Committee, the EPO Disciplinary Board and the EPO Disciplinary Board of Appeal (Article 5 of the Regulation).

- 7 The EPI has adopted a Code of Professional Conduct ('the Code') pursuant to Articles 1 to 4 of the Regulation and Article 4(c) of the abovementioned Regulation on the establishment of the EPI.
  
- 8 The EPI Council may amend the Code of its own motion, without the need for authorisation by the EPO.
  
- 9 The purpose of the Code is to govern the conduct and other activities of the members in so far as such activities are related to the Convention.
  
- 10 The Code, in the version thereof relevant for the present case, that is to say, as amended on 30 September and 3 October 1997, includes the following provisions:

'Article 2 — Advertisements

- (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;

...

- (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 — Relations 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.

...'

## Facts and procedure

- 11 On 14 October 1997 the EPI notified the Commission of the latest version of the Code, as amended on 30 September and 3 October 1997, with a view to obtaining negative clearance or, failing that, an exemption from the prohibition of restrictive practices.
  
- 12 On 7 April 1999 the Commission adopted Decision 1999/267/EC relating to a proceeding pursuant to Article 85 of the EC Treaty [IV/36.147 — EPI Code of Conduct] (OJ 1999 L 106, p. 14, hereinafter ‘the contested decision’).
  
- 13 Article 1 of the contested decision reads 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], 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.’

- 14 Under Article 2 of the contested decision, the other provisions of the Code were given negative clearance.
- 15 By application lodged at the Court Registry on 14 June 1999, the applicant brought an action under Article 230 of the EC Treaty for partial annulment of the contested decision, in so far as it relates to Article 2(b)(1) and (3) and Article 5(c) of the Code (Case T-144/99).
- 16 By letter of 28 January 2000 the applicant requested the Commission to suspend the effect of the contested decision pending delivery of the judgment in Case T-144/99.
- 17 The Commission refused that request by letter of 17 February 2000.
- 18 By separate document lodged at the Registry on 6 March 2000, the applicant brought the present action under Article 242 of the EC Treaty for suspension of operation of Article 1 of the contested decision as from 23 April 2000.

- 19 The Commission submitted its observations on the present application for interim relief on 17 March 2000.
- 20 The applicant submitted its observations in reply to the Commission's observations on 28 March 2000.
- 21 By letter of 5 April 2000, the Commission submitted its observations in reply to the applicant's final observations.

## Law

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- 22 Under the combined provisions of Articles 242 and 243 EC and Article 4 of Council Decision 88/591/ECSC, EEC, Euratom, of 24 October 1988 establishing a Court of First Instance of the European Communities (OJ 1988 L 319, p. 1), as amended by Council Decision 93/350/Euratom, ECSC, EEC, of 8 June 1993 (OJ 1993 L 144, p. 21), the Court may, if it considers that circumstances so require, order that application of the contested act be suspended or prescribe any necessary interim measures.
- 23 Article 104(2) of the Rules of Procedure provides that applications for interim measures must state the circumstances giving rise to urgency and the pleas of fact



and law establishing a prima facie case for the interim measures applied for. Those requirements are cumulative, so that an application for suspension of operation must be dismissed if either of them is not met (order of the President of the Court of First Instance of 30 June 1999 in Case T-70/99 R *Alpharma v Council* [1999] ECR II-2027, paragraph 42). In addition, the Court hearing an application for interim relief must balance the interests at stake (order of the President of the Court of Justice of 29 June 1999 in Case C-107/99 R *Italy v Commission* [1999] ECR I-4011, paragraph 59; orders of the President of the Court of First Instance of 21 July 1999 in Case T-191/98 R *DSR-Senator Lines v Commission* [1999] ECR II-2531, paragraph 22, and of 25 November 1999 in Case T-222/99 R *Martinez and de Gaulle v Parliament* [1999] ECR II-3397, paragraph 22).

- 24 It is necessary to ascertain whether those conditions are fulfilled in the present case.

### *Arguments of the parties*

#### Admissibility

- 25 The Commission observes that Article 1 of the contested decision will cease to have effect that on 23 April 2000 and is not intended to have legal effect after that date, and also that it is a measure favourable to the applicant. Consequently, the Commission questions whether the application for interim relief is admissible.
- 26 In addition, the Commission contends that, in order for the application to have any purpose, it must be construed as meaning that the applicant is seeking from the Court a declaration which would be treated either as an exemption granted by

the Community judicature or as a sort of ‘provisional negative clearance’ for the contested provisions of the Code. The present application seeks the ‘suspension’, in relation to the applicant, of a provision of the EC Treaty, namely the prohibition laid down in Article 81(1) EC. According to the Commission, it is clear from the relevant case-law that an application for interim relief aimed at obtaining a provisional authorisation goes further than what the applicant could obtain by means of its main action (order of the Court of Justice of 12 May 1959 in Case 19/59 R *Geitling and Others v High Authority* [1960] ECR 34). Thus, according to case-law (order of the President of the Court of First Instance of 7 June 1991 in Case T-19/91 R *Vichy v Commission* [1991] ECR II-265, paragraph 20), a decision by the Commission to withdraw immunity to a fine under Article 15(6) of Regulation No 17 of the Council of 6 February 1962: First Regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-62, p. 87), does not, in itself, contain any injunction and requires no enforcement. Consequently, the alleged implicit finding in the contested decision of inconsistency with Article 81(1) EC is likewise incapable of forming the subject of a measure suspending its operation.

- 27 The applicant observes that Article 1 of the contested decision produces obvious legal effects which, as such, may be the subject of an application for suspension of their operation, even if those effects are not expressly set out. As from 23 April 2000, the applicant will not be able to retain the Code in its present form without bad faith and without running the risk of a fine.

The existence of a prima facie case

- 28 The applicant puts forwards, in essence, two pleas in law to show that its claims are prima facie justified.

29 First, it claims that the Commission had failed to fulfil its obligation to provide a statement of reasons and, thereby, to comply with essential procedural requirements, inasmuch as it has not explained how the inclusion in the Code of the ban on comparative advertising is contrary to Community law, in particular Article 81 EC, when 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 (OJ 1984 L 250, p. 17), as amended by Directive 97/55/EC of the European Parliament and of the Council of 6 October 1997 (OJ 1997 L 290, p. 18), permits a ban on comparative advertising by the professions.

30 Second, the applicant claims that the Commission has infringed the rules of the EC Treaty, in particular Article 81 EC, and the rules of law concerning its application, by declaring Article 2(b)(1) and (3) and Article 5(c) of the Code to be contrary to Article 81(1) EC, whereas:

— first, Directive 97/55 expressly provides that comparative advertising may be prohibited in respect of the professions, which presupposes that such a ban is not contrary to Article 81(1) EC, and

— second, the provisions in question are professional ethical obligations, the objective of which is in the public interest, and which by their nature constitute an element of competition in accordance with Article 81(1) EC.

31 Alternatively, the applicant claims that the Commission has (1) failed to fulfil its obligation to provide a statement of reasons and (2) has infringed Article 81(3) EC and Article 8 of Regulation No 17 by exempting the two contested provisions for a transitional period only so as to enable the applicant to amend the Code,

despite the fact that the conditions for application of Article 81(3) EC had already been fully met.

- 32 The Commission, observing that the applicant merely refers to the arguments put forward in the main action, questions whether this is consistent with Article 104(2) of the Rules of Procedure. Since the application for interim measures does not deal with the question of the prima facie justification for such measures, the Commission concludes that it is unable to submit more detailed observations on this point.

### Urgency

- 33 According to the applicant, suspension of the operation of Article 1 of the contested decision is a matter of manifest urgency. The amendments which it is required to make to the Code in order to allow comparative advertising and the possibility of actively canvassing the clients of other professional representatives would have irreversible consequences for its members.
- 34 With regard to competition, the applicant argues that the amendments in question would have the effect of preventing smaller firms which do not have the necessary financial capacity from resisting comparative advertising and its secondary effect of disparagement. They would also be unable to resist the active canvassing of clients and to prevent damage to the clients themselves. The amendments would also have perverse lasting effects in relation to clients, particularly in terms of image.

- 35 Finally, the applicant refers to the difficulty which the profession would have, once those practices were taken up, in reverting to the previous situation and the practical impossibility of monitoring such a backward step, particularly because of the widespread geographical dispersal of professional representatives.
- 36 The applicant concludes that the amendments to be made to the Code have a manifestly adverse and irreparable effect on the interests of the profession which it represents, and that the interests of the public are also affected because of the virtual impossibility of checking the truth of such advertising.
- 37 The Commission considers that the criterion of urgency has not been fulfilled, because of the period which has elapsed between the adoption of the contested decision and the lodging of the present application for interim measures. During that period, the applicant could have adopted new rules consistent with Article 81(1) EC or notified the Commission of rules which would have met the exemption conditions for a longer period, or it could have requested a renewal of the exemption.
- 38 The Commission concludes that, even assuming that a situation of urgency exists, it is due to the applicant's failure to act.
- 39 As regards the risk of serious and irreparable damage, the Commission submits that no proof of this has been adduced by the applicant.

*Assessment by the Court*

- 40 It is necessary to begin by considering the criterion of urgency, as the question of the admissibility of the present application may be left aside.
- 41 First of all, it must be observed that an applicant's interest in obtaining the measures sought is of particular importance in proceedings for interim relief.
- 42 It is settled case-law that the urgency of an application for interim measures must be assessed in relation to the necessity for an interim order to prevent serious and irreparable damage to the party applying for those measures. It is for the party seeking suspension of the operation of an act to prove that it cannot wait for the outcome of the main proceedings without suffering damage of that kind (order of the President of the Court of First Instance of 9 August 1999 in Joined Cases T-38/99 R to T-42/99 R, T-45/99 R and T-48/99 R *Sociedade Agrícola dos Arinhos and Others v Commission* [1999] ECR II-2567, paragraph 42).
- 43 In order be able to determine whether the damage which the applicant fears is serious and irreparable and therefore provides grounds for, exceptionally, disapplying the contested decision, the judge hearing the application must have hard evidence allowing him to determine the precise consequences which the absence of the measures applied for would in all probability entail (order of the President of the Fourth Chamber (Extended Composition) of the Court of First Instance of 2 April 1998 in Case T-86/96 R *Arbeitsgemeinschaft Deutscher Luftfahrt-Unternehmen and Hapag-Lloyd v Commission* [1998] ECR II-641, paragraph 64, and the order of the President of the Second Chamber of the Court of First Instance of 16 July 1999 in Case T-143/99 R *Hortiplant v Commission* [1999] ECR II-2451, paragraph 18).

- 44 As regards the applicant's assertion that the changes to be made to the Code would have irreversible consequences for competition, including in particular the exclusion of small firms, the applicant has furnished no evidence to justify the grant of interim measures. It has produced no economic or accounting data relating to the firms in question which would enable the judge hearing the interlocutory application to make a sufficiently well-founded prognosis himself as regards their being barred from competing (order of 2 October 1997 of the President of the Court of First Instance in Case T-213/97 R *Eurocoton and Others v Council* [1997] ECR II-1609, paragraph 47).
- 45 With regard to the allegedly irreversible consequences in relation to clients, particularly so far as image is concerned, and the allegedly adverse effect on the public interest in general, it must be observed that the contested decision states (paragraph 48) that the Commission fixed a transitional period 'to enable representatives to adapt gradually to the new situation and to avoid the risks of confusion for users, which are liable to damage the image that professional representatives give to the institutions before which they represent their clients' and that such risks could result from too sudden a transition. However, the applicant has adduced no hard evidence to show that the temporary exemption concerning the two contested provisions of the Code is likely to cause serious and irreparable damage in relation to clients, although a transitional period of more than one year was allowed. Furthermore, the applicant has not explained why that period was not used to seek a renewal of the exemption at issue or to adapt to the contested decision.
- 46 Finally, by referring, without further reasons, to the alleged difficulty which the profession would have, once the changes were made to the Code, in reverting to the previous situation and the virtual impossibility of monitoring such a backward step, particularly because of the widespread geographical dispersal of professional representatives, the applicant has likewise not shown the existence of serious and irreparable damage.

- 47 It follows from the foregoing that the applicant has not succeeded in showing that it would suffer serious and irreparable damage if the interim measures were not granted.
- 48 Consequently, the application for interim relief must be dismissed, without their being any need to consider whether the other criteria for the suspension of operation are fulfilled.

On those grounds,

THE PRESIDENT OF THE COURT OF FIRST INSTANCE

hereby orders:

1. The application for interim measures is dismissed.
2. The costs are reserved.

Luxembourg, 14 April 2000.

H. Jung

Registrar

B. Vesterdorf

President