JUDGMENT OF THE COURT OF FIRST INSTANCE (Second Chamber)
28 March 2001 *

In Case T-144/99,

Institute of Professional Representatives before the European Patent Office, established in Munich (Germany), represented by R. Collin and M.-C. Mitchell, Avocats, with an address for service in Luxembourg,

applicant,

v

Commission of the European Communities, represented by E. Gippini Fournier, acting as Agent, with an address for service in Luxembourg,

defendant,

* Language of the case: French.

APPLICATION for annulment of Commission Decision 1999/267/EC of 7 April 1999 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),

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Second Chamber),

composed of: A.W.H. Meij, President, A. Potocki and J. Pirrung, Judges,

Registrar: G. Herzig, Administrator,

having regard to the written procedure and further to the hearing on 9 November 2000,

gives the following

Judgment

Legal background

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 only be undertaken 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 (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, so as to include comparative advertising (OJ 1997 L 290, p. 18) (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 No 17 of the Council of 6 February 1962: First Regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-1962, p. 87).

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;

...

(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 (IV/36.147 EPI code of conduct) (OJ 1999 L 106, p. 14, hereinafter 'the Decision').

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* [2000] ECR II-2067, 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.

Admissibility

29 During the oral procedure, the defendant expressed doubts as to the admissibility of the action and observed that the Decision should give the applicant cause for satisfaction, since it granted its request for an exemption.

30 Under Article 113 of its Rules of Procedure, the Court may at any time, even of its own motion, consider whether there exists any absolute bar to proceeding with a case, which, according to settled case-law, includes the conditions of admissibility of an action set out in the fourth paragraph of Article 230 EC (Case C-313/90 *CIRFS and Others* v *Commission* [1993] I-1125, paragraph 23).

31 The Court observes, first of all, that it was only after a complaint had been lodged and a statement of objections sent to the applicant that the Code of Conduct was notified to the Commission, with a view to obtaining, principally, negative clearance and, only in the alternative, an exemption.

32 Furthermore, the grant of an exemption presupposes that the provisions in question fall within the prohibition imposed by Article 81(1) EC (Case 32/65 *Italy* v *Council and Commission* [1966] ECR 389, at 405-6). Therefore, in declaring in Article 1 of the Decision that Article 85(1) of the Treaty is, pursuant to Article 85(3) of the Treaty, inapplicable to the provisions of the Code of Conduct, the Commission impliedly but necessarily rejected the applicant's application for negative clearance.

33 It is therefore immaterial that the finding of infringement is expressly stated only in the grounds of the Decision, since that finding constitutes the basis of the EPI's obligation to terminate the infringement, and its effects on the applicant's legal situation do not depend in its position in the Decision (see, in that regard, Joined Cases 56/64 and 58/64 *Consten and Grundig* v *Commission* [1966] ECR 299, at 338-9).

34 To that extent, the Decision indisputably produces binding legal effects such as to affect the applicant's interests by bringing about a distinct change in its legal position (Joined Cases C-68/94 and C-30/95 *France and Others* v *Commission* [1998] ECR I-1375, paragraph 62).

35 A further reason why the applicant's interest in bringing proceedings cannot be doubted is that annulment of the Decision would restore it to the position prior to the finding of infringement (see, to that effect, Case 22/70 *Commission* v *Council* [1971] ECR 263, paragraph 60).

The application for annulment of the first subparagraph of Article 1 of the Decision, in so far as it relates to Article 2 of the Code of Conduct

36 The applicant puts forward three pleas in law, alleging breach of the obligation to state reasons, breach of Article 7(5) of the Directive and infringement of Article 81 EC.

First plea in law, alleging breach of the obligation to state reasons

Arguments of the parties

37 The applicant refers, first of all, to the derogation provided for in Article 7(5) of the Directive and claims that in the Decision the Commission merely refused to apply that derogation on the ground that it could only be applied 'in compliance

with the provisions of the Treaty'. The Commission thus directly calls into question the lawfulness of Article 7(5) of the Directive with regard to Article 81 EC. However, it is not for the Commission to comment on the lawfulness of a measure adopted by the Parliament and the Council.

38 Since the Directive makes provision for a derogation in favour of the liberal professions by permitting them to prohibit or restrict comparative advertising, the Commission must explain precisely how Article 2(b)(1) and (3) of the Code of Conduct is indicative of provisions incidental to the ban in the strict sense of comparative advertising that are prohibited by Article 81(1) EC.

39 The absence of such an explanation amounts to an infringement of Article 253 EC.

40 The Commission contends that the plea is unfounded.

Findings of the Court

41 The Court has consistently held that the statement of reasons required by Article 253 EC must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in order to enable the persons concerned to ascertain the reasons for the measure and to enable the Court to carry out its review (Case C-56/93 *Belgium* v *Commission* [1996] ECR I-723, paragraph 86).

42 In the present case, it appears that recital 42 to the Decision is devoted exclusively to the question of the interpretation and effect of Article 7(5) of the Directive. In substance, the Commission states, first, that Article 7(5) does not provide for any automatic derogation in respect of rules issued by professional organisations, second, that it is not established that the EPI is an organisation for the purposes of Article 7(5) and, third, that Article 85 of the Treaty is still applicable in any event.

43 Thus, the Commission's reasoning is expressed clearly and unequivocally. In reality, the applicant's objections go not to the statement of reasons for the Decision but to the examination of the substance of the case (see, to that effect, Case T-84/96 *Cipeke* v *Commission* [1997] ECR II-2081, paragraph 47).

44 The first plea in law must consequently be rejected.

Second plea in law, alleging breach of Article 7(5) of the Directive

Arguments of the parties

45 The applicant first of all claims that, contrary to the doubts expressed by the Commission in the Decision, the EPO and, consequently, the EPI must be treated as a body or organisation responsible, under the law of the Member States, for

regulating the exercise of a professional activity within the meaning of Article 7(5) of the Directive.

46 The applicant further submits that the interpretation which the Commission puts on Article 7(5) of the Directive deprives that provision of any effect and renders it meaningless. By relying on Article 81 EC, the Commission calls into question the possibility of prohibiting comparative advertising in the case of the liberal professions, which was none the less the legislature's intention.

47 The applicant claims that the Directive does not in reality raise any problem of hierarchy of norms in relation to the Treaty. In making provision for the possibility of prohibiting comparative advertising in the case of the liberal professions, the legislature took Article 81 EC into consideration and concluded that such a prohibition was not in itself contrary to that provision. Therefore it is only when the ban on comparative advertising is used for purposes other than in the general interest, for example in a discriminatory manner, that Article 81 EC is applicable.

48 The Commission contends that the plea in law submitted by the applicant is unfounded.

Findings of the Court

49 As the Commission indicated in the second paragraph of recital 42 to the Decision, there is no need to decide whether the EPI may be classified as body or organisation responsible, under the law of the Member States, for regulating the exercise of a professional activity, within the meaning of Article 7(5) of the Directive.

50 Even if that were the case, the principle of the hierarchy of norms precludes this provision in a measure of secondary legislation from permitting a derogation from a Treaty provision.

51 Furthermore, Article 7(5) of the Directive refers expressly to that principle. It states that Member States are to be authorised to maintain or introduce provisions prohibiting comparative advertising of professional services, 'in compliance with the provisions of the Treaty'.

52 Contrary to what the applicant maintains, such an approach does not have the consequence that Article 7(5) of the Directive is deprived of practical effect or that it must be considered unlawful.

53 The implementation of Article 81 EC can only proceed from a case-by-case examination for the purpose of determining whether the various criteria on which it depends are satisfied, in particular with regard to the rules for the actual application of Article 7(5) of the Directive and the consequences of such application in each individual case. It cannot be precluded that such an examination may disclose that Article 81(1) EC is not applicable.

54 Furthermore, 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.

55 The second plea in law must therefore be rejected.

Third plea in law, alleging infringement of Article 81 EC

Arguments of the parties

56 The applicant maintains that, in accordance with the case-law of the Court of Justice (Case 33/74 *Van Binsbergen* [1974] ECR 1299; Case 71/76 *Thieffry* [1977] ECR 765; and Case C-55/94 *Gebhard* [1995] ECR I-4165), professional codes of conduct pursue an aim in the general interest. It is therefore necessary to accept, by application of the rule of reason, that they are indispensable and cannot therefore fall within the scope of Article 81(1) EC.

57 Thus, the ban on comparative advertising is necessary in the context of a regulated activity which is a matter of public policy and does not adversely affect competition. In the present case, that ban is based on the discretion, dignity and essential courtesy that must prevail within a liberal profession. It makes it possible to ensure compliance with the ethical rules that bind regulated professions whose members exercise an activity which is a matter of public policy.

58 In a profession such as the one with which the present case is concerned, success should depend much more on merit than on the pull of advertising, which favours representatives with the greatest financial means.

59 Those principles, moreover, are at the origin of the ban on comparative advertising for the liberal professions in Article 7(5) of the Directive. In reality, the services provided by those professions, which form part of a complex whole, are not for the main part objectively comparable.

60 The applicant observes, last, that the ban on advertising comparing professional representatives is only marginal in scope. It constitutes a limited exception to the principle of freedom to advertise and is designed solely to ensure that such advertising does not become unfair and misleading.

61 The Commission contends that both subparagraphs 1 and 3 of Article 2(b) of the Code of Conduct introduce a ban on comparative advertising and thus constitute a restriction of competition.

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* [1986] ECR 1425, 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 have 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.

The application for annulment of the first paragraph of Article 1 of the Decision in so far as it relates to Article 5(c) of the Code of Conduct

Arguments of the parties

81 The applicant relies on an infringement of the EC Treaty and of the Directive.

82 The applicant claims that Article 5(c) of the Code of Conduct corresponds to a classic rule of professional conduct which applies to all liberal professions.

83 With reference to the specific nature of those professions, and in particular of their professional codes of conduct, recognised by case-law (see paragraph 56 above), the applicant maintains that the provision in question does not restrict competition.

84 Moreover, all that is prohibited is an 'active approach' by a professional representative to the clients of other representatives dealing with the same case, which constitutes an essential professional obligation necessary in any liberal profession and justified by the principles of discretion and fairness. That prohibition has no effect on competition, since, at the client's request, a new

representative could act on his behalf, or be required to compete with a number of representatives wishing to handle the same case. Similarly, any client of a representative might be sent advertising material from another representative, since advertising is generally permitted.

85 The prohibition on approaching the client of another representative is justified both while a case is still proceeding, as the Commission accepts, and when a case has been concluded. The sole aim is to prevent unfair practices between professional representatives, since an approach to another representative's client in respect of a case which is proceeding or which has been terminated inevitably implies some criticism of the conduct of the case, contrary to the elementary principles of fairness and confraternity.

86 The Commission's essential objection is that the provision at issue constitutes at least an obstacle to a representative's scope for offering his services in respect of a case which has already been dealt with and for demonstrating his skills; it is thus more difficult for him to approach another representative's former clients.

87 The fact that the client is able to change representatives or seek an independent opinion does not overcome that difficulty, since it implies an approach by the client, solely on the basis of his own opinion, without the benefit of advice volunteered by professionals.

88 Furthermore, in the light of its imprecise wording, Article 5(c) of the Code of Conduct could become a serious obstacle to the establishment of professional contacts with the former clients of other representatives. Contrary to the impression given by the applicant, Article 5(c) does not merely limit a representative's right to approach a client of another representative in the same case.

Findings of the Court

89 It is not disputed by the parties that the Commission has not expressed any reservation in respect of Article 5(c) of the Code of Conduct, in so far as that provision imposes a 'prohibition on offering unsolicited services in respect of cases which are being handled by another representative' (recital 37 to the Decision).

90 On the other hand, it has raised objections in regard to cases which have already been terminated.

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.

The alternative application for annulment of the second paragraph of Article 1 of the Decision in that it grants only a transitional exemption

101 In the light of the foregoing arguments, the present alternative application must be considered only in so far as it relates to Article 2(b)(1) of the Code of Conduct.

102 The applicant advances three pleas in law alleging failure to state reasons, infringement of Article 81(3) EC and infringement of Article 8 of Regulation No 17.

First plea in law, alleging failure to state reasons

103 The applicant claims that the Commission does not explain in the Decision why the conditions of exemption would no longer be fulfilled after the expiry of the transitional period fixed in the second paragraph of Article 1, namely 23 April 2000.

104 That first plea cannot be upheld.

105 In recital 48 to the Decision, the Commission explained that the date of 23 April 2000 had been chosen on the ground, *inter alia*, that it corresponded to the deadline for transposing the Directive into national law.

106 Thus, in accordance with Article 253 EC, the decision contains a clear and unequivocal statement of the Commission's reasoning.

Second plea in law, alleging infringement of Article 81(3) EC

Arguments of the parties

107 The applicant observes, first of all, that the Commission referred in its defence to the position expressed by a number of Member States at the meeting of the Advisory Committee on Restrictive Practices and Dominant Positions on 17 November 1998. Despite being requested to do so by the applicant, however, the Commission refused to produce the opinion delivered by that committee, on the ground that it was not a public document. In Joined Cases 100/80 to 103/80 *Musique diffusion française* v *Commission* [1983] ECR 1825 the Court of Justice held that, pursuant to Article 10(6) of Regulation No 17, an opinion such as that at issue could not be put in evidence. In other words, the Commission, contrary to the *inter partes* principle and the rights of the defence, used in its pleadings extracts from a document which it knew it was unable to produce before the Court.

108 All reference to that opinion, and the assertion which the Commission had based on it, should therefore be excluded from the proceedings.

109 As regards the substance of the plea, the applicant claims that all the conditions governing the grant of a permanent exemption under Article 81(3) EC are satisfied. By refusing to grant such an exemption, the Commission infringed that provision of the Treaty.

110 First, the applicant alleges, Article 2(b)(1) of the Code of Conduct helps improve the distribution of the services in question and/or to promote economic progress, while allowing consumers a fair share of the resulting benefit, within the meaning of Article 81(3) EC.

111 Article 2(b)(1) of the Code of Conduct constitutes an obligation of professional conduct designed to ensure compliance with the ethics and fundamental principles governing a liberal profession. The fundamental object is thus to ensure a permanent improvement of the services provided by professional representatives for the direct benefit of clients.

112 The ban on comparative publicity improves the provision of services by professionals, who must devote their energies, for the benefit of their clients, to preparing documents relating to applications for European patents and to representing their clients before EPO bodies.

113 In reality the complexity of the services provided by agents makes objective comparison difficult. Even where fees are concerned, comparison is impossible, since a multitude of factors come into play in addition to hourly rates, such as competence, experience and so forth. Any comparison may therefore be misleading and contrary to Article 3a of the Directive.

114 Furthermore, the energy and time wasted in vain attempts at comparing the activities of the members of the EPI would affect the quality of their services and be likely to distort in the eyes of the public the image those professionals convey of institutions involved in legal procedures. If comparative advertising were permitted, it would ultimately be of advantage only to representatives occupying a strong position on the market and with significant financial resources, to the detriment of other representatives, who would then be unable to survive.

115 The prohibition of comparative advertising ensures that consumers do not bear the cost of such advertising and of the time spent in searching for factors for comparison which in practice would be impossible to find.

116 Second, the applicant claims that the provision at issue is indispensable, within the meaning of Article 81(3) EC, having regard to the specific nature of the profession of representatives, who 'participate in an activity which is a matter of public policy'.

117 Third, competition is not eliminated for a significant proportion of the services in question. Apart from the fact that certain advertising methods and certain methods of offering services are excluded, the members of the EPI remain free to compete by employing a number of other methods.

118 The applicant concludes by observing that the solution adopted in the Decision introduces, from 23 April 2000, a distinction between professional representatives, for whom comparative advertising is to be permitted, and liberal professions such as lawyers and intellectual property counsel, for whom comparative advertising remains prohibited in many Member States.

119 The Commission contends that, in setting the period over which an exemption is to apply, it has a margin of discretion, in respect of which judicial review is limited (Case T-17/93 *Matra Hachette* v *Commission* [1994] ECR II-595).

120 In reply to the applicant's complaint concerning the reference to the opinion of the Advisory Committee on Restrictive Practices and Dominant Positions, the

Commission observes that the failure to disclose that opinion is not contrary to the principle of the right to a fair hearing (*Musique diffusion française and Others* v *Commission*, cited above, paragraph 36). Furthermore, the exemption period was determined solely on the basis of the considerations set out in recital 48 to the Decision.

121 In the present case, the Commission concluded that an exemption until 23 April 2000, although of limited duration, was sufficient to allow representatives and consumers to adapt to the new situation.

122 The Commission observes that virtually all the arguments put forward by the applicant in order to demonstrate that the ban on comparative advertising is capable of permanently satisfying the conditions laid down in Article 81(3) EC relate to the first of those conditions, concerning the improvement of the production or distribution of goods or the promotion of technical or economic progress. However, those arguments are unconvincing. Some of them seek to call into question the fact that representatives are undertakings within the meaning of Article 81 EC, while others amount to vague value-judgments which condemn the very concept of comparative advertising for all professions without distinction, whereas the Community legislature has adopted the opposite stance; furthermore, those criticisms are pointless, in the light of the strict conditions governing the lawfulness of comparative advertising which are laid down in the Directive. Other arguments, finally, relate to advertising in general, whereas the Code of Conduct itself already permits certain forms of advertising.

123 As regards the arguments which more specifically impugn the practicability of comparative advertising applied to the profession of authorised representatives, such as the difficulty in comparing prices objectively or the risks of misleading advertising, the Commission contends that the answer lies in the strict cumulative conditions which must be fulfilled if comparative advertising is to be permitted under the Directive.

124 The Commission concludes by rejecting the applicant's complaint in respect of the distinction which, according to the applicant, will exist from 23 April 2000 between the situation of representatives and that of other liberal professions. That distinction is merely the consequence of the incomplete harmonisation of national law and does not result from the Decision.

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 only relate 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-384/94 and T-388/94 *European Night Services and Others* v *Commission* [1998] ECR II-3141, 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 (*Musique diffusion française* v *Commission*, cited above, 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.

Third plea in law, alleging infringement of Article 8 of Regulation No 17

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.

On those grounds,

THE COURT OF FIRST INSTANCE (Second Chamber),

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/36.147 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.

Meij Potocki Pirrung

Delivered in open court in Luxembourg on 28 March 2001.

H. Jung A.W.H. Meij

Registrar President