JUDGMENT OF THE COURT (Fourth Chamber)

6 March 2003 *

In Case C-478/01,

Commission of the European Communities, represented by M. Patakia, acting as Agent, with an address for service in Luxembourg,

applicant,

v

Grand Duchy of Luxembourg, represented by J. Faltz, acting as Agent,

defendant,

APPLICATION for a declaration that, by maintaining the obligation for patent agents, when supplying services, either to be domiciled in Luxembourg or, failing such domicile, to opt for domicile with an approved agent, and by failing to

* Language of the case: French.

supply information concerning the precise conditions for the application of Article 85(2) of the Law of 20 July 1992 amending the rules on patents (*Mémorial* A 1992, p. 1530), and Articles 19 and 20 of the Law of 28 December 1998 governing access to occupations in craft trades, business and industry, and to certain liberal professions (*Mémorial* A 1998, p. 1494), the Grand Duchy of Luxembourg has failed to fulfil its obligations under Article 49 EC et seq. and Article 10 EC respectively,

THE COURT (Fourth Chamber),

composed of: C.W.A. Timmermans, President of the Chamber, D.A.O. Edward and A. La Pergola (Rapporteur), Judges,

Advocate General: F.G. Jacobs,
Registrar: R. Grass,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 14 November 2002,

gives the following

Judgment

1 By application lodged at the Court Registry on 11 December 2001, the Commission of the European Communities brought an action under Article 226 EC for a declaration that, by maintaining the obligation for patent agents, when supplying services, either to be domiciled in Luxembourg or, failing such domicile, to opt for domicile with an approved agent and by failing to supply information concerning the precise conditions for the application of Article 85(2) of the Law of 20 July 1992 amending the rules on patents (*Mémorial* A 1992, p. 1530, 'the Law on patents'), and Articles 19 and 20 of the Law of 28 December 1998 governing access to craft trades, business and industry, and to certain liberal professions (*Mémorial* A 1998, p. 1494, 'the Law governing access to professions'), the Grand Duchy of Luxembourg has failed to fulfil its obligations under Article 49 EC et seq. EC and Article 10 EC respectively.

Legal background

The relevant Community provisions

2 Article 10 EC provides:

'Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or

resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks.

They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty.'

3 Article 49 EC provides:

'Within the framework of the provisions set out below, restrictions on freedom to provide services within the Community shall be prohibited in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended.

The Council may, acting by a qualified majority on a proposal from the Commission, extend the provisions of the Chapter to nationals of a third country who provide services and who are established within the Community.'

The relevant national provisions

4 Under Article 83(2) and (3) of the Law on patents:

'(2) Natural or legal persons having their domicile or principal place of business in the territory of the European Economic Community may act through an

employee in any procedure instituted by this law: that employee, who must possess authority in accordance with the statutes, regulations and provisions concerning the articles of association of companies in the national legislation of the principal's State, need not be an approved agent. The employee of a legal person referred to in this paragraph may also act for other legal persons which have their principal place of business in the territory of the European Economic Community and have economic connections with the first legal person.

(3) Natural and legal persons which do not have their domicile or principal place of business in the territory of the European Economic Community must be represented by an approved agent and act through him in any procedure instituted by this law, not including the payment of the fees provided for thereunder, save for lodging a patent application.'

5 Article 83(4) of the Law on patents provided:

'No one may exercise rights under a patent application or a patent unless he has his actual or elective domicile in the Grand Duchy of Luxembourg. The choice of domicile in Luxembourg, if necessary, which determines the court having jurisdiction, may be made only through an agent approved in Luxembourg. If the latter does not have his actual domicile in Luxembourg, he must opt for domicile with an approved agent who has actual domicile there.'

6 Article 83(4) was repealed by Article 13 of the Law of 11 August 2001 amending the Law of 20 July 1992 amending the rules on patents (*Mémorial* A 2001, p. 2190).

7 Article 85(2) of the Law on patents provides:

'Without prejudice to Article 83(2), in addition to lawyers... natural persons authorised to practise the profession of industrial property agent by virtue of the Law [governing access to professions] shall be considered to be approved agents having their actual domicile in the Grand Duchy of Luxembourg within the meaning of Article 83(4).'

8 Under Article 19(1)(d) of the Law governing access to professions:

'The profession of self-employed industrial property agent shall consist in the direction, assistance and representation where an authority has been given in the field of industrial property, in particular in obtaining, preserving, protecting and challenging exclusive rights conferred by patents, trade marks, drawings or designs.

Professional qualifications for access to the profession of industrial property agent shall be proved as follows:

(1) by possession of a certificate attesting success in the European professional qualification examination...;

(2) by possession of a declaration made by the industrial property office of the Government of one of the Member States that the person concerned has been admitted to the profession of industrial property agent, in so far as the profession is regulated in that State;

(3) by possession of a diploma awarded on completion of a course of study in a university centre specialising in industrial property and established in one of the Member States of the European Communities and by completion of a probationary training period of 12 months;

(4) by possession of a university or equivalent diploma awarded on completion of a course of study in a scientific, technical or legal field of at least four years and a probationary training period of 12 months.

...'

9 Article 20 of the Law governing access to the professions provides:

'Nationals of Member States of the European Economic Community who, although not established in Luxembourg, come there occasionally and temporarily in order to collect orders or supply services connected with the commercial and liberal professions shall be exempted from any administrative authorisation given by the Luxembourg authorities, without prejudice to the directives of the Council concerning the freedom to supply services in respect of the self-employed professional activities covered by these provisions.

Persons carrying on activity in craft trades or industry shall, however, be required to demonstrate to the Minister responsible for granting authorisation in respect of establishment that they are lawfully authorised to carry on their occupation in their country of establishment, without prejudice to the directives of the Council concerning the freedom to supply services in respect of certain self-employed occupations in craft trades and industry. The minister shall issue them with an *ad hoc* certificate.'

The pre-litigation procedure

10 Since it considered that certain provisions of the Luxembourg patent rules laid down in the Law on patents of 30 June 1880, as amended by the Law of 31 October 1978, raised questions as to their compatibility with Community law, on 15 April 1998 the Commission sent the Grand Duchy of Luxembourg a letter of formal notice, requesting it to submit its observations in that respect within two months.

11 By letter of 8 July 1998 the Luxembourg authorities sent the Commission the text of the Law on patents, which had entered into force on 1 January 1998 and replaced the 1880 Law on patents, and the text of the Law governing access to professions. By the same letter the Luxembourg authorities informed the Commission, first, that they intended to amend Article 85(2) of the Law on patents so as to make it compatible with Community law and, second, that because the domicile requirement under that law was to be abolished, the Luxembourg intellectual property service would accept acts made by a person not enrolled in the register of agents so long as he could prove that he fulfils the

qualification conditions laid down in Article 19(1)(d) of the Law governing access to professions.

12 After examining the legislative texts referred to in the paragraph above, the Commission, considering that Article 83(4) of the Law on patents, which was still in force, was incompatible with Article 49 EC and that further information was required concerning the conditions for application of Article 85(2) of that Law and Articles 19 and 20 of the Law governing access to professions, sent the Grand Duchy of Luxembourg a further letter of formal notice, requesting that Member State to submit its observations on that point within two months.

13 Since that letter went unanswered, on 26 January 2000 the Commission sent the Grand Duchy of Luxembourg a reasoned opinion, requesting it to take the measures necessary to comply therewith within two months of notification of that opinion.

14 Since the Luxembourg Government did not reply to the reasoned opinion, the Commission decided to bring this action.

The application

15 At the outset, in its application the Commission challenged the requirement that patent agents wishing to supply services in Luxembourg should actually be

domiciled there or should have an elective domicile there with an approved agent, a requirement imposed by Article 83(4) of the Law on patents. As a result of the adoption of the Law of 11 August 2001, which repealed that provision, the Commission decided to narrow the scope of its application, as regards the infringement of Article 49 EC, to the requirement to have an official address with an approved agent when supplying services.

16 In its application the Commission refers, in this connection, to the fact that the Grand Duchy of Luxembourg had declared during the pre-litigation procedure that, once the domicile requirement in that Member State had been abolished, it would accept acts made by a person who was not enrolled in the register of agents if that person could prove that he fulfilled the qualification conditions for the establishment of agents.

17 In that context, the Grand Duchy of Luxembourg in its defence refers to the requirement that an approved agent should actually be domiciled in that country, which is maintained in force by Article 85(2) of the Law on patents, and acknowledges that such a requirement is contrary to Community law. It claims that the reference in that provision to that requirement is to be deleted as soon as possible.

18 As the Court has consistently held, observance of the principle laid down in Article 49 EC requires not only the elimination of all discrimination on grounds

of nationality but also the abolition of any restriction liable to prohibit or otherwise impede the activities of a provider of services established in another Member State where he lawfully provides similar services (see, in particular, Case C-58/98 *Corsten* [2000] ECR I-7919, paragraph 33, and Case C-131/01 *Commission* v *Italy* [2003] ECR I-1659, paragraph 42).

19 Accordingly, the Luxembourg legislation making the supply of services by patent agents subject to a requirement to elect domicile with an approved agent, as it stood when the period prescribed by the reasoned opinion expired is incompatible with Article 49 EC, as the Grand Duchy of Luxembourg has itself acknowledged.

20 It must be added that the principles of legal certainty and the protection of individuals require, in areas covered by Community law, that the Member States' legal rules should be worded unequivocally so as to give the persons concerned a clear and precise understanding of their rights and obligations and enable national courts to ensure that those rights and obligations are observed (see, to this effect, Case C-306/91 *Commission* v *Italy* [1993] ECR I-2133, paragraph 14).

21 Even following the legislative amendments adopted in 2001, the Luxembourg legislation still contains ambiguities which could lead to the maintenance in force of the requirement that patent agents should, when supplying services, elect domicile with an approved agent.

22 That is the context in which the Commission has, in addition, argued that the Grand Duchy of Luxembourg is in breach of the duty to cooperate in good faith imposed by Article 10 EC, inasmuch as it has failed to provide the information requested of it concerning the application of Article 85(2) of the Law on patents in conjunction with Articles 19 and 20 of the Law governing access to professions. According to the Commission, the Luxembourg Government's conduct prevented it from reaching a conclusion as to whether those provisions of national law are compatible with Article 49 EC.

23 The Grand Duchy of Luxembourg has not raised any defence to that claim.

24 According to settled case-law, Article 10 EC makes it clear that the Member States are required to cooperate in good faith with the enquiries of the Commission pursuant to Article 226 EC, and to provide the Commission with all the information requested for that purpose (see, *inter alia*, Case 192/84 *Commission* v *Greece* [1985] ECR 3967, paragraph 19, and Case C-375/92 *Commission* v *Spain* [1994] ECR I-923, paragraphs 24 to 26).

25 It is not disputed that, during the pre-litigation procedure, the Luxembourg Government failed to provide the information requested of it concerning the application of Article 85(2) of the Law on patents in conjunction with Articles 19

and 20 of the Law governing access to professions. In particular, it did not reply either to the supplementary letter of formal notice or to the reasoned opinion itself.

26 In those circumstances, the Commission's application must be considered to be well founded.

27 In the light of the foregoing considerations, it must be held that, having regard to the requirement that patent agents, when supplying services, should elect domicile with an approved agent, and having regard to the fact that the Luxembourg Government did not supply information concerning the precise conditions for the application of Article 85(2) of the Law on patents and Articles 19 and 20 of the Law governing access to professions, the Grand Duchy of Luxembourg has failed to fulfil its obligations under Article 49 EC and Article 10 EC respectively.

Costs

28 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the Grand Duchy of Luxembourg has been unsuccessful, the latter must be ordered to pay the costs.

On those grounds,

THE COURT (Fourth Chamber),

hereby:

1. Declares that, having regard to the requirement that patent agents, when supplying services, should elect domicile with an approved agent, and having regard to the fact that the Luxembourg Government has not provided information concerning the precise conditions for the application of Article 85(2) of the Law of 20 July 1992 amending the rules on patents and Articles 19 and 20 of the Law of 28 December 1998 governing access to occupations in craft trades, business and industry, and to certain liberal professions, the Grand Duchy of Luxembourg has failed to fulfil its obligations under Article 49 EC and Article 10 EC.

2. Orders the Grand Duchy of Luxembourg to pay the costs.

Timmermans Edward La Pergola

Delivered in open court in Luxembourg on 6 March 2003.

R. Grass

Registrar

C.W.A. Timmermans

President of the Fourth Chamber