II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 30 January 1995

relating to a proceeding under Article 85 of the EC Treaty

(IV/33.686 — Coapi)

(Only the Spanish text is authentic)

(95/188/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation No 17 of 6 February 1962, first Regulation implementing Articles 85 and 86 of the Treaty (1), as last amended by the Act of Accession of Spain and Portugal, and in particular Article 3 (1) thereof,

Having regard to an application submitted under Article 3 (2) of Regulation No 17,

Having regard to the Commission's decision of 6 July 1993 to initiate proceedings in this case,

Having given the Colegio Oficial de Agentes de la Propiedad Industrial, an association of undertakings, the opportunity to make known its views on the objections raised by the Commission, in accordance with Article 19 (1) of Commission Regulation No 99/63/EEC of 25 July 1963 on the hearings provided for in Article 19 (1) and (2) of Council Regulation No 17 (2),

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions,

(1) OJ No 13, 21. 2. 1962, p. 204/62.
(2) OJ No 127, 20. 8. 1963, p. 2268/63.

Whereas :

I. THE FACTS

A. The complaint

(1) On 29 August 1990 an informal complaint was submitted to the Commission against the *Colegio Oficial de Agentes de la Propiedad Industrial* (Official Association of Industrial Property Agents) (hereinafter referred to as 'the Coapi'). According to the complainant, the Coapi fixes scales of charges for services provided by these agents in Spain, relating to the filing of patents, the registration of trade marks and utility models and other industrial property procedures, thereby infringing Article 85 (1) of the EC Treaty.

(2) The complainant, in support of its complaint, provided the scale of charges issued by the Coapi to its members for services provided after 1 January 1988 but the facts were established and set in their proper economic and legal context in particular by the replies to the formal requests for information sent to the Coapi on 16 October 1990, 15 May 1991 and 4 June 1992.

B. Industrial property agents and their activities

(3) Section 156 of Law No 11/1986 of 20 March 1986 on patents provides a definition of Spanish industrial property agents and a brief description of their activities. The agents are natural persons registered

as agents with the Industrial Property Registry (1) (hereinafter referred to as 'the Registry') who, in the practice of their profession, offer their services to the general public for the provision of advice, assistance or as representatives in various industiral property procedures and in the defence of the resultant rights *vis-à-vis* the Registry.

In general, the basic services provided by industrial property agents are as follows (2):

(i) to provide, in the initial stages, explanations and definitions of rights;

(ii) to act in the acquisition of rights;

(iii) to represent and advise clients in maintaining and exercising their rights and in any disputes concerning the acquisition and protection of those rights.

Agents thus have varied duties: legal adviser, representative in patent office procedures, representative in patent applications in foreign countries in close association with foreign agents, adviser in infringement proceedings and similar proceedings, and adviser in the monitoring and renewal of patents, trade marks (payment of renewal fees at the prescribed intervals and other statutory formalities), etc.

Generally speaking, industrial property agents have three kinds of client, namely individual inventors, businesses and foreign industrial property agents.

Industrial property agents also deal with applications concerning industrial property rights from foreign countries as well as from the countries in which they practise.

The activities involved in those two categories are not very different; nevertheless, where the application originates in a foreign country, an industrial property agent is not usually involved in the initial registration, only in the application to register a domestic patent corresponding to the initial registration in the foreign country.

The agent must therefore prepare the corresponding application in accordance with the national law, which will require amendment of substantive and formal aspects of the initial application and its translation into the language of his country.

Industrial property agents also assist Spanish clients in applications to register their inventions in foreign countries, which must take place at the same time as the initial application if the foreign country is not a member of the Paris Convention for the Protection of Industrial Property and within a year of filing the initial application if it is a member.

With regard to European patents (3), industrial property agents' responsibilities include validation of published applications for European patents designating Spain in order to secure provisional protection and the validation of European patents designating Spain in order to secure national effect. These services primarily involve translation, publication and printing formalities and verification of registry entries.

Agents also deal with the filing of applications for European patents on behalf of Spanish clients.

C. The Coapi and its legislative and regulatory framework

(4) The Coapi is the professional association of industrial property agents in Spain. It is in the form of a legal person governed by Spanish public law and consists of all agents practising in Spain.

As a profession organized as an association (colegio), the Coapi comes within the general legislative and regulatory framework applicable to such associations, namely Law No 2/1974 of 13 February 1974 on professional associations, as amended by Law No 74/1978 of 26 December 1978, and its procedures are governed by internal regulations (hereinafter referred to as 'the Coapi Regulations'). In addition, there are certain specific legislative or regulatory provisions which govern the practice of the profession.

1. *The general legislative framework: the law on professional associations*

(5) Law No 2/1974 of 13 February 1974, as amended by Law No 74/1978 of 26 December 1978, defines professional associations, which include the Coapi, as 'legal persons governed by public law and

(1) The Registry was renamed 'The Spanish Patents and Trade Marks Office' on the promulgation of Law No 21/1992 of 16 July 1992 on industrial affairs.

(2) See *The Role, Qualifications and Associations of Industrial Property Attorneys.* A. de ELZABURU. WIPO/ Geneva, 1984, p. 2.

(3) Applications for European patents must be filed with the European Patent Office in Munich. A European patent represents a group of national patents of the Contracting States designated in the application; in a Contracting State, it is equivalent in its effects and status to a patent issued by the State's national patent office.

supported by the law and recognized by the State, having their own legal personality and capacity to attain their objects' (section 1 (1)). The objects of such legal persons are essentially: the regulation (ordenación) of the activities of these professions, their sole representation and the defence of the professional interests of the members, without prejudice to the powers of the State in relation to matters concerning the public service (section 1 (3)).

(6) According to the terms of Section 5 of the Law, the responsibilities of the professional associations, within their various territorial jurisdictions, shall include the following:

— to represent and promote the defence of the profession *vis-à-vis* the public authorities (paragraph g),

— to regulate the professional activities of the associations' members and to supervise professional ethics and dignity and respect for individual rights and to exercise the power to impose sanctions in disciplinary matters (paragraph i),

— to secure good relations and cooperation between the associations' members by preventing unfair competition (paragraph k),

— to take the measures necessary to prevent the illegal practice of the profession (paragraph l),

— to regulate minimum fees if such fees are not chargeable in the form of customs duties, administrative tariffs or dues (paragraph ñ). However, that responsibility is assigned to the Consejos Generales de los Colegios (general councils of the associations), as the representative and superior coordinating bodies of the associations in so far as it has national scope or effects (section 9 (1) (a)),

— to confer approval on members' professional work if the rules of the professional association so require (paragraph q),

— to comply, and to secure compliance by the members of the association, with general and special laws, professional rules and internal regulations and the standards and decisions adopted by the governing bodies of associations in matters within their powers (paragraph t).

(7) Section 8 of the Law lays down that 'an appeal shall lie to the administrative courts against decisions of the associations and of the general councils provided that they are subject to administrative law and all appeal procedures within the association have been exhausted'. In particular, acts of governing bodies of the associations which are manifestly contrary to the law and those which are *ultra vires* are automatically void. Acts which are contrary to associations' internal regulations and those involving misuse of powers are voidable (section 8 (3)).

(8) Section 6 (1) lays down that the professional associations are regulated by their internal rules and regulations, without prejudice to the laws applicable to the particular profession. The general councils are required to draw up general rules applicable to all associations in the same profession, after consulting those associations. The rules are to be submitted for approval to the Government, acting through the relevant ministry. This procedure is to be followed by associations covering the entire country (section 6 (2)). The general rules cover the matters specified in section 6 (3), namely the rights and duties of the members of the associations, the associations' administrative bodies, the rules applicable to the establishment of associations and their rules of procedure, rules on charges and penalties, and the associations' specific objects and functions, etc.

(9) Section 3 (2) lays down that 'where professions are organized as associations, membership of an association responsible for the territory on which the profession will be practised shall constitute an indispensable requirement for practice of the profession'.

(10) It is laid down in the transitional provisions of the Law that the regulations of professional associations and their superior councils and their internal rules are to remain in force in so far as they are not contrary to the Law, without prejudice to any amendments which are necessary.

(11) Although the constitutionality of Law No 2/1974 has been challenged on various occasions before the Constitutional Court, that Court has ruled that it is in accordance with Article 36 of the Spanish Constitution, which lays down that 'the specific features of the legal rules applicable to professional associations and the practice of the professions shall be governed by the law. The internal structure and procedures of the associations shall be democratic'.

In its judgments, the Constitutional Court has ruled that the requirement of membership of a professional association and compliance with its rules do not constitute unjustified restrictions in so

far as they do not prevent professions organized as associations from establishing societies or unions or joining existing bodies.

2. *The Coapi Regulations*

(12) The Coapi Regulations, which also constitute the measure establishing the Coapi, date from 29 November 1926. They include provisions on its decision-making bodies, and on scales of charges, advertising, rights and duties of members and sanctions (1).

The regulations are based on a Royal Decree of 27 February 1926. This decree ratified the principle of obligatory affiliation to professional organization for industrial property agents enrolled in the Register of Industrial and Commercial Property (hereinafter referred to as 'the RICP'), on condition that they adopted regulations for its organization which were in accordance with the basic principles laid down in that Royal Decree. A Royal Decree of 28 February 1927 approved the regulations of 29 November 1926.

At present the Coapi Regulations are based on Law No 2/1974 of 13 February 1974, as amended by Law No 74/1978 of 26 December 1978, described above (see points 5 to 10).

The Coapi's decision-making bodies

(13) The Coapi is run by an administrative board of seven members including a chairperson and vice-chairperson, elected by the general meeting (Articles 4 and 8 of the Coapi Regulations).

The administrative board is the Coapi's representative for legal purposes and its duties include to comply. and secure compliance, with the decisions of the general meeting, the Coapi Regulations and the measures taken by the public authorities (Article 13 (7)) and to examine and adjudicate upon complaints against members.

The ordinary general meeting is held in January of each year and extraordinary meetings are held at the request of the administrative board of its own motion or acting on a written request by a quarter of the members.

The general meeting decides on proposals submitted by the administrative board. These decisions are to be taken by a majority of members present unless the decision concerns the expulsion of a member, which requires the presence of at least half of the members of the Coapi (Article 39).

Provisions concerning fees and penalties

(14) Under Article 49 of the Coapi Regulations, all industrial property agents are required to apply the minimum scales of charges fixed by the general meeting, which apply to all industrial property services provided to clients, Spanish and foreign. The only exceptions are for services where the cost is variable and difficult to establish in advance (the drafting of memoranda, appeals, cases where industrial property has lapsed, etc.). The Article also makes provision for two scales of charges in industrial property matters originating in foreign countries : one for advice concerning patents from these countries (correspondent scales) and the other for individuals dealing directly with Spanish agents.

However, Article 48 of the Coapi Regulations also lays down that the administrative board proposes to the general meeting for approval 'scales of charges which shall be observed equally by all industrial property agents (tarifas que deban regir para todos los Agentes por igual), whilst allowing the widest possible scope for fees for cases which, by reason of their complexity, difficulty and length, necessitate higher charges'.

(15) Under Article 35 of the Regulations (Chapter VII, The disciplinary powers of the Association) the following are punishable acts :

— failing to comply with the Regulations and the decisions adopted by general meetings (paragraph 1) ;

— charging fees below those contained in the scale of charges approved by general meetings (paragraph 7).

These penalties take the form of fines, temporary suspension of practice or even expulsion from the Coapi (Article 38 (3), (4) and (5)).

The power to impose penalties is vested in the administrative board or the general meeting, depending on the seriousness of the punishable acts (Article 36).

(1) It should be noted that this decision relates only to the restrictions on competition through the fixing of minimum rates of fees.

3. *The specific legislative and regulatory framework*

(16) Industrial property agents are also subject to the more specific rules in Law No 11/1986 of 20 March 1986 on patents, as amended by Law No 21/1992 of 16 July 1992 on industrial affairs, and in the regulations for the implementation of the former Law, which may be summarized as follows :

— persons resident abroad must invariably employ an industrial property agent (section 155 (2) of Law No 11/1986),

— only Spanish nationals, or nationals of other Member States who have an office in Spain, may be registered in the Special Register of Industrial Property Agents, always provided that they fulfil the following conditions : a clean criminal record, possession of an appropriate qualification, third-party insurance, and security lodged with the Registry (now the Spanish Patents and Trade Marks Office). In addition, agents must take an oath to maintain professional secrecy and to refrain from representing conflicting interests in one and the same case (first additional provision of paragraph 3 of Law No 21/1992 and Title IV of the Regulations for the implementation of the Law on patents).

(17) In addition, section 17 of Law No 32 of 10 November 1988 on trade marks contains provisions resembling section 155 (2) of the Law on patents.

4. *The regulatory framework for industrial patent agents at European level*

(18) On 30 September 1986 Spain acceded to the Convention on the grant of European patents, signed in Munich on 5 October 1973 (hereinafter referred to as 'the European Patent Convention'), subject to the reservation that European patents concerning chemical and pharmaceutical products should not be effective in Spain.

The European Patent Convention lays down the conditions on which an approved agent may represent any natural or legal person in any proceedings under the Convention. Many Spanish industrial property agents have become European patent agents under Articles 134 and 163 of the Convention. In this capacity they are also members of the Institute of Professional Representatives before the European Patent Office, set up by the Administrative Council of the European Patent Organisation. In their capacity as European patent agents, Spanish industrial property agents are required to comply with the rules of professional conduct laid down by the Office's Administrative Council and the code of professional conduct adopted by the Institute's council. These rules do not contain any provisions recommending or fixing minimum charges.

D. The scales of charges fixed by the Coapi

1. *Provision of services*

(19) Under Article 49 of the Coapi Regulations (see point 14 above), the scales of charges approved by the general meeting of the Coapi must cover services concerning industrial property which they provide to Spanish or foreign clients. These scales of charges are not subject to the approval of the public authorities.

Since 1987 the scale of charges for Spanish clients (national tariff, in pesetas) has consisted of 53 sections arranged in 13 chapters (A — patents, B — European patents, C — trade marks, D — international trade marks, E — labels, F — utility models, G — industrial and artistic designs, H — international designs, I — commercial names and signs, J — cinematographic films, K — assignments, L — investigations and M — opposition, replies in suspensory proceedings, certification, etc.)

There are two foreign scales of charges : tariff A (foreign correspondents) and tariff B (foreign individuals or businesses), which contained 52 sections in 1987 and 1988, and 54 sections in 1989, 1990 and 1991 arranged in six chapters (patents and utility models, European patents, trade marks, industrial designs, assignments etc.). The Chapter 'Patents and utility models' covers applications, translations of descriptions into Spanish, revision of documents received in Spanish, copies of memoranda, replies in suspensory proceedings, filing or replying to an opposition, payment of annual fees, applications for reinstatement, etc. The services concerning European patents involve validation of a published European patent application designating Spain to obtain provisional protection (23), validation of a European patent designating Spain to obtain national effects (24) and the translation, adaptation and revision of documents received in Spanish (26, 27 and 28). The Chapter 'Trade marks' includes

applications for registration (29), applications for renewing a trade mark (31), applications for reinstatement of a forfeited trade mark (33), payment of quinquennial fees (35), opposition (36) and replies to opposition (37).

The sections in the Chapter 'Industrial designs' concern applications (39 and 40), renewal (41), replies to opposition or suspensory proceedings (42), opposition to an industrial design application (43) and payment of quinquennial fees (44). The Chapter 'Assignments' deals with registration of deeds of assignment, and transfer or change of name (45). Up to and including 1988, the Chapter 'General information' contained details of services involving general official search referring to registrability of a trade mark (46), late filing of documents or applications for extension of an official deadline (47), obtaining an official certificate (48), copies of specifications and drawings (49), surveillance of a patent or design when the annual fees are paid by another agent (50), reconsideration appeal (51) and appearance concerning a Spanish application filed by another agent (52). In the version applicable after 1989, section 46 is headed 'official search referring to trade marks (list of antecedents)'. Two other sections have been added: 'official search referring to marks, including study of antecedents and assessment (47) and claim of priority (48)'. The old numbers 47-52 have been renumbered 49-54.

2. *Price-fixing criteria*

(20) In fixing the scales of charges issued to its members, the Coapi maintains that it takes account of both general and specific factors.

The criteria in the first category include the length of working time, direct costs of materials and general professional and non-professional expenditure. Working time is assessed on the basis of the time spent on the various stages of the administrative procedure. It is used to calculate the cost of direct and indirect labour.

Direct material costs include official charges, costs of office equipment and costs of communications.

General professional expenditure means the incidence of taxes, subscriptions to official or professional publication, etc. General non-professional expenditure covers items such as rent, leasing, and depreciation.

Specific factors concern characteristics of clients: language, their level of familiarity, or expertise and professionalism in the field of industrial property, and whether they are dealt with in a personal meeting or by correspondence.

These specific characteristics involve three graded scales of charges: local/national clients (national tariff), correspondents (foreign agents) (tariff A), and direct foreign clients (tariff B). Tariffs A and B (foreign tariffs) are denominated in French francs, German marks, pounds sterling, Swiss francs, US dollars and yen.

E. The market

(21) The relevant services are completion of formalities in applications for patents, registration of trade marks, or other industrial property procedures, and all services relating to the renewal and monitoring of these rights.

The demand for services to secure the benefit of industrial property rights comes both from clients resident in Spain (individual inventors or firms) and from foreign clients (individual inventors, firms and patent advisers).

The Spanish Laws on patents and on trade marks (see 16 and 17) confer on Spanish industrial property agents exclusive rights to provide services [1] (fields are not specified) connected to enjoyment of these rights by clients (individual or corporate clients or patent advisers) resident outside Spain.

Leaving aside whether or not those Laws are contrary to the EC Treaty in particular on account of the fact that, when the services are sought by clients resident in Spain wishing to assert an industrial property right in Spain or abroad, Spanish industrial property agents do not have an exclusive right, it must be concluded that under these Laws an agent provides services on two markets where the competitive conditions are different; in other words, there are two separate markets:

(a) the market for services connected with the enjoyment of industrial property rights in Spain, necessitating relations with the Spanish Patents and Trade Marks Office and sought by non-residents, which constitutes a market reserved for Spanish industrial property agents, who must be registered with the Coapi;

[1] These are services involving relations with the Spanish Patents and Trade Marks Office.

(b) the market for services connected with the enjoyment of industrial property rights in Spain or abroad sought by clients resident in Spain, which can be sought from persons other than Spanish industrial property agents. However, these agents necessarily occupy an important position on this market in view of the specific and technical nature of the services and the conditions of access to the profession, which provide a guarantee to clients that members are competent to provide such services.

The Coapi had the following members : 286 in 1988, 307 in 1989, and 323 in 1990. It estimates the total annual turnover involving members' activities at [...](*), with business from other Member States accounting for 14 % thereof.

F. Coapi decisions on price-fixing

(22) The Coapi, acting through its general meeting, regularly (generally annually) adopts decisions increasing the scales of charges and sometimes changes the sections describing the services provided by agents.

The record of the ordinary general meeting held on 29 January 1987 refers to a decision to hold periodic general meetings before the end of each year to discuss the scales of charges.

The charges are studied by the administrative board, which may put forward to the general meeting proposals for their alteration.

The records of the general meetings for the years 1987, 1988, 1989 and 1990, and those of the meetings of the administrative board (for these years and also for 1991) in which the work was prepared, refer to the procedures followed in determining price increases, the adoption of new scales of charges and the date when they should become effective. In addition, Circulars of 12 December 1986 and 21 September 1987 deal with the inclusion of new services in the scales of charges and the interpretation of certain sections.

1. *Coapi Circulars of 12 December 1986 and 21 September 1987*

(23) Circular No 27 of 12 December 1986 notifies members of new scales of charges applicable to new services resulting from Spain's accession to the European Patent Convention, for services with the European Patent Office on behalf of Spanish clients and with the Registry on behalf of correspondents and foreign direct clients, and for services relating to the validation of applications for European patents designating Spain to obtain provisional protection and produce national effects. The list containing new sections corresponding to the national scale of charges, the foreign scale of charges for correspondents (tariff A) and the foreign scale of charges for direct clients (tariff B) was appended to the Circular.

The basic amounts in pesetas used to calculate the corresponding amounts for the new sections in foreign currency are given both for tariff A and for tariff B. Tariff B is 20 % higher than tariff A (in pesetas).

The Circular indicated that these sums were provisional, to be confirmed or amended in the light of experience, after discussion and agreement by the general meeting.

(24) Circular No 10 of 21 September 1987 clarifies aspects of Circular No 27 of 12 December 1986 concerning the application of the scales of charges, particularly sections 23 to 28 of the scales in US dollars, pounds sterling, German marks and yen and sections 101 to 106 of the national scale of charges concerning validation of published European applications and European patents granted with provisional or final protection in Spain.

2. *The record of the ordinary general meeting of 29 January 1987*

(25) The record of the meeting states that the proposal of the administrative board was approved as follows :

— the national scale of charges : a 10 % increase in fees and an increase in charges in proportion to the real variation in the Registry's charges, except for the sections 'Renewal of distinctive signs and industrial models', where the increase was to relate exclusively to the charges,

— the foreign scales of charges : alignment of the scale for US dollars, pounds sterling and French francs (depreciated currencies) on the Swiss franc scale and maintenance of the others (Swiss francs, yen and German marks), since the increase determined for the preceding year

(*) Deleted as a business secret.

involved an increase of 10 % above the Swiss franc rate and from the time of the increase the Swiss franc, the German mark and the yen had appreciated by 12 % against the peseta while the US dollar had fallen by 7,5 %,

— the date when the new scales would be effective was 1 February 1987.

In Circular No 3 of 4 February 1987, the Coapi informed its members of 'the most urgent amounts pending completion of printing the new scale of charges' for the national and foreign scales of charges approved by the general meeting of 29 January 1987. The foreign scales of charges only became effective from 1 March 1987.

3. *Records of the meetings of the administrative board and of the extraordinary general meeting of 24 November 1987*

(26) On 24 November 1987 the administrative board decided to propose to the general meeting 'a general increase of 5 % applicable to the national scale of charges (corresponding to the 1987 rate of inflation) and the foreign scale of charges in Swiss francs (which had not altered appreciably against the peseta) and an alignment on the Swiss franc scale of the scales for other foreign currencies except those with a variation less than 2 %' (involving increases of 9 % for the French franc scale, 7 % for the German mark scale and 10,6 % for the yen scale).

The record of the general meeting shows that the increases in those foreign scales incorporated the 5 % increase decided on and allowed for the depreciation of these currencies.

In Circular No 19 of 25 November 1987, the Coapi informed its members of the 'most urgent amounts' since the scales of charges had not been printed, in order to make it possible to comply with the date for which the new scales were to be effective (1 January 1988).

4. *Records of the meetings of the administrative board and of the extraordinary general meeting of 20 October 1988*

(27) The administrative board's proposals on the alteration of the scales of charges which were adopted by the general meeting of 20 October 1988 were based on :

— a possible (future) increase of 3 % in parafiscal charges, producing an impact on the charges applicable to distinctive signs, and industrial designs,

— fluctuations in the different currencies used for billing.

Moreover, the record of the administrative board's meeting of 14 November 1988 shows a decision to apply an increase of 5 % to all sections of the national scale under the authority granted by the general meeting of 20 October 1988.

With regard to the foreign scales of charges, the pound sterling scale was unaltered except for certain sections because this currency had remained the most stable throughout the year and its increase in value of 3,5 % was in line with the forecast increase in charges.

Consequently, undervalued scales of charges (French francs, German marks and Swiss francs) were simply aligned on the pound sterling scale, except for sections where increases were proposed. In addition, overvalued scales (yen and US dollars) were only to be altered for those sections where the increases were situated between 20 % and 30 %.

In Circular No 16 of 21 November 1988, the Coapi informed its members that the general meeting of 20 October 1988 had approved the new scales of charges and informed them of the 'most urgent' prices since printing of the scales of charges had not been completed.

5. *Records of the meeting of the administrative board of 17 January 1990 and of the ordinary general meeting of 25 January 1990*

(28) The record of the general meeting of 25 January 1990 notes the approval of the administrative board's proposal to increase the national scale of charges by 5 % (increase due in the Registry charges) and the foreign scales of charges by the same percentage plus the fluctuations in the rates of the various currencies. The scale of charges in German marks was taken as the reference. All other currencies were aligned on the reference currency and all sections were increased by 5 % except for four (opposition, replies in suspensory proceedings, searches concerning marks and opposition proceedings).

It was also decided that the new scales of charges would be effective from 1 April 1990 and that the proofs of the scales would be distributed to members pending final printing, so that the date fixed could be complied with ; this was done by Circular No 7 of 5 March 1990.

6. Records of the meetings of the administrative board of 21 September 1990 and 10 December 1990 and of the general meeting of 11 December 1990

(29) The record of the meeting of the administrative board of 21 September 1990 notes the proposal on increases to the foreign scales of charges to be submitted to the general meeting; it involved an increase of 10 % in the scale of charges in German marks and alignment of the others on that scale.

The general meeting of 11 December 1990 approved the proposal to increase the scales of charges submitted by the administrative board, approval having been previously deferred by decision of the general meeting of 24 October 1990.

The new scales of charges were to be determined on the following bases:

— an increase of 12 % in the scale of charges in pesetas (5 % for the increase in Registry charges and 7 % for the increase in the consumer price index);

— alignment of the various scales of charges in foreign currency on the German mark and a general increase of 10 %.

7. Records of the meetings of the administrative board of 6 November 1991, 20 November 1991, 4 December 1991 and 9 January 1992

(30) The record of the meeting of the administrative board of 6 November 1991 notes a proposal for a general increase in the scales of charges of 5 %, corresponding to the increase in the Registry charges.

The record of the meeting of 20 November 1991 states 'the scales should be aligned on those charged by foreign agents, in particular those in the European Community. A detailed study comparing the scales of Spanish industrial property agents and those of foreign agents pointed to the conclusion, and called for the proposal, that the scales of charges for foreign clients should not be amended, taking account of the amount of those charges and movements in rates of exchange. Furthermore, the national scale of charges, should be amended for individual sections'.

Accordingly the record of the meeting of the administrative board of 4 December 1991 urged that the national scale of charges should be increased by 8 %, 10 % or 20 % for most sections. Other sections, such as those on opposition in connection with industrial designs and the drafting of memoranda, were to be specially increased, by 30 % and 25 % respectively, over the 1990 charges for these sections.

Furthermore, at its meeting of 9 January 1992, the administrative board concluded that the foreign scales of charges should not be altered because, 'since October 1990, when those scales were last altered, the peseta had fallen by between 0,2 % and 6,2 % against the US dollar, the yen and the German mark, whilst it had risen against the French franc, the Swiss franc and the pound sterling by between 0,9 % and 4,7 %'.

G. The arguments of the Coapi

(31) The essential aspects of the written and oral observations submitted by the Coapi to the Commission may be summarized as follows:

(a) The Coapi is a public service body (1). The Spanish Constitutional Court has on a number of occasions confirmed professional associations' status as corporations governed by public law, considering that the basic legislation on these associations (see points 5 to 10 above) comes within the exclusive jurisdiction of the State, not of the autonomous communities.

The Coapi considers that, on this view, professional associations constitute public service bodies since the Spanish Constitution assigns to the State sole juridiction concerning 'the bases of the legal rules applicable to public service bodies'.

(b) The Coapi cannot be classed as an association of undertakings within the meaning of Article 85 (1) of the EC Treaty. Even if each industrial property agent could be classed as an undertaking within the meaning of Article 85 (the Coapi leaves this question open), when agents meet within the Coapi they do not do so in that capacity since the Coapi in the discharge of the functions assigned to it by Law No 2/1974, as amended by Law No 74/1978, is required to take account of the interests of ordinary individuals.

The Coapi thus has 'a duty to take into consideration the public interest, as distinct from the mere selfish interest of its members, and the duty to secure compliance by its members with the duties flowing from applicable general and specific legislation', that is, it is vested with State authority.

(1) The *Tribunal de Defensa de la Competencia* (Court for the Protection of Competition) has nevertheless ruled in its decisions of 20 November 1992 and 30 December 1993 that 'professional associations' do not consitute public service bodies and their acts are not administrative acts. The Court considers that such associations constitute corporations covering certain industries or professions whose basis and establishment are strictly private; it adds that this status is recognized in the settled case-law of both the Constitutional Court and the Supreme Court.

(c) The acts of a professional association in the discharge of the functions assigned to it by law constitute administrative acts subject to review by and appeal *(revisables y recurribles)* to administrative courts. The Coapi's decisions thus constitute administrative acts which can in no way be considered decisions of associations of undertakings within the meaning of Article 85 (1) of the EC Treaty.

(d) The Coapi regulations constitute a royal decree forming part of Spanish law. They therefore constitute a State rule.

(e) The Coapi has always fixed minimum prices in accordance with the general Spanish legislation applicable to professional associations and the special legislation applicable to industrial property agents. It has never exceeded the limits of this legislative and regulatory framework.

(f) Since the Coapi regulations are in the nature of State rules, they cannot be declared incompatible with Article 85 (1) of the EC Treaty in proceedings under Regulation No 17. The foregoing also applies to the Coapi's decisions, since the Coapi forms part of the public service and its decisions constitute administrative acts.

(g) The Commission therefore cannot institute proceedings against the Coapi under Regulation No 17 since the contested acts of the Coapi merely constitute the application by a public service body of the legislation on professional associations.

(h) The Commission should, on the other hand, institute proceedings under Article 169 of the EC Treaty against the Spanish State if it considers that this legislation contravenes Article 85 of the EC Treaty by granting professional associations the status of public service bodies and by conferring on them certain functions which are capable of restricting competition.

(i) In any case, the Coapi's fixing of minimum prices has the advantage of promoting competition between members of a profession on the quality of their services. If a consumer has no choice in the matter of prices he will select the agent offering the best guarantees of honesty, experience, diligence and the like, which will result in an improvement in the quality of services and prevent dishonest agents from deceiving consumers by providing poor service.

II. LEGAL ASSESSMENT

A. Article 85

1. *Undertakings and associations of undertakings*

(32) Industrial property agents constitute undertakings within the meaning of Article 85 (1) of the EC Treaty where they practise their profession a self-employed persons.

Such agents provide their services on a long-term basis and for consideration. The fact that they constitute a regulated profession for the purposes of Spanish law and Council Directive 89/48/EEC [1], that the services are of an intellectual, technical or specialized nature and that they are provided on a personal and direct basis does not alter the nature of the economic activity.

According to the Court of Justice of the European Communities in its judgment of 23 April 1991 in Case C-41/90 Höfner v. Macroton [2], '... the concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed...'.

(33) The Coapi, which incorporates all industrial property agents in Spain, therefore constitutes an association of undertakings within the meaning of Article 85 (1) of the EC Treaty. The fact that it forms a professional association to which the public authorities have entrusted certain functions for the regulation of the profession and that in Spanish law it forms a legal person governed by public law, does not prevent Coapi from being regarded as an association of undertakings.

2. *Agreements between undertakings, decisions by associations of undertakings*

(34) The Coapi Regulations (which are concerned with both the establishment of the Coapi and its rules of procedure) form in their origins an agreement between undertakings. They were adopted by a meeting of industrial property agents. Subsequently, the general meeting of the Coapi has modified these regulations several times. Therefore, it follows from this that the Coapi Regulations also constitute a decision by an association of undertakings within the meaning of Article 85 (1) of the EC Treaty.

Moreover, at present the Coapi Regulations are governed by Law No 2/1974 of 13 February 1974, as amended by Law No 74/1978 of 26 December 1978, which lays down that the internal rules and regulations of professional associations must be drawn up by their decision-making bodies and submitted for approval to the public authorities.

[1] OJ No L 19, 24. 1. 1989, p. 16.
[2] [1991] ECR I-1979, paragraph 21.

The Coapi Regulations, which are thus both an agreement and a decision, are autonomous and separate from the legislation which preceded (Royal Decree of 27 February 1926) and followed them (Royal Decree of 28 February 1927 and subsequent modifications). These decrees do not alter the Coapi Regulations' status as an agreement between undertakings or a decision by an association of undertakings (see points 44 to 48 below).

(35) Likewise, the acts of the Coapi's general meeting and of its administrative board in fixing prices, which were adopted under the Coapi Regulations, constitute decisions by associations of undertakings within the meaning of Article 85 (1). These acts are binding on all members and the Coapi ensures that they are applied, employing its power to impose penalties (fines and other sanctions extending to expulsion from the Coapi).

3. *Appreciable restrictions of competition*

(a) Restrictions on prices under the Coapi Regulations

(36) Article 48 of the Coapi Regulations lays down that for particularly complex cases, the administrative board proposes to the general meeting for its approval, 'the scale of charges which shall be applied in the same way by all industrial property agents, seeking to provide the widest possible scope of fees for such cases'.

Article 49 of the Coapi Regulations specifies that the general meeting, acting on the proposal of the administrative board, is to fix compulsory minimum scales of charges for all services in the field of industrial property except in the case of services where the price is difficult to determine in advance (drafting of memoranda, appeals, cases where industrial property has lapsed, etc.) (see point 14 above). Article 35 (7) of the Regulations states that 'the charging of fees below those covered in the scales of charges approved by the general meeting' constitutes a punishable act.

(37) Articles 48 and 49 of the Coapi Regulations consequently have as their object an appreciable restriction on the freedom of action of Coapi members by announcing a common fixing of minimum prices. These arrangements thus constitute an agreement having as its object the establishment of scales of charges for clients, and as such are contrary to Article 85 (1) (a) of the EC Treaty. By these provisions the Coapi members have collectively renounced their freedom to fix their own individual scales of charges for payment of services provided to clients.

(b) Price restrictions resulting from the application of the Coapi Regulations

(38) The decisions of the Coapi adopting annual increases in the national scale of charges and in the foreign scales of charges (tariff A applied to foreign corresponents and tariff B applied to foreign individual clients) and the new scales of minimum charges and the specific dates when they became effective, incorporated in the records of the meetings of 29 January 1987, 24 November 1987, 20 October 1988, 25 January 1990, 11 December 1990 and 4 December 1991 (see points 25 to 30 above) constitute appreciable restrictions of competition within the meaning of Article 85 (1) (a) of the EC Treaty.

These decisions apply the restrictions contained in Articles 48 and 49 of the Coapi Regulations. Not only their object but also their effect is to prevent industrial property agents from competing through fees below the fixed minimum charges. In doing so, they artificially reinforce barriers to entry for aspirant industrial property agents and thereby limit access for clients to alternative sources of services for obtaining patent or trade mark rights in Spain.

The foregoing constitute appreciable restrictions in so far as they extend to all of the services in question, provided by industrial property agents to clients in Spain or abroad.

(39) Collective price fixing is a serious restriction of competition prohibited by Article 85 (1) of the EC Treaty. In its judgment of 30 January 1985 in Case 123/83, BNIC v Clair, the Court of Justice held that 'By is very nature, an agreement fixing a minimum price (. . .) binding on all traders on the market in question, is intended to distort competition on that market' (1).

(1) [1985] ECR 391, paragraph 22.

4. *Appreciable effect on trade between Member States*

(40) Article 49 of the Coapi Regulations establishes that the minimum scales of charges applied by Coapi members relate to two categories of services: services to clients resident abroad and services to clients resident in Spain. The latter category covers both applications to secure industrial property rights in Spain and applications seeking such rights abroad. It should be noted that a person resident in Spain would normally lodge an application to secure a right in Spain in conjunction with an application to secure a right abroad. For example, if a client wishes to secure the exclusive right to use a trade mark protected in Spain in Member States to which products bearing the mark are exported, he must register the mark in each of these countries. In that case the client will request an industrial property agent to do this or to file an application for an international mark with the International Bureau of WIPO, Geneva, pursuant to the Madrid Agreement.

It follows that the minimum scales agreed on in the Coapi cover at least two types of cross-border services: those enabling clients established abroad to secure a right in Spain and those enabling Spanish clients to secure a right abroad. To this extent, the arrangements in question may affect trade between Member States within the meaning of Article 85 (1) of the EC Treaty.

As the Court of Justice held in its judgment of 19 April 1988 in Case 27/87, Erauw-Jacquery v. La Hesbignonne [1], an agreement is only caught by the prohibition contained in Article 85 if it affects trade between Member States to an appreciable degree. In this case, it is a fact that the scales of charges affect most of the business in the sector. These scales of charges apply first of all to all applications from clients abroad. Coapi members monopolize these activities. Second, with regard to activities open to competition (applications by Spanish clients to secure rights abroad), Coapi members necessarily hold a preponderant position. This is because they are specialists in the field, unlike their Spanish competitors. By reason of their affiliation the Coapi members fulfil certain conditions concerning professional skills. This gives them an identifiable status with clients, enabling them to attract most of the business. As regards foreign competitors, a Spanish client will tend to prefer a Spanish agent for language or practical reasons.

5. *Inapplicability of Article 85 (3)*

(41) In this particular case the undertakings concerned are all based in a single Member State. However, these agreements or decisions relate to both the 'importation' and 'exportation' of services between Member States. They are therefore not covered by Article 4 (2) (1) of Regulation No 17 and, if they are not notified, there is no need to consider whether or not the agreement fulfils the four conditions for exemption laid down in Article 85 (3) of the Treaty.

However, even if a notification had been made, the provisions of the Coapi Regulations of the fixing of scales of charges and the Coapi decisions implementing these provisions could not have fulfilled the four conditions for exemption.

The practice of the Commission in its decisions, confirmed by the Court of Justice, shows clearly that the collective fixing of minimum prices is considered a serious breach of the rules on competition of the EC Treaty and that it therefore cannot qualify for an exemption under Article 85 (3).

Even if it were supposed that the collective fixing of minimum prices was intended to ensure high-quality services, it is not the appropriate means in this case.

First, collective fixing would not prevent the provision of poor-quality services with impunity if the prices were higher than the minima (see Commission Decision 82/896/EEC — AROW/BNIC) [2].

Second, the quality of the services provided by industrial property agents is in any case largely secured by the conditions for access to the profession, the exclusive rights granted to agents and the high level of probity attaching to the professions.

[1] [1988] ECR 1919, paragraph 17.

[2] OJ No L 379, 31. 12. 1982, p. 1, paragraph 69.

(42) Moreover, the Court of Justice, in its judgment of 17 January 1984 in Joined Cases 43 and 63/82, VBBB and VBVB [1], declared that, even if the collective fixing of minimum prices constituted some sort of guarantee against unfair competition, it did not constitute sufficient reason to exempt a whole market from the Community rules on competition.

The Coapi's legal obligation to take account of the rights of ordinary individuals in the discharge of the functions entrusted to it by the law (see 6 above, Section 5 (i) of Law No 2/1974) likewise does not suffice to conclude that the four conditions for exemption laid down in Article 85 (3) are fulfilled. In fact, the clause in question does not specifically concern fees. These are dealt with by Section 5 (ñ) of the same law. This clause leaves the professional associations entirely free to fix minimum fees as they wish. Moreover, the Coapi has stated that its scales of charges are based on economic factors (see 20 above).

(43) These restrictions prevent consumers from benefiting from services at lower prices which more efficient agents could provide and form a disincentive for agents to seek to alter their working practices to enable them to reduce their costs. The restrictions therefore fail to allow consumers a fair share of the benefits and do not improve the distribution of services or promote technical or economic progress.

B. Non-applicability of the national legal framework to the rules on competition of the EC Treaty

(44) The Coapi cannot disclaim its liability by maintaining that the acts in question follow from the provisions of Law No 2/1974 of 13 February 1974, as amended by Law No 74/1978 of 26 December 1978.

The only legal obligation of the Coapi is to draw up its internal regulations (see 8 above). Section 5 (ñ) of Law No 2/1974, in specifying that the responsibilities of professional associations shall include 'to regulate minimum professional fees', does not constitute an obligation for them to do so.

(45) This Law does not itself fix scales of charges nor even the criteria for fixing these scales, leaving the professional associations the responsibility for doing so.

Competition on prices is not restricted by the legislation itself but by the acts, permitted by the legislation, of private businesses acting through their professional association. These acts do not form part of the exercise of public authority.

(46) The fact that ordinary individuals may appeal to the administrative courts against decisions of the Coapi does not alter the nature of these decisions as decisions of associations of undertakings.

The Court of Justice, in its judgment of 30 January 1985 in Case 123/83, BNIC v. Clair [2], ruled that 'Article 85 states that it applies to agreements between undertakings and decisions by associations of undertakings (...) the legal framework within which such agreements are made and such decisions are taken and the classification given to that framework by the various national legal systems are irrelevant as far as the applicability of the Community rules on competition and in particular Article 85 of the Treaty are concerned'. The decisions taken by the BNIC would have been referred to the administrative courts and not to the ordinary courts (see judgment cited above, point 2.1.2 [1985] ECR 408).

Furthermore, the *Tribunal de Defensa de la Competencia* (TDC) emphasizes in its two decisions cited above (see footnote to point 31 (a)) that certain acts of professional associations may be appealed against in the administrative courts. This is not because they constitute administrative acts but because these courts are better able to understand matters relating to the delegation of public authority. The TDC adds that what determines that such acts should be put before the administrative courts is simple legal convenience and that it cannot be inferred from this that acts of the 'colegios' constitute administrative acts.

(47) Moreover, the Court of Justice, in its judgment of 16 November 1977 in Case 13/77, INNO v. ATAB [3], laid down that if undertakings could escape the application of the Community competition rules simply because their behaviour had been encouraged by the public authorities, Articles 85 *et seq.* would be deprived of their effectiveness.

[1] [1984] ECR 19, paragraph 37.

[2] [1985] ECR 391, paragraph 17.

[3] [1977] ECR 2115, paragraphs 30 to 34.

(48) Even if the State could be rendered liable in this case, this would at most serve to reduce the amount of a fine to which the Coapi might be liable but would not exclude the application of the competition rules to it (see the position of the Commission in Case 41/83 (judgment of the Court of Justice of 20 March 1985 in Case 41/83, Italy v. Commission) [1]. Even if a State delegates to an association of undertakings power to fix the prices to be applied by its members and, in doing so, commits a breach of Article 3 (g), the second paragraph of Article 5 and Article 85 of the EC Treaty, the association's exercise of that power does not escape the application of Article 85 of the EC Treaty.

C. Article 3 (1) of Regulation No 17

(49) Article 3 (1) of Regulation No 17 lays down that, where the Commission, upon application or upon its own initiative, finds that there is infringement of Article 85 (1), it may by decision require the undertakings or associations of undertakings concerned to bring such infringement to an end.

The Coapi has failed to bring the infringements to an end since it maintains that its decisions fixing minimum scales of charges cannot be declared contrary to Article 85 (1) of the EC Treaty because of its status as a legal person governed by public law and the powers conferred on it by national legislation. In those circumstances, the Commission considers that it must order it to bring the infringements to an end,

HAS ADOPTED THIS DECISION:

Article 1

The following constitute infringements of Article 85 (1) of the EC Treaty:

(a) Articles 48 and 49 of the Regulations of the Colegio Oficial de Agentes de la Propiedad Industrial (the Coapi); and

(b) the decisions of the Coapi adopted since 1987 concerning the annual establishment of minimum scales of charges applicable to clients resident in Spain, to the extent that these concern services relating to applications for the grant or renewal of industrial property rights abroad, as well as minimum scales of charges applicable to clients resident abroad.

Article 2

The Coapi shall take all the steps necessary to bring the infringements mentioned in Article 1 to an end forthwith and to abstain in future from adopting measures having the same object or effect.

Article 3

The Coapi shall inform its members in writing of the content of this Decision and that is has terminated the infringements referred to in Article 1, specifying the practical consequences which flow therefrom, in particular the freedom of the individual members to establish their own scales of charges.

The Coapi shall, within two months of notification of this Decision, communicate to the Commission the information transmitted to its members pursuant to the foregoing paragraph.

Article 4

This Decision is addressed to:

Colegio Oficial de Agentes de la Propiedad Industrial (Coapi)
calle Montera 13
E-28013 Madrid.

Done at Brussels, 30 January 1995.

For the Commission
Karel VAN MIERT
Member of the Commission

[1] [1985] ECR 880, paragraph 17.