E0020.99-LT1360/01-013240004

Decision of the Disciplinary Board of Appeal dated 6 March 2001

D 20/99

(Translation)

Composition of the board:

Chairman: P. Messerli
Members: J.-P. Seitz
C. Rennie-Smith
E. Klausner
H. Lichti

Article: 134(8)(c) EPC
Article: 1, 7, 26 RDR

Keyword: "National amnesty" - "Distortion of competition among professional representatives"

Headnote

I. National amnesty laws are inapplicable in disciplinary proceedings before international authorities.

II. Misuse of corporate assets constitutes unfair distortion of competition among colleagues and hence a breach of the code of conduct of professional representatives before the EPO.

Summary of facts and submissions

I. By letter received at the European Patent Office on 18 March 1999, X acting through his lawyer Y filed an appeal against the EPO Disciplinary Board's decision of 24 February 1999 to issue him with a reprimand.

The statement setting out the grounds of appeal was received on 23 April 1999.

The appellant requested that the complaint filed against him be summarily dismissed, that the contested decision imposing a penalty on him be set aside, and that oral proceedings be held.

In a communication dated 25 October 2000, which did not in any way prejudge the issue, simply being intended to help with preparations for oral proceedings, the Disciplinary Board of Appeal notified the appellant of its observations on the facts and legal aspects of the case.

The appellant replied to this communication on 29 December 2000.

Non-public oral proceedings were held on 6 March 2001.

II. Under Article 6(1) of the Regulation on discipline for professional representatives (RDR) and Article 7(2) of the Additional Rules of Procedure of the Disciplinary Committee of the Institute of Professional Representatives before the European Patent Office, the Disciplinary Committee was asked to consider a complaint relating to three charges filed against X by Z in her capacity as President of the French Patent Agents' Association (CNCPI), received at the *epi* on 30 July 1996 and confirmed on 31 October 1996.

On 5 June 1997, pursuant to Article 6(2) RDR, the Disciplinary Committee referred the matter to the Disciplinary Board of the EPO.

In the contested decision of 24 February 1999, the Disciplinary Board of the EPO:

- imposed a penalty in respect of the first charge only

- considered that the second charge did not fall within the scope of the RDR and that the third charge should be removed from the present proceedings because it had been the subject of earlier proceedings (*non bis in idem*).

III. To substantiate the penalty imposed in respect of the first charge, the Disciplinary Board held that acts attributable to X and liable to criminal prosecution in France constituted breaches of the provisions of Article 1(1) and (2) RDR.

The contested decision cites the grounds for a judgment handed down by the Lille *Tribunal de grande instance* in criminal proceedings, which held that, from 1989 to May 1992, D, an employee of company P of which X was a majority shareholder, worked at least half a day every week for consultancy ... managed by this same X, while continuing to be paid by company P. According to the Lille court, those acts constituted misuse of corporate assets. For the Disciplinary Board, it followed that these same acts represented a breach of the RDR on the part of X, in that they were also tantamount to unfair competition in relation to his fellow European patent attorneys, who were required to pay the people who worked for them.

IV. At first instance the EPO Disciplinary Board ruled out application of the provisions of the French amnesty act of 3 August 1995 which had covered the final criminal judgment on which the Board relied in imposing a disciplinary penalty on the appellant.

To this end it cited the case law of the present Disciplinary Board of Appeal, in particular the decision in D 11/91, which ruled that an amnesty granted under national law or by a national authority had no legal effect for international authorities and could not be relied on before them.

V. In his statement of grounds the appellant argued as follows:

A. Regarding the applicability of the French amnesty act:

- On the one hand, the conviction on which the Disciplinary Board had based its disciplinary action against him was covered by amnesty.

- On the other hand, even if, as ruled at first instance, the international disciplinary authority was at liberty to take account of acts which had been the subject of a criminal conviction covered by amnesty, proof of those acts still had to be established under legally admissible conditions.

- That had not been the case, as proof of the misuse of corporate assets of which he stood accused had been provided solely by reference to a conviction which was covered by amnesty, and reference to such a conviction was prohibited by Article 23 of the French amnesty act of 3 August 1995 granting amnesty for certain offences and punishments.

- For that reason alone, the contested decision had to be set aside.

B. Regarding the appellant's alleged misuse of corporate assets:

- The first-instance ruling had been based solely on a conviction covered by amnesty and had paid no attention to the prosecution's submissions in the criminal proceedings which led to the conviction, even though the state prosecutor had found no evidence of a crime, basing this conclusion on the agreement between company P and consultancy L to make available the services of D as a European patent attorney, and even though that agreement, approved by the board of directors and examined by the auditor of the company in question, ruled out any misuse of corporate assets.

- Even if it had been proven that D was paid only by company P for his work at consultancy L, that would not in itself constitute a breach of Article 1(1) and (2) RDR, since such an agreement was neither detrimental to the conscientious exercise of the European patent attorney's profession nor inappropriate to its dignity, and did not prejudice the necessary confidence in that profession.

- Given the period of limitation for proceedings under Article 26 RDR, D had helped to draw up only seven European applications, so his contribution had been marginal, most of the work having been done by another employee of consultancy L, which was managed by the appellant.

The appellant further asserted that the applicability of the French amnesty act was the reason why he had not appealed at the time against the sentence now covered by amnesty, although an appeal would have been very likely to succeed in view of the public prosecutor's concluding submissions.

Reasons for the decision

1. The appeal is formally correct and is admissible.

2. *Regarding the scope of the appeal*

In the contested decision of 24 February 1999, the Disciplinary Board of the EPO, handling disciplinary proceedings against the appellant by virtue of the Disciplinary Committee's decision of 5 June 1997, ruled as follows:

- it imposed a penalty in respect of the first charge only

- it considered that the second charge did not fall within the scope of the RDR and that the third charge should be removed from the present proceedings because it had been the subject of earlier proceedings (*non bis in idem*).

As neither the President of the *epi* Council nor the President of the EPO has made use of the right of appeal granted them by Article 8(2) RDR, the contested decision is now final in respect of the second and third charges.

The Disciplinary Board of Appeal is therefore required to rule on the appeal filed by professional representative X only in respect of the first charge and the resultant penalty imposed by the contested decision of 24 February 1999.

The statement of grounds for the appeal, using the standard language of the French courts, argues as follows:

"X notes that the Disciplinary Board rightly found that neither the second nor the third charge could be maintained against him. The decision will be endorsed in that respect."

It follows that the board of appeal is required to rule only on the single issue referred to it, viz. whether the first charge, which the contested decision considered proven, constitutes a breach of the rules of professional conduct set out in Articles 1, 2 and 3 RDR and whether the penalty imposed is justified in view of the gravity of the alleged breach.

It follows *a contrario* that the board of appeal can under no circumstances increase the severity of the penalty. That is in keeping with the principle of the devolutive effect of appeals and the general prohibition on making the situation of the sole appellant worse, in the absence of a cross-appeal (no *reformatio in peius*).

3. *As to the merits*

3.1 Regarding the applicability of the French amnesty act

In his pleadings the appellant himself acknowledges that, as ruled at first instance, the international disciplinary authority is wholly at liberty to take account of acts which have been the subject of a criminal conviction covered by amnesty under national law.

That is entirely in keeping with the case law of the present board of appeal (see for example D 11/91), under which an amnesty under national law has no legal effect for international authorities.

Accepting the opposite would be tantamount to dismantling the equality of professional representatives before international disciplinary provisions, to which all EPC states have necessarily agreed by way of delegation, by leaving any of those states free to nullify an act committed within its sovereign territory and subject to those provisions.

Having acknowledged this principle, the appellant still maintains that the disciplinary authority is required to prove breaches of the RDR under legally admissible conditions, and that those had not prevailed in the present case, where proof of the acts attributed to the appellant at first instance had been produced solely by reference to a French criminal conviction covered by amnesty under French law, even though reference to such a conviction constituted a criminal offence.

Yet it is an established principle of law that an amnesty does not take away the criminal nature, in either strictly legal or disciplinary terms, of the acts to which it relates, proof of which may still be established by all available means, including reference to the criminal case file. While there is a prohibition on citing a conviction covered by amnesty, there is nothing to stop a judge referring to the reasons for the conviction, in as far as they substantiate the annulled punishment, as a basis for his findings in a case of a different nature, civil or disciplinary, relating to the same acts.

3.2 As to the merits

In this case it is clear from the state prosecutor's submissions, from the report of company P's auditor and from the reasons for a final judgment which is now *res judicata* that D was involved in drawing up European patent applications in consultancy L, owned by the appellant, while being paid by company P.

However, it is evident from the file submitted to the board of appeal that this contractual arrangement has never been the subject of invoicing, except in 1992 where it is clear that company P invoiced the sum of FRF 49 530 to consultancy L for "staff costs, book-keeping and data processing". This invoice, with "staff costs" forming only one of its items and not necessarily relating to the work of D, is on a completely different scale to the payments made to D by company P, which for 1992 amounted to around FRF 570 000.

This gave an advantage to consultancy L by cutting the cost of drawing up patent applications.

This was an undue advantage as it inevitably entailed unfair distortion of competition in relation to other European patent attorneys, who are required to pay people working for them under strict market rules.

For that reason alone, such conduct is both inappropriate to the dignity of the European patent attorney's profession and liable to prejudice the necessary confidence in that profession.

Hence the appellant has contravened the provisions of Article 1(1) and (2) RDR.

4. Consequently, the penalty imposed at first instance in respect of that charge alone was justified, and the appeal must be dismissed.

4.1 The board of appeal wishes the present decision to be published without revealing identities, as authorised by Article 18 of its Additional Rules of Procedure (OJ EPO 1980, 188). This publication will replace that ordered at first instance.

Order

For these reasons it is decided that:

1. The appeal is dismissed.

2. The present decision will be published without revealing identities.

3. The contested decision will not be published.