



EUROPEAN COMMISSION

Brussels, 12 January 2001

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By courier service UPS

Registered with advice of delivery

Dr Anthony Goldstein

[...]

Subject: Case COMP/35.580
Complaint against the General Council of the Bar of England and Wales
Decision rejecting the complaint made pursuant to Regulation 17

Dear Dr Goldstein

I refer to your application of 26 May 1995 and to subsequent complaints made pursuant to Article 3(2) of Council Regulation No17 alleging violation by the General Council of the Bar of England and Wales (the 'GCB') of EC competition rules.

On 16 June 2000, the Director-General for Competition informed you that pursuant to Article 6 of Commission Regulation 2842/98¹, the Commission considered that the information in its possession did not justify giving a favourable response to your complaint. However, pursuant to the provisions cited above you were provided with an opportunity to submit comments to the Commission and to acquaint yourself with the documents which formed the basis for the Commission's position.

You replied to the Commission's letter of 16 June by letter dated 14 July 2000 ('your reply'). By letter dated 12 October 2000 you provided the Commission with a copy of the skeleton arguments of the parties in the appeal proceedings brought by you before the Visitors to the Inns of Court.

By this letter I inform you that the Commission rejects your complaint.

I must emphasise that, in so far as your complaint relates to alleged breaches by the United Kingdom of the Directives on the free movement of lawyers, it is not covered by

¹ OJ L 354/18 - 30.12.98

Regulation 17. Equally, the reply to those allegations set out below are not part of the procedure under that Regulation either.

FACTS

1. Reference is made to the Commission's letter pursuant to Article 6 dated 16 June 2000 for a description of the complaint and facts.

ASSESSMENT

2. When considering arrangements under which members of professions offer their services, a preliminary distinction can be made between the rules governing the qualifications needed to practise and the rules governing the exercise of the profession.

1. RULES GOVERNING THE QUALIFICATIONS NEEDED TO PRACTICE

1.1. The legal framework at Community level

3. In your response to the Article 6 letter, you allege that the Commission reached its preliminary conclusions as a result of its failure to properly examine the legal framework laid down at Community level for the regulation of the profession of lawyer, in particular with regard to the legal conditions to be satisfied for conferring the professional qualification of barrister.
4. You appear to take the view that Directives regulating the profession of lawyer at Community level (Directives 77/249, 89/48 and 98/5)² have the effect of harmonising the requirements which should be fulfilled by an individual in order for him or her to obtain the right to practise as a lawyer. You refer to 'harmonised Community rules' on the subject which, in your opinion, confer upon an individual an automatic right to practise as a lawyer upon completion of the prescribed academic training. Accordingly you maintain that having completed such training you are 'entitled to automatic registration with the competent authority and a certificate of authorisation to practice as a Community lawyer (barrister)'.³ You thus appear to take the view that the Directive's requirements become not only the minimum that a Member State shall lay down but also the maximum they may lay down.
5. The Commission considers that you take the wrong view as to the effect of those Directives. The Directives do not harmonise rules relating to access to the profession of lawyer but instead impose certain minimum requirements on Member States as regards the recognition by them of lawyers from other Member States who wish either to provide services or establish themselves in the formers' territories. The object of the Directives is therefore to facilitate the free movement of lawyers and their freedom to provide services. Accordingly the Directives do not impose any

² Directive 77/249/EEC of 22.3.1977 to facilitate the effective exercise of lawyers of freedom to provide services; Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained; and Directive 89/48/EEC of 21.12.1998 on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years' duration.

³ Paragraph 23 of your letter of 14 July refers.

obligations on Member States to confer on individuals who have fulfilled training and/or other criteria in their jurisdiction the right to practise as a lawyer. The cases you cite do not support any other conclusion.

6. The Directives do not preclude the exercise of discretionary powers by Member States which may prevent an individual from practising as a barrister notwithstanding his or her successful completion of the prescribed academic training. Your view that the Directives preclude such exercise is therefore rejected.
7. Furthermore, nothing in the Directives prevent the General Council of the Bar from conferring upon certain lawyers the title 'Queen's Council'. The case-law you cite in this respect does not support a different conclusion. Your allegation at paragraph 32 of your reply to the Article 6 letter is, therefore, rejected.

1.2. Implementation of the Directives by the UK

8. In your reply to the Article 6 letter you allege for the first time that the UK has failed to properly implement the Directives. You appear to take such a view on the basis that a correct implementation would necessarily preclude the exercise by the General Council of the Bar of discretionary powers preventing an individual from practising as a barrister notwithstanding his or her successful completion of the prescribed academic training.
9. As stated above, the Commission rejects your assertion that the Directives preclude the use of discretionary powers. Accordingly the Commission considers your claim that the UK has failed to implement the Directives properly to be unfounded.

1.3. Application of the Directives to purely national situations

10. You appear to argue that the rules contained in Directives 77/249 and 98/5 do not apply only in cases concerning nationals from one Member State wishing to practice as lawyers in other Member States. You state that this is clear not only from the Directives themselves but also from Case C-40/93 *Commission-v-Italy* [1995] ECR I-1319.⁴
11. It is settled case-law of the Court of Justice that the provisions of the Treaty on freedom of establishment and freedom to provide services do not apply to purely internal situations in a Member State (see Case 204/87 *Bekaert* [1998] ECR 2029; Joined Cases C-54/88, C-91/88 and C-14/89 *Nino* [1990] ECR I-3537; Case C-152/94 *Van Buynder* [1995] ECR I-3981; and Case C-17/94 *Gervais* [1995] ECR I-4353).
12. Accordingly the Commission rejects your view that the Directives may apply to purely national situations.

2. RULES GOVERNING THE EXERCISE OF THE PROFESSION

2.1. Introduction

⁴ Paragraphs 23 and 24 of the reply.

13. Your letter of 26 May 1995 alleges violation by the General Council of the Bar of England and Wales of EC competition rules as regards certain provisions of the Code of Conduct of the Bar of England and Wales, which regulates the conduct of independent and employed barristers in those territories. Further allegations have been made by you in letters to the Commission dated 10 March 1997, 18 February 1999, 12 July 1999, 27 January 2000, 10 February 2000 and in your reply of 14 July 2000 to the Article 6 letter.
14. Reference is made to the Commission's letter pursuant to Article 6 dated 16 June 2000 for a description of each of the specific allegations you have made, other than those which were made for the first time in your reply to the Article 6 letter. Reference is also made to the Commission's preliminary legal assessment under EC competition rules on pages 8 and 9 of the Article 6 letter of some of your allegations.⁵
15. For the reasons set out below, the Commission considers that:
 - (a) there is insufficient Community interest in pursuing some of the allegations which you have made; and
 - (b) as regards the other matters complained of, and on the basis of the information which you have provided, there appears to be no infringement of Articles 81 or 82.

2.2. Rejection of allegations on grounds of lack of Community Interest

16. In the Article 6 letter, the Commission informed you of its intention, subject to the receipt of comments from you which would lead it to take a different view, to reject on grounds of insufficient Community interest:
 - (a) all allegations made in your letter of 26 May 1995;
 - (b) your allegation that GCB rules differentiate between self-employed and employed barristers in breach of the principle of non-discrimination (see your letter to the Commission of 10 March 1997);
 - (c) your allegation that the General Council of the Bar infringed EC competition rules by its exercise of, or its sanctioning of the exercise of, discretionary powers which may prevent an individual from practising as a barrister notwithstanding his or her successful completion of the prescribed academic training (see your letter to the Commission of 12 July 1999);
 - (d) to the extent that they allege infringement of EC competition rules, allegations made by you in correspondence subsequent to 12 July 1999 relating to the conduct of the Special Committee of Lincoln's Inn as regards its investigation into the matters complained of against you (see your letters to the Commission of 15 October 1999 and 14 January 2000).

⁵ At page 8, Section 3 'Your letter of 26 May 1995 (all allegations)' and at page 9, Section 3 'Your letter of 12 July 1999 (allegations concerning exercise of discretionary powers by the GCB)'

17. The Article 6 letter gave the following reasons for concluding, on a preliminary basis, that there was insufficient Community interest to investigate those allegations further:

3. Rejection of allegations on grounds of lack of Community interest

...

Community Interest

According to case law of the Court of First Instance, while the Commission is obliged to examine carefully the factual and legal particulars brought to its notice by a complainant, it is under no obligation to rule on the existence or otherwise of an infringement and, accordingly, cannot be compelled to carry out an investigation in relation to a complaint submitted to it. The Court has also recognised the right of the Commission to set priorities as regards its treatment of cases on the basis of the Community interest represented by them, and that decisions taken by the Commission to apply different degrees of priority to the cases submitted to it are not incompatible with its obligations under Community law.

In order to assess the Community interest in further investigating a case, the Commission is required (inter alia) to balance the significance of the alleged infringement as regards the functioning of the common market, the probability of establishing the existence of the infringement and the scope of the investigation required in order to fulfil its task of ensuring compliance with EC competition rules.

Even if its preliminary assessment is incorrect concerning the existence or otherwise of (i) any appreciable effects on trade between Member States in relation to allegations made in your complaint of 26 May 1995; and (ii) an infringement under EC competition rules as regards the exercise of discretionary powers by the GCB, as referred to in your complaint of 12 July 1999, the Commission considers, taking into account the likelihood of proving an infringement of EC competition rules, that there is insufficient Community interest in pursuing these allegations further because:

- the effects of the alleged anti-competitive practices are predominantly limited in geographical scope to the territories of England and Wales. Accordingly, the matters raised in your complaint are of minor significance to the maintenance of effective competition in the single market, and that any further investigation of those matters could not be justified taking into account on the one hand the significant resources which would need to be devoted to any such investigation and, on the other hand, the limited benefit to the Community of establishing the existence or otherwise of an infringement by the GCB;*
- Article 81 produces direct effects in Member States and confers rights on individuals which the national courts are required to safeguard. As such, and to the extent that you consider your legal rights have been violated by the GCB, the possibility to address yourself to the national courts, who have the power to declare agreements void under Article 81(2) of the Treaty, remains open to you;*

18. You have put forward arguments as to why it is inappropriate for the Commission to conclude that there is insufficient Community interest to investigate the substance of these allegations. For the reasons indicated below, the Commission considers that your reply to the Article 6 letter does not lead it to take a different view.

2.2.1. Arguments relating to the nature of the alleged infringements

19. First, you state that it is clear from your letter of 26 May 1995 that requests relating to State measures precluding effective competition fall within the scope of EC competition rules, and in particular Article 86 of the EC Treaty (your reply at paragraph 46).

20. The Commission notes that your letter of 26 May 1996 makes no specific allegation of infringement of Article 86 (formerly Article 90) of the EC Treaty. This explains why the Commission made no specific reference to Article 86 in the Article 6 letter. In any event, had you made that specific allegation, the view taken by the Commission that there is insufficient Community interest in investigating the allegations made in that letter under Articles 81 and 82 would have necessarily led it to take a similar view as regards any related allegation of infringement of Article 86.
21. Second, you argue that the Commission is wrong to conclude that the effects of the alleged anti-competitive practices are limited in geographical scope to the territories of England and Wales, in that it failed to have regard to the provision of legal services in the UK by lawyers from other Member States exercising the rights of establishment and freedom to provide services (see your reply at paragraph 56). In this context you ask the Commission to take into account not only issues relating to independent lawyers but also those relating to employed lawyers which, in your view, would lead it to change its position (paragraph 44 of your reply).
22. The Commission considers that whether or not lawyers from other Member States provide legal services in the UK, the effects of the alleged anti-competitive practices remain limited in geographical scope to the territories of England and Wales. The status of lawyer does not, in the Commission's view, change its conclusion.
23. Thirdly, you argue that 'it is clear that the restrictions placed on lawyers of the European Community by the relevant undertakings in the United Kingdom are such as to prejudice the realisation of the aim of a single market for legal services throughout the Community' (paragraph 57 of your reply).
24. The Article 6 letter informed you of the Commission's view that the matters raised in your complaint are of minor significance to the maintenance of effective competition in the single market. Nothing in your response leads the Commission to a different conclusion.
25. Fourthly, you make various remarks concerning (i) the implementation of the Directive and the UK's failure to indicate when its breach of the EC Treaty may be rectified (paragraph 55), (ii) the existence of illegal legal structures in the UK (paragraph 55); (iii) the fact that the 'issues may be limited by time in that the UK authorities may at some future undetermined date negate these restrictions' (paragraph 58); and (iv) the fact that, 'even if the restrictions no longer existed, the Commission has on other occasions issued notices or statements condemning certain types of behaviour...' (paragraph 60 of your reply).
26. The Commission does not fully appreciate the relevance of such comments to the question of Community interest in the present case. In any event such comments do not lead it to change its conclusions in this regard.
27. Fifthly, you argue that the Commission has failed to have regard to the facts and law of a formal communication pursuant to Article 10 of the EC Treaty, namely the contents of a speech given by a former Competition Director-General on the subject of competition and the professions (paragraphs 71 to 77 of your reply).
28. Whether or not that speech represents a formal communication pursuant to Article 10, the Commission does not consider that its rejection of your complaint departs from any general principle outlined therein and to which you have referred.

2.2.2. Arguments relating to the existence of adequate remedies in national courts

29. First, you argue that the Commission should examine whether the 'national procedural rules guarantee that the national court will apply the rule of law' (paragraph 62 of your reply).
30. The Commission has no intention of examining such issues in the absence of any cogent evidence indicating that the UK is in breach of its obligations under the EC Treaty. You have provided no such evidence.
31. Secondly, you state that it would be wrong for the Commission to 'wash its hands' of the complaint because 'the national proceedings are still at a very early stage compared to the complaint'. In this context you state that the report by the UK competition authority on the effect of exclusion of certain professions from the Competition Act 1998 might not be able to be relied upon in the national court (paragraphs 63 and 64 of your reply).
32. The Commission considers that the fact that national proceedings may or may not be at an early stage is not a reason for it to take a position on the substance of a complaint when the complaint is otherwise not of Community interest. As regards the review undertaken by the national competition authority, the Commission made reference to this in its Article 6 letter only in order to bring its existence to your attention. The Commission does not rely on the existence of that review in rejecting your complaint.
33. Thirdly, you argue that you do not have an effective remedy before the national courts in view of the proceedings which were brought against you under Section 42 of the Supreme Court Act (paragraph 65 of your reply).
34. The Commission notes that the effect of the Order made against you under Section 42 is to require you to seek leave of the High Court before instituting civil proceedings. The Commission does not agree that the effect of the Order is to preclude you from relying in national legal proceedings on the rights conferred upon you by the Treaty. The effect of the Order is not to stop all future litigation but to require you to obtain the leave of the High Court before you institute or proceed with legal proceedings.
35. In this context the Commission notes the outcome of your application to have the Section 42 Order set aside on the grounds that it was contrary to EU law and thereby invalid. That application was refused by Richards J on 14 February 2000. The Commission has no power to assess the validity of decisions of national courts as it is in no way an appellate court above the national courts.
36. Fourthly, you argue that civil litigation is extremely complex and the chances of obtaining an appropriate remedy, especially when faced with a full legal team on the other side, must be seen as reduced (paragraph 68 of your reply).
37. National provisions allow you in specified circumstances to obtain legal assistance to pursue claims before the national courts. As a general principle, the Commission takes the view that where such arrangements exist you are provided with adequate protection when pursuing claims before the national courts. The Commission notes that you have received assistance from lawyers in your dealings with the Commission in the present case.

2.3. Rejection of all remaining allegations

2.3.1. Allegations made in your letter of 10 March 1997

38. The Article 6 letter stated (inter alia):

As regards the allegations made in your letter of 10 March 1997, and on the basis of the very limited information which you provide in support of them: (i) I am unable to agree with your conclusion that the Lawyers Directive creates confusion among nationals of Member States as you suggest, ... and (iii) your conclusion that the maintenance in force of the system of designated professional title of Queen's Counsel constitutes an illegal State aid is not supported by information which allows my services to make a proper assessment – failing receipt of information from you which clarifies the nature of any aid given by the UK authorities and the reasons why the granting of such aid should be declared illegal under European State aid rules, the Commission does not intend to pursue this matter further.

39. You have previously failed to produce to the Commission any cogent arguments in support of the allegations referred to above. In the absence of such arguments your allegations appear to be mere assertions without any apparent foundation. The Commission therefore considers it inappropriate to pursue these matters further on the grounds that it has no reason to conclude, on the basis of the information which you have provided, that EC competition rules may have been infringed. Nothing in your reply to the Article 6 letter leads the Commission to take a different view.

2.3.2. Allegations made in your letter of 18 February 1999

40. The Article 6 letter stated (inter alia):

As regards your letter of 18 February 1999, and taking into account your failure to provide any reasoned explanation as to why you consider the Council of Benchers to have acted in breach of Articles 6 and 13 of the European Convention on Human Rights and Council Directive 93/13, the Commission does not propose to investigate these matters further. While the Commission has, since receiving your application of 12 July 1999, proceeded on the basis that you no longer considered it necessary for it to consider those allegations further, you should be aware that in the event that you do wish it to do so, the Commission will only assess those allegations upon receipt from you of fully reasoned arguments.

41. You have previously failed to produce to the Commission any cogent arguments in support of the allegations referred to above. In the absence of such arguments your allegations appear to be mere assertions without any apparent foundation. The Commission therefore considers it inappropriate to pursue these matters further on the grounds that it has no reason to conclude, on the basis of the information which you have provided, that EC competition rules may have been infringed. Nothing in your reply to the Article 6 letter leads the Commission to take a different view.

2.3.3. Allegations made in your letter of 12 July 1999

42. The Article 6 letter states (inter alia):

The Commission wishes to make the following observations in relation to... your letter of 12 July 1999:

- *As regards your allegation concerning the GCB's purported failure to comply with provisions of the European Convention on Human Rights, you should be aware that the Commission is not in a position to consider matters which do not fall within the scope of its competence as defined by the EC Treaty. To the extent therefore that the Commission is unable to consider your (as*

yet unspecified) allegations in this regard, I advise you to seek legal redress either at the national level or before the European Court of Human Rights, whichever may be appropriate.

43. The Commission reiterates this position.

- *As regards your allegation that the Under Treasurer of Lincoln's Inn, through his failure to obtain information from the Commission, has acted in breach of EC competition rules, the Commission considers that your allegation is not sufficiently precise to allow it to determine which of the competition rules have been infringed and why.*

44. The Commission considers that nothing in the competition rules obliged the Under Treasurer of Lincoln's to obtain information from the Commission. Nothing in your reply to the Article 6 letter leads the Commission to take a different view. Accordingly your allegation is rejected.

- *The Commission draws a similar conclusion as regards your allegation concerning a breach of the principle of protection of good repute in view of the very limited information which you have provided in support of that claim.*

45. You have previously failed to produce to the Commission any cogent arguments in support of the allegation referred to above. In the absence of such arguments your allegation appears to be mere assertion without any apparent foundation. The Commission therefore considers it inappropriate to pursue this matter further on the grounds that it has no reason to conclude, on the basis of the information which you have provided, that EC competition rules may have been infringed. Nothing in your reply to the Article 6 letter leads the Commission to take a different view.

2.3.4. Allegations made in your letter of 27 January 2000

46. The Article 6 letter states (inter alia):

As regards your assertion that the GCB and Inns of Court act in breach of Directive 84/450/EC, the Commission is unable to determine your reasons for making those allegations on the basis of the information you have provided.

47. The Commission now rejects this allegation. The provisions of Directive 84/450 fall to be implemented by Member States. It is open to you to make a complaint to the Commission if you have reason to believe that the United Kingdom has incorrectly implemented the Directive.

48. As regards your statement at paragraph 83 of your reply to the Article 6 letter concerning guidance of the GCB on advertising, the Commission has not been made aware of any such guidance and you have made no previous specific allegation in relation to it. You are free to submit a separate complaint in this regard if you so wish.

You allege also that there is no justification for maintaining in force different conditions for access to practice as a self-employed and employed lawyer, and that the Inns of Court are illegal structures insofar as they are societies of barristers and judges. You have failed, however, to provide the Commission with any supporting information which would allow it to consider these matters properly.

49. You have previously failed to produce to the Commission any cogent arguments in support of the allegations referred to above. In the absence of such arguments your allegations appear to be mere assertions without any apparent foundation. The Commission therefore considers it inappropriate to pursue these matters further on

the grounds that it has no reason to conclude, on the basis of the information which you have provided, that EC competition rules may have been infringed. Nothing in your reply to the Article 6 letter leads the Commission to take a different view.

50. In any event you should be aware that as regards different conditions for access to practise as a self-employed and employed lawyer, Directives 77/249 (Article 6) and 98/5 (Article 8) explicitly recognise the right of Member States to differentiate between these fields of activity, although in a different context.

2.3.5. Allegation made in your letter of 10 February 2000

51. The Article 6 letter states (inter alia):

As regards the wording of the advertisement of the Court of First Instance inviting applications for the post of Legal Secretary, the Commission notes that this concerns neither the provision of legal services by barristers nor practices relating to the admission under GCB rules of barristers to the Bar of England and Wales. Accordingly the Commission does not consider the wording of this advertisement as relevant to its assessment of your allegations.

52. Nothing in your reply leads the Commission to alter its position in this regard.

3. OTHER MATTERS

3.1. Restrictions on numbers of lawyers

53. Your reply to the Article 6 letter states at paragraph 49: 'At page 12 of the Article 6 letter, the Commission states inter alia that the restrictions imposed by the GCB and the Inns of Court on the numbers of barristers... fall outside the scope of EU competition rules'.
54. The Commission makes no such statement. If, as the Commission supposes, your statement refers to your allegation concerning the exercise by the GCB of discretionary powers, you are referred to the preceding comments at section 2.1 of this letter.

3.2. Alleged breach of Article 11, Regulation 17

55. At paragraph 78 of your reply to the Article 6 letter you allege that the Commission failed to carry out its obligations correctly under Article 11, Regulation 17 in that it pursued in an inadequate manner issues raised by the GCB.
56. The Commission considers your allegation to be unfounded. Article 11 of Regulation 17 does not impose obligations on the Commission and, even if it did, the Commission carried out its enquiries to the extent that was necessary to facilitate a proper instruction of your complaint.

3.3. Assessment under Articles 81 and 82 of the EC Treaty

57. At paragraphs 80 to 95 of your reply to the Article 6 letter you comment on the applicability of Articles 81 and 82 of the EC Treaty to the matters raised in your complaint. You state that the Commission's preliminary finding that the supply of services by lawyers known as barristers would not appear to have any appreciable

effect on trade between Member States is 'bizarre in the light of the Commission's decision in the EPI case (OJ L 106, 23.4.99)'.

58. The Commission considers that whether or not there the substance of your allegations referred to in section 2.1 above fall within the scope of EC competition rules, this has no bearing on its decision to reject those allegations on grounds of insufficient Community interest. The Commission considers nonetheless that you have not put forward any convincing reasons which might lead it to change its view that the alleged practices have no appreciable effect on trade between Member States. The EPI decision related to applications for European patents filed with the European Patent Office in Munich. Such services have at least European dimension and, other than for customers in Germany, are necessarily cross-border. The effect of the restrictions in the EPI decision and of the practices alleged by you to fall within the scope of Articles 81 and 82 are not, therefore, analogous.
59. As regards your request that the Commission have regard to Article 82 in its assessment of your allegations, the Commission notes that you have made no specific allegation of abuse. In any event, and on the basis of the information which you have provided to the Commission, the Commission considers that there is insufficient Community interest to investigate these issues further

4. CONCLUSION

60. In conclusion, and for the reasons set out above, the Commission's final decision is to reject your complaint.

Yours sincerely,

Done at Brussels, For the
Commission
M. Monti (signed)