AS TO THE ADMISSIBILITY OF

Application No. 14622/89
by Walter-Georg HEMPFING
against the Federal Republic of Germany

The European Commission of Human Rights sitting in private on 7 March 1991, the following members being present:

MM. C.A. NØRGAARD, President
J.A. FROWEIN
S. TRECHSEL
F. ERMACORA
E. BUSUTTIL
G. JÖRUNDSSON
A.S. GÖZÜBÜYÜK
A. WEITZEL
J.-C. SOYER
H.G. SCHERMERS
H. DANELIUS
Mrs. G. H. THUNE
Sir Basil HALL
MM. F. MARTINEZ RUIZ
C.L. ROZAKIS
MM. L. LOUCAIDES
J.-C. GEUS
A.V. ALMEIDA RIBEIRO
M.P. PELLONPÄÄ

Mr. H.C. KRÜGER, Secretary to the Commission

Having regard to Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 12 December 1985 by Walter-Georg Hempfing against the Federal Republic of Germany and registered on 6 February 1989 under file No. 14622/89;

Having regard to the report provided for in Rule 47 of the Rules of Procedure of the Commission;

Having deliberated;

Decides as follows:

THE FACTS

The facts of the case, as they have been submitted by the parties, may be summarised as follows:

The applicant, born in 1947, is a German national and resident in Stuttgart. He is a lawyer by profession.

In a circular letter of 17 December 1983 the applicant addressed himself to several Stuttgart collection agencies. The letter reads as follows:

[German]

"Sehr geehrte Damen und Herren,

durch einen Mandanten bin ich auf Ihr Büro hingewiesen worden.

Möglicherweise suchen Sie - jetzt oder in der nächsten Zeit - einen zusätzlichen Vertreter vor Gericht.
Falls ja, bin ich gerne bereit, mich von Ihnen 'testen'

zu lassen: ich glaube, Ihre Interessen zu Ihrer Zufriedenheit zu vertreten.

Ich bin 35 Jahre alt, über fünf Jahre Anwalt, war vier davon in Reutlingen/Tübingen zugelassen und habe dort bereits etwa zwei Jahre lang in einem größeren, renommierten Büro ein großes Unternehmen Ihrer Branche betreut.

Ich vertrete momentan verschiedene US-amerikanische Auftraggeber (hauptsächlich über zwei Büros) hier in Deutschland bei der Eintreibung von Forderungen.

Für ein weiteres Gespräch stehe ich Ihnen gerne zur Verfügung."

[Translation]

"Madam, Sir,

a client has drawn my attention to your agency.

Possibly you are, now or in the near future, looking for a further counsel in court. If so, I am quite prepared to be put to the test. I believe I can represent your interests to your satisfaction.

I am 35 years old, counsel for more than five years, four of which I practised in Reutlingen/Tübingen, where I have already, for about two years in a renowned law office, represented a big firm in your line of business.

For the time being, I am representing several clients from the United States of America (mostly through two offices) in collecting outstanding debts here in Germany.

I would gladly be at your disposal for a further interview."

On 19 June 1984 the Stuttgart Bar Association (Rechtsanwaltskammer) censured the applicant's professional conduct and issued an official reprimand (schärfste Mißbilligung). The Association, referring to the applicant's circular letter of 17 December 1983, found him guilty of having violated S. 2 para. 1 of the Rules for Lawyers' Professional Conduct (Standesrichtlinien). The Association considered that the applicant's circular letter constituted a particularly striking case of prohibited advertising on the ground that he had taken the initiative of contacting possible clients by mail. The applicant had thereby plainly contravened a fundamental principle of the lawyers' professional rules. To abandon this principle would have drastic consequences in particular for newcomers, because the big and established offices, with their financial means, could overwhelm any newcomers in advertising.

On 8 November 1984 the Bar Association dismissed the applicant's appeal (Einspruch). It considered in particular that the prohibition on advertising could not be changed in respect of young counsel. If that were the case, established offices could always employ a young lawyer in order to advertise. As a consequence, young lawyers with their own law office would be at an even bigger disadvantage. In any event, only the General Assembly of the Federal Bar Association (Bundesrechtsanwaltskammer) would be competent to change the Rules.

On 24 July 1985 the Stuttgart District Disciplinary Court for Lawyers (Ehrengericht) dismissed the applicant's request for a judicial review of the decision of the Stuttgart Bar Association. The Court found that the applicant had gravely violated the

prohibition on advertising in taking the plain initiative to address collection agencies and in offering his services as counsel in order to get briefs. Furthermore, the Bar Association and the Disciplinary Court for Lawyers were not competent to restrict the prohibition on advertising and, in any case, there was no such necessity. A lawyer had other means of drawing public attention to his qualifications, in particular the quality of his work as a lawyer, publications, participation in conferences or membership in local associations. Abolishing or restricting the prohibition on advertising could only be to the advantage of the established law firms, never to the young lawyer. Moreover the duty to refrain from advertising corresponded to the liberal profession of lawyers, which was, in accordance with S. 2 para. 2 of the Federal Regulations for Lawyers (Bundesrechtsanwaltsordnung), not considered as a trade, and presupposed a relationship of trust with the client.

On 11 October 1985 the Federal Constitutional Court (Bundesverfassungsgericht) refused to accept the applicant's constitutional complaint (Verfassungsbeschwerde) on the ground that it offered no prospect of success. The Constitutional Court found in particular that the duty to refrain from advertising was based on S. 43 of the Federal Regulations for Lawyers and specified in the Rules of Professional Conduct. In the present case the interests in a proper administration of justice (geordnete Rechtspflege) outweighed the applicant's right to freedom of expression. The Constitutional Court noted in particular that the applicant had, of his own accord, offered his services to unknown persons, and his circular letter contained information which the addressee could not directly verify.

According to S. 1 of the Federal Regulations for lawyers, a lawyer is an independent organ in the administration of justice ("unabhängiges Organ der Rechtspflege"). His rights and duties are laid down in the general provision of S. 43 which reads as follows:

[German]

"Der Rechtsanwalt hat seinen Beruf gewissenhaft auszuüben. Er hat sich innerhalb und außerhalb des Berufes der Achtung und des Vertrauens, welche die Stellung des Rechtsanwalts erfordert, würdig zu erweisen."

[Translation]

"A lawyer has to practise his profession conscientiously. Whether in pursuit of his profession or otherwise, he has to prove himself worthy of the respect and trust which the position of a lawyer requires."

In accordance with S. 177 para. 2 (2) of the Federal Regulations for Lawyers, the Federal Bar Association (Bundesrechtsanwaltskammer), in the Rules for Lawyers' Professional Conduct, laid down the generally recognised rules concerning the conduct of lawyers. S. 2 para. 1, first sentence, of these Rules provides that it is contrary to the ethics of the profession if a lawyer advertises his practice.

By a decision of 14 July 1987, the Federal Constitutional Court changed its jurisprudence according to which the Rules for Lawyers' Professional Conduct constituted a means of interpretation in respect of S. 43 of the Federal Regulations for Lawyers. Until enactment of rules of professional conduct in bye-laws, only a minimum of professional duties indispensable for the proper functioning of the administration of justice persisted (see 1 BvR 537/81, 11951/87, Entscheidungssammlung des Bundesverfassungsgerichts (BVerfGE) Vol. 76, p. 171). Thus the core of the prohibition on advertisement, i.e. advertisement directly aimed at practice, or on misleading advertisement, always undisputedly formed part of the duties of any

liberal profession (Federal Constitutional Court's decision of 14 July 1987, 12 BvR 162/79; BVerfGE 76, p. 196).

In case of violations of professional duties, S. 74 para. 1 of the Federal Regulations for Lawyers provides for a reprimand.

COMPLAINTS

The applicant complains under Article 10 para. 1 of the Convention that the reprimand violated his right to freedom of expression.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 12 December 1985 and registered on 6 February 1989.

On 17 May 1990 the Commission decided to bring the application to the notice of the respondent Government and to invite them to submit written observations on its admissibility and merits.

The Government submitted observations on 3 September 1990. The applicant made submissions in reply on 4 November 1990.

THE LAW

The applicant complains about the reprimand by the Stuttgart Bar Association of 19 June 1984. He invokes Article 10 para. 1 (Art. 10-1) of the Convention which reads, insofar as relevant, as follows:

"Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority ..."

The Government consider that the applicant's circular letter constituted advertising for his own business and might not, therefore, come within the ambit of Article 10 (Art. 10) of the Convention. In any way, the reprimand was justified under Article 10 para. 2 (Art. 10-2). The measure complained of had been based on S. 43 of the Federal Regulations for Lawyers as specified in the Rules of Professional Conduct which prohibited advertising for clients. Furthermore, the reprimand had been necessary in a democratic society for the protection of the rights of others, in particular of other lawyers.

In this respect, the Government submit that also in other Member States, lawyers are only entitled to moderate advertising, a direct contact with possible clients being prohibited. The principles concerning lawyers' professional conduct elaborated in the framework of the European Communities and the international standards also prohibit advertising. Taking into account that advertising was not at the core of Article 10 para. 1 (Art. 10-1), the reprimand was not dispropritionate.

The applicant maintains that, with his circular letter, he had not only intended to advertise his services, but also to fight the German practice of prohibiting lawyers from advertising their services. Moderate advertising by lawyers would help young lawyers or small law firms to find clients.

The Commission considers that the official reprimand issued by the Bar Association constituted an interference with the applicant's freedom to impart information. The Commission has next examined whether the measure complained of was justified under Article 10 para. 2 (Art. 10-2), namely whether it was prescribed by law, had a legitimate aim under Article 10 para. 2 (Art. 10-2) and was necessary

in a democratic society for the aforesaid aim.

The legal basis for the reprimand against the applicant was S. 74 in conjunction with S. 43 of the Federal Regulations for Lawyers, and S. 2 of the Rules for Lawyers' Professional Conduct, which emanated from the Federal Bar Association and were used to interpret the general provision of S. 43 of the Federal Regulations for Lawyers. According to recent case-law of the German Federal Constitutional Court, the Rules for Lawyers' Professional Conduct were no longer a valid means of interpretation, and only an undisputed minimum of professional duties, including the prohibition on advertising directly aimed at practice, persisted.

The Commission observes that under S. 43 of the Federal Regulations for Lawyers, their professional duties were phrased in a general way. However, frequently laws are framed in a manner that is not absolutely precise, particularly in fields in which the situation changes according to the prevailing views of society. The interpretation and application of such legislation are inevitably questions of practice (cf. Eur. Court H.R., Markt Intern Verlag GmbH and Klaus Beermann judgment of 20 November 1989, Series A no. 165, p. 18, para. 30 with further references).

In the present case, the prohibition on direct advertising for practice was laid down in the Rules for Lawyers' Professional Conduct and, according to the case-law of the Federal Constitutional Court, formed part of the essence of professional duties of any liberal profession. This practice was accessible and enabled lawyers to regulate their professional conduct. The reprimand in question was thus prescribed by law.

The probibition on advertising for practice pursued, as stated in the decision of the Federal Constitutional Court of 11 October 1985, the interest of a proper administration of justice. The Bar Association and the Disciplinary Court for Lawyers, in their respective decisions of 19 June and 8 November 1984 as well as 24 July 1985, referred to the protection of young lawyers vis-à-vis established law firms and the interests of possible clients.

The Commission finds that the prohibition on advertising serves the purpose of protecting the rights of others, namely of the public in general and of the members of the profession as to the proper functioning of the services rendered by lawyers.

As regards the necessity of interfering with the applicant's right to freedom of expression, the Commission recalls that in Article 10 para. 2 (Art. 10-2) the adjective "necessary" implies the existence of a "pressing social need". The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but this goes hand in hand with a European supervision which is more or less extensive depending upon the circumstances (cf. Eur. Court H.R., Barthold judgment of 25 March 1985, Series A no. 90, pp. 24-25, para. 55; Markt Intern Verlag GmbH and Klaus Beermann judgment, op. cit., pp. 19-20, para. 33).

In the present case, the Bar Association issued an official reprimand in view of a circular letter in which the applicant, on his own initiative, had advertised his services as a lawyer to several collection agencies. This disciplinary measure was confirmed in ensuing proceedings before German courts.

The Commission observes that freedom of expression holds a prominent place in a democratic society. As regards the matters of advertising and publicity in the liberal professions, restrictions on the freedom of expression should not discourage members from contributing to a public debate on topics affecting the life of the community. Prohibiting a veterinary surgeon from making declarations in

the context of a genuine problem of absence of a night service, because these statements have the secondary effect of giving publicity to his own clinic, is not consonent with the freedom of expression (cf. Eur. Court H.R., Barthold judgment, op. cit., p. 26, para. 58).

The Commission finds that the applicant, in his circular letter, asserted first a personal relation to the addressee, he then indicated his qualifications and advertised directly his services, offering to be tested by new clients. There is nothing to indicate that the contents of the applicant's circular letter was related to any public discussion or intended to inform the public or the addressees of the letter about any general problem. From the text and the circumstances of the applicant's letter, the advertising effect thus appears as his only motive.

In these circumstances, the Commission, taking into account, on the one hand, the applicant's interest in advertising his services on his own accord to unknown persons, and, on the other hand, the rights of others in a proper functioning of the profession of lawyers as well as the very light nature of the sanction, finds that the reprimand complained of is not disproportionate. The Commission therefore considers that the interference in question can be regarded as necessary in a democratic society for the protection of the rights of others.

It follows that the application is manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

For these reasons, the Commission by a majority

DECLARES THE APPLICATION INADMISSIBLE.

Secretary to the Commission — President of the Commission

(H. C. KRÜGER) — (C. A. NØRGAARD)