PROCEDURE (MARKET RESEARCH): THE IMS CASE

Subject: Procedure
Interim measures
Copyright

Industry: Market research; pharmaceuticals
(Implications for other industries)

Parties: IMS Health Inc
Commission of the European Communities
National Data Corporation (complainant)

Source: Order Of The President Of The Court Of First Instance, dated 10 August 2001, in Case T-184/01 R (*IMS Health Inc v Commission of the European Communities*)

(Note. This case is concerned with the substance of the matter only to the extent that consideration of the substance was necessary for determination of the question, whether the Commission was justified in imposing interim measures as part of its decision in the IMS case. These measures consisted substantially of a requirement that the applicant, IMS, should grant a licence to a competitor, NDS, of its copyright in a scheme for analyzing market trends; or, more precisely, in that part of the scheme known as the brick structure, which is defined in paragraph 1 of the Order below. There are obvious reminders here of the Magill case; and the President of the Court has sought to differentiate the circumstances of the Magill case from the circumstances arising here. But there is clearly more to be said on the matter. The importance of the substantive issue is the relationship between intellectual property rights and anti-trust rules, as well as the extent to which ownership of an intellectual property right may be used to foreclose the market in a given product or service field. The importance of the procedural issue concerns the conditions on which a Commission decision may include interim measures. In the present case, these conditions were not fulfilled. A fuller report will appear when the final judgment is given.)

Background

1. IMS Health Incorporated (hereinafter the applicant) is a market research company that provides a broad range of market research, marketing, and sales management services to the pharmaceutical industry. In particular, it provides, through its German subsidiary, regional wholesaler data report services to interested pharmaceutical companies in respect of sales of pharmaceutical products by pharmacies throughout Germany. The services are based on a brick structure. Brick structures divide a country into artificially designated geographic areas or bricks that are used to report and measure sales of individual pharmaceutical products.

2. Since 1969 the applicant has invested considerable resources in developing its German brick-structure-based information services. These efforts culminated in the development of the 1860 brick structure format (the 1860 brick structure), which was launched in January 2000. The 1860 brick structure now constitutes the central feature of the applicant's German regional wholesaler data-information service.

3. Suspecting that two competitors on the German market, Pharma Intranet Information AG (PI) and AzyX Deutschland GmbH (AzyX), which were founded by former senior personnel from IMS Health and which had initially entered the German market selling services based on alternative brick structures, were, by early 2000, in fact selling services based on copies of the 1860 brick structure, the applicant commenced, on 26 May 2000, copyright infringement proceedings before the Regional Court, Frankfurt am Main. On 16 November 2000, the Frankfurt court, confirming an earlier judgment of 12 October 2000, held that, under German copyright law, the applicant enjoyed copyright in the 1860 brick structure. In the same judgment, it also confirmed an injunction it had issued on 27 October 2000 prohibiting PI from using brick structures derived from the applicant's 1860 brick structure.

4. On 26 October 2000, National Data Corporation (hereinafter NDC), also a United States company, which had acquired PI in August 2000, requested a licence from the applicant to use the 1860 brick structure in return for an annual licence fee of DM 10,000 (€5,112.92). By letter of 28 November 2000, the applicant rejected the request while the copyright issue remained *sub judice* before the national courts, PI having lodged an appeal against the Frankfurt court's judgment of 26 November 2000. In a further letter of 18 December 2000, the applicant refused to enter into negotiations arguing that it was not essential for NDC to have the use of the 1860 brick structure to compete against it on the German market.

5. On 18 December 2000, NDC lodged a complaint with the Commission alleging that the applicant's refusal to licence the 1860 brick structure to it constituted an infringement of Article 82, EC Treaty.

6. On 8 March 2001, the Commission sent a Statement of Objections (SO) to the applicant which was received on 9 March 2001. The Commission alleged, having regard in particular to Case C-7/97 (*Bronner*), that access to the 1860 brick structure amounted to an essential facility (SO, paragraph 84) for competitors of the applicant such as NDC. Accordingly, the applicant's refusal to allow access thereto potentially constituted a prima facie abuse of the dominant position which, in the Commission's view, it held on the relevant German market as a result of the 1860 brick structure. The Commission warned the applicant that it intended to adopt a decision imposing interim measures (SO, paragraphs 100 to 103).

7. The applicant submitted a written response to the SO on 2 April 2001. An oral hearing then took place on 6 April 2001. The Commission sent a request for further information to the applicant on 4 May 2001, to which the latter replied on

14 May 2001. The applicant also replied, on 14 June 2001, to further evidence obtained by the Commission following requests made by it of a number of pharmaceutical companies, copies of which were provided by the Commission to the applicant in two instalments on 22 May and 6 June 2001 respectively.

8. On 19 June 2001, PI's appeal against the judgments of 27 October and 16 November 2000 was dismissed by the Higher Regional Court, Frankfurt am Main.

The contested Decision

9. On 3 July 2001, the Commission adopted a decision relating to a proceeding pursuant to Article 82, EC Treaty (Case COMP D3/38.044 - NDC Health/IMS Health: Interim measures) (hereinafter the contested decision). The decision is based on Council Regulation 17 of 1962, as amended, and in particular on the Commission's powers under Articles 3 and 16 thereof as interpreted by the Community judicature in the *Camera Care* line of case-law (see, *inter alia,* Case 792/79 R (*Camera Care* v *Commission*), Joined Cases 228/82 and 229/82 (*Ford* v *Commission*) and Case T-44/90 (*La Cinq* v *Commission*)).

10. In the contested decision, the Commission considers (paragraph 41) that, according to the *Camera Care* line of case-law, three conditions must be satisfied before it may take protective measures in the course of a competition investigation:
- there is reasonably strong prima facie case establishing an infringement;
- there is a likelihood of serious and irreparable harm to the applicants unless the measures are ordered;
- there is an urgent need for protective measures.

11. The Commission finds in the contested decision that these conditions are satisfied in the present case. The applicant's refusal of access to the 1860 brick structure is likely to eliminate all competition in the relevant market, since without it it is not possible to compete on the relevant market (paragraph 181). This finding is based on its conclusion that the said structure constitutes a 'de facto industry standard (paragraph 180). It also considers, on the basis of the evidence before it, that 'there is good reason to suppose that unless NDC is granted a licence to the 1860 brick structure its German operation will go out of business, and that there will be intolerable damage to the public interest (paragraph 190). The latter assessment is based primarily on its concern for the continued presence of the [applicant's] other current competitor, AzyX, on the market (paragraph 195).

12. The effective part of the contested decision provides:

> *Article 1*
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> IMS Health (IMS) is hereby required to grant a licence without delay to all undertakings currently present on the market for German regional sales data services, on request and on a non-discriminatory basis, for the use of 1 860 brickstructure, in order to permit the use of and sales by such undertakings of regional sales data formatted according to this structure.

Article 2

In any licensing agreements relating to the 1 860 brick structure, any royalties to be paid for these licences shall be determined by agreement between IMS and the undertaking requesting the licence ('the parties).

If an agreement has not been reached within two weeks of the date of the request for a licence, appropriate royalties will be determined by one or several independent experts. The expert(s) will be chosen by agreement of the parties within one week of the parties' failure to agree on a licence fee. If an agreement on the identity of the expert(s) has not been reached within this time, the Commission shall appoint an expert or several experts from a list of candidates provided by the parties, or, if appropriate, choose one or several suitably qualified person(s).

The parties will make available to the expert(s) any document which the expert(s) consider necessary or useful to carry out their task. The expert(s) shall be bound by professional secrecy and shall not disclose any evidence or documents to third parties except to the Commission.

The expert(s) will make a determination on the basis of transparent and objective criteria, within two weeks of being chosen to carry out this task. The expert(s) will communicate this determination without delay to the Commission for approval. The Commission's Decision shall be final and take effect immediately.

Article 3

A penalty of 1 000 euros per day shall be payable in respect of any period during which IMS fails to comply with the provisions of this Decision.

Article 4

The provisions of this Decision shall apply until notification of the decision concluding the proceeding.

Article 5

This Decision is addressed to IMS Health of Harewood Avenue, London NW1, United Kingdom.

Applications to the Court

13. By application lodged at the Registry of the Court of First Instance on 6 August 2001, the applicant brought an action under the fourth paragraph of Article 230, EC Treaty, seeking, *inter alia*, the annulment of the contested decision or, alternatively, its annulment insofar as it requires IMS Health to licence the 1860 [b]rick [s]tructure to companies currently present on the German market for regional sales data services and specifies the conditions under which the negotiation of licence terms will be conducted and approved by the Commission.

14. By separate application lodged at the Court's Registry on the same day, the applicant, in accordance with Articles 242 and 243, EC Treaty, brought the present application for interim measures in respect of the operation of the contested decision. It requests the President of the Court of First Instance to order the following interlocutory relief:

- to suspend the operation of the Decision on his own initiative until such time as he has heard and determined this Application;

- to further suspend the operation of the Decision until the Court of First Instance has rendered judgment on the [the main action]; and
- to grant any other interim measures the President considers appropriate.

15. In respect of the first measure of interim sought from the judge hearing the application for interim measures, the applicant submits that it is extremely urgent that the operation of the contested decision be suspended until an order is made terminating the proceedings for interim relief. It points out that, in accordance with Article 2 of the contested decision, a decision by the Commission that would be 'final and take effect immediately could be taken even before the end of August 2001. It is clear from paragraph 6 of the present application that this particular claim for interim relief is based on Article 105(2) of the Rules of Procedure of the Court of First Instance (hereinafter the Rules).

16. In support of the claim, the applicant's core submission is that the contested decision contradicts settled Community case-law, as well as previous Commission decisions, by finding that it is prima facie unlawful for a dominant undertaking, such as the applicant, to refuse to share with competitors a competitive advantage in the form of its intellectual property in the 1860 brick structure in respect of the very market to which that intellectual property relates. The finding of the Commission deprives it of the very essence of its copyright under national law as recognised by Community law and is manifestly incompatible with Article 295, EC Treaty. It will thereby cause the applicant to incur immediate, serious, enduring and potentially irreparable damage, in particular by materially and permanently devaluing its brick-structure-based and copyright-protected data-information services to a generic commodity service indistinct from the services offered by its competitors.

17. As regards the Commission's view that the existence of a prima facie abuse by the applicant of its dominant position may be justified by reference to its finding that the 1860 brick structure amounts to an industry standard and, hence, an essential facility for competitors such as the complainant NDC, the applicant contends that this constitutes a new legal objection which was not mentioned by the Commission in the SO and in respect of which it was not given an adequate opportunity to be heard prior to the adoption of the contested decision.

18. Concerning the balance of interests, the applicant alleges that it favours suspension of the decision because the interim measures ordered by the Commission in the contested decision are not protective in nature. Instead of preserving the status quo and, thus, ensuring the effectiveness of the final decision to be given in the main action, they alter the status quo by forcing the applicant to negotiate licence terms with NDC and AzyX where those undertakings previously not only had no licence but were, as found by the German courts, actually infringing its copyright in the 1860 brick structure. Moreover, since the contested decision accepts that those undertakings are already active on the German market and have developed their own brick structures, there is no interim need to grant them a licence to use the 1860 brick structure so as permit them to offer interested pharmaceutical companies the same services as the applicant is currently providing.

19. Pursuant to the second subparagraph of Article 105(2) of the Rules, the President of the Court of First Instance may grant an application for interim relief even before the observations of the opposite party have been submitted. Any such order may later be varied or cancelled either on application by a party to the application for interim measures or by the President of his own motion.

Review of case law

20. It is settled case-law that Article 105(2) of the Rules permits the judge hearing an application for interim measures, either where it is necessary to enable him to have enough time to be sufficiently informed so as to be in a position to judge a complex factual and/or legal situation raised by the application before him, or where it is desirable in the interests of the proper administration of justice that the status quo be maintained pending a decision on the application, to adopt provisional interim measures: Case 221/86 R, (*Group of the European Right* v *European Parliament*), paragraph 9; Case 194/88 R, (*Commission* v *Italy*), paragraph 3; Case C-195/90 R, (*Commission* v *Germany*), paragraph 20; Case T-12/93 (*CCE Vittel et CE Pierval v Commission*), paragraph 33). The scope of the power granted by that provision does not necessarily fall to be interpreted differently where the decision in respect of which provisional interim relief is sought is one in which interim measures have been adopted by the Commission pending the termination of an investigation under Regulation 17 concerning an alleged infringement of Community competition law: Case 229/82 R (*Ford* v *Commission*), paragraphs 7 and 8.

21. In the present case, it is first appropriate to recall that Article 295, EC Treaty, provides that the Treaty shall in no way prejudice the rules in the Member States governing the system of property ownership. It follows from Article 295, EC Treaty, that a judge hearing an application for interim measures should normally treat with circumspection a Commission decision imposing, by way of interim measures taken in the course of a pending investigation under Article 3 of Regulation 17, an obligation upon the proprietor of an intellectual property right recognised and protected by national law to license the use of that property right.

22. It would appear from the contested decision that the Commission has based the contested decision particularly on its interpretation of the scope of the principles set out by the Court of Justice in *Magill*: Joined Cases C-241/91 P and C-242/91 P (*RTE and ITP* v *Commission*). In that case, the Court of Justice, having rejected the contention that the exercise of a national copyright [could] never be reviewed in relation to Article 86 (now Article 82, EC Treaty) confirmed that a refusal to grant a licence, even if it is the act of an undertaking holding a dominant position, [could] not in itself constitute abuse of a dominant position (paragraphs 48 and 49). It then acknowledged that the exercise of an exclusive right by the proprietor may, in exceptional circumstances, involve abusive conduct (point 50).

23. On the question whether such exceptional circumstances existed in that case, the Court of Justice, on the basis of the findings of fact of the Court of First

Instance regarding the existence of a distinct market for the provision of comprehensive weekly television guides separate from that of market for the separate weekly guides already produced, *inter alia*, by each of the appellants (paragraph 52), held as follows (paragraphs 53 to 57):

> Thus the appellants - who were, by force of circumstance, the only sources of the basic information on programme scheduling which is the indispensable raw material for compiling a weekly television guide - gave viewers wishing to obtain information on the choice of programmes for the week ahead no choice but to buy the weekly guides for each station and draw from each of them the information they needed to make comparisons.
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> The appellants' refusal to provide basic information by relying on national copyright provisions thus prevented the appearance of a new product, a comprehensive weekly guide to television programmes, which the appellants did not offer and for which there was a potential consumer demand. Such refusal constitutes an abuse under heading (b) of the second paragraph of Article 86 of the Treaty.
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> Second, there was no justification for such refusal either in the activity of television broadcasting or in that of publishing television magazines ..... .
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> Third, and finally, as the Court of First Instance also held, the appellants, by their conduct, reserved to themselves the secondary market of weekly television guides by excluding all competition on that market ... since they denied access to the basic information which is the raw material indispensable for the compilation of such a guide.
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> In the light of all those circumstances, the Court of First Instance did not err in law in holding that the appellants' conduct was an abuse of a dominant position within the meaning of Article 86 of the Treaty.

24. It is clear from the reasoning of the Court of Justice in the *Magill* case that there are a number of potentially important differences between the circumstances of that case and those underlying the present case as set out in the contested decision. Yet the approach of the Commission underlying the contested decision would provisionally appear, in large measure, to depend upon the extent of the notion of exceptional circumstances to which the Court of Justice refers in that case. It would also appear from an interim assessment of both the contested decision and the present application that the applicant has made out a provisional prima facie case that the Commission has misconstrued the scope of the principles set out in *Magill* by finding that, notwithstanding the differences between that case and the present case, the applicant's refusal to grant a copyright licence to NDC, among others, so that the latter could provide essentially the same information services, based in large part on freely available data, on the same market and to the same potential consumers as the services currently provided by the former amounts to a prima facie abuse of its dominant position. Even if the Commission were correctly to have found that the potential incompatibility of the impugned refusal of the applicant to licence the use of its copyright with the objectives of Article 82, EC Treaty, could not be excluded merely because of the abovementioned factual differences, the correctness of the conclusion it draws from *Magill* in the final sentence of paragraph 67 of the

contested decision cannot, for the purposes of justifying the far-reaching interim measures adopted in the contested decision, be, even temporarily, confirmed.

Commission's powers to adopt interim measures

25. At first sight, it would appear that the applicant also has made out a not unconvincing case that the interim measures adopted by the Commission in the contested decision exceed the scope of the Commission's powers to adopt interim measures on the basis of the *Camera Care* case-law. Far from preserving the *status quo ante* where the NDC and AzyX were, as found by the national courts, providing a service based on an infringement of the applicant's copyright, the applicant is required by the contested decision to licence those undertakings so that, pending the final decision to be adopted by the Commission upon completion of its investigation of NDC's complaint, they are to be permitted legally to exploit that copyright. The contention of the Commission in the contested decision, made in respect of the similar argument advanced by the applicant in its observations on the SO, that the interim measures adopted therein merely maintain NDC's ability to compete the market, and are no more than what is required in this situation to prevent intolerable damage to the public interest (paragraph 217 of the contested decision) would not seem, at least on an initial assessment, to address the argument made by the applicant that they legitimise conduct that was previously illegitimate and are thus inappropriate as interim measures.

26. Furthermore, the applicant seems, at least provisionally, to have a prima facie case against the Commission's findings that the 1860 brick structure has become an industry standard based on the fact that much, if not all, of the evidence upon which that finding is based in the contested decision was obtained only after the applicant had submitted its written and oral replies in respect of the SO. It could therefore be the case that the applicant was not afforded an adequate opportunity to rebut that evidence before the adoption of contested decision.

27. In these circumstances, it is clear that the judge hearing the application for interim measures needs time, in accordance with the case-law cited in paragraph 20 above, to consider the complex factual and legal issues raised by the present application. Having regard in particular to the potentially very important economic consequences for the applicant of a decision of the Commission to fix the terms for a compulsory licence of its copyright in the 1860 brick structure and to the serious encroachment on its property rights which any such decision would constitute, the proper administration of justice justifies, at this stage, a temporary suspension of the operation of the contested decision.

28. Accordingly, without waiting for the observations of the Commission, the deadline for whose submission has been fixed, following a request from it for a delay, for 12 September 2001, and without prejudice to the final decision to be made in the course of the present proceedings, it is necessary to order, as a protective measure in the interest of the proper administration of justice until that decision is given, the suspension of the operation of the contested decision.

29. As the order terminating an application for interim relief must be made speedily, this interim protective measure is not such as to cause irreparable harm either to the Commission's interest, or to that of the applicant's competitors, and particularly NDC, in the application of the interim measures adopted in the contested decision.

Court's Order

On those grounds, the President Of The Court Of First Instance hereby orders:

1. The operation of the Commission Decision of 3 July 2001 relating to a proceeding pursuant to Article 82 EC (Case COMP D3/38.044 - NDC Health/IMS Health: Interim measures) is suspended until the order terminating the present proceedings for interim relief is made;

2. Costs are reserved. ■

Hearing Officers

The Commission has appointed Serge Durande and Karen Williams to be Hearing Officers. Their duty is to safeguard the rights of companies to be heard and defend themselves in merger reviews and in anti-trust proceedings. The appointments follow the Commission's decision last May to strengthen the role and independence of the Hearing Officers and improve the overall accountability of the Commission's decision-making process in competition matters. According to the mandate adopted in May, the Hearing Officers are no longer attached to the Competition department, but report directly to the Competition Commissioner. Their role is to ensure that the procedural rights of the parties have been fully respected regarding, for example, the right of access to the file compiled by the Competition department in a competition case, the right to be heard (at an oral hearing, if requested) and to safeguard the confidentiality of sensitive information. Since the new mandate came into force, the Hearing Officer's report has been published together with the decision in the Official Journal, thus contributing to greater transparency in competition cases.

The Hearing Officers are high-ranking officials (Mr Durande and Ms Williams are respectively A2 and A3 grade officials). Both have extensive experience in the application of European competition law, having previously worked in the Commission's Competition Directorate General, Mr Durande most recently as Head of the Units dealing with Financial Services and Transport, and Ms Williams as Case Manager in the Merger Task Force.

Source: Commission Statement IP/01/1529, dated 30 October 2001