

Case T-201/04 R

Microsoft Corp.

v

Commission of the European Communities

(Proceedings for interim relief — Article 82 EC)

Order of the President of the Court of First Instance, 22 December 2004 . . . II - 4470

Summary of the Order

1. *Applications for interim measures — Suspension of operation of a measure — Conditions for granting — Prima facie case — Urgency — Cumulative nature — Need to weigh up all the interests involved — Discretion of the judge dealing with the application for interim relief*

(Rules of Procedure of the Court of First Instance, Art. 104(2))

2. *Applications for interim measures — Interim orders — Duty to state reasons — Limits (Rules of Procedure of the Court of First Instance, Art. 107(1))*
3. *Applications for interim measures — Formal requirements — Submission of applications — Statement of the essential elements of fact and law in the application for interim relief itself and the documents annexed thereto — General reference to an annexed document, setting out the details of the argument — Not permissible (Parts VII(1) and (2) of the Practice Directions)*
4. *Applications for interim measures — Production during the proceedings, in order to respond to the arguments of another party, of documents predating the lodging of the application for interim relief — Lawfulness*
5. *Applications for interim measures — Suspension of operation of a measure — Conditions for granting — Urgency — Serious and irreparable damage — Burden of proof*
6. *Applications for interim measures — Suspension of operation of a measure — Conditions for granting — Urgency — Serious and irreparable damage — Obligation placed on an undertaking to issue licences affecting its intellectual property rights — Assessment on a case-by-case basis*
7. *Applications for interim measures — Suspension of operation of a measure — Conditions for granting — Serious and irreparable damage — Obligation placed on an undertaking to disclose secret information — Not in itself serious damage — Burden of proof on the undertaking*
8. *Applications for interim measures — Suspension of operation of a measure — Conditions for granting — Urgency — Serious and irreparable damage — Financial loss*
9. *Applications for interim measures — Suspension of operation of a measure — Conditions for granting — Urgency — Serious and irreparable damage — Obligation placed on an undertaking in a dominant position to alter its business policy — Insufficient (Art. 82 EC)*
10. *Applications for interim measures — Suspension of operation of a measure — Conditions for granting — Urgency — Serious and irreparable damage — Irreversible developments in market conditions — Included*

11. *Applications for interim measures — Suspension of operation of a measure — Dismissal of application — Possibility of submitting another application — Condition — New facts*
(Rules of Procedure of the Court of First Instance, Art. 109)
12. *Applications for interim measures — Suspension of operation of a measure — Conditions for granting — Urgency — Serious and irreparable damage — Financial loss*
13. *Applications for interim measures — Suspension of operation of a measure — Conditions for granting — Urgency — Serious and irreparable damage suffered by the applicant*
14. *Applications for interim measures — Suspension of operation of a measure — Conditions for granting — Serious and irreparable damage — Interference with intellectual property rights — Assessment of actual situation*

1. Under Article 104(2) of the Rules of Procedure of the Court of First Instance, an application for interim relief must state the circumstances giving rise to urgency and the pleas of fact and law establishing a *prima facie* case for the interim measures applied for. Those conditions are cumulative, so that an application for interim relief must be dismissed if any one of them is absent. Where appropriate, the judge hearing an application for interim relief must also weigh up the interests involved. In the context of that overall examination, the judge dealing with the application must exercise the broad discretion which he enjoys when determining the manner in which those various conditions are to be examined in the light of the specific circumstances of each case.
2. The judge dealing with an application for interim relief cannot be required to reply explicitly to all the points of fact and law raised in the course of the proceedings. In particular, it is sufficient that the reasons given by the judge dealing with the application at first instance validly justify his order in the light of the circumstances of the case and enable the Court of Justice to exercise its powers of review.

(see para. 73)

(see paras 71-72)

3. Under Part VII(1) of the Practice Directions adopted by the Court of First Instance, an application for interim relief must be intelligible in itself, without necessitating reference to the application lodged in the main proceedings. It follows that the merits of such an application can be assessed only by

reference to the elements of fact and law as they emerge from the application for interim relief itself and from the documents annexed to that application and intended to illustrate its content. While it cannot be concluded that every assertion based on a document that is not annexed to the application for interim relief must necessarily be excluded from the proceedings, evidence to support such an assertion cannot however be regarded as having been adduced if the assertion in question is challenged by the other party to the proceedings or by a party intervening in support of that other party. While an application may be supported and supplemented on specific points by references to particular passages in documents which are annexed to it, a general reference to other documents, even if they are annexed to the application for interim relief, cannot make up for the absence of essential elements in that application. In this regard, Part VII(2) of the Practice Directions, which requires that the pleas of fact and law on which the main action is based (establishing a *prima facie* case on the merits in that action) be stated with the utmost concision, cannot, without circumventing that rule, be construed as permitting the general reference to an annexed document setting out the details of the argument.

(see paras 86-88, 97)

ments only in the course of the proceedings, provided that it did so in order to support its observations in response to the arguments put forward by the opposing party or by the interveners in their pleadings, little significance attaching in this regard to the fact that the document annexed bears a date prior to that on which the application for interim relief was lodged or that it is identical or comparable to a document annexed to the main application.

(see para. 93)

5. The urgency of an application for interim relief must be assessed in relation to the necessity for an interim order in order to prevent serious and irreparable damage to the party applying for those measures. It is for that party to prove that it cannot wait for the outcome of the main proceedings without suffering damage of that kind. The alleged damage must be certain or at least established with sufficient probability, while the applicant is required to prove the facts forming the basis of the supposed damage.

4. In interim proceedings, a party cannot be criticised for having produced docu-

(see paras 240-241, 427)

6. To take the view that a breach of the exclusive prerogatives of the holder of an intellectual property right constitutes in itself, and irrespective of the circumstances particular to each case, serious and irreparable damage, would mean that the urgency requirement of a suspension of operation is always satisfied when an undertaking is obliged by a Commission decision to issue licences affecting such rights. In such circumstances, the judge hearing an application for interim relief must therefore examine whether, in the light of the elements of the case, the fact that those rights will be affected until a decision has been given on the merits of the case is likely to cause, over and above the simple breach of the exclusive prerogatives of the holder of the rights in question, serious and irreparable damage.

(see paras 248, 250-251)

ment of such a decision to show what irreparable damage might be caused to it by the simple fact that third parties had knowledge of data disclosed by it, as opposed to the developments resulting from the use of that knowledge. Nor does the disclosure of information previously kept secret necessarily mean that serious damage will occur.

(see paras 253-254)

8. The serious nature of the financial damage on which an undertaking relies in order to justify the urgency of the suspension of operation which it seeks before the judge dealing with the application for interim measures must be assessed by reference to its financial power.

(see para. 257)

7. While it is an indisputable fact that, once acquired, knowledge of information previously kept secret — whether because it is the subject of an intellectual property right or because it constitutes a trade secret — may be retained, that annulment of the Commission decision ordering such disclosure would therefore not delete the knowledge of that information from memories and that compensation would be very difficult as the value of the transfer of knowledge would be difficult to quantify, it is none the less for the undertaking seeking a stay of enforce-

9. In principle, any decision taken under Article 82 EC and requiring a dominant undertaking to bring an abuse to an end necessarily entails a change in its business policy. The obligation imposed on an undertaking to alter its conduct cannot therefore be regarded as constituting serious and irreparable damage in itself, short of considering that the urgency requirement is always satisfied

when the decision whose suspension is sought orders the addressee to bring abusive conduct to an end. Where an applicant invokes an interference with its business freedom to demonstrate that the interim measure applied for must be ordered as a matter of urgency, it must adduce evidence either that implementation of the contested measure will oblige it to alter certain essential elements of its business policy and that, even after judgment in its favour has been given in the main proceedings, the effects of the implementation of that measure will prevent it from resuming its initial business policy, or that those effects will cause it serious and irreparable damage of another kind, it being borne in mind that it is in the light of the circumstances of each case that the alleged damage must be assessed. Thus the judge dealing with the application for interim measures must assess the consequences of the interference with the undertakings' freedom to define their business policies in the light of the effects of the implementation of the measure.

(see paras 291-293, 409)

10. It cannot be precluded that disclosure of the information relating to the interoperability of a product with competitors' products which an undertaking in a dominant position is ordered by a Commission decision to effect might alter market conditions in such a way that that undertaking would not only

lose market share but also, should the decision be annulled, would no longer be able to regain the market share lost and, accordingly, that such an obligation might be considered to be serious and irreparable harm permitting the undertaking concerned to seek, by way of provisional measure, suspension of operation of the decision. However, it is for the undertaking concerned to adduce any factual evidence to support its argument, in particular by demonstrating that there would be obstacles preventing it from regaining a significant part of the share which it could have lost as a result of the remedy.

(see para. 319)

11. Under Article 109 of the Rules of Procedure of the Court of First Instance, rejection of an application for an interim measure does not bar the party who made it from making a further application on the basis of new facts. In the present case, it cannot be ruled out that a continuing disagreement as to details of the means of implementation of the impugned decision might be regarded as a 'new fact'.

(see para. 325)

12. Damage which would essentially consist of additional development costs for the applicant and which, therefore, in the absence of proof to the contrary, would constitute financial damage, does not, save in exceptional circumstances, constitute irreparable damage.

under the head of urgency, unless it is shown that the damage would, conversely, cause damage to the party seeking the measure.

(see para. 416)

(see paras 413, 435)

13. The urgency of an application for interim relief must be assessed in relation to the necessity for an interim order in order to prevent serious and irreparable damage to the party applying for those measures. Consequently, in so far as damage may be caused to third parties, it cannot be taken into account

14. The mere fact that a Commission decision may to a certain extent affect intellectual property rights is, in the absence of explanations to the contrary, insufficient to support the conclusion that there is serious and irreparable damage, at least independently of the actual effects of such interference.

(see para. 473)