

**Case T-289/03**

**British United Provident Association Ltd (BUPA) and Others**

**v**

**Commission of the European Communities**

(Intervention — Confidentiality)

Order of the President of the Third Chamber (Extended Composition) of the  
Court of First Instance, 4 March 2005 . . . . . II - 745

Summary of the Order

1. *Procedure — Intervention — Communication of pleadings to interveners — Derogation — Confidential treatment — Conditions — Application for confidential treatment — Statement of reasons — Examination by the President — Verification of secret or confidential nature — Weighing-up of interests*

*(Rules of Procedure of the Court of First Instance, Art. 116(2); Instructions to the Registrar of the Court of First Instance, Art. 5(4), first para.)*

2. *Procedure — Intervention — Communication of pleadings to interveners — Derogation — Confidential treatment — Information provided by an insurer to a public authority entrusted by the national legislature with certain powers of supervising and applying national provisions governing private health insurance and required to make a report to the government — Information not capable of being regarded as confidential vis-à-vis the Member State concerned*  
(Rules of Procedure of the Court of First Instance, Art. 116(2))
3. *Procedure — Intervention — Communication of pleadings to interveners — Derogation — Confidential treatment — Whether application for confidential treatment vis-à-vis a Member State justified by a risk that the latter might communicate to another intervener, dependent upon it, information whose confidentiality the latter has not challenged — Risk not established, having regard to the inadmissibility of such conduct on the part of the Member State*  
(Art. 10 EC; Rules of Procedure of the Court of First Instance, Art. 116(2))
4. *Procedure — Intervention — Communication of pleadings to interveners — Derogation — Confidential treatment — Application for confidential treatment concerning information already widely reported in the media, particularly at the instigation of the applicant itself — Dismissal*  
(Rules of Procedure of the Court of First Instance, Art. 116(2))
5. *Procedure — Intervention — Communication of pleadings to interveners — Derogation — Confidential treatment — Application for confidential treatment of information not capable of giving access to concrete economic information harmful to the applicants' commercial interests — Dismissal*  
(Rules of Procedure of the Court of First Instance, Art. 116(2))

1. The first sentence of Article 116(2) of the Rules of Procedure of the Court of First Instance lays down the principle that interveners are to receive a copy of every document served on the parties. It is only by way of derogation from that principle that the second sentence of that provision enables the Court to make certain documents in the case the subject of confidential treatment and

thus to exclude them from the obligation of communication to the interveners.

For the purpose of determining the conditions under which recourse may be had to that derogation, it is necessary to balance, in respect of each document

or passage of a document on the Court's file for which confidential treatment is claimed, the applicant's legitimate concern to prevent substantial damage to its business interests and the interveners' equally legitimate concern to have the necessary information for the purpose of being fully in a position to assert their rights and to state their case before the Court.

intervener challenging the exclusion depriving it of certain information. Only where that is the case will it have to balance the legitimate interests of the parties to the proceedings in accordance with the principles set out above.

(see paras 22-26)

As a general rule, an application for the confidential treatment of information which contains business secrets should be upheld. Furthermore, a derogation from the principle set out in the first sentence of Article 116(2) of the Rules of Procedure can be made only after an examination of the confidentiality or otherwise of each document on the file for which an application for confidential treatment, duly reasoned, has been submitted. It is particularly in order to allow such an examination that the first paragraph of Article 5(4) of the Instructions to the Registrar of the Court of First Instance provides that a party's application for the confidential treatment of certain information on the file must specify the confidential matters or passages and explain why they are confidential.

2. Information concerning the possible consequences for the applicant of a system for harmonising risk levels being implemented on the national sickness insurance market, which that party, being active in that market, has supplied in that regard to a State authority of that Member State, entrusted by the national legislature with certain powers of supervising and applying the national provisions governing private health insurance and with a role as government adviser on the matter and with a duty to gather, evaluate and communicate to the relevant minister all the essential facts relating to the functioning of the private health insurance market in order to judge the relevance of introducing that system, cannot be regarded as confidential vis-à-vis a Member State intervening in proceedings before the Court of First Instance.

Therefore, when hearing an application for confidentiality, the President must first examine whether the matters in respect of which confidential treatment is requested are capable of being classified as business secrets or other confidential information vis-à-vis the

(see paras 28-29)

3. The fact that a Member State and a body which is in some respects dependent on it might have concordant general positions on a given matter provides no ground for inferring that their respective interventions in proceedings before the Court of First Instance are necessarily perfectly in accord with each other, or that they are likely to exchange information between themselves, even if confidential, concerning the case in hand, or that information communicated to the Member State and the confidentiality of which in its regard the said body has not challenged, might nevertheless be made accessible to it by the Member State.
  4. Applications for confidential treatment, in relation to an intervener, of information already widely reported in the media must be dismissed, since that information has lost its confidentiality and therefore no longer warrants specific protection by the Court of First Instance.
- (see paras 34-35)

The risk of such communication cannot therefore be regarded as making that information confidential vis-à-vis the Member State, especially as an exchange between the interveners of certain information which, after challenge by the opposing party, had been communicated to them by the Court of First Instance on an individual basis and solely for the purposes of defending their own legitimate interests in the proceedings would, in any event, be inadmissible and constitute a serious undermining of the requirements of the sound administration of justice and, to the extent that a Member State was involved, constitute a breach of the duty of loyalty under Article 10 EC.

(see paras 31-32)

5. Where it has not been conclusively established how, on the basis of aggregate data, which are, moreover, of a certain age, a third party might deduce concrete information harmful to the applicants' commercial interests, as to turnover, accounts and, finally, current profitability, there is no need to allow their application for the exclusion of such data from the documents to be sent to an intervening party.

(see para. 38)