

Case T-184/01 R

IMS Health Inc.

v

Commission of the European Communities

(Proceedings for interim relief — Competition law — Complaint — Alleged abuse of copyright — Commission decision providing for protective measures — Conditions for the grant of interim relief — Prima facie case — Urgency — Balancing of interests)

Order of the President of the Court of First Instance, 26 October 2001 . . . II-3198

Summary of the Order

1. *Competition — Administrative proceedings — Termination of infringements — Adoption of interim measures — Powers of the Commission — Conditions governing the exercise of those powers*
(Council Regulation No 17, Art. 3(1))

2. *Applications for interim measures — Suspension of operation of a measure — Suspension of operation of interim measures in the field of competition — Scope of the powers of the judge hearing the application for interim relief*
(Arts 242 EC and 243 EC; Rules of Procedure of the Court of First Instance, Art. 104; Council Regulation No 17, Art. 3(1))
3. *Applications for interim measures — Suspension of operation of a measure — Suspension of operation of interim measures in the field of competition — Conditions for granting — Prima facie case — Interim measures justified on grounds of urgency — No effect on requirement to present prima facie case — Account to be taken of the urgency by the judge hearing the application for interim relief when balancing all the interests at stake*
(Arts 242 EC and 243 EC; Rules of Procedure of the Court of First Instance, Art. 104(2); Council Regulation No 17, Art. 3(1))
4. *Applications for interim measures — Suspension of operation of a measure — Suspension of operation of an interim measure in the field of competition requiring the proprietor of an intellectual property right to licence the use of that right — Examination by the judge hearing the application for interim relief — Article 295 EC — Whether relevant*
(Arts 82 EC, 242 EC, 243 EC and 295 EC; Rules of Procedure of the Court of First Instance, Art. 104; Council Regulation No 17, Art. 3(1))
5. *Applications for interim measures — Suspension of operation of a measure — Suspension of operation of interim measures in the field of competition — Conditions for granting — Serious and irreparable harm — Standard of proof — Copyright infringement — Included*
(Art. 242 EC; Rules of Procedure of the Court of First Instance, Art. 104(2))
6. *Applications for interim measures — Suspension of operation of a measure — Suspension of operation of interim measures in the field of competition — Conditions for granting — Balancing of all of the interests involved — Priority given to safeguarding copyrights*
(Arts 30 EC, 82 EC, 242 EC, 243 EC and 295 EC; Rules of Procedure of the Court of First Instance, Art. 104(2))

1. Two conditions must be satisfied before the Commission may take protective measures in the course of an ongoing investigation under Regulation No 17; protective measures may be granted only where the impugned practices are such as to constitute a breach of the Community rules on competition that could be sanctioned by a final decision of the Commission,

and, secondly, only in cases of proven urgency in order to prevent a situation arising where it is likely that serious and irreparable damage to the party applying for their adoption, or intolerable damage to the public interest, will be caused.

(see paras 52-55)

2. Under Articles 242 EC and 243 EC, the judge hearing an application for interim relief may, if he considers that the circumstances so require, order that application of the contested act be suspended or prescribe any necessary interim measures, whereby account must be taken of the conditions laid down, as regards applications brought before the Court of First Instance, in Article 104(2) of the Rules of Procedure, as further defined in the case-law.

There is no reason to suppose that the scope of the powers granted pursuant to Article 104 of the Rules of Procedure to the judge hearing an application for interim relief, in respect of a final Commission decision applying the Treaty competition law rules and adopted on the basis of the express powers it enjoys under Regulation No 17, falls to be interpreted differently where the decision in respect of which interim relief is sought constitutes, instead, an interim decision adopted on the basis of the Commission's implied power to adopt interim measures under Article 3(1) of that regulation.

(see paras 59-60)

3. In the context of an application for interim relief in respect of an interim measure adopted in the field of compe-

tion, there is no convincing reason why an applicant should be required to demonstrate a particularly strong or serious prima facie case against the validity of what constitutes a prima facie evaluation by the Commission of the existence of an infringement of Community competition law. The mere fact that the reason underlying the Commission's assessment was that the taking of protective measures was urgent does not justify requiring an applicant who is seeking the suspension of the decision imposing those measures to demonstrate a particularly strong prima facie case, since that aspect can be taken into account by the judge hearing such an interim application when considering in whose favour the balance of interests lies.

The applicant in such interim-relief proceedings must therefore demonstrate, in order to establish the existence of a prima facie case, the subsistence of serious grounds for doubting the correctness of the Commission's assessment of at least one of the conditions for adopting interim measures in the field of competition. Nevertheless, the judge hearing such an application will, in determining whether all the conditions for granting interim relief prescribed by Articles 242 EC and 243 EC and Article 104(2) of the Rules of Procedure are satisfied, but particularly in assessing whether the balance of interests favours the applicant or the Commission, take account both of the latter's

analysis of the urgency that justified the adoption of the contested interim measures and the reasons why it balanced the interests involved in favour of adopting such measures.

prove its existence. It is sufficient for the harm, particularly where it depends on the occurrence of a number of factors, to be foreseeable with a sufficient degree of probability.

(see paras 65-66, 73)

4. Article 295 EC provides that a judge hearing an application for interim relief 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 No 17 and based upon a provisional interpretation of Article 82 EC, an obligation upon the proprietor of an intellectual property right recognised and protected by national law to licence the use of that property right.

Nevertheless, an evaluation of the factors capable of justifying suspension of the operation of a measure, such as a decision relating to a proceeding pursuant to Article 82 EC, and requiring an undertaking to grant all its competitors a licence to use one of its copyrighted products by reason of the damage to which it is likely to give rise, must take account of the fact that it is, in itself, an interim measure adopted by the Commission in the course of an investigation which has not yet been concluded. It must therefore be considered whether or not there is a serious risk that the detrimental effects of the contested decision would, if it were put into operation immediately, exceed those of a conservatory measure and, in the meantime, cause damage considerably in excess of the inevitable but short-lived disadvantages arising from such an interim decision.

(see para. 91)

5. The urgency of an application for interim relief must be assessed in the light of the need for an interlocutory order in order to avoid serious and irreparable damage to the party seeking the relief. It is for the party who pleads serious and irreparable damage to

Damage of a purely financial nature cannot, save in exceptional circumstances, be regarded as irreparable, or even as being reparable only with difficulty, if it can ultimately be the subject of financial compensation. Damage of a financial nature that is

not eliminated by the implementation of the judgment in the main proceedings constitutes an economic loss which may be made good by the means of redress provided for in the Treaty, in particular Articles 235 EC and 288 EC. However, where the means of redress in the event of the contested decision being annulled would be an action for damages before the national courts, it is clearly not possible, nor indeed appropriate, for the judge hearing the application for interim relief to speculate on the likelihood of adequate redress being obtained by the applicant before the national courts.

6. The public interest in respect for property rights in general and for intellectual property rights in particular is expressly reflected in Articles 30 EC and 295 EC. The mere fact that an applicant invokes and seeks to enforce its copyright for economic reasons does not lessen its entitlement to rely upon the exclusive rights granted by national law for the very purpose of rewarding innovation.

To reduce copyright to a purely economic right to receive royalties dilutes the essence of that right and is, in principle, likely to cause potentially serious and irreparable harm to the rightholder. The fundamental rationale of copyright is that it affords the creator of inventive and original works the exclusive right to exploit such works, thereby ensuring that there is a reward for the creative effort. Copyright is of fundamental importance both for the individual owner of the right and for society generally. The purely temporary nature of the significant interference with the specific subject-matter of the applicant's intellectual property right does not, in itself, suffice to allay the real risk of serious and irreparable damage.

In the context of an application for suspension of operation of an interim measure, adopted by the Commission, requiring the grant of a licence to use a copyright, where the characterisation of an applicant's refusal to licence its copyright as abusive for the purpose of Article 82 EC is not unambiguous and where there is a tangible risk that it will suffer serious and irreparable harm if forced, in the meantime, to license its competitors, the balance of interests favours the unimpaired preservation of its copyright until judgment in the main action.

(see para. 116-117, 119, 125, 127)

(see paras 143-144)