

ORDER OF THE COURT OF FIRST INSTANCE (Fifth Chamber)

10 March 2005 \*

In Case T-184/01,

**IMS Health, Inc.**, established in Fairfield, Connecticut (United States), represented by N. Levy, J. Temple-Lang, Solicitors, and R. O'Donoghue, Barrister,

applicant,

v

**Commission of the European Communities**, represented initially by A. Whelan, É. Gippini Fournier and F. Siredey-Garnier, and subsequently by A. Whelan, acting as Agents, with an address for service in Luxembourg,

defendant,

\* Language of the case: English.

supported by

**NDC Health Corp.**, formerly National Data Corp., established in Atlanta, Georgia (United States), represented initially by I. Forrester QC, F. Fine, Solicitor, C. Price and A. Gagliardi, lawyers, and subsequently by C. Price, J. Bourgeois, lawyers, and F. Fine, and lastly by F. Fine,

and

**NDC Health GmbH & Co. KG**, established in Bad Camberg (Germany), represented initially by I. Forrester QC, F. Fine and M. Powell, Solicitors, C. Price and A. Gagliardi, lawyers, and subsequently by F. Fine, C. Price and J. Bourgeois, lawyers, and lastly by F. Fine,

and by

**AzyX Deutschland GmbH Geopharma Information Services**, established in Neu-Isenburg (Germany), represented initially by G. Vandersanden, L. Levi and D. Dugois, lawyers, and subsequently by G. Vandersanden and L. Levi,

APPLICATION for annulment of Commission Decision 2002/165/EC of 3 July 2001 relating to a proceeding pursuant to Article 82 EC (Case COMP D3/38.044 — NDC Health/IMS Health: Interim measures) (OJ 2002 L 59, p. 18),

THE COURT OF FIRST INSTANCE  
OF THE EUROPEAN COMMUNITIES  
(Fifth Chamber)

composed of M. Vilaras, President, F. Dehousse and D. Šváby, Judges,

Registrar: H. Jung,

makes the following

**Order**

**Background to the dispute**

1 IMS Health Inc. ('IMS'), a US company, provides information to undertakings in the pharmaceutical and healthcare product sectors in several countries.

- 2 In Germany IMS carries on its business through its subsidiary, IMS Health GmbH & Co. OHG. It supplies a regional sales data service to interested pharmaceutical laboratories. That service is based on a brick structure called the '1 860 brick structure', which divides Germany into 1 860 geographical zones for the purpose of reporting data on sales of medicinal products.
  
- 3 IMS took the view that certain companies — in this case, Pharma Intranet Information AG ('PII') and AzyX Deutschland GmbH Geopharma Information Services ('AzyX') — were using copies of the 1 860 brick structure and commenced legal proceedings in the Landgericht Frankfurt am Main (Frankfurt am Main Regional Court) for infringement of copyright. Those proceedings were commenced on 26 May 2000 against PII and on 22 December 2000 against AzyX.
  
- 4 By order of 12 October 2000, the Landgericht Frankfurt prohibited PII from using the 1 860 brick structure. By order of 27 October 2000, confirmed by judgment of 16 November 2000, the Landgericht Frankfurt also prohibited PII from using the 2 847 or 3 000 brick structures, or any other structure of that type based on the 1 860 brick structure. The order of 12 October 2000 and the judgment of 16 November 2000 were confirmed on 17 September 2002 and 19 June 2001 respectively by the Oberlandesgericht Frankfurt am Main (Frankfurt am Main Higher Regional Court).
  
- 5 A US company, NDC Health Corp. (formerly National Data Corp.) ('NDC') took over PII and then carried on business in Germany through its subsidiary, NDC Health GmbH & Co. KG. By order of the Landgericht Frankfurt of 28 December 2000, confirmed by judgment of 12 July 2001, the same prohibition was imposed on NDC.

6 By order of 28 December 2000, the Landgericht Frankfurt also prohibited AzyX from providing, promoting or offering data based on the 1 860 brick structure. The Landgericht Frankfurt confirmed that order by judgment of 15 February 2001.

7 At the same time as those legal proceedings, NDC and AzyX applied to IMS for a licence to use the 1 860 brick structure in return for an annual licence fee. IMS refused those requests on 28 November 2000 and 28 May 2001 respectively.

8 It is in that context that, on 19 December 2000, NDC lodged a complaint with the Commission based on Article 82 EC.

9 As a result of that complaint, on 3 July 2001, the Commission adopted Decision 2002/165/EC relating to a proceeding pursuant to Article 82 EC (Case COMP D3/38.044 — NDC Health/IMS Health: Interim measures) (OJ 2002 L 59, p. 18, 'the contested decision').

10 In that decision, the Commission found that there was a prima facie case of abuse within the meaning of Article 82 EC in so far as IMS was refusing to issue a licence to use the 1 860 brick structure. Furthermore, the Commission found that there was a likelihood of serious and irreparable harm to the public interest. It noted in this connection that there was a risk that IMS's competitors, namely NDC and AzyX, would withdraw from the German market if they were not granted licences.

- 11 For those reasons, the Commission decided to adopt interim measures in the form of an order compelling IMS to grant a licence for the use of the 1 860 brick structure without delay to all undertakings present on the market for German regional sales data services on request and on a non-discriminatory basis.

### **Procedure and forms of order sought**

- 12 On 6 August 2001, IMS brought an action under the fourth paragraph of Article 230 EC for the annulment of the contested decision.
- 13 By separate document lodged at the Registry of the Court of First Instance on the same date, IMS further sought an order pursuant to Articles 242 EC and 243 EC suspending application of the contested decision until the Court of First Instance delivers judgment in the main action.
- 14 By order of 10 August 2001, adopted pursuant to the second subparagraph of Article 105(2) of the Rules of Procedure of the Court of First Instance, the President suspended, as a protective measure, the application of the contested decision until the order terminating the present proceedings for interim relief is made (order of the President of the Court of First Instance in Case T-184/01 R *IMS Health v Commission* [2001] ECR II-2349).

- 15 By order of 26 October 2001, the President of the Court of First instance suspended the application of the contested decision (order of the President of the Court of First Instance of 26 October 2001 in Case T-184/01 R *IMS Health v Commission* [2001] ECR II-3193). On appeal by NDC that order was confirmed by order of the President of the Court of Justice of 11 April 2002 in Case C-481/01 P(R) *NDC Health v IMS Health and Commission* [2002] ECR I-3401).
- 16 By order of the President of the Third Chamber of the Court of First Instance of 5 February 2002, AzyX, NDC and NDC Health GmbH & Co. KG were permitted to intervene in support of the form of order sought by the Commission.
- 17 By order of 26 September 2002, the President of the Third Chamber of the Court of First Instance stayed the proceedings in the present case pending the decision of the Court of Justice on the questions referred for a preliminary ruling on the interpretation of Article 82 EC by the Landgericht Frankfurt in proceedings pending before that court between IMS and NDC.
- 18 On 13 August 2003, the Commission adopted Commission Decision 2003/741/EC relating to a proceeding under Article 82 EC (Case COMP D3/38.044 — NDC Health/IMS Health: Interim measures) (OJ 2003 L 268, p. 69, ‘the decision of 13 August 2003’) by which it withdrew the contested decision.
- 19 By letter lodged at the Registry of the Court of First Instance on 16 September 2003, the Commission applied to the Court of First Instance for a declaration that there is no longer any need to give a decision in the present case and produced in support of its application a copy of the decision of 13 August 2003. The Commission also sought an order that each party bear its own costs.

- 20 The parties were requested to submit observations in writing on the question whether there was still any need to give a decision in the present case.
- 21 In its observations on the application for a declaration that there is no longer any need to give a decision, IMS claims that the Court of First Instance should:
- reject the Commission's application in its entirety and, when it comes to rule on the main proceedings, order the Commission to pay the costs including those incurred in relation to its observations;
  - alternatively, in the event that the Commission's request is granted, order that institution to pay the costs.
- 22 In their joint observations on the application for a declaration that there is no longer any need to give a decision, lodged at the Registry of the Court of First Instance on 4 November 2003, NDC and NDC Health GmbH & Co. KG submit that there is no longer any need for the Court of First Instance to give a decision on the application to set aside the contested decision and they seek an order that each party bear its own costs.
- 23 In its observations on the application for a declaration that there is no longer any need to give a decision, lodged at the Registry on 14 October 2003, AzyX states that it has no particular observations to make, but seeks an order that it not be ordered to bear its own costs.



- 24 On 29 April 2004, the Court of Justice delivered judgment on the reference for a preliminary ruling in Case C-418/01 *IMS Health*, not yet published in the ECR).
- 25 On 8 June 2004, by way of measures of organisation of procedure pursuant to Article 64 of the Rules of Procedure, several questions were put to the principal parties regarding the scope of the decision of 13 August 2003. The parties replied to those questions within the prescribed period.

**The application for a declaration that there is no need to give a decision**

*Arguments of the parties*

- 26 In its application for a declaration that there is no need to give a decision the Commission submits that the present action has become without object.
- 27 In its reply to the questions put by the Court of First Instance on 8 June 2004 on the scope of the decision of 13 August 2003, the Commission states that that decision is based on factors which arose after the adoption of the contested decision. It therefore states that the decision of 13 August 2003 has no retroactive effect in itself.

- 28 The Commission nevertheless submits that no legal effect has ensued from the contested decision. It submits first that the contested decision only imposed 'interim' measures and was not therefore based on a definitive finding of an infringement of Article 82 EC. Second, the Commission points out that the contested decision was suspended throughout the period of its potential application.
- 29 In the Commission's view, the only conceivable legal effect is that which could apply to the German courts in national proceedings. However, the Commission submits that there is no need to continue the present proceedings and points out that the contested decision in the present case can no longer have legal effect for those courts given the withdrawal by the decision of 13 August 2003. Therefore there is no risk of conflicting decisions in breach of the principle of legal certainty.
- 30 IMS for its part submits that the declaration should not be made in the present case.
- 31 First, IMS submits that the withdrawal of the contested decision has not removed its legal effects. Pointing out that a declaration that there is no need to give a decision may be made where the contested act has been fully withdrawn or superseded by a later act which is itself contested, IMS considers that proceedings may continue to have purpose if the withdrawn decision continues to have legal effect, in particular because the withdrawal only has legal effect for the future. IMS adds that if the decision was not withdrawn with retroactive effect a declaration that there is no need to give a decision would preclude it from challenging the validity and the effects of the contested decision.

32 Second, IMS submits that the merits of the contested decision are a relevant factor in the determination of proceedings pending before the German courts and points, in that regard, to proceedings pending between it and NDC. IMS points out in particular in that context that NDC puts forward the argument that, according to the *prima facie* assessment in the contested decision, IMS abused its dominant position by not granting NDC a licence. IMS adds, moreover, that NDC could submit that, between 3 July 2001 and 13 August 2003, the contested decision was neither withdrawn nor annulled and that it was entitled to a licence for that period. IMS refers in particular to the judgment in Case C-344/98 *Masterfoods and HB* [2000] ECR I-11369, and submits that the German courts might have doubts as to how to decide a case where the contested decision was neither annulled nor retroactively withdrawn. Lastly, IMS states that the questions referred to the Court for a preliminary ruling by the Landgericht Frankfurt did not address certain points put forward in the application for annulment.

33 Third, IMS submits that the application for a declaration that there is no need to give a decision should be rejected for reasons of procedural economy. IMS submits in this respect that it retains an interest in the prosecution of annulment proceedings since there is a risk that it will face measures similar to the contested decision in the future. Furthermore, IMS notes that the Commission has always refused to rule on whether the investigation should be adjourned or even on whether the proceedings were closed. Lastly, IMS submits that there is a risk that NDC or other undertakings might rely on the contested decision as a possible basis for claiming a licence.

### *Findings of the Court*

34 By its application for a declaration that there is no need to give a decision, the Commission raises a procedural point which, pursuant to Article 114(3) of the Rules of Procedure, should be resolved without opening the oral procedure, since the Court considers that it has sufficient information from the documents in the file.

35 It should be noted that during the proceedings and by the decision of 13 August 2003 the Commission expressly withdrew the contested decision.

36 It is clear from the statement of reasons for the decision of 13 August 2003 that, as the Commission noted, the 'withdrawal' has no retroactive effect and that that decision should therefore be regarded as withdrawing the contested decision with effect from that date.

37 In those circumstances, the contested decision has no longer had binding legal effect with regard to the applicant since the entry into force of the decision of 13 August 2003.

38 However, according to the case-law, the applicant may retain an interest in the annulment of a measure withdrawn in the course of proceedings if the annulment of that measure may in itself have legal consequences (see order of the Court of First Instance of 14 March 1997 in Case T-25/96 *Arbeitsgemeinschaft Deutscher Luftfahrt-Unternehmen and Hapag-Lloyd v Commission* [1997] ECR II-363, paragraph 16, and the case-law cited).

39 In the present case, the applicant specifically submits that it retains an interest in seeking the annulment of the contested decision given its legal effects during the period prior to the withdrawal decision.

40 It should be noted that application of the contested decision was suspended, first of all, by an order of the President of the Court of First Instance of 10 August 2001, then by an order of the President of the Court of First Instance of 26 October 2001. The contested decision could not therefore have legal effect between the suspension of its application for the first time, namely 10 August 2001, and the entry into force of the decision of 13 August 2003.

- 41 It is clear that the contested decision had legal effect only from when it entered into force to the time when its application was suspended. However, perusal of the file shows that, whilst application of the contested decision had begun, no effect remains to justify an interest in seeking annulment of the contested decision.
- 42 Thus, it is clear from Article 2 of the contested decision that the obligation to grant a licence, laid down by Article 1 of that decision, could only be following an application by IMS's competitors and an agreement as to the royalties to be paid, to be determined by experts where necessary.
- 43 It is clear from the file that IMS's competitors, in this case AzyX and NDC, lodged an application for a licence after the contested decision was adopted. The parties were unable to agree on the appropriate royalties and the procedure for selecting an expert began. However, in the light of the order made by the President of the Court of First Instance on 10 August 2001, that procedure did not continue and the Commission did not appoint an expert.
- 44 It is therefore not in dispute that the applicant was not compelled under the contested decision to grant a licence to one of its competitors and neither can it be so compelled today on the same basis, as the contested decision was withdrawn on 13 August 2003.
- 45 Similarly, it is not in dispute that the penalty envisaged by Article 3 of the contested decision could not be applied for the period in question and cannot be applied in the future owing to the withdrawal of that decision.

46 As for the applicant's arguments based on the outcome of the judicial proceedings pending in Germany and the application of the judgment in *Masterfoods and HB*, paragraph 32 above, it should be noted that the purpose of that judgment is to prevent any risk of contradiction between the decisions of national courts and those of the Commission. It is sufficient to note that the contested decision disappeared from the Community legal system with effect from 13 August 2003 and that there is no risk of contradiction in the present case. The German courts therefore have complete freedom as to how to decide the cases before them, as the contested decision in any event only adopted interim measures.

47 It should be added that in the light of the matters already set out at paragraphs 40, 44 and 45 above, no legal effect of the contested decision remains. The fact that the applicant's competitors in Germany or other interested operators may refer, before the national courts, to the mere existence in the past of the contested decision in order to obtain a licence or compensation has no effect in itself on the legal position of the applicant.

48 Lastly, the Court of First Instance notes, in relation to IMS's argument that it might be faced in the future with a measure identical to the contested decision, that in any event the applicant's situation could only be affected, if at all, by decisions distinct from the contested decision, any challenge to which would give rise to legal proceedings distinct from the present application for annulment.

49 For all of those reasons, it must be concluded that IMS has adduced no evidence for finding that, notwithstanding the withdrawal of the contested decision, it retains an interest in having that decision annulled. It follows that the present action is without object and there is no longer any need to give a decision in the present case.

## Costs

- 50 The Commission submits that each party should be ordered to bear its own costs on the basis that the contested decision was withdrawn due to a material change of circumstances. That withdrawal does not however mean that the Commission has altered its initial position as regards the existence of a prima facie case of abuse of a dominant position. Moreover, that withdrawal affects neither the assessment in the contested decision of the criteria of urgency nor that of the balance of interests, nor the appropriateness of the interim measures ordered therein.
- 51 By contrast, IMS considers that the Commission should be ordered to pay the costs. It submits, first of all, that the relative merits of the parties' original pleas in law is one factor allowing the Court of First Instance to exercise its discretion in relation to costs. IMS refers in this context, in particular, to the order of 26 October 2001 in Case T-184/01 R *IMS Health v Commission*, paragraph 15 above. Moreover, IMS submits that considerations of equity and fairness suggest that the Commission be ordered to pay the costs and it explains essentially that the present case and the mistakes made resulted in increased costs on its part.
- 52 Under Article 87(6) of the Rules of Procedure, where a case does not proceed to judgment, the costs are to be in the discretion of the Court of First Instance.
- 53 It should be noted that the Commission withdrew the contested decision because of the change in the circumstances underlying its adoption, namely the state of competition. Neither the decision of 13 August 2003 nor the documents placed in the file lead to the conclusion that the Commission accepted that the contested decision was unlawful in the light of the pleas in law advanced by the applicant.

54 It should also be noted that under Article 107(4) of the Rules of Procedure, orders made by the President of the Court of First Instance are to have only an interim effect and are to be without prejudice to the decision on the substance of the case by the Court of First Instance.

55 The Court of First Instance considers that an order that the parties are to bear their own costs, including those relating to the proceedings on the application for interim measures, would constitute a fair reflection of the circumstances of the present case.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby orders:

- 1. There is no need to give a decision in the present action.**
- 2. Each party shall bear its own costs, including the costs incurred in connection with the application for interim measures.**

Luxembourg 10 March 2005.

H. Jung

Registrar

M. Vilaras

Le président