ORDER OF THE PRESIDENT OF THE COURT
OF 7 JULY 1981 [1]

International Business Machines Corporation v Commission of the European Communities

"Decision to initiate a procedure under Article 86 of the EEC Treaty and statement of objections"

Joined Cases 60 and 190/81 R

In Joined Cases 60 and 190/81 R,

INTERNATIONAL BUSINESS MACHINES CORPORATION, Armonk, New York 10504, United States of America, represented by Jeremy Lever, Queen's Counsel, of the Bar of England and Wales, David Edward, Queen's Counsel, advocate of the Scots Bar, John Swift, Christopher Bellamy and Nicholas Forwood, barristers of the Bar of England and Wales, and Andrew Soundy, of Ashurst, Morris, Crisp and Co., Solicitor of the Supreme Court of England and Wales, with an address for service in Luxembourg at the offices of International Business Machines of Belgium SA, 8 Boulevard Royal,

applicant,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Adviser, John Temple Lang, and Götz zur Hausen, a member of the Legal Department, with an address for service in Luxembourg at the office of Oreste Montalto, a member of its Legal Department, Jean Monnet Building, Kirchberg,

defendant,

and

MEMOREX SA, 178 Chaussée de la Hulpe, 1170 Brussels, represented by Ivo Van Bael and Jean-François Bellis, of the Brussels Bar, with an address for service in Luxembourg at the chambers of Messrs Elvinger and Hoss, 15 Côte d'Eich,

intervener,

1 — Language of the Case: English.

THE PRESIDENT OF THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

makes the following

ORDER

Facts and Issues

I — Previous history of the dispute

On 19 December 1980 the Director-General for Competition addressed to the applicant a letter stating that the Commission, in pursuance of Article 86 of the EEC Treaty, had decided to initiate proceedings against it under Article 3 of Regulation No 17 of the Council of 6 February 1962 (Official Journal, English Special Edition 1959-1962, p. 87) for infringement of Article 86 of the EEC Treaty. Enclosed with that letter was the statement of objections provided for in Article 19 of Regulation No 17. At the same time the applicant was invited to make known before 30 April 1981 in writing or orally its observations on the objections put forward with regard to it by the Commission.

By a letter of 20 February 1981 IBM called upon the Commission to withdraw the statement of objections and to terminate the proceedings initiated against it or, in the alternative, to adopt certain measures intended, according to IBM, to remedy if possible the defects vitiating the statement of objections and so as to permit IBM to exercise effectively its right to defend itself. These measures were to consist in a clarification of the Commission's position with regard to the facts and conclusions contained in the statement of objections and in the Commission's agreeing not to make use of the right which it had reserved to itself to put forward other objections at a later stage.

By a letter of 13 April 1981 the Commission refused to accede to IBM's requests. It did however extend until 31 August 1981 the period allowed for the written reply to the statement of objections.

For the purposes of this order the abuse of a dominant position alleged may be described as consisting in the fact that IBM, to protect its position against undertakings described as "plug compatible manufacturers" (manufacturers of peripheral devices with compatible plugs), which produce certain processing elements which may be used by the central processing units produced by IBM, has pursued the following policies:

(a) it has adopted a marketing policy consisting of supplying certain products as a supplement at no separate charge ("bundling"), particularly the main memory or storage for its central processing units as well as the basic software; bundling occurs when one product is supplied

with another at no separate price or where one product is physically attached to another and supplied at no separate price;

(b) on the announcement of new products for use with its compatible series of computer systems, IBM refuses to disclose details of any interface change until at least after first customer shipment, if at all;

(c) IBM refuses to supply certain valuable software to users of IBM computer systems unless such software is used with a central processing unit of IBM manufacture, whether or not such unit was supplied by IBM.

II — Written procedure

In Case 60/81

In its application, registered at the Court on 18 March 1981, the applicant claims that the Court should:

1. Declare void:

   (a) the act or acts of the Commission by which a proceeding was initiated against IBM pursuant to Article 3 of Regulation No 17 of the Council and a statement of objections was addressed to the applicant; and/or

   (b) the statement of objections itself in so far as by itself it constitutes an act of the Commission;

2. Order the Commission to pay the costs.

In support of this application IBM puts forward essentially three submissions which may be summarized as follows:

1. Illegality of the contested measures by reason of the Commission's failure to meet minimum criteria required for a statement of objections. The lack of clarity of that statement and the inadequacy of the periods allowed for replying to it are incompatible with the fundamental principles relating to observance of the rights of the defence.

2. Illegality of the decision to initiate the administrative procedure on the ground that that decision was not taken by the Commission acting collegially or by an authority which had validly received a delegation to do so.

3. Illegality of the contested measures on the ground of breach of principles of international law, namely the principle of comity or non-interference in the internal affairs of the United States. This principle is opposed to the exercise of Community powers in a case in which, as here, the disputed conduct takes place for the most part outside the Community and is in addition the subject of judicial proceedings in the United States.

By a document registered at the Court on 10 April 1981 the Commission, in pursuance of Article 91 (1) of the Rules of Procedure, raised an objection of inadmissibility against the application by IBM. It claimed that the Court should declare the application inadmissible without joining the question of

admissibility to the substance of the case and order IBM to pay the costs.

By an order of 13 May 1981 the Court allowed Memorex SA, a company incorporated under Belgian law, which had lodged a complaint against IBM with the Commission, to intervene in the case in support of the conclusions of the defendant.

By a separate document registered at the Court on 29 May 1981, the applicant, pursuant to Articles 185 and 186 of the EEC Treaty and Article 83 of the Rules of Procedure of the Court, made an application for the adoption of interim measures claiming that the Court should:

1. Suspend the Commission's administrative procedure in Case IV/29.479 and/or

2. Suspend the application of the acts, the validity of which IBM has contested in the main proceedings; and/or

3. Adopt any other necessary interim measures.

In its written observations on that application the Commission contended that the Court should dismiss it and order IBM to pay the costs. Memorex put forward the same contention.

In Case 190/81

In a second application, registered on 22 June 1981, IBM claimed that the Court should:

1. Declare that the Commission has infringed the Treaty by failing to act in accordance with requests made by IBM by letter of 20 February 1981;

2. Alternatively, annul the decision or decisions of the Commission addressed to IBM in the letter of 13 April 1981 from the Director of Directorate IV B;

3. Alternatively, declare that the Community is responsible for the damage caused to IBM by and in the unlawful initiation and prosecution of administrative proceedings in Case IV/29.479 and by the Commission's failure or refusal to comply with IBM's requests of 20 February 1981; and order the Community to pay compensation;

4. Order the Commission and/or the Community to pay the costs.

By a separate document, registered at the Court on 22 June 1981, IBM put forward, in pursuance of Articles 185 and 186 of the EEC Treaty and Article 83 of the Rules of Procedure of the Court, an application for the adoption of interim measures in which it claimed that the Court should:

1. (a) Suspend the Commission's administrative procedure in Case IV/29.479; and/or

   (b) suspend the application of the acts, the failure or refusal to withdraw which IBM has contested in its concurrent application; and/or

   (c) adopt any other necessary interim measures;

2. Order the Commission to pay the costs.

By order of the President of the Court of 30 June 1981 Memorex SA was also

allowed to intervene in these second proceedings for the adoption of interim measures in support of the Commission's conclusions.

The Commission and the intervener contended that the applications for the adoption of interim measures should be dismissed and that IBM should be ordered to pay the costs.

III — Submissions and argument of the parties

In Case 60/81 R

According to the applicant the interim measures applied for are necessary to preserve the jurisdiction of the Court of Justice to give a judgment having practical effect when it adjudicates on the admissibility and the merits of the application in the main proceedings. They are equally necessary to prevent an administrative procedure continuing without lawful authority, to prevent a serious breach of international law involving the Community as a whole and finally to prevent further damage to IBM.

In response the Commission first contests the admissibility of the application for the adoption of interim measures, since its inadmissibility follows from the inadmissibility established, in the Commission's opinion, with regard to the main proceedings. It claims that, when the Commission raises an objection within the meaning of Article 91 of the Rules of Procedure against an application for annulment it is appropriate that judgment should be given on that objection before an application for the adoption of interim measures is considered.

The Commission claims in addition that the applicant has been unable to establish the necessary urgency for the measures which it requests, and cannot do so. Its need to reply to a statement of objections by no means provides a threat of serious or irreversible damage of such a nature as to justify the suspension of the administrative procedure pending the Court's decision on the main proceedings. It contends that the application should be dismissed.

The intervener's arguments are essentially similar to those of the Commission and it contends that the same action should be taken.

In Case 190/81 R

The applicant states that this second application for the adoption of interim measures seeks the same interim relief as that requested in Case 60/81 R and that the grounds for this application are *mutatis mutandis* the same as those in the previous case to which it therefore refers. In essentials what is sought is an order for the suspension of the administrative procedure initiated by the statement of objections of 19 December 1980.

The Commission and the intervener put forward essentially the same arguments as those previously advanced.

IV — Oral procedure

The parties were duly summoned and presented oral argument at the hearing of the application for the adoption of interim measures on 6 July 1981.

Decision

1 The applications in Cases 60/81 R and 190/81 R have the same subject-matter; it is therefore appropriate to join them and to give the decision regarding them in a single order.

2 According to Article 185 of the Treaty, actions brought before the Court of Justice do not have suspensory effect. The court may, however, if it considers that circumstances so require, order that application of the contested measures be suspended. It may also in pursuance of Article 186 of the Treaty prescribe any necessary interim measures.

3 According to Article 83 (2) of the Rules of Procedure a suspension of enforcement and the decision ordering provisional measures are subject to the existence of circumstances giving rise to urgency and factual and legal grounds establishing a *prima facie* case for such measures.

4 It is clear from the consistent case-law of the Court that measures of this nature cannot be considered unless the factual and legal grounds relied on to obtain them establish a *prima facie* case for granting them. In addition there must be urgency in the sense that it is necessary for the measures to be issued and to take effect before the decision of the Court on the substance of the case in order to avoid serious and irreversible damage to the party seeking them; finally they must be provisional in the sense that they do not prejudge the decision on the substance of the case.

5 In support of its applications the applicant in substance claims that a suspension of enforcement would be justified because otherwise:

(i) IBM will be forced to lodge a defence to a statement of objections delivered by the Commission without lawful authority;

(ii) The Commission will have been permitted to continue to act in breach of binding principles of international law;

(iii) IBM will have been forced to lodge a defence to a statement of objections so ill-defined and obscure as to justify the raising of the *exceptio obscuri libelli* and breach of due process.

6 The applicant's arguments amount in substance to claiming that the measures contested in the main proceedings are vitiated by such clear and serious defects that those measures appear, even at first sight, as lacking any legal basis and in reality constitute an evident nullity, known in the administrative law of certain Member States as "voies de fait administratives". The nature and gravity of these illegalities alone imply, it is alleged, that it is necessary and urgent to put a stop immediately to situations of this type and that the judge to whom the application is made has jurisdiction to do so.

7 Without prejudice to the admissibility or the merits of the actions in the main proceedings, the measures under challenge, having regard to the nature of the complaints made against them, do not appear to be measures lacking even an appearance of legality, and as such to require their operation to be suspended forthwith.

8 It was therefore for the applicant to demonstrate, with a view to the avoidance of serious and irreversible damage to itself, the necessity and urgency for the Court to grant the relief sought.

9 The factual and legal grounds relied upon by the applicant are not, however, such as to establish these basic conditions. The contested measures in the two main actions are in fact measures of inquiry and investigation, which precede a decision of the Commission relating to the issue whether or not the applicant is or has been guilty of conduct prohibited by Article 86 of the Treaty.

10 The pursuit of administrative proceedings of this type, organized, as the Court has emphasized on various occasions, with a view to permitting undertakings to make known their point of view and to enlighten the Commission,

does not involve for the applicant any obligation other than that of participating, with a view to the defence of its rights, in the course of that procedure. That obligation is not of such a nature as to cause it, either as regards its legal position or as regards its interests, serious and irreversible damage of such a kind as to justify the measures sought.

11 It follows from all the considerations set out above that the applications must be dismissed.

Costs

12 Costs must in the circumstances be reserved.

On those grounds,

THE PRESIDENT OF THE COURT,

as an interim measure,

hereby orders as follows:

1. **The applications for the adoption of interim measures are dismissed.**

2. **Costs, including those of the intervention, are reserved.**

Luxembourg, 7 July 1981

A. Van Houtte
Registrar

J. Mertens de Wilmars
President