# ORDER OF THE PRESIDENT OF THE COURT OF FIRST INSTANCE
26 October 2001 *

In Case T-184/01 R,

**IMS Health Inc.**, a company incorporated in accordance with the laws of the State of Delaware, established at Fairfield, Connecticut (United States of America), represented by N. Levy and J. Temple Lang, Solicitors, and R. O'Donoghue, Barrister,

applicant,

v

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

defendant,

* Language of the case: English.

supported by

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

and

**NDC Health Corporation**, a company incorporated in accordance with the laws of the State of Delaware, established at Atlanta, Georgia (United States of America), represented by I. Forrester QC, F. Fine, Solicitor, C. Price and A.F. Gagliardi, lawyers, with an address for service in Luxembourg,

and

**NDC Health GmbH & Co. KG**, established at Bad Camberg (Germany), represented by I. Forrester QC, F. Fine, M. Powell, Solicitor, C. Price and A.F. Gagliardi, lawyers, with an address for service in Luxembourg,

interveners,

APPLICATION for interim measures in respect of the Commission Decision of 3 July 2001 relating to a proceeding pursuant to Article 82 EC (Case COMP D3/38.044 — NDC Health/IMS Health: Interim measures),

THE PRESIDENT OF THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES

makes the following

## Order

### Background

1 Pharmaceutical manufacturing undertakings require information concerning the sales both of their own products and those of their competitors in order to develop their marketing policies. As a high proportion of medical prescriptions are dispensed by pharmacies in the neighbourhoods of the prescribing doctors, data concerning sales of pharmaceutical products by wholesalers to pharmacies represent a good approximation of doctors' prescribing preferences and, consequently, enable pharmaceutical manufacturers to gauge the effectiveness of the performance of the sales representatives who talk to them.

2 Regional sales-data (or market) reports are based on data purchased from pharmaceutical wholesalers by undertakings engaged in the provision of sales-data services to pharmaceutical companies. Agreements between wholesalers and the providers of regional sales-data services in Germany contain stipulations designed to respect the former's obligations under the German Bundesdatenschutzgesetz (Federal Data Protection Act). The Bundesdatenschutzgesetz

requires that pharmaceutical sales information be aggregated for at least three pharmacies within each geographical area to which the data supplied relate. In practice, it appears that respect for this requirement necessitates the inclusion of at least four to five pharmacies within each geographical segment.

3 The processing of the raw, regional sales data purchased from pharmaceutical wholesalers is carried out by the providers of sales-data reports according to their respective input structures. The data are then checked and formatted in accordance with 'brick' structures, on which various analyses are carried out by the service providers. Bricks divide a country into artificially designated geographic areas. The essential purpose of a brick structure is to create territorial segments within a particular market with equal or comparable sales performance potential, whilst respecting data-protection requirements and certain geographical boundaries. In Germany, sales territories of pharmaceutical sales representatives are defined by reference to an aggregation of several bricks.

4 The data formatted, according to a brick structure, form the basis for regional sales reports. These reports are delivered by the service providers to the pharmaceutical companies in printed form, on CD-ROM, online or in a combination of these forms, depending on the client's preference. The data is then either processed internally by the pharmaceutical companies or submitted by them to other undertakings for analysis on their behalf.

5 IMS (Intercontinental Marketing Services) Health Incorporated (hereinafter either the 'applicant' or 'IMS') is a United States-based company that provides a broad range of market research, marketing, and sales management services to the pharmaceutical industry. It is the world's leading provider of information solutions to the pharmaceutical and healthcare industries. IMS is active in 100

countries. In Germany, through its German subsidiary (IMS Health GmbH & Co. OHG, hereinafter 'IMS Health'), it provides a regional sales-data service to interested pharmaceutical companies. Since 2000, its service has been based on a brick structure entitled the '1 860 brick structure'. This brick structure is central to the present proceedings.

6 The applicant has been investing resources in developing brick-structure-based, data-report services in Germany since 1969. It started out using a 329 brick-segment structure. By the late 1980s, this early rudimentary structure had been subdivided into more sophisticated structures containing initially 418 and then 922 segments. In 1991 a number of cities were further subdivided creating a structure with 1 086 bricks. In 1992, an additional 244 bricks, corresponding to administrative units in the former German Democratic Republic, were added to take account of the effects of German reunification. In 1993, following the introduction of a five-digit postcode system in Germany, a complete reworking of its brick structure was required. 119 cities were restructured with the result that a 1 845 segment structure was created.

7 In 1998, the applicant began a development programme designed, *inter alia*, to lead to the creation of a new brick structure. The programme culminated in the development of a format for the 1 860 brick structure in 1999. The 1 860 brick structure was launched on the market in January 2000 and now constitutes the core feature of the regional sales-data service provided by IMS Health in Germany.

8 Suspecting that two competitors on the German market, Pharma Intranet Information AG (hereinafter 'PI') and AzyX Deutschland GmbH Geopharma Information Services (hereinafter 'AzyX'), which were founded by some of its former senior personnel and which had initially entered the German market selling services based on alternative brick structures, were, by early 2000, in fact marketing services based on copies of the 1 860 brick structure, the applicant

decided to bring copyright infringement proceedings before the Landgericht (Regional Court) Frankfurt am Main (hereinafter 'Landgericht Frankfurt'). These proceedings were lodged, respectively, on 26 May 2000 and 22 December 2000 against PI and AzyX.

9 In the proceedings against PI, the Landgericht Frankfurt, on 16 November 2000, confirming an earlier judgment of 12 October 2000, held that, under German copyright law, the applicant, through IMS Health, enjoyed copyright protection in the 1 860 brick structure. In the same judgment, it also confirmed an injunction it had issued on 27 October 2000 prohibiting PI and Mr Lederer, a former general manager of IMS Health, from using the 1 860 brick structure and brick structures 'derived' from the 1 860 brick structure.

10 National Data Corporation (hereinafter 'NDC'), which is also a United States-based company and an international competitor of the applicant, acquired PI in August 2000. On 26 October 2000, it requested a licence from the applicant to use the 1 860 brick structure in return for an annual licence fee of DEM 10 000 (EUR 5 112.92). By letter of 28 November 2000, the applicant rejected the request while the copyright issue remained *sub judice* before the national courts, PI having lodged an appeal against the Landgericht Frankfurt's abovementioned judgments of 27 October and 16 November 2000. In a further letter of 18 December 2000, the applicant refused to enter into licence negotiations on the basis that it was not essential for NDC to have the use of the 1 860 brick structure so as to compete against it on the German market.

11 On 4 December 2000, NDC Health GmbH & Co. KG, NDC's German subsidiary (hereinafter 'NDC Health') brought an action for a declaration before

the Landgericht Nürenburg-Fürth that IMS Health was not entitled to require it not to use structures based, *inter alia*, on the 1 860 brick structure. However, on 28 December 2000, IMS Health obtained an interim injunction from the Landgericht Frankfurt prohibiting the use by NDC Health, *inter alia*, of the 1 860 brick structure.

12 On 19 June 2001, PI's appeal against the judgments of 27 October and 16 November 2000 was dismissed by the Oberlandesgericht (Higher Regional Court) Frankfurt am Main (hereinafter 'Oberlandesgericht Frankfurt').

13 On 12 July 2001, the Landgericht Frankfurt rejected an appeal brought by NDC Health against the interim injunction issued against it on 28 December 2000.

14 On 30 August 2001, in the context of the main copyright action between IMS Health and NDC Health regarding the former's application for a definitive injunction prohibiting the latter from using the 1 860 brick structure or any of its derivatives, the Landgericht Frankfurt decided to stay the proceedings and refer a number of questions to the Court of Justice pursuant to Article 234 EC. In substance, it wishes to know whether the application of German copyright law may be affected by Article 82 EC in circumstances where there has been some industry involvement in the development of the protected work. On 22 October 2001, this preliminary reference was registered as Case C-418/01 at the Court of Justice's Registry.

15 In the AzyX proceedings, the Landgericht Frankfurt issued, on 28 December 2000, an interim injunction prohibiting AzyX from providing, promoting or offering data on the basis of the 1 860 brick structure. On 15 February 2001 it confirmed the said interim injunction.

16 Consequently, on 24 April 2001, AzyX requested a licence from the applicant to use the 1 860 brick structure. On 28 May 2001, the applicant refused this request, principally because it did not consider that access to the 1 860 brick structure was necessary to permit AzyX to compete against it on the German market and because it regarded as too low the royalty of DEM 100 000 (EUR 51 129.19) offered by AzyX.

17 On 18 September 2001, the Oberlandesgericht Frankfurt vacated the injunction issued by the Landgericht Frankfurt against AzyX on 28 December 2000, with the result that the latter is no longer prohibited by court order in Germany from using the 1 860 brick structure or its derivatives (see further paragraphs 44 and 45 below).

**The Commission's investigation and adoption of the contested decision**

18 On 18 December 2000, NDC lodged a complaint with the Commission alleging that the applicant's refusal to license it to use the 1 860 brick structure constituted an infringement of Article 82 EC. It also requested the Commission to adopt interim measures against the applicant.

19 The applicant initially commented on the complaint in a letter of 12 January 2001 and replied to requests for information from the Commission by letters, respectively, of 15 and 26 January 2001 and of 7 March 2001.

20 On 8 March 2001, the Commission sent a Statement of Objections (hereinafter 'SO') to the applicant which was received on 9 March 2001. The Commission defined the crucial question as being whether or not the 1 860 brick structure constituted an 'essential facility' (SO, paragraph 58). It concluded (SO, paragraph 84), on the information available to it, that access to that structure appeared to be indispensable for competitors, that the applicant's refusal to grant licences was not objectively justified and that the said refusal potentially constituted an abuse of the dominant position which IMS held on the relevant German market. The Commission warned IMS that it intended to adopt a decision imposing interim measures (SO, paragraphs 100 to 103).

21 The applicant submitted a written response to the SO on 2 April 2001. A hearing before the Commission then took place on 6 April 2001, during which considerable discussion took place of whether or not the 1 860 brick structure constituted a *de facto* industry standard. The Commission sent a request for further information to the applicant on 4 May 2001, to which the latter replied on 14 May 2001. The applicant also replied, on 14 June 2001, to further evidence obtained by the Commission following post-hearing requests for information made by it pursuant to Article 11 of Council Regulation No 17 of 6 February, the first Regulation implementing Articles [81] and [82] of the Treaty, (OJ, English Special Edition 1959-1962, p. 87, hereinafter 'Regulation No 17') of a number of pharmaceutical companies. These requests were designed to ascertain their views concerning the allegedly indispensable nature of the 1 860 brick structure. Copies of the responses of these pharmaceutical companies were provided by the Commission to the applicant in two instalments on 22 May 2001 and 7 June 2001. The applicant commented on that additional evidence by way of a further memorandum to the Commission of 14 June 2001. It was also heard at a meeting which took place between its representatives and those of the Commission on 18 June 2001.

22 On 3 July 2001, the Commission adopted a decision relating to a proceeding pursuant to Article 82 EC (Case COMP D3/38.044 — NDC Health/IMS Health: Interim measures) (hereinafter the 'contested decision'). It is based on

Regulation No 17, and particularly on the Commission's powers under Article 3 thereof to adopt interim measures first identified by the Court of Justice in *Camera Care* v *Commission* (Case 792/79 R [1980] ECR 119, hereinafter '*Camera Care*'), and confirmed in a number of subsequent judgments of the Community judicature (see Joined Cases 228/82 and 229/82 *Ford* v *Commission* [1984] ECR 1129, hereinafter '*Ford*'; Case T-23/90 *Peugeot* v *Commission* [1991] ECR II-653, hereinafter '*Peugeot*'; and Case T-44/90 *La Cinq* v *Commission* [1992] ECR II-1, hereinafter '*La Cinq*').

23 In the recitals in the preamble to the contested decision, the Commission considers (paragraph 41) that the conditions which, according to the above-mentioned *Camera Care* line of case-law, must be satisfied before it may take protective measures in the course of a pending Regulation No 17 investigation are all satisfied.

24 Regarding the existence of a prima facie infringement of Article 82 EC, the Commission, first, analyses the relevant product and geographical markets. It distinguishes, on the basis of information provided by the applicant in its letter of 7 March 2001, between data collected from retail pharmacies and data collected from pharmaceutical wholesalers (paragraphs 47 and 48). These data give rise to four distinct services depending on whether they relate to national or regional data. Moreover, German data represent a separate product that is not substitutable for data from another country. Accordingly, the Commission defines the relevant market in this case as being 'the market for German regional sales data services' (paragraph 51).

25 As the relevant market is the largest of its kind in the Community, the Commission considers it to constitute a substantial part of the common market (paragraph 60). As the applicant enjoys a 'quasi-monopoly situation' on that

market with a market share of 'over [...% [1]]', NDC and AzyX being its only competitors, the Commission finds it to have a dominant position on the relevant market (paragraph 62).

26 Next, the Commission explains (see paragraphs 63 to 185) why, 'on the evidence available at present', there exists a sufficient prima facie case that the applicant's refusal to license NDC constitutes an abuse under Article 82 EC and why interim measures should be ordered, 'if the other conditions for ordering such measures are fulfilled' (paragraph 186). This assessment is based essentially on the existence of 'exceptional circumstances' and particularly on its view (drawn from the findings set out in paragraphs 75 to 123) that the 1 860 brick structure constitutes a 'de facto industry standard' (paragraph 180). The applicant's 'refusal of access to the 1 860 brick structure is likely to eliminate all competition in the relevant market, since without it it is not possible to compete on the relevant market' (paragraph 181). This conclusion is based essentially on its findings that there is no likelihood of the applicant's competitors creating an alternative structure to the 1 860 brick structure (see paragraphs 124 to 166) and on the absence of any justification for the latter's refusal to license its competitors (paragraphs 167 to 174).

27 The Commission also finds that there is 'a risk of serious and irreparable harm and intolerable damage to the public interest which establishes the urgent need to grant protective interim measures' (paragraph 201). It considers, on the basis of the evidence before it, that 'there is good reason to suppose that unless NDC is granted a licence to the 1 860 brick structure its German operation will go out of business, and that there will be intolerable damage to the public interest' (paragraph 190). In its view, without interim measures, NDC will lose current customers, have no prospect of attracting new customers for the coming years and will probably 'cease trading in Germany' (paragraph 193). Apart from the

1 — Confidential information deleted.

serious risk of irreparable harm to NDC, there is also 'a risk of intolerable damage to the public interest within the meaning of the *La Cinq* judgment' (paragraph 195). It states that '[a]n eventual finding in the main decision that IMS had abused its dominant position under Article 82 EC would be illusory if meanwhile NDC's German subsidiary and other competitors had been put out of business' (paragraph 196). Finally, rejecting IMS's contention that it would suffer irreparable harm, it concludes that 'the balance of interests in this case favours the applicant' (paragraph 199).

28 Accordingly, Articles 1 to 3 of the operative part of the contested decision provide:

'*Article 1*

IMS Health (IMS) is hereby required to grant a licence without delay to all undertakings currently present on the market for German regional sales data services, on request and on a non-discriminatory basis, for the use of 1 860 brick structure, in order to permit the use of and sales by such undertakings of regional sales data formatted according to this structure.

*Article 2*

In any licensing agreements relating to the 1 860 brick structure, any royalties to be paid for these licences shall be determined by agreement between IMS and the undertaking requesting the licence ("the parties").

If an agreement has not been reached within two weeks of the date of the request for a licence, appropriate royalties will be determined by one or several independent experts. The expert(s) will be chosen by agreement of the parties within one week of the parties' failure to agree on a licence fee. If an agreement on the identity of the expert(s) has not been reached within this time, the Commission shall appoint an expert or several experts from a list of candidates provided by the parties, or, if appropriate, choose one or several suitably qualified person(s).

The parties will make available to the expert(s) any document which the expert(s) consider necessary or useful to carry out their task. The expert(s) shall be bound by professional secrecy and shall not disclose any evidence or documents to third parties except to the Commission.

The expert(s) will make a determination on the basis of transparent and objective criteria, within two weeks of being chosen to carry out this task. The expert(s) will communicate this determination without delay to the Commission for approval. The Commission's Decision shall be final and take effect immediately.

*Article 3*

A penalty of EUR 1 000 per day shall be payable in respect of any period during which IMS fails to comply with the provisions of this Decision.'

29 Article 4 of the contested decision specifies that its 'provisions... shall apply until notification of the decision concluding the proceeding', while, according to Article 5, the decision is 'addressed to IMS Health of Harewood Avenue, London NW1, United Kingdom'.

## Procedure

30 By application lodged at the Registry of the Court of First Instance on 6 August 2001, the applicant brought an action under the fourth paragraph of Article 230 EC seeking, *inter alia*, in the form of order sought the annulment of the contested decision or, alternatively, its annulment 'in so far as it requires IMS Health to license the 1 860 Brick Structure to companies currently present on the German market for regional sales data services and specifies the conditions under which the negotiation of licence terms will be conducted and approved by the Commission'.

31 By separate application lodged at the Court's Registry on the same day, the applicant, in accordance with Articles 242 and 243 EC, brought the present application for interim measures in respect of the operation of the contested decision. In the form of order sought, the President of the Court of First Instance is requested:

'— to suspend the operation of the Decision on his own initiative until such time as he has heard and determined this Application;

— to further suspend the operation of the Decision until the Court of First Instance has rendered judgment on the [the main action]; and

— to grant any other interim measures the President considers appropriate'.

32 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, *ex parte*, the operation of the contested decision until the order terminating the present proceedings for interim relief is made. This interim order was based on what appeared, provisionally, to be the existence of a prima facie case against the validity of the contested decision, the potentially serious economic and non-economic consequences for the applicant of compulsory-licence terms being fixed by the Commission in respect of the use of the 1 860 brick structure and the need, so as to ensure the proper administration of justice, for the judge hearing the application for interim measures to have time to consider the complex factual and legal issues raised by the present proceedings.

33 By applications lodged at the Court's Registry, respectively, on 13 and 14 August 2001, AzyX and NDC sought, *inter alia*, leave to intervene in support of the form of order sought by the Commission in the present proceedings. By letters of 27 August 2001, neither the applicant nor the Commission raised any objection to those applications, but both parties requested confidential treatment *vis-à-vis* the applicants in intervention in respect of certain documents.

34 The applicants in intervention, without prejudice to the outcome of their respective applications, were invited by the President, on 29 August 2001, to submit any written observations, along with any applications for confidential treatment, they wished to make by 12 September 2001.

35 On 29 August 2001, AzyX applied for permission to use French in its observations supporting its application in intervention. The applicant, by letter of 31 August 2001, having objected only to the use of French in any written observations submitted by AzyX, and the Commission having no objection, the

President decided, on 5 September 2001, in accordance with Article 35(2) of the Rules of Procedure, to permit AzyX to use French in its oral observations.

36 By application lodged at the Court's Registry on 12 September 2001, NDC Health applied for leave to intervene in support of the form of order sought by the Commission. It explained that, although its observations would be essentially identical to those of NDC, as the undertaking directly implicated in the copyright infringement proceedings brought in Germany by IMS Health, it had an interest in intervening separately. Without prejudice to the outcome of its application, it was invited by the President on 13 September 2001 to submit the same day any written observations and any application for confidential treatment it wished to make. As the oral hearing was fixed for the following day, the President decided to hear the observations of the parties in respect of this further application in intervention at that hearing.

37 At the oral hearing on 14 September 2001, the President, noting NDC's status as the complainant in the ongoing administrative procedure before the Commission, that NDC Health was directly implicated in the copyright infringement proceedings brought by IMS Health in Germany and that AzyX was not merely IMS Health's only other current competitor on the relevant market but also closely associated with the investigation of NDC's complaint, decided that the interest of all three applicants in intervention in the result of the present interim-relief proceedings, as required by the second paragraph of Article 37 of the EC Statute, applicable to the Court of First Instance by virtue of Article 36 thereof, was established. Accordingly, the President decided to accept the three applications in intervention.

38 In the absence of any request from the main or intervening parties for a formal order in respect of the various applications for confidential treatment lodged by the main and intervening parties, the President, having perused the documents

and particulars concerned by the applications, then decided at the oral hearing that they should, prima facie, be treated as confidential for the purposes of the present proceedings, since they appeared, in accordance with Article 116(2) of the Rules of Procedure, to constitute business secrets.

39 Accordingly, the main and intervening parties presented oral observations and replied to questions from the President. A further written statement from Dr Sati Sian, Vice-President of the applicant, which supplemented a confidential statement contained in Annex Four to the application for interim measures, was admitted by the President to the case-file, without any objection from the other parties. Dr Sian was also permitted by the President, without objection from the other parties, to made a confidential oral statement in a special closed session. In the absence of objections, Mr Jeffrey Kanis, Vice-President of NDC Health, was also authorised by the President to make a statement at the hearing.

40 By letter of 18 September 2001, the President asked the Commission to confirm, as alleged by the applicant in both its application and oral observations, whether or not the Commission possessed information regarding the brick structure(s) currently being used by the interveners, AzyX and NDC/NDC Health, for the purpose of supplying regional sales-data services on the German market. In the event that it possessed such information, the Commission was requested to submit it to the Court's Registry by 24 September 2001. In so far as any such information was considered to contain confidential business secrets of any of the interveners, the Commission was also requested, by the same deadline, to submit appropriate non-confidential version(s) of the relevant information.

41 Following a request from the applicant to be allowed to submit brief supplementary observations in order to respond to the written observations of the Commission and the interveners, all of which were received by it only very

shortly before the oral hearing, the President decided to fix 24 September 2000 as the deadline for the submission of such observations. The Commission and the interveners were allowed until 27 September 2001 to submit succinct further observations in respect of the applicant's supplementary observations.

42 On 24 September 2001, the Commission replied to the written question of 18 September 2001. The President being satisfied, in accordance with Article 116(2) of the Rules of Procedure, of the prima facie confidential nature of that response, a non-confidential version thereof, submitted in full by the Commission on 25 September 2001, was notified to the applicant and to the interveners on 26 September 2001.

43 Supplementary written observations were received from the applicant on 24 September 2001, and from the Commission and the interveners on 27 September 2001.

44 The Oberlandesgericht Frankfurt's decision of 18 September 2001 to vacate the Landgericht Frankfurt's injunction against AzyX of 28 December 2000, was, according to the applicant's supplementary observations, adopted for procedural reasons. In its supplementary observations, the Commission, although not formally contesting this assessment, indicates that the national court's reasoning relates to a different evaluation of the urgency underlying IMS Health's application for injunctive relief regarding the alleged breach by AzyX of its copyright in the 1 860 brick structure. AzyX provides no information in its supplementary observations regarding the Oberlandesgericht Frankfurt's judgment.

45 On 18 October 2001, the President, by way of a written question, asked the applicant to confirm whether or not it was possible for IMS Health to bring an

appeal against the judgment of the Oberlandesgericht Frankfurt and, if so, whether it intended to lodge such an appeal. By letter of 22 October 2001 the applicant replied stating that the judgment was final. It confirmed that the judgment lifted the injunction against AzyX for the reasons identified by the Commission in its supplementary observations. However, IMS stressed that it is premised on the assumption that the copyright in the 1 860 brick structure is valid.

## Law

46 Under Articles 242 EC and 243 EC and Article 4 of Council Decision 88/591/ECSC, EEC, Euratom of 24 October 1988 establishing a Court of First Instance of the European Communities (OJ 1988 L 319, p. 1), as amended by Council Decision 93/350/Euratom, ECSC, EEC of 8 June 1993 (OJ 1993 L 144, p. 21), the Court of First Instance may, if it considers that the circumstances so require, order that the application of the contested act be suspended or prescribe any necessary interim measures.

47 Article 104(2) of the Rules of Procedure provides that applications 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 sought. The measures sought must be necessary in order to avoid serious and irreparable damage to the applicant's interests arising before a decision is reached in the main action and provisional in that they must not prejudge that decision or neutralise in advance its effects (orders in Joined Cases 76/89 R, 77/89 R and 91/89 R *RTE and Others* v *Commission* [1989] ECR 1141, paragraph 12, hereinafter 'the *Magill* order'; Case C-149/95 P(R) *Commission* v *Atlantic Container Line and Others* [1995] ECR I-2165, paragraph 22, hereinafter '*Commission* v *Atlantic Container Line*'; and Case C-268/96 P(R) *SCK and FNK* v *Commission* [1996] ECR I-4971, paragraph 30, hereinafter '*SCK and FNK*'). The judge hearing an application for interim measures must, where appropriate, also weigh up the interests involved (order in Case C-445/00 R *Austria* v *Council* [2001] ECR I-1461, paragraph 73).

48 Article 3(1) of Regulation No 17 provides:

'Where the Commission upon application or upon its own initiative, finds that there is infringement of Articles [81 and 82] EC, it may by decision require the undertakings or associations of undertakings concerned to bring such infringements to an end.'

49 In *Camera Care*, the Court of Justice stated (paragraphs 17 and 18):

'As regards the right to take decisions conferred upon the Commission by Article 3(1) [of Regulation No 17], it is essential that it should be exercised in the most efficacious manner best suited to the circumstances of each given situation. To this end the possibility cannot be excluded that the exercise of the right to take decisions conferred upon the Commission should comprise successive stages so that a decision finding that there is an infringement may be preceded by any preliminary measures which may appear necessary at any given moment.

From this point of view the Commission must also be able, within the bounds of its supervisory task conferred upon it in competition matters by the Treaty and Regulation No 17, to take protective measures to the extent to which they might appear indispensable in order to avoid the exercise of the power to make decisions given by Article 3 from becoming ineffectual or even illusory because of the action of certain undertakings. The powers which the Commission holds under Article 3(1) of Regulation No 17 therefore include the power to take interim measures which are indispensable for the effective exercise of its functions and, in particular, for ensuring the effectiveness of any decisions requiring undertakings to bring to an end infringements which it has found to exist.'

50 The power of the Commission to adopt such interim decisions pursuant to its investigatory powers under Regulation No 17 in *Camera Care* has been confirmed in *Ford* (paragraphs 18 and 19), *Peugeot* (paragraphs 19 and 20), and *La Cinq* (paragraphs 27 and 28).

51 It is appropriate in the present interim-relief proceedings, where the applicant is seeking the interlocutory suspension of an interim Commission decision that takes protective measures pursuant to the *Camera Care* line of case-law, first, to consider the extent of the stateable case that it must demonstrate in order to justify, subject to its satisfying the other conditions, the suspension sought.

*The interlocutory judicial review of interim Commission decisions*

52 According to the contested decision, three conditions must be satisfied under the *Camera Care* line of case-law before the Commission may take protective measures in the course of an ongoing investigation under Regulation No 17. They are (paragraph 41):

'— there is a reasonably strong prima facie case establishing an infringement;

— there is a likelihood of serious and irreparable harm to the applicants unless the measures are ordered;

— there is an urgent need for protective measures'.

53 It should straightaway be pointed out that in *La Cinq* the Court of First Instance clarified (paragraph 28) the precise conditions which, in accordance with the case-law of the Court of Justice, namely the orders in *Camera Care* and in *Ford* v *Commission* (Joined Cases 229/82 R and 228/82 R [1982] ECR 3091, hereinafter 'the *Ford* order'), must be fulfilled before the Commission may adopt interim measures. It held, first, that protective measures may be granted only where the impugned practices at issue are prima facie 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, that such measures are to be taken 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. It stated that the condition concerning urgency, which, in the decision at issue in that case, just as in the contested decision, the Commission had regarded as a third condition for ordering interim measures, was, however, 'in reality but one aspect of the condition concerning the risk of serious and irreparable damage' (paragraph 29).

54 It follows, since if a risk of serious and irreparable harm exists urgency is inevitably simultaneously established, that the three conditions enumerated by the Commission in the contested decision fall correctly to be characterised as constituting effectively two conditions.

55 It is appropriate initially to recall that, since the two conditions for ordering interim measures are concurrent, failure to fulfil either of them will suffice so as to prevent the Commission from exercising its power to adopt such measures (*La Cinq*, paragraph 30).

56 The Commission, supported by NDC and NDC Health, submits that, having regard to the interim nature of the protective measures taken in the contested decision, the judge hearing an application for interim relief must reconsider the same conditions, albeit at the behest of the applicant, as those already considered to be satisfied in the contested decision: i.e. that exceptional circumstances exist

which render the refusal to license the brick structure an abuse by the applicant of its dominant position; that the applicant's sole competitors will, in the short-term, be forced out of the relevant market if they are not granted access, for a reasonable fee, to this presumptively essential brick structure; and that there is no danger that the obligatory grant of such access will cause serious and irreparable harm to the applicant. Since the standard of judicial review in annulment proceedings against decisions based on complex economic assessments, such as those which underlie the findings made in the contested decision, is that of requiring that the Commission has committed a manifest error, the applicant in the present proceedings should be required to establish a stateable case that the Commission has manifestly erred in its consideration of all of the requisite conditions. In other words, as the Commission stressed both at the oral hearing and in its supplementary observations, the applicant must not only demonstrate the existence of a prima facie case that the contested decision manifestly misconstrues the scope of Article 82 EC, in arriving at the prima facie conclusion that an abuse has occurred, but, in addition, a stateable case of manifest error concerning the consideration of the urgency and the balance of interests justifying the adoption of the impugned interim measures. As formulated by NDC in its written observations, the standard of proof required of the applicant is that it demonstrate the absence of a 'credible legal basis for the contested decision'.

57 Responding to these arguments at the oral hearing, the applicant alleged that, as regards the prima facie case requirement, it was merely required to prove to the satisfaction of the judge hearing the interim application that it had established a reasonable chance of winning the main action. To impose a higher standard would prejudge that action and effectively deny it the possibility of obtaining interim relief. In any event, even if it may be required, *quod non*, to demonstrate the existence of a stronger than usual prima facie case, it submits that it is manifest, at least provisionally, that the core prima facie conclusion reached by the Commission in the contested decision regarding the abusive nature of its refusal to license is flawed.

58 In *Commission* v *Atlantic Container Line*, the President of the Court of Justice upheld the order adopted by the President of the Court of First Instance in *Atlantic Container Line and Others* v *Commission* (T-395/94 R [1995] ECR II-595, hereinafter '*Atlantic Container Line and Others* v *Commission*'). In the order under appeal, the President of the Court of First Instance had not imposed any special standard of prima facie case in respect of an application for suspension of a Commission decision refusing, *inter alia*, to grant an exemption, pursuant to Article 81(3) EC and Article 9(1) of Regulation No 17. The decision of the Commission whether or not to grant such an exemption, being one which the Commission alone has power to adopt, constitutes a classic example of a decision that is inherently discretionary in nature involving the assessment of complex factual and economic criteria. In its appeal, the Commission alleged, in respect of the prima facie case requirement, that the contested order had transformed the normal test of '"*fumus boni juris*" into a test of "*fumus non mali juris*"'.

59 The Commission's plea was rejected. The President of the Court of Justice held that, 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', and that, in so doing, 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' (*Commission* v *Atlantic Container Line*, paragraph 21). As regards the condition specified in Article 104(2) of the Rules of Procedure relating to the pleas of fact and law establishing a prima facie case for the interim measures applied for, he stated that 'a number of different forms of wording had been used in the case-law to define the condition relating to the establishment of a prima facie case, depending on the individual circumstances' (paragraph 26). Noting that the wording of the contested order, which referred to pleas in law which are not, prima facie, entirely ungrounded, was identical or similar to that used on a number of occasions by the Court of Justice, he stated that '[s]uch a form of wording shows that, in the opinion of the judge hearing the application, the arguments put forward by the applicant cannot be dismissed at that stage of the procedure without a more detailed examination' (paragraph 26). He then confirmed, on the basis of the case-law, that the said judge 'may consider that,

in the light of the circumstances of the case, such pleas in law provide prima facie justification for ordering suspension of the application of an act under Article [242 EC] or interim measures under Article [243 EC]' (paragraph 27).

60 There is no reason to suppose that the scope of the power granted pursuant to Article 104 of the Rules of Procedure to the judge hearing an application for interim relief, as interpreted by the President of the Court of Justice in *Commission* v *Atlantic Container Line* 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 *Camera Care* case-law.

61 This view is confirmed by the previous case-law concerning interim-relief applications brought in respect of the first two Commission decisions adopting interim measures (see the *Ford* order and Case T-23/90 R *Peugeot* v *Commission* [1990] ECR II-195, hereinafter 'the *Peugeot* order'). In the former, the President of the Court of Justice stated (paragraph 8) that, '[w]hilst the Commission is not prima facie prevented, when examining an application for an exemption in respect of a distribution network, from making the grant of the exemption conditional upon extension of the range of products distributed, the fact remains that certain questions arising in these proceedings may give rise to serious dispute [and that] objections which it is possible to raise regarding the procedure selected by the Commission cannot be rejected without further consideration'. This sufficed to establish a prima facie case since the urgency of the applicant's request for a suspension of the contested decision was then examined.

62 This approach was applied in the *Peugeot* order. Having referred to the requirement that interim measures adopted by the Commission be 'of a

temporary nature and be restricted to what is required in the given situation' (paragraph 17), the President of the Court of First Instance then stated (paragraph 18):

'In consequence, without there being any need to rule on all the submissions put forward by the applicants against the provisional measures adopted by the Commission, submissions which, moveover, are also put forward in the main application and fall to be examined in the proceedings on the substance of the case, it is sufficient for the purposes of the present proceedings on the application for interim measures to consider whether the submissions of law and fact relied on prima facie justify a suspension of the operation of the contested decision...'.

63 Although rejecting the applicant's main argument that the Commission had committed a manifest error in deciding that motor vehicle distribution agreements were not, in general, exempted from the scope of Article 81(1) EC by Regulation ([E]C) No 123/85 of 12 December 1984 on the application of Article [81(3) EC] to certain categories of motor-vehicle distribution and servicing agreements (OJ 1985 L 15, p. 16), the President of the Court of First Instance decided that a prima facie case was established, since it was not possible 'to overlook the fact that certain questions which are raised in the present case give rise to serious problems of interpretation' (paragraph 22).

64 There is, moreover, nothing in the order in *National Carbonising Company* v *Commission* (Case 109/75 R [1975] ECR 1193, hereinafter '*NCC*') which would justify the conclusion, drawn by analogy by NDC and NDC Health, that the applicant must demonstrate the absence of a credible legal basis for the contested decision. In that case, the applicant sought an order requiring the Commission either to take a decision addressed to NCB, its supplier, or alternatively an order addressed to NCB to refrain from implementing a certain policy on prices. The Commission considered that the complaint against it concerned an alleged failure to act within the meaning of Article 35 CS. The President of the Court of Justice, observing that was for the court hearing the main action to determine whether there was an actionable failure to act, stated that 'the applicant [was] in fact asking the judge hearing the proceedings for the adoption of interim measures

that no effect should be given to a negative decision refusing, in particular, to take emergency measures [and that] [t]o grant such an application would amount, temporarily, to a positive decision taken by the judge hearing the proceedings for the adoption of interim measures in lieu and instead of the Commission' (paragraph 6). Consequently, it was for the Commission 'to adopt the measures which it consider[ed] necessary', as it would be 'contrary to the balance between the institution[s] which derives from the Treaty for the judge hearing the proceedings for the adoption of interim measures to substitute himself for the Commission in the exercise of a power which belongs primarily, subject to review by the Court, to the Commission which has all the information required for this purpose or the means of obtaining it' (paragraph 8). It follows that *NCC*, as the Court of Justice itself stated in *Camera Care* (paragraph 20), merely confirmed the existence, albeit within the context of the CS Treaty, of a power for the Commission, subject to certain conditions, 'to take the measures of conservation' (paragraph 8).

65 No principles emerge from the abovementioned case-law that would support the plea advanced by the Commission, supported by NDC and NDC Health, regarding the special nature of the prima facie case (*fumus boni juris*) that must be established in an interim-relief application concerning an interim Commission decision adopting protective measures.

66 Nor is there any other convincing reason why an applicant should be required to demonstrate a particularly strong or serious stateable case against the validity of what, after all, constitutes a prima facie evaluation by the Commission of the existence of an infringement of Community competition law. The 'provisional' nature of such Commission decisions was expressly recalled in the *Ford* and *Peugeot* orders (see, respectively, paragraphs 11 and 24). 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. The Commission's concerns can be taken into account by the judge hearing such an interim application when considering in whose favour the balance of interests lies. There is thus no justification for affording to such provisional Commission decisions a special status for the purpose of interim-relief applications.

67 In this respect, it is noteworthy that the Court of First Instance in *Peugeot* rejected the various arguments raised by the applicant in its plea alleging the failure by the Commission to establish, in law, any prima facie indication of an infringement of Article 81 EC. The standard required of the Commission was that of being 'right to consider... at first sight' (paragraph 37), or, alternatively, of its conclusions not being 'prima facie' incorrect (paragraph 46). Furthermore, in response to a claim that the Commission was not empowered to take provisional measures, since the situation was not sufficiently clear as a matter of law and it had not been shown that there was 'any particular likelihood of the existence of an infringement', the Court pointed out that, 'in proceedings relating to the legality of a Commission decision imposing provisional measures, the requirement of a finding of a prima facie infringement cannot be placed on the same footing as the requirement of certainty that a final decision must satisfy' (paragraph 61). The Commission was therefore 'fully entitled to take the view that, at first sight, there were serious doubts as to the legality' of the circular at issue in that case (paragraph 63). Applying this standard in *La Cinq*, the Court held that the Commission, 'in requiring for a grant of interim measures to be possible, the existence of a clear and flagrant infringement', had based its reasoning justifying the refusal at issue in that case 'on an erroneous interpretation in law of the condition relating to the probable existence of an infringement' (paragraphs 61 and 62).

68 Since the Commission is not obliged to establish, as a matter of probability, the existence of a prima facie violation of the Community competition rules before adopting a decision imposing interim measures, it would likewise be inappropriate to impose on the applicant seeking interim relief against such a decision, which is inherently not based on a full and final appreciation of the facts and law in question and which may have very serious consequences for the addressee, a requirement that it establish a strong prima facie case against the invalidity of that decision.

69 The Commission insists, however, that the requirement to establish a strong prima facie case applies, *a fortiori*, in respect of the assessment made in the contested decision of the urgency and balance of interests favouring the adoption of interim measures.

70 In this respect, it is appropriate to recall that in *Camera Care* the Court of Justice expressly referred to the need for the Commission to be able to take protective measures where they 'appear indispensable' in order to avoid the exercise of the decision-making power given by Article 3 of Regulation No 17 'becoming ineffective or even illusory' (paragraph 18). In its judgment in *La Cinq*, the Court of First Instance held (paragraphs 79 and 80), referring to *Camera Care*, that the Commission, in stating in its decision refusing to adopt interim measures in that case, that 'the only damage that can be regarded as irreparable is that which cannot be remedied by any subsequent decision', based itself upon 'a legally incorrect conception of irreparable damage the existence or risk of which could justify the adoption of interim measures', that went 'beyond what is required by the case-law of the Court of Justice, which merely refers to damage which could no longer be remedied by the decision to be adopted by the Commission upon the conclusion of the administrative procedure'.

71 *La Cinq* therefore provides no support for the argument advanced in the present proceedings by the Commission. The fact that the Commission, before adopting a decision imposing interim measures, need satisfy itself that the damage to competition, the occurrence of which it fears in the absence of such measures, must be such that it could not be remedied by the final decision to be adopted in the matter, does not imply that an applicant seeking interim relief in respect of such an interim Commission decision must demonstrate that the latter's appraisal of the urgency underlying the adoption of that decision was manifestly flawed.

72 In any event, the Commission's assessment of the conditions which must be established, in accordance with the *Camera Care* line of case-law, before it adopts a decision imposing interim measures, constitutes, in effect, one of the necessary legal prerequisites for the valid adoption of any such decision. Since the absence of either of the conditions prescribed by that case-law will suffice to render invalid a decision imposing interim measures, the Commission's assessment of urgency, just like any related assessment it makes of the balance of interests, falls to be considered by the judge hearing an application for interim relief in respect of such a decision as part of the control of its prima facie legality.

73 The applicant in interim-relief proceedings such as the present need 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 required by the *Camera Care* line of case-law. 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.

74 In the light of the foregoing, it follows that the plea advanced by the Commission, supported by NDC and NDC Health, as to the manifest nature of the prima facie case that an applicant seeking the suspension of a Commission decision imposing interim measures must be in a position to establish is misconceived.

75 Accordingly, it is necessary to consider whether the applicant has succeeded in establishing the existence of serious doubts as to the correctness of the legal analysis that underlies the prima facie conclusion reached in the contested decision that the applicant has abused its dominant position on the relevant market by refusing to license its competitors, and that, as a result, the adoption of interim measures is necessary to restore competition to that market.

*The existence of a prima facie case*

76 The applicant advances, in essence, five pleas in support of its conclusion that the contested decision is, prima facie, invalid. Its core substantive plea, which it bases

on several inter-related arguments, concerns the correctness of the legal analysis underlying the Commission's conclusion that its refusal to license the use of its copyright in the 1 860 brick structure constitutes an abuse of the dominant position it enjoys on the relevant market. It also asserts that the central factual premiss of the contested decision is vitiated by error, that all the important findings of law and fact made therein contradict those made by the German courts, that the measures adopted are not conservatory in nature and that its right to a fair hearing was breached by the Commission.

77 It is appropriate first to consider the prima facie merits of its core plea.

Arguments of the parties

78 The applicant, first, submits that the Commission may only adopt interim measures in respect of conduct that is clearly illegal according to established rules of Community law (*La Cinq*, paragraph 28). This is not the case with the contested decision as it contradicts settled Community case-law and previous Commission decisions by finding that it is prima facie unlawful for a dominant undertaking to refuse to share with competitors a competitive advantage in the form of its intellectual property in the 1 860 brick structure in respect of the very market to which that intellectual property relates. It deprives the applicant of the very essence of its copyright under national law as recognised by Community law and is manifestly incompatible with Article 295 EC.

79 The applicant refers, in particular, to *Volvo* v *Veng* (Case 238/87 [1988] ECR 6211, paragraph 7) and *CICRA* v *Renault* (Case 53/87 [1988] ECR 6039,

paragraph 10, hereinafter, where referred to collectively, '*Volvo/Renault*'); to the judgments of the Court of First Instance in *RTE* v *Commission* (Case T-69/89 [1991] ECR I-485, paragraph 71, hereinafter '*RTE* judgment') and Case T-76/89 *ITP* v *Commission* ([1991] ECR II-575, hereinafter '*ITP* judgment'); and to that of the Court of Justice, given on appeal in respect of those judgments, in Joined Cases C-241/91 P and C-242/91 P *RTE and ITP* v *Commission* [1995] ECR I-743, paragraph 49, hereinafter '*Magill*'). It submits that a dominant undertaking's refusal to license its intellectual property rights can constitute an abuse in two circumstances only: first, where, alongside refusing a licence, the undertaking engages in additional behaviour that is, in itself, abusive, such as unlawful pricing and; secondly, where there is an 'essential facility'.

80 It is, however, the notion of what constitutes an essential facility that has been relied upon in the contested decision. According to the applicant, that notion only applies where two distinct markets are involved and the product or service supplied in one (usually an 'upstream') market is a necessary input for the production of goods or services in the second (usually 'downstream') market. The previous case-law where the Community judicature and, before the adoption of the contested decision, the Commission have considered refusals to supply by a dominant undertaking in such circumstances to be abusive has always involved two different markets: it cites, in particular, *Commercial Solvents* v *Commission* (Joined Cases 6/73 and 7/73 [1974] ECR 223 — separate markets for a raw material and derivatives of the raw material); *CBEM* v *CLT and IPB* (Case 311/84 [1985] ECR 3261 — separate markets for television broadcasting and telemarketing); *GB-Inno-BM* (Case C-18/88 [1991] ECR I-5941 — separate markets for the establishment and operation of the public telecommunications network, and for the importation, marketing, connection, commissioning and maintenance of equipment for connection to the said network); *Magill* (separate markets for television programme listings and guides); *Tiercé Ladbroke* v *Commission* (Case T-504/93 [1997] ECR II-923 — separate markets for broadcasting coverage of horse races and the operation of betting shops, hereinafter '*Tiercé Ladbroke*'); *Bronner* v *Mediaprint* (Case C-7/97 [1998] ECR I-7791 —

separate markets for the distribution of newspapers and the publication and sale of newspapers, hereinafter '*Bronner*'); and the Commission decisions in Case IV/34.689 *Sea Containers* v *Stena Sealink* (OJ 1994 L 15, p. 8 — markets for port services and passenger ferry services) and in Case IV/34.801 FAG *Flughafen Frankfurt/Main AG* (OJ 1998 L 72, p. 30 — separate markets for airport facilities for the landing/take-off of aircraft and the provision of ramp-handling services).

81 There are two essential aspects to the claim advanced by the applicant on the basis of this case-law. First, it contends that the 'essential facility' doctrine presupposes the use by a dominant undertaking of its market power on the market where it is dominant in order to preclude or undermine competition on a downstream or neighbouring market where it already operates or wishes to operate, or which it wishes simply to prevent, as in *Magill*, from emerging as a new market. Secondly and referring specifically to *Magill*, which it stresses is the only case before the contested decision where the Commission sought to apply the approach underlying the 'essential facilities' doctrine to the exercise of intellectual property rights, IMS contends that it was the rightholders' use of the copyright acquired as a result of their activities on the market where they were dominant (broadcasting) in order to extend that dominance into a downstream market (weekly television guides) that amounted to the 'exceptional circumstances' justifying the characterisation of their refusal to license as an abuse. IMS Health's refusal, in this case, to license its competitors to use the 1 860 brick structure is justified because it is not seeking to exploit its market power in a separate market. It cannot be abusive, the applicant insists, for a copyright holder to refuse to license competitors who wish to have access to its right in order to compete against it on the very market where the exclusivity granted by that right is used as the central feature of the rightholder's business and where its dominance may, at least potentially turn, on the maintenance of its exclusive right. The mere fact that that protected feature has itself become the subject of a strong customer preference, such that the product or service incorporating it dominates the market, does not suffice to require the rightholder to license those who wish to compete against it on that market.

82 In its observations, the Commission observes that the potential import of the *ex parte* order of 10 August 2001, and particularly the reluctance of the President of the Court of First Instance 'even temporarily' (paragraph 24) to confirm the measures adopted in the contested decision, should not be interpreted so as to place on the Commission the effective burden of establishing the soundness of the underlying analysis of Article 82 EC. Regardless of the weakness of its reasoning on a particular point, it submits that the contested decision must be assumed to be valid and should not be suspended in the absence of direct evidence of urgency and of an assessment of the balance of interests which favours the applicant.

83 The Commission observes that the interim conclusions drawn in the contested decision are based on a combined analysis of the *Magill*, *Tiercé Ladbroke* and *Bronner* case-law. Since complex questions of law and fact are best reserved for the main action, it suffices for the present proceedings to state that, having reached a provisional assessment that the facts were so exceptional that Article 82 EC required a limitation on the exercise by IMS Health of its intellectual property rights, the Commission fully took into account those property rights when exercising its powers to adopt appropriate interim measures. This is particularly reflected, the Commission stressed at the oral hearing, by the requirement that the envisaged licensees pay reasonable royalties (paragraph 215 of the contested decision).

84 The Commission submits that the circumstances of *Magill* are not, in substance, very different from those considered in the contested decision. Neither the protected programme listings in *Magill*, nor the brick structure currently at issue, constitutes a separate product: each is an element indispensable to the supply of a separate service and of no utility unless incorporated in the latter. Whilst acknowledging in its supplementary observations that the differences between IMS's sales-data service and those of its competitors are not such that the latter may be regarded as constituting new services, as in *Magill*, it contends that the 'exceptional circumstances' found in that case, as confirmed in the *Tiercé*

*Ladbroke* and *Bronner* case-law, are not confined to the specific facts of *Magill*. Consequently, the applicant's reliance on the significance of the absence of two markets is misplaced.

85 The Commission further submits that, although the doctrine of 'essential facilities' is often invoked in circumstances where a dominant undertaking attempts to exploit its dominance on a downstream market, no such precondition is found in the *Magill*, *Tiercé Ladbroke* and *Bronner* case-law, or in *European Night Services and Others* v *Commission* (Joined Cases T-374/94, T-375/94, T-384/94 and T-388/94 [1998] ECR II-3141). Moreover, its importance would appear to have been rejected by the Court of First Instances in *Micro Leader* v *Commission* (T-198/88 [1999] ECR II-3989, hereinafter '*Micro Leader*'). In any event, where the essential facility comprises a structure protected by intellectual property rights, the link between the facility and the market on which competition is excluded is necessarily very close; the product sold or the service provided necessarily incorporates, to some extent, the subject-matter protected by the relevant right.

86 NDC and NDC Health contend that the contested decision respects the criteria for the adoption of decisions imposing interim measures set out in the *Camera Care* line of case-law. The Commission's finding that the use by IMS of its copyright to drive its competitors out of the relevant market constitutes, prima facie, an abuse falls within the classical notions of abusive behaviour as defined in the Treaty and applied in cases such as *Magill*; i.e. that intellectual property rights are not 'immune' from the application of the Treaty competition rules. The contested decision, in concluding (paragraph 67) that the principle therein established covers cases where the allegedly abusive conduct prevents the emergence of a new product, does not manifestly misapply *Magill*. Thus, contrary to the applicant's core claim, neither the relevant previous Commission decisions nor the case-law requires, as a precondition for the application of the 'essential facilities' doctrine, that there be two separate adjoining markets.

87 AzyX submits that, since the contested decision clearly demonstrates that the 1 860 brick structure has become an industry standard, the 'special responsibility' of dominant undertakings not to infringe the competition rules (Case 322/81 *Michelin* v *Commission* [1983] ECR 3461, paragraph 57) justifies the conclusion that the applicant has abused its dominant position. The exceptional circumstances bringing its behaviour within the *Volvo/Renault*, *Magill* and *Micro Leader* case-law are its use of its alleged copyright before the German courts as a means of eliminating potential competitors. AzyX contends that the abuse is demonstrated, in its own case, by the fact that, although it had entered the German market during the spring-summer period of 1999, the applicant only sought to invoke its copyright against it at the very moment (December 2000) when AzyX was beginning to present a real competitive threat. In its supplementary observations, AzyX adds that the timing of the applicant's reaction was carefully chosen: applying for and obtaining an injunction in December 2000 was designed to paralyse AzyX in January 2001 when most of its client contracts for the new year were due to be signed.

Findings of the President

88 Having regard to the express assumption underlying the contested decision (paragraph 36) to the effect that the 1 860 brick structure is covered by copyright in Germany, an assumption which, moreover, the Commission has not sought to condition in its observations in the present proceedings, it is necessary to proceed on the premiss that the applicant, through IMS Health, is the owner of a valid copyright in that structure. In principle, this copyright entails the exclusive right to reproduce the structure in the course of providing regional sales-data services and the right to decide whether or not to grant licences to third parties to use it.

89 The conclusion reached in the contested decision that the applicant has, prima facie, abused its dominant position on the relevant market by refusing to license its copyright in the 1 860 brick structure, which in effect amounts to a finding that it has used that copyright as an instrument of abuse in order to prevent its competitors, NDC Health and AzyX, from both remaining on that market and successfully competing with it, raises delicate questions as to the exact scope of Article 82 EC and of the Commission's own powers under Article 3 of Regulation No 17, as interpreted in the *Camera Care* line of case-law. A detailed examination of these questions is manifestly beyond the scope of the present interim-relief proceedings and must, as in the *Magill* order (see paragraph 14), be reserved for the Court of First Instance when giving judgment in the main action.

90 However, as the Commission, supported by the interveners, denies that a prima facie against the validity of the contested decision has been demonstrated, it is necessary to examine whether or not the applicant has, in respect of its core plea in the present proceedings, established the subsistence of serious doubts concerning the validity of the contested decision.

91 It is appropriate initially to recall that Article 295 EC provides that '[t]his Treaty shall in no way prejudice the rules in the Member States governing the system of property ownership'. It follows 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.

92 In so far as the applicant, on the other hand, contends, by reference to *La Cinq* (paragraph 28), that the Commission must demonstrate clearly the illegal nature of the alleged conduct before the adoption of such interim measures would be

justified, it suffices to point out that no such requirement flows from the authentic French version (French being the language of procedure in *La Cinq*) of that paragraph of the judgment. Unlike the English text, the French text does not limit the power of the Commission to adopt interim measures to circumstances where, in the final decision, it could impose a penalty in respect of the conduct at issue.

93 It follows that the mere fact that the interpretation of Article 82 EC adopted in the contested decision appears to be relatively novel does not, in itself, affect the assessment to be made of the prima facie case requirement. The applicant must still demonstrate the existence of a serious dispute or at least reasonable doubts regarding the validity of the Commission's interim assessment of the competition rules (the *Ford* order, paragraph 8, *Commission* v *Atlantic Container Line*, paragraph 26).

94 In the light of the arguments based on *Magill* advanced by the parties in these proceedings, it is necessary to consider that judgment as regards the appellant broadcasters' plea that the Court of First Instance had misapplied the concept of abuse of a dominant position. In its judgments in *RTE* and *ITP* (paragraphs 71 and 56 respectively), the latter, although acknowledging that it was common ground that the specific subject-matter of a copyright entitled the rightholder to reserve for itself the exclusive right to reproduce the protected work and that such a reservation was not in itself abusive, held that it may constitute an abuse, 'when in the light of the details of each individual case, it is apparent that the right is exercised in such ways and circumstances as in fact to pursue an aim manifestly contrary to the objectives of Article [82 EC]'.

95 In *Magill,* the Court of Justice straightaway rejected the contention that the exercise of a national copyright 'can never be reviewed in relation to Article [82 EC]' before confirming, on the basis of *Volvo*, that a 'refusal to grant a licence, even if it is the act of an undertaking holding a dominant position, cannot

in itself constitute abuse of a dominant position' (paragraphs 48 and 49). It then acknowledged that 'the exercise of an exclusive right by the proprietor may, in exceptional circumstances, involve abusive conduct' (paragraph 50). As to whether such 'exceptional circumstances' existed, the Court of Justice, on the basis of the Court of First Instance's findings of fact, confirmed (paragraphs 52 to 56) the existence of three sets of exceptional circumstances.

96 First, it confirmed (*Magill*, paragraph 52, referring respectively to the *RTE* judgment, paragraph 62, and the *ITP* judgment, paragraph 48) that a distinct market existed for the provision of comprehensive weekly television guides separate from that for the separate weekly guides already produced, *inter alia*, by each of the appellants. It then found that the broadcasters were, 'by force of circumstance, the only sources of the basic information on programme scheduling which is the indispensable raw material for compiling a weekly television guide' (*Magill*, paragraph 53), and that their refusal to provide that information 'by relying on national copyright provisions thus prevented the appearance of a new product, a comprehensive weekly guide to television programmes, which the appellants did not offer and for which there was a potential consumer demand' (*Magill*, paragraph 54). It concluded that such a refusal constituted an abuse under heading (b) of the second paragraph of Article 82 EC.

97 Secondly, it confirmed (*Magill*, paragraph 55) the finding that there was 'no justification for such refusal either in the activity of television broadcasting or in that of publishing television magazines (*RTE* judgment, paragraph 73, and *ITP* judgment, paragraph 58)'.

98 Thirdly, the Court of Justice upheld (*Magill*, paragraph 56) the Court of First Instance's finding that the broadcasters' conduct had the effect of reserving to themselves the secondary market of weekly television guides by excluding all competition on that market, through denying 'access to the basic information which is the raw material indispensable for the compilation of such a guide'.

99 It then concluded (*Magill*, paragraph 57) that, '[i]n the light of all those circumstances, the Court of First Instance did not err in law in holding that the appellants' conduct was an abuse of a dominant position within the meaning of Article [82 EC]' (paragraph 57).

100 It is clear from *Magill* that there are a number of potentially important differences between the circumstances of that case and those underlying the contested decision, whose existence, albeit not their significance, has not been seriously contested by the Commission. The contested decision appears to turn upon a non-cumulative interpretation of the conditions regarded as constituting 'exceptional circumstances' in *Magill*. The Commission asserts that the exercise of a copyright may amount to an abuse, 'even in the absence of abusive additional conduct when, *inter alia*, it prevents the appearance of a new product' (paragraph 67 of the contested decision). The conditions to which the Court of Justice refers in *Magill* (paragraph 54) are not regarded by the Commission as being, in principle, essential for the existence of 'exceptional circumstances'.

101 In the present proceedings, instead of seeking to exclude the emergence of a new service on a separate market, the applicant's refusal to grant a copyright licence to NDC and AzyX appears, at first sight, to be designed to prevent the latter from furnishing regional sales-data services based on freely available data, provided on the same market and to the same potential clients and differing only as to detail from the services offered by the applicant. Central to the contested decision is the finding that the targeted pharmaceutical manufacturers appear to require the data in question to be presented in the 1 860 brick-structure format developed by the applicant. The Commission therefore provisionally concludes that, without access to that structure, the applicant's competitors cannot compete with it on the relevant market. In essence, the Commission's analysis would appear to be that the prevention, by means of a refusal to license an intellectual property right, of the emergence of new competitors willing to offer, at most, new variations of the

same services and on the same market as the dominant undertaking may amount to an abuse where those competitors cannot otherwise access the market in question because the protected work constitutes a *de facto* industry standard.

102 The Commission's provisional conclusion that the prevention of the emergence of a new product or service for which there is potential consumer demand is not an indispensable part of the notion of 'exceptional circumstances' developed by the Court of Justice in *Magill* constitutes, at first sight, an extensive interpretation of that notion. Accordingly, only the main judgment can remove the serious dispute concerning the correctness of this interpretation.

103 However, in the contested decision, the Commission seeks to reconcile this seemingly broad interpretation of the notion of 'exceptional circumstances' developed in *Magill* by reference to latter case-law, and particularly *Bronner*. In its view, a refusal to supply on the part of a dominant undertaking will be abusive, even where it concerns the refusal to licence copyright, provided (paragraph 70 of the contested decision):

'— the refusal of access to the facility is likely to eliminate all competition in the relevant market;

— such refusal is not capable of being objectively justified; and

— the facility itself is indispensable to carrying on business, inasmuch as there is no actual or potential substitute in existence for that facility'.

104 In *Bronner*, the Court of Justice recalls (paragraph 40), by way of 'exceptional circumstances' 'found' in *Magill*, each of the findings of the Court of First Instance confirmed by the Court of Justice in paragraphs 53 to 56 of its judgment in *Magill* (see paragraphs 96 to 98 above). In *Bronner*, the Court of Justice then observes that *Magill* was concerned with 'the exercise of an intellectual property right' (paragraph 41). It is beyond the scope of the review possible in the present proceedings to determine whether these passages in *Bronner*, and paragraph 131 of the Court of First Instance's judgment in *Tiercé Ladbroke* v *Commission*, support the prima facie conclusion reached in the contested decision. Although the Commission's interpretation may be correct, the existence of reasonable grounds for concluding that the 'exceptional circumstances' envisaged by the Court of Justice in *Magill*, and recalled by it in *Bronner*, are concurrent cannot be excluded.

105 The applicant's assertion, having regard to the prevailing economic theories underlying the 'essential facilities' doctrine, that this is particularly the case as regards the condition that the impugned refusal to licence of the dominant undertaking must prevent the appearance of a new product on a market separate from that on which the undertaking in question is dominant constitutes a serious legal question that merits full consideration by the Court of First Instance in the main action. This interpretation of *Magill* arguably finds support in much of the case-law to which IMS refers (see particularly paragraph 80 above). It would also seem to be echoed by Advocate General Jacobs who opined, in *Bronner*, that *Magill* could 'be explained by the special circumstances of that case which swung the balance in favour of an obligation to license' (Opinion, paragraph 63).

106 Accordingly, as there is, at the very least, a serious dispute regarding the correctness of the fundamental legal conclusion underpinning the contested decision, i.e. that 'exceptional circumstances' exist in the present case capable of justifying the imposition of a compulsory-licence obligation, the applicant has clearly established a prima facie case justifying the interim relief sought. Indeed, even if it were necessary, notwithstanding the findings set out particularly in paragraphs 68 and 73 above, for an applicant in interlocutory proceedings such

as the present to demonstrate the existence of a strong prima facie case, the applicant must be regarded as having satisfied that requirement in respect of its core plea. It is therefore necessary to consider whether the condition in respect of urgency is satisfied.

*Urgency*

Arguments of the parties

107 The applicant firstly contends that its intellectual property right in the 1 860 brick structure is a core feature of its competitiveness and plays a fundamental role in distinguishing its regional sales-data service from those provided by its competitors. If it were compelled to share its copyright, its service, painstakingly developed over many years, would be devalued into a generic offering indistinct from the competing services. Referring to the order in *Bayer* v *Commission* (Case T-41/96 R [1996] ECR II-381, paragraph 54, hereinafter '*Bayer*'), it submits that, as in that case, IMS Health's freedom in the present case to define a crucial element of its business policy would be undermined by implementation of the contested decision. In its supplementary observations, it observes that the economic and commercial value of a unique advantage, once lost by 'commoditisation', can never be restored. It also insists that the risk, if it were forced to license NDC Health and AzyX, of the latter using the time that would elapse before judgment in the main action to seek to persuade customers gained to switch over to using brick structures that do not infringe its copyright in the 1 860 brick structure is real. It is aggravated by the fact that both of those competitors have at different stages claimed that certain of their brick structures do not infringe that copyright.

108 Secondly, the applicant alleges that execution of the contested decision will lead to market developments that will be very difficult, if not impossible, to reverse (*Atlantic Container Line and Others* v *Commission*, paragraph 55). According to the applicant, the economic value to it of customers lost to its competitors following the imposition of compulsory licences will not be recovered. Those customers will no longer accept the intellectual and creative foundation of its service. It will experience insurmountable difficulties convincing them that its copyright is valid and will be unable commercially to raise its prices again to those commensurate with the enjoyment of an exclusive right. As was recognised in the *Magill* order (paragraphs 16 and 18), those customers will probably become accustomed to the availability of service offerings from several sources and will resist returning to a situation where IMS Health alone is capable of providing the relevant service. In its supplementary observations, it asserts that the Commission's dismissal of this risk demonstrates its unfamiliarity with the realities of business: every decision, including final as opposed merely to interim decisions, that threatened to lead to lasting or far-reaching changes in the market has so far been suspended (the *Ford* and *Magill* orders; orders in *Atlantic Container Line and Others* v *Commission*, and in *Bayer*).

109 The applicant, thirdly, contends that the direct financial losses it has already incurred as a result of NDC Health's and AzyX's infringement of its copyright are already very significant. It claimed at the oral hearing already to have lost [...] of its [...] subscription customers to NDC Health and AzyX, of which [...] had switched since 9 March 2001 when the SO was issued. It estimates its total lost revenues in respect of such customers to be EUR [...] per annum based on the subscription rates applicable in 2000. Moreover, a further [...] customers have not yet renewed contracts due to expire at the end of the year, although it would have been normal for them already to have done so. Since NDC Health and AzyX are the only two other undertakings active on the market, it may reasonably be supposed that most, if not all, of these customers will switch to them if the contested decision is not suspended. In the latter event, the total additional losses to IMS Health would be EUR [...] per annum based on current subscription rates. Thus, IMS Health's overall quantifiable losses in Germany for 2002 would be

EUR [...]. Referring to *NCC*, it submits that an undertaking in damages or some other financial guarantee (such as a bank guarantee) would be particularly appropriate in this case, where the facts are highly contested and where the Commission's assessment appears to contravene well-established principles of Community law. However, such a measure would not remove the very serious risk of unquantifiable losses occurring if the contested decision were not suspended.

110 The Commission denies that the applicant has established a risk of serious and irreparable harm. As regards the alleged financial losses that may be suffered by IMS, the Commission, referring, *inter alia*, to *Abertal SAT* v *Commission* (Case C-213/91 R [1991] ECR I-5109, paragraph 24) recalls that financial loss does not in principle fall to be regarded as irreparable. There is no question, given the applicant's quasi-monopolistic position on the German market, of its survival being jeopardised by the implementation of the contested decision (Joined Cases C-51/90 R and C-59/90 R *Comos-Tank* v *Commission* [1990] ECR I-2167, paragraphs 30 and 31, and Case T-301/94 R *Laakman Karton* v *Commission* [1994] ECR II-1279, paragraph 23 et seq.). Nor will IMS Health's market share collapse if its competitors are granted licences, particularly as they will be subject to the competitive constraint of having to pay royalties. In any event, the possible financial losses feared by the applicant are unsubstantiated and represent an implausible 'worst-case scenario'. Regarding the revised assessment of those losses presented by IMS at the oral hearing, the Commission maintained that they would be marginal because the vast majority of clients on a revenue basis would remain with IMS and its assessment overlooks the importance of the proposed licensees' obligation to pay it royalties. The benefit of this obligation will be equal to twice the amount of the royalties paid, since the royalties will increase IMS Health's revenues whilst correspondingly reducing those of the licensees.

111 Furthermore, the Commission submits that the exclusion of financial losses is not contingent on their recoverability. If the contested decision is annulled, it would

be open to the applicant to recover such losses from NDC and AzyX. Regarding the allegation that provision should have been made in the contested decision for an undertaking to be furnished by the proposed licensees, the Commission submits that the imposition of such a condition should be very exceptional. The circumstances of this case differ from those of *NCC*, the only case to date where such a condition was imposed. However, the Commission would not object to a contractual provision in the license agreements between IMS Health and its competitors providing for such a guarantee. At the hearing, it added that it would accept a safeguard imposed by the President of the Court of First Instance regarding the provision of such a guarantee provided its amount was reasonable.

112 Regarding the supposed interference with IMS's business autonomy, the Commission maintains that certain such changes are inherent in the adoption of any interim conservatory measure. The cardinal question in the present proceedings is to decide whether or not the ensuing damage is considerably in excess of the inherent but temporary disadvantages arising from the adoption of such interim decisions. The applicant has not demonstrated that the degradation of its right that it might suffer from having to share, in return for a reasonable royalty, the 1 860 brick structure with its competitors would go beyond such inherent disadvantages. Granting the licences at issue would not restrict IMS Health's independence to define its business policy: it would affect neither its freedom to fix its prices nor, given the extent of its dominance on the relevant market, its ability to adopt a business policy to meet the challenge of competition.

113 Nor will the contested decision, in the Commission's view, cause any significant and lasting market developments. First, it is clear that Article 1 thereof, read in the light of the reasoning in its preamble, is limited to NDC Health and AzyX. Thus, there would be no impediment to the applicant enforcing its copyright if the decision were annulled in the main action. Secondly, the circumstances in these proceedings differ from those considered in the orders in *Bayer*, *Langnese-Iglo and Schöller* v *Commission* (Joined Cases T-7/93 R and T-9/93 R [1993] ECR II-131) and in *Van den Bergh Foods* v *Commission* (Case T-65/98 [1998]

ECR II-2641, hereinafter '*Van den Bergh Foods*'), where the addressees of the impugned decisions were required to alter their contractual relations with large numbers of wholesalers and retailers. These proceedings are also not comparable with *Atlantic Container Line and Others* v *Commission*, where the immediate application of the impugned decision to a sector which was already in a fragile state was regarded as being liable to result, among others things, in a price collapse and the disappearance of some undertakings.

114 NDC and NDC Health submit that the applicant is seeking effectively to argue in the present proceedings that IMS Health would be gravely prejudiced by being required, on a temporary basis and in return for royalties, to license the use of a utilitarian copyright over an industry standard. They contend that the feared devaluation of the applicant's intellectual property in the 1 860 brick structure into a 'generic offering' is unconvincing; IMS Health's copyright protection has only recently become available in Germany and the applicant has failed to explain why its right would be degraded in Germany through doing there, for a royalty, that which it has already agreed to do in the United Kingdom in respect of a comparable property right without the benefit of a royalty. Moreover, as the data at issue are freely available, execution of the contested decision would not, unlike in *Postbank* v *Commission* (Case T-353/94 R [1994] ECR II-1141), entail the risk that secret information would be published. Regarding the possibility of imposing a bank guarantee, they doubted its necessity at the oral hearing since IMS would not suffer any irreparable financial losses. Furthermore, IMS could use the need to reach agreement on the terms of any such guarantee as a means of delaying the granting of the licences provided for in the contested decision. Contrary to the trivial losses that might be caused to the applicant, NDC Health cannot compete with IMS Health without being able to use the 1 860 brick structure. In their supplementary observations, they contend that the evidence from the pharmaceutical industry is overwhelming; pharmaceutical companies

must receive regional sales-data in the 1 860 format. In any event, NDC's 3 942 structure is not a viable alternative to IMS Health's 1 860 brick structure, since the scope of the injunction obtained against NDC Health, in so far as it concerns 'derivative' structures, is unclear and will not be clarified, as the Commission pointed out in the contested decision (paragraph 143), for another three years.

115 AzyX submits that the contested decision correctly found that it would suffer serious and irreparable harm if the interim measures ordered therein were not implemented. Due to the importance for the AzyX group of companies of revenues from the German market, its financial survival would be jeopardised within a very short time if the interim measures ordered by the Commission were suspended. If the 1 860 brick structure does constitute, notwithstanding IMS's denial, an essential facility, the damage caused to the applicant from having to license that structure would, if the contested decision is annulled in the main action, be purely temporary. If, however, it is not indispensable, any irreparable client loss would, AzyX alleges, be due to other competitive features and not the contested decision.

Findings of the President

116 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 (orders in *SCK and FNK*, paragraph 30; Case C-329/99 P(R) *Pfizer Animal Health* v *Council* [1999] ECR I-8343, paragraph 94; and Case C-471/00 P(R) *Commission* v *Cambridge Healthcare Supplies* [2001] ECR I-2865, paragraph 107, hereinafter '*Cambridge*'). It is for the party who pleads serious and irreparable damage to prove its existence (orders in Case C-278/00 R *Greece* v *Commission* [2000] ECR I-8787, paragraph 14, and of the President of the Court of First Instance in Case

T-53/01 R *Poste Italiane* v *Commission* [2001] ECR II-1479, paragraph 110). 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 (orders in Case C-335/99 P(R) *HFB and Others* v *Commission* [1999] ECR I-8705, paragraph 67; *Cambridge*, paragraph 108; and Case T-237/99 R *BP Nederland and Others* v *Commission* [2000] ECR II-3849, paragraph 49).

117 Nevertheless, an evaluation of the factors capable of justifying suspension of the operation of a measure such as the contested decision, 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 (the *Ford* order, paragraph 11). 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 (the *Ford* and *Peugeot* orders, paragraphs 14 and paragraph 24, respectively).

118 The Commission, supported by the intervening parties, dismisses the seriousness of the losses likely to be suffered by the applicant. They represent the worst-case scenario and ignore the financial importance of the royalty payments it will receive. However, the applicant has produced what appears, at first sight, to be cogent evidence that its direct losses this year may amount to EUR [...] and that they could quite easily rise to EUR [...] in 2002. Although the contested decision provides no information regarding either IMS Health's turnover or revenues, AzyX alleges, without its being contradicted by the applicant on this point, that IMS Health's revenues in Germany in respect of its regional sales-data service amount annually to approximately EUR 25 million. In all these circumstances, it cannot be excluded that losses of the order of between EUR [...] and EUR [...] per annum for IMS Health would, notwithstanding its membership of a group of companies of the size of IMS, potentially be very serious.

119 Nevertheless, it has consistently been held that 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 (orders in *Abertal SAT* v *Commission*, paragraph 24; Case T-230/97 R *Comafrica and Dole* v *Commission* [1997] ECR II-1589, paragraph 32, *Cambridge*, paragraph 113; and in order in Case T-339/00 R *Bactria* v *Commission* [2001] ECR II-1721, paragraph 94). This case-law is based on the premiss that 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 (orders in *Comafrica and Dole*, cited above, paragraph 38, and in Case T-169/00 R *Esedra* v *Commission* [2000] ECR II-2951, paragraph 47). However, in the present case, the means of redress envisaged by the Commission in its observations, in the event of the contested decision being annulled, would be for the applicant to seek compensation (presumably damages for breach of its copyright) before the German courts. It is clearly not possible, nor indeed appropriate, for the judge hearing the present application for interim relief to speculate on the likelihood of adequate redress being obtained by IMS before the national courts. It cannot, for instance, be excluded that the very fact of granting licences pursuant to the contested decision to NDC Health and AzyX could, even if that decision were later annulled, have adverse consequences on the extent of the possible redress available to IMS Health.

120 Moreover, having regard to the broad discretion enjoyed by the Commission in deciding whether it is opportune to adopt interim decisions such as the contested decision, it would, at first appearance, seem unlikely that the applicant could succeed in any action for damages brought against the Commission. In other words, it is unlikely that the grounds upon which the contested decision might ultimately be annulled in the main action would suffice to constitute a serious breach of Community law such that IMS could realistically argue that the Commission had manifestly and gravely disregarded the limits on its discretion (see Case C-352/98 P *Bergaderm and Goupil* v *Commission* [2000] ECR I-5291,

paragraphs 41 to 44, and the judgment in Joined Cases T-198/95, T-171/96, T-230/97, T-174/98 and T-225/99 *Comafrica and Dole* v *Commission* [2001] ECR II-1975, paragraph 134).

121 Nevertheless, even though the possibility of IMS Health being unable to recover the financial losses it may suffer as a result of the execution of the contested decision cannot be excluded, interim relief is generally not granted in respect of financial damage unless the applicant is in a position to adduce evidence that would justify a prima facie finding that, failing the relief sought, the losses alleged would be such as to threaten its survival. In the present proceedings, the applicant has not contested the Commission's finding (paragraph 3 of the contested decision) that IMS is active in 100 countries and had, in 2000, a turnover of USD 1.4 billion. Although it is IMS Health which, according to the statements of Dr Sian, will suffer the feared losses in question, it is both permissible and appropriate, where the addressee of the decision and the applicant both in the main action and present proceedings is IMS, to consider the potential effects of those losses on the latter as a whole (orders in Case C-12/95 P *Transacciones Marítimas and Others* v *Commission* [1995] ECR I-467, paragraph 12; Case T-260/97 R *Camar* v *Commission and Council* [1997] ECR II-2357, paragraph 50; Case T-13/99 *Pfizer Animal Health* v *Council* [1999] ECR II-1961, paragraph 155, confirmed on appeal by order in Case C-329/99 P(R), cited above, paragraph 67; and the order of the President of the Court of First Instance in Case T-111/01 R *Saxonia Edelmetalle* v *Commission* [2001] ECR II-2335, paragraph 27). Having regard to the financial strength of IMS and to the alleviation of IMS Health's losses through the receipt of royalty payments, the Commission's conclusion in the contested decision that the financial losses that could be incurred would be unlikely, at least before judgment in the main action, to threaten its survival on the relevant market would appear to be well founded. It follows that such damage cannot, in itself, suffice to justify the interim relief sought.

122 Moreover, the Commission has indicated that it would not oppose the applicant seeking to include a financial guarantee clause in the licence terms it negotiates

with NDC and AzyX. The inclusion of appropriate bank-guarantee clauses in the final licence terms fixed by the Commission, in accordance with Article 2 of the contested decision, would further alleviate the risk of irreparable financial damage occurring.

123 It is therefore necessary to consider whether, as alleged by the applicant, there is a real risk that the detrimental effects of executing the contested decision on the structure of competition on the relevant market, and particularly on the value of the applicant's copyright in the 1 860 brick structure, could cause serious and potentially irreparable harm to it.

124 It is important to emphasise that the contested decision does not seek to call into question the recognition by the Landgericht Frankfurt of the applicant's copyright (held through IMS Health) in the 1 860 brick structure (paragraphs 36 and 211). In so far as NDC and NDC Health seek to classify that copyright as utilitarian, their submissions go beyond the scope of the contested decision and are therefore incapable of supporting the Commission's submissions that the present application for interim measures in respect of that decision be rejected. As the Landgericht Frankfurt has recognised that the creative effort underlying the 1 860 brick structure is worthy of copyright protection, the applicant is justified in invoking the genuine risk of devaluation of its copyright.

125 The fundamental rationale of copyright is that it affords the creator of inventive and original works the exclusive right to exploit such works (Case 158/86 *Warner Brothers and Metronome Video* v *Christiansen* [1988] ECR 2605, paragraph 13, hereinafter '*Warner Brothers*'), thereby ensuring that there is a 'reward for the creative effort' (*RTE*, paragraph 71, *ITP*, paragraph 56). Copyright is of fundamental importance both for the individual owner of the

right and for society generally (Opinion of Advocate General Gulmann in *Magill*, paragraph 11). To reduce it to a purely economic right to receive royalties dilutes the essence of the right and is, in principle, likely to cause potentially serious and irreparable harm to the rightholder.

126 The Commission, supported by the intervening parties, seeks to justify the necessity for such a dilution in the present proceedings by asserting that the resulting damage to the applicant will, if it wins the main action, be temporary and remain within the limits of the effects inherent in conservatory measures. In other words, IMS Health will automatically regain all of its clients on restoration of its exclusive right, since the *de facto* essential nature of the brick structure will then again oblige those clients exclusively to deal with it.

127 The allegedly 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 to the applicant's interests.

128 First, there is a clear risk that IMS Health's current clients, many of whom are large pharmaceutical companies themselves or undertakings that form part of economically powerful multinational groups, will not, if allowed a choice between competing providers of regional sales-data services based on the 1 860 brick structure over a period of two to three years, willingly accept a forced return to a single service offered at a higher price by a monopolistic service provider. Secondly, the discontent of IMS Health's clients will be exacerbated if, as the judge hearing the present application for interim measures was informed by the interveners at the oral hearing, the details of the sales-data services offered by them, although by necessity based upon the 1 860 brick structure, differ considerably from those offered by the applicant. It cannot therefore be excluded that such discontent could manifest itself in a willingness to undertake the

expense necessary to accept sales-data in a non-1 860-brick-compatible format so as to avoid a return to the applicant enjoying a quasi-monopolistic position on the relevant market. This is particularly the case since many of those clients appear, as alleged in the contested decision (paragraphs 75 to 84), to have played a significant role, through RPM Arbeitskreis (Working Group), in the development of 1 860 brick structure. The mere fact that some of them seem to have been unwilling, as AzyX contends, at the conference organised by it in Frankfurt on 15 March 2001, during a four-and-a-half hour meeting to countenance switching to a different format does not exclude a change in their attitude if the contested decision — whose anticipated adoption it was decided to support at that meeting — were later annulled.

129 Consequently, it must be found as a point of fact that there are serious grounds for believing that many of the market developments to which immediate execution of the decision is likely to give rise would be very difficult, if not impossible, later to reverse if the application in the main action were to be upheld (order in *Van den Bergh Foods*, paragraph 66).

130 Furthermore, it cannot be excluded that implementation of the contested decision will restrict the applicant's freedom to define its business policy (*Bayer*, paragraph 54). It is clear from the observations submitted in the present proceedings that the applicant could not, if the decision is implemented, continue to apply the same business policy to a market in which its competitors are legally entitled, subject only to the obligation to pay royalties, to compete freely with it as that which it has hitherto been applying. At the moment of adoption of the contested decision, both NDC Health and AzyX were providing services either on the basis of the 1 860 brick structure (and, thus, in all likelihood in infringement of the applicant's copyright), or on the basis of some other similar brick structures which may or may not have constituted infringing 'derivatives' of that structure (and in respect of which a climate of legal uncertainty prevailed). The imposition of an obligation on the applicant to license NDC Health and AzyX will clearly

change those prevailing market conditions. The mere fact, as the Commission observes, that the applicant's own initial refusal to license its competitors contributed to those legal uncertainties does not alter the nature of the change in market conditions that would be effected by the prospective legitimation of NDC's and AzyX's conduct as a result of obtaining licences following the implementation of the contested decision.

131 Moreover, in circumstances where, as the Commission submits in its supplementary observations, it is not possible to say with certainty whether the applicant's competitors 'current brick structures breach [its] copyright', and where at least one of those competitors, namely NDC, publicly denies that its 3 942 brick structure infringes that copyright, it is not possible to dismiss as purely hypothetical the risk that NDC and AzyX might use the period of protection from copyright-infringement actions that would be provided by execution of the contested decision to persuade their present and future clients to switch from the 1 860 brick structure to other allegedly non-infringing structures. At first view, it seems likely that that risk would have to be taken into account by the applicant in formulating its business policy pending judgment in the main action.

132 Accordingly, it falls to be concluded that there is a real and tangible risk that execution of the contested decision could, before judgment in the main action, cause serious and irreparable harm to the applicant of a nature likely to exceed the inevitable, short-lived disadvantages inherent in the adoption of such protective measures.

133 It is therefore necessary to weigh the interests involved, in order to determine whether all of the conditions necessary for granting the interim relief sought in the present application are satisfied.

*The balance of interests*

Arguments of the parties

134 The applicant submits that neither NDC nor AzyX will suffer irreversible harm if the operation of the contested decision is suspended. They already have a significant number of customers and have both developed alternative (and allegedly non-infringing) brick structures that they can continue to use and improve. It refers specifically to NDC's 3 942 brick structure which, in the licence negotiations following the adoption of the contested decision, the latter claimed was not subject to the licence. Furthermore, any damage suffered would be self-inflicted; as NDC and AzyX were ordered to desist from infringing IMS Health's copyright by the Landgericht Frankfurt on 12 October and 28 December 2000. They first requested licences on 26 October 2000 and 23 April 2001, respectively, and therefore any customers they have supplied since then with services based on the 1 860 brick structure have been supplied in breach of those injunctions. While they had a right to seek relief before the Commission, they had no right, pending the latter's investigation of that complaint, to infringe the copyright in the 1 860 brick structure.

135 The applicant also submits that the Commission's claim that, in the absence of licences, NDC and AzyX will go out of business in Germany is exaggerated. NDC is the world's largest multi-segment, health-information services company with an annual turnover (according to its own internet website on 22 July 2001) of approximately USD 685 million. It is IMS's principal competitor in the United States of America and is active in several European countries. AzyX, for its part, has activities in a number of European countries that are not affected by the absence of a licence to use the 1 860 brick structure in Germany.

136 Finally, the applicant submits that no other third party or public interests would be harmed by the interlocutory suspension of the contested decision. In particular, as the sales-data services at issue are only used for internal purposes by pharmaceutical companies and form a small proportion of their overall sales and marketing expenditure, there would be no effect on final consumers of pharmaceutical products of its exclusive right being maintained pending the main judgment.

137 The Commission submits that the proportionate character of the limitation ordered in the contested decision of the applicant's exclusive right is demonstrated by the fact that provision is made for compensation by way of reasonable royalty payments. This fact, coupled with the interest of IMS's competitors and of its clients in the maintenance of competition, dictate strongly in favour of allowing the contested decision to be implemented pending judgment in the main action. At the oral hearing, the Commission contested the applicant's submission that a suspension of the contested decision would not operate to preclude both NDC and AzyX from re-entering the German market if the decision's validity were later upheld in the main action.

138 NDC submits that, before granting a suspension, the judge hearing the interim application should be satisfied that the applicant's interests outweigh the significant counterbalancing interests, namely the negative effects on NDC and AzyX, the pharmaceutical companies and the public interest. Given what it alleges are IMS Health's 'astonishingly high' earnings revenues, it contends that customers will reap the benefits of the competition process if the contested decision is executed. The contested decision takes the least disruptive means available of ensuring the maintenance of competition on the relevant market. The balance of interests requires the licensing of the utilitarian copyright at issue in the present case pending the main judgment.

139 AzyX contends that the general interest of the common market would be better served in the interim period by allowing competition to operate rather than by

permitting IMS to block the relevant market. At the oral hearing, it contested the applicant's assertion that it could return to the German market in two year's time; as some 75% of the AzyX group's total turnover is at present realised in Germany, an exclusion from that market for two years would seriously threaten its survival. Against this, a potential loss to IMS of, according to AzyX, approximately 1.5% of its worldwide revenues is not comparable.

Findings of the President

140 In the contested decision (paragraph 187) the Commission relies on *La Cinq* (paragraph 28). In the absence of interim measures ordered, it claims that serious and irreparable damage may be caused to NDC and intolerable damage to the public interest. Regarding NDC, the contested decision invokes financial losses and damage to its commercial reputation in Germany if it is unable to fulfil contracts as a result of the injunction preventing it from using the 1 860 brick structure (paragraph 192). It finds that NDC will be unable to compete with the applicant unless it obtains access to that structure (paragraphs 193 and 194). In response to a question posed at the oral hearing, the Commission specified that the urgency for NDC relates to the risk that, even though it is a large company, it could not sustain the 'astonishing' losses that it would incur pending the main judgment on the German market without access to the 1 860 brick structure. The intolerable damage to the public interest would, according to the contested decision, flow from the serious risk that AzyX would go out of business leaving IMS the sole provider of regional sales-data services in Germany. The Commission's concern is for 'the continued presence of... AzyX, on the market', since its European operation, due to its smaller size and lower worldwide revenues than NDC, 'is even more susceptible to going out of business in the absence of interim measures' (paragraph 195). At the oral hearing, it referred to competition on the relevant market being 'annihilated' pending the main judgment failing execution of the contested decision.

141 In accordance with the *Camera Care* line of case-law, the Commission may adopt an interim decision taking protective interim measures that it deems to be indispensable for ensuring the effectiveness of any final decision it later adopts in respect of the allegedly anti-competitive conduct under investigation. It is clear from that case-law that, in certain circumstances, the public interest in the maintenance of effective competition on the relevant market will require the adoption of protective measures that impinge upon the rights of undertakings whose conduct is still merely under investigation pursuant to Article 3 of Regulation No 17. It is for the Commission to assess whether the adoption of such measures in a particular case is appropriate. However, where the judge hearing an application for interim measures is satisfied that the conditions prescribed both by Articles 242 EC and 243 EC and Article 104 of the Rules of Procedure are satisfied, he must balance the interests relied upon by the Commission to justify its decision against those invoked by the applicant in favour of the interim relief sought.

142 In the contested decision the Commission concludes that there is a pressing need to impose an obligation requiring IMS Health to grant licences regarding its copyright in the 1 860 brick structure so that two of its competitors can continue, pending the adoption of the final Commission decision, actively to compete with IMS on the market on which that right is currently used. This conclusion is reached notwithstanding its recognition of 'the essential role played by intellectual property rights in promoting innovation and competition' (paragraph 211) and IMS's argument that its copyright will be rendered 'nugatory' by interim measures, thus deterring potential investment in intellectual property rights (paragraph 210). It bases this assessment of the appropriate balancing of the interests involved on what it perceives to be the proportionate nature of the interference with IMS's right; the temporary deprivation of its exclusive right under national law in return for 'reasonable' royalties.

143 It is important initially to recall that 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 the applicant has invoked and sought to enforce its copyright in the 1 860 brick structure for

economic reasons does not lessen its entitlement to rely upon the exclusive right granted by national law for the very purpose of rewarding innovation (see *Warner Brothers*, paragraph 13; Joined Cases C-92/92 and C-326/92 *Phil Collins and Others* [1993] ECR I-5145, paragraph 20; Case C-200/96 *Metronome Musik* [1998] ECR I-1953, paragraphs 15 and 24; and Case C-61/97 *FDV* [1998] ECR I-5171, paragraphs 13 to 18).

144 In the present case, where there is, on the face of it, a clear public interest underlying the applicant's effort to enforce and profit from the specific subject-matter of its copyright in the 1 860 brick structure, the inherently exceptional nature of the power to adopt interim measures would normally require that conduct whose termination or amendment is targeted by such measures fall clearly within the scope of the Treaty competition rules. However, the characterisation of the refusal to licence at issue in the present proceedings as abusive turns, prima facie, on the correctness of the Commission's interpretation of the case-law concerning the scope of the 'exceptional circumstances'. It is this case-law which explains the clearly special situations in which the objective pursued by Article 82 EC may prevail over that underlying the grant of intellectual property rights. In this context, where the abusive nature of the applicant's conduct is not unambiguous having regard to the relevant case-law 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.

145 This is particularly true in the present proceedings where it is clear that the public interest invoked by the Commission in the contested decision relates, in substance, primarily to the interests of the applicant's competitors. NDC and NDC Health claim that consumers will reap the benefit of that competition. Yet the applicant points out, without its having been contradicted on this point, that, as the cost to pharmaceutical companies of purchasing sales-data information

forms a small proportion of their overall sales and marketing expenditure, there would be no (or at least no perceptible) effect on final consumers of pharmaceutical products if its exclusive right were maintained pending the main judgment. It cannot therefore, at least at first impression, be excluded that the balance of interests effected in the contested decision by the Commission, which seems to equate the interests of NDC and AzyX with the interests of competition (see paragraph 140 above), ignores the primary purpose of Article 82 EC, which is to prevent the distortion of competition, and especially to safeguard the interests of consumers, rather than to protect the position of particular competitors (Opinion of Advocate General Jacobs in *Bronner*, paragraph 58).

146 Moreover, even though the greater threat of permanent, or at least of long-term, exclusion from the relevant market is faced, as recognised in the contested decision, by AzyX, the balance of interests in the present proceedings still does not favour its immediate execution. It is clear from the information furnished to the President regarding the decision of the Oberlandesgericht Frankfurt of 18 September 2001, and from perusing the reasoning set out in the judgment, that there is no longer any court prohibition on AzyX competing on the relevant market using brick structures that may infringe the applicant's copyright in the 1 860 brick structure. If AzyX chooses to continue to use such structures, it would be subject to the risk that, if the validity of IMS Health's copyright in that structure were later definitively upheld, it may be required to pay damages to IMS Health for breach of that copyright. However, the public interest in ensuring that IMS Health is subject to competition on the relevant market pending the main judgment cannot prevail to such an extent over that concerning the need to protect its copyright that AzyX should be granted a licence, based on an interim application of Article 82 EC, so as to protect it against the risk of an adverse judgment being given against it in the copyright-infringement proceedings between it and IMS Health in Germany, which, IMS informs the President, will come again for hearing before the Landgericht Frankfurt on 21 November 2001.

147 As for the Commission's doubts regarding the likelihood of NDC Health being unable to remain active on the relevant market pending judgment in the main judgment, the risk does not appear, having regard to the economic strength of the NDC group, to be significantly greater than the risk, dismissed by the Commission, that the financial loss which the applicant risks incurring if the contested decision is executed might, in itself, threaten IMS Health's survival on that market (see paragraph 121 above).

148 Finally, in so far as the Commission's reference in its written observations to 'other interests' protected by the contested decision may be regarded as an explanation, rather than as an extension, of the interests invoked by the Commission in that decision, it would not justify a different appreciation of the balance of interests to be made in the present proceedings. Thus, the mere fact that certain pharmaceutical companies might be unhappy with the price and the standard of services offered by IMS Health would not mean that their interests would be seriously or irreparably damaged by an interlocutory suspension of the contested decision.

149 The balance of interests thus inclines in favour of ordering the suspension of the execution of the decision before judgment in the main action.

150 It follows from all of the above that the conditions required under Article 242 EC and Article 104(2) of the Rules of Procedure for granting the interlocutory suspension sought by the applicant in the present proceedings are satisfied.

On those grounds,

THE PRESIDENT OF THE COURT OF FIRST INSTANCE

hereby orders:

1. **Execution of the Commission Decision of 3 July 2001 relating to a proceeding pursuant to Article 82 EC (Case COMP D3/38.044 — NDC Health/IMS Health: Interim measures) is suspended until such time as the Court of First Instance has given judgment in the main action;**

2. **Costs are reserved.**

Luxembourg, 26 October 2001.

H. Jung — Registrar

B. Vesterdorf — President