ORDER OF THE PRESIDENT OF THE COURT
11 April 2002 *

In Case C-481/01 P(R),

NDC Health Corporation, formerly National Data Corporation, established in Atlanta (United States of America),

and

NDC Health GmbH & Co. KG, established in Waldems-Esch (Germany),

represented by F. Fine, Solicitor, C. Price, Avocat, I.S. Forrester QC, M.D. Powell, Solicitor, A.F. Gagliardi, Avvocato, and J. Killick, Barrister, with an address for service in Luxembourg,

appellants,

APPEAL against the order of the President of the Court of First Instance of the European Communities of 26 October 2001 in Case T-184/01 R *IMS Health* v *Commission* [2001] ECR II-3193, seeking to have that order set aside,

* Language of the case: English.

the other parties to the proceedings being:

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

applicant at first instance,

Commission of the European Communities, represented by A. Whelan, acting as Agent, with an address for service in Luxembourg,

defendant at first instance,

and

AzyX Deutschland GmbH Geopharma Information Services, established in Neu-Isenburg (Germany), represented by G. Vandersanden and L. Levi, Avocats,

intervener at first instance,

THE PRESIDENT OF THE COURT,

after hearing the Advocate General, A. Tizzano,

makes the following

Order

1 By application lodged at the Court Registry on 12 December 2001, NDC Health Corporation, formerly National Data Corporation, and NDC Health GmbH & Co. KG (hereinafter referred to together as 'NDC') appealed pursuant to Article 225 EC and the second paragraph of Article 50 of the EC Statute of the Court of Justice against the order of the President of the Court of First Instance of 26 October 2001 in Case T-184/01 R *IMS Health* v *Commission* [2001] ECR II-3193 ('the contested order'), in which he ordered that the operation of Commission Decision 2001/165/EC of 3 July 2001 relating to a proceeding pursuant to Article 82 of the EC Treaty (Case COMP D3/38.044 — NDC Health/IMS Health: Interim measures) (OJ 2002 L 59, p. 18, 'the contested decision') should be suspended until judgment was given in the main action.

2 By documents lodged at the Registry on 18 January 2002, the Commission, AzyX Deutschland GmbH Geopharma Information Services ('AzyX') and IMS Health Inc. ('IMS') submitted written observations to the Court.

Facts and procedure

3 In the contested decision the Commission took the view that IMS has a dominant position in the German market for data services on sales and prescribing of

pharmaceutical products. It found that the '1 860 brick structure' developed by IMS, which represents the geographical model of analysis of the German market on the basis of which the regional sales data are formatted and offered to customers by IMS, constitutes a *de facto* industry standard in the relevant market. The Commission concluded that there exists a sufficient prima facie case that IMS's refusal to grant a licence for the use of that structure constitutes an abuse of a dominant position. The refusal prevents new competitors from entering or surviving in that market, which causes serious and irreparable damage to the public interest.

4 The Commission therefore adopted interim measures requiring IMS '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 the 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 1 of the contested decision). The Commission also decided that 'any royalties to be paid for these licences shall be determined by agreement between IMS and the undertaking requesting the licence'. In the absence of agreement between those parties, the royalties were to be determined by one or several independent experts (Article 2 of the contested decision).

5 By application lodged at the Registry of the Court of First Instance on 6 August 2001, IMS brought an action under the fourth paragraph of Article 230 EC for the annulment of the contested decision.

6 By separate document lodged at the Registry of the Court of First Instance on the same date, IMS further sought an order suspending operation of the contested decision until the Court of First Instance gave judgment on the main action.

7 Since suspension of operation was also sought for the period until the application for interim relief was determined, the President of the Court of First Instance, by order of 10 August 2001 adopted on the basis of Article 105(2) of the Rules of Procedure of the Court of First Instance, suspended *ex parte* the operation of the contested decision pending the ruling on the application for interim relief.

The contested order

8 By the contested order the President of the Court of First Instance allowed IMS's application and ordered the operation of the contested decision to be suspended.

9 The factual and legal background to the case, the contested decision and the procedure in the Court of First Instance are set out in paragraphs 1 to 45 of the contested order.

10 In paragraphs 49 and 50 of the order, the judge hearing the application for interim relief noted, first, that the Commission's power to adopt interim decisions in competition proceedings derives from Article 3(1) of Regulation No 17 of the Council of 6 February 1962, First Regulation implementing Articles [81] and [82] of the Treaty (OJ, English Special Edition 1959-1962, p. 87), as interpreted by the Court in the order of 17 January 1980 in Case 792/79 R *Camera Care* v *Commission* [1980] ECR 119, confirmed by the judgment in Joined Cases 228/82 and 229/82 *Ford* v *Commission* [1984] ECR 1129.

11 The judge then considered the question of the extent to which he could intervene with respect to decisions imposing interim measures adopted by the Commission in the context of applying the rules on competition. The Commission had submitted that, because of the limited nature of judicial review in applications for

the annulment of decisions based on complex economic assessments, IMS was required in the present case to show that the Commission had made manifest errors of assessment concerning the existence of a prima facie case, urgency and the balance of interests justifying the adoption of the interim measures taken in the contested decision (paragraph 56 of the contested order).

12 On this point, the judge considered, in paragraphs 58 to 64 of the contested order, a number of orders of this Court and of the Court of First Instance (orders in Case 109/75 R *National Carbonising Company* v *Commission* [1975] ECR 1193, Joined Cases 228/82 R and 229/82 R *Ford* v *Commission* [1982] ECR 3091 and Case C-149/95 P(R) *Commission* v *Atlantic Container Line and Others* [1995] ECR I-2165; orders in Case T-23/90 R *Peugeot* v *Commission* [1990] ECR II-195 and Case T-395/94 R *Atlantic Container Line and Others* v *Commission* [1995] ECR II-595), in the light of which he concluded:

'65 No principles emerge from the abovementioned case-law that would support the plea advanced by the Commission, supported by [NDC], 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... 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.'

13 With respect more particularly to the extent to which he could intervene as regards the Commission's assessment of urgency and the balance of interests, the judge concluded:

'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.'

14 The judge concluded, in paragraph 74 of the contested order, that 'the plea advanced by the Commission, supported by [NDC], 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'.

15 As regards the prima facie case, IMS's main plea challenged the legal analysis underlying the Commission's conclusion that the refusal of IMS to grant a licence constituted an abuse of its dominant position in the relevant market.

16 In that context, the judge considered it necessary to examine whether IMS had shown that serious doubts subsisted concerning the validity of the contested decision (paragraph 90 of the contested order). To do so, he analysed, in paragraphs 94 to 105 of the order, the case-law relating to the 'exceptional circumstances' in which the exercise of copyright by the proprietor may constitute an abuse of a dominant position (Joined Cases C-241/91 P and C-242/91 P *RTE and ITP* v *Commission* [1995] ECR I-743 and Case C-7/97 *Bronner* [1998] ECR I-7791).

17 The judge considered that the Commission appeared to have adopted the contested decision on the basis of a non-cumulative interpretation of the conditions regarded as constituting 'exceptional circumstances' in *RTE and ITP* (paragraph 100 of the contested order). The Commission had sought to justify

that interpretation by reference to *Bronner*, but the judge said that 'although the Commission's interpretation may be correct, the existence of reasonable grounds for concluding that the "exceptional circumstances"... are concurrent cannot be excluded' (paragraph 104 of the contested order). He considered in particular that IMS's assertion that the case-law requires that the refusal to grant licences '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' (paragraph 105 of the contested order).

18 In conclusion, the contested order found that there was 'a serious dispute regarding the correctness of the fundamental legal conclusion underpinning the contested decision', which established that there was a prima facie case (paragraph 106 of the contested order).

19 The judge also held that the condition of urgency was satisfied, in view of the real and tangible risk that the operation of the contested decision could, before judgment was given in the main action, cause IMS serious and irreparable damage (paragraph 132 of the contested order). To reach that conclusion, he based himself in particular on the following reasoning:

'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 [the] 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...

130 Furthermore, it cannot be excluded that implementation of the contested decision will restrict the applicant's freedom to define its business policy...

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.'

20 As regards the balance of interests, the judge concluded that it inclined 'in favour of ordering the suspension of the execution of the [contested] decision before judgment in the main action' (paragraph 149 of the contested order). His reasoning was as follows:

'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] 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..., 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...

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.'

21 The judge consequently ordered the operation of the contested decision to be suspended until the Court of First Instance gave judgment in the main action (point 1 of the operative part of the contested order).

The appeal

Arguments of the parties

Arguments of NDC, AzyX and the Commission

22 NDC, supported by AzyX and the Commission, asks for the contested order to be set aside, the application by IMS to the Court of First Instance for interim measures to be dismissed, and IMS to be ordered to pay the costs. It puts forward 14 pleas in law in support of the appeal.

23 By its first plea, NDC criticises the judge hearing the application for interim relief for having substituted his own legal assessment of the facts for that of the Commission, contrary to the principles governing judicial review in situations involving complex economic assessments, which is confined to a review of the lawfulness of the contested act. That restriction of the judicial role is especially relevant in the context of applications for interim measures. According to NDC, the contested order should not have departed from the Commission's findings of fact unless they were manifestly wrong. The judge should have examined whether a prima facie case of manifest error had been made out. NDC puts forward several examples to show that the judge arrived at findings of fact which differed from the Commission's without explaining in what respect the Commission's decision was wrong in law.

24 According to the Commission, this plea is especially relevant as regards the issues of urgency and the balance of interests. The contested order disregarded the finding of fact in the contested decision that the 1 860 brick structure constitutes a *de facto* industry standard which is indispensable for access to the relevant market. It also disregarded the findings of fact concerning the irreversibility of the market developments which might follow the contested decision. Contrary to what he said in paragraph 73 of the contested order, the judge did not take account of those findings of the Commission.

25 By its second plea, NDC criticises the judge for taking into consideration the merits of the legal arguments relating to the prima facie case in his analysis of urgency and the balance of interests, in particular by attaching weight to the consequences of any restriction of IMS's copyright rights (paragraphs 123 to 133 and 144 of the contested order). According to NDC, the analysis of the prima facie case is distinct from the analysis of urgency and of the balance of interests. The judge failed to respect this distinction.

26 NDC's third plea alleges that the judge applied a wrong legal criterion when examining whether the damage alleged by IMS would be irreparable. That may be seen from the use of expressions such as 'it cannot be excluded' or 'it is not possible to dismiss as purely hypothetical' (paragraphs 128, 130 and 131 of the contested order), which are not sufficient to establish specific, serious and irreparable damage.

27 By its fourth plea, NDC criticises the judge for adopting a wrong legal criterion when examining urgency. Instead of attaching importance to 'discontent' among IMS's customer base, he should have considered whether there were 'obstacles of a structural or legal nature' which would prevent IMS from recovering its market share if it were successful in the main action (paragraphs 128 and 129 of the

contested order). NDC relies in support of this plea on the order in Case C-459/00 P(R) *Commission* v *Trenker* [2001] ECR I-2823, paragraph 102.

28 By its fifth plea, NDC criticises the judge for applying a wrong criterion, in paragraph 128 of the contested order, to determine whether the condition of urgency was satisfied, in particular by failing to consider whether the damage alleged by IMS was a 'direct consequence' of the contested decision. NDC refers in support of this plea to the order in Case T-13/99 R *Pfizer Animal Health* v *Council* [1999] ECR II-1961.

29 NDC's sixth plea is that the judge applied a wrong legal criterion as regards urgency, by finding that a compulsory licence necessarily constituted a restriction of IMS's freedom to define its business policy, which therefore justified suspension of operation (paragraphs 130 and 131 of the contested order).

30 By its seventh plea, NDC criticises the judge for failing to take into account the principle of proportionality. He did not comply with his obligation to consider whether suspension of the operation of the contested decision was necessary to prevent serious and irreparable damage. He should have considered whether some other measure would have been sufficient to address IMS's concerns.

31 By its eighth plea, NDC argues that the reliance on Article 295 EC as an element favouring suspension of operation constitutes an error of law. That article does not apply where, as in the present case, the alleged copyright was created by a Community directive which makes the rights it grants subject to the application of the competition rules (paragraph 143 of the contested order).

32 As regards this plea, the Commission, while accepting that the protection of intellectual property rights is important for the public interest, submits that the conditions under which the contested decision required IMS to grant licences — in particular their temporary character and the determination of a reasonable royalty — were proportionate and such as to ensure that the damage to the public interest in the protection of intellectual property rights did not exceed the inevitable but short-lived disadvantages arising from an interim measures decision. The judge's conclusion is vitiated by the failure to take into account the private and public interests which should have been balanced against the interest in maintaining copyright.

33 By its ninth plea, NDC criticises the judge for attributing legal significance to the fact that consumers would not pay more for pharmaceutical products whether the operation of the contested decision were suspended or not. According to NDC, the case-law has never suggested that the alleged absence of an impact on the final consumer is a relevant factor as regards the suspension of operation of a decision (paragraph 145 of the contested order).

34 In support of this plea, AzyX criticises the judge for considering, in paragraph 145 of the contested order, that 'it cannot..., 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..., 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'. According to AzyX, it follows from the Court's case-law (see, in particular, Case 6/72 *Europemballage and Continental Can* v *Commission* [1973] ECR 215, paragraph 26) that Article 82 EC has several objectives and the protection of consumers' interests is not the primary purpose. The contested decision is not intended to protect the position of specific competitors, but rather to restore competition in the relevant market by means of protection of equal opportunities of economic operators.

35 In this connection, the Commission submits that competition is also meant to protect the interests of customers, in this case the pharmaceutical companies which use the services in question. Referring again to *Europemballage and Continental Can*, it points out that it is in the public interest to ensure effective competition at all stages of production.

36 By its 10th plea, NDC argues that the assertion that 'there are serious grounds for believing that many of the market developments... would be very difficult, if not impossible, later to reverse' (paragraph 129 of the contested order) is not justified by the reasoning which precedes it.

37 By its 11th plea, NDC accuses the judge of making contradictory findings, in that he states in paragraph 128 of the contested order that customers' discontent will be exacerbated because the services offered by NDC and AzyX 'differ considerably' from those of IMS, whereas in paragraph 101 he stated that they would offer, 'at most, new variations of the same services'.

38 It is also contradictory and amounts to a distortion of the evidence, according to NDC's 12th plea, to say on the one hand that the contested decision would force IMS to change its business policy because its competitors, including AzyX, would then be 'legally entitled... to compete freely with it' (paragraph 130 of the contested order), and on the other hand that 'there is no longer any court prohibition on AzyX competing' (paragraph 146 of the contested order).

39 NDC's 13th plea alleges that the judge failed to take account of evidence submitted to him showing that IMS operates its business successfully in other

countries, such as the United Kingdom, without enjoying the copyright which it claims to be essential for its operations in Germany.

40 Finally, by its 14th plea, NDC criticises the judge for failing to take account of essential aspects of the findings in the contested decision. He distorted the content of the decision in relation to the likely effects of suspension of operation of the contested decision on NDC and AzyX, and of a refusal of suspension on IMS (paragraph 147 of the contested order).

Arguments of IMS

41 IMS asks the Court to dismiss the appeal and order NDC to pay the costs. It considers that the pleas put forward are, in part, manifestly inadmissible, in that they relate to the assessment of the facts by the judge hearing the application for interim relief, and, in part, unfounded.

42 As to the first plea in the appeal, IMS submits that it misunderstands the function of the judge hearing an application for interim relief, who is simply obliged to apply the conditions for the grant of interim relief, for which he may have to make findings of fact and law. IMS relies in this respect on paragraph 23 of the order in *Commission* v *Atlantic Container Line and Others*, according to which 'the judge hearing the application enjoys a broad discretion' as regards the manner in which the conditions for granting interim relief are to be examined. According to IMS, the statements of fact in the contested order fall within the limits of the judge's discretion. It submits that the judge may depart from the Commission's findings of fact only if they are manifestly wrong, and that if that were not the case the scope of interim judicial protection would be greatly

reduced. It also observes that the judge considered that, even accepting that it was necessary to show a strong prima facie case, the condition of a prima facie case had to be regarded as satisfied in the present case (paragraph 106 of the contested order).

43 As regards NDC's second plea, IMS replies that the judge did indeed balance the interests involved in the present case, namely, on the one hand, the interests of IMS and the public interest in the protection of intellectual property rights and, on the other, the interests of IMS, NDC and AzyX in avoiding serious and irreparable damage, and the need to maintain stability in the relevant market by maintaining the status quo ante. It adds that the strength of the prima facie case — that is, the force of its legal arguments — is relevant for the balance of interests. An undertaking should not suffer damage as a result of an interim measure unless there is a strong probability that it has acted contrary to the competition rules. According to IMS, the judge was entitled to give greater weight to the protection of intellectual property than to the other interests involved, since a refusal to grant a licence is contrary to the competition rules only in exceptional circumstances.

44 As regards the third plea in the appeal, IMS submits that the judge applied the correct legal standard concerning urgency. The quotations selected by NDC are taken out of context and are not representative of the criterion applied in the contested order.

45 As to the fourth plea in the appeal, IMS disputes the argument that the judge should have assessed whether there existed 'obstacles of a structural or legal nature' which would prevent IMS from recovering its share of the market if it were successful in the main action. He was not required to find the existence of such obstacles, since he had already found that there was a significant obstacle as a result of the resistance of IMS's customers to the restoration of a monopoly situation.

46 As regards the fifth plea in the appeal, concerning the failure to analyse in the contested order whether the damage which might be caused to IMS by the contested decision was the direct consequence of the decision, IMS considers that that was clearly the case. It disputes the relevance of the order in *Pfizer Animal Health* v *Council*. In its opinion, the situation examined in that order in fact showed damage that was independent of the decision at issue.

47 As regards NDC's sixth plea, concerning business freedom, IMS submits that it relates to a point of fact and is therefore inadmissible. To the extent that it might be regarded as admissible, IMS considers that interim measures should preserve or restore the status quo, rather than forcing an undertaking to change its business policy, whereas the contested decision would radically alter the status quo, with serious consequences for IMS's commercial freedom.

48 As to the seventh plea in the appeal, IMS argues that the principle of proportionality was observed by the judge. It submits that, in accordance with that principle, other possibilities — such as the provision of a bank guarantee by NDC and AzyX — were raised at the hearing.

49 As regards NDC's eighth plea, IMS submits that the reference to Article 295 EC is justified, since its copyright derives from German legislation. On the other hand, the assertion that Article 295 EC does not apply to harmonised property rights is not supported by the case-law.

50 As regards the ninth plea in the appeal, IMS submits that the judge was right to take into account the lack of impact of the contested decision on the final consumer, so as to safeguard the interests of third parties not represented in the

proceedings for interim relief. It supports the statement by the judge that the balancing of interests by the Commission in the contested decision appears to equate the interests of NDC and AzyX with those of competitors, disregarding the essential objective of Article 82 EC (paragraph 145 of the contested order). IMS considers that that decision compelled it to share its principal competitive advantage with its competitors. They would therefore be able to offer largely similar services, which would amount to protecting competitors instead of promoting competition.

51 As regards the 10th to 14th pleas, IMS submits that they relate to the judge's assessment of the facts. Such pleas are therefore inadmissible. In the alternative, it submits that they are unfounded.

Findings of the President

52 Since the written observations of the parties contain all the information needed to give judgment on the appeal, there is no need to hear oral argument from them.

53 It should be noted, to begin with, that under Article 225 EC and Article 51 of the EC Statute of the Court of Justice, an appeal is 'limited to points of law', to the exclusion of any assessment of the facts. That provision applies also to appeals brought pursuant to the second paragraph of Article 50 of the Statute.

54 The Court of First Instance has exclusive jurisdiction to find the facts, except where a substantive inaccuracy in its findings is attributable to the documents submitted to it, and to appraise those facts. That appraisal thus does not, except where the clear sense of the evidence has been distorted, constitute a point of law which is subject, as such, to review by the Court of Justice on appeal (see, *inter alia*, Case C-390/95 P *Antillean Rice Mills and Others* v *Commission* [1999] ECR I-769, paragraph 29).

The first plea

55 The first plea concerns the question of the degree of review by the judge hearing an application for interim measures with respect to Commission decisions taking interim measures in competition matters.

56 NDC cites the case-law which states that review by the Court, in the context of an action for annulment, of decisions based on complex economic assessments is limited to verifying whether the procedural rules have been complied with, whether the statement of reasons is adequate, whether the facts have been adequately stated, and whether there has been any manifest error of assessment or a misuse of powers (see, *inter alia*, Case 42/84 *Remia and Others* v *Commission* [1985] ECR 2545, paragraph 34). According to NDC, in the context of an application for interim relief brought against a Commission decision on interim measures, that case-law implies that the applicant must be able to show an especially strong prima facie case and demonstrate manifest errors of assessment as regards the appraisal of urgency and, if appropriate, the balancing of interests carried out by the Commission.

57 On this point, it must be remembered that, in the context of an application for interim relief seeking the suspension of operation of an act of a Community

institution, the judge hearing the application must ascertain whether the applicant has shown that there is urgency and the pleas of fact and law establishing a prima facie case for the interim measure (Article 104(2) of the Rules of Procedure of the Court of First Instance).

58 The case-law relied on by NDC cannot be transposed unqualified to proceedings for interim relief without calling into question the conditions governing the adoption of an interim measure. Such a transposition, with the consequences advocated by NDC for the conditions of ordering interim measures laid down by the Rules of Procedure, might reduce interim judicial protection too much and limit the broad discretion the judge hearing an application for interim relief must have in order to exercise the powers conferred on him (see, to that effect, the order in *Commission* v *Atlantic Container Line and Others*, paragraph 23).

59 The fact that in the present case the contested decision relates to the adoption of interim measures by the Commission does not cast doubt on that assessment. As stated in paragraph 66 of the contested order, there is no justification for giving such interim decisions of the Commission a particular status in the context of applications for interim measures. The judge hearing the application therefore cannot, when considering the conditions for ordering such measures, attach greater importance to the Commission's provisional assessments than to its definitive ones.

60 It may be noted here that the importance of interim judicial protection of the rights of those concerned with respect to interim measures adopted by the Commission was expressly pointed out by the Court in paragraph 20 of its order in *Camera Care*.

61 Accordingly, the first plea must be rejected.

The second plea

62 The second plea concerns the question whether the judge hearing the application for interim relief erred in law by taking account of the merits of the legal arguments relating to the prima facie case in his analysis of urgency and the balance of interests, in particular by attaching weight to the consequences of any restriction of IMS's copyright.

63 On this point, it should be noted that the conditions for the ordering of suspension of operation and interim measures must be the object of an overall examination in which the judge hearing an application for interim relief enjoys a wide discretion (order in *Commission* v *Atlantic Container Line and Others*, paragraph 23). Thus, the strength or weakness of the pleas relied on to show a prima facie case may be taken into consideration by the judge in his assessment of urgency and, if appropriate, of the balance of interests (see, to that effect, the order in Case C-445/00 R *Austria* v *Council* [2001] ECR I-1461, paragraph 110).

64 As to the argument concerning the importance attached to IMS's copyright, it is clear from the Court's case-law that the exercise of intellectual property rights may be subjected to restrictions imposed under Article 82 EC only in exceptional circumstances (see, *inter alia*, Case 238/87 *Volvo* [1988] ECR 6211, paragraphs 7 to 9, and *RTE and ITP* v *Commission*, paragraphs 48 to 50).

65 Consequently, the contested order is not vitiated by an error of law in taking account of the strength of the prima facie case put forward by IMS, and particularly in attaching importance to the consequences of the contested decision for IMS's copyright rights.

66 The second plea must also be rejected.

The pleas relating to urgency

67 By its third to seventh pleas, which should be examined together, NDC criticises the judge for applying incorrect legal criteria as regards his assessment of urgency.

68 As to the third plea, it must be observed that the conclusion in paragraph 132 of the contested order 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' is based on a set of considerations set out in paragraphs 124 to 131 of the contested order.

69 The fact that some of the risks identified in those considerations are characterised by expressions such as 'it cannot be excluded' and 'it is not possible to dismiss as purely hypothetical' is not capable of constituting an error of law vitiating the judge's assessment of urgency.

70 As to the fourth plea, it must be observed that paragraph 102 of the order in *Commission* v *Trenker*, which is relied on by NDC in support of its arguments, does no more than state that in that case the applicant at first instance had not shown the existence of 'obstacles of a structural or legal nature' which might harm the recovery of its share of the market in the products in question. It cannot be deduced generally from that finding, which forms part of a set of factors taken

into consideration for the purpose of assessing urgency and the balance of interests in that case, that only structural or legal obstacles to the recovery of market shares can establish urgency for the purposes of proceedings for interim relief.

71 As to the judge's assessments of fact concerning the consequences of the contested decision for IMS, they cannot be examined in this appeal, for the reasons explained in paragraphs 53 and 54 above.

72 As to the fifth plea in the appeal, it suffices to note that paragraphs 128 and 129 of the contested order demonstrate unequivocally a direct causal relation between the operation of the contested decision and the damage which its immediate operation could cause to IMS.

73 As to NDC's sixth plea, it suffices to note that it challenges the judge's findings of fact concerning the foreseeable consequences of the contested decision for IMS's business policy. Consequently, for the reasons set out in paragraphs 53 and 54 above, the plea is inadmissible.

74 As to NDC's seventh plea, it must be observed that NDC does no more than assert that the judge failed to take account of the principle of proportionality, without challenging precise elements of the contested order. According to settled case-law, it follows from Article 225 EC, the first paragraph of Article 51 of the EC Statute of the Court of Justice and Article 112(1)(c) of the Rules of Procedure of the Court of Justice that an appeal must specify precisely the alleged flaws in the judgment which it applies to have set aside and the legal arguments which specifically support that application (see, *inter alia*, Case C-73/95 P *Viho* v *Commission* [1996] ECR I-5457, paragraph 25).

75 Moreover, it should be observed that paragraph 122 of the contested order makes it clear that the alternative solution of including a bank guarantee in the licence terms — a solution accepted by the Commission but rejected by NDC — was taken into account by the judge.

76 Accordingly, the third to seventh pleas must be rejected in part as inadmissible and in part as unfounded.

The pleas relating to the balance of interests

77 The eighth and ninth pleas in the appeal, which should be examined together, concern alleged errors of law in the balancing of interests.

78 The eighth plea criticises the judge hearing the application for interim relief for taking into consideration Article 295 EC, when that provision was of no relevance in the present case.

79 The ninth plea, as taken up and developed by AzyX and the Commission, criticises the contested order for attaching legal consequences to the fact that consumers will not pay more for pharmaceutical products in the event of suspension of operation of the contested decision.

80 The criticism relates essentially to the interpretation, in paragraph 145 of the contested order, of Article 82 EC as having the essential objective in particular of safeguarding the interests of consumers rather than protecting the position of individual competitors. Such an interpretation is said to be contrary to settled case-law according to which Article 82 'is not only aimed at practices which may cause damage to consumers directly, but also at those which are detrimental to them through their impact on an effective competition structure' (see *Europemballage and Continental Can*, paragraph 26).

81 It should be observed at the outset that an error of law with respect to the interpretation of a provision of Community law which is decisive for the assessment of one of the conditions for ordering interim measures is capable of calling into question the validity of an order for interim relief.

82 In the present case, however, the recourse in paragraph 143 of the contested order to Article 295 EC is not decisive for the outcome of the balancing of interests. The judge mentions that provision, Article 30 EC and several judgments of the Court as justification for the interpretation that protection of intellectual property rights is in the public interest. In those circumstances, without it being necessary to rule on the relevance of Article 295 EC in this respect, the eighth plea is in any event of no effect.

83 As to the ninth plea, it must be observed that, in so far as the judge states in paragraph 145 of the contested order that the purpose of Article 82 EC is 'to prevent the distortion of competition', there is no contradiction with the *Europemballage and Continental Can* judgment.

84 On the other hand, the reasoning in paragraph 145 cannot be accepted without reservation, in so far as it could be understood as excluding protection of the

interests of competing undertakings from the aim pursued by Article 82 EC, even though such interests cannot be separated from the maintenance of an effective competition structure.

85 For the purposes of the present appeal, however, it suffices to observe, first, that in assessing the balance of interests the judge could take into consideration the consequences of suspension of operation of the contested decision for the interests of consumers and, second, that paragraph 145 of the contested order forms part of a set of arguments, set out in paragraphs 143 to 148 of the order, on the basis of which the judge concluded that the balance of interests favoured IMS. The possible error of law concerning the interpretation of Article 82 EC was not therefore decisive for the judge's assessment of the balance of interests.

86 Accordingly, the eighth and ninth pleas must be rejected.

The pleas relating to manifest errors of assessment or distortion of the evidence

87 By its final five pleas, NDC argues that there were manifest errors of assessment or distortions of the evidence.

88 As pointed out in paragraphs 53 and 54 above, the Court of First Instance's appraisal of the evidence submitted to it does not, except where the clear sense of the evidence has been distorted, constitute a point of law which is subject to review by the Court of Justice on appeal.

89 By its 10th plea, NDC contests the judge's appraisals of fact concerning urgency, as not being justified by the reasoning in the contested order. The 13th and 14th pleas criticise the judge for not taking into account certain items of evidence or findings of fact in the contested decision. First, however, the judge's assessment of urgency is sufficiently reasoned in paragraphs 127 to 131 of the contested order. Second, NDC has not shown how his appraisals of fact, in so far as they differ from those of the Commission or fail to take certain items of evidence into account, constitute a distortion of the facts.

90 The 11th and 12th pleas in the appeal confine themselves to mentioning alleged contradictions between phrases in the contested order isolated from their context, without explaining how they might constitute a distortion of the facts capable of making the contested order null and void.

91 Consequently, the 10th to 14th pleas must be rejected as inadmissible.

92 It follows from all the foregoing that the appeal must be dismissed in its entirety as inadmissible in part and unfounded in part.

Costs

93 Under Article 69(2) of the Rules of Procedure, which applies to appeals by virtue of Article 118, the unsuccessful party is to be ordered to pay the costs if they have

been applied for in the successful party's pleadings. Since NDC has been unsuccessful and IMS has applied for costs, NDC must be ordered to pay the costs.

On those grounds,

THE PRESIDENT OF THE COURT

hereby orders:

1. The appeal is dismissed.

2. NDC Health Corporation and NDC Health GmbH & Co. KG are ordered to pay the costs.

Luxembourg, 11 April 2002.

R. Grass
Registrar

G.C. Rodríguez Iglesias
President