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Pharmaceuticals

Recent press reports have been suggesting that the pharmaceutical industry, which it is currently fashionable to criticise, has been attacked by "officials of the Commission in Brussels". The press reports have not identified the officials; but it seems reasonably certain that the origin of the criticisms is a speech given by Mario Monti, Commissioner for Competition Policy, in Antwerp on 11 October 2001. In his speech, he said, fairly enough, that in this sector there was the rather specific phenomenon that the consumer usually was not directly affected by the price of the product being reimbursed or otherwise covered by the different national health insurance systems. Price control is a common feature in many national regulatory systems in the pharmaceutical sector throughout the Community.

As in so many other sectors, such as the car sector, prices differ between Member States and parallel trade occurs between low-price countries and high-price countries. From the early sixties the Commission has pursued a merciless policy against companies which, one way or the other, clipped the wings of parallel traders. DaimlerChrysler is the last one in a long series of companies to feel the heat. *[See page 252 in this issue.]* "Does this policy also make sense in the pharmaceutical sector? The industry claims it does not. The Commission takes a different viewpoint. However, industry is tenacious. All our decisions are being challenged in the European Courts. In the past the debate has been on mere technicalities. In all other pending cases the debate is much broader. The industry asks the Courts in Luxembourg to declare that the pharmaceutical sector is so different that the Commission's parallel trade policy has no *raison d'être*. Leaving aside the details, we take the view that the industry is wrong." (This is by no means self-evident: see the Advocate-Geberal's Opinion in *Merck v Primecrown.*)

The other important issue is that the Commission is confronted more and more with the question of the boundaries within which a pharmaceutical company can use its intellectual property rights, typically its patents, to prevent potential newcomers from entering the market. "There should not be any misunderstanding. Research based companies, which have invested vast amounts of money to develop new, innovative medicines are entitled to patent protection. That monopoly right enables them to charge profitable prices in order to recoup their investment; and patent holders will obviously fight tooth and nail to hold on to their monopoly right since every extra day of protection generates monopoly profits. Potential newcomers sometimes complain that they do so in an abusive manner. It is for us to examine these allegations." *[For a copyright case, see IMS on page 267 of this issue.]* ■

DISTRIBUTION (MOTOR VEHICLES): THE DAIMLERCHRYSLER CASE

Subject:	Distribution arrangements Parallel trade Sales restrictions Price fixing Fines
Industry:	Motor vehicles (Implications for other industries)
Parties:	DaimlerChrysler AG
Source:	Commission Statement IP/01/1394, dated 10 October 2001

(Note. It seems surprising that cases of this sort still occur. All the basic legal issues are so well settled, and all the previous infringers have been so heavily fined, that large corporations with ample legal advice at their disposal must be assumed to find infringement less onerous than compliance. Yet this is hard to believe. As the Commission points out, there have been three recent cases in which car manufacturers have been heavily fined; but the fines have not had a sufficiently deterrent effect. Whether the Commission is influenced by this infringement enough to take a hard line on the other DaimlerChrysler case at present being investigated remains to be seen: this is the state aid case reported in our September 2001 issue, on page 206.)

The Commission has decided to impose a fine of €71,825,000 on DaimlerChrysler AG, one of the world's leading car manufacturers, for three infringements against Article 81 of the EC Treaty. The Commission decision concerns measures adopted by DaimlerChrysler to impede parallel trade in cars and limit competition in the leasing and sale of motor vehicles. This is the fourth Commission decision in recent years imposing a fine against a car manufacturer for an infringement of the EC competition rules.

The Competition Commissioner made the following comments on the decision. "A new car is an expensive purchase and consumers pay attention to prices. The Commission is determined to ensure that they benefit from competition at retail level and are given a good deal. Consumers strongly and rightly criticise the functioning of the Common Market if they are unable to find a official distributor who is willing to supply them or if they are discriminated against in relation to national customers. Our investigation has also shown once more that the car manufacturers can largely control their distributors and punish those whose commercial behaviour they dislike. This is an area where the law is perfectly clear. Practices like the ones that DaimlerChrysler engaged in are therefore unacceptable."

The Commission identified three types of infringements of the EC competition rules. The first consists of measures by DaimlerChrysler constituting obstacles to parallel trade. The undertaking instructed the members of its German distribution network for Mercedes passenger cars, roughly half of whom are agents, not to sell cars outside their respective territory. This was done in particular in the form of circular letters. In addition, DaimlerChrysler instructed its distributors to oblige foreign consumers to pay a deposit of 15% to DaimlerChrysler when ordering a car in Germany. This was not the case for German consumers, even though they might present the same "risk" of, for instance, being unknown to the seller, ordering a car with particular specifications, or living far away. The application of Article 81 to the restrictions agreed between DaimlerChrysler and its German agents results from the fact that these agents have to bear a considerable commercial risk linked to their activity. From the point of view of EC competition law, they must therefore be treated as dealers.

In a second infringement, DaimlerChrysler limited in Germany and Spain the sales of cars by Mercedes agents or dealers to independent leasing companies as long as these companies had not yet found customers (lessees) for the cars concerned. As a consequence, it restricted the competition between its own leasing companies and independent leasing companies because the latter could not put cars on stock or benefit from rebates granted to all fleet owners. Consequently, the independent leasing companies were not able to pass on such favourable conditions, in particular concerning prices and the availability of cars, to their customers. It is important to note that sales of Mercedes cars to leasing companies represent a substantial part of all sales of Mercedes cars. Commission Regulation EC/1475/95 concerning motor vehicle distribution clearly states that leasing companies have to be treated in the same way as final customers, to which distributors are completely free to sell new cars, as long as the lessee has no right to purchase the leased vehicle before the end of the leasing contract.

Finally, DaimlerChrysler participated in a price fixing agreement in Belgium with the aim of limiting the rebates granted by its subsidiary Mercedes Belgium and the other Belgian Mercedes dealers to consumers. A "ghost shopper" investigated the sales policies of the dealers and DaimlerChrysler agreed to enforce the agreement by reducing the supply to dealers who granted higher rebates than the 3% which had been agreed. This amounts to resale price maintenance, a practice that was already prohibited by the Commission last June in its decision against Volkswagen.

The measures adopted by DaimlerChrysler infringe the provisions of Article 81(1) of the EC Treaty, which prohibits all agreements between undertakings which may affect trade between Member States, and which have as their object or effect the prevention, restriction or distortion of competition within the Single Market. Moreover, Regulation EC/1475/95 prohibits car manufacturers and their importers from restricting, either directly or indirectly, the freedom of final consumers to buy new motor vehicles in the Member State of their choice. It therefore ensures that European consumers have the option of buying a car wherever it is most advantageous to them. The Regulation also states that the freedom of dealers to determine prices and discounts in reselling to end consumers must not be restricted. This means that the sales prices and conditions must not be fixed by the manufacturer. They have to be determined by each individual dealer.

The amount of the fine takes into account the gravity of the infringements, their duration and the position of the company on the market. The fine must also have a sufficient deterrent effect on DaimlerChrysler and other companies. The first infringement, the obstruction of parallel trade, directly jeopardises the proper functioning of the Common Market by partitioning national markets. For this reason it has to be qualified as "very serious". In addition, it constitutes an infringement of long duration: the 15% deposit obligation had been in force since 1985, while the instruction to distributors in Germany not to sell outside their respective sales territories was applied from February 1996 to June 1999. The restrictions imposed on the sale of cars to leasing companies can be categorised as a "serious infringement" of medium duration (five years; and this practice continues). Finally, price fixing also has to be seen as a "serious infringement" and of medium duration (around four years in this case; it ended in 1999).

Although this case was started on the Commission's own initiative, complaints had come from consumers about the practices concerned. The decision is based on documents found during inspections in December 1996 at the premises of DaimlerChrysler AG (formerly Daimler-Benz AG or Mercedes-Benz AG) in Germany, and of its subsidiaries in Belgium, the Netherlands and Spain. ■

The AOL Time Warner / IPC Case

The Commission has approved the acquisition by Time, a subsidiary of US company AOL Time Warner, of sole control of IPC, the leading magazine publisher in the United Kingdom and Ireland. The Commission concluded that, whichever way the markets were defined, the deal would not pose any problems. The Commission's investigation showed that the proposed operation neither created nor strengthened a dominant position in the markets for magazine readership or advertising in either the UK or Ireland. The Commission also concluded that, even if it were to take a narrower view of the market, it would not pose any problem. Morover, the results of the Commission's market investigation showed that the creation of a vertical link between IPC's consumer magazine business and AOL TW's internet access business was unlikely to lead to the creation or strengthening of a dominant position on either market. This is partly because there does not currently exist in the UK a separate demand for on-line consumer magazines and partly because consumer magazines are largely sold in the UK via newsagents rather than via on-line subscriptions. The acquisition is unlikely to foreclose the possibilities for further vertical integration or similar co-operation between competitors of IPC and AOL TW in the UK.

Source: Commission Statement IP/01/1414, dated 12 October 2001

DOMINANT POSITION (RAILWAYS): THE DEUTSCHE BAHN CASE

Subject: Abuse of dominant position

Industry: Railways
(Implications for other industries)

Parties: Deutsche Bahn AG
Georg Verkersorganisation
Statens Jarnvagar

Source: Commission Statement IP/01/1415, dated 12 October 2001

(Note. This case epitomises an increasingly important problem in competition law, both in the European Union and elsewhere: namely, the extent to which a trader should be required to open a monopoly or dominant position to his competitors. Mere possession of a dominant position is not an infringement of the competition rules: there must be an abuse. In the present case, the Commission claims that the abuse lies in foreclosing the market in effect, as well as in charging arbitrarily high prices. It is well established that the latter, if proved, is an abuse; it is less well established that the former calls for a remedy. We shall report on future developments in this potentially important case.)

The Commission has sent Deutsche Bahn AG (DB), the German State-owned railway company, a Statement of Objections, alleging that DB has violated European competition rules by refusing to provide traction to a small German competitor. The refusal makes it almost impossible for Georg Verkehrs-organisation (GVG) and its partner Statens Järnvägar (SJ), the Swedish State Railway company, to offer a regular passenger rail service from Berlin to Malmö. As this is a crucial railway link between Germany and Sweden, customers would suffer if the service had to be terminated. The case concerns a passenger night train service from Berlin to Malmö via Sassnitz. Since 25 September 2000, SJ has operated on this route with its German partner GVG on the basis of an international grouping. However, as this service requires a certain type of locomotive, in order to operate between Berlin and Sassnitz, GVG has to rent a locomotive from another source. For the time being, DB, which operates more than 1000 locomotives suitable to carry out this service, is the only company which could provide such a locomotive on a regular basis. This is particularly the case with regard to the necessary back-up service. While DB had provided traction to GVG on earlier occasions, this time it requested a considerably higher price and refused to provide traction after one month. This triggered a complaint from GVG and SJ to the European Commission.

In its Statement of Objections, the Commission considers that DB abused its dominant position in three ways. In the first place, an abuse of dominant position arises by discriminating against GVG/SJ when requiring them to pay a considerably higher price than DB charges Private Wagon Owners for the provision of the same traction service. In the second place, an abuse arises as, after one month, DB refused to provide traction altogether. In the third place, DB required GVG to hire additional staff, thereby inflating GVG's costs.

If DB/SJ are forced to stop operating on this route, consumers travelling between Germany and Sweden will be deprived of an important railway link. DB has been given two months to reply. If the Commission upholds its position, it may take a decision against DB which includes the possibility of imposing fines. This is the second time the Commission has had to act to prevent national rail companies from abusing their dominant position on their respective markets with regard to passenger transport. In July, the Commission sent a Statement of Objections to Italy's Ferrovie dello Stato after GVG also complained that it was unfairly being denied access to the Italian market for passenger transport.

To provide rail passenger transport services, small private railway companies depend on renting traction elsewhere. DB operates about 99% of all locomotives which are equipped for such a service. Suitable second hand locomotives are generally not available; and the acquisition of a new locomotive incurs a prohibitively high fixed cost. More important, only DB operates a locomotive pool which offers the necessary back-up service if the locomotive in operation needs maintenance or repair. A locomotive pool allows a significant reduction in the overall cost of operation as it limits the time when locomotives remain idle. Since DB has refused to provide traction to GVG/SJ, the latter have found a temporary solution by renting a locomotive from a manufacturer. However, as they cannot obtain the necessary back-up service without obtaining traction from DB, they will not be in a position to continue operating on this route in the future.

The Commission, Council and European Parliament have all urged that rail transport throughout the Community should be revitalised. To encourage the development of the railway sector and increase its competitiveness with other forms of transport, more competition in the railway market is essential. As pointed out in the Commission's White Paper on the Revitalisation of railways in the Community, the steep decline of railway transport in comparison with road and air transport is mainly due to the price policy and the comparably poor railway transport services. Directive EEC/91/440 was a first step in liberalising the passenger rail transport market in the Community. However, in spite of the fact that the Directive came into force more than 8 years ago, there has been almost no competition in the provision of international rail passenger transport in the Community. This is the first case in which a state railway company has entered into a grouping with a private company in competition with another state railway company.

In the Commission's view, more dynamic railways can be achieved only if there is more competition in the sector. New operators will provide new services and a different price/quality mix, key ingredients for winning back passengers to the rail and for reducing European road congestion. The application of the competition rules to the railway sector has therefore become a priority. ■

ACQUISITIONS (IRON ORE): THE CVRD CASE

Subject:	Acquisitions Conditions
Industry:	Parties (Some implications for other industries)
Parties:	Companhia Vale do Rio Doce (CVRD) (Brazil) Mitsui & Co. Ltd (Mitsui) (Japan) Caemi Mineração e Metalurgia SA (Caemi) (Brazil) Quebec Cartier Mining Company (QCM) (Canada) Mineração Brasilieras Reunidas (MBR) (Brazil)
Source:	Commission Statement IP/01/1515, dated 30 October 2001

(Note. In this case, the participants are from Brazil, Japan and Canada: not one is from the European Union. The interest of the case lies in the very fact that a joint acquisition of a Brazilian company, by another Brazilian company and a Japanese company, should have been the subject of an investigation and a decision by the Commission of the European Communities. It is a logical extension of the line of cases in which the activities of United States companies have come under scrutiny in Brussels. As in the United States cases, the rationale here is that, although the companies concerned are outside the European Union, their trading operations in or with the European Union bring them within the ambit of European competition laws. Otherwise, the case has no unusual features. It originally raised competition concerns; but these were resolved by the divestiture of certain related interests. These interests were Canadian.)

The Commission has given the go-ahead for the proposed acquisition of joint control of Brazilian iron ore mining company Caemi by CVRD, another Brazilian iron ore producer, and Japanese trading company Mitsui. The Commission has found that the operation would have led to the creation or strengthening of a dominant position in the market for the seaborne supply of iron ore pellets. However, the parties to the merger have undertaken to dispose of Caemi's 50% interest in QCM, a Canadian iron ore producer, which removes the Commission's competition concerns.

Under the terms of the proposed transaction, Companhia Vale do Rio Doce (CVRD) and Mitsui & Co. Ltd (Mitsui) will acquire joint control of Caemi Mineração e Metalurgia SA (Caemi). Caemi's assets principally consist of Brazilian iron ore mining company Mineração Brasilieras Reunidas (MBR) and a 50-percent stake in Canadian iron ore producer Quebec Cartier Mining Company (QCM). Mitsui already holds 40% of the voting shares of Caemi. In a first stage, Mitsui will acquire the outstanding 60% of Caemi's voting shares, which are currently in private hands. In the second stage of the operation, 50% of Caemi's voting shares will be purchased by CVRD.

The deal was notified for clearance on 18 June 2001 in the European Economic Area - the fifteen European Union states plus Norway, Iceland and Liechtenstein - because the merging companies' turnover in Europe meets the thresholds set out in the Merger Regulation, the European Community's merger control law. On 3 July 2001, the Commission decided to open an in-depth investigation.

The merger will have an impact on competition in the supply of iron ore, which is used almost exclusively in steel making. It is sold in three forms: sinter fines, lump and pellets. Most iron ore is sold, in all three forms, for transformation into steel using the basic oxygen furnace method. However, some iron ore (known as direct reduction ore) is sold, in the form of lump and pellets, for the production of steel using an electric arc furnace.

The competitive impact of the merger was assessed in relation to the supply of seaborne iron ore, as Western European steel producers - due to an absence of local supplies - depend almost exclusively on iron ore imported from mines located a long way from Europe. Iron ore transported by ship represents about 45% of all traded iron ore; and the main sources of seaborne supply are located in Brazil and Australia. Participation in the seaborne trade requires access to a specific infrastructure such as dedicated railways, suitable for the transportation of very large tonnages, and deep water harbours. CVRD is the world's largest producer of seaborne sinter fines and pellet iron ore, followed by the Australian-based mining companies Rio Tinto and BHP.

The Commission's investigation has shown that the proposed transaction would lead to the creation, if not the strengthening, of a dominant position in the seaborne supply of iron ore pellets; the new entity would hold a particularly high share of this market in the wake of the merger. The investigation revealed that the remaining competitors, principally Rio Tinto and BHP, as well as the smaller Swedish company LKAB, would not be likely to be able to constrain effectively Mitsui/CVRD/Caemi's market behaviour. For similar reasons, the Commission concluded that the operation would also lead to the creation or strengthening of a dominant position in the seaborne market for direct reduction iron ore.

On 5 October 2001, the parties offered two commitments designed to remove the competition concerns identified by the Commission. The first consisted of an offer to divest Caemi's 50% interest in QCM, thereby eliminating the overlap between CVRD's and Caemi's production of iron ore pellets. As a result, the commitment removes the Commission's competition concerns in relation to the supply of these products, and in relation to the supply of direct reduction ore. This conclusion has been borne out by market enquiries - addressed to competitors and customers of the merging iron ore companies - regarding both the future viability of QCM and regarding its ability to provide effective competition in the markets concerned.

The second commitment consisted of an offer to establish a new corporate entity - dubbed "New Caemi" by the merging companies - which would incorporate MBR, Caemi's Brazilian iron ore mining operation, and Ferteco, an iron ore mining company which CVRD recently acquired from German steelmaker Thyssen Krupp. Although Mitsui and CVRD would have equal ownership of the new company, and equal rights to appoint directors to its Board, Mitsui would have a casting vote, subject only to CVRD's right to veto fundamental changes to New Caemi's business. This commitment was not, however, regarded by the Commission as necessary for the clearance of the transaction, since the competitive concerns raised by the operation were fully addressed by the divestiture of QCM.

CVRD is a diversified mining company with its headquarters in Rio de Janeiro, Brazil. It is the world's largest iron ore producer and the leading supplier of iron ore to Europe; it also has significant interests in related commercial transport infrastructure, including railways and port operations. Since 1999, CVRD has acquired control or joint control of the Brazilian iron ore mining companies Samitri, Socoimex and Samarco. Earlier this year, it purchased the Brazilian iron ore mining company Ferteco from Thyssen-Krupp. With the acquisition of Caemi, CVRD will control all Brazilian mining companies exporting iron ore.
Mitsui, based in Tokyo, is a Japanese trading concern. It has worldwide trading activities in various commodities including iron ore. Mitsui holds minority stakes in a number of iron ore mining companies, including a significant stake in the world's second largest individual iron ore mine, Robe River in Australia. It also has a controlling stake in a small Indian iron ore producer. Caemi is a Brazilian holding company headquartered in Rio de Janeiro which holds equity investments in a number of Brazilian and Canadian mines producing iron ore as well as other metals and minerals. Caemi also has interests in a number of related logistics businesses. It is the world's fourth largest iron ore producer. ■

The IATA (Freight) Case

Following Commission objections in May this year, the International Air Transport Association (IATA) has agreed to end the joint setting of rates for the air transport of freight within the European Economic Area. The Commission welcomes this decision, which will lead to greater competition in the setting of air cargo shipment rates to the benefit of European exporters and the European economy as a whole. Until June 1997, the activities of the IATA tariff conferences for freight shipment within the European Economic Area were exempted under Commission Regulation EC/1617/93. The Commission ended the block exemption because conference tariffs were considerably higher than market prices and price consultations no longer appeared justified. IATA then applied for an individual exemption, arguing that tariff conferences facilitated cargo interlining. Interlining occurs when cargo is carried for all or part of the journey by an airline other than the airline selling the ticket; cargo tariffs fixed by the tariff conferences are then used to calculate each carrier's compensation. However, the Commission took the view that this 55 year-old restrictive system was no longer necessary to provide customers with efficient interlining services; and IATA has agreed to end the joint setting of cargo rates within the EEA from the beginning of 2002, when rates will be fixed individually by each carrier.

Source: Commission Statement IP/01/1433 dated 19 October 2001

PROCEDURE (GLASS): THE KISH CASE

Subject:	Procedure Admissibility Complaints Relevant market
Industry:	Glass (Implications for other industries)
Parties:	Kish Glass Co. Ltd Commission of the European Communities Pilkington United Kingdom Ltd (intervener)
Source:	Order of the Court of Justice of the European Communities, dated 18 October 2001, in Case C-241/00 P (Kish Glass Co. Ltd v Commission of the European Communities)

(Note. Although this appeal, from a judgment of the Court of First Instance in 2000, reported in our June 2000 issue, on page 137, was unsuccessful, it has three points of interest: first, in the discussion of the admissibility of an action in a case in which "it is not likely to procure any advantage to the party bringing it" discussed in paragraphs 19ff; second, in a reminder of the rights of complainants, discussed in paragraphs 30ff; and, third, in the rejection, in paragraphs 38ff, of a largely factual argument about the geographical market, on the grounds that this was not an appropriate matter for appeal. This last point is undoubtedly correct in law, but is nevertheless unsatisfactory, since the ruling of the Court of First Instance on the relationship between transport costs and the geographical market was not entirely convincing.)

Order

1. By application lodged at the Court Registry on 15 June 2000, Kish Glass Co. Ltd (hereinafter Kish Glass) brought an appeal under Article 49 of the EC Statute of the Court of Justice against the judgment of the Court of First Instance of 30 March 2000 in Case T-65/96 (*Kish Glass v Commission*) (hereinafter the judgment under appeal) in which it dismissed the action brought by Kish Glass for annulment of the Commission Decision of 21 February 1996 (IV/34.193 - Kish Glass, hereinafter the contested decision) rejecting the complaint made by the applicant on 17 January 1992 pursuant to Article 3(2) of Council Regulation 17 of 1962, alleging an infringement of Article 86 (now Article 82)of the EC Treaty.

Facts and legal background to the dispute

2. The judgment under appeal sets out the facts behind the action before the Court of First Instance and the legal background as follows:

[The statement sets out the facts and concludes with paragraph 18.]

> 18 By decision of 21 February 1996, received by the applicant on 1 March 1996, the Commission definitively rejected the complaint lodged by Kish Glass (Case IV/34.193 - Kish Glass, hereinafter the contested decision). The Commission maintained its previous position that the relevant product market was the sale of float glass of all thicknesses to dealers, that the relevant geographical market was the Community as a whole, or at least the northern part of the Community, and that Pilkington did not hold a dominant position on that market.

3. It is against that background that Kish Glass brought an action before the Court of First Instance on 11 May 1996.

The judgment under appeal

4. By the judgment under appeal, the Court of First Instance dismissed the action brought by Kish Glass in its entirety.

5. First, in paragraphs 32 to 39 of the judgment under appeal, the Court of First Instance dismissed as unfounded the plea by Kish Glass alleging breach of the right to be heard and of the principle of legal certainty and misuse of powers.

6. Second, in paragraphs 44 to 47 of the judgment under appeal, the Court of First Instance dismissed as unfounded the plea by Kish Glass alleging breach of procedural rules.

7. Third, in paragraphs 51 to 53 of the judgment under appeal, the Court dismissed as unfounded the plea by Kish Glass alleging breach of essential procedural requirements and of the principle of legal certainty.

8. Fourth, in paragraphs 62 to 70 of the judgment under appeal, the Court dismissed as unfounded the plea by Kish Glass alleging a manifest error of assessment in the definition of the relevant product market.

9. Fifth, in paragraphs 81 to 100 of the judgment under appeal, the Court dismissed as unfounded the plea by Kish Glass alleging a manifest error of assessment of the geographical market.

The appeal

10. In its appeal Kish Glass claims that the Court should:
- annul the judgment under appeal and the contested decision;
- order the Commission to bear the costs, including those incurred in proceedings before the Court of First Instance.

11. The Commission contends that the Court should:
- dismiss the appeal as inadmissible or, in the alternative, as unfounded;

- order Kish Glass to bear the costs.

12. Pilkington contends that the Court should:
- dismiss the appeal as unfounded;
- order Kish Glass to bear the costs.

13. Kish Glass relies on three pleas in support of its appeal, the first alleging the misinterpretation by the Court of First Instance of the requirements of Article 11 of Regulation 17, the second alleging the misapplication by the Court of First Instance of the case-law of the Court of Justice concerning the rights of a complainant and the third alleging the misapplication by the Court of First Instance of Article 190 (now Article 253) of the EC Treaty and misrepresentation of the evidence put before the Court of First Instance.

14. As a preliminary point, it must be observed that, under Article 119 of the Rules of Procedure of the Court of Justice, where the appeal is clearly inadmissible or clearly unfounded, the Court may at any time dismiss it by reasoned order.

Admissibility of the appeal

15. The Commission contends that the appeal is inadmissible in its entirety on the ground that it is not likely to procure any advantage to the party bringing it.

16. In the contested decision the Commission dismissed the argument of Kish Glass to the effect that Pilkington held a dominant position on the market in 4 mm float glass in Ireland, on the ground that both the analysis of the relevant product market and that of the geographical market were incorrect. In other words, in order to challenge the contested decision it is necessary to refute both aspects of the Commission's analysis.

17. Although the appellant's third plea relates to the geographical market selected by the Commission in the contested decision, the Commission takes the view that the appeal by Kish Glass does not challenge the part of the judgment under appeal which confirms its analysis as to the relevant product market.

18. Therefore, according to the Commission, Kish Glass has not established that, if the appeal were granted, it would affect the result brought about by the contested decision. The treatment of the first two pleas relied on by the appellant, which are of a procedural nature, is not liable to alter that conclusion since, even if those pleas were upheld, they could not, in any event, affect the legality of the contested decision.

19. Kish Glass counters that, in relying on the inadmissibility of the appeal on the ground that the third plea of the appeal concerns only the analysis of the geographical market, the Commission disregards the fact that the first two pleas of the appeal concern matters of procedure which affected the analysis of the relevant product market.

20. In that regard, it must be borne in mind that, according to settled case-law, for an applicant to have an interest in bringing proceedings the appeal must be likely, if successful, to procure an advantage to the party bringing it (Case C-19/93 P, *Rendo and Others v Commission*, paragraph 13, and Case C-174/99 P, *Parliament v Richard*, paragraph 33).

21. Although it is true that the applicant's third plea relates only to the relevant geographical market and that the first two pleas are procedural in nature, it must nonetheless be held that the second plea concerns matters which are directly connected with the analysis of the relevant product market. Therefore, contrary to the Commission's contention, in order to conclude that this second plea cannot affect the legality of the contested decision, it is necessary to examine it as to its substance.

22. On the face of it, it would not be possible to rule out repercussions on the analysis of the relevant product market if this second plea were upheld. Consequently, if the third plea were also founded, the situation brought about by the contested decision might be affected, with the result that the applicant does have an interest in bringing proceedings.

23. Accordingly, the appeal in its entirety must be declared admissible.

The first plea

24. In its first plea, Kish Glass submits that the Court of First Instance misinterpreted the requirements of Article 11 of Regulation 17 in holding that the Commission could justifiably obtain evidence by telephone and follow up that oral request with a written request in the proper form.

25. First, Kish Glass submits that there is a contradiction in the Court's reasoning in paragraphs 38 and 44 of the judgment under appeal. Second, the Court confused the argument by Kish Glass that the Commission had exceeded its powers in asking for information by telephone and its argument on the misuse of powers by the Commission. Third, the Court was wrong to hold that information obtained from undertakings by telephone following an oral request under Article 11 of Regulation 17 is presumed to be correct in the absence of evidence to the contrary.

26. In that regard, it must be observed that, at paragraph 38 of the judgment under appeal, the Court of First Instance held that Article 11 of Regulation 17 does not prevent the Commission from obtaining information by means of oral requests followed by requests in the proper form.

27. Furthermore, it is clear from paragraphs 16 and 17 of the judgment under appeal, set out at paragraph 2 of this order, that, on 14 November 1995, the Commission sent written requests for information to the undertakings operating on the Irish market, pursuant to Article 11 of Regulation 17, and that it received replies to those requests. Those findings were not disputed by the appellant.

28. Accordingly, given that the contested decision is based on written information properly obtained by the Commission in accordance with the procedure laid down by Article 11 of Regulation 17, the question whether the Commission is entitled, in dealing with a competition case, to make oral requests for information to undertakings operating on the relevant market is of no relevance to the outcome of the appeal.

29. It follows that the first plea is inoperative.

The second plea

30. In its second plea, Kish Glass submits that the Court of First Instance made an error of law as to the rights of a complainant in competition cases in emphasising the distinction between those rights and those of the defendant in such cases. That procedural error had repercussions on the analysis made by the Commission of the relevant product market.

31. In support of this plea the appellant submits, first, that the Court of First Instance misapplied the judgment in Joined Cases 142/84 and 156/84, *BAT & Reynolds v Commission*, and, second, that the Court of First Instance misconstrued the judgment in Case C-282/95 P, *Guérin Automobiles v Commission*, according to which the right to have access to a file entails the right to comment on it. Accordingly, the appellant considers, first of all, that it should have been given a reasonable opportunity to submit comments on the replies given by the undertakings operating on the Irish market, secondly, that the period of nine days between the time when Kish Glass received those replies and the date of the adoption of the contested decision was insufficient to comment on them and, finally, that even if a period of nine days were sufficient to submit comments, the Commission should have informed Kish Glass of the deadline set.

32. First, it must be observed that the Court of First Instance held, at paragraphs 33 and 34 of the judgment under appeal that, as regards the right to be heard and the right of access to the file, the undertakings making a request under Article 3 of Regulation 17 could not claim the same protection as those subject to a competition investigation.

33. In that regard, suffice it to note that nothing in the conclusions reached on this subject in the judgment under appeal suggests an error of law.

34. Second, as regards the rights of the applicant as a complainant, the Court of First Instance held at paragraph 35 of the judgment under appeal that, in the present case, the investigation of the complaint lasted more than four years and ... the applicant had the opportunity to put its point of view on several occasions. It went on to state in the same paragraph: in particular, the last five replies of the Irish companies of which the applicant was notified did not alter the essential points with which the procedure was concerned so that the fact that the Commission only allowed the applicant nine days to comment on the replies before adopting the contested decision did not prevent it from making its views known.

35. It must be observed in that regard that the conclusions of the Court of First Instance are based on findings of fact, which cannot be subject to review in an appeal unless it is established that the Court of First Instance distorted the evidence before it. However, that has not been established by the appellant.

36. In any event, even if the rights of the complainant had been infringed, in order for the plea to be upheld it would have to be established that, had it not been for that irregularity, the outcome of the procedure might have been different (see Joined Cases 209/78 to 215/78 and 218/78, *Van Landewyck and Others v Commission*, paragraph 47, and Case C-142/87, *Belgium v Commission*, paragraph 48).

37. It must be held, as the Commission correctly observed, and as is clear *inter alia* from the proceedings before the Court of First Instance, that Kish Glass had no more substantive comments to make on the replies of the undertakings operating on the relevant market. Under the circumstances, the fact that Kish Glass had only nine days to comment on those replies was not such as to affect the analysis of the relevant product market or the result which the contested decision brought about.

38. Accordingly, the second plea put forward by the appellant must be rejected as manifestly unfounded.

The third plea

39. In its third plea the appellant claims that the Court of First Instance incorrectly applied Article 190 of the EC Treaty in not holding that the contested decision was vitiated by a failure to state adequate reasons as to the transport costs of float glass. That failure was referred to by the Court of First Instance itself at the hearing but was not mentioned in the judgment under appeal, which therefore misrepresented the facts.

40. The appellant submits that the Commission's written reply to the Court, which states that transport costs are no more than 19% of the value of the product within a 500 km radius of the factory, is inconsistent with point 33 of the contested decision, according to which those costs are approximately 10% of product value. That inconsistency should, in any event, have entailed the annulment of the contested decision for failure to state reasons. Accordingly, the Court of First Instance was wrong to hold at paragraph 89 of the judgment under appeal that, contrary to what appeared to emerge from the hearing, the contested decision is not vitiated by contradiction in referring in point 33 to the *Pilkington-Techint/SIV* decision.

41. In that regard, it must be observed that, since the second plea relied on by the appellant, relating to the analysis of the relevant product market, is manifestly unfounded, the third plea cannot procure an advantage to it because it only concerns the part of the judgment under appeal concerning the relevant geographical market.

42. Since the analysis of the relevant product market on which the contested decision is based cannot be subject to review in this appeal and as that analysis on its own suffices to warrant the rejection of the complaint by Kish Glass, even if the third plea were upheld, it would not entail the annulment of the judgment under appeal, as the Commission correctly argued in its observations set out at paragraphs 16 and 17 of this order. Accordingly, this plea is inoperative (see, to that effect, the order in Case C-137/95 P, *SPO v Commission*, paragraph 47, and the judgment in Case C-362/95 P, *Blackspur DIY and Others v Council and Commission*, paragraph 43).

43. It follows that the appeal must be dismissed in its entirety as manifestly unfounded.

Costs

44. Under Article 69(2) of the Rules of Procedure, which is applicable to the appeal procedure by virtue of Article 118 of those rules, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. As the Commission and Pilkington have applied for costs to be awarded against the appellant and since the appellant has ben unsuccessful, it must be ordered to pay the costs.

Court's Order

The Court hereby orders:
1. The appeal is dismissed.
2. Kish Glass Co. Ltd is to pay the costs.

The La Poste / SNELPD Case

The Commission has adopted a Decision on the monitoring of relations between the French company La Poste and firms specialising in the making-up and preparation of mail. The Commission sees a conflict of interests in the relations between La Poste and private mail-preparation firms in that La Poste is both a competitor of those firms and, in view of its postal monopoly, their unavoidable partner. In the Commission's view, this conflict of interests encourages La Poste to abuse its dominant position. Since French legislation does not provide for sufficiently effective or independent monitoring to neutralise this conflict of interest, the Commission takes the view that the French State has contravened Article 86(1), read in conjunction with Article 82, of the Treaty. The Decision is the result of proceedings initiated by the Commission at the end of 1998 at the request of the SNELPD, a trade association representing the majority of French mail-preparation firms. The SNELPD's members provide a variety of services ranging from the making-up of mail on behalf of large mail originators to the delivery of mail in pre-sorted bags to certain offices of La Poste. The mail-preparation sector is particularly linked to that of direct mail.

Source: Commission Statement IP/01/1476, 23 October 2001

PROCEDURE (MARKET RESEARCH): THE IMS CASE

Subject: Procedure
Interim measures
Copyright

Industry: Market research; pharmaceuticals
(Implications for other industries)

Parties: IMS Health Inc
Commission of the European Communities
National Data Corporation (complainant)

Source: Order Of The President Of The Court Of First Instance, dated 10 August 2001, in Case T-184/01 R (*IMS Health Inc v Commission of the European Communities*)

(Note. This case is concerned with the substance of the matter only to the extent that consideration of the substance was necessary for determination of the question, whether the Commission was justified in imposing interim measures as part of its decision in the IMS case. These measures consisted substantially of a requirement that the applicant, IMS, should grant a licence to a competitor, NDS, of its copyright in a scheme for analyzing market trends; or, more precisely, in that part of the scheme known as the brick structure, which is defined in paragraph 1 of the Order below. There are obvious reminders here of the Magill case; and the President of the Court has sought to differentiate the circumstances of the Magill case from the circumstances arising here. But there is clearly more to be said on the matter. The importance of the substantive issue is the relationship between intellectual property rights and anti-trust rules, as well as the extent to which ownership of an intellectual property right may be used to foreclose the market in a given product or service field. The importance of the procedural issue concerns the conditions on which a Commission decision may include interim measures. In the present case, these conditions were not fulfilled. A fuller report will appear when the final judgment is given.)

Background

1. IMS Health Incorporated (hereinafter the applicant) is a market research company that provides a broad range of market research, marketing, and sales management services to the pharmaceutical industry. In particular, it provides, through its German subsidiary, regional wholesaler data report services to interested pharmaceutical companies in respect of sales of pharmaceutical products by pharmacies throughout Germany. The services are based on a brick structure. Brick structures divide a country into artificially designated geographic areas or bricks that are used to report and measure sales of individual pharmaceutical products.

2. Since 1969 the applicant has invested considerable resources in developing its German brick-structure-based information services. These efforts culminated in the development of the 1860 brick structure format (the 1860 brick structure), which was launched in January 2000. The 1860 brick structure now constitutes the central feature of the applicant's German regional wholesaler data-information service.

3. Suspecting that two competitors on the German market, Pharma Intranet Information AG (PI) and AzyX Deutschland GmbH (AzyX), which were founded by former senior personnel from IMS Health and which had initially entered the German market selling services based on alternative brick structures, were, by early 2000, in fact selling services based on copies of the 1860 brick structure, the applicant commenced, on 26 May 2000, copyright infringement proceedings before the Regional Court, Frankfurt am Main. On 16 November 2000, the Frankfurt court, confirming an earlier judgment of 12 October 2000, held that, under German copyright law, the applicant enjoyed copyright in the 1860 brick structure. In the same judgment, it also confirmed an injunction it had issued on 27 October 2000 prohibiting PI from using brick structures derived from the applicant's 1860 brick structure.

4. On 26 October 2000, National Data Corporation (hereinafter NDC), also a United States company, which had acquired PI in August 2000, requested a licence from the applicant to use the 1860 brick structure in return for an annual licence fee of DM 10,000 (€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 Frankfurt court's judgment of 26 November 2000. In a further letter of 18 December 2000, the applicant refused to enter into negotiations arguing that it was not essential for NDC to have the use of the 1860 brick structure to compete against it on the German market.

5. On 18 December 2000, NDC lodged a complaint with the Commission alleging that the applicant's refusal to licence the 1860 brick structure to it constituted an infringement of Article 82, EC Treaty.

6. On 8 March 2001, the Commission sent a Statement of Objections (SO) to the applicant which was received on 9 March 2001. The Commission alleged, having regard in particular to Case C-7/97 (*Bronner*), that access to the 1860 brick structure amounted to an essential facility (SO, paragraph 84) for competitors of the applicant such as NDC. Accordingly, the applicant's refusal to allow access thereto potentially constituted a prima facie abuse of the dominant position which, in the Commission's view, it held on the relevant German market as a result of the 1860 brick structure. The Commission warned the applicant that it intended to adopt a decision imposing interim measures (SO, paragraphs 100 to 103).

7. The applicant submitted a written response to the SO on 2 April 2001. An oral hearing then took place on 6 April 2001. 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 requests made by it of a number of pharmaceutical companies, copies of which were provided by the Commission to the applicant in two instalments on 22 May and 6 June 2001 respectively.

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

The contested Decision

9. On 3 July 2001, the Commission adopted a decision relating to a proceeding pursuant to Article 82, EC Treaty (Case COMP D3/38.044 - NDC Health/IMS Health: Interim measures) (hereinafter the contested decision). The decision is based on Council Regulation 17 of 1962, as amended, and in particular on the Commission's powers under Articles 3 and 16 thereof as interpreted by the Community judicature in the *Camera Care* line of case-law (see, *inter alia*, Case 792/79 R (*Camera Care* v *Commission*), Joined Cases 228/82 and 229/82 (*Ford* v *Commission*) and Case T-44/90 (*La Cinq* v *Commission*)).

10. In the contested decision, the Commission considers (paragraph 41) that, according to the *Camera Care* line of case-law, three conditions must be satisfied before it may take protective measures in the course of a competition investigation:
- there is 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.

11. The Commission finds in the contested decision that these conditions are satisfied in the present case. The applicant's refusal of access to the 1860 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 finding is based on its conclusion that the said structure constitutes a 'de facto industry standard (paragraph 180). It also 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 1860 brick structure its German operation will go out of business, and that there will be intolerable damage to the public interest (paragraph 190). The latter assessment is based primarily on its concern for the continued presence of the [applicant's] other current competitor, AzyX, on the market (paragraph 195).

12. The effective part of the contested decision provides:

> *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 brickstructure, 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 1 000 euros per day shall be payable in respect of any period during which IMS fails to comply with the provisions of this Decision.

Article 4

The provisions of this Decision shall apply until notification of the decision concluding the proceeding.

Article 5

This Decision is addressed to IMS Health of Harewood Avenue, London NW1, United Kingdom.

Applications to the Court

13. 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 Treaty, seeking, *inter alia*, the annulment of the contested decision or, alternatively, its annulment insofar as it requires IMS Health to licence the 1860 [b]rick [s]tructure 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.

14. By separate application lodged at the Court's Registry on the same day, the applicant, in accordance with Articles 242 and 243, EC Treaty, brought the present application for interim measures in respect of the operation of the contested decision. It requests the President of the Court of First Instance to order the following interlocutory relief:

- 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.

15. In respect of the first measure of interim sought from the judge hearing the application for interim measures, the applicant submits that it is extremely urgent that the operation of the contested decision be suspended until an order is made terminating the proceedings for interim relief. It points out that, in accordance with Article 2 of the contested decision, a decision by the Commission that would be 'final and take effect immediately could be taken even before the end of August 2001. It is clear from paragraph 6 of the present application that this particular claim for interim relief is based on Article 105(2) of the Rules of Procedure of the Court of First Instance (hereinafter the Rules).

16. In support of the claim, the applicant's core submission is that the contested decision contradicts settled Community case-law, as well as previous Commission decisions, by finding that it is prima facie unlawful for a dominant undertaking, such as the applicant, to refuse to share with competitors a competitive advantage in the form of its intellectual property in the 1860 brick structure in respect of the very market to which that intellectual property relates. The finding of the Commission deprives it of the very essence of its copyright under national law as recognised by Community law and is manifestly incompatible with Article 295, EC Treaty. It will thereby cause the applicant to incur immediate, serious, enduring and potentially irreparable damage, in particular by materially and permanently devaluing its brick-structure-based and copyright-protected data-information services to a generic commodity service indistinct from the services offered by its competitors.

17. As regards the Commission's view that the existence of a prima facie abuse by the applicant of its dominant position may be justified by reference to its finding that the 1860 brick structure amounts to an industry standard and, hence, an essential facility for competitors such as the complainant NDC, the applicant contends that this constitutes a new legal objection which was not mentioned by the Commission in the SO and in respect of which it was not given an adequate opportunity to be heard prior to the adoption of the contested decision.

18. Concerning the balance of interests, the applicant alleges that it favours suspension of the decision because the interim measures ordered by the Commission in the contested decision are not protective in nature. Instead of preserving the status quo and, thus, ensuring the effectiveness of the final decision to be given in the main action, they alter the status quo by forcing the applicant to negotiate licence terms with NDC and AzyX where those undertakings previously not only had no licence but were, as found by the German courts, actually infringing its copyright in the 1860 brick structure. Moreover, since the contested decision accepts that those undertakings are already active on the German market and have developed their own brick structures, there is no interim need to grant them a licence to use the 1860 brick structure so as permit them to offer interested pharmaceutical companies the same services as the applicant is currently providing.

19. Pursuant to the second subparagraph of Article 105(2) of the Rules, the President of the Court of First Instance may grant an application for interim relief even before the observations of the opposite party have been submitted. Any such order may later be varied or cancelled either on application by a party to the application for interim measures or by the President of his own motion.

Review of case law

20. It is settled case-law that Article 105(2) of the Rules permits the judge hearing an application for interim measures, either where it is necessary to enable him to have enough time to be sufficiently informed so as to be in a position to judge a complex factual and/or legal situation raised by the application before him, or where it is desirable in the interests of the proper administration of justice that the status quo be maintained pending a decision on the application, to adopt provisional interim measures: Case 221/86 R, (*Group of the European Right* v *European Parliament*), paragraph 9; Case 194/88 R, (*Commission* v *Italy*), paragraph 3; Case C-195/90 R, (*Commission* v *Germany*), paragraph 20; Case T-12/93 (*CCE Vittel et CE Pierval v Commission*), paragraph 33). The scope of the power granted by that provision does not necessarily fall to be interpreted differently where the decision in respect of which provisional interim relief is sought is one in which interim measures have been adopted by the Commission pending the termination of an investigation under Regulation 17 concerning an alleged infringement of Community competition law: Case 229/82 R (*Ford* v *Commission*), paragraphs 7 and 8.

21. In the present case, it is first appropriate to recall that Article 295, EC Treaty, provides that the Treaty shall in no way prejudice the rules in the Member States governing the system of property ownership. It follows from Article 295, EC Treaty, that a judge hearing an application for interim measures 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 17, an obligation upon the proprietor of an intellectual property right recognised and protected by national law to license the use of that property right.

22. It would appear from the contested decision that the Commission has based the contested decision particularly on its interpretation of the scope of the principles set out by the Court of Justice in *Magill*: Joined Cases C-241/91 P and C-242/91 P (*RTE and ITP* v *Commission*). In that case, the Court of Justice, having rejected the contention that the exercise of a national copyright [could] never be reviewed in relation to Article 86 (now Article 82, EC Treaty) confirmed that a refusal to grant a licence, even if it is the act of an undertaking holding a dominant position, [could] not 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 (point 50).

23. On the question whether such exceptional circumstances existed in that case, the Court of Justice, on the basis of the findings of fact of the Court of First

Instance regarding the existence of a distinct market for the provision of comprehensive weekly television guides separate from that of market for the separate weekly guides already produced, *inter alia*, by each of the appellants (paragraph 52), held as follows (paragraphs 53 to 57):

> Thus the appellants - who 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 - gave viewers wishing to obtain information on the choice of programmes for the week ahead no choice but to buy the weekly guides for each station and draw from each of them the information they needed to make comparisons.
>
> The appellants' refusal to provide basic 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. Such refusal constitutes an abuse under heading (b) of the second paragraph of Article 86 of the Treaty.
>
> Second, there was no justification for such refusal either in the activity of television broadcasting or in that of publishing television magazines ..... .
>
> Third, and finally, as the Court of First Instance also held, the appellants, by their conduct, reserved to themselves the secondary market of weekly television guides by excluding all competition on that market ... since they denied access to the basic information which is the raw material indispensable for the compilation of such a guide.
>
> In 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 86 of the Treaty.

74. It is clear from the reasoning of the Court of Justice in the *Magill* case that there are a number of potentially important differences between the circumstances of that case and those underlying the present case as set out in the contested decision. Yet the approach of the Commission underlying the contested decision would provisionally appear, in large measure, to depend upon the extent of the notion of exceptional circumstances to which the Court of Justice refers in that case. It would also appear from an interim assessment of both the contested decision and the present application that the applicant has made out a provisional prima facie case that the Commission has misconstrued the scope of the principles set out in *Magill* by finding that, notwithstanding the differences between that case and the present case, the applicant's refusal to grant a copyright licence to NDC, among others, so that the latter could provide essentially the same information services, based in large part on freely available data, on the same market and to the same potential consumers as the services currently provided by the former amounts to a prima facie abuse of its dominant position. Even if the Commission were correctly to have found that the potential incompatibility of the impugned refusal of the applicant to licence the use of its copyright with the objectives of Article 82, EC Treaty, could not be excluded merely because of the abovementioned factual differences, the correctness of the conclusion it draws from *Magill* in the final sentence of paragraph 67 of the

contested decision cannot, for the purposes of justifying the far-reaching interim measures adopted in the contested decision, be, even temporarily, confirmed.

Commission's powers to adopt interim measures

25. At first sight, it would appear that the applicant also has made out a not unconvincing case that the interim measures adopted by the Commission in the contested decision exceed the scope of the Commission's powers to adopt interim measures on the basis of the *Camera Care* case-law. Far from preserving the *status quo ante* where the NDC and AzyX were, as found by the national courts, providing a service based on an infringement of the applicant's copyright, the applicant is required by the contested decision to licence those undertakings so that, pending the final decision to be adopted by the Commission upon completion of its investigation of NDC's complaint, they are to be permitted legally to exploit that copyright. The contention of the Commission in the contested decision, made in respect of the similar argument advanced by the applicant in its observations on the SO, that the interim measures adopted therein merely maintain NDC's ability to compete the market, and are no more than what is required in this situation to prevent intolerable damage to the public interest (paragraph 217 of the contested decision) would not seem, at least on an initial assessment, to address the argument made by the applicant that they legitimise conduct that was previously illegitimate and are thus inappropriate as interim measures.

26. Furthermore, the applicant seems, at least provisionally, to have a prima facie case against the Commission's findings that the 1860 brick structure has become an industry standard based on the fact that much, if not all, of the evidence upon which that finding is based in the contested decision was obtained only after the applicant had submitted its written and oral replies in respect of the SO. It could therefore be the case that the applicant was not afforded an adequate opportunity to rebut that evidence before the adoption of contested decision.

27. In these circumstances, it is clear that the judge hearing the application for interim measures needs time, in accordance with the case-law cited in paragraph 20 above, to consider the complex factual and legal issues raised by the present application. Having regard in particular to the potentially very important economic consequences for the applicant of a decision of the Commission to fix the terms for a compulsory licence of its copyright in the 1860 brick structure and to the serious encroachment on its property rights which any such decision would constitute, the proper administration of justice justifies, at this stage, a temporary suspension of the operation of the contested decision.

28. Accordingly, without waiting for the observations of the Commission, the deadline for whose submission has been fixed, following a request from it for a delay, for 12 September 2001, and without prejudice to the final decision to be made in the course of the present proceedings, it is necessary to order, as a protective measure in the interest of the proper administration of justice until that decision is given, the suspension of the operation of the contested decision.

29. As the order terminating an application for interim relief must be made speedily, this interim protective measure is not such as to cause irreparable harm either to the Commission's interest, or to that of the applicant's competitors, and particularly NDC, in the application of the interim measures adopted in the contested decision.

Court's Order

On those grounds, the President Of The Court Of First Instance hereby orders:

1. The operation 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 the order terminating the present proceedings for interim relief is made;

2. Costs are reserved. ■

Hearing Officers

The Commission has appointed Serge Durande and Karen Williams to be Hearing Officers. Their duty is to safeguard the rights of companies to be heard and defend themselves in merger reviews and in anti-trust proceedings. The appointments follow the Commission's decision last May to strengthen the role and independence of the Hearing Officers and improve the overall accountability of the Commission's decision-making process in competition matters. According to the mandate adopted in May, the Hearing Officers are no longer attached to the Competition department, but report directly to the Competition Commissioner. Their role is to ensure that the procedural rights of the parties have been fully respected regarding, for example, the right of access to the file compiled by the Competition department in a competition case, the right to be heard (at an oral hearing, if requested) and to safeguard the confidentiality of sensitive information. Since the new mandate came into force, the Hearing Officer's report has been published together with the decision in the Official Journal, thus contributing to greater transparency in competition cases.

The Hearing Officers are high-ranking officials (Mr Durande and Ms Williams are respectively A2 and A3 grade officials). Both have extensive experience in the application of European competition law, having previously worked in the Commission's Competition Directorate General, Mr Durande most recently as Head of the Units dealing with Financial Services and Transport, and Ms Williams as Case Manager in the Merger Task Force.

Source: Commission Statement IP/01/1529, dated 30 October 2001