IMS Health GmbH v NDC Health GmbH
(Court of Justice of the European Union Case C-418/01, 29 April 2004)

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Summary

In the *IMS Health* case, the Court of Justice of the European Union (hereinafter "CJEU") clarified the 'exceptional circumstances' test used to determine whether a refusal to license an intellectual property right (hereinafter "IPR") constitutes an abuse of a dominant position under Art. 102 of the Treaty on the Functioning of the European Union (hereinafter "TFEU")[1].

The facts

IMS Health GmbH & Co. KG (hereinafter "IMS"),[2] a company specialized in the pharmaceutical and healthcare industry, provided sales data on pharmaceutical products in Germany. Such data was organized according to a structure consisting of 1860 "bricks", each corresponding to a certain geographic area of Germany. The 1860 brick structure was created with the help of IMS's clients, i.e. undertakings in the pharmaceutical industry, and became a *de facto* standard in the industry. In the late 1990s, one of IMS's competitors, Pharma Intranet Information AG (hereinafter "PII") which was later acquired by NDC Health GmbH & Co. KG (hereinafter "NDC"), started using a brick structure very similar to IMS's one. In 2000, IMS sued PII and NDC for copyright infringement in Germany, alleging that its 1860 brick structure was a database protected by copyright. In response, NDC filed the same year a complaint with the Commission of the European Communities (hereinafter "the Commission"),[3] claiming that IMS's refusal to license its 1860 brick structure constituted an abuse of dominant position. At the same time, the German Court in which the copyright dispute between IMS and NDC was being settled requested a preliminary ruling from the CJEU on the interpretation of Art. 102 TFEU.

The legal issues

The German Court asked the CJEU to clarify under which circumstances the refusal by an undertaking in a dominant position to grant a license concerning an IPR constitutes an abuse of a dominant position prohibited by Art. 102 TFEU.

First, the CJEU referred to its well-established case law according to which the refusal to grant a license of an IPR by an undertaking holding a dominant position cannot in itself constitute an abuse of dominant position.

The CJEU then identified four cumulative conditions in which a refusal to license would be abusive: (1) access to the product or service protected by the IPR is indispensable in order to compete on the market; (2) the refusal prevents the emergence

[1] Formerly Art. 82 of the Treaty establishing the European Community.
[2] IMS is now known as IQVIA.
[3] The Commission of the European Communities is known today as the European Commission.

of a new product or service; (3) the refusal is unjustified; and finally (4) the refusal is likely to exclude all competition on the secondary market.

1. For a product or a service to be indispensable, it must be determined whether alternative products or services exist, even if they are less advantageous, and whether technical, legal or economic constraints are making it impossible or unreasonably difficult for a competitor to create these alternatives. In the light of the circumstances of the case, the CJEU acknowledged that the degree of participation by users, i.e. pharmaceutical laboratories, in the development of the 1860 brick structure and the outlay, particularly in terms of cost, on the part of potential users in order to purchase studies on regional sales of pharmaceutical products presented on the basis of an alternative structure are relevant factors to be taken into consideration.
2. The second condition, namely the "new product" requirement, reflects the necessity to adequately balance on the one hand the protection of IPRs and the economic freedom of its owner and on the other hand the protection of free competition. Free competition only prevails if the refusal to grant a license prevents the development of a secondary market to the detriment of the consumers. Thus, the undertaking that requests the license must intend to produce a new good or service not offered by the owner of the intellectual property and for which a potential consumer demand exists. It cannot merely duplicate the product already offered.
3. The refusal by an undertaking in a dominant position to allow access to a product protected by an IPR has to be justified by objective considerations. This may not be the case if the competitor intends to produce a new good or service not protected by the intellectual property right at hand (condition 2, above).
4. As regards the last condition, i.e. the likelihood of excluding competition on a secondary market, two "interconnected" markets have to be identified: an upstream market, constituted by the product or service protected by the IPR and a (secondary) downstream market, on which the product or service in question is used for the production of another product or service. In the case at hand, it is for the German Court to decide first whether the 1860 brick structure constitutes, upstream, an indispensable factor in the downstream supply of German regional sales data for pharmaceutical products. Second, the German Court will have to determine whether the refusal by IMS to grant a license to use the 1860 brick structure is capable of excluding all competition on the market for the supply of reports on sales of pharmaceutical products.

An abuse of a dominant position by an undertaking refusing to grant a license for an intellectual property indispensable for a third party, occurs when all the "exceptional circumstances" mentioned above are fulfilled. The CJEU established the above standard, but made clear that national Courts, namely the German Court in the case at hand, should make the determination of whether the respective conditions are met.

Points of significance

- The exercise of an exclusive right deriving from an IPR can be regarded as abusive in exceptional circumstances.
- The refusal by an undertaking which holds a dominant position and owns an IPR in a product indispensable for carrying on a particular business to grant a

license to use that product amounts to an abuse of a dominant position within the meaning of Art. 102 TFEU only under "exceptional circumstances". For the CJEU, "exceptional circumstances" are present when the refusal to license prevents the emergence of a new product, if this refusal is unjustified and likely to eliminate all competition on a secondary market.

- When a violation of Art. 102 TFEU has been established, a compulsory license can be issued.
    - The TRIPS Agreement in Article 31 (k) even authorizes WTO Members to waive certain procedural requirements (i.e. prior negotiations with the patent holder; predominant supply of the domestic market) where a compulsory license is granted to remedy a practice determined after judicial or administrative process to be anti-competitive.
- The CJEU did not specify what a "new product" was. Thus, it could be argued for example that a new product in the *IMS Health* case would be reports on sales of pharmaceutical products including additional or different information than IMS's ones.

Key words: Abuse of dominant position, EU competition law, copyright, database, refusal to license, compulsory license.

Available at: http://curia.europa.eu/juris/liste.jsf?num=C-418/01