

Judging Competition Law: Recent Case-Law Of The European Court Of Justice

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According to a commentator, the judgement given by the European Court of Justice in *IMS Health*¹ last year was one of the most awaited competition judgements in the history of that court.² Since it is at the centre of your business, my contribution will focus on this case and put it into perspective.

The Treaty provision to be interpreted in *IMS Health* was Article 82 EC. It prohibits the abuse of a dominant position within the common market or a substantial part of it in so far as it may affect trade between Member States. According to Article 82, second paragraph, heading b, CE, such abuse may, in particular, consist in limiting production, markets or technical development to the prejudice of consumers.

I. *IMS Health*—Factual and procedural background

In *IMS Health*, the ECJ was asked whether in the circumstances set out by a German court seeking a preliminary ruling an undertaking commits an abuse of a dominant position where it does not permit (for valuable consideration) its competitors to use a database over which it claims copyright.

The dispute in the main proceedings was between *IMS Health* (IMS) and NDC Health (NDC), both engaged in tracking sales of pharmaceutical and healthcare products. It concerned the use by NDC of a

so-called brick structure developed by IMS for the provision of German regional sales data on pharmaceutical products. The bricks were created by taking account of various criteria, such as the boundaries of municipalities, post codes, population density, transport connections and the geographical distribution of pharmacies and doctors' surgeries. The studies produced by IMS were structured on the basis of a brick structure consisting of 1860 bricks, or a derived structure, each brick corresponding to a designated geographic area.

IMS set up a working group in which undertakings in the pharmaceutical industry, which are its clients, participate. That working group makes suggestions for improving and optimising market segmentation.

The national court found that IMS not only marketed its brick structures along with its studies, but also distributed them free of charge to pharmacies and doctors' surgeries. According to the national court, that practice helped those structures to become the normal industry standard to which its clients adapted their information and distribution systems.

A former manager of IMS created a company, later acquired by NDC, whose activity also consisted in marketing regional data on pharmaceutical products in Germany

formatted on the basis of brick structures. At first, this company drew up its reports on the basis of a segmentation of German territory into 2201 areas. On account of reticence manifested by potential clients who were accustomed to the IMS brick structures, it decided to use structures of bricks very similar to those used by IMS.

IMS tried to prevent the use of those structures. Faced with the imminent adoption of an interim injunction, NDC requested IMS to grant it for valuable consideration a licence to use its structure over 1860 areas. IMS refused to do so.

A complex pattern of litigation arose. On the one hand, IMS obtained interlocutory orders against NDC and its predecessor. In these interim proceedings, the Higher Regional Court (Oberlandesgericht) Frankfurt am Main held that the brick structure is a database which may be protected by copyright under the German Copyright law. On the other hand, the European Commission adopted an interim measure ordering IMS to grant a licence to use the 1860 brick structure. Yet the President of the Court of First Instance of the European Communities ordered the suspension of this measure,³ and the appeal by NDC against that order was dismissed by the President of the ECJ.⁴

1. 29 April 2004, C-418/01, nyr.

2. Vassilis Hatzopoulos, 41 CMLR (2004), 1613.

3. Case T-184/01 *IMS Health v. Commission* [2001] ECR II-3193.

4. Case C-481/01 *NDC Health v. IMS Health* P (R) [2002] ECR I-3401.

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The proceedings that gave rise to a request for a preliminary ruling in this matter were the main proceedings before the Regional Court (Landgericht) Frankfurt am Main. In these proceedings, IMS pursued its objective of prohibiting NDC from using the 1860-brick structure or any derivative thereof.

II. *IMS Health*— Questions referred

The Regional Court Frankfurt am Main took the view that IMS cannot exercise its right to obtain an injunction prohibiting all unlawful use of its work if it acts in an abusive manner, within the meaning of Article 82 EC, by refusing to grant a licence to NDC on reasonable terms. It therefore decided to stay the proceedings and to refer to the Court three questions.

The first question read as follows:

- Is Article 82 EC to be interpreted as meaning that there is abusive conduct by an undertaking with a dominant position on the market where it refuses to grant a licence agreement for the use of a databank protected by copyright to an undertaking which seeks access to the same geographical and product market if the participants on the other side of the market, that is to say potential clients, reject any product which does not make use of the databank protected by copyright because their set-up relies on products manufactured on the basis of that databank?

The second and the third questions concerned the relevance to the question of abusive conduct of two elements:

- The extent to which an undertaking with a dominant position on the market has involved persons from the other side of the market in the development of the databank protected by copyright; and
- The material outlay (in particular with regard to costs) in which clients who have hitherto been supplied with the product of the undertaking having a dominant market position would be involved if they were in future to go over to purchasing the product of a com-

peting undertaking which does not make use of the databank protected by copyright.

III. Previous case-law

In order to assess whether the judgement given by the ECJ in this case breaks new ground, I shall first recall previous judgements of the Court concerning the possibility that a refusal to enter into contractual relations may be deemed to constitute an abuse of a dominant position. Except for the first two rulings of this line of case-law, all the others are referred to in the reasoning of the *IMS Health* judgement.

In the 1974 *Commercial Solvents* judgement,⁵ the problem of abuse was dealt with by reference to an interruption of the supply of raw materials. The reason for the interruption was that the producer which had previously delivered the raw material to manufacturers of derivatives had decided to start manufacturing these derivatives itself. The Court held that an undertaking which has a dominant position in the market in raw materials and which, with the object of reserving such raw material for manufacturing its own derivatives, refuses to supply a customer, which is itself a manufacturer of these derivatives, and therefore risks eliminating all competition on the part of this customer, is abusing its dominant position.⁶ In this case, there were two clearly distinct markets: the market A for raw material and the market B for the derivatives. The undertaking X had a dominant position in the market A and intended to extend its market power to a market B in which the undertaking Y was already present.

In the 1985 *Telemarketing* judgement⁷ the Court specified that the reasoning on which *Commercial Solvents* was based also applies to the case of an undertaking holding

a dominant position on the market in a service which is indispensable for the activities of another undertaking on another market.⁸ *Telemarketing* was about a dominant undertaking on the television market. It refused to supply the services of the television station to any telemarketing undertaking other than an associated company.⁹ The Court affirmed that an abuse within the meaning of Article 86 of the EC Treaty (now Article 82 EC) is committed where, without any objective necessity, an undertaking holding a dominant position on a particular market reserves to itself an ancillary activity which might be carried out by another undertaking as part of its activities on a neighbouring but separate market, with the possibility of eliminating all competition from such undertaking.¹⁰

In this case the national court had already held that the telemarketing activities constitute a separate market from that of the chosen advertising medium.¹¹

The *Volvo*¹² case decided in 1988 is the first case in this line of case-law in which intellectual property rights were at stake. It concerned the refusal by the proprietor of a registered design in respect of body panels for motor vehicles to grant a licence for the supply of such panels. The ECJ stated that the right of the proprietor of a protected design to prevent third parties from manufacturing and selling or importing, without its consent, products incorporating the design constitutes the very subject-matter of his exclusive right. The Court concluded that an obligation imposed upon the proprietor of a protected design to grant to third parties, even in return for a reasonable royalty, a licence for the supply of products incorpo-

5. Joined Cases 6/73 and 7/73, [1974] ECR 223.

6. Paragraph 25.

7. *CBEM v CLT and IPB*, Case 311/84, [1985] ECR 3261.

8. Paragraph 25.

9. Paragraph 26.

10. Paragraph 27.

11. Paragraph 26.

12. Case 238/87 [1988] ECR 6211.

rating the design would lead to the proprietor thereof being deprived of the substance of his exclusive right, and that a refusal to grant such a licence cannot in itself constitute an abuse of a dominant position.¹³

However, the Court added that the exercise of an exclusive right by the proprietor of a registered design in respect of car body panels may be prohibited by Article 86 of the Treaty if it involves, on the part of an undertaking holding a dominant position, certain abusive conduct such as the arbitrary refusal to supply spare parts to independent repairers, the fixing of prices for spare parts at an unfair level or a decision no longer to produce spare parts for a particular model even though many cars of that model are still in circulation, provided that such conduct is liable to affect trade between Member States.¹⁴ The ECJ noted that no instance of any such conduct had been mentioned by the national court.¹⁵

The well-known *Magill*¹⁶ case decided in 1995 once more raised the question how to judge a refusal to grant a licence for the use of an intellectual property right. Certain television broadcasters had invoked their copyright over their television programme listings in order to prevent third parties from publishing complete weekly guides to the programmes of the various broadcasters.

As to the existence of a dominant position, the ECJ held that the mere ownership of an intellectual property right cannot confer such a position.¹⁷ However, the broadcasting companies concerned enjoyed a de facto monopoly over the information used to compile listings for their programmes. They were thus in a position to prevent effective

competition on the market in weekly television magazines. The ECJ therefore confirmed the assessment by the Commission and the Court of First Instance that these companies occupied a dominant position.¹⁸

With regard to the issue of abuse, the Court referred to the *Volvo* judgement. It reiterated that a refusal to grant a licence in respect of an intellectual property right cannot in itself constitute an abuse of a dominant position.¹⁹ However, according to the Court, it is also clear from the *Volvo* judgement that the exercise of an exclusive right by the proprietor may, in exceptional circumstances, involve abusive conduct.²⁰

In the Court's view, the circumstances of the *Magill* case were such as to constitute abusive conduct on the part of the appellant broadcasters. The Court specified three aspects:

First, the broadcasters 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.²¹ The 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.²² The ECJ pointed out that such refusal constituted an abuse under heading (b) of the second paragraph of Article 86 of the Treaty.²³

Second, there was no justification for such refusal.²⁴

Third and finally, the broadcasters, by their conduct, reserved to

themselves the secondary market of weekly television guides by excluding all competition in that market since they denied access to the basic information which is the raw material indispensable for the compilation of such a guide.²⁵

It has to be noted that in *Magill* for the first time the fact that the appearance of a new product was prevented formed part of the reasoning. This fact was presented as an element of a set of circumstances which was sufficient for the refusal to be treated as abusive.

The last case in the series leading to *IMS Health* is the *Bronner*²⁶ case decided in 1998. The Court was asked whether an abuse of a dominant position is constituted by the fact that a press undertaking with a very large share of the daily newspaper market in a Member State which operates the only nationwide newspaper home-delivery scheme in that Member State refuses paid access to that scheme by the publisher of a rival newspaper, which by reason of its small circulation is unable either alone or in cooperation with other publishers to set up and operate its own home-delivery scheme under economically reasonable conditions.

The Court emphasized that, in examining whether an undertaking holds a dominant position within the meaning of Article 86 of the Treaty, it is of fundamental importance to define the market in question and to define the substantial part of the common market in which the undertaking may be able to engage in abuses which hinder effective competition.²⁷ The Court therefore invited the national court to determine whether the home-delivery schemes constituted a separate market.²⁸

Finally, it would need to be determined whether the refusal in ques-

13. Paragraph 8.

14. Paragraph 9.

15. Paragraph 10.

16. Joined Cases C-241/91 P and C-242/91 P *RTE and ITP v. Commission* [1995] ECR I-743.

17. Paragraph 46.

18. Paragraph 47.

19. Paragraph 49.

20. Paragraph 50.

21. Paragraph 53.

22. Paragraph 54.

23. Paragraph 54.

24. Paragraph 55.

25. Paragraph 56.

26. Case C-7/97 [1998] ECR I-7791.

27. Paragraph 32.

28. Paragraph 34.

tion deprived the competitor of a means of distribution judged essential for the sale of its newspaper.²⁹

To plead the existence of an abuse in a situation such as the *Brunner* case, it would be necessary not only that the refusal of the service comprised in home delivery be likely to eliminate all competition in the daily newspaper market on the part of the person requesting the service and that such refusal be incapable of being objectively justified, but also that the service in itself be indispensable to carrying on that person's business, inasmuch as there was no actual or potential substitute in existence for that home-delivery scheme. According to the Court, that was certainly not the case.³⁰

The Court stated that other methods of distributing daily newspapers such as by post and through sale in shops and at kiosks, even though they may be less advantageous for the distribution of certain newspapers,³¹ exist and are used by the publishers of those daily newspapers. Moreover, it did not appear that there were any technical, legal or even economic obstacles capable of making it impossible, or even unreasonably difficult, for any other publisher of daily newspapers to establish, alone or in cooperation with other publishers, its own nationwide home-delivery scheme and use it to distribute its own daily newspapers.³² According to the Court, for access to the existing system to be capable of being regarded as indispensable it would be necessary at the very least to establish that it is not economically viable to create a second home-delivery scheme for the distribution of daily newspapers with a circulation comparable to that of the daily newspapers distributed by the existing scheme.³³

The situation in *Brunner* resem-

bles that in *IMS Health* in so far as the enterprise charged with abuse already holds a dominant position in a market B; whether there exists a separate market A for the asset to which the competitor claims access is doubtful.

IV. *IMS Health*— The judgement

The ECJ built on this case-law when last year it gave its judgement in *IMS Health*. Against this background, it reformulated the questions of the national court. It also lowered the level of abstraction of the first question in line with a practice aiming at the avoidance of over-generalization.

According to the ECJ, by its first question, the national court asked, essentially, whether the refusal to grant a licence to use a brick structure for the presentation of regional sales data by an undertaking in a dominant position which has an intellectual property right therein to another undertaking which also wishes to provide such data in the same Member State, but which, because potential users are unfavourable to it, cannot develop an alternative brick structure for the presentation of the data that it proposes to offer, constitutes an abuse of a dominant position within the meaning of Article 82 EC.³⁴

The Court noted that this question was based on a premise, whose validity it was for the national court to ascertain, namely that the use of the 1860 brick structure protected by an intellectual property right is indispensable in order to allow a potential competitor to have access to the market in which the undertaking which owns the right occupies a dominant position.

The Court interpreted the second and the third question as essentially seeking to clarify the relevant criteria for the determination of whether use of the 1860 brick structure protected by the intellectual property

right is indispensable for enabling a potential competitor to gain access to the market in which the undertaking owning the right occupies a dominant position. It therefore decided to answer the second and third questions first.³⁵

The second and third questions

The ECJ derived from *Brunner* that, in order to determine whether a product or service is indispensable for enabling an undertaking to carry on business in a particular market, it must be determined whether there are products or services which constitute alternative solutions, even if they are less advantageous, and whether there are technical, legal or economic obstacles capable of making it impossible or at least unreasonably difficult for any undertaking seeking to operate in the market to create, possibly in cooperation with other operators, the alternative products or services. It held that in order to accept the existence of economic obstacles, it must be established, at the very least, that the creation of those products or services is not economically viable for production on a scale comparable to that of the undertaking which controls the existing product or service.³⁶

The ECJ pointed out that it is for the national court to determine, in the light of the evidence submitted to it, whether such is the case in the dispute in the main proceedings. In that regard, the Court gave the following directions: Account must be taken of the fact that a high level of participation by the pharmaceutical laboratories in the improvement of the 1860 brick structure protected by copyright, on the supposition that it is proven, has created a dependency by users in regard to that structure, particularly at the technical level. In such circumstances, it is likely that those laboratories would have to make exceptional organizational and financial efforts in order

29. Paragraph 37.

30. Paragraphs 41 and 42.

31. Paragraph 43.

32. Paragraph 44.

33. Paragraph 46.

34. Paragraph 21.

35. Paragraph 24 and 25.

36. Paragraph 28.

to acquire the studies on regional sales of pharmaceutical products presented on the basis of a structure other than that protected by the intellectual property right. The supplier of that alternative structure might therefore be obliged to offer terms which are such as to rule out any economic viability of business on a scale comparable to that of the undertaking which controls the protected structure.³⁷

For these reasons the Court answered the second and third questions as follows:

“For the purposes of examining whether the refusal by an undertaking in a dominant position to grant a licence for a brick structure protected by an intellectual property right which it owns is abusive, the degree of participation by users in the development of that 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 factors which must be taken into consideration in order to determine whether the protected structure is indispensable to the marketing of studies of that kind.”³⁸

The first question

In answering the first question, the Court recalled that exercise of an exclusive right by the owner may, in exceptional circumstances, involve abusive conduct³⁹ and that such exceptional circumstances were present in the case giving rise to the judgement in *Magill*.⁴⁰

According to the Court, it is clear from that case-law that, in order for the refusal by an undertaking which owns a copyright to give access to a product or service indispensable for carrying on a particular business to be treated as abusive, it is sufficient that three cumulative conditions be

satisfied, namely, that that refusal is preventing the emergence of a new product for which there is a potential consumer demand, that it is unjustified and such as to exclude any competition on a secondary market.

Since the observations submitted to the Court had revealed a major dispute as regards the interpretation of the third condition, it considered that question first.

It recalled the approach followed by the Court in the *Bronner* judgement and described it as follows: “(...) the Court held that it was relevant, in order to assess whether the refusal to grant access to a product or a service indispensable for carrying on a particular business activity was an abuse, to distinguish an upstream market, constituted by the product or service, in that case the market for home delivery of daily newspapers, and a (secondary) downstream market, on which the product or service in question is used for the production of another product or the supply of another service, in that case the market for daily newspapers themselves. The fact that the home-delivery service was not marketed separately was not regarded as precluding, from the outset, the possibility of identifying a separate market.”⁴¹

The Court stated that, for the purposes of the application of the earlier case-law, it is sufficient that a potential market or even hypothetical market can be identified. It held that such is the case where the products or services are indispensable in order to carry on a particular business and where there is an actual demand for them on the part of undertakings which seek to carry on the business for which they are indispensable.⁴²

The Court derived from this that it is determinative that two different stages of production may be identified and that they are interconnected, inasmuch as the

upstream product is indispensable for the supply of the downstream product.⁴³

It pointed out that, transposed to the facts of the case in the main proceedings, that approach prompts consideration as to whether the 1860 brick structure constitutes, upstream, an indispensable factor in the downstream supply of German regional sales data for pharmaceutical products.⁴⁴

The ECJ invited the national court to establish whether that is in fact the position, and, if so, to examine whether the refusal by IMS to grant a licence to use the structure at issue is capable of excluding all competition on the market for the supply of German regional sales data on pharmaceutical products.

Next, the Court dealt with the condition relating to the emergence of a new product. It explained that this condition relates to the consideration that, in the balancing of the interest in protection of the intellectual property right and the economic freedom of its owner against the interest in protection of free competition, the latter can prevail only where refusal to grant a licence prevents the development of the secondary market to the detriment of consumers. Therefore, the refusal by an undertaking in a dominant position to allow access to a product protected by an intellectual property right, where that product is indispensable for operating on a secondary market, may be regarded as abusive only where the undertaking which requested the licence does not intend to limit itself essentially to duplicating the goods or services already offered on the secondary market by the owner of the intellectual property right, but intends to produce new goods or services not offered by the owner of the right and for which there is a potential consumer demand.⁴⁵

The ECJ considered that it was

37. Paragraph 46.

38. Paragraph 30 and point 1 of the operative part.

39. Paragraph 35.

40. Paragraph 36.

41. Paragraphs 42 and 43.

42. Paragraph 44.

43. Paragraph 45.

44. Paragraph 46.

for the national court to determine whether such was the case in the dispute in the main proceedings.⁴⁶

As to the condition relating to whether the refusal was unjustified the Court noted that no specific observations had been made. It held that it was for the national court to examine, if appropriate, in the light of the facts before it, whether the refusal of the request for a licence was justified by objective considerations.⁴⁷

Summing up, the ECJ answered the first question as follows:

“The refusal by an undertaking which holds a dominant position and owns an intellectual property right in a brick structure indispensable to the presentation of regional sales data on pharmaceutical products in a Member State to grant a licence to use that structure to another undertaking which also wishes to provide such data in the same Member State, constitutes an abuse of a dominant position within the meaning of Article 82 EC where the following conditions are fulfilled:

- The undertaking which requested the licence intends to offer, on the market for the supply of the data in question, new products or services not offered by the owner of the intellectual property right and for which there is a potential consumer demand;
- The refusal is not justified by objective considerations; and
- The refusal is such as to reserve to the owner of the intellectual property right the market for the supply of data on sales of pharmaceutical products in the Member State concerned by eliminating all competition on that market.

V. Assessment

The judgement in *IMS Health* was not given by the Grand Chamber. The case had been attributed to a chamber consisting of five judges

which indicates that in the view of the Members of the Court it raised a significant point but one that could be decided within the scope of existing jurisprudence.

In several respects, the judgement spelled out what was already inherent in the previous case-law. This goes in particular for the clarification that a potential or hypothetical market for the upstream product or services is sufficient for the application of the earlier case-law on abuse of a dominant position.

In my view, the most important development brought about by the *IMS Health* case is the definition of the role to be played by the condition related to the emergence of a new product. The message of *Magill* had been that in order for the refusal by an undertaking which owns an intellectual property right to give access to a product or service indispensable for carrying on a particular business to be treated as abusive it is sufficient that three cumulative conditions be satisfied, one of them being that that refusal is preventing the emergence of a new product for which there is a potential consumer demand. This did not exclude that another set of circumstances might also be sufficient for that purpose. *IMS Health* promoted the condition related to the emergence of a new product to a necessary one. Where it is not satisfied the balance will come down in favour of the interest in protection of the intellectual property right and the economic freedom of its owner.

45. Paragraphs 48 and 49 of the judgement.

46. Paragraph 50.

47. Paragraph 51.