REFUSAL TO SUPPLY (PHARMACEUTICAL DATA): THE IMS CASE

Subject: Refusal to supply
Abuse of dominant position
Licensing agreements
Market entry
Interim measures

Industry: Pharmaceutical data
(Some implications for other industries)

Parties: IMS Health
NDC Health
AzyX Geopharma Services

Source: Commission Statement IP/01/365, dated 14 March 2001

(Note. Several features of this case are interesting. One is the Commission's approach to the question of a refusal to supply, with particular reference to the circumstances in which a refusal constitutes an infringement: as a rule in the past, it has been necessary to show reasonable and objective reasons for refusal if it is to be justified. Another point is the question of market entry, which appears to be inhibited by the difficulty competitors have in offering customers a different territorial structure from the one put in place by IMS. Observers may wonder whether this is a genuine difficulty or not. A third point concerns the use by IMS of copyright protection for its territorial scheme. There is a hint here of the way in which US firms may patent business methods. Finally, this is one of the rare cases in which the Commission may resort to "interim measures", in which it will have to show the Court that, in the absence of such measures, "serious and irreparable damage" may ensue. This is a case to watch.)

The Commission has sent US company IMS HEALTH (IMS), the world leader in data collection on pharmaceutical sales and prescriptions, a statement of objections with a view to imposing interim measures. IMS's refusal to grant a licence to its regional sales data method in Germany, known as the 1860 brick structure, would appear to constitute an abuse of a dominant position, according to the Commission's preliminary conclusions. The refusal makes it impossible for new competitors to enter or stay on the market in question and is likely to cause serious and irreparable damage to the two present competitors of IMS: NDC Health of the United States and AzyX Geopharma Services of Belgium.

IMS Health is the world's number one supplier of information on sales and prescriptions of pharmaceutical products with a presence in more than 100 countries and a world-wide turnover of $1.4 billion in 1999. It occupies a dominant position in Germany.

Pharmaceuticals sales data and regional data, in this particular case, are an essential tool for pharmaceutical companies, which use the information to allocate sales territories, develop incentive schemes for their sales representatives and inform their sales force about market changes (market shares, comparison with previous years or months, and so on). IMS was the only provider of regional data in Germany until 1999 at which point two new competitors, NDC Germany (German subsidiary of NDC of the United States) and AzyX Geopharma (German subsidiary of a Belgian company) entered the market. These two companies initially attempted to distribute their regional sales information according to a structure based on a subdivision of the territory of the former German Federal Republic rather than into 1860 segments. However, discussions with potential customers proved that data analysed in this manner would not be marketable because it would not correspond to the territorial division already in place within the industry.

The 1860 brick structure is in effect a segmentation of the German territorial division already in place within the industry. The 1860 brick structure is in effect a segmentation of the German territory into 1860 zones or bricks. This segmentation is used to report the estimated sales of pharmaceutical products in each zone. The purpose of the segmentation is to allow reporting of sales data broken down into a small, useful geographic area, while avoiding the identification of sales to individual pharmacies. The latter is necessary for data protection purposes. In Germany data protection rules require that at least three pharmacies be aggregated. To keep the structure stable at least four or five pharmacies are necessary in each segment. The 1860 brick structure was created by IMS in co-operation with the pharmaceutical companies in the early 1970s. It is regarded by the pharmaceutical industry as an essential tool to have the data delivered.

In 2000, IMS filed a lawsuit in the Frankfurt District Court against the two new competitors, alleging that they had infringed IMS's copyright in the 1860 brick structure. The court at the end of 2000 prohibited NDC and AzyX from employing the 1860 brick structure or any other brick structure derived from it. While continuing to contest that the structure is in fact protected by copyright, both NDC and Azyx then asked IMS for a licence to use the 1860 brick structure, which was refused. According to NDC, which complained to the Commission in December 2000, in the absence of a licence it would be barred from operating and Germany. In all likelihood IMS's conduct would foreclose the market to potential new entrants and eliminate all prospect of competition in Germany.

Following the preliminary judgment of the German Court and NDC's complaint, the Commission investigated whether there was a real and practical possibility for companies willing to offer pharmaceutical sales data in Germany to employ another structure which would not infringe any copyright IMS might have. This does not seem to be the case. The preliminary investigation of the Commission shows that the refusal of access to the structure is likely to eliminate all competition in the relevant market. Such refusal cannot be objectively justified and the structure itself is indispensable for NDC to carry on its business, inasmuch as there is no actual or potential substitute. This situation is likely to

cause serious and irreparable damage to the two competitors of IMS. The Commission takes the view that this type of practice by a company in a dominant position like IMS distorts competition between rival operators and forms a solid barrier to potential entrants.

The statement of objections concludes that the refusal in question is a prima facie abuse of a dominant position within the meaning of Article 82 of the EC Treaty. This is a preliminary document starting the procedure for granting interim measures and is not the Commission's final verdict on granting the interim measures or on the substance of the case. However, according to European Competition Commissioner, Mario Monti, if the Commission's initial opinion is confirmed, IMS will have to license the use of the 1860 brick structure on non-discriminatory, commercially reasonable terms.

Procedure

The power of injunctive relief was recognised by the Court of Justice in 1980, but interim measures procedures remain exceptional (there have been fewer than 15 cases so far). The Commission resorts to such exceptional measures when there is a risk of serious and irreparable harm either to a specific firm or to competition in general. The procedure is similar to the normal procedure except that it is accelerated. In accordance with the rights of defence in interim measures cases, IMS has two weeks from receiving the statement of objections to comment in writing. It is also entitled to ask for a hearing, which may also be attended by the complainant and by EU member states' competition experts who form the Advisory Committee on Restrictive Practices and Dominant Positions. The adoption of interim measures would not end the procedure as the Commission would continue its investigation on the substance of the case. IMS could also appeal against the measures before the Court of Justice in Luxembourg. ■

The GE / Honeywell Case

The Commission has decided to open a full investigation into the proposed merger between US companies General Electric (GE) and Honeywell International Inc. (Honeywell). The Commission will make a detailed assessment of the impact of the transaction on competition, in particular as regards the supply of components to aircraft, such as jet engines, avionics and non-avionics products. The focus of the investigation will be on whether or not the combination of GE's strong market position on engines with Honeywell's also strong market positions on avionics and certain non-avionics products will create or strengthen a dominant position on any of these markets.

Source: Commission Statement IP/01/298, dated 1 March 2001