DOMINANT POSITION (PHARMARCEUTICAL DATA): THE IMS CASE

Subject: Abuse of dominant position
Copyright
Unfair competition

Industry: Pharmaceutical data collection

Parties: IMS Health
NDC Health

Source: Commission Statement IP/03/1159, dated 13 August 2003

(Note. This is not the same case as the one involving IMS and at present awaiting judgment by the Court of First Instance. It is, however, similar, with the surprising twist that the German Court has made a ruling favourable to the position adopted by the Commission in the earlier case. This has enabled the Commission to withdraw its earlier decision on interim measures. The proceedings in the Court of First Instance are nevertheless continuing on the substantive issues raised by the first case; and the Advocate General's Opinion is expected later this year. A further twist to the case is that the German Court has also held that copying IMS's system of data collection is a breach of German unfair competition law.)

The European Commission has withdrawn its interim measures decision adopted on 3 July 2001 against IMS Health (IMS), the world leader in data collection on pharmaceutical sales and prescriptions. A judgment from the Frankfurt Higher Regional Court, while recognising that IMS Health's 1860 brick structure was protected by national copyright, now allows NDC Health (NDC) to market a brick structure which meets customers' needs. Therefore there is no longer any urgency requiring the Commission's intervention.

In its September 2002 judgment, the Frankfurt Higher Regional Court held that third parties could not be barred from developing another structure based on administrative and postal divisions "even if the resulting structure might have a similar number of brick segments to the 1860 structure and might be deemed to be derived from that structure". Therefore other brick structures very similar to the 1860 structure could be developed for the collection of pharmaceutical sales data and used legitimately to produce and market pharmaceutical sales reports. The Court also found that Pharma Intranet Information (PI) (now a subsidiary of NDC) had breached the German unfair competition law, by copying the 1860 structure and using it.

In a separate case, the Frankfurt Provincial Court had asked the Court of Justice of the European Communities for a preliminary ruling on the interpretation of Article 82 of the Treaty in the context of a parallel action for copyright

infringement before the German courts, again involving IMS Health and NDC Health. The Opinion of the Advocate General is expected later in the year.

In July 2001, the Commission found that IMS had no objective justification for refusing to grant a licence for the 1860 brick structure to NDC. The Commission considered that there was a prima facie case of behaviour constituting an abuse of a dominant position under Article 82. The use of the 1860 brick structure was considered as being indispensable to carrying on business on the relevant market because there was no actual or potential substitute for it.

The Commission found that the refusal by IMS to license the 1860 brick structure created a risk of serious and irreparable harm to the complainant, NDC. The Commission therefore adopted the Decision of 3 July 2001 ordering IMS, by way of interim measures, to license the 1860 brick structure to its then competitors on the market for German regional pharmaceutical sales data services. IMS, in return, was entitled to royalties to be agreed with by the parties within a two week period of the date of the request for a licence failing which appropriate royalties would be determined by independent experts. On 26 October 2001 the President of the Court of First Instance suspended the execution of the Commission's decision; and the President of the Court of Justice later confirmed the suspension; this was, however, without prejudice to the substantive issues. ■

The DSM / Roche Case

The Commission has cleared the proposed acquisition of the Vitamins and Fine Chemicals division of Swiss company Roche by Dutch-based company DSM. The Commission had identified competition concerns in one market for feed enzymes, which are animal feed additives. DSM submitted a package of undertakings aimed at terminating its alliance with the German chemicals company, BASF, for the production and distribution of feed enzymes and transferring its activities in the production of feed enzymes to a purchaser to be approved by the Commission. After careful evaluation of the package of undertakings, the Commission concluded that the remedies removed its competition concerns and would restore effective competition.

DSM and Roche Vitamins and Fine Chemicals (RV&FC)are active in a broad range of product areas, however, the only overlaps are in feed enzymes which are added to animal feed. DSM and RV&FC belong to two different vertical alliances. DSM has an alliance with BASF and RV&FC with Novozymes, a Danish producer of industrial enzymes. In their respective alliances DSM and Novozymes are mainly responsible for research and development and production while BASF and RV&FC are mainly responsible for sales and distribution. Both alliances provide for a high level of economic integration and mutual interdependence. The acquisition of RV&FC by DSM would have created a structural link between the two alliances and led to near monopolies on the market for phytase at both the levels of production and distribution. However, the operation is also being reviewed by the US Federal Trade Commission with which the Commission is closely co-operating.

Source: Commission Statement IP/03/1079, 23 July 2003