

Court of Justice of the European Communities: Judgment on Compulsory Licensing

IRIS 2004-6:1/1

*Ot van Daalen
De Brauw Blackstone Westbroek The Hague*

On 29 April 2004, the European Court of Justice in a preliminary ruling gave further guidance on the compulsory licensing of intellectual property rights under European competition law. The ruling is an answer to a referral made by the Landgericht Frankfurt am Main in Germany.

The three questions asked by the Landgericht in the main proceedings concerned the conditions under which a company in a dominant position should license its intellectual property to its competitors. The Court considered that in exceptional circumstances a dominant undertaking is obliged to license its intellectual property right.

First, the subject-matter protected by the right should constitute, upstream, an indispensable factor in the downstream supply of a product. The degree of user participation in the development of the subject-matter protected by the right, and the outlay, particularly in terms of cost, on the part of the users in purchasing an alternative product are relevant factors to consider when determining if it is indispensable. The potential licensee should also intend to produce new goods or services not offered by the owner of the right, and for which there is consumer demand. Third, the refusal should not be justified by objective considerations. And fourth, the refusal should be such as to reserve to the owner of the right the market for the supply of the product by eliminating all competition on that market.

At issue, in this case, is the licensing of formats for the provision of regional sales data of pharmaceutical products. Pharmaceutical wholesale companies offer their sales data to companies who create sales reports, which are then sold to pharmaceutical companies. The data provided by the wholesale companies is broken into geographical segments called "bricks", which are formatted in a predefined way.

IMS is the dominant company for the provision of these sales reports in Germany. Its data formats for the provision of sales data, the "1860 brick structure" and derived formats, have been created in cooperation with the pharmaceutical companies, and the free offering of its reports helped it become the normal industry standard. Pharmaceutical companies have become accustomed to the

provision of sales reports according to this structure.

In 2000, the court in Frankfurt considered that IMS' data formats were protected by copyright, and by way of a provisional order forbade the use of the formats by its competitor, NDC. After IMS refused to license its formats to NDC, the latter submitted a complaint to the Commission, claiming that IMS' refusal to license constituted an abuse of its dominant position under Article 82 of the EC Treaty. The European Commission on 3 July 2001 by way of interim measures ordered IMS to license its 1860 brick structure (OJ 2002 L 59, p. 18). This decision was later suspended by the President of the Court of First Instance on 26 October 2001 (T-184/01), and the President of the European Court of Justice dismissed the appeal against the suspension (C-481/01). In 2003, the Commission withdrew its first order to license the structure, because there was no longer any urgency to impose interim measures (OJ 2003 L 268, p. 69). In the main proceedings at the origin of this preliminary ruling, IMS is pursuing its aim of prohibiting NDC from using its 1860 brick structure.

Judgment of the European Court of Justice of 29 April 2004, case C-481/01, IMS Health GmbH & Co. OHG v NDC Health GmbH & Co. KG

<http://www.curia.eu.int/jurisp/cgi-bin/gettext.pl?lang=en&num=79959570C19010418&doc=T&ouvert=T&seance=ARRET>

