

Press and Information Division

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Judgment of the Court of Justice in Case C-418/01

IMS Health GmbH & Co. OHG v NDC Health GmbH & Co. KG

**THE REFUSAL BY AN UNDERTAKING IN A DOMINANT POSITION TO
GRANT A LICENCE FOR A COPYRIGHT ONLY CONSTITUTES AN ABUSE
OF A DOMINANT POSITION IN CERTAIN CIRCUMSTANCES**

In order for such a refusal to be regarded as abusive it must prevent the emergence of a new product or service for which there is a potential demand, be without objective justification and be capable of eliminating all competition on the relevant market.

IMS Health and NDC Health are involved in the tracking of sales of pharmaceutical and healthcare products. IMS Health provides pharmaceutical laboratories with German regional sales data on pharmaceutical products, formatted according to a structure of 1860 or 2847 bricks which each correspond to a designated geographical area. The development and improvement of those structures is the subject of working groups in which IMS Health and its clients have participated. According to the national court, IMS Health not only sold but also distributed its brick structures to pharmacies and doctors' surgeries free of charge. That practice helped to make those structures become a model to which clients adapted their information and distribution systems.

In 1988, a director left IMS Health and set up Pharma Intra Information (PII) also in order to sell German regional sales data for pharmaceutical products presented on the basis of another brick structure of 2201 bricks. Having tried in vain to sell the data presented on the basis of that structure, PII decided to work with the 1860 or 3000 brick structures, which are very similar to IMS Health's structures. PII was acquired by NDC Health.

At the request of IMS Health, the Landgericht Frankfurt am Main prohibited PII (and, after its acquisition, NDC Health) from using any structure derived from IMS Health's brick structure because it was a database protected by copyright.

The national court considers that IMS Health cannot refuse to grant a licence to NDC Health if that refusal constitutes an abuse of a dominant position according to Community law. It therefore referred questions to the Court of Justice on the circumstances under which such behaviour constitutes an abuse of a dominant position.

The Court observes, first of all, that it is for the national court to determine whether the product or service at issue is indispensable to an undertaking in order to carry out business in the relevant market. In that context, the national court must consider whether there are products or services which constitute alternative solutions. In the present case, the national court may take into consideration the fact that a high degree of participation by the pharmaceutical laboratories in the improvement of the brick structure may have created a technical dependency by users on that structure. In such circumstances, it is probable that those laboratories would have to make very significant technical and financial efforts to be able to acquire data presented on the basis of an alternative structure.

Next, the Court recalls that the exclusive right to reproduction forms part of the copyright-holder's rights, so that a refusal of a licence cannot, in itself, constitute an abuse of a dominant position. Nevertheless, the exercise of an exclusive right may, in exceptional circumstances, give rise to abusive conduct. **In order for the refusal** by an undertaking which owns a copyright to give access to a product or service indispensable to carry on business **to be regarded as an abuse, three conditions** must be fulfilled:

- the undertaking which requested the licence must intend to offer **new products or services** not offered by the owner of the copyright and for which there is a potential consumer demand;
- the **refusal cannot be justified** by objective considerations, and
- the **refusal** is such as to **reserve to the undertaking** which owns the copyright **the relevant market**, by eliminating all competition on that market.

The Court stresses that it is for the national court to determine whether those conditions are fulfilled in the case before it.

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Available languages: English, French, German, Italian, Spanish.

*The full text of the judgment can be found on the internet (www.curia.eu.int).
In principle it will be available from midday GMT on the day of delivery.*

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