COMMISSION

COMMISSION DECISION
of 13 August 2003
relating to a proceeding under Article 82 of the EC Treaty
(Case COMP D3/38.044 — NDC Health/IMS Health: Interim measures)

(notified under document number C(2003) 2920)

(Only the English text is authentic)

(2003/741/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty [1], as last amended by Regulation (EC) No 1/2003 [2], and in particular Articles 3 and 16 thereof,

Having regard to the Commission Decision of 8 March 2001 to initiate proceedings in this case,

Having regard to the Commission Decision 2002/165/EC [3] based on Regulation No 17, and particularly on the Commission's powers under Article 3 thereof to adopt interim measures, addressed and notified to IMS Health in this case,

Having regard to the application for withdrawal of the decision by IMS Health on 31 October 2002,

Having given IMS Health, NDC Health and AzyX the opportunity to make known their views on whether or not the Commission should withdraw the interim measures decision on grounds of lack of urgency,

Having regard to the final report of the Hearing Officer in this case [4],

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas:

(1) IMS Health (IMS) has created, in collaboration with the pharmaceutical industry over a long period of time, a brick structure for the presentation of regional pharmaceutical prescription and sales data services in Germany. The Commission found in its Decision 2002/165/EC that this constituted a de facto industry standard and it was acknowledged to be so by the pharmaceutical companies. The need for comparable and compatible data, the possible loss of relationship between sales representatives and the doctors, the modification of the working contracts of sales representatives and the costs incurred to modify software and applications based on the 1860 brick structure if pharmaceutical companies were to switch to another brick structure, were considered as creating a very significant obstacle for them to do so. Moreover, technical and other constraints such as the necessary use of administrative boundaries, the data-protection law and the uncertainty concerning the permissibility under copyright law of selling data in another structure based on postal districts, gravely limited the possibilities to create other marketable brick structures. In particular, the Landgericht Frankfurt am Main (Frankfurt District Court) had granted, between October and December 2000, separate injunctions prohibiting NDC Health (NDC) (an American multinational company), AzyX (a much smaller Belgian company) and Pharma Intranet Information (PI, now a subsidiary of NDC), competitors of IMS on the regional pharmaceutical sales data services market, from using structures derived from the 1 860 brick structure on the basis that IMS enjoyed copyright protection.

[1] OJ 13, 21.2.1962, p. 204/62.
[2] OJ L 1, 4.1.2003, p. 1.
[3] OJ L 59, 28.2.2002, p. 18.
[4] OJ C 250, 18.10.2003.

(2) The Commission also found that IMS had no objective justification for refusing to grant a licence for the 1860 brick structure to, NDC and AzyX. The Commission considered that there was a prima facie case of behaviour constituting an abuse under Article 82. The Commission considered that there were 'exceptional circumstances' within the meaning of the phrase used by the European Court of Justice in *Magill* ([1]) read in conjunction with the *Ladbroke* ([2]) and *Bronner* ([3]) cases. The use of the 1 860 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.

(3) The Commission found that the refusal by IMS to license the 1 860 brick structure created a risk of serious and irreparable harm to the complainant, NDC, and of intolerable damage to the public interest which established the urgent need to grant protective interim measures. First, the Commission considered, on the basis of the evidence before it, that unless NDC was granted a licence to the 1 860 brick structure its German operation would go out of business. In the Commission's view, without interim measures, NDC would lose current customers, had no prospect of attracting new customers for the coming years and would probably cease trading in Germany. Second, apart from the serious risk of irreparable harm to NDC, there was also a risk of intolerable damage to the public interest within the meaning of the *La Cinq* judgment ([4]). Since without the 1 860 brick structure it was not possible to compete on the market at that time or in the foreseeable future, there would be, in the absence of interim measures, a serious risk to the continued presence on the market of the other competitor then active, AzyX. Finally, rejecting IMS's contention that it would suffer irreparable harm, the Commission concluded that the balance of interests in this case favoured both NDC and the public interest.

(4) The Commission therefore adopted Decision 2002/165/EC, which ordered IMS, by way of interim measures, to license the 1 860 brick structure to its then competitors on the market for German regional pharmaceutical sales data services, in return for royalties to be agreed 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.

(5) By application lodged at the Registry of the Court of First Instance on 6 August 2001 under the reference T-184/01, IMS Health brought an action seeking the annulment of the decision or alternatively annulment of its decision concerning the requirement to license the 1 860 brick structure in circumstances where the licence terms would be conducted and approved by the Commission and the suspension of the operation of the Commission's Decision.

(6) By an Order of 26 October 2001 in case T-184/01R, the President of the Court of First Instance (CFI) suspended the execution of Commission Decision 2002/165/EC until such time as the Court of First Instance has given judgment in the main action.

(7) By application lodged at the Court Registry on 12 December 2001 under the reference C-481/01 P(R), NDC Health Corporation appealed against the abovementioned order of the President of the CFI.

(8) By an Order of 11 April 2002 in case C-481/01P(R), the President of the Court of Justice (ECJ) dismissed the appeal of NDC.

(9) Reference has been made on 12 July 2001 to the ECJ by the Landgericht Frankfurt am Main (Frankfurt District Court) for a preliminary ruling on related questions regarding the interpretation of Article 82 of the Treaty. The reference arises in the context of a copyright infringment action before the German courts between IMS Health and NDC Health. This case was registered under the reference C-418/01 and is still pending and proceedings in the main action concerning Decision 2002/165/EC have been stayed until judgment has been given in that preliminary ruling.

(10) In a judgment of 17 September 2002, the Oberlandesgericht Frankfurt am Main (Frankfurt Higher Regional Court) dismissed an appeal brought by PI against the abovementioned judgment of the Frankfurt District Court enjoining PI and its co-founder from using the 1 860 brick structure or any derivative thereof. While recognising that the 1 860 brick structure was protected by national copyright (the relevant right being held by, *inter alia*, certain IMS employees rather than by IMS itself) and that direct reproduction of that structure by a competitor of IMS constituted a breach of the Gesetz gegen den unlauteren Wettbewerb (Law on Unfair Competition), the Higher Regional Court held that 'der Beklagten oder Dritten die freie, selbständige Entwicklung einer Segmentstruktur, die ebenfalls auf der Einteilung nach Landkreisen, kreisfreien Städten und Postleitzahlbezirken beruht und deshalb ggfs. aus einer annähernd gleichen Anzahl von Segmenten besteht, nicht ohne weiteres untersagt werden könnte. (…) Insbesondere könnte es der Beklagten oder Dritten nicht zugemutet werden, eine den praktischen Anforderungen nur unzulänglich gerecht werdende Datenstruktur zu erstellen, nur um einen möglichst weiten Abstand von dem Produkt der Klägerin zu halten. Vielmehr können

([1]) Joined cases C-241/91 P and C-242/91 P, *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP)* v *Commission*, [1995] ECR p. I-0743.
([2]) Case T-504/93 *Tiercé Ladbroke SA* v *Commission*, [1997] ECR p. II-923.
([3]) Case C-7/97 *Oscar Bronner GmbH & Co KG* v *Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co KG*, [1998] ECR p. I-7791.
([4]) Case T-44/90 *La Cinq*, [1992] ECR p. II-1.

Abweichungen nicht verlangt werden, wo die Übereinstimmungen auf sachlich — technischen Anforderungen beruhen und unter Berücksichtigung des Freihaltebedürfnisses der Wettbewerber in diesen Merkmalen die angemessene Verwirklichung der Technischen Aufgabe liegt.' (The defendant or third parties could not simply be prohibited from developing freely and independently a brick structure that is similarly based on a breakdown by district, urban district and post-code district and for that reason comprise more or less the same number of bricks. (…) In particular, the defendant or third parties could not be expected to produce a data structure that does not sufficiently satisfy the practical requirements simply in order to keep as much distance as possible from the plaintiff's product. Instead, variations cannot be demanded where the overlaps are based on material technical requirements and, in the light taking into account 'the need of availability' for competitors, the appropriate performance of the technical task depends on these features).

(11) On 16 April 2003, the Frankfurt District Court forbade AzyX to use the 1 860 brick structure and any derivative of it. This judgment was not appealed before the Frankfurt Higher Regional Court.

(12) In its observations of 12 May 2003 on whether or not the Commission should withdraw the interim measures decision, IMS considered that the interpretation of the 17 September 2002 raises legal and factual questions that remain sub judice before the German Courts and that it is for them to determine the precise scope of that judgment. As to the withdrawal of the interim measures decision, IMS suggested that the appropriate course of action would be to withdraw that decision since none of the conditions for interim measures are satisfied, including, but not limited to the lack of urgency. As for the current situation in the market, in 2002, IMS had a market share of between […] (*) and […] % in value and […] contracts. In the first quarter of 2003, this market share increased by […] points in value and to […] contracts taking into account the situation of AzyX.

(13) In its observations of 12 May 2003, NDC considered that there is still considerable uncertainty as to what could be regarded as a derivative of the 1 860 brick structure, in particular what is substantially similar to the 1 860 brick structure and consequently prohibited under German copyright law. NDC is currently offering data in a structure consisting in around 4 000 bricks. This structure is consistent with the structures used by the German postal services. Nevertheless NDC has signed a certain number of new contracts since the 17 September judgment was rendered and there is now apparently greater scope for competitors of IMS to stay on the market as NDC represented between […] and […] % in value of the market in 2002 and increased its market share by […] points in the first quarter with a large amount of contracts. Moreover, NDC has been able to conclude contracts with some bigger pharmaceutical undertakings in its view since the judgement, whereas it previously had no contracts with the top 20 firms.

(*) The square brackets denote confidential information.

(14) AzyX stopped its activities in Germany on 12 March 2003. AzyX had some contracts and represented between […] and […] % in value of the market for German regional pharmaceutical sales data services at the end of 2002. According to AzyX, the losses were caused by its difficulties, driven in its view by the legal uncertainty, in achieving a sustainable level of penetration of the German market and were no longer bearable.

(15) As regards AzyX, its withdrawal from the German market for regional pharmaceutical sales data services constitutes a material change in circumstances. To the extent that the Commission's decision sought to preserve the public interest in viable competition on that market until a final decision could be adopted in this case, that objective can no longer be realised by requiring the grant of a licence to AzyX. The grant of such a licence to AzyX therefore is not possible and is no longer urgent.

(16) As regards NDC's own interests and the public interest in the maintenance of the sole surviving source of competition, it is not necessary for the Commission to take a position on the likely outcome of the pending proceedings for breach of copyright and unfair competition between IMS and NDC. The Commission notes that the Frankfurt Higher Regional Court's judgment of 17 September 2002 coincides with an improvement in the market position of NDC, based on use of the abovementioned structure. In particular, NDC has, for the first time, succeeded in concluding contracts with some larger pharmaceutical companies in the period subsequent to the judgment and its projections for 2003 indicate a general improvement relative to previous years. Therefore, without prejudice to the question whether the judgment of 17 September 2002 has caused this improvement in the commercial position of NDC, there has been a material change in circumstances. The threat of extinction of NDC, posed to NDC and to the public interest in competition, no longer has the urgency to require the grant of a licence to NDC which was identified by the Commission at the time of adoption of its Decision and which is necessary to justify the maintenance of interim measures.

(17) It is therefore necessary to withdraw Decision 2002/165/EC notified to IMS Health on the ground that there is no longer proven urgency requiring the prevention of irreparable damage to NDC and to the public interest in competition before the Commission adopts the decision concluding the present administrative proceeding,

HAS ADOPTED THIS DECISION:

Article 1

Commission Decision 2002/165/EC of 3 July 2001, relating to a proceeding pursuant to Article 82 of the EC Treaty (COMP/D3/38.044 NDC Health/IMS Health: Interim measures) is hereby withdrawn.

Article 2

This Decision is addressed to:

IMS Health
Harewood Avenue
London NW1
United Kingdom.

Done at Brussels, 13 August 2003.

For the Commission
Mario MONTI
Member of the Commission