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Navigating the intersection between IP and competition law: some clarity from the Belgian Supreme Court

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The refusal to grant a licence for intellectual property (IP) rights can sometimes conflict with competition law. This topic has already been explored in the case law of national courts and the Court of Justice of the European Union, most notably in the landmark case *IMS Health* (C418/01) of 29 April 2004. Such refusal has often been addressed under the prohibition of abuse of dominant position, a topic that is of course particularly relevant in FRAND (Fair, Reasonable, and Non-Discriminatory) litigation. To succeed, the party requesting a licence typically needs to demonstrate the dominant position of the IP rights holder in the relevant market, a task that can prove difficult in practice.

Since 2020, Belgium has added new provisions to its Code of Economic Law (CEL) to prohibit abuses of economic dependency, in addition to its provisions relating to the abuse of a dominant position. Economic dependency is defined as “*the position of subjection of a company to one or more other companies characterised by the absence of a reasonably equivalent alternative available within a reasonable timeframe, at reasonable conditions and costs, enabling the latter or each of the latter to impose services or conditions that could not be obtained under normal market circumstances*”. Article IV.2/1 CEL reads : “*It is prohibited for one or more companies to abuse a position of economic dependence in which one or more companies find themselves in relation to it or them, where competition is likely to be affected in the Belgian market concerned or a substantial part thereof. (...) [a non exhaustive list of abusive practices is then given]*”. It follows from this provision, as well as from Belgian case-law, that the following three conditions must be met to characterise an abuse of economic dependence:

- (i) First, one company must be economically dependent on another;
- (ii) Second, this situation must be exploited abusively;
- (iii) Third, this has an effect on competition in the relevant Belgian market or a substantial part of it.

Provided that the above conditions are met, the Belgian legislator’s intention was therefore to enable Courts to sanction abusive behaviour, regardless of the existence of a dominant position on the Belgian market. Belgian Courts have already applied these provisions on several occasions, for instance in relation to a manufacturer’s refusal to continue supplying goods to retail stores or the refusal to provide banking services. Yet it wasn’t until 2022 that a Belgian Court applied these

provisions for the first time to the field of IP, in the case *Tunstall v. Télé-Secours and Victrix*.

The facts of this case can be summarised as follows : Télé-Secours, a telecare services provider in the Brussels region, historically relied on software and hardware from its provider, Tunstall. Tunstall holds EP 2 160 038 which protects among other things, “*a system for transmitting dual tone multi-frequency (“DTMF”) digits across a packet-switched network*”. Eventually, when Télé-Secours tried to replace Tunstall’s software by a software developed by the company Victrix (now part of Careium), Tunstall alleged patent infringement against both Victrix and Télé-Secours, claiming that Victrix’ sale of the software and its use by Télé-Secours infringed its patent rights.

In response, Victrix and Télé-Secours counterclaimed by requesting the Brussels Enterprise Court to order Tunstall to offer a licence for the use of its patent, arguing that the refusal constituted an abuse of dominant position and/or of economic dependence. While the Court rejected the claim based on the abuse of dominant position because it considered that such a position was not established, it found that Tunstall’s refusal did constitute an abuse of both Télé-Secours and Victrix’ economic dependence towards Tunstall. The Court notably concluded that Victrix could not enter the relevant Belgian market without a licence from Tunstall. Tunstall was thus ordered to grant a licence.

Tunstall appealed this judgment and the Brussels Court of appeal overturned the order to grant a licence. The Court notably found that Tunstall’s refusal to grant a licence to Victrix could not constitute an abuse of economic dependence because there was no preexisting contractual relationship between both parties. The Court referred to Belgian case-law and legal authorities pointing towards such a requirement of a preexisting contract.

Victrix and Télé-Secours appealed to the Supreme Court, which – amongst other things – examined the necessity of a preexisting contract to establish economic dependency. The Supreme Court quashed the Court of appeal decision, ruling that economic dependency can exist in the absence of a preexisting contractual relationship between the licensor and the licensee.

The commented decision is important as it underscores that the refusal by an established company to license IP rights to a company trying to enter a market can be deemed abusive without having to establish dominance, nor any contractual relationship between parties. The case has been remanded to the Court of appeal of Mons for further proceedings.

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