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# The Belgian Competition Council orders an ICT company to disclose proprietary information over its electronic network (CRM/Portima)

**Belgique, Pratiques unilatérales, Abuse of dominant position, Access to information, Essential facility, Access to facilities, Dominance (notion), Information technology**

I. Parties

Portima is an ICT company which provides electronic network and software services to insurance companies and brokers.

Computer Ressource management ("CRM") is a rival company which develops secured information exchange softwares for insurance companies and brokers.

II. Facts

Portima has developed an electronic network called AS/2 which enables insurance companies and brokers to communicate swiftly with respect to insurance policies, terms and other relevant commercial information. Portima has also developed mastering software called "BRIO" which, in the same way as an operating system, allows brokers and insurance companies to use the core functions of the AS/2 network. CRM has developed a similar program called " Insusoft".

CRM filed a request for provisional measures against Portima in order to obtain access to certain information relating to the AS/2 network. According to CRM, Portima refuses to disclose to third parties information about the changes it brings to the AS/2 computer program and the AS/2 modules. As a result, softwares competing with BRIO cannot interoperate adequately with the AS/2 network.

CRM believes that Portima's course of conduct, which allegedly distorts competition in the market for the provision of mastering softwares, is akin to an abuse of a dominant position contrary to Article 3 of the Belgian Competition Act (the national equivalent to article 82 EC).

III. The decision

Following the President of the Competition Council's unproblematic assertion of the Council's jurisdiction to grant provisional measures on the basis of Article 62 of the Belgian Competition Act, the Council examined the merits of CRM's allegations.

To assess the veracity of CRM's allegations, the Council applied a two-tier approach, reminiscent of the methodology applied in the ECJ case law. The Council first assessed whether Portima held a dominant position.

The Council made a distinction between the national market for the provision of mastering softwares, specifically for insurance brokers, and the national market for the communication networks for the exchange of information between insurance companies and brokers. One the one hand, on the market for the provision of mastering software, Portima had

a market share of 75% to 80%. The rest of the market is divided between four independent software producers. On the other hand, AS/2 was one of a kind on the market of information exchange networks between insurance companies and brokers. Therefore the Council decided that Portima holds a dominant position on both markets.

The Council subsequently turned to the assessment of Portima's withholding of technical specifications on the AS/2 network and modules. Belgian insurance brokers need a communication network such as the AS/2 network. Other forms of communication are neither actual nor substantial substitutes. Portima's refusal to disclose technical specifications hindered or even prevented the compatibility of mastering softwares other than BRIO with AS/2. This refusal is preventing the emergence of a new similar product for which there is a potential demand by the insurance brokers.

Consequently, rival mastering softwares were being technically foreclosed from the market and competition on a secondary market was eliminated, with insurance brokers being forced to purchase Portima's mastering software. Portima has thus unlawfully abused its dominant position.

The Council ultimately considers that CRM is exposed to the risk of suffering "serious, immediate and irremediable harm". In addition, Portima's practices are likely to injure the "general economic interest". Therefore, Portima should communicate all the necessary information to all producers of competing software under a penalty of 2000 € per day.

IV. Comments

At first glance, the Council's decision shares obvious analogies with the notorious Magill (ECJ, April 6th, 1995, RTE and ITP v. Commission, Joined Cases C-241/91 P and C-242/91 P, [1995] ECR I-743) and IMS Health case-law (ECJ, April 29 th, 2004, IMS Health, Case C-418/01, [2004] ECR I-5039), where the Community Court subordinated a finding of abusive refusal to licence intellectual property rights ("IPRs") to the proof that four conditions were met : (i) the IPR is indispensable ; (ii) the refusal to licence prevents the emergence of a "new product" ; (iii) the refusal to licence eliminates competition on a secondary market ; and (iv) the refusal to licence finds no objective justification.

On closer examination, however, the Portima decision stands apart from these cases. In the present case, a number of downstream operators sought to obtain effective access to the AS/2 network, in order to compete on market for mastering softwares. Absent conclusive evidence of the existence of IPRs over the AS/2 plaform, the Council should have concluded that the plaintiff was demanding access to an input not different from a physical infrastructure (such as e.g., railway, telecommunications or gas distribution networks). Yet, the Council decided to apply the four conditions set out by the EC case-law in Magill and IMS Health, whilst this test only applies to situations involving IPRs.

A plausible reason for this confusion is that the Council has assumed the existence of IPRs, due to the fact that the case concerned a virtual electronic network and software producers. In much the same way as the CFI in its recent Microsoft ruling (CFI, September 17th, 2007, Microsoft v. Commission, Case T-201/04), the Council appears reluctant to deal with the painstaking issue whether the dispute involved IPRs. Rather than belonging to the Magill or IMS Heatlh strand of cases, the Portima decision is in fact much closer to Microsoft.

In practice, enforcing the stringent Magill and IMS Health standard to cases where incentives to innovation do not necessarily deserve a significant degree of protection, may create a risk of type II errors (false negatives). In the present case, the Council managed to alleviate that concern - and found Portima guilty of abuse - on the basis on a superficial assessment of the four conditions (and in particular of the "new product" requirement), which is open to criticism.

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