

## The Brussels Court Of Appeal Recognizes In-House Counsel Legal Privilege

On March 5, 2013, the Brussels Court of Appeal issued a landmark judgment (“Judgment”) recognizing that, under Belgian law, legal advice rendered by in-house counsel (and related correspondence) benefits from a protection equivalent to legal privilege. The Judgment was given in a case opposing telecommunications incumbent Belgacom to the Belgian competition authority (“BCA”). Pursuing a long-time effort in defense of in-house counsel privilege, Cleary Gottlieb represented *pro bono* the Belgian Institute for Company Lawyers (“IJE/IBJ”) as intervener in support of Belgacom.

The Judgment stems from inspections (“dawn-raids”) conducted at Belgacom’s premises in October 2010, during which the BCA for the first time seized a large amount of electronic files, including dozens of documents originating from or addressed to in-house counsel. Subsequently, Belgacom claimed that many of the documents seized fell out-of-the-scope of the BCA’s inspection mandate, and that legal advice rendered by its in-house lawyers was privileged. After the BCA partly denied both claims, Belgacom brought an appeal before the Brussels Court of Appeal.

The Judgment has important implications at Belgian level for it clarifies the scope of a statutory provision introduced in 2000, whereby legal advices rendered by in-house counsel (members of the IJE/IBJ) are “*confidential*”.<sup>1</sup> It also has consequences at EU level, because: (i) it expressly rejects the applicability of the *Akzo* ruling of the EU Courts (which denied in-house counsel privilege in EU antitrust proceedings) in national competition proceedings;<sup>2</sup> and (ii) it may reopen the debate on the recognition of in-house counsel legal privilege at EU level insofar as it derives such legal privilege in the Belgian context from the right to privacy protected by Article 8 of the European Convention of Human Rights (“ECHR”) and Article 7 of the EU Charter of Fundamental Rights.

Section I below summarizes the background of the case, Section II outlines the reasoning underpinning the Judgment, and Section III considers the implications.

---

<sup>1</sup> Art. 5 of the Act establishing the IJE/IBJ, *M.B./B.S.*, July 4, 2000, p. 23252.

<sup>2</sup> Joined Cases T-125/03 and T-253/03, *Akzo Nobel Chemicals et al./Commission* [2007] II-3523; Case-550/07, *Akzo Nobel Chemicals et al./Commission*, [ECR] 2010 I-8301.

## I. BACKGROUND

In 2000, Belgium passed a statute establishing the IJE/IBJ and holding that “*advice rendered by company lawyers [members of the IJE/IBJ] to the benefit of their employer and in the framework of their activity as legal counsel, are confidential*”. The actual scope and effect of that provision had been debated ever since. The controversy was particularly acute in relation to competition law investigations, notably after the BCA publicly announced in 2008 that it would henceforth deny legal privilege to in-house counsel legal advice in view of the 2007 *Akzo* judgment of the EU Tribunal, which was later confirmed by the EU Court of Justice.

The validity of the BCA’s practice remained untested until Belgacom brought suit in 2010 against a decision whereby the BCA refused to put aside in-house counsel legal advice in the aftermath of an inspection carried out at its premises in October of that year.<sup>3</sup> The dispute between Belgacom and the BCA also related to other issues, including the “in/out-of-scope” character of numerous documents seized during the inspection, the language of the case and, eventually, the jurisdiction of the Brussels Court of Appeal to hear and decide on these matters.

The Brussels Court of Appeal first issued an interlocutory judgment suspending the communication of the contentious documents to the BCA officials in charge of the investigation.<sup>4</sup> It then sought confirmation of its jurisdiction by the Constitutional Court. Once confirmed, the Court invited the parties to file briefs on the merits of the issues raised before it. At that time, the IJE/IBJ decided to intervene for the first time in a pending court case, in support of Belgacom’s claim that the confidentiality attached to the communications originating from and addressed to its in-house counsel, inasmuch as they were IJE/IBJ members, precluded their seizure in national antitrust proceedings.

In substance, the BCA argued that it was legitimate to apply the solution prevailing at EU level (*i.e.*, refusal of in-house counsel privilege), as confirmed by the EU Courts in *Akzo*, in the context of national competition investigations seeking to enforce EU antitrust provisions, *in casu* Art. 102 TFEU. Belgacom and the IJE/IBJ, in contrast, argued that the *Akzo* ruling was not applicable to investigations carried out by national competition authorities, and that in-house counsel legal advice was protected from seizure by Belgian statutory law and/or Articles 6 and 8 ECHR (protecting the right to a fair trial and the right to privacy, respectively), even when national authorities are applying EU law.

---

<sup>3</sup> The dispute related to 197 emails originating from or addressed to Belgacom’s in-house counsel after April 2008, as well as to three documents predating April 2008 that were deemed by the BCA not to contain legal advice or by Belgacom not to relate to the case.

<sup>4</sup> In that interlocutory judgment, the Court of Appeal already hinted that the *Akzo* ruling of the EU Courts “*did not seem*” applicable to Belgian competition proceedings.

## II. THE COURT OF APPEAL’S REASONING

The Court of Appeal reasoned in five steps to reach the conclusion that in-house counsel legal advice deserved a protection equivalent to legal privilege under Belgian law:

- First, it held that the legal privilege benefiting members of the Bar (*i.e.*, outside counsel) was a fundamental right originating primarily in Arts. 8 ECHR protecting the right to privacy, and expressly referred to the corresponding provision of the EU Charter of Fundamental Rights (Art. 7).
- Second, it rejected Belgacom’s and the IJE/IBJ’s claim that in-house counsel legal advice falls within the ambit of Art. 458 of the Criminal Code, which is the historical legal basis of legal privilege in Belgium. In particular, the Judgment underlines that, in 2000, the Belgian legislature purposefully preferred a reference to the notion of “confidentiality” over a reference to Art. 458 when granting protection to in-house counsel legal advice (though this is questionable). Likewise, the Judgment said that Art. 458 only applies to members of professions to which it is “necessary” to turn, which would not be the case for in-house counsel in relation to legal advice.<sup>5</sup>
- Third, the Court of Appeal emphasized that, according to the 2000 statute, in-house counsel fulfill a task of general interest, which is to “*ensure a correct application of the law by companies*”. It is only in furtherance of that task, which results in the provision of legal advice, that they deserve protection. Legal advice, however, should be understood broadly, the Court held, as including requests for advice, related correspondence and preparatory materials.
- Fourth, in view of the task of general interest fulfilled by in-house counsel, denying a protection equivalent to legal privilege to their legal advice would amount to a disproportionate interference with the right to privacy benefiting companies pursuant to Art. 8 ECHR. In support of that key statement, the Court of Appeal considered that: (i) employers must be “*certain*” that requesting legal advice from in-house counsel could not result in a disclosure to third-parties; and (ii) the possibility to interfere with the confidentiality of their legal advice would affect “*the inner essence of the task entrusted to in-house counsel*”.

---

<sup>5</sup> However, there is case-law in other areas where appellate courts have referred to Art. 458 in order to set aside in-house counsel legal advice as evidence in court proceedings. In any event, Art. 458 merely provides for criminal penalties in case of disclosure of “secrets” entrusted to certain professions, including doctors and pharmacists, and says nothing about a possible prohibition of seizure in case of inspections by a public authority. Accordingly, the Presidents of the French- and Dutch- speaking sections of the Brussels Bar published a joint opinion in 2012 stating that Art. 458 was not a proper foundation for legal privilege, which was to be rooted instead in Arts. 6 and 8 ECHR (see J.-P. Buyle and D. van Gerven, “Le fondement et la portée du secret professionnel de l’avocat dans l’intérêt du client”, *J.T.*, 2012, p. 327).

- Fifth, most importantly, the Judgment rejected the application of the *Akzo* ruling in national competition proceedings, including when the BCA enforces EU competition law provisions. The different solution prevailing under Belgian law arises from the fact that Belgium and the EU are two distinct legal orders, the Court said, which is illustrated by the fact that, according to EU law, when national competition authorities carry out inspections “*at the request of the Commission*” they have to do so “*in accordance with their national law*”.<sup>6</sup>

Accordingly, the Court of Appeal concluded that the BCA had breached Art. 8 ECHR by seizing legal advice rendered by Belgacom’s in-house counsel and ordered the relevant files to be erased.

### III. IMPLICATIONS

Though it can still be appealed to the Belgian Supreme Court, the Judgement has important implications at Belgian level, as follows:

- It confirms – after years of legal uncertainty – that the confidentiality of in-house counsel legal advice involves a prohibition from seizure in investigations of national competition proceedings. That protection extends to requests for advice, related correspondence and preparatory materials.
- By analogy, the protection of in-house counsel legal advice can apply to any other enforcement measures because Article 8 ECHR is applicable irrespective of the nature of the public action, whether civil, administrative or criminal.
- However, even though the Judgment uses sweeping language, it is safe to consider that legal privilege only applies to legal advice rendered by in-house counsel who are members of the IJE/IBJ. Indeed, Belgian statutory law only confers confidentiality to IJE/IBJ members’ legal advice, because they are subject to professional responsibility rules.

In addition, the Judgment has or may have interesting consequences at EU level too:

- First, it expressly rejects the applicability of the *Akzo* ruling to national competition proceedings, even when they seek to enforce EU competition law. Likewise, it confirms that national law applies (and therefore legal privilege should be granted) when a national authority carries an inspection at the request of the EU Commission (but not when it merely assists EU officials during an inspection carried out by the Commission).

---

<sup>6</sup> Art. 22 of EU Regulation 1/2003 on the implementation of the rules on competition laid down in Articles [101] and [102] of the Treaty, *O.J.E.C.*, L.1, January 4, 2003, p. 1.

- More fundamentally, the fact that the Court of Appeal founded the legal privilege of in-house counsel on Art. 8 ECHR, while mentioning its equivalent in the EU Charter of Fundamental Rights, (re)opens new avenues to defend the recognition of privilege at EU level, notably as the Union is becoming a party to the ECHR Treaty. Until more EU Member States give in-house counsel legal advice privilege at national level, however, it remains unclear whether the EU Court of Justice would be willing to change its position.

Practically, in-house counsel based in Belgium are strongly advised to register with the IJE/IBJ in order to benefit from the protection granted by the Judgment. In order to prevent disputes in case of inspections, IJE/IBJ members should also pay great care and attention to the proper labelling of their legal advice, related correspondence and preparatory materials (possible wording include: (i) “Confidential - Protected by Article 5 of the Act of March 1<sup>st</sup>, 2000”; and (ii) “Confidential - Prepared for the purpose of obtaining legal advice from (or at the request of) in-house counsel”). The IJE/IBJ also recommends its members to immediately claim the benefit of the Judgment in ongoing procedures.

\* \* \*

If you have any questions, please feel free to contact any of your regular contacts at the firm or any of our partners and counsel listed on our website at <http://www.clearygottlieb.com>.

CLEARY GOTTLIEB STEEN & HAMILTON LLP

**NEW YORK**

One Liberty Plaza  
New York, NY 10006-1470  
T: +1 212 225 2000  
F: +1 212 225 3999

**WASHINGTON**

2000 Pennsylvania Avenue, NW  
Washington, DC 20006-1801  
T: +1 202 974 1500  
F: +1 202 974 1999

**PARIS**

12, rue de Tilsitt  
75008 Paris, France  
T: +33 1 40 74 68 00  
F: +33 1 40 74 68 88

**BRUSSELS**

Rue de la Loi 57  
1040 Brussels, Belgium  
T: +32 2 287 2000  
F: +32 2 231 1661

**LONDON**

City Place House  
55 Basinghall Street  
London EC2V 5EH, England  
T: +44 20 7614 2200  
F: +44 20 7600 1698

**MOSCOW**

Cleary Gottlieb Steen & Hamilton LLC  
Paveletskaya Square 2/3  
Moscow, Russia 115054  
T: +7 495 660 8500  
F: +7 495 660 8505

**FRANKFURT**

Main Tower  
Neue Mainzer Strasse 52  
60311 Frankfurt am Main, Germany  
T: +49 69 97103 0  
F: +49 69 97103 199

**COLOGNE**

Theodor-Heuss-Ring 9  
50688 Cologne, Germany  
T: +49 221 80040 0  
F: +49 221 80040 199

**ROME**

Piazza di Spagna 15  
00187 Rome, Italy  
T: +39 06 69 52 21  
F: +39 06 69 20 06 65

**MILAN**

Via San Paolo 7  
20121 Milan, Italy  
T: +39 02 72 60 81  
F: +39 02 86 98 44 40

**HONG KONG**

Cleary Gottlieb Steen & Hamilton (Hong Kong)  
Bank of China Tower, 39<sup>th</sup> Floor  
One Garden Road  
Hong Kong  
T: +852 2521 4122  
F: +852 2845 9026

**BEIJING**

Twin Towers – West (23<sup>rd</sup> Floor)  
12 B Jianguomen Wai Da Jie  
Chaoyang District  
Beijing 100022, China  
T: +86 10 5920 1000  
F: +86 10 5879 3902

**BUENOS AIRES**

CGSH International Legal Services, LLP-  
Sucursal Argentina  
Avda. Quintana 529, 4to piso  
1129 Ciudad Autonoma de Buenos Aires  
Argentina  
T: +54 11 5556 8900  
F: +54 11 5556 8999

**SÃO PAULO**

Cleary Gottlieb Steen & Hamilton  
Consultores em Direito Estrangeiro  
Rua Funchal, 418, 13 Andar  
São Paulo, SP Brazil 04551-060  
T: +55 11 2196 7200  
F: +55 11 2196 7299

**ABU DHABI**

Al Sila Tower, 27<sup>th</sup> Floor  
Sowwah Square, PO Box 29920  
Abu Dhabi, United Arab Emirates  
T: +971 2 412 1700  
F: +971 2 412 1899

**SEOUL**

Cleary Gottlieb Steen & Hamilton LLP  
Foreign Legal Consultant Office  
19F, Ferrum Tower  
19, Eulji-ro 5-gil, Jung-gu  
Seoul 100-210, Korea  
T: +82 2 6353 8000  
F: +82 2 6353 8099