

In-house legal privilege recognised under Belgian Competition Law

In a judgment of 5 March 2013, the Brussels Court of Appeal has recognised that documents produced by in-house lawyers are covered by legal privilege in investigations under the Belgian Competition Act.

The judgment diverges from the established case-law of the European Courts and goes against the decisional practice of a number of national competition authorities.

The Belgian Competition Authority has already stated that it is assessing the possibility of appealing the judgment to the Supreme Court.

Background to the judgment

The judgment is based on an appeal against a dawnraid by the Belgian Competition Authority which took place in the offices of Belgacom, the Belgian telecommunications incumbent, in 2010. The dawnraid was based on a complaint by two competitors and was the start of an investigation into alleged abusive behaviour by Belgacom in the ADSL market. As is customary, a number of electronic documents and e-mails had been seized, amongst which e-mails that were sent by or to in-house lawyers.

The judgment

The judgment of the Brussels Court of Appeal ("the Court") bases its reasoning on Article 5 of the Law which organises the Belgian Institute for in-house lawyers ("*Institut des Juristes d'Entreprises/Instituut voor Bedrijfsjuristen*") and the parliamentary discussions around that Law. Article 5 of the Law provides that "*opinions given by in-house counsel, for the benefit of his employer and in the context of his activity as in-house counsel, are confidential.*"

The Court holds that this provision, read in conjunction with Article 8 of the European Convention for Human Rights ensuring the right to privacy, means that the Belgian Competition Authority cannot seize documents containing legal advice rendered by

Key issues

- Brussels Court of Appeal has recognised in-house lawyers have legal privilege.
- Belgian Competition Authority is considering appeal to the Supreme Court.

in-house counsel. The Court extends this principle to requests for legal advice, correspondence relating to the request, drafts opinions and preparatory documents.

The interplay with Akzo

The Court recognises that this view is not in line with the Akzo and AM&S judgments at the European level but refers to the specific provision in the Belgian law and to the fact that the procedural rules under national and community law do not have to be aligned.

Practical consequences

1. The judgment only applies to members of the Belgian Institute of in-house lawyers.
2. In the context of competition investigations by the Belgian Competition Authority, companies can now oppose the seizure of legal advice produced by their in-house counsel.
3. This does not apply to competition investigations by the European Commission where the rule of Akzo still fully applies.
4. In case the Belgian Competition Authority performs a dawnraid at the request of the European Commission or another competition authority, Regulation 1/2003 provides that it will exercise its powers in accordance with its national law. One can therefore assume that the principle of legal privilege for in-house counsel also applies to this scenario. The Court expressly supports that view. Whether the European Commission will accept this substantial divergence from its own practice in raids which

are organised on its behalf, remains an open question.

5. In practice, it is of paramount importance that documents of in-house lawyers active in Belgium are clearly labelled "privileged" and, where feasible, are kept in separate folders so as to ensure a proper defence in case of a dawnraid.
6. In ongoing investigations by the Belgian Competition Authority, it may be useful to request that any in-house counsel documents are discarded from the file.
7. The Belgian Competition Authority has already announced that it is considering an appeal before the Supreme Court.

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