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RECOGNIZING THE LEGAL PRIVILEGE OF IN-HOUSE COUNSEL

The Brussels Court of Appeal and the Dutch Supreme Court are now recognizing the legal privilege of in-house counsel, which challenges the applicability of the landmark *Akzo* ruling. **Damien Gerard** and **Maurits Dolmans**[1] dig deeper

On March 5, 2013, the Brussels Court of Appeal issued a landmark judgment recognizing that, under Belgian law, legal advice (and related correspondence) given by in-house counsel benefits from a protection equivalent to legal privilege. The Court of Appeal's judgment is the result of inspections ("dawn raids") conducted in October 2010 at the premises of the incumbent Belgian telecommunications operator, Belgacom, during which the Belgian Competition Authority ("BCA"), for the first time, seized a large number 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 outside the scope of the BCA's inspection mandate, and that legal advice provided by its in-house lawyers was privileged. After the BCA dismissed both claims in part, Belgacom brought an appeal before the Brussels Court of Appeal.

The *Belgacom* judgment has important implications at Belgian level, because it clarifies the scope of a statutory provision introduced in 2000, whereby legal advice given by members of the Belgian Institute for Company Lawyers (IJE/IBJ) is "*confidential*" (see Article 5 of the Act of March 1, 2000 establishing the IJE/IBJ). 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 (see T-125 and 253/03 and C-550/07); and (ii) it may reopen the debate on the recognition of in-house counsel legal privilege at EU level insofar as such legal privilege was held by the Court of Appeal to derive 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.

Ten days after the *Belgacom* judgment, in the *Delta*[2] case, the Dutch Supreme Court (*Hoge Raad*) upheld privilege for in-house counsel who are members of the Bar ("*advocaat in loondienst*," also known as "Cohen advocaat"). In a very brief judgment, the Supreme Court held, in essence, that an employed member of the Bar deserves the same rights to legal privilege as outside counsel. To reach that decision, the court expressly refused to follow the *Akzo* ruling of the European Court of Justice (which also involved a Dutch in-house counsel who was a member of the Bar), on the grounds that: (i) *Akzo* applies in EU competition law proceedings only; and (ii) it is long-standing practice in the Netherlands that the "professional statute" signed by an employer is sufficient to guarantee both the application of the ethical rules promulgated by the Dutch Bar Association and the independence of in-house counsel who are members of the Bar.

The remainder of this article is structured as follows: Section I below summarizes the background of the *Belgacom* case; Section II outlines the reasoning underpinning the *Belgacom* judgment; and Section III considers the implications of the Belgian and Dutch cases inasmuch as, while facing two different models for the regulation of the in-house counsel profession, they have both clearly rejected the applicability (and potential extension) of the *Akzo* ruling to national proceedings and, further, challenged the rationale underlying the approach adopted by the EU Courts.

I Background to the *Belgacom* judgment

In 2000, Belgium passed a statute establishing the IJE/IBJ, which provided that "*advice provided by company lawyers* [members of the IJE/IBJ] *to the benefit of their employer and in the framework of their activity as legal counsel, is confidential*." The actual scope and effect of that provision has been debated ever since. The controversy was particularly acute in relation to competition law investigations, notably after the BCA publicly announced in 2008 that, in view of the 2007 *Akzo* judgment of the EU General Court (later confirmed by the Court of Justice), it would henceforth not recognize legal advice given by in-house

counsel as being covered by legal privilege. The validity of the BCA's practice remained untested until 2010, when Belgacom appealed a decision whereby the BCA refused to set aside materials (about 200 e-mails) containing in-house counsel legal advice following an inspection carried out at its premises in October of that year. 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. 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. It was at this point that, for the first time, the IJE/IBJ decided to intervene in a pending court case, in support of Belgacom's claim that 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 approach taken 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* Article 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.

The court concluded the BCA had breached Article 8 ECHR by seizing legal advice provided by Belgacom's in-house counsel

II The Court of Appeal's reasoning in the *Belgacom* case

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

- Firstly, it held that the legal privilege benefiting members of the Bar (*i.e.*, outside counsel) was a fundamental right originating primarily in Article 8 ECHR (protecting the right to privacy), and expressly referred to the corresponding provision of the EU Charter of Fundamental Rights (Article 7).

- Second, it rejected Belgacom's and the IJE/IBJ's claim that in-house counsel legal advice falls within the ambit of Article 458 of the Criminal Code, the historical legal basis of legal privilege in Belgium. In particular, the judgment states that, in 2000, the Belgian legislature purposefully preferred a reference to the notion of "confidentiality" over a reference to Article 458 when granting protection to in-house counsel legal advice. Likewise, the judgment held that Article 458 only applies to members of professions to which it is "necessary" to turn, which would not be the case for legal advice given by in-house counsel.[3]

- Third, the Court of Appeal emphasized that, according to the 2000 IJE/IBJ 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 light 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 under Article 8 ECHR. In support of this 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 of interference with the confidentiality of their legal advice would affect "*the essence of the task entrusted to in-house counsel*."

- Fifth, and most importantly, the judgment rejected the application of the *Akzo* ruling in national competition proceedings, including when the BCA enforces EU competition law provisions. In the Court of Appeal's view, the different approach under Belgian law is due to the fact that Belgium and the EU are two distinct legal orders, as 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*" (cf. Article 22 of EU Regulation 1/2003).

Accordingly, the Court of Appeal concluded that the BCA had breached Article 8 ECHR by seizing legal advice provided by Belgacom's in-house counsel and ordered the relevant files to be destroyed.

III Implications of the Dutch and Belgian cases

The *Delta* case of the Dutch Supreme Court confirms existing practice in the Netherlands and, it is hoped, will be persuasive in other jurisdictions. Indeed, it may encourage other countries to adopt arrangements similar to those in the Netherlands, recognizing privilege for in-house counsel in situations where the employer has confirmed in writing the independence of the in-house counsel and has acknowledged the binding nature of the applicable ethical rules.

Bar associations in other jurisdictions should consider implementing similar arrangements to those in Belgium and the Netherlands

In jurisdictions where in-house counsel cannot be members of the Bar, the Belgian model, namely the establishment of a separate professional order for company lawyers – such as the IJE/IBJ – with its own ethical rules, offers an interesting alternative. Although it may still be appealed to the Belgian Supreme Court, the *Belgacom* judgment makes clear that the confidentiality of in-house counsel legal advice prohibits the seizure of such material during investigations carried out by the BCA and therefore has an effect similar to legal privilege. That protection extends to requests for advice, related correspondence and preparatory materials. By analogy, the protection of in-house counsel legal advice may also be applicable to enforcement measures other than competition investigations, as Article 8 ECHR is applicable irrespective of the nature of the public action, whether civil, administrative or criminal.

In addition, both the *Delta* and *Belgacom* judgment have or may have interesting consequences at EU level as well. Firstly, both courts expressly rejected the applicability of the *Akzo* ruling to national competition proceedings, even when these proceedings seek to enforce EU competition law. Likewise, they confirm that national law applies (and therefore legal privilege should be granted) when a national authority carries out an inspection at the request of the European Commission (but not when it merely assists EU officials during an inspection carried out by the commission).

More fundamentally, the fact that the judgment in *Belgacom* based the legal privilege of in-house counsel on Article 8 ECHR, while mentioning its equivalent in the EU Charter of Fundamental Rights, opens up or perhaps re-opens new avenues to defend the recognition of in-house counsel privilege at EU level, particularly in light of the accession of the Union to the ECHR. 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 depart from the position it took in *Akzo*.

Generally, in-house counsel based in Belgium are strongly advised to register with the IJE/IBJ. Likewise, in-house counsel in the Netherlands should follow the requirements for recognition as "employed counsel" (*advocaat in loondienst*). More broadly, company lawyers or Bar associations in other jurisdictions should consider implementing similar arrangements to those in place in Belgium and the Netherlands, either by establishing a separate professional order or by having employers recognize the binding character of ethical rules issued by the national Bar association and in-house counsel's independence. More practically, in order to prevent disputes in case of inspections, both IJE/IBJ members in Belgium and *advocaat in loondienst* in the Netherlands should also take great care and pay close attention to the proper labelling – as "Privileged & Confidential" – of their legal advice, related correspondence and preparatory materials. ■

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Footnotes

1 Cleary Gottlieb Steen & Hamilton LLP.

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2 Hoge Raad (Dutch Supreme Court), case 12/02667, *Delta et al.*, March 15, 2013 (available at www.rechtspraak.nl, ref. LJN:BY6101)

3 NB: (i) there is case-law in other areas where Belgian appellate courts have referred to Article 458 in order to set aside in-house counsel legal advice as admissible evidence in court proceedings; and (ii) in any event, Article 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.