Country Reports

Belgium

Recognition of Legal Professional Privilege to In-House Counsel and Boundaries to the Seizing of Business Data during Inspections

Jeroen Dewispelaere*

On 5 March 2013, the Brussels Court of Appeal rendered a landmark judgment in which it confirmed the plea of Belgacom, the historic telecommunications operator in Belgium, that advice from in-house lawyers benefits from the legal professional privilege and may therefore not be examined by the Belgian Competition Authority. The Court also ruled that the selection of digital files seized during an inspection must be based upon precise, appropriate and proportionate keywords. In particular, there must be a relevant link between the subject-matter and the purpose of the inspection on the one hand and the search term(s) on the other.

I. Introduction

The Brussels Court of Appeal (‘Court’) occupies a particular and important position in the Belgian legal landscape, as it has an exclusive competence to render judgments in cases against decisions from the Belgian Competition Authority (‘BCA’). Indeed, pursuant to the relevant national legislation, the Court is entitled to assess the decisions of the BCA in relation to the evaluation of alleged restrictive practices and the control of concentrations.

In principle, the Court disposes of a full authority to review the decisions of the BCA in antitrust matters (so-called “volle rechtsmacht” or “pouvoir de pleine juridiction”). This means that the Court can set its findings in the place of the decision of the BCA, without however taking up the role of the latter. In this respect, the Court can for instance decide that the BCA has unjustly issued an infringement decision because there is insufficient proof of the practices under scrutiny or because these practices are not contrary to competition law. On the other hand, the Court may also determine that certain practices qualify as anticompetitive behaviour and, subsequently, take the necessary measures to tackle this behaviour.

It follows from the above that the decisions of the Court in antitrust matters are not only relevant for the interests of the parties concerned, but can also have far-reaching consequences with respect to the application of competition law in Belgium. For instance, the Court already rendered important judgments on the application of interim measures by the BCA and on the participation of the BCA in proceedings brought before national courts.

This country report will focus on a recent judgment of 5 March 2013 in which the Court confirmed the plea of Belgacom, the traditional telecommunications operator.

* Attorney-at-law at &DE BANDT advocaten in Brussels.

1 Article 75 of the Act of 15 September 2006 on the Protection of Economic Competition (‘APEC’). This Act has been replaced by book IV of the new Code of Economic Law that was published in the State Gazette of 26 April 2013. The provisions of Article IV.79 of this code correspond to Article 75 of the APEC.

2 Book IV of the new Code of Economic Law brings along some important modifications with respect to this authority, see H. Gilliams, ‘Het nieuwe Belgisch mededingingsrecht’ (2013) 6 RDC•TBH p. 496.


tions operator in Belgium, that advice from in-house lawyers benefits from the legal professional privilege (‘LPP’) and may therefore not be examined by the BCA. In its judgment, the Court also held that the BCA may only make use of precise, appropriate and proportionate keywords when searching the company’s digital records for possible infringements of competition law.

II. Background and facts

As the Belgian incumbent telecommunications operator, Belgacom is active in a full range of telecommunications services providing wholesale and retail services, fixed and mobile telecommunications and voice, data and TV services, mainly at national level. Despite the ongoing liberalisation within the telecom sector as from 1998, Belgacom has retained until today a 100% share in the market for the provision of wholesale unbundled access to the local loop and sub-loops for the purpose of providing broadband and voice services.

In October 2010, the BCA conducted an inspection (“dawn raid”) at Belgacom’s premises as part of the authority’s investigation into the alleged abuse of dominance by Belgacom in the high-speed internet industry following a complaint by other DSL providers Mobistar and KPN Belgium. During this inspection, the BCA seized for the first time a large amount of electronic documents and files, including internal emails containing legal advice given by Belgacom’s in-house counsel to its employer as well as the correspondence related thereto.

Subsequently, Belgacom claimed that many of the digital records fell outside the scope of the inspection mandate and that legal advice rendered by its in-house lawyers was privileged. The BCA’s College of Competition Prosecutors however (partly) denied these claims, referring inter alia to the Akzo ruling of the Court of Justice of the European Union (‘CJEU’).

In March 2011, Belgacom lodged an appeal before the Court. In February 2012, the Belgian Institute for Company Lawyers (‘IJE/IBJ’) joined the case in support of Belgacom’s claim.

III. Findings of the Court

The Court first ascertains that it is competent to deal with the appeal. Indeed, subsequent to the preliminary ruling of the Belgian Constitutional Court of 22 December 2011, the Court considers that, in order to guarantee the right of effective judicial review and the right to a fair trial, any decision of the College of Competition Prosecutors in relation to the selection and the seizure of (electronic) data must fall within the scope of Article 75 of the APEC.

Consequently, the Court determines its position as regards the granting of LLP for advice rendered by in-house counsel and the delimitation of the scope of an inspection by the BCA.

1. The recognition of LPP for in-house counsel

The Court emphasises that, according to Article 5 of the Act of 1 March 2000 establishing the IJE/IBJ (‘IJE/IBJ Act’), in-house lawyers fulfil a mission of...
general interest that consists in ensuring a correct application of the law by companies. According to the Court, the preservation of this general interest mission necessitates that the advice of in-house counsel must be protected against disclosure. Moreover, the Court holds that, in view of this mission, the possibility to interfere with the confidentiality of the legal advice rendered by in-house counsel would amount to a disproportionate interference with the right to privacy as laid down in Article 8 of the European Convention of Human Rights (‘ECHR’). It therefore concludes that the BCA cannot seize any documents or files containing legal advice provided by in-house lawyers or use such information to demonstrate a competition law infringement.\textsuperscript{13}

The Court further explains that the LPP does not cover all activity of in-house counsel, but is limited to the advice given by the in-house counsel to its employer. On the other hand, the Court underlines that the notion of advice is to be understood broadly as including the request for advice, any correspondence related to this request, the draft advice and all preparatory documents. In the same vein, the Court explains that confidentiality is no longer guaranteed once the addressee of the advice has shared this advice to a person outside the company. Ultimately, the Court expressly rejects the application of the \textit{Akzo} ruling of the CJEU to the present case. According to the Court, the CJEU only expresses itself on the situation at European level but does not exclude differing solutions at the level of the Member States.\textsuperscript{14} In this context, the Court further suggests that when the national competition authorities conduct inspections on behalf of the European Commission they must abide to their national law.\textsuperscript{15}

2. The delimitation of the scope of an investigation

As regards the seizure of the digital records of the company under scrutiny, the Court states that before copying any files, the BCA should in principle first evaluate whether or not these files are relevant for the investigation of the alleged anticompetitive behaviour. According to the Court, this principle finds its roots in the Belgian Cybercrime Act of 28 November 2000\textsuperscript{16} and in the case law of the European Court of Human Rights on the right to privacy.\textsuperscript{17}

Along these lines, the Court holds that in the event the BCA has copied a great number of electronic files without making a distinction with respect to their relevance in light of the factual circumstances of the complaint, as in the case at hand, the subsequent selection methodology should guarantee that documents that fall outside the scope of the investigation are deleted from the file. More precisely, in order to avoid fishing expeditions, the BCA may only make use of precise, appropriate and proportionate keywords when searching for possible infringements of competition law. In particular, there must be a relevant link between the subject-matter and the purpose of the inspection on the one hand and the search term(s) on the other. General keywords that may relate to a variety of topics do not respect this requirement. Also, the Court imposes that the selection of an electronic file on the basis of a keyword must be confirmed by a subsequent selection on the basis of at least one other keyword. Once the selection of the digital records is completed, the BCA is furthermore bound to verify the pertinence of the selected files on the basis of a statistically justified sample test. A negative result of this test will affect the “\textit{in scope}” character of the selection.

Finally, the Court rules that the mission assignment can only relate to facts not older than five years from the date the case was referred to the BCA.\textsuperscript{18}

\begin{flushleft}
\textsuperscript{13} It is not entirely clear which in-house lawyers can benefit from this protection but, as the Court partly bases its reasoning on the IJE/IBJ Act and makes various references to the lawyers affiliated to the IJE/IBJ, it is arguable that the findings of the Court only apply to the legal advice rendered by these lawyers.

\textsuperscript{14} See also Case C-550/07 P, \textit{Akzo Nobel Chemicals/Commission} (2010) ECR I-8301, para. 102.

\textsuperscript{15} In this context, the Court expressly refers to Article 22 of Council Regulation (EC) No 1/2003. It is however unclear whether the Court contemplates both the situation where the BCA undertakes an inspection on its own but at the request of the European Commission and the situation where the BCA merely assists the European Commission carrying out an inspection. Nonetheless, it is important to clearly differentiate between these two situations since, in the latter case, the Court’s findings would have the impracticable effect that, during the same inspection, the EU officials could look at more documents than their national partners.

\textsuperscript{16} Article 39bis, § 2, of the Belgian Cybercrime Act of 28 November 2000 provides the possibility to copy the data that are stored in a computer system on storage media belonging to the government “\textit{insofar as these data are useful for the same purposes as the seizure}” and the seizure of the physical system is not desirable.

\textsuperscript{17} European Court of Human Rights 27 September 2005, Sallinen/Finland, paras. 82-92.

\textsuperscript{18} According to the Court, this finding stems from the prescription period laid down in Article 88, § 1, of the APEC. This period is again included in Article IV.80, § 1, of the new Code of Economic Law.
\end{flushleft}
this case, all files dating back more than five years from the complaint lodged by Mobistar and KPN Belgium are “out of scope”.

**IV. Conclusions**

The judgment of the Court obviously has important consequences for the organisation of national competition proceedings and investigations, both inside and outside the network industries. In addition, the judgment may have significant effects at EU level.

Indeed, the fact that the Court (co-)founded the LPP of in-house counsel on Article 8 of the ECHR could reinforce discussions to defend such LPP at EU level, all the more so because the EU will soon become a contracting party to the ECHR. Also, the CJEU has indicated that it would be willing to reconsider its restrictive case law if there would be a predominant trend in the Member States towards the recognition for in-house lawyers of the benefit of LPP. The shift from Belgium towards the recognition LPP for in-house counsel is therefore an important signal and will definitely strengthen the position of the other Member States – such as Greece, the Netherlands, Poland, Portugal, and the UK – that already provide that internal company communications with in-house lawyers benefit from the protection afforded by LPP.

Moreover, the guiding principles that need to be kept in mind by the BCA when treating and selecting relevant electronic documents, as set forward by the Court, are sufficiently broad so that they could probably find more general application, including in other Member States.