

# Brussels Court of Appeal Rules that Legal Professional Privilege Applies to In-house Counsel

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## Background

In October 2010, the Belgian Competition Authority (BCA) carried out a dawn raid following a complaint by two competitors of Belgacom alleging that Belgacom was abusing its dominant position in the high speed asymmetric digital subscriber line market. The BCA seized numerous electronic files, including the email correspondence of Belgacom's in-house lawyers. In March 2011, relying principally on Belgian law relating to the creation and governance of the Belgian Institute of In-House Counsel (BIIC), Belgacom initiated proceedings against the BCA, challenging the BCA's denial of LPP in relation to the documents seized.

## The Judgment

On the basis of Article 5 of the Law of 1 March 2000, which provides expressly for the confidential treatment of legal opinions given by in-house lawyers, the Court of Appeal ruled that in-house counsel who are subject to the BIIC rules are to be accorded LPP.

In reaching its decision, the Court placed emphasis on the autonomy of the Member States (subject to the EU principles of equivalence and effectiveness) when laying down rules of procedure. In this instance, Belgian law provided for clear, statutory protection of correspondence between in-house lawyers and their internal clients.

This is in contrast to the stance taken by the Court of Justice of the European Union (CJEU) in *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v European Commission* [2010]. In *Azko*, (and prior to *Akzo in AM & S Europe Ltd v Commission of the European Communities* [1982] ), the EU courts examined whether there was a uniform view on the issue of LPP across Member States. Following a comparative assessment of the rules in place in different Member States, the Court decided not to extend legal professional privilege to in-house counsel.

## Conclusion

Notwithstanding the possibility of an appeal by the BCA to the Belgian Supreme Court, the following main points should be noted:

- In relation to national investigations, where national law states that correspondence between in-house counsel and their internal clients should be treated as confidential, LPP applies.
- In relation to investigations by the European Commission, the attitude towards LPP as developed by the EU courts applies: in-house counsel do not benefit from LPP.
- Investigations where a national competition authority assists the European Commission in carrying out dawn raids will fall within the remit of the EU rules and LPP will therefore not apply to in-house counsel.

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