

## THE JUDGMENT OF THE EUROPEAN COURT OF JUSTICE IN *VEBIC*: A TALE OF TWO STATUTORY LOOPHOLES

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### I. Introduction

A recent reform of European Union (“EU”) competition law may have gone unnoticed. In *VEBIC*, the Grand Chamber of the Court of Justice of the European Union (“ECJ”) reworded Article 5 of Regulation 1/2003.<sup>1</sup> This provision sets out the powers that Member States (“MS”) must bestow upon those organs which they have to designate as National Competition Authorities (“NCAs”) under Article 35. Following *VEBIC*, the new, unofficial wording of Article 5 reads as follows:

Powers of the competition authorities of the Member States: The competition authorities of the Member States shall have the power to apply Articles 81 and 82 of the Treaty in individual cases. For this purpose, acting on their own initiative or on a complaint, they may take the following decisions: [...]. “*The competition authorities of the Member States shall have the power to appear as defendants/respondents in judicial proceedings initiated before review courts against their decisions*”.

The case behind this silent, yet important amendment to Regulation 1/2003 concerns a classic situation of incomplete statutory engineering at both EU and national levels. It involved the interpretation of the Belgian competition statute adopted in 2006 (the “LPCE”),<sup>2</sup> whose chief aim was to replace the infamous Belgian competition agency with a more effective competition authority, thus solving the many deficiencies that had plagued competition enforcement in Belgium until then.<sup>3</sup> To this end, the LPCE established a new competition authority composed of (i) a *Competition Council* in charge of the adoption of final decisions;<sup>4</sup> and (ii) a *Competition Service* in charge of the investigation of anticompetitive practices. In line with Article 5 of Regulation 1/2003, the LPCE entrusted this authority with a range of investigative, decisional and remedial powers. It also regulated the judicial review of the Competition Council’s decisions

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<sup>1</sup> See ECJ, C-439/08, *VEBIC*, 7 December 2010, not yet reported.

<sup>2</sup> See Loi sur la protection de la concurrence économique, coordonnée le 15 septembre 2006.

<sup>3</sup> See F. Rizzutto, “Competition law enforcement in Belgium: The system remains flawed and uncertain despite recent reform”, 29 Issue 6, *European Competition Law Review*, 2008, p.367.

<sup>4</sup> Article 11 LPCE provides that the Competition Council is an “*administrative court*”.

by the Brussels Court of Appeals (the “review court”) without, however, saying anything about the *Competition Council*’s standing as defendant/respondent before the review court.

With this background, the review court was soon faced with a somewhat puzzling situation. In the context of annulment proceedings against an infringement decision of the Competition Council, the applicant, VEBIC – a professional association that had unlawfully distributed a price guide to its members – faced no defendant/respondent. The review court observed that no provision of the LPCE enabled the Competition Council to appear as defendant/respondent in annulment proceedings. In contrast, the LPCE expressly entitled the Minister for Economics to start annulment proceedings and appear as a party. Applying a “*silence means prohibition*” reasoning, it came to the view that the LPCE *precluded* the Competition Council from defending its decisions before the review court.

This, in turn, was a cause of legal concern for the review court. Unable to defend its decisions in court, the Competition Council might not be able to ensure the effectiveness of the EU competition rules and safeguard the general economic interest. More specifically, the review court discerned a possible conflict between the LPCE and Article 2, 15 and 35 of Regulation 1/2003 which require MS to appoint effective NCAs (Article 35), vest them with various decisional prerogatives, and bestow upon them the ability to submit – on their own initiative – observations on arguments set forth in proceedings before national courts (Article 15).

The review court thus referred four questions to the ECJ under Article 267 of the Treaty on the Functioning of the EU (“TFEU”).<sup>5</sup> First, given the entitlement of NCAs to submit observations in national proceedings pursuant to Article 15 of Regulation 1/2003, can MS exclude – as arguably done by the LPCE – a NCA’s ability to appear as defendant/respondent before review courts? Second, do the provisions of Regulation 1/2003 go beyond a mere entitlement to submit observations in national proceedings, and impose on NCAs a duty to appear as defendant/respondent in annulment proceedings? Third, does this obligation – if any – bear upon the NCA organ that takes the decisions mentioned at Article 5 of Regulation 1/2003 (in contrast to the organ in charge of investigations, for instance)? Finally, does this still hold true if the decision-making organ qualifies as a “*jurisdiction*”, as jurisdictions normally do not appear before review courts to defend their rulings?

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<sup>5</sup> See judgment of the Court, ¶39.

Not unsurprisingly for a procedure emanating in the country of René Magritte, the case exhibited several surreal features. First, it did not involve the application of the EU competition rules. Absent an effect on trade between MS, the Competition Council’s decision was only based on national competition law. The Court nonetheless found the reference to be admissible, given that the review court can remand the Competition Council’s appraisal of the facts, and decide that the impugned conduct had an effect on trade between MS.<sup>6</sup> Second, during the pleadings, the Competition Council – which appeared before the ECJ (!) – took a somewhat surprising stance. In contrast to many NCAs in Europe which have consistently sought to expand their powers – and have been lambasted for this – the Competition Council argued that it should not benefit from the right to appear as respondent/defendant before review courts.<sup>7</sup> To the best of our knowledge, the Belgian Competition Council may be the first NCA ever to request a limitation of its prerogatives.

## **II. The Judgment’s Content: Effectiveness 1 – Procedural Autonomy 0**

The Court’s judgment does not beat around the bush. Given the close nexus between the four questions, it deals with them altogether.<sup>8</sup> To begin with, Article 2 and Article 15(3) of Regulation 1/2003 enshrine no prerogative, let alone obligation, on the part of NCAs, to appear as parties in review proceedings against their decisions. Those provisions concern other issues, namely the burden of proof,<sup>9</sup> and the intervention of NCAs as *amicus curiae* before national courts (not as defendant/respondent).<sup>10</sup>

In contrast, the general obligation of MS to appoint effective NCAs enshrined in Article 35(1) has wide ranging practical consequences. Article 35(1) seeks to ensure that in the decentralized enforcement system of Regulation 1/2003, the provisions of the Regulation “*are effectively complied with*” so that the EU competition rules are “*applied effectively in the general*

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<sup>6</sup> See judgment of the Court, ¶44. Interestingly, if the review court finds that there is no effect on trade (and confirms the Competition Council’s decision), the answers of the ECJ on the questions referred will not to apply to the pending dispute.

<sup>7</sup> We note, in passing, and quite paradoxically, that the Competition Council voluntarily appeared before the ECJ.

<sup>8</sup> See judgment of the Court, ¶49.

<sup>9</sup> See judgment of the Court, ¶54

<sup>10</sup> See judgment of the Court, ¶55. This provision is one of the various mechanisms of Regulation 1 that seeks to ensure a consistent application of EU competition law across national territories. This provision thus concerns all national courts in general and not specifically review courts.

*interest*".<sup>11</sup> In this context, absent a right of NCAs to participate as defendant/respondent in review proceedings,<sup>12</sup> "there is a risk that the court before which the proceedings have been brought might be wholly 'captive' to the pleas in law and arguments put forward by the undertaking(s) bringing the proceedings".<sup>13</sup> In turn, the Court surmises that review courts may often succumb to applicants' arguments – and defuse the application of Article 101 and 102 TFEU – including in cases where those provisions should apply. To allay the ensuing risk of systemic type II errors ("false negatives" or the exoneration of harmful conduct), NCAs should thus be entitled to appear before the review court. National laws that preclude such a possibility on the part of NCAs are not in line with Article 35.<sup>14</sup>

The Court further adds that the effectiveness of EU competition law implies in practice that NCAs must *use* their right to appear before a review court to defend their decisions.<sup>15</sup> Of course, they remain free to gauge whether their intervention is necessary and useful.<sup>16</sup> But a consistent course of non intervention would violate the effectiveness of Article 101 and 102 TFEU.

The Court's judgment illustrates the limits brought by the principle of effectiveness to the principle of procedural autonomy. That said, the Court concedes that under the latter principle, MS are competent to decide which of the NCA organs may participate, as defendant/respondent, to review proceedings.<sup>17</sup>

### **III. The Judgment's Reasoning: Outcome 1 – Logic 0**

From a regulatory perspective, the *VEBIC* ruling entails a top down harmonization of national competition litigation on the basis of the ECJ's own *inter partes* litigation model. Under the Court's rules of procedure, Article 263 TFEU proceedings involve litigation against the institution, body or organ which adopted the act whose annulment is sought.<sup>18</sup> This outcome is at

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<sup>11</sup> See judgment of the Court, ¶56.

<sup>12</sup> See judgment of the Court, ¶59.

<sup>13</sup> See judgment of the Court, ¶58.

<sup>14</sup> See judgment of the Court, ¶64.

<sup>15</sup> See judgment of the Court, ¶61.

<sup>16</sup> See judgment of the Court, ¶60.

<sup>17</sup> See judgment of the Court, ¶63.

<sup>18</sup> See Article 21 of the Statute of the Court of Justice of the EU: "A case shall be brought before the Court of Justice by a written application addressed to the Registrar. The application shall contain the applicant's name and permanent address and the description of the signatory, the name of the party or names of the parties against whom

first sight satisfactory. With the NCA appearing as party, the review court can pass judgment out of a larger wealth of information.

To reach this outcome, however, the Court relies on a somewhat specious reasoning. To take a controversial analogy, review courts faced only with annulment-driven arguments – and with no arguments *against* – would, as if they were puppets, inevitably uphold such applications. This risk of type II errors would be further compounded by the fact that competition cases often involve “*complex legal and economic assessments*”.<sup>19</sup>

Besides the fact that this underestimates, in law and facts, the review courts’ ability to rebuff baseless submissions, the Court’s reasoning is not entirely convincing. First, in practice, most competition cases arise out of complaints (or leniency applications). In such cases, complainants often appear before review courts to challenge the applicant’s arguments. Review courts are thus not always confronted only with one-sided arguments from the applicant.

Second, annulment proceedings do not only involve the challenge of infringement decisions applying Articles 101 and/or 102 TFEU. In a not insignificant number of cases, applicants challenge the rejection of a complaint by the NCA or a positive decision (*e.g.* an Article 101(3) TFEU decision that benefits to rivals). In such cases, the ECJ’s concern for the elimination of type II errors should lead to the opposite outcome. Here, the judicial review system should maximize chances of annulment, and accordingly bar the NCAs from intervening as defendants/respondents before review courts.

Finally, the Court surmises that NCAs’ intervention limits the probability of annulment. This, however, is only true to the extent that the NCA’s decision is lawful (which cannot be presumed). In cases where the NCA’s decision is flawed (“*type I errors*” or “*false convictions*”), the applicant can “*cross-examine*” the NCA before the review court. This, in turn, is likely to increase the probability of annulment.<sup>20</sup>

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*the application is made, [...]*. Annulment proceedings are not merely “*a trial against an administrative act*” in the sense of the traditional French “*recours pour excès de pouvoir*”.

<sup>19</sup> See judgment of the Court, ¶58.

<sup>20</sup> In turn, this limits the risks of type I decisional errors in the first place. If the NCA anticipates that it will have to explain its decisions before an impartial review court, it will have increased incentives to adopt sound, well reasoned decisions.

#### IV. The Judgment's Consequences: Statutory Amendment 1 – Status Quo 0

The main consequences of the *VEBIC* judgment concern the Belgian authorities. In its Opinion, Advocate General Mengozzi hinted that the LPCE would have to undergo statutory changes.<sup>21</sup> Given, however, the current state of deadlock in Belgian politics, this is unlikely to happen in the short term. More fundamentally, the Belgian authorities seem reluctant to cast in stone a derogation to the general principle that “*administrative courts*” cannot be parties to subsequent judicial proceedings.<sup>22</sup> Finally, the Competition Council has unofficially voiced concerns that a regulatory duty to appear before the review court would further put a strain on its limited administrative resources.

In our opinion, the existing wording of the LPCE can perfectly accommodate the novel principle enshrined in the ECJ’s ruling. A careful reading suggests that the LPCE nowhere precludes explicitly the Competition Council to appear as defendant/respondent before the review court (contrary to the initial interpretation of the referring court).<sup>23</sup>

This notwithstanding, there is a string of compelling reasons for a statutory amendment of the LPCE. First, the Competition Council is a “*bifurcated*” competition agency composed of several independent organs.<sup>24</sup> Absent a specific regulatory provision defining which of them should appear in review proceedings,<sup>25</sup> the several organs could avail themselves of the right to appear. This, in turn, generates concerns. With several NCA organs appearing as defendant/respondent, and throwing artillery in the same direction, proceedings might be *unbalanced* at the expense of the applicant (equality of arms issue). In addition, if the various NCA organs follow distinct litigation strategies, defense pleadings might be *inconsistent* (effectiveness issue). A more

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<sup>21</sup> See judgment of the Court, ¶96: “*If the Court of Justice were to agree with my suggested answers to the four questions referred it is probable that the national legislature would have to amend the WBEM in order to grant one of the components of the competition authority the status of party to proceedings before the Hof van beroep te Brussel*”.

<sup>22</sup> See Opinion of AG Mengozzi at ¶82. In Belgian law, administrative courts are jurisdictions.

<sup>23</sup> One may actually question whether the legal issue at stake was not simply a moot problem. It ought to be noted, also, that the LPCE indicates at Article 75(7) that requests for annulment must be notified to the Competition Council, which tends to support the view that the Competition Council has an interest in the dispute before the review court.

<sup>24</sup> See on this concept, Michael J. Trebilcock and Edward M. Iacobucci, “Designing Competition Law Institutions: Values, Structure, and Mandate”, 2010 Vol. 41, *Loyola University Chicago Law Journal*, p.455.

<sup>25</sup> Or a memorandum of understanding between those organs.

appropriate solution would be to designate the organ that adopted the decision as the sole capable of appearing before the review court.<sup>26</sup>

Second, a revision of the LPCE is necessary to ensure the consistent application of Belgian and EU competition rules. Under the *VEBIC* ruling, the duty of the Belgian NCA to appear as defendant/respondent before the review court only covers EU competition law cases. It is under no such duty in domestic competition law cases. In light of the above, domestic competition law proceedings might thus be more prone to type II errors than EU competition law proceedings. This should not, and cannot be the case. The LPCE should thus establish that in all competition (EU *and* domestic) cases, the NCA is entitled to appear as defendant/respondent.

Moreover, absent an amendment to the LPCE, the Belgian NCA remains free to engage in unlawful avoidance strategies. For instance, the Belgian NCA may promote a restrictive interpretation of the “*effect on trade*” condition, in order to apply only the domestic competition rules (and escape to the duty to intervene before the review Court set out in *VEBIC*).<sup>27</sup>

## V. Conclusion

In *VEBIC*, the Court kills two birds with one stone. Its ruling subtly complements the key EU Regulation underpinning the enforcement of Article 101 and 102 TFEU and paves the way towards regulatory reforms in Belgium and possibly in other Member States which face similar issues. For instance, the French domestic legislation expressly rules out the possibility for the NCA to participate as a party to review proceedings.<sup>28</sup>

In so far as Belgium is concerned, the LPCE has given rise, since its inception, to quite a few interpretative difficulties (in particular on procedural issues). With this judgment, the ECJ has opened a window of opportunity for an extensive fine-tuning of the domestic competition framework. Of course, this process remains hostage to the current state of limbo in Belgian political affairs. That said, the Belgian competition organs can regulate a number of procedural

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<sup>26</sup> In practice, the Competition Council might have to set up its own legal service, like the EU Commission’s one or that of the French Competition Authority.

<sup>27</sup> Given the Competition Council’s explicit reluctance to appear before the review court, this cannot be excluded.

<sup>28</sup> See Article R 464-11 of the French Code of Commerce. I am grateful to E. Provost for bringing this to my attention. In a judgment of 27 January 2011, the Paris Court of Appeal declared (arguably to remove this inconsistency with the *VEBIC* case) that the French NCA was appearing as a party in review proceedings.

issues through soft law instruments (best practices, notices, memorandums of understanding, etc.). Why wait?

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