

# EU Court of Justice Declares National Competition Authorities May Intervene in Competition Proceedings before National Courts

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Litigation before national courts to appeal the decision of a national competition authority (NCA) or a private lawsuit is an important right for companies conducting business or making sales in the European Union. However, some Member States have not allowed their NCAs themselves to participate in such an appeal. A recent ruling by the EU Court of Justice (Court) reverses that, with important implications for business and the NCAs themselves.

In the absence of any EU legislation harmonizing national procedural rules, the conduct of litigation across the 27 EU Member States varies. Indeed, it is an established principle under EU law that each national jurisdiction is procedurally autonomous. Nevertheless, the December 7, 2010 judgment of the Court, in a case involving the Belgian competition authority, has established the right of NCAs to intervene in national court proceedings, whatever national procedural law might provide. This judgment could have a significant impact on a number of national legal systems and may also affect defendants in national competition proceedings. Specifically, defendants in a private enforcement action may find that they are confronted not only by the claimants but also the NCA.

## Right of Authorities to Appear in National Court Proceedings

In various Member States, companies that are the subject of adverse decisions by national competition authorities have the right to appeal to a court or tribunal. For example, in the UK, the Competition Appeal Tribunal

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has jurisdiction to hear appeals of decisions of the Office of Fair Trading, Competition Commission, and the various sectoral regulators, with the relevant authorities also having standing to defend their decisions. Similarly, in Germany, the Federal Cartel Office may appear before the German courts in case of appeal of its decisions. A key feature in these jurisdictions is that the national competition authorities are part of the appeal proceedings – and may thus “defend” the general interest while allowing the national court to hear more than the parties’ views on their particular case.

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However, a recent Court judgment has highlighted that today some Member States’ laws do not give their NCAs standing before their national courts. The case in question reviewed the implications of the fact that Belgian competition law currently does not allow the national competition authority to intervene in national appeal proceedings. According to Belgian law, the authority may neither defend its decisions nor act as *amicus curiae* in other competition law cases. In the course of appeal proceedings launched by the Flemish Bakers Federation against a cartel fine decision by the Belgian Competition Council, the Brussels Appeal Court referred questions relating to the investigatory authority’s inability to intervene to the EU Court of Justice. The Court ruled that this shortcoming in Belgian law had the potential to hamper the effectiveness of EU competition law enforcement.

The Court’s ruling puts EU Member States on notice that they must ensure that their competition authorities do

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have the right to appear before national courts. According to the Court, if national authorities may not appear before national courts, the ongoing enforcement of Articles 101 and 102 TFEU is jeopardized. Similarly, the Court found that the effective enforcement of EU law is at risk even if the power to intervene exists but in practice is exercised infrequently.

Consistent with the principle that the Member States have procedural autonomy, the Court made clear that each NCA must “gauge the extent to which their intervention is necessary and useful having regard to the effective application of EU competition law.” However, as a result of

this Court decision, clearly all EU Member State NCAs now do have the right to intervene in competition actions and may begin to appear even in private enforcement actions (which are encouraged by the EU) where previously they had no standing.

### **Consequences of the Recent Ruling**

It remains to be seen whether the Court’s judgment will spur NCAs to act on their newly-declared right to appear in court and actively intervene in future cases. Such interventions will become particularly important as follow-on damage actions begin to gain pace in Europe. Furthermore, some Member States such as Belgium will now have to revise their national legislation to be consistent with the Court’s judgment. □