ON THE CONCEPT OF "COURT OR TRIBUNAL" FOR THE PURPOSES OF ARTICLE 267 OF THE TFEU: THE *STATUS* OF NATIONAL COMPETITION AUTHORITIES, AFTER THE JUDGEMENT OF THE COURT OF JUSTICE IN CASE C-462/19

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In case C-462/19[1], the Court of Justice ("CJ") rules that a request for a preliminary ruling from the Spanish Competition Authority is inadmissible, since it does not satisfy the features of a "court or tribunal" for the purposes of Article 267 of the Treaty on the Functioning of the European Union ("TFEU").

1. LEGAL FRAMEWORK

According to Articles 19(3)(b) of the Treaty on European Union ("TEU")[2], and 267 of the Treaty on the Functioning of the European Union ("TFEU")[3], any court or tribunal of a Member State "may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling" "concerning: (a) the interpretation of the Treaties [and/or] (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union".

It is nowadays widely accepted that this instrument not only promotes legal unity in a European Union ("EU") of "variable geometry", but also contributes to further developing the Law. Being an EU mechanism, and given

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1 Judgment of the Court of 16 September 2020, in case C-462/19, *Asociación Nacional de Empresas Estibadoras y Consignatarios de Buques (Anesco) and Others*, EU:C:2020:715 ("CJ's judgement").

2 OJ C 326, 26.10.2012.

3 OJ C 326, 26.10.2012.

the volatility of realities among Member States, the CJ understood that a "concept of EU law" was needed. Consequently, in order to give some meaning to the words "court" and "tribunal", the CJ developed a variable case law, according to which some criteria are to be considered, in order to ascertain whether a given entity may refer questions to the CJ for a preliminary ruling. So far, the following factors are to be taken into account: *i)* the bodies' statutory origin; *ii)* its permanence; *iii)* whether its procedure is *inter partes*; *iv)* its compulsory jurisdiction; *v)* whether it applies rules of law; *vi)* its independence; and *vii)* whether its final decision is judicial in nature. Though this methodology is undoubtedly best suited to adapt the wording of the Treaties to new realities as well as to ensure the respect for Member States' organisational autonomy, the truth is that from *Vaassen-Göbbels*[4] until now, the CJ adopted dissonant rulings, frequently putting forward solutions in strong contradiction with the proposals of the Advocates General in their Opinions. The result seems to be a "too flexible and not sufficiently consistent [case law], with the lack of legal certainty that entails"[5].

In spite of that casuistic approach, and inspired by the need to apply the same treatment to similar realities, regardless of how "formally" designated or treated by the Law of a certain Member State, the CJ has already appreciated the admissibility of references from *i)* different types of "courts", such as arbitration courts, economic and administrative courts, courts of audit, or even patent courts; *ii)* competition authorities; *iii)* administrative bodies; *iv)* professional bodies; *v)* Ombudsmen; and *vi)* appeal committees. While being abundant, the results of such casuistic path tend to be a little deceiving, which might justify a switch in the CJ's approach.

2. FACTS

In the course of proceedings brought by the *Comisión Nacional de los Mercados y la Competencia* (Spanish National Commission on Markets and Competition, hereinafter "CNMC"), against a group of operators and employee representatives, concerning an alleged infringement to competition law rules, in particular to Article 101 of the TFEU, the CNMC decided to stay

4 Judgment of the Court of 30 June 1966, in case C-61/65, *G. Vaassen-Göbbels (a widow) v Management of the Beambtenfonds voor het Mijnbedrijf*, EU:C:1966:39.

5 Opinion of Advocate General Ruiz-Jarabo Colomer, in case C-17/00, *François de Coster v Collège des Bourgmestre et Echevins de Watermael-Boitsfort*, EU:C:2001:366, §14.

the proceedings and refer four questions to the CJ for a preliminary ruling. According to its own understanding, the CNMC meets the criteria for being considered a "court or tribunal" for the purposes of Article 267 of the TFEU, since "it has a legal basis, it is permanent and it is a compulsory jurisdiction, it makes rulings in accordance with an adversarial procedure, it is an independent body and, when performing its duties, it complies with the requirement for objectivity and impartiality vis-à-vis the parties to the proceedings and their respective interests with regard to the subject matter of those proceedings" (see §33 of the CJ's judgement). By judgement of 16 September 2020, the CNMC's request for a preliminary ruling was declared inadmissible by the CJ.

3. BRIEF COMMENTARY

This is not the first time the CJ is called upon to decide on the admissibility of a reference for a preliminary ruling from a competition authority. In the *Syfait* case[6], contrary to what the Advocate General Jacobs sustained, the Court considered that it lacked jurisdiction to answer the questions referred by the Greek Competition Commission, since it did not enjoy full independence. Differently, in the case *Asociación Española de Banca Privada and others*[7], the CJ expressly admitted the reference for a preliminary ruling from the Spanish Competition Court.

Now, in the judgement under review, the CJ concludes that the Spanish Competition Authority is not a "court or tribunal" for the purposes of Article 267 of TFEU, since it "cannot be regarded as having the standing of a 'third party' in relation to the authority which adopts the decision" (see §40 of the CJ's judgement) and its decisions are much closer to administrative decisions than to judicial ones. In order to support its conclusion, the Court indicated and analyzed, in particular, the following circumstances: *i)* the proceedings at issue in the main suit may be initiated *ex officio*; *ii)* the CNMC is required to work in close collaboration with the European Commission and it may be denied jurisdiction in favour of the latter; *iii)* the penalty proceedings shall be terminated within a termination period of 18 months; *iv)* its decisions

6 Judgment of the Court of 31 May 2005, in case C-53/03, *Synetairismos Farmakopoion Aitolias & Akarnanias (Syfait) and Others v GlaxoSmithKline plc and GlaxoSmithKline AEVE*, EU:C:2005:333.

7 Judgment of the Court of 16 July 1992, in case C-67/91, *Dirección General de Defensa de la Competencia v Asociación Española de Banca Privada and others*, EU:C:1992:330.

may be appealed to the administrative courts; *v)* the CNMC may withdraw its own decision, in case of appeal and, finally; *vi)* its decisions do not benefit from some of the most relevant attributes of judicial decisions, *inter alia*, the capability of acquiring the force of *res judicata* (see §§41-49 of the CJ's judgement). This being said, the CJ concluded that the situation could not be compared with the one that the Court had to deal with in case *Asociación Española de Banca Privada and others,* already referred to above (see §50 of the CJ's judgement).

4. PRACTICAL SIGNIFICANCE

As the Advocate General Ruiz-Jarabo Colomer correctly puts it, the aim of the preliminary ruling is not "to assist an agency of the executive", but instead to promote a channel of direct communication between the CJ and the national courts, in this way introducing an instrument of "technical dialogue" between them (see its *Opinion in Case C-17/00*, already referred to above, §§76-82). There are undoubtedly reasons that plead for a comprehensive reassessment of the legitimacy to resort to the mechanism provided for in Article 267 of the TFEU, such as *i)* considerations of judicial economy; *ii)* the competition authorities' ability to identify the relevant issues and doubts on the application of competition rules; *iii)* the need to ensure uniformity in an ever more decentralized system of application and enforcement of competition law; *iv)* the competition authorities' duty to disapply national legislation contrary to the law of the EU, among others (see, for instance, Opinion of Advocate General Jacobs[8], in case C-53/03, *Syfait and others*, already mentioned above). However, while this might be true in abstract, we do not think that the rationale behind the reference for a preliminary ruling is such as to entitle national competition authorities ("NCAs") to resort to such instrument.

On the one hand, because the "court or tribunal" to this end is supposed to be a third-party, that is, an entity that besides being above the parties, does not have any personal interest in the decision to be adopted. In this regard, despite being entrusted with the prosecution of missions of general interest, national competition authorities have at least an indirect interest in that the courts uphold its decisions. Moreover, as accurately pointed out by the CJ in this judgement, authorities such as the CNMC act as parties (defendant

8 EU:C:2004:673, §45.

or appellant) in the proceedings before courts which are perfectly capable of identifying the doubts or problems regarding the interpretation or validity of the Law of the European Union, if necessary, upon application by the parties. Thus, as the Romans used to say, "*nemo debet esse iudex in propria causa*".

On the other hand, we do not believe that concerns about judicial economy or the need for uniformity benefit only NCAs, since those same arguments also apply and could be used to sustain the right of private individuals and companies to directly refer questions to the CJ for a preliminary ruling. After all, it follows from the principle of equality that both parties in the proceedings shall be given the same rights. Furthermore, since the administrative decisions are subject to judicial review by courts which "are able to assess the need to make a reference for a preliminary ruling to the Court of Justice, there is therefore no danger that Community law will not be uniformly applied" (see *Opinion of Advocate General in Case C-17/00*, already referred to above, §28).

In short, we are thus of the opinion that the CJ has properly addressed the problem in the judgement under review. Though it is true that some of the features that the CJ considers when assessing the admissibility of references for a preliminary ruling are common both to the administrative bodies and to the judiciary, the former are still administrative bodies, different from "courts" or "tribunals" for the purposes of Article 267 of the TFEU. At least, as long as they remain (interested) parties, the independence requirement is not sufficiently fulfilled.