



## Reports of Cases

JUDGMENT OF THE COURT (Ninth Chamber)

16 September 2020\*

(Reference for a preliminary ruling – Meaning of ‘court or tribunal’ for the purposes of Article 267 TFEU – Criteria – Comisión Nacional de los Mercados y la Competencia (National Commission on Markets and Competition, Spain) – Inadmissibility of the request for a preliminary ruling)

In Case C-462/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Comisión Nacional de los Mercados y la Competencia (National Commission on Markets and Competition, Spain), made by decision of 12 June 2019, received at the Court on 13 June 2019, in the proceedings against

**Asociación Nacional de Empresas Estibadoras y Consignatarios de Buques (Anesco),**

**Comisiones Obreras,**

**Coordinadora Estatal de Trabajadores del Mar (CETM),**

**Confederación Intersindical Gallega,**

**Eusko Langileen Alkartasuna,**

**Langile Abertzaleen Batzordeak,**

**Unión General de Trabajadores (UGT),**

intervening parties:

**Asociación Estatal de Empresas Operadoras Portuarias (Asoport),**

THE COURT (Ninth Chamber),

composed of S. Rodin, President of the Chamber, M. Vilaras (Rapporteur), President of the Fourth Chamber, and D. Šváby, Judges,

Advocate General: J. Kokott,

Registrar: A. Calot Escobar,

having regard to the written procedure,

\* Language of the case: Spanish.

after considering the observations submitted on behalf of:

- Asociación Nacional de Empresas Estibadoras y Consignatarios de Buques (Anesco), by T. Arranz Fernández-Bravo, D. Sarmiento Ramírez-Escudero and A. Gutiérrez Hernández, abogados,
- Comisiones Obreras, by R. González Rozas, abogada,
- Coordinadora Estatal de Trabajadores del Mar (CETM), by S. Martínez Lage, P. Martínez-Lage Sobredo and V.M. Díaz Domínguez, abogados,
- Confederación Intersindical Gallega, by H. López de Castro Ruiz, abogado,
- Unión General de Trabajadores (UGT), by D. Martín Jorredo, abogado,
- Asociación Estatal de Empresas Operadoras Portuarias (Asoport), by E. Van Hooydonk, advocaat, and J. Puigbó, abogado,
- the Spanish Government, by S. Centeno Huerta, acting as Agent,
- the European Commission, by S. Baches Opi and C. Urraca Caviedes, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,  
gives the following

### **Judgment**

- 1 This reference for a preliminary ruling concerns the interpretation of Article 101 TFEU and of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101 and 102 TFEU] (OJ 2003 L 1, p. 1).
- 2 The request has been made in the course of proceedings brought by the Comisión Nacional de los Mercados y la Competencia (CNMC) (National Commission on Markets and Competition, Spain) against the Asociación Nacional de Empresas Estibadoras y Consignatarias de Buques (Anesco), the Comisiones Obreras, the Coordinadora Estatal de Trabajadores del Mar (CETM), the Confederación Intersindical Gallega, Eusko Langileen Alkartasuna, Langile Abertzaleen Batzordeak and the Unión General de Trabajadores (UGT) concerning the conclusion of a collective agreement imposing an obligation to take over the contracts of workers for the provision of cargo-handling services, on the ground that that agreement contravenes Article 101 TFEU and the corresponding national legislation.

### **Legal context**

#### ***EU law***

- 3 Recitals 17 and 18 of Regulation No 1/2003 state:  
(17) If the competition rules are to be applied consistently and, at the same time, the network is to be managed in the best possible way, it is essential to retain the rule that the competition authorities of the Member States are automatically relieved of their competence if the Commission initiates its own proceedings. Where a competition authority of a Member State is

already acting on a case and the Commission intends to initiate proceedings, it should endeavour to do so as soon as possible. Before initiating proceedings, the Commission should consult the national authority concerned.

(18) To ensure that cases are dealt with by the most appropriate authorities within the network, a general provision should be laid down allowing a competition authority to suspend or close a case on the ground that another authority is dealing with it or has already dealt with it, the objective being that each case should be handled by a single authority. This provision should not prevent the Commission from rejecting a complaint for lack of Community interest, as the case-law of the Court of Justice has acknowledged it may do, even if no other competition authority has indicated its intention of dealing with the case.’

4 Article 11(6) of this regulation provides:

‘The initiation by the Commission of proceedings for the adoption of a decision under Chapter III shall relieve the competition authorities of the Member States of their competence to apply Articles [101 TFEU] and [102 TFEU]. If a competition authority of a Member State is already acting on a case, the Commission is only to initiate proceedings after consulting with that national competition authority.’

### *Spanish law*

#### *Law on the protection of competition*

5 Article 1(1) of Ley 15/2007 de Defensa de la Competencia (Law 15/2007 on the protection of competition) of 3 July 2007 (BOE No 159 of 4 July 2007, p. 12946, ‘the Law on the protection of competition’) provides:

‘Any agreement, decision, collective recommendation or concerted or consciously synchronised practice, which has as its object or which results in or may result in the prevention, restriction or distortion of competition in all or part of the national market is prohibited ...’

6 Paragraph 36(1) of that law provides:

‘The final deadline for issuing and notifying the decision putting an end to the penalty proceedings for conduct restricting competition shall be 18 months from the date those proceedings are opened ...’

7 Article 38(1) of that law provides as follows:

‘Expiry of the maximum period of 18 months provided for in Article 36(1) for putting an end to the penalty proceedings relating to agreements and prohibited practices shall cause the proceedings to lapse.’

8 Under Article 44 of that law:

‘The [CNMC] may decline to initiate proceedings or may discontinue existing proceedings or cases for lack or loss of competence or purpose. In particular, any one of those circumstances shall be deemed to exist in the following situations:

(a) where the [CNMC] is not competent to take action against conduct detected or reported in accordance with [Regulation No 1/2003] or where the conditions laid down in that regulation for dismissing complaints have been met;

...’

9 Article 45 of the Law on the protection of competition provides:

‘Administrative proceedings relating to the protection of competition shall be governed by the provisions of this law and its implementing legislation and, on a supplementary basis, by Law 30/1992 of 26 November 1992 on the rules governing public authorities and the common administrative procedure ...’

10 Article 48(1) of that law provides as follows:

‘The decisions and acts of the President and the Board of the [CNMC] are not subject to any administrative review and may only be challenged before the administrative courts ...’

11 Article 49(1) of that law provides as follows:

‘The proceedings shall be initiated *ex officio* by the [Competition] Directorate either on its own initiative or on that of the Board of the [CNMC] or following a complaint ...’

*Law establishing the CNMC*

12 Article 1(2) of Ley 3/2013 de creación de la Comisión Nacional de los Mercados y la Competencia (Law 3/2013 establishing the National Markets and Competition Commission) of 4 June 2013 (BOE No 134 of 5 June 2013, p. 42191, ‘the Law establishing the CNMC’) provides:

‘The aim of the [CNMC] is to guarantee, preserve and promote the proper functioning, transparency and existence of effective competition on all markets and in all production sectors for the benefit of consumers and users.’

13 Article 2(1) of that law provides:

‘The [CNMC] shall have independent legal personality and full capacity to act in accordance with public and private law, and when carrying out its functions and performing its duties, it shall operate with organisational and functional autonomy and complete independence from the Government, public administrations and market stakeholders. In addition, it shall be subject to parliamentary and judicial scrutiny.’

14 Article 3 of that law provides:

‘1. The [CNMC], when carrying out its functions and performing its duties, shall act independently of any business or commercial interest.

2. When fulfilling its duties under the legislation, and without prejudice to collaboration with other bodies or the managerial powers of the Government’s general policy exercised through its legislative powers, neither the staff nor the members of the bodies of the [CNMC] shall seek or accept instructions from any public or private entity.’

15 Article 15 of that law provides:

‘1. The members of the Board [of the CNMC], including the President and the Vice-President, shall be appointed by the Government by royal-decree on a proposal from the Ministro de Economía y Competitividad [(Minister for Economic Affairs and Competitiveness, Spain)] from among individuals of recognised authority and professional expertise in the field of activity of the [CNMC] following an

examination of the person proposed for the post before the relevant committee of the Congress of Deputies. The Congress, through the relevant committee acting by an absolute majority, may veto the appointment of the proposed candidate within one calendar month from receipt of the relevant communication. In the absence of any express declaration from the Congress once that deadline has expired, the relevant appointments shall be deemed to be accepted.

2. The term of office of the members of the Board shall be six years without the possibility of renewal. The members of the Board shall be renewed on a partial basis every two years so that each member of the Board shall not remain in his or her post for more than six years.’

16 Article 17(1) of the Law establishing the CNMC provides:

‘The plenary session of the Board shall be comprised of the all the members of the Board. It shall be chaired by the President of the [CNMC]. If the President is absent or ill or the post is vacant, he or she shall be replaced by the Vice-President or, failing that, by the most senior board member or, where members have the same length of service, by the eldest.’

17 Article 19(1) of that Law provides as follows:

‘The role of the President of the [CNMC] shall be to:

...

(f) promote the activities of the [CNMC] and the fulfilment of the functions entrusted to it; in particular, to propose the annual or multi-annual action plans which will define its objectives and priorities;

(g) manage the staff of the [CNMC] in accordance with the powers conferred on it by the specific legislation;

(h) manage, coordinate, evaluate and supervise the various units of the [CNMC], without prejudice to the functions of the Board; in particular coordinate, with the assistance of the Secretary of the Board, the proper functioning of the units of the [CNMC].

...’

18 Article 20 of that law provides as follows:

‘The Board of the [CNMC] shall be the decision-making body for the functions of adjudication, consultation and the promotion of competition and arbitration and of the resolution of conflicts provided for in the present law. In particular, it shall be the body responsible for:

...

13. appointing and dismissing management staff on a proposal from the President of the Board.

...’

19 Article 25 of that law, entitled ‘Management bodies’ provides in paragraph 1 that the CNMC has four investigation directorates, including the Competition Directorate (*Dirección de Competencia*). That directorate is responsible for examining cases relating to the CNMC’s functions of preserving and promoting effective competition on all markets and in all sectors.

20 Under Article 29 of that law, relating to the power to impose penalties:

‘1. The [CNMC] shall exercise the power to carry out inspections and to impose penalties in accordance with the provisions of Chapter II of Title IV of [the Law on the protection of competition], Title VI of [Ley 7/2010 General de la Comunicación Audiovisual (General Law 7/2010 on audiovisual communication) of 31 March 2010 (BOE No 70 of 1 April 2010)], Title VIII of [Ley 32/2003 General de Telecomunicaciones (General Law 32/2003 on telecommunications) of 3 November 2003 (BOE No 264 of 4 November 2003)], Title X of [Ley 54/1997 del Sector Eléctrico (Law 54/1997 on the electric sector) of 27 November 1997 (BOE No 285 of 28 November 1997, p. 35097)], Title VI of [Ley 34/1998 del sector de hidrocarburos (Law 34/1998 on the hydrocarbon sector) of 7 October 1998 (BOE No 241 of 8 October 1998)], Title VII of [Ley 43/2010 del servicio postal universal, de los derechos de los usuarios y del mercado postal (Law 43/2010 on the universal postal service, users’ rights and the postal market) of 30 December 2010 (BOE No 318 of 31 December 2010, p. 109195)] and Title VII of [Ley 39/2003 del Sector Ferroviario (Law 39/2003 on the railway sector) of 17 November 2003 (BOE No 276 of 17 November 2003)].

2. For the purposes of exercising the power to impose penalties, there shall be the necessary operational separation between the investigation phase, which falls within the remit of the staff of the directorate responsible for the matter, and the decision-making phase, which falls within the remit of the Board.

3. The procedure for exercising the power to impose penalties shall be governed by the provisions of the present law, the laws referred to in paragraph 1 and, for any matter not covered by the above legislation, [Ley 30/1992 de Régimen Jurídico de las Administraciones Públicas y del Procedimiento Administrativo Común (Law 30/1992 on the rules governing public authorities and the common administrative procedure) of 26 November 1992 (BOE No 285 of 27 November 1992)] and its implementing legislation. In particular, the penalty proceedings in relation to the protection of competition shall be governed by the specific provisions of Law 15/2007 of 3 July 2007.

4. The decision shall put an end to the administrative procedure, and an action may be brought against it before the administrative courts.’

*Royal Decree 657/2013*

21 Article 4 of the Statute of the National Commission on Markets and Competition, approved by Real Decreto 657/2013 por el que se aprueba el Estatuto Orgánico de la Comisión Nacional de los Mercados y la Competencia (Royal Decree 657/2013 approving the Statute of the National Commission on Markets and Competition) of 30 August 2013 (BOE No 209 of 31 August 2013, p. 63623, ‘the Statute of the CNMC’), entitled ‘Institutional coordination and cooperation, provides:

‘Where it is apparent from European Union or national legislation, the [CNMC] shall be considered to be:

(a) the national competition authority.

...’

22 Article 15(2) of that statute provides:

‘The President of the [CNMC], who is also President of the plenary session of its Board and of the Competition Division, shall exercise the functions of managing and representing [the CNMC] in accordance with Article 19 of the [Law establishing the CNMC]. When exercising those functions, the President shall be responsible for:

...

- (b) proposing to the plenary session of the [CNMC] the appointment and dismissal of the Secretary of the Board, the investigation directors and the other management staff of the [CNMC];

...'

*Law on the administrative courts*

- 23 Article 75(1) and (2) of Ley 29/1998 reguladora de la Jurisdicción Contencioso-administrativa (Law 29/1998 on the administrative courts) of 13 July 1998 (BOE No 167 of 14 July 1998) provides:

'1. Defendants may choose not to defend an application by satisfying the requirements laid down in paragraph 2 of the preceding article.

2. After the defendant has chosen not to defend the application, the judge or court shall, without further formality, deliver judgment in accordance with the form of order sought by the applicant, unless that leads to a manifest infringement of the legal order, in which case the court shall inform the parties of the grounds which may preclude granting the form of order sought and shall hear the parties within the normal period of 10 days, after which the court shall deliver a judgment which it considers to be compliant with the law.'

**The dispute in the main proceedings and the questions referred for a preliminary ruling**

- 24 By judgment of 11 December 2014, *Commission v Spain* (C-576/13, not published, EU:C:2014:2430), in a case in which the scheme for managing workers in the cargo-handling services of the port sector then in force in Spain, the Court held that, by requiring undertakings of other Member States wishing to exercise the activity of cargo-handling in Spanish ports of general interest, first, to register with a *Sociedad Anónima de Gestion de Estibadores Portuarios* (Dockers' Management Public Limited Liability Company, 'SAGEP') and, as appropriate, to hold shares in that company and, secondly, to employ as a priority workers provided by that company, including a minimum number on permanent contracts, the Kingdom of Spain had failed to fulfil its obligations under Article 49 TFEU.
- 25 In order to enforce the judgment of 11 December 2014, *Commission v Spain* (C-576/13, not published, EU:C:2014:2430), the Kingdom of Spain adopted Real Decreto-ley 8/2017 por el que se modifica el régimen de los trabajadores para la prestación del servicio portuario de manipulación de mercancías dando cumplimiento a la Sentencia del Tribunal de Justicia de la Unión Europea de 11 de diciembre de 2014, recaída en el Asunto C-576/13 (procedimiento de infracción 2009/4052) (Royal Decree-Law 8/2017 amending the provisions governing workers providing port cargo-handling services in order to comply with the judgment of the Court of Justice of the European Union of 11 December 2014 in Case C-576/13 (infringement proceedings 2009/4052)) of 12 May 2017 (BOE No 114 of 13 May 2017). That decree-law provides for the free recruitment of port workers in order to provide cargo-handling services and in essence stipulates that, in order to provide that service, it is not necessary for the undertakings providing the port cargo-handling service ('the handling undertakings') to hold shares in a SAGEP.
- 26 However, Royal Decree-Law 8/2017 introduced a transitional adjustment period of three years, expiring on 14 May 2020, during which handling undertakings were required to use employees from a SAGEP for a certain percentage of their activities, whether or not they are shareholders in that SAGEP. It was stipulated that, at the end of that transitional period, the SAGEPs would have the choice of going into dissolution or continuing their activities under a system of free competition, as the case may be, with the port employment centres and the other temporary employment agencies.

- 27 On 6 July 2017, Anesco, the association comprising undertakings from the port sector, on the one hand, and a number of trade unions (the CETM, the UGT, the Comisiones Obreras, the Confederación Intersindical Gallega, Langile Abertzaleen Batzordeak and Eusko Langileen Alkartasuna), on the other, concluded a collective agreement aimed at ‘maintaining social harmony’ and preserving all of the jobs of dockers recruited by the SAGEPs before 30 September 2017. By that agreement, Anesco and the trade unions amended the fourth national framework agreement by introducing a seventh additional provision which provides that the handling undertakings which leave a SAGEP are to take over the port stowage staff attached to that SAGEP under the same employment conditions to the extent of their shareholding in the capital of the SAGEP concerned.
- 28 On 3 November 2017, the Competition Directorate initiated infringement proceedings S/DC/0619/17, Acuerdo Marco de la Estiba (Framework Agreement on Stowage), against Anesco and the trade unions. One of the grounds for bringing those proceedings was the fact that the only company which applied to leave a SAGEP during the transitional period had been subjected to a series of actions which seriously interfered with its activity and its competitiveness and which could be regarded as amounting to a boycott.
- 29 On 12 November 2018, the Competition Directorate submitted to the Competition Division of the Board of the CNMC a proposal for a decision in which it concluded that the collective agreement between Anesco and the trade unions in question in the main proceedings amounted to conduct prohibited by Article 1 of the Law on the protection of competition and Article 101 TFEU, in that the additional obligations imposed by that agreement exceeded the bounds of collective negotiation and as a result restricted the exercise of the right to withdraw and, therefore, the conditions of free competition.
- 30 On 29 March 2019, the Kingdom of Spain adopted Real Decreto-Ley 9/2019 por el que se modifica la Ley 14/1994, de 1 de junio, por la que se regulan las empresas de trabajo temporal, para su adaptación a la actividad de la estiba portuaria y se concluye la adaptación legal del régimen de los trabajadores para la prestación del servicio portuario de manipulación de mercancías (Royal Decree-Law 9/2019 amending Law No 14/1994 of 1 June 1994 on temporary employment agencies in order to adapt it to port stowage activities and concluding the legal changes to the arrangements governing workers providing port cargo-handling services) of 29 March 2019 (BOE No 77 of 30 March 2019, p. 32836). That decree-law makes it possible during the transitional period to make provision through collective agreements or contracts for the compulsory takeover of the staff of the SAGEPs in cases where the handling undertakings decide to leave the SAGEPs or to go into dissolution.
- 31 The CNMC observes that the adoption of that measure, which has the status of a law, has had the effect of prolonging the time limit for exercising the right of withdrawal to the entire transitional period laid down by Royal Decree-Law 8/2017, that is until 14 May 2020.
- 32 Therefore, the CNMC is unsure whether (i) the collective agreements amending the fourth national framework agreement and (ii) Royal Decree-Law 9/2019 are compatible with Article 101 TFEU, which, in its opinion, justifies making a reference to the Court on the basis of Article 267 TFEU.
- 33 In that respect, the CNMC considers that it is a ‘court or tribunal’ for the purposes of Article 267 TFEU on the ground that, in line with the case-law of the Court, 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.



- 34 In those circumstances, the CNMC decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:
- (1) Must Article 101 TFEU be interpreted as meaning that agreements between operators and employee representatives, even when termed collective agreements, are prohibited where they (i) stipulate that undertakings which leave a ... SAGEP ... must accept the transfer of SAGEP workers and (ii) establish the method by which the transfer takes place?
  - (2) If the answer to the previous question is in the affirmative, must Article 101 TFEU be interpreted as precluding provisions of national law such as those in Royal Decree-Law 9/2019 in so far as they provide the basis for the collective agreements that impose a particular means of transferring employees [which] extends beyond employment matters and produces a harmonisation of commercial conditions?
  - (3) If the aforesaid legal provisions are held to be contrary to EU law, must the case-law of the Court of Justice on the primacy of EU law and its consequences, as established in the [judgments of 15 December 1976, *Simmenthal* (35/76, EU:C:1976:180) and of 22 June 1989, *Costanzo* (103/88, EU:C:1989:256)], be interpreted as requiring a public law body such as the [CNMC] to disapply those provisions of national law which contravene Article 101 TFEU?
  - (4) If the answer to the first question is in the affirmative, must Article 101 TFEU, [Regulation No 1/2003] and the duty to ensure the effectiveness of EU laws be interpreted as requiring an administrative authority such as the CNMC to impose fines and periodic penalty payments on those entities [which] behave in the way described?

#### **Admissibility of the request for a preliminary ruling**

- 35 While in the order for reference the CNMC sets out the reasons why, in its opinion, it is a ‘court or tribunal’ for the purposes of Article 267 TFEU and, in its observations, Asoport states that it concurs with that assessment, the other parties to the main proceedings, along with the Spanish Government and the Commission, express doubts in that regard. In particular, the latter submit that the proceedings before the CNMC, such as those in the main proceedings, are not intended to lead to a decision of a judicial nature, so that that body cannot be regarded as having the nature of a ‘court or tribunal’ for the purposes of Article 267 TFEU.
- 36 According to settled case-law, in order to determine whether the body making a reference is a ‘court or tribunal’ for the purposes of Article 267 TFEU, which is a question governed by EU law alone, the Court takes account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedures are *inter partes*, whether it applies rules of law and whether it is independent. In addition, a national court may refer a question to the Court of Justice only if there is a case pending before it and if it is called upon to give judgment in proceedings intended to lead to a decision of a judicial nature (judgment of 31 May 2005, *Syfait and Others*, C-53/03, EU:C:2005:333, paragraph 29 and the case-law cited).
- 37 Finally, as regards the notion of a ‘court or tribunal of a Member State’ for the purposes of Article 267 TFEU, the Court has repeatedly stated that it can, by its very nature, designate only an authority acting as a third party in relation to the authority which adopted the decision forming the subject matter of the proceedings (judgments of 30 March 1993, *Corbiau*, C-24/92, EU:C:1993:118, paragraph 15, and of 19 September 2006, *Wilson*, C-506/04, EU:C:2006:587, paragraph 49).
- 38 In the first place, with regard to the CNMC’s standing as a third party, it is apparent from Article 17(1) and Article 19(1)(f) to (h) of the Law establishing the CNMC that the President of the CNMC chairs the Board of the CNMC which adopts decisions on behalf of the CNMC and that, in that respect, it

exercises the functions of managing the staff of the CNMC and manages, coordinates, evaluates and supervises all the units of the CNMC, including the Competition Directorate which drew up the proposal for a decision that prompted the present request for a preliminary ruling. In addition, it is apparent from the first paragraph of Article 20, point 13, of the Law establishing the CNMC and Article 15(2)(b) of the Statute of the CNMC that the President of the CNMC is responsible for proposing to the Board of the CNMC the appointment and dismissal of management staff, which includes the management staff of the Competition Directorate.

- 39 Thus, as the Court held in paragraph 33 of the judgment of 31 May 2005, *Syfait and Others* (C-53/03, EU:C:2005:333), concerning the Epitropi Antagonismou (Competition Commission, Greece) which maintained an operational link with its secretariat, an investigation body on whose proposal it adopted decisions, the Board of the CNMC maintains an organisational and operational link with the Competition Directorate of the CNMC, which makes proposals for decisions which the Board is called upon to adjudicate.
- 40 Therefore, contrary to what the CNMC states, it cannot be regarded as having the standing of a ‘third party’ in relation to the authority which adopts the decision that may form the subject matter of proceedings and consequently cannot be classified as a ‘court or tribunal of a Member State’ for the purposes of Article 267 TFEU.
- 41 In the second place, it should be pointed out that the decisions which the CNMC is required to adopt in cases such as the one in the main proceedings resemble administrative decisions, which precludes them from being adopted in the exercise of judicial functions (see, by analogy, order of 14 November 2013, *MF 7*, C-49/13, EU:C:2013:767, paragraph 17).
- 42 Thus, it should be observed that, as is apparent from Article 4 of the Statute of the CNMC, the CNMC is the competition authority responsible, under Article 1(2) of the Law establishing the CNMC, for guaranteeing, preserving and promoting the proper functioning, transparency and existence of effective competition on all markets and in all production sectors for the benefit of consumers and users in Spain.
- 43 The proceedings at issue in the main suit are penalty proceedings initiated *ex officio*, in accordance with Article 49(1) of the Law on the protection of competition, by the Competition Directorate of the CNMC against Anesco and the trade unions in question in the main proceedings, which is confirmed by the fact that Asoport is an interested party in the proceedings conducted by the CNMC.
- 44 The fact the CNMC acts *ex officio* as a specialised administration exercising the power to impose penalties in matters falling within its competence indicates that the decision which it is called upon to make in the proceedings which led to the present request for a preliminary ruling is administrative and not judicial in nature (see, by analogy, order of 14 November 2013, *MF 7*, C-49/13, EU:C:2013:767, paragraph 18).
- 45 The same is true for the fact that the CNMC is required to work in close collaboration with the Commission and may be denied jurisdiction in favour of the latter under Article 11(6) of Regulation No 1/2003, at least in certain cases where the rules of EU law are applicable and the Commission is better placed to deal with the case (see, by analogy, judgment of 31 May 2005, *Syfait and Others*, C-53/03, EU:C:2005:333, paragraphs 34 and 35).
- 46 In addition, Article 36(1) of the Law on the protection of competition requires the CNMC to adopt and notify the decision putting an end to the penalty proceedings in the event of anti-competitive behaviour within a maximum period of 18 months, and Article 38(1) of that law stipulates that on expiry of that period the proceedings will lapse, regardless of the wishes of the interested parties and, in particular, any complainants.

- 47 It should also be pointed out that, under Article 75 of the Law on the administrative courts, where an action before the administrative courts was brought against a decision made by the CNMC, the latter may choose not to defend the application, that is to say, withdraw its own decision provided that the party who brought an action against the decision of the CNMC before the relevant courts is in agreement.
- 48 It is clear from the foregoing that the penalty proceedings before the CNMC are on the periphery of the national court system and do not fall within the exercise of judicial functions. The decision of the CNMC putting an end to the proceedings is an administrative decision which, whilst being final and immediately enforceable, is not capable of acquiring the attributes of a judicial decision, in particular the force of *res judicata* (see, to that effect, judgment of 16 February 2017, *Margarit Panicello*, C-503/15, EU:C:2017:126, paragraph 34 and the case-law cited).
- 49 The administrative nature of the proceedings in the main suit is also confirmed by Article 29(4) of the Law establishing the CNMC which provides that the adoption of a decision by the Board of the CNMC puts an end to the proceedings which are expressly qualified as ‘administrative’. In addition, under Article 48(1) of the Law on the protection of competition, an action before the administrative courts may be brought against such a decision, during which the CNMC, as was pointed out in particular by the Spanish Government in its written observations, acts as a defendant in the court proceedings at first instance before the Audiencia Nacional (National High Court, Spain) or as an appellant or respondent in the event of an appeal against the judgment of the Audiencia Nacional before the Tribunal Supremo (Supreme Court, Spain).
- 50 The above considerations may not be called into question by the judgment of 16 July 1992, *Asociación Española de Banca Privada and Others* (C-67/91, EU:C:1992:330), in which the Court implicitly acknowledged the admissibility of a request for a preliminary ruling from the Tribunal de Defensa de la Competencia (Competition Court, Spain). In that regard, it should be pointed out that that judgment was delivered in the context of the previous Spanish Law on the protection of competition, under which that body was separate from the investigation body in competition matters created by that law, that is to say the Dirección General de Defensa de la Competencia (General Directorate for the Protection of Competition, Spain). In the present case, as is apparent from Article 29(1) of the Law establishing the CNMC, the CNMC simultaneously exercises the functions previously attributed to the Tribunal de Defensa de la Competencia (Competition Court) and those previously attributed to the General Directorate for the Protection of Competition.
- 51 Having regard to all the foregoing considerations, it must be held that the request for a preliminary ruling from the CNMC is inadmissible.

### Costs

- 52 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring body, the decision on costs is a matter for that body. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Ninth Chamber) hereby rules:

**The request for a preliminary ruling from the Comisión Nacional de los Mercados y la Competencia (National Commission on Markets and Competition, Spain), made by decision of 12 June 2019, is inadmissible.**

[Signatures]