Kluwer Competition Law Blog

National Competition Authorities and Article 267 TFEU: the ECJ's take on the referral by the Spanish Commission on Markets and Competition and its implications

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A welcome post by the new Deputy Editor

Introduction and summary

In the recent Anesco case, the ECJ held the preliminary request of the Spanish National Commission on Markets and Competition (CNMC) inadmissible due to the fact that the CNMC was not a 'court or tribunal' for the purpose of Article 267 TFEU. The ECJ has not dealt with the question whether a competition authority is a 'court or tribunal' since its famous 2005 Syfait case, which came to the same conclusion with regard to the Greek Competition Commission. In 1992, the Court still did accept a reference from a Spanish competition authority but back then, the institutional framework in Spain was different, with a competition court distinct from the competition investigatory body. The ECJ decision of September 16, 2020, however, comes as no surprise, since the institutional framework in Syfait and Anesco are similar. Today, Spain follows a model where the investigative and decision-making activities are functionally separated but handled by one (administrative) institution. New compared to Syfait is the legal reasoning of the Court that now focuses more specifically on the nature of the competition proceedings in front of the CNMC and concludes that they are of an administrative and not a judicial nature. The reasoning is not clearly transferrable to the many different institutional settings in the ECN or other quasi-judicial authorities of the Member States. In any case, the big underlining, normative question remains: does it make sense to have a strict dialogue only between judges or do we need references by specialised authorities on the periphery of the national judicial systems for the sake of uniform and effective application of European (competition) law?

The ECJ's decision on the CNMC

The preliminary request was made in the context of competition proceedings concerning the conclusion of a possible anti-competitive collective agreement. The board of the CNMC referred certain substantive questions to the ECJ and considered itself a 'court or tribunal'. In its view, it complies with the relevant judicial features defined by EU-case law.

The ECJ started with reiterating just these key judicial features that are widely known from standard case law, namely: (1) established by law, (2) permanent, (3) compulsory jurisdiction, (3) adversial proceedings, (4) power to apply legal rules, and (5) independence. Furthermore, a court

can only refer questions if a case is pending before it and in proceedings leading to a decision of a judicial nature. The Court did not go into arguments brought forward by the CNMC concerning features (1) – (4), likely since it is obvious that the CNMC fulfils these (like many other competition and quasi-judicial authorities). In its reasoning, the ECJ first tackled the question of independence and then, second, whether the proceedings in the underlining case were of a judicial nature.

On the question of independence, the Court applied a formula that was only indicated in Syfait but is known from other case law on non-competition law bodies. According to this formula, the "concept of independence involves primarily an authority acting as a third party in relation to the authority which adopted the contested decision." The ECJ held that the third-party criterion was not fulfilled, due to the organisational and operational links between the board and the directorates of the CNMC. The president of the CNMC chairs the board but at the same time exercises the functions of managing, coordinating, evaluating and supervising the directorates of the CNMC and their staff.

Surprisingly, the Court did not go into the issue brought forward in past cases where it affirmed the independence of a body because the national legal framework could ensure a separation of functions between the different responsible departments within an authority. In any case, the ECJ could have stopped here. It did not, most likely since its interpretation of the concept of independence has often been criticised. It has been a moving concept in the case law of the Court, that went from a structural to a functional and now back to a more operational dimension.

The Court therefore moved on from the question of independence and explained in-depth why the proceedings in front of the CNMC are not intended to lead to a decision of judicial nature but are administrative. A strong indication was given by the law establishing the CNMC itself, which expressly qualified its proceedings as 'administrative' – the ultimate decision on this, however, does not lie with national but with EU law. By-analogy to existing case law on a Czech trademark authority, the ECJ brought forward that the CNMC acts *ex officio* as a specialised administration exercising the power to impose penalties in matters falling within its competence, which is typically administrative and not judicial in nature. The Court went on to argue that, after the board of the CNMC adopts a decision and this decision is appealed, the CNMC itself needs to defend the decision in front of an administrative court. This is a cogent observation, since that is typical for an administrative entity but not a (first-instance) court. Moreover, whilst being final and immediately enforceable, the decision of CNMC is not capable of *res judicata*.

Some part of the Courts reasoning are not as compelling. Just like in Syfait, the ECJ's main argument focused on the fact that the CNMC is required to work in close collaboration with the Commission and might be denied jurisdiction in favour of the latter due to Article 11(6) of Regulation 1/2003. This is, however, not a question of the judicial nature of the proceeding but rather if there is a pending case before the referring court. The question whether the Commission can take over the case has nothing to do with whether the proceeding before the national body are intended to lead to a decision of a judicial nature. Proceedings can still originally be meant to result in a judicial decision and subsequently terminated because the Commission is better placed to deal with the case. In these situations, the ECJ can reject a preliminary reference due to the lack of a pending case before the national court but the question whether the initial proceedings where themselves of a judicial nature is not affected.

The future for NCA's and preliminary references

The ECJ's decision is not only problematic from a viewpoint of Article 6 ECHR, i.e. the quasi-criminal nature of competition fines and the related procedures. Moreover, the decision raises questions concerning the effective and uniform application of competition law in the EU, as already stressed by AG Jacobs in Syfait. Since Regulation 1/2003, backed by the recent ECN+ Directive, national competition authorities are the prime enforcers of competition law who, due to the complexity of the field, are regularly confronted with interpretative questions better solved at a uniform EU level. If all NCA's could directly refer questions to the ECJ, one would not need to wait for the appeal court to raise the issues with the ECJ (which might also never happen if the decisions by the NCA are not appealed). Effectiveness and judicial economy, in particular, the timely resolution of the issue, could be used to set aside doubts with regard to the judicial qualities of the referring authority, like the Court did in the past. In recent years and specifically with this decision, the Court, however, clearly favours a judicial dialogue between judges over efficiency arguments.

The last word has not yet been spoken on preliminary references by NCA's (and other quasi-judicial authorities). While most Member States follow some kind of administrative model (which is arguably favoured by Regulation 1/2003 and the ECN+ Directive), in other jurisdictions, for example Austria, an investigation is carried out by the competition authority, that then has to bring the case before a court to decide on the case (judicial model). It is uncontroversial that these courts can raise questions with the ECJ. Other Member States also might demonstrate more clearly that the national legal framework could ensure a separation of functions between the different responsible departments within an authority. This indicates a clear differential treatment of the competition authorities from different Member State as 'courts or tribunals' in the sense of Article 267 TFEU, based on their respective national institutional settings. Such a finding seems arbitrary, in particular when recalling the Courts dogma that the definition of 'court or tribunal' is a clear concept of EU law.

Welcome message by the new Deputy Editor

"Competition law? Is that a specialisation now?" – Questions I am gladly asked back in my hometown, far away from our beloved competition law bubble. Certainly, it gives you some perspective on the nerds that we really are, fascinated with platforms, two-sided markets, monopolies, due process and much more (which I am nevertheless happy to be a part of). I am even more happy now, to work with Peter and the wonderful people of Wolters Kluwer and push forward the dialogue on this fast-moving field. I look forward to reading all your submissions!

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