On the Continued Inadmissibility of Preliminary References from National Competition Authorities – Time for a Change?

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Introduction

1. As a general rule, the Court of Justice of the European Union (CJEU) has held as inadmissible questions referred on the basis of Article 267 Treaty on the Functioning of the European Union (TFEU) for a preliminary ruling by national administrative regulatory authorities. This is because the CJEU has ruled that they do not meet the EU law requirements to be considered courts or tribunals. Namely, that in order for the body making a reference to be considered a court or tribunal for the purposes of the preliminary reference procedure, which is a question governed by Community law alone, the CJEU first verifies whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent. In addition, in order to establish whether a national administrative body, entrusted by law with different categories of function, it determines in what specific capacity, judicial or administrative, it is acting and regarding which it seeks a ruling. Finally, the CJEU has established that there must be a case pending before the referring body and that it is called upon to give judgment in proceedings intended to lead to a decision of a judicial nature.[1]

2. While the case law establishes that all of the criteria must be met in order for a referring body to be recognised as a court or tribunal, the CJEU has been criticised for not clarifying the relative importance and pertinence accorded to each criterion when determining whether a body is a court or tribunal for the purposes of the preliminary references. Indeed, the case law of the CJEU has been described as being excessively casuistic, lacking clear and precise features, that does not provide a reliable frame of reference that offers a confused and inconsistent panorama which causes general uncertainty.[2] This is perhaps unsurprising in light of the wide variety of organisational, functional and procedural characteristics that national administrative competition authorities (NACAs) may have and that the CJEU must evaluate when determining if they have standing to refer questions. That said, is the sweeping criticism of the case law still fully justified or has the CJEU implicitly acknowledged the need for greater clarity and consistency in its case law on the matter and subsequently established a reliable frame of reference for the

[1] See: Case C-503/15 *Ramon Margarit Panicello* at paras 27 and 28.

[2] See: Opinion of AG Ruiz-Jarabo Colomer, Case C-17/00 *De Coster*, point 58.

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determination of whether national regulatory authorities (NRAs), such as NACAs, can be recognised as courts or tribunals?

3. There is evidence to support the proposition that the CJEU has indeed gradually established a more reliable and principled frame of reference for the determination of whether national administrative regulatory authorities can be recognised as courts or tribunals for the purposes of Article 267 TFEU. For example, in the recent *Anesco and Others*[3] ruling of the CJEU, that is the main focus of this article, the CJEU, drawing on principles it has set down in a number of other recent references from national administrative regulatory bodies provides a number of welcome clarifications on the relative importance of the criteria applied to national administrative competition authorities. Indeed, it is submitted that the recent case-law of the CJEU now provides a clear and coherent evaluative framework regarding the constitution and functions of NRAs more generally when determining whether their requests for preliminary rulings are admissible in light of the principles it had first established in the seminal *Corbiau*[4] and *Syfait and Others*[5] rulings. Central to the evaluative framework is the criterion of independence. This article will consider the latest attempt by an NACA to overcome the seemingly insurmountable admissibility hurdles put in place by the CJEU since the *Corbiau,TDC A/S*[6] and *Syfait* rulings.

4. The article will also briefly consider the possible impact on the admissibility of future requests for preliminary rulings from NACAs and indeed other NRAs as presently organised and operating in the Member States in light of the very prescriptive provisions regarding the requirements of independence in Directive 2019/1.[7]

The Point of Departure: National Institutional Autonomy

5. The Member States of the European Union enjoy a degree of institutional autonomy with regards to the organisation and structuring of their national administrative regulatory authorities tasked, usually on the basis of harmonising directives, with implementing and enforcing EU law in a variety of areas of the Internal Market. This also now includes the administrative bodies designated by the Member States as responsible for EU competition law enforcement. As the CJEU has noted, it follows from Article 288 TFEU that Member States are required when transposing a directive, to ensure that it is fully effective, whilst retaining a broad discretion as to the choice of ways and means of ensuring it is implemented. That freedom of choice does not affect the obligation imposed on all Member States to adopt all the measures that are necessary to ensure that the directive concerned is fully effective in accordance with the objectives which it seeks to attain. Therefore, it is clear that when constituting and empowering national regulatory bodies, Member States' institutional autonomy

[3] Case C-462/19 *Anesco and Others.*
[4] Case C-24/92 *Corbiau.*
[5] Case C-53/03 *Syfait and Others.*
[6] Case C-222/13, *TDC v Erhvervsstyrelsen.*
[7] Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market (Text with EEA relevance) OJ L 11, 14.1.2019.

may be exercised only in accordance with the objectives and obligations laid down in a harmonising directive. In the performance of their assigned tasks NRAs must meet the organisational and operational requirements of the pertinent directive.[8]

6. A clear example of this approach, and the main subject of this assessment of the current legal position with regards to the admissibility of preliminary references to the CJEU from NACAs, is provided by the rules laid down in the Regulation 1/2003[9] and Directive 2019/1 governing the institutional and procedural aspects of the enforcement of EU competition law by NACAs.

7. Thus, Article 35 of Regulation 1/2003[10] allows Member States to decide the appropriate institutional structures for the public enforcement of EU competition Law. On the basis of Article 35, the Member States have adopted one of the two broad organisational and institutional configurations. The first, and by far the most common, is that of an integrated administrative authority competent to investigate competition law infringements and adopt decisions with the

[8] See Case C-424/15 *Xabier Ormaetxea Garai*, paras 29-31.

[9] See Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (Text with EEA relevance) *OJ L 1, 4.1.2003.*

[10] Article 35 of Council Regulation (EC) No 1/2003 on the Designation of competition authorities of Member States:

> 1. The Member States shall designate the competition authority or authorities responsible for the application of Articles 81 and 82 of the Treaty in such a way that the provisions of this regulation are effectively complied with. The measures necessary to empower those authorities to apply those Articles shall be taken before 1 May 2004. The authorities designated may include courts.
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> 2. When enforcement of Community competition law is entrusted to national administrative and judicial authorities, the Member States may allocate different powers and functions to those different national authorities, whether administrative or judicial.
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> 3. The effects of Article 11(6) apply to the authorities designated by the Member States including courts that exercise functions regarding the preparation and the adoption of the types of decisions foreseen in Article 5. The effects of Article 11(6) do not extend to courts insofar as they act as review courts in respect of the types of decisions foreseen in Article 5.
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> 4. Notwithstanding paragraph 3, in the Member States where, for the adoption of certain types of decisions foreseen in Article 5, an authority brings an action before a judicial authority that is separate and different from the prosecuting authority and provided that the terms of this paragraph are complied with, the effects of Article 11(6) shall be limited to the authority prosecuting the case which shall withdraw its claim before the judicial authority when the Commission opens proceedings and this withdrawal shall bring the national proceedings effectively to an end.

Recital 35 explains that in order to attain a proper enforcement of Community competition law, Member States should designate and empower authorities to apply Articles 81 and 82 of the Treaty as public enforcers. They should be able to designate administrative as well as judicial authorities to carry out the various functions conferred upon competition authorities in this Regulation. This Regulation recognises the wide variation which exists in the public enforcement systems of Member States. The effects of Article 11(6) of this Regulation should apply to all competition authorities. As an exception to this general rule, where a prosecuting authority brings a case before a separate judicial authority, Article 11(6) should apply to the prosecuting authority subject to the conditions in Article 35(4) of this Regulation. Where these conditions are not fulfilled, the general rule should apply. In any case, Article 11(6) should not apply to courts insofar as they are acting as review courts.

potential for the judicial review of the final authority decision before a competent court. In this model there is usually an organisational and functional division between, on the one hand, a branch of the administrative authority that investigates and proposes the decisions to be adopted and, on the other hand, a branch of the authority that following an evaluation of the decision proposed by the investigative branch adjudicates and adopts the final decision on the case. The second type of configuration sees the existence of an investigating and prosecuting authority and an entirely separate body, usually a specialised court, that adopts the final decision with the possibility of the judicial review of the final decision. That said, regardless of the institutional configuration adopted by each Member State, until recently national procedural law governed the procedural aspects of public enforcement by national competition authorities. Not surprisingly therefore, the enforcement of EU competition law was uneven and variable in terms of effectiveness in the Member States.

8. The institutional and procedural autonomy that Article 35 leaves to the Member States has recently been significantly reduced by the adoption of Directive 2019/9 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market. Directive 2019/19 has the objective of harmonizing national rules concerning the powers and functions accorded to NACAs when enforcing EU and national competition law. The Directive requires Member States to put in place harmonized rules regarding the guarantees of independence, adequate resources, and enforcement and fining powers of NACAs that are regarded as necessary to apply Articles 101 and 102 TFEU uniformly and effectively and indeed, to create a common and level EU competition law public enforcement area. For the purposes of this article, the provisions designed to ensure the guarantees of the functional independence of NACAs are of particular interest as it is one of the key factors in determining whether a body referring preliminary references to the CJEU is a court or tribunal for the purposes of Article 267 TFEU.

The Foundations: The Distinction Between a Court or Tribunal and an Administrative Authority.

9. The explicit distinction between a court or tribunal and an administrative authority was first established by the CJEU in the *Corbiau* case.[11] In *Corbiau,* the CJEU ruled that the expression 'court or tribunal' by its very nature can only mean an authority acting as a third party in relation to the authority which adopted the decision forming the subject matter of the proceedings. Thus, where there is a clear organisational link, such as a hierarchical or management relationship between the albeit functionally distinct units of the same administrative authority, the administrative authority concerned does not meet the requirement of being a third party in proceedings. According to the CJEU, this is confirmed and indeed reinforced by the possibility that in an appeal against an administrative regulatory or adjudicatory decision brought before an

[11] See: *Corbiau* paras 14-17.

appeals court or tribunal, the administrative authority that adopted the decision is required to be a party to the appeal proceedings, usually as the defendant.

10. The *Corbiau* ruling therefore established a very stringent condition for national administrative authorities with regulatory, rule enforcement and adjudicatory powers to meet for the CJEU to accept jurisdiction. In short, the finding of the existence of any internal organisational link between different operational units within the same administrative authority will almost certainly be ruled to conflict with the requirements of the procedural independence and impartiality of proceedings before national administrative authorities that are empowered to perform on the one hand investigative and prosecution functions and on the other, adjudicatory and enforcement functions.

11. The concept of independence, both functional and institutional or organisational implicit in the *Corbiau* ruling, is regarded by some observers as the most important requirement a body must meet in order to be recognised as a court or tribunal by the CJEU. Indeed, one observer has submitted that it is usually the criterion that determines the admissibility issue.[12] Clarifying the requirements of independence from both internal and external pressures has indeed been fundamental in shaping the case law regarding the admissibility of requests for preliminary references to the CJEU from NACAs, and indeed, the admissibility of references from other NRAs. The importance of independence as a factor was first recognised in 1987.[13] All of the pertinent case-law has involved the CJEU clarifying some of the uncertainties surrounding the distinction it has drawn between administrative and judicial type decisions in proceedings before NACAs and NCAs.

12. As a starting point regarding the *Anesco and Others* ruling it may also be useful to first briefly recall the key aspects of the seminal *Syfait and Others* ruling of the CJEU. In *Syfait and Others* the CJEU ruled that the Greek NACA did not satisfy the criteria to be considered a court or tribunal. First of all, found that it was subject to the supervision of the Minister for Development, which implied that the minister was empowered, within certain limits, to review the lawfulness of its decisions. Next, even though its members enjoyed personal and operational independence, and were bound in the exercise of their duties only by the law and their conscience but there were no particular safeguards in respect of their dismissal or the termination of their appointment, which did not appear to constitute an effective safeguard against undue intervention or pressure from the executive on the members of the NCA. In addition, its President was responsible for the coordination and general policy of the secretariat and was the supervisor of the personnel of that secretariat and exercises disciplinary power over them, with the result that, by virtue of the operational link between the Competition Commission, a decision-making

[12] Georgios Anagostaras, "Preliminary Problems and Jurisdictional Uncertainties: The Admissibility of Questions Referred by Bodies Performing Quasi-Judicial Functions" (2005) 30 (6) European Law Review 878.

[13] See: Case C- 14/86 *Pretore di Salo*, para 7 where the CJEU ruled that it has jurisdiction to reply to a request if that request emanates from a court or tribunal which has acted within the general framework of its task of judging, independently and in accordance with the law, cases coming within the jurisdiction conferred on it by law, even though certain functions of that court or tribunal in the proceedings which gave rise to the reference are not, strictly speaking, of a judicial nature.

body, and its secretariat, a fact-finding body on the basis of whose proposal it adopted decisions, the Competition Commission was not a clearly distinct third party in relation to the State body which, by virtue of its role, may be akin to a party in the course of competition proceedings. Finally, a competition authority such as the Greek NACA is required to work in close cooperation with the Commission and may, pursuant to Article 11(6) of Regulation No 1/2003, be relieved of its competence by a decision of the Commission. Whenever the Commission relieves a national competition authority of its competence it has immediate consequence that the proceedings initiated before it will not lead to a decision of a judicial nature. It followed, according to the CJEU, from the factors examined that the Greek NACA is not a court of tribunal for the purposes of the preliminary references procedure before the CJEU.[14] In essence, the Greek NACA could not be considered to be a court or tribunal because it was found by the CJEU to not fully meet the requirements of criterion of independence and it also failed to meet the requirement that it exercise compulsory jurisdiction and adopt decisions of a judicial nature because the Commission could relieve it of the competence to act.

13. The *Syfait and Others* ruling therefore clearly signalled that unitary NACAs that both investigated and adopted infringement decisions and that could be relieved of their competence to act by the Commission should desist from referring questions to the CJEU. Not surprisingly, therefore, NACAs with similar organisational and operational characteristics to the Greek NACA did not refer questions to the CJEU. However, in June 2019, perhaps surprisingly in light of the settled nature of the case law on the inadmissibility of questions from NACAs, the Spanish National Commission on Markets and Competition (CNMC), decided to test the continued affirmative status of that ruling by referring questions for a preliminary ruling to the CJEU. It is important to note the submission of the CNMC before the CJEU justifying its decision to refer questions. Not least because the CJEU has had to systematically respond in a very detailed manner when ruling on the admissibility of the reference from that body to the submission of the CNMC that it considered itself a court or tribunal for the purposes of Article 267 TFEU.

The CNMC Justifications for the Request to the CJEU

14. The request for a preliminary ruling was justified by the CNMC on the ground that it was a court or tribunal because it was of the view that it satisfied all of the requirements established by the CJEU in the case law in order to be regarded as a court or tribunal for the purposes of Article 267 TFEU. Namely, that it must have a legal basis, it must be a permanent body, its jurisdiction must be mandatory; proceedings must be conducted in accordance with the adversarial procedure; it must apply rules of law and it must be independent.

15. The CNMC submitted that it is governed by law and thereby satisfies the requirement for a legal basis and also that it is a permanent body. With regard to the mandatory nature of its jurisdiction, the CNMC submitted that it is classed as a public law body and has jurisdiction to apply Articles 101 and 102 TFEU and that its jurisdiction is not dependent on the agreement of the parties, on

[14] See: *Syfait and Others*.

whom its decisions are enforceable and binding. It continued that its infringement proceedings are adversarial. It illustrated this by submitting that decisions of the Board of the CNMC are issued following a hearing at which interested parties can put forward arguments and submit evidence concerning the decisions issued by each of the competent bodies, submitting information on the facts, their classification in law, and the parties' liability in connection with those facts. It added that infringement proceedings are governed by the principle of functional separation which requires a two-stage process in which different bodies, the Competition Directorate and the Board, are responsible for conducting the investigation and adopting the decision respectively. Both bodies, according to the CNMC, form part of the CNMC, and there is no external interference. The two-stage process according to the CNMC sees the Competition Directorate investigate cases, initiate and conduct infringement proceedings, and submit a draft decision to the Board. The Board weighs up the investigating body's recommendation and the parties' final arguments, and it may hold a hearing. At the end of the procedure it issues a decision in which it applies EU competition law where trade between Member States may be affected and which is enforceable and can be appealed in the administrative courts. The CNMC therefore considers that it satisfies the requirement regarding the application of rules of law in order to be considered a court or tribunal the purposes of Article 267 TFEU.

16. With regards to the requirement of independence, the CNMC submitted that as provided for in national law, it operates with organisational and functional autonomy and complete independence in carrying out its functions and performing its duties. This includes the legal requirement that members of the CNMC bodies are prohibited from seeking or accepting instructions from any public or private organisation.

17. The CNMC also asserted that it has the status of a third party which is separate from any government body which may be subject to its oversight, that it has complete autonomy in the performance of its duties, and that it is protected from any external interference or pressure that could jeopardise its members' independence of judgement. In addition, decisions of the Board of the CNMC are immediately enforceable. Moreover, in performing its duties, the CNMC must behave completely objectively and impartially towards the parties to the dispute and their respective interest in the case. In addition, its members cannot be removed from office.

18. Finally, the CNMC submitted that the judgment in *Syfait and Others* does not apply to its situation, because the Greek Competition Commission was subject to the supervision of the Minister for Development and there were no particular safeguards in respect of the dismissal or termination of the appointment of its members. On the contrary, ministerial supervision of the CNMC is legally not permissible and there are safeguards regarding the removal of office its officials in place. Following the reform of competition law enforcement in Spain the CNMC actually enjoys an even greater degree of independence than its predecessor, the Competition Tribunal, and that the CJEU had deemed met the EU law requirements in order to be recognised as a court or tribunal for the purposes of Article 267 TFEU when it accepted the admissibility of a request

for a preliminary ruling from that body. The CNMC also submitted that it saw no change in the situation regarding the Commission's competence to relieve a national competition authority of an investigation or decision into a competition law infringement that was already possible when the CJEU admitted the questions referred for a preliminary ruling by its predecessor, the Competition Tribunal.[15]

The Development of a Uniform Evaluative Framework Regarding the Admissibility of References from sectoral NRAs

19. It is important to note that subsequently, and to a certain extent in parallel to the *Syfait and Others* ruling, the CJEU has developed and applied similar criterion with regards to the non-admissibility of references from NRAs established with powers of enforcement and oversight over particular sectors of the internal market such as telecommunications or audiovisual media services.[16] Of particular importance in these rulings has also been the elaboration of what the CJEU has defined as the external and internal aspects or dimensions of NRA independence. Requirements that were implicit in the *Syfait and Others* ruling when the CJEU considered the potential external influence of the political authorities on the NACA and internally when it evaluated the operational links between the investigative decision-making units in the NACA.

20. For example, in the *TDC A/S* ruling the CJEU had to decide on whether the Danish Telecommunications Complaints Board, is a court or tribunal for the purposes of Article 267 TFEU. Regarding the criterion to determine whether the body met the requirement of independence that the CJEU ruled is inherent in the task of adjudication. The Court held that it implies above all that the body in question acts as a third party in relation to the authority which adopted the contested decision. Specifically, that there are two aspects to the concept of independence. The first aspect, which is external, entails that the body is protected against external intervention or pressure liable to jeopardise the independent judgment of its members as regards proceedings before them. The second aspect, which is internal, is linked to impartiality and seeks to ensure a level playing field for the parties to the proceedings and their respective interests with regard to the subject-matter of those proceedings. That aspect requires objectivity and the absence of any interest in the outcome of the proceedings apart from the strict application of the rule of law. Those guarantees of independence and impartiality require rules, particularly as regards the composition of the body and the appointment, length of service and the grounds for abstention, rejection and dismissal of its members, in order to dismiss any reasonable doubt in the minds of individuals as to the

[15] See: Working Document, Case C-462/19, Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice and *Anesco and Others*, paras 33 and 35.

[16] See: Case C-222/13 *TDC A/S v Erhvervsstyrelsen*, and Case C-517/09 *RTL Belgium* that concerned a reference for a preliminary ruling from the Belgian Licensing and Control Authority of the Broadcasting Authority. Indeed, in the RTL ruling the CJEU cited its ruling in *Syfait and Others* at paragraph 45 to justify its ruling that the reference was inadmissible because the referring national regulatory authority failed to meet the criterion of internal independence in particular.

imperviousness of that body to external factors and its neutrality with respect to the interests before it. In order to consider the condition regarding the independence of the body making the reference as met, the CJEU ruled that the case-law requires*, inter alia*, that dismissals of members of that body should be determined by express legislative provisions. The CJEU ruled that unlike the rules governing the dismissal of ordinary court judges, the rules governing the dismissal of the members of the Danish Telecommunications Complaints Board and the conditions for their dismissal are not subject to any specific rules, other than the general rules of administrative law and employment law which apply in the event of an unlawful dismissal. Thus, it did not appear that the dismissal of members of the Telecommunications Complaints Board was subject to specific guarantees which would dispel any reasonable doubt as to the independence of that body. Finally, the CJEU held that as was apparent from the documents before it, an appeal against a decision of the Telecommunications Complaints Board may be made before the ordinary courts. If such an appeal was made, the Telecommunications Complaints Board has the status of a defendant. That involvement of the Telecommunications Complaints Board in proceedings challenging its own decision implies that, when it adopts that decision, the Telecommunications Complaints Board is not acting as a third party in relation to the interests at stake and does not possess the necessary impartiality. That structuring of the legal remedies against a decision of the Telecommunications Complaints Board thus emphasises the non-judicial nature of the decisions delivered by that body.

21. In *Banco de Santander SA,*[17] in determining whether it had jurisdiction to find admissible a reference from the Spanish Central Tax Tribunal, the CJEU applied the internal and external dimensions of independence to a body defined by national law as a Tribunal when it ruled that while it satisfied the criteria in that the Tribunal had been established by law, that it is was permanent, that its jurisdiction is compulsory, that its procedure is *inter partes* and that it applies rules of law, it failed to satisfy the requirements of independence. It pointed first to the systemic importance of the criterion. Notably, that the independence of national courts and tribunals is essential to the proper working of the judicial cooperation system embodied by the preliminary ruling mechanism established by Article 267 TFEU, in that, in accordance with the settled case-law of the Court that mechanism may be activated only by a body responsible for applying EU law which satisfies that criterion of independence. The CJEU ruled as it had done in the *TDC A/S* case, that the concept of 'independence' has two aspects and proceeded to clarify the main aspects of the concept. The first aspect, which is described as external, requires that the body concerned exercise its functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever, being thus protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions. As regards the external aspect of the concept of 'independence', it ruled that the irremovability of the members of the body concerned constitutes a guarantee that is essential to judicial

[17] Case C-274/14 *Banco de Santander SA.*

independence in that it serves to protect the person of those who have the task of adjudicating in a dispute. Furthermore, the CJEU held that principle of irremovability, is of cardinal importance and requires, that judges may remain in post provided that they have not reached the obligatory retirement age or until the expiry of their mandate, where that mandate is for a fixed term. While it is not wholly absolute, the CJEU continued, there can be no exceptions to that principle unless they are warranted by legitimate and compelling grounds, subject to the principle of proportionality. Thus, judges may be dismissed if they are deemed unfit for the purposes of carrying out their duties on account of incapacity or a serious breach of their obligations, provided the appropriate procedures are followed. Finally, the guarantee of irremovability of the members of a court or tribunal requires that dismissals of members of that body should be determined by specific rules, by means of express legislative provisions offering safeguards that go beyond those provided for by the general rules of administrative law and employment law which apply in the event of an unlawful dismissal.

22. The CJEU then defined the key aspects of the second, internal, dimension of the concept of 'independence'. It held that it is linked to 'impartiality' and seeks to ensure a level playing field for the parties to the proceedings and their respective interests with regard to the subject matter of those proceedings. That dimension requires objectivity and the absence of any interest in the outcome of the proceedings apart from the strict application of the rule of law. Thus, according the Court, the concept of 'independence', which is inherent in the task of adjudication, implies above all that the body in question acts as a third party in relation to the authority which adopted the contested decision. Those guarantees of independence and impartiality require rules, particularly as regards the composition of the body and the appointment, length of service and the grounds for abstention, rejection and dismissal of its members in order to dismiss any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it.

23. Following a careful analysis of the national rules governing the appointment and removal from office of members of the Tribunal the CJEU held that they were not such to protect the members against direct and indirect external pressures that are liable to cast doubt on their independence. In essence, the members were appointed by Ministers and could be removed by the appointing Minister by the application of the general rules of administrative law and the basic regulations relating to civil servants and not by specific rules, by means of express legislative provisions, such as those applicable to members of the judiciary. In short, the principle of irremovability was not limited to certain exceptional cases only was not met by the national rules. It follows, according to the CJEU, that national rules must ensure that specific and effective safeguards in respect of the appointment and termination of the appointment of members of national regulatory authorities must be in place in order to guarantee that members of the national administrative regulatory body are able to resist any undue pressure from the executive. In that regard, the appointment of members of the judiciary enjoying the particular protection and guarantees of independence reserved for members of the judiciary and having a decisive

weight in the decisions adopted by the administrative regulatory body has been acceptable to the CJEU. The CJEU also held that a separation of functions within an administrative regulatory body may not be sufficient to meet the requirements of internal independence and impartiality with regards to third parties in proceedings. This will be the case where the is a personal overlap or connection between the separate functional departments. This is most obvious in cases in which a member of one department may have a managerial or decisional role over the functionally separate department. Indeed, this would be particularly so where the functional and personal relationship between two departments of the same administrative body are conflated so that making it impossible for one of the departments to act or be considered to be a third party in respect of the actions of the second department, and thus, of the interests before it.

24. The CJEU added very usefully that the fact that administrative regulatory bodies may not constitute 'courts or tribunals' for the purposes of Article 267 TFEU because they fail to meet one of the elements of the criterion of independence does not relieve them of the obligation to ensure that EU law is applied when adopting their decisions and to disapply, if necessary, national provisions which appear to be contrary to provisions of EU law that have direct effect, since these are obligations that fall on all competent national authorities, not only on judicial authorities. Moreover, the existence of judicial appeals against decisions of the administrative regulatory bodies following the complaints procedure ensures the effectiveness of the mechanism of the request for a preliminary ruling provided for in Article 267 TFEU and the uniform interpretation of EU law, since those national courts have the option of making or, where appropriate, are required to make a request for a preliminary ruling to the Court of Justice where a decision on the interpretation or the validity of EU law is necessary in order for them to give judgment.

Admissibility of the request for a preliminary ruling

25. The request in *Anesco and Others* was made in the course of proceedings brought by the CNMC against an employers association and trade unions 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.[18]

26. As noted above, despite the case-law of the CJEU finding questions from NACAs and indeed a wide variety of other national regulatory bodies such as telecommunications regulatory authorities as inadmissible, the Spanish NACA, the CNMC was of the view that it was a 'court or tribunal' for the purposes of Article 267 TFEU. It did so 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

[18] *Anesco and Others*, paras 1-2.

objectivity and impartiality vis-à-vis the parties to the proceedings and their respective interests with regard to the subject matter of those proceedings. Indeed, the CNMC submitted that the CJEU had in any event found admissible requests for a preliminary reference from its NCA predecessor, the Competition Tribunal in Case C-67/91.[19]

27. Not surprisingly, therefore, the CJEU had first to rule on the admissibility of the questions referred by the CNMC.

28. The CJEU began by noting that 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, the other parties to the main proceedings, along with the Spanish Government and the Commission, express doubts in that regard. In particular, the latter submitted 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.[20]

29. The CJEU continued by recalling that 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, that it 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. In other words, the CJEU will also have regard to the procedural role and intended outcome of the body making a reference. Thus it also recalled that it will recognise as a court or tribunal only an authority acting as a third party in relation to the authority which adopted the decision forming the subject matter of the proceedings.[21]

30. Having recalled the organisational, procedural and adjudicatory aspects of determining whether a referring body is a court or tribunal for the purposes of Article 267 TFEU, the CJEU turned to consider whether the CNMC met the requirements established in the case-law.

31. The CJEU ruled first that with regards to the CNMC's standing as a third party, it was apparent from 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 request for a preliminary ruling. In addition, it

[19] See: Case C-67/91 *Associaion Espanola de Banca Privada and Others*.
[20] *Anesco and Others*, para 35.
[21] *Ibid.,* paras 36-37.

held that it was apparent the Law establishing the CNMC and 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. Citing its ruling in *Syfait and Others* it held that in practice and according to national law 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.[22]

32. Therefore, the CJEU ruled that 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. In short, Given the role of the Board with regards to the Competition Directorate, it could not be seen as not having a potential influence over the latter unit because of its role in the appointment of personnel and management oversight over the latter. As in the *Syfait and Others* ruling, the potential lack of internal independence of the investigating division of the NACA from the decisional unit fell short of the requirement of independence established in the case-law of the CJEU. While, the NACA, appears to not breach the requirement of independence with regards to the subjects of the investigation and possible sanctioning decision, the CJEU in effect ruled that the investigating and prosecuting division of the NACA lacked adequate guarantees of organisational and operational separation and operational independence from the adjudicatory and decisional division. [23] The implications of this ruling are that in order to meet the requirements of what the CJEU termed 'external' independence regarding judicial independence in the case law, this obstacle to the admissibility of references from NCAs can only be overcome if Member States ensure that competition law enforcement is conferred on organisationally and operationally distinct divisions in an administrative regulatory and enforcement authority or opt for the second type of configuration noted above. For example, the approach adopted in Member States such as Germany, Austria and Sweden where specialist courts are in place, in essence cartel courts, that meet all the requirements of judicial independence and that are organisationally and operationally entirely separate from the NACA that can only investigate and prosecute alleged infringing undertakings in proceedings it brings before the specialist court.

33. The CJEU then proceeded to rule on the judicial or administrative nature of NACA proceedings and final decisions. Citing the order in *MF7* ruling,[24] it 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.[25]

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[22] *Ibid.,* para 38.

[23] *Ibid.,* paras 39 and 40.

[24] Case C-49/13 *MF7.*

[25] *Anesco and Others*, para 40. See also: *MF7*. In *MF7* the CJEU clarified that a national body cannot be regarded as a court or tribunal in circumstances where it decides by performing non-judicial functions, such as functions of an administrative nature. Thus, in proceedings before an NACA that may be brought not only on the

34. The CJEU then turned to examine the constitution and functions of the CNMC. It held that 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. It ruled that 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 which is confirmed by the fact that the association of port operators is an interested party in the proceedings conducted by the CNMC. It continued that 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 request for a preliminary ruling is administrative and not judicial in nature. The CJEU is clearly signalling that when functioning in this way, that is as an *ex officio* public enforcer of the competition rules, the CNMC is not as such conducting proceedings that are *inter partes*. Nor is it adjudicating in proceedings between opposing parties.[26]

35. The CJEU then confirmed its ruling in *Syfait and Others* by holding that 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. In addition, a provision of the national 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 another provision 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.[27]

36. The CJEU also pointed out that, under a provision of the national 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

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application or complaint of a third party, but also of the NACA's own motion, suggests that that body is not a court or tribunal but has the characteristics of an administrative body. In order to determine whether a body may refer a case to the CJEU, it is appropriate to do so on the basis of criteria relating both to the constitution of that body and to its function. It ruled in *Belov* that when not performing judicial functions but other functions of an administrative nature, it cannot be recognised as such as a court or tribunal. Further, in *ANAS* the CJEU ruled that It follows that in order to establish whether a national body, entrusted by law with different functions, is to be regarded as a court or tribunal it is necessary to determine in what specific capacity it is acting within the particular legal context in which it seeks a ruling from the CJEU. NACAs are clearly entrusted with different competition law enforcement functions. It may act in a number of specific capacities. For example, as the body investigation infringements, on the basis of complaints or of its own motion after a sectoral investigation or on request from the Government. It may propose the adoption of decisions involving behavioural and financial penalties. Finally, NACAs may be empowered to adopt infringement decisions. In that regard it may act as the adjudicatory and decision-making body.

[26] *Anesco and Others*, paras 42- 44.

[27] *Anesco and Others*, paras 45-46.

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.[28]

37. The CJEU concluded that it is clear that penalty proceedings before the CNMC are on the periphery of the national court system and do not fall within the exercise of judicial functions. Not least, according to the CJEU, because 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*[29] The CJEU ruled that the administrative nature of the proceedings in the main suit is also confirmed by a provision 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, the CJEU pointed out that a provision of the law on the protection of competition provides that, an action before the administrative courts may be brought against such a decision, during which the CNMC 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). In short, the CNMC cannot be considered to be a court or tribunal if it is to be a party in appeal proceedings against its decisions.[30]

38. The CJEU therefore confirms its ruling in *Syfait and Others* regarding the requirements of EU law defining a court or tribunal it had laid down in that ruling in order to consider a reference for a ruling admissible. It stressed in particular, that the case pending before the referring body must lead to a decision of a judicial nature and that it can only designate as a court or tribunal an authority acting as a third party in relation to the authority which adopted the decision forming the subject matter of the proceedings. Because of the operational and managerial links between the decision making body of the CNMC, the Board, and the investigative and prosecuting unit of the CNMC, that propose a decision to Board of the CNMC, the Competition Directorate, the third party requirement is not met. The CNMC cannot be regarded as having the standing of a third-party in relation to the authority which adopts the decision which may, in turn, form the subject matter of court proceeding. [31]

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[28] *Anesco and Others*, para 47.

[29] The CJEU cites its judgment Case C-503/15 *Margarit Panicello*, para 34. Proceedings before the CNMC do not preclude, on grounds of *lis pendens*, an independent action being brought before a national court in proceedings for a declaration, an injunction or damages nor are they grounds for the pleas that may be made, in parallel or subsequently before that court being inadmissible. *Anesco and Others*, para 48.

[30] *Anesco and Others*, para 49.

[31] *Anesco and Others*, para 44.

39. The CJEU went further in justifying its ruling that the CNMC was not a court or tribunal by clarifying the administrative nature of proceedings before the CNMC and the administrative nature of the decisions adopted by the CNMC. To that extent it therefore goes further than in the *Syfait and Others* ruling. It held that the decisions which the CNMC is required to adopt in *ex officio* penalty proceedings resemble administrative decisions which precludes them from being adopted in the exercise of judicial functions. It is the CNMC that is acting against Anesco and the trade unions. It is not adjudicating in a dispute between opposing parties as an impartial third party. In support of this finding the CJEU pointed to the systemic responsibilities of the CNMC as set down in national law. When the CNMC, and by analogy, an NACA acts *ex officio* as a specialised administration exercising the power to impose penalties in matters falling within its competence the decision which it is called to make according to the CJEU, is administrative and not judicial in nature. [32]

40. The CJEU pointed to a number of reasons in justification. First, as in *Syfait* the CNMC is required to work in close collaboration with the Commission and may be denied jurisdiction by the latter in certain circumstance. Second, the CNMC must adopt a decision within 18 months. In the event it fails to do so, the proceedings will lapse, regardless of the wishes of interested parties and, in particular, any complainants. Third, where an action is brought before an administrative court against a decision of the CNMC, the CNMC is a party to proceedings. It acts as the defendant at first instance before the High Court, or as an appellant or respondent in the event of an appeal against the judgment of the High Court before the Supreme Court. Moreover, the CNMC may choose not to defend the application, thus in effect withdrawing its own decision provided that the party who brought an action against the decision of the CNMC is in agreement. Fourth, the CJEU held that penalty proceedings before the CNMC are on the periphery of the national court system and do not fall within the exercise of judicial functions. This is because a decision of the NACA putting an end to proceedings is an administrative decision which whilst final and immediately enforceable is not capable of acquiring the attributes of a judicial decision, in particular the force of *res judicata*. Finally, the CJEU noted that the administrative nature of proceedings is confirmed by the national rule that provides that the adoption of a decision by the Board of the CNMC putting an end to proceedings is expressly qualified as administrative.[33]

41. Having held that the CNMC was not a court or tribunal within the meaning of Article 267 TFEU, the CJEU ruled that the request for a preliminary ruling from the CNMC is inadmissible. It also dismissed the submission by the CNMC that it was a court by distinguishing the current institutional arrangements to enforce EU competition law in Spain with the previous system. It held that the justification for its findings may not be called into question by the judgment of

[32] *Anesco and Others*, para 45-47.
[33] *Anesco and Others*, para 48.

The Association of Private Banks and Others[34] in which the CJEU implicitly acknowledged the admissibility of a request for a preliminary ruling from the Spanish Competition Court. In that regard, it held 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 General Directorate for the Protection of Competition. The CJEU ruled that it was apparent from Law establishing the CNMC, that the CNMC simultaneously exercises the functions previously attributed to the Competition Court and those previously attributed to the General Directorate for the Protection of Competition. In other words, under the previous law, the Directorate for the Protection of Competition acted as a third party in relation to the authority which adopted the contested decision. The Competition Court was entirely independent, separate and a thus third party in relation to the General Directorate.[35]

Concluding Remarks

42. As noted above, writing in 2001, Advocate General Colomer submitted that the case-law on the definition of the term court or tribunal was too flexible, not sufficiently consistent, was casuistic, very elastic and not very scientific and therefore lacked legal certainty.[36] He noted that while the case law was unchanged in respect of some of the requirements, specifically whether the body is established by law, whether it is permanent and whether its decisions apply the law, others which he argued most clearly define a court or tribunal, such as the indispensable criterion of independence, *inter partes* procedure or decision of a judicial nature, have been interpreted on occasions in a confused manner by the CJEU. Does the ruling in *Anesco and Others* definitively clarify why NACAs cannot be considered to be courts and tribunals for the purposes of the preliminary references procedure?

43. It is important to recall that when determining whether to accept jurisdiction in requests for preliminary rulings the CJEU takes into account the purpose of the Article 267 TFEU procedure which is to ensure that Union law is equally effective in every corner of the Union. It must also determine whether the body referring contributes to guaranteeing that no sector of Union law escapes the process of harmonisation and uniform interpretation. It is submitted that with regards to NACAs and NRAs in particular, the CJEU has in essence, gradually incorporated the principles expressed in the Opinion of Advocate General Colomer in finding their requests for preliminary rulings inadmissible because they do not fulfil the requirements independence and impartiality to be considered courts or tribunals for the purposes of Article 267 TFEU. In *Anesco and Others* the CJEU appears to have excluded the possibility that NACAs may refer questions arising out of own initiative proceedings pending before them. The ruling does not clarify if the same barriers to admissibility would apply if

[34] Case C-67/91.

[35] *Anesco and Others*, para 50.

[36] See: Opinion of AG Ruiz-Jarabo Colomer, Case C-17/00 *De Coster.Ruiz-Jarabo Colomer*.

NACAs are also empowered by national rules to adjudicate in disputes between complainants and alleged infringers of the competition rules. For example, in *ANAS*,[37] confirmed in *Epitropos tou Elegktikou Synedriou,*[38] the CJEU ruled that the question whether a body is entitled to refer a question to the CJEU falls to be determined on the basis of criteria relating both to the constitution of that body and to its function.

44. In the event NACAs are not empowered to adjudicate in disputes between alleged victims and perpetrators of competition law infringements they are defined by the CJEU as fundamentally administrative bodies that are not functionally able to meet the requirements of internal and external independence and impartiality in their proceedings. However, it is submitted that in the event national law provides that NACAs are empowered to combine a number of functions, both administrative and judicial in nature could fall within the scope of what the CJEU has defined as performing a judicial function. Indeed, as noted above, the case-law the CJEU appears to accept that a body with multiple functions, both administrative and judicial, may be recognised as a court or tribunal if it refers a request when performing a specifically judicial function.[39] In that regard, it is therefore necessary to determine in what specific capacity an NACA, or indeed an NRA, is acting such as the particular legal context in which it seeks a ruling from the CJEU. For the purposes of that analysis, the CJEU has ruled that no relevance is to be attributed to the fact that, when otherwise configured- or even when it is the same but exercising powers other than those in the context of which the reference was made -the body concerned falls to be classified as a court or tribunal for the purposes of Article 267 TFEU.

45. The ruling of the CJEU regarding NACA independence in *Anesco and Others* is therefore entirely consistent with the two aspects of independence established by the CJEU regarding the judiciary and NRAs. It also aligns with the provisions on NACA independence now set down in the recent EU directive harmonizing procedural, investigative and sanctioning powers of national administrative competition authorities. It sets down in some detail the measures guaranteeing the independence of their NACAs that the Member States must adopt. The provisions leave very limited scope for Member States to ignore their obligations or indeed misconstrue them. In legislative terms at least, it is now possible to identify the key organisational and operational characteristics of what may be labelled the EU ideal type independent NACA.

46. Thus, Directive 2019/9 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market[40] provides in Articles 4 and 5 the key features of the model

[37] Case C-192/98.
[38] Case C-364/11, paras 21-22 and Case C-394/11 *Belov,* paras 40-41.
[39] See for example: *ANAS*.
[40] Directive 2019/1

relating specifically to EU competition law enforcement by national competition authorities. Article 4 provides that in order to guarantee the independence of NACA, Member States must ensure that such authorities perform their duties and exercise their powers impartially. In particular, Member States shall at a minimum ensure that the staff are able to perform their duties and exercise their powers independently from political and other external influence; neither seek nor take any instructions from government or any other public or private entity; refrain from taking any action which is incompatible with the performance of their duties and/or with the exercise of their powers. The persons who take decisions shall not be dismissed from such authorities for reasons related to the proper performance of their duties or to the proper exercise of their powers. They may be dismissed only if they no longer fulfil the conditions required for the performance of their duties or if they have been found guilty of serious misconduct under national law. The conditions required for the performance of their duties, and what constitutes serious misconduct, shall be laid down in advance in national law. Member States shall ensure that the members of the decision-making body of NACAs are selected, recruited or appointed according to clear and transparent procedures laid down in advance in national law. Article 5 establishes that Member States must ensure that national competition authorities are provided with adequate resources in order to operate effectively and exercise their regulatory tasks independently. Member States therefore must ensure at a minimum that national competition authorities have a sufficient number of qualified staff and sufficient financial, technical and technological resources that are necessary for the effective performance of their duties, and for the effective exercise of their powers. Member States shall also ensure that NACAs are granted independence in the spending of the allocated budget for the purpose of carrying out their duties.

47. It is submitted that the provisions regarding the independence of NACAs, if transposed correctly by the Member States, will make it more difficult for the CJEU to find inadmissible references from NACAs. This would be so, especially if the investigative and prosecuting division and the decisional division of the NACA are functionally and operationally independent of each other and appointed by different entities or individuals. The head of the NACA could not have any managerial or directional responsibility over the investigating and prosecuting division. In other words, if the internal organization and operation of the NACA meets the second, internal, requirement of independence. NACAs with this organizational and operational characteristic should overcome many of the barriers regarding the external and internal aspects of independence.

48. That said, three obstacles may still stand in the way of the recognition of NACAs as courts or tribunals for the purposes of Article 267 TFEU. First, if the investigative and adjudicatory departments are linked in any way this will breach the third-party rule. In short, as noted above, the adjudicatory branch

must be a complete third party to the division investigating and proposing a decision. It must remain impartial when performing its adjudicatory, decision-making role. Second, the NACA impartial adjudicatory division cannot, or the NACA as a whole, could not be called as a party, for example, as a defendant in appeal proceedings against the decision of the NACA. Only the investigating and or prosecuting party could be a party in such appeal proceedings. Third, only proceedings before the adjudicatory branch that are genuinely *inter partes* and not *ex officio* would qualify. In other words, the proceedings before the decision-making branch of the NACA would have to be manifestly judicial and adversarial in nature with both complainants and alleged infringers as parties to proceedings. It only remains to examine the national rules governing enforcement proceedings by NCACs to determine whether the rules in place are apt to satisfy the three requirements outlined above. But that matter is beyond the scope of this article. The additional justification for finding questions from NACAs as inadmissible. Namely, because the Commission may relieve an NACA of the competence to investigate and indeed decide a case is not such as to undermine the requirement of independence and thus to render questions as inadmissible. It is highly unlikely that the Commission would relieve an NACA of the power to determine the outcome of proceedings if that NACA had referred questions to the CJEU. In the highly unlikely event, the Commission were minded to do so the NACA could always withdraw the reference.