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

Date lodged:

13 June 2019

Referring court:

Comisión Nacional de los Mercados y la Competencia (Spain)

Date of the decision to refer:

12 June 2019

Interested party, in its status as person concerned:

Asociación Estatal de Empresas Operadoras Portuarias (ASOPORT)

Defendant:

Subject matter of the main proceedings

The main proceedings concern the imposition of a penalty on the signatories to the IV Acuerdo para la regulación de las relaciones laborales en el sector de la estiba portuaria (Fourth Agreement on the regulation of employment relations in the stevedoring sector; 'the Fourth Stevedoring Framework Agreement') on the ground that the clauses concerning the transfer of employees are anti-competitive.

Purpose and legal basis of the request for a preliminary ruling

The request for a preliminary ruling concerns the compatibility with Article 101 TFEU of national legislation on the transfer of dock workers. The legal basis is Article 267 TFEU.

Questions referred

- 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 Sociedad

Anónima de Gestión de Estibadores Portuarios [(Stevedore Management Company; 'SAGEP')] must accept the transfer of SAGEP workers and (ii) establish the method by which the transfer takes place?

- 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 that extends beyond employment matters and produces a harmonisation of commercial conditions?

- 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 *Simmenthal* and *Fratelli Costanzo* judgments among others, be interpreted as requiring a public law body such as the Comisión Nacional de los Mercados y la Competencia [(National Commission on Markets and Competition; 'CNMC')] to disapply those provisions of national law contrary to Article 101 TFEU?

- If the answer to the first question is in the affirmative, must Article 101 TFEU and 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, 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 that behave in the way described?

Provisions of EU law relied on

Article 101 TFEU.

Judgment of 15 December 1976, *Simmenthal Spa* v *Ministero delle finanze* (C-35/76, EU:C:1976:180).

Judgment of 22 June 1989, *Costanzo* (103/88, EU:C:1989:256). Paragraphs 28 to 33.

Judgment of 16 July 1992, *Asociación Española de Banca Privada and Others* (C-67/91, EU:C:1992:330). Opinion of Advocate General Jacobs delivered on 10 June 1992 in *Asociación Española de Banca Privada and Others* (C-67/91, EU:C:1992:256).

Judgment of 30 March 1993, *Corbiau* (C-24/92, EU:C:1993:118). Paragraph 15.

Judgment of 21 September 1999, *Albany* (C-67/96, EU:C:1999:430).

Judgment of 9 September 2003, *CIF* (C-198/01, EU:C:2003:430).

Judgment of 31 May 2005, *Syfait and Others* (C-53/03, EU:C:2005:333).

Judgment of 19 September 2006, *Wilson* (C-506/04, EU:C:2006:587). Paragraphs 49 and 51 to 53.

Judgment of 12 January 2010, *Petersen* (C-341/08, EU:C:2010:4), paragraph 80.

Judgment of 17 July 2014, *Torresi* (C-58/13 and C-59/13, EU:C:2014:2088). Paragraph 22.

Judgment of 9 October 2014, *TDC* (C-222/13, EU:C:2014:2265), paragraphs 30 to 32.

Judgment of 11 December 2014, *Commission* v *Spain* (C-576/13, EU:C:2014:2430).

Judgment of 6 October 2015, *Consorci Sanitari del Maresme* (C-203/14, EU:C:2015:664). Paragraphs 17 and 19.

Judgment of 22 October 2015, *EasyPay and Finance Engineering*, (C-185/14, EU:C:2015:716). Paragraph 37.

Judgment of 14 September 2017, *The Trustees of the BT Pension Scheme* (C-628/15, EU:C:2017:687). Paragraph 54.

Judgment of 20 September 2018, *Montte* (C-546/16, EU:C:2018:752). Paragraphs 23 and 24.

Judgment of the EFTA Court of 19 April 2016 (Case E 14/15, *Holship Norge AS* v *Norsk Transportarbeiderforbund*). Paragraphs 41 and 52.

Provisions of national law relied on

Ley 3/2013, de 4 de junio, de creación de la Comisión Nacional de los Mercados y la Competencia (Law No 3 of 4 June 2013 establishing the National Commission on Markets and Competition). Articles 1(1) and 2(2), Article 5(f), Articles 25(2) and 29(2), Article 23 and Article 36(2).

Ley 15/2007, de 3 de julio, de Defensa de la Competencia (Law No 15 of 3 July 2007 on competition; 'the Law on Competition'). Articles 1 and 4.

Real Decreto-ley 8/2017, de 12 de mayo, 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 No 8 of 12 May 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)) (BOE No 114 of 13 May 2017, p. 39641). Article 2(1) and (2), first and second transitional provisions and first additional provision.

Real Decreto-ley 9/2019, de 29 de marzo, que 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 (Royal Decree-Law No 9 of 29 March 2019 amending Law No 14 of 1 June 1994 on temporary employment agencies in order to adapt it to stevedoring activities and concluding the legal changes to the arrangements governing workers providing port services (BOE No 77 of 30 March 2019, p. 328361). Article 4.

Brief summary of the facts and the main proceedings

1 For many years, stevedoring services in Spain were characterised by the fact that employment was available only to dock workers who were registered with the management companies in their various configurations (State Loading and Unloading Companies ('SEEDs'), Port Economic Interest Groupings ('APIEs') and SAGEPs).

2 The key aspect of those arrangements was that employment was reserved so that in theory priority in employment was given to workers attached to the management companies and in practice they were the only workers hired. One consequence of those arrangements was that the management companies, of which the stevedoring companies were required to be shareholders, necessarily had to act as intermediaries when employees were transferred between undertakings.

3 The system remained in place until the judgment in *Commission* v *Spain* (C-576/13) was implemented. In that judgment, the Court of Justice held that the arrangements governing the management of workers providing cargo-handling services in Spain were contrary to the freedom of establishment recognised in Article 49 TFEU, because they required undertakings from other Member States to register with a SAGEP, to give priority in employment to workers supplied by that company, and to employ a minimum number of those workers on permanent contracts.

4 In order to implement the judgment, the 2017 Royal Decree-Law was passed. This established freedom of hiring with regard to dock workers for the provision of cargo-handling services. There were two aspects to that freedom: first, employers had complete freedom over the hiring of workers to provide cargo-handling services, so that employment would no longer be reserved to SAGEP workers; secondly, stevedoring companies no longer had to hold shares in the SAGEP.

5 The first transitional provision in the 2017 Royal Decree-Law establishes a three-year transitional period (until 14 May 2020) to enable the SAGEPs gradually to adapt to the new legal framework.

6 Thus, until 14 November 2017 a SAGEP's shareholders could choose between remaining in that company and leaving it on an individual basis, by selling their shares to the other shareholders who decided to remain. The remaining shareholders could agree a new allocation of the share capital and allow in new shareholders. If no shareholder opted to remain in the SAGEP, it would be wound up. In addition, throughout the whole transitional period the existing SAGEPs could choose between being wound up and continuing their activities.

7 From 14 May 2020 the remaining SAGEPs will have to choose between being wound up and continuing their activities as a Centro Portuario de Empleo (Port Employment Centre; 'CPE') or a temporary employment agency. From then on, the SAGEPs would be governed by the rules of the free market.

8 The second transitional provision in the 2017 Royal Decree-Law provides that during the transitional period all stevedoring companies, whether or not they belong to a SAGEP, must employ SAGEP workers to perform a minimum percentage of their stevedoring work, calculated on a year-on-year basis.

9 Under the first additional provision of the 2017 Royal Decree-Law, the provisions of the existing collective agreements had to be revised within one year to bring them into line with the new arrangements, and any clauses in the collective agreements that failed to satisfy that requirement, restricted the freedom of recruitment in respect of port cargo-handling services or commercial port services, or restricted competition would automatically be void.

10 From 29 July 2013 the Fourth Stevedoring Framework Agreement has applied. That agreement was signed by the Asociación Nacional de Empresas Estibadoras y Consignatarias de Buques (National Association of Stevedoring Companies and Shipping Agents; 'ANESCO'), on behalf of the undertakings in the sector, and by the following trade unions on behalf of the workers: Coordinadora Estatal de Trabajadores del Mar (National Coordinator for Seafarers; 'CETM'), Unión General de Trabajadores (General Workers' Union; 'UGT'), Comisiones Obreras (Workers' Commissions; 'CC.OO.') and the Confederación Intersindical Galega (Galician Inter-Trade Union Confederation; 'CIG').

11 Following the entry into force of the 2017 Royal Decree-Law, a Negotiating Committee was established which was charged, amongst other things, with amending the Fourth Stevedoring Framework Agreement. To ensure that 'the trade unions undertake to maintain social peace during this period', ANESCO and its member firms 'undertake to guarantee 100% employment for dock workers employed by the SAGEP until 30 September 2017'.

12 On 6 July 2017, an amendment was made to the Fourth Stevedoring Framework Agreement. This consisted in the addition of a seventh additional provision, under which any undertaking which decided to leave a SAGEP would take on the employment of the dock workers who were employed by the SAGEP at the time the 2017 Royal Decree-Law came into force (that is, the workers would be

transferred to the undertaking), in proportion to the shares which the undertaking held in the SAGEP. This means that those workers could voluntarily decide to join departing firms and retain their conditions of employment. In addition, if the SAGEP was wound up, the workers were also entitled to transfer.

13 According to that additional provision, this situation would be governed by the legislation on business succession and by the Fourth Stevedoring Framework Agreement and the sectoral collective agreements until they were replaced by a new Framework Agreement or collective agreement.

14 Two further amendments were subsequently made to the Fourth Stevedoring Framework Agreement which had the common objective of imposing transfers of employees through a collective agreement, in order to ensure 100% employment for SAGEP workers on the departure of its shareholders. One of these amendments gave the National Joint Sectoral Committee [comprised of management and workers] power to interpret employees' transfer terms and to resolve any disputes arising during the separation process. The other varied the seventh additional provision, adding a second paragraph which provided that the voluntary transfer (that is, voluntary for the dock workers) to a stevedoring company that was leaving the SAGEP under the first transitional provision of the 2017 Royal Decree-Law had to be governed by, amongst other principles, the principle of strict neutrality — to ensure that undertakings which left the SAGEP were not placed in a less favourable competitive situation — and the principle of proportionality, as regards the decision on the number of employees to be transferred. The departing undertaking, the SAGEP and the workers' representatives may, however, agree different or supplementary criteria, provided that the latter comply with the principle of strict neutrality and are approved by the National Joint Sectoral Committee.

15 During the six-month period established by the 2017 Royal Decree-Law for employers to apply to leave the SAGEP, only one stevedoring company submitted an application. The company applied to leave the SAGEP for Puerto de Sagunto (SESASA), notifying SESASA of the application on 13 November 2017.

16 From the point when the company gave notice of its intention to leave SESASA, both it and other companies in the same group have been the subject of a series of actions that have had a significantly detrimental impact on its business and competitiveness, and the Dirección de Competencia (Competition Directorate) considers that these actions may amount to a boycott.

17 Once the process of leaving the SAGEP had begun, the procedure to implement the transfer of employees under the collective agreement was activated in accordance with the Fourth Stevedoring Framework Agreement as amended, and the sectoral joint committee was convened. That committee agreed that the undertaking which wished to leave should take on 19 workers, which reflected its 19.02% shareholding in the SAGEP.

18 On 3 November 2017, the Competition Directorate of the CNMC brought infringement proceedings in connection with the Fourth Stevedoring Framework Agreement, against ANESCO and the CETM, UGT, CC.OO., Langile Abertzaleen Batzordeak ('LAB'), CIG and Eusko Langileen Alkartasuna ('ELA') trade unions.

19 The Competition Directorate characterises the actions described above as conduct prohibited under Article 101 TFEU and Article 1 of the Law on Competition because, in spite of the content of the first transitional provision of the 2017 Royal Decree-Law, the operators and the trade unions have come to an agreement (published as a collective agreement) which imposes a series of additional obligations on undertakings, such as requiring departing employers to take on dock workers from the SAGEP in proportion to their previous shareholdings and in accordance with employment categories imposed by a committee comprising representatives of the undertakings active in the market (the applicant's competitors) and workers' representatives.

20 In the Competition Directorate's view, those agreements involve the imposition of commercial conditions between operators that go beyond the bounds of collective negotiation and, therefore, constitute a restriction on the exercise of the right to leave and thus on the conditions of free competition which the amended legislation introduced in the wake of the ruling by the Court of Justice of the European Union was intended to safeguard. Consequently, on 12 November 2018, the Competition Directorate issued a draft decision in which it concluded that those actions constitute an unjustified, disproportionate and discriminatory measure that affects the freedom to hire employees to provide port cargo-handling services and the freedom of companies licensed to provide such services to decide whether or not to be part of companies whose corporate object is to supply workers, and that they therefore infringe Article 1 of the Law on Competition and Article 101 TFEU.

21 On 31 March 2019, before the CNMC completed its infringement proceedings, the 2019 Royal Decree-Law came into force. This law enables the social partners, through collective agreements or pacts, to establish the obligatory transfer of SAGEP workers where companies wish to leave the SAGEP, conversion to a [CPE] is sought or in cases of liquidation.

22 In particular, Article 4 of the 2019 Royal Decree-Law provides that, in order to ensure stability of employment, trade union organisations and employer associations may, under a collective agreement or pact, establish the employee transfer measures required in order to preserve the employment of workers who were providing port cargo-handling services on the entry into force of the 2017 Royal Decree-Law and continue to provide such services. Consequently, where undertakings cease to be shareholders in a SAGEP, or where a SAGEP is wound up, the employee transfer mechanism (which must be transparent, objective and fair) will apply if the trade unions and employer associations so agree. If a [CPE] is formed, it will take on the employees of the former SAGEP.

23 In addition, the 2019 Royal Decree-Law extends the period during which undertakings may exercise the right to leave so that it covers the entire transitional period provided for in the 2017 Royal Decree-Law, that is, until 14 May 2020. This rule would therefore appear, de facto, to have a certain retrospective effect, as it apparently validates decisions on employee transfers taken before it came into effect, including decisions that are the subject of legal proceedings. This would be inconsistent with the provisions of the 2017 Royal Decree-Law, which laid down a period of one year in which to adapt the collective agreements and stated that any agreements that had not been brought into line would be void.

Main arguments of the parties to the main proceedings

24 The parties' arguments are not included.

Brief summary of the basis for the request for a preliminary ruling

25 The first issue raised by the CNMC is its own status as a court or tribunal. In considering this point, the CNMC first sets out the five requirements that must be satisfied in order to be a 'court or tribunal': 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.

26 In terms of its legal basis, the CNMC notes that it is governed by Law 3/2013, which demonstrates that it satisfies the requirement for a legal basis and that it is a permanent body.

27 With regard to the mandatory nature of its jurisdiction, under Spanish law the CNMC is classed as a public law body, and Law 3/2013 confers jurisdiction on it to apply Articles 101 and 102 TFEU; its jurisdiction is not dependent on the agreement of the parties, on whom its decisions are enforceable and binding.

28 Turning to the adversarial nature of the proceedings, the CNMC states that, under Spanish law, infringement proceedings conducted by the CNMC must follow the adversarial procedure. Thus, decisions of the Board of the CNMC on the application of Articles 101 and 102 TFEU are issued under a procedure that entails a hearing at which interested parties can put forward arguments and submit evidence concerning the various 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. Moreover, infringement proceedings are governed by the principle of functional separation; this 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. Both bodies form part of the CNMC, and there is no external interference.

29 Under those arrangements, the Competition Directorate investigates cases, initiates and conducts infringement proceedings, and submits 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 — which is enforceable and can be appealed in the administrative courts — in which it applies the Law on Competition, and Articles 101 and 102 TFEU where trade within the European Union is affected.

30 The CNMC considers that it also satisfies the requirement to apply rules of law in order to be a court or tribunal. Lastly, as regards the body's independence, the CNMC states that, under Article 2(1) of Law 3/2013, it operates with organisational and functional autonomy and complete independence in carrying out its functions and performing its duties. Moreover, Article 3 of that Law prohibits members of CNMC bodies from seeking or accepting instructions from any public or private organisation.

31 The CNMC also asserts that it has the status of a third party which is separate from any government body that 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 interests in the case. In addition, its members cannot be removed from office.

32 The CNMC notes that the Court of Justice admitted a request for a preliminary ruling from the CNMC's predecessor, the Tribunal de Defensa de la Competencia (Competition Court; 'TDC'). While the Court of Justice replied to the question without analysing the TDC's capacity to make the reference, Advocate General Jacobs did examine the issue in his Opinion and concluded that he was in no doubt that the TDC should be considered a court or tribunal.

33 In that regard, the CNMC states that it enjoys an even greater degree of independence than its predecessor; it therefore argues that, as the TDC was deemed independent, there is even more reason to consider the CNMC to be so.

34 The CNMC also argues that the judgment *Syfait and Others* does not apply to its situation, because in that case the Epitropi Antagonismou (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 appointment of its members. It also maintains that the European Commission's competence in competition matters exists only where the competition rules established by the European Union are being applied, and this already existed when the Court of Justice admitted the question referred for a preliminary ruling by the TDC.

35 In conclusion, the CNMC maintains that it must be considered a 'court or tribunal of a Member State' within the meaning of Article 267 TFEU.

36 Turning to the substance of the case, the CNMC notes that, like Article 1 of the Law on Competition, Article 101 TFEU prohibits all agreements between economic operators which have as their object or effect the restriction of competition within the European market. However, Article 4 of the Law on Competition precludes Article 1 of that law from applying to conduct that is the result of applying a rule of law.

37 There is extensive case-law from the Court of Justice to the effect that Article 101 TFEU applies to operators who set common conditions for providing services in the market, and that the concept of an operator is an autonomous concept of EU law. The Court of Justice has also clarified that there is nothing to preclude competition law from applying to workers' organisations (such as trade unions) provided that their actions go beyond their areas of responsibility and have as their object or effect the harmonisation of commercial matters.

38 In that regard, the *Albany* judgment precludes collective agreements from being automatically excluded from the application of competition rules, meaning that the competition authorities must first examine the nature and purpose of the agreement before concluding whether or not Article 101(1) TFEU applies. The *Viking* judgment, which concerned restrictions on freedom of establishment arising from the application of a collective agreement, held that while the protection of workers is a fundamental right which can, in principle, justify a restriction of one of the fundamental freedoms guaranteed by the Treaty, any such restrictions must be suitable for ensuring the attainment of the legitimate objective pursued and must not go beyond what is necessary to achieve that objective.

39 Consequently, where the pact or collective agreement extends beyond those areas (such as matters relating to pay, holidays, working hours or work organisation), in accordance with the *Albany* judgment the competition authorities must examine the nature and purpose of the pact or agreement before deciding whether or not the competition rules apply to it. That examination must pay particular attention not only to the subject matter of the agreement, but also to whether it imposes obligations on third parties or affects other markets in a way that is not justified by the objective of collective bargaining.

40 The EFTA Court delivered a similar judgment in *Holship Norge AS* v *Norsk Transportarbeiderforbund*: while conditions must be examined on a case-by-case basis, giving certain workers a right to be preferred over other workers, or operating a boycott in order to obtain approval of the agreement, cannot be considered to be permitted.

41 In the CNMC's view, the 2019 Royal Decree-Law allows the conclusion of collective agreements which provide for workers to be transferred on the disputed

terms, stating that it does so in order to ensure that the employment rights of SAGEP dock workers are respected.

42 There is also settled case-law recognising the primacy of EU law. Thus, in the *CIF* judgment, the Court of Justice held that 'where undertakings engage in conduct contrary to Article 81(1) EC and where that conduct is required or facilitated by national legislation which legitimises or reinforces the effects of the conduct, specifically with regard to price-fixing or market-sharing arrangements, a national competition authority, one of whose responsibilities is to ensure that Article 81 EC is observed: has a duty to disapply the national legislation; may not impose penalties in respect of past conduct on the undertakings concerned when the conduct was required by the national legislation; may impose penalties on the undertakings concerned in respect of conduct subsequent to the decision to disapply the national legislation, once the decision has become definitive in their regard; may impose penalties on the undertakings concerned in respect of past conduct where the conduct was merely facilitated or encouraged by the national legislation, whilst taking due account of the specific features of the legislative framework in which the undertakings acted.'

43 However, the CNMC considers that that judgment cannot be applied directly, in so far as in the present case operators are permitted to conclude agreements only under the auspices of collective agreements.

44 For all those reasons, the CNMC is uncertain as to how Article 101 TFEU must be interpreted when it comes to determining whether or not the conduct at issue in the present case could be considered to fall within the prohibition in Article 101(1) TFEU.

45 The CNMC also understands that the case-law established by the Court of Justice in the *Costanzo*, *Petersen* or *The Trustees of the BT Pension Scheme* judgments could also be relevant. In accordance with that case-law, the administrative authorities of Member States are under a duty to give full effect to those provisions, if necessary refusing of their own motion to apply any conflicting provision of national law, without the need to request or await the prior setting aside of that provision of national law by legislative or other constitutional means.