Provisional text

JUDGMENT OF THE COURT (Second Chamber)

27 February 2019 (*)

(Reference for a preliminary ruling — Freedom of establishment — Regulation (EC) No 1008/2008 — Air carrier company — Reprivatisation process — Sale of shares representing up to 61% of the share capital — Conditions — Requirement to keep the headquarters and effective management in a Member State — Public service obligations — Requirement to maintain and develop the existing national hub)

In Case C-563/17,

REQUEST for a preliminary ruling under Article 267 TFEU from the Supremo Tribunal Administrativo (Supreme Administrative Court, Portugal), made by decision of 20 June 2017, received at the Court on 25 September 2017, in the proceedings

Associação Peço a Palavra,

João Carlos Constantino Pereira Osório,

Maria Clara Marques Pires Sarmento Franco,

Sofia da Silva Santos Arauz,

Maria João Galhardas Fitas

v

Conselho de Ministros,

intervening parties:

Parpública — Participações Públicas SGPS SA,

TAP — Transportes Aéreos Portugueses SGPS SA,

THE COURT (Second Chamber),

composed of K. Lenaerts, President of the Court, acting as President of the Second Chamber, A. Prechal (Rapporteur) and C. Toader, A. Rosas and M. Ilešič, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 13 September 2018,

after considering the observations submitted on behalf of:

– Parpública — Participações Públicas SGPS SA, by M. Mendes Pereira, advogado,

– the Portuguese Government, by L. Inez Fernandes, M. Figueiredo and A. Duarte de Almeida, acting as Agents,

– the Italian Government, by G. Palmieri, acting as Agent, and by P. Gentili, avvocato dello Stato,

– the Netherlands Government, by M.K. Bulterman and J. Langer, acting as Agents,

– the European Commission, by P. Costa de Oliveira, L. Malferrari and K. Simonsson, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 21 November 2018,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 49, 54, 56 and 57 TFEU and of Articles 2, 16 and 17 of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (OJ 2006 L 376, p. 36).

2 The request has been made in proceedings between the Associação Peço a Palavra, a non-profit making organisation subject to Portuguese law, and four natural persons of Portuguese nationality (together, 'APP and others') and the Conselho de Ministros (Council of Ministers, Portugal) concerning the validity of a decision setting out certain conditions in the tender specifications for the process of indirectly reprivatising TAP — Transportes Aéreos Portugueses SA ('TAP').

Legal context

European Union law

Directive 2006/123

3 According to recital 21 of Directive 2006/123, 'transport services, including urban transport, taxis and ambulances as well as port services, should be excluded from the scope of this Directive'.

4 It is clear from Article 2(2)(d) of that directive that the directive does not apply to services in the field of transport, including port services, falling within the scope of Title V of Part Three of the EC Treaty, which is now Title VI of Part Three of the FEU Treaty.

5 In Chapter IV of the directive, entitled 'Free movement of services', Article 16 lays down conditions relating to the right of service providers to provide services freely in a Member State other than that in which they are established and Article 17 lists derogations from that right.

Regulation (EC) No 1008/2008

6 Recitals 10 to 12 of Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community (OJ 2008 L 293, p. 3) state:

'(10) In order to complete the internal aviation market, still existing restrictions applied between Member States, such as restrictions on the code sharing on routes to third countries or on the price setting on routes to third countries with an intermediate stop in another Member State ... should be lifted.

(11) To take into account the special characteristics and constraints of the outermost regions, in particular their remoteness, insularity and small size, and the need to properly link them with the central regions of the Community, special arrangements may be justified regarding the rules on the period of validity of the contracts for public service obligations covering routes to such regions.

(12) The conditions under which public service obligations may be imposed should be defined clearly in an unambiguous way, while the associated tender procedures should allow a sufficient number of competitors to take part in the tenders. The Commission should be able to obtain as much information as necessary to be able to assess the economic justifications for public service obligations in individual cases.'

7 Article 2 of that regulation, entitled 'Definitions', provides:

'For the purposes of this Regulation:

1. "operating licence" means an authorisation granted by the competent licensing authority to an undertaking, permitting it to provide air services as stated in the operating licence;

...

8. "air operator certificate (AOC)" means a certificate delivered to an undertaking confirming that the operator has the professional ability and organisation to ensure the safety of operations specified in the certificate, as provided in the relevant provisions of Community or national law, as applicable;

9. "effective control" means a relationship constituted by rights, contracts or any other means which, either separately or jointly and having regard to the considerations of fact or law involved, confer the possibility of directly or indirectly exercising a decisive influence on an undertaking, in particular by:

(a) the right to use all or part of the assets of an undertaking;

(b) rights or contracts which confer a decisive influence on the composition, voting or decisions of the bodies of an undertaking or otherwise confer a decisive influence on the running of the business of the undertaking;

10. "air carrier" means an undertaking with a valid operating licence or equivalent;

11. "Community air carrier" means an air carrier with a valid operating licence granted by a competent licensing authority in accordance with Chapter II;

...

14. "traffic right" means the right to operate an air service between two Community airports;

...

26. "principal place of business" means the head office or registered office of a Community air carrier in the Member State within which the principal financial functions and operational control, including continued airworthiness management, of the Community air carrier are exercised.'

8 In Chapter II of Regulation No 1008/2008, entitled 'Operating licence', Article 4 provides:

'An undertaking shall be granted an operating licence by the competent licensing authority of a Member State provided that:

(a) its principal place of business is located in that Member State;

(b) it holds a valid AOC issued by a national authority of the same Member State whose competent licensing authority is responsible for granting, refusing, revoking or suspending the operating licence of the Community air carrier;

...

(f) Member States and/or nationals of Member States own more than 50% of the undertaking and effectively control it, whether directly or indirectly through one or more intermediate undertakings, except as provided for in an agreement with a third country to which the Community is a party;

...'

9 Article 8(1), (5) and (7) of Regulation No 1008/2008 provides:

'1. An operating licence shall be valid as long as the Community air carrier complies with the requirements of this Chapter.

A Community air carrier shall at all times be able on request to demonstrate to the competent licensing authority that it meets all the requirements of this Chapter.

...

5. A Community air carrier shall notify the competent licensing authority:

...

(b) in advance of any intended mergers or acquisitions;

...

7. In relation to Community air carriers licensed by it the competent licensing authority shall decide whether the operating licence shall be resubmitted for approval in case of change in one or more elements affecting the legal situation of a Community air carrier and, in particular, in the case of a merger or takeover.

...'

10 In Chapter III of Regulation No 1008/2008, entitled 'Access to routes', Article 15 provides:

'1. Community air carriers shall be entitled to operate intra-Community air services.

2. Member States shall not subject the operation of intra-Community air services by a Community air carrier to any permit or authorisation. Member States shall not require Community air carriers to provide any documents or information which they have already supplied to the competent licensing authority, provided that the relevant information may be obtained from the competent licensing authority in due time.

...'

11 Article 15(4) and (5) of that regulation lays down rules on code sharing arrangements into which all Community air carriers are permitted to enter.

12 Also in Chapter III of Regulation No 1008/2008, Article 16(1) and (4) of that regulation, entitled 'General principles for public service obligations', states:

'1. A Member State, following consultations with the other Member States concerned and after having informed the Commission, the airports concerned and air carriers operating on the route, may impose a

public service obligation in respect of scheduled air services between an airport in the Community and an airport serving a peripheral or development region in its territory or on a thin route to any airport on its territory any such route being considered vital for the economic and social development of the region which the airport serves. That obligation shall be imposed only to the extent necessary to ensure on that route the minimum provision of scheduled air services satisfying fixed standards of continuity, regularity, pricing or minimum capacity, which air carriers would not assume if they were solely considering their commercial interest.

The fixed standards imposed on the route subject to that public service obligation shall be set in a transparent and non-discriminatory way.

...

4. When a Member State wishes to impose a public service obligation, it shall communicate the text of the envisaged imposition of the public service obligation to the Commission, to the other Member States concerned, to the airports concerned and to the air carriers operating the route in question.

The Commission shall publish an information notice in the *Official Journal of the European Union*:

(a) identifying the two airports connected by the route concerned and possible intermediate stop-over point(s);

(b) mentioning the date of entry into force of the public service obligation; and

(c) indicating the complete address where the text and any relevant information and/or documentation related to the public service obligation shall be made available without delay and free of charge by the Member State concerned.'

Portuguese law

13 By Decree-Law No 181-A/2014 of 24 December 2014 (*Diário da República* series I, No 248, 24 December 2014), the Council of Ministers lay down the process for the reprivatisation of TAP, including, inter alia, a 'reference' direct sale in the amount of up to 61% of the shares in TAP's parent company, the holding company TAP — Transportes Aéreos Portugueses SGPS SA ('TAP SGPS').

14 The recitals of that decree-law state inter alia:

'The company has strong ties with the country, which should be maintained, and it is therefore appropriate to privilege maintaining its defining characteristic as a "flagship enterprise". The government considers that the process of TAP's reprivatisation must respect the strategic importance of its "national hub", as a fundamental part of the relationship between Europe, Africa and Latin America, of which TAP's flight operations form an integral part, also having regard to the importance of domestic routes, in particular to connections between the mainland and the islands, which are fundamental to promoting territorial and social cohesion and economic development.'

15 Article 4(3) of Decree-Law No 181-A/2014 lists certain criteria for selecting proposals to purchase for the purposes of admitting potential purchasers to participate in the following stages of the direct sale process and of choosing the successful offers. It provides that the other appropriate specific conditions will be determined by decision of the Council of Ministers.

16 Under Article 8 of that decree-law, entitled 'Legislative framework':

'1. The definitive and specific conditions governing the transactions to be completed in the reprivatisation of TAP SGPS and the exercise of the powers conferred on the Council of Ministers pursuant to this decree-law shall be determined by the adoption of one or several Resolutions.

2. As regards the reference direct sale, the Council of Ministers shall be empowered, inter alia:

(a) to approve the tender specifications determining the specific conditions of those transactions and to subject those shares purchased and registered to the rules on inalienability;

...'

17 Under Article 8 of Decree-Law No 181-A/2014, on 15 January 2015, the Council of Ministers adopted Decision No 4-A/2015 (*Diário da República* Series I, No 13, of 20 January 2015), including, inter alia, the tender specifications governing the reference direct sale, which is reproduced in Annex I to that decision and incorporated as an integral part thereof ('the tender specifications').

18 Article 1 of the tender specifications, entitled 'Subject matter', provides:

'1. These specifications govern the terms and conditions for the reference direct sale of shares in the capital of [TAP SGPS], to be carried out as part of the process for the indirect reprivatisation of the share capital in [TAP]. ...

2. The reference direct sale involves the disposal, by direct negotiation, of one or more indivisible lots of shares in the capital of [TAP SGPS] to one or more national or foreign investors, individually or as a group.

3. The reference direct sale of the shares referred to in the preceding paragraph shall be agreed with one or more tenderers who have been selected as purchasers of the shares covered by the direct sale.

4. As part of the reference direct sale, the shares to be purchased by the tenderer or tenderers selected shall be disposed of by Parpública — Participações Públicas SGPS SA.'

19 Under Article 5 of the tender specifications, entitled 'Selection criteria':

'The criteria to be used for selecting one or more entities which will purchase the shares identified in Article 1(2) are as follows:

(a) The contribution to strengthening the economic and financial capacity of [TAP SGPS], [TAP] and of their capital structure, ... in such a way as to contribute to the sustainability and enhancement of the companies, and to the growth of their business, and to preserve the relative weight and value of the remaining capital held by the State and the value of the put option;

…

(c) The submission of, and performance guarantee for, an adequate and coherent strategic plan with a view to preserving and promoting the growth of [TAP] whilst achieving the objectives defined by the government for the reprivatisation process; promoting the enhancement of its competitive position as a global air carrier operator in its current markets and in new markets; maintaining the integrity, corporate identity and independence of the TAP Group, in particular preserving the TAP trade mark and its association with Portugal and ensuring that the headquarters and effective management of the TAP Group remain in Portugal; contributing to preserving and developing the operational and commercial qualities of the TAP Group, and enhancing and developing its human resources;

(d) The capacity to ensure proper compliance, in good time, with the public service obligations of [TAP], including the flight connections between the main national airports and the airports of the autonomous regions, where applicable, and the continuation and further development of the routes serving the autonomous regions, the diaspora and Portuguese-speaking countries and communities;

(e) The contribution to the growth of the national economy, including maintaining and developing the current national hub as a platform of vital strategic importance in relations between Europe, Africa

and Latin America;

...'

20 By Decision No 32-A/2015 of 21 May 2015 (*Diário da República* Series I, No 98, of 21 May 2015), the Council of Ministers considered, following the first stage of the reprivatisation process, that one bid should be rejected, since it did not respect all the conditions set out in the tender specifications and that two other tenderers whose bid was, in essence, equivalent should be invited to participate in the negotiation stage, the second stage of the reprivatisation process.

21 By Decision No 38-A/2015 of 11 June 2015 (*Diário da República* Series I, No 113, of 12 June 2015), several companies belonging to the Gateway Group were selected to proceed to share purchases representing 61% of TAP SGPS's share capital. The improved binding offer submitted by those companies was regarded as stronger in terms of respecting the selection criteria set out in Article 5 of the tender specifications, inter alia, in respect of contributing to reinforcing the economic and financial capacities of the TAP Group.

22 On 24 June 2015, a contract was signed, in which Parpública — Participações Públicas SGPS SA ('Parpública') accepted to sell 61% of TAP SGPS's share capital to the companies of the Gateway Group for EUR 10 million. That sales contract was subject to certain conditions, compliance with which was required at the latest by 24 June 2016.

23 By Decision No 30/2016 of 19 May 2016 (*Diário da República* Series I, No 99, of 23 May 2016), the Council of Ministers took note of a Memorandum of Understanding signed on 6 February 2016 between the Portuguese State and Atlantic Gateway SGPS Lda with a view to amending the terms and conditions of the Portuguese State's shareholding in TAP SGPS. In that memorandum, the former company accepted to sell back to Parpública sufficient shares so that the Portuguese State would hold 50% of TAP SGPS's share capital.

24 As a result of that agreement, the Gateway Group and the Portuguese State hold 45% and 50%, respectively, of TAP SGPS's share capital, the remaining 5% being held by the TAP Group's employees.

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

25 APP and others brought an action before the referring court, the Supremo Tribunal Administrativo (Supreme Administrative Court, Portugal) seeking a finding of invalidity or the annulment of Decision No 4-A/2015 of the Council of Ministers of 15 January 2015 in so far as that decision includes the tender specifications governing the reference direct sale of shares representing up to 61% of TAP SGPS's share capital.

26 In support of that action, APP and others submit, first of all, that Article 5(c) of the tender specifications, in so far as it requires that the TAP Group's headquarters and effective management be kept in Portugal, infringes Articles 49 and 54 TFEU, next, that Article 5(d) of the tender specifications, in so far it requires the purchaser of the shares to comply with public service obligations, infringes Articles 56 and 57 TFEU and Articles 16 and 17 of Directive 2006/123, and, lastly, that Article 5(e) of the tender specifications, in so far as it requires that the existing national hub be maintained and developed, falls foul of Articles 56 and 57 TFEU and of Articles 16 and 17 of that directive.

27 In those circumstances, the Supremo Tribunal Administrativo (Supreme Administrative Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Does EU law, in particular Articles 49 and 54 TFEU and the principles set out in those articles, in a procedure relating to the process for the indirect reprivatisation of the share capital in a publicly owned company engaged in the activity of air transport, permit the documents establishing that

procedure to include the requirement to keep the headquarters and effective management of that company in the Member State where it was incorporated as a criterion for selecting the purchases proposed by the potential investors and for choosing the successful offers?

(2) Does EU law, in particular Articles 56 and 57 TFEU and the principles set out in those articles, and the principles of non-discrimination, proportionality and necessity, in a procedure relating to the process for the indirect reprivatisation of the share capital in that company, permit the documents establishing that procedure to include the requirement to comply with the public service obligations on the part of the purchasing entity as a criterion for selecting the purchases proposed by the potential investors and for choosing the successful offers?

(3) Does EU law, in particular Articles 56 and 57 TFEU and the principles set out in those articles, in a procedure relating to the process for the indirect reprivatisation of the share capital in that company, permit the documents establishing that procedure to include the requirement to maintain and develop the current national hub on the part of the purchasing entity as a criterion for selecting the purchases proposed by the potential investors and for choosing the successful offers?

(4) As regards the activity carried on by that company whose share capital is being disposed of under the reprivatisation procedure, must it be regarded as a service in the internal market subject to the provisions of Directive [2006/123] due to the presence of the exception laid down in Article 2(2)(d) of that directive relating to services in the field of transport, and consequently, does that procedure also have to be shown to be subject to that directive?

(5) If the answer to [the fourth] question is in the affirmative, do the provisions of Articles 16 and 17 of that directive, in a procedure relating to the process for the indirect reprivatisation of the share capital in that company, permit the documents establishing that procedure to include the requirement to comply with the public service obligations on the part of the purchasing entity as a criterion for selecting the purchases proposed by the potential investors and for choosing the successful offers?

(6) If the answer to [the fourth] question is in the affirmative, do the provisions of Articles 16 and 17 of that directive, in a procedure relating to the process for the indirect reprivatisation of the share capital in that company, permit the documents establishing that procedure to include the requirement to maintain and develop the current national hub on the part of the purchasing entity as a criterion for selecting the purchases proposed by the potential investors and for choosing the successful offers?'

Consideration of the questions referred

The fourth to sixth questions

28 By its fourth to sixth questions, which it is appropriate to consider together in the first place, the referring court asks, with reference to TAP's activity in the field of air transport services, whether Directive 2006/123 is relevant, for the purposes of answering the questions referred, in so far as those questions concern the conformity with EU law of the public service obligations and of the requirement to maintain and develop the existing national hub which were imposed under the indirect reprivatisation process of that undertaking.

29 In that regard, it must be found that a service activity in the air carrier industry, such as TAP's main business, must be classified as 'services in the field of transport' within the meaning of Article 2(2)(d) of Directive 2006/123 read in the light of recital 21 thereof, to which that directive does not apply (see, to that effect, judgment of 20 December 2017, *Asociación Profesional Elite Taxi*, C−434/15, EU:C:2017:981, paragraph 36).

30 That classification is confirmed by the case-law of the Court, according to which the concept of 'services in the field of transport' includes not only transport services in themselves but also any service inherently

linked to any physical act of moving persons or goods from one place to another by means of transport (judgment of 20 December 2017, *Asociación Profesional Elite Taxi*, C−434/15, EU:C:2017:981, paragraph 41 and the case-law cited).

31 Therefore, there is no need to consider the fifth and sixth questions concerning, more particularly, the compatibility with Articles 16 and 17 of Directive 2006/123 of the conditions set out in the tender specifications, which require, in carrying out TAP's air carrier activity after the reprivatisation of that company, certain requirements relating to public service obligations and to maintaining and developing the national hub of that company.

32 By contrast, in so far as the Court may extract from the information provided by the referring court the legislation and the principles of EU law that require interpretation in view of the subject matter of the dispute in the main proceedings (judgment of 16 July 2015, *Abcur*, C−544/13 and C−545/13, EU:C:2015:481, paragraph 34), it should be made clear that, for the purposes of assessing the compatibility with EU law of the conditions set out in the tender specifications, Regulation No 1008/2008, in so far as it establishes common rules for the operation of air services in the European Union, may be relevant.

33 In the light of the foregoing considerations, the answer to the fourth question is that Directive 2006/123 must be interpreted as irrelevant for the purposes of assessing the compatibility with EU law of certain requirements relating to the activities carried out by an air carrier company, imposed on the purchaser of a qualified holding in the share capital of that company, in particular of the requirement that that purchaser be required to perform public service obligations and to maintain and develop that company's national hub.

The first to third questions

Preliminary observations

34 By its first to third questions, which it is appropriate to consider together in the second place, the referring court asks, in essence, whether the fundamental freedoms enshrined in the Treaties are respected by certain 'criteria' set out in the tender specifications for choosing the purchaser to acquire shares representing up to 61% of the share capital of a holding company, under the reprivatisation process of its subsidiary which operates in the field of air transport, in particular requirements relating to the public service obligations imposed on that subsidiary, to keeping the headquarters and effective management of the group to which those companies belong in the Member State in question and to maintaining and developing the existing national hub.

35 In that regard, it should be noted, first of all, that, in its written observations and at the hearing before the Court, Parpública, the State-owned company which transferred those shares and owned the shares retained by the Portuguese State, claimed that, in its first to third questions, the referring court was wrong in characterising the criteria as 'requirements'. It submits that they are merely criteria taken into account in assessing the various bids, since the potential purchaser of the shareholding is not necessarily required to undertake to fulfil those criteria in full. The Portuguese Government also questioned the binding character of the criteria.

36 According to the Court's settled case-law, in the procedure laid down by Article 267 TFEU, the functions of the Court of Justice and those of the referring court are clearly separate. Although it is for the Court to interpret the provisions of EU law, it falls exclusively to the referring court to interpret national legislation. The Court must base itself on the interpretation of national law as described to it by the referring court (see, to that effect, inter alia, judgments of 11 September 2014, *Essent Belgium*, C−204/12 to C−208/12, EU:C:2014:2192, paragraph 52, and of 28 July 2016, *Astone*, C−332/15, EU:C:2016:614, paragraph 24).

37 Furthermore, the mandatory character of the criteria listed in the tender specifications seems to be confirmed by Article 1(1) thereof, which provides that those tender specifications 'govern the terms and conditions for the reference direct sale of shares in the capital of [TAP SGPS], to be carried out as part of the process for the indirect reprivatisation of the share capital in [TAP]'.

38 It seems difficult to dispute that those criteria are capable of binding the purchaser of the shares at issue, since the criteria will, in principle, lead every tenderer participating in the reprivatisation process to undertake, having submitted a tender, to comply with all of the requirements under those criteria.

39 In addition, it is clear from the file before the Court that, after selecting the purchaser of the shares, agreements were entered into in which that purchaser bound itself contractually to comply with those requirements.

40 Next, it should be noted that the referring court requests the Court to examine the requirement in the tender specifications of maintaining the headquarters and effective management in the Member State in question in respect of the provisions of the FEU Treaty on the freedom of establishment, and the requirements of the tender specifications on the performance of the public service obligations and on the maintaining and developing of the existing national hub in respect of the provisions of the FEU Treaty on the freedom to provide services.

41 Those various requirements apply to operators wishing to be selected as the purchaser of the shares subject to the reprivatisation process concerned and thereby to become established in Portugal. The requirements therefore primarily affect the freedom of establishment of the tenderer, although they also have an indirect effect on the services provided by TAP.

42 In addition, those requirements must be assessed solely in the light of the freedom of establishment and not that of the free movement of capital.

43 According to the Court's settled case-law, national legislation intended to apply only to those shareholdings which enable the holder to exert a definite influence on a company's decisions and to determine its activities falls within the scope of the freedom of establishment (judgments of 13 April 2000, *Baars*, C−251/98, EU:C:2000:205, paragraph 22, and of 10 June 2015, *X*, C−686/13, EU:C:2015:375, paragraph 18).

44 In the present case, the purchase of 61% of TAP SGPS's share capital at the end of the reprivatisation process at issue in the main proceedings appears sufficient to allow the shareholder involved to exert a definite influence on the management and control of that company and thus also over its subsidiary TAP. It seems that that would still be the case following the redefinition of the shareholders in TAP SGPS, after which that shareholding of 61% was reduced to 45%, the Portuguese State having bought back the shares necessary to increase its holding from 34% to 50%.

45 Lastly, as regards the relevance of Article 345 TFEU, to which Parpública and the Italian Government referred in their written observations submitted to the Court, it is indeed true that the requirements set out in the tender specifications, in so far as they frame the reprivatisation of a State-owned company belonging to one Member State alone, fall within the scope of that article.

46 However, according to the Court's settled case-law, Article 345 TFEU does not mean that rules governing the system of property ownership current in the Member States are not subject to the fundamental rules of the FEU Treaty, including, inter alia, the prohibition of discrimination, freedom of establishment and the free movement of capital (judgment of 22 October 2013, *Essent and Others*, C−105/12 to C−107/12, EU:C:2013:677, paragraph 36 and the case-law cited).

The existence of restrictions on the freedom of establishment

47 First of all, as regards the requirement that the purchaser is required to perform the public service obligations at issue in the main proceedings, it must be recalled that, under Article 5(d) of the tender specifications, that requirement concerns 'the capacity to ensure proper compliance, in good time, with the public service obligations of [TAP], including the flight connections between the main national airports and the airports of the autonomous regions, where applicable, and the continuation and further development of

the routes serving the autonomous regions, the diaspora and Portuguese-speaking countries and communities'.

48 In that context, it is common ground that, as regards scheduled air connections between Portugal and its autonomous regions, such as the outermost regions of the Azores Islands or Madeira Island, that Member State has, in the past, imposed public service obligations on air carriers in respect of air service routes which were, in accordance with Article 16(4) of Regulation No 1008/2008, the subject of notices published in the *Official Journal of the European Union*. Moreover, it is clear from the file before the Court that the conformity of those obligations with the substantive and procedural requirements laid down in Articles 16 and 17 of that regulation has not been called into question.

49 According to the Court's settled case-law, any national measure taken in an area which has been the subject of exhaustive harmonisation at the level of the European Union must be assessed in the light of the provisions of that harmonising measure and not in the light of the provisions of primary law (judgments of 17 November 2015, *RegioPost*, C−115/14, EU:C:2015:760, paragraph 57, and of 7 September 2017, *Eqiom and Enka*, C−6/16, EU:C:2017:641, paragraph 15 and the case-law cited).

50 In that regard, it must be held that, in respect of the public service obligations in the air carrier services industry, Articles 16 to 18 of Regulation No 1008/2008, interpreted in the light of recital 12 thereof, in so far as they govern the substantive and procedural conditions in detail which must be satisfied so that public service obligations may be imposed and in so far as they provide, in addition, for a procedure for reviewing those obligations after they have been imposed, amount to exhaustive harmonisation.

51 It is clear, in particular, from Article 16(1) of the regulation, that public service obligations can be imposed by a Member State only on certain air routes within the European Union, in particular on those connecting an airport located in the European Union and an airport in a peripheral region in its territory.

52 It follows that, in so far as Article 5(d) of the tender specifications merely requires the new shareholder selected as a result of the reprivatisation process at issue in the main proceedings to comply with potential public service obligations imposed on TAP in accordance with the substantive and procedural conditions laid down in Articles 16 and 17 of Regulation No 1008/2008, that national measure is in conformity with EU law, and there is no need to consider that measure in respect of primary law, in particular as regards the freedom of establishment.

53 Next, as regards the requirements resulting from Article 5(c) and (e) of the tender specifications for the purchaser of the shares subject to the reprivatisation process at issue in the main proceedings concerning, on the one hand, keeping the headquarters and effective management in Portugal and, on the other, maintaining and developing the existing national hub, it must be found that those national measures do not relate to a field harmonised by Regulation No 1008/2008, so that they must be assessed in the light of EU primary law, in the present case as regards the freedom of establishment.

54 In that regard, it must be borne in mind that, according to the Court's settled case-law, all measures which prohibit, impede or render less attractive the exercise of freedom of establishment must be considered to be restrictions on that freedom within the meaning of Article 49 TFEU (see, inter alia, judgment of 25 October 2017, *Polbud — Wykonawstwo*, C−106/16, EU:C:2017:804, paragraph 46 and the case-law cited).

55 Both requirements at issue in the main proceedings, arising from Article 5(c) and (e) of the tender specifications, undeniably constitute restrictions on the freedom of establishment, since they prohibit, impede or render less attractive the exercise of that freedom.

56 Those requirements are intended to prevent, at a future time, certain decisions from being taken by TAP SGPS's bodies at the end of the reprivatisation process and changes to the resulting share structure, in particular decisions intending to transfer the principal place of business or hub of the company concerned outside of Portugal, despite the fact that such decisions could be in the financial interests of the company.

57 Thus, those requirements mean restrictions on the decision-making powers normally open to the bodies of the company of a purchaser of shares representing up to 61% of TAP SGPS's share capital, such restrictions being comparable to those which could result from the exercise by a Member State of the powers of Member State shares which confer upon it special rights, namely 'golden shares', intended to defend general interests (see, by analogy, judgment of 28 September 2006, *Commission* v *Netherlands*, C−282/04 and C−283/04, EU:C:2006:608, paragraph 30).

58 As regards, in particular, the requirements laid down in Article 5(c) of the tender specifications, aiming to ensure that the headquarters and effective management of the TAP Group continue to be located in Portugal, the restrictive character of those requirements cannot, contrary to what has been claimed by Parpública and the Portuguese Government, be called into question on the basis of the judgment of 22 December 2010, *Yellow Cab Verkehrsbetrieb* (C−338/09, EU:C:2010:814).

59 In that judgment, the Court held, inter alia, that the requirement for applicant economic operators to have a seat or permanent establishment in the Member State concerned in order to be licensed to operate a regular bus service was not contrary to EU law where it was applied after the authorisation to operate had been granted and before the business operator commenced operation of that service.

60 In that regard, the Court pointed out, in particular, that the requirement at issue could not logically constitute, as such, a barrier to, or restriction on, the freedom of establishment since it did not impose the slightest restriction on the freedom of economic operators established in other Member States to create agencies or other establishments in that territory (judgment of 22 December 2010, *Yellow Cab Verkehrsbetrieb*, C−338/09, EU:C:2010:814, paragraph 34).

61 However, the fact remains that that requirement is fundamentally different from the requirement at issue in the main proceedings, which relates to maintaining the headquarters and effective management of the TAP Group in Portugal, that is to say the principal place of business of the companies belonging to that group. That requirement — which is unlimited in time — does not require the creation of a new secondary establishment but that the principal place of business of those companies existing in the Member State concerned be maintained.

62 In accordance with Articles 49 and 54 TFEU, such a requirement to maintain a principal place of business in the Member State concerned constitutes a restriction to the freedom of establishment of a company incorporated under the legislation of a Member State, that is, in the present case, under Portuguese legislation. That freedom encompasses the right to transfer the principal place of business of the company to another Member State, which requires, if that transfer entails the conversion of the company into a company subject to the law of the latter Member State and the loss of its nationality of origin, compliance with the conditions for incorporation laid down in the legislation of the Member State of relocation (see, to that effect, judgment of 25 October 2017, *Polbud — Wykonawstwo*, C−106/16, EU:C:2017:804, paragraphs 33 to 35).

Potential justification for the restrictions on the freedom of establishment

63 The issue then arises of whether the requirements arising from Article 5(c) and (e) of the tender specifications, relating to maintaining TAP's headquarters and effective management in Portugal and to maintaining and developing the existing national hub, respectively, which have been found to constitute restrictions to the freedom of establishment of the purchaser of the shares subject to the reprivatisation process at issue in the main proceedings, may be justified by an overriding reason in the public interest, which requires that they are appropriate for ensuring the attainment of the objective in question and do not go beyond what is necessary to attain that objective (see, to that effect, inter alia, judgment of 25 October 2017, *Polbud — Wykonawstwo*, C−106/16, EU:C:2017:804, paragraph 52).

64 In that regard, in the first place, the Court rejects the Netherlands Government's submission that the requirement relating to maintaining TAP's headquarters and effective management in Portugal is justified

by the objective of policing compliance with the requirement to fulfil the public service obligations arising from Article 5(d) of the tender specifications.

65 As the Advocate General stated in point 85 of his Opinion, for the purposes of policing such compliance, there are measures less restrictive of the freedom of establishment, such as the requirement of a secondary establishment. In addition, a requirement for any air carrier company to maintain its principal place of business in a Member State on the sole ground that it operates an air connection from or to that Member State subject to a public service obligation would be manifestly disproportionate.

66 As regards, in the second place, the identification of overriding reasons in the public interest potentially relevant for the purposes of justifying the restrictive measures arising from Article 5(c) and (e) of the tender specifications, it is clear from the preamble to Decree-Law No 181-A/2014 that the tender specifications must take account of the fact that TAP is a company which 'has strong ties with the country, which should be maintained, and [that] it is therefore appropriate to privilege maintaining its defining characteristic as a "flagship enterprise"', and that the tender specifications must ensure that TAP's reprivatisation process respects, inter alia, the 'strategic importance of its "national hub", as a fundamental part of the relationship between Europe, Africa and Latin America, of which TAP's flight operations form an integral part', also having regard to the 'importance of domestic routes, in particular to connections between the mainland and the islands, which are fundamental to promoting territorial and social cohesion and economic development'.

67 Those general aims are reproduced in Article 5(c) of the tender specifications in so far as they include 'the submission of, and performance guarantee for, an adequate and coherent strategic plan with a view to preserving and promoting the growth of [TAP] whilst achieving the objectives defined by the government for the reprivatisation process; promoting the enhancement of its competitive position as a global air carrier operator in its current markets and in new markets; maintaining the integrity, corporate identity and independence of the TAP Group, in particular preserving the TAP trade mark and its association with Portugal and ensuring that the headquarters and effective management of the TAP Group remain in Portugal; contributing to preserving and developing the operational and commercial qualities of the TAP Group, and enhancing and developing its human resources'.

68 The same general aims are also clear from Article 5(e) of the tender specifications, which refers to 'the contribution to the growth of the national economy, including maintaining and developing the existing national hub as a platform of vital strategic importance in relations between Europe, Africa and Latin America'.

69 It is also relevant in that regard that Article 5(d) of the tender specifications refers to 'the flight connections between the main national airports and the airports of the autonomous regions, where applicable, and [to] the continuation and further development of the routes serving the autonomous regions, the diaspora and Portuguese-speaking countries and communities'.

70 In that regard, it must be borne in mind that, in so far as Article 5(c) and (e) of the tender specifications refers to objectives such as preserving and promoting the growth of TAP, reinforcing the economic strength of that company, contributing to preserving and developing the operational and commercial qualities of the TAP Group and contributing to the growth of the national economy, it is settled case-law that purely economic grounds, such as, in particular, promotion of the national economy or its proper functioning, cannot serve as justification for an obstacle to one of the fundamental freedoms enshrined in the Treaties (see, inter alia, judgment of 21 December 2016, *AGET Iraklis*, C−201/15, EU:C:2016:972, paragraph 72).

71 However, as Parpública and the Portuguese Government submitted, in essence, Article 5(c) and (e) of the tender specifications, read in conjunction with Article 5(d) thereof and with the preamble to Decree-Law No 181-A/2014, in so far as its aims to safeguard the continuation and further development of TAP's air routes which serve third countries with particular historical, cultural and social ties to the Portuguese Republic in which Portuguese is the official language or one of the official languages, such as the Republic

of Angola, the Republic of Mozambique or the Federative Republic of Brazil, relates to an overriding reason in the public interest capable justifying a restriction to the freedom of establishment.

72 In that regard, it must be borne in mind that the guarantee of a service of general interest may constitute an overriding reason in the public interest capable of justifying an obstacle to one of the fundamental freedoms enshrined in the Treaties (see, by analogy, judgment of 28 September 2006, *Commission* v *Netherlands*, C−282/04 and C−283/04, EU:C:2006:608, paragraph 38).

73 It follows that the relevant overriding reason in the public interest for the purposes of justifying the restrictive measures arising from Article 5(c) and (e) of the tender specifications consists of safeguarding the public interest service aimed at ensuring that there are sufficient scheduled air services to and from Portuguese-speaking third countries with which Portugal has particular historical, cultural and social ties.

74 In the third place, as regards whether the requirement arising from Article 5(c) of the tender specifications relating to maintaining TAP's headquarters and effective management in Portugal may be justified, the fact remains, as pointed out by the Advocate General in point 89 of his Opinion, that that requirement is proportionate to that overriding reason in the public interest.

75 Subject to verification by the referring court, it is clear from the file before the Court that bilateral agreements have been entered into between the Portuguese Republic and certain third countries, including precisely those Portuguese-speaking third countries which have particular historical, cultural and social ties to the Portuguese Republic, such as the Republic of Angola, the Republic of Mozambique or the Federative Republic of Brazil, which subject TAP's traffic rights for air routes with those countries to maintaining TAP's principal place of business in Portugal.

76 Subject to verification by the referring court, it thus follows from those bilateral agreements that TAP would lose its traffic rights on routes to or from those third countries if it were to transfer its principal place of business outside of Portugal. Therefore, it is clear that a requirement such as that arising from Article 5(c) of the tender specifications, in so far as it requires that TAP's principal place of business be maintained in that Member State, is an appropriate measure for acting upon the overriding reason in the public interest of ensuring that there are sufficient scheduled air routes to and from the Portuguese-speaking third countries concerned with which Portugal has particular historical, cultural and social ties.

77 In addition, that requirement does not go beyond what is necessary for that overriding reason in the public interest since moving TAP's principal place of business outside of Portugal would, in accordance with Article 8(1) of Regulation No 1008/2008, read in conjunction with Article 4(a) of the regulation, mean losing the validity of the operating licence and of the AOC issued to TAP by the competent Portuguese authority, thereby precluding the operation of all scheduled air route services, including those to and from the Portuguese-speaking third countries concerned, it being common ground that those air routes form a substantial share of TAP's business.

78 In addition, the proportionality of that requirement as regards the overriding reason in the public interest referred to in paragraph 73 above is corroborated by the fact that that requirement does not preclude TAP from creating secondary establishments, such as branches or subsidiaries outside of Portugal.

79 In the fourth place, the issue arises of whether the requirement under Article 5(e) of the tender specifications relating to maintaining and developing the existing national hub is justified as regards the objective of safeguarding the public interest service of ensuring that there are sufficient scheduled air route services to and from the Portuguese-speaking third countries concerned with which Portugal has particular historical, cultural and social ties.

80 In that regard, it has not been established that maintaining the organisational model of the air connection services of the existing national hub is necessary for the purposes of attaining the objective of air connections with the Portuguese-speaking third countries concerned. A priori it is not clear that it cannot be ruled out that that objective may be obtained by means of a different organisational model.

81 In any event, although it also does not seem necessarily ruled out that the model of the existing national hub may constitute a useful means of attaining that objective, the fact remains that that model applies to all air routes and not only those to and from the Portuguese-speaking third countries concerned.

82 It follows that the requirement for the purposes of ensuring that the existing national hub is maintained and developed goes beyond what is necessary to attain the intended objective of ties with those third countries.

83 In the light of all of the foregoing considerations, the answer to the first to third questions is that Article 49 TFEU must be interpreted as not precluding tender specifications governing the conditions to which a reprivatisation process of an air carrier company is subject from including:

– a requirement that the purchaser of the shares subject to the reprivatisation process has the capacity to fulfil the performance of the public service obligations on that air carrier company, and

– a requirement that the purchaser maintain that air carrier company's headquarters and effective management in the Member State concerned, in so far as the transfer of that company's principal place of business outside of that Member State would mean that company losing the air traffic rights conferred on it under bilateral agreements between that Member State and third countries with which that Member State has particular historical, cultural and social ties, which is for the referring court to ascertain.

Article 49 TFEU must be interpreted as precluding those tender specifications from including a requirement that the purchaser of those shares ensure that the existing national hub is maintained and developed.

Costs

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

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

1. **Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market must be interpreted as irrelevant for the purposes of assessing the compatibility with EU law of certain requirements relating to the activities carried out by an air carrier company, imposed on the purchaser of a qualified holding in the share capital of that company, in particular of the requirement that that purchaser be required to perform public service obligations and to maintain and develop that company's national hub.**

2. **Article 49 TFEU must be interpreted as not precluding tender specifications governing the conditions to which a reprivatisation process of an air carrier company is subject from including:**

   – **a requirement that the purchaser of the shares subject to the reprivatisation process has the capacity to fulfil the performance of the public service obligations on that air carrier company, and**

   – **a requirement that the purchaser maintain that air carrier company's headquarters and effective management in the Member State concerned, in so far as the transfer of that company's principal place of business outside of that Member State would mean that company losing the air traffic rights conferred on it under bilateral agreements between**

that Member State and third countries with which that Member State has particular historical, cultural and social ties, which is for the referring court to ascertain.

Article 49 TFEU must be interpreted as precluding those tender specifications from including a requirement that the purchaser of those shares ensure that the existing national hub is maintained and developed.

[Signatures]

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* Language of the case: Portuguese.